

EPA Statements on Montana's Natural Condition Provision
February 2014

Exhibit No. 2Date 2/18/15Bill No. SB 325

MCA 75-5-306. Purer than natural unnecessary -- dams. (1) It is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements established under this chapter are met.

(2) "Natural" refers to conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil, and water conservation practices have been applied. Conditions resulting from the reasonable operation of dams at July 1, 1971, are natural.

ARM 17.30.602(19) "Naturally occurring" means conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied. Conditions resulting from the reasonable operation of dams in existence as of July 1, 1971, are natural.

March 23, 1994 Letter to Montana Regarding the February 24, 1994 Department Advisory Opinion (Excerpt)

EPA has no problem with the concept that "(i)t is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream..." In this context, however, our view is that "natural condition" is, by definition, a condition provided by nature without human-caused changes. As a result, the intent of any definition of natural should be to draw a distinction between natural and human-caused sources of impacts. The distinction is important because: 1) it reflects the congressional objective to restore the nation's waters to a natural ecological condition defined as a measure of their chemical, physical and biological integrity, and 2) it makes a regulatory distinction between human-caused problems which can be regulated and natural sources of impacts which generally are not regulated. A number of States include the term "natural" somewhere in their water quality protection programs. Implementation of that term is accomplished by using water bodies that are *least* impaired by human activities as the reference condition for "natural" conditions. We believe that Montana could better address this "natural" issue by similarly separating implementation issues from the definition of the term. ...

EPA strongly urges Montana to: (1) withdraw the 1994 opinion, and (2) assure that all MPDES permits ensure compliance with all water quality standards, with the term "naturally occurring" to be construed only to mean conditions existing without human intervention or, in the case of runoff or percolation, conditions over which humans have no control or over which all reasonable conservation practices have been applied.

January 26, 1999 Action Letter

Definition of "Naturally Occurring" in 17.30.602(17) and "Natural" in MCA 75-5-306(2).

Comment: These Sections define "naturally occurring" and "natural" as "... conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied. Conditions resulting from dams in existence as of July 1, 1971 are "natural." These provisions have been in the State's statute and water quality standards for some time and have been approved in past Regional actions. These provisions are not, therefore, revised or new water quality standards subject to approval/disapproval action by the Region. **Nevertheless, these are provisions which EPA now believes are unacceptable in their current form, and we recommend that they be revised in this legislative session and the anticipated regulatory process that would follow the legislative session.**

The appropriateness of Montana's definition of "natural" was addressed by the Region in 1994 in response to a Department legal opinion which interpreted the definition of "natural" in 75-5-306(2) to mean the condition of State waters extant in 1955, the year Montana's water quality statute was enacted. In a March 23, 1994 letter to the Department, EPA explained that the State's definition of "natural" was inconsistent with the intent of the CWA, and would, among other things, remove the basis for remediation of historically damaged waters. Our principal objection to this new interpretation was that historically degraded waters would be declared "natural," and any basis for future remediation would be effectively removed. In our view, that interpretation and the current language in the statute and regulation ignore the fundamental water quality restoration goal inherent in the objective of the CWA. As we explained in our March 23, 1994 letter, EPA has no problem with the concept that "(i)t is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements established under this chapter are met." Our problem with the definitions and their interpretation was then and is now that the "natural condition" is, by definition, a condition provided by nature without human-caused changes. The "natural condition" is not one that either occurred prior to 1955 or is secured by application of best management practices.

We readily acknowledge that there are human-caused changes that are very likely irretrievable, but such conditions should not be addressed by declaring them to be "natural." A definition of "natural" should draw a distinction between natural and human-caused sources of impacts. The distinction is important because: 1) it reflects the Congressional objective to restore the nation's waters to a natural ecological condition defined as a measure to their chemical, physical and biological integrity, 2) it makes a distinction between human-caused problems which can be regulated and natural sources which cannot, and 3) it provides a clear basis of intent for the implementation of the water quality standards, allowing a distinction to be made between "natural" and "irretrievable human-caused conditions." It is not uncommon for States to include a definition of "natural" somewhere in their water quality standards or permitting programs. Because this is something of a national issue, EPA's Office of Science and Technology issued a guidance memorandum, "Establishing Site Specific Aquatic Life Criteria Equal to Natural Background," to promote and ensure a measure of national consistency on this issue (Memorandum from Tudor T. Davies to Regional Water Management Division Directors, November 5, 1997). The guidance makes points similar to the Region's 1994 letter concerning the relationship of natural background to "non-anthropogenic sources" and explains how States are to implement their "natural" provisions when deriving site-specific criteria.

Based on the Region's experience with this issue in 1994 and the 1997 national guidance, it is now the Region's view that the definitions of "naturally occurring" in 17.30.602(17) and "natural" in MCA 75-5-306(2) can no longer be accepted as being consistent with the CWA and the federal water quality standards regulation. We would hope that the Legislature would address this issue in the current session and that the Board would address the issue in response to a change in the Section 75-5-306(2) of the Montana water quality statute. If, however, the State and EPA are unable to reach resolution on this issue, the Region intends to address the unrevised statutory and regulatory provisions by way of a referral to the EPA Administrator under CWA Section 303(c)(4)(B).

March 16, 1999 Letter to Montana on Proposed Resolution of EPA's Disapproval of Montana's WQS and Discussion of Potential Referrals to the Administrator

As described in EPA's January 26, 1999 action, these Sections define "naturally occurring" and "natural" as "... conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied. Conditions resulting from dams in existence as of July 1, 1971 are natural." These provisions have been in the State's statute and water quality standards for some time and have been approved in past Regional actions. These provisions are not, therefore, revised or new water quality standards subject to

approval/disapproval action by the Region. Nevertheless, these are provisions which EPA now believes are unacceptable in their current form, and we recommend that they be revised in this legislative session and the anticipated regulatory process that would follow the legislative session.

In our January 26, 1999 discussion of this issue, we recommended that the State make a distinction between "natural" conditions and "irretrievable human-caused" conditions as a way of addressing EPA's concerns. As an initial step that might be taken in the current Legislative session, we suggest that the Department's propose an amendment to S.B. 499 that would delete the language from the current definition that refers to "...developed land where all reasonable land, soil and water conservation practices have been applied and conditions resulting from dams in existence as of July 1, 1971." In the next session or in regulation, the Department could then evaluate whether or not there was a real need for further amendment such as addressing the "irretrievable human-caused" condition issue.

August 12, 1999 Action Letter

As described in EPA's January 26, 1999 action, these Sections define "naturally occurring" and "natural" as "... conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied. Conditions resulting from dams in existence as of July 1, 1971 are natural." These provisions have been in the State's statute and water quality standards for some time and have been approved in past Regional actions. These provisions are not, therefore, revised or new water quality standards subject to approval/disapproval action by the Region. Nevertheless, these are provisions which EPA now believes are unacceptable in their current form. EPA recommended that these provisions be revised during the 1999 legislative session and the anticipated regulatory process that will now follow the completed legislative session.

In our January 26, 1999 discussion of this issue, we recommended that the State make a distinction between "natural" conditions and "irretrievable human-caused" conditions as a way of addressing EPA's concerns. We made a recommendation to the Department that it propose a straightforward amendment to the statute, deleting the language from the current definition that refers to "...developed land where all reasonable land, soil and water conservation practices have been applied and conditions resulting from dams in existence as of July 1, 1971 ." We suggested that, in the next legislative session or in regulation, the Department could then evaluate whether or not there was a real need for further amendment such as addressing the "irretrievable human-caused" condition issue.

No statutory change was proposed by the Department, and this issue was not addressed by the Legislature in the 1999 session. This is troubling for EPA. We note, however, that Director Simonich, in his testimony, explains that the Department intends to address this issue and will work with EPA to seek resolution.¹ We will continue our discussions with the Department before making any decision on the need to refer this issue to the Administrator.

¹ Simonich's testimony also states that the definition of "natural" has been in place since 1955, the year Montana's water quality statute was enacted.