

HOUSE BILL NO. 685

INTRODUCED BY S. FITZPATRICK

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A FEASIBILITY ALLOWANCE TO MEET THE WATER QUALITY NONDEGRADATION POLICY; REVISING A DEFINITION; AMENDING ADMINISTRATIVE RULES; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 75-5-103, 75-5-301, 75-5-303, 75-5-316, 75-5-516, AND 75-5-605, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-5-103, MCA, is amended to read:

"75-5-103. (Temporary) Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Associated supporting infrastructure" means:

(a) electric transmission and distribution facilities;

(b) pipeline facilities;

(c) aboveground ponds and reservoirs and underground storage reservoirs;

(d) rail transportation;

(e) aqueducts and diversion dams;

(f) devices or equipment associated with the delivery of an energy form or product produced at an energy development project; or

(g) other supporting infrastructure, as defined by department rule, that is necessary for an energy development project.

(2) "Board" means the board of environmental review provided for in 2-15-3502.

(3) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.

(4) "Council" means the water pollution control advisory council provided for in 2-15-2107.

(5) (a) "Currently available data" means data that is readily available to the department at the time

1 a decision is made, including information supporting its previous lists of water bodies that are threatened or
2 impaired.

3 (b) The term does not mean new data to be obtained as a result of department efforts.

4 (6) "Degradation" means a change in water quality that lowers the quality of high-quality waters for
5 a parameter. The term does not include those changes in water quality determined to be nonsignificant
6 pursuant to 75-5-301(5)(c).

7 (7) "Department" means the department of environmental quality provided for in 2-15-3501.

8 (8) "Disposal system" means a system for disposing of sewage, industrial, or other wastes and
9 includes sewage systems and treatment works.

10 (9) "Effluent standard" means a restriction or prohibition on quantities, rates, and concentrations of
11 chemical, physical, biological, and other constituents that are discharged into state waters.

12 (10) "Energy development project" means each plant, unit, or other development and associated
13 developments, including any associated supporting infrastructure, designed for or capable of:

14 (a) generating electricity;

15 (b) producing gas derived from coal;

16 (c) producing liquid hydrocarbon products;

17 (d) refining crude oil or natural gas;

18 (e) producing alcohol to be blended for ethanol-blended gasoline and that are eligible for a tax
19 incentive pursuant to Title 15, chapter 70, part 5; or

20 (f) transmitting electricity through an electric transmission line with a design capacity of equal to or
21 greater than 50 kilovolts.

22 (11) "Existing uses" means those uses actually attained in state waters on or after July 1, 1971,
23 whether or not those uses are included in the water quality standards.

24 (12) "High-quality waters" means all state waters, except:

25 (a) ground water classified as of January 1, 1995, within the "III" or "IV" classifications established
26 by the department's classification rules; and

27 (b) surface waters that:

28 (i) are not capable of supporting any one of the designated uses for their classification; or

1 (ii) have zero flow or surface expression for more than 270 days during most years.

2 (13) "Impaired water body" means a water body or stream segment for which sufficient credible data
3 shows that the water body or stream segment is failing to achieve compliance with applicable water quality
4 standards.

5 (14) "Industrial waste" means a waste substance from the process of business or industry or from
6 the development of any natural resource, together with any sewage that may be present.

7 (15) "Interested person" means a person who has a real property interest, a water right, or an
8 economic interest that is or may be directly and adversely affected by the department's preliminary decision
9 regarding degradation of state waters, pursuant to 75-5-303. The term includes a person who has requested
10 ~~authorization to degrade high-quality waters~~ a feasibility allowance.

11 (16) "Load allocation" means the portion of a receiving water's loading capacity that is allocated to
12 one of its existing or future nonpoint sources or to natural background sources.

13 (17) "Loading capacity" means the mass of a pollutant that a water body can assimilate without a
14 violation of water quality standards. For pollutants that cannot be measured in terms of mass, it means the
15 maximum change that can occur from the best practicable condition in a surface water without causing a
16 violation of the surface water quality standards.

17 (18) "Local department of health" means the staff, including health officers, employed by a county,
18 city, city-county, or district board of health.

19 (19) "Metal parameters" includes but is not limited to aluminum, antimony, arsenic, beryllium,
20 barium, cadmium, chromium, copper, fluoride, iron, lead, manganese, mercury, nickel, selenium, silver,
21 thallium, and zinc.

22 (20) "Mixing zone" means an area established in a permit or final decision on nondegradation
23 issued by the department where water quality standards may be exceeded, subject to conditions that are
24 imposed by the department and that are consistent with the rules adopted by the department.

25 (21) "Nutrient work group" means an advisory work group, convened by the department,
26 representing publicly owned and privately owned point sources of pollution, nonpoint sources of pollution, and
27 other interested parties that will advise the department on nutrient standards, the implementation of those
28 standards, and associated economic impacts.

1 (22) "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark,
2 lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or
3 discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters.

4 (23) "Outstanding resource waters" means:

5 (a) state surface waters located wholly within the boundaries of areas designated as national parks
6 or national wilderness areas as of October 1, 1995; or

7 (b) other surface waters or ground waters classified by the department under the provisions of 75-
8 5-316 and approved by the legislature.

9 (24) "Owner or operator" means a person who owns, leases, operates, controls, or supervises a
10 point source.

11 (25) "Parameter" means a physical, biological, or chemical property of state water when a value of
12 that property affects the quality of the state water.

13 (26) "Person" means the state, a political subdivision of the state, institution, firm, corporation,
14 partnership, individual, or other entity and includes persons resident in Canada.

15 (27) "Point source" means a discernible, confined, and discrete conveyance, including but not
16 limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or
17 other floating craft, from which pollutants are or may be discharged.

18 (28) (a) "Pollution" means:

19 (i) contamination or other alteration of the physical, chemical, or biological properties of state
20 waters that exceeds that permitted by Montana water quality standards, including but not limited to standards
21 relating to change in temperature, taste, color, turbidity, or odor; or

22 (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or
23 other substance into state water that will or is likely to create a nuisance or render the waters harmful,
24 detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds,
25 fish, or other wildlife.

26 (b) The term does not include:

27 (i) a discharge, seepage, drainage, infiltration, or flow that is authorized under the pollution
28 discharge permit rules adopted by the department under this chapter;

1 (ii) activities conducted under this chapter that comply with the conditions imposed by the
2 department in short-term authorizations pursuant to 75-5-308;

3 (iii) contamination of ground water within the boundaries of an underground mine using in situ coal
4 gasification and operating in accordance with a permit issued under 82-4-221.

5 (c) Contamination referred to in subsections (28)(b)(iii) and (28)(b)(iv) does not require a mixing
6 zone.

7 (29) "Sewage" means water-carried waste products from residences, public buildings, institutions,
8 or other buildings, including discharge from human beings or animals, together with ground water infiltration
9 and surface water present.

10 (30) "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or
11 other wastes to an ultimate disposal point.

12 (31) "Standard of performance" means a standard adopted by the department for the control of the
13 discharge of pollutants that reflects the greatest degree of effluent reduction achievable through application of
14 the best available demonstrated control technology, processes, operating methods, or other alternatives,
15 including, when practicable, a standard permitting no discharge of pollutants.

16 (32) (a) "State waters" means a body of water, irrigation system, or drainage system, either surface
17 or underground.

18 (b) The term does not apply to:

19 (i) ponds or lagoons used solely for treating, transporting, or impounding pollutants; or

20 (ii) irrigation waters or land application disposal waters when the waters are used up within the
21 irrigation or land application disposal system and the waters are not returned to state waters.

22 (33) "Sufficient credible data" means chemical, physical, or biological monitoring data, alone or in
23 combination with narrative information, that supports a finding as to whether a water body is achieving
24 compliance with applicable water quality standards.

25 (34) "Threatened water body" means a water body or stream segment for which sufficient credible
26 data and calculated increases in loads show that the water body or stream segment is fully supporting its
27 designated uses but threatened for a particular designated use because of:

28 (a) proposed sources that are not subject to pollution prevention or control actions required by a

1 discharge permit, the nondegradation provisions, or reasonable land, soil, and water conservation practices; or

2 (b) documented adverse pollution trends.

3 (35) "Total maximum daily load" or "TMDL" means the sum of the individual waste load allocations
4 for point sources and load allocations for both nonpoint sources and natural background sources established at
5 a level necessary to achieve compliance with applicable surface water quality standards.

6 (36) "Treatment works" means works, including sewage lagoons, installed for treating or holding
7 sewage, industrial wastes, or other wastes.

8 (37) "Waste load allocation" means the portion of a receiving water's loading capacity that is
9 allocated to one of its existing or future point sources.

10 (38) "Water quality protection practices" means those activities, prohibitions, maintenance
11 procedures, or other management practices applied to point and nonpoint sources designed to protect,
12 maintain, and improve the quality of state waters. Water quality protection practices include but are not limited
13 to treatment requirements, standards of performance, effluent standards, and operating procedures and
14 practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material storage.

15 (39) "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug, jetted, or
16 otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition of ground water.

17 (40) "Watershed advisory group" means a group of individuals who wish to participate in an
18 advisory capacity in revising and reprioritizing the list of water bodies developed under 75-5-702 and in the
19 development of TMDLs under 75-5-703, including those groups or individuals requested by the department to
20 participate in an advisory capacity as provided in 75-5-704.

21 **75-5-103. (Effective on occurrence of contingency) Definitions.** Unless the context requires
22 otherwise, in this chapter the following definitions apply:

23 (1) "Associated supporting infrastructure" means:

24 (a) electric transmission and distribution facilities;

25 (b) pipeline facilities;

26 (c) aboveground ponds and reservoirs and underground storage reservoirs;

27 (d) rail transportation;

28 (e) aqueducts and diversion dams;

(f) devices or equipment associated with the delivery of an energy form or product produced at an energy development project; or

(g) other supporting infrastructure, as defined by department rule, that is necessary for an energy development project.

(2) "Board" means the board of environmental review provided for in 2-15-3502.

(3) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.

(4) "Council" means the water pollution control advisory council provided for in 2-15-2107.

(5) (a) "Currently available data" means data that is readily available to the department at the time a decision is made, including information supporting its previous lists of water bodies that are threatened or impaired.

(b) The term does not mean new data to be obtained as a result of department efforts.

(6) "Degradation" means a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant pursuant to 75-5-301(5)(c).

(7) "Department" means the department of environmental quality provided for in 2-15-3501.

(8) "Disposal system" means a system for disposing of sewage, industrial, or other wastes and includes sewage systems and treatment works.

(9) "Effluent standard" means a restriction or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents that are discharged into state waters.

(10) "Energy development project" means each plant, unit, or other development and associated developments, including any associated supporting infrastructure, designed for or capable of:

(a) generating electricity;

(b) producing gas derived from coal;

(c) producing liquid hydrocarbon products;

(d) refining crude oil or natural gas;

(e) producing alcohol to be blended for ethanol-blended gasoline and that are eligible for a tax incentive pursuant to Title 15, chapter 70, part 5; or

(f) transmitting electricity through an electric transmission line with a design capacity of equal to or greater than 50 kilovolts.

(11) "Existing uses" means those uses actually attained in state waters on or after July 1, 1971, whether or not those uses are included in the water quality standards.

(12) "High-quality waters" means all state waters, except:

(a) ground water classified as of January 1, 1995, within the "III" or "IV" classifications established by the department's classification rules; and

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(ii) have zero flow or surface expression for more than 270 days during most years.

(13) "Impaired water body" means a water body or stream segment for which sufficient credible data shows that the water body or stream segment is failing to achieve compliance with applicable water quality standards.

(14) "Industrial waste" means a waste substance from the process of business or industry or from the development of any natural resource, together with any sewage that may be present.

(15) "Interested person" means a person who has a real property interest, a water right, or an economic interest that is or may be directly and adversely affected by the department's preliminary decision regarding degradation of state waters, pursuant to 75-5-303. The term includes a person who has requested authorization to degrade high-quality waters a feasibility allowance.

(16) "Load allocation" means the portion of a receiving water's loading capacity that is allocated to one of its existing or future nonpoint sources or to natural background sources.

(17) "Loading capacity" means the mass of a pollutant that a water body can assimilate without a violation of water quality standards. For pollutants that cannot be measured in terms of mass, it means the maximum change that can occur from the best practicable condition in a surface water without causing a violation of the surface water quality standards.

(18) "Local department of health" means the staff, including health officers, employed by a county, city, city-county, or district board of health.

(19) "Metal parameters" includes but is not limited to aluminum, antimony, arsenic, beryllium,

1 barium, cadmium, chromium, copper, fluoride, iron, lead, manganese, mercury, nickel, selenium, silver,
2 thallium, and zinc.

3 (20) "Mixing zone" means an area established in a permit or final decision on nondegradation
4 issued by the department where water quality standards may be exceeded, subject to conditions that are
5 imposed by the department and that are consistent with the rules adopted by the department.

6 (21) "Nutrient work group" means an advisory work group, convened by the department,
7 representing publicly owned and privately owned point sources of pollution, nonpoint sources of pollution, and
8 other interested parties that will advise the department on nutrient standards, the implementation of those
9 standards, and associated economic impacts.

10 (22) "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark,
11 lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or
12 discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters.

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15 or national wilderness areas as of October 1, 1995; or

16 (b) other surface waters or ground waters classified by the department under the provisions of 75-
17 5-316 and approved by the legislature.

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19 point source.

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21 that property affects the quality of the state water.

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23 partnership, individual, or other entity and includes persons resident in Canada.

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25 limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or
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1 waters that exceeds that permitted by Montana water quality standards, including but not limited to standards
2 relating to change in temperature, taste, color, turbidity, or odor; or

3 (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or
4 other substance into state water that will or is likely to create a nuisance or render the waters harmful,
5 detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds,
6 fish, or other wildlife.

7 (b) The term does not include:

8 (i) a discharge, seepage, drainage, infiltration, or flow that is authorized under the pollution
9 discharge permit rules adopted by the department under this chapter;

10 (ii) activities conducted under this chapter that comply with the conditions imposed by the
11 department in short-term authorizations pursuant to 75-5-308;

12 (iii) contamination of ground water within the boundaries of a geologic storage reservoir, as defined
13 in 82-11-101, by a carbon dioxide injection well in accordance with a permit issued pursuant to Title 82, chapter
14 11, part 1;

15 (iv) contamination of ground water within the boundaries of an underground mine using in situ coal
16 gasification and operating in accordance with a permit issued under 82-4-221;

17 (c) Contamination referred to in subsections (28)(b)(iii) and (28)(b)(iv) does not require a mixing
18 zone.

19 (29) "Sewage" means water-carried waste products from residences, public buildings, institutions,
20 or other buildings, including discharge from human beings or animals, together with ground water infiltration
21 and surface water present.

22 (30) "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or
23 other wastes to an ultimate disposal point.

24 (31) "Standard of performance" means a standard adopted by the department for the control of the
25 discharge of pollutants that reflects the greatest degree of effluent reduction achievable through application of
26 the best available demonstrated control technology, processes, operating methods, or other alternatives,
27 including, when practicable, a standard permitting no discharge of pollutants.

28 (32) (a) "State waters" means a body of water, irrigation system, or drainage system, either surface

1 or underground.

2 (b) The term does not apply to:

3 (i) ponds or lagoons used solely for treating, transporting, or impounding pollutants; or

4 (ii) irrigation waters or land application disposal waters when the waters are used up within the
5 irrigation or land application disposal system and the waters are not returned to state waters.

6 (33) "Sufficient credible data" means chemical, physical, or biological monitoring data, alone or in
7 combination with narrative information, that supports a finding as to whether a water body is achieving
8 compliance with applicable water quality standards.

9 (34) "Threatened water body" means a water body or stream segment for which sufficient credible
10 data and calculated increases in loads show that the water body or stream segment is fully supporting its
11 designated uses but threatened for a particular designated use because of:

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13 discharge permit, the nondegradation provisions, or reasonable land, soil, and water conservation practices; or

14 (b) documented adverse pollution trends.

15 (35) "Total maximum daily load" or "TMDL" means the sum of the individual waste load allocations
16 for point sources and load allocations for both nonpoint sources and natural background sources established at
17 a level necessary to achieve compliance with applicable surface water quality standards.

18 (36) "Treatment works" means works, including sewage lagoons, installed for treating or holding
19 sewage, industrial wastes, or other wastes.

20 (37) "Waste load allocation" means the portion of a receiving water's loading capacity that is
21 allocated to one of its existing or future point sources.

22 (38) "Water quality protection practices" means those activities, prohibitions, maintenance
23 procedures, or other management practices applied to point and nonpoint sources designed to protect,
24 maintain, and improve the quality of state waters. Water quality protection practices include but are not limited
25 to treatment requirements, standards of performance, effluent standards, and operating procedures and
26 practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material storage.

27 (39) "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug, jetted, or
28 otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition of ground water.

1 (40) "Watershed advisory group" means a group of individuals who wish to participate in an
2 advisory capacity in revising and reprioritizing the list of water bodies developed under 75-5-702 and in the
3 development of TMDLs under 75-5-703, including those groups or individuals requested by the department to
4 participate in an advisory capacity as provided in 75-5-704."

5
6 **Section 2.** Section 75-5-301, MCA, is amended to read:

7 **"75-5-301. Classification and standards for state waters.** Consistent with the provisions of 80-15-
8 201 and this chapter, the department shall:

9 (1) establish the classification of all state waters in accordance with their present and future most
10 beneficial uses, creating an appropriate classification for streams that, due to sporadic flow, do not support an
11 aquatic ecosystem that includes salmonid or nonsalmonid fish;

12 (2) formulate and adopt standards of water quality, considering the economics of waste treatment
13 and prevention. When rules are adopted regarding temporary standards, they must conform with the
14 requirements of 75-5-312. Standards must meet the following requirements:

15 (a) for carcinogens, the water quality standard for protection of human health must be the value
16 associated with an excess lifetime cancer risk level, assuming continuous lifetime exposure, not to exceed 1×10^{-3}
17 in the case of arsenic and 1×10^{-5} for other carcinogens. However, if a standard established at a risk
18 level of 1×10^{-3} for arsenic or 1×10^{-5} for other carcinogens violates the maximum contaminant level
19 obtained from 40 CFR, part 141, then the maximum contaminant level must be adopted as the standard for that
20 carcinogen.

21 (b) standards for the protection of aquatic life do not apply to ground water.

22 (3) review, from time to time at intervals of not more than 3 years and, to the extent permitted by
23 this chapter, revise established classifications of waters and adopted standards of water quality;

24 (4) adopt rules governing the granting of mixing zones, requiring that mixing zones granted by the
25 department be specifically identified and requiring that mixing zones have:

26 (a) the smallest practicable size;

27 (b) a minimum practicable effect on water uses; and

28 (c) definable boundaries;

1 (5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not
2 limited to rules that:

3 (a) provide a procedure for department review and authorization of ~~degradation~~ a feasibility
4 allowance;

5 (b) establish criteria for the following:

6 (i) determining important economic or social development; and

7 (ii) weighing the social and economic importance to the public of allowing the proposed project
8 against the cost to society associated with a loss of water quality;

9 (c) establish criteria for determining whether a proposed activity or class of activities, in addition to
10 those activities identified in 75-5-317, will result in nonsignificant changes in water quality for any parameter in
11 order that those activities are not required to undergo review under 75-5-303(3). These criteria must be
12 established in a manner that generally:

13 (i) equates significance with the potential for harm to human health, a beneficial use, or the
14 environment;

15 (ii) considers both the quantity and the strength of the pollutant;

16 (iii) considers the length of time the degradation will occur;

17 (iv) considers the character of the pollutant so that greater significance is associated with
18 carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances
19 that are less harmful or less persistent.

20 (d) provide that changes of nitrate as nitrogen in ground water are nonsignificant if the discharge
21 will not cause degradation of surface water and the predicted concentration of nitrate as nitrogen at the
22 boundary of the ground water mixing zone does not exceed:

23 (i) 7.5 milligrams per liter from sources other than sewage;

24 (ii) 5.0 milligrams per liter from sewage discharged from a system that does not use level two
25 treatment in an area where the ground water nitrate as nitrogen is 5.0 milligrams per liter or less;

26 (iii) 7.5 milligrams per liter from sewage discharged from a system using level two treatment, which
27 must be defined in the rules; or

28 (iv) 7.5 milligrams per liter from sewage discharged from a system in areas where the ground water

1 nitrate as nitrogen level exceeds 5.0 milligrams per liter primarily from sources other than human waste; and
2 (e) for septic system discharges that are not subject to ground water permitting requirements
3 under 75-5-401, establish criteria to determine when the discharges result in nonsignificant changes in surface
4 water quality in order that those discharges are not required to undergo review under 75-5-303(3) and no
5 further analysis under law or rule is required. The criteria must:

6 (i) be adopted by rule before July 1, 2024; and
7 (ii) be developed in a manner that generally considers soil type, mixing zone dilution and nitrogen
8 credits, horizontal distance between the discharge and the surface water in the direction of ground water flow,
9 and elevation, including:

10 (A) adopt surface water impacts for low flow conditions based on mixing zone dilution
11 concentrations and other credits for nitrogen;

12 (B) credit nitrogen degradation at the drainfield and riparian zone attenuation based on soil type;

13 (C) exempt surface water body impacts when drainfield is lower in elevation than the waterbody;

14 (D) limit the adjacent to surface water trigger analysis to a maximum of 1/4 or 1/2 mile from the
15 drainfield to a surface water, depending on soil type; and

16 (E) create nonsignificant surface water impact categories of 500 or more feet from the surface
17 water that consider soil texture, ground water depths and other pertinent information.

18 (6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective
19 and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute
20 guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy
21 established in 75-5-303(2) and (3).

22 (7) adopt rules to implement this section."
23

24 **Section 3.** Section 75-5-303, MCA, is amended to read:

25 **"75-5-303. Nondegradation policy.** (1) Existing uses of state waters and the level of water quality
26 necessary to protect those uses must be maintained and protected.

27 (2) Unless authorized by the department under subsection (3) or exempted from review under 75-
28 5-317, the quality of high-quality waters must be maintained.

1 (3) The department may ~~not authorize degradation of~~ allow lower water quality through a feasibility
2 allowance in high-quality waters unless when it has been affirmatively demonstrated by a preponderance of
3 evidence to the department that:

4 (a) ~~degradation a feasibility allowance~~ is necessary because there are no economically,
5 environmentally, and technologically feasible modifications to the proposed project that would result in no
6 degradation;

7 (b) the proposed project will result in important economic or social development ~~and that the~~
8 ~~benefit of the development exceeds the costs to society of allowing degradation of~~ in the area that the high-
9 quality waters are located;

10 (c) existing and anticipated use of state waters will be fully protected; and

11 (d) the least degrading water quality protection practices determined by the department to be
12 economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to
13 and during the proposed activity.

14 (4) The department shall issue a preliminary decision either denying or authorizing ~~degradation the~~
15 feasibility allowance and shall provide public notice and a 30-day comment period prior to issuing a final
16 decision. The department's preliminary and final decisions must include:

17 (a) a statement of the basis for the decision; and

18 (b) a detailed description of all conditions applied to ~~any authorization to degrade state waters a~~
19 feasibility allowance, including, when applicable, monitoring requirements, required water protection practices,
20 reporting requirements, effluent limits, designation of the mixing zones, the limits of ~~degradation the~~ authorized
21 feasibility allowance, and methods of determining compliance with the ~~authorization for degradation~~ feasibility
22 allowance.

23 (5) An interested person wishing to challenge a final department decision may request a hearing
24 before the board within 30 days of the final department decision. The contested case procedures of Title 2,
25 chapter 4, part 6, apply to a hearing under this section.

26 (6) Periodically, but not more often than every 5 years, the department may review ~~authorizations~~
27 ~~to degrade~~ feasibility allowances for state waters. Following the review, the department may, after timely notice
28 and opportunity for hearing, modify the ~~authorization~~ feasibility allowance if the department determines that an

1 economically, environmentally, and technologically feasible modification to the development exists. The
2 decision by the department to modify ~~an authorization~~ a feasibility allowance may be appealed to the board.

3 (7) The department may not issue ~~an authorization to degrade~~ a feasibility allowance for state
4 waters that are classified as outstanding resource waters.

5 (8) The department shall adopt rules to implement this section."
6

7 **Section 4.** Section 75-5-316, MCA, is amended to read:

8 **"75-5-316. Outstanding resource water classification -- rules -- criteria -- limitations --**
9 **procedure -- definition.** (1) As provided under the provisions of 75-5-301 and this section, the department may
10 adopt rules regarding the classification of waters as outstanding resource waters.

11 (2) The department may not:

12 (a) grant ~~an authorization to degrade~~ a feasibility allowance under 75-5-303 in outstanding
13 resource waters; or

14 (b) allow a new or increased point source discharge that would result in a permanent change in the
15 water quality of an outstanding resource water.

16 (3) (a) A person may petition the department for rulemaking to classify state waters as outstanding
17 resource waters. The department shall initially review a petition against the criteria identified in subsection (3)(c)
18 to determine whether the petition contains sufficient credible information for the department to accept the
19 petition.

20 (b) The department may reject a petition without further review if it determines that the petition
21 does not contain the sufficient credible information required by subsection (3)(a). If the department rejects a
22 petition under this subsection (3)(b), it shall specify in writing the reasons for the rejection and the petition's
23 deficiencies.

24 (c) The department may not adopt a rule classifying state waters as outstanding resource waters
25 until it accepts a petition and makes a written finding containing the provisions enumerated in subsection (3)(d)
26 that, based on a preponderance of the evidence:

27 (i) the waters identified in the petition constitute an outstanding resource based on the criteria
28 provided in subsection (4);

1 (ii) the increased protection under the classification is necessary to protect the outstanding
2 resource identified under subsection (3)(a) because of a finding that the outstanding resource is at risk of
3 having one or more of the criteria provided in subsection (4) compromised as a result of pollution; and

4 (iii) classification as an outstanding resource water is necessary because of a finding that there is
5 no other effective process available that will achieve the necessary protection.

6 (d) The written finding provided for in subsection (3)(c) must:

7 (i) identify the criteria provided in subsection (4) that serve as justification for the determination
8 that the water is an outstanding resource;

9 (ii) specifically identify the criteria that are at risk and explain why those criteria are at risk; and

10 (iii) specifically explain why other available processes, including the requirements of 75-5-303, will
11 not achieve the necessary protection.

12 (4) The department shall consider the following criteria in determining whether certain state waters
13 are outstanding resource waters. However, the department may determine that compliance with one or more of
14 these criteria is insufficient to warrant classification of the water as an outstanding resource water. The
15 department shall consider:

16 (a) whether the waters have been designated as wild and scenic;

17 (b) the presence of endangered or threatened species in the waters;

18 (c) the presence of an outstanding recreational fishery in the waters;

19 (d) whether the waters provide the only source of suitable water for a municipality or industry;

20 (e) whether the waters provide the only source of suitable water for domestic water supply; and

21 (f) other factors that indicate outstanding environmental or economic values not specifically
22 mentioned in this subsection (4).

23 (5) Before accepting a petition, the department shall:

24 (a) publish a notice and brief description of the petition in a daily newspaper of general circulation
25 in the area affected and make copies of the proposal available to the public. The cost of publication must be
26 paid by the petitioner.

27 (b) provide for a 30-day written public comment period regarding whether the petition contains
28 sufficient credible information, as provided in subsection (3)(b), prior to the hearing required in subsection

1 (5)(c);

2 (c) hold a public hearing regarding the petition and its contents and allow further written and oral
3 testimony at the hearing;

4 (d) issue a proposed decision, including:

5 (i) the written finding provided for in subsection (3)(c); and

6 (ii) the department's acceptance or rejection of the petition;

7 (e) provide for a 30-day public comment period regarding the department's proposed decision; and

8 (f) issue a final decision on acceptance or rejection of the petition, which must include a response
9 to comments received by the department, and make copies of this decision available to the public.

10 (6) (a) After acceptance of a petition, the department shall prepare an environmental impact
11 statement, as provided under Title 75, chapter 1, part 2, and this section.

12 (b) (i) The petitioner is responsible for all of the costs associated with gathering and compiling data
13 and information, and completing the environmental impact statement.

14 (ii) Before the department may initiate work on the environmental impact statement, the petitioner
15 shall pay the estimated cost of completing the environmental impact statement, as determined by the
16 department.

17 (iii) Upon completion of the environmental impact statement, the petitioner shall pay the
18 department any costs that exceeded the estimated cost. If the cost of the environmental impact statement was
19 less than the estimated cost paid by the petitioner, the department shall reimburse the difference to the
20 petitioner.

21 (iv) The department may not grant or deny a petition until full payment for the environmental impact
22 statement is received.

23 (7) The department shall consult with other relevant state agencies and county governments when
24 reviewing outstanding resource water classification petitions.

25 (8) (a) After completion of an environmental impact statement and consultation with state agencies
26 and local governments, the department may deny an accepted outstanding resource water classification
27 petition if it finds that:

28 (i) the requirements of subsection (3)(c) have not been met; or

(ii) based on information available to the department from the environmental impact statement or otherwise, approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts.

(b) If the department denies the petition, it shall identify its reasons for petition denial.

(c) If the department grants the petition, the department shall initiate rulemaking to classify the waters as outstanding resource waters.

(9) A rule classifying state waters as outstanding resource waters under this section may be adopted but is not effective until approved by the legislature.

(10) The department may not postpone or deny an application for ~~an authorization to degrade state waters~~ a feasibility allowance under 75-5-303 based on pending:

(a) department action on an outstanding resource water classification petition regarding those waters; or

(b) legislative approval of department action designating those waters as outstanding resource waters.

(11) As used in this section, "petitioner" means an individual, corporation, partnership, firm, association, or other private or public entity that petitions the department to adopt rules to classify waters as outstanding resource waters."

Section 5. Section 75-5-516, MCA, is amended to read:

"75-5-516. Fees authorized for recovery -- process -- rulemaking. (1) Except as provided in subsections (12) and (13), the department shall by rule prescribe fees sufficient to cover the department's documented costs, both direct and indirect, of:

(a) reviewing and acting upon an application for a permit, permit modification, permit renewal, certificate, license, or other authorization required by rule under 75-5-201 or 75-5-401;

(b) reviewing and acting upon a petition for a ~~degradation~~ feasibility allowance under 75-5-303;

(c) reviewing and acting upon an application for a permit, certificate, license, or other authorization for which an exclusion is provided by rule from the permitting requirements established under 75-5-401;

(d) enforcing the terms and conditions of a permit or authorization identified in subsections (1)(a)

1 through (1)(c). If the permit or authorization is not issued, the department shall return this portion of any
2 application fee to the applicant.

3 (e) conducting compliance inspections and monitoring effluent and ambient water quality; and

4 (f) preparing water quality rules or guidance documents.

5 (2) Except as provided in subsection (12), the rules promulgated under this section must include:

6 (a) a fee on all applications for permits or authorizations, as identified in subsections (1)(a) through
7 (1)(c), that recovers to the extent permitted by this subsection (2) the department's cost of reviewing and acting
8 upon the applications. This fee may not be more than \$5,000 per discharge point for an application addressed
9 under subsection (1), except that an application with multiple discharge points may be assessed a lower fee for
10 those points according to rule.

11 (b) an annual fee to be assessed according to the volume and concentration of waste discharged
12 into state waters. The annual fee may not be more than \$3,000 per million gallons discharged per day on an
13 annual average for any activity under permit or authorization, as described in subsection (1), except that:

14 (i) a permit or authorization with multiple discharge points may be assessed a lower fee for those
15 points according to rule; and

16 (ii) a facility that consistently discharges effluent at less than or equal to one-half of its effluent
17 limitations and that is in compliance with other permit requirements, using the previous calendar year's
18 discharge data, is entitled to a 25% reduction in its annual permit fee. Proportionate reductions of up to 25% of
19 the permit fee may be given to facilities that consistently discharge effluent at levels between 50% and 100% of
20 their effluent limitations. However, a new permittee is not eligible for a fee reduction in its first year of operation,
21 and a permittee with a violation of any effluent limit during the previous calendar year is not eligible for a fee
22 reduction for the following year.

23 (3) To the extent permitted under subsection (2)(b), the annual fee must be sufficient to pay the
24 department's estimated cost of conducting all tasks described under subsection (1) after subtracting:

25 (a) the fees collected under subsection (2)(a);

26 (b) state general fund appropriations for functions administered under this chapter; and

27 (c) federal grants for functions administered under this chapter.

28 (4) For purposes of subsection (3), the department's estimated cost of conducting the tasks

described under subsection (1) is the amount authorized by the legislature for the department's water quality discharge permit programs.

(5) If the applicant or holder fails to pay a fee assessed under this section or rules adopted under this section within 90 days after the date established by rule for fee payment, the department may:

(a) impose an additional assessment consisting of not more than 20% of the fee plus interest on the required fee computed as provided in 15-1-216; or

(b) suspend the permit or exclusion. The department may lift the suspension at any time up to 1 year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments, and interest imposed under subsection (5)(a).

(6) Fees collected pursuant to this section must be deposited in an account in the special revenue fund type pursuant to 75-5-517.

(7) The department shall give written notice to each person assessed a fee under this section of the amount of fee that is assessed and the basis for the department's calculation of the fee. This notice must be issued at least 30 days prior to the due date for payment of the assessment.

(8) A holder of or an applicant for a permit, certificate, or license may appeal the department's fee assessment to the board within 20 days after receiving written notice of the fee determination under subsection (7). The appeal must include a written statement detailing the reasons that the permit holder or applicant considers the department's fee assessment to be erroneous or excessive.

(9) If part of the department's fee assessment is not in dispute in an appeal filed under subsection (8), the undisputed portion of the fee must be paid to the department upon written request of the department.

(10) The contested case provisions of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6, apply to a hearing before the board under this section.

(11) A municipality may raise rates to cover costs associated with the fees prescribed in this section for a public sewer system without the hearing required in 69-7-111.

(12) (a) The application fee assessed pursuant to this section for a suction dredge, as described in 82-4-310(2), may not be more than:

(i) \$25 if it is owned and operated by a resident of this state; or

(ii) \$100 if it is owned and operated by a nonresident of this state.

(b) The annual fee assessed pursuant to this section for a suction dredge, as described in 82-4-310(2), may not be more than:

(i) \$25 if it is owned and operated by a resident of this state; or

(ii) \$100 if it is owned and operated by a nonresident of this state.

(13) A county, an incorporated city or town, or a conservation district formed pursuant to Title 76, chapter 15, is not subject to fees for authorizations pursuant to 75-5-318 or certifications related to section 401 of the federal Clean Water Act, 33 U.S.C. 1341."

Section 6. Section 75-5-605, MCA, is amended to read:

"75-5-605. Prohibited activity -- exemption. (1) It is unlawful to:

(a) cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters. Any placement of materials that is authorized by a permit issued by any state or federal agency is not a placement of wastes within the prohibition of this subsection (1)(a) 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.

(b) violate any provision set forth in a permit or stipulation, including but not limited to limitations and conditions contained in the permit;

(c) cause degradation of state waters without ~~authorization~~ a feasibility allowance pursuant to 75-5-303;

(d) violate any order issued pursuant to this chapter; or

(e) violate any provision of this chapter.

(2) Except for the permit exclusions identified in 75-5-401(5), it is unlawful to carry on any of the following activities without a current permit from the department:

(a) construct, modify, or operate a disposal system that discharges into any state waters;

(b) construct or use any outlet for the discharge of sewage, industrial wastes, or other wastes into any state waters; or

(c) discharge sewage, industrial wastes, or other wastes into any state waters.

(3) Activities associated with routine or periodic maintenance, repair, replacement, or operation of

1 irrigation water conveyance systems, including activities associated with any constructed channel, canal, ditch,
2 pipeline, or portion of any constructed channel, canal, ditch, or pipeline, are not prohibited activities under this
3 chapter if the activities do not result in exceeding water quality standards for any receiving water outside the
4 irrigation water conveyance system. The diversion of water in accordance with an existing water right or permit
5 pursuant to Title 85, chapter 2, is not a prohibited activity under this chapter."

6
7 **NEW SECTION. Section 7. Department to amend rules.** The department shall amend ARM
8 17.30.707 and 17.30.708 to add references to feasibility allowances.

9
10 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are
11 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
12 the part remains in effect in all valid applications that are severable from the invalid applications.

13
14 **NEW SECTION. Section 9. Effective date.** [This act] is effective on passage and approval.

15 - END -