



# **Water Policy 2000**

**Report to the 57th Legislature of the State of Montana**

**Environmental Quality Council**

**December 2000**

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# Water Policy 2000

December 2000

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# Chapter 1: Introduction

## Who We Are and What We Do: The EQC and the Water Policy Subcommittee

The Environmental Quality Council (EQC) is a 17-member, bipartisan interim committee of the Montana Legislature. The EQC appointed a Water Policy Subcommittee to fulfill its statutory responsibilities related to water policy during the 1999-2000 interim.

The members of the Water Policy Subcommittee are:

Senator Bea McCarthy, Chair  
Representative Bill Tash  
Senator Jon Tester

## Report Overview

This report includes:

- # an introduction that includes an overview of the steps in the EQC's decisionmaking process and public comments received (**Chapter 1**);
- # a review of the EQC's statutory responsibilities and activities during the 1999-2000 interim (**Chapter 2**);
- # a brief summary of recent court decisions that affect Montana's water policy (**Chapter 3**); and
- # background information and analysis of selected issues surrounding regulation of swine facilities (**Chapter 4**).

## Steps in the Process

The steps in the process for completing this report are summarized below.

May 2000                    **Notice of draft report and public comment period.** A notice that included a brief description of the draft report and information about how to obtain the report--and when to comment--was mailed to: the EQC's mailing list (237 individuals and organizations); all county commissions; all county clerk and recorders; those who attended the

1999 Subcommittee meeting in Great Falls; major Montana agricultural organizations; and others.

June 2000

**Draft report circulated for public comment.** The draft report was mailed upon request and was also made available on the EQC's website. The draft report included proposed recommendations for additional regulation of swine facilities. The draft recommendations proposed to require financial assurance and individual permits for swine operations that have more than 1,000 animal units and that meet the definition of a concentrated animal feeding operation.

July 10, 2000

**Deadline for written comments on draft report.** Comments were received from 21 individuals or organizations. Of these, 17 were from pork producers, two were from organizations or individuals representing groups of pork producers, one was from another agricultural organization, and one was from an individual citizen.

No comments supported the draft recommendations. Twenty comments opposed the draft recommendations and one letter did not address the draft recommendations. This letter expressed disappointment that the draft report did not address funding for watershed groups and advocated EQC support of more funding for local watershed groups.

July 26, 2000

**Water Policy Subcommittee meeting and decision.** The Water Policy Subcommittee heard more public testimony and asked questions of those in attendance. No one testified in favor of the draft recommendations. The Subcommittee decided to make no recommendations and to eliminate Chapter 5: Draft Recommendations from the report. The Subcommittee decided to recommend that the EQC approve chapters one through four of the draft report.

July 28, 2000

**EQC meeting.** The EQC approved adoption of chapters one through four of the draft report.

# Chapter 2: The EQC's Water Policy Activities During the 1999-2000 Interim

## Statutory Responsibilities

The water policy duties of the Environmental Quality Council (EQC) are set forth in section 85-2-105, Montana Code Annotated (MCA). This section was amended by House Bill 458 in 1999 to add assistance with interagency coordination to the EQC's duties. The EQC's water policy duties are paraphrased below.

- # Advise the Legislature on the **adequacy of Montana's water policy**.
- # Advise the Legislature on **important state, regional, national, and international developments** that affect Montana's water resources.
- # Oversee **policies and activities of Executive Branch agencies** and other state institutions that affect Montana's water resources.
- # Assist with **interagency coordination** related to Montana's water resources.
- # **Communicate with the public** about water policy and water resources.
- # Analyze and comment on the **state water plan**, when prepared by the Department of Natural Resources and Conservation (DNRC).
- # Analyze and comment on the **Renewable Resource Grant and Loan Program** report.
- # Analyze and comment on **water-related research** undertaken by state entities.
- # Analyze, verify, and comment on the information in the **Water Information System of the Natural Resource Information System (NRIS)**.
- # Report to the Legislature.

## Activities During the 1999-2000 Interim

The EQC's activities related to its water policy duties are summarized below. Meeting dates are provided so that the interested reader can consult the meeting minutes if more detailed information is desired. The minutes are available on the EQC's website and from the Legislative Environmental Policy Office.

### ***Total Maximum Daily Loads (TMDLs)***

The Water Policy Subcommittee discussed proposed federal TMDL regulations (September 22, 1999). The EQC sent a letter to the U.S. Environmental Protection Agency (EPA) commenting on the proposed regulations. The letter recommended that states that have already established TMDL programs in compliance with the Clean Water Act be allowed to submit those programs to the EPA for approval, rather than changing existing programs to comply with new rules.<sup>1</sup>

The EQC was briefed on *Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency* (December 2, 1999). Court decisions in this case are summarized in **Chapter 3**.

### ***Concentrated Animal Feeding Operations (CAFOs)***

The Subcommittee held a public meeting (October 21, 1999) to hear comments on the Montana Department of Environmental Quality (DEQ) proposed general permit for CAFOs. The meeting minutes and written comments that were provided to the Subcommittee were submitted to the DEQ for consideration. The Subcommittee monitored the DEQ's progress with respect to revisions of the general permit as well as the state's *Draft Strategy for Improving Water Quality Compliance From Concentrated Animal Feeding Operations*.

The Subcommittee was briefed on regulation of hog farms on January 20 and May 4, 2000. The Subcommittee decided to investigate specific issues related to this topic. These issues are presented in **Chapter 4** of this report.

### ***Water Quality Trends***

EQC Chairman Bill Crismore sent a letter to the following state agencies requesting information about monitoring of environmental trends: DEQ, DNRC, Department of Agriculture, and Department of Fish, Wildlife, and Parks (DFWP). The agencies responded to the request in writing. The Subcommittee held a joint meeting with the Land Use/Environmental Trends Subcommittee on May 4, 2000, to discuss tracking of environmental trends. Representatives of state and federal agencies briefed the two Subcommittees on information available to evaluate trends in water quality. Officials from the state agencies named above discussed possible indicators of water quality trends and agreed to identify some indicators that can be used by policymakers to determine whether or not water quality is improving. They also agreed to identify indicators for air quality and invasive species.

Agency staff did not identify specific indicators but suggested that environmental conditions and trends be evaluated on the basis of beneficial use support. The EQC members discussed this approach but did not agree that it was the best option (September 11, 2000).

On September 12, 2000 the EQC appointed a four-member subcommittee to work with the appropriate state agencies to help them develop specific performance measures or indicators before the next interim. The indicators are to be used by the state to identify and describe environmental conditions and trends in water quality, air quality, and invasive species.

### ***Drought***

The EQC was briefed on current conditions as well as the activities of the Governor's Drought Advisory Committee and its members (May 5, 2000).

### ***Water Leasing***

The DFWP submitted the *1999 Annual Progress Report: Water Leasing Study* to the EQC.

### ***EPA Review of Montana's Water Quality Standards***

The Subcommittee was briefed on the status of the EPA's review of Montana's water quality standards and asked the DEQ director to keep them apprised of any new developments.<sup>2</sup>

### ***Coal Bed Methane***

The EQC heard presentations on coal bed methane development in southeastern Montana, potential impacts on water quality and quantity, and efforts of state and federal agencies to address those impacts (December 2, 1999; March 24, 2000; May 5, 2000; September 11, 2000).

### ***River Recreation***

The Subcommittee sent a letter to the Montana Office of the Bureau of Land Management requesting information about the Bureau of Land Management's plans to address impacts of river recreation related to celebration of the Lewis and Clark bicentennial.<sup>3</sup> Staff from the Bureau of Land Management made a presentation to the EQC about the agency's efforts to mitigate the impacts of increased river recreation as a result of the Lewis and Clark bicentennial (December 2, 1999).

### ***Columbia Basin Issues***

The EQC heard a presentation from the staff of the Northwest Power Planning Council and was briefed on activities of the Legislative Council on River Governance, a coalition of legislators from Oregon, Washington, Idaho, and Montana (January 21, 2000).

### ***Bull Trout Recovery***

The EQC was updated on Montana's bull trout recovery plan (January 21, 2000).

### ***Nonpoint Source Pollution From State Agencies***

The 1999 Montana Legislature passed Senate Joint Resolution No. 3, which was introduced by request of the EQC. This resolution strongly urges state agencies to serve as role models for implementation and refinement of best management practices (BMPs) to reduce nonpoint source water pollution in Montana. EQC Chair Crismore sent a letter to state agencies encouraging them to take action in response to this resolution.

### ***Court Decisions***

The Water Policy Subcommittee was briefed on the Montana Supreme Court decision in *Confederated Salish and Kootenai Tribes v. Clinch* (January 20, 2000). The EQC was briefed on *Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency*, and *Montana Environmental Information Center v. Department of Environmental Quality* (December 2, 1999). These and other important court decisions related to water policy in Montana are summarized in **Chapter 3**.

### ***Water Rights***

The EQC was briefed on the proposed Crow Tribe-Montana Water Rights Compact (May 24, 1999) before it was ratified by the Montana Legislature in June 1999.

The EQC also heard a presentation on an agreement between the State of Montana and the Avista Corporation regarding water rights in the Clark Fork River Basin<sup>4</sup> (September 22, 1999). The state and the Avista Corporation agreed to conduct a public collaborative process to gather information from existing and potential water users in the Clark Fork River Basin to help shape an "Existing Water User Protection Agreement", which was intended to establish mutually agreeable terms and conditions for basin closure legislation to be submitted to the 57th Montana Legislature.

The agreement was intended to develop license conditions for the Noxon Rapids and Cabinet Gorge hydroelectric projects. However, the Federal Energy Regulatory Commission decided not to include provisions related to state water rights as conditions of the license. As of September 2000, the water rights issue was being discussed through a consensus building process involving stakeholders in the Clark Fork River Basin and legislation was not being proposed by the DNRC (September 11, 2000).

### ***Water Research***

The Water Policy Subcommittee forwarded its work plan to the Montana University System Water Resources Center in order to help the Center staff identify water resources problems of state significance in Montana. Staff participated in the ranking of preproposals for Montana water resources grants administered by the Water Resources Center under the federal Water Resources Research Act.<sup>5</sup>

Subcommittee staff also participated in the Ground Water Assessment Steering Committee.

### ***Lockwood Water Quality Issues***

The EQC heard presentations from DEQ staff, representatives of the Lockwood Water Users Association, and a Yellowstone County Commissioner (March 24, 2000). The EQC sent a letter to Governor Racicot supporting his anticipated concurrence with the proposed decision to list the Lockwood solvent site as a federal superfund site. Subsequently, the EQC also sent a letter to the EPA supporting the federal register notice that proposed listing the site.

The EQC asked staff to work with the DEQ to develop legislation that would amend the state superfund law (CECRA) to change the notification process for potentially liable persons (May 5, 2000). Draft legislation was presented to the EQC on July 28, 2000. On September 12, 2000, the EQC voted to request legislation (LC 0165).

### ***Interagency Coordination***

EQC staff participated in the Montana Watershed Coordination Council and served on the agenda committee that coordinates the activities of the Council. Staff also participated in the Ground Water Assessment Steering Committee and the Montana Wetlands Council.

### ***Renewable Resource Grant and Loan Program***

DNRC staff briefed the EQC on applications received for renewable resource grants and loans (July 28, 2000). (A report on the status of the Renewable Resource Grant and Loan Program is produced by the DNRC prior to each legislative session.)

### ***Water Information System***

Staff from the NRIS of the Montana State Library made a presentation to the EQC about the information available through the Water Information System (September 11, 2000).

## Endnotes

1. Senator William Crismore, Chair, EQC, letter, December 2, 1999.
2. Mary Vandenbosch, Resource Policy Analyst, Legislative Environmental Policy Office, memorandum re: *Partial EPA Approval of Montana's Water Quality Standards*, August 27, 1999, and May 4, 2000, Water Policy Subcommittee meeting minutes.
3. Senator Bea McCarthy, Chair, Environmental Quality Council Water Policy Subcommittee, letter, October 1, 1999.
4. State of Montana and Avista Corporation. June 1999. *Working Agreement to Protect the Security of Existing Rights and to Preserve Options for the Orderly Development of Waters in the Clark Fork River Basin Upstream of the Noxon Rapids Hydroelectric Project*.
5. Grants are authorized by P.L. 101-397. Funding for the program is made available in Montana through the United States Geological Survey (USGS) 104 (B) Competitive Research Grants.

# Chapter 3: Summary of Court Decisions Relevant to Montana's Water Policy

## Introduction

This chapter contains a brief summary of court cases that have been decided since the previous Environmental Quality Council (EQC) water policy report.<sup>1</sup> There have been several significant court decisions in the last 2 years.

### Montana v. U.S. Environmental Protection Agency

In 1995, the U.S. Environmental Protection Agency (EPA) granted the Confederated Salish and Kootenai Tribes the ability to be treated as a state under federal clean water laws for the purpose of setting water quality standards for all waters on the Flathead Indian Reservation. The EPA determined that the Tribes possessed inherent authority over nontribal members on fee lands within the boundaries of the reservation, based on a finding that water pollution from these nontribal members would have serious and substantial impacts on the health and welfare of the Tribes. The state opposed granting the Tribes "treatment as state" status to the extent that this would give the Tribes the authority to govern activities of nontribal members, including political subdivisions. At least 44% of the land within the Flathead Indian Reservation is now owned by nontribal members.

The state filed for judicial review. Both the U.S. District Court<sup>2</sup> and the Ninth Circuit Court of Appeals<sup>3</sup> upheld the EPA's decision. The State and others asked the U.S. Supreme Court to hear the case, but the Court declined to hear it in October 1998.<sup>4</sup>

Tribal governments for two Montana Indian reservations (the Fort Peck Reservation and the Flathead Reservation) have "treatment as state" status for water quality standards.

### Montana Environmental Information Center v. Department of Environmental Quality<sup>5</sup>

This case dealt with Montana's constitutional right to a clean and healthful environment as well as Montana's nondegradation policy for water quality. The Montana Supreme Court concluded the following:

- # The right to a clean and healthful environment is a fundamental right because it is guaranteed by Article II, section 3, of Montana's Constitution.

- # Any statute or rule that implicates the right to a clean and healthful environment must be strictly scrutinized and can survive scrutiny only if the state establishes a compelling state interest, and the state's action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the state's objective.
- # The Court will apply a strict scrutiny test to a *state or private* action that implicates the right to a clean and healthful environment provided in either Article II, section 3, of the Montana Constitution or Article IX, section 1, of the Montana Constitution. Article IX, section 1 (1) states: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."
- # The District Court erred when it held that the constitutional right to a clean and healthful environment was not implicated, absent a demonstration that public health is threatened or that current water quality standards are affected to such an extent that there is a significant impact on the Landers Fork or Blackfoot River.
- # The constitutional right to a clean and healthful environment and to be free from unreasonable degradation is implicated in this case because the proposed pumping tests would have added a known carcinogen to the water and the Montana Department of Environmental Quality (DEQ) (or its predecessor) concluded (through the adoption of ARM 17.30.715) that discharges containing carcinogenic parameters greater than the concentration of those parameters in the receiving water have a significant impact.
- # Section 75-5-303, MCA, is a reasonable implementation of the mandate provided for in Article IX, section 1 (Montana Constitution). This section addresses the state's nondegradation policy.
- # To the extent that section 75-5-317 (2)(j), MCA (1995), arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substances being discharged, it violates the environmental rights guaranteed by the Montana Constitution. The Court's holding is limited to this subsection as applied to the facts in this case. The case was remanded to the District Court for a strict scrutiny of this specific statutory provision and, in particular, for a determination of whether there is a compelling state interest for the enactment of the statute. The text of the subsection in question, along with relevant portions of the section, is presented below:

**75-5-317. Nonsignificant activities.** (1) The categories or classes of activities identified in subsection (2) cause changes in water quality that are nonsignificant because of their low potential for harm to human health or the environment and their conformance with the guidance found in 75-5-301(5)(c).

(2) The following categories or classes of activities are not subject to the provisions of 75-5-303: . . .

(j) discharges of water to ground water from water well or monitoring well tests, hydrostatic pressure and leakage tests, or wastewater from the disinfection or flushing of water mains and storage reservoirs, conducted in accordance with department-approved water quality protection practices; . . .

- # The plaintiffs (Montana Environmental Information Center, Clark Fork-Pend Oreille Coalition, and Women's Voice for the Earth) have standing to challenge conduct that has an arguably adverse impact on the area in the headwaters of the Blackfoot River where they fish and recreate and from which they consume the water.

Montana District Court Judge Sherlock ruled the matter moot in June 2000.<sup>6</sup> The judge concluded that "a colossal realignment of the status quo" would be required in order for any further well tests to occur. The judge imposed the following conditions in his order:

- # Seven-Up Pete Joint Venture must notify the District Court and the plaintiffs before submitting an application to the DEQ for further ground water tests.
- # No further ground water tests will be permitted on the McDonald Project site without DEQ authorization.
- # The DEQ must notify the District Court and the plaintiffs immediately upon receiving an application for water well pump testing.

The District Court will take no further action unless the conditions mentioned in the order have been met.

## **Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency**<sup>7</sup>

In 1997, Friends of the Wild Swan and four other Montana environmental organizations filed a lawsuit against the EPA. The lawsuit challenged the EPA's actions with respect to Montana's total maximum daily load (TMDL) program.

U.S. District Court Judge Donald Molloy ruled on the case in November 1999. The plaintiffs challenged the EPA's administration of the federal Clean Water Act under three separate causes of action.

### ***Count 1***

The EPA failed to perform a mandatory duty to identify water quality limited segments (WQLS) in Montana and to develop TMDLs for those segments. Judge Molloy dismissed the motion for summary judgment on this count. In his order, the judge stated that the EPA has only two affirmative duties upon receipt of a state's submission of WQLS or TMDLs: the EPA has a mandatory duty to review the submission within 30 days; and if the EPA disapproves of a state's submission, the EPA has a mandatory duty to identify appropriate WQLS and to develop corresponding TMDLs within 30 days of the disapproval.

### ***Count 2***

The EPA's failure to identify Montana's WQLS and to develop corresponding TMDLs constitutes "agency action unlawfully withheld or unreasonably delayed" in violation of the federal Administrative Procedure Act. Judge Molloy dismissed the motion for summary judgment on this count.

### ***Count 3***

Plaintiffs asked for a declaration that the EPA's approval of Montana's 1998 submission of WQLS and TMDLs was arbitrary and capricious because it was deficient in the following six respects:

1. It failed to identify all of Montana's WQLS.
2. It failed to include certain streams as WQLS even though the plaintiffs provided sufficient evidence to compel their listing as WQLS.
3. The WQLS identified in the submission were assigned priorities without proper consideration of the effect of nonpoint source pollution on Montana's native cold water fisheries.
4. It failed to adequately respond to public comment.
5. It contained 129 point source TMDLs that do not satisfy the requirements of a TMDL.

6. It contained an inadequate number of TMDLs.

Judge Molloy granted the motion for summary judgment for one part of Count 3 (number 6). The judge found that the EPA acted arbitrarily and capriciously when it failed to disapprove of Montana's inadequate submission of TMDLs. Judge Molloy ordered the parties to submit briefs that describe the appropriate remedy for the EPA's violation of the federal Administrative Procedure Act.

Judge Molloy issued an order on June 21, 2000.<sup>8</sup> Key provisions of the order are highlighted below.

- # Required the EPA to approve or establish TMDLs for WQLS identified on Montana's 1996 list submitted under section 303 (d) of the Clean Water Act.
- # Required the EPA, working in conjunction with the State of Montana, to develop and adopt a schedule that will result in the development of all necessary TMDLS for each of the sites on Montana's 1996 list by May 5, 2007. The schedule must be developed by November 1, 2000.
- # Authorized the State of Montana to prioritize water bodies on the 1996 list and to develop TMDLs for EPA approval.
- # Required the EPA to approve or disapprove a TMDL submitted by the state within 30 days. If the EPA disapproves a TMDL, the EPA is required to establish a TMDL within 30 days of disapproval.
- # Prohibited the EPA from issuing any new permits or increasing the permitted discharge for any permittee under the National Pollutant Discharge Elimination System (NPDES) permitting program until all necessary TMDLs are established for a particular WQLS.

The EPA and the DEQ requested that the permit ban be removed from the order because, they argued, it conflicts with Montana law, is not necessary and is not supported by the Clean Water Act. The plaintiffs requested that the June 21 order be amended to clearly prohibit DEQ from issuing Montana Pollutant Discharge Elimination System (MPDES) permits. The DEQ has been delegated the authority to issue most permits under the NPDES program in Montana. The DEQ issues MPDES permits under this program.

On September 21, 2000 Judge Molloy amended his June 21 order to read as follows:

Until all necessary TMDLs are established for a particular WQLS, neither the EPA nor the State of Montana shall issue any new permits or increase permitted discharge for any permittee under the National Pollutant Discharge Elimination System permitting program or under the Montana Pollutant Discharge Elimination System permitting program.<sup>9</sup>

On October 13, 2000, the DEQ filed a motion for a partial stay of the order, pending appeal. Specifically, the DEQ asked the judge to stay the part of the order that prohibits issuance of NPDES or MPDES permits.

On November 6, 2000 Judge Molloy denied the DEQ's motion for a stay pending appeal.<sup>10</sup>

Some elements of Judge Molloy's order are consistent with state law. There are two major differences between the judge's order and state law:

- # Under state law, the DEQ is not required to develop TMDLs for water bodies subsequently removed from the 1996 list. Judge Molloy's order requires the DEQ to develop TMDLs for all water bodies on the 1996 list. There were approximately 900 water bodies on the 1996 list. The draft 2000 list includes 431 water body segments.
- # Under Montana law (75-5-703 (10), MCA), the issuance of a discharge permit is not precluded because a TMDL is pending. Point source discharges may begin or continue, subject to certain requirements. One of these requirements is that the discharge may not cause a decline in water quality for parameters by which the water body is impaired. Judge Molloy's order prohibits issuance of any new MPDES permits on a WQLS until all necessary TMDLs are approved for that segment.

The September 21 order prohibited the DEQ from increasing permitted discharge for any permittee under the MPDES permitting program. Although an authorization to discharge under a general permit is, in many cases, authorizing an increase in permitted discharge, Judge Molloy implied in his November 6 order that his September 21 order does not apply to an authorization to operate under an existing general MPDES permit. A general permit covers a category of discharges (e.g., concentrated animal feeding operations) rather than an individual facility. General permits are issued for a period of 5 years. Most of the MPDES permits issued by the DEQ are general permits.

## **Confederated Salish and Kootenai Tribes v. Clinch**

In *Confederated Salish and Kootenai Tribes v. Clinch*<sup>11</sup>, the Montana Supreme Court held that the Montana Department of Natural Resources and Conservation (DNRC) "cannot determine whether water is legally available on the Flathead Indian Reservation, because the Department cannot determine whether the issuance of those permits would affect existing water rights until the Tribe's rights are quantified by compact negotiation pursuant to section 85-2-702, MCA or by a general *inter sese* water rights adjudication."

Legislation enacted by the 1999 Montana Legislature (Senate Bill 468) temporarily closed the Clark Fork River Basin to further surface water appropriations and reservations for consumptive uses, with some exceptions. The Flathead Indian Reservation is included within the Clark Fork River Basin. The temporary closure expires February 28, 2001. In light of this, before the Montana Supreme Court's decision (and until February 28, 2001), the DNRC would issue water use permits or certificates of water right on the Flathead Indian Reservation for:

- # ground water withdrawals;
- # surface water for the following consumptive uses: domestic or stock use, municipal water supply, or temporary emergency appropriations necessary to protect lives or property; and
- # surface water for nonconsumptive uses (e.g., hydropower production and other uses that do not decrease the supply, flow, or level of water).

Following the decision, the DNRC will issue water use permits or certificates of water right on the Flathead Indian Reservation for the following types of withdrawals:

- # ground water withdrawals up to 35 gallons per minute (GPM), not to exceed 10 acre-feet a year; or
- # ground water withdrawals from aquifers that are not connected to surface water.

## **American Wildlands v. Browner**<sup>12</sup>

In July 1998, American Wildlands and other environmental organizations filed a lawsuit alleging that the EPA violated the federal Clean Water Act and the federal Administrative Procedure Act by failing to approve or disapprove Montana's new and revised water

quality standards since 1989 and failing to promptly prepare and promulgate standards for the state standards that do not meet the requirements of the Clean Water Act. In December 1998 and January 1999, the EPA approved and disapproved some of Montana's water quality standards. American Wildlands amended its complaint following this action. American Wildlands sought declaratory and injunctive relief. U.S. District Court Judge John Kane affirmed the actions of the EPA, to the extent that the District Court has jurisdiction. Specific elements of the complaint and Judge Kane's decision are presented below.

1. American Wildlands contends that the EPA's approval of Montana's water quality standards exempting nonpoint source pollution from the state's antidegradation rules is arbitrary, capricious, an abuse of discretion, or in violation of the federal Clean Water Act. The Court affirmed the EPA decision.
2. American Wildlands contends that the EPA's approval of Montana's water quality standards exempting mixing zones from compliance with narrative water quality criteria and the state's antidegradation rules is arbitrary and capricious or in violation of the Clean Water Act. The Court affirmed the EPA's approval of Montana's mixing zone policy.
3. American Wildlands asserts that the EPA has violated its duty to promptly promulgate replacements for Montana's disapproved standards in violation of 33 U.S.C. 1313 (c) (4)(B). The Court found that the EPA is not in violation of this law, based on the record before the Court. Judge Kane noted that the record does not reflect whether Montana has revised its standards. If Montana has not revised its standards, he notes that the EPA is required to promulgate new standards.
4. American Wildlands contends that the EPA's failure to review and approve or disapprove Montana's definition of an "interested person" is arbitrary, capricious, and an abuse of discretion in violation of 33 U.S.C. 1313(c)(3), 40 C.F.R. 131.21, and the federal Administrative Procedure Act. The Court ruled that the EPA is not in violation of these laws and regulations.
5. American Wildlands contends that the EPA's incorporation and use of Montana's new and revised water quality standards without the EPA's prior approval and the EPA's continued incorporation and use of water quality standards that were disapproved by the EPA is arbitrary, capricious, and an abuse of discretion. American Wildlands asked the Court to order the EPA to promptly review any permit, decision, or other regulatory action that incorporated or otherwise relied

upon the disapproved standard and to revise these actions as necessary. The judge ruled that the Court does not have jurisdiction over this issue.

## Endnotes

1. Montana Environmental Quality Council. Fall 1998. *Montana's Water Policy--1997-98*. Helena, Montana: Legislative Environmental Policy Office.
2. 941 F. Supp. 945 (1996).
3. 137 F.3d 1135 (1998).
4. U.S. Supreme Court Docket No. 97-1929. Petition for writ of certiorari denied October 5, 1998.
5. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999).
6. 2000 ML 1432 (1st Judicial Dist.)
7. Judge Donald W. Molloy, United States District Court, District of Montana, Missoula Division, Order, Cause No. CV 97-35-M-DWM. November 4, 1999.
8. Judge Donald W. Molloy, United States District Court, District of Montana, Missoula Division, Order, Cause No. CV 97-35-M-DWM. June 21, 2000.
9. Judge Donald W. Molloy, United States District Court, District of Montana, Missoula Division, Order, Cause No. CV 97-35-M-DWM. September 21, 2000.
10. Judge Donald W. Molloy, United States District Court, District of Montana, Missoula Division, Order, Cause No. CV 97-35-M-DWM. November 6, 2000.
11. 1999 MT 342, 297 Mont. 448, 992 P.2d 244 (1999).
12. Civil Action No. 98-K-1621. United States District Court, District of Colorado. April 28, 2000.

# Chapter 4: Regulation of Swine Facilities-- Analysis of Selected Issues

*No man should be allowed to be president who does not understand hogs.*

*--President Harry S. Truman*

## Introduction

This chapter presents background information about hog farms and the regulation of hog farms and analyzes specific issues related to regulation of the water quality impacts of swine facilities: requirements for individual permits and financial assurance. A memorandum describing local government authority to address swine facilities is included in **Appendix D**.

The Water Policy Subcommittee has heard concerns about other issues related to swine facilities including concerns about odor, air quality, and ownership of hog farms. These issues are not addressed in this report.

As a result of resolutions approved by the 1999 Montana Legislature, the Environmental Quality Council (EQC) was assigned to undertake comprehensive studies of the Montana Environmental Policy Act and Montana's eminent domain laws. Consequently, the EQC does not have the resources to conduct a comprehensive study of regulation of swine facilities this interim. The Water Policy Subcommittee has targeted specific aspects of regulation of swine facilities that are related to water quality.

## Industry Trends

### *National*

Important trends in the swine industry include:

- # a shift to confined feeding operations;
- # larger swine operations. Between 1969 and 1992, the average number of hogs sold by each hog farm more than quadrupled. During the same period of time, overall hog sales increased by more than 20%.<sup>1</sup>
- # a change in geography: swine operations have expanded beyond traditional Midwest locations to other regions; and

- # a shift in pork production from "farrow-to-finish" operations that breed and raise pigs to market weight in one operation to more specialized operations that focus on one or two stages of swine production.

### ***Regional***

Some Rocky Mountain states have experienced an increase in hog farms:

- # Three **Colorado** counties and one county in **Utah** are among America's top 100 counties with respect to numbers of hogs and pigs.<sup>2</sup>
- # **Utah** raised almost 13 times as many hogs in 1998 as it did in 1990.<sup>3</sup>
- # **Utah** was home to the 17th largest hog farm in the United States in 1999. Circle Four Farms near Milford, Utah, shipped 650,000 market hogs in 1999.<sup>4</sup> At full capacity, the operation is projected to produce between 2.2 million and 2.4 million hogs for slaughter each year.<sup>5</sup>
- # **Colorado's** swine production increased 25% from 1996 to 1997 and 92% from 1992 to 1997.<sup>6</sup>
- # **Wyoming's** swine production increased by 134% between 1992 and 1996.<sup>7</sup>

### ***Montana***

Montana has not experienced the significant increase (or decrease in some cases) experienced elsewhere in the country.

- # Between 1992 and 1997, the total swine inventory decreased by 20%.<sup>8</sup>
- # During the same period, the number of swine farms decreased by 41%.
- # The number of swine on each farm declined by 42% between 1992 and 1997.

Overall, the number of swine in Montana has remained relatively stable since 1990. On December 1, 1999, there were 150,000 swine in Montana.<sup>9</sup>

Governor Racicot established a Vision 2005 Task Force on Agriculture in 1998 to identify and develop initiatives with the goal of doubling Montana's agricultural economy by the end of the year 2005. One goal of the Task Force related to hog production and marketing.

Specifically, the Task Force sought to market 1 million hogs annually by 2005 and 2 million hogs annually by 2010. The primary entity responsible for implementing this goal is the Montana Pork Producers Council.<sup>10</sup>

According to staff from the Montana Pork Producers Council and the Montana Department of Agriculture, the Task Force was not seeking to bring giant hog farms to Montana, but instead to add value to Montana's existing operations. In particular, it was seeking to develop a market for Montana barley and to market barley-fed hogs in Asia.<sup>11</sup>

Swine prices plummeted shortly after the goal was adopted. As a result of this and other factors affecting the grain industry, interest in this initiative is low. One entity was considering development of an operation but was unable to obtain capital because of the poor market conditions.

## Water Quality Impacts Associated With Swine Facilities

### Overview

Swine facilities can contaminate surface water and ground water. Contamination can occur as a result of:

- # leaking storage facilities;
- # improper land application of wastes; and
- # leaks during transportation of waste from point to point.

The primary contaminants of concern for all animal feeding operations are the nutrients nitrogen and phosphorous. Adverse effects from excess nutrients in surface water include: low levels of dissolved oxygen, eutrophication, and toxic algal blooms. Nitrogen in the form of nitrate can contaminate ground water used for drinking.<sup>12</sup> A literature review conducted for the Minnesota Environmental Quality Board concluded:

Feedlot runoff contains extremely large loads of nutrients and oxygen demanding substances, and if not properly collected and prevented from entering surface waters, this runoff can severely degrade surface water quality.<sup>13</sup>

The number of documented serious water quality pollution problems involving manure lagoon spills and feedlot runoff is generally several tens of events per year in each of the states with high concentrations of feedlots.<sup>14</sup>

The Minnesota Environmental Quality Board study also concluded that the number of documented fish kills resulting from lagoon and basin manure spills and feedlot runoff is typically a small fraction of the total number of operations.

North Carolina has documented the water quality impacts of swine facilities<sup>15</sup> and found:

- # in North Carolina in 1998, there were 107 documented discharges from swine facilities, with 31 of these reaching surface waters;
- # a North Carolina State University study showed that 38% of older, unlined anaerobic lagoons leaked nitrogen compounds into the ground water at "strong" or "very strong" levels.

The U.S. Environmental Protection Agency (EPA) has documented numerous discharges and fish kills from animal feeding operations, including hog farms.<sup>16</sup>

## How Are Hog Farms Regulated Now?

### *Federal*

**Overview.** The federal Clean Water Act gives the EPA the authority to regulate point source discharges under the National Pollutant Discharge Elimination System (NPDES) program. The NPDES program addresses potential discharges into surface water or ground water connected to surface water. Currently, 43 states, including Montana, are authorized to implement the NPDES program. Swine operations that meet the definition of a concentrated animal feeding operation (CAFO) are point source dischargers subject to the requirements of this program. The CAFO requirements cover other animals in addition to swine.<sup>17</sup>

**Recent initiatives.** In March 1999, the United States Department of Agriculture and the EPA published the *Unified National Strategy for Animal Feeding Operations*.<sup>18</sup> This strategy sets forth a framework of actions that the federal agencies plan to take under existing legal and regulatory authority to reduce water quality and public health impacts from improperly managed animal wastes.

One element of the strategy is the *Guidance Manual and Sample NPDES Permit for Concentrated Animal Feeding Operations*.<sup>19</sup> The EPA expects to revise the NPDES regulations for concentrated animal feeding operations in December 2002.

The EPA's Office of Technology establishes effluent limitation guidelines for feedlots. The EPA is expected to issue revised guidelines for several types of CAFOs, including swine, by the end of this year.

### **Montana**

**Overview.** A permit is required from the Montana Department of Environmental Quality (DEQ) for a CAFO that has the potential to discharge pollution from livestock waste into surface water or ground water. Montana does not have regulations or permits specific to swine. Swine operations that are CAFOs can be regulated under a Montana Ground Water Pollution Control System (MGWPCS) permit or a Montana Pollutant Discharge Elimination System (MPDES) permit.

Outside of Indian reservations, all permits are issued by the DEQ. The EPA issues permits on Indian reservations.

**When is a CAFO permit required?** Montana uses the same criteria as the EPA for determining when an agricultural operation is a CAFO. A permit is required when all of the following conditions are met:

- # The facility meets both of the criteria for an animal feeding operation:
  1. Animals are stabled, confined, and fed or maintained for a total of 45 days or more in any 12-month period.
  2. Crops, vegetation forage growth, or postharvest residues are not sustained in the normal growing season over any portion of the facility.
  
- # The facility meets one of the following criteria for a CAFO:
  1. contains more than 1,000 animal units (2,500 swine larger than 55 pounds);
  2. contains between 301 (750 swine larger than 55 pounds) and 1,000 animal units and a discharge occurs through a manmade conveyance or there is a discharge of pollutants directly into state waters that originate outside of the facility and pass over, across, or through the facility; or
  3. is designated as a CAFO by the DEQ. Criteria for designation by the DEQ are set forth in ARM 17.30.1330.

- # The facility has the potential to discharge to state waters as described in section 75-5-103 (25), MCA. State waters include surface or underground: bodies of water, irrigation systems, or drainage systems.

The calculation of animal units depends on the species. For swine, the number of animal units is calculated by multiplying the number of swine weighing 25 kilograms (approximately 55 pounds) or more by 0.4. If an operation has more than one species, the calculation is made for each, then the numbers of animal units for each species are combined.

**How many Montana CAFOs have swine?** As of March 2000, the DEQ was aware of 17 CAFOs with swine. Fourteen of these operations also house other types of animals. Of the CAFOs with swine:

- # 2 have less than 1,000 animal units;
- # 15 have more than 1,000 animal units;
- # 3 have more than 2,000 animal units; and
- # 1 has 32,200 animal units.<sup>20</sup>

**Recent initiatives.** The DEQ issued a *Draft Strategy for Improving Water Quality Compliance From Concentrated Animal Feeding Operations* for public comment in May 1999.<sup>21</sup> According to the DEQ, the EPA required the state to develop a strategy to complement the *Unified National Strategy for Animal Feeding Operations*. The final strategy was adopted in July 2000.<sup>22</sup> It includes both regulatory and nonregulatory components.

The DEQ also issued a revised general permit for CAFOs for public comment in July 1999. The new general permit became effective August 15, 2000.<sup>23</sup>

### ***Other States***

Several states have adopted laws or rules specific to swine. These include: Colorado, Idaho, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, and Wyoming. Some states have approved temporary moratoria on permitting. Unlike the EPA and Montana, many states that have passed laws regulating swine have taken a multimedia approach, addressing air quality and land use as well as water quality.

## Voluntary Compliance Audit Program

The EPA and the National Pork Producers Council have agreed to a comprehensive compliance audit program. The program provides incentives for pork producers to undertake voluntary, comprehensive on-farm environmental assessments by greatly reducing penalties for Clean Water Act violations that are promptly disclosed and corrected under this program. The National Pork Producers Council plans to have independent auditors conduct more than 10,000 audits nationwide. The Montana Pork Producers Council is promoting and participating in this effort.<sup>24</sup>

Another objective of the Vision 2005 Task Force on Agriculture was to:

Develop a proactive coordinated environmental plan of action through livestock organizations that deal with confinement livestock facilities in cooperation with state agencies that includes producer and consumer education.<sup>25</sup>

## Policy Issue: Requirements for Individual Permits

### *Use of General Permits Nationwide*

The EPA authorizes the use of general permits to cover a category of discharges within a geographic region. According to the EPA, operations subject to the same effluent limitations and operating conditions and requiring similar monitoring are most appropriately regulated under a general permit. This is one way of reducing the administrative burden of permitting large numbers of facilities. The EPA reports that the use of general permits appears to be increasing. Of the 43 states authorized to implement the NPDES program, 19 have issued a state NPDES general permit for CAFOs and 10 have issued a state non-NPDES general permit for CAFOs.<sup>26</sup>

South Dakota has issued a general permit specific to swine under the NPDES program.

### *Requirements for Individual Permits in Other States*

**Appendix A** shows requirements for individual permits for swine facilities in selected states.

## **Montana**

**Types of permits.** Swine operations can be regulated under three types of permits:

- # individual MGWPCS permit;
- # general MPDES permit for CAFOs; or
- # individual MPDES permit.

There are no existing CAFOs that are currently regulated under individual MPDES permits. Two CAFOs are regulated under individual MGWPCS permits and not MPDES permits. According to DEQ staff, both operations could potentially be authorized to operate under the general permit.<sup>27</sup>

**When is an individual permit required?** Administrative rules (ARM 17.30.1341 (4)-- see **Appendix B**) require an owner or operator who wishes to operate a point source under a general permit to complete a standard MPDES permit application. The DEQ is required to either authorize the applicant to operate under the general permit or notify the applicant that the source does not qualify. The rules establish reasons for denial, and the DEQ must cite one of these reasons if permission to operate under the general permit is denied.

If the application is denied (and not withdrawn by the applicant), the DEQ must proceed to process the application as an individual MPDES permit.

Sources are exempt from the requirement for a MGWPCS permit if they have a MPDES permit.

### ***Following General Permit Authorization***

**When is a CAFO regulated under the general permit required to obtain an individual permit?** The DEQ may require any owner or operator covered under the general permit to apply for and obtain an individual MGWPCS or MPDES permit if:

- # the discharge is a significant contributor of pollution;
- # the discharger is not in compliance with the conditions of the general permit; or

- # conditions or standards have changed so that the discharge no longer qualifies for a general permit.

**How do requirements for an individual permit differ from a general permit?** General permit conditions are generic, rather than being tailored to an individual site. Operators who wish to operate under the general permit must apply for authorization to do so. The DEQ may impose conditions in its letter authorizing a facility to operate under a general permit. The authorization letter specifies the weather station that must be used for determining a 25-year, 24-hour rainfall event. (CAFO facilities must be designed, constructed, and operated to contain all process generated wastewaters plus the runoff from such a storm event.)

Authorization letters sometimes require ground water monitoring. Soil testing is required for one facility. The method of land application is restricted for another facility.

Key differences between an individual permit and a general permit under administrative rules (ARM 17.30.1301, *et seq.*) include:

- # a public notice and fact sheet is issued for each permit for an individual facility;
- # a 30-day public comment period is required for each individual permit;
- # the DEQ is required to hold a public hearing when there is a significant degree of public interest;
- # the DEQ is required to respond to public comments;
- # the fees are higher. The application fee for a general permit is \$200, and for an individual permit, it is \$2,500. The annual fee for a general permit is \$250, and for an individual permit, it is \$1,000.

According to DEQ staff, other differences include the following:

- # The level of environmental review for each facility is greater. An environmental assessment or environmental impact statement is completed for each facility.
- # It takes longer to process the permit.

- # Reporting is required more frequently (generally, quarterly for individual permits in comparison with annually for general permits).<sup>28</sup>

## Policy Issue: Financial Assurance

Montana does not require financial assurance for CAFOs.

Financial assurance requirements for selected states that have requirements specifically for swine operations are presented in **Appendix C**. Not every state with a financial assurance requirement is included. According to a recent survey, eight states impose bonding or financial assurance requirements on CAFOs to pay for closure or cleanup costs.<sup>29</sup>

The types of costs for which financial assurance is required vary from state to state. All of these states authorize or require promulgation of rules by the appropriate environmental agency. The regulations may address the following:

- # allowable forms of financial assurance;
- # the basis for determining the amount of financial assurance required (cost estimate submitted by permittee or formula in rule);
- # revoking or denying issuance of permits if financial assurance is not provided in accordance with the regulations;
- # review of financial institutions and adequacy of financial assurance mechanisms;
- # assurance that the funds will be available to the agency when needed;
- # release of the financial assurance instrument;
- # forfeiture of the financial assurance instrument;
- # revision on a regular basis or as costs change; or
- # a provision stating that financial assurance does not relieve the operation from liability or responsibility for costs.

All four states reviewed authorize the use of surety bonds and irrevocable letters of credit for financial assurance. All four states authorize additional mechanisms that may include: federally insured certificates of deposit, government-backed securities, cash, trust funds, self-insurance, insurance, or financial test and guarantee.

All four states require financial assurance to cover costs of closure, some require postclosure care, and three of the four states require financial assurance for corrective action costs.

An alternative approach is to establish a fund for cleanup of abandoned facilities. The State of Iowa has established a manure storage indemnity fund. Money goes into the fund from:

- # fines for violations at confinement feeding operations; and
- # a one-time fee for construction of a confinement feeding operation.

Counties have access to money from the manure storage indemnity fund for the purpose of cleaning up abandoned sites when other sources of funding are not available.<sup>30</sup> Arkansas has experienced some instances in which the permittee has abandoned the facility and is exploring the possibility of setting up a fund to pay for closure of abandoned liquid waste ponds.<sup>31</sup>

## Endnotes

1. The average number of hogs sold by each hog farm increased from 138 to 588 between 1969 and 1992. McBride, John. *Change in U.S. Livestock Production 1969-92, Agricultural Economic Report No. 754*. <<http://www.econ.ag.gov/epubs/pdf/aer754/>>, U.S. Department of Agriculture, Rural Economy Division, Economic Research Service, July 1997.
2. National Pork Producers Council. *Pork Facts 1999/2000*. <<http://www.nppc.org/PorkFacts/pfindex.html>>, n.d.
3. Fewer Producers, More Hogs, Lower Prices in 1998. *NorthWest Pork News*. <<http://agadsrv.msu.montana.edu/Extension/Swine/NWPork%20News/NWPorkspring.htm>>, Spring 1999.
4. *Frequently Asked Questions*. <<http://www.c4farms.com/FAQ/FAQ.htm#market>>, Circle Four Farms, n.d.
5. Utah Governor's Office of Planning and Budget. August 1996. *Employment and Population Impacts of Circle Four Farms: Four Development Scenarios*. Salt Lake City, Utah.
6. Colorado Agricultural Statistics 1998, cited in Seidl, Andrew and Jessica Davis. February 1999. "Report on Animal Feeding Operations and Rural Colorado Communities." *Agricultural and Resource Policy Report*. Fort Collins, Colorado: Colorado State University, Department of Agricultural and Resource Economics.
7. Iowa's Pork Industry--Dollars and Scents 1998, cited in Seidl.
8. Calculated from data in *Hogs and Pigs Inventory, Value Per Head, and Total Value, December 1, Montana, USA*. <<http://www.nass.usda.gov/mt/livestock/hog&pig.htm>>, Montana Agricultural Statistics Service, March 16, 2000. All data presented in this section are from this source.
9. *ibid.*
10. Vision 2005 Task Force on Agriculture. October 6, 1998. *Montanans Working for Montana*. Final Report to Governor Racicot. Helena, Montana.
11. Meta Boyer, Chief, Agriculture Marketing and Business Development Bureau, Montana Department of Agriculture, telephone conversation, May 25, 2000, and Sue Huls, Executive Director, Montana Pork Producers Council, telephone conversation, May 26, 2000.

12. U.S. Environmental Protection Agency (EPA). *Animal Feeding Operations (AFOs)*. <<http://www.epa.gov/owmitnet/afo.htm>>, Office of Wastewater Management, October 20, 1999.
13. University of Minnesota, College of Agriculture, Food and Environmental Sciences. September 1999. *A Summary of the Literature Related to the Effects of Animal Agriculture on Water Resources* (Prepared for the Minnesota Environmental Quality Board). St. Paul: Minnesota Environmental Quality Board, p. G-4.
14. *ibid*, p. G-6.
15. North Carolina Department of Environment and Natural Resources. *Framework for the Conversion of Anaerobic Swine Waste Lagoons and Sprayfields*. <<http://www.enr.state.nc.us/files/hogs/hogplan.htm>>, n.d.
16. EPA. Office of Water Standards and Applied Sciences Division. December 1998. *Environmental Impacts of Animal Feeding Operations*, Appendix B.
17. EPA. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*. <<http://www.epa.gov/owmitnet/afo.htm#facts>>, August 1999.
18. United States Department of Agriculture and EPA (USDA/EPA). *Unified National Strategy for Animal Feeding Operations*. <<http://www.epa.gov/owm/finafost.htm>>, March 9, 1999.
19. EPA. September 21, 2000. *Guidance Manual and Sample NPDES Permit for Concentrated Animal Feeding Operations: Review Draft*. Washington, D.C.: Office of Wastewater Management.
20. Information from DEQ database. Note that most facilities house more than one type of animal.
21. Montana Department of Environmental Quality (DEQ). May 1999. *Draft Strategy for Improving Water Quality Compliance From Concentrated Animal Feeding Operations*. Helena, Montana.
22. Montana Department of Environmental Quality (DEQ). July 2000. *Strategy for Improving Water Quality Compliance From Concentrated Animal Feeding Operations*. Helena, Montana.
23. DEQ. July 11, 2000. *General Discharge Permit, Concentrated Animal Feeding Operation (CAFO-GDP, Permit No.: MT G010000)*. Helena, Montana: Permitting and Compliance Division.
24. EPA. *Clean Water Act Compliance Audit Program for Pork Producers*. <<http://es.epa.gov/oeca/ore/porkcap/factsh.html>>, Office of Regulatory Enforcement, September 29, 1999.

25. Vision 2005 Task Force on Agriculture.
26. EPA. *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, p. 15.
27. Tim Byron, Water Quality Specialist, DEQ, Water Protection Bureau, telephone conversation, October 7, 1999, and electronic mail, April 26, 2000.
28. Byron, personal conversation, April 18, 2000.
29. Animal Confinement Policy National Task Force. *Preliminary State Policy Survey Results*. <<http://cherokee.agecon.clemson.edu/summary.htm>>, June 1999.
30. Iowa Department of Natural Resources. *Confinement Feeding Operations*. <<http://www.state.ia.us/government/dnr/organiza/epd/wastewtr/feedlot/feedlt.htm>>, Environmental Protection Division, n.d.
31. Keith Brown, Manager, State Permits Branch, Water Division, Arkansas Department of Environmental Quality, electronic mail, May 22, 2000.

## **Appendix A**

# **Individual Permit Requirements Applicable to Swine Facilities--Selected States**

	Colorado <sup>1</sup>	Wyoming <sup>2</sup>	Kansas <sup>3</sup>	Iowa
<b>Number of swine<sup>4</sup> (1999)</b>	910,000	105,000	1,460,000	15,400,000 <sup>5</sup>
<b>Facility size/type</b>	Capacity $\geq$ 800,000 lbs. <sup>6</sup> or designated commercial by local zoning regulations	Facilities with $\geq$ 1,000 AUs <sup>7</sup>	Facilities with $\geq$ 1,000 AUs <sup>8</sup> or any facility w/potential to pollute	<b>Confinement feeding operations</b> with -anaerobic lagoon/earthen manure storage basin (>200,000 lbs. <sup>9</sup> ) -formed manure storage structures ( $\geq$ 625,000 lbs. <sup>10</sup> ) -storage of manure exclusively in dry form ( $\geq$ 1,250,000 lbs. <sup>11</sup> )
				<b>Open feedlots</b> with >2,500 butcher and breeding swine or 750 swine if discharge wastes into state waters <sup>12</sup>
<b>Application to new/existing facilities</b>	New and existing facilities	New and expanded facilities after 2/28/97	New, existing, and expanded facilities	New and expanded facilities

**Notes**

1. Section 25-8-501.1, Colorado Revised Statutes (C.R.S.) and Colorado Department of Public Health and Environment, Water Quality Control Commission. *Regulation #61* (5 CCR 1002-61).
2. Senate Enrolled Act 49, 1997 Wyoming Legislature (WS 35-11-302) and Wyoming Department of Environmental Quality, *Chapter 20, Permitting, Design and Operation Standards for Confined Swine Feeding Operations*, Water Quality Division Rules and Regulations.
3. KSA 1998 Supp. 65-1, 178, *et seq.*, and KAR 28-18a.
4. USDA. December 28, 1999. *Hogs and Pigs*. Washington, D.C. National Agricultural Statistics Service, Agricultural Statistics Board.
5. Iowa Department of Natural Resources. Confinement Feeding Operations. <<http://www.state.ia.us/government/dnr/organiza/epd/wastewtr/feedlot/feedlt.htm>>, Environmental Protection Division, n.d.

6. Equivalent to: 11,500 weaned swine (70 pounds or less); or 3,020 feeder swine (more than 70 pounds, up to finish weight); or 2,000 breeding sows and/or boars.
7. 1,000 animal units (AUs) are equivalent to 2,500 swine. A butcher or breeding pig over 55 pounds counts as 1 swine. Three weaned pigs, each weighing less than 55 pounds, count as 1 swine.
8. 1 AU equals 2.5 swine, each weighing more than 55 pounds, or 10 weaned swine, each weighing 55 pounds or less. Total animal units are calculated by multiplying the number of swine weighing more than 55 pounds by 0.4, and adding this figure to the number of weaned swine weighing 55 pounds or less multiplied by 0.1.
9. 1,333 butcher and breeding swine or 500 sows.
10. 4,167 butcher and breeding swine or 1,563 sows.
11. 8,333 butcher and breeding swine or 3,125 sows.
12. U.S. Environmental Protection Agency (EPA). *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*. <<http://www.epa.gov/owmitnet/afo.htm#facts>>, August 1999.

## **Appendix B**

### **Administrative Rules of Montana (17.30.1341)-- Requirements for General Permits**

17.30.1341 GENERAL PERMITS (1) The department may issue general permits for the following categories of point sources which the board has determined are appropriate for general permitting under the criteria listed in 40 CFR 122.28:

- (a) cofferdams or other construction dewatering discharges;
- (b) groundwater pump test discharges;
- (c) fish farms;
- (d) placer mining operations;
- (e) suction dredge operations using suction intakes no larger than 4" in diameter;
- (f) oil well produced water discharges for beneficial use;
- (g) animal feedlots;
- (h) domestic sewage treatment lagoons;
- (i) sand and gravel mining and processing operations;
- (j) stormwater point sources;
- (k) treated water discharged from petroleum cleanup operations;
- (l) discharges from public water supply systems, as determined under Title 75, chapter 6, MCA;
- (m) discharges to wetlands that do not contain perennial free surface water;
- (n) discharges from road salting operations;
- (o) asphalt plant discharges;
- (p) discharges of hydrostatic testing water;
- (q) discharges of noncontact cooling water;
- (r) swimming pool discharge; and
- (s) septic tank pumper disposal sites.

(2) Although general MPDES permits may be issued for a category of point sources located throughout the state, they may also be restricted to more limited geographical areas.

(3) Prior to issuing a general MPDES permit, the department shall prepare a public notice which includes the equivalent of information listed in ARM 17.30.1372(6) and shall publish the same as follows:

- (a) prior to publication, notice to the US environmental protection agency;
- (b) direct mailing of notice to the water pollution control advisory council and to any persons who may be affected by the proposed general permit;
- (c) publication of notice in a daily newspaper in Helena and in other daily newspapers of general circulation in the state or affected area;
- (d) after publication, a hearing must be held and a 30-day comment period allowed as provided in ARM 17.30.1372 through 17.30.1377 and 17.30.1383.

(4) A person owning or proposing to operate a point source who wishes to operate under a general MPDES permit shall complete a standard

MPDES application form available from the department. The department shall, within 30 days of receiving a completed application, either issue to the applicant an authorization to operate under the general MPDES permit, or shall notify the applicant that the source does not qualify for authorization under a general MPDES permit, citing one or more of the following reasons as the basis for denial:

(a) the specific source applying for authorization appears unable to comply with the following requirements:

(i) effluent standards, effluent limitations, standards of performance for new sources of pollutants, toxic effluent standards and prohibitions, and pretreatment standards;

(ii) water quality standards established pursuant to 75-5-301, MCA;

(iii) prohibition of discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste;

(iv) prohibition of any discharge which the secretary of the army acting through the chief of engineers finds would substantially impair anchorage and navigation;

(v) prohibition of any discharges to which the regional administrator has objected in writing;

(vi) prohibition of any discharge which is in conflict with a plan or amendment thereto approved pursuant to section 208(b) of the act; and

(vii) any additional requirements that the department determines are necessary to carry out the provisions of 75-5-101, MCA, et seq.

(b) the discharge is different in degree or nature from discharges reasonably expected from sources or activities within the category described in the general MPDES permit;

(c) an MPDES permit or authorization for the same operation has previously been denied or revoked;

(d) the discharge sought to be authorized under a general MPDES permit is also included within an application or is subject to review under the Major Facility Siting Act, 75-20-101, et seq., MCA;

(e) the point source will be located in an area of unique ecological or recreational significance. Such determination must be based upon considerations of Montana stream classifications adopted under 75-5-301, MCA, impacts on fishery resources, local conditions at proposed discharge sites, and designations of wilderness areas under 16 USC 1132 or of wild and scenic rivers under 16 USC 1274.

(5) Where authorization to operate under a general MPDES permit is denied, the department shall proceed, unless the application is withdrawn, to process the application as an individual MPDES permit under this subchapter.

(6) Every general MPDES permit must have a fixed term not to exceed 5 years. Except as provided in (10) of this rule, every authorization to operate under a general MPDES permit expires at the same time the general MPDES permit expires.

(7) Where authorization to operate under a general MPDES permit is issued to a point source covered by an individual MPDES permit, the department shall, upon issuance of the authorization to operate under the general MPDES permit, terminate the individual MPDES permit for that point source.

(8) Any person authorized or eligible to operate under a general MPDES permit may at any time apply for an individual MPDES permit according to the procedures in this subchapter. Upon issuance of the individual MPDES permit, the department shall terminate any general MPDES permit authorization held by such person.

(9) The department, on its own initiative or upon the petition of any interested person, may modify, suspend, or revoke in whole or in part a general MPDES permit or an authorization to operate under a general MPDES permit during its term in accordance with the provisions of ARM 17.30.1361 for any cause listed in ARM 17.30.1361 or for any of the following causes:

(a) the approval of a water quality management plan containing requirements applicable to point sources covered in the general MPDES permit;

(b) determination by the department that the discharge from any authorized source is a significant contributor to pollution as determined by the factors set forth in 40 CFR 122.26(c)(2); or (c) a change in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to a source or to a category of sources;

(d) occurrence of one or more of the following circumstances:

(i) violation of any conditions of the permit; or

(ii) obtaining an MPDES permit by misrepresentation or failure to disclose fully all relevant facts;

(iii) a change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge; or

(iv) a failure or refusal by the permittee to comply with the requirements of 75-5-602, MCA.

(10) The department may reissue an authorization to operate under a general MPDES permit provided that the requirements for reissuance of MPDES permits specified in ARM 17.30.1322.

(11) The department shall maintain and make available to the public a register of all sources and activities authorized to operate under each general MPDES permit including the location of such sources and activities, and shall provide copies of such registers upon request.

(12) For purposes of this rule, the board hereby adopts and incorporates by reference (see ARM 17.30.1303 for complete information about all materials incorporated by reference):

(a) 40 CFR 122.28 (July 1, 1991) which sets forth criteria for selecting categories of point sources appropriate for general permitting;

(b) 40 CFR 124.10(d)(1) (July 1, 1991) which sets forth minimum contents of public notices;

(c) 40 CFR 122.26(c)(2) (July 1, 1991) which sets forth criteria for determining when a point source is considered a "significant contributor of pollution";

(d) 16 USC 1132 (wilderness area designations); and

(e) 16 USC 1274 (wild and scenic river designations).

(History: 75-5-201, 75-5-401, MCA; IMP, 75-5-401, MCA; NEW, 1989 MAR p. 2060, Eff. 12/8/89; AMD, 1992 MAR p. 1241, Eff. 6/12/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1999 MAR p. 1661, Eff. 7/23/99.)

## **Appendix C**

### **Financial Assurance Requirements Applicable to Swine Facilities-- Selected States**

	Colorado <sup>1</sup>	Wyoming <sup>2</sup>	Kansas <sup>3</sup>	Idaho <sup>4</sup>
<b>Facility size/type</b>	Capacity ≥ 800,000 lbs. <sup>5</sup> or designated commercial by local zoning regulations.	Facilities with ≥ 1,000 AUs <sup>6</sup>	Facilities with ≥ 3,725 AUs <sup>7</sup>	≥ 2,000 AUs <sup>7</sup>
<b>Application to new/existing facilities</b>	New and existing. Existing facilities required to submit financial assurance plan by 12/31/99.	New and expanded facilities after 2/28/97.	New and existing. Submission of evidence of financial ability required annually. New/expanding facilities must also submit with permit application.	Not addressed in law (rulemaking to be completed).
<b>Mechanisms allowed</b>	Not specified in law. Authorized in rule: irrevocable letter of credit, trust fund, surety bond, insurance, financial test and guarantee, other mechanisms approved by CDPHE.	Not specified in law. Authorized in rule: irrevocable letter of credit, surety bond, federally insured certificate of deposit, government backed security, cash.	Not specified in law. Authorized in rule: trust fund, surety bond, irrevocable letter of credit, insurance, self-insurance.	Surety bond, trust fund, irrevocable letter of credit, insurance, corporate guarantee.
<b>Closure</b>	Required	Required	Required	Required
<b>Postclosure activities</b>	Required	Required	Not required	Not addressed in law
<b>Corrective action</b>	Required	Required	Not required	Required
<b>Other</b>				Counties may require greater financial assurances

**Notes:**

1. Section 25-8-501.1, Colorado Revised Statutes (C.R.S.) and Colorado Department of Public Health and Environment (CDPHE), Water Quality Control Commission. *Regulation #61* (5 CCR 1002-61).

2. Senate Enrolled Act 49, 1997 Wyoming Legislature (WS 35-11-302) and Wyoming Department of Environmental Quality, *Chapter 20, Permitting, Design and Operation Standards for Confined Swine Feeding Operations*, Water Quality Division Rules and Regulations.

3. KSA 1998 Supp. 65-1, 178, *et seq.*, and KAR 28-18a.
4. 2000 Idaho Legislature. Senate Bill No. 1478 and House Bill No. 696 and Idaho Department of Health and Welfare, Division of Environmental Quality. *Rules Regulating Swine and Poultry Facilities* (IDAPA 16.01.09).
5. Equivalent to: 11,500 weaned swine (70 pounds or less); or 3,020 feeder swine (more than 70 pounds, up to finish weight); or 2,000 breeding sows and/or boars.
6. 1,000 animal units (AUs) are equivalent to 2,500 swine. A butcher or breeding pig over 55 pounds counts as 1 swine. Three weaned pigs, each weighing less than 55 pounds, count as 1 swine.
7. 1 AU equals 2.5 swine, each weighing more than 55 pounds, or 10 weaned swine, each weighing 55 pounds or less. Total animal units are calculated by multiplying the number of swine weighing more than 55 pounds by 0.4, and adding this figure to the number of weaned swine weighing 55 pounds or less multiplied by 0.1.

## **Appendix D**

### **Local Government Authority to Address Swine Facilities**



# ENVIRONMENTAL QUALITY COUNCIL

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Todd Everts

## MEMORANDUM

**To:** Water Policy Subcommittee

**From:** Mary Vandebosch  
Environmental Quality Council Staff

**Date:** November 20, 2002

**Subject:** Local Government Authority to Address Swine Facilities

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At the state level, the Department of Environmental Quality (DEQ) regulates those swine facilities that are concentrated animal feeding operations (CAFOs). In addition, the DEQ has the authority to regulate air emissions, including hydrogen sulfide and odor. Local governments also have some authority. Please note that this memorandum is not a legal opinion.

This memorandum includes information relevant to local governments with general powers as well as self-governing powers. Local governments with self-governing powers may have more options than those identified below. However, local governments with self-governing powers may not adopt regulations that are prohibited by the state or inconsistent with state law. Local regulations may not be less stringent than state law or rules.

### **Right-to-Farm Legislation**

Montana does have "right-to-farm" laws (76-2-901 through 76-2-903, MCA). These laws limit, but do not necessarily preclude nuisance actions or zoning ordinances that affect agricultural activities. The term "agricultural activity" is defined in 76-2-902, MCA. In general, Montana laws protect the *normal operation* of existing agricultural facilities.

Montana's right-to-farm laws have not been interpreted by the Montana Supreme Court and there are areas of uncertainty which are discussed below. However, it is important to recognize that right-to-farm laws do not completely eliminate a local government's ability to exercise its police powers to protect public health, safety, and welfare.

## Nuisance

### *Overview of the Law*

A nuisance may be addressed under criminal or civil law. A private nuisance is defined in 27-30-101, MCA. In general, a private nuisance is a condition that interferes with the use or enjoyment of another person's property. A public nuisance is defined in 27-30-102 and 45-8-111, MCA. In general, a public nuisance affects an entire neighborhood or community or a considerable number of persons. If the nuisance is a public nuisance, then an action may be brought under criminal law by either an individual or the county attorney.

Local boards of health have the authority to abate nuisances affecting health and safety and to bring an action to restrain the violation of public health laws or rules (50-2-116, MCA).

### *Limitations*

Montana law limits nuisance actions against agricultural operations. Specifically,

- A nuisance ordinance may not prohibit or force the termination of an existing agricultural activity outside of the boundaries of an incorporated city or town. This prohibition also covers agricultural activities that were outside the boundaries of an incorporated city or town and were incorporated by annexation. (76-2-903, MCA).
- If an agricultural operation was in place first, it does not become a nuisance as a result of *normal operation* when new residences or businesses move in next door.
- The plaintiff will have to prove that a swine operation is a nuisance.<sup>1</sup>

In addition to the specific language noted above, Montana's law also has general language stating the Legislature's intent to protect agricultural activities from governmental zoning and nuisance ordinances. Does this mean *all* agricultural activities regardless of whether they are new or existing and regardless of any harm they might cause? The answer is probably no, but this is not absolutely certain. We cannot predict what decision a court will reach if asked to rule on this question. There are several reasons behind this conclusion.

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<sup>1</sup>In McCullum v. Kolokotronis (131 Mont. 438, 311 P.2d 780 (1957)), the Montana Supreme Court, citing 66 C.J.S Nuisances, section 75, subd. 5 and Vaaszil v. Molnar (133 N.J. Eq. 577, 3 A. (2d) 743), concluded that a chicken or poultry business is not a nuisance *per se*, but may become a nuisance *per accidens*. This means that the simple existence of a chicken or poultry business does not constitute a nuisance; however, such a business may be proven to be a nuisance.

- Although the Montana Legislature has indicated its interest in protecting agricultural activities, Montanans have other rights. All of these rights need to be considered. For example, Montanans have constitutional private property rights and a constitutional right to a clean and healthful environment.
- Montana's nuisance laws specifically refer to the *normal* operation of an agricultural facility, leaving open the possibility that certain operations might not be considered "normal."
- In other states, defenses against nuisance claims that are based on right-to-farm laws are not always successful. Sometimes they are successful and sometimes they are not. (See "For More Information" below.)

### *Other Options*

Citizens affected by swine facilities may be able to bring an action against the facility under laws governing trespass, negligence and liability.

### **Planning and Zoning**

Counties are authorized to develop and adopt growth policies and zoning regulations. There are some limitations on the use of these tools.

### *Growth Policies*

Counties are authorized to adopt growth policies (master plans or comprehensive plans) under Title 76, Chapter 1, MCA. A county must adopt a growth policy for the entire jurisdictional area before adopting county-initiated zoning regulations.

Growth policies must identify existing and projected land uses. A growth policy with maps can help to show current and potential landowners where land use is primarily residential or agricultural. This may be a useful tool for identifying the most appropriate place to site a facility.

A growth policy must include community goals and objectives. Some Montana counties have included statements related to promoting or preserving agriculture in their growth policies. Some counties have encountered controversy when interpreting the meaning of these goals following the adoption of the growth policy. A goal of "promoting agriculture" may mean attracting hog farms to one reader or a specific measure to help wheat farmers to another reader. Specific statements that capture the wishes of the community will help to avoid this situation.

Please note that state law prohibits use of a growth policy to prevent the complete use of agricultural resources by a property owner (76-1-113 (1), MCA).

## County (Part 2) Zoning

Zoning regulations may affect future land uses, but not existing uses. While zoning can be a way to separate incompatible land uses, Montana law limits the use of zoning ordinances that affect agriculture. However, local governments may not be completely prohibited from adopting zoning regulations that affect swine facilities or other animal feeding operations. Limitations on zoning ordinances include the following:

- A local government may not adopt a zoning ordinance that prohibits existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town. This prohibition also covers agricultural activities that were outside the boundaries of an incorporated city or town and were incorporated by annexation. (76-2-903, MCA).
- The law that authorizes county-initiated zoning says that county zoning regulations "may not prevent the complete use, development, or recovery of any mineral, forest or agricultural resources by the owner" (76-2-209, MCA).

Although the Legislature's intention that zoning regulations not prevent the *complete use* of agricultural operations is clear, it is not clear where the line should be drawn.<sup>2</sup> Some local governments in other states have adopted zoning regulations that do not prohibit swine facilities, but establish requirements for the location of certain structures (e.g., manure storage facilities must be located a certain distance from residences on adjacent properties). Any jurisdiction that intends to regulate swine facilities in its zoning regulations should consult the county attorney early in the process. The Montana Department of Commerce has useful publications (See "For More Information" below). Keep in mind that:

- There must be a rational basis for zoning regulations that is substantially related to the county's authority to promote public health, safety, morals, and general welfare.
- Livestock operations that produce the same effects should be regulated the same. If the impact from a poultry operation is the same as a hog farm, the same regulation should apply to both types of operations.

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<sup>2</sup>The Montana Supreme Court has only ruled on this section of law once, in a case involving a gravel operation. (Missoula County v. Am. Asphalt, Inc. (216 Mont. 423, 701 P.2d 990 (1985))). The Court declined to announce a broad interpretation of the statutes. The Court noted that a "reasonable construction of these broad statutes depends, to an extent, on the circumstances in which they are applied."

### *Citizen-Petition (Part 1) Zoning*

The law that authorizes citizen-petition (Part 1) zoning in counties prohibits the citizen-petition zoning district from regulating lands used for grazing, horticulture, agriculture, or the growing of timber (76-2-109, MCA). It should be noted that the citizen-petition (Part 1) zoning law is more restrictive than the county (Part 2) zoning law; it prohibits any regulation of land used for agriculture under this law.

### **Air Quality Permitting**

Counties may establish and administer air pollution control programs upon approval by the Board of Environmental Review (75-2-301, MCA). The DEQ does not now require air quality permits for swine facilities or CAFOs. State law provides the authority to regulate odor and hydrogen sulfide. Counties that administer air pollution control programs may establish more stringent requirements than state law or rules under certain circumstances.

### **Local Water Quality Districts**

County commissioners may establish local water quality districts, which are districts established to protect, preserve and improve the quality of surface and ground water within the district (Title 7, Chapter 13, Part 45, MCA). The commissioners may adopt local ordinances to accomplish these goals.

### **Cruelty to Animals**

Cruelty to animals is addressed in section 45-8-211, MCA. Please note that the use of commonly accepted agricultural and livestock practices is not prohibited under this law.

### **For More Information**

#### *Regulation of Animal Feeding Operations*

- # *Water Policy 2000*. Report from the EQC includes background information and analysis of selected issues surrounding regulation of swine facilities.

Available on the EQC web site under committee information: Contact the EQC office at (406) 444-3742.

- # Regulation of CAFOs under the Montana Pollutant Discharge Elimination System.

Information available on the DEQ web site: <http://www.deq.mt.gov/wqinfo/5-3-1-6.htm> or contact the DEQ Water Protection Bureau at (406) 444-3080.

- # Air quality regulations. Contact the DEQ Air and Waste Management Bureau at 444-3490.

### *Planning and Zoning*

- # The Department of Commerce has several useful publications that provide information about development of growth policies and zoning regulations. Contact the Community Technical Assistance Program at 444-3757.
- # Jim Schwab. 1998. *Planning and Zoning for Concentrated Animal Feeding Operations*. Planning Advisory Service Report Number 482. Chicago, Illinois: American Planning Association.
- # S. Mark White. 2000. Regulation of Concentrated Animal Feeding Operations: The Legal Context. *Land Use Law and Zoning Digest*. February 2000: 3-10.

### *Case Law*

- # American Farmland Trust Information Library Case Study Summaries. Available on the web: <http://www.farmlandinfo.org/fic/laws/state/summs/summcat.html> (see Right-to-Farm/Nuisance).
- # Bormann v. Board of Supervisors in and For Kossuth County (584 N.W.2d 309 (Iowa 1998), cert denied, 119 s Ct. 1096 (1999)). In this case, the Iowa Supreme Court ruled that portion of an Iowa right-to-farm law that provided immunity against nuisance suits to be unconstitutional and invalid. The Court's decision was based on the Fifth Amendment to the U.S. Constitution as well as the Iowa constitution. The U.S. Supreme Court declined to hear the case on appeal.