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## Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters? Response to Horwich's Nondegradation Article: Protecting Montana's High Quality Waters from Degradation

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# MONTANA'S NONDEGRADATION LAWS: WILL WE ALLOW CONTINUED DEGRADATION OF MONTANA'S WATERS? RESPONSE TO HORWICH'S NONDEGRADATION ARTICLE: PROTECTING MONTANA'S HIGH QUALITY WATERS FROM DEGRADATION

Grant D. Parker\*

Obviously the framers of that constitution believed that they had taken every necessary precaution against . . . special privileges, public abuses . . . or juggling of laws by corporations, domestic and foreign. Reading these mandates now, in the customary meaning of plain language, they appear adequate for their unmistakable purpose. Yet there is not one of those constitutional provisions or inhibitions which has not been violated, evaded or ignored, by the organizers or operators of the corporate combine in its conquest of the state. . . . The constitution of Montana has become a 'constitution between friends.'<sup>1</sup>

## I. INTRODUCTION

This article reviews and responds to Professor John Horwich's insightful article entitled *Water Quality Nondegradation in Montana: Is Any Deterioration Too Much?*<sup>2</sup> The short answer to the question raised by Professor Horwich, is that under Montana's Constitution, no water quality degradation is allowed beyond the baseline condition existing when the constitution was adopted in 1972.

Professor Horwich's article joins a number of thoughtful commenta-

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1. JERRE C. MURPHY, *THE COMICAL HISTORY OF MONTANA - A SERIOUS STORY FOR FREE PEOPLE - BEING AN ACCOUNT OF THE CONQUEST OF AMERICA'S TREASURE STATE BY ALIEN CORPORATE COMBINE, THE CONFISCATION OF ITS RESOURCES, THE SUBJUGATION OF ITS PEOPLE, AND THE CORRUPTION OF FREE GOVERNMENT TO THE USES OF LAWLESS ENTERPRISE AND ORGANIZED GREED EMPLOYED IN "BIG BUSINESS"* 225-26 (1912). Murphy's book describes the history of personal and environmental damage in Montana inflicted by the corporate amalgamation which became the Anaconda Copper Company.

2. John L. Horwich, *Water Quality Nondegradation in MT: Is Any Deterioration Too Much?*, 14 PUB. LAND L. REV. (1993)[hereinafter Horwich].

ries which analyze state and federal nondegradation or antidegradation policies.<sup>3</sup> This discussion is particularly important in Montana, a state which has adopted the strongest statutory and constitutional nondegradation pronouncements in the nation. The analysis of nondegradation often brings out policy biases of the authors - either favoring water quality degradation and fewer economic burdens on polluters, or favoring internalizing the costs of pollution and strict nondegradation positions.<sup>4</sup>

The goals of federal and Montana water quality laws have been to eliminate pollution and to clean up our waters.<sup>5</sup> Thus, regulatory agencies should aggressively discourage degradation of Montana's waters. Montana's Constitution prohibits degradation of state waters.<sup>6</sup> Under the constitutional nondegradation requirements, sources existing as of June 1972 are in effect grandfathered, and may continue discharging into waters at, or below, historic levels.<sup>7</sup>

In 1993 the 53rd Montana Legislature passed Senate Bill 401, modifying Montana's statutory nondegradation policy. This article, and Professor Horwich's article, were substantially drafted prior to passage of the new legislation, and primarily address the pre-1993 nondegradation policy. As discussed below in section II (D)(2), S. 401 amended Montana's statutory nondegradation policy by providing an opportunity for all sources of pollution to apply for nondegradation waivers. The new law applies to all requests to degrade Montana's waters filed after the date of enactment, April 29, 1993.<sup>8</sup> Activities and applications to degrade waters

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3. WILLIAM H. ROGERS JR., 2 ENVIRONMENTAL LAW - AIR AND WATER § 4.2, at 19-21, § 4.7, at 104, § 4.16, at 258, § 4.17, at 262-66 (1986 and Supp. 1992); H. Michael Anderson, *Water Quality Planning for The National Forests*, 17 ENVTL. L. 591 (1987); Mark C. Van Putten and Bradley Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863 (1986); Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983); 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 (1977); William W. Wolf, *The Water Degradation Policy*, 2 J. MAR. L. & COM. 843 (1971); Stephen Hall, Note, *Nondeterioration and the Protection of High Quality Waters Under Federal Water Pollution Control Law*, 4 UTAH L. REV. 737 (1977); Michael Snyder, Note, *Nondegradation of Water Quality: The Need for Effective Action*, 50 NOTRE DAME L. REV. 890 (1975).

4. See ROGERS, *supra* note 3, at § 4.1, 12-13.

5. See Montana Water Quality Act, MONT. CODE ANN. §§ 75-5-101 to 1112 (1991) and Federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988).

6. See *infra* notes 35-47 and accompanying text.

7. Other aspects of the state and federal water quality laws force pollution sources to gradually clean up discharges. See ROGERS, *supra* note 3, § 4.2, at 20, § 4.17, at 262-66 (federal policy of no-discharge by 1985 and variation in state law cases from no pollution allowed to technical discharge limits); Van Putten and Jackson, *supra* note 3 (discussing Clean Water Act's no-discharge goal, antidegradation, and antibacksliding rules). The Montana Constitution also recognizes a constitutional duty to improve the quality of our environment. MONT. CONST. art. IX, § 1, cl. 1.

8. S. 401, 53d Leg., 1993 Mont. Laws ch. —, § 10. This legislation was signed by Governor Racicot on April 29, 1993 [hereinafter S. 401].

existing as of April 29, 1993, will be governed by the old statute.<sup>9</sup>

Montana's Constitution and the pre-1993 nondegradation policy prohibit polluters from degrading water quality below the level established in 1972 and prohibit new sources from degrading our high quality waters at all.<sup>10</sup> The 1993 nondegradation legislation establishes a statutory scheme allowing for waiver of the state's nondegradation policy and degradation of Montana's waters. However, the state is prohibited from allowing any nondegradation waiver that would conflict with the constitutional prescription against water quality degradation.<sup>11</sup>

The quote from Murphy at the beginning of this article presents an historical perspective on Montana's Constitution and laws, and how they fared at the hands of the mining industry. The Anaconda Company, the state's most powerful corporate citizen for much of the 20th century, has now pulled out of Montana leaving behind the nation's largest Superfund site along the Clark Fork River.<sup>12</sup> Mining-related discharges into the Clark Fork River have caused frequent fish kills. Hazardous substances have been responsible for eliminating much of the aquatic biota in the Clark Fork and Silver Bow Creeks, and have seriously compromised the Clark Fork's fish population and species diversity.<sup>13</sup>

In 1992 the Water Quality Bureau of the Department of Health and Environmental Sciences (Department) identified 1,365 miles of streams in Montana which did not support the water-use classifications developed as part of Montana's regulatory stream classification system, and 12,541 miles that only partially supported their designated uses.<sup>14</sup> In addition, 4,502 miles of Montana's streams, and 270,847 acres of lakes, were recognized as having elevated levels of toxic pollutants.<sup>15</sup>

Pressure will always exist to compromise laws, and even to compromise the Constitution, in the name of economic development and corporate profits. However, the constitution is Montana's supreme law, and any

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9. Legislation affecting substantive statutory provisions are not retroactive unless expressly declared. MONT. CODE ANN. § 1-2-109 (1991). Procedural amendments, however, may be applied retroactively. *State ex rel. Johnson v. District Court*, 417 P.2d 109, 113 (Mont. 1966).

10. See *infra* notes 35-47 and accompanying text.

11. *Id.*

12. The Clark Fork Superfund complex covers an area 150 miles long, from east of Butte, Montana to just west of Missoula, Montana. MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, CLARK FORK BASIN NATURAL RESOURCE DAMAGE ASSESSMENT AND PROGRAM STRATEGY AND FUNDING REQUEST DOCUMENTATION 1 (Jan. 11, 1991)(submitted in support of the Governor's Jan. 1991 Budget)(copy on file with the author).

13. MONTANA NATURAL RESOURCE DAMAGE PROGRAM, ASSESSMENT PLAN: PART I, CLARK FORK RIVER BASIN NPL SITES, MONTANA 32-33 (Jan. 1992)(copy on file with the author).

14. MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, WATER QUALITY BUREAU, MONTANA 305(b) REPORT (June 1992) tbl. 3, at 9 (copy on file with the author).

15. *Id.* tbl. 7, at 15 (identifying water bodies with elevated levels of man-caused or naturally-occurring toxics).

change to express constitutional mandates must be by a vote of the people, not by administrative, judicial, or legislative fiat.<sup>16</sup>

## II. MONTANA'S WATER QUALITY NONDEGRADATION POLICY AND PROGRAM

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

Professor Horwich presents a detailed history of Montana and federal water quality nondegradation policies that need not be repeated here.<sup>17</sup> Montana departed from the federal antidegradation policy proposed in the late 1960s, and adopted a much stricter nondegradation policy as demonstrated by the pre-1993 statute and constitution.

When the Montana Legislature adopted its nondegradation policy in 1971, it incorporated a nondegradation policy developed by the Montana Pollution Control Council in the late 1960s.<sup>18</sup> Montana's strict nondegradation policy was readily accepted by regulated industry and the Montana Legislature. In fact, R. Louis Brown, attorney for the Anaconda Copper Mining Company, testified on January 12, 1971, before the House Committee on Environment and claimed that the company would not be causing any degradation of ambient water quality by 1974.<sup>19</sup>

Montana's nondegradation policy as it existed in the late 1960s and early 1970s met and exceeded the minimum federal requirements existing at the time. The Water Quality Act of 1965 created a major federal role in regulating and cleaning up the nation's waters.<sup>20</sup> The 1965 Act required each state to develop and enforce ambient water quality standards, and enabled the federal government to promulgate appropriate regulations for recalcitrant states.<sup>21</sup> Sections 1(a) and 5(c) of the 1965 Act specifically

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16. *General Agr. Corp. v. Moore*, 534 P.2d 859, 862 (Mont. 1975) (recognizing that "[n]o function of government can be discharged in disregard of or in opposition to" the constitution). The Montana Constitution, however, may be amended by initiative or referendum, but only by a majority vote of the people. MONT. CONST. art. XIV, §§ 8, 9.

17. See Horwich, *supra* note 2, at 4-17.

18. 1971 MONT. LAWS CH. 21, § 6; Horwich, *supra* note 2, at 6-9; see also *Testimony on H.R. 85 Before the House Committee on Environment and Natural Resources*, 42d Leg. (Jan. 12, 1971) (testimony of Winton Weydemeyer, Montana Conservation Council). Though changed slightly over time, the 1971 nondegradation policy remained substantially unchanged until modified by the 1993 Montana Legislature. Horwich, *supra* note 2, at 9-10, 19-20; S. 401, *supra* note 8.

19. *Hearing on H.R. 85 Before the House Committee on Environment and Natural Resources*, 42d Leg. (Jan. 12, 1971) ("Mr. Brown stated that even though the company had done all it possibly could, there was some polluting of the creek at that time. . . . Mr. Brown stated that within the next 2 or 3 years the company would not be contributing anything in the receiving streams that is not as clean as the receiving streams.").

20. Pub. L. No. 89-234, 79 Stat. 903 (1965).

21. *Gaba, supra* note 3, at 1177-80; *Columbus County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1062-63 (Ohio 1992).

emphasized the goal of *enhancing* water quality through water quality standards.<sup>22</sup>

In May 1966 the U.S. Department of the Interior promulgated guidelines detailing a nondegradation policy stating that state standards which failed to protect existing water quality or to protect future uses would be unacceptable.<sup>23</sup> Though the Pollution Control Council's records of the adoption of Montana's first nondegradation policy are limited, it is possible that this strict nondegradation standard influenced Montana's program.<sup>24</sup> On February 8, 1968, U.S. Secretary of the Interior Stewart Udall announced a departmental policy which encouraged maintaining existing high quality water standards.<sup>25</sup> The policy allowed water quality to be lowered only if existing or potential uses were protected, and if new or increased sources of pollution provided the best technological treatment available.<sup>26</sup> The nondegradation policy adopted by the Montana Pollution Control Council in 1969 was similar to the federal policy, but it required new or increased sources of pollution from any industrial, public, or private project or development to provide the degree of waste treatment necessary to maintain high water quality.<sup>27</sup>

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22. Pub. L. No. 89-234, 79 Stat. 903, §§ 1(a), 5(c) (1965).

23. *Columbus*, 600 N.E.2d at 1063. The following statement of the 1965 guidelines is set forth in *Columbus*:

The guidelines provided in relevant part: "1. Water quality standards should be designed to 'enhance the quality of water.' If it is impossible to provide for prompt improvement in water quality at the time initial standards are set, the standards should be designed to prevent any increase in pollution. *In no case will standards providing for less than existing water quality be acceptable.*

" \* \* \*

"5. *Water quality criteria should be accompanied by a description of present water quality and uses, together with uses expected in the future and the water quality required to make those uses possible. The water quality standards proposed by a State should provide for:*

"(a) *Potential and future water uses as well as the present intended use and uses;*

"(b) *The upgrading and enhancement of water quality and the use or uses of streams or portions thereof that are presently affected by pollution;*

"(c) *The maintenance and protection of quality and use or uses of waters now of a high quality or of a quality suitable for present and potential future uses.*" (Emphasis added in *Columbus*). *Id.* at 1063 (quoting U.S. DEPARTMENT OF THE INTERIOR FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, GUIDELINES FOR ESTABLISHING WATER QUALITY STANDARDS FOR INTERSTATE WATERS (1966)); see also, Hines, *supra* note 3, at 658.

24. Cf. Horwich, *supra* note 2, at 15.

25. U.S. DEP'T OF THE INTERIOR FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, COMPENDIUM OF DEPARTMENT OF INTERIOR STATEMENTS ON NON-DEGRADATION OF INTERSTATE WATERS 1-2 (Aug. 1968), quoted in Hines, *supra* note 3, at 659 n.53 and cited in *Columbus*, 600 N.E.2d at 1063-64.

26. *Id.*

27. Horwich, *supra* note 2, at 6-7 (citing undated (though presumably 1968 or 1969) correspondence from Clairborne W. Brinck, Director, Division of Env'tl. Sanitation of Montana Dep't of Health to Persons Receiving Montana Water Quality Criteria, Water Use Classifications and Policy Statements).

The water quality standards approach established in the 1965 Act allowed polluters to claim an entitlement to degrade until the standards were exceeded.<sup>28</sup> Two methods to counter this position involved maintaining ambient water quality, known as nondegradation or antidegradation, and creating effluent limitations. With the adoption of the Federal Water Pollution Control Act Amendments of 1972, a general prohibition against water pollution was established.<sup>29</sup> Congress pronounced a zero discharge goal in which pollution discharge into national waters was unacceptable, and stated that all discharges would be eliminated by application of effective effluent limitations.<sup>30</sup> Increasingly stringent effluent limitations were designed to promote technological improvements and the elimination of pollutants.<sup>31</sup> State water quality standards were designed to supplement effluent limitations as the nation worked toward the goal of zero discharge.<sup>32</sup> It was in this *zeitgeist* that the framers of Montana's Constitution adopted a strict nondegradation policy.<sup>33</sup>

Section 101(a)(1) of the Federal Clean Water Act still states the national goal of eliminating the discharge of pollutants into the national waters by 1985.<sup>34</sup> A stronger mandate prohibiting air, land, and water quality degradation, and promoting enhancement of the environment, was written into Montana's Constitution. Montana agencies and courts cannot ignore statements in Montana's Constitution providing that water quality degradation is not allowed, and that the quality of our environment must be improved.

### B. *The Montana Constitution*

The Montana Constitution has two primary sections designed to enhance Montana's environment and protect it from degradation. Mont. Const. art. II, § 3 recognizes the right and responsibility of all Montanans to a clean and healthful environment. This provision creates a self-executing right to a clean and healthful environment, and limits governmental actions that would render the Montana environment either unclean

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28. ROGERS, *supra* note 3, at 13.

29. Columbus County Metro. Park Dist. v. Shank, 600 N.E.2d 1042, 1065 (Ohio 1992).

30. *Id.*; Van Putten & Jackson, *supra* note 3, at 866-67.

31. Columbus, 600 N.E.2d at 1067.

32. *Id.* at 1070.

33. See also Bill Leaphart, Comment, "Public Trust" as a Constitutional Provision in Montana, 33 MONT. L. REV. 175 (1971) (advocating adoption of strict environmental protection provisions in Montana's Constitution, including public trust recognition); C. Louise Cross, *The Battle for Environmental Provisions in Montana's 1972 Constitution*, 51 MONT. L. REV. 449 (1990) (discussing action on constitutional environmental protection proposals); and Deborah Beaumont Schmidt and Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411 (1990).

34. 33 U.S.C. § 1251(a)(1) (1988).

or unhealthy.<sup>35</sup>

The Montana Supreme Court is bound by the intent of the framers of the constitution, and looks first to the plain language of the constitution to determine its meaning.<sup>36</sup> As Professor Horwich recognizes, Article IX of the Montana Constitution establishes a clear statement that water quality may not be degraded.<sup>37</sup> Section 1 of Article IX states as follows:

Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration of this duty.

(3) 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.<sup>38</sup>

Subsection 1 establishes that government and all people are responsible for "maintain[ing] and improv[ing] a clean and healthful environment in Montana for present and future generations."<sup>39</sup> Under subsection 3, water, land, and air constitute part of the critical environmental life support system which cannot be degraded.<sup>40</sup> As Professor Horwich noted, this constitutional prohibition against water quality degradation is supported by the distinction between allowable degradation of natural resources, so long as they are not unreasonably degraded or depleted, and the strict prohibition against degradation of the environmental life support system.<sup>41</sup>

To further support the plain language of Article IX, the debate in the Constitutional Convention provides conclusive evidence of a strict nondegradation policy. Comments on the majority proposal at the Constitutional Convention demonstrate that the Montana Legislature cannot allow any degradation of Montana's waters:

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35. Daniel Kemmis, Comment, *The Montana Constitution, Taking New Rights Seriously: I. Environmental Rights*, 39 MONT. L. REV. 221, 233 (1978).

36. *State ex rel. Racicot v. District Court*, 794 P.2d 1180, 1183 (Mont. 1990).

37. Horwich, *supra* note 2, at 5, 18.

38. MONT. CONST. art. IX, § 1, subsec. 1.

39. *Id.* In debate on this provision, Constitutional Delegate Miles Romney recognized the clear intent to prevent further degradation by stating that "maintain means to keep it the same or at least not to have it lessened; enhance is to augment or increase." MONT. LEGISLATURE, IV MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1205 (1981) [hereinafter VERBATIM TRANSCRIPT]. MONT. CONST. art. IX, § 1, subsec. 2, requires the legislature to provide for the administration and enforcement of this duty.

40. MONT. LEGISLATURE, II MONTANA CONSTITUTIONAL CONVENTION COMMITTEE PROPOSALS 555 (1979) (comments on proposal by the Natural Resources and Agriculture Committee, Feb. 18, 1972) [hereinafter COMMITTEE PROPOSAL].

41. Horwich, *supra* note 2, at 18.



*Subsection (3) mandates the legislature to provide adequate remedies to protect the environmental life support system from degradation.* The committee intentionally avoided definitions to preclude being restrictive and the term "environmental life support system" is all encompassing including, but not limited to air, water, and land and whatever interpretation is afforded this phase by the legislature and courts; *there is no question that it cannot be degraded.*

... [T]he majority proposal requires the legislature to provide whatever remedies are necessary to prevent degradation and unreasonable depletion.<sup>42</sup>

The Natural Resources and Agricultural Committee refused to define the term "environmental life support system" to avoid a narrow definition that was restrictive and would fail to adequately protect Montana's environment from degradation.<sup>43</sup>

However, traditional notions of statutory construction require that each constitutional provision must be interpreted in a manner consistent with other sections of the constitution.<sup>44</sup> Paragraph 1 of Section 1, Article IX, of the Montana Constitution creates an obligation to maintain and improve Montana's environment, and requires that there be no further degradation. Thus, paragraph 3, which requires the legislature to prevent degradation of the state's environmental life support system, must be strictly interpreted to prohibit any degradation of Montana's high quality waters.<sup>45</sup>

The plain intent to prohibit any degradation is also demonstrated by comments from the delegates to the Constitutional Convention. Delegate C.B. McNeil, who is now a district court judge for Montana's 20th Judicial District, commented on Article IX as follows:

Your committee presents and recommends, in its proposal, the strongest constitutional environmental section of any existing state constitution. . . . There is no state constitution anywhere that requires the affirmative duty to enhance the environment. . . . [T]he provision drafted by the majority requires that we, at least at a minimum, maintain the present Montana

42. COMMITTEE PROPOSAL, *supra* note 40, at 555 (emphasis added).

43. *Id.* Interpretation of statutory or constitutional provisions should be made in a manner to provide protection, rather than degradation, of the environment. *Columbus County Metro. v. Shank*, 600 N.E.2d 1042, 1056 n.17 (Ohio 1992).

44. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.05 at 103 (5th ed. 1992) (stating that an instrument must always be construed as a whole, and the meaning ascribed from the context, the nature, and the intent of the body which framed the constitution).

45. See MONT. CONST. art. IX, § 1, subsec. 3.

environment. . . . *To those who may lack such confidence in the elected representatives of the people, the clear and concise duty to maintain and enhance the environment cannot be contravened.* . . . [T]he majority proposal - requires the Legislature to provide whatever remedies are necessary to prevent degradation and to prevent unreasonable depletion.<sup>46</sup>

Additional debate makes it clear that the delegates intended to permit no degradation of Montana's environmental quality, and to affirmatively require enhancement of what existed in 1972.<sup>47</sup> Delegate Wade Dahood explained the effect of Article IX as follows: "We have to raise a barrier against pollution, and everybody wants to do it, and we have raised a barrier against pollution in the State of Montana. And the environment we have now is not going to become worse by any degree. It is going to improve."<sup>48</sup> Thus, both the plain language of the constitution, and the statements of Constitutional Convention delegates, prohibit even a *de minimis* amount of degradation.

### C. What Does Degradation Mean?

Professor Horwich argues that the definition of degradation might be manipulated to allow diminution of Montana's high quality waters.<sup>49</sup> He opines that the legislature could define "degradation" so that lowering water quality would not fall within the statutory definition of the term.<sup>50</sup> Such an approach, however, counters standard canons of constitutional construction. Absent specific definitions, constitutional terms are given their common usage and meaning.<sup>51</sup> To create a statutory definition that defies its common meaning renders a law unconstitutional.<sup>52</sup>

Recently, the Ohio Supreme Court rejected efforts to define "degradation," so that lowering water quality to a use-based or standards-based level was not considered "degradation."<sup>53</sup> The Ohio Supreme Court did not allow efforts to circumvent the state's antidegradation laws through the definitional approach proposed by Professor Horwich.<sup>54</sup> In refusing to adopt a use-based or standards-based definition of degradation, the court

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46. VERBATIM TRANSCRIPT, *supra* note 39, at 1200-01 (comments of delegate McNeil).

47. VERBATIM TRANSCRIPT, *supra* note 39, at 1205 (comments of C.B. McNeil).

48. *Id.* at 1257.

49. Horwich, *supra* note 2, at 18. Professor Horwich presents a range of possible definitions of "degradation" ranging from worsening any parameter of water quality to actually interfering with, or precluding, existing or potential uses of waters.

50. *Id.*

51. See VERBATIM TRANSCRIPT, *supra* note 39, at 1206 (statement of George Heliker) (applying common usage and meaning to descriptive adjectives used in the Montana Constitution).

52. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.28, at 249 (5th ed. 1992).

53. Columbus County Metro. v. Shank, 600 N.E.2d 1042, 1055 (Ohio 1992).

54. See Horwich, *supra* note 2, at 34-35.

held that such an "interpretation, in turn, would eviscerate the rule because it allows a clear degradation of water quality to be considered nondegradation."<sup>55</sup> Instead, the court defined degradation to include any increase in the amount of pollutants or a perceptible decrease in water quality.<sup>56</sup>

The U.S. Supreme Court also recently addressed nondegradation policies in *Arkansas v. Oklahoma*.<sup>57</sup> The Court upheld the Environmental Protection Agency Chief Judicial Officer's definition of Oklahoma's nondegradation policy for the upper Illinois River. A discharge was allowed in Arkansas, an upstream state, because it would "not lead to a detectable change in water quality" in downstream Oklahoma.<sup>58</sup> While serious questions remain about whether detectability should always provide limits to a nondegradation policy,<sup>59</sup> the Supreme Court has adopted the view that, at a minimum, degradation involves any detectable lowering of water quality.

The Montana Department of Health and Environmental Sciences has promulgated regulations which define degradation to include changes in water quality which result in conditions becoming worse than naturally-occurring conditions.<sup>60</sup> The Department drafted, and the Montana 53rd Legislative Assembly adopted, the following definition of degradation: "a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant . . ."<sup>61</sup>

Thus, the overwhelming body of legislative, judicial, and administrative authority has interpreted degradation to mean any reduction in, or lowering of, ambient water quality.<sup>62</sup> This compels a strict application of Montana's Constitution which prohibits *any* water quality degradation by new or increased sources.

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55. *Columbus*, 600 N.E.2d at 1056.

56. *Id.* at 1055-57.

57. 112 S. Ct. 1046, 1059 (1992).

58. *Id.* at 1060.

59. *Oklahoma v. E.P.A.*, 908 F.2d 595, 632 (10th Cir. 1990), *rev'd on other grounds*, *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1058 (1992).

60. MONT. ADMIN. R. § 16.20.701(1)(a)(i)-(ii)(1992). The regulations also attempt to exclude certain temporary and non-point-source pollution from activities constituting degradation. MONT. ADMIN. R. § 16.20.701(b)(1992).

61. S. 401, *supra* note 8, § 1(4)(to be codified at MONT. CODE ANN. § 75-5-103(4) (1993)). Parameter is defined as a physical, biological, or chemical property of state water when a value of that property affects the quality of the state water. *Id.* § 1(16)(to be codified at MONT. CODE ANN. § 75-5-103(16) (1993)).

62. The Montana Legislature's adoption of a strict definition of degradation should guide judicial interpretations of Montana's Constitution which proscribes any degradation. *See* 2B SUTHERLAND, STATUTORY CONSTRUCTION § 49.03, at 7 (5th ed. 1992) (contemporaneous and practical interpretations of statutory and constitutional language applied by courts).

#### D. State Program Consistency

Montana's nondegradation policy must be consistent with constitutional, statutory, and regulatory requirements. Since the Montana Legislature adopted a statutory nondegradation policy in 1971, and the constitutional degradation prohibition was instituted in 1972, the Department has been negligent in enforcing a strict nondegradation policy. As noted by the Chief of Montana's Water Quality Bureau:

An interesting thing we have found in our past 12 months of establishing our Montana policy is that, initially, there was no clear consensus about what the purpose of nondegradation was. After 20 years of having the Constitution and law in effect which both specifically address nondegradation, many of the Water Quality Bureau's staff had no clear understanding of the intent of the policy nor any goals or direction in terms of its implementation. It was too commonly referred to as an 'unreasonable or unworkable' policy; one which 'sounds good but can't be implemented.' The understanding of some staff members was that the Water Quality Bureau's role was 'to support all petitions to degrade that are technically sound and that do not violate water quality standards.'<sup>63</sup>

It is this lack of agency policy and enforcement that has led to a nondegradation policy among friends - a policy of non-enforcement that has unlawfully allowed Montana's waters and streams to be degraded.

#### 1. Consistency Within the Pre-1993 Statute

Prior to April 29, 1993, Montana's statutory nondegradation policy was as follows:

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

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63. Letter from Dan L. Frasier, Chief, Montana Water Quality Bureau, to Max H. Douson, Director, U.S. Environmental Protection Agency Region VIII Water Management Division (Dec. 27, 1992) (consisting of Montana's comments on the EPA Region VIII's draft guidance on antidegradation implementation).

subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality.<sup>64</sup>

As Professor Horwich acknowledges, the plain meaning of subsection 2, and the history of Montana's nondegradation policy, requires new and increased sources of pollution to maintain existing water quality under this statutory provision.<sup>65</sup>

Subsection 2 means what it says. New or increased sources of pollution must provide the degree of treatment necessary to maintain high quality waters. Although Professor Horwich is correct in recognizing that this provides some question as to the meaning and effect of subsection 1,<sup>66</sup> to allow new or increased sources to pollute and degrade Montana's high quality waters would violate the plain language of Montana's pre-1993 statutory nondegradation policy. Each word in the statute must be given effect, and the legislature's statements must not be rendered superfluous.<sup>67</sup>

Subsection 1 applies to state *waters*, not to dischargers. Any lowering of surface water or groundwater ambient water quality must be justified by necessary economic or social development and not preclude present and anticipated uses.<sup>68</sup> As Professor Horwich correctly notes, subsection 1 must govern activities of existing sources.<sup>69</sup> Thus, under the statute, if a stream's ambient quality decreases as a result of natural or out-of-compliance man-made pollution, existing sources would be able to apply for permission to continue discharging, even though the water's ambient quality is being lowered.<sup>70</sup>

Despite any alleged inconsistency between subsections 1 and 2, the courts and agencies must give effect to the legislative pronouncements in subsection 2.<sup>71</sup> The particular pronouncement that new and increased sources must maintain existing water quality should be given effect over any general statements set forth in subsection 1.<sup>72</sup> Moreover, standard rules of construction further support the contention that subsection 2 must

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64. MONT. CODE ANN. § 75-5-303 (1991)(emphasis added).

65. Horwich, *supra* note 2, at 19-22; see MONT. CODE ANN. § 75-5-303(2) (1991).

66. Horwich, *supra* note 2, at 21-22; see MONT. CODE ANN. § 75-5-303(1) (1991).

67. See 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.06, at 119 (5th ed. 1992).

68. See MONT. CODE ANN. § 75-5-303(1) (1991). Loose application of the terms "economic" and "social" could result in agencies allowing degradation while avoiding Montana's strict prohibition against degradation.

69. Horwich, *supra* note 2, at 20-22; see MONT. CODE ANN. § 75-5-303(1) (1991).

70. For example, a fire, a slide, or a violation from an up-stream permitted discharger, could cause increased sediment loading or degradation in a stream. Even though the stream's water quality is not being maintained, subsection 1 allows existing sources to continue discharging so long as they do not preclude present or anticipated uses, and can demonstrate necessary economic and social justifications.

71. See MONT. CODE ANN. § 1-2-232 (1991)(an interpretation which gives effect is preferred over one which makes void).

72. See MONT. CODE ANN. § 1-2-102 (1991).

not be ignored. Environmental statutes are to be liberally construed to effect their intended purpose to protect the environment.<sup>73</sup>

Under the pre-1993 nondegradation statute, allowing new and increased sources to degrade Montana's waters is impermissible, because it would violate the plain language of subsection 2.<sup>74</sup> Furthermore, such an interpretation is faulty because it involves serious conflicts based on the constitutional prohibition of any water quality degradation. In *Parker v. Yellowstone County*, the Montana Supreme Court stated that it will construe the terms of a statute to preserve its constitutionality.<sup>75</sup> Because subsection 2 is consistent with Articles II and IX of Montana's Constitution, it cannot be ignored, and must be given its literal meaning.<sup>76</sup> In light of the constitution's mandate against water quality degradation, any reading of subsection 1 which allows degradation was repealed by implication.<sup>77</sup> This is especially true in Montana where preservation and enhancement of the environment is a fundamental, constitutionally protected right.

## 2. Consistency Within the 1993 Statute

The Montana Legislature passed Senate Bill 401, thereby amending Montana's statutory nondegradation policy.<sup>78</sup> This act weakened the state's strict statutory prohibition against degradation by new and increased sources, and expressly allowed "mixing zones" where degradation may be allowed and water quality standards may be exceeded.<sup>79</sup>

Senate Bill 401 requires the Board of Health and Environmental Sciences (Board) to adopt rules which allow the Department of Health and Environmental Science (Department) to approve mixing zones.<sup>80</sup> These zones would be allowed to have levels of pollution in excess of promulgated water quality standards.<sup>81</sup> Under this legislation, mixing zones may be approved even if they adversely impact existing uses such as providing

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73. *Columbus County Metro. v. Shank*, 600 N.E.2d 1042, 1056 n.17 (Ohio 1992)(supporting a liberal interpretation of Ohio's nondegradation policy which is triggered by any pollution of, or perceptible change in, water quality)(citing *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 666 (3d Cir. 1984)); *United States v. Frezzo Bros., Inc.* 602 F.2d 1123, 1128 (3d Cir. 1979). *See also* 3A SUTHERLAND, STATUTORY CONSTRUCTION, Ch. 75, at 405-45 (5th ed. 1992).

74. *See* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.01 at 81 (5th ed. 1992) (supporting the plain meaning of a statute); MONT. CODE ANN. § 75-5-303(2) (1991).

75. *Parker v. Yellowstone County*, 374 P.2d 328, 330-31 (Mont. 1962).

76. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 45.11, at 49 (5th ed. 1992); MONT. CODE ANN. § 75-5-303(2) (1991).

77. *See* 4 SUTHERLAND, STATUTORY CONSTRUCTION § 23.20, at 387 (4th ed. 1985).

78. S. 401, *supra* note 8.

79. *Id.* (to be codified at MONT. CODE ANN. § 75-5-103(13) (1993) (definition of mixing zone); § 75-5-301(4)(providing criteria for establishing mixing zones)).

80. *Id.* (to be codified at MONT. CODE ANN. § 75-5-301(4) (1993)).

81. *Id.* (to be codified at MONT. CODE ANN. § 75-5-103(13) (1993)).

drinking or stock water, swimming, or fishing.<sup>82</sup>

Senate Bill 401 prohibits any degradation of Montana's high quality waters<sup>83</sup> unless the Department has granted a waiver.<sup>84</sup> The statute applies to both surface and groundwater,<sup>85</sup> and to both point source and non-point source discharges.<sup>86</sup> The Board is granted authority to define a category of degradation which is "non-significant."<sup>87</sup>

The Board is required to adopt regulations governing nondegradation waivers.<sup>88</sup> Under the 1993 nondegradation law, no one in Montana may degrade any high quality water (unless the degradation is nonsignificant) until he or she has received a waiver from the Department. The Department may only grant a nondegradation waiver after the applicant has demonstrated compliance with a set of criteria including lack of non-degrading alternatives, protection of existing uses, and demonstration of a proposed project's important social and economic benefits.<sup>89</sup>

The newly adopted statutory nondegradation policy expressly allows degradation of Montana's high quality waters. The Montana Legislature did not even attempt to conform to the constitutional mandate by adopting Professor Horwich's recommendations which would allow diminution in water quality by defining it as not constituting degradation.<sup>90</sup> Instead, the legislature sanctioned degradation, even if it violates water quality standards, so long as an applicant for a nondegradation waiver complies with certain criteria.<sup>91</sup>

### 3. *Constitutional Consistency*

Any laws passed by the Montana Legislature, whether before or after the constitution was ratified in June 1972, may not contravene the state's constitution.<sup>92</sup> The new law, and agency action under this law, is contrary to Montana's Constitution which prohibits the legislature from allowing

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82. *Id.* (to be codified at MONT. CODE ANN. § 75-5-301(4)(b) (1993)).

83. High quality waters are waters which, for a single parameter, are better than the Board's adopted water quality standards. All waters are considered to be high quality unless the Board of Health determines that they are not suitable for human consumption or the growth and propagation of fish and associated aquatic life. S. 401, *supra* note 8 (to be codified at MONT. CODE ANN. § 75-5-103(9) (1993)). Thus, the legislature has attempted to exclude certain degraded waters from the protection offered by the nondegradation policy.

84. S. 401, *supra* note 8 (to be codified at MONT. CODE ANN. §§ 75-5-303(2) and (3) (1993)).

85. *Id.* (to be codified at MONT. CODE ANN. § 75-5-303(1) (1993) and § 75-5-103(23)).

86. *Id.* (to be codified at MONT. CODE ANN. § 75-5-303(3)(d) (1993) and § 75-5-103(25)).

87. *Id.* (to be codified at MONT. CODE ANN. § 75-5-301(5)(C) (1993)).

88. *Id.* (to be codified at MONT. CODE ANN. § 75-5-301(5) (1993)).

89. *Id.* (to be codified at MONT. CODE ANN. § 75-5-303(3) (1993)).

90. See *supra* notes 49-52 and accompanying text. As presented above, such an approach is contrary to the language, and expressed intent, of the Montana Constitution.

91. See *supra* notes 78-89 and accompanying text.

92. See 4 SUTHERLAND, STATUTORY CONSTRUCTION, § 23.20, at 387 (4th ed. 1985).

any water quality degradation.<sup>93</sup> As recognized by Professor Horwich, and as discussed above, the Department's nondegradation policy, and the new nondegradation law, violate Montana's strict constitutional nondegradation requirements.<sup>94</sup> Any efforts to undertake regulatory or statutory changes must be consistent with the 1972 Montana Constitution.

#### 4. *Federal Antidegradation Program Consistency*

The Clean Water Act allows states to adopt stricter pollution control standards than the federal Act.<sup>95</sup> Thus, Montana's nondegradation policy may be more demanding, but cannot be weaker, than the federal nondegradation or antidegradation policy. Professor Horwich has thoroughly discussed the inconsistencies between the state and federal policies and identified a few areas in which Montana's program is less protective than the federal program.<sup>96</sup> As discussed above, Montana has a nondegradation policy that is stricter than the federal standards.<sup>97</sup> Efforts to lower Montana's requirements to the federal level violate Montana's laws and can only be achieved by the proper statutory and constitutional amendments.

### III. POLICY AND PROGRAM ISSUES AND RECOMMENDATIONS - AN ALTERNATIVE PERSPECTIVE

Professor Horwich argues that the legislature should address Montana's nondegradation policy.<sup>98</sup> The Montana Constitution mandates that the legislature provide adequate remedies to prevent Montana's water from being degraded.<sup>99</sup> Thus, the legislature must provide regulatory programs and remedies to ensure that no one is allowed to degrade Montana's high quality waters below their 1972 level. The legislature has no constitutional authority to allow Montana's environmental life support system to be degraded in any manner.

As discussed above, Professor Horwich's proposal to have the legisla-

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93. See MONT. CONST. art. IX, § 1, subsec. 3.

94. See *supra* section II(B).

95. 33 U.S.C. § 1370 (1988); 40 C.F.R. § 131.12 (1992); *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1057 (1992).

96. Horwich, *supra* note 2, at 31-33 (noting the inconsistency with the state's "necessary" economic and social development criteria, and the federal government's "important" development criteria, as well as Montana's weaker protection of existing beneficial uses).

97. See also Letter from Dan L. Frasier, Chief, Montana Water Quality Bureau, to Max H. Douson, Director, U.S. Environmental Protection Agency Region VIII Water Management Division (Dec. 27, 1992). "[I]t is agreed by most that [Montana's nondegradation policy] is more restricting than the federal antidegradation policy." *Id.*

98. Horwich, *supra* note 2, at 22 and accompanying text.

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



ture define "degradation" to allow lowering of Montana's high quality waters is contrary to the express language and intent of the Montana Constitution.<sup>100</sup> Instead of looking for ways to allow degradation of Montana's waters, statutes and regulations should ensure that any pollution from new or increased sources will result in no net degradation of Montana's high quality waters. The simplest method may be to treat discharges to prevent degradation of ambient water quality.<sup>101</sup> An alternative method would be for potential dischargers to clean up up-stream discharges so that there is no net degradation of the stream at the discharge point. Such a proposal would comply with Montana's pre-1993 nondegradation statute, its current nondegradation statute, and Montana's Constitution.<sup>102</sup>

Professor Horwich appears to take the position that prohibiting further water quality degradation is unreasonable, or represents an extreme position that should be abandoned.<sup>103</sup> This author disagrees with Professor Horwich's characterization that few people would advocate a strict nondegradation position.<sup>104</sup> The people of Montana ratified the Montana Constitution on June 6, 1972. That constitution clearly stated that Montanans desired to improve the quality of Montana's environment, and to halt any further degradation of Montana's air, land, and waters.<sup>105</sup>

A strict nondegradation policy does not proscribe further economic development in Montana. New sources of pollution in a stream or lake could meet the constitutional nondegradation requirements by guaranteeing reduction of pollution sources upstream from the proposed source - so long as the net water quality does not decrease at any point. Anyone wishing to discharge into Montana's pristine waters would have to ensure that the ambient water quality is not degraded.

Characterizing the nondegradation debate as "jobs versus the envi-

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100. See *supra* sections II(B) and (C).

101. A tough no-discharge or nondegradation policy is not an extreme or unusual requirement. Section 13 of the Rivers and Harbors Act of 1899 flatly prohibited discharge of refuse (other than sewage) into navigable waters. 30 Stat. 1152 (1899) (codified at 33 U.S.C. § 407 (1988)); ROGERS, *supra* note 3, § 4.11, at 162-80. States have established nondegradation requirements for many water bodies. See, e.g., *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1051 n.2 (1992) (no degradation allowed in high quality scenic river areas); *Big Fork Mining Co. v. Tennessee Water Qual. Control Bd.*, 620 S.W.2d 515 (Tenn. App. 1981) (upholding denial of discharge permit for mine based on antidegradation policy); *New Jersey Builders v. Dep't of Envtl. Protection*, 404 A.2d 320 (N.J. Super. 1979) (upholding nondegradation policy for New Jersey Central Pine Barrens); Telephone interview with John Short, Director, Regulatory and Enforcement Unit, Lahonton Regional Water Quality Control Board (April 5, 1993) (zero discharge for waste water and solid wastes in the Lake Tahoe Basin).

102. Any discharger must also comply with other legal requirements to apply the appropriate level of water quality treatment.

103. See Horwich, *supra* note 2, at 3, 34, 36.

104. See *id.* at 34.

105. MONT. CONST. art. IX, § 1.

ronment"<sup>106</sup> distorts the debate from the real issues. Montana's future economic growth and prosperity is likely to be driven by its high quality environment, not the boom and bust cycle created by out-of-state corporations extracting coal or hardrock minerals.<sup>107</sup> Economic activities may occur so long there is compliance with Montana's nondegradation requirements. Economic development must be consistent with our constitutional mandate to maintain, enhance, and prevent degradation of our air, land, and waters.

Any efforts to weaken Montana's prohibition against degradation of our high quality waters must be by a vote of the people. The Montana Legislature does not have the authority to allow any degradation of Montana's air, land, or water, below the 1972 levels.

#### IV. CONCLUSION

This author agrees with Professor Horwich's conclusions that the Department and Board of Health and Environmental Sciences' nondegradation program is contrary to both Montana's statutes and constitution.<sup>108</sup> The newly enacted nondegradation statute also has serious constitutional deficiencies. However, Professor Horwich's suggestion that there be careful study and discussion of Montana's nondegradation policy is a proper and timely call to address this important issue.<sup>109</sup>

It is the appreciation for, and recognition of, Montana's clean environment that is, and will continue to be, a driving force for Montana's economic health. Taking precipitous steps to expressly allow degradation of Montana's high quality waters is not good policy. Instead, we should all be working on efforts to *enhance* Montana's most valuable economic resource, a clean and healthy environment. We must remember the legacy that the mining industry has left our state because of lax laws, and laxer enforcement.

Montana is blessed with beautiful mountains, clean rivers, and fruitful plains. The framers of Montana's Constitution, and Montana's Legislative Assemblies between 1971 and 1993, have taken strong stands against degrading our high quality waters. It is important to leave future generations with cleaner waters, rather than allowing continued degradation of Montana's water bodies. Efforts to allow increased degradation and

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106. Horwich, *supra* note 2, at 3.

107. See Jerry D. Johnson and Raymond Rasker, *The Role of Amenity Resources for Business Expansion and Retention in the Greater Yellowstone Region* (rev. ed. Mar. 1993) (unpublished manuscript); AL GORE, *EARTH IN THE BALANCE* (1992); THOMAS M. POWERS, *THE ECONOMIC PURSUIT OF QUALITY* (1988).

108. See Horwich, *supra* note 2, at 5, 22, 26, 29-30.

109. See *id.* at 34.

pollution of Montana's waters and environment should not be lightly undertaken.