

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By CHAIRMAN LORENTS GROSFIELD, on March 19, 1997,
at 3:00 PM, in Room 312.

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: HB546 Posted March 3, 1997
Executive Action: HB524

HEARING ON HB546

Sponsor: REP. BILL TASH, HD 34, DILLON

Proponents: Steve Pilcher, Western Environmental Trade Assn.
John Bloomquist, Mt. Stockgrower's Assn.
Patrick Heffernan, Mt. Logging Assn.
John Youngberg, Mt. Farm Bureau
Dan Pittman, Society of American Foresters
Cary Hegreberg, Mt. Wood Products
Tim Hunter, City of Missoula
Alec Hansen, Association of Cities and Towns
Leo Berry, Mt. Power Company
Les Graham, Mt. Cattlewomen's Assn., Mt. Dairy Assn.

Larry Brown, Northern Montana Oil and Gas Assn.
and Ag Preservation Association

Vivian Drake, Lewis and Clark County,
Water Quality District

Chuck Watters, Upper Clark Fork Steering Committee

Mike Volesky, Mt. Assn. of Conservation Districts

Pam Langley, Mt. Agri Business Association

Mark Simonich, Dept. of Environmental Quality

Opponents: Jim Jenson, Mt. Environmental Information Center
Geoff Smith, Clark Fork Pend Orielle Coalition
Vicki Watson, University of Montana
Debby Smith, Mt. Chapter of the Sierra Club
Peter Funk, Trout Unlimited
Jim Richard, Mt. and National Wildlife Federation
Janet Ellis, Mt. Audubon

Opening Statement by Sponsor:

REP. BILL TASH, HD 34, DILLON, stated the bill dealt with the TMDLs, Total Maximum Daily Loads, as identified in Section 303(d) of the Clean Water Act, which was a process based on scientific data to assess pollution levels in streams. He said HB546 was an opportunity to do remediation efforts and corrective efforts for Montana's impaired waters. He thought it would be better to have our attention directed toward remediation rather than litigation. REP. TASH said to draft legislation such as HB546, would address these areas of concern and more importantly, to do the right thing, by proceeding ahead in corrective measures. He added that the State of Montana was in arrears for putting all this together. He handed out amendments suggested for HB546 (EXHIBIT 1).

Proponents' Testimony:

Steve Pilcher, Western Environmental Trade Association, (WETA), supported HB546 and said the bill represented a reasonable and responsible approach to addressing the water quality problem. He passed out copies of WETA's Briefing Paper (EXHIBIT 2) and his written testimony, (EXHIBIT 2A). It was noted that Section 303 of the Federal Clean Water Act requires states to supply EPA with a prioritized list of streams which do not meet the water quality standards and also requires the development of TMDLs. He added that Montana, like many states have had difficulty meeting the requirement and developing the necessary TMDLs in a timely manner.

He defined a TMDL as Total Maximum Daily Load. He explained it as a corrective action plan for the problems identified. He said the TMDL process did the following:

1. Quantified the amount of pollutant present violating water quality standards.
2. Identified the source of the pollution for both non-point and point sources.

3. Determined how much the stream can assimilate on its own and still meet water quality standards.
4. Determined a load allocation process, ie., how much of the pollutant can be contributed from each of the identified sources.
5. Identified treatment requirements that were necessary to stay within those load limits.
6. Established a monitoring plan to determine if the desired goals and objectives were being achieved.

Mr. Pilcher said Montana has approximately 900 water bodies on the list not meeting water quality standards. In other states that had failed to comply with the federal requirements in a timely manner, environmental groups have successfully sued both the State and the EPA, and basically shut down activities within the impacted watersheds until the TMDLs were completed. To avoid this happening in Montana, Representatives of WETA began working with interested groups nearly a year ago to try to draft a legislative solution. HB546 was the resulting legislation. In November of 1996 representatives of DEQ, natural resource industries and environmental organizations were invited to participate in a collaborative legislative solution. Some environmental groups chose to put it in the hands of the court system and in December of 1996 a notice of intent to sue was sent to DEQ and EPA. In February, environmental groups filed suit in Missoula Federal District Court.

Mr. Pilcher said this bill puts Montana on a course to be in compliance with the federal law and to restore water quality within a ten year time frame. He then went through some of the main features of the bill. See **EXHIBIT 2**.

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John Bloomquist, Mt. Stockgrowers Association, said the Federal Clean Water Act was the basis for many of the Montana water quality programs. In general, the State must assess and list the impaired water bodies and the lists were supposed to be based on reliable data. He said the Department has done the best job they could with the dollars at hand, in listing the waters around the State of Montana. As the TMDL process continued and the ramifications of being on that list became known, greater attention was focused on the list and what information was there to back it up.

Traditionally, the TMDL concept applied to point source discharges, but now includes non-point sources as well. He said the bill embodies the State's non-point pollution programs into the TMDLs.

Section 3, deals with the modification of the list and the establishment of priorities. He felt it was important to have the ability to petition to add or delete streams from the list. There may not be enough data on a particular listed stream, for

example, so one would have to look at the stream again to determine if it should be on the list or not.

Section 4, involved local level participation, where input from the local area would be interjected. He thought this section did a good job of recognizing local areas and development of TMDLs on an individual basis. Voluntary efforts would also be recognized in the development of TMDLs, such as the BMPs, best management practices. **Mr. Bloomquist** believed that the regulatory approach wasn't as effective as education and voluntary programs.

Section 6, involved the protection of water rights. He said it was important that water rights would not be impaired through this process.

Mr. Bloomquist suggested an amendment concerning the codification instruction. Presently, the bill is codified in Title 75-chapter 5, part 3, which dealt with standards of classifications. He felt that this bill should be codified in a different part.

Patrick Heffernan, Staff Forester, Montana Logging Association, supported HB 546 and passed out his written testimony for the record (EXHIBIT 3).

John Youngberg, Montana Farm Bureau, supported the bill and the amendments that were offered. Last November, when collaborative efforts were taking place, several major points were agreed on by everyone. The first point, if the water was impaired, the water body needed to be cleaned up. Secondly, everyone wanted the money to be spent on actual ground work. The environmental community wanted to make sure there was a milestone, ie., a time frame. In order for people to know when these TMDLs would be done, the development of a schedule was added, and that schedule had to be in place after the first year. He said the bill was not perfect for either side of the issue, but it was as close as we could get in the process.

Dan Pittman, Past Chairman of the Montana Society of American Foresters, stated he was here at the request of **Sam Gilbert, Chairman of the Mt. Society of American Foresters,** and read the letter written by **Mr. Gilbert (EXHIBIT 4),** in support of HB 546, and a position statement by the Society of American Foresters, (EXHIBIT 5).

Cary Hegreberg, Montana Wood Products Association, stated that the association also supported HB 546 as good public policy which would undoubtedly improve Montana's water quality. He said that the wood industry has a proven track record of implementing effective voluntary practices that protect water quality. This bill is an extension of the common sense approach, which the wood industry has been employing for the last decade. The Association believed this legislation will render the lawsuit moot because it demonstrates Montana's commitment for water quality improvement by using sound science as a basis for listing and delisting

streams, and by implementing practical point source and non-point source solutions. Their members planned on being involved in both the local and the state wide efforts throughout the process to ensure that this legislation does what it is intended to do.

Tim Hunter, Waste Water Division Superintendent for the City of Missoula, stated the city generally supported HB 546. He said since 1994, the City of Missoula had been working on a voluntary pollution reduction program which was developed as the equivalent of a TMDL. Section 5.5 of the Clean Water Act authorized an EPA study of the Clark Fork Basin and was completed in February 1993. The study recommended a formation of the Tri-state Implementation Council to implement the national plans contained in this document. The council was formed along with several subcommittees, including a committee to look at nutrients in the Clark Fork River. **Mr. Hunter** said after two years, signs of improved water quality and reduced algae problems were apparent, as a result of the implementation of the long term nutrient reduction plan in the Upper Clark Fork River. This plan was put together by representatives of municipalities of Butte, Silverbow, Deerlodge, and Missoula, along with DEQ, Stone Container Corp. He noted that voluntary measures in Missoula have resulted from the Council's efforts.

He wanted to comment on the issue of being fair to all sources of pollutants, point sources versus non-point sources. He was concerned about Section 4, where the word "shall" was changed to the word "may" following EPA's guidance for TMDL development. He said in the EPA guidance, a waste load allocation is done for point sources, and a load allocation is supposed to be done for non-point sources. His concern was that point sources was fairly clear, being that the waste load allocations were to become a part of the discharge permits, but for load allocations that were supposed to be done for non-point sources, it appeared to be treated much more lightly. He referred to (6)c of Section 4, where the department shall "assist and inform land owners regarding the application of a voluntary program of reasonable land, soil, and water conservation practices." **Mr. Hunter** depicted this statement as vague and feared that without enforceable language, that point sources would end up being liable and legally responsible for sources of non-point pollution. He did recognize **REP. TASH's** amendments, which do address this.

Mr. Hunter commented that he would like to see wording in the bill that specifically acknowledges the Tri-State Implementation Council and their voluntary Nutrient Reduction Program. He said the City of Missoula and other entities would like to be considered for the statewide TMDL Advisory Groups and Watershed Advisory Groups.

Alec Hansen, League of Cities and Towns, supported this bill and said it was a step in the right direction for the water quality of Montana. He had some concern over how the bill dealt with the

load allocation, whether or not non-point sources of discharge would be included.

Mr. Hansen pointed out that the costs of the sewage treatment modifications to ensure compliance came directly out of the pockets of home owners and businesses through municipal sewage treatment rates. He wanted to make sure that everybody should be responsible for what is in that river, and the costs for cleaning it up.

Leo Berry, Attorney, Montana Power Company, wanted to say they supported HB 546 too.

Les Graham, Montana Cattlewomen's Association, Montana Dairy Association, Montana Association of Livestock and Auction, gave their support of HB546.

Larry Brown, Mt. Oil and Gas Association, Ag Preservation Association, wanted to thank the people who brought this legislation forward. He said the TMDL concept had been around a long time, since the late 70's, and should be brought forward in the future. He also wanted to mention that natural conditions should be considered in the allocation process.

Vivian Drake, Lewis and Clark County, Water Quality Protection District, supported HB 546 because it compelled DEQ to develop TMDLs for the threatened and impaired water bodies in the state. The District needed DEQ's assistance for TMDL development so that they could begin to look at the different ways to improve and better manage our water bodies. She said that the Water Quality District was the recipient of a joint EPA/DEQ grant to assess stormwater runoff from Helena city streets and to develop a TMDL for a portion of Tenmile Creek. **Ms. Drake** recommended that the water quality districts in the state be added to the legislation where reference was made to local conservation districts and watershed advisory groups. Lewis and Clark County had several local groups, who also expressed a real interest in watershed management, and involvement with the TMDL process.

Chuck Watters, Upper Tenmile Watershed Steering Group, read his written testimony, attached as (EXHIBIT 6), in support of HB 546.

Mike Volesky, Executive Director, Mt. Association of Conservation Districts, said it was certainly appropriate for the conservation districts to be involved with the development of the TMDLs. He said they were the local entity that dealt with natural resource management and non-point pollution. Through the Non-point Pollution Program and the Federal Clean Water Act, funds are available known as 319 money. These funds pass through the state for the purpose of aiding grants and conservation districts and other entities for non-point pollution projects. He said the projects had been quite successful because of the fact that the individuals or local groups came up with their own solutions to their problems. His concern was how the TMDL Program would be funded and how the 319 money would be effected. It was suggested

that 319 grant money would be diverted to fund the TMDL Program, where a good portion of the money would be used for FTEs at the state level, management plans, assessments, and monitoring.

Mr. Volesky strongly believed that the traditional use of the 319 funds should be maintained for on the ground projects. The conservation districts will not support this legislation at the expense of a very successful program.

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Pam Langley, Montana Agri Business Association, supported HB546.

Mike Murphy, Montana Water Resources Association, supported HB546, especially the point of protecting water rights and agriculture.

Mark Simonich, Director, Dept. of Environmental Quality, distributed his written testimony, (EXHIBIT 7), and further addressed the importance of the program to the people of Montana. He said 900 streams were on a list that were listed as threatened or impaired. From the directives of the Federal Clean Water Act, Montana was charged with coming up with a way of determining what the load allocations of those streams were and to clean those streams up. He said the Department had not been very active in doing that over the years and the Department recognizes that. **Director Simonich** stated that was part of the reason a lawsuit was filed. He believed this legislation was very important because it was very specific in directing the Dept. to deal with the impaired stream issues in the State of Montana and develop TMDLs so that the water quality of those streams can be improved.

Opponents' Testimony:

Jim Jenson, Executive Director, Montana Environmental Information Center, wanted to highlight three things that were problems in the legislation of HB546. First, it takes too long for the state to come into compliance. This bill specifies 10 years to conduct analysis of the streams, then a five year period during which voluntary measures will be observed or monitored, which then would be 15 years on top of the 18 years the state is already behind. He said 33 years is simply too long for the state to come into compliance with the law. Our waters continue every year to worsen, he added.

The second point he was concerned with was the lack of money appropriated in the bill. He felt that meant the promises that have been made are hollow at best. He urged the committee to demand that the Dept. show the Legislature exactly how they will spend the funds, if they get some. He also thought that a contract approach would be faster and cheaper than hiring more FTEs. He noted that 15 years of research has already been done in this specific area by private sector companies using modern methodologies.

The third point **Mr. Jenson** wanted to state very strongly was that a voluntary approach does not work. He said the (BMPs), Best Management Practices of the the timber industries over the last decade have been shown not to work. He emphasized that streams are not improving in quality, and at best, the Best Management Practices only slowed the decline of water quality. Any allegation that they have remedied water quality and improved the quality of streams simply doesn't conform with the research that has been done. He emphasized that they were not Best Management Practices, but were Minimum Management Practices. He continued to say industry has done a good job in getting those practices implemented broadly and deeply, but they are not intended to solve the problem that the TMDL requirements of the Federal Clean Water Act require to be solved.

Mr. Jenson closed in saying that the discussion about water quantity by **Mr. Bloomquist**, that the legislation cannot affect the water rights in any way, and the amendment put on by the House, simply denies reality. The state needs to have the flexibility at some point in the future to look at water quantity in streams. MEIC urged the committee to revisit that question, and take out that prohibition that water rights would not be effected in any way.

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Geoffrey Smith, Clark Fork-Pend Oreille Coalition, submitted his written testimony, (EXHIBIT 8). He closed in saying that HB546 was a good starting point in fixing Montana's ailing TMDL program, but didn't go far enough, fast enough.

Vicki Watson, Professor, aquatic ecology and pollution biology, University of Montana, submitted her written testimony, (EXHIBIT 9). **Dr. Watson** stated that the bill fell short of addressing the problems of Montana's impaired and threatened waters. Instead, it set up a procedure badly biased towards defining away many of the problems, and limited the DEQ in implementing actions. **Dr. Watson** handed out copies of changes she had suggested for HB 546, (EXHIBIT 10).

Debby Smith, Montana Chapter of the Sierra Club, opposed the bill as it was written because it did not go far enough. She said, however, that the bill had potential to be a very good bill. The provisions that need to be changed, including Section 4, subsection 10, which allowed discharge permits to continue to be issued for ongoing or new activities. This would not improve the quality of the streams. Secondly, the same section 4, subsections 8 & 9, allowed for non-point sources to continue to be regulated as voluntary programs. She suggested that voluntary approaches would not meet federal requirements.

Ms. Smith felt that the time frame was not fast enough for how long it took for TMDL development and monitoring. She said it

would then be 33 years since federal law mandated Montana's compliance. She urged the committee to change the time frame.

Peter Funk, Montana Council of Trout Unlimited, stated his organization felt that the mandate in this bill to remove certain streams found was essentially too much of a mandate. He mentioned the various time frames that were in the bill.

A one year time frame for Dept. to develop TMDL schedules.

A two year time frame to develop a data management system and to remove certain streams from the list, (Page 6 line 24-29).

A ten year time frame for the development of TMDLs.

He noted that the second fastest mandate in the Act was to remove certain streams. He felt the priorities go backwards. The intent of the bill was to improve water quality in the State and perhaps, the mandate, initially, ought to be the development of the TMDLs rather than to remove streams.

Secondly, he felt that the advisory rule, on page 10, line 22, regarding the discharge permit, "should not be precluded because of pending TMDLs," seemed vague. **Mr. Funk** said the language which immediately proceeded it appeared to say that as long as water quality is not degraded, point source permits can be continued to be issued. However, when it is read in conjunction with the next line, he was not sure what the requirement that the issuance of a discharge permit may not be precluded solely because of a TMDL meant. In regard to the evaluation of progress under this bill, on the bottom of page 9 to page 10. The term "credible data" is used throughout the bill for listing and delisting purposes and he felt the same sort of scientific test should be used in terms of evaluation of the success of the program. **Mr. Funk** closed in saying he hoped the dollars would be found for this program.

Jim Richard, Mt. and National Wildlife Federation, opposed the bill because of the lack of secure funding, the time frames involved, and the inadequate interim protection measures.

Janet Ellis, Mt. Audubon, stated her organization did support the amendments given to strengthen the bill. She said in the next year, under the milestones that were outlined in the bill, a schedule was planned on how fast TMDLs were to be developed. She said one of the things the committee needed to realize was that a TMDL is just a study, not an implementation. She wanted to see some kind of implementation schedule for TMDLs with milestones, as well as a report back to the Legislators.

Questions From Committee Members and Responses:

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SENATOR FRED VAN VALKENBURG, asked the sponsor **REP. TASH** if it was fair to conclude that this bill would not be before the Legislature were it not for the threatened law suit by the environmental organizations.

REP. TASH replied that it was not a fair statement. He said that even though there was an intent to file suit, that this legislation had been addressed some time before that suit was filed. He said with regards to doing the right thing, we should recognize the fact that maybe our impaired waters and identification process had been somewhat tardy and relaxed in the past.

SEN. VAN VALKENBURG had questions on the funding sources. He asked **REP. TASH** if 319 money was still a possibility and if other funding sources were being sought?

REP. TASH said the funding of this bill was a ongoing process. It was necessary to identify a funding source, which had been section 319 of the Federal Clean Water Act. Section 319 money was identified for on the ground projects. The Natural Resource Subcommittee of the Appropriations Committee recommended that 50 percent of 319 money be allocated to initiate the TMDL Program, rather than the full amount. This was done in the interest of ensuring that the funding of on the ground projects be continued in the future.

SEN. VAN VALKENBURG asked **REP. TASH** if HB2 had \$700,000 a year in it right now for this purpose? **REP. TASH** referred the question to **Director Simonich**.

Director Simonich replied no, at this point in time, there was no money specifically allocated or appropriated in HB2 for this TMDL bill. The 319 money that has been spoken about has been federal dollars appropriated to the department which are received on a regular basis. As **REP. TASH** indicated, the subcommittee put restrictive language in that portion of the Dept.'s budget requiring the Dept. must make a minimum of 50 percent of the total 319 non-point source grant award from EPA has to go through Conservation Districts for demonstration grants. He said that was the program **Mike Volesky** was talking about earlier. Any 319 money used for any portion of the TMDL effort would come from remaining federal 319 dollars that come into the Dept. **Director Simonich** stated it would not be taken out of the grant program.

SEN. VAN VALKENBURG asked **Director Simonich** if the Dept. requested **REP. TASH** to offer an amendment to HB2 and put this money into the bill.

Director Simonich said he did not do that at this point in time because the joint appropriation subcommittee routinely suggested that until a piece of legislation was well on its way through one body, preferably through both bodies, they were not inclined to amend HB2 to include those types of funds. He said the

department expects those amendments to be offered to the Conference Committee after final action is taken on HB546.

SEN. VAN VALKENBURG asked why no significant effort had been made in the past 20 years to do what was supposed to have been done with respect to TMDLs.

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Director Simonich said part of the reason there were no significant efforts to implement the TMDL procedures was that when the requirement was put into law, as often happens, the federal government didn't immediately layout the specific guidance to the state on how to implement the law. Secondly, TMDLs did not rank as high as other work on the priority list, such as permits. Because of the fact that priorities simply did not get placed on the TMDLs, funding or FTEs did not get set aside for that. The Dept. realized the TMDL Program needed to be a priority program, and in order to get the job done, submitted the suggestion of this legislation to the Governor's office last May, well before the notification of a lawsuit.

SEN. VIVIAN BROOKE asked **Director Simonich**, if he served on **Governor Racicot's** Water Pollution Control Advisory Council?

Director Simonich said no he did not and explained that the Water Pollution Control Advisory Council was created in Statute, it wasn't created by the Governor. He said the committee had not met in quite some time, but this past year, that advisory council was re-energized. Under the law, the purpose of that advisory council was to take water quality related rules to the Board of Environmental Review, previously, the Board of Health, for adoption. Last year, Governor Racicot's fully appointed that committee and the members are scheduled to meet quarterly, more if necessary. They act in an advisory capacity to the Director. Therefore, the the Director does not sit on the council itself.

SEN. BROOKE asked about how the group was being paid?

Director Simonich said basically per diem, which is a minimal cost and generally already in the budget.

SEN. BROOKE asked if this bill gets funded, will we during the last 29 days see any kind of budget that will reflect the program's expenses? Will we be able to analyze that money?

Director Simonich said he would try to lay that out for the committee. He pointed out that the fiscal note from this bill is probably not as accurate as when it was first developed because of the language that was placed in HB2. It would be 50 percent versus 60 percent of the 319 money which could be utilized for the TMDL program.

SENATOR MACK COLE asked **Director Simonich** about the 900 lakes and rivers and how they got those figures.

Director Simonich said that the Federal Clean Water Act required the Dept. to do an assessment of the water bodies in the state. The assessment lists water bodies or portions of water bodies that do not fully meet their beneficial uses. In Montana, beneficial uses are defined in the water quality act, which include water supply, recreation, fisheries, and a variety of other uses. The water has to go to fulfilling one of those uses. The Dept. could list it either impaired or threatened. If an activity has a potential for seriously impairing that water body, we should be listing it. In some cases, the streams that are on the list, streams like the Clark Fork River, are as about impaired as they come. While other streams on the list are put there because of some proposed activity which might pose a threat to impairment. He said there has been allegations to the Dept. concerning past "windshield surveys," which are surveys that do not contain sufficient credible data to support the streams on the list. He said that kind of data did exist for some of the streams on the list but generally, there was hard credible data obtained from gaging stations, USGS data, etc. There is a provision in the bill for taking streams off the list which requires re-surveying the water body and showing the supportive data in the process. In some cases, it may be as **REP. TASH** indicated, a cursory to look at the conditions of the habitat surrounding the stream, or the actual quality of the stream itself. In other cases, it may be hard data that has come from monitoring stations on streams. He said it is usually a combination of all these situations. The bill is focusing to put together a better system for assurance of credible data that is needed to make these determinations to put the streams on the list or take them off.

SEN. COLE asked about the size of a stream reach.

Director Simonich replied that when we talk about streams or reaches, it could be a stretch of stream as short as one mile, to the entire length of the stream.

SEN. COLE asked if this was all under federal law?

Director Simonich said the federal law required us to do this. The department hasn't had specific rules to guide us previously. and what this piece of legislation intended to do was to give us very specific directions in how those portions of the Federal Clean Water Act should be implemented.

CHAIRMAN GROSFIELD handed out copies of the List Of Waterbodies in Need of TMDL, 1996 (EXHIBIT 11) and Briefing Paper On Montana's TMDL Process by DEQ, February 1997, (EXHIBIT 12).

SENATOR MIKE TAYLOR asked **Director Simonich** about the statement, "there hasn't been one stream that has improved in quality in the State of Montana." Is that true or false?

Director Simonich said for the streams on the list, during that time period, only one single stream has had a TMDL done and submitted to EPA. The TMDL had been approved, which puts that stream in the position of being taken off the list. Some streams have been taken off the list purely because the causes of impairment were exclusively natural causes. He tried to clarify that there are cases where streams may have been taken off the list but that doesn't mean the water quality has improved.

SEN. TAYLOR asked **Director Simonich** what the costs would be to clean up a stream and how we will pay for this.

Director Simonich said the cost to clean up those streams is potentially hundreds of millions of dollars. He said the Clark Fork alone was costing that much money, however, that does not mean that all the other streams will cost that much. A lot of streams can be improved quite cost effectively without a great deal of money. The fiscal note strictly related to the effort of doing the stream assessments, developing the TMDLs, it did not include actual implementation work on the ground. He said that was why other sources of money, particularly those demonstration projects, were extremely important.

SEN. TAYLOR asked **Vicki Watson** if she had any cost figures on stream clean up.

Vicki Watson replied what needed to be done on a lot of streams was for communities to get involved and to carry out their own restoration efforts. She said not all streams are like the Clark Fork, and many streams just need to be used less severely. In some cases, streams and lake shores can recover naturally, and what may need to be done is mainly to change practices such as grazing, or other management practices.

SENATOR VIVIAN BROOKE asked **Director Simonich** about the data management system and if credible data from other sources would be used.

Director Simonich replied that we need to have some way of accessing all the various information and substantial credible data on any given stream so that the people from the local area, who may want to work on that stream, can get to the data fairly easily. He said that was a portion of the data management system that they could coordinate in conjunction with the technical staff of the Dept. of Administration.

Director Simonich said the Dept. uses as many sources as possible for collecting information about the streams. The Dept. uses other state agencies, federal agencies, U.S. Geological Services, EPA, and local voluntary monitoring information that are

available. He said the Dept. makes sure the data was collected properly and it was credible information.

CHAIRMAN GROSFIELD asked **Director Simonich** about the 319 money, and the conservation district shares of that money.

Director Simonich responded that up until two years ago, there was not a requirement within HB2, that any specific portion of that 319 money had to go to the conservation districts. They were one of the prime candidates for receiving the grants. Then, two years ago, one of the members of the subcommittee, offered an amendment that required up to 60 percent of the money to be run through the conservation districts. Of the money that was available the past two years, DEQ contracted through the conservation districts close to 77 percent of that. However, not all that was actually spent for a variety of reasons.

CHAIRMAN GROSFIELD asked **Mr. Volesky** if 50 percent of the 319 money to be channeled through the conservation district would be acceptable?

Mr. Volesky said the 50 percent figure worked out dollar wise fairly close to what conservation districts would have gotten anyway. He said it wasn't so much that the conservation districts want that money to go through districts, it's just the fact that a grant program is available for anyone that wants to get that money on the ground. He said a lot of individuals applying for those grants would go through the district anyway as a way to sponsor their project.

CHAIRMAN GROSFIELD asked **Mr. Volesky** if it would bother him if the remaining 50 percent went to the TMDL program?

Mr. Volesky said it would certainly decrease the total amount of grants that had been going out on the ground.

CHAIRMAN GROSFIELD said he agreed with **Vicki Watson** that there was a lot of room for innovation. He asked her if three years was realistic to have a good start on improvement?

Vicki Watson said she thought as long as the natural recovery was allowed to take place in connection with changed practices that improvement could begin. She said it depends on the area and how much cooperation from the local community to change those practices such as irrigation and grazing, for example, to enhance stream improvement. As long as reasonable progress is being made, vegetation growing back, banks stabilizing, and voluntary practices are moving in that same direction, it was possible.

CHAIRMAN GROSFIELD asked **Vicki Watson** if she contemplated some kind of voluntary best management practices happening?

Vicki Watson said restoration efforts and best management practices may occur where it is appropriate. She said that

usually natural recovery is the best bet but it needs changed practices to go along with it.

CHAIRMAN GROSFIELD said that would take some period of time. **Vicki Watson** answered affirmatively. She noted cases of degradation on BLM land where significant improvement within five years have been seen. Other cases she said they were talking about 40 years for complete recovery but that is with very little changed practices. With a greater degree of compliance and participation, BLM are seeing notable improvement in five years and usually see it in pretty good shape in 10 or 15 years.

CHAIRMAN GROSFIELD asked **Vicki Watson** about the comments made by the opponents, of taking too long, and doesn't go far enough. Do you take that to mean that unless the bill is changed we should kill it?

Vicki Watson responded that she would rather see it changed than killed.

CHAIRMAN GROSFIELD asked **Vicki Watson** about the voluntary BMPs characterization that was made for the timber industry. Has it not done much good?

Vicki Watson said the voluntary BMPs have resulted in some improvement, maybe not enough to reverse impairments on some streams. There is still significant water quality problems. She thought the EQC's own audit showed, that even though some BMPs were used, there were significant water quality problems on many sites, which could have been corrected if more BMPs had been used. That is where the water quality agency should step in and say your not doing quite enough here, and we want you to add additional BMPs.

CHAIRMAN GROSFIELD asked **Mr. Jenson** about the lawsuit and why MEIC waited 18 years to file a lawsuit? **Mr. Jenson** said they made a mistake. He said its been a problem that has been going on for a long time and we don't approach it lightly. Litigation costs a lot of money along with time for the organization. He believed there was no other way to solve the problem. He said when the bill did not show one red cent in it, we did not think there was much commitment there. He said it was the same situation in the House and he wasn't very optimistic about the commitment. He thought the federal government would probably do better than the state on that.

CHAIRMAN GROSFIELD noted if the lawsuit if successful, it puts the ballgame in the hands of the EPA. Do you think its better for Montana's environment to have the federal government handle this?

Mr. Jenson said the EPA can't do any worse than the State has done in the past. He pointed out in Idaho where this kind of local watershed group was proposed to try to develop TMDLs, that

process has not worked. In fact, Idaho now is trying to figure out what to do to comply with the federal court decision since the local watershed advisory group process did not work. It may work in some cases. He suggested to ask Fish, Wildlife & Parks about the costs involved. The change of practices that worked and were agreed to by ranchers, were mostly different ways to irrigate and clean ditches. That is the sort of thing we need to look at, to see what is the difficulty. On Ten Mile Creek, its going to cost more than it cost on Deep Creek, because you have a concentration of extremely caustic mining waste that is contaminating that stream. Mine Land Reclamation is very expensive. The range of costs are from very low to very high. It is important to prioritize, to get the most for the money spent.

SEN. VAN VALKENBURG asked **Director Simonich** if he considered utilizing some kind of fee to both point and non-point sources to fund the TMDL project?

Director Simonich said it had come up from time to time, but no one had figured out an appropriate way to levy such a fee, particularly to non-point sources of pollution where it is very difficult to identify the sources, let alone quantify it.

SEN. TAYLOR asked **Director Simonich** how would we take care of a scenario of a city with a sewage problem which is polluting a lake.

Director Simonich said those are the kind of problems we have dealt with routinely for years. Point source dischargers have to have a national discharge permit or a state discharge permit. As we go through the permitting process, we try to minimize the impact of that discharge. He believed people involved with cities and towns were fearful that this whole TMDL effort would be put together and balanced on the backs of those kinds of municipalities, where it is easy to point the finger at a particular point source and measure the impact. He said this bill is probably their savior because thats what was happening in the past. We are trying to focus our efforts to minimize degradation or any continued pollution in the streams. By focusing on the point sources, we have nailed municipalities and other businesses with point source discharges we have responded to violations with enforcement and fines and have reduced their ability to discharge through restrictions on permits and mixing zones. This bill, for the first time ever, deals with non-point sources as actively as we have with point sources. But again, non-point sources are hard to specifically identify and quantify.

Closing by Sponsor:

REP. BILL TASH closed by saying he appreciated those people that came and testified both as proponents and opponents and good points have been made on both sides. He commented on the

statement, "are we doing enough fast enough?" He said there were no fantasies or quick fixes, but this was a place to start. HB546 is a place to find the solutions and do it in a balanced way that will be long term solutions rather than quick fixes. It cost a lot of money to bring suit, as **Mr. Jenson pointed out** and it cost a lot of money to defend suits. He said everybody would be a lot better off if the money spent on litigation was put on the ground finding solutions to the problem. He said good points made by **Dr. Watson** and appreciated her testimony. With regards to costs for clean-up of the impaired waters, it is hard to put any fixed cost on it based on a particular reach or stream. There are too many variables involved. **Dr. Watson** brought up a very good point on that respect, that the clean-up costs will be on-going but a lot of times these streams do in fact clean up themselves. That's why it is important to be good stewards of the land. He said the ones that manage the land correctly, and take care of the resources, have much fewer problems. The exploiters are the ones that are against it. As a state, we can leave this better than we found it and by all means we are obligated to do so. Through this piece of legislation, it is a place to start. He hoped the committee would concur and pass this bill.

{Tape: 2; Side: B; Approx. Time Count: 5:30; Comments: None.}

CHAIRMAN GROSSFIELD closed the hearing on HB546.

EXECUTIVE ACTION ON HB524

Amendments to HB524 were distributed, (EXHIBIT 13,14, and 15).

Amendments: hb052401.alm

Motion: SEN. BROOKE MOVED AMENDMENT hb054601.alm as contained in EXHIBIT 13.

Discussion:

SEN. BROOKE explained the first amendment was an attempt to have parallel language. The second amendment was put forward as a result of the situation in Missoula, the White Pines Sash, which involved a high degree of public interest. She explained that many people from her area would rather have the Dept. do the remedial action health study versus what was outlined in the bill. She said this amendment would put the responsibility back to the Dept. to determine the health risk.

SEN. TAYLOR asked SEN. BROOKE if this would take away the self-auditors? She said yes, it defines a different situation for when the person liable would go forward with this action and it would put it back into the Dept.'s hands.

SEN. TAYLOR asked SEN. BROOKE how she would define a "high health risk?"

SEN. BROOKE said there were many ways to define it but she thought if any groundwater were effected by contaminants of high toxicity, this would pose a high health risk.

SEN. WILLIAM CRISMORE stated that the amendment would change the intent, and asked **Leo Berry** to comment on this.

Leo Berry said this amendment was offered in the House and the people that were supporting the bill agreed to the other amendment offered, but not to this one. He said the amendment did change the intent of the bill. **Mr. Berry** said under the law, even with this bill, the agency retained the ability to review all work and may require changes to be made if needed.

CHAIRMAN GROSFIELD asked **Mr. Berry** if the amendment passed, would this in several cases, require a double expenditure of monies?

Mr. Berry believed that the way the system worked presently, a double expenditure of money exists regardless of who does the work and it didn't affect the duplication issue one way or the other. He said it was a matter of the belief that private parties can do the job as well and less expensive.

SEN. BEA MCCARTHY asked **SEN BROOKE** about the words, " high degree of public interest."

SEN. BROOKE said the intent of the amendment was to somewhat tighten the reins and give the Dept. the same authority they have now in certain situations. She said in Missoula a situation triggered an incredible high degree of public interest because of the location of a contaminated mill site, which was within an urban area. The water testing that was performed in the area revealed water well contamination. This resulted in a high degree of public interest. **SEN. BROOKE** did not feel the amendment would change the intent of the bill.

SEN. DALE MAHLUM asked **Denise Mills, DEQ**, doesn't the Dept. have to sign off on the remedial work of a private contractor when it is completed?

Denise Mills said that was correct, and the work must be done in accordance with industry's standards, so to speak, and acceptable with the Dept.

SEN. MAHLUM asked **SEN. BROOKE** about the purpose of the amendment since work still has to be approved by the Dept.

SEN. BROOKE said the amendment would give more control or direction to how that health study would be carried out. She thought the Dept. would take a step down and the other parties would have more of a lead in the process, if this amendment was not put into the bill.

CHAIRMAN GROSFIELD commented that Amendment No. 1 was a good suggestion, however, he had some reservations on Amendment No. 2. He thought determining a degree of public interest or even high health risk could be very subjective. For example, a situation may occur where there may be low risks and low levels of interest, but midway through the process, a newspaper editorial triggered a high degree of public interest. Then the process would have to begin anew or possibly go to court because the high degree of public interest was not recognized. He did not feel it was a good idea to set this type of thing up. He would rather segregate the two amendments, and vote on No. 1 first.

Motion/Vote: **CHAIRMAN GROSFIELD** MOVED TO ADOPT AMENDMENT NO. 1 AS CONTAINED IN EXHIBIT 13. MOTION CARRIED 9 to 0.

Vote: Motion to adopt Amendment No. 2, motion failed 7 to 2, with **SEN. BROOKE** AND **SEN. VAN VALKENBURG** voting aye.

Discussion: **SEN. VAN VALKENBURG** said he received a proposed amendment from **Peter Neilsen, Missoula City-County Health Dept.**, and he asked Mr. Mitchell to prepare an amendment based on **Mr. Neilsen's** suggestion. He then forwarded that to **Mr. North, DEQ**, for consideration. **Mr. Berry, and Ms. Hedges** were asked for any suggestions concerning ways to avoid duplication of health risk assessments. **SEN. VAN VALKENBURG** said the assessments have a high price tag, in the area of \$100,000, and it might be possible to have a mutual agreeable contractor do the health risk assessment, instead of two assessments being done.

Ms. Hedges said she spoke with **Leo Berry** about the same issue and discussed how the Dept. could go about developing rules and criteria on hiring contractors jointly. This was a solution that both **Mr. Berry** and herself agreed would be worth addressing.

Mr. Berry said a joint hiring process would be beneficial, and would give the agency and the public more confidence in the work that would be done. He agreed that the duplication work on these sites would be a waste of everyone's money and would like to see some kind of methodology used to eliminate that duplication. He said he talked with **Denise Mills** and **Director Simonich** about this and they thought the Dept. had the authority to do it now. He did not object to the amendment that was proposed.

Director Simonich said the Dept. did not object to the Amendment. He wasn't sure if it was absolutely necessary because nothing he knew about presently, prohibited the Dept. from doing what he thought this did. In terms of allowing a joint process of selection, he thought that would be appropriate, but he hesitated to have the Dept. jointly enter into a contract. **Director Simonich** felt two bosses on the contract would not be a good idea and a separation should exist between the Dept. and the PLP.

SEN. MCCARTHY said if this amendment had been in effect when we were doing the clean-up of the golf course in Anaconda, it would

have helped matters tremendously. She said there had been tremendous duplication in that instance.

Director Simonich said that was done under CECRA, a federal superfund program.

SEN. VAN VALKENBURG said based on the answers that Mr. Berry, Ms. Hedges, and Director Simonich had given, he was not going to offer the amendment that he had prepared at the request of Mr. Neilsen, and he was going to offer the Amendment that Ms. Hedges submitted .

CHAIR. GROSFIELD commented that according to what was said in SB197, agencies cannot make rules on subjects that have not been considered by the Legislature. He thought it was important to have this amendment in this bill. He read the amendment which is attached as EXHIBIT 15, 1. Page 8, Line 5, insert: "NEW SECTION. Rulemaking authority - remedial action contractors. The department shall develop rules that allow for the joint selection and/or hiring of remedial action contractors."

Motion/Vote: SEN. VAN VALKENBURG MOVED THE AMENDMENT by Anne Hedges, EXHIBIT 15, and to allow any technical changes be made to the amendment if needed. MOTION CARRIED UNANIMOUSLY.

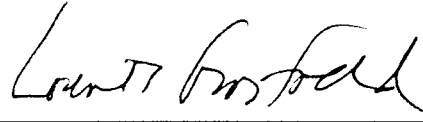
Motion/Vote: SEN. VAN VALKENBURG MOVED THE AMENDMENT hb052402.alm as contained in EXHIBIT 14. MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. TAYLOR MOVED HB524 AS AMENDED. HB524 PASSED AS AMENDED 7 TO 3, WITH SEN. BROOKE, SEN. VAN VALKENBURG AND SEN. MAHLUM VOTING NO.

CHAIRMAN GROSFIELD closed the hearing at 6:03 PM.

ADJOURNMENT

Adjournment: 6:03



SEN. LORENTS GROSFIELD, Chairman



GAYLE HAYLEY, Secretary

LG/GH