

EXHIBIT NO. 5DATE: 2-11-05BILL NO. SB281

## LEGAL MEMO

NOTICE: THIS IS ATTORNEY WORK PRODUCT AND IS THEREFORE CONSIDERED **CONFIDENTIAL**. THIS MEMO CONTAINS SENSITIVE INFORMATION RELATING TO LEGAL ISSUES AND STRATEGIES. DO NOT ALLOW ACCESS TO THIS DOCUMENT WITHOUT THE CONSENT OF THE BELOW LISTED INDIVIDUAL.

TO: DON ALLEN, EXECUTIVE DIRECTOR, WESTERN ENVIRONMENTAL  
TRADE ASSOCIATION (WETA)  
FROM: MICHAEL S. KAKUK, ATTORNEY  
RE: SB281 BILL MEMO  
DATE: FEBRUARY 10, 2005

**PURPOSE AND DISCLAIMER**

You have asked me to briefly SB281. This is provided below.

**Note.** These comments are based on preliminary review only, therefore, additional research may be necessary before final decisions are made regarding this important issue. All comments are mine alone and should not be attributed to any other individual or organization.

As always, feel free to contact me with any questions, comments, or to further discuss this matter.

**INTRODUCTION**

SB281 is in direct response to HB473 passed in the 2001 legislative session. HB473 was an important revision to the Montana Environmental Policy Act (MEPA) and stated in part:

*The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.*

HB473 (2001), codified as §75-01-201(5)(a).

HB473 was a simple reflection that MEPA is an environmental information statute, and not an environmental protection statute. HB473 clarified that nothing in MEPA grants an agency any authority to deny or condition a permit. An agency's substantive authority to deny or condition permits must be found in other parts of substantive regulatory law.

In a Memo to you dated February 12, 2001, I stated:

*MEPA is not an environmental protection statute. It is an environmental information statute. Montana has many environmental protection statutes – the water quality act, the air quality act, and the hard rock mining act just to name a few. What do you get when you go through these substantive laws – if everything is in order you get a permit. What do you get when you go through MEPA – you get information. That's the difference between substantive acts such as the WQA and a procedural act such as MEPA.*

*The issue that HB 473 addresses is – What can the agency do with the information it generates under MEPA? For example – before a grain elevator goes up it needs a permit under Montana's Air Quality Act. Suppose that this grain elevator was going up near Pompey's Pillar and members of the public were concerned that the elevator would have an adverse impact on the visual aesthetics in the area, specifically the visual impact on Pompey's Pillar. Since granting an air quality permit is "decisionmaking" under MEPA, the agency must comply with MEPA. And since visual aesthetics are certainly part of the human environment, the elevator's impact on that visual resource must be evaluated under MEPA.*

*Under HB 473, if the agency finds that the elevator would have "significant" impacts on the human environment, related for example to the aesthetic resource, it would be required to complete an EIS. It would also be required to analyze alternatives to the project sponsor's project. Under HB 473, the agency could suggest mitigation measures to the project sponsor to reduce the impacts of the project. The agency could also help the sponsor develop mitigation measures to address the impacts. What the agency can not do under HB 473 is deny, withhold, or condition the air quality permit based on the results of its MEPA analysis. The agencies have never had this authority under MEPA and HB 473 clarifies that they do not have it now.*

The very issue of MEPA's inability to protect the environment, on its own, was discussed at length during committee hearings and floor debates.

Again quoting from the February 2001 memo, I raised, and rebutted, the very argument now used by supporters of SB281:

*Argument Against: HB 473 leaves unprotected any resource, for example aesthetic or wildlife resource, that is not regulated by another substantive law.*

*Rebuttal: If you assume that an agency today can withhold, condition, or deny a permit for an air quality permit based on impacts to the aesthetic resource then HB 473 would no longer allow the agency to "protect" the aesthetic resource through the air quality act. I do not believe that the agency currently has this authority under MEPA, nor do I believe that such authority is warranted or in the public interest.*

*If the people of Montana believe that a resource needs the protection of a substantive law, the legislature should develop and enact that law, and the agencies should implement the law. Trying to protect the aesthetic resource through the AQA is ineffective and inefficient protection for the resource in question and leads to equal protection and due process concerns for the agencies.*

SB281 "repeals" HB473 by specifically allowing state agencies to impose conditions on any permit or other authority to act based on impacts identified in an environmental review in order to protect public health and safety and to protect fish and wildlife.

### BILL ANALYSIS

Opponents to HB473 were told in 2001 that if they believed that public health and safety or Montana's wildlife resource was unprotected, then they should create and pass a Public Health and Safety Act or Wildlife Protection Act. After four years, they have come up with one sentence.

(ii) An agency may impose conditions on any permit or other authority to act based on impacts identified in an environmental review prepared in accordance with parts 1 through 3 of this chapter in order to protect public health and safety and to protect fish and wildlife.

SB281, page 4, lines 26 through 28.

There are numerous problems with the above language. For example:<sup>1</sup>

- SB281 states that an agency “may” impose conditions, but it provides no guidance to the agencies as to when such imposition would be appropriate.
- SB281 provides no guidance regarding how the agencies are to define “condition”.
- SB281 allows agencies to impose conditions based on “impacts” to public health and safety and, without some guidance regarding the definition of “impact”, impacts must then mean any impact regardless of significance.
- SB281 allows agencies to “protect” public health and safety, but, again, there is no guidance regarding what “protect” means.

More importantly, I believe that this one sentence Public Health and Safety/Fish and Wildlife Protection Act is an unlawful delegation of legislative authority to state agencies.

The Montana Supreme Court is clear and consistent on this matter:

*The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in*

---

<sup>1</sup> This memo is not meant to be an exhaustive legal brief regarding these issues and the problems are merely outlined. Additional research and information can be provided upon request.

*delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid.*

Bacus v. Lake County (1960), 138 Mont. 69, 78, 354 P.2d 1056, 1091

*" . . . the standard must not be so broad that the officer or board will have unascertainable limits within which to act."*

Bacus, at 81, 1062.

*The legislature may constitutionally delegate its legislative functions to an administrative agency, but it must provide, with reasonable clarity, limitations upon the agency's discretion and provide the agency with policy guidance.*

City of Missoula v. Missoula County (1961), 139 Mont. 256, 259, 362 p.2d 539, 541. (Emphasis added.)

*The legislation was constitutionally deficient because "[n]o legislatively defined 'policy, standard or rule' [was] effectively given" and because the bill failed to "prescribe with reasonable clarity the limits of power delegated."*

White v. State (1988), 233 Mont. 81 at 90. (Emphasis added.)

*A statute granting legislative power to an administrative agency will be held to be invalid if the legislature has failed to prescribe a policy, standard, or rule to guide the exercise of the delegated authority. If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, the statute is invalid.*

Hayes v. Lame Deer High School Dist., 303 Mont. 204, 15 P.3d 447, 2000 MT 342 (Mont. 12/19/2000) at ¶15. (Citations omitted, emphasis added.)

Citing the "Separation of Powers" provision, Article IV, Section 1 of the 1889 Montana Constitution (virtually identical to Article III, Section 1 of the 1972 Montana Constitution), we stated:

*When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows*

*The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity*

*"\* \* \* On the other hand, a statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative agency, and its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations." Bacus, 138 Mont. at 78-79, 354 P.2d at 1061 (emphasis in original) (quoting 73 C.J.S. Public Administrative Bodies and Procedure § 29 at 324-25)*

*Haynes, Justice Nelson Special Concurrence, at ¶41. (Emphasis added.)*

The below are just a few of the numerous instances where SB281 fails to provide adequate, or in most cases, even any, guidance on the agencies' rights, obligations, or limitations, under SB281 as required under the Montana Constitution and the above quoted case law.

While it's clear that, under SB281, state agencies are allowed to "condition" impacts to public health and safety and the fish and wildlife resource, SB281 provides no criteria for the agencies to weigh in determining when or what conditions are appropriate.

- How do the agencies make the determination when it is appropriate to condition a permit? Since they "may" condition to protect, won't they get sued every time they do not condition to protect?
- Who within each agency will be making these decisions? Does each agency have public health and safety or fish and wildlife specialists able to make these decisions or will, for example, Fish, Wildlife, and Parks act as a clearinghouse - evaluating all fish and wildlife agency condition decisions? (Note: As of the time of this Memo was drafted, there has been no Fiscal Note requested for SB281. I for one would be very interested in knowing how much SB281 could end up costing the state.)
- How is the project sponsor involved in these condition decisions?
- How are other members of the public involved in the SB281 condition process?
- What level of impact would be an appropriate trigger to condition the permit? Significant impacts, moderate, slight, any?
- To what impact level must the agency condition, moderate; slight; or no impacts at all?
- What should the agencies consider when imposing conditions?

- May the agencies consider adverse economic impacts to the project sponsor resulting from their conditions?
- May they consider the loss of jobs to the local area, region, or even state as a whole resulting from their conditions?
- Do the agencies have to consider the potential devaluation of the sponsor's private property rights due to their conditions?

### CONCLUSION

SB281 does not establish a public health and safety or fish and wildlife protection program. It establishes the authority to protect but leaves all the details to the state agencies. SB281 provides state agencies with complete and unfettered discretion in imposing conditions to protect public health and safety and the wildlife resource. The absolute lack of guidance on how to impose such mitigation is fatal under Montana law.

This memo does not address the question of whether or not Montana needs a Public Health and Safety Act or a Fish and Wildlife Protection Act. This memo simply states my opinion that SB281 raises important public policy questions and is an unlawful delegation of legislative authority.

I hope this brief recap of the initial research has been useful. If I can be of further service regarding these or other issues, please let me know.