LEGAL REVIEW NOTE

Bill No.: SB 349

LC#: LC1657, To Legal Review Copy, as of February 11, 2025

Short Title: Declare authority over existing fossil-fuel fired electric generating units

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

As drafted, SB 349generally provides that the Montana Department of Environmental Quality has authority over existing fossil-fuel fired electric generating units within the state of Montana. Specifically, new section 2 provides:

NEW SECTION. **Section 2. Policy and requirements for fossil-fuel generating units within borders of state.** (1) Environmental regulations as it relates to fossil fuel-fired electric generating units in the state for the purposes of regulating air quality, water quality, and emissions and business activity performed in the state is the principal responsibility of the department of environmental quality.

(2) The department of environmental quality shall be the sole oversight and permitting authority for existing fossil-fuel fired electric generating units, relating to air quality, water quality and emissions standards, pursuant to Title 75, chapter 1, chapter 2, and chapter 5.

Supremacy Clause

Air quality, water quality, hazardous waste disposal, and emission standards are regulated under the federal Clean Air Act, the Clean Water Act, and the Resource Conversation and Recovery Act. Thus, these acts provide that the federal programs supersede state regulation.

The Supremacy Clause under the United States Constitution, Art. VI, cl. 2. This clause provides that the Constitution, federal laws passed pursuant to the Constitution, and treaties made under the Constitution's authority constitute the supreme law of the land. Under the Supremacy Clause, if a conflict between state law and federal law exists, federal law prevails. California v. ARC America Corp., 490 U.S. 93 (1989), and Jones v. Rath Packing, 430 U.S. 519 (1977).

As drafted, SB 349 may raise potential federal constitutional issues related to the Supremacy Clause in that it proposes to supersede federal law relating to fossil-fuel fired electric generating units permitting and enforcement.

Commerce Clause

The Commerce clause under the United States Constitution, Art. I, Section 8, cl. 3, broadly gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The U.S. Supreme Court has consistently held that the Commerce Clause is a grant of plenary authority to Congress, meaning it is a power which is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981).

The U.S. Supreme Court has held that the Commerce Clause's power to regulate interstate commerce extends to "the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce or persons or things in commerce." *Id.* [internal citations omitted]. The Court has clarified that, due to the broad scope of the Commerce Clause, "even activity that is purely intrastate in character may be regulated by Congress, where the activity [...] affects commerce among the States." *Id*. at 277.

As drafted, SB 349 may potentially implicate the Commerce Clause and U.S. Supreme Court precedent. The Court has consistently held that the broad scope of the Commerce Clause extends

to intrastate activities.

Requestor comments: