

HOUSE BILL NO. 465

INTRODUCED BY T. MANZELLA

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A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING THE IMPLEMENTATION OF CERTAIN FEDERAL OR STATE REGULATIONS ON WOOD-BURNING DEVICES; ESTABLISHING PENALTIES FOR VIOLATING THE PROHIBITION; AMENDING SECTIONS 2-1-404, 2-9-105, 2-9-305, 75-2-111, 75-2-203, 75-2-207, AND 75-2-301, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, wood from dead or dying trees is an important natural resource in Montana; and

WHEREAS, Montana's public and private forests need and benefit from extraction of dead or dying timber; and

WHEREAS, burning wood for structural heat uses a renewable resource that is affordable and carbon neutral; and

WHEREAS, many Montana citizens are logistically or economically dependent on burning wood to heat structures, and for some, burning wood means the difference between surviving and not surviving; and

WHEREAS, federal regulations that make burning wood to heat structures more difficult, more expensive, or impossible are contrary to the needs and best interests of the citizens of Montana; and

WHEREAS, in its compact with the United States, Montana has retained all police powers and did not cede the power to regulate wood-burning devices in Montana to the United States; and

WHEREAS, Montana intends to fully and exclusively occupy the regulatory area concerning wood burning for heating structures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Definitions.** As used in [sections 1 through 3], unless the context requires otherwise, the following definitions apply:

- (1) "Current limits" means 15 micrograms of particulate matter per cubic meter of air.
- (2) "Structure" means a residence, barn, shop, garage, or commercial building or any other building that is not industrial in nature.
- (3) "Wood-burning devices" includes wood-burning stoves for heating and cooking, fireplaces, and any

1 other wood-burning apparatus traditionally used in structures.

2

3 **NEW SECTION. Section 2. Direction to state agencies not to administer federal wood-burning**  
 4 **device regulatory programs.** (1) Notwithstanding the provisions of Title 2, chapter 1, part 4, and except as  
 5 provided in subsection (2) of this section, an agency of this state, as defined in 2-18-101, may not implement or  
 6 enforce in any way any state or federal regulation, rule, or policy:

7 (a) implementing wood-burning device regulatory programs that impose particulate limits more restrictive  
 8 than current limits;

9 (b) regulating wood-burning devices installed and in use on or before January 1, 2015; or

10 (c) requiring wood-burning devices to be taken out of use, replaced, or removed because of a change  
 11 in ownership or a change in the use or occupation of a structure.

12 (2) An agency of this state, as defined in 2-18-101, may implement or enforce a state or federal  
 13 regulation, rule, or policy for fire safety.

14

15 **NEW SECTION. Section 3. Penalties.** (1) A public officer or employee of this state who enforces or  
 16 attempts to enforce an act, order, law, statute, rule, or regulation of the government of the United States in  
 17 violation of [section 2] is guilty of official misconduct and is subject to the penalties provided in 45-7-401.

18 (2) (a) An aggrieved party has a private cause of action against any public officer or employee of this  
 19 state who violates the provisions of this section.

20 (b) A public officer or employee of this state may be liable for court costs, attorney fees, compensatory  
 21 damages, and punitive damages.

22 (3) A public officer or employee of this state who violates [sections 1 through 3] may not be indemnified.

23

24 **Section 4.** Section 2-1-404, MCA, is amended to read:

25 **"2-1-404. State programs to implement federal statutes.** (1) ~~A~~ Except as provided in [sections 1  
 26 through 3], a state official or employee charged with the duty of implementing a federal statute shall implement  
 27 the law as required by the federal statute in good faith and with a critical view toward the provisions of any federal  
 28 regulation, guideline, or policy in order to identify those provisions of any federal regulation, guideline, or policy  
 29 that are inconsistent with Montana policy or do not advance Montana policy in a cost-effective manner.

30 (2) ~~An~~ Except as provided in [sections 1 through 3], an executive branch agency of state government

1 that is authorized to develop a state program to respond to any mandates contained in a federal statute shall  
 2 develop the state program and promulgate any necessary rules, using the following criteria:

3 (a) State programs should be developed by the state agency to meet the requirements of federal statutes  
 4 in good faith and with a critical view toward any federal regulations, guidelines, or policies.

5 (b) State programs should be developed with due consideration of the financial restraints of local  
 6 governments, the citizens of Montana, and the state, including the limitation imposed by Article VIII, section 9,  
 7 of the Montana constitution.

8 (c) A state program that implements the goals of the federal statute should provide for the most efficient  
 9 method possible, with careful consideration given to the cost of the program and the impact of the program on  
 10 local governments and Montana citizens and on the long-range public health, safety, and welfare of citizens of  
 11 the state."

12

13 **Section 5.** Section 2-9-105, MCA, is amended to read:

14 **"2-9-105. State or other governmental entity immune from exemplary and punitive damages.** ~~The~~  
 15 Except as provided in [section 3], the state and other governmental entities are immune from exemplary and  
 16 punitive damages."

17

18 **Section 6.** Section 2-9-305, MCA, is amended to read:

19 **"2-9-305. Immunization, defense, and indemnification of employees.** (1) It is the purpose of this  
 20 section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued  
 21 for their actions taken within the course and scope of their employment.

22 (2) ~~Except as provided in [section 3],~~ in any noncriminal action brought against any employee of a  
 23 state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged  
 24 violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while  
 25 acting within the course and scope of the employee's office or employment, the governmental entity employer,  
 26 except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the  
 27 employee.

28 (3) Upon receiving service of a summons and complaint in a noncriminal action against an employee,  
 29 the employee shall give written notice to the employee's supervisor requesting that a defense to the action be  
 30 provided by the governmental entity employer. If the employee is an elected state official or other employee who

1 does not have a supervisor, the employee shall give notice of the action to the legal officer or agency of the  
 2 governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the  
 3 employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense  
 4 provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice,  
 5 whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the  
 6 defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all  
 7 expenses relating to the retained defense and pay any judgment for damages entered in the action that may be  
 8 otherwise payable under this section.

9 (4) ~~In~~ Except as provided in [section 3], in any noncriminal action in which a governmental entity  
 10 employee is a party defendant, the employee must be indemnified by the employer for any money judgments or  
 11 legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to  
 12 which the employee may be subject as a result of the suit unless the employee's conduct falls within the  
 13 exclusions provided in subsection (6).

14 (5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter  
 15 constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject  
 16 matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave  
 17 rise to the claim. ~~In~~ Except as provided in [section 3], in an action against a governmental entity, the employee  
 18 whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the  
 19 governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim  
 20 is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an  
 21 exclusion provided in subsections (6)(b) through (6)(d).

22 (6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee  
 23 may not be defended or indemnified by the employer for any money judgments or legal expenses, including  
 24 attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

25 (a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other  
 26 reason does not arise out of the course and scope of the employee's employment;

27 (b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through  
 28 7;

29 (c) the employee compromised or settled the claim without the consent of the government entity  
 30 employer; or

1 (d) the employee failed or refused to cooperate reasonably in the defense of the case; or  
 2 (e) the employee violated [section 3].

3 (7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the  
 4 governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as  
 5 to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should  
 6 clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or  
 7 other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the  
 8 employee until a final judgment is rendered in that action holding that the employer did not have an obligation to  
 9 defend the employee. The governmental entity employer does not have an obligation to provide a defense to the  
 10 employee in a declaratory judgment action or other legal action brought against the employee by the employer  
 11 under this subsection."  
 12

13 **Section 7.** Section 75-2-111, MCA, is amended to read:

14 **"75-2-111. Powers of board.** The board shall, subject to the provisions of 75-2-207 and [section 2]:

15 (1) adopt, amend, and repeal rules for the administration, implementation, and enforcement of this  
 16 chapter, for issuing orders under and in accordance with 42 U.S.C. 7419, and for fulfilling the requirements of 42  
 17 U.S.C. 7420 and regulations adopted pursuant to that section, except that, for purposes other than agricultural  
 18 open burning, the board may not adopt permitting requirements or any other rule relating to:

19 (a) any agricultural activity or equipment that is associated with the use of agricultural land or the  
 20 planting, production, processing, harvesting, or storage of agricultural crops by an agricultural producer and that  
 21 is not subject to the requirements of 42 U.S.C. 7475, 7503, or 7661a;

22 (b) a commercial operation relating to the activities or equipment referred to in subsection (1)(a) that  
 23 remains in a single location for less than 12 months and is not subject to the requirements of 42 U.S.C. 7475,  
 24 7503, or 7661a; ~~or~~

25 (c) forestry equipment and its associated engine used for forestry practices that remain in a single  
 26 location for less than 12 months and are not subject to the requirements of 42 U.S.C. 7475, 7503, or 7661a; or

27 (d) wood-burning devices;

28 (2) hold hearings relating to any aspect of or matter in the administration of this chapter at a place  
 29 designated by the board. The board may compel the attendance of witnesses and the production of evidence at  
 30 hearings. The board shall designate an attorney to assist in conducting hearings and shall appoint a reporter who

1 must be present at all hearings and take full stenographic notes of all proceedings, transcripts of which will be  
2 available to the public at cost.

3 (3) issue orders necessary to effectuate the purposes of this chapter;

4 (4) by rule require access to records relating to emissions;

5 (5) by rule adopt a schedule of fees required for permits, permit applications, and registrations consistent  
6 with this chapter;

7 (6) have the power to issue orders under and in accordance with 42 U.S.C. 7419."  
8

9 **Section 8.** Section 75-2-203, MCA, is amended to read:

10 **"75-2-203. Board to set emission levels.** (1) ~~The~~ Except as provided in [section 2], the board may  
11 establish the limitations of the levels, concentrations, or quantities of emissions of various pollutants from any  
12 source necessary to prevent, abate, or control air pollution. Except as otherwise provided in or pursuant to this  
13 section, ~~such~~ the levels, concentrations, or quantities ~~shall~~ must be controlling, and ~~no~~ an emission in excess  
14 ~~thereof shall be lawful~~ of the quantities is a violation of this section.

15 (2) ~~In~~ Except as provided in [section 2], in any area where the concentration of air pollution sources or  
16 of population or where the nature of the economy or of land and its uses ~~so require~~ requires action, the board may  
17 fix more stringent requirements governing the emission of air pollutants than those in effect pursuant to  
18 subsection (1) of this section.

19 (3) The board may by rule use any widely recognized measuring system for measuring emission of air  
20 contaminants.

21 (4) ~~Should~~ Except as provided in [section 2], if federal minimum standards of air pollution ~~be~~ are set by  
22 federal law, the board may, if necessary in some localities of this state, set more stringent standards by rule."  
23

24 **Section 9.** Section 75-2-207, MCA, is amended to read:

25 **"75-2-207. State regulations no more stringent than federal regulations or guidelines -- exceptions**  
26 **-- procedure.** (1) After April 14, 1995, except as provided in subsections (2) and (3) or unless required by state  
27 law, the board or department may not adopt a rule to implement this chapter that is more stringent than the  
28 comparable federal regulations or guidelines that address the same circumstances. ~~The~~ Except as provided in  
29 [sections 1 through 3], the board or department may incorporate by reference comparable federal regulations or  
30 guidelines.

1           (2) (a) ~~The~~ Except as provided in [sections 1 through 3], the board or department may adopt a rule to  
2 implement this chapter that is more stringent than comparable federal regulations or guidelines only if:

3           (i) a public hearing is held;

4           (ii) public comment is allowed; and

5           (iii) the board or the department makes a written finding after the public hearing and comment period that  
6 is based on evidence in the record that the proposed standard or requirement:

7           (A) protects public health or the environment;

8           (B) can mitigate harm to the public health or the environment; and

9           (C) is achievable with current technology.

10          (b) The written finding required under subsection (2)(a)(iii) must reference information and peer-reviewed  
11 scientific studies contained in the record that form the basis for the board's or the department's conclusion. The  
12 written finding must also include information from the hearing record regarding costs to the regulated community  
13 that are directly attributable to the proposed standard or requirement.

14          (c) (i) A person or entity affected by a rule of the board or department adopted after January 1, 1990,  
15 and before April 14, 1995, that the person or entity believes is more stringent than comparable federal regulations  
16 or guidelines may petition the board or department to review the rule.

17          (ii) If the board or department determines that the rule is more stringent than comparable federal  
18 regulations or guidelines, the board or department shall either revise the rule to conform to the federal regulations  
19 or guidelines or follow the process provided in subsections (2)(a) and (2)(b) within a reasonable period of time,  
20 not to exceed 6 months after receiving the petition.

21          (iii) A petition under this section does not relieve the petitioner of the duty to comply with the challenged  
22 rule. The board or department may charge a petition filing fee in an amount not to exceed \$250.

23          (iv) A person may also petition the board or department for a rule review under subsection (2)(a) if the  
24 board or department adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines  
25 existed and the federal government subsequently establishes comparable regulations or guidelines that are less  
26 stringent than the previously adopted board or department rule.

27          (3) This section does not apply to a rule adopted under the emergency rulemaking provisions of  
28 2-4-303(1)."

29

30           **Section 10.** Section 75-2-301, MCA, is amended to read:

1           **"75-2-301. Local air pollution control programs -- consistency with state and federal regulations**

2   **-- procedure for public notice and comment required.** (1) After public hearing, a municipality or county may  
3 establish and administer a local air pollution control program if the program is consistent with this chapter and  
4 is approved by the board.

5           (2) If a local air pollution control program established by a county encompasses all or part of a  
6 municipality, the county and each municipality shall approve the program in accordance with subsection (1).

7           (3) (a) Except as provided in [sections 1 through 3] and subsection (5) of this section, the board by order  
8 may approve a local air pollution control program that:

9           (i) subject to subsection (4), provides by rule, ordinance, or local law for requirements compatible with,  
10 more stringent than, or more extensive than those imposed by 75-2-203, 75-2-204, 75-2-211, 75-2-212, 75-2-215,  
11 75-2-217 through 75-2-219, and 75-2-402 and rules adopted under these sections;

12           (ii) provides for the enforcement of requirements established under subsection (3)(a)(i) by appropriate  
13 administrative and judicial processes; and

14           (iii) provides for administrative organization, staff, financial resources, and other resources necessary  
15 to effectively and efficiently carry out the program. As part of meeting these requirements, a local air pollution  
16 control program may administer the permit fee provisions of 75-2-220. The permit fees collected by a local air  
17 pollution control program must be deposited in a county special revenue fund to be used by the local air pollution  
18 control program for administration of permitting activities.

19           (b) Board approval of a rule, ordinance, or local law that is more stringent than the comparable state law  
20 is subject to the provisions of subsection (4).

21           (4) (a) ~~Except as provided in [sections 1 through 3],~~ a local air pollution control program may, subject  
22 to approval by the board, adopt a rule, ordinance, or local law to implement this chapter that is more stringent than  
23 comparable state or federal regulations or guidelines only if:

24           (i) a public hearing is held;

25           (ii) public comment is allowed; and

26           (iii) the board or the local air pollution control program makes a written finding after the public hearing and  
27 comment period that is based on evidence in the record that the proposed local standard or requirement:

28           (A) protects public health or the environment of the area;

29           (B) can mitigate harm to the public health or the environment; and

30           (C) is achievable with current technology.

1 (b) The written finding required under subsection (4)(a)(iii) must reference information and peer-reviewed  
2 scientific studies contained in the record that form the basis for the board's or the local air pollution control  
3 program's conclusion. The written finding must also include information from the hearing record regarding costs  
4 to the regulated community that are directly attributable to the proposed local standard or requirement.

5 (c) (i) A person or entity affected by a rule, ordinance, or local law approved or adopted after January  
6 1, 1996, and before May 1, 2001, that the person or entity believes is more stringent than comparable state or  
7 federal regulations or guidelines may petition the board or the local air pollution control program to review the rule,  
8 ordinance, or local law.

9 (ii) If the board or local air pollution control program determines that the rule, ordinance, or local law is  
10 more stringent than state or federal regulations or guidelines, the board or local air pollution control program shall  
11 either revise the rule, ordinance, or local law to conform to the state or federal regulations or guidelines or follow  
12 the process provided in subsections (4)(a) and (4)(b) within a reasonable period of time, not to exceed 6 months  
13 after receiving the petition.

14 (5) Except for those emergency powers provided for in 75-2-402, the board may not delegate to a local  
15 air pollution control program the authority to control any air pollutant source that:

16 (a) requires the preparation of an environmental impact statement in accordance with Title 75, chapter  
17 1, part 2;

18 (b) is subject to regulation under the Montana Major Facility Siting Act, as provided in Title 75, chapter  
19 20; or

20 (c) has the potential to emit 250 tons a year or more of any pollutant subject to regulation under this  
21 chapter, including fugitive emissions, unless the authority to control the source was delegated to a local air  
22 pollution control program prior to January 1, 1991.

23 (6) If the board finds that the location, character, or extent of particular concentrations of population, air  
24 pollutant sources, or geographic, topographic, or meteorological considerations or any combination of these make  
25 impracticable the maintenance of appropriate levels of air quality without an areawide air pollution control  
26 program, the board may determine the boundaries within which the program is necessary and require it as the  
27 only acceptable alternative to direct state administration.

28 (7) If the board has reason to believe that any part of an air pollution control program in force under this  
29 section is either inadequate to prevent and control air pollution in the jurisdiction to which the program relates or  
30 is being administered in a manner inconsistent with this chapter, the board shall, on notice, conduct a hearing

1 on the matter.

2 (8) If, after the hearing, the board determines that any part of the program is inadequate to prevent and  
3 control air pollution in the jurisdiction to which it relates or that it is not accomplishing the purposes of this chapter,  
4 it shall require that necessary corrective measures be taken within a reasonable time, not to exceed 60 days.

5 (9) If the jurisdiction fails to take these measures within the time required, the department shall  
6 administer within that jurisdiction all of the provisions of this chapter, including the terms contained in any  
7 applicable board order, that are necessary to correct the deficiencies found by the board. The department's  
8 control program supersedes all municipal or county air pollution laws, rules, ordinances, and requirements in the  
9 affected jurisdiction. The cost of the department's action is a charge on the jurisdiction.

10 (10) If the board finds that the control of a particular air pollutant source because of its complexity or  
11 magnitude is beyond the reasonable capability of the local jurisdiction or may be more efficiently and  
12 economically performed at the state level, it may direct the department to assume and retain control over that air  
13 pollutant source. A charge may not be assessed against the jurisdiction. Findings made under this subsection  
14 may be either on the basis of the nature of the sources involved or on the basis of their relationship to the size  
15 of the communities in which they are located.

16 (11) A jurisdiction in which the department administers all or part of its air pollution control program under  
17 subsection (9) may, with the approval of the board, establish or resume an air pollution control program that  
18 meets the requirements of subsection (3).

19 (12) A municipality or county may administer all or part of its air pollution control program in cooperation  
20 with one or more municipalities or counties of this state or of other states.

21 (13) Local air pollution control programs established under this section shall provide procedures for public  
22 notice, public hearing, public comment, and appeal for any proposed new or revised rules, ordinances, or local  
23 laws adopted pursuant to this section. The procedures must comply with the following requirements:

24 (a) The local air pollution control program shall create and maintain a list of interested persons who wish  
25 to be informed of actions related to rules, ordinances, or local laws adopted by the local air pollution control  
26 program.

27 (b) At least 30 days prior to the adoption, revision, or repeal of a rule, ordinance, or law, the local air  
28 pollution control program shall give written notice of its intended action.

29 (c) The notice required under subsection (13)(b) must include:

30 (i) a statement of the terms or substance of the intended action or a description of the subjects and

1 issues affected by the intended action;

2 (ii) an explanation of the procedure for a person to be included on the list of interested persons  
3 established pursuant to subsection (13)(a);

4 (iii) an explanation of the procedures and deadlines for presentation of oral or written comments related  
5 to the intended action;

6 (iv) an explanation of the process for requesting a public hearing as provided in subsection (13)(f); and

7 (v) the rationale for the intended action. The rationale must:

8 (A) include an explanation of why the intended action is reasonably necessary to implement the goals  
9 and purposes of the local air pollution control program;

10 (B) specifically address those intended actions for which there are no similar state or federal regulations  
11 or guidelines; and

12 (C) be written in plain, easily understood language.

13 (d) For the purposes of subsection (13)(c)(v), a statement of authority to adopt a rule, ordinance, or local  
14 law does not, standing alone, constitute a showing of reasonable necessity for the intended action.

15 (e) The local air pollution control program shall mail a copy of the proposed rule, ordinance, or local law  
16 to all interested persons on the list established pursuant to subsection (13)(a) who have made timely requests  
17 to be included on the list.

18 (f) If at least 10 of the persons who will be directly affected by the proposed rule, ordinance, or local law  
19 request a public hearing, the local air pollution control program shall hold a hearing to hear comments from the  
20 public on the intended action.

21 (g) The local air pollution control program shall prepare a written response to all comments submitted  
22 in writing or presented at the public hearing for consideration prior to adoption, revision, or repeal of the proposed  
23 rule, ordinance, or local law.

24 (h) A person who submits a written comment on a proposed action or who attends a public hearing in  
25 regard to a proposed action must be informed of the final action."

26

27 **NEW SECTION. Section 11. Codification instruction.** [Sections 1 through 3] are intended to be  
28 codified as an integral part of Title 75, chapter 2, part 2, and the provisions of Title 75, chapter 2, part 2, apply  
29 to [sections 1 through 3].

30

1            NEW SECTION. **Section 12. Severability.** If a part of [this act] is invalid, all valid parts that are  
2 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,  
3 the part remains in effect in all valid applications that are severable from the invalid applications.

4

5            NEW SECTION. **Section 13. Effective date.** [This act] is effective on passage and approval.

6

- END -