MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON SB 499

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on April 14, 1999 at 8:39 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Bea McCarthy (D)
Sen. Mack Cole (R)
Rep. Karl Ohs (R)
Rep. Bill Eggers (D)
Rep. Bill Tash (R)

Members Excused: None.

Members Absent: None.

Staff Present: Gilda Clancy, Committee Secretary
Larry Mitchell, Legislative Services Division

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

Committee Business Summary:

Free Conference Committee Hearing SB 499

Discussion:

CHAIRMAN GROSFIELD asked **Larry Mitchell, Legislative Services**, to explain the differences in the amendments submitted today. **EXHIBIT(frs81sb0499a01)**

Mr. Mitchell explained the amendments are similar to the amendments handed out on April 13, 1999. They reinstate the permit exclusion for the discharge of ambient ground water to surface waters, but it still subjects that process to a non-degradation review. This is amendment 4.

Amendment 3 is a technical amendment which puts the 'catch' line back into the stricken from the bill. It retains a severability clause.

Amendment 6 is an applicability section which only includes subsection 1 from the prior amendments, and not subsection 2. The difference is the manner in which it is now written, it would basically grandfather those construction activity permits using the narrative standards in this bill, for this next construction season for those permits which were issued. But, it has stricken the grandfather clause for the exemptions in subsection 2 from April 13, 1999. Subsection 2 attempted to grandfather back in some of those activities which have been occurring for the past several years in terms of mine exploration and oil and gas for permits for discharge to surface water.

He explained this amendment also takes out that change of definition which was proposed in the prior amendment. There are four pages from that prior amendment which were strictly the addition of 75-5-103, MCA, which was the definition section to change the definition of high quality waters. That amendment has been dropped.

CHAIRMAN GROSFIELD thought the parties who are interested in this bill have talked about whether they could find a way to deal with that. He asked for anyone to report what was discussed.

Jeff Barber, Environmental Information Center, related they understood the concern the Committee has shown in not having someone who is watering their lawn or irrigating get a permit. They have unsuccessfully found a distinguishing characteristic between large developments like the Blackfoot or the methane gas which would set them apart from the other people whom they did not want to have to get a permit. For awhile, they thought they could do this on a 'volume of water' basis, but were told the people who have flow-through stock tanks used more water than a mine might. They have not been able to come up with the thing which sets them apart from others, other than they know they are someone they want to look at. He said the Committee could take this section out or leave it in, as they see fit.

Mark Simonich, Director, Department of Environmental Quality, stated to adequately characterize the sentiments of the department, they did originally suggest if they are looking for a way to define what types of discharge they would have to get permits for, that volume might be a basis for that. There are certain types of discharges that cannot be characterized by full volume and capture all those discharges either in or out of the permit systems. They haven't been able to figure out a more definitive way to narrowly define which activities need permits.

He feels that they are at a point the Committee needs to put permit exclusions in the law entirely or to leave it out entirely. He doesn't think in the short time frame now, we really have the ability to put into law something which will work for all the people in Montana.

SEN. MCCARTHY asked **Mr. Simonich** if they leave it out entirely, what will be the repercussions of EPA?

Mr. Simonich did not believe there would be any repercussions with EPA in terms of this bill. This is a permit issue and this bill is before the Committee because under the law, EPA has to review Montana standards, particularly what EPA has disapproved. That is what is trying to be corrected by this bill.

Permitting issues are particularly being challenged by EPA to administer better programs. Not putting that into this bill does not jeopardize that one way or the other.

John Bloomquist, Montana Stockgrowers Association, explained looking at the difference between the amendments from April 13, 1999 and today's amendments, the idea behind flexibility in the amendments is to allow activities which relied on the law at the time they were conducted, should be able to continue business in the manner they have been. The EPA has disapproved some standards on some activities which occur and we are not protecting those activities from the flexibility. He thinks this is intended ingenuous.

In the new applicability section, we are taking 308 activities and keeping those, but on other, disapproved activities under non-degradation exemption are in question. He believes the State should say these people should abide by law at the time they conducted their activities and should be able to continue to do so. He thinks it is good to add the savings provision because we should be consistent with that.

Regarding the 401 language in amendment 4, he believes it is very critical that be placed into this bill. The EPA only specifically disapproved one small section of that language. That exclusion is a sound, common sense exclusion.

CHAIRMAN GROSFIELD thought on the new amendments, there is agreement on all except the issue in subsection 2 of the old amendments.

Mr. Simonich responded he suspected there may be two issues. One has to do with the permit language, the second one is amendment number 6 on applicability. They think amendment number 6 is such

that it is not going to raise a problem with EPA. They believe this set of amendments does strike a balance and the department fully supports these amendments. They have been dealing with the issue that EPA has disapproved their standards. They have worked with EPA, their staff has negotiated with them thoroughly for the past four months.

When they had the hearing in the House, they presented a letter to the Committee which was signed by **Max Dodson** stating the amendments the department had requested in the House, those changes to the law were acceptable by EPA. That's why DEQ would accept the narrowly defined applicability clause which speaks only to those short term construction activities.

They heard people in the agricultural community were the most greatly concerned, and believe the applicability clause solves that problem. On the other hand, if you stretch those applicability clauses, that would be considered on-going discharges. They fear that will be an issue for EPA.

Steve Pilcher, TVX Mineral Hill Mine and Stillwater Mine, related he is confused by EPA's position as conveyed to **Director Simonich**. The reason is on April 13, 1999, during the discussion they met with the department, the department worked to identify those permit decisions based on the rules and statute in effect at that time. It was decided there were three, two of which are existing discharges, one for Mineral Hill Mine and one for the Stillwater Mine. It was also discussed, in both of those cases, both got a permit.

In 1974, when the State delegated the permit program responsibility, it included a provision where they issued an Montana Pollutant Discharge Elimination System (MPDES) permit which is then submitted to EPA and they have an opportunity to object to that permit. In the case of both TVX and Stillwater Mines, MPDES permits were issued in accordance with the statutes and rules and they were in effect at that time and EPA did not object to the permit. What is confusing is they had a built-in process which allows them to object to a properly issued permit at that time, but they didn't utilize that provision. Now they are telling **Director Simonich** it is a show-stopper if we provide protection to those decisions which were already made. It seems to him they are looking for another bite of the apple. They had an opportunity to influence the permit decision which was made at time in accordance with that delegation agreement and they didn't choose to do so.

CHAIRMAN GROSFIELD asked, "what about the methane gas permits"?

Mr. Pilcher thought the same would hold true to any permits. He had mentioned the day before the Redstone Gas Partner project is in the process of obtaining an MPDES permit as these others have done, because there could be some times of the year when they would exceed water quality standards and would not be able to use the exemption language in section 4 of these amendments. If they are issued an MPDES permit, EPA has the same ability to object to terms and conditions of that permit that they wouldn't any time else.

REP. OHS inquired what are the other activities which would be caught in this?

Mr. Pilcher asserted when they met with the department, they went through the 75-5-317 exemption, category by category, and they could only come up with three discharge activities decisions which have been made by the department in accordance with that exemption. That is what they are trying to protect with this applicability protection.

CHAIRMAN GROSFIELD stated he is still troubled by this issue. He can understand some basis for concern over an ongoing discharge from a mine or methane gas well, but those people are already going through the process.

If he had a permit on a national forest someplace, for example, and he had a flow-through stock tank and somebody didn't like his cows in a public meadow, and they are looking for a way to get his cows off of there, that whole litigation process is started. He would like to nip that in the bud. He would like to figure out a way to deal with this and is not convinced they should adopt the subsection 2 amendments and the April 13, 1999 set of amendments as they are, but he would rather do that than ignore the issue. He would be willing to give everybody another day to figure this out.

SEN. MCCARTHY remarked currently, DEQ requires a 24-hour pump test when drilling a well at 1.5 times the designed pumping rate on all water systems, both community and non-community. It is her understanding a $40 permit is required at every stage of this operation. Also, when they discharge a permit is required. She asked DEQ what about irrigation wells, fish hatcheries, etc? Every step of the way, does this gentleman have to pay another $40 to keep drilling and discharging and testing? She said she doesn't understand this process. How can we keep these people in business doing this? During the conversation of April 13, 1999 it sounded as if a water well driller may need up to four or five permits just to drill one well.

Abe Horpestad, DEQ, responded he didn't understand the question.

Larry Mitchell explained the question is what permits are required, in particular, in terms of this amendment. Would an MPDES permit be required to discharge ambient ground water from a drilling operation if that water was discharged to surface water for an operation required by DEQ? For example, to run a pump test for 24 hours. If they are required to run pump tests on new community systems, that could generate a huge quantity of ambient ground water. If that discharge went to the surface water, would that require an MPDES permit?

Mr. Horpestad answered DEQ does not normally require a MPDES permit to pump this.

SEN. MCCARTHY said in April 13, 1999 discussion, it came up that this person would have to pay a permit fee every time he ran a pump test.

Mr. Horpestad responded he didn't believe that to be the case.

SEN. MCCARTHY asked if this would change under these new amendments.

Mr. Horpestad answered what is being proposed is putting back in the exclusion for ground water. There would be no permit for that.

CHAIRMAN GROSFIELD commented that would also involve no permit required for a number of other things.

Also, he realizes those present have also worked to come up with a volume of water on either a daily or annual basis which could be authorized through an amendment for permitting purposes and no agreement has been made. He asked if they had any ideas on how to deal with this issue?

Mr. Horpestad responded they worked on basing this issue around volume and character of the discharge. The consensus was there seems to be no way to narrow it further than what has already been done.

REP. OHS remarked the concern is the methane wells. Is there another part of law not related to this where it can possibly be addressed?

Mr. Horpestad reported there is a provision which makes reference to non-degradation. Non-degradation rules itself saying they can declare something to be significant based upon the punitive

affects. They could be addressed in terms of degradation affects.

SEN. COLE asked regarding the issues as far as agricultural discharges, would **Mr. Horpestad** inform the Committee on those?

Mr. Horpestad responded the amendment would deal only with discharged ground water and surface water. A vast majority of irrigation discharges are based upon surface water discharge.

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CHAIRMAN GROSFIELD mentioned there is a lot of irrigation, stock tanks and those kinds of things.

Mr. Horpestad stated those would be covered by the amendments **(EXHIBIT 1)** and they would not require a permit.

REP. OHS said it seems to him that has already been discussed and that amendment is appropriate.

CHAIRMAN GROSFIELD referred to the applicability amendment number 2 from April 13, 1999. Why does amendment 4 not take care of subsection 2?

Mr. Bloomquist responded these are really two different things. Amendment four deals with the permitting issue. Subsection two of the applicability from yesterday's amendments deals with a non-degradation exemption.

CHAIRMAN GROSFIELD reiterated then, in one case we are talking about a permit requirement and the other case an exemption.

Mr. Simonich informed there is a difference between a permit and a non-degradation review. The non-degradation review is the standard issue which the EPA disapproved. So they are suggesting amendment number 4. The applicability clause as drafted is narrow, to only deal with those short-term activities.

CHAIRMAN GROSFIELD gave an example of installing a flow-through stock water tank and ground water is being tapped, and at the end of that flow-through tank that water is surface water, he would be exempt from a permit but not from non-degradation review unless something is adopted to take care of that. In order for him to install that tank in full compliance with the law, he would have to go to the department and go through a non-degradation review.

Mr. Horpestad alleged the non-degradation rules specifically allow individual persons to determine whether or not the activity is significant. He is certain **CHAIRMAN GROSFIELD** would determine his tank was not significant and that would be the end of the matter.

CHAIRMAN GROSFIELD didn't think it would be the end of the matter if his neighbor or the Forest Service does not like the cows in the public grazing. There is probably a problem with that water.

Mr. Horpestad responded the non-degradation rule specifically says you can make the determination. He does not know what legal avenue those people would have to contest that determination.

REP. TASH shared **CHAIRMAN GROSFIELD'S** concern. He used the example of a stock water system where he was required by permit on Forest Service lands to start the project with their engineering. The engineers were from Beaverhead National Forest Service and the over-flow from the spring developments flowed back to State waters. He has not only had problems on Forest Service grounds but also on the Bureau of Land Management grounds.

Mr. Horpestad stated if someone dislikes your stock water tank return, and tries to build a case on degradation, that person will not find sympathy from the department. If ground water is coming out and going down to the creek, they have better things to do than to nit-pick over something like that.

REP. TASH replied that does provide some security for him, then.

CHAIRMAN GROSFIELD said he is not worried about the department, but about the neighbor or whoever it is who doesn't like what he is doing.

Mr. Bloomquist informed the Committee the way 401 is presently worded in present law, not in the bill, addresses the non-degradation issue. The EPA has already disapproved that limited language in 401. That is unaltered ground water discharge. You don't need a permit and it is not degradation. Under present law, it is covered on both ends. You don't need a permit and you don't need to go through non-degradation.

Right now under rules, an individual can make this non-degradation determination. You won't need a permit if amendment 4 is adopted. He thinks if somebody were to make an issue out of the example **CHAIRMAN GROSFIELD** gave, they would have quite a burden on them, but it does exist.

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The EPA had the option to propagate something along those lines. In his opinion, what we are left with is putting in amendment 4 and if someone wants to take on a Forest Service permit regarding cattle, good luck to them, but this does prevent the possibility.

Quite frankly, he would like to tell EPA we are sticking with present law. But they would probably propagate something similar to amendment 4.

CHAIRMAN GROSFIELD reaffirmed with respect to amendment 2, that we can probably get by without it.

Mr. Bloomquist responded it is odd to him to have a savings provision for 308 and not have one for those other listed items under 317-2. He thinks there are only two or three in the US. If EPA wants to say that is a deal-buster, he is not sure it is their authority extends to savings provisions of State law. He thought they should be consistent and the Committee should put them both in.

CHAIRMAN GROSFIELD conveyed there are two options, we can take action now or give everybody one more day.

SEN. MCCARTHY asked if **Mr. Bloomquist** could be involved in the discussions with the department and other parties to work this out?

CHAIRMAN GROSFIELD thought the department basically said they support the amendments.

Mr. Simonich informed they helped put these amendments together with the understanding it is a compromise package.

REP. OHS said as far as he is concerned, the Committee is now left with one issue, that being the exemption review and the savings provision.

REP. TASH mentioned he could accept all the amendments except for the consistency they could place on amendment number 6.

REP. EGGERS had the same sentiments. He would like to know more about section 6 to see if there is some middle ground and another day would help.

SEN. COLE said he wonders if they can come up with something by tomorrow, but thinks they at least need another day.

SEN. MCCARTHY and **CHAIRMAN GROSFIELD** both agreed.

ADJOURNMENT

Adjournment: 9:30 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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Gilda Clancy, Secretary

LG/GC