

MINUTES

**MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 17, 1997,
at 3:00 PM, in Room 312-1

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB293, Posted 3/3/97
Executive Action: HB156, HB154

HEARING ON HB293

Sponsor: REP. SCOTT ORR, HD 82, LIBBY

Proponents: Mark Simonich, Director, Dept. of Environmental
Quality, (DEQ)
Tom Ebzery, Exxon
Don Allen, Mt. Wood Products Association
Riley Johnson, National Federation of Independent
Business, (NFIB)
Frank Crowley, Helena Attorney
Larry Brown, No. Oil and Gas Assn., Ag Preservation
Association
Steve Pilcher, Western Environmental Trade Assn.

Charles Brooks, Billings Chamber of Commerce
Dexter Busby, Montana Refinery, Great Falls
Gail Abercrombie, Mt. Petroleum Association
Mike Murphy, Mt. Water Resources Association
Steve Turkiewicz, Mt. Auto Dealers Association

Opponents: Peter Funk, Trout Unlimited
Beth Baker, Dept. of Justice
Anne Hedges, Mt. Environmental Information Center
Richard Parks, Northern Plains Resource Council
Debby Smith, Sierra Club
Robert Brohough, Carriage Trade Cleaners
Vern Bertelsen, Citizen
Anthony Mele, Citizen
Vicki Watson, University of Montana, Citizen
John Krutar, Orvando Rancher
Janet Ellis, Mt. Audubon
Scott Kulbeck, Mt. Farm Bureau Federation
Jim Emerson, Helena
John Smart, Helena
Geoffrey Smith, Clark Fork-Pend oreille Coalition
Brett Browncombe, Mt. Wildlife Federation
Cesar Hernandez, Cabinet Resource Group
Brad Martin, Citizen and Mt. Democratic Party
Beverly Fox, Helena

Informational Witness: Eric Finke, Helena Office, EPA

Opening Statement by Sponsor:

REP. SCOTT ORR, HD 82, LIBBY said HB293, the Environmental Audit Bill, was before the Committee last session but did not go through. During the interim, it was worked on by a working group, however, he said a consensus on the bill was not reached. He said the bill before you is the re-write of last session's bill from the work group's input. He went quickly through the highlights of the bill.

Page 1. Line 25, gave a definition of an "environmental audit."
Line 30, privilege was no longer part of the bill, but immunity still is.

Page 2. Lines 7-12, stated the conditions for immunity.
Line 13, New Section 5. A report is required and is public information.
Line 28, if the information is wanted it was subject to discovery but there is still an avenue to get that information through the court system.

Page 3. Line 9, New Section 6, means if any of these things are violated, then you no longer have your immunity.
Line 11, (a) if you purposely committed a violation,
Line 13, if you repeatedly violated a environmental law,
Line 16, if you haven't corrected it by the schedule.

REP. ORR distributed a handout, Voluntary Environmental Audit-Fact Sheet, attached as (EXHIBIT 1).

Proponents' Testimony:

Mark Simonich, Director, Dept. of Environmental Quality, (DEQ), stated he was there in behalf of **Governor Marc Racicot.** He handed out his written testimony, attached as **(EXHIBIT 2).** **Director Simonich** presented an amendment striking "Requires," and inserting "includes" on Page 2, line 16. **(EXHIBIT 3).**

Tom Ebzery, Attorney for Exxon Company, USA, stated he was a member of the working group and presented his written testimony, attached as **(EXHIBIT 4).**

Don Allen, Mt. Wood Products Association, stated he was also a part of the working group. He believed the more important part of the bill was Section 2, which stated the key words on line 15, "nothing in [sections 3 through 6] is intended to inhibit or be a substitute for the exercise of the regulatory authority by those agencies entrusted with protecting Montana's environment." In a nutshell, he said, if the true purpose of all environmental regulation in the state was to seek a cleaner environment, this was one way to get there. He believed that the voluntary best management practices were successful and it was better to work cooperatively versus the policeman type of approach. In view of what has done to date, as far as trying to get this bill in place, would not oppose the amendments. **Mr. Allen** also wanted to mention two other people that supported this bill: **Rex Manuel, Cenex;** and **Pam Langley, Mt. Agriculture Business Association.**

Riley Johnson, National Federation of Independent Business, viewed that an environmental self audit was a matter of trust, and that government should help the citizenry to accomplish the social good and not to seek out and destroy its citizenry in regards to business and economics. They also saw government as the leader for accomplishing the social goods determined by the Legislature and not the heavy handed enforcer. **Mr. Johnson** emphasized that it was not a big business issue. He gave some statistics of the poll their organization gave in 1989 to their members. They asked their members if they were affected by environmental laws and regulations, and asked if they would be in favor of self-audits? It revealed that 71 percent were not effected in 1989, and only 32 percent were interested in self-audits. They asked the same question in 1997 and 19 percent said they were not effected, and 82 percent were in favor of self-audits. They felt it was a dramatic turn and the census revealed that the members would sooner or later be affected by environmental issues. He closed in asking the Committee to allow self-audits, and let them take care of their own problems.

Frank Crowley, Attorney in Helena, passed out two handouts, a copy of the Toxic Release Inventory Reporting Form R and Instructions, and federal regulations **(EXHIBIT 5),** printed by the Bureau of National Affairs. He said these federal regulations

were incorporated by references into Montana state regulations. **Mr. Crowley** commented that if one quickly scanned these regulations, and reviewed the complexity and the detail, it would reveal what the day to day environmental management people had to deal with by having an industrial facility. He said he had been involved with environmental regulations for a number of years and there were many reasons to support HB293. He wanted to focus on one area of criticism. Much of the opposition had referred to the bill as a "free ticket out of jail." He said if you take a pragmatic approach to environmental compliance in the state and consider the fact that the old days of the philosophical battles are long past. He stated, "it is now a question of how are we going to comply, not whether we have to comply."

Larry Brown, Northern Oil and Gas Association, and the Ag Preservation Association, stated that from an agricultural perspective, environmental audits have some affect on them especially with dairies and feedlots. The oil and gas industry have interests in this bill from situations such as oil spills, reclamation of drill sites, etc. He said he worked for an environmental firm during the off season of the session, and he felt the standards that they had to abide by to conduct these environmental audits are somewhat overwhelming. The ASTM standards are widespread as format for how those reports are reported. In order to conduct these type of audits, they are generally evaluated and certified by a certain body of environmental professionals. The liability is also incredible. In doing these audits for a few thousand dollars, one may discover a million dollars worth of environmental problems. The issue then becomes the risk of environmental non-compliance at the risk of public health and safety. He thought public health and safety issues were the utmost important. He also wanted to mention a program that was being considered in industry called Risk Based Corrective Action Program. He explained if there is a environmental risk that may effect public health and safety, then you take the appropriate level for disclosure, and put it into action to correct it. He finished in saying this bill is a start to provide an incentive to conduct environmental auditing. He hoped the bill didn't go too far to scare the small operator off.

Steve Pilcher, Western Environmental Trade Association, (WETA), stated that our regulatory programs are intended to protect our environmental resources. Our regulatory programs are only successful if compliance is achieved. Therefore, anything that we can do to enhance compliance is going to be beneficial. He said that HB293 provides the necessary and important encouragement of industry to voluntarily make timely modifications. By doing so, not only is compliance achieved, but the environment is protected. He added that nothing in this bill prevents the Dept. of Environmental Quality to conduct necessary compliance inspections on their own or appropriate enforcement actions.

Charles Brooks, Billings Chamber of Commerce and the Montana Chamber of Commerce, felt that this was a very wise approach to the problem and that there were enough safeguards in the bill. He urged the committee to pass this bill.

Dexter Busby, Montana Refinery, Great Falls, supported HB293 and believed the concept of self-audits was the right thing to do.

Gail Abercrombie, Executive Director of the Montana Petroleum Association, wished to commend the Committee and the people that continued to work on this particular piece of legislation. She said it was a long hard battle and it took a lot of perseverance. She emphasized that HB293 did not diminish any of the existing regulatory programs. This bill gives businesses an ability to examine and find out where they are at in terms of compliance with environmental regulations.

Mike Murphy, Montana Water Resources Association, believed this legislation was reasonable and promoted environmental protection.

Steve Turkowitz, Montana Auto Dealers Association, supported HB293.

{Tape: 1; Side: A; Approx. Time Count: 3:40; Comments: None.}

Opponents' Testimony:

Peter Funk, Montana Chapter of Trout Unlimited, stated the 2000 members of his organization opposed this bill. He said they saw some problems with the bill such as the timing of the reports, criminal immunity, and the public's access to the audit information. Section 6 of the bill, he believed was designed to take out many serious environmental violations. It appeared to them that the thrust of the bill was to deal with the more "minor" violations.

He referred to the top of Page 2, where it says, these violations needed to be reported to the Dept. of Environmental Quality within 30 days of their occurrence. He asked the Committee, who is it, under this bill, that determines if the exceptions apply. He posed an incident which resulted in substantial damage to human health. This bill does not require a report of that incident for 30 days to DEQ. That said to him someone other than our state regulatory agency makes the decision about whether these exceptions apply or not. He strongly felt that there should be a shorter time frame for reporting than the 30 days. He said there were other national bills of this type which required reporting within ten days and felt that this shorter time frame would help assure that the agencies make the decisions.

The second area he commented on was that of criminal immunity. He said the language prohibits the Dept. of Justice from acting.

Again, **Mr. Funk** referred to Section 6 and believed that "knowingly" type violations were exempted from the bill. **Mr. Funk** said the majority of criminal violations require either purpose, knowledge or negligence. He suggested to the Committee that it was inappropriate to include criminal immunity on Page 2 of the bill.

The third point he raised was whether or not the audit information is public. He referred to the bottom of Page 2 where it said "the Dept. may not request an environmental audit..." He thought of this bill as a trade off, and the state is saying we will give you civil administrative and criminal immunity. His feeling was that the trade off in the bill ought to be public. It is important to recognize that it says repeated violations constitute an exemption from this process. If you are in a situation where a regulated entity has used the audit process in the past to disclose the violation and in the future there is a subsequent violation, which under this bill, takes it out of the audit process. He strongly felt that there should be access to the audit information especially with entities with repeated violations. The last sentence says the audit information may not be used against the regulated entity in any administrative hearing or judicial action. He asked the Committee to think about the repeat violations, and if that was a good idea.

Mr. Funk distributed some amendments to HB293 for the Committee to consider, (**EXHIBIT 6**). He explained them briefly. The first two amendments simply deleted the language dealing with criminal immunity and left the bill as it was with regard to administrative or civil penalties. The third amendment dealt with the compliance schedule and struck "negotiated between the Department and the regulated entity." Amendment No. 3 simply says the compliance schedule "will be written by the department." Amendment No. 4 dealt with Line 10 of Page 2, where it talked about the regulated entity cooperating with the Department and providing information that is necessary to the implementation of Sections 1-6. The amendment he proposed inserted, "all information that the department deems necessary to determine the extent of the violation and the potential harm caused by the violation." Amendment No. 5 dealt with the extent to which the audit information is public and suggested that where it says "but the department may not request an environmental audit," and inserted "The department may request the environmental audit report if it is necessary to determine the nature and extent of the violation."

Mr. Funk added that the vote in the House on this particular bill this session was 60 to 40. It was not 90 something to a single digit number as was stated. He didn't believe that this bill could be characterized as having massive and overwhelming support.

Beth Baker, Dept. of Justice, said they are not primarily responsible for the enforcement of the environmental laws in Montana. A copy of her written testimony is attached as **(EXHIBIT 7)**. She handed out copies of the amendments she had prepared, **(EXHIBIT 7A)**, and a letter dated February 21, 1997, concerning EPA's "Statement of Principles-Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," **(EXHIBIT 8)**. She called attention to HB102, which revises the sentencing and correctional policies of the State of Montana and one of the principles that was incorporated in that bill states that sentencing correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions. They believe that the criminal immunity provisions in this bill were inconsistent with that policy and should not be there.

{Tape: 1; Side: B; Approx. Time Count: 3:50; Comments: Turned Tape.}

Anne Hedges, Montana Environmental Information Center, said she was part of the working group and wanted to discuss some of the points that were not agreed upon. She said that they could reach agreement on the fact that industries should audit and small businesses should audit. She believed it is a beneficial practice. One of the things they could not decide on was whether we should go with the education. One of the reasons, people don't audit is because they don't know what an audit is or how to go about it. They believe the emphasis in this arena should be on educating companies on how to go about it. MEIC supports penalty mitigation but opposes blanket immunity. MEIC could support this bill if there were a few amendments to it.

Ms. Hedges spoke about what was going on at the national level regarding environmental audit policies in states. EPA came out with a memo on February 14, 1997, attached as **(EXHIBIT 9A)**, which **Ms. Baker** has also passed out. She referred to Page 2 of the document, which discusses the authority that states need to maintain, if they are going to be delegated programs by EPA. She read from the document, "In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements." She said the document then went through the components that EPA will be looking for. **Ms. Hedges** believed that some of those components which are missing from the bill were intentionally excluded and needed to be put in the bill in order to make it satisfactory with EPA and the public interest community.

Ms. Hedges referred to Page 2 (2i), significant economic benefit, and explained what that meant. She said when a company is penalized for a violation, there is a punitive side of that penalty, and also an economic benefit side of it. The economic benefit side intends to level the playing field for all the

parties that are engaged in that business so that the party who was not in compliance does not gain an economic advantage over its competitors. She said, "it should not pay to pollute, and if the state can not collect that economic benefit, then it will pay to pollute."

Ms. Hedges referred to **(EXHIBIT 9B)**, an Office Memorandum from **Mark Simonich**, the Director of the Dept. of Environment Quality, dated November 7, 1996. This was in response to the Self Audit Workgroup. The memo said is that the state needs to have the ability to recover some part of the penalty including the economic benefit for violations. She was disappointed that the Dept. did an about-face on this component.

Ms. Hedges referred to Page 2 again of **(EXHIBIT 9A)**, and said the Dept. needs to be able to have the ability to get civil penalties for repeat violations, for serious harm, and for activities that may present imminent and substantial endangerment. She noted that imminent is not in this bill and needs to be included. The Dept. needs to be able to obtain fines and sanctions for willful and knowing violations and for gross negligence.

Ms. Hedges referred to **(EXHIBIT 9E)**, a memo to her from the EPA listing the programs which have not yet been delegated to MT. She said these programs could be jeopardized if EPA believes the state will not have the enforcement authority it needs. She noted the EPA states this in the memo. She noted that there were five states that have audit laws that resulted in environmental groups and public interest groups petitioning EPA to revoke their primacy, which include: Colorado, Ohio, Texas, and possibly Wyoming. MEIC believes that this law will seriously jeopardize Montana's ability to enforce our programs.

Ms. Hedges included in her packet some amendments for HB293, attached as **(EXHIBIT 9C)**, which she felt would take care of some of the concerns. She pointed out that there was no provision in the bill when an entity that has violated the law, to remediate harm. She said there needs to be a provision in this bill that allows that entity to remediate any harm as a result of that violation. In her packet, there was also a copy of a newspaper article, dated March 10, 1997 from a Bozeman paper, attached as **(EXHIBIT 9D)**.

Richard Parks, **Northern Plains Resource Council**, **(NPRC)**, handed out copies of his written testimony opposing HB293, attached as **(EXHIBIT 10)**. He also distributed amendments suggested by NPRC, attached as **(EXHIBIT 11)**.

Debby Smith, **Montana Chapter of the Sierra Club**, stated they oppose HB293. She said there was parts in the bill that they could commend and supported the basic idea of voluntary compliance with the environmental laws. She made a point saying that voluntary compliance with any law does not always work, and that is why there are provisions in the law to punish those that

do not comply. She supported the amendments that the previous opponents had stated concerning removing criminal immunity. In addition **Ms. Smith** suggested as an amendment, to delete the sentence, line 28 of Page 2 through line 1 of Page 3, of Section 5, that says the Dept. can't use any information of the environmental audit in any proceeding. **Ms. Smith** said the main flaw of the original bill was that you don't want things being secret especially in court. She also suggested that an amendment be included concerning meaningful deadlines. She said on Page 2 in Section 4, Lines 6 through 11, did not have any definite deadlines. The Legislature needs to give some direction in subsections 1,2, and 3. She urged the Committee to oppose the bill as written and to amend it as she suggested. She added, why not be tough on crime and why treat these corporate offenders any different that we would treat an individual criminal. Don't subject our government to criticism by the public by setting up a special categories for so-called corporate polluters.

Robert Brohaugh, Carriage Trade Cleaners, Great Falls, distributed his written testimony, attached as **(EXHIBIT 12)**.

Vern Bertelsen, Citizen, stated he had read this piece of legislation and feared that this is opening doors for very serious problems. He said environmental degradation can be something that will last forever, and we should not take any chances to give anybody an opportunity to pollute and then escape the penalties.

Anthony Mele, Citizen, opposed HB293. He said if this bill was based on the premise, regulation doesn't work as well as enticement, he asked, how much enticement then is necessary. He commented that it should be enough enticement to know that if you acted responsibly, and the community would continue to support you. The bill effectively said to him that we need to exempt industry from direct responsibility. He did not oppose incentives but he did oppose immunity from prosecution just because they admit their guilt.

He also felt this bill would shield industry from public scrutiny that is so necessary. He believed that HB293 would create two standards of accountability. For example, if he broke the law, regardless of his intent, all his actions are a matter of public record and he must answer for them. His incentives for avoiding this scenario are many and not a single one of them include a system by which he could hide his act and remedy the situation. He said there was nothing in our history of this state that gives us any reason to believe that secret self regulation will improve environmental quality. He made the analogy of giving candy to children to get them to do what you want them to do. He said at some point in time you have to draw the line and put your foot down. He asked what action do children most respect? He concluded in saying HB293 is a giant piece of candy.

{Tape: 1; Side: B; Approx. Time Count: 4:15; Comments: None.}

Dr. Vicki Watson, Professor, University of Montana, stated that she spoke in behalf of herself and she opposed HB293. She distributed her written testimony attached as **(EXHIBIT 13)**.

John Krutar, Ovando Rancher, recommended that the Committee table this bill or take a careful look at the proposed amendments. He thought this bill would make it very easy for entities to pollute our rivers.

Tara Pele, Montana Public Interest Research Group, (Mont PIRG), said they were a consumer and good government advocacy group and opposed this bill because it is not only a bad environmental policy, but also it is a bad government policy. She urged the Committee, if they found it necessary to pass this bill, that it should be done only on a trial basis.

Janet Ellis, Montana Audubon, submitted her written testimony, **(EXHIBIT 14A)**, her proposed amendments, **(EXHIBIT 14B)**, a copy of Title 75, **(EXHIBIT 14C)**, and how HB293 applies to Agriculture, Title 80, **(EXHIBIT 14D)**.

Scott Kulbeck, Montana Farm Bureau Federation, supported the concept of self auditing for voluntarily identifying environmental violations, but they were opposed to HB293 as written.

Jim Emerson, Helena, opposed HB293 as it was written. He added that the people that put forward this bill asked to be trusted, but they have not shown us any reason to trust them in the past. He gave an example of Montana Rail Link where they have not taken care of their past actions.

John Smart, Helena Citizen, wanted to remind the Committee that the most recent example we have of self audits being total failures is the destruction of the Little Rockies by Pegasus Gold Company.

Geoffrey Smith, Clark Fork-Pend Oreille Coalition, stated his organization is a group of various people dedicated to protecting and restoring water quality throughout the Clark Fork River Basin and opposed HB293. He distributed his written testimony, attached as **(EXHIBIT 15)**.

Brett Brownscombe, Montana Wildlife Federation, stated their opposition to HB293 lied in the polluter protection provisions contained in the bill. He passed out his written testimony, attached as **(EXHIBIT 16)**.

Brad Martin, Montana Democratic Party, stated they were in opposition to HB293 in its current form and believed it does not accomplish what is important, which is protecting the health and welfare of the citizens of this state.

{Tape: 2; Side: A; Approx. Time Count: 4:35; Comments: Start of Tape 2.}

Cesar Hernandez, Coordinator of The Cabinet Resource Group, Noxon, opposed HB293 and submitted a copy of his written testimony, attached as (EXHIBIT 17).

Beverly Fox, Helena, opposed this bill. She wanted to comment on why people stay away from the polls was because they know their voices are no longer being heard. The voices that are being heard are those from big corporations.

Questions From the Committee:

SEN. WILLIAM CRISMORE asked **Director Simonich** to respond to **Anne Hedge's** concern she mentioned with economic benefit.

Director Simonich explained that he participated with the Environmental Quality Council to try to come up with some recommendations concerning language for the bill. He said the discussion entailed all the various pieces of input for consideration. He said that discussion was one of the reasons the Dept. laid off the need for economic benefit or consideration of economic benefit. He said now, without the self audit bill in place, there are many times when the Dept. takes enforcement actions against private entities, that economic benefit is looked at very strongly to determine whether the Dept. thinks economic benefit is a necessary component of any penalty that would be assessed. He said in many cases, working with the parties, they both try to correct the situation on the ground and clean it up. He felt the environment gained more that way than simply collecting the economic benefit. He reiterated that the Dept. doesn't push collecting the economic benefit currently without the audit bill being in place.

SEN. CRISMORE asked **Director Simonich** if he felt EPA would take away primacy if this bill passed.

Director Simonich said that **Mr. Wardell of EPA** has not indicated to him that the passage of this bill would directly cause EPA to take back primacy. The letter from EPA did say that this would caution them to look very cautiously at future programs that the Dept. might submit for primacy. He said EPA would not take any stand on whether or not the passage of the bill would cause them to withdraw primacy on any of the state's programs.

SEN. VAN VALKENBURG commented to **REP. ORR** that the significant opposition to the bill revolved around granting criminal immunity. The bill itself prohibits the granting of criminal immunity when a violation has been committed by the person purposely and knowingly. Essentially, it needs only one other amended statement and that is negligently. Under criminal law,

that has to be gross negligence in order for that to be established. **SEN. VAN VALKENBURG** asked **REP. ORR** if they really needed to grant criminal immunity in this bill to accomplish your goals.

REP. ORR responded that yes they did. But he said there has been very few criminal violations. He said he doubted that anyone would use this vehicle to stand behind. He said if they did, the end result is going to be that we get the environment cleaned up, because they have to enter into a negotiation agreement to clean up the site. The bottom line is that maybe once in the next 20 or 30 years, we would have somebody actually get immunity. He thought that was a fairly good tradeoff for all of the other things that the state would get cleaned up in the meantime.

SEN. VAN VALKENBURG commented that it apparently would not be a sufficient enough tradeoff to eliminate that opposition to the bill concerning criminal immunity. He said if that was deleted, the only thing that is being affected is gross negligence. He asked **REP. ORR** if they could give any ground on this part of the bill. **REP. ORR** answered no.

SEN. VAN VALKENBURG asked **Charles Brooks, Billings Chamber of Commerce**, about small business people in the State of Montana, since he was the only one left in the hearing room that could represent small business. He commented that **Mr. Brohough**, who is a small business owner in the dry cleaning business in Great Falls, that testified for the opponents, basically said that essentially the passage of this bill would give his competitors an economic advantage because in essence, he made the investment in environmental clean up and/or possible new technology, while his competitors have not. He asked from the perspective of other small business people, if that doesn't hold true that we are giving a significant economic competitive advantage to people that have not done anything for compliance and break the law. **SEN. VAN VALKENBURG** suggested that possibly something should be put in this bill that requires the Dept. to assess a economic penalty, if there is a substantial economic benefit.

Mr. Brooks replied that the small business person is most likely to discover something he didn't know about, not something he did knowingly.

SEN. VAN VALKENBURG said his question to him was so what if he discovers it, but he turns out to have obtained a significant economic competitive advantage. Shouldn't we be looking at assessing something to level the playing field.

Mr. Brooks said he did not see that as an economic advantage.

SEN. TAYLOR asked the sponsor about the states that passed environmental self audit laws, and if they were exactly as this bill is written. **REP. ORR** said he did not have the list of

states that have self audit laws but he knew that South Dakota, Idaho, and possibly Wyoming. He said it varied.

SEN. TAYLOR wondered if any of those states have given up criminal immunity. **REP. ORR** answered some have and there were various combinations.

SEN. TAYLOR asked what incentive do small businesses have to follow environmental laws. **REP. ORR** said the motive of this bill is to provide a tool for people that want to find out what their environmental problems are today and not leave the problem for their children or someone else in the future. This way they can find out how to clean up the problem without the fear of going to jail.

SEN. BEA MCCARTHY asked **Director Simonich** if he had time to review **Beth Baker's** amendments and if so asked him to comment on them. He said the Dept. has looked at those amendments and said the Dept. thinks some of the amendments were appropriate. **Director Simonich** explained the way the Dept. viewed these audits. He said the audits would have to be periodic scheduled audits. He did not see this additional clarification really necessary. Regarding striking criminal immunity, he reiterated that the way the bill was written, still gave the Dept. an opportunity to take criminal prosecution. That was the reason the Dept. did not suggest that the bill needed that added. He added there is not a very good track record in the state in trying to pursue criminal environmental enforcement cases through the courts. The courts have a particularly high burden and the state simply is not being real successful in that area.

SEN. MCCARTHY asked **Director Simonich** if he had reviewed **Mr. Funk's** amendments of Trout Unlimited. He answered they were offered in the House but he could not comment on them at this time because he did not have the specific amendments at hand.

{Tape: 2; Side: A; Approx. Time Count: 5:00; Comments: None.}

SEN. VIVIAN BROOKE asked **Director Simonich** about what he said concerning some type of requirement by the Dept. to do scheduled periodic environmental audits.

Director Simonich said the definition of the self audit indicates that it has to be periodic or that the company has to put together a regular program for scheduled periodic audits.

SEN. BROOKE commented that there was not time frame mentioned and had questions about the procedures undergone on an audit. She wondered if the Dept. could implement stricter periodic audits than intended.

Director Simonich replied the word, "periodic" was specifically in the bill. He said the Dept. can't require stricter periodic

audits simply because the audits are not required in the first place.

SEN. BROOKE asked **Larry Brown, Northern Mt. Oil and Gas**, what organization he represented and if he could comment on the controversial problems with the Yellowstone Pipeline. He said he represented Northern Mt. Oil and Gas Association, and said he did not know any specifics on that issue. He offered to comment on the standards and procedures involved in an environmental audit. **Mr. Brown** explained that the standards are structured very carefully and have to be certified by the ASTM (American Standards and Testing Materials) standards.

SEN. BROOKE asked **Tom Ebzery, Exxon** if this bill passed what would be different concerning the environmental outcome for example in the Yellowstone Pipeline, which resulted in leaks and spills.

Mr. Ebzery said without knowing the specifics of that project, it appeared to him that it would of been reported and a compliance schedule would of been worked out with the Dept. to clean up the contamination.

SEN. BROOKE asked if the entity who is regulated has to make the discovery or can other entities make the discovery. **Mr. Ebzery** said he thought that the regulated entity or a contractor under that entity would be the ones to conduct the audit.

SEN. MCCARTHY stated to **Director Simonich** that there was no fiscal note with this bill which leads her to believe that your not going to need any further auditors or extra personnel.

Director Simonich replied that this audit will be done by the business or agent that they hire. It does not require the Dept. to perform those audits, therefore the Dept. did not see a large fiscal impact. He said it would be their role to respond to whatever violation that was brought to the Dept.

SEN. VAN VALKENBURG said to **Vicki Watson** that it sounded like **Mr. Simonich** had a different interpretation of what **Mr. Wardell of EPA**, had said than you have. Could you respond to the context of **Director Simonich** answer concerning primacy. What risks are there to continue primacy over these environmental laws that the federal government has either given authority to the State of Montana to enforce or could in the future give authority to the state to enforce.

Ms. Watson said the copy said Jan, 30, and we have had information since that date. She said this particular letter seemed to her, made a very strong statement. Their conclusion is based on these concerns listed, and all those concerns are still in the bill. It says HB293 in its current form, will prevent the delegation of environmental programs to the department. **Ms. Watson** said perhaps, there has been some clarification since the

letter was written or a backing off of how strong EPA's statement sounds.

CHAIRMAN GROSFIELD asked the question to be referred to **Eric Finke, EPA**.

Eric Finke, EPA, Helena, responded to the question about delegation. The letter was written by **Mr. Wardell** did state that as the bill was written, and the bill is not much different now, will probably have some significant impact on the delegation of programs in the State of Montana.

SEN. VAN VALKENBURG asked **Mr. Finke** if it would affect the continued enforcement of federal programs that have already been delegated to the state.

Mr. Finke said that was difficult to answer because a replication of programs is something the EPA does not want to do. He said EPA has been petitioned in five states to withdraw the programs. He said the first hearing comes up in Texas, and that information from that case will substantially have an effect on determining which way EPA goes.

SEN. VAN VALKENBURG commented to **Director Simonich** that EPA sounds quite serious, which is quite a bit different from what he characterized the position of EPA. He asked the Director to respond to this.

Director Simonich retorted that he did not think he characterized it any differently than what **Mr. Finke** just did. He said **Mr. Finke** just told you that in the letter that **Mr. Wardell** sent to **Rep. Knox**, that the EPA had indicated concern for various portions of this bill, and they were not sure whether it meant that the Dept. was fully meeting the requirements under federal law. However, **Director Simonich** said as he had looked at the letter, and looked at the way it's applied, he disagreed with that. He said one of the questions is whether or not the Dept. had to put public access to information. He felt Montana provides more access to information than the federal government generally did. What he really said was that those concerns of this bill will cause the EPA to really question further delegation. Delegation for further programs. He also said that he could not give you a definitive answer whether EPA would withdraw primacy to programs currently delegated to the state, and in fact, EPA really doesn't like to do that. **Director Simonich** said that very much reflects what he indicated to this Committee earlier.

SEN. TAYLOR asked the sponsor **REP. ORR** if this bill would create jobs. **REP. ORR** replied that it very well could. He commented it would keep the money flowing in the respect that the money would not be going to fines.

SEN. TAYLOR asked **REP. ORR** if a sunset clause would be a possibility to see if it works.

REP. ORR replied that was one of the amendments that has been offered a few times, and it was resisted. He said the fact is, if this bill does not work, it just would not be used.

SEN. BROOKE asked **Ms. Watson** if the lack of access to information was prohibiting the advancement of science in any way. (Example: Tobacco Industry)

Vicki Watson said if she understood the bill correctly, it does say that the data that has been collected in the past, such as compliance data, etc., would still be available as it has been. It is information that the regulated community might get from the course of an environmental audit, and that is not required by the Dept. to submit. She said a company might do their own individual study and gather information on a particular area of concern but that information is not required to be submitted to the department. The information may be very important to people possibly in the surrounding area, for example if there was contamination moving laterally in that area, but legally it is not required by the Dept.

CHAIRMAN GROSFIELD commented to **Mr. Ebzery** that there was a lot of misunderstanding as to what an environmental audit is. First off, we are looking at a periodic document, that is an internal assessment initiated by the regulated entity for the purpose of coming into compliance. He asked how rulemaking can be incorporated in this if it specifically says that the audit has to be a review that is not required by law, rule, etc. It has to be something totally voluntary that is beyond what is required by whatever law. Can you describe specifically, how the group might see any agency rulemaking regarding periodic audits. How would that compare to this definition of an environmental audit.

Mr. Ebzery, Exxon, replied that his interpretation is similar to **CHAIR. GROSFIELD** in that it specifically states it is voluntary. He added but at the same time, it is important to have the audit itself mean something.

{Tape: 2; Side: A; Approx. Time Count: 5:20; Comments: Close to the end of Side A..}

CHAIRMAN GROSFIELD gave an example of some business that conducted an audit, and they brought forth some kind of a violation that came up during that audit. But that audit was the first one they ever did, so would this bill apply to them, since it says audits must be periodic.

Mr. Ebzery said he believed it would apply because you have to start sometime. He assumed he would be reporting that violation as a result of the audit so then you would begin this process. It would be applicable if you did have a violation.

CHAIRMAN GROSFIELD asked **Mr. Ebzery** when does the time line trigger regarding reporting information. He added it may take from two days to two weeks to complete an audit, and you have to disclose the information in writing within 30 days after the violation has been determined to exist. **Mr. Ebzery** said the some states are allowing 60 days and some are just allowing 10 days. The discussion have been in the past that these audits sometimes take four to six weeks. They felt that 60 days was a reasonable period of time for a larger operation and it was compromised at 30 days.

CHAIRMAN GROSFIELD asked **Director Simonich** what kinds of rules would he foresee that would require specific periodic stipulations on the audit and still fit onto this statute. He added that this bill says that it can not be subject to any rule or law.

{Tape: 2; Side: B; Approx. Time Count: 5:30; Comments: Start of Side B.}

Director Simonich replied the Dept. is not going to require audits be done but it says the entities have to cooperate with the Dept. He said the cooperation is done by working with the company and determining how good the audits are or how they are intending to do the audits. This is done to get a clearer picture of the situation.

CHAIRMAN GROSFIELD asked **REP. ORR** to explain what kind of rulemaking you expect.

REP. ORR said he talked to someone from the MSU Extension Service, and they have been working on a brochure that lists different kinds of audits, which includes environmental audits. An idea has been brought up about folding the aspects of this bill into that brochure. It would be laid out so a business would know just exactly the steps to take. He added that there are provisions in there for it to be a periodic audit. Since it is a voluntary approach he felt that strict rules were needed and that was the best way.

CHAIRMAN GROSFIELD said this applies to Title 75 and Title 80, why did you not apply it to mining or oil and gas.

REP. ORR said that those entities are highly regulated entities, and they have current programs for remediation. This is more directed at small businesses, and some large businesses that want to participate.

SEN. MCCARTHY asked **Mr. Finke, EPA**, if your department prosecuted anyone for criminal violations in this particular area. He answered he did not know.

SEN. MCCARTHY commented if she understood what he had said previously, he was in favor of the amendments from **Beth Baker**, which changes from criminal to civil because of your department's current policy.

Mr. Finke hesitated to take a position one way or the other. He said if they removed criminal immunity from this bill, he would feel better about this bill.

CHAIRMAN GROSFIELD reminded everyone that **Mr. Finke** appeared here as a informational witness of a federal agency, and not as a proponent or opponent.

CHAIRMAN GROSFIELD asked **REP. ORR** to close and speak about how you see environmental audits by big business and by small business coming forth. He also asked him to comment on the outcome of environmental clean-up with and without this bill.

REP. ORR closed in saying that the advantage big business currently has is that they have big attorneys and can hide information anyway. Small businesses do not have that avenue open to them because of their monetary limitations. He said the impetus of this bill is to give the small business entities an incentive to come forward and clean up the environment. He said that **CHAIRMAN GROSFIELD** hit the nail on the head when he mentioned previously the misunderstanding of this bill. He didn't think the bill was as bad as the opponents do. He thought of this bill as a step forward in environmental law. In the 60's and 70's we used the heavy hand of enforcement to get compliance with environmental law. Now, we are talking about a new way - that of cooperation and one that is result oriented. He hoped that both sides will see that point, and see that cooperation, which is a big part of this bill, will be a reality.

REP. ORR said at least 30 amendments have been offered in subcommittee, and more amendments in committee hearings and during executive action, along with more amendments offered on the floor of the House. He urged the Committee to resist all but the one which was offered by the Department. He then went through the amendments.

Page 2, at the top, **Mr. Funk of Trout Unlimited**, where he said it must be reported within 30 days of the occurrence. He said that was not the intent of the bill at all. It's the point the businesses are doing the environmental audit- spotting the problem. If it exists, then the entity has 30 days to notify the Dept. and then negotiate the compliance schedule to get the problem cleaned up.

REP. ORR commented on criminal immunity. He reiterated that there was only a few times that criminal situations came up. He did not think that we are ever going to meet that problem of someone who is criminally violating the law being able to hide

behind this, because if one goes to Section 6, it says the act does not apply.

REP. ORR said significant economic benefit was currently part of state and federal law and for good reason. He gave an example of two dry cleaners in a town where one is taking the cleaning solution and dumping it into a pit out back, and the other one is going ahead and recycling it and doing what they should, which costs more. Obviously, that dry cleaner which is violating the law, does have an economic benefit, because it is costing him less to do the job. He said what would happen if that illegal dry cleaners then decided to do an environmental audit and try to rid themselves of this liability. The outcome of that negotiated compliance schedule, would find that they knowingly and purposely, violated the law, so therefore, Section 6 would not apply.

REP. ORR commented on Section 6, Line 21 where it talked about- after the effective date of this act due to federal law, prohibits the use of Sections 1-6 for obtaining primacy over federally delegated programs. He said why that statement is in there is because we don't want the EPA to just adopt the rule that says all the states that have gone through this process of adopting the self audit law, to just throw it out and respond, that's the rule. We want EPA to go through the process of holding formal public hearings and show why they want to do it. If after a hearing, they make that determination, then it would be acceptable.

REP. ORR commented on the candy example of the enticement issue. He said with children, we want to teach them honesty and have the children tell their parents when they do something wrong. If a child came forth and told their parents that they did do something wrong, most likely the parents would not spank them. They would thank the children for telling them and make the children know coming forward voluntarily is the right thing to do. He said that was one of the reasons this bill is before you was because of what precipitated in Colorado. An entity came forward to the state and said they have been violating an air quality emission law and wanted to fix it. They asked the state what do we do. The Dept. then lined out what to do and then they fined them a million dollars. He said that was the kind of heavy handed enforcement that we are trying to get away from.

He closed in saying thank you for a good hearing and appreciated everyone's patience.

CHAIRMAN GROSFIELD closed the hearing on HB293.

{Tape: 2; Side: B; Approx. Time Count: 5:40; Comments: None.}

EXECUTIVE ACTION ON HB154

Motion/Vote: SEN. COLE MOVED HB154 TO CONCUR, MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB156

Motion: SEN. COLE MOVED HB156 TO CONCUR.

Discussion: SEN. KEATING said this bill involved an increase of 2.5 percent of spendable income to be used for administration. They are asking for an increase in the authority to allocate more state special revenue before it comes to the state general fund. He said it doesn't make any difference whether it's state special or whether its general fund, it is more money spent. He said it ought to be appropriated rather than statutorily appropriated.

SEN. COLE referred to the technical note of LC175.

CHAIRMAN GROSFIELD said that had been tabled.

SEN. KEATING said there was no action taken on it and SEN. SWYSGOOD attempted to amend the concept of LC175 into the RIT bill, SB267. That motion failed. He said there was not much sympathy for LC175. This bill here, the coordination is only if LC175 would pass then this one would be void. What this does is it increases the amount of the percentage of spendable earned income. He said it doesn't make any difference of the route it takes, you're still reducing the general fund. They just want to get the money before it gets in the general fund so they don't have to compete with other entities that are competing for general fund money.

SEN. TAYLOR asked about the increase of 2.5 percent to 3.0 percent.

SEN. VAN VALKENBURG said that was \$81,000.00 which was needed for Swan River Boot Camp, and the inventory of hazardous materials, and paying the state's share of the late water claims.

Motion: SEN. CRISMORE MOVED THAT HB156 DO CONCUR.

Substitute Motion: SEN. KEATING MOVED TO TABLE 156.

Vote: Substitute Motion to TABLE, PASSED 8 TO 2, WITH SEN. CRISMORE AND SEN. COLE VOTING NO.

CHAIRMAN GROSFIELD adjourned at 6:00 PM.

ADJOURNMENT

Adjournment: 6:00 PM



SEN. LORENTS GROSFIELD, Chairman



GAYLE HAYLEY, Secretary

LG/GH