

*Senate* BILL NO. 356

INTRODUCED BY

*Doherty* *Hayes* *Bishop*  
*Billinger* *Whitcomb* *Raney* *Everitt* *Groner*

A BILL FOR AN ACT ENTITLED: "AN ACT EXPANDING THE CLASS OF PERSONS WHO MAY APPEAL TO THE BOARD A FINAL DEPARTMENT DECISION REGARDING NONDEGRADATION OF WATER QUALITY; REMOVING THE DIRECTIVE THAT CERTAIN CHANGES IN NITRATE CONCENTRATIONS BE FOUND NONSIGNIFICANT; CONVERTING FROM DISCRETIONARY TO MANDATORY THE PERIODIC REVIEW OF AUTHORIZATIONS TO DEGRADE AND ALLOWING SUBSEQUENT REVOCATION OF AUTHORIZATION; CHANGING THE TERMINOLOGY REGARDING THE RELATIONSHIP BETWEEN PLACEMENT OF WASTES AND THEIR LIKELIHOOD TO CAUSE POLLUTION OF STATE WATERS; AND AMENDING SECTIONS 75-5-103, 75-5-301, 75-5-303, AND 75-5-605, MCA."

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. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

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

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

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

(4) "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).

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

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

(7) "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.

(8) "Existing uses" means those uses actually attained in state waters on or after July 1, 1971,

1 whether or not those uses are included in the water quality standards.

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

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

5 (b) surface waters that:

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

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

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

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

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

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

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

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

27 (16) "Outstanding resource waters" means:

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

30 (b) other surface waters or ground waters classified by the board under the provisions of 75-5-316

1 and approved by the legislature.

2 (17) "Owner or operator" means a person who owns, leases, operates, controls, or supervises a  
3 point source.

4 (18) "Parameter" means a physical, biological, or chemical property of state water when a value  
5 of that property affects the quality of the state water.

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

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

11 (21) (a) "Pollution" means:

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

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

19 (b) A discharge, seepage, drainage, infiltration, or flow that is authorized under the pollution  
20 discharge permit rules of the board is not pollution under this chapter. Activities conducted under the  
21 conditions imposed by the department in short-term authorizations pursuant to 75-5-308 are not considered  
22 pollution under this chapter.

23 (22) "Sewage" means water-carried waste products from residences, public buildings, institutions,  
24 or other buildings, including discharge from human beings or animals, together with ground water infiltration  
25 and surface water present.

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

28 (24) "Standard of performance" means a standard adopted by the board for the control of the  
29 discharge of pollutants that reflects the greatest degree of effluent reduction achievable through application  
30 of the best available demonstrated control technology, processes, operating methods, or other alternatives,

1 including, when practicable, a standard permitting no discharge of pollutants.

2 (25) (a) "State waters" means a body of water, irrigation system, or drainage system, either  
3 surface or underground.

4 (b) The term does not apply to:

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

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

8 (26) "Treatment works" means works, including sewage lagoons, installed for treating or holding  
9 sewage, industrial wastes, or other wastes.

10 (27) "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  
13 limited to treatment requirements, standards of performance, effluent standards, and operating procedures  
14 and practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material  
15 storage.

16 (28) "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug, jetted,  
17 or otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition of  
18 ground water."  
19

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

21 **"75-5-301. Classification and standards for state waters.** Consistent with the provisions of  
22 80-15-201 and this chapter, the board shall:

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

26 (2) (a) formulate and adopt standards of water quality, giving consideration to the economics of  
27 waste treatment and prevention. When rules are adopted regarding temporary standards, they must  
28 conform with the requirements of 75-5-312.

29 (b) Standards adopted by the board must meet the following requirements:

30 (i) for carcinogens, the water quality standard for protection of human health must be the value

1 associated with an excess lifetime cancer risk level, assuming continuous lifetime exposure, not to exceed  
2  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-5}$  for other carcinogens. However, if a standard established at  
3 a risk level of  $1 \times 10^{-3}$  for arsenic or  $1 \times 10^{-5}$  for other carcinogens violates the maximum contaminant  
4 level obtained from 40 CFR, part 141, then the maximum contaminant level must be adopted as the  
5 standard for that carcinogen.

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

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

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

11 (a) the smallest practicable size;

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

13 (c) definable boundaries;

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

16 (a) provide a procedure for department review and authorization of degradation;

17 (b) establish criteria for the following:

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

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

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

25 (i) equates significance with the potential for harm to human health or the environment;

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

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

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

1 ~~(d) provide that changes of nitrate [as nitrogen] in ground water are nonsignificant if the discharge~~  
2 ~~will not cause degradation of surface water and the predicted concentration of nitrate [as nitrogen] at the~~  
3 ~~boundary of the ground water mixing zone does not exceed:~~

4 ~~(i) 7.5 milligrams per liter for nitrate [as nitrogen] sources other than domestic sewage;~~

5 ~~(ii) 5.0 milligrams per liter for domestic sewage effluent discharged from a conventional septic~~  
6 ~~system;~~

7 ~~(iii) 7.5 milligrams per liter for domestic sewage effluent discharged from a septic system using level~~  
8 ~~two treatment, which must be defined in the rules; or~~

9 ~~(iv) 7.5 milligrams per liter for domestic sewage effluent discharged from a conventional septic~~  
10 ~~system in areas where the ground water nitrate [as nitrogen] level exceeds 5.0 milligrams per liter primarily~~  
11 ~~from sources other than human waste.~~

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

16 (7) adopt rules to implement this section."  
17

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

19 **"75-5-303. Nondegradation policy.** (1) Existing uses of state waters and the level of water quality  
20 necessary to protect those uses must be maintained and protected.

21 (2) Unless authorized by the department under subsection (3) or exempted from review under  
22 75-5-317, the quality of high-quality waters must be maintained.

23 (3) The department may not authorize degradation of high-quality waters unless it has been  
24 affirmatively demonstrated by a preponderance of evidence to the department that:

25 (a) degradation is necessary because there are no economically, environmentally, and  
26 technologically feasible modifications to the proposed project that would result in no degradation;

27 (b) the proposed project will result in important economic or social development and that the  
28 benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;

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

30 (d) the least degrading water quality protection practices determined by the department to be

1 economically, environmentally, and technologically feasible will be fully implemented by the applicant prior  
2 to and during the proposed activity.

3 (4) The department shall issue a preliminary decision either denying or authorizing degradation and  
4 shall provide public notice and a 30-day comment period prior to issuing a final decision. The department's  
5 preliminary and final decisions must include:

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

7 (b) a detailed description of all conditions applied to any authorization to degrade state waters,  
8 including, when applicable, monitoring requirements, required water protection practices, reporting  
9 requirements, effluent limits, designation of the mixing zones, the limits of degradation authorized, and  
10 methods of determining compliance with the authorization for degradation.

11 (5) An interested person wishing to challenge a final department decision may request a hearing  
12 before the board within 30 days of the final department decision. The contested case procedures of Title  
13 2, chapter 4, part 6, apply to a hearing under this section.

14 (6) Periodically, but not more often than every 5 years, the department ~~may~~ shall review  
15 authorizations to degrade state waters. Following the review, the department may, after timely notice and  
16 opportunity for hearing, modify or revoke the authorization if the department determines that an  
17 economically, environmentally, and technologically feasible modification to the development exists or that  
18 revocation is appropriate. The decision by the department to modify or revoke an authorization may be  
19 appealed to the board.

20 (7) The board may not issue an authorization to degrade state waters that are classified as  
21 outstanding resource waters.

22 (8) The board shall adopt rules to implement this section."  
23

24 **Section 4.** Section 75-5-605, MCA, is amended to read:

25 **"75-5-605. Prohibited activity.** (1) It is unlawful to:

26 (a) cause pollution as defined in 75-5-103 of any state waters or to place or cause to be placed  
27 any wastes ~~where they will~~ in a location where they are likely to cause pollution of any state waters. Any  
28 placement of materials that is authorized by a permit issued by any state or federal agency is not a  
29 placement of wastes within the prohibition of this subsection if the agency's permitting authority includes  
30 provisions for review of the placement of materials to ensure that it will not cause pollution of state waters.

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

3 (c) site and construct a sewage lagoon less than 500 feet from an existing water well;

4 (d) cause degradation of state waters without authorization pursuant to 75-5-303;

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

6 (f) violate any provision of this chapter.

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

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

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

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

13 -END-



STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0356, as introduced

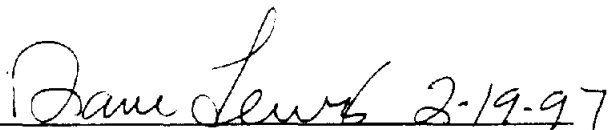
DESCRIPTION OF PROPOSED LEGISLATION:

An act expanding the class of persons who may appeal to the Board of Environmental Review a final Department of Environmental Quality (DEQ) decision regarding nondegradation of water quality; removing the directive that certain changes in nitrate concentrations be found nonsignificant; converting from discretionary to mandatory the periodic review of authorizations to degrade and allowing subsequent revocation of authorization; changing the terminology regarding the relationship between placement of wastes and their likelihood to cause pollution of state waters.

ASSUMPTIONS:

1. A rulemaking proceeding will be necessary to determine whether to change the existing nitrate-nitrogen nondegradation threshold in the absence of the statute requiring a specific threshold. If rulemaking is initiated, approximately 35 pages of administrative register notices would be published at a cost of \$35/page and four public hearings around the state at a cost of (3 staff members\*(31.20 + 19.50)) + (\$.1514\*1,074 miles) in Helena, Billings, Kalispell, and Missoula.
2. The Board (BER) may elect not to change current rules, in which case there would be no additional fiscal impact to the DEQ.
3. If, however, the BER elects to adopt rules similar to the 1994 rules -- in which case the nitrate-nitrogen standards would be approximately 2.5 mg/L less than existing standards-- this level of change would generate the workload described below. If the BER elects to adopt greater or lesser standards, costs would decrease or increase the fiscal impact accordingly.
4. The existing process for an authorization to degrade is significantly more complex than it was before 1994. Additional water data, monitoring, database development, evaluation of technologically feasible alternatives and social, economic and historic information, and responses to public comments are required to be developed as a part of the process.
5. Under existing standards, no authorizations to degrade have been requested. Therefore, there is no existing workload for comparison.
6. Approximately 210 additional hours of review are assumed to be necessary to fulfill the requirements for processing a request for an authorization to degrade within existing statutory timeframes in both subdivision and nondegradation law.
7. The number of subdivision requests for authorizations to degrade will increase from existing levels of 0 (none) to 126 per year (Approximately 75% of the existing 1,346 subdivision applications are currently reviewed under the nondegradation rules. The remaining subdivisions are hooked up to existing sewer systems with adequate capacity. Although none of the 1,009 subdivision applications subject to nondegradation review have exceeded existing nitrate-nitrogen thresholds, approximately 50%, or 504 would exceed the new threshold in assumption #3 above. It is assumed that developers would choose to revise their plans approximately 75% of the time to avoid the authorization-to-degrade process. This leaves 25%, or 126 subdivision applications per year being reviewed under the authorization-to-degrade process.) Another two applications per year would be associated with groundwater permits.
8. At 210 additional hours of review per application, an additional 13 FTE would be necessary to process the requests for authorization to degrade and **to continue to meet statutory time frames.**
9. Approximately 50% of all subdivision authorization-to-degrade decisions will be appealed (63 appeals) per year.

(Continued)

  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

STEVE DOHERTY, PRIMARY SPONSOR      DATE

Fiscal Note for SB0356, as introduced

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(continued)

- 10. Approximately 5% of all other nondegradation decisions will be appealed (<1).
- 11. Although each appeal will require additional staff time and attorney time, such appeals typically last for prolonged periods and thus DEQ cannot estimate the actual effect such appeals may have on workload.
- 12. These 13 FTE for authorization to degrade reviews would consist of seven grade 15 technical specialists and six grade 14 technical specialists. Computers (\$2,700) and office furniture (\$1,050) would be needed initially for each staff person. Another \$1,600 per person in rent would be necessary and \$5,000 per person in incidental expenses (phone, utilities, miscellaneous travel and public meetings).
- 13. The total impact to the DEQ would be at least \$641,635 unless time frames were eliminated from both the nondegradation and subdivision review laws. No change would occur in revenues; therefore, general fund is assumed.

FISCAL IMPACT:

	<u>FY98</u>	<u>FY99</u>
	<u>Difference</u>	<u>Difference</u>
<u>Expenditures:</u>		
FTE	13.00	13.00
Personal Services	\$432,090	\$432,090
Indirect @17%	73,455	73,455
Operating Expenses	87,340	85,800
Equipment	<u>48,750</u>	<u>0</u>
Total	\$641,635)	\$591,345
 <u>Funding:</u>		
General Fund (01)	\$641,635	\$591,345