

COUNTIES - Requirement that counties give Department of Fish, Wildlife, and Parks notice of planned repair and maintenance to bridges and roads;

FISH AND WILDLIFE - Requirement that counties give Department of Fish, Wildlife, and Parks notice of planned repair and maintenance to bridges and roads;

HIGHWAYS - Requirement that counties give Department of Fish, Wildlife, and Parks notice of planned repair and maintenance to bridges and roads;

NATURAL RESOURCES - Requirement that counties give Department of Fish, Wildlife, and Parks notice of planned repair and maintenance to bridges and roads;

SOIL AND WATER CONSERVATION - Requirement that counties give Department of Fish, Wildlife, and Parks notice of planned repair and maintenance to bridges and roads;

WATER AND WATERWAYS - Applicability of notice provision to counties planning repairs and maintenance to bridges and roads;

MONTANA CODE ANNOTATED - Sections 7-14-2203, 75-7-103, 75-7-111, 87-5-502 to 87-5-506;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 15 (1977), 39 Op. Att'y Gen. No. 2 (1981), 40 Op. Att'y Gen. No. 71 (1984).

HELD: Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance to bridges and roads in accordance with section 87-5-502, MCA, except when an emergency threatens such a bridge or road.

27 May 1986

Russell R. Andrews  
Teton County Attorney  
Teton County Courthouse  
Choteau MT 59422

Dear Mr. Andrews:

You have requested my opinion on the following question:

Does section 87-5-502, MCA, require counties to give notice to the Montana Department of Fish, Wildlife, and Parks of planned repairs

and/or maintenance to existing bridges and roads?

I conclude that the relevant statutes require that such notice be given to the Department of Fish, Wildlife, and Parks, except in those circumstances where section 87-5-506, MCA, applies.

Chapter 5 of Title 87 of the Montana Code Annotated addresses wildlife protection. Stream protection is the subject of sections 87-5-501 to 509, MCA. These sections are prefaced with the following policy:

87-5-501. State policy. It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved.

That policy statement and the associated statutory sections have remained virtually intact since their enactment in 1965. 1965 Mont. Laws, ch. 10. These sections provide that any agency of state or local government must notify the Department of Fish, Wildlife, and Parks (hereinafter Department) of any planned construction that may change the natural environment of a stream. § 87-5-502, MCA. As such, these provisions complement the requirements of the Natural Streambed and Land Preservation Act of 1975, §§ 75-7-101 to 124, MCA, whereby any person planning a project altering a stream must present written notice to the local conservation district or board of county commissioners. §§ 75-7-111, 75-7-103(7), MCA. A person for purposes of that Act is defined as "any natural person, corporation, firm, partnership, association, or other legal entity not covered under 87-5-502." § 75-7-103(4), MCA. See generally 40 Op. Att'y Gen. No. 71 (1984), 39 Op. Att'y Gen. No. 2 at 9 (1981), 37 Op. Att'y Gen. No. 15 at 57 (1977).

Your inquiry concerns the applicability of section 87-5-502, MCA, to county maintenance of bridges and roads. Section 87-5-502, MCA, provides in full:

Notice of construction or hydraulic projects. An agency of state government, county, municipality, or other subdivision of the state of Montana, hereafter called applicant, shall not construct, modify, operate, maintain, or fail to maintain any construction project or hydraulic project which may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries by any type or form of construction without first causing notice of such planned construction to be served upon the department on forms furnished by the department as soon as preliminary plans are completed but not less than 60 days prior to commencement of final plans for construction. Such notice shall include detailed plans and specifications of so much of said project as may or will affect any such stream in any manner specified above.

You question whether the quoted section has full effect because another section grants counties the power to alter streambeds to repair and maintain bridges. Section 7-14-2203, MCA, provides:

Repairs to streambeds, watercourses, and banks. The board of county commissioners may also make repairs to streambeds and watercourses and the banks thereof when any bridge is in danger of being damaged or lost because of erosion or changes in the beds or banks.

By its express language section 7-14-2203, MCA, does nothing more than grant county commissioners authority to make repairs under certain emergency conditions. It does not, either expressly or implicitly, waive compliance with section 87-5-502, MCA. Since both provisions can be given effect simultaneously, section 7-14-2203, MCA, should not be construed in a manner which impairs operation of section 87-5-502, MCA. See Shuman v. Bestrom, 42 St. Rptr. 54, 57, 693 P.2d 536, 538-39 (1985); 2A Sutherland Statutory Construction § 51.02 (4th ed. 1984).

You indicate that counties frequently undertake routine maintenance of bridges and highways near streams and that compliance with the 60-day notice requirement of section 87-5-502, MCA, is burdensome for local governments. However, the statute is clear that such construction falls within the parameters of the notice requirement as long as the work "may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks." Obviously, maintenance or repair work that will not affect a stream or its banks is exempt from the notice requirement. For example, a frost-heaved highway passing over or adjacent to a stream could be repaired without notice as long as no equipment or paving materials entered the stream environment. The mere fact that maintenance or repair is routine or planned does not, however, exempt the work from the notice requirement. Where such work is anticipated by local government the notice requirement should not prove burdensome providing the Department acts promptly to review the construction plans in accordance with its statutory mandates. See §§ 87-5-503 to 505, MCA. Specifically, the Department must complete its initial review of a proposed project within 30 days of its receipt of construction plans from the applicant. § 87-5-504, MCA.

When an emergency exists that threatens a road or bridge with damage, the notice requirement is waived. Section 87-5-506, MCA, provides specifically that the streambed protection part of the Code does not operate "in emergencies such as floods, ice jams, or other conditions causing emergency handling." This provision supplements the previously discussed authority of counties to alter streambeds to save a threatened bridge. The application of section 87-5-506, MCA, is broader in that it applies to agencies of state government and municipalities as well as county government. In operation, the statute allows highway crews to repair road damage and alleviate dangerous conditions promptly without invoking the notice and review process. However, the emergency exception may not be used to justify reviewless construction occurring months after a particular emergency. By the language of section 87-5-506, MCA, review is suspended "in emergencies," which I construe to include repairs immediately required and performed.

**THEREFORE, IT IS MY OPINION:**

Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance to bridges and roads in accordance with section 87-5-502, MCA, except when an emergency threatens such a bridge or road.

Very truly yours,

**MIKE GREELY**  
Attorney General