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WATER QUALITY NONDEGRADATION IN MONTANA: IS ANY DETERIORATION TOO MUCH?

John L. Horwich*

I. INTRODUCTION

Since the mid-1960s, when the federal government began earnestly to address problems of pollution, the history of pollution control has been a search for the best approach. After decades of experimentation, we are largely left with the two preeminent approaches that were identified early in the era of modern environmental law: health and welfare based ambient quality and technology-based controls. These two approaches, even when combined, however, leave a potentially significant gap in environmental protection. What happens when the quality of the air or water is already better than the health or welfare based standard? What if compliance with technology-based controls will lead to a deterioration of the existing air or water quality? For more than two decades the federal and Montana governments have responded to this gap with policies and programs designed to protect air and water quality from undesirable degradation. This article examines Montana's water quality nondegradation policy and program.

Pollution control premised upon health and welfare based ambient quality is "ends based." That is, it begins by identifying the minimal quality of the relevant medium (e.g., air or water) necessary to avoid adverse effects on health or welfare. This minimal air or water quality then becomes the end to be achieved. Discharges of air or water contaminants are to be controlled as necessary to assure that ambient air or water quality do not fall below these minimal standards. The health and welfare based ambient quality approach has always been the primary emphasis of the Clean Air Act.¹

Pollution control premised upon technology-based controls is "means based." That is, it begins by identifying the degree of pollution control that is economically and technologically achievable. In their pure form, technology-based controls require that discharges of air or water contaminants be controlled to the extent economically and technologically feasible, regardless of the ultimate effect on the ambient quality of the receiving air

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1. See, e.g., 42 U.S.C. §§ 7408-7410 (1988 & Supp. III 1991).

or water. As thus applied, technology-based controls could either result in ambient quality that is better or worse than minimally required to protect health and welfare. Since the Clean Water Act Amendments of 1972, the federal approach to water pollution has been primarily technology-based.²

Today, the health and welfare based ambient quality approach and the technology-based approach rarely exist in their pure forms. The Clean Air Act includes significant technology-based standards³ and the Clean Water Act incorporates important ambient water quality standards.⁴ Of course, recent changes to pollution control laws have also introduced new regulatory approaches, including disclosure requirements⁵ and incentive-based approaches.⁶ Despite the combining of approaches and the introduction of new techniques, the health and welfare based ambient quality and technology-based approaches remain the dominant approaches to pollution control.

Whether employed separately or in combination, these approaches leave a potentially significant gap in environmental protection. The significance of the gap depends upon one's perspective on conservation and environmental protection; but the existence of the gap is indisputable. Environmental programs premised upon health and welfare based ambient quality raise the question of what happens when the quality of the environmental medium (e.g., air or water) is already better than the standard. May the air or water be fouled until it reaches the level of the relevant health and welfare based standard? The answer is important to environmentalists and industrialists: if the answer is "yes," environmentalists see a license to pollute pristine airsheds and watercourses, while industrialists see an opportunity for economic development in "clean" areas free of the constraints applicable in "dirty" areas. If the answer is "yes," environmental regulation will be working toward a uniform national ambient environmental quality: dirty areas ultimately will be improved to meet the ambient standards and clean areas ultimately will be degraded until they reach the ambient standards. Pristine air and water would become the subject of folktales.

Environmental programs premised upon the technology-based approach encounter a similar dilemma. The technology-based approach applies air emission limitations and wastewater discharge limitations to pollution sources, regardless of the individual or cumulative impact on the

2. *See, e.g.*, 33 U.S.C. §§ 1311, 1314, 1342 (1988).

3. *See, e.g.*, 42 U.S.C. §§ 7411 - 7412 (1988 & Supp. III 1991).

4. *See, e.g.*, 33 U.S.C. §§ 1312 - 1313 (1988).

5. *See, e.g.*, Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11,001-11,050 (1988).

6. *See, e.g.*, 42 U.S.C. §§ 7651b(b)-(f), 7651c, 7651n (Supp. III 1991).

receiving water or air. Obviously, such an approach permits clean air and water to be degraded; and at its extreme, it would allow ambient quality to exceed health and welfare based standards. While such an approach has the merit of uniformity (sources are subject to the same requirements regardless of geographic location), that uniformity comes at the potential expense of the quality of the receiving medium.

This dilemma has not gone unnoticed. Since 1966, federal air and water pollution control programs have included a public policy against undesirable degradation.⁷ Montana followed shortly thereafter with its own policy addressing water quality degradation.⁸ These nondegradation policies are ambient quality based; however, rather than establishing standards based upon the minimal quality necessary to protect health and welfare, they employ the existing quality as a baseline. For the most part, the federal and state nondegradation policies are not absolute prohibitions against degradation. They create a presumption in favor of preserving high quality water and air; but they permit limited degradation if justified and subject to strict conditions.⁹

As characterized by Dean Hines, a recognized expert on nondegradation: "Nondegradation provides a classic illustration of the confrontation between environmentalists who rely on ethical norms for guidance in public decisionmaking and economists who insist that such decisions be based on rigorous analysis of competing values."¹⁰ In today's lingo: nondegradation is a battleground in the jobs versus environment war. Ardent environmentalists maintain that our ethical obligation is clear and unequivocal: environmental quality should never be degraded. Ardent industrialists are equally adamant that the imperative is quite the opposite: existing environmental quality is irrelevant; the most stringent standards should never exceed those necessary to protect human health and welfare.

For more than two decades, the federal and Montana water quality nondegradation policies have sought a balance between these two extremes. These policies favor preserving high quality waters, but authorize limited degradation if the economic or social benefits justify the loss of environmental quality. To state the policy is to highlight the difficult political choices required to implement the policy. Dean Hines has characterized the seminal issues: How much deterioration in water quality is significant enough to merit concern? How much economic or social

7. N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clear Air and Clean Water*, 62 IOWA L. REV. 643, 645 (1977) [hereinafter Hines]. See *infra* notes 21-22 and accompanying text.

8. See *infra* note 24 and accompanying text.

9. See Hines, *supra* note 7, at 645.

10. *Id.* at 650.

benefit justifies a given level of water quality deterioration? Who will decide the answers to these questions and based on what criteria?¹¹

While nondegradation issues are important nationwide, they assume added significance in less developed locales.¹² Areas with little or no impact from urbanization and industrialization contain our cleanest water and purest air. It is these areas that have the potential for the greatest impact from pollution limited only by health and welfare based ambient standards or technology-based standards. It is these areas where nondegradation is not the exception, but the rule. Nondegradation is a critical, if not *the* critical, feature of environmental regulation in a state like Montana, with its huge land area and small population, its rural and nonindustrial character, and its largely undeveloped expanses. It has been said that nondegradation "serves as the pollution control analogue to wilderness preservation in public lands management."¹³ The analogy highlights the significance of nondegradation policy to the environmental quality of Montana.

The focus of this article is Montana's water quality nondegradation policy. The article begins by examining in detail Montana's groundwater nondegradation policy and program. After charting the evolution of the policy and program from the federal initiatives in the mid-1960s to the current state program, the article evaluates the current program. The statute establishing Montana's water quality nondegradation policy is analyzed for internal consistency. The regulations implementing the state program also are analyzed for internal consistency and for consistency with the statutory authority. The entire Montana program is compared to the state constitutional mandate regarding degradation of the "environmental life support system."¹⁴ Finally, the state program is evaluated for consistency with the federal requirements for state nondegradation programs. The article concludes by highlighting the fundamental environmental policy and program dilemmas raised by Montana's current water quality nondegradation program, and by recommending solutions to these dilemmas.

II. MONTANA'S WATER QUALITY NONDEGRADATION POLICY AND PROGRAM

Montana's current water quality nondegradation policy and program are the result of more than twenty years of evolution. The state policy was initiated in the late 1960s in response to federal legislation. The basic state

11. *Id.* at 646.

12. *Id.* at 645.

13. *Id.*

14. MONT. CONST. art. IX, § 1.

policy, as expressed in the Montana statutes, has remained substantively unchanged in the intervening period.¹⁵ Meanwhile, the federal policy and regulations have been revised several times and the state has adopted a new constitution, including new environmental mandates. Montana's water quality nondegradation program must be consistent with the federal requirements and with Montana's 1972 Constitution. While Montana's program is generally consistent with the minimal federal requirements, there are several respects in which the Montana program is at least arguably less protective of water quality than required by federal law. In addition, the exceptions to the nondegradation policy permitted by Montana statute appear to contravene the absolute constitutional prohibition against degradation of water quality.

Montana's groundwater nondegradation policy is implemented through regulations adopted by Montana's Board of Health and Environmental Sciences. These regulations must be internally consistent and within the authority and policy established by the state statute expressing Montana's water quality nondegradation policy. In important respects, the current nondegradation regulations are internally inconsistent and exceed their statutory authority.

A. *The History of the Federal and Montana Water Quality Nondegradation Policy*

The first major federal regulatory program addressing contamination of the nation's waters was the 1965 Water Quality Act.¹⁶ That Act resolved a longstanding controversy over the federal approach to water pollution. The debate between advocates for health and welfare based ambient standards and advocates for technology-based standards was decided in favor of ambient standards.¹⁷ The new federal program required the states to adopt and enforce ambient water quality standards consistent with nationally uniform federal guidance.¹⁸ The statute itself was sketchy, leaving explication to the federal agency charged with administering the Act, the Federal Water Pollution Control Administration of the U.S. Department of the Interior.¹⁹

One of the agency's first tasks was to inform the states of the criteria

15. See *infra* notes 28-31 and 56-58 and accompanying text.

16. Pub. L. No. 89-234, 79 Stat. 903 (1965). Although the first general federal law addressing water pollution was the Water Pollution Control Act of 1948 (Pub. L. No. 80-845, 62 Stat. 1155), that law provided for federal studies, research and sewage treatment funding, with little attention to regulating sources of pollution.

17. See Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 907 (1965).

18. *Id.*

19. Hines, *supra* note 7, at 658.

that would be applied in federal review of their water quality standards.²⁰ In Guidelines published in May 1966, the agency expressed the federal nondegradation policy: "In no case will [state water quality] standards providing for less than existing water quality be acceptable;"²¹ and state water quality standards must provide for "[t]he maintenance and protection of quality and use or uses of water now of a higher quality or of a quality suitable for present and potential uses."²²

After some confusion over the federal commitment to nondegradation, on February 8, 1968, Secretary of the Interior Udall issued a statement announcing the Administration's position on nondegradation:

Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at their existing high quality. These and other waters of a State will not be lowered in quality unless and until it has been affirmatively demonstrated to the State water pollution control agency and the Department of the Interior that such change is justifiable as a result of necessary economic or social development and will not interfere with or become injurious to any assigned uses made of, or presently possible in, such waters. This will require that any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters will be required, as part of the initial project design, to provide the highest and best degree of waste treatment available under existing technology, and, since these are also Federal standards, these waste treatment requirements will be developed cooperatively.²³

The State of Montana responded to the federal requirement to develop water quality criteria, water use classifications and policy statements pursuant to the 1965 Water Quality Act and federal guidelines. In approximately 1969, the Montana Water Pollution Control Council adopted a policy statement on nondegradation:

Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at that high quality unless it has been

20. *Id.*

21. Hines, *supra* note 7, at 658 (quoting U.S. DEP'T OF INTERIOR FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, GUIDELINES FOR ESTABLISHING WATER QUALITY STANDARDS FOR INTERSTATE WATERS 5 (1966)).

22. *Id.*

23. U.S. DEP'T OF INTERIOR FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, COMPENDIUM OF DEPARTMENT OF INTERIOR STATEMENTS ON NON-DEGRADATION OF INTERSTATE WATERS 1-2 (Aug. 1968) [hereinafter DOI COMPENDIUM].

affirmatively demonstrated to the state that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of such waters. Any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters will be required to provide the necessary degree of waste treatment to maintain high water quality. In implementing this policy, the Secretary of the Interior will be kept advised in order to discharge his responsibilities under the Federal Water Pollution Control Act, as amended.²⁴

The state policy was clearly patterned after Secretary Udall's 1968 statement.²⁵ The federal and state policies agreed on the basic presumption that high quality waters were to be maintained at their existing high quality. The policies also agreed that degradation of that high quality may be allowed if certain conditions were fulfilled. Both policies agreed that the first of these conditions was an affirmative demonstration that the "change is justifiable as a result of necessary economic or social development." The federal and state policies differed slightly on the second condition to allowable degradation: the federal policy required an affirmative demonstration that the degradation "will not interfere with or become injurious to any assigned uses made of, or presently possible in, such waters;" whereas the state policy required an affirmative demonstration that the degradation "will not preclude present and anticipated use of such waters." The federal standard was stricter in prohibiting degradation that would interfere with or become injurious to uses, while the state standard only prohibited degradation that would actually "preclude" such uses. On the other hand, the state standard was apparently more stringent in protecting "anticipated use" of waters as well as present uses; whereas the federal standard protected only current uses and those which were "presently possible" in such waters.

The policies also apparently differed in their application to non-high quality waters, i.e., those waters whose existing quality is not better than the established standards. The federal policy statement employed the first two sentences to express the general policy that high quality waters were not to be degraded and to establish the conditions under which degradation

24. Undated correspondence from Claiborne W. Brinck, Director, Division of Envtl. Sanitation of Montana Dep't of Health to Persons Receiving Montana Water Quality Criteria, Water Use Classifications and Policy Statements. Presumed to have been written in 1969 based upon other references to the Montana Water Pollution Control Council's 1969 nondegradation policy. (on file with the author).

25. I have been unable to locate any explanation for the differences between the federal policy expressed in Secretary Udall's 1968 statement and Montana's policy expressed by the Water Pollution Control Council.

may be allowed. The state policy accomplished both tasks in the first sentence. The difference was substantive. In setting forth the conditions under which degradation may be allowed, the second sentence of the federal policy expressed that these conditions applied to "[t]hese [high quality waters] and other waters of a State." The implication was that even non-high quality waters may not be degraded unless certain conditions were met. In contrast, the state policy eliminated any reference to non-high quality waters, and combined the first two sentences of the federal policy to make explicit that the Montana policy applied only to high quality waters.

The other differences between the initial federal and state nondegradation policies were even more significant.²⁶ After establishing the basic presumption in favor of nondegradation and the conditions under which degradation may be allowed, both policies described requirements to be imposed on industrial, public or private projects or developments which would constitute a new source of pollution or an increased source of pollution to high quality waters. The federal policy required these sources, "as part of the initial project design, to provide the highest and best degree of waste treatment available under existing technology." The state policy required these sources "to provide the necessary degree of waste treatment to maintain high water quality." The federal standard was apparently technology-limited (i.e., these sources would be required to employ the best technology currently available); whereas the state standard was water-quality driven (i.e., these sources would be required to employ whatever waste treatment was necessary to preserve the current high water quality).

The important issue posed by these policies was what happens to a new or increased source of pollution which, even after application of the best technology currently available, still would degrade high quality water. Under the federal policy, these sources appeared to be eligible for the nondegradation waiver expressed in the second sentence of the federal policy. This interpretation is consistent with the technology-limited treatment requirement and with the syntactical structure of the federal policy. These requirements for new and increased sources of pollution in both the federal and state policies followed the description of the conditions under which degradation may be allowed. In the federal policy, these requirements were prefaced by the phrase "This will require that." "This" referred to the nondegradation exemption, indicating that new or increased sources of pollution were eligible for the nondegradation exemption, but in any event they had to employ the best technology currently available.

The state policy eliminated the prefatory phrase referencing the

26. See *infra* notes 108-23 and accompanying text.

preceding nondegradation exemption and asserted a more stringent water-quality based treatment requirement. These changes to the federal policy suggest Montana intended to adopt an absolute nondegradation policy for new and increased sources of pollution, precluding such sources from receiving the nondegradation exemption. Because the controversy over the meaning of this language continues more than twenty years later,²⁷ it is unfortunate any intent to differ from the federal policy in this respect was not made more explicit.

Montana's water pollution statutes were extensively revised by the 1971 Legislature.²⁸ That legislation accomplished major administrative reorganization, by transferring most water quality authority from the Water Pollution Control Council to the Board of Health. That legislation also codified Montana's nondegradation policy.²⁹ The codified policy was essentially verbatim the policy previously adopted by the Water Pollution Control Council.³⁰ Significantly, when the language was codified, the general nondegradation policy and exemption provisions were placed in one statutory subsection, and the requirements applicable to new and increased sources of pollution were placed in a separate statutory subsection.³¹ This structure lends additional support to the argument that the standards applicable to new and increased sources of pollution are independent, absolute requirements that are not subject to the nondegradation exemption.

While the state was establishing a water pollution program to comply with the 1965 Water Quality Act, Congress completely overhauled the federal program with the passage of the Clean Water Act Amendments of

27. See *infra* notes 108-23 and accompanying text.

28. See 1971 MONT. LAWS Ch. 21, § 6.

29. Specifically, it provided: (1) The board [of Health] shall:

....

(c) review from time to time, at intervals of not more than three years, established classifications of waters and standards of water purity and classification, provided that . . .

....

(3) the board shall require that any state waters whose existing quality is better than the established standards as of the date on which such standards become effective be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of such waters, and

(4) the board shall require any industrial, public, or private project or development, which would constitute a new source of pollution or an increased source of pollution to high quality waters, referred to in (3) immediately above, to provide the degree of waste treatment necessary to maintain that existing high water quality.

Id.

30. See *supra* note 24 and accompanying text. See also, TESTIMONY ON H.R. 85 BEFORE THE HOUSE COMMITTEE ON ENVIRONMENT AND RESOURCES, 42d Leg. (Jan. 12, 1971)(testimony of Winton Weydemeyer, Montana Conservation Council).

31. 1971 MONT. LAWS Ch. 21, §§ 6(c)(3) - (4).

1972.³² The 1972 Amendments represented a major mid-course correction in the federal approach to water pollution control. While the 1965 Water Quality Act adopted ambient standards as the guiding light of water pollution control,³³ the 1972 Amendments rejected that approach in favor of technology-based standards.³⁴ Even though the principal means of water pollution control became technology-based effluent limitations, the 1972 Amendments declared it a national goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."³⁵

The 1972 Amendments were silent on the subject of nondegradation. The new agency now charged with administering the federal water pollution control policy, the Environmental Protection Agency (EPA), had to decide whether statutory silence indicated federal abandonment of the nondegradation policy. The legislative history of the 1972 Amendments contained several references to the nondegradation policy,³⁶ and EPA found general support for the policy in the new law. The general intent of the legislation, to restore and *maintain* the integrity of the nation's waters, supported a nondegradation policy.³⁷ Further, section 303 of the Act, which made water quality standard requirements under the prior law the starting point for the new water quality requirements, arguably embraced the nondegradation policy that had become an integral component of the earlier standards program.³⁸ The EPA, with prodding from environmentalists, decided to continue the federal nondegradation program.³⁹

The EPA did not formally adopt regulations implementing the nondegradation policy until 1975.⁴⁰ Meanwhile, the Montana Legislature made minor, nonsubstantive changes in the language of the statutory nondegradation policy in 1974 and 1975.⁴¹

32. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

33. See *supra* note 17 and accompanying text.

34. See, e.g., 33 U.S.C. §§ 1311 - 1312 (Supp. V 1975).

35. 33 U.S.C. § 1251(a) (Supp. V 1975).

36. Hines, *supra* note 7, at 675 (citing S. Rep. No. 414, 92d Cong., 1st Sess. 76-77 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 85 (1972)).

37. See 33 U.S.C. § 1251(a) (Supp. V 1975). See also U.S. EPA OFFICE OF WATER REGULATIONS AND STANDARDS, QUESTIONS AND ANSWERS ON: ANTIDEGRADATION (Aug. 1985) [hereinafter EPA QUESTIONS AND ANSWERS].

38. EPA QUESTIONS AND ANSWERS, *supra* note 37. See also Hines, *supra* note 7, at 675.

39. Hines, *supra* note 7, at 675-77.

40. See *infra* note 44 and accompanying text.

41. 1974 MONT. LAWS Ch. 349, § 62 involved renumbering of subsections and changes to pronouns (e.g., "such" to "these"). 1975 MONT. LAWS Ch. 455, § 5 included minor word changes to the statutory nondegradation policy, which appear to clarify but not alter the meaning of the policy. Waters subject to the nondegradation policy were described as those whose existing quality is "higher" than the standards, in lieu of the previous reference to "better." The previous statute referred to the quality being better than the established "standards as of the date on which the standards become effective." In 1975, that reference was changed to the quality being higher than the established "water quality standards," without reference to the date on which such standards become effective.

After roughly two years of considering whether to change the federal approach to nondegradation,⁴² the EPA formally adopted regulations that continued the policy first enunciated by Secretary Udall in 1968:⁴³

(e) The State shall develop and adopt a Statewide antidegradation policy and identify the methods for implementing such policy pursuant to § 130.10(b)(2). The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses is allowable.

(2) Existing high quality waters which exceed those levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water shall be maintained and protected unless the State chooses, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, to allow lower water quality as a result of necessary and justifiable economic or social development. In no event, however, may degradation of water quality interfere with or become injurious to existing instream water uses. Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and feasible management or regulatory programs pursuant to section 208 of the Act for nonpoint sources, both existing and proposed.⁴⁴

While this first, formal regulatory codification of the federal nondegradation policy followed the lead established by Secretary Udall, it also reflected substantive refinement. The federal policy as reflected in the 1976 regulations clearly established a three-tiered approach to maintaining and protecting various levels of water quality and uses, an approach that remains the cornerstone of the federal policy today.⁴⁵ The first tier

42. Hines, *supra* note 7, at 677-79.

43. See *supra* note 23 and accompanying text. As stated in the preamble to the final rule: "The Agency's antidegradation policy is the same in many respects as the policy that EPA and its predecessor Agency have encouraged the States to adopt in the past." 40 Fed. Reg. 55,336 (1975).

44. 40 C.F.R. § 130.17(e) (1976).

45. See 48 Fed. Reg. 51,403 (1983). See also *infra* notes 63-85 and accompanying text.

established that, at a minimum, all existing uses and the level of water quality necessary to support those uses must be maintained and protected.⁴⁶ The second tier provided protection of actual water quality in areas where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water ("fishable/swimmable").⁴⁷ As to these fishable/swimmable waters, the policy established procedures and criteria pursuant to which limited water quality degradation may be allowed.⁴⁸ Degradation could be allowed if the state chose to permit it after public consideration of the issue and provided the degradation did not interfere with or become injurious to existing instream water uses.⁴⁹ The third tier created an absolute prohibition on degradation of high quality waters which constitute an outstanding national resource.⁵⁰

The codified federal policy reflects limited, specific variations from the previous informal policy. The formal rule clearly limits the nondegradation policy to "high quality" waters. In this respect, the formal federal policy adopted the approach reflected in Montana's 1969 Water Pollution Control Council policy and 1971 statute.⁵¹ Rather than defining "high quality" waters as those where the existing quality is better than the established water quality standards, the formal federal policy defines them as those where the existing quality is better than the "fishable/swimmable" criteria. The formal federal policy focuses solely on the impact on existing instream uses; it gives no consideration to uses "presently possible" in such waters.⁵² While the prior federal policy left the decision whether to allow degradation to both the state and the Federal Department of the Interior, the codified policy placed that responsibility primarily with the state. To assure that the decision whether to allow degradation was made openly and with full public input, the codified federal policy required that such a decision by the state must follow "full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process."⁵³

Finally, the formal federal policy altered the requirements applicable to new or increased sources of pollution. The 1968 policy required new or increased sources of pollution to high quality waters "to provide the highest

46. 48 Fed. Reg. 51,403 (1983); 40 C.F.R. § 130.17(e)(1) (1976).

47. 48 Fed. Reg. 51,403 (1983); 40 C.F.R. § 130.17(e)(2) (1976). *See* 33 U.S.C. § 1312(a) (Supp. V 1975) (defining the "fishable/swimmable" standard).

48. 40 C.F.R. § 130.17(e)(2) (1976).

49. *Id.*

50. 40 C.F.R. § 130.17(e)(2) (1976). *See infra* notes 201-03 and accompanying text.

51. *See supra* notes 25-26 and accompanying text.

52. *See supra* note 23 and accompanying text.

53. 40 C.F.R. § 130.17(e)(2) (1976).

and best degree of waste treatment available under existing technology.”⁵⁴ This was a technology-limited standard which, at least in theory, might impose more stringent discharge requirements than would otherwise apply under the Clean Water Act. The 1975 codified policy instead obligated the state to assure that existing statutory and regulatory requirements were met for all new and existing point sources and all existing and proposed nonpoint sources.⁵⁵ The codified policy, while extending its requirements to existing as well as new or increased sources, seemed to require no more stringent control on such sources than would otherwise apply under the Clean Water Act.

In 1977 the Revised Code of Montana was entirely recodified as the Montana Code Annotated. That recodification included a restructuring of Montana’s water quality nondegradation provisions into the form in which they appear today.⁵⁶ Prior to the 1977 recodification, the nondegradation provisions had always appeared as a condition of the Board of Health’s triennial review of water classifications and water quality standards.⁵⁷ Since 1977, the nondegradation policy has stood as an independent statutory provision.⁵⁸

The federal antidegradation policy has undergone several refinements since its initial adoption as a formal rule in 1975.⁵⁹ In 1979, the federal policy of 1975 was readopted verbatim, but relocated to 40 C.F.R. § 35.1550(e).⁶⁰ In 1982, EPA proposed significant changes to the antidegradation policy. The agency’s recommendation included a shift in emphasis to the current use of the water instead of individual water quality parameters which might be higher than necessary to protect existing uses.⁶¹ This change would have allowed degradation of particular parameters without requiring special state approval, so long as the existing uses were protected. This substantial change was criticized in comments on the proposed rule and it was ultimately rejected in the revised rule published on

54. See *supra* note 23 and accompanying text.

55. 40 C.F.R. § 130.17(e)(2) (1976).

56. Compare MONT. CODE ANN. § 75-5-303 (1978) with § 75-5-303 (1991).

57. See Act of April 2, 1973, ch. 506, sec. 2, § 69-4808.2(1)(c), 1973 MONT. LAWS.

58. MONT. CODE ANN. § 75-5-303 (1991) provides:

The board [of Health and Environmental Sciences] shall require:

(1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters; and

(2) any industrial, public, or private project or development which would constitute a new source of pollution or an increased source of pollution to high-quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality.

59. See *supra* note 44 and accompanying text.

60. 44 Fed. Reg. 30,400 (1979).

61. 47 Fed. Reg. 49,238 (1982).

November 8, 1983.⁶²

The 1983 revised rule did, however, introduce several changes to the 1975 policy. Deleted from the 1983 rule were the sentences stating that no further water quality degradation would be allowed which would interfere with or become injurious to existing instream uses.⁶³ EPA had concluded the terms "interfere" and "injurious" were subject to misinterpretation as precluding any activity which might even momentarily add pollutants to the water.⁶⁴ To reaffirm EPA's commitment to protecting water quality and not merely existing uses, however, language was added requiring that the level of water quality necessary to protect existing uses must be maintained and protected.⁶⁵ This expressed EPA's intention that the antidegradation policy applied to individual water quality parameters.⁶⁶

The 1983 policy also reflected several refinements in the terms of the exemption from nondegradation. Since Secretary Udall's 1968 statement,⁶⁷ the criteria for allowing degradation were that such degradation was a result of necessary and justifiable economic or social development and such degradation would not interfere with or become injurious to existing uses.⁶⁸ The 1983 rule altered the criteria to require a finding by the state that lower water quality "is necessary to accommodate important economic or social development in the area in which the waters are located," and that in allowing such lower water quality existing uses shall be protected "fully."⁶⁹ In addition, the 1983 rule reinstated the burden on the state approving degradation that had been a part of Secretary Udall's original policy.⁷⁰ Secretary Udall had required that the criteria justifying degradation be "affirmatively demonstrated to the State,"⁷¹ whereas the codification of the policy from 1975 until 1983 authorized a state to "choose" to allow lower water quality as a result of necessary and justifiable economic or social development.⁷² In 1983, the regulation deleted any reference to a state "choosing" degradation, and required that the state "find" that allowing lower water quality is necessary to accommodate important economic or social development.⁷³

It is difficult to characterize the 1983 criteria for allowing lower water

62. 48 Fed. Reg. 51,400 (1983).

63. *Id.* at 51,402, 51,407.

64. *Id.* at 51,402-03.

65. 40 C.F.R. § 131.12(a)(1) (1984).

66. EPA QUESTIONS AND ANSWERS, *supra* note 37 at 4.

67. *See supra* note 23 and accompanying text.

68. *See supra* notes 42-44 and accompanying text.

69. 40 C.F.R. § 131.12(a)(2) (1984).

70. *See supra* note 23 and accompanying text.

71. *See supra* note 23 and accompanying text.

72. 40 C.F.R. § 35.1550(e)(2) (1979).

73. 40 C.F.R. § 131.12(a)(2) (1991).

quality as either more or less stringent than the previous policy. Clearly the change from allowing a state to "choose" degradation to requiring a "finding" makes the decision less discretionary and more subject to judicial review. It is a matter of opinion whether the former standard that the degradation is a result of necessary and justifiable economic or social development, or the new standard that degradation is necessary to accommodate important economic or social development, is more stringent. The former standard required that the economic or social development be "necessary and justifiable," which appears more stringent than the new requirement that the economic or social development be "important." On the other hand, the relationship between degradation of water quality and the economic or social development appears more stringent under the new rule. The former policy simply required that the degradation be "a result of" the economic or social development; while the new standard requires that the degradation be "necessary" to accommodate the economic or social development. Arguably, under the new standard, if there is any way to accomplish the economic or social development without degradation, then degradation may not be allowed, because it would not be necessary.

The new policy also introduces a geographic perspective into the economic or social development criteria. The previous policy simply considered economic or social development, but the new policy focuses on economic or social development "in the area in which the waters are located."⁷⁴ This, again, seems to reduce the threshold for approving degradation. If the context is local, the proposed economic or social development is more likely to be "important," than if the context is statewide or national.

It is also difficult to characterize the change from the original policy, which restricted allowable degradation to only that which would not interfere with or become injurious to existing uses, to the new policy that allowable degradation must still "protect existing uses fully."⁷⁵ In describing the new policy, EPA stated simply that it means "the full use must continue to exist even if some change in water quality may be permitted."⁷⁶ It seems the new policy is less stringent, since decreases in water quality that might interfere with or become injurious to existing uses might nevertheless allow the full existing use to continue.

Another refinement in the 1983 regulation concerned outstanding national resource waters. Since 1975, the federal policy absolutely forbade

74. *Id.*

75. *Id.*

76. 48 Fed. Reg. 51,403 (1983).

any degradation of outstanding national resource waters.⁷⁷ In 1983, EPA restated the policy as requiring that in outstanding national resource waters "water quality shall be maintained and protected."⁷⁸ EPA described this change as providing a limited exception to the absolute no degradation requirement of prior law.⁷⁹ The new policy was designed to allow states to approve limited activities which result in temporary and short-term changes in water quality in outstanding national resource waters.⁸⁰

The final refinement in the 1983 regulation addressed the standard to be met by nonpoint sources. As provided by the previous rule,⁸¹ states were to assure that new and existing point sources achieved the highest statutory and regulatory requirements.⁸² The previous rule required existing and proposed nonpoint sources to comply with all "feasible management or regulatory programs pursuant to section 208 of the Act."⁸³ The new rule required nonpoint sources to achieve "all cost-effective and reasonable best management practices."⁸⁴

The federal antidegradation regulations remain today the same as those adopted in 1983.⁸⁵ Even though when the Clean Water Act was amended in 1987, Congress for the first time included a statutory reference

77. 40 C.F.R. § 35.1550(e)(2) (1979).

78. 40 C.F.R. § 131.12(a)(3) (1991).

79. 48 Fed. Reg. 51,403 (1983).

80. *Id.* For further discussion concerning outstanding national resource waters, see *infra* notes 201-03 and accompanying text.

81. 40 C.F.R. § 35.1550(e)(2) (1979).

82. 40 C.F.R. § 131.12(a)(2) (1991).

83. 40 C.F.R. § 35.1550(e)(2) (1979).

84. 40 C.F.R. § 131.12(a)(2) (1991).

85. The current federal antidegradation policy provides:

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

40 C.F.R. § 131.12 (1991).

to antidegradation.⁸⁶ The reference, however, is obscure, providing no insight into the concept or directive as to how to implement the policy.⁸⁷

Although the Montana Legislature adopted a statutory nondegradation policy in 1971,⁸⁸ rules implementing the state's nondegradation policy were not promulgated until 1982.⁸⁹ Except for amendments in 1984 which included groundwater within the state's nondegradation policy,⁹⁰ and recent changes in the fall of 1992,⁹¹ the state's administrative regulations implementing the nondegradation policy have remained unaltered. Also in 1982, the Montana Department of Health and Environmental Sciences adopted special rules addressing groundwater nondegradation.⁹² The rules established a groundwater pollution control system patterned after the national and state surface water pollution discharge elimination system.⁹³ These nondegradation provisions have not been changed since their adoption.⁹⁴

B. *The Montana Constitution*

When the current version of the Montana Constitution was adopted in 1972, several provisions were included to express the state's interest in environmental quality.⁹⁵ On the subject of environmental degradation, article IX, section 1, subsection 3 provides: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."⁹⁶ The language clearly indicates a dual degradation policy: Environmental life support systems should be protected from all degradation, while natural resources should be protected from "unreasonable depletion and degradation."

Records of the 1972 Constitutional Convention support a strict interpretation that degradation of water quality is absolutely prohibited. The drafters of the constitutional language intentionally avoided defining

86. 33 U.S.C. § 1313(d)(4)(B) (1988).

87. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 853 (1992).

88. See *supra* notes 28-29 and accompanying text.

89. MONT. ADMIN. R. tit. 16, ch. 20, subpt. 7 (1982).

90. 1984 Mont. Admin. Reg. 1804.

91. 1992 Mont. Admin. Reg. 2064.

92. 1982 Mont. Admin. Reg. 1942.

93. *Id.*

94. See MONT. ADMIN. R. tit. 16, ch. 20, subpt. 10 (1982).

95. See, e.g., MONT. CONST. art. II, § 3 ("the right to a clean and healthful environment"); MONT. CONST. ART. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

96. MONT. CONST. art. IX, § 1, subsec. 3.

any of the terms of the provision.⁹⁷ They stated, however, that the term "environmental life-support system" is "all encompassing, including but not limited to air, water and land."⁹⁸ They also stated that whatever might ultimately be the legislative and judicial parameters placed on the definition of "environmental life-support system," "there is no question [that system] cannot be degraded."⁹⁹ The constitutional policy on water quality degradation appears clear: water quality may not be degraded.

This policy interpretation is reinforced by the treatment accorded degradation of natural resources in the same constitutional paragraph.¹⁰⁰ Although the environmental life support system is to be protected from degradation, natural resources are to be protected from "unreasonable depletion and degradation."¹⁰¹ The drafters acknowledged that some nonrenewable natural resources are to be consumed, and this provision "permits the Legislature to determine whether the resources [are] being unreasonably depleted."¹⁰² In establishing different degradation standards for the environmental life support system and for natural resources, the drafters clearly distinguished between an absolute prohibition on degradation and a prohibition on *unreasonable* degradation.

The only flexibility that applies to water quality degradation under the Montana Constitution appears to be the definition of "degradation" itself. As noted above, the drafters of the provision intentionally left all terms, including "degradation," undefined.¹⁰³ What constitutes degradation of the environmental life support system (especially water quality)? Does degradation under the constitution consist of any worsening of any parameter of water quality? Or is degradation of water quality triggered only by a worsening of water quality which actually precludes (or interferes with?) existing (or potential?) uses? These are only a few of the possible interpretations of "degradation" from which the Montana courts may select when they ultimately must interpret its meaning.

C. *Consistency of the Montana Nondegradation Policy and Program: Internal, Constitutional and Federal*

Montana's water quality nondegradation policy and program exist within typical constraints: the policy and program must be internally consistent (statutes and regulations), consistent with the state constitution,

97. MONT. LEGISLATURE, IV MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1201 (1981)(statement of Delegate McNeil) [hereinafter VERBATIM TRANSCRIPT].

98. *Id.*

99. *Id.*

100. MONT. CONST. art. IX, § 1, subsec. 3.

101. *Id.*

102. VERBATIM TRANSCRIPT, *supra* note 97, at 1201 (alteration in original).

103. See *supra* note 97 and accompanying text.

and consistent with the minimum federal requirements.¹⁰⁴ Montana's water quality nondegradation policy and program are deficient in all three respects.

1. *Internal Consistency*

The basic statutory provisions expressing Montana's water quality nondegradation policy are themselves internally inconsistent, or at best ambiguous.¹⁰⁵ The Montana Administrative Code provisions implementing the nondegradation program exceed the statutory authority in some respects and are internally inconsistent in other respects.¹⁰⁶

(a) *Consistency Within The Statute*

As discussed previously,¹⁰⁷ Montana's water quality nondegradation policy is set forth succinctly in the statutes. In its current form, the policy reads as follows:

75-5-303. Nondegradation policy. The board [of Health and Environmental Sciences] shall require:

(1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters; and

(2) any industrial, public, or private project or development which would constitute a new source of pollution or an increased source of pollution to high-quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality.¹⁰⁸

Subsection (1) sets forth the basic nondegradation principle and establishes the criteria for an exemption to the general prohibition on degradation. Subsection (2) establishes a separate waste treatment standard to apply to new or increased sources of pollution. As discussed previously, this Montana policy was first adopted in similar form in 1969 and it was based upon the federal policy expressed by Secretary of the Interior Udall in 1968.¹⁰⁹

The principal issue that has arisen over the meaning of Montana's

104. 40 C.F.R. § 131.12(a) (1991).

105. See *infra* notes 107-24 and accompanying text.

106. See *infra* notes 125-85 and accompanying text.

107. See *supra* notes 28-31, 56-58 and accompanying text.

108. MONT. CODE ANN. § 75-5-303 (1991).

109. See *supra* notes 24-25 and accompanying text.

statutory policy is whether new or increased sources of pollution may apply for a waiver from the nondegradation requirements.¹¹⁰ Under the federal policy that served as the foundation for Montana's policy, new or increased sources of pollution apparently were eligible for the nondegradation waiver.¹¹¹ This interpretation is supported by the structure and syntax of the original federal policy¹¹² and by subsequent statements by federal officials explaining the federal policy.¹¹³

The Montana policy, although clearly patterned after the 1968 federal policy, altered the federal language regarding standards applicable to new or increased sources of pollution. These alterations at least support an interpretation that under Montana law a new or increased source of pollution is not eligible for a nondegradation waiver.

Montana's original 1969 policy was altered syntactically to separate the standards applicable to new and increased sources of pollution from the

110. See Memorandum from Michael S. Kakuk of the Montana Environmental Quality Council to Council Members 7 (Mar. 26, 1992) (on file with the author) [hereinafter Kakuk Memorandum].

111. See *supra* text accompanying notes 26-27.

112. See *supra* text accompanying notes 26-27.

113. Comments within Secretary Udall's February 8, 1968 statement establishing the original federal nondegradation policy clearly indicate a new or increased source of pollution should be eligible for the nondegradation waiver:

[I]t is also imperative that the water quality standards provision of the Act be administered in a way that will neither seek nor serve to stifle further economic development in areas where interstate waters are of high quality.

....

So what we say is — we have attached three conditions [to an exemption to nondegradation]. And as a basis for these decisions, the burden of proof is on the proposed *new use*, whether it is an electric power plant, or an industry using water, that they have to show to the states' satisfaction, and more importantly, to our satisfaction, that there are compelling social and economic reasons — this would be a first condition — that they are prepared to install the very latest and most modern pollution control equipment, and thereby to minimize any temporary degradation.

DOI COMPENDIUM, *supra* note 23, at 2, 4 (emphasis added).

... When it can be shown that necessary economic or social development justifies a reduction of water quality and that such reduction will not interfere with existing uses, a lowering of water quality will be permitted (if the *new industry* is willing to install the best practicable means of treatment to minimize its abuse of such high quality water).

DOI COMPENDIUM, *supra* note 23, at 38 (Remarks by Max N. Edwards, Assistant Secretary of the Interior for Water Pollution Control, before the Fontana Conservation Roundup, Fontana Dam, North Carolina, May 17, 1968) (emphasis added).

The EPA answers the question whether in high quality waters, new dischargers or expansion of existing facilities are subject to the provisions of antidegradation as follows:

Yes. Since such activities would presumably lower water quality, they would not be permissible unless the State finds that it is necessary to accommodate important economic or social development (Section 131.12(a)(2)). In addition the minimum technology based requirements must be met, including new source performance standards. This standard would be implemented through the wasteload and NPDES permit process for such new or expanded sources.

EPA QUESTIONS AND ANSWERS, *supra* note 37, at 6.

preceding references to the nondegradation exemption.¹¹⁴ This distinction was emphasized when the policy was codified in the Montana statutes in 1971, when the standards applicable to new or increased sources of pollution were placed in an independent subsection of the statutes.¹¹⁵ Montana's policy further varied from the original federal policy in the treatment standard applied to new or increased sources of pollution. The federal standard was technology-limited (i.e., these sources were required to employ the best technology currently available);¹¹⁶ whereas the state standard is water-quality driven (i.e., these sources must employ whatever waste treatment is necessary to preserve the current high water quality).¹¹⁷ The requirement that new or increased sources of pollution to high quality waters in Montana must provide the "degree of waste treatment necessary to maintain that existing high water quality"¹¹⁸ seems to admit of no exception. Such an interpretation is supported by the differences between the Montana policy and the contemporaneous federal policy on which it was based.¹¹⁹

Under this interpretation of the standards applicable to new or increased sources of pollution (MCA 75-5-303(2)), the nondegradation exception provided in MCA 75-5-303(1) becomes virtually meaningless. If subsection (2) establishes an absolute prohibition on degradation applicable to all new or increased sources of water pollution, then subsection (1) and its exemption provision must apply only to "existing" sources of water pollution—meaning those in existence in 1971 when the statute was first adopted.¹²⁰ But even as to these "existing" sources, if degradation is threatened because of an increase in discharge (presumably either an increase in types of pollutants or quantity of pollutants), then subsection (2) is triggered and no degradation is allowed, without exception. This leaves subsection (1) applying only to "existing" sources at their "existing" level of discharge. Because the baseline for evaluating degradation is the "existing" water quality, and that existing water quality already includes discharges from "existing" sources, subsection (1) would only apply to a hypothetical situation that can never arise. An interpretation that makes

114. See *supra* text accompanying notes 26-27.

115. See *supra* notes 28-31 and accompanying text.

116. See *supra* note 23 and accompanying text.

117. See *supra* note 24 and accompanying text.

118. MONT. CODE ANN. § 75-5-303(2) (1991).

119. The federal policy has moved away from the technology-limited standard for new and increased sources, to the innocuous requirement that states "assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources." 40 C.F.R. § 131.12(a)(2)(1991). This seems to say nothing more than that states shall see that the otherwise applicable effluent limitations and discharge standards are enforced.

120. Or perhaps those in existence in 1969 when the Montana Water Pollution Control Council first adopted the nondegradation policy.

subsection (1) a nullity creates a clear dilemma.

The Board of Health and Environmental Sciences and the Department of Health and Environmental Sciences have eluded this dilemma by interpreting subsections (1) and (2) as authorizing new or increased sources of pollution to apply for the nondegradation waiver if they cannot meet the nondegradation standard after applying pollution control measures.¹²¹ This interpretation is followed in the regulations implementing the nondegradation policy.¹²² While this interpretation may be consistent with the federal policy,¹²³ may be good policy,¹²⁴ and may restore meaning to subsection (1), it ignores the plain language of subsection (2) and disregards the history of that provision.

The Montana Legislature should resolve this critical conflict within the statutory nondegradation policy. Until it is resolved, one might argue that Montana has an inflexible water quality nondegradation policy subject to no exceptions.

(b) *Consistency Within The Regulations*

To implement the water quality nondegradation policy established by the Montana Legislature,¹²⁵ the Board of Health and Environmental Sciences has promulgated administrative regulations.¹²⁶ General regulations addressing nondegradation of water quality, both for surface water and groundwater, are found in title 16, chapter 20, subchapter 7 of the Administrative Rules of Montana. Additional regulations particularly addressing nondegradation of groundwater quality are found in title 16, chapter 20, subchapter 10 of the Administrative Rules of Montana. These regulations are internally inconsistent and, in some respects, inconsistent with the statutory policy they are designed to implement.

These subchapters can best be understood by considering them together. Although subchapter 7 by its terms applies to both point and nonpoint sources of pollution discharging to surface and groundwater, and subchapter 10 applies only to point sources discharging to groundwater, the nondegradation programs established by both subchapters are interdependent and they must be consistent with each other and with the statutory foundation for each (MCA 75-5-303).¹²⁷

121. Kakuk Memorandum, *supra* note 110, at 7-8.

122. See *infra* notes 144-51 and accompanying text.

123. See *supra* text accompanying notes 26-28.

124. See *infra* section III. A.

125. See MONT. CODE ANN. § 75-5-303 (1991).

126. See *supra* notes 88-93 and accompanying text.

127. MONT. CODE ANN. § 2-4-305(6) (1991) ("Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, no rule adopted is valid or effective unless: (a)

The starting point for the nondegradation policy and program is to determine first when the policy is to be invoked. Under the statute, the policy is invoked only as to "state waters whose existing quality is higher than established water quality standards."¹²⁸ Under subchapter 7 of the regulations, the nondegradation policy comes into play regarding "waters whose quality is higher than established water quality standards."¹²⁹ Under subchapter 10 of the regulations, the nondegradation policy affects "any groundwater whose existing quality is higher than the established groundwater quality standards for its classification."¹³⁰ The reference to classifications for groundwater nondegradation is problematic.

Under the Montana Water Quality Act, the Board of Health and Environmental Sciences (Board) is to classify all waters (both surface water and groundwater) in accordance with their present and future most beneficial uses.¹³¹ The Board has adopted regulations providing for the classification of the groundwaters of the state.¹³² All groundwaters are to be placed in one of four classes (Class I the highest through Class IV the lowest) based upon their actual quality or actual use, as of October 29, 1982, whichever places the groundwater in a higher class.¹³³ The classes differ based upon their suitability for domestic use, irrigation, drinking water for wildlife and livestock and for industrial and commercial purposes.¹³⁴ The only numeric criteria differentiating the classes is specific conductance.¹³⁵

While the state has made substantial progress in classifying surface waters pursuant to a similar scheme,¹³⁶ groundwaters of the state are classified only on an as-needed basis.¹³⁷ This delay in classification creates a problem where the classification is based upon the actual quality or actual use (whichever results in a higher classification) as of October 29, 1982.¹³⁸ Particularly where the only numeric criteria for classification is specific conductance, it is impossible for the state to assign a specific conductance value that applied more than a decade earlier. The result is that groundwaters are in fact classified according to their existing quality or use,

consistent and not in conflict with the statute.").

128. MONT. CODE ANN. § 75-5-303(1) (1991).

129. MONT. ADMIN. R. 16.20.703(1) (1992). *See also Id.* at 16.20.704(1).

130. MONT. ADMIN. R. 16.20.1011(a) (1982).

131. MONT. CODE ANN. § 75-5-301 (1991).

132. MONT. ADMIN. R. 16.20.1002 (1982).

133. *Id.* at 16.20.1002(1).

134. *Id.* at 16.20.1002(2).

135. *Id.*

136. *See* MONT. ADMIN. R. tit. 16, ch. 20, subch. 6 (1992).

137. Interview with Abraham A. Horpestad, Environmental Program Supervisor, Montana Department of Health and Environmental Sciences, in Helena, Montana (Dec. 18, 1992).

138. MONT. ADMIN. R. 16.20.1002(1) (1982).

whichever is higher, as of the date of classification, not as of October 29, 1982.¹³⁹

This approach to groundwater classification means that few (if any) groundwaters will ever have an existing quality that is higher than the established groundwater quality standards for their classification. Since specific conductance is the only numeric criteria and specific conductance is expressed as a range of values applicable to each class (e.g., Class II groundwaters have a specific conductance ranging from 1000 to 2500 micromhos/cm at 25 degrees C), groundwater would rarely have an existing quality better than the groundwater quality standards for its classification.¹⁴⁰ As a result, the nondegradation policy for groundwater would rarely (if ever) be invoked, even though there may be numerous instances in which new or increased pollution sources would degrade existing water quality.¹⁴¹

If the Montana Administrative Code provisions governing application of the nondegradation policy to groundwater are read literally (and there is no basis to do otherwise), the principle of nondegradation will have little application to groundwater. Such a result is not only contrary to the concept of nondegradation, it conflicts with the broad nondegradation policy expressed in the Montana Statutes that applies to any state waters¹⁴² whose existing quality is higher than the established water quality standards.¹⁴³

As discussed earlier,¹⁴⁴ a significant question surrounds the application of the nondegradation policy to new or increased sources of pollution. Under MCA 75-5-303(2), it appears that new or increased sources of pollution are absolutely prohibited from degrading water quality.¹⁴⁵ These

139. Horpestad interview, *supra* note 137.

140. MONT. ADMIN. R. 16.20.1002(2) (1982).

141. For example, assume a new source proposes to discharge into a Class II groundwater, which currently has a specific conductance of 1200 micromhos/cm at 25 degrees C. The new source will increase the specific conductance to 2000 micromhos/cm. Clearly the new source will result in a deterioration of the quality of the groundwater; it will "degrade" the groundwater in the common meaning of the term. Nevertheless, under a literal reading of MONT. ADMIN. R. 16.20.1002(1), this new source will not be subject to Montana's groundwater nondegradation policy.

Although the existing specific conductance of the receiving groundwater of 1200 is clearly in the low range for Class II groundwaters (the range being 1000 to 2500), the existing quality of that groundwater is not higher than the established water quality standards for that class of groundwaters. As a result, this groundwater does not qualify as a high-quality groundwater and the substantial degradation proposed may proceed without consideration of Montana's nondegradation policy.

142. Under the Montana Water Quality Act, "state waters" are defined to include "any body of water, . . . either surface or underground;" thereby expressly including groundwater. MONT. CODE ANN. § 75-5-103(9) (1991).

143. MONT. CODE ANN. § 75-5-303(1) (1991).

144. See *supra* notes 26-27, 109-21 and accompanying text.

145. See *supra* notes 117-22 and accompanying text.

sources appear ineligible for the waiver allowing limited degradation.¹⁴⁶ Despite substantial support for this interpretation from the literal language of the statute and the history behind the language,¹⁴⁷ both the Board and the Department of Health and Environmental Sciences have interpreted the law to make new or increased sources of pollution eligible for the waiver from nondegradation.¹⁴⁸ This interpretation has been codified in the administrative regulations which expressly provide that the requirements of the water quality nondegradation subchapter (which includes the waiver from nondegradation) "apply to any activity of man which would cause a new or increased source of pollution to state waters."¹⁴⁹ In fact, this limitation apparently excludes application of the nondegradation program to existing sources, except when such sources become "increased source[s] of pollution to state waters." Such a limitation runs counter to the position of advocates of an absolute prohibition against degradation by new or increased sources, who contend that the waiver from nondegradation applies *only* to existing sources.¹⁵⁰ Interestingly, the administrative rules have limited the administrative program for nondegradation to new or increased sources since their original adoption.¹⁵¹

The application of the nondegradation policy is further restricted by the regulatory definitions of "degradation."¹⁵² Subchapter 7 defines "degradation" for both surface water and groundwater¹⁵³ and subchapter 10 defines degradation for groundwater.¹⁵⁴ Degradation of surface water is defined broadly as the worsening of any one of a list of water quality parameters.¹⁵⁵ This definition is consistent with the statutory nondegradation policy which begins from the presumption that water whose existing quality is higher than established water quality standards is to be maintained at that high quality.¹⁵⁶ The statutory policy dictates that "degradation" consists of the worsening of any parameter for which a water quality standard has been established.

The regulations defining degradation of groundwater do not implement this statutory policy. Both subchapter 7 and subchapter 10 define "degradation" of groundwater as meaning that as a result of a source discharging pollutants to groundwater, (1) the concentration, outside of

146. See MONT. CODE ANN. § 75-5-303(1) (1991).

147. See *supra* notes 26-28 and accompanying text.

148. See *supra* notes 121-24 and accompanying text.

149. MONT. ADMIN. R. 16.20.702 (1992).

150. See *supra* notes 119-21 and accompanying text.

151. 23 Mont. Admin. Reg. 2142 (Dec. 16, 1982).

152. MONT. ADMIN. R. 16.20.701(1)(a) (1992); MONT. ADMIN. R. 16.20.1011(2) (1982).

153. MONT. ADMIN. R. 16.20.701(1)(a) (1992).

154. MONT. ADMIN. R. 16.20.1011(2) (1982).

155. MONT. ADMIN. R. 16.20.701(1)(a)(i) - (ii) (1992).

156. MONT. CODE ANN. § 75-5-303(1) (1991).

applicable mixing zones, of a pollutant for which maximum contaminant levels (MCLs)¹⁵⁷ have been established has become worse, or (2) the concentration of other pollutants, outside of applicable mixing zones, has become worse and "will adversely affect existing beneficial uses or beneficial uses reasonably expected to occur in the future."¹⁵⁸ This definition of "degradation" is troublesome because it inserts a criterion for degradation of non-MCL pollutants that does not appear justified by the enabling statute.¹⁵⁹ For non-MCL pollutants, the regulations provide that degradation does not occur despite an increase in the concentration of the pollutant, unless that increase "will adversely affect existing beneficial uses or beneficial uses reasonably expected to occur in the future."¹⁶⁰ The requirement that an increase in a non-MCL pollutant must adversely affect existing or future beneficial uses in order to constitute degradation seems to go beyond the statutory mandate that "any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality."¹⁶¹ The additional criterion requiring an adverse effect on existing or future beneficial uses exceeds the express policy of the state legislature.

The regulatory definitions of degradation establish a further limitation on the scope of Montana's water quality nondegradation policy. The definitions in both subchapter 7 and subchapter 10 provide that changes in water quality resulting from nonpoint source pollutants from lands or operations where all reasonable land, soil and water management or conservation practices have been applied do not constitute degradation.¹⁶² This definitional exclusion does not seem justified under the nondegradation statute.¹⁶³ Under that statute, new or increased pollution from a nonpoint source, just as from a point source, is either absolutely prohibited,¹⁶⁴ or it may be permitted but only upon a showing that "a change [in water quality] is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters."¹⁶⁵ Excluding nonpoint source pollution from lands where all

157. A maximum contaminant level is the maximum permissible level of a given contaminant in water delivered to any user of a public water system as established pursuant to the federal Safe Drinking Water Act. 42 U.S.C. § 300g-1 (1988).

158. MONT. ADMIN. R. 16.20.701(1)(a)(iii) and (iv) (1992); MONT. ADMIN. R. 16.20.1011(2) (1982).

159. MONT. CODE ANN. § 75-5-303 (1991).

160. MONT. ADMIN. R. 16.20.701(1)(a)(iv) (1992); MONT. ADMIN. R. 16.20.1011(2) (1982).

161. MONT. CODE ANN. § 75-5-303(1) (1991).

162. MONT. ADMIN. R. 16.20.701(1)(b)(i) (1992); MONT. ADMIN. R. 16.20.1011(3) (1982).

163. MONT. CODE ANN. § 75-5-303 (1991).

164. See *supra* notes 114-19 and accompanying text.

165. MONT. CODE ANN. § 75-5-303(1) (1991). See also *supra* notes 121-24 and accompanying text.

reasonable land, soil and water management or conservation practices have been applied, means that degradation from these sources is permitted without regard to whether the degradation is justifiable as a result of necessary economic or social development and without regard to its effect on present and anticipated use of the affected waters. Such a broad exclusion is inconsistent with the statutory nondegradation policy as expressed in MCA section 75-5-303.

The rationale for this exclusion is a section of the Montana Water Quality Act which provides that it is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream, and "natural" is defined to refer to "conditions or material present from runoff or percolation . . . from developed land where all reasonable land, soil, and water conservation practices have been applied."¹⁶⁶ In order to reconcile this statutory mandate with the nondegradation policy, the administrative rules simply define these "natural" conditions as not constituting degradation.¹⁶⁷

This exclusion is similar to a provision in the relevant federal regulations.¹⁶⁸ The federal regulations provide that when a state allows degradation *after* determining that allowing lower water quality is necessary to accommodate important economic or social development, the state must assure that there shall be achieved "all cost-effective and reasonable best management practices for nonpoint source control."¹⁶⁹ Thus, while the state regulations simply exclude nonpoint sources employing reasonable best management practices from the nondegradation policy, the federal regulations subject such sources to full review under the nondegradation policy. Under the federal regulations, a nonpoint source which would degrade water quality even after employing all cost effective and reasonable best management practices, would only be allowed to commence or continue operations after the full public review process and a finding that the lower water quality is necessary to accommodate important economic or social development and existing uses will be protected fully.¹⁷⁰

As noted previously,¹⁷¹ both the federal regulations obligating states to adopt nondegradation policies and the Montana statute expressing Montana's policy provide for an exception which allows degradation under certain conditions. Under both the federal regulation and the state statute,

166. MONT. CODE ANN. § 75-5-306(2) (1991).

167. MONT. ADMIN. R. 16.20.701(1)(b)(i) (1992); MONT. ADMIN. R. 16.20.1011(3) (1982).

168. See 40 C.F.R. § 131.12(a)(2) (1991).

169. *Id.*

170. *Id.*

171. See *supra* notes 25-26 and accompanying text.

the exception consists of allowing some degree of degradation to the existing water quality.¹⁷² Upon meeting the criteria for an exception allowing degradation, a particular source will be authorized to discharge pollutants subject to specific limits. The Board of Health and Environmental Sciences has implemented this exception in regulations set forth in subchapter 7.¹⁷³ The state regulations implementing the exception to nondegradation of water quality are inconsistent with the state statute.¹⁷⁴ The administrative implementation of the exception to nondegradation is found the Montana Administrative Rules which provide:

If the board [of Health and Environmental Sciences] determines, based on necessary or important economic or social development, that degradation may be allowed, in no event may degradation of state waters interfere with or become harmful, detrimental or injurious to public health, recreation, safety, welfare, livestock, wild birds, fish and other wildlife or any other uses which existed or could have existed on or after November 28, 1975. In allowing such degradation or lower water quality, the board shall assure that within the basin upstream of the proposed degradation there shall be achieved the highest statutory and regulatory requirements for all point and nonpoint sources.¹⁷⁵

The department [of Health and Environmental Sciences] may require that a petition contain such of the following information as is warranted by the potential impacts of a proposed change in water quality and as will allow the board [of Health and Environmental Sciences] to determine whether the proposed change will preclude present and anticipated use of the affected waters and is justifiable as a result of necessary economic or social development.¹⁷⁶

While section 16.20.704(3) incorporates the precise language of the underlying statute,¹⁷⁷ section 16.20.702(2) introduces new factors into the nondegradation exception process. Although the statute and section 16.20.704(3) identify the first of the two criteria for a nondegradation exception as "necessary economic or social development," section 16.20.702(2) refers to "necessary or important economic or social development." Prior to regulatory amendments effective in the fall of 1992, the standard in section 16.20.702(2) also referred only to "necessary" eco-

172. 40 C.F.R. § 131.12(a)(2) (1991); MONT. CODE ANN. § 75-5-303(1) (1991).

173. MONT. ADMIN. R. 16.20.702(2), 16.20.704 (1992).

174. See MONT. CODE ANN. § 2-4-305(6)(a) (1991)(stating that a rule is invalid and ineffective if it is not consistent with or is in conflict with the statute it is implementing).

175. MONT. ADMIN. R. 16.20.702(2) (1992).

176. *Id.* at 16.20.704(3).

177. MONT. CODE ANN. § 75-5-303(1) (1991).

conomic or social development.¹⁷⁸ The Board of Health and Environmental Sciences had proposed earlier in 1992 that the standard be changed by substituting a reference to "important" for "necessary."¹⁷⁹ When the final, revised rule was issued, it contained references to "necessary or important" economic or social development.¹⁸⁰ Certainly economic or social development may be important, even though it is not necessary. Section 16.20.702(2) introduces the option of a lower standard of economic or social development than authorized by the statute. As it now stands, rule 16.20.702(2) sets forth a standard inconsistent with subsequent rule 16.20.704(3) and, more significantly, inconsistent with the statutory criteria established by section 75-5-303, Montana Code Annotated.

The second of the statutory criteria for a nondegradation exception is that the lower water quality "will not preclude present and anticipated use of these waters."¹⁸¹ Rule 16.20.702(2) introduces a significantly different concept. Until September 30, 1992, this rule provided that if an exception to the nondegradation principle were allowed, "in no event may degradation of state waters interfere with or become harmful, detrimental or injurious to public health, recreation, safety, welfare, livestock, wild birds, fish and other wildlife or other beneficial uses."¹⁸² This regulatory standard varies substantially from the statutory standard.

The genesis of the regulatory language seems to be the Montana Water Quality Act definition of "pollution."¹⁸³ As laudable as the concept reflected in the regulation may be, the regulation materially increases the burden on an applicant for a nondegradation exception beyond the statutory criteria. By requiring that the degradation not "interfere with or become harmful, detrimental or injurious to" various uses that may or may not exist or be anticipated, the regulation exceeds the statutory standard that the degradation will not "*preclude* present and anticipated use of these waters" (emphasis added).¹⁸⁴ Certainly water quality degradation may interfere with, or become harmful, detrimental or injurious to present and anticipated uses of waters without actually precluding those uses. In addition, various of the uses protected by the regulatory language may not qualify as "present or anticipated use" of the relevant waters.

178. MONT. ADMIN. R. 16.20.702(2) (1982).

179. 1992 Mont. Admin. Reg. 503 (Mar. 26, 1992).

180. 1992 Mont. Admin. Reg. 2065 (Sept. 10, 1992).

181. MONT. CODE ANN. § 75-5-303(1) (1991).

182. MONT. ADMIN. R. 16.20.702(2) (1984).

183. "Pollution" means "the discharge, seepage, drainage, infiltration, or flow of any liquid, gaseous, solid, radioactive, or other substance into any state water which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife." MONT. CODE ANN. § 75-5-103(5) (1991).

184. MONT. CODE ANN. § 75-5-303(1) (1991).

This issue has been confused even further by a recent amendment to rule 16.20.702(2).¹⁸⁵ This amendment replaced the catchall reference in the rule to "other beneficial uses" with a reference to "any other uses which existed or could have existed on or after November 28, 1975."¹⁸⁶ This change was in response to concerns expressed by EPA Region VIII that the Montana rules did not clearly protect "existing uses."¹⁸⁷ While this change may have placated EPA, the Board of Health and Environmental Sciences must bear in mind that it may only revise regulations to satisfy EPA requirements to the extent such changes are authorized by the underlying state legislation. If EPA requirements cannot be met within the current state statutory authority, then legislative changes to the statute must precede regulatory amendments.

2. *Constitutional Consistency*

As noted earlier,¹⁸⁸ the Montana Constitution absolutely prohibits water quality degradation.¹⁸⁹ Insofar as the Montana statutes¹⁹⁰ and Montana administrative rules¹⁹¹ provide an exception to allow degradation, they appear to contravene the clear intent of the constitution. The only flexibility to reconcile the absolute prohibition in the constitution with a policy allowing limited degradation lies in the absence of a definition of "degradation" in the constitution.¹⁹² It rests with the Montana Legislature, and ultimately with the Montana courts, to interpret the term—either to enforce a literal, absolutist definition denying any deterioration of environmental quality, or to construe "degradation" as requiring an actual adverse effect on health, welfare or the environment beyond mere numerical deterioration in quality.

3. *Federal Consistency*

The federal antidegradation policy requires states to develop and adopt nondegradation policies and programs that are, at a minimum, consistent with the requirements set forth in the federal regulations.¹⁹³ Thus, Montana's policy and program must be consistent with the federal

185. 1992 Mont. Admin. Reg. 2064 (Sept. 10, 1992).

186. 1992 Mont. Admin. Reg. 503 (Mar. 26, 1992).

187. Letter from James J. Scherer, Regional Administrator, U.S. EPA Region VIII to Dr. Sidney Pratt, Acting Director, Montana Department of Health and Environmental Sciences (Mar. 8, 1988)(on file with the author).

188. See *supra* notes 96-103 and accompanying text.

189. MONT. CONST. art. IX, § 1.

190. MONT. CODE ANN. § 75-5-303(1) (1991).

191. MONT. ADMIN. R. 16.20.700-705 (1992); MONT. ADMIN. R. 16.20.1011 (1982).

192. See *supra* note 103 and accompanying text.

193. 40 C.F.R. § 131.12 (1991).

criteria.

The evolution of both the federal and Montana water quality nondegradation policies and programs was recited earlier.¹⁹⁴ That discussion highlighted some of the respects in which the Montana law varies from the federal law. In particular, Montana's statutory nondegradation policy establishes criteria for granting exceptions which vary from the current federal policy. The state statutory policy requires an affirmative demonstration that the "change [i.e., lower water quality] is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters."¹⁹⁵ When this basic policy was first adopted by Montana in 1969,¹⁹⁶ the phrase "justifiable as a result of necessary economic or social development" was lifted verbatim from the operative federal policy.¹⁹⁷ In the meantime, the federal policy has evolved to refer to a finding "that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located."¹⁹⁸

The first criterion of the state policy is no longer consistent with the minimum federal requirements.¹⁹⁹ The relative significance of the adjectives "necessary" and "important" is critical. Under the existing state policy, the economic or social development must be "necessary."²⁰⁰ Once that determination is made, lower water quality may be approved by the state so long as that lower water quality is "justifiable as a result of" that economic or social development. Under the current federal policy, the economic or social development must be "important." Once that determination is made, lower water quality must be "necessary to accommodate" that development. The relationship between the lower water quality and the economic or social development is all-important. Under the state standard, lower water quality need only be "justified" by the development, implying some form of cost/benefit weighing in which the government agency concludes that the benefits of the development justify the costs of lower water quality. The federal standard, on the other hand, requires that lower water quality be "necessary to accommodate" the development. The

194. See *supra* section II. A.

195. MONT. CODE ANN. § 75-5-303(1) (1991).

196. See *supra* note 24 and accompanying text.

197. See *supra* note 25 and accompanying text.

198. 40 C.F.R. § 131.12(a)(2) (1991).

199. See *supra* notes 177-80 and accompanying text for discussion of the two criteria of state policy.

200. The requirement that economic or social development must be "necessary" is problematic itself. On what basis is economic or social development "necessary"? Is it "necessary" because people merely desire it, or is it only "necessary" if they will starve or perish without it? The concept is simply inappropriate when evaluating economic or social development. The current federal standard that the economic or social development be "important" makes more sense. See discussion *infra* section III. B.

language in the federal regulation implies that lower water quality may be allowed only if the development cannot be accomplished in a manner that would not adversely impact water quality.

The second criterion of the nondegradation exception is also problematic. Montana's statutory policy requires a showing that the lower water quality "will not preclude present and anticipated use of these [high quality] waters."²⁰¹ The current federal standard requires that the state, in allowing lower water quality, "protect existing uses fully."²⁰² While Montana's protection of anticipated uses exceeds the minimum federal requirements, state law may be more protective. But Montana appears to be less protective of existing uses, at least as established by the statutory (as distinguished from the regulatory) nondegradation policy.²⁰³ While federal law requires that existing uses be fully protected, Montana merely requires that the lower water quality not "preclude" the present use. It would seem that water quality deterioration could interfere with or impede a current use (which would then not be "protected fully"), although not actually "precluding" that use. The Montana standard, thus, seems inconsistent with the minimum federal standards.

Finally, there is another quirk of the Montana administrative rules which merits attention. The administrative rules express in unequivocal terms that "[d]egradation of national resource waters is prohibited."²⁰⁴ This policy appears consistent with the federal requirement that state antidegradation policies provide that where high quality waters constitute an outstanding national resource, that water quality shall be maintained and protected.²⁰⁵ However, while the federal regulation cites as examples of waters constituting an outstanding national resource "waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance,"²⁰⁶ the Montana regulations limit "national resource waters" by definition to only "surface waters in national parks, wilderness or primitive areas."²⁰⁷ This variation from the minimum federal requirement is noteworthy.

This definition is critical, in that it establishes a class of waters that cannot be degraded, regardless of any economic or social development that would be denied in the process. The first distinction between the federal and state definitions is that the state definition is limited to surface waters. This is not actually a change from the federal requirement, because the

201. MONT. CODE ANN. § 75-5-303(1) (1991).

202. 40 C.F.R. § 131.12(a)(2) (1991).

203. See *supra* notes 75-76 and accompanying text.

204. MONT. ADMIN. R. 16.20.702(3) (1992).

205. 40 C.F.R. § 131.12(a)(3) (1991).

206. *Id.*

207. MONT. ADMIN. R. 16.20.701(5) (1992).

federal antidegradation policy applies only to surface waters.²⁰⁸ It is noteworthy, however, because in all other respects the Montana nondegradation policy has been extended to groundwater. When the Montana administrative rules were revised to extend the nondegradation policy and program to groundwater in 1984, the definition of "national resource waters" was the only section not altered to accommodate groundwater as well as surface water.²⁰⁹ Montana has thereby excluded any groundwaters from the absolute protection provided by the classification as a national resource water. The state scheme affords pristine groundwaters underlying national parks or wilderness areas no greater protection against degradation than groundwaters elsewhere.

The second distinction between the federal and state definitions of national resource waters is the limitation by the state to surface waters only in national parks, wilderness or primitive areas.²¹⁰ The state has elected not to extend similar protection to waters in state parks and wildlife refuges and, most significantly, has eliminated the opportunity to extend this absolute protection to "waters of exceptional recreational or ecological significance."²¹¹ This latter variation from the federal antidegradation policy appears inconsistent with the minimum requirements established by the federal regulations. By failing to extend this additional degree of protection to at least the categories of national resource waters identified in the federal regulations, the state water quality standards are arguably inconsistent with the minimum federal standards.

III. POLICY AND PROGRAM ISSUES AND RECOMMENDATIONS

The preceding discussion has identified a number of significant problems with Montana's current water quality nondegradation policy and program. Many of these problems are a result of the chronological evolution of Montana's program. While the state program may have been consistent with state and federal law when originally adopted in 1969, Montana adopted a new constitution in 1972 and the federal requirements have been revised. Montana's fundamental nondegradation policy has not kept pace with these changes. Other problems with Montana's nondegradation program stem from regulatory changes made either at the behest of the agency responsible for administering the program or in response to EPA demands, but in either case made without due consideration of state law authority. Whatever the causes, the time is ripe for a complete and careful reconsideration and restatement of Montana's water

208. WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW 517 (1992).

209. 1984 Mont. Admin. Reg. 1453 (Oct. 11, 1984).

210. MONT. ADMIN. R. 16.20.701(5) (1992).

211. 40 C.F.R. § 131.12(a)(3) (1991).

quality nondegradation policy and program. The difficult policy choices must be confronted and resolved by the legislature if Montana is to go forward with a meaningful nondegradation policy.

The issues facing Montana (and any other state addressing water quality nondegradation) can be organized under the three questions noted in the Introduction: How much deterioration in water quality is significant enough to merit concern? How much economic or social benefit justifies a given level of water quality deterioration? Who will decide the answers to these questions and based on what criteria?²¹² The state's response to these questions must be constrained by the mandates of the state constitution and the minimum federal antidegradation requirements.

A. *How Much Deterioration in Water Quality is Significant Enough to Merit Concern?*

The most protective water quality nondegradation policy would simply prohibit deterioration in any water quality parameter. Such a policy would be comparatively simple to administer. Such a policy would certainly meet the minimum federal requirements and would comply with the strictest interpretation of the Montana Constitution. Indeed, those who urge a strict interpretation of MCA 75-5-303(2) maintain this is Montana's current policy, at least with respect to new or increased sources of pollution.²¹³ Such a policy, however, admits of no exceptions and would deny any development that would deteriorate water quality, regardless of how valuable the economic or social benefits or how minimal the water quality impacts. Few would actually advocate such an absolutist policy.

Once the simple, absolutist policy is foregone, perplexing legal and policy choices arise. The first issue is whether the Montana Constitution permits a nonabsolutist water quality nondegradation policy.²¹⁴ Although it appears clear that the constitution prohibits any degradation of water quality, by not defining "degradation," the constitution leaves open the possibility that not every mere deterioration in water quality is prohibited. This provides the state legislature with an opportunity to establish a nonabsolutist nondegradation policy, by distinguishing that deterioration of water quality which constitutes degradation from that which does not.

This distinction may rest upon numeric criteria, which at least for some parameters could establish *de minimis* increases that are insignificant. Or the distinction could reflect the current regulatory definition of degradation for non-MCL pollutants, requiring both a worsening of the

212. See *supra* note 11 and accompanying text.

213. See *supra* notes 114-20 and accompanying text.

214. See *supra* notes 95-103 and accompanying text.

pollutant concentration *and* a resultant adverse effect on existing or future beneficial uses.²¹⁵ Certainly there are other alternative methods to define degradation, and the ultimate approach may combine several alternatives. The main point is that the eventual program definition must be authorized by the state statutes and be consistent with the Montana Constitution and federal requirements.

Does Montana intend to apply a different nondegradation standard to new or increased sources of pollution?²¹⁶ This distinction is not mandated by either the Montana Constitution or the federal regulations. If a different standard is to apply to new or increased sources of pollution, what sources are governed by the general standard? The current law is unclear in these respects, with government administrators interpreting the requirements one way and environmentalists another. The different treatment accorded new or increased sources has its roots in the original 1968 federal and 1969 state policies. However, differences between the language of those policies and twenty years of experience highlight the importance of legislative clarification of Montana's policy.²¹⁷

Does Montana intend a more restrictive definition of Outstanding National Resource Waters entitled to absolute protection than even the minimum federal requirements?²¹⁸ Should this higher level of protection be extended by the state to waters in state parks and wildlife refuges and to waters of exceptional recreational or ecological significance? When Montana extended the nondegradation policy to groundwaters generally, did Montana intend to exclude groundwater entirely from the category of Outstanding National Resource Waters? These difficult questions must be confronted by the legislature as part of a comprehensive water quality nondegradation policy for the state. The consequences are too great, and the policy choices too fundamental, for the decision to be deferred to agency discretion in the course of adopting administrative rules.

Does the state intend that water quality degradation from nonpoint sources is not significant so long as all reasonable land, soil and water management or conservation practices have been applied, regardless of the extent of degradation or impact on existing or future beneficial uses?²¹⁹ Or, instead of excluding such sources entirely from the nondegradation program, should the state require such sources to meet the same standards as point sources before it allows degradation?

The legislature must address these fundamental policy choices in

215. See *supra* notes 157-61 and accompanying text.

216. See *supra* notes 110-24 and accompanying text.

217. See *supra* notes 110-24 and accompanying text.

218. See *supra* notes 204-11 and accompanying text.

219. See *supra* notes 162-70 and accompanying text.

deciding how much deterioration in water quality is significant enough to merit concern. Only after a forthright resolution of these issues, as expressed in legislation, can the state proceed to implement an effective nondegradation program.

B. *How Much Economic or Social Benefit Justifies a Given Level of Water Quality Deterioration?*

As just discussed, once the simple absolutist position is abandoned, the difficult policy choices arise. In allowing some deterioration in water quality, the state is faced with two general alternatives. The state could adopt a policy which provides only a limited exception to absolute nondegradation for *de minimis* deterioration in water quality. This approach focuses solely upon the nature of the deterioration itself, without regard to the activity causing the deterioration. This "no harm, no foul" approach acknowledges that there is some negligible deterioration in water quality that has no meaningful impact on health or the environment. An alternative approach adopts a form of cost/benefit or risk/benefit analysis. Under this approach, even more than *de minimis* deterioration in water quality may be justified by appropriate economic or social benefits. This latter approach is already present in the federal regulations²²⁰ and in Montana's administrative regulations,²²¹ and arguably is Montana's statutory policy.²²²

This approach requires a balancing of costs and benefits or risks and benefits. It is the responsibility of the legislature, charged with enunciating state policy, to identify the relevant criteria to be weighed and to establish the method by which those criteria are to be weighed. As noted previously,²²³ currently Montana's statutes and regulations and the federal regulations are all inconsistent in these respects.

At least as currently constituted, this approach relies upon two factors: The significance of the economic or social development, and the relationship between that development and the resulting water quality degradation. Under the present Montana statutory policy, the economic or social development must be "necessary" and the lower water quality must be "justifiable" as a result of that economic or social development.²²⁴ Under the present federal guidelines, the economic or social development must be "important" and the lower water quality must be "necessary to

220. See 40 C.F.R. § 131.12(a)(2) (1991).

221. See MONT. ADMIN. R. 16.20.702(2), 16.20.704(3) (1992).

222. See MONT. CODE ANN. § 75-5-303(1) (1991).

223. See *supra* notes 110-24, 174-80, 195-99 and accompanying text.

224. MONT. CODE ANN. § 75-5-303(1) (1991).

accommodate" that development.²²⁵ These standards are not the same, and the Montana Legislature ought to appreciate the differences and adopt a standard for the state.

The current state standard is troublesome in several respects. What constitutes a "necessary" economic or social development? If employment in the region will double or the tax base will triple, is the development "necessary"? "Necessary" is an inappropriate adjective when characterizing economic or social development. Also under the current state standard, once the economic or social development is found to be necessary, lower water quality need only be "justifiable" as a result of the development. Such a standard implies a cost/benefit balancing of the simplest kind. Unfortunately, balancing the costs of water quality degradation against the benefits of economic or social development is anything but simple. Furthermore, a standard which merely requires that the degradation be "justifiable" provides no guidance to those charged with performing the balancing or to courts asked to review that balancing.

The current federal standard seems at least to resolve these difficulties. The federal policy requires that the economic or social development be "important." While "important" is hardly an objective standard, it is more appropriate than "necessary" when describing economic or social development. Administrative regulations and guidance may be promulgated by the agency to further refine what constitutes "important economic or social development." The federal standard also seems an improvement over the state standard in requiring that the lower water quality be "necessary to accommodate" the development. Such a standard connotes that water quality degradation may be allowed only in the absence of an alternative not involving lower water quality which will also accommodate the development. This standard is consistent with a stringent water quality nondegradation policy, in which degradation is allowed only as a last resort.

Even if water quality degradation is allowed under certain circumstances, that degradation is limited. Here, again, inconsistencies pervade the state statutory policy,²²⁶ state administrative regulations²²⁷ and federal requirements.²²⁸ Montana's statutory policy limits allowable degradation to that which will not preclude present and anticipated use of high quality waters.²²⁹ Montana's administrative rules incorporate a standard that prohibits degradation that would interfere with or become harmful,

225. 40 C.F.R. § 131.12(a)(2) (1991).

226. See *supra* notes 181-87 and accompanying text.

227. See *supra* notes 181-87 and accompanying text.

228. See *supra* notes 201-203 and accompanying text.

229. MONT. CODE ANN. § 75-5-303(1) (1991).

detrimental or injurious to public health or a range of beneficial uses.²³⁰ The federal standard requires that any allowable lower water quality protect existing uses fully.²³¹ Each of these standards is different, with Montana's current statutory policy being the least protective. Once again, the state legislature should confront the policy implications of the different standards and adopt a clear and consistent policy for the state.

C. Who Will Decide the Answers to these Questions and Based Upon What Criteria?

The adoption of a state water quality nondegradation policy is fraught with difficult policy choices. Within the confines established by the state constitution and federal requirements, it is the people of the state, acting through their elected legislative representatives, who ought to strike the balance between environmental preservation and economic and social development. While the policy choices are difficult and fundamental, the relevant issues are not difficult to identify. The time is now for the state legislature to confront and resolve these policy issues, so that Montana may move forward with a clear and comprehensive water quality nondegradation policy.

Once the legislature has charted the appropriate policy course, it will be left to the Board and Department of Health and Environmental Sciences to implement that policy. Undoubtedly, whatever policy the legislature adopts will require substantial administrative implementation. That implementation, both in the adoption of rules and in case-by-case application, must occur in an atmosphere of full public participation. Standards to be applied will be inherently subjective, no matter how objective the criteria appear. While the courts may serve as a check on clear abuses of authority, it is the political process which must serve as the final arbiter of the program. For this reason, case-by-case application of the nondegradation policy must be open to public participation and scrutiny, and the decision should rest with a politically responsive body.

IV. CONCLUSION

More than two decades of experience have proved the critical role that water quality nondegradation plays in a comprehensive water pollution control program. Particularly in a state like Montana, where clean water is still the rule and not the exception, it is the water quality nondegradation policy which will be responsible for the water quality of the state in the future. Although Montana has adopted statutes and administrative rules

230. MONT. ADMIN. R. 16.20.702(2) (1992).

231. 40 C.F.R. § 131.12(a)(2) (1991).

establishing a water quality nondegradation program, that program is internally inconsistent and out of step with the state constitution and current federal requirements. The current program leads to administrative confusion and certain litigation, all the while leaving the citizens of the state unsure of the state's policy. The issues are clear, even if the choices are difficult. The Montana Legislature must acknowledge its political responsibility to establish a clear and comprehensive water quality nondegradation policy for the state.

ADDENDUM

The Montana Legislature met after this article was completed. The subject of water quality nondegradation proved to be of great interest during Montana's 53rd legislative session which concluded in April 1993. Legislators requested eight bills to be drafted dealing with nondegradation. Of these, three were introduced and two, Senate Bill 401 and Senate Joint Resolution 29, were passed and approved.

Senate Bill 401 (Chapter 595, Laws of 1993) was initially drafted at the request of the Montana Department of Health and Environmental Sciences, the agency charged with implementing Montana's nondegradation policy. SB 401 addresses several of the issues identified in the foregoing article. The following are the most significant changes enacted by SB 401.

SB 401 amends Montana Code Annotated § 75-5-103 to, for the first time, include a definition of degradation. Degradation is defined to mean a change in water quality that lowers the quality of high-quality waters for any parameter. This stringent definition is qualified by exempting from the term "degradation" changes in water quality that are determined to be "nonsignificant" by the Department of Health and Environmental Sciences.

The new law also recasts the fundamental nondegradation policy and the nondegradation exception, to eliminate the confusion over application of the policy to existing and new and increased sources of pollution. Under the new law, the fundamental nondegradation policy is that existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected. Degradation of high-quality waters may be authorized by the Department of Health and Environmental Sciences but only if it has been affirmatively demonstrated to the Department that:

- (a) degradation is necessary because there are no economically, environmentally, and technologically feasible alternatives to the proposed project that would result in no degradation;
- (b) the proposed project will result in important economic or social development that exceeds the benefit to society of maintaining existing

high-quality waters and exceeds the costs to society of allowing degradation of high-quality waters;

(c) existing and anticipated use of state waters will be fully protected; and
(d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

To implement these changes in the law, the Board of Health and Environmental Sciences is to adopt rules, including rules establishing criteria for (1) determining important economic or social development, (2) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality, and (3) determining whether a proposed activity or class of activities will result in nonsignificant changes in water quality. Thus, several of the important issues in water quality nondegradation have been referred for resolution to the administrative rulemaking process.

Although the 1993 Montana Legislature passed SB 401 amending Montana's water quality nondegradation law, it also approved Senate Joint Resolution 29, Laws of 1993, which requests the Montana Environmental Quality Council to study the nondegradation issue before the next legislative session in 1995. The Joint Resolution instructs the Environmental Quality Council to review all the significant issues surrounding water quality nondegradation. In particular, for example, the study is to examine the relationship between the nondegradation policy provisions contained in Montana water quality laws and the various interpretations of the relevant sections of the Montana Constitution. The Joint Resolution lists 11 such specific topics for study. The Environmental Quality Council is to consult with federal, state and local officials, industries and citizens, and other persons with expertise or interest and to report its findings and recommendations to the 54th Legislature in 1995.