

MINUTES

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

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chair Bianchi, on March 22, 1993, at 3:15 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: SJR 29, HB 365, HB 395, HB 488, HB 503
Executive Action: None.

HEARING ON SJR 29

Opening Statement by Sponsor:

Senator Cecil Weeding, Senate District 14, stated SJR 29 would request the Environmental Quality Council (EQC) to conduct a study of the nondegradation provisions of the Montana water quality laws and their implementation. He said the EQC would then be required to report its findings and recommend legislation to members of the 54th Legislative Session. Senator Weeding noted SJR 29 was drafted in response to concerns raised by a variety of bills introduced this session pertaining to water

quality. He said SJR 29 is necessary because no commonly accepted definitions exist for "nondegradation" or "high quality waters".

Proponents' Testimony:

Mr. Richard Parks, Northern Plains Resource Council (NPRC), spoke from prepared testimony in support of SJR 29 (Exhibit #1).

Mr. Phil Tawney, NPRC Legal Counsel, submitted to the record a letter addressing his association's concerns regarding SB 401, a bill to change Montana's water quality nondegradation statute (Exhibit #2). He said SJR 29 would help solve some potential questions of constitutionality in the event SB 401 were passed. He noted the Montana Constitution provides that "the Legislature is directed to provide adequate remedies for the protection of the environment life support system from degradation and to provide adequate remedies to prevent unreasonable depletion of natural resources". Mr. Tawney said the Constitution clearly prohibits the degradation of all natural resources including water. He said Montana is experiencing a surge in its economic and population base because people want to live in a pristine environment where the water is pure.

Senator Gary Forrester, Senate District 49, stated his support for SJR 29. He said his district experienced a petroleum spill two years ago which has yet to be adequately cleaned up. He said SJR 29 would help address problems like the one experienced by his community.

Ms. Jean Charter, NPRC, spoke from prepared testimony in support of SJR 29 (Exhibit #3).

Mr. Cesar Hernandez, Cabinet Resource Group, stated a "mixing zone" currently exists in the Clark Fork River valley that extends from the Warm Springs Ponds to Lake Pondera. He said seven mineral bodies have been identified near his hometown of Troy, Montana; one of which has been developed. Mr. Hernandez said the issue of nondegradation is complicated enough to merit a comprehensive and non-biased study.

Mr. Gary Langley, Montana Mining Association, stated the Committee should urge the EQC to conduct a study of Montana's nondegradation laws. He said the issue of water quality is complex, unclear and difficult to enforce. Mr. Langley recommended the Committee also pass SB 401 so Montana would have a clear and concise nondegradation policy.

Ms. Mona Jamison, Mikelson Land Company, stated it was critical to define nondegradation. She said water quality laws have been in existence for twenty years but have not been equitably enforced. Ms. Jamison urged the Committee to pass SJR 29 and not pass SB 401.

Mr. Jim Jensen, Montana Environmental Information Center (MEIC), stated his support for SJR 29. He said "while the law is not broken, the process is". He concluded the EQC study would help reach a consensus on procedural changes necessary in existing law.

Mr. Leo Barry, Entech, stated Entech's support for SJR 29 is "conditioned and cautious". He said SJR 29 should not be used as a tool for defeating SB 401. Mr. Barry noted nondegradation does not just apply to the hard rock mining industry. He said comprehensive environmental legislation has been adopted in Montana without an initial study but urged the Committee to pass SJR 29.

Mr. Kim Wilson, Clark Fork Pondera Coalition Legal Counsel, stated his organization's support for SJR 29. He said he was appreciative of the Department of Health and Environmental Science's (DHES) efforts to mediate a solution to SB 401. He said DHES's actions illustrate the need for an interim study on water quality nondegradation. Mr. Wilson said it was critical for SJR 29 to study compliance and coordination with federal law as it relates to nondegradation.

Ms. Peggy Trenk, Western Environmental Trade Association (WETA), stated her support for both SJR 29 and SB 401.

Mr. Bob Robinson, DHES Director, stated the Department's support for SJR 29 as "a tool to get SB 401 in place".

Ms. Susan Pauli, NPRC, stated her support for SJR 29. She said the Montana Water Quality Act should not be weakened.

Mr. Jim Mulligan, Stillwater Protective Association, stated his support for SJR 29. He said it was important to maintain Montana's high quality waters.

Mr. Dave Price, Bear Creek Council, stated he was concerned about the definitions for "mixing zones" and "nondegradation". He said the EQC should define these acts before any legislation is changed.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator McClernan asked Mr. Tawney if land and air were included in the Montana Constitution's definition of the "environmental life support system". Mr. Tawney replied yes and added that the Constitutional Committee purposely avoided a specific definition so no resource would be exempted.

Senator Grosfield asked Mr. Tawney if it was unconstitutional to degrade Montana's air, land and water. Mr. Tawney replied yes.

Senator Grosfield asked Mr. Tawney how Montana could "go forward with a strict interpretation of the Constitution". Mr. Tawney replied that only a vote of the people could change Montana's Constitution. He said a number of industries have entered Montana with the notion of "cutting corners" with respect to Montana's environmental provisions. He said it should be up to the voters to decide if these provisions should be changed.

Senator Swysgood asked Mr. Tawney if, under his strict interpretation of the Montana Constitution, any level of nondegradation would be permitted. Mr. Tawney replied that his interpretation of the Constitution would allow for degradation as long as it was corrected by the responsible entity.

Closing by Sponsor:

Senator Weeding stated a number of groups who usually take opposite sides on most issues were in agreement that SJR 29 is necessary. He added that EQC study is needed since some form of SB 401 will probably be passed by the Legislature.

HEARING ON HB 365**Opening Statement by Sponsor:**

Representative John "Sam" Rose, House District 11, stated HB 365 pertained to closure of the Teton River Basin. He said the Teton River is a small and young stream. He noted the Teton River has the potential to "break out" into McDonald stream which would cause major property and environmental damage. Representative Rose noted that in response to this potential hazard, concerned area residents came together to assess the situation. He said it would cost approximately \$60,000 per mile to stabilize the Teton River. He noted the Environmental Protection Agency (EPA) may contribute a maximum of \$500,000 to the restoration project. Representative Rose stated he amended Section 3 back into the bill on the House floor. He said he feared that Teton River would "lose water on the upper end" if DHES flushed the stream to remove excess minerals. He said the Teton River Basin should be closed because it is "over appropriated". Representative Rose

noted that in one summer, 125 requests were made for water from the Teton River Basin which already irrigates 35,000 acres. He concluded his irrigation district should be able to handle this problem on its own.

Proponents' Testimony:

Representative Roger DeBruycker, House District 13, stated the Teton River has been permitted so frequently that "the flood of 1964 would not even be enough to satisfy the water supply". He asked the Committee to support HB 365.

Mr. Jay Rice, Teton River Water Users Association (TRWUA) President, stated the Teton River provides a number of economic and recreational benefits. He said the area is becoming a "haven" for hunters and fishers. He said closing the Teton River Basin would provide protection for this area as originally sought by the Department of Fish, Wildlife and Parks (FWP) when it issued a reservation to prohibit any new uses for this body of water. Mr. Rice concluded "retaining the FWP reservation would further erode the present irrigation base".

Mr. Clay Crawford, Teton River Study Committee Chair, stated a fragile coalition has been formed between landowners and FWP to address this issue on a local level. He urged the Committee to retain Section 3 of HB 365.

Mr. Bill Richard, rancher, stated the Teton river has been dry for eight of the last sixteen years. He noted that since 1973, the Department of Natural Resources and Conservation (DNRC) has issued 28 new permits and three water reservations. He said the majority of water right holders in his area agree that the only way to avoid worsening the problem is to close the entire Teton River Basin. Mr. Richard said the water quality of Freezeout Lake has been affected by overuse and urged the Committee to support HB 365.

Ms. Jo Brunner, Montana Water Resources Association (MWRA), stated HB 365 would protect existing users. She said water users want to protect streams and added they have a right to protect their water use interests.

Senator Bob Hockett, Senate District 7, excused himself from the Committee for the purpose of testifying in favor of HB 365. He said the Teton River stream is "dewatered" by the time it reaches the point of entry into the Marias River.

Mr. Gary Fritz, DNRC, spoke from prepared testimony in support of HB 365 (Exhibit #4).

Mr. Leonard Blixrud, TRWUA, stated the water diverted flows north east and forms an aquifer in the Farmington area. He said prior to irrigation, this area would be a desert unable to sustain

anything.

Mr. Bob Lane, FWP Legal Counsel, spoke from prepared testimony in support of HB 365 (Exhibit #5). He said Section 3 should be removed from the bill.

Mr. Stan Bradshaw, Montana Trout Unlimited (MTU), stated the support of his organization and Montana Wildlife Federation for HB 365. He said HB 365 "makes sense" because not enough water is in the Teton River. He noted DNRC's reservations would be suspended if HB 365 were passed. Mr. Bradshaw concluded Section 3 of the bill was unnecessary and urged the Committee to remove the section.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Keating asked Mr. Richard if, at one time, area ranchers used the Teton River as a primary water source. Mr. Richard replied yes and added many ranchers still do. He said the water must be treated before it can be used as drinking water.

Senator Weeding asked Representative Rose if Freezeout Lake drained the Fairfield Bench. Representative Rose replied Senator Weeding was correct.

Closing by Sponsor:

Representative Rose closed his remarks on HB 365.

HEARING ON HB 395

Opening Statement by Sponsor:

Representative Mike Foster, House District 32, stated HB 395 would close the upper Missouri River Basin to further issuance of any permits until adjudication is completed. He said the upper Missouri River Basin includes the Missouri River and all its tributaries above the Morony Dam near Great Falls. According to Representative Foster, HB 395 would recognize that the Missouri River Basin is over appropriated.

Proponents' Testimony:

Ms. Holly Franz, Montana Power Company (MPC), submitted to the record a fact sheet on the proposed closure of the Missouri River Basin (Exhibit #6). She said the primary purpose for basin closure is to protect existing water users' rights by prohibiting applications for additional users. Ms. Franz stated MPC has been concerned for decades about overuse of the Missouri River Basin and has objected to the issuance of additional permits. She concluded an in-depth study by DNRC determined there was "no water available in the Missouri River Basin".

Ms. Jo Brunner, MWRA, stated her support for HB 395.

Mr. Bob Lane, FWP Legal Counsel, spoke from prepared testimony in support of HB 395 (Exhibit #7).

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Swysgood asked Ms. Franz why stock water and domestic use had not been exempted from HB 395. Ms. Franz replied permit applications for non-consumptive uses, a permit to which MPC would not object, were reviewed on a case-by-case basis by DNRC. She said permit applications, in general, were being stayed.

Senator Swysgood asked Ms. Franz if MPC would support an amendment to exempt stock water and domestic uses from HB 395. Ms. Franz replied no.

Closing by Sponsor:

Representative Foster closed his remarks on HB 395.

HEARING ON HB 488**Opening Statement by Sponsor:**

Representative Ray Brandewie, House District 49, stated HB 488 would direct the DSL to establish a salvage timber program to make use of salvage timber before it decays to the point it has

no economic value. He said HB 488 would not "put salvage timber ahead of green timber sales" but would elevate the status of salvage timber as a valuable resource. Representative Brandewie noted salvage timber would be a good source of revenue for small independent loggers.

Proponents' Testimony:

Mr. Don Allen, Montana Wood Products Association (MWPA), stated a progressive salvage program is important to the health of Montana's forests. He said 95 percent of the American public favors timber salvage programs. Mr. Allen noted the U.S. Forest Service recently issued a directive to states requesting them to "put more emphasis on salvage resources". He asked the Committee to reaffirm the importance of salvage timber and to create a state policy by passing HB 488.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

None.

Closing by Sponsor:

Representative Brandewie asked either Senator Swift or Senator Swysgood to carry HB 488 on the Senate floor should it pass.

HEARING ON HB 503

Opening Statement by Sponsor:

Senator Lorents Grosfield, Senate District 41, secondary sponsor of HB 503, opened the hearing on HB 503 for Representative Bob Ream, sponsor of HB 503. Senator Grosfield stated HB 503 would change "and" to "or" on page 3, line 5 to amend the definition of timber sale in the Streamside Management Zone (SMZ) Act. He concluded HB 503 would clarify existing language only.

Proponents' Testimony:

Ms. Janet Ellis, Montana Audobon Legislative Fund, stated HB 503 would "fix a loophole in the law and require forestation". She said this clarification would keep people from "skirting the intent of the law".

Mr. Don Allen, MWPA, stated HB 503 would address the concerns of landowners who were unclear as to whether existing law applied to them.

Mr. Jeff Jahnke, DSL, stated his support for HB 503.

Mr. Stan Bradshaw, MTU, stated his support for HB 503.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Swift stated he recalled the final rules for the SMZ Act specifically exempted "stand improvement regeneration" from the law. He asked Mr. Jahnke if DSL had discussed HB 503 with industry representatives and landowners. Mr. Jahnke replied DSL had spoken with all concerned parties regarding HB 503.

Closing by Sponsor:

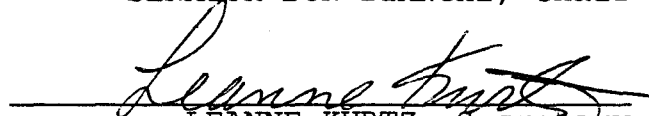
Senator Grosfield closed his remarks on HB 503.

ADJOURNMENT

Adjournment: 5:17 p.m.



SENATOR DON BIANCHI, Chair



LEANNE KURTZ, Secretary

DB/rc

ROLL CALL

SENATE COMMITTEE NATURAL RESOURCES DATE 3/22

NAME	PRESENT	ABSENT	EXCUSED
Sen. Bianchi	✓		
Sen. Hockett	✓		
Sen. Bartlett	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Keating	✓		
Sen. Kennedy	✓		
Sen. Swift	✓		
Sen. Suysgood	✓		
Sen. McLernan	✓		
Sen. Treitz	✓		
Sen. Weeding	✓		
Sen. Weldon	✓		

Northern Plains Resource Council

SENATE NATURAL RESOUR

EXHIBIT NO. 1

DATE 3/22/93

BILL NO. SJR 29

**TESTIMONY OF RICHARD PARKS ON BEHALF OF THE
NORTHERN PLAINS RESOURCE COUNCIL IN SUPPORT OF SJR 29
AN INTERIM ENVIRONMENTAL QUALITY COUNCIL STUDY OF
THE MONTANA WATER QUALITY ACT'S NON-DEGRADATION POLICY**

Monday, March 22, 1993

Chairman Bianchi, members of the committee, for the record my name is Richard Parks. I own and operate a fly fishing outfitting business in Gardiner, and I am the current chairman of the Northern Plains Resource Council. I am speaking on behalf of NPRC today in support of SJR 29. NPRC believes that passage of SJR 29 is a prudent and conservative approach to the complicated and contentious issues related to the Montana Water Quality Act's nondegradation policy.

NPRC participated in good faith in the subcommittee working group on SB 401. We can live with the limited procedural compromise amendments arrived at through that process. However, those negotiations clearly demonstrated that many major issues remain unresolved, and that the full ramifications of these issues have not yet been determined.

It is clear that both the Department and the mining industry support including provisions in SB 401 that would substantially weaken the Water Quality Act. Therefore, unless this committee amends SB 401 to include only the compromise amendments, we will oppose SB 401 in favor of SJR 29.

NPRC believes that even if SB 401 passes in its current controversial form, an EQC study would be essential to address the many unanswered questions that have been raised about this bill.

We also believe the Senate should support SJR 29 in order to preserve an alternative to SB 401 in case the House adds amendments that would further weaken the Water Quality Act. This committee--through its experience with SB 320--knows all too well the likelihood of that possibility.

I would like to discuss some major issues raised by SB 401, and why NPRC believes they would more appropriately be addressed through an EQC study:

1) MIXING ZONES

NPRC's position is that the current law, and the Montana Constitution, prohibit new or increased sources of pollution from obtaining mixing zones, especially mixing zones that allow violations of water quality standards. SB 401 would explicitly allow such mixing zones.

SJR 29 would allow a thorough review and analysis of how mixing zones can or can not be used in the implementation of the Montana Water Quality Act. There are several important reasons why mixing zones should be addressed through an EQC study:

1) SB 401's provision for mixing zones could be struck down as being unconstitutional in upcoming court cases. An EQC study would allow the Department to continue authorizing mixing zones under its current interpretation of the law, while developing alternatives that would meet constitutional requirements.

2) An EQC study would provide the time to look at the significant differences between groundwater and surface water mixing zones. The Department could complete the implementation guidance policy for ground water mixing zones which it has only just begun to draft. The Department would also be provided a forum through which to solicit public comment on the drafting of its guidance policy for ground water mixing zones. An EQC study could help develop a consensus on this controversial issue, in contrast to SB 401's mixing zone provision which will remain highly controversial and may be found unconstitutional.

2) REPEALING THE CURRENT NONDEGRADATION POLICY

This issue is the linch pin of the debate over SB 401. All of the other major issues that have been debated in SB 401 are inextricably linked to whether the legislature jettisons the two paragraphs currently contained in section 303. [See page 9, Section 3, of SB 401]

Instead of "clarifying" the procedures, as the Department claims, this total rewrite of the current nondegradation policy would actually repeal and drastically weaken the current law. We believe this language is unconstitutional, because it removes the current requirement in subsection 2

of section 303 that requires new or increased sources of pollution "to provide the degree of waste treatment necessary to maintain...existing high water quality."

The Department would also have you believe that the world as we know it will come to a screeching halt if SB 401 does not pass with the current nondegradation policy totally stricken from the law, and replaced with the new language in SB 401. Again, this is simply not the case. The Department already claims to have the authority to grant mixing zones under the current law. If SB 401 were to fail, the Department would simply continue to grant mixing zones under existing rules.

The Department will say that it must have the discretion to grant mixing zones for new or increased sources of pollution, because it's impossible to permit such sources without violating water quality standards. Yet the EPA has informed us that the waste water treatment systems for the metro Denver area and the Coors brewery are both required by their permits to meet standards "at the pipe" for their discharges. EPA said that zero discharge permits are common, especially in the West where such a stringent standard is absolutely necessary to protect many low flow rivers and streams that don't have the capacity to dilute "mixing zones". Mr. Jensen of MEIC has also mentioned the Lake Tahoe basin as an example of where accelerated development has necessitated the implementation of a zero discharge policy in an entire basin.

Yet the Department will say, with all confidence, that it is virtually impossible to require zero discharge permits in Montana. Again, the Department's emphasis is to ensure the status quo, and to ignore the Montana Constitution. Do we in Montana really believe that we can afford business as usual when it comes to protecting our unique water resources? Is Billings that far behind Denver? Is the accelerated development in the Flathead, Gallatin, Paradise or Helena Valleys that far behind Lake Tahoe? We think not. SJR 29 would provide the necessary time and resources to examine thoroughly the controversial and highly technical issue of what degree of treatment is feasible, and at what cost.

In closing, I would like to reference a recommendation from the State Water Plan explaining why the plan did not include water protection provisions for hard rock mining:

Due to the complexity...of this issue..., amendments to the Metal Mine Reclamation Act are not recommended at this time. Recognizing the depth and importance of mining-related concerns, the following...options...should be taken up for further study in a future state water planning cycle *or by a legislative body as appropriate. [Emphasis added]* [Montana Water Plan (proposed), August 7, 1992., p. 9]

The options referenced were five specific legislative proposals to better protect water resources from hard rock mining that were rejected by the State Water Plan Advisory Council. After addressing various issues through both the state water planning process and the EQC, NPRC strongly believes that the EQC would provide the best forum for making real progress on an issue as broad and complex as the nondegradation policy. We find it ironic that after two years of study the State Water Plan Advisory Council found the narrow issue of better protecting water resources from hard rock mining as "too complex" to make legislative recommendations, yet, the Department of Health finds it appropriate to draft, introduce and try to pass sweeping changes in the Water Quality Act--with no formal public review--after a mere month of drafting SB 401 prior to the 1993 Legislature.

The contentious provisions of SB 401, if passed, will have significant impacts on many people throughout the state. NPRC urges the Senate Natural Resources Committee to approach the broad and complex issues of water nondegradation with the same caution displayed by the State Water Plan Advisory Council on the issue of water protection from mining. NPRC urges a "do pass" recommendation on SJR 29.

Thank you for your consideration. I would be happy to try to answer any questions the committee members might have.

Sincerely,

Richard Parks, Chair
Northern Plains Resource Council

Tawney & Dayton

Attorneys At Law

Henry R. Crane (MT, CO, NC)
Peter S. Dayton (MT, IL)
Grant D. Parker (MT, WA)
Philip D. Tawney (MT)

Peter Michael Meloy (MT)
of Counsel

March 22, 1993

607 S.W. Higgins Avenue
P.O. Box 3658
Missoula, Montana 59806-3658

Telephone: (406) 542-5000
In Montana: (800) 823-6226
FAX: (406) 542-8920

Senate Natural Resources Committee
Montana's 53rd Legislative Assembly
Capitol Station
Helena, MT 59620

SENATE NATURAL RESOURCES

EXHIBIT NO. 2

DATE 3/22/93

BILL NO. SJR 29

SB 401 - Changes to Montana's
Water Quality Nondegradation Statute

Dear Natural Resource Committee Members:

We are writing to urge you to reject efforts to weaken the state's Water Quality Act provisions which protect Montana's nationally-recognized high quality waters from degradation.

Montana is experiencing renewed economic growth and vitality because it has clean water and good overall environmental quality. We represent a number of growing and successful businesses in Montana that would not be here if it wasn't for our clean water and our high environmental quality. The changes being proposed by the Department of Health and the new administration will result in a lowering of water quality. We believe these proposed changes send the wrong message to Montanans and others interested in investing in our state, and in the long run, will be a detriment to our economy. Montana's reputation for world-renowned trout fishing will be damaged if we weaken existing water quality laws.

We represent Northern Plains Resource Council in some of its efforts to protect Montana's water quality. Based on this experience, we believe that the radical statutory changes in SB 401 concerning mixing zones and nondegradation waivers should be defeated. The bill raises fiscal and constitutional questions that could eliminate the ability of the Department of Health and Environmental Sciences to implement this program.

Northern Plains Resource Council and other citizen organizations have met with the Department of Health and the mining industry, and have agreed to procedural changes to improve the nondegradation administrative process. This compromise should be adopted, and the controversial proposed changes to mixing zones and degradation by new and expanded sources should be submitted to the Environmental Quality Council for an interim study.

Natural Resources Committee
Page 2
March 22, 1993

In 1971 the Montana Legislature adopted a nondegradation policy that prohibited new and increased sources of pollution from degrading Montana's high quality waters.

We believe that passing the nondegradation waiver provisions in SB 401 would constitute an unconstitutional legislative act. Article IX, Section 1 of the Montana Constitution prohibits the Legislature from allowing any degradation of Montana's high quality waters. The proper method for allowing such degradation, as required by the the Montana constitution, is to submit the issue to a vote of the people.

The history of the Constitutional Convention supports the position that the Montana Legislature cannot provide for the degradation of Montana waters. The comments on the majority proposal clarify that this section applies to water, and that Montana's waters cannot be degraded:

Subsection (3) mandates the legislature to provide adequate remedies to protect the environmental life support system from degradation. The committee intentionally avoided definitions to preclude being restrictive and the term "environmental life support system" is all encompassing including, but not limited to air, water, and land and whatever interpretation is afforded this phrase by the legislature and courts; there is no question that it cannot be degraded.
[Emphasis added.]

Vol. II, Proceedings of Constitutional Convention of State of Montana, pg. 555 (1971-1972). This prohibition on degradation is further supported by comments of Delate C.B. McNeil from Polson, who stated that, "our intention was to permit no degradation of the present environment of Montana and affirmatively require enhancement of what we have now." *Vol. IV, Proceedings of Constitutional Convention of State of Montana, pg. 1205 (1971-1972).*

We ask you to reject the recent efforts to expressly allow pollution and degradation of our waters. Instead, join us in supporting the submission of this issue to the Environmental Quality Council for an interim study.

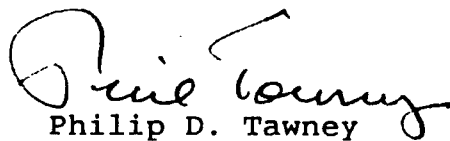
Natural Resources Committee
Page 3
March 22, 1993

EXHIBIT #2
DATE 3-22-93
SJR-29

If you have any questions regarding these matters, please
feel free to call.

Sincerely,

Tawney & Dayton


Philip D. Tawney


Grant D. Parker

GDP/dkc

enclosure

cc: Governor Racicot

Northern Plains Resource Council

SENATE NATURAL RESOURCES

EXHIBIT NO. 3

DATE 3/22/93

BILL NO. SJR 29

TESTIMONY OF JEANNE CHARTER ON BEHALF OF THE BULL MOUNTAIN LAND OWNERS ASSOCIATION AND THE NORTHERN PLAINS RESOURCE COUNCIL IN SUPPORT OF SJR 29, AN INTERIM ENVIRONMENTAL QUALITY COUNCIL STUDY OF THE MONANTA WATER QUALITY ACT'S NON-DEGRADATION POLICY

Monday, March 22, 1993

Chairman Bianchi, members of the committee, for the record my name is Jeanne Charter. My husband and I own and operate a ranch in the Bull Mountains north of Billings. I am speaking today on behalf of both the Bull Mountain Landowners Association and other NPRC members who live in the coal fields of Eastern Montana. I would like to raise some concerns about what passage of SB 401 will mean for farmers and ranchers, and why we think an EQC study is prudent alternative to passing SB 401 in its current form.

1) DEFINITION OF HIGH QUALITY WATERS

The Department has agreed to support a proposed industry amendment that would drastically weaken SB 401's current definition of high quality waters. That amendment would lower Montana's nondegradation policy to the "fishable/swimmable" goals of the federal Clean Water Act, thus tying Montana's nondegradation policy to the federal act's anti-degradation policy. This federal policy is based on protecting beneficial uses, not on protecting high quality waters per se. Additionally, the federal act does not protect groundwater at all. The most drastic implication of this change for NPRC members--many of whom live in Eastern Montana--is that it would dramatically reduce the current protection afforded groundwater under the Montana Water Quality Act and the Montana Constitution.

The Department's eager support of this amendment, despite strong opposition from conservationists, and despite its potential unconstitutionality, is typical of the Department's attitude throughout its efforts to draft and pass SB 401. That attitude has been:

- 1) to get language in the bill to legitimize the status quo;
- 2) not to worry about groundwater; and

3) not to worry about the Montana Constitution.

SJR 29 would provide the opportunity for all interested parties to explore the implications of different definitions of high quality waters, and to look closely at whether a proposed definition is practical and constitutional.

2) "NONSIGNIFICANT" DEGRADATION

SB 401's current definition of high quality waters already includes a significant loophole. As drafted, SB 401 would exempt from Montana's nondegradation policy an unknown number of polluting activities that the Department and the Board of Health will be allowed to classify as "nonsignificant". The Department and the Board have already used their discretionary authority to exclude a whole list of activities from having to obtain groundwater discharge permits.

While minimal progress was made in the SB 401 subcommittee working group to define "significant" degradation, it is still the department's intent to include mixing zones that violate water quality standards under the definition of "nonsignificant" degradation. The issues involved are too complex and too contentious--and the ramifications too uncertain--to include this provision in SB 401 at this late stage in the process. NPRC is willing to continue the dialogue on what is nonsignificant and significant degradation, but we believe that an EQC study is the most appropriate forum in which to do so.

SJR 29 would provide the opportunity:

1) to review the status of the extensive groundwater exemptions currently contained in state rules;

2) to explore options to bring groundwater polluting activities under the requirements of the Montana Water Quality Act and its nondegradation policy--including an assessment of whether the Department of Health has the resources necessary to repeal the groundwater exemptions and require groundwater discharge permits, or whether other agencies can do the job;

3) to review the working relationships between the Department of Health and the other various agencies regulating groundwater discharges; and

4) to make thoughtful recommendations on appropriate statutory or regulatory changes to improve overall implementation of the nondegradation policy in relation to groundwater protection.

3) NONDEGRADATION AND NONPOINT SOURCES OF POLLUTION

Another major unresolved issue addressed in SJR 29 is how implementation of the nondegradation policy will affect nonpoint sources of pollution. Last summer the Board of Health passed two major rule changes that bring nonpoint sources explicitly under the nondegradation policy.

One new rule [16.20.704 (6) ARM] says that the procedures of the nondegradation review process "shall apply to owners and operators of...nonpoint sources of pollution." NPRC asked the Department how it would determine which nonpoint sources of pollution would have to petition for exemptions to the nondegradation policy, and how the Department would process such exemptions. The Department could not explain how it would do either of these things.

Another new rule [16.20.702 (2), ARM] states that before authorizing a degradation exemption, the Board of Health

shall assure that within the basin upstream of the proposed degradation there shall be achieved the highest statutory and regulatory requirements for all point and nonpoint sources [of pollution].

We asked the Department last December how they will make a determination of whether all point and nonpoint sources of pollution will meet these requirements, and again, the Department could not explain how they will do this. Our concern is that SB 401 will clear the way for concentrated economic interest to enjoy lax enforcement, and we'll have to make up the difference. We want a policy where everyone does their fair share, and an EQC would provide the forum where this can be thought out.

The Department has not determined how it will implement either of these rules under the current law, let alone how it will implement them under SB 401. In either case, it would certainly make sense to conduct an EQC study to look at these issues regardless of whether SB 401 passes or the form in which it may pass.

Thank you for your consideration. I would be happy to try to answer any

questions the committee members might have.

Sincerely,

Jeanne Charter
Bull Mountain Landowners Association
Northern Plains Resource Council

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON HOUSE BILL 365, FIRST READING

BEFORE THE SENATE NATURAL RESOURCES COMMITTEE

MARCH 22, 1993

A BILL FOR AN ACT ENTITLED: "AN ACT CLOSING THE TETON RIVER BASIN TO FURTHER CONSUMPTIVE APPROPRIATIONS, EXCEPT APPROPRIATIONS FOR GROUND WATER, CERTAIN STORAGE PROJECTS, AND DOMESTIC, MUNICIPAL, AND STOCK USES; NULLIFYING CERTAIN WATER RESERVATIONS IN THE TETON RIVER BASIN; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND APPLICABILITY DATE."

The Department of Natural Resources and Conservation supports this proposed legislation which closes the Teton River Basin to applications to appropriate surface water supplies for consumptive uses.

The department estimates that the Teton River Basin is capable of producing 250,000 feet of water in an average year. At the same time, 2,305 pre-1973 surface and ground water rights have been filed for the Teton River Basin. The amount of flow involved with these claims is 78,000 cubic feet per second or 2,300,000 acre-feet per year. Much of the claimed water diverted in the basin eventually returns to the system and is re-used. Yet the large discrepancy between the claimed rights and the available water supply cannot be ignored. In the face of this extensive level of claimed water use it is not surprising that the department has issued only 28 permits for surface water appropriation in the basin since the passage of the Water Use Act in 1973. Only one permit has been issued in the past nine years. Based on this past record and findings of recent water availability studies of the department, it is unlikely that any applicants for future surface water appropriations can demonstrate they will not adversely affect the existing water right holders.

In summary, the department supports House Bill 365. Coupled with the comprehensive management program inherent in Board Order establishing water reservations in the basin, it provides assurances that the best interests of all water users in the basin can be protected.

SENATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE 3/22/93
BILL NO. HB 365

SENATE NATURAL RESOURCES

EXHIBIT NO. 5

DATE 3/22/93

BILL NO. HB 365

HB 365
March 22, 1993

**Testimony presented by Bob Lane, Dept. of Fish, Wildlife & Parks
before the Senate Natural Resources Committee**

The department supports the concept of a basin closure in the Teton River basin.

Our concern is with the impact of closures in the upper Missouri River Basin on the instream water reservations granted by the Board of Natural Resources and Conservation on June 30, 1992.

These reservations were granted for fisheries, recreation and water quality with a priority date of July 1, 1985. Because of a condition put on the reservations by the Board, the reservations for instream purposes and for irrigation are partially nullified.

In testimony on two Senate bills already heard by this committee and in testimony on two closure bills before a House committee, I have explained the department's concern with the impacts of the Board's condition and argued that it was now clear the Board's condition was not good public policy. However, both the House and Senate have decided so far to defer to the Board on this issue. The department can accept this decision. It preserves the status quo of the reservations as granted by the Board.

However, this bill has an additional section. The department is

troubled by Section 3 that codifies the Board's condition. The department prefers that Section 3 be eliminated so that decisions on reservations will be left to the Board.

**UPPER MISSOURI RIVER BASIN CLOSURE
Questions and Answers**

Q: What is a basin closure?

A: A basin closure prevents the Department of Natural Resources and Conservation (DNRC) from issuing new water use permits in highly appropriated basins. Mont. Code Ann. § 85-2-319 allows either the legislature or DNRC to close a basin. Basin closure does not affect existing water rights nor does it affect the ability to make changes to existing water rights. Basin closure only affects new, proposed water uses.

Q: How is the Upper Missouri River Basin defined?

A: The Upper Missouri River Basin includes the Missouri River and all of its tributaries above Morony Dam near Great Falls.

Q: Why is basin closure being proposed in the Upper Missouri River Basin?

A: The basin closure proposal is largely a result of the recent water reservation process conducted in the Upper Missouri River Basin. Evidence submitted at the water reservation hearings clearly showed that the Upper Missouri River Basin is already overappropriated. The following evidence was introduced at the reservation hearings:

- * Agricultural groups introduced testimony showing that the Beaverhead, Red Rock, Big Hole, Ruby, Boulder, Jefferson, Gallatin, East Gallatin, Smith, Dearborn and Sun Rivers are all fully appropriated based on agricultural claims alone.
- * The Montana Power Company and the Bureau of Reclamation have large water rights at their dams on the Missouri River which are rarely satisfied except in occasional years during high spring flows.
- * DNRC prepared a water availability computer model which confirmed that no additional water is available in the Upper Missouri River Basin except in occasional years during high spring flows.

There is no additional water available for appropriation in the basin. Existing water right holders should not be forced to continually expend time and money to protect their water rights against new appropriations when there is no additional water.

Q: Is the basin closure proposed in the Upper Missouri River a permanent, total closure?

A: No, the closure is neither permanent nor total. The basin closure will last only until the basin has been adjudicated by the Montana Water Court. If the adjudication confirms that there is no additional water for new uses, the basin closure can be extended. During the period of the closure, groundwater wells, nonconsumptive uses of water, and storage projects utilizing high spring flows will be allowed.

Q: Will the basin closure affect the water reservations granted in the Upper Missouri River Basin?

A: The closure will suspend the water reservations granted to the Department of Fish, Wildlife and Parks (DFWP), the Department of Health and Environmental Sciences (DHES), the Bureau of Land Management (BLM), and various conservation districts. These water reservations contain a condition that the reservations "shall have no force and effect in any basin... for the period of time and for any class of uses for which permit applications are precluded."

The true value of these reservations are debatable since they have a very junior 1985 priority date. At the very best, the reservations may prevent new uses and diversions. To do so, however, the reservation holders must file objections to new permits and expend the time and money necessary to enforce their water reservations. This same objective can be accomplished in a much simpler and direct method by closing the basin. Basin closure will protect existing water users from further reductions in the water supply and will protect stream flows by preventing additional water diversions.

Prepared by Holly Franz for
The Montana Power Company
January 4, 1993
Revised March 15, 1993

EXHIBIT #6
DATE 3-22-93
HB-395

TESTIMONY IN SUPPORT OF HOUSE BILL 395

My name is Holly Franz. I am testifying on behalf of the Montana Power Company (MPC) in support of HB 395. HB 395 will close the Upper Missouri River basin to further appropriations until the basin is adjudicated.

HB 395 is a basin closure bill. The primary purpose of a basin closure is protection of existing water rights. Basin closure protects existing water rights by prohibiting new junior water uses and by eliminating the need to spend time and money objecting to new uses on streams which are already overappropriated.

There has been much discussion about the various "motives" for supporting closure bills. The Montana Power Company's (MPC) motive in supporting HB 395 is to protect its senior water rights. MPC has eight dams on the Madison and Missouri River. The farthest upstream dam is Hebgen, near West Yellowstone, and the farthest downstream is Morony Dam near Great Falls. The Upper Missouri River Basin, as defined in House Bill 395, includes the entire Missouri River and its tributaries above Morony Dam. This includes the Gallatin, Madison, and Jefferson Rivers. The priority dates for MPC's water rights on the Missouri River range from 1892 to 1955. MPC's existing water rights, particularly its 7,100 cfs right at Holter Dam and its 10,000 cfs right at Cochrane Dam, are satisfied only in occasional years during high spring runoff.

For years, MPC has alleged that the Missouri River is fully appropriated. In the 1940s, MPC brought a lawsuit seeking to enjoin further diversions from the Missouri River upstream from Morony Dam. The Montana U.S. District Court ruled in 1942 that the Missouri River was fully appropriated. This case was appealed and overturned on separate jurisdictional grounds.

In 1977, MPC began to object to all new permit applications for consumptive use--again arguing that the Missouri River was fully appropriated. Notwithstanding MPC's objections, DNRC continued to issue new permits. MPC and the Bureau of Reclamation appealed the new permits to the district court. The district court ruled in favor of MPC and declared the new permits void. MPC, the Bureau and DNRC then entered into an agreement allowing these permits to be used until MPC and the Bureau's water rights are adjudicated. Most, if not all of the consumptive use permits issued after July 1, 1985, are subject to MPC's objection and will be declared void if MPC's water rights are adjudicated as claimed.

To further protect its water rights, MPC filed an objection to all of the consumptive water reservations applications in the Missouri River above Morony Dam. Despite MPC's objections, several municipalities and conservation districts were issued consumptive water reservations. DFWP and DHES also received instream flow

water reservations. Reservations were also granted to BLM and the Bureau.

The water reservation process did more than produce the famous (or infamous) closure condition about which you have heard so much. The reservation provided new substantive, indepth evidence of water availability in the Upper Missouri. You may remember Gary Fritz's testimony on other basin closure bills in which he stated there is no indepth analysis of water availability in the basins suggested for closure. This is not true in the Upper Missouri.

As part of the water reservation proceeding, DNRC developed a water availability computer model for the Upper Missouri River basin. This model considered historic stream flows, acres irrigated, irrigation efficiency, return flow and other relevant factors to determine water availability. The model determined that except for certain years during high spring flows, there is no further water available for appropriation in the Upper Missouri River basin. The model's results are consistent with MPC's water use records, which MPC has maintained for as long as its dams have existed.

MPC is not, of course, the only water user on the Missouri River. During the water reservation hearing, the agricultural objectors introduced evidence that many streams in the Upper Missouri, including the Beaverhead, Red Rock, Big Hole, Ruby, Boulder, Jefferson, Gallatin, East Gallatin, Smith, Dearborn and Sun Rivers, and many other tributaries are fully appropriated based on agricultural water rights alone. There is no question that the Upper Missouri is highly appropriated. MPC has been arguing this for years. It's time to close the basin.

As you have previously heard, basin closure is complicated by the board's closure condition. Under this condition, all of the reservations issued, except for municipalities, will be suspended "for the period of the closure and for the uses closed." House Bill 395 has no impact on the Board's order. As a result of the Board's condition, however, the passage of House Bill 395 will temporarily suspend the reservations of the DFWP, DHES, BLM, and the CDs. In other words, DFWP and the others will not be able to object to new consumptive surface water rights. Under basin closure, however, there will be no consumptive permits to object to because none can be issued. DFWP should be able to object, based on its reservation, to any water use excepted from the closure such as groundwater, nonconsumptive uses, storage during high spring flows, and temporary emergency appropriations.

At the reservations hearings, Pat Graham, the current DFWP director, testified that DFWP wanted a reservation for two reasons: to protect the status quo and to reserve water in case water becomes available in the future. DFWP can achieve both of these goals through basin closure. Basin closure maintains the status

EXHIBIT #6
DATE 3-22-93
HB-395

quo by preventing any additional water diversions. Since the closure only lasts until the adjudication is complete, it also allows DFWP to protect water which may become available in the future. If there is unappropriated water available in the basin after adjudication, the closure will terminate and DFWP's reservation will be reinstated.

During the basin closure, DFWP may lose the ability to object to changes made to existing consumptive surface water rights. In the water reservation hearings, Liter Spence of DFWP testified that from 1978 through October 1991, DFWP objected to only two change applications in the Yellowstone River basin. Even when DFWP objected, it usually did not request that the change be denied, but rather sought a specific condition recognizing DFWP's water reservation. The positive impacts of basin closure clearly outweigh any possible benefit from DFWP filing an occasional objection to changes in existing water rights.

The Upper Missouri River basin is fully appropriated and should be closed to new consumptive, surface water permits. MPC urges your support of HB 395.

HB 395
March 22, 1993

**Testimony presented by Bob Lane, Dept. of Fish, Wildlife & Parks
before the Senate Natural Resources Committee**

The department supports the concept of a basin closure in the Missouri River basin above Morony Dam.

Our concern is with the impact of closures in the upper Missouri River Basin on the instream water reservations granted by the Board of Natural Resources and Conservation on June 30, 1992.

These reservations were granted for fisheries, recreation and water quality with a priority date of July 1, 1985. Because of a condition put on the reservations by the Board, the reservations for instream purposes and for irrigation are partially nullified.

In testimony on two Senate bills already heard by this committee and in testimony on two closure bills before a House committee, I have explained the department's concern with the impacts of the Board's condition and argued that it was now clear the Board's condition was not good public policy. However, both the House and Senate have decided so far to defer to the Board on this issue. The department accepts this decision. It preserves the status quo of the reservations as granted by the Board.

The department would strongly resist any attempts to amend this closure bill to completely eliminate the water reservations granted

by the Board. I raise this point because SB 282 initially had a section that did completely undo the work of the Board by eliminating the water reservations in the Jefferson and Madison River basins. This committee amended that section out.

DATE 3/22/93

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SJR 29, HB 365, HB 395, HB 488, HB 503

Name	Representing	Bill No.	Check One	
			Support	Oppose
Bill Recheff		HB365	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Marie Recheff		HB365	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Diane Walker		HB 365	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Richard Vion		HB365	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jeff J. Lake	DSL	HB503	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jeanne Charin	NPRC Bull Mt Landowners	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Kim Wilson	Clark Fork Coal	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Teresa Erickson	NPRC	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
David Price	Bear Cr Council	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pat Clark	Cottwood Resource Comd	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Robin Cunningham	FOAM	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Engene Jones	Sierra Club	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Stan Bradshaw	M.T. TU.	SJR 29 HB 365 HB 395	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Paula	CRO/NPRC	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Andrea Stauder	NPRC	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Linda Larson	NPRC	SJR 29	<input checked="" type="checkbox"/>	<input type="checkbox"/>

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3/22/93

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SJR 29, HB 365, HB 395, HB 488, HB 503

Name Representing Bill No. Check One Support Oppose

Name	Representing	Bill No.	Support	Oppose
<i>[Faint]</i>	<i>[Faint]</i>	SJR 29	X	
CESAR HERNANDEZ	CABINET RESOURCE GRP	SJR 29	X	
MICHAEL JAMISON	Mikelson Land Co.	SJR 29	X	
Jim Jensen	MEIC	SJR 29	✓	
Richard Parks	NPRC	SJR 29	✓	
Peggy Thorne	WETA	SJR 29	✓	
Janet Ellis	MT Audubon Leg Fund	SJR 29 HB 503	✓ ✓	
Jim Reardon	MT. Wildlife Fed	SJR 29 HB 365 HB 503	✓ ✓ ✓	
Stan Bradshaw	MT. T.U.	HB 503	✓	
Leo Berry	Entech	SJR 29	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY