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Water—A Problem in Montana

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NOTES

WATER—A PROBLEM IN MONTANA

Ten years ago the term ecology would have been meaningless to the average citizen in the United States. Today almost everyone has a basic understanding of what the word means. Unlike apartheid, ecology is not a new word created to define a previously unencountered phenomenon. Ecologists have always been concerned with the existence of organisms and their relationship with their environment. It is only recently that the term has taken on its popular connotation in which the organism is man and the environment is the world in which man lives.

In 1969 Montana passed legislation that allowed new and rigid air quality standards to be created in order to promote and protect the health and welfare of the state's citizens.¹ It placed the administrative responsibility for clean air with the State Board of Health.² In 1971 the Legislature will be faced with a new proposal for the control of water pollution.

The purpose of this article is to give the Montana legislator and citizen an idea of the magnitude of the problem that our state faces with its water resources. The problem will be discussed in two parts. Part I will discuss the relationship between water quality and water pollution and suggest a system that would give the state the best and most practical control over its water resources. Part II will explain the proposed water pollution legislation popularly referred to as the "Rusoff Proposal."³ The Legislature is urged to take the necessary steps to improve Montana's laws in this area, because these measures are needed in Montana and needed now.

PART I. THE ULTIMATE GOAL

MONTANA'S PROBLEM AREAS

Montana is in an ideal situation regarding its water resources since most water used in Montana originates in the state.⁴ The mountains

¹REVISED CODES OF MONTANA, §§ 69-3904 to -3924 (1947) [hereinafter cited as R.C.M. 1947].

²R.C.M.1947, § 69-3907.

³The proposed legislation is set forth in the appendix herein.

⁴MONTANA WATER RESOURCES BOARD, REPORT ON WATER RESOURCES AND PLANNING 5 (October 1968).

	Millions of Acre Feet		
	Enters State	Leaves State	Originating in State (does not include evapotranspiration)
Missouri Basin	6.73	16.70	9.97
Columbia Basin	8.16	25.31	17.15
Hudson Bay Basin	0.00	.86	.86
	<u>14.89</u>	<u>42.87</u>	<u>27.98</u>

⁵“Presently, estimates are that between eight and ten million acre-feet of water are diverted for irrigation, stock, domestic, public supply, and industrial use of which about five million acre-feet are consumed, i.e., evapotranspired in the process of use.”

of Montana also supply water to other parts of the country through the Missouri and Columbia River system. The nation, therefore, depends on Montana to provide clean water for its use. It would seem then that Montana has an obligation, if not a responsibility, to keep the water clean. Unlike the other states that depend upon Montana for a steady supply of clean useable water, Montana depends primarily upon itself for such water. Thus the state is in a particularly enviable position, since it enjoys more than 1,500 lakes and more than 32,000 miles of rivers and streams,⁵ the quality of which is controlled by its own citizens. Indeed, if the water quality standard is not properly controlled by the citizens of Montana, others who depend upon our water may impose controls upon it.

Montana is singularly dependent upon its natural resources for its economic existence. The state's soil, mineral wealth, and scenic wonders are the basis of its three most important industries—agriculture, mining and tourism.⁶ Agriculture⁷ and mining⁸ are generally considered prime contributors to water pollution. The tourist industry, although not generally considered a contributor to pollution, does add to Montana's water quality problem.⁹ Other industries considered to cause severe water pollution problems are the pulp and paper industry,¹⁰ the utility industry,¹¹ and the food processing industry.¹² These are some of the real bread and butter industries in Montana. Sugar beet factories and meat packing plants need extensive amounts of water and are potential polluters. If discharges from these two industries are not properly treated, the appearance of the water is ruined and the dissolved oxygen content is exhausted.¹³ Fish and other aquatic life depend on this dissolved oxygen content. Montana has sugar beet factories at Sidney, Billings and Hardin, and meat packing facilities in Great Falls, Billings, Butte and Missoula.¹⁴

Perhaps no industry has been more harshly criticized than the pulp and paper industry.¹⁵ This is due to the nature and effects of its pollutant, i.e., a "sulfite liquor" which is a non-fibrous material removed from wood chips during the cooking process. This pollutant literally

⁵COLLIER'S ENCYCLOPEDIA XVI at 488 (1967).

⁶*Id.* at 489.

⁷Note, *Special Problems of Water Pollution: The Private Sector*, 1 U.C.D. L. REV. 105, 116 (1969).

⁸*Id.* at 113.

⁹2 CCH CLEAN AIR AND WATER NEWS 13 (Nov. 6, 1970). Oklahoma found it necessary to pass a Scenic River Act providing for penalties of \$250 fines and up to 30 days in jail for persons found guilty of littering scenic rivers; 2 CCH CLEAN AIR AND WATER NEWS 15 (Oct. 29, 1970). Ohio recently passed a boat sewage act prohibiting on or after July 1, 1973, any water craft not equipped with an approved sewage disposal system from using certain waters.

¹⁰*Special Problems, supra* note 7 at 107.

¹¹*Id.* at 110.

¹²*Id.* at 114.

¹³Hines, *Controlling Industrial Water Pollution: Color the Problem Green*, ENVIRON. L. REV. 282, 292 (1970).

¹⁴COLLIER'S, *supra* note 5 at 492.

¹⁵*Special Problems, supra* note 7 at 107.

suffocates water creatures, including fish, with its biochemical oxygen demand.¹⁶ One of the largest pulp mills in the world is in Missoula.

Montana's most important industry is agriculture. Indisputably agriculture is dependent upon good water as well as good soil. Agriculture is the largest single user of water.¹⁷ The two primary uses that agriculture makes of such water are consumptive—crop production and stock watering.¹⁸ The greater portion of the water diverted for these uses is returned to a water reservoir either as surface water or as ground-water.¹⁹ This returning water, whether runoff or seepage, creates a water pollution problem. Runoff²⁰ is the overflow of excess irrigation waters which contains animal wastes, fertilizers, sediment and contaminants washed from the land. Seepage²¹ is water containing similar materials which filters through the soil and returns to the ground water supply or else accumulates in the ground. The effect that these returning waters have on the receiving resource depends on the particular pollutants and on whether the receiving resource is surface water or ground water.

The most distinguishable characteristic of the water pollution problem caused by agriculture is that the pollution does not emanate from one point.²² Every cultivated and irrigated field is a potential contributor. Due to the magnitude of the problem, scientific research and proposals for reasonable controls are sorely lacking in the agriculture industry.²³ With over 2,000,000 irrigated acres, there is potential for even greater problems than we have at the present.

One exception to the non-emanation point characteristic of agricultural pollution is the feedlot.²⁴ The feedlot problem is very similar to a point-source polluter such as an industrial waste discharger. The large number of cattle brought together for feeding creates large quantities of animal wastes. These wastes reach water reservoirs either through runoff when it rains or through seepage. Three distinct water pollution problems are created by these wastes because:²⁵ (1) the wastes are extremely high in biochemical oxygen demand and chemical oxygen

¹⁶*Id.* at 108.

¹⁷WILLRICH AND HINES, *WATER POLLUTION CONTROL AND ABATEMENT*, 151 (1967).

¹⁸MONTANA WATER RESOURCES BOARD, *supra* note 4 at 10.

¹⁹*Id.*

²⁰*Special Problems, supra* note 7 at 117.

²¹*Id.*

²²Hines, *Agriculture: The Unseen Foe in the War on Pollution*, 55 CORN. L. REV. 740 (May, 1970).

²³22 CCH CLEAN AIR AND WATER NEWS 4 (Oct. 22, 1970). Quoting Dr. Jesse Lunin, Chief Soil Chemist for the Soil and Water Conservation Research Division of U.S.D.A.'s Agriculture Research Service.

"Basically, agriculture's responsibility in establishing water quality criteria will have to be closely associated with the development of practices that will make more efficient use of existing soil and water resources and, at the same time, prevent degradation of water quality."

²⁴Hines, *supra* note 22 at 744.

²⁵*Id.* at 741.

demand, (2) the bacterial level of animal wastes is very high (which is especially bad where recreational use of water is heavy) and (3) the nutrient content is very high, thereby promoting a field for the growth of algae, i.e., secondary pollution.²⁶ In 1967 Montana had 550 feedlots in operation with 98,000 head of cattle being fed.²⁷ In addition irrigated lands and feedlots are often located in the same area, since irrigated land is used for growing feed for the cattle.²⁸ Therefore, an area that has both irrigated land and feedlots has a water pollution problem compounded by both operations adding their pollutants to the same water reservoir.

There are many other industries and even recreational activities that contribute to the degradation of Montana's waters. Many, if not most, of our municipalities have inadequate waste treatment facilities; indeed, some have no such facilities at all.²⁹ Every living person has some adverse effect on the total environment. It is on that premise that the Legislature is asked to take positive regulatory action over the state's waters.

WATER POLLUTION AND WATER QUALITY

Nature herself is responsible for adding impurities to the world's waters, by the so-called natural pollution of turbidity and silt flushed off the surface of the soil and the organic load from decayed vegetation.³⁰ But natural pollution is not the cause of the world's water problem, or even of Montana's, except where poor conservation practices multiply the amount of these impurities. Pollution in a theoretical sense is simply use of water by man which in any manner degrades its quality.³¹ However, implicit in any system for water quality control or water pollution

²⁶GINDLER, *WATER POLLUTION AND QUALITY CONTROLS* 15 (WATERS AND WATER RIGHTS, Vol. 3, Clark ed. 1967).

"Some organisms, such as algae, are beneficial in moderate numbers, but harmful in great concentrations. Whether bacteria are beneficial or harmful depends on the species. Most bacteria are beneficial; harmful varieties are called pathogens. The coliform bacteria count, which is a measure of fecal contamination, is commonly used to determine whether water is potentially dangerous. Viruses which are dangerous to man may also be present in water. Even trees and other vegetation in water may affect its quality."

²⁷COLLIER'S *ENCYCLOPEDIA* (1967, Supp. 1968) at 371.

²⁸MONTANA WATER RESOURCES BOARD, *supra* note 4 at 10.

²⁹2 *CCH CLEAN AIR AND WATER NEWS* 5 (Sept. 3, 1970). An economic forecast made by *U. S. News & World Report* in August, 1970 stated that the nation must spend \$71 billion to correct environmental problems in the next 5 years. Of this amount, \$54 billion is needed to clean up waterways; of the \$54 billion, \$40 was needed for new and improved sewer systems and municipal waste-treatment plants.

³⁰WILLRICH AND HINES, *supra* note 17 at 90; MONTANA WATER RESOURCES BOARD, *supra* note 4 at 6. Sediment yields of streams in western Montana are less than 99 tons per square mile of drainage area. In the eastern part of the state the sediment yields are upwards of 300-500 tons per square mile of drainage area. In central Montana streams average sediment yields of 100-299 tons per square mile of drainage area. Sediment yield in streams reflects the character of the rocks over which they flow. In some areas transport of sediment has been accelerated by the actions of man and animals.

³¹WILLRICH AND HINES, *supra* note 17 at 34.

control must be a tolerance for some change in the water as part of the right to use the water.³²

In order to understand water pollution and how legislation may help control it, one must first understand something of the interrelationships between water rights, water quantity and water quality. It will be helpful to have a working definition of pollution control and water quality control. The generally accepted definition of pollution control is the control of waste discharges that unreasonably degrade water.³³ On the other hand, water quality control is usually defined as the control over any factor that unreasonably impairs beneficial use of water.³⁴

A. Natural Stream Quality

There are a number of reactions when one removes water from a stream.³⁵ Consider the effect of an appropriation³⁶ on the quality of the natural stream itself. First, the assimilative capacity of the stream is reduced as a loss of aeration follows from a lessening of stream velocity.³⁷ The stream may not have sufficient oxygen left to support the same quantity or quality of aquatic life that it could support before the appropriation. Second, there is greater evaporation loss due to the increased temperature; this naturally follows from the diminishing of the supply and the reduction in the velocity of the flow.³⁸ Third, since minerals do not evaporate with the moisture, there is a higher mineral content in the remaining water.³⁹ When the mineral content is too high, some species of aquatic life may not be able to exist. Finally, lower water flow leads to a more productive field for algae growth which in turn may cause a nuisance by creating undesirable taste and odor.⁴⁰ Thus, the resulting loss to the individual stream as well as to the whole watershed is twofold: (1) a loss in the quantity of water due to the actual taking and (2) a loss in the quality of the remaining flowing water. However, the public need not be concerned as long as the changes in the water quality of the natural stream after an appropriator has removed a quantity of water are relatively insignificant.

³²Robie, *Relations Between Water Quality and Water Rights*, CONTEMPORARY DEVELOPMENTS IN WATER LAW 72 (Johnson and Lewis ed. 1970).

³³Note, *State Control of Water Pollution; The California Model*, 1 U.C.D. L. REV. 1, 13 (1969).

³⁴*Id.*

³⁵GINDLER, *supra* note 26 at 5.

"A change in the regimen may alter water quality even though the amount of foreign matter discharged into the stream remains the same. A change in stream velocity may substantially affect its ability to purify waste discharges. It may also accelerate or retard the impairment of water quality by natural processes, such as by silting or stagnation."

³⁶Appropriation in this paragraph is limited to mean an actual removal of water from the stream.

³⁷Robie, *supra* note 32 at 77.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*; see quoted material, *supra* note 35.

B. Beneficial Uses

There is another consideration that goes hand-in-hand with the concern for natural stream quality. This is the effect that the appropriation has on another potential or present beneficial use. As in most states in the West, water rights in Montana are controlled by the prior appropriation doctrine. It is not difficult to see how a prior appropriation affects a subsequent appropriator's right to use water when it is just a quantity of water with which the subsequent appropriator is concerned. It is more difficult to understand how removal of a quantity of water affects the quality of the remaining water to the detriment of a subsequent appropriator.⁴¹

Having in mind the effects an appropriation may have on the water quality of a particular source, it can be readily seen that there are three effects that a prior use may have on another beneficial use of water from the same source. The uses can be neutral⁴²—the first use having only slight affect on the water quality of the source. An example of such neutral effect is a river that is used for navigation as well as for industrial cooling water. The navigation has no adverse effect on the quality of the water for the industrial use. Two uses of water from the same source can also be complementary⁴³—one use upgrading the water quality for the second use without the second use degrading the water for the prior use. An example of complementary uses is the use of water from a reservoir for cooling water in a factory and by people for recreation.⁴⁴ The water is warmed so that people can swim and water ski. Two water uses can also be competitive⁴⁵—one use absolutely conflicting with the second use. An example of this is the use of water by a factory for cooling processes which warms the water to such an extent that sport or commercial fish downstream can no longer survive.⁴⁶

In the first two examples given, neither party's use of the water is adversely affected by the other party's appropriation of the water. The quality of the water in the source is so slightly affected that both uses can be sustained simultaneously. However, in the third situation, in which the uses are competitive, the real problem in water quality control is presented. Which of a variety of beneficial uses should be permitted? Under the present Montana law if two uses are competitive, the prior appropriator, assuming he is using the water beneficially, may be able to sustain his right to use that water even though he is adversely

⁴¹GINDLER, *supra* note 26 at 7.

"To be reuseable, water must be maintained at a suitable quality. Degradation of water quality by a single user can reduce the number of times that the water may be reused, even if it does not pollute the water to the point of being unuseable by the next user downstream. . . . Protection of water quality for reuse is vital to the optimum utilization of our limited water resources."

⁴²WILLRICH AND HINES, *supra* note 17 at 39.

⁴³*Id.*

⁴⁴*Id.* at 40.

⁴⁵*Id.*

⁴⁶*Id.*

affecting the quality of the water for another use.⁴⁷ First in time is the criterion under present Montana statutes, providing that the appropriator makes beneficial use of the water.⁴⁸

C. *The Relationship*

With a fundamental understanding of water quality problems, it can be seen why there should be concern for water pollution at the time an appropriation is made. It is admitted that historically water pollution has only been concerned with discharges into the water,⁴⁹ although water quality purists have usually been concerned with the conservation of water.⁵⁰ However, by closely analyzing the goals of water conservationists and pollution control proponents, it is apparent that their main objective is to prevent the unreasonable degradation of water quality.

The fact that an appropriation by itself can so diminish a source that it is unable to support high standards of aquatic life or provide any further beneficial use to man is more than a concern for conservationists. Under present law, if an appropriation were made that totally destroyed a flowing stream in Montana, and that stream was the subject of no prior appropriation, it appears that nothing could be done to prevent such destruction so long as the water was used beneficially by the appropriator.⁵¹ However, total disruption of a stream which prevents any further beneficial use must also be considered an unreasonable degradation of water. This should be included in the same type of offenses against water as pollution, even though the appropriator has not discharged

⁴⁷R.C.M.1947, §§ 89-802, 89-807; Robie, *supra* note 32 at 75.

"It is generally held, for example, that a prior appropriator is liable for pollution that interferes with the right of a senior appropriator, although the question whether senior appropriators have a right to lower water quality to the detriment of junior appropriators is unsettled. Also even if an upstream appropriator causes pollution, abatement will not always be available as a remedy. A court may deny an injunction to the plaintiff and compensate him by money damages instead. In some instances, as in the case of riparian rights, pollution may be allowed to continue against the private right of others under the theory of prescriptive rights. The recognition of a right to pollute also exists in the prior appropriation system. For instance, if the cost to upstream users of preventing pollutant discharges from entering the stream is many times the value of the downstream rights, the polluting use may be deemed reasonable."

⁴⁸R.C.M.1947, §§ 89-802, 89-807.

⁴⁹*State Control*, *supra* note 33.

⁵⁰*Id.*; GINDLER, *supra* note 26 at 6.

"Hence, the term 'water quality' is not used here merely as a euphemism for the term 'water pollution', which is a more traditional and pungent phrase. . . . 'quality' takes into account any properties of water that may affect its usefulness. 'Pollution' is one kind of alteration of quality which renders water undesirable for some beneficial use. The maintenance or improvement of water quality may thus require affirmative steps beyond merely prohibiting acts of man that pollute waters. A modern trend is the effort to provide water quality control rather than solely to prevent water pollution."

⁵¹*See* cited and quoted material, *supra* note 47; R.C.M.1947, § 89-801, declares certain waters to be subject to appropriation of the fish and game commission of the state of Montana; R.C.M.1947, § 89-805.

one drop of waste water and even though no present water right is being abridged.

A second and perhaps stronger justification for ridding legislation of the historic concept of water pollution⁵² can best be seen by looking at the waste water discharges. From where do these discharges come? In general, an appropriator of water, after having satisfied his need for the water, returns some portion of the water appropriated to the source from which it came or to another body of water either on the surface or underground.⁵³ The Montana statutes discuss appropriation as a diversion of water.⁵⁴ But it can be argued that a discharge of waste water to a flowing source is in itself an appropriation on that source.⁵⁵ If this contention is true, virtually all users of water that are in any manner adversely affecting this state's water quality are subject to the prior appropriation doctrine. It is not necessary to have a physical taking of water from a source to have an appropriation on that source. It is only necessary that a use is being made of the state's water in that source.

In the main then, the state must be concerned with water pollution, (legislatively speaking, water quality control) at the moment an appropriation is made. If the appropriation is in the nature of a discharge of excess water, then the state must be concerned with the content of that discharge at the time the appropriation is made. However, if the appropriation is a taking and using of water from a source, and return water is certain to be created, then the state must be just as concerned with the content of the water to be returned. Whether this concern for the return water should be manifested when water is appropriated or when water is returned is the issue. It is urged that the concern should be manifested at the time of the appropriation.

⁵²See quoted material, *supra* note 50.

⁵³MONTANA WATER RESOURCES BOARD, *supra* note 4 at 12.

Acre Feet Per Year		
<i>Surface Water</i>		
<i>Use</i>	<i>Diverted</i>	<i>Consumed</i>
Crop production	10,000,000	3,750,000
Public supplies	79,000	8,000
Industrial	169,000	17,000
Rural domestic	1,000	100
Stock	18,000	6,000
	10,267,000	3,781,100
 <i>Ground Water</i>		
<i>Use</i>	<i>Diverted</i>	<i>Consumed</i>
Crop production	45,000	20,000
Public supplies	33,000	3,000
Industrial	31,000	3,000
Rural domestic	11,000	1,000
Stock	20,000	7,000
	140,000	34,000

⁵⁴R.C.M.1947, §§ 89-803, 89-806.

⁵⁵See quoted material, *supra* note 47.

MONTANA'S POTENTIAL FOR SOLVING THE PROBLEM

The objective of any state water quality control system must be twofold: (1) maximize beneficial uses and (2) minimize any deleterious effects that these beneficial uses may have on the state's waters. Such a control system would consist of controls on appropriations of water that remove water from a source as well as on appropriations that use the water without removing it from the source. Appropriations on water within a source would include navigation, recreation and waste water carriage.⁵⁶ Appropriation of water would be an all inclusive term meaning the use of water, not the actual diversion of water.

A. *The Classification*

In order to maximize beneficial uses and minimize losses in water quality, it is necessary to take into consideration a wide variety of present and potential uses.⁵⁷ However, a use can no longer be considered beneficial solely because of an economic benefit to the appropriator, the community, or the state. Certainly no use should be considered beneficial if it destroys the source thereby precluding any other use. Nor should such use be considered beneficial if it so adversely affects the return water that it cannot be permitted to be returned. Destruction of water as a result of an appropriation cannot be allowed.

If the water in a source has an established quality standard which is not allowed to be impaired by any appropriation or combination of appropriations, the objective of the state water quality control system can be met. Beneficial uses of any water from that source would simply be limited to those uses which would not lower the quality standard of that source.

What kind of standards are possible that would satisfy both economic and environmental interests? Certainly ideals that individuals of either interest may envision could not be established for every stream. However, individual stream quality standards, determined only after public hearings⁵⁸ have been held, would provide a feasible means to satisfy the various interests.

The following is a scale of stream quality standards that has been suggested:⁵⁹ (1) natural state, (2) potable water, (3) preservation of fish and wildlife, (4) stock watering and irrigation, (5) recreational

⁵⁶Since it has not been determined that a waste water discharge is an appropriation of water, a statutory definition may be necessary to ensure such interpretation.

⁵⁷Robie, *supra* note 32 at 82.

⁵⁸"The day has passed when the states can sit back and measure out fifty cubic feet per second here and fifty cubic feet per second there without considering either the quality of the water appropriated or the effect of the appropriation on water quality. If the problem of the relationships between water rights and water quality is not resolved, conflicts will arise over water use rivaling in intensity the struggle between riparians and appropriators that dominated water development in several of the western states in times past."

State Control, *supra* note 33 at 16. Priorities of beneficial uses should not be determined by law, but by a broad look at the various factors and considerations.

⁵⁹Hines, *supra* note 13 at 319.

⁶⁰WILLRICH AND HINES, *supra* note 17 at 14.

uses—swimming and skiing, (6) industrial uses—cooling and process water, (7) free of nuisance, (8) navigable, and (9) water carriage for wastes. Not all of these standards are acceptable for Montana. It is unthinkable to allow any stream in Montana to simply become an open sewer. At the same time, it is just as unthinkable to require that every stream in Montana be kept to its natural state. However, there should be no reasonable argument against streams in certain areas of Montana, such as the Bob Marshall Wilderness, having stream quality standards equal to its natural state. However, generally speaking, standards requiring either natural state or permitting unlimited waste carriage would not be considered reasonable.⁶⁰

B. *The Objective*

It is, of course, not feasible to simply establish a standard for a stream and require adherence to that standard. In order to effectuate a program for water quality by establishing standards, some variances would, of necessity, be permitted at the outset. In some situations, lower stream standards may need to be established temporarily so as to allow industries and municipalities to continue functioning.⁶¹ Therefore, to attain its goal, the state would require that every stream receiving a temporary classification also be given a water quality objective. When the standards and objectives for all streams have attained a one-to-one ratio, the goal will have been attained.⁶²

Water quality objectives, when needed, should be established at the same time as the water standards. The same procedures including public hearings, should also be followed. There are several vital factors to be considered in establishing these objectives. California uses the following:⁶³

- (1) past, present and probable future beneficial uses of water;
- (2) environmental characteristics of the hydrographic unit under consideration, including the quality of the water available thereto;

⁶⁰Hines, *supra* note 13 at 321.

"The theme that consistently runs through criticism of the standards approach is that initial standards will be too low and will be so difficult to change that they will in effect create a license to pollute. State standards should be designed to enhance not just preserve the quality of the waters regulated."

⁶¹Robie, *supra* note 32 at 81. States should by statute reserve the right to review and revise water quality standards. However, such a right is probably implicit in any state statutory control of water quality control.; West. Cal. Water Code § 13263(g) (West 1956).

"No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharges. All discharges of waste into waters of the state are privileges, not rights."

⁶²An example of streams with standards equal to objectives would be streams in the Bob Marshall Wilderness.

Although when the standards and objectives have attained a one-to-one ratio the goal is accomplished, maintaining that ratio will present a new challenge.

⁶³West. Cal. Water Code § 13241 (West 1956).

(3) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;

(4) economic considerations.

It should be noted that changes in any of these four factors may be cause for changes in the established water quality objective for that stream. However, under no circumstances should an objective be lowered.

The California Legislature recently passed legislation allowing the administering agency on water quality control to appropriate water for storage which could later be released to protect and enhance water quality for beneficial uses.⁶⁴ Such legislation allows the agency to take into account the amount of water needed to remain in the source for the protection of beneficial uses.

C. *The Appropriation*

The prior appropriation doctrine has the potential for utilizing water rights to effectuate a water quality policy if such rights are issued by the state by permit.⁶⁵ At present, Montana does not have a permit system to control the appropriation of water. It has been suggested that since the prior appropriation doctrine is in effect in Montana, the judiciary has some control over water appropriations.⁶⁶ However, such judicial control should not be confused with water quality supervision. It is clear that an appropriation permit system could control the location of new diversions and impose, upon the use of water, conditions in accord with state water quality regulations.⁶⁷ If, in addition, prior appropriations could be condemned and new permits issued if more beneficial use of the water could be demonstrated, Montana would truly be on its way to an enlightened state water control system.⁶⁸

⁶⁴West. Cal. Water Code § 1242.5 (West 1956).

⁶⁵Robie, *supra* note 32 at 76.

⁶⁶Note, *Modern Western Legislation As A Pattern For Changes In The Montana Law Of Water Rights*, 28 MONT. L. REV. 95 (1966).

⁶⁷Robie, *supra* note 32 at 76.

⁶⁸*Modern Western Legislation, supra* note 66 at 111; Clyde, *Mineral Rights Versus Water Rights*, II NAT. RES. LAW., 299 321 (Nov. 1969).

"The absolute ownership concept of property ought not to be permitted to prevail where to do so will produce a result which is adverse to the public interest or which is manifestly unreasonable. . . . Each state has the power to develop its own rules of property. The concept of absolute ownership of land is required to yield in a great variety of circumstances to prevent waste, to conserve natural resources, to provide for public safety, to prevent a use of land which creates dust, noise, and odors. The use of land is controlled by zoning. Certainly no one should be permitted to develop his land in the cheapest way without regard to the adverse effect on neighboring land. . . . If it is possible to develop the land and with some additional expense also to prevent the waste of the water, the law ought to require it. If the only way one can be used is to destroy the other, then the public interest ought to prevail. . . . In a state where percolating water is subject to appropriation, I assert that neither should always be paramount, but that the matter must be resolved by the doctrine of reasonableness."

It is time to bring water rights, water quality and beneficial uses into balance.⁶⁹ The demand for fresh water is increasing every day.⁷⁰ Some areas which, historically, have had an abundance of water are now critically short of useable water.⁷¹ The time has passed when a state should allow appropriations of water without considering the quality of the water appropriated or the effect of the appropriation on water quality.⁷²

It is submitted, therefore, that proper pollution control is not simply a control of discharges to a stream. Nor is it only a control of an appropriator's use. It is, in reality, a species of water quality control. When, in the past, the quality of an appropriated source has deteriorated and a human agency was found to be responsible, such a deterioration has been deemed pollution and a remedy was available for prior appropriators if they could show damage. Such remedy will always be appropriate. But, legislation that is both corrective and preventive in nature should, if possible, treat the problem and not the symptom.⁷³ A program that has the preservation of water quality as an objective is inclusive of any program that provides the state a remedy against those who have polluted the water.⁷⁴ If a stream quality standard were breached, any appropriators of that stream which were exceeding their appropriation permits would be foreclosed from using the water until such time as the stream standard was reestablished. A state administered individual monitoring system would, of course, be part of any right to appropriate water.

SUMMARY

Unlike many other states, Montana's waters can still be considered a substantial natural resource. Neither people nor industry have, as yet, polluted our waters to the extent that restoration is questionable. We are still in a position to insure that Montana will have high quality water in the future.

This discussion of the potential for effective control over water resources is not a proposal. It merely points out what should be a long range goal for legislative control. Under this ideal, the prior appropriation doctrine which is already in effect in Montana, would simply be updated. Any user of water would be required to know and disclose to the people of Montana the effect which his use would have on the state's water quality. The longer such a program is delayed, the more difficult it will be to bring water quality to the desired standards. There are three major steps to the program:

⁶⁹See quoted material, *supra* note 57.

⁷⁰Clyde, *supra* note 68 at 328.

⁷¹*Id.*

⁷²See quoted material, *supra* note 57.

⁷³See quoted material, *supra* note 50.

⁷⁴*Id.*

- (1) declare any use of water whether it be for waste discharge or for an actual diversion to be an "appropriation";
- (2) establish water quality standards and objectives, if needed, for all water resources;
- (3) require a state permit for all "appropriations" of water.

There are, however, two major problems involved with the long range goal discussed herein. First, the program would be very expensive to administer. Methods and systems would have to be established to monitor every discharge to a stream and continually measure the stream quality to ensure the standard was not violated. Second, there is no state agency that could administer such an all-encompassing program. It is possible that the administrative reorganization now in progress will establish a Natural Resources Department. Such a department would seem to be the proper agency for water quality control.

The "Rusoff Proposal" by any measure is a sound first step in the control over degradation of water quality. Although its purpose is solely to control effluent discharges, it is this problem that is the primary cause, at present, of degradation in water quality.

P. BRUCE HARPER

PART II. POLLUTION CONTROL ACT.

RESPONSIBILITY FOR THE ADMINISTRATION OF THE PROPOSED ACT.

The chief administrative provision of the bill is section 4, a proposed amendment to the Revised Codes of Montana § 69-4805 (1947), which would provide as law:

Except as otherwise provided, the department acting under the guidance of the board as to matters and policy, is responsible for administration of the provisions of this chapter.

The duties of the department are to be performed by a director of water pollution control, a position created by the bill and to be filled by appointment by the executive officer of the department subject only to the qualifications proposed by the bill and those adopted by the board.¹

The duties and powers of the department are expressly designated in section 7 of the bill. The duties of the department are a combination of some of the duties of the present water pollution control council,² and some of the duties of the department under the present act.³ It would be meaningless for purposes of this note to trace the predecessors in

¹PROPOSED ACT, § 4.

²REVISED CODES OF MONTANA, § 69-4813 (1947) [hereinafter cited as R.C.M.1947].

³R.C.M.1947, § 69-4809.

power of those delineated in the proposed act. Suffice it to say that the power and duty structure of the proposed act follows more definitive lines of policy and administration than does the present law.

A. Policy Guidelines—Duties and Powers of the State Board of Health.

A brief sketch of the state board of health's control of the department's functions will be helpful. The delegation of duties and powers to the board is in two parts, those mandatory of performance as designated by the word "shall," and those permissive of performance, designated by the use of the word "may." This latter category is composed of the power to facilitate the operation of the act by accepting federal and other grants, and to establish waste treatment standards.⁵

The former category directs the board to, among other things, establish classifications of waters⁶ according to use, standards of water purity, and rules governing the issuance of permits. The policy guidelines thus established by the board and those adopted with the proposed act⁷ control the administration of the act by the department through the office of director of water pollution control.

B. Administration of Board Policy by the Department.

As previously stated, the department administers the rules, classifications, and standards established by the board. The act expressly requires the department to control the issuance and limits of temporary permits which may result in pollution. The department must take an active role in the furtherance of public policy. The department must issue "clean-up" orders to any person who has deposited material "in or near state waters and which may cause pollution."⁸ This latter provision has no equivalent in the present law.

C. Summary.

The proposed bill defines and divides responsibility along more definitive lines than the present law. The law as it now stands gives enforcement power to both the board⁹ and the council¹⁰ and gives policy making powers to the council.¹¹ Thus, at least in respect to delegation of powers and duties, the proposed act is clearly superior.

⁵PROPOSED ACT, § 6(1), (2).

⁶PROPOSED ACT, § 6(2).

⁷PROPOSED ACT, § 2(9). This section defines "state waters" as any body of water, irrigation or drainage system.

⁸PROPOSED ACT, § 6(1)(c)(1), provides for the automatic adoption of "such classifications, standards and rules as have been adopted by the state water pollution control council" under the present law.

⁹PROPOSED ACT, § 7(1).

¹⁰R.C.M.1947, § 69-4808(d), (e).

¹¹R.C.M.1947, § 69-4813.

¹²R.C.M.1947, § 69-4813(1), (3), (7).

PROCEDURES

A. Administrative Hearings.

Sweeping changes are embodied by the proposal in the area of public hearings. Basically the proposal, in three separate sections, contemplates three different situations which require a public hearing before the board. They are: first, when the board plans, pursuant to section 6, to classify streams, establish or modify standards, or make, modify or revoke rules;¹² second, when the department, pursuant to section 7, believes there has been a violation of the act and either the department requires the violator to appear at a public hearing, or the department does not require the hearing but the board grants the violator's request for a hearing;¹³ and, third, when the department has taken some action pursuant to its power under section 7 to control the issuance and limits of permits.¹⁴

Each of these sections have rules of procedure and conditions which must be fulfilled which are, in turn, appropriate to the purpose of the hearings they establish.

The scope of the present law is narrow. R.C.M. § 69-4814 (1947), is the exclusive provision on initial public hearings under present Montana law. It requires a hearing under the circumstances of the first situation set out above; that is, where a classification or rule is to be established or modified. Section 12 of the proposed act amends this section. The changes proposed are not extreme. The board must still initiate its own hearing procedures when it deals with standards, rules and classifications. This requirement is imposed on the council under the present law. The changes are, as a whole, only those which are necessary for continuity.¹⁵ The one exception to this statement is the provision allowing all interested persons to participate in the hearings subject, however, to the boards' power to "make rules for the orderly conduct of the hearings."¹⁶

If a violation of the bill has or may have occurred, the department is the agency responsible for initiating the hearing procedure. It is possible that such a hearing could result from a complaint by a private citizen since the board is required by the bill to direct the department to investigate any complaint concerning any violation of the act.¹⁷

¹²PROPOSED ACT, § 12.

¹³PROPOSED ACT, § 13. This section contemplates a hearing where there may have been a violation of the act. Nothing in its language indicates that such a hearing is mandatory.

¹⁴PROPOSED ACT, § 14.

¹⁵For example, under section 12 the board, rather than the council, is the hearing agency. Since, pursuant to section 6 of the bill, the board alone has the power to establish and review rules and classifications, the amendment merely conforms to the over-all re-delegation of power made by the bill.

¹⁶PROPOSED ACT, § 12.

¹⁷PROPOSED ACT, § 20.

Present law may contemplate a hearing in such a situation,¹⁸ but it is not clear whether it does, and if it does, what its requirements may be. The proposed law is superior, since it not only contemplates a hearing in such a situation, but also sets out in detail the duties of the board where such a hearing is conducted.

Section 14 of the bill governs hearings conducted to review action of the department in regard to permits. It is in two parts: first, review of a denial of an application for a permit or a modification of an existing permit; and second, review of a revocation of suspension of an existing permit. This distinction is made in recognition of the status of the party seeking board review. On the one hand, the party denied a permit or the modification of one or one who's permit was ordered modified because of a change in circumstances, presumably would not have been polluting up to that time. Conversely, a party who's permit had been suspended or revoked presumably was polluting at the time of the action.

Whether present law contemplates a hearing in such a situation is unclear.¹⁹ What is certain, however, is that the proposal is very comprehensive on the subject matter of public hearings and the time and manner of their conduct. The bill's provisions on this subject are akin to those on powers and duties. They have a common element of clarity.

In this area of administrative hearings, the proposed act follows quite closely section 7 (a) of the Department of Health, Education and Welfare's Suggested Act.²⁰ The essential distinction between the two is that the federal proposal does not utilize a full time independent officer such as the director of water pollution control in the act under consideration, but rather uses the "Board"²¹ to affect the same procedures. Under H.E.W.'s Suggested Act, the hearing agency is substantially the same as the present Montana Water Pollution Control Council.²²

B. Rehearings and Appeals.

The present law contains a provision allowing a "re-hearing" by the council of an order of either the board or the council.²³ It does not contain an "initial hearing" provision. The bill contains no such express provision for rehearing although the board may review the actions of the department in regard to permits and alleged violations.²⁴ The present

¹⁸R.C.M.1947, § 69-4813 (8) provides that "the council shall hold any hearings necessary for proper administration" of the present law.

¹⁹Id.

²⁰SUGGESTED STATE WATER POLLUTION CONTROL ACT, REVISED. United States Department of Health, Education and Welfare Public Health Service, 1965, § 7A [hereinafter cited as SUGGESTED ACT, 1965].

²¹Apparently a state water pollution control board; see SUGGESTED ACT, 1965, § 3.

²²SUGGESTED ACT, 1965, § 3(a)(1). Cf. R.C.M.1947, § 69-4810.

²³R.C.M.1947, § 69-4815.

²⁴PROPOSED ACT, §§ 13 and 14. These sections contemplate what is characterized in the foregoing material as the second and third "situations."

law may contemplate an initial hearings, but that is unclear. The net effect of the proposal on the absolute number of hearings prior to judicial review is consequently also unclear.

The present law's re-hearing provision illustrates at least one of its own internal weaknesses: the lack of a clear delegation of authority which results inevitably in uncertainty as to which agency has the final legal power to act. For example, since the board may, pursuant to R.C.M. § 69-4808 (1947), modify council action in the interest of human health; and since the council may modify or reverse board action pursuant to R.C.M. § 69-4815 (1947); it is at least arguable that the final authority among the various agencies is unknown.

The proposed act establishes the board alone as the hearing agency. As such, the board passes on department action. The board's review is the "final" administrative determination.

The next step to be taken by a party seeking a result contrary to the board's "final" determination is, of course, judicial review. The proposal, in section 15, makes significant changes here. Consistent with the over-all tenor of the proposal, the provisions governing judicial review are concise and comprehensive.

To obtain judicial review, one must be "any person" who 1) is aggrieved by an order of the board, and 2) has exhausted all his administrative remedies.²⁵

The district court review would be limited to the record of the board's hearing as compiled pursuant to section 13 of the bill. The court's jurisdiction, thus limited, is considerably different than that allowed under present law.²⁶ The matters upon which the court may sit in judgment under the bill are intended to be substantially different than those which are, upon a literal reading, apparently intended under the present law. The proposed act implicitly seeks to accomplish two ends: first, to expedite appeals from agency hearings, and second, to allow the hearing agency to develop, over a period of time, an expertise in the determination of facts which composes the appeal record and impose a recognition of such expertise on the reviewing court. Upon this premise, the court then would have the power only to determine whether the agency's determination was constitutional, within its authority, procedurally correct, supported by the evidence, and whether its order was reasonable.²⁷ Stated otherwise and quite clearly by the bill, the court would determine whether the agency's determination was "lawful" and reasonable. The language

²⁵PROPOSED ACT, § 15. An important change may be proposed here. The grant of "standing" to appeal to "any person" aggrieved is quite broad.

²⁶R.C.M.1947, § 69-4816(8) provides for trial de novo (anew) on appeal.

²⁷PROPOSED ACT, § 15(6) allows the court to determine, if appropriate, whether the board's order was constitutional, within the power of the board to issue, issued pursuant to legal procedure, supported by evidence, and within the reasonable discretion of the board.

of the present law is confusing and ambiguous.²⁸ It would seem to allow the court to disregard the findings of the hearing agency and substitute its own discretion. What present law does say is unknown until the Montana Court is faced with some problem particularly under it. It is inferior to the proposal because it is unclear and subject to several alternative constructions.

C. *Judicial and Administrative Sanctions*

After a hearing, or, in the event that the person against who's interest the board was acting did not request a hearing, the "board may issue an appropriate order for the prevention, abatement, or control of pollution."²⁹ Further, the board may, "in addition to or instead of issuing an order, "commence an action to recover a penalty³⁰ as prescribed in section 17 of the proposed act. That section provides in part:

Any person who violates . . . this chapter . . . is guilty of an offense, and subject to a fine not exceeding one thousand dollars (\$1,000.00) . . . [Per day for each day there is a violation].³¹

Such an action is not a bar to an action praying for injunctive or other appropriate relief,³² nor does it in any way alter existing rights of action.³³ These provisions follow closely the provisions of H.E.W.'s Suggested Act,³⁴ and the 1967 Montana Air Pollution Law³⁵ (which has not of yet reeked havoc on the State). There is not a similar provision in the present Montana Water Pollution Law.

The power to seek an injunction is granted to the board in section 19 of the bill, and in R.C.M. § 69-4818 (1947). The distinctions between these sections are not substantial. The present law requires the council to seek an injunction against anyone who fails to comply with a final order of that body.³⁶ The proposed act's relevant section is more particular and perhaps more expressive of potential situations which might call for injunctive relief.³⁷ It states that the board may seek an injunction in any one of three general instances,³⁸ and that the court applied to may issue a temporary restraining order pending any action.

A SUMMARY OF PROPOSED CHANGES.

The most sweeping changes proposed are in the areas of allocation of duties and responsibilities for administration of control of water pol-

²⁸R.C.M.1947, § 69-4816(9) allows the court to determine whether the order was within the authority of the issuing agency, whether the evidence supports the order, and whether the order is reasonable under the circumstances.

²⁹PROPOSED ACT, § 13(6).

³⁰PROPOSED ACT, § 13(7).

³¹PROPOSED ACT, § 17(1).

³²PROPOSED ACT, § 17(3).

³³PROPOSED ACT, § 17(4).

³⁴SUGGESTED ACT, 1965, § 10, particularly n. 17.

³⁵R.C.M.1947, § 69-3921.

³⁶R.C.M.1947, § 69-4818.

³⁷PROPOSED ACT, § 19.

³⁸PROPOSED ACT, § 19. This section provides that an injunction may be sought where there is 1) a continued violation which has been the basis of action; 2) failure to comply with an emergency order of the board; or 3) failure to comply with a final order of the board.

lution and in the area of public hearings. The mandatory duties of the existing water pollution control council are almost entirely transferred to the board. The board's duties are set out with specificity in the proposed act.³⁹ This specificity is lacking in present Montana Law.

The department of health, acting through the office of the director of water pollution control, a post created by the bill, would be given investigatory and administrative duties complimentary to those of the board.⁴⁰ The water pollution advisory council would be reduced to an organization granted the power only to make recommendations to the board relative to the administration of the act.⁴¹ The present council's powers would be transferred to the board of health.⁴² The act proposes an increase in the council's membership by two with the addition as members, the Commissioner of Agriculture and "a representative of an organization concerned with fishing for sport."⁴³

Two important sections are proposed which have no counterpart in the present law.⁴⁴ The first is a provision creating emergency procedures to be followed by the department to meet emergency situations.⁴⁵ The second is a provision which requires the department, at the board's direction, to make an investigation into alleged violations of the act in response to complaints by any person, corporation, agency or association.⁴⁶

The board has the power to seek enforcement of its orders by injunction. This power is apparently permissive and not mandatory.⁴⁷

The proposed act makes one significant change in the definitional section.⁴⁸ It adopts a new definition of "pollution." Some portions of this definition come from the H.E.W.'s Suggested Act.⁴⁹ The definition employed in the bill does not impose an absolute requirement of water purity. Rather, it defines pollution with reference to applicable standards of water purity.

Other proposed provision, amendments, and the repealing of existing sections are generally significant when viewed in light of a positive over-view of the policy underlying the act. It restates this State's Policy in regard to water pollution, for the first time, in wholly positive terms.⁵⁰ The act would repeal statutory provisions which were statements con-

³⁹PROPOSED ACT, § 6.

⁴⁰PROPOSED ACT, § 7.

⁴¹PROPOSED ACT, § 11.

⁴²PROPOSED ACT, § 6; Cf: R.C.M.1947, § 69-4813.

⁴³PROPOSED ACT, § 8.

⁴⁴Save possibly R.C.M.1947, § 69-4813(8) and (10).

⁴⁵PROPOSED ACT, § 18.

⁴⁶PROPOSED ACT, § 20.

⁴⁷PROPOSED ACT, § 19.

⁴⁸R.C.M.1947, § 69-4802.

⁴⁹PROPOSED ACT, § 2(5); SUGGESTED ACT, 1965, § 2(a).

⁵⁰PROPOSED ACT, § 1.

trary to⁵¹ or exceptions from⁵² the policy provisions, either as presently stated or as amended.

MARK A. CLARK

PART III. ADDENDUM—THE PROPOSED MONTANA WATER POLLUTION CONTROL ACT.

EXPLANATION OF PRESENTATION.

Set out below is the proposed Montana Water Pollution Control Act. Changes it makes in the present law will be noted as follows: proposed sections not appearing in the present law will *appear in italics*; portions of a section which are repealed and sections entirely repealed will be so designated. Notes are made where general rules of statutory construction may be appropriate or helpful.

GENERAL RULES OF STATUTORY CONSTRUCTION.

The basic precept of statutory construction applied by courts is the effort to determine the intent of the legislature in the passage of the statute then at hand. The Montana Supreme Court ascribes to this premise. The case of *Flecher v. Paige*, 124 Mont. 114 (1950), is significant. There the Montana Court summarized some important and relevant rules applicable in making a determination of intent.

Every word, phrase, clause, or sentence employed is to be considered and none shall be held meaningless if it is possible to give effect to it.

* * *

The meaning of a given term employed in a statute must be measured and controlled by the connection in which it is employed, the evident purpose of the statute, and the subject to which it relates.

* * *

Where a statute directs that a thing may be done in one manner it ordinarily implies that it shall not be done in any other manner.⁵³

These statements are placed in this introductory material because they may be more relevant here, as a means of molding an attitude or setting a pace for the reading of the proposed act, than as isolated footnotes to a particular section, clause or phrase in the text of the act.

⁵¹R.C.M.1947, § 69-4801(2). This section uses negative terms in defining the "natural" state of the stream.

⁵²R.C.M.1947, § 69-4803. This section allows an exception to the general policy against pollution.

⁵³*Flecher v. Paige*, 124 Mont. 114, 220 P.2d 484 (1950).

TEXT OF THE PROPOSAL.

Section 1. Section 69-4801, R.C.M., 1947, is amended to read as follows:

“69-4801. Public policy of the state⁵⁴ (1) It is the public policy of this state to:

(a) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses;

(b) provide a comprehensive program for the prevention, abatement, and control of water pollution.

(2) It is not necessary that wastes be treated to a purer condition than the natural conditions of the receiving stream. [However, municipal or industrial pollution upstream shall not be considered natural. (Stricken)] “*Natural*” refers to conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied. Conditions resulting from dams at the effective date of this act are “*natural*”.

Section 2. Section 69-4802, R.C.M. 1947, is amended to read as follows:

“69-4802. Definitions.⁵⁵ As used in this chapter, unless the context clearly indicates otherwise:

(1) “Sewage” means water-carried waste products from residences, public buildings, institutions, or other buildings including discharge from human beings or animals together with ground water infiltration and surface water present.

(2) “Industrial waste” means any waste substance from the process of business or industry, or from the development of any natural resource together with any sewage that may be present;

(3) “Other wastes” means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, tar, chemicals, *dead animals, sediment*, and all other substances that may pollute state waters;

(4) “Contamination” means impairment of the quality of state waters by sewage, industrial wastes or other wastes creating a hazard to human health;

(5) [“Pollution” means the alteration of any of the properties of the state waters which is detrimental to their most beneficial use (Stricken)] “*Pollution* means such contamination, or other alteration of the physical, chemical or biological properties, of any state waters, as exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any state water as will or is likely to create a nuisance or render such waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, or to livestock, wild animals, birds, fish or other wildlife, provided, however, that any discharge which is permitted by Montana water quality standards is not “*pollution*” for the purposes of this chapter.”⁵⁶

⁵⁴What affect should be given to a statement of public policy made in a statute? The courts and commentators have taken a variety of approaches in giving weight to such provisions; none, however, find them to be conclusive on the resolution of doubtful statutory meaning. Such a statement is merely persuasive in finding legislative intent. See, generally: SUTHERLAND, STATUTORY CONSTRUCTION, § 5902 (3d ed. 1943); CRAWFORD, STATUTORY CONSTRUCTION, § 212, (1940); and the cases cited therein.

⁵⁵Where definitions are included in a statute, there is a tendency by the courts to give controlling affect to the definitions. *Montana Beer Retailers' Protective Association v. State Board of Equalization*, 95 Mont. 30, 25 P.2d 128 (1933). The basic premise of statutory construction is the quest for the determination of legislative intent. Thus, courts should give great weight to the manifestation of legislative intent found in statutory definitional sections. SUTHERLAND, *supra* note 54 at § 4814.

Unfortunately, however, they are not conclusive on the problem they seek to solve. A court will still be faced with the constructional problem if it is ever necessary to know the meaning of, or the degree necessary to satisfy, such words as harmful, detrimental, injurious, safety and welfare as used in sub-section (5) of section 2 of the proposed act. There is no reasonable solution to this problem.

⁵⁶The use of the ordinarily disjunctive word “or” is indicia of a legislative intent that a violation of any of the requirements of the statute is a violation of the statute. *Santos v. Dondero*, 11 Cal.App.2d 720, 54 P.2d 764 (Cal., 1936). Unless it is necessary

(6) "Sewerage system" means any device for collecting or conducting sewage, industrial wastes or other wastes to an ultimate disposal point;

(7) "Treatment works" means any works installed for treating or holding sewage, industrial wastes or other wastes;

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

(9) "State waters" means any body of water, irrigation system, or drainage system either surface or underground;

(10) "Person" means the state, any political subdivision of the state, institution, firm, corporation, partnership, or individual or other entity;

(11) "Council" means the state water pollution [control (Stricken)] advisory council created by this act.

(12) "Board" means the state board of health.

(13) "Department" means the state department of health.

(14) "Executive officer" means the chief administrative officer of the state department of health.

(15) "Director" means the director of water pollution control, a position created by this act.

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

Section 3⁵⁷ Section 69-4804, R.C.M., 1947, is amended to read as follows:

"69-4804. Chapter [inapplicable (Stricken)] applicable to drainage or seepage from artificial bodies of water privately owned. [exception (Stricken)] This chapter [does not apply (Stricken)] applies to drainage or seepage from all sources including that from artificial, privately owned [bodies of water unless drainage reaches flowing waters in a condition which would pollute the flowing waters (Stricken)] ponds or lagoons if such drainage or seepage may reach other state waters in a condition which may pollute the other state waters."⁵⁸

Section 4. Section 69-4805, R.C.M., 1947, is amended to read as follows:

"69-4805. Administration of chapter.⁵⁹ [responsibility of state board of health. Under council supervision, the state board of health has responsibility for administra-

to give affect to obvious legislative intent or to cure statutory ambiguity, a court should not substitute the word "and" for the term "or." *Lommasson v. School District No. 1, Multnomah County*, 201 Ore. 71, 261 P.2d 860 (1953).

Thus, pollution is: any contamination of state waters; any alteration of the properties of state waters; any discharge of any substance into state waters; any of which are likely to cause a nuisance or be detrimental to the public interest.

⁵⁷R.C.M.1947, § 69-4803 is repealed by the proposed act. That section allowed the classification of state waters as being for "industrial use" where they had been primarily and continuously used for dumping of industrial waste for a period of over thirty years, and had not been used for human consumption in a water system serving over 100 persons. At best this section is contrary to the public policy statement contained in both R.C.M.1947, § 69-4801 and § 1 of the proposed act.

⁵⁸What meaning should be accorded the phrases "may reach other state waters" and "may pollute" as used in this section?

The word "may" is generally defined as having the "ability or competence to accomplish some end." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1936, (1963).

The term "may" as used in the context of this section is not a technical or legal term of art; rather, it is a term of common meaning and thus according to the following rule, its common meaning will prevail. That rule is that in the absence of a contrary legislative intent, common terms in a statute are presumed to have been used in their common sense. SUTHERLAND, *supra* note 54 at § 4919.

⁵⁹Implicit in this section is the presumed validity of the delegation of power by the legislature to the existing administrative agencies and boards. Although there is no adverse possession on an invalid delegation of power, the validity of this section's delegation, which merely amounts to a realignment, should not be questioned. Moreover, since this delegation is along the lines which are generally termed "traditional," no problem should be presented. See generally, SUTHERLAND, *supra* note 54 at § 300

tion of the provisions of this chapter. The state board may use personnel of the state department of health as necessary to administer the provisions of this chapter. (Stricken) *Except as otherwise provided, the department, acting under the guidance of the board as to matters of policy, is responsible for administration of the provisions of this chapter.*

The executive officer shall appoint a director of water pollution control to perform the duties and powers conferred upon the department by this act. The director shall meet requirements established by the board. The director shall have a minimum of five years of responsible experience in water pollution control or aquatic ecology programs. His salary shall be set in accord with other members of the staff with the same degree of responsibility and training. He will be responsible for the administration of the water pollution control act within the limitations of funds and personnel assigned.

The executive officer shall,⁶⁰ in the absence of a director of water pollution control, assign another member of the staff to perform the duties and exercise the powers of a director.

The department may use personnel of the state and local departments of health as necessary to administer the provisions of this act.⁶¹

Section 5. Section 69-4806, R.C.M., 1947, is amended to read as follows:

“69-4806. Pollution unlawful—permits. It is unlawful to:

(1) cause pollution as defined in section [122 (5) (69-4802 (5) (Stricken)] 69-4802 (5), R.C.M., 1947, [of this act (Stricken)] of any state waters or to place or cause to be placed any wastes in a location where they are likely⁶² to cause pollution of any state waters;

(2) carry on any of the following activities without a current permit from the department;

(a) *construct, modify, or operate a disposal system which discharges to any state waters, or*

(b) *construct or [modify a disposal system which discharges to the state waters (Stricken)] use any outlet for the discharge of sewage, industrial wastes, or other wastes to any state waters; or*

[(c) *increase the volume or strength of sewage, industrial wastes, or other wastes in excess of the permissive discharges specified under any existing permit;*

(d) *construct or use any new outlet for the discharge of sewage, industrial wastes, or other wastes to the state waters. (Stricken)]*

(3) *violate any limitation imposed by a current permit.⁶³*”

Section 6.⁶² (1) The board shall:⁶³ [This section is a new proposal.]

(a) *establish and modify the classification of all waters in accordance with their present and future most beneficial uses;*

(b) *formulate standards of water purity and classification of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention;*

(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*

⁶⁰The meaning of the word “shall” is important. The rule is nearly too well known to be cited, but noethless, it is: absent a clearly contrary legislative intent, the word “shall” is mandatory. *In re Bascom*, 126 Mont. 129, 136, 246 P.2d 223 (1952).

⁶¹The use of the term “likely” in this section is similar to the use of the word “may” in section 3 of the Proposed Act. As noted at note 58, such a term does not carry a technical or legal meaning, and should be construed according to its common meaning absent a clear legislative content to the contrary.

⁶²R.C.M. 1947, §§ 69-4807, 69-4808, and 69-4809 are repealed by the proposed act. These sections dealt with the delegations of duties to the board of health and the issuance of permits. These subjects received coverage in sections 6 and 7 of the bill.

R.C.M. 1947, § 69-4808.1 is not affected by the proposed act. This section deals with the power of the Board to administer state matching funds for the construction of water pollution control facilities.

⁶³The word “shall” as mandatory is dealt with in note 59. The effect of the mandatory delegation of power and authority to an administrative agency is generally held to require strict compliance by the agency with the terms of the delegation in order to validate the actions of the agency. *Bascom*, *supra* note 59.

(1) such classifications, standards, and rules as have been adopted by the state water pollution control council under section 133, chapter 197 of the laws of 1967⁶⁴ shall be deemed, without necessity of a hearing, to have been initially adopted by the board.

(2) in revising classifications or standards or in adopting new classifications or standards the board may not so formulate standards of water purity or classify any state water as to lower any water quality standard applicable to any state water below the level applicable under the classifications and standards adopted by the state water pollution control council under section 133, chapter 197 of the laws of 1967.

(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 increase 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;

(d) advise, consult, and cooperate with other states, other state and federal agencies, affected groups, political subdivisions, and industries in the formulation of a comprehensive plan to prevent and control pollution;

(e) make rules governing application for permits to discharge sewage, industrial wastes, or other wastes into state waters including rules requiring the filing of plans and specifications relating to the construction, modification, or operation of disposal systems;

(f) make rules governing the issuance, denial, modification, or revocation of permits, provided, however, that:

(1) the rules shall allow the issuance or continuance of a permit only if the department finds that operation consistent with the limitations of the permit will not result in pollution of any state waters, except that

(2) the rules may allow the issuance of a temporary permit under which pollution may result, for a period no longer than three years and subject to no extension, if the department finds that the issuance of such a permit is proper for obtaining compliance with the applicable standards, that

(3) the rules shall provide that the department shall revoke any permit if the department finds that the holder of the permit has violated its terms, unless the department also finds that the violation was accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the violation as soon as was reasonably possible; and that

(4) any person introducing a new source or increased source of sewage, industrial waste, or other wastes as defined in section 69-4802 (1), (2), and (3), R.C.M., 1947, to waters and tributaries of waters classified as A-open-D-1 or higher by the board shall be required to install and maintain the highest and best degree of treatment works necessary to maintain adequately said classification, as defined in section 69-4802 (7), R.C.M., 1947, prior to the issuance of a permit by the department;

(g) hold any hearings necessary for the proper administration of this chapter;

(h) make rules for the administration of this chapter; and

(i) bring actions in court for the enforcement of this chapter.

(2) The board may:

(a) accept loans and grants from the federal government and from other sources to carry out the provisions of this chapter; and

(b) establish minimum requirements for the treatment of wastes.

Section 7. (1) The department ⁶⁵ shall: [This is a new proposal.]

(a) issue, suspend, revoke, modify, or deny permits to discharge sewage, industrial wastes, or other wastes to state waters, consistently with rules made by the board;

⁶⁴Section 133, Chapter 197 of the Laws of 1967 is codified as R.C.M.1947, § 69-4813.

⁶⁵The "department" herein referred to is the Director of Water Pollution Control.

See section 4 of the Proposed Act.

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(b) examine and approve or disapprove plans and other information needed to determine whether a permit should be issued or suggest changes in plans as a condition to the issuance of a permit;

(c) clearly specify in any permit any limitations imposed as to the volume, strength, and other significant characteristics of the waste to be discharged.

(d) collect and furnish information relating to the prevention and control of water pollution; and

(e) conduct or encourage necessary research and demonstrations concerning water pollution.

(f) issue orders to any person to clean up any material which he or his employee, agent, or subcontractor has accidentally or purposely dumped, spilled, or otherwise deposited in or near state waters and which may pollute them.

(2) The department may:⁶⁶

(a) through its authorized representatives, enter upon any private or public property at reasonable times to investigate conditions relating to pollution of state waters; and

(b) issue, modify, or revoke orders for the abatement of pollution.

Section 8. Section 69-4810, R.C.M., 1947, is amended to read as follows:

“69-4810. State water pollution [control (Stricken)] *advisory* council—creation—members, appointment and term of office. There is a state water pollution [control (Stricken)] *advisory* council whose members are:

(1) the executive officer of the state department of health;

(2) the state fish and game director;

(3) the director of the [water conservation board (Stricken)] *Montana water resources board*;

(4) *the commissioner of agriculture*;

(5) [four (4) (Stricken)] *five (5)* members appointed by the governor for terms of four (4) years as follows:

(a) a representative of industry concerned with the disposal of inorganic waste;

(b) a representative of industry concerned with the disposal of organic waste;

(c) a representative of agriculture;

(d) a representative of municipal government;

(e) *a representative of an organization concerned with fishing for sport.*”

Section 9. Section 69-4811, R.C.M., 1947, is amended to read as follows:

“69-4811. State water pollution [control (Stricken)] *advisory* council—vacancy in office, filling—compensation of members. Terms of council members holding office on the effective date of this act shall not be affected. An appointment to an expired term shall be for four (4) years. An appointment to an unexpired term shall be for the remainder of the term. The [four (4) (Stricken)] *five (5)* appointed members shall receive twenty dollars (\$20) per day plus actual and necessary expenses incurred in performing their duties. Expenses shall be paid by the department [of health (Stricken)] from funds appropriated and allocated to water pollution control.”

Section 10. Section 69-4812, R.C.M., 1947, is amended to read as follows:

“Section 69-4812. State water pollution [control (Stricken)] *advisory* council—officers—meetings—quorum—designating of deputy by members. (1) The council shall select a chairman from among its members. The executive officer shall designate a member of the [public health engineering (Stricken)] staff of the department of health to act as secretary to the council. The secretary shall keep records of all actions taken by the council.

(2) It shall hold at least two (2) regular meetings each calendar year. Special meetings shall be held at the call of the chairman or upon written request of two (2) or more members. A majority of the members is a quorum.

(3) Each member may, by filing with the secretary, designate a deputy or alternate to perform his duties.”

⁶⁶The use of the term “may” in the statute is ordinarily directory, absent a clear

Section 11. Section 69-4813, R.C.M., 1947, is amended to read as follows:

"69-4813. Powers and duties of the council. The council [shall (Stricken)] *may* [(1) establish and modify the classifications of all waters in accordance with their present and future most beneficial uses;

(2) investigate means of eliminating materials which pollute state waters, and prevent pollution that is detrimental to the public health, recreation, agriculture, industry, animals, fish, or aquatic life;

(3) adopt rules to guide the state board and department in the administration of this act.

(4) adopt a comprehensive program for prevention of pollution of waters;

(5) recommend and encourage research and demonstrations relating to water pollution;

(6) direct the state board and department regarding any action necessary as a result of research and demonstrations;

(7) formulate standards of water purity and classification of water according to its most beneficial use giving consideration to the economics of waste treatment and prevention;

(8) hold any hearings necessary for the proper administration of this act, receive complaints, and make investigations;

(9) utilize staff services of the state board and department as they are able to furnish within budgetary limits.

(10) exercise all incidental powers necessary to carry out the provisions of this chapter (Stricken) *by majority report, minority report, or report of one or more members of the council, make recommendations to the board concerning any matters relating to the administration of this act.*"

Section 12. Section 69-4814, R.C.M., 1947, is amended to read as follows:

"69-4814. Hearings by [council (Stricken)] *board*—notice. Before streams are classified, standards established or modified or *rules made, revoked or modified*, the [council (Stricken)] *board* shall hold a public hearing. Notice of the hearing specifying the waters concerned and the classification, standards or modification of them *and any rules proposed to be made, revoked or modified* shall be published at least once a week for three (3) consecutive weeks in a *daily* newspaper of general circulation in the area affected. Notice shall also be mailed directly to persons the [council (Stricken)] *board* believes may be affected by the [classification or standard (Stricken)] *proposed action. The council shall be given not less than thirty (30) days prior to first publication to comment on the proposed action.*

At a hearing held under this section, the board shall give all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The board may make rules for the orderly conduct of the hearing but need not require compliance with the rules of evidence or procedure applicable to hearings held under section 13 of this act."

[All sections that follow are new proposals.]

Section 13.^{or} (1) Whenever the department has reason to believe that a violation of this chapter or any rule made under it has occurred, it may cause written notice to be served personally or by mail upon the alleged violator or his agent. The notice shall state the provision alleged to be violated, the facts alleged to constitute the violation, the nature of any corrective action which the department proposed to require, and the time within which such action is to be taken. For the purposes of this chapter, service by mail shall be deemed complete on the day of mailing.

(2) In a notice given under part (1) of this section, the department may require the alleged violator to appear before the board for a public hearing and to answer the charges made against him. Such hearing shall be held no sooner than fifteen (15) days after service of the notice, except that the board may set an earlier date for hearing if it is requested to do so by the alleged violator. The board may set a later date for hearing at the request of the alleged violator shows good cause for delay.

(3) If the department does not require an alleged violator to appear before the board for a public hearing, he may request the board to conduct such a hearing. His

^{or}R.C.M.1947, §§ 69-4815, 69-4816, 69-4817, 69-4818, and 69-4819 are repealed. These sections, dealing with hearings and administrative and judicial remedies are replaced by the bill's sections 12, 13, 14 and 15.

request shall be in writing and shall be filed with the executive officer no later than thirty (30) days after service of a notice under subsection (1) of this section.

(4) If a hearing is held pursuant to the provisions of this section, it shall be public and shall, if the board deems it practicable, be held in any county in which the violation is alleged to have occurred. The board shall permit all parties to respond to the notice served under subsection (1), to present evidence and argument on all issues, and to conduct cross-examination required for full disclosure of the facts. The board shall keep a stenographic record of the hearing and at least one (1) copy of any written exhibits put in evidence.

(5) A representative of the board may administer oaths, examine witnesses, and issue notices of the hearing including subpoenas requiring the testimony of witnesses and the production of evidence. Witnesses shall receive the same fees and mileage as in civil actions. In case of failure to obey a notice of hearing or subpoena, the district court where the hearing is held has jurisdiction upon request by the board to issue an order requiring a person to appear and testify or produce evidence, and failure to obey shall be punished as contempt of district court.

(6) After a hearing or on failure of an alleged violator to make a timely request for a hearing, the board may issue an appropriate order for the prevention, abatement, or control of pollution. The order shall be accompanied by a statement of the board's findings, reasons, and conclusions upon all material issues of fact, law, or discretion. It shall state the date or dates by which any violation shall cease and may prescribe timetables for necessary action in preventing, abating, or controlling the pollution.

(7) In addition to or instead of issuing an order, the board may initiate appropriate action for recovery of a penalty pursuant to section 17 of this act.

Section 14. (1) If the department denies an application for a permit or modifies a permit, the department shall give written notice of its action to the applicant or holder, and he may request a hearing before the board, in the manner stated in section 13 of this act, for the purpose of petitioning the board to reverse or modify the action of the department. Such hearing shall be held within thirty (30) days after receipt of written request. After the hearing, the board shall affirm, modify, or reverse the action of the department. Modification of a permit shall be effective thirty (30) days after receipt of notice by the holder, unless the department specifies a later date, if the holder does not request a hearing before the board. If the holder does request a hearing before the board, no order modifying his permit shall be effective until twenty (20) days after he has received notice of the action of the board.

(2) If the department suspends or revokes a permit because it has reason to believe that the holder has violated this chapter, the department may specify that the suspension or revocation is effective immediately, if the department finds that the violation is likely to continue and will cause pollution the harmful effects of which will not be remedied immediately on the occasion of the violation. Upon petition by the holder of the permit, the board shall grant the holder a hearing, to be conducted in the manner specified in section 13 of this act and shall issue an order affirming, modifying, or reversing the action of the department. The order of the board shall be effective immediately, unless the board directs otherwise.

Section 15. (1) Any person who has exhausted all administrative remedies available before the department and board and who is aggrieved by an order of the board may, within twenty (20) days after the date of the order, petition for review by the district court of the county in which the alleged source of pollution is located.

(2) An action for review shall be initiated by delivering a copy of a written petition for review to the executive officer of the board, and by filing the original of the petition with the clerk of the court in which review is sought. The petition shall specify the order or orders review of which is sought and shall state the grounds of the petition. When the petition is filed with the clerk of the court, the district court has jurisdiction of the action. As soon as possible in the ordinary course of business and within thirty (30) days after receipt of the petition by the board, the board shall certify to the district court the entire record and proceedings, including all evidence received in the form of documents and other exhibits and a transcript of such testimony taken by the board as any party shall request.

(3) Any person interested in the order may intervene, in the manner provided by the Rules of Civil Procedure, if he shows good cause. An intervenor is a party for the purpose of this chapter.

(4) The attorney general shall represent the board if requested, or the board may appoint special counsel for the proceedings, subject to the approval of the attorney general.

(5) Neither the state nor the board need give a bond or make a deposit for costs upon an action for review by a district court or upon any subsequent appeal.

(6) The review by the district court shall be based solely on the record of the hearing before the board. That record shall include the notice given pursuant to section 13 (1) of this act, any testimony transcribed pursuant to subsection (2) of this section, any exhibits filed with the board, any motions or pleadings which were submitted to the board and any rulings made by the board with respect to them, the order under review, the statement of the board accompanying the order, and any relevant document filed in the proceeding. To the extent necessary in respect to the issues, the court shall determine whether the order of the board was (a) constitutional, (b) within the statutory jurisdiction and powers of the board, (c) issued pursuant to procedure required by law, (d) supported by substantial evidence on the whole record or such portions of the record as may be cited by the parties, and (e) within the reasonable discretion of the board. The court shall then as appropriate, affirm, modify, or reverse the order of the board or remand the case to the board for further proceedings. The court may, if appropriate, issue an injunction directly compliance with the order of the board as affirmed or modified.

(7) Any party may appeal from the decision of the district court to the supreme court of Montana in the manner provided for civil cases.

(8) The initiation of an action for review or the taking of an appeal shall not stay the effectiveness of any order of the board, unless the court finds that there is probable cause to believe.

1. that refusal to grant a stay will cause serious harm to the affected party, and
2. that any violation found by the board
 - (a) will not continue, or
 - (b) if it does continue, any harmful effects on state waters will be remedied immediately on the cessation of the violation.

If the court does not stay the effectiveness of an order of the board, it may enforce compliance with that order by issuing a temporary restraining order or an injunction at the request of the board.

Section 16. Confidentiality of records. Any information concerning sources of pollution which is furnished to the board or department or which is obtained by either of them is a matter of public record and open to public use. However, any information unique to the owner or operator of a source of pollution which would, if disclosed, tend to weaken his competitive position shall be confidential unless he expressly agrees to its publication or availability to the general public or unless such information is introduced as evidence in a hearing before the board. Any information not intended to be public when submitted to the board or department shall be submitted in writing and clearly marked confidential. Under no circumstances shall data describing physical and chemical characteristics of a waste discharged to state waters be considered confidential. The board may use any information in compiling or publishing analyses or summaries relating to water pollution, if such analyses or summaries do not identify any owner or operator of a source of pollution or reveal any information which is otherwise made confidential by this section.

Section 17. (1) Any person who violates any provision of this chapter other than section 16 of this act, or any rule or order issued pursuant to it is guilty of an offense and subject to a fine not to exceed one thousand dollars (\$1,000). Each day of violation constitutes a separate offense.

(2) Any person who willfully violates section 16 of this act is guilty of an offense and subject to a fine not to exceed one thousand dollars (\$1,000).

(3) Action pursuant to section (1) of this section does not bar enforcement of this chapter or of rules or orders issued pursuant to it by injunction or other appropriate remedy. The board shall institute and maintain any and all such enforcement proceedings in the name of the state.

(4) A purpose of this chapter is to provide additional and cumulative remedies to prevent, abate and control the pollution of state waters. This chapter shall not be construed to abridge or alter rights of action or remedies in equity or under the common law or statutory law, criminal or civil, nor shall any provision of this chapter or any act done by virtue of it be construed as estopping the state or any municipality or person as owners of water rights or otherwise in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

(5) All fines collected shall be deposited to the credit of the department, to be used to alleviate pollution for which no person subject to action by the department or board is responsible.

Section 18. Emergencies. Notwithstanding any other provisions of this chapter, if the department finds that a person is committing or is about to commit an act in

violation of this chapter or an order or rule issued under it which, if it occurs or continues, will cause substantial pollution the harmful effects of which will not be remedied immediately after the commission or cessation of the act, the department shall order such person to stop, avoid, or moderate the act so that the substantial injury will not occur. The order shall be effective immediately upon receipt by the person to whom it is directed, unless the department provides otherwise. Notice of the order shall conform to the requirements of section 13 (1) of this act so far as practicable; the notice shall indicate that the order is an emergency order. Upon issuing such an order, the department shall fix a place and time for a hearing before the board, not later than five (5) days thereafter, unless the person to whom the order is directed shall request a later time. The department may deny a request for a later time if it finds that the person to whom the order is directed is not complying with the order. The hearing shall be conducted in the manner specified in section 13, subsections (4), (5), and (6) of this act. As soon as practicable after the hearing, the board shall affirm, modify, or set aside the order of the department. The order of the board shall be accompanied by the statement specified in section 13 (6) of this act. An action for review of the order of the board may be initiated in the manner specified in section 15 of this act. The initiation of such an action or taking of an appeal shall not stay the effectiveness of the order, unless the court shall find that the board did not have reasonable cause to issue an order under this section.

Section 19. Injunctions. The board may bring an action for an injunction against the continuation of any alleged violation which has been the basis of suspension or revocation of a permit by the department or against any person who fails to comply with an emergency order issued by the department by virtue of section 18 of this act or any final order of the board. The court to which the board applies for an injunction may issue a temporary injunction, if it finds that there is reasonable cause to believe that the allegations of the board are true, and it may issue a temporary restraining order pending action on the temporary injunction.

Section 20. Action by other parties. Any person, association, corporation or agency of the state or federal government may apply to the board protesting any violation of this chapter. The board shall thereupon direct the department to investigate the alleged violation. The department shall make the investigation and make a written report to the board and to the person, association, corporation or agency which made the protest.

Section 21. Cooperation with the council, board, and department. The council, board, and department may require the use of records of all state agencies and may seek the assistance of such agencies. State, county, and municipal officers and employees, including sanitarians and other employees of local department of health, shall cooperate with the council, board and department, in furthering the purposes of this chapter, so far as is practicable and consistent with their other duties.

Section 22. Sections 69-4803, 69-4807, 69-4808, 69-4809, 69-4815 69-4816, 69-4817, 69-4818, and 69-4819, R.C.M., 1947, are repealed.

Section 23. It is the intent of the legislative assembly that, if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.