MONTANA
Enforceable Provisions Applicable to Nonpoint Source Water Pollution

DISCHARGE PROHIBITIONS

Water Pollution Control Law

Montana’s water pollution control law includes some provisions that may be used to take enforcement action against nonpoint source discharges. A general provision prohibits discharges or placement of wastes that cause pollution, including pollution from nonpoint sources. The law also establishes a nondegradation policy that applies to certain nonpoint sources, though it does not apply to agricultural discharges covered under a ground water management plan.

- The water quality code makes it unlawful to "cause pollution ... of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters."1 "Pollution" is defined broadly, and clearly includes pollution from nonpoint sources.2 However, exempt from the prohibition is "any placement of materials that is authorized by a permit issued by any state or federal agency ... if the agency’s permitting authority includes provisions for review of the placement of materials to ensure that it will not cause pollution of state waters."3

- The code also makes it unlawful to "cause degradation of state waters without authorization," and establishes a detailed nondegradation policy for state waters.4 Under the non-degradation policy, degradation of high-quality waters may not be authorized without an extensive cost-benefit analysis and consideration of non-degrading options.5 However, several potentially polluting activities are exempted from the nondegradation policy and classified as "nonsignificant." These include: nonpoint sources existing on or before April 29, 1993; new nonpoint sources that follow "reasonable land, soil, and water conservation practices"; use of agricultural chemicals under an approved agricultural ground water management plan; land application of manure and sewage sludge; nonpoint source activities that cause short-term changes in water quality and result from streambed preservation activities or permitted water uses; and dam maintenance and repair that causes short-term changes in water quality.6

The Department of Environmental Quality has general inspection and penalty authority for violations of the water quality code, including the discharge prohibition.7 For alleged violations, the DEQ may serve a notice letter or an administrative notice and order, and may require public hearing of the charges.8 After finding a violation, a hearing board may issue an order for prevention, abatement, or control of pollution, and administrative penalties of up to $10,000 per violation per day.9 The DEQ also may issue specific compliance orders, cleanup orders for any material that is "accidentally or purposely dumped, spilled, or otherwise deposited in or near state waters and that may pollute state waters," or emergency orders; it also may bring civil actions for appropriate relief, including temporary and permanent injunctions.10 Judicial remedies include civil penalties of up to $25,000 per day and, for willful or negligent violations of the discharge prohibition, criminal fines of up to $25,000 per day, imprisonment of up to one year, or both.11 Criminal penalties may be doubled for repeat violations.12
Other Discharge Limitations

- The civil code defines nuisance as "anything which is injurious to health, indecent or offensive to the senses...or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin...."\(^{13}\)

- Similarly, the criminal code defines public nuisance as a "condition which defines safety or health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons," or which "renders dangerous for passage ... waters used by the public."\(^{14}\)

Both the civil and criminal nuisance provisions contain "coming to the nuisance" exemptions for agricultural or farming operations that are operating normally and have been in operation "longer than the complaining resident has been in possession or commercial establishment has been in operation."\(^{15}\) Moreover, there is a "right to farm" law that intends "to protect agricultural activities from governmental zoning and nuisance ordinances," by pre-empting local governments from passing any "ordinance or resolution that prohibits any existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town."\(^{16}\)

Within these limitations, "any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance" may bring a civil action for damages, as well as for an injunction or abatement.\(^{17}\) Public nuisances may be enforced against by indictment or information as well as civil actions or abatement.\(^{18}\) Public nuisances under the criminal code are subject to fines not to exceed $500, imprisonment of up to six months, or both.\(^{19}\) Abatement may be sought in an equity action for public nuisance filed in the name of the state by the county attorney or any resident of the state, and may include forfeiture of fixtures, closing and/or temporary seizure of the premises.\(^{20}\)

Fish/Fisheries Laws

- The fish and wildlife code does not provide an enforceable authority for nonpoint source pollution. It does make the use of explosives or "any corrosive or narcotic poison or other deleterious substance...for the purpose of catching, stunning, or killing fish" a misdemeanor,\(^{21}\) and requires restitution for illegal killing of wildlife, including fish, where killing is done "knowingly or purposely."\(^{22}\) The general penalties for violation of the code include fines of $50-$1,000 and/or imprisonment of up to 6 months.\(^{23}\) The restitution requirement is $10 per game fish illegally taken.\(^{24}\)

OPERATIONAL REQUIREMENTS

Forestry Requirements

- The forestry code requires creation of "streamside management zones" for forest streams.\(^{25}\) A streamside management zone must "encompass[] a strip at least 50
feet wide on each side of a stream, lake, or other body of water, measured from the ordinary high-water mark, and extends beyond the high-water mark to include wetlands and areas that provide additional protection in zones with steep slopes or erosive soils. Within these zones, there are specific prohibitions on certain forest activities, including: broadcast burning; off-road vehicle operation; clearcutting; road construction unless necessary for stream crossing; handling, storage, application or disposal of hazardous or toxic substances in a manner that pollutes water bodies or that may damage humans, land, animals, or plants; side-casting of road material into water bodies; or deposit of slash in water bodies.27

There are detailed regulations delineating the stream management zones and defining prohibited practices and site-specific alternative practices.28 The department of natural resources and conservation has inspection authority on federal, state and private land to ensure compliance with the rules for streamside management zones.29 The department may issue civil penalties of up to $1,000 per day, as well as rehabilitation orders.30

- The forestry code also contains a section titled "protection of forest resources,"31 which "encourages" the use of best management practices and includes a requirement that notice be given prior to commencement of any forestry practices.32 Upon receiving such notice, the department of natural resources and conservation must decide whether to require an onsite consultation with the operator, based on whether "the proposed timber sale is in a high-priority location for watershed resources" or whether "a consultation could contribute to improved watershed management."33 However, this procedure is not in itself enforceable; the code expressly states that consultation "is intended only for the purpose of providing information to owners and operators and does not confer upon the department or any other agency of state or local government authority to compel an owner or operator to undertake or refrain from undertaking specific management practices that are not otherwise regulated by law or rule."34

**Agriculture Requirements**

- The soil conservation code allows for creation of soil conservation districts to conduct research, implement projects and provide technical assistance and education on soil conservation.35 These districts are authorized to formulate and propose soil and water conservation regulations, which are subject to approval by referendum.36 Once approved, the regulations may prescribe specific agricultural practices for soil and water conservation within the district.37 Affected parties may petition for a variance where "there are great practical difficulties or unnecessary hardship in the way of ... carrying out ... the strict letter of the land use regulations."38 The district’s decision whether to issue a variance is reviewable in court.39

Soil conservation districts have authority to enter and inspect premises to determine compliance with their regulations.40 They may petition the state district court for an order enforcing the regulations where nonobservance "tends to increase erosion on defendant’s lands ... and is interfering with the prevention or control of erosion on other lands."41 The court may order specific performance of required practices, or permit the district to perform the work and recover its costs from the landowner.42
The Natural Streambed and Land Preservation Act requires that any "project," defined as the physical alteration of a stream resulting in a change in the state of the stream, be approved by the local soil conservation district or board of county commissioners before commencing work. Approval decisions are made by the district board based on recommendations made by an onsite inspection team, and are subject to judicial review. The decision is based on multiple factors, including: the effects on soil erosion and sedimentation; upstream or downstream flooding and erosion effects; streamflow, turbidity, and water quality effects; and effect on fish and aquatic habitat. Projects engaged in without approval or outside the scope of the approval are declared a public nuisance and subject to abatement proceedings; they are also subject to civil penalties of up to $500 per day and/or a misdemeanor fine of up to $500. However, "customary and historic maintenance and repair of existing irrigation facilities that do not significantly alter or modify the stream" are excluded from the definition of "project," and thus from the approval requirement.

The Agricultural Chemical Ground Water Protection Act covers both pesticides and fertilizers, and requires the department of agriculture and the department of environmental quality to cooperate to administer ground water standards for agricultural chemicals. It requires them to develop numerical standards and interim standards for agricultural chemicals, primarily based on EPA’s promulgated and nonpromulgated standards under the Clean Drinking Water Act. Both departments are authorized to "implement appropriate actions ... to mitigate any existing impacts of an agricultural chemical found in ground water." These include development of a general ground water management plan and site-specific management plans, which must be complied with by all persons in the covered geographic area. The plans are adopted by rulemaking or with emergency authority. Site-specific management plans may include restrictions on chemical use in certain areas; best management practices; certification, training and licensing requirements; setback areas near water wells; and alternative practices.

It is unlawful to violate any provision of a site-specific ground water management plan, any order issued pursuant to the Act, or any provision of the Act. Both the department of agriculture and the DEQ have monitoring authority. The department of agriculture is the lead department for determining compliance with groundwater management plans, and is granted inspection authority under the Act. The DEQ is the lead department for determining health risks, and may enforce the Act using its enforcement authority under the water quality code. The department of agriculture may issue compliance orders, assess administrative civil penalties of up to $1,000 per violation, and file civil actions seeking a temporary or permanent injunction. Violators are also subject to judicial penalties of up to $10,000 per violation and, for intentional violations, criminal penalties of up to $25,000 and/or imprisonment of up to one year, which can be doubled for repeat offenses.

Montana’s general pesticide law makes it illegal "to discard any pesticide or pesticide container in a manner that causes injury to humans, domestic animals, or wildlife or that pollutes any waterway in a way harmful to any wildlife in the waterway or to the environment." The department of agriculture has general entry, investigation and enforcement authority for pesticide violations, including violations of the handling, use and application standards.
Violation of the pesticide law or rules is a misdemeanor, punishable by a fine of $100-$1,500; the department also may issue compliance orders, including cleanup requirements, and/or seek injunctive relief in court. “Major violations,” which include misuse that is inconsistent with labelling and results in “proven exposure” or “proven harm” to humans, agricultural commodities, livestock, or the environment, are subject to civil penalties of up to $25,000 per violation; and, if committed willfully, subject to a $50,000 fine and imprisonment of up to 10 years.

Development and Other Earth-Disturbing Activities

Apart from any programs for the control of urban stormwater under the federal Clean Water Act or that may be authorized by general land use regulation such as zoning, state law provides the following authorities.

- The water quality code allows, but does not require, the creation of local water quality districts "to protect, preserve, and improve the quality of surface water and ground water." County commissions and/or city councils may establish such districts, whose directors may then develop a local water quality program that is implemented through local ordinances, including administrative and civil enforcement and penalties. Specific focuses of the programs include onsite waste water disposal, storm water runoff, and engine lubricants. The districts also have authority to assess fees for water use, although irrigation and livestock uses are exempt from these fees. Upon approval of the programs, state enforcement authority may be delegated to the district level.

- The legislature also has enacted a law protecting lakeshores, and declared that "local governments should play the primary public roles in establishing policies to conserve and protect lakes." Under that law, "a person who proposes to do any work that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore must first secure a permit for the work from the local governing body." Local jurisdictions are required to adopt regulations, including criteria for issuing and denying permits for work in lake areas; factors for consideration include water quality, fish and wildlife habitat, navigation and recreation, public nuisance, and visual and aesthetic values. Regulations and decisions of these governing bodies are judicially enforced and judicially reviewable. Violation of orders or regulations is a misdemeanor, subject to up to 30 days in jail and/or a $500 fine; violators may also be required to restore the lake to its original state before the unauthorized work was commenced.

- As discussed above, the Natural Streambed and Land Preservation Act requires that any "project," defined as the physical alteration of a stream resulting in change in the state of the stream, be approved by the local soil conservation district or board of county commissioners before commencing work.
Endnotes
6. Mont. Code Ann. §§ 75-5-317(2)(a), (b), (c), (h), (q), (r). The detailed nondegradation regulations are found at Mont. Admin. R. § 16.20.701.
8. Mont. Code Ann. § 75-5-611; the enforcement regulations are found at Mont. Admin. R. § 16.20.102.
43. Mont. Code Ann. § 75-7-101 et seq.
45. Mont. Code Ann. § 75-7-112.
46. Mont. Code Ann. §§ 75-7-122, -123.
47. Mont. Code Ann. § 75-7-103(5)(b).
49. Mont. Code Ann. § 80-15-201. "The board may determine ... that an interim numerical standard different from either a promulgated or nonpromulgated federal standard is justified." Mont. Code Ann. §
80-15-201(1). However, standards may not be more stringent than federal standards unless they are adopted through a full notice-and-comment procedure. Mont. Code Ann. § 80-15-110.

61 Mont. Code Ann. § 80-8-305(1).
64 Mont. Code Ann. § 80-8-306(5).
66 Mont. Code Ann. § 75-5-311(5).
69 Mont. Admin. R. § 16.20.501 et seq.
70 Mont. Code Ann. § 75-7-201 et seq.
71 Mont. Code Ann. § 75-7-204.
74 Mont. Code Ann. §§ 75-7-216, -205.
75 Mont. Code Ann. § 75-7-101 et seq.