MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on March 22, 1999 at 3:10 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:
Sen. William Crismore, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: None
Executive Action: HB 340; HB 486; HB 298

EXECUTIVE ACTION ON HB 340

Motion: **SEN. COCCHIARELLA** moved that **HB 340 BE CONCURRED IN.**

Discussion:

Greg Hahn, Supervisor of Right-Of-Way Lands Section, Montana Department of Transportation, stated he brought copies of the unsigned Fiscal Note for the bill that had not been presented at the hearing. **EXHIBIT(nas64a01)**. Section 1, Part 1, of this act would require **MDT** to locate, reference, file corner record of every monument, accessory or reference to the monument prior to disturbing or destroying that monument. All public survey monuments and a majority of private property corners, by virtue of 76-3-209 MCA, requires such action now. This bill would require **MDT** to do the same for corners, accessory and references. It is probably a reasonable request but not an inexpensive one for **MTD**. This will affect not only new construction but most reconstruction projects and maintenance as well. Sec. 1, Part 2, would require **MTD** to restore or replace the monument or the accessory to the monument using references established in Section 1, Part 1, and file a new corner record or a Certificate of Survey within 30 days of disturbing the same. This process will be very expensive for **MTD** and cost about $1.2 million as indicated by the Fiscal Note. It will be almost impossible for the Department to comply. **MTD** is not supporting this bill, it will not, however, oppose the bill if the introduced amendments are included. In a compromise to the landowners and surveyors, **MTD** is willing to comply with Part 1 but not Part 1. **MTD** believes that meeting halfway with the request of the surveyors and landowners of Montana is as financially and physically possible as its resources will permit.

SENATOR CRISMORE questioned why the committee had not received this information before? **Mr. Hahn** stated they had attended every hearing but no one until the last hearing questioned the amendment and no one questioned the fact they wanted to amend it.

SENATOR TAYLOR questioned if **MTD** knew about this kind of fiscal impact, why was it not presented in the General Transportation budget? **SEN. CRISMORE** stated the bill had not been passed.

SENATOR TAYLOR questioned if it was standard to cost out 8 hours to locate property corners? **Mr. Hahn** stated it required that much time to locate, mark and record it. Typically it takes between 6 to 8 hours.

SENATOR COCCHIARELLA stated she withdrew her motion.

SENATOR CRISMORE stated he was going to postpone executive action on this until Friday.

SENATOR McCARTHY questioned if the sponsor was aware of the financial impact? **SENATOR CRISMORE** said he was not certain.

SENATOR COLE stated this not only included **MDT** but included counties roads also. He asked if fiscal impact information could be obtained for the counties as well.

SENATOR MAHLUM requested **Mr. Mitchell** obtain that information for the committee.

SENATOR COCCHIARELLA stated the Fiscal Note says this is in the Governor's Budget. She asked **Mr. Mitchell** to find out if it is included in **HB 2** or if it goes to appropriations.

SENATOR MAHLUM questioned what would have happened to **MTD** had the committee passed this bill today without knowledge of the fiscal impact, would that have been a problem? **Mr. Hahn** stated yes.

SENATOR GROSFIELD questioned what they do now instead of filing corner records? **Mr. Hahn** stated they replace public survey corners and private property founding corners now which is part of what 76-3-209 MCA talks about. This bill says they will replace any references or any other pins other than property corners and public surveys.

{Tape : 1; Side : A; Approx. Time Counter : 0 - 9.8; Comments : None.}

EXECUTIVE ACTION ON HB 486

Motion: **SEN. COLE** moved that **HB 486 BE CONCURRED IN.**

Discussion:

SENATOR TAYLOR requested an explanation of page 3, lines 15-18, "unless affiliated by a stock ownership". **Mr. Mitchell** stated there has to be a direct connection between a parent company and the company that perhaps is involved in the cleanup. Unless there is a direct affiliation by stock ownership, that site would become an orphan share if the smaller of the companies was bankrupt. **SEN. TAYLOR** stated what if he owned a piece of ground and leased the ground to **SEN. MAHLUM** who contaminates the ground

with his project. Because the cleanup will cost $1 million dollars and **SEN. MAHLUM'S** business is only worth $200,000, he declares bankruptcy and leaves. Does it revert back to the owner that leased the land to be responsible for the cleanup? Does this amendment say they are responsible or not? **Mr. Mitchell** stated the owner of the property would still be responsible. The amendment gets more to the situation where **TAYLOR** is Company A, **MAHLUM** is Company B and **GROSFIELD** is Company C. **TAYLOR** owns all three. **GROSFIELD'S** company pollutes and goes bankrupt. The middle company disappears and there is no stock connection between **TAYLOR** and this company any further. **GROSFIELD'S** company becomes an orphan share even though **TAYLOR** originally had owned it. By getting rid of the middle company, there is not stock connection between the three.

SENATOR WILSON stated he had an amendment to offer to strike that language.

SENATOR GROSFIELD asked for further clarification of the stock ownership issue. He questioned if that is how it works in the example just given? **Mr. Berry** stated there were two examples given. The first example being where **TAYLOR** leased the property to **MAHLUM** who polluted the property and left. Under Super Fund law, **TAYLOR** is responsible for cleanup. After cleanup, he could apply to the Orphan Share to be reimbursed for **MAHLUM'S** portion of that liability. Usually the lessor is responsible for about one-third and the lessee is responsible for two-thirds. The state establishes an allocation process where a variety of factors are considered and the shares could change as a result of those factors. **SEN. GROSFIELD** questioned is that under current law? **Mr. Berry** stated that is under current law and it does not change under current law. The reason for the amended bill is the Department determined under current law to strike the new language. The change was made to be sure there was a stock relationship between those parties and not an insurance contract relationship.

In the situation where you have tiered corporations and the bottom tier goes bankrupt there is a contractual relationship under Montana law between the three corporations. Under Super Fund, the parent company is liable and has to do the cleanup. It could, under this law, apply for reimbursement under the orphan share but it has to go through that allocation process. If there was a stock ownership relationship there and was actually in control of that lower company, it's allocation would likely be zero. Technically it could be eligible for an orphan share but once you go through the allocation process, he thinks it would be zero.

SENATOR WILSON questioned if there were any holes to be shot in what **Mr. Berry** said? **Bill Curley, Acting Chief Remediation Counsel for the Department of Environmental Quality,** stated in the example **Mr. Berry** explained what triggered the need for the bill amendment. **TAYLOR** as owner of the property has a claim against **MAHLUM'S** company who is now bankrupt, so the owner will not get anything out of it. His company is an orphan if it is not affiliated with any viable person. The Department made the determination that if he had insurance coverage which would pay his share, the insurance coverage would have to pay first before looking to the orphan share for reimbursement. The bill as amended would change that so the owner could do an allocation and receive reimbursement from the orphan share. If the owner did not collect insurance, then the Department representing the orphan share could go after the insurance.

SENATOR WILSON stated the way it was explained to him was this new language would create situations where the orphan share account could be gone after a whole lot more than what was originally proposed. Who is holding the bag? **Mr. Curley** stated he had alluded to two different questions, one being are you letting someone off the hook and the second being who is holding the bag? There are two different answers to both questions. He is not sure the insurer is being let off the hook by the revisions to current law in the bill. It does change the burden of who would have to go after the insurer or another party. **SEN. WILSON** stated so the big corporation with this new language could effectively end up in a situation where it is not their game and they do not have to go after the insurance company. The bankrupt polluter is out and not going after the insurance company. Since there is no direct stock ownership, the parent company is not going after the insurance. Then it reverts back to the orphan share account? **Mr. Curley** said that is basically correct.

SENATOR COCCHIARELLA stated the way **SEN. WILSON** just explained this is the way she understood how this would work. She thought BN-Santa Fe would be off the hook for anything and **DEQ** would have to go through the suing and go after them. **Leo Berry** stated that was not the case. BN would be responsible or any landowner would be responsible for the cleanup. The landowner can then apply for a reimbursement from the orphan share to cover this bankrupt parties allocation. The more you were involved in the activity, the less you will get back. **SENATOR COCCHIARELLA** questioned where the insurance company was in this? **Mr. Berry** stated at the back of the bill, on the bottom of page 13, allows the liable party who had to clean it up to sue the insurance company or on the next page, it authorizes the Department to sue the insurance company. If any money is recovered from the insurance company,

it gets credited back to the orphan share. They would not get to recover twice.

SENATOR TAYLOR referred to page 3, line 17 and 18, and stated this is a policy decision as he understands it, whether the state should collect the money from the insurance company or the company should go after the money from the insurance company. If this amended bill is accepted, it says the company is not responsible for collecting the money, but the state is. If you want the state to collect the money and not the company, you accept this amended bill as written. If you think the company should collect the money from the insurance company the amendment would be taken out. The company will still be reimbursed from the orphan share for the money they have to expend to collect from the insurance company? **Mr. Berry** said page 13 states who is going to sue the insurance company. Either the Department or the private party can sue the insurance company under this bill. If they sue for $500,000 and it costs them $100,000 to pursue litigation, $400,000 is credited back to the orphan share. The policy decision argument he has heard is who should be doing the suing and do you get to deduct legal fees from that recovery? If a private party takes that on or if the state takes that on they should be reimbursed because they could lose and be out $100,000.

This issue is a little bit different. This goes to determining who qualifies to be an orphan not who is going to sue the insurance company but who will qualify to be an orphan. As he explained before, by changing the definition of orphan share, corporations are qualified to be an orphan. If you look at other parts of the law and you allocate out what they would get back from the orphan share, if they are the senior corporation, he estimates they would get zero back.

SENATOR GROSFIELD questioned why do we want to do this? **Mr. Berry** stated because of the issue where the Department determines that an affiliate is an insurance company.

SENATOR COCCHIARELLA asked for clarification on "we had a company". Is it a BN company? **Mr. Berry** stated it was the Kalispell Pole Site where BN leased property to the Kalispell Pole Company who operated on site for many years, went out of business and the only one left is the widow of the guy who operated it. They had some old insurance policies. They applied to the orphan share. They started dealing with the company and concluded they had no assets. The only assets are the widow's. The attorney had two choices, either apply to the orphan share or sue the widow. No one wanted to sue the widow. They applied to the orphan share and the Department said it was not an orphan. There are old insurance policies and they would have to make a

claim against them. The insurance company denied all the coverage. They went back to the Department and asked if it was an orphan now because there is no money here? The Department said no, they may still be liable under the terms of the policies. He then asked if the Department was going sue the insurance company. They said no. At that point they were stymied because they would not sue the insurance company but they would not declare it to be an orphan either. He withdrew the petition for the orphan share and he filed an action against Kalispell Pole Company in Federal Court in Missoula. They have confessed liability for contaminating the site. They will assign their rights under their insurance policies to the law firm and they will then sue the insurance company. This is trying to correct that situation so they don't have to go around in a circle. If an insurance carrier is not an affiliate of a company, that is a separate contractual arrangement. An affiliate is a sister company of some sort where there is a stock relationship. If you have subsidiaries there is a stock relationship, you do not want to let the big guy out.

SENATOR McCARTHY questioned if the widow was absolved of any liability? **Mr. Berry** stated the case is not finished yet. The law firm's agreement with Kalispell Pole is they will not go after any of the individual owners of the widow if they assign them the policy. All he want to do with this language is make sure that does not have to happen again.

SENATOR MAHLUM questioned how long this had been going on? **Mr. Berry** stated two to three years.

SENATOR WILSON stated it is a $8,670,000 estimated cleanup cost, is that correct? **Mr. Berry** stated it is but this bill does not really affect that one way or another. This bill is not retroactive. **SEN. WILSON** said so that is what you did under orphan share the way it used to be defined. What would have happened under this new language? **Mr. Berry** stated under existing law if it is an $8 million dollar cleanup and $2 to $3 million is recovered from the insurance company, the rest would qualify as an orphan. It is not changing that relationship. Under this bill any of those recovered monies would be credited against the orphan share so double recovery would not be possible.

SENATOR GROSFIELD asked her concern? **Anne Hedges, Montana Environmental Information Center,** stated her concern was that she was one of the individuals who participated in the consensus process that took two years to develop this language. That consensus language is being changed from what was agreed upon. This language means that no one has to go after the insurance

company. When reading this in conjunction with page 13 at the bottom, you allow the financially responsible party to be gone after by the potentially responsible person and say the Department 'may' go after the insurance company. Nobody 'has' to. If you read this in conjunction with the Fiscal Note, it says litigation will not be pursued by the Department if it is not going to be beneficial. That is not the purpose of the orphan share. The orphan share fund was supposed to be a fund of last resort, it was always to go to on the ground cleanup. She does not disagree to allow recovery of attorney's fees from the fund indirectly but she does disagree that, with the combination of these two languages, no one will go after the insurance company.

SENATOR GROSFIELD asked if the Department is not going to sue? **Denise Mills, DEQ,** stated they put a qualification in the Fiscal Note that says they would essentially make an assessment of the viability of pursuing the insurance policy to recover the orphan share process if reimbursed. There may be situations where they would either break even or the cost of litigation would outweigh the benefit they might gain from pursuing that. **SEN. GROSFIELD** said they would not sue unless it looked like the Department would come out ahead and if you did come out ahead you would? **Ms. Mills** stated that was correct.

SENATOR KEATING questioned if the plaintiff loses, they cannot ask for reimbursement out of the orphan share for remedial action costs, can they? **Ms. Mills** stated that is not quite correct. The policy question is that the amendments proposed in this bill would mean if the owner has gone in to do the cleanup because the lessee has left, that is a two-third allocation that is identified as an orphan share. The owner has already been reimbursed for those costs from the orphan share fund and then either he or the Department, under these amendments, would then pursue the insurance policy to recover those remedial action costs. If the plaintiff in this case, is successful in recovering those costs, all the attorney fees would be reimbursed from the orphan share fund. If the plaintiff is unsuccessful, the orphan share reimbursement has already been made. **SEN. KEATING** questioned the loser is not able to come back to recover legal costs from the orphan share? **Ms. Mills** said from her understanding of the bill she thought that was correct.

{Tape : 1; Side : A; Approx. Time Counter : 9.8 - 45; Comments : None.}

SENATOR COCCHIARELLA questioned what is the impact of the bill, as it is without amendment, having the Department not pursuing some situations and pursuing others? **Mark Simonich, Director,**

DEQ, said this is really a policy call for the legislature to make. There is always a judgement call going to be made by parties on the other side at any time as to whether that insurance policy is viable whether there is a real opportunity to win or and whether there is sufficient policy there to make it worthwhile to go after. This bill shifts the burden somewhat. It shifts the burden to the state and puts them in a more active role. It allows other responsible parties to come in to pursue a cost allocation and then have the state make that determination whether or not the state wants to pursue the insurance company. On balance, when you get through the whole thing, it should not make a great deal of difference to the orphan share fund itself. Ultimately if they are doing their job best they can, there should be very little difference to the fund but it does begin to shift some of the burden to the state to have the state be more proactive in potentially pursuing any of those potentially liable or financial responsible parties out there such as insurance companies.

Motion: **SEN. WILSON** moved that **HB 486 AMENDMENT #HB048602.ALM BE ADOPTED. EXHIBIT(nas64a02).**

Discussion:

SENATOR WILSON stated on page 3, line 17, this amendment proposes to strike "an affiliate of" and insert "affiliated with" and strike "unless affiliated by stock ownership". The amendment puts it back to the original law developed under a consensus council process. He does not believe that just because there is not an affiliation by stock ownership that anyone should be let out of the process of going after an insurance company to rectify the environmental damage.

SENATOR KEATING stated he needs an explanation of the term affiliated. How close a relationship is that? **Mr. Curley** stated in existing law the Department's interpretation was it means there is a contractual relationship that makes the affiliate responsible for the legal liability of the principal.

SENATOR KEATING stated in the case between the railroad and the widow, since the pole company is defunct, is the railroad on the hook because of their affiliation with the widow? **Mr. Curley** stated the railroad is on the hook because, under the basic statutory liability scheme under **CECRA**, it is the owner of the property and the owner of the property is one of the liable persons. How much of the liability they have to assume depends on their relationship to the property and historically what has happened. This does not change that. If they have to do the

cleanup, it changes whether they can go after the orphan share to be reimbursed for the defunct party's share or whether they have to look to the insurer first.

SENATOR KEATING questioned is the insurance company affiliated with the widow? **Mr. Curley** stated a determination was made that the insurance company was affiliated with the pole plant corporation which was the liable party. The widow is not actually a liable party.

SENATOR GROSFIELD stated in a similar case they would not be allowed to look at the Orphan Share Fund until they exhaust the remedies with the insurance company? **Mr. Curley** stated if it appeared there was viable insurance coverage, that was the determination the Department made. **SEN. GROSFIELD** stated if the bill passes, the agencies will be a position, on page 13, of looking at the insurance and doing a cost analysis to determine what money they will pay. If the language is changed the burden is shifted to the company so the company will go through the same analysis. It is a catch 22 because they cannot use the orphan share account until they have gone after their insurance. Is that correct? **Mr. Curley** stated the Department would have to make a fair judgement also as to if there is viable coverage so their determination on the insurance coverage would be the same in either case. **SEN. GROSFIELD** stated he felt more comfortable with the Department making the decision and not having this circular run around that we will end up with without it if he understands this right. He will oppose the amendment.

SENATOR WILSON questioned how big a deal is this? **Mr. Berry** stated stated in this case they are forced to sue the widow. There is no contractual relationship between BN and the insurance company so they have to sue the widow and have her sign her rights over, though the Department has not done a real analysis of whether that is a viable action. It is obvious that the committee is confused as the bill has more important parts to it than this particular item and he suggests the committee accept **SEN. WILSON'S** amendment to solve the issue and they will come back and try to address it next time. It is a viable issue but obviously needs more work to make everyone feel comfortable.

Vote: Motion that **AMENDMENTS HB048602.ALM BE ADOPTED failed 5-5.**

{Tape : 1; Side : B; Approx. Time Counter : 0 - 13.5; Comments : None.}

SENATOR WILSON stated **REP. BOOKOUT** is in attendance and had received permission from **CHAIRMAN CRISMORE** to address the committee and explain her amendments.

Motion: **SEN. WILSON** moved that the **BOOKOUT HB 486 AMENDMENTS HB048601.AMV BE ADOPTED.**

Discussion:

REPRESENTATIVE SYLVIA BOOKOUT REINICKE, HD 71, ALBERTON, stated at the hearing **REP. ANDERSON** did not want these amendments to go on the bill because then it would have to go back to the Floor for another debate. She told him the committee had the amendments and to leave it up to the committee and he could say whatever he wanted to against them. She did not tell him to say that she had changed her mind about wanting them to be considered. She presented her amendments as per **EXHIBIT(nas64a03).** As explained to her by **Greg Petesch,** the Federal Super Fund law will acknowledge when the state has a law that says the property owner is not liable for condemnation. As far as she knows, this little bit of language is the only personal property rights protection law we will pass this session. She encouraged the committee to join her in doing something for the people back home.

SENATOR MAHLUM questioned if this was for the Yellowstone Pipe Line? **REP. REINICKE** stated yes.

SENATOR McCARTHY stated **REP. TUSS** has a resolution about eminent domain and stream related issues. **REP. REINICKE** stated that is a study which is still alive but she was referring to something going into current law now in her previous comment.

SENATOR MILLER questioned if this was not a major part of a bill that already existed in the House? **REP. REINICKE** stated she had two eminent domain bills before the House Natural Resource Committee which were tabled, hence **REP. TUSS** came up with the idea for a study. **SENATOR MILLER** questioned this is not basically what one of the bills were that was tabled in House Business and Labor? **REP. REINICKE** stated it is part of it. **SEN. MILLER** stated he knows that if one bill dies in the House, the same bill cannot proceed forward in the other House and he wonders how that applies to amendments? If this is basically the bill and it dies in the House, the committee has the authority to stick it on another bill in the Senate and run it through? **REP. REINICKE** stated this is a small part of the bill.

SENATOR GROSFIELD stated the title of **HB 486** talks about institutional controls and orphan shares and now we are putting condemnation into it. Are not we straying pretty far from the title of the bill? **Mr. Mitchell** stated basically this amendment seeks to change the liability section of **CECRA** which is amended

in this bill. He felt it was on the edge but felt also that it was within the title of this particular bill.

SENATOR GROSFIELD said he had signed **REP. TUSS'** resolution as he felt it would be good to have a study on this whole eminent domain issue. There is a lot of confusion out there and he feels the guidelines in the statutes are maybe not what they ought to be. He would support a study but he did not feel he could support this amendment to put that into this bill at this time.

SENATOR COLE stated there have also been some bills that had an affect on the Cenex Pipe Line East of Billings, would that be involved in this too? **Mr. Mitchell** stated whenever a property has been condemned for the purpose of an easement, should that condemnation or the use of that property that has been condemned result in a release of a hazardous substance subjected to remediation under **CECRA**, this amendment would apply. It would basically hold the person whose property has been condemned not liable for the remediation of that release.

SENATOR KEATING he is trying to figure out authorizing a person harmed by a release to sue to recover damages and be awarded attorneys fees. Can't the person damaged now sue? Why is this in this section? **Mr. Mitchell** stated it is his belief they can. **Mr. Curley** stated there is a contribution action under **CECRA** by which a person normally would be able to sue the other responsible parties for the contribution. You would assume in a pipeline leak, the pipeline would be responsible for 100% of the costs and the landowner should be allocated zero. **SEN. KEATING** questioned what about the landowner who's land off the easement was damaged? Can they not sue? **Mr. Curley** stated if they incur any costs as a result of the damage in cleaning it up they can then sue the other responsible parties to recover those costs. **SEN. KEATING** stated he just did not see a need for this in the law.

Vote: Motion that **HB 486 AMENDMENTS HB048601.AMV BE ADOPTED failed 3-6 in a Roll Call Vote** with **SENATORS COLE, GROSFIELD, KEATING, McCARTHY, MILLER AND ROUSH voting no.**

Motion: **SEN. MCCARTHY** moved that **HB 486 AMENDMENTS HB048601.ALM BE ADOPTED. EXHIBIT(nas64a04).**

Vote: Motion that **HB 486 AMENDMENTS HB048601.ALM BE ADOPTED carried 9-0.**

Motion/Vote: **SEN. COLE** moved that **HB 486 BE CONCURRED IN AS AMENDED. Motion carried 8-1 with Wilson voting no.**

{Tape : 1; Side : B; Approx. Time Counter : 13.5 - 30.2; Comments : None.}

EXECUTIVE ACTION ON HB 298

Motion: **SEN. MILLER** moved that **HB 298 BE CONCURRED IN.**

Discussion:

SENATOR MILLER stated he had contacted **Roger Perkins**, a hydrologist in Laurel who had worked on the subdivision that brought this legislation forward, and he said he thought this bill would accomplish what was trying to be accomplished. With his expert advice he will support the bill.

SENATOR McCARTHY stated she wanted to be sure she understood the bill on page 2, line 19. **Mr. Mitchell** stated this gets to the types of things **DEQ** can review in terms of approving subdivision plats, in terms of water and sewage, and gets to the issue of requiring an adequate supply in terms of quality, quantity and dependability of water. It is more to the issue of dependability. If the Department determines that because of the dependability issue with water supply or rejects the subdivision, then the applicant has to come back with an alternative. Some of those alternatives come back to the Department as saying they will haul water and use cisterns instead. This bill will not allow the Department to require a cistern be installed if there is an alternative water supply elsewhere where water can be hauled within a reasonable distance.

REPRESENTATIVE FUCHS stated the word "hauled" comes from the way the rules are written. He is trying to take away the authority of the Department to require a cistern be used if an alternative water supply is available. Currently, the local reviewing authority is not able to handle it. If the bill is not passed then money needs to be appropriated for another 12-15 field people for the Department to ensure compliance.

SENATOR GROSFIELD questioned is Title 76 Chapter 4, Part 1 subdivision law? **John North**, **Chief Legal Counsel**, **DEQ**, stated yes, it is sanitation subdivision law. **SEN. GROSFIELD** questioned are we dealing with rulemaking authority of the Department with

respect to subdivisions or the Board of Environmental Review? **Mr. North** stated the rulemaking authority and the subdivisions act, with one small exception, is with the Department. **SEN. GROSFIELD** stated we are talking about approval or nonapproval for subdivisions that are brought in by a developer. The implication is if there is not adequate water then the Department could require a cistern. It appears to him there has to be a demonstration there is enough water for the whole subdivision or else the Department can go ahead and require cisterns. Is that correct? **Mr. North** stated in subsection (b) it says, in the existing language, the rules need to require there is adequate evidence that the water supply, as proposed, is sufficient in terms of quality, quantity and dependability. That means that for the entire subdivision the applicant had to have demonstrated the water supply had good quality and sustained yield, i.e. provides so many gallons per minute over a certain amount of time and that it would be there in the future. If you exclude from the new language parts ii and iii and just go with the first language, it says the Department may not require a cistern be installed when the proposed water supply is a well and the test wells or existing wells comply with the requirements that pertain to quality and sustained yield being quantity. He thinks that would remove the dependability requirement. **SENATOR GROSFIELD** questioned with respect to the whole subdivision? **Mr. North** said yes. **SEN. GROSFIELD** stated this is not a bill then about exempting individual lots within a subdivision. This is effective upon passage and approval but how does this affect actions already taken by the Department? **Mr. North** said it depends how you interpret the language in Section 19 where it says "the Department may not require that a cistern be installed".

{Tape : 1; Side : B; Approx. Time Counter : 30.2 - 47; Comments : None.}

SENATOR COLE questioned why a cistern would not be needed if water was hauled? He also asked for a run down on how this works now and how it would be if the bill passed? **Mr. Simonich** stated currently the developer proposes a development to the Department and the developer proposes the type of water supply that would be used whether that be a well, cistern, etc. In the proposal, the developer can also provide information to the Department to show they have the quality, quantity and the dependability for the water supply. The Department reviews all that information and ultimately makes a decision whether they agree with that information and if they do, they approve the subdivision. If they do not agree they disapprove the subdivision. The Department does not then require another system, it is up to the developer if they are going to propose something different or if

they are going to go back to the drawing board and develop better information to try to convince the Department that the water is adequate. Only if the developer has proposed the use of cisterns and the Department has approved cisterns, would they be required to be put into place. This bill says that even though a developer has proposed a subdivision to the Department, and through a process of disapproving the water supply as not being adequate, the developer then proposes cisterns. This bill says even after that has been the approved mechanism, the Department could not require the developer to install those cisterns. On a lot by lot basis, he would expect this would be challenged.

SENATOR COLE asked how you would deal with making sure you don't have wells situated in such a place that it could cause problems? **Mr. Simonich** stated when they review a subdivision it is prospective. The entire subdivision is brought in and proposed and they look at it to lift the sanitary restrictions to determine if adequate water supply is available and adequate means to handle the sanitation wastewater. On some lots, there might be a single location adequate to put in a septic system and drainfield and still allow the other properties to have a drainfield with minimum distance to a water well so there is not contamination from the drainfield to a neighbors water well. With this bill, if the Department cannot require that the system be put in place that was originally proposed, it may mean that one entity may drill a well on this property and that may be in a place that is an immediate downgradient from the only place the neighbor could put his drainfield. If there is a water well in place, it threatens the neighbors ability to put in a drainfield and ultimately build on that property. Those are protections currently in the law he is afraid we lose with this legislation.

SENATOR GROSFIELD questioned what kind of liability does the Department have when they approve something and three of four wells come up dry? Who is liable, the Department or developer? **Mr. North** stated as long as the Department exercises reasonable care in exercising this function, it will not be liable. **SEN. GROSFIELD** stated if the bill is passed as is and some wells end up dry and they are not required to put a cistern in, does that liability change or not? **Mr. North** stated if they no longer have the authority to look into dependability, he does not feel they would be liable.

SENATOR COCCHIARELLA asked if it was the intent of the bill to be retroactive to past subdivisions? **REP. FUCHS** stated that is not the intent, it is only to prevent what has happened on this important issue between the county and the state not to happen on future subdivisions.

REPRESENTATIVE FUCHS said he would like to speak to the dependability question. In February, 1996, the administrative co-committee on a 6-2 vote ruled the Departments rules were clear and inconsistent on the dependability issue.

SENATOR GROSFIELD stated if that is the Sponsor's intent, a savings clause should be added. It would be best to clarify that is the intent in the bill.

Mr. Mitchell stated a savings clause could be done conceptually.

Motion/Vote: **SEN. KEATING** moved that a **SAVINGS CLAUSE BE ADDED TO THE BILL. Motion carried 9-0.**

Motion/Vote: **SEN. MILLER** moved that **HB 298 BE CONCURRED IN AS AMENDED. Motion failed 3-7 by Roll Call Vote** with **SENATORS CRISMORE, COCCHIARELLA, COLE, GROSFIELD, McCARTHY, ROUSH AND WILSON voting no.**

Motion/Vote: **SEN. WILSON** moved that **HB 298 BE TABLED. Motion carried 7-3 with SENATORS MAHLUM, KEATING AND MILLER voting no.**

{Tape : 2; Side : A; Approx. Time Counter : 0 - 14.4; Comments : None.}

ADJOURNMENT

Adjournment: 5:00 P.M.

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SEN. WILLIAM CRISMORE, Chairman

_____
JYL SCHEEL, Secretary

WC/JS

EXHIBIT(nas64aad)