

**MINUTES**

**MONTANA SENATE  
53rd LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By Chair Bianchi, on February 17, 1993, at 5:45 p.m.

**ROLL CALL**

**Members Present:**

Sen. Don Bianchi, Chair (D)  
Sen. Bob Hockett, Vice Chair (D)  
Sen. Sue Bartlett (D)  
Sen. Steve Doherty (D)  
Sen. Lorents Grosfield (R)  
Sen. Tom Keating (R)  
Sen. Ed Kennedy (D)  
Sen. Bernie Swift (R)  
Sen. Chuck Swysgood (R)  
Sen. Henry McClernan (D)  
Sen. Larry Tveit (R)  
Sen. Cecil Weeding (D)  
Sen. Jeff Weldon (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Paul Sihler, Environmental Quality Council  
Leanne Kurtz, Committee Secretary

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

**Committee Business Summary:**

Hearing: SB 388, SB 401, SB 280  
Executive Action: SB 338

**HEARING ON SB 401 and SB 388**

**Note:**

Because SB 388 was not printed until February 15, the Committee heard any proponents for the bill on February 16, and held the hearing on SB 388 open until February 17 for further proponents and any opponents.

**Opening Statement by Sponsor:**

Senator Henry McClernan, Senate District 34, said SB 401 is a compromise bill but the law needs to be clarified. He added whatever comes out of SB 401 and SB 388 will affect everyone who discharges anything into any water.

**Proponents' Testimony:**

Dan Fraser, chief of the Water Quality Bureau, Department of Health and Environmental Sciences (DHES) said the purpose of the Water Quality Act's nondegradation policy is to protect Montana's ground and surface waters whose quality is higher than the established standards (Exhibit #1). He said the department would have to review degradation authorization every 5 years.

Alan Joscelyn, a lawyer from Helena, said his practice includes substantial involvement with water quality issues. He presented written testimony with his suggested changes (Exhibit #2).

Bill Bucher, a water quality professional representing himself, said the present system of nondegradation is not a system at all. He thinks SB 401 would be a better process for implementing nondegradation.

**Opponents' Testimony:**

Mona Jamison, representing Mikelson Land Co., said her client has been developing land adjacent to the Stillwater Mining Co. She said they are very strongly opposed to SB 388 and moderately opposed to SB 401. Regarding SB 388, she said the fundamental issue is whether or not Montana should maintain and protect high quality waters. She cautioned the committee to consider the long term ramifications of SB 388. Ms. Jamison said last year there were 4 major applications for nondegradation waivers presented to the Board of Health, and two major proposed mining operations received waivers. She directed the committee to page 9, line 10 of SB 388, suggesting this language sets off a balancing test between necessary economic and social development versus the maintenance of high quality water. According to SB 388, Ms. Jamison said, degradation allowed "in the area" only, does not recognize that many state waters have other significant uses such as agriculture and recreation. Ms. Jamison said SB 388 denies the right of downstream users to get high quality water, and benefits the headwaters, especially if the guiding principal is to allow degradation. Ms. Jamison said SB 388 shifts the burden and cost of treatment away from the polluter or the discharger onto people who have had absolutely no role in causing that degradation. Ms. Jamison said the most objectionable aspect of the definition of degradation on p. 2 is that for any statistically significant reduction to be apparent, lengthy,

quantitative water records must be available. In reality, such records rarely, if ever, exist. She said one of the more significant problems with this bill is on p. 3, lines 1 and 2, where degradation is defined to not include changes in water quality that occur within a mixing zone. Ms. Jamison discussed her opposition to mixing zones, stating that they constitute a permit to pollute. She stated that on p. 8, section 4, line 10, SB 388 proposes to eliminate the nondegradation policy as it now exists in the state of Montana. Ms. Jamison said SB 388 eliminates, as a public policy, the inherent value of high quality waters.

Ms. Jamison said she would like to make a couple comments on SB 401. She said she thinks the Statement of Intent is an appropriate and judicious statement of public policy. Ms. Jamison discussed her problems with the administrative procedures established in SB 401, stating she does not believe the Board of Health can grasp technical material after a two to six hour presentation every six to eight weeks. She said there are two reasons she opposes SB 401. The mixing zones are the same in both bills and she suggested that this bill could be improved with amendments to the mixing zone language. Ms. Jamison said she would be surprised if SB 388 is compatible with the federal Clean Water Act. She believes SB 401 provides an opportunity for applicants to get the projects and get a waiver.

Linda McMullen, cattle rancher on the Boulder River downstream from a proposed large hard rock mining operation, spoke on behalf of herself. She said in the quest for economic development, clean water must be recognized as the most valuable natural resource. She urged the Committee to vote no on SB 388 and SB 401. Ms. McMullen said SB 401 might be acceptable with the amendments Ms. Jamison suggested.

Stan Bradshaw, Montana Trout Unlimited, said SB 388 violates the fundamental premise of water protection, maintenance and improvement.

Regarding SB 401, Mr. Bradshaw said there are a number of good things in the bill, but there are still problems with mixing zones. Mr. Bradshaw said SB 401 represents a net concession of simple economic interest versus the larger public interest of protecting our water quality. Mr. Bradshaw stated the complexity of nondegradation issues defy a reasonable solution in the legislature. He urged the Committee to either table or kill both of these bills and authorize an Environmental Quality Council study over the biennium to determine if both sides can reach some consensus on how to approach the issue.

Paul Hawks, rancher from Melville, speaking on behalf of the Northern Plains Resource Council (NPRC), said he is opposed to both SB 388 and SB 401. Because he didn't see SB 388 until late the night before, Mr. Hawks focused his testimony on SB 401. While the Department of Health and Environmental Services (DHES)

says SB 401 clarifies the nondegradation petition process, Mr. Hawks stated he thinks SB 401 will gut the intent of the nondegradation policy. Mr. Hawks said SB 401 does not provide protection of pristine waters as the present statute does and Section 3 completely changes the intent of protecting existing water uses. Mr. Hawks said it is not clear if the mixing zones are subject to nondegradation regulations, and he finds the Statement of Intent to be full of loopholes. Mr. Hawks added if routine exemptions are allowed in pristine headwaters and other upstream locations, there will eventually be a cumulative effect downstream. He urged the committee to reject SB 401. Mr. Hawks distributed a copy of a letter to Governor Racicot outlining the complexity of nondegradation policy (Exhibit #3).

Senator Bianchi said it had been suggested the Committee authorize an Environmental Quality Council (EQC) study of nondegradation issues. Mr. Hawks said NPRC suggested that as a possible option.

Bruce Farling, representing the Clark Fork-Pend Oreille Coalition, presented written testimony opposing SB 388 (Exhibit #4).

Diane Moore, Sweetgrass County, said these bills will weaken the existing Water Quality Act. She asked the Committee to vote no on SB 388 and SB 401.

Jean Clark, cattle rancher on the Boulder River, and vice chair of NPRC, said NPRC's philosophy is responsible land stewardship. She said she does not support either SB 388 or SB 401, as she believes neither to be in the spirit of good stewardship or the wishes of most Montanans.

Farwell Smith, Big Timber rancher, said the community depends heavily on the high quality of the Boulder River and he opposes SB 388. He said the existing statute strongly protects Montana's high quality of water.

Brian McNitt, Montana Environmental Information Center (MEIC) said MEIC believes SB 388 and SB 401 are asking the legislature to significantly change Montana's 20 year policy to protect and improve water quality. The current water quality act and state policy are working to both protect water, and allow reasonable impacts from developments. Mr. McNitt said Montana's social and economic future depend on clean, nondegraded water, and MEIC believes there is no reasonable compromise on this issue. Mr. McNitt urged the Committee to reject both SB 388 and SB 401 and stated he would support an EQC study on this issue.

Jim Richard, Montana Wildlife Federation (MWF), said his organization opposes both SB 388 and SB 401. He added MWF commends DHES for trying to come up with a bill that would deal fairly with this process.

**Questions From Committee Members and Responses:**

Senator Doherty asked Mr. Joscelyn if mining companies could still operate profitably by treating water to meet the nondegradation standards without getting the exemption.

Mr. Joscelyn said the determining factor is what the best treatment method is for the situation. The Board of Health adopted the department's technical staff's recommendation on what was the maximum level of nitrate that could be allowed without having any impact on the river. A mining company had previously asked for permission to change the ambient quality in the East Boulder River up to 3 1/2 parts per million nitrate. The department recommended that no more than 1 part per million be allowed because that is 1/10th of the health standard. The options were active high-tech treatment or land application treatment. The Board opted for the land application treatment over the high-tech method because there were other environmental impacts to the high-tech option.

Senator Weeding asked the sponsors what prompted them to bring this legislation, and asked what the compelling reason was to do anything.

Senator Swysgood said he understands that the current policy on the book is determined by rule, and there is no set policy on nondegradation.

Senator McClernan said he would agree with Senator Swysgood and said there is evidence that the federal government will get involved. He asked Mr. Fraser to address Senator Weeding's question.

Dan Fraser, DHES, said the biggest reason is the policy applies to activities that degrade waters, and not specifically to industry or to the hard rock mining portion of industry. Mr. Fraser said the policy applies to municipalities, publicly owned treatment works, subdivisions, septic tanks and drain fields.

Senator Weeding asked why the Water Quality Bureau did not commence a process involving the public and develop some legislation to consider rather than having private groups develop something that fits their best interest but may or may not be in the public interest. Mr. Fraser said SB 401 is the department's legislation.

Senator Grosfield asked if the department, under SB 401, could do an adequate job of protecting the health and economy of Montana. Mr. Fraser said yes, given the resources. He added there is a bill in House Taxation which is designed to give them the authority to charge fees. The biggest reason a nondegradation policy has never been implemented is because no funding for personnel has been provided to do the job. Senator Grosfield asked about the budget. Mr. Fraser said SB 401 allows DHES to

determine activities that do not cause significant degradation. He estimated that it would cost \$250,000 to \$300,000 to do nondegradation reviews.

Senator Doherty asked Mona Jamison to respond to that and asked both sponsors if it was their intent that SB 388 or SB 401 affect current litigation.

Ms. Jamison said SB 388 would gut the litigation involving Stillwater Mining Company. She said SB 401 would have some impact, but not as much as SB 388. Ms. Jamison said the existing law works and two projects have received waivers. She said she is not suggesting that the rules do not have to be changed and clarified.

Senator Doherty said Senator McClernan should hope the department will not use SB 401, should it pass in any form, as an attempt to influence any ongoing litigation. Senator McClernan said he hopes the department would not try to apply any legislation to a situation like that.

Senator Swysgood noted SB 388 does not have an effective date which means it becomes effective October 1.

#### Closing by Sponsor:

Senator Swysgood said no one wants to see the water degraded. He said SB 388 attempts to develop a policy that addresses all of the concerns. He said this is a contentious and controversial area, but very important to everyone.

Senator McClernan closed on SB 401. He said the Committee has been presented with 3 or 4 options. He added he thinks the EQC study would take a couple years or longer, but the Committee should give some thought to all the options.

### HEARING ON SB 280

#### Opening Statement by Sponsor:

Senator Lorents Grosfield, Senate District 41, said SB 280 is the result of the state water planning process. He described the bill to the Committee, stating it is a significant change in Montana water law and should be looked at seriously.

#### Proponents' Testimony:

Karen Fagg, representing Governor Racicot's office, expressed the governor's support for SB 280, noting he believes it is a well thought out, well compromised bill. She said interest in SB 280 was very high, as was the belief in the need to develop a

compromise that could be presented to the legislature. Ms. Fagg said SB 280 recognizes all of the interests and all of the water uses that are critical to the future of Montana. She urged the Committee to recognize the compromise and balance that was involved, and to support the bill.

Gary Fritz, Department of Natural Resources and Conservation (DNRC) complimented Sen. Grosfield on his presentation and work on the bill and said DNRC supports SB 280 (Exhibit #5).

Stan Bradshaw, Montana Trout Unlimited, commended Ms. Fagg and her staff for the last 4 years of work. SB 280 recognizes that water allocation affects water quality, which, he said, is a major change in the law. Mr. Bradshaw stated SB 280 doesn't effect existing rights, but changes new usage.

Bruce Farling, representing the Clark Fork Coalition, said his organization supports SB 280. He said the coalition is one of two conservation organizations appointed by Ms. Fagg to the steering committee. Mr. Farling said the Committee needs to consider how a new water right for one individual affects many others downstream.

Vivian Drake, supervisor of the Lewis and Clark County Water Quality Protection District said in her work with DNRC and the Water Quality Bureau, it has become clear that water quantity and water quality issues are separate. Ms. Drake added SB 280 goes a long way in bringing these two points together. She urged the Committee to support SB 280.

Ted Doney, representing himself, said he specializes in water rights in his law practice, and has been following this issue very closely for the past 2 years. He supports SB 280 because it incorporates some needed changes in the statute. Mr. Doney said SB 280 integrates water quality with water rights, which he believes is a significant change in the law. Mr. Doney said he thinks it would be bad water policy to increase the burden on applicants for permits or changes. He added he would be satisfied if the record of this hearing clearly showed there is no intent to increase the burden of proof in existing law. He doesn't think wording in SB 280 accurately reflects what was agreed to in the water plan. Mr. Doney said he thinks it is bad policy to place unnecessary burdens on applicants. He suggested public interest be listed as a criteria for issuing a water right or proving a change. Mr. Doney recommended the Committee strike subsection (h) from the bill on pages 3, 10 and 17. Mr. Doney said he does support the bill in general.

John Bloomquist, Montana Stockgrowers Association, said they support the water quality process, but have a problem with the language identified by Mr. Doney. He said this will be a major change in Montana water law. SB 280 would allow a discharge permit holder under the water quality laws to prevent someone from diverting water on to their water right. If there is going

to be a change in water law, it must be specific. Mr. Bloomquist suggested possible amendments.

**Opponents' Testimony:**

None.

**Questions From Committee Members and Responses:**

Senator Weeding said he carried the bill last session. He asked about subsection (i) on page 3 regarding effluent limitations. He said that was the objection to last session's bill

Mr. Doney said subsection (i) will set defacto instream flows in Montana streams without water rights being attached.

Mr. Bloomquist said if discharge permit holders control someone's ability to divert their water right on a source, it should be dealt with. He suggested adding language which states these criteria are not intended to interfere with someone's ability to utilize their water right. Senator Bianchi said he would like to hear from Mr. Bradshaw on subsection (i).

Mr. Bradshaw said Mr. Doney suggests that everytime somebody files for a change or a new right, they would have to hire a water expert. That subject was broached in the steering committee and in the advisory council which is why lines 14 through 16 are in the bill. Mr. Bradshaw said the burden falls first on the objector, who is going to have to hire the water quality expert. He added that will discourage frivolous objections. Mr. Bradshaw stated the steering committee recommended including public interest criteria. Mr. Bradshaw said the steering committee realized a water quality classification cannot legally be downgraded. He said there is a new fiscal note for SB 280 that has new language.

Senator Grosfield discussed the fiscal notes, stating that the bottom line is there is no fiscal impact. He said he would check on the new fiscal note. Sen. Grosfield added he assumes DHES would only object to major or controversial projects.

Jack Thomas of the Water Quality Bureau, said he helped prepare the fiscal note and served on the steering committee. He said the bureau supports SB 280. Mr. Thomas discussed the two fiscal notes, stating the second one, showing zero impact, is what SB 280 will require from the department's standpoint.

Senator Grosfield said there is a change from the first fiscal note. He asked the Committee to look at the Statement of Intent which says DNRC and the Board of Natural Resources and Conservation should assess the magnitude, character, duration,



and geographical extent of the projected effects and utilize this assessment in a practical manner. Sen. Grosfield said SB 280 deals with stream classification and whether it will be significantly impacted. The intent is to maintain the integrity of water system classification and not do something to a stream that would threaten its classification. An objection could be based on removal of a large amount of water. The department then would assess the magnitude, character, duration and geographical extent of the effect and would utilize that assessment in a practical manner.

Senator Bianchi asked Senator Grosfield to comment on sections (h) and (i) on page 3.

Senator Grosfield said section (i) gives discharge permit holders an opportunity to enter the water permitting process. The water plan requested DHES to notify water users when there was going to be an administrative process, or when there was a discharge permit change. Sen. Grosfield said section (h) is the most significant part of SB 280. Sen. Grosfield said there may not be any streams in the state that currently meet all of those standards.

Senator Keating said he was concerned about the \$300,000 in general fund and asked why the general fund had to be the source of money. Sen. Keating asked if SB 280 would create more work, and increase the number of applications that have to be processed. Senator Grosfield said the bill involved one FTE (full time employee).

Mr. Fritz said the the water development special revenue account, not the general fund, is the funding source for the department's costs.

**Closing by Sponsor:**

Senator Grosfield closed on SB 280. He said he asked the department after the process was over, how much the plan would cost and how much water planning costs the state of Montana. The department said it costs around \$200,000. He said the burden language should be clarified.

**EXECUTIVE ACTION ON SB 338**

**Motion:**

Senator Weeding MOVED TO AMEND SB 338 (SB033801.amk).

**Discussion:**

Senator Weeding said the amendment (Exhibit #6) clarifies the definition of solid and hazardous waste.

**Vote:**

The motion to AMEND SB 338 carried unanimously.

**Discussion:**

Senator Bianchi said Senator Yellowtail had another amendment and asked Michael Kakuk to explain it.

Michael Kakuk said copies of the amendment could not be obtained that evening. He said the intent of the amendments is to exempt small scale medical waste facilities from the act. He said this amendment was suggested by Mr. Lawrence (who was not present), an employee of Sure Way Disposal, a company proposing a medical waste incinerator for western Montana.

Senator Bianchi said Senator Yellowtail could introduce the amendment on the floor if the bill gets that far. He added he does not understand why it is needed because hospitals are exempt.

**Motion:**

Senator Bartlett moved TO AMEND SB 338 (SB033801.PCS).

Senator Swysgood asked industry representatives about the amendment. Jerome Anderson, Holnam Inc., said the amendment would extend the act for 4 1/2 years and does not provide for a sunset. He said the termination would amount to a ban in the sense that the economic future of these plants will be determined sometime within the next 4 1/2 years.

Senator Bartlett asked Kathryn Kelly, a scientist hired by Holnam, Inc., what the longest period of time was that a cement kiln burned hazardous waste in a process similar to what is being proposed in Montana.

Ms. Kelly responded kilns in the United States have been burning waste for over 10 years, while other countries have burned waste for about 40 years. Senator Bartlett asked if there had been any medical studies investigating incidence of cancer or other diseases in the communities where waste has been burned. Ms. Kelly said the Center for Disease Control waits for industries to be associated with a certain prevalent disease, and do investigative work from there. Senator Bartlett said because it is of specific concern in this case, she wonders if anyone has looked at communities in which cement plants are burning hazardous waste. Ms. Kelly said there is currently an exposure

study being conducted in Texas, which will take about a year and a half to complete. She distributed a letter to the Committee discussing EPA memos on dioxins in cement kiln dust (Exhibit #8).

Senator Bartlett said this issue is one of public safety, and if the standards are sufficiently stringent to protect public safety, she doesn't think the siting act is needed. Sen. Bartlett said she would support the amendment providing a termination date because there is concern that the safety of waste burning has not been sufficiently proven. She added if it is not safe for the general public to be within 5 miles of a facility burning hazardous waste, it certainly is not safe for someone to work within such a facility.

Senator Bartlett said if the Committee preferred the 1995 termination date, she would consider that a friendly change in the amendment.

Senator Grosfield noted the kilns would be dealing with a fairly long permitting process, and asked Mr. Anderson how long it will take to receive a permit. Jerome Anderson said the permit process will take 18 to 24 months depending on the extent of the environmental impact study (EIS). Senator Grosfield asked DHES to comment on the permitting process and what they do with information from the EIS.

Roger Thorvilson, DHES, said it would be difficult to determine the exact length of time, but in other states, incineration permits take approximately 4 years. He added pertinent information is always considered as it becomes available in the permitting process.

#### Motion:

Senator Bartlett MOVED the termination date be changed to October 1, 1995. She said the "55" would now be dropped to "54" (See Exhibit #6).

Senator Swysgood said he is concerned about SB 338's effects on the Columbia Falls Aluminum plant and its ability to economically dispose of the hazardous waste the plant produces. He doesn't think the Committee should deter an industry that in good faith attempts to meet all of the requirements.

Senator Bartlett closed on the amendment. She said according to Mr. Thorvilson, permits have been issued within an 18 month period, not necessarily 2 to 4 years. Sen. Bartlett said she doesn't think the process of seeking a permit would be prohibited under this bill as amended.

#### Vote:

The MOTION TO AMEND FAILED with 6 voting YES and 6 voting NO.

**Motion:**

Senator Weldon MOVED SB 338 DO PASS AS AMENDED (Yellowtail Amendment - Exhibit #6).

**Discussion:**

Senator Weeding said the Committee could be opening the door to Montana being the repository of hazardous waste from other states. Sen. Weeding said there is a possibility that the companies could burn hazardous waste safely and make some money, but before the health and safety of Montana's citizens are compromised, the companies had better be sure of what they are doing.

Senator Tveit said he thinks the Committee needs to look ahead and make sure all health concerns are taken care of, and that the burning of the waste is very clean. He said the legislature will be back in session before any permits are given, and can look at waste burning then.

Senator Grosfield said this is not a vote for us to compromise the health of Montana. The issue is allowing an industry to apply for a permit under very careful, strict guidelines.

**Vote:**

The MOTION that SB 338 DO PASS AS AMENDED FAILED 9 to 4 by a roll call vote.

**Motion:**

Senator Swysgood MOVED TO TABLE SB 388.

**Discussion:**

Senator Weeding requested the vote be reversed and be indicated as a Do Not Pass.


Senator Swysgood withdrew his motion to Table SB 388.

**Motion/Vote:**

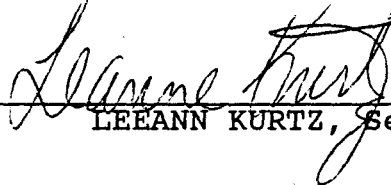
Senator Weeding MOVED SB 388 receive a Minority Report. The MOTION CARRIED UNANIMOUSLY.

ADJOURNMENT

**Adjournment:** The meeting adjourned at 9:30 p.m.



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SENATOR DON BIANCHI, Chair



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LEEANN KURTZ, Secretary

DB/lak

# ROLL CALL

SENATE COMMITTEE NATURAL RESOURCES      DATE 2/17/93

*night meeting*

NAME	PRESENT	ABSENT	EXCUSED
Sen. Bianchi	X		
Sen. Hockett	X		
Sen. Bartlett	X		X
Sen. Doherty	X		X
Sen. Grosfield	X		X
Sen. Keating	X		
Sen. Kennedy	X		
Sen. Swift	X		
Sen. Suroso	X		
Sen. McCernan	X		
Sen. Treitz	X		
Sen. Weeding	X		
Sen. Weldon	X		

FC8

Attach to each day's minutes

ADVERSE

SENATE STANDING COMMITTEE REPORT

Page 1 of 1  
February 18, 1993

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration Senate Bill No. 338 (first reading copy -- white), respectfully report that Senate Bill No. 338 be amended as follows and as so amended do not pass.

Signed: *Don Bianchi*  
Senator Don Bianchi, Chair

That such amendments read:

1. Page 2, line 11.

Following: "means"

Insert: "a waste containing"

2. Page 3, following line 12.

Insert: "(8) "Waste" means either a:

(a) solid waste as defined in 75-10-203; or

(b) hazardous waste as defined in 75-10-403."

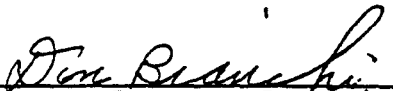
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MINORITY COMMITTEE REPORT  
SENATE STANDING COMMITTEE

Page 1 of 1  
February 18, 1993

MR. PRESIDENT:

We, a minority of your committee on Natural Resources having had under consideration Senate Bill No. 338 (first reading copy - white), respectfully request that Senate Bill No. 338 be amended as follows and as so amended do pass.

Signed:   
Senator Don Bianchi

Signed:   
Senator Steve Doherty

Signed:   
Senator Cecil Weeding

Signed:   
Senator Jeff Weldon

That such amendments read:

1. Page 2, line 11.

Following: "means"

Insert: "a waste containing"

2. Page 3, following line 12.

Insert: "(8) "Waste" means either a:

(a) solid waste as defined in 75-10-203; or

(b) hazardous waste as defined in 75-10-403."

-END-



ROLL CALL VOTE

SENATE COMMITTEE Natural Resources BILL NO. SB 338

DATE \_\_\_\_\_ TIME \_\_\_\_\_ A.M. P.M.

NAME	YES	NO
Chairman Bianchi	✓	
Vice-Chairman Mockett	✓	
Sen. Bartlett	✓	
Sen. Doherty	✓	
Sen. Grosfield		✓
Sen. Keating		✓
Sen. Kearney		✓
Sen. McLernan		✓
Sen. Swift		
Sen. Snyggard		✓
Sen. Tveit		✓
Sen. Weeding	✓	
Sen. Weldon	✓	

Leanne Kurtz  
SECRETARY

MOTION: Rep Grenier amendment Exhibit (6) CHAIR

Motion failed

# ROLL CALL VOTE

SENATE COMMITTEE Natural Resources

BILL NO. SB 338

DATE 2/17/93

TIME \_\_\_\_\_

A.M. P.M.

NAME	YES	NO
Chairman Binchi	✓	
Vice-Chairman Hockett		✓
Sen. Bartlett		✓
Sen. Dehersty	✓	
Sen. Grosfield		✓
Sen. Keating		✓
Sen. Kennedy		✓
Sen. McLernan		✓
Sen. Swift		✓
Sen. Swysgood		✓
Sen. Tleit		✓
Sen. Ukeiding	✓	
Sen. Weldon	✓	

Lecorne Kurtz  
SECRETARY

\_\_\_\_\_  
CHAIR

MOTION: Weldon Ids Pass As  
Amended. Motion Failed  
(Yellowtack amendment)

**DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES**

**TESTIMONY ON SB 401**

*The purpose of the Water Quality Act's nondegradation policy is to protect state waters, both ground waters and surface waters, whose quality is higher than the established standards.*

*This policy, if implemented, will protect state waters from the increased degradation or worsening of water quality which is the ultimate result of increased development, population growth and the corresponding discharge of an increasing quantity of wastes into our finite water resource.*

*The philosophy is simple and appropriate. Simply put, it is to ensure that future generations enjoy the same quality waters we now have. It means, however, that we have to rethink our accepted practices of using waters as sewers, as places to dispose of wastes and as a vehicle to transport wastes away from us, which is, unfortunately, toward someone else. Not everyone can live upstream.*

*The philosophy is simple - implementation of the policy is not. The more you study the policy and consider the many alternatives, and the innumerable possibilities, the more aware you will become of just how difficult implementation really is. The more you think about the consequences of not implementing a stringent nondegradation policy, protective of water quality, the more convinced you will become that implementation is crucial to the future of the state.*

*The department has worked for the past several months to develop SB 401. The bill is summarized fairly well by lines 3 - 13 on page 2 of the STATEMENT OF INTENT.*

*"In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented to the extent determined to be economically and technologically feasible."*

SENATE NATURAL RESOURCES

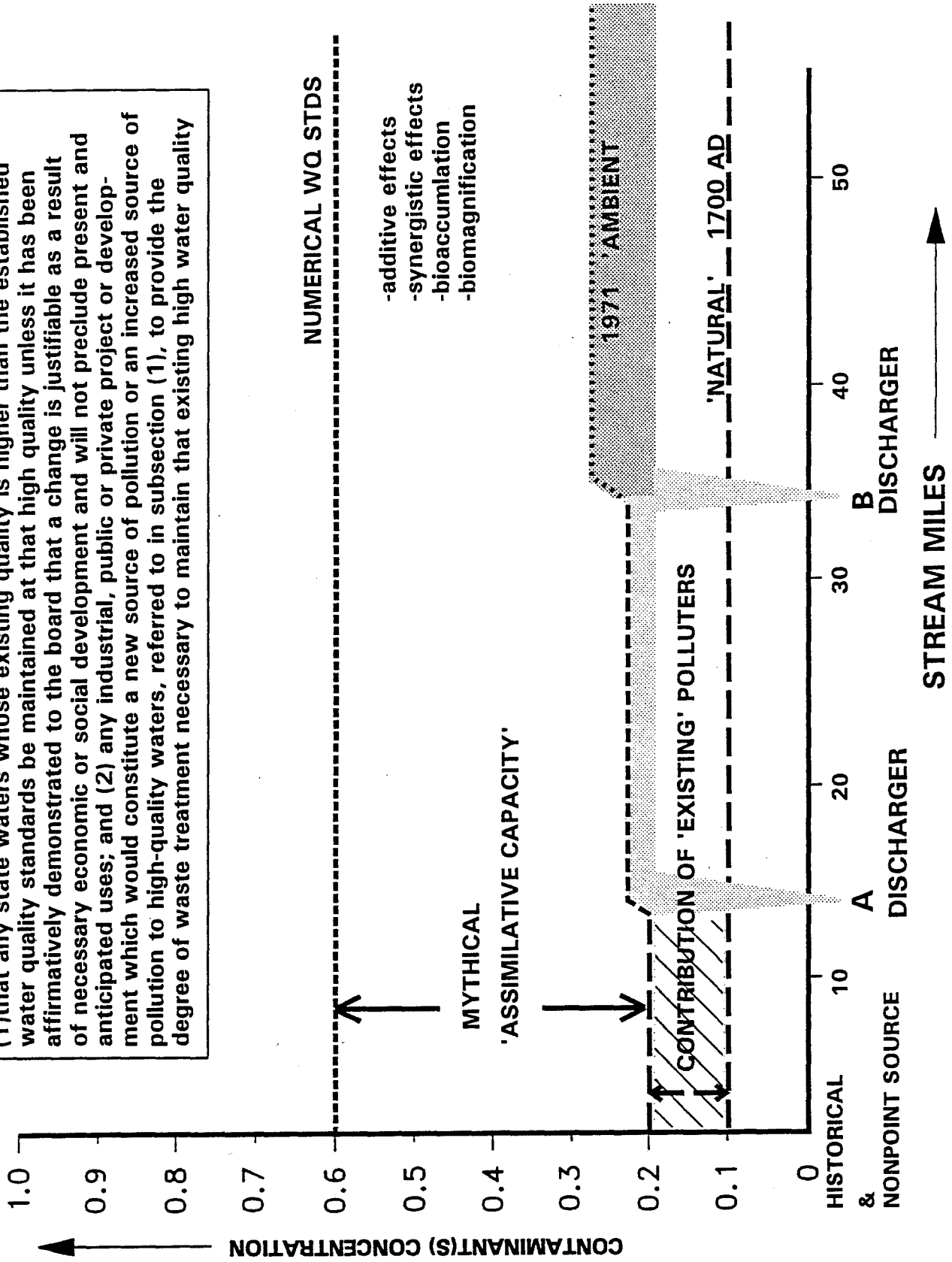
EXHIBIT NO. 1

DATE 2/17/93

BILL NO. SB 401

# NONDEGRADATION POLICY. The board shall require:

(1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated uses; and (2) any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high-quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality



## SUMMARY OF DHES' NONDEGRADATION BILL

### 75-5-103. Definitions.

EXHIBIT #1  
DATE 2-17-93  
SB-401

#### **(4) "Degradation"**

*The purpose of applying nondegradation review is not to totally prohibit degradation, but it does require a mandatory evaluation of alternatives that may result in less degradation or no degradation. This parameter-by-parameter approach affords the greatest protection to state waters. It essentially makes all state waters "high quality" for some or all parameters, therefore, applying the policy to all waters and 'writing off' none. The weasel wording here is in reference to changes that are determined to be "nonsignificant". All activities of man cause some degree of water pollution and it is clear that a full nondegradation review cannot be conducted on all of them, therefore, we have to get some of them out of the process in order to make it workable.*

#### **(8) "Existing uses"**

*Existing uses are the bottom line in terms of how far degradation can go (see 75-5-303 (1), new language).*

#### **(9) "High quality waters"**

*Again, as in (3) above, this serves to clearly show all waters are protected by the nondegradation policy with the same caveat regarding nonsignificance.*

#### **(11) "Interested person"**

*The interested person definition limits those who can appeal the department's preliminary decision.*

#### **(13) "Mixing zone"**

*Mixing zones are a part of the current operating practice when permits are issued. When an effluent is discharged to a receiving water of higher quality it can't be mixed instantaneously, therefore, there is a mixing zone. The only way we know of to avoid this is to have the effluent identical in all respects (parameters) to the receiving water. Practically, this is not possible.*

**(25) "Water quality protection practices"**

**We, in our nondegradation policy review and development over the past 1 1/2 years, decided to put in this definition in an effort to include all activities that could potentially be required as conditions of authorization to degrade state waters. The intent is to apply the "least degrading water quality protection practices economically and technologically feasible" (see 75-5-303 (3) (d)) as a condition of allowing an applicant to degrade state waters.**

**75-5-301. Classification and standards for state waters.**

**(4) & (5).**

**These sections are to give the board the authority to adopt rules governing mixing zones and implementing the nondegradation policy.**

**(4) a, b & c are intended to minimize the impacts of allowing mixing zones.**

**(5)(a) allows the board to adopt rules for department review and authorization of degradation.**

**(5)(b)(i) & (ii) allow for rules to determine; 1. important economic or social development and, 2. weighing the cost/benefit to society.**

**(5)(c) provides for rules by which the department would determine what activities would result in "nonsignificant" changes.**

**75-5-303 Nondegradation policy. This is the heart of the issue. We have made our best effort to determine what the 2 conflicting subsections really mean and have rewritten the policy to clarify that meaning and expand it in a manner consistent with the rest of the Water Quality Act (WQA).**

**(1) This subsection establishes the "bottom line". Existing uses must be protected and maintained; no exceptions. To not maintain all existing uses would cause violations of the water quality standards and this is expressly prohibited by the WQA.**

**(2) This subsection tells us the only way to degrade high quality waters is to get authorization from the department.**

**(3) Details when and how degradation can be allowed.**

(a) a showing would have to be made that no technologically and economically feasible alternatives are available that would not degrade state waters. Obviously economics come into play here. When EPA makes these kinds of determinations they typically look at things which are "generally affordable" to a particular kind of industry or development. If it is generally affordable, it would be required regardless of the individual financial circumstances of the applicant.

(b) a "balancing" would have to be made showing the benefit to society from allowing the development to go forward exceeds the cost of losing, to the extent authorized by the department, the high quality water. This should be examined, we believe, on a state-wide basis rather than just by looking at the benefit to the local area. The constitution gives ownership of the waters to the state, so this seems appropriate to us.

(Establishing criteria and making these kinds of determinations are, to some extent, subjective in nature and more easily said than done.)

(c) a determination would have to be made that, if the authorization to degrade were granted, existing and anticipated uses would be fully protected.

(d) and, as mentioned earlier, the least degrading water quality protection practices determined by the department to be economically and technologically feasible would have to be in place as a condition of authorizing the degradation.

(4) This is a procedural issue.

(5) This section allows challenges to the department's decisions.

(6) This section requires the department to revisit the authorization every five years. It would be possible that, upon a five year review, the department would determine a higher level of technology or some other water quality protection practice would have to be put in place. If uses were shown to be impaired the authorization would have to be withdrawn or conditions would have to be applied which would correct the problems.

**75-5-605. Prohibited activity.** (c) This clearly makes it prohibited to degrade state waters without getting the authorization pursuant to 75-5-303.



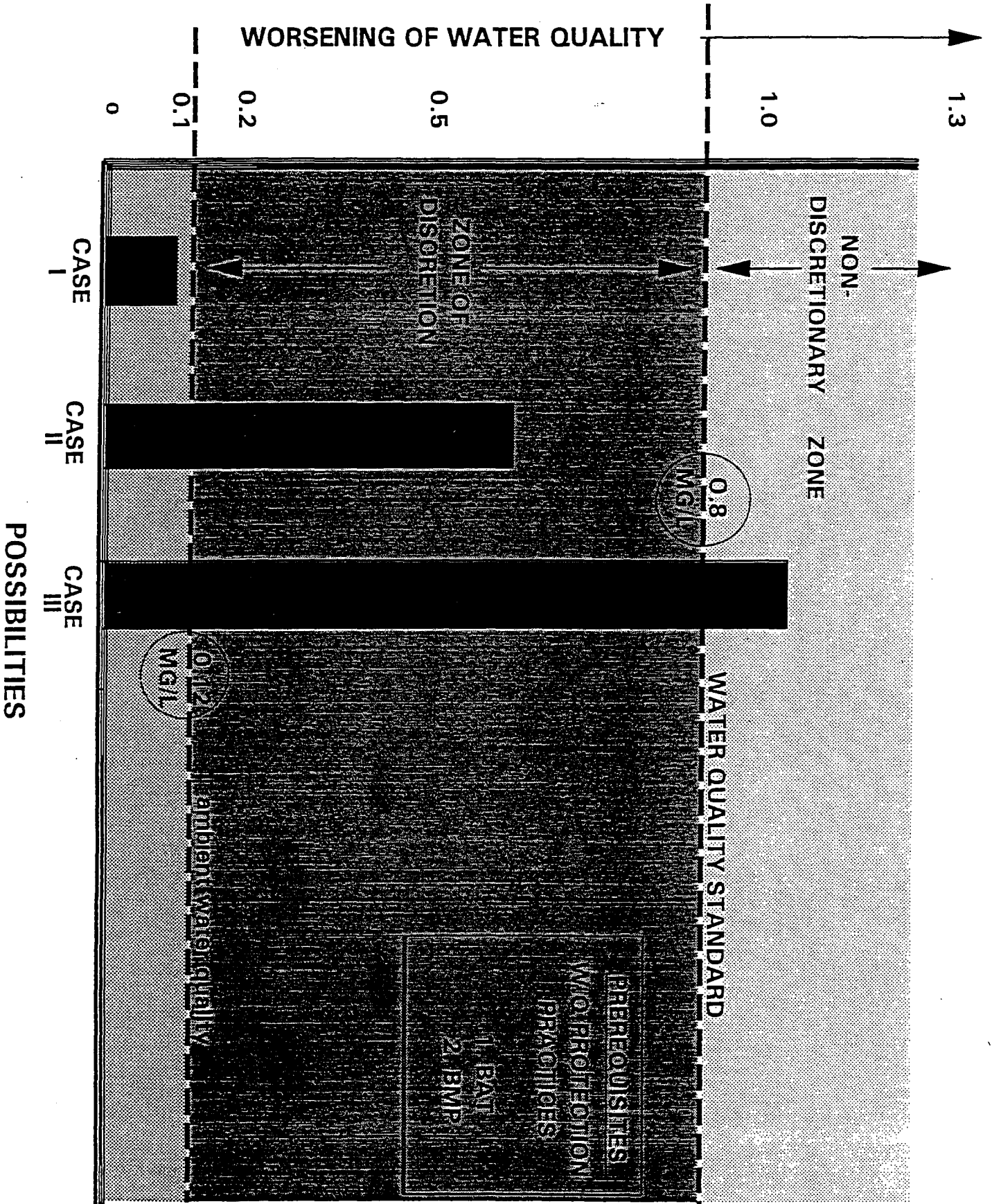




EXHIBIT #1  
DATE 2-17-93  
SB-401

## **EXPLANATION OF "POSSIBILITIES" GRAPH**

### **CASE I:**

***Minimum treatment requirements and best management practices are sufficient to produce an effluent which does not degrade the receiving water.***

***Nondegradation is not an issue.***

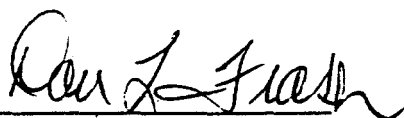
### **CASE II:**

***Minimum treatment requirements and best management practices are not sufficient to ensure no degradation of the receiving water occurs. The nondegradation review process would be triggered. The applicant would have to:***

- 1. show that the degradation is necessary because there are no economically and technologically feasible alternatives which would result in no degradation;***
- 2. show the proposed project will result in important economic or social development that exceeds the benefit to society of maintaining the existing high-quality waters;***
- 3. the department will have to be satisfied that uses will be protected;  
and***
- 4. the least degrading water quality protection practices economically and technologically feasible will have to be implemented.***

### **CASE III:**

***In this example water quality standards are violated after minimum treatment and after water quality protection practices. The activity could not be authorized by the department.***



**Dan L. Fraser, P.E., Chief  
Water Quality Bureau**

## SENATE BILL 401

## Testimony of Alan Joscelyn

Senate Natural Resources Committee

February 17, 1993

I am a Helena lawyer whose practice includes substantial involvement with water quality issues. During the past three years, I have represented several clients in proceedings with the Montana Department of Health and Environmental Sciences regarding Montana's nondegradation statute.

My comments on SB 401, which are based on the experience I have had in this field, are as follows:

Statement of Intent:

Page 1, line 22: Add "high quality" following "of". The intent of the policy is to maintain the quality of high quality waters, i.e., waters whose existing quality is higher than water quality standards. Waters which are not of "high quality" are protected in terms of existing uses, not in terms of quality per se.

Page 2, line 7: Add "economically and technologically feasible" following "no". This change is necessary to make the Statement of Intent consistent with Section 3 of the bill, and to avoid confusion later as to the Legislature's intent.

Page 3, line 5: Add "to the extent possible consistent with the necessity for allowance of mixing zones" following "minimized". This is necessary for consistency with Section 2, and to avoid later questions as the Legislature's intent.

Section 1:

Page 4, line 10: The proposed definition is not acceptable. This definition includes all waters of the state, including those which do not meet anyone's common-sense definition of high quality water. For example, it would include waste waters such as sewage and all process and waste-waters from industrial processes. The Environmental Protection Agency's Region VIII office has made it clear, in its most recent guidance document, that Tier 2 nondegradation protection (protection based on assessing changes in parameters for which standards have been set) is not meant to apply to waters which are not fishable or swimmable. Rather, those waters are protected instead by protecting existing uses and the quality

necessary to support those uses. This proposed definition obliterates the intended distinction between high quality and low quality waters, in terms of how they are protected.

A better approach would be to adopt a definition along the lines proposed in SB 388, which makes a factual distinction between high and low quality waters. Another alternative is to simply define high quality waters as those whose quality is such that the water is suitable for swimming or support of a salmonid fishery. This definition is simple, it is compatible with EPA guidance and meshes well with Montana's already-adopted water classification system.

Page 5, Line 15: Add ", for which water quality standards have been adopted," following "water". This change is necessary to ensure that agency review and proceedings are limited to changes in parameters which have been recognized as meaningful in terms of water quality.

### Section 3:

Page 10, line 5: add " or Board" following "department". This change is necessary to reflect the right of appeal, and the fact the Board will be the final decision-maker in the event of an appeal.

Page 10, line 6: Add ", (4) or (5)" following "(3)". This change is necessary, again, to reflect the right of appeal and that the Board may make the final decision.

Page 10, line 8: Add: "or Board" following "department". Same reasons as foregoing change.

Page 10, line 10: Delete: "to the department" following "demonstrated". Same reason as foregoing change.

Page 10, line 15: Delete remainder of sentence following "development". This decision regarding important economic or social development necessarily requires a determination that the benefits of the project exceed the benefit of maintaining the water quality at its present level. Accordingly this is redundant. Worse, the term "society" is undefined and could create problems.

Page 10, Line 22: Add the following new sentence at the end of the subsection: "In determining "least degrading" and economic and technological feasibility, the department (or the Board, on appeal) will consider the environmental impacts of the various alternatives analyzed."

EXHIBIT #2  
DATE 2-17-93  
SB-401

Page 10, Line 20: Delete "by the department". This change is to reflect the right of appeal to the Board, and the fact the Board may make the final decision on appeal.

Page 11, Line 4: Add the following new sentence following "decision.": "In the event of an appeal, the Board will make its own determination of the issues raised by the appeal." This change is necessary to clarify what the Board's role will be in determining an appeal.

Page 11, Line 11: Add the following new sentence at the end of the subsection: "Any decision by the department under this subsection is subject to appeal to the Board as set forth in subsection (5)."

# Northern Plains Resource Council

January 12, 1993

Marc Racicot, Governor  
Governor's Office  
State Capitol Bldg.  
Helena, MT 59620

SENATE NATURAL RESOURCES  
EXHIBIT NO. 3  
DATE 2/17  
BILL NO. SB 388  
401

Dear Governor,

On behalf of the Northern Plains Resource Council (NPRC), I would like to thank you for meeting with our Legislative Task Force on December 12th. Our members appreciated the effort you made to meet with us, as well as your openness on the issues of concern to the NPRC and other Montanans. Your willingness to consider our views is a refreshing change from the previous administration. We look forward to building on this open relationship throughout your tenure in office.

NPRC would like to offer you our perspective on current efforts by the Department of Health and Environmental Sciences (DHES) to draft legislation that would substantively weaken the Montana Water Quality Act. We have reviewed a draft of the Department's bill, and attended a meeting sponsored by DHES to explain the bill. NPRC believes that the bill would seriously jeopardize the Water Quality Act's current protection of Montana's pristine water resources; that the bill may be unconstitutional; and that it would divert the Department's time and energy away from developing solutions to several crucial implementation problems that cannot be solved effectively through legislation. NPRC therefore asks you to consider withdrawing the support of the Governor's office from the Department's efforts to draft this misguided legislation. We urge you to refocus the Department's current efforts from "clarifying" the nondegradation policy through what is likely to be controversial and polarizing legislation, to clarifying and working towards a consensus on the policy through rulemaking and an interim study. Such efforts could focus on:

- 1) the Department ensuring that applicants for nondegradation exemptions fully develop treatment options preventing degradation;
- 2) the Department mandating (i.e., not leaving it discretionary) that a thorough cost-benefit analysis is developed on treatment options preventing degradation versus options allowing degradation;
- 3) the Department ensuring the actual permit conditions--including the proposed treatment methods and monitoring plans--being proposed for a degradation exemption are made available with reasonable time for public review prior to the hearing;
- 4) the Department developing a plan and appropriate agency policies needed to apply the nondegradation policy for those polluting activities currently exempted from having to obtain groundwater discharge permits;
- 5) the Department developing a plan and appropriate agency policies to apply the nondegradation policy to nonpoint sources of pollution--including procedures for determining how nonpoint sources will be required to implement best management practices upstream from where degradation exemptions are granted as required by state and federal rules;
- 6) the Department identifying ways to increase its capacity to meet its current statutory obligations to ensure effective enforcement of the Water Quality Act--and in particular the nondegradation policy; and,
- 7) the Department exploring the possibility of supporting a resolution for an interim legislative study by the Environmental Quality Council to try to develop some consensus on how the nondegradation policy should be implemented, and whether any legislative changes may be needed to more effectively implement the policy.

The following points provide more background and arguments for the course outlined above.

**1) The Department's draft bill would abandon the State of Montana's existing philosophy of not allowing degradation of essential elements of environmental life support systems--namely pristine water--as currently set forth in the Montana Water Quality Act and the Montana Constitution.**

The Department's draft bill would repeal 75-5-303--the nondegradation policy--of the Water Quality Act, including 75-5-303 (2) MCA, that requires new or increased sources of pollution "to provide the degree of waste treatment necessary to maintain ...existing high water quality." The bill would replace 75-5-303 with language that would conform the Water Quality Act to DHES's current--and we believe illegal and unconstitutional--interpretation of the law that allows degradation exemptions for new or increased sources of pollution.

NPRC and others have challenged the Department's current policy of allowing new or increased sources of pollution to obtain degradation exemptions, because we believe such a departmental policy violates section 75-5-303 of the Water Quality Act. We have also argued that our interpretation of the Act is supported by the Montana Constitution's mandates that each citizen has "...the right to a clean and healthful environment..." [Article II, Section 3]; and that the state has a Constitutional duty to "...maintain and improve..." the environment, and to prevent degradation of water, a critical component of our essential environmental life support system [Article IX, Section 1].

However, both DHES and the Board of Health have maintained that they do have the authority to grant exemptions to new or increased sources. NPRC, our local affiliates, and others have raised these constitutional questions--along with other issues--in legal challenges to Chevron/Manville's proposed water degradation exemptions for mining projects on the Stillwater and East Boulder Rivers. The two exemptions have been combined into one case that is scheduled for a hearing before State District Court Judge Dorothy McCarter in January of 1994. If the Department's draft bill were to pass, its provision allowing new or increased sources of pollution to degrade pristine waters would explicitly abandon the current statutory and constitutional mandates to prevent water degradation, and may be found unconstitutional when Judge McCarter renders her decision in our case.

Since DHES and the Board of Health disagree with our interpretation, and claim to have the authority to allow exemptions for new or increased sources under current law, NPRC believes the prudent course of action would be to allow the courts to decide this issue, and then reevaluate the need for legislation once a decision is rendered. Such a decision on this and related issues could serve to clarify the true need for legislative changes for parties on all sides of these issues by *clarifying the constitutional issues that have been raised*. If DHES wins its argument in court, its proposed legislation--"to clarify" that new or expanded sources *are* eligible for exemptions--would be unnecessary, and the Department will have wasted an enormous amount of time and energy fighting for controversial legislation that we believe may only serve to polarize this issue further. If DHES loses, then the proposed legislation may well be found unconstitutional, and the Department will also have wasted time and energy in trying to pass this bill.

DHES is currently redrafting water quality rules--including nondegradation rules. DHES could move forward with its rulemaking based on its own interpretations of current law. NPRC believes that certain changes--including most being proposed in the Department's draft bill--could be made through rulemaking that could clarify the application process for exemptions. Such clarification could benefit the public, the department and applicants for exemptions. However, we believe it would be counterproductive for everyone involved to have a controversial legislative battle that can only serve to polarize this volatile issue even further, and divert everyone's limited resources into such a fight. NPRC urges you to consider refocusing DHES's limited resources into moving forward with its rulemaking, and away from drafting controversial, unnecessary, and potentially unconstitutional legislation.

**2) The Department's bill fails to address another crucial problem that has plagued degradation applications to date: it does not mandate a rigorous cost-benefit analysis that thoroughly weighs the costs of alternatives allowing degradation against the costs of preventing degradation.**

In all degradation petitions developed to date, the Department has refused to require the applicants to complete a *thorough* cost-benefit analysis of alternatives that could prevent degradation in comparison to alternatives that would allow degradation. There are two main reasons for this failure. First, the Department has refused to follow its own rules that--before they were changed last summer--required an applicant for an exemption to first obtain a water discharge permit with conditions preventing degradation *prior to* applying for an exemption. And, second, the Department has refused to

EXHIBIT #3

DATE 2-17-93

SB-388-401

existing authority under its rules to require applicants to do a thorough cost-benefit analysis of preventing degradation. If the Department had utilized its existing authority (see ARM 16.20.704) to require applicants to provide water treatment alternatives in the environmental review that would prevent degradation--then the Board of Health could have made more informed decisions whether to grant exemptions. Such an analysis would have also provided the public with a clearer picture of the issues at stake.

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Another problem with the bill is that it would base approval of water degradation exemptions heavily on whether alternatives are "economically achievable" for the applicant, not on broader social and economic criteria as provided for in the nondegradation rules [ARM 16.20.704]. Again, this language would put into statute the policy of the Department to allow degradation exemptions based primarily on applicants' ability to pay for treatment that they cannot afford.

For example, in the Environmental Assessment for the degradation petition on the Blue Range Mine near the Department ignored public testimony urging consideration of a surface tailing impoundment as an alternative to placing cyanide-laced tailing back into an abandoned (and leaking) Gypsum mine simply because the mine could not afford a surface impoundment. The Department did not require the company to provide any documentation to substantiate this claim. NPRC believes the current law requires the test for social and economic feasibility to be based on industry-wide, state-of-the-art treatment technologies, not on whether a certain company can afford such treatment.

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The bill would significantly increase the number of exemptions without providing the resources that would be necessary to meet the increased demands for monitoring and enforcement.

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Granting of degradation exemptions places a much greater burden on both the Department of Health and the State Lands to be able to ensure compliance with permit conditions that allow limited pollution of pristine water not exceeding drinking water standards, and without harming existing and future beneficial uses. Neither the Department, nor the State Lands, have demonstrated that they have the necessary resources or political will to ensure that mining operations comply with drinking water standards, let alone the much more rigorous monitoring necessary for ensuring compliance with the more stringent permit conditions demanded by degradation exemptions.

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For example, Noranda Minerals stands accused of violating drinking water standards during mine exploration at the site on Libby Creek in the Cabinet Mountains. Neither the company--who sent in the monitoring reports reporting violations--nor DSL, nor DHES, acted on these detected violations for a year and half. Nevertheless, in 1992 the state granted Noranda a degradation exemption for this mining project while it was still prosecuting Noranda for the earlier violations.

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This Noranda example is by no means an isolated case. NPRC researched agency files for mining violations in 1990. We found that the hard rock mining industry had been assessed over \$600,000 in fines--many for violations--over the last decade. Yet we also found that the state agencies involved had only collected 10% of those fines by October of 1990. NPRC maintains that neither DHES nor DSL have the capacity to ensure compliance with much more stringent nondegradation permit conditions, when they cannot even ensure compliance with the less stringent water quality standards. NPRC believes that DHES is being imprudent in pushing for a bill that will likely increase the number of degradation exemptions, without proposing how it intends to enforce the permit conditions that will be required by them.

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**Document Shelved**

Another example of DHES's lack of enforcement capabilities is the recent shelving of a draft enforcement bill. In the fall of 1991, DHES Director Dennis Iverson told NPRC and other conservation groups that he had assembled a task force made up of DHES enforcement personnel to review and make recommendations on what resources and policies the Department would need to effectively enforce the public health and environmental protection laws that are its responsibility.

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The "Regulatory Enforcement Policy Task Force" was created, and it did draft a "Regulatory Enforcement Policies and

SENATE NATURAL RESOURCES  
EXHIBIT NO. 4  
DATE 2/17/93  
BILL NO. SB 388

From the Clark Fork - Pend Oreille Coalition  
P.O. Box 7593, Missoula, MT 59807 542-0539

WHY SB 388, WHICH RADICALLY  
WEAKENS THE LAW PROTECTING THE  
QUALITY OF MONTANA'S DRINKING  
WATER, STREAMS AND LAKES,  
SHOULD BE REJECTED.

SB 388 claims to "clarify" the nondegradation policy in Montana's Water Quality Act. What it really does, however, is eliminate the policy, thereby robbing Montanans of the ability to protect our cleanest waters, an ability that is guaranteed by our Constitution.

The nondegradation policy says our highest-quality ground and surface waters should be protected unless it is demonstrated that degrading those waters is necessary for needed economic development. A high-quality water is one that is cleaner than the chemical and physical standards adopted by the state board of health for that class of water. The state standards are the minimum protection a stream can have. Adopted by the state board of health, these standards cannot be exceeded.

Article IX, Section 1 of the Montana Constitution recognizes the importance of protecting high quality water from nondegradation. It states:

*"The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."*

Records of the Constitutional Convention support a strict interpretation of nondegradation and also define water as part of the environmental life support system in Montana.

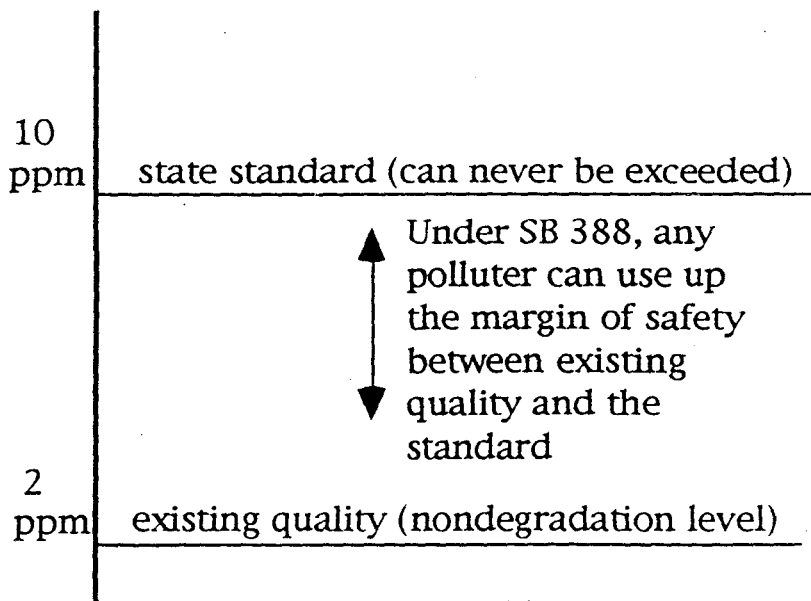
BEFORE VOTING ON SB 388, IT IS CRUCIAL YOU UNDERSTAND HOW IT HARMS WATER QUALITY PROTECTION IN MONTANA.



• Wording in Section 1 (4) (a) of SB 388 essentially says that high quality water is any water that does not exceed the minimum legal standards adopted to protect beneficial uses such as drinking water and fish. The language implies there is nothing wrong with polluters polluting right up to the minimum protection standards. SB 388 tells us there is no value to having a stream cleaner than the minimum legal standards.

• SB 388 allows today's polluters to use up the safety margin between a water's existing quality and the minimum levels needed to protect beneficial uses such as drinking water and fisheries. By allowing the margin be used up, SB 388 could rob future Montanans of development options that might degrade water. SB 388 could stymie future economic development in Montana. An example is the heavily polluted Clark Fork River. Because the river exceeds minimum protection standards for some nutrient-related criteria at certain times of the year, the state may have to limit new development that produces nutrients. Or, current polluters such as Butte, Deer Lodge and Missoula's municipal sewage plants, as well as the Frenchtown pulp mill, will have to reduce pollution to the point the river meets standards. This will be expensive and it limits development.

The following graph illustrates the critical difference between existing high quality and minimum legal standards:



- SB 388 also does not recognize that low levels of many pollutants, such as highly toxic dioxin or metals such as arsenic or copper, accumulate in streams and groundwater. Though polluters may comply with standards, their pollutants can accumulate at unhealthy levels in soils or groundwater. When they accumulate to high levels, as we see at hazardous cleanup sites around Montana, they are difficult and expensive to eliminate. A nondegradation policy that emphasizes maintaining existing high quality instead of polluting up to standards helps prevent the accumulations of toxics at unhealthy levels.

- Because SB 388 says the only level of pollution that is unacceptable degradation are levels exceeding minimum standards, a nondegradation policy or exemptions from it would be unnecessary. (Exemptions, except short-term waivers for some dischargers, from legally established minimal-standards by law cannot occur.)

- Without a nondegradation policy that protects existing high quality water, Montana would not comply with the federal Clean Water Act, thereby compelling the Environmental Protection Agency to take over Montana's water quality program. SB 388 could hand over regulation of Montana's water quality to federal bureaucrats. Or, the federal government could eliminate funding for the Montana's Water Quality Bureau, much of which is funded by EPA.

- Section 1, (4)(i.) of SB 388 would allow industries that create nonpoint source pollution to not only degrade but to violate legal water quality standards as long as some vague "water management or conservation practices" have been applied. This may violate federal water quality law.

- Section 1 (4) (ii) does not define "temporary changes" or "short term activities," when it exempts them from nondegradation criteria. In 1988, a "short-term and temporary" release of a few hours duration of highly concentrated heavy metals from ARCO's tailings along the upper Clark killed more than 5,000 fish.

- Section 1(9) includes as "high quality waters" those that can have unhealthy levels of at least three pollutants. This means that undrinkable drinking water, such as some of the groundwater around Milltown contaminated with high levels of arsenic, can be considered "high quality water." It means that the upper

reaches of the Blackfoot, with mining-related cadmium levels documented to be depressing fish populations can also be considered a high quality water.

• In Section 4, the actual definition of the nondegradation policy has many problems:

- 1.) it only protects "existing uses" and not those beneficial uses for which protective standards for the water are based.
- 2.) it says "high quality waters must be maintained." That means, according to SB 388's definition of "high quality waters," if a water body has up to three pollutants that violate standards that protect beneficial uses, those harmful levels must be maintained!
- 3.) the economic test on whether degradation should be allowed is based on local economic interest, even though all ground and surface water in Montana are waters of the State. SB 388 suggests, then, that unless you live somewhere near the body of water proposed to be degraded, you have no say as to whether the degradation is in the best interest of you or other Montanans. That means only people who live on or near Montana's blue-ribbon fisheries, which bring Montana millions of fishing dollars into Montana, would have any say on whether proposed degradation was based on important economic development. Localizing the economic test may be against Montana's Constitution, which recognizes that all waters of the state are owned by all Montanans.

IF MONTANA'S NONDEGRADATION POLICY MUST GENUINELY BE CLARIFIED, THEN IT SHOULD BE DONE METHODICALLY WITH AMPLE OPPORTUNITY FOR THE PUBLIC TO BE TOLD THE CONSEQUENCES. SB 388, HOWEVER, RADICALLY REDUCES WATER QUALITY PROTECTION AND ROLLS BACK THE CONSTITUTIONAL RIGHT THAT ALL MONTANANS HAVE TO A CLEAN AND HEALTHFUL ENVIRONMENT.

TESTIMONY OF THE  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
ON SENATE BILL 280, FIRST READING

BEFORE THE SENATE NATURAL RESOURCES COMMITTEE

FEBRUARY 17, 1992

*A BILL FOR AN ACT ENTITLED: "AN ACT IMPLEMENTING THE 1992 STATE WATER PLAN; INCLUDING WATER QUALITY AS A CRITERION FOR WATER PERMIT, CHANGE AUTHORIZATION, CONTROLLED GROUND WATER AREA, AND BASIN CLOSURE DETERMINATIONS; AMENDING SECTIONS 85-2-311, 85-2-319, 85-2-402, AND 85-2-506, MCA; AND PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE."*

The Department of Natural Resources and Conservation (DNRC) supports Senate Bill 280. It is the result of the state water planning process in which a problem that was identified by the public as being significant was addressed, and inexpensive and effective mechanisms for solving the problem were developed.

Water quality and water use are inextricably linked by natural physical, chemical, and biological processes. Yet, for the most part, our laws treat water use and water quality protection as separate and distinct functions, capable of being dealt with in isolation. As our scarce water resources become subjected to greater pressure and require more intensive management, it becomes obvious that water quality protection laws begin to affect opportunities for water use. Conversely, water uses that go unregulated by water quality laws begin to have real impacts upon water quality. The right hand doesn't know what the left hand is doing, and it is possible that they work at cross purposes.

This bill provides processes by which our existing laws and institutions can be better integrated to avoid such problems. It does not mandate that water quality protection will always prevail over water development, or vice versa. Under this legislation, the DNRC would continue to bear primary authority for making water allocation decisions, but with some opportunity for consideration of water quality concerns. Without this bill, decisions about whether to approve new water use permits, changes in water rights, basin closures, and the establishment of controlled groundwater areas would be made without adequate consideration of water quality protection needs.

Senate Bill 280 set forth three specific water quality-related criteria to be considered when deciding whether to issue new water use permits, authorize water rights changes, or close basins to new appropriations. These new criteria relate to new or changed water uses and whether they would have water quality impacts that would: (1) adversely affect

(or substantially violate) state water quality classifications and standards that are applicable to the particular source of supply; and (3) substantially interfere with the ability of a water quality discharge permit-holder to comply with the terms of their permit. Water quality criteria would only be considered for new permit and change authorizations if a valid objection with substantial supporting evidence is filed. Further, only the Department of Health and Environmental Sciences would be allowed to apply for a basin closure on the basis of water quality.

With the proposed amendment, controlled groundwater areas could become useful tools for protecting public health and safety in areas having known groundwater quality problems. Such designations could still afford the use of the resource, but regulate its use for specific purposes, require treatment, or limit development so that polluted areas could not migrate or expand.

The fiscal note prepared for this legislation notes the expense of one new position in the DNRC to coordinate water quality and water use management. The DHES portion of the fiscal note calls for an additional 2.7 FTE effort in DHES to implement the provisions of the bill. This is in contrast with the concept envisioned by the state water plan wherein the DHES effort would be handled by existing staff. The intent of this bill is not to require DHES to devote four man-hours in analyzing each permit and change application. The more likely scenario would be the one where an existing staff member would spend a couple of hours each week reviewing the permit notices. However, only infrequently would there be an application worthy of receiving an objection on the basis of water quality concerns. It is estimated that such objections would be received at a rate of only two to three such applications per month. Further, where there are stream reaches or aquifers with known problems, it would be far more cost effective for DHES to petition for a basin closure rather than provide a detailed level of analysis of each individual permit.

In conclusion, this legislation was the culmination of a thoughtful, participatory process for dealing with a very complicated but significant problem. It sets forth a solution to this problem having the least cost and impact to our existing water management institutions. Absent such an approach, there is a very real possibility that the federal government, which is becoming increasingly concerned about this issue from a water quality protection perspective, could impose a regulatory approach upon Montanans that fails to reflect the specific needs and concerns of this state.

Amendments to Senate Bill No. 338  
First Reading Copy

Requested by Sen. Yellowtail  
For the Committee on Natural Resources

Prepared by Michael S. Kakuk  
February 9, 1993

1. Page 2, line 11.

Following: "means"

Insert: "a waste containing"

2. Page 3, following line 12.

Insert: "(8) "Waste" means either a:

(a) solid waste as defined in 75-10-203; or

(b) hazardous waste as defined in 75-10-403."

SENATE NATURAL RESOURCES

EXHIBIT NO. 6

DATE 2/17/93

BILL NO. SB 336

Amendments to Senate Bill No. 338  
First Reading Copy

Requested by Rep. Grimes  
For the Committee on Natural Resources

Prepared by Paul Sihler  
February 15, 1993

SENATE NATURAL RESOURCES  
EXHIBIT NO. 7  
DATE 2/17  
BILL NO. SB338

1. Title, line 7.  
Strike: "AND"  
Insert: ", "  
Following: "DATE"  
Insert: ", AND A TERMINATION DATE"

2. Page 1.  
Following: line 15  
Insert:

"[This act] terminates October 1, 1997. It is the intent of the legislature that, based upon available information, including the results of currently ongoing studies, the 55th legislature review the implementation of [this act] and review the need for and scope of [this act]."

54

3. Page 5.  
Following: line 15  
Insert:

"NEW SECTION. Section 7. {standard} Termination. [This act] terminates October 1, 1997."

February 17, 1993

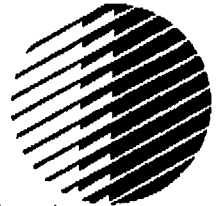
Senator Don Bianchi and Members of the  
Senate Natural Resources Committee  
State Capitol Annex  
Helena, Montana

SENATE NATURAL RESOURCES

EXHIBIT NO. 8

DATE 2/17/93

BILL NO. SB 338



Environmental  
Toxicology  
International

Dear Senators:

I'm sorry I didn't get the chance last night to discuss the EPA memos on dioxins in cement kiln dust, passed out at the Committee meeting last night. Herewith my comments on the above memos.

I first heard of these data almost six months ago; they are not new data. The fact they are still not widely circulated is a good indication of EPA's lack of urgency about these data and the lack of public health concern regarding dioxins at these levels.

The dioxins measured in cement kiln dust are about what most had expected. Dioxins are common byproducts of combustion, and can be measured in every combustion process from cigarettes to woodstoves to automobiles to incinerators. The issue is clearly not one of presence -- is dioxin there or not? -- but one of effect -- is dioxin present in quantities sufficient to cause adverse impacts?

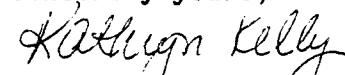
The answer is, apparently not. The December 21, 1992, memo from EPA you received last night summarizes this issue quite well. Several constituents of cement kiln dust, including dioxin, were found to exceed their screening criteria. This was expected; any detectable amounts of dioxin present would exceed the very conservative screening criteria, and of course one would expect detectable quantities to be present from combustion processes.

However, the screening criteria are not *health* effects criteria. As stated in the EPA memo, the purpose of the screening criteria is to help prioritize constituents of concern for further EPA evaluation, in part to optimize agency resources. The dioxin levels were evaluated further in a risk assessment, which will be published in April as part of a larger report due to Congress.

The risk assessment calculations were completed months ago; they take only a matter of hours to run, not days or weeks. If EPA had noted a problem with this health effects evaluation, you may be sure they would have acted immediately to address an imminent health threat, as they have in the past with Alar and other issues. They did not do so. Further, as stated in the EPA memo, the health effects evaluation is only one of several factors the EPA will take into consideration in their overall evaluation of cement kiln dust.

In sum, these are considered positive data with regard to the safety of cement kilns burning hazardous waste.

Sincerely yours,

  
Kathryn E. Kelly, Dr.P.H.

600 Stewart St., Suite 700  
Seattle, WA 98101 USA  
Telephone (206) 441-6142  
Facsimile (206) 443-1812



53rd LEGISLATIVE SESSION  
NATURAL RESOURCES COMMITTEE

PROXY VOTE

I, Senator Sw, Ft do hereby  
grant my proxy vote to Chairman Bianchi or Secretary Kurtz as  
follows:

BILL NUMBER SB 338

MOTION

Do Pass  
Yes \_\_\_\_\_ No \_\_\_\_\_

Do Not Pass  
Yes X \_\_\_\_\_ No \_\_\_\_\_

Indefinitely Postponed  
Yes \_\_\_\_\_ No \_\_\_\_\_

Tabled  
Yes \_\_\_\_\_ No \_\_\_\_\_

2/17/93  
Date

Bernie Swift  
Signature

DATE 2/17/93

SENATE COMMITTEE ON Natural Resource

BILLS BEING HEARD TODAY: 2# SB 388 SB 401  
SB 280

Name	Representing	Bill No.	Check One	
			Support	Oppose
Stan Broadbent	MT. T.O.		280	388 401
Jay Richard	MT. Wildlife Fed			388 401
Linda McMullen	Rancher NPRC			388 401
Bill Butler	Citizen	401	401	
Janet Ellis	MT Audubon			401 388
Mona Jameson	Mikelson Land Co			401 388
Bruce Farling	Clark Fork Coalition			388 401
Brian McVitt	M.E.I.C	401 388		X
Paul Hawks	NPRC	401 388		X
Scott Ringold	NPRC	" "		X
RACHAEL RAUE SIRS	FAMILY (OF 6)	388 401		X

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY