

HOUSE BILL NO. 467  
INTRODUCED BY D. BARRETT

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT NECESSITY MUST BE SHOWN BEFORE CHANGES TO THE EXISTING WATER QUALITY OF CERTAIN WATERS CAN BE PROHIBITED; REQUIRING THE BOARD OF ENVIRONMENTAL REVIEW TO MAKE A WRITTEN FINDING WHEN ACCEPTING A PETITION TO CLASSIFY WATERS AS OUTSTANDING RESOURCE WATERS; PROVIDING CRITERIA FOR THE BOARD OF ENVIRONMENTAL REVIEW'S WRITTEN FINDING; PROVIDING A HEARING PROCESS WHEN THE BOARD OF ENVIRONMENTAL REVIEW RECEIVES A PETITION FOR RULEMAKING TO CLASSIFY A WATER AS AN OUTSTANDING RESOURCE WATER; PROVIDING THAT THE COSTS OF THE ENVIRONMENTAL IMPACT STATEMENT MUST BE PAID BY THE PETITIONER; AMENDING SECTIONS 75-5-315 AND 75-5-316, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND RETROACTIVE APPLICABILITY DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 75-5-315, MCA, is amended to read:

**"75-5-315. Outstanding resource waters -- statement of purpose.** (1) The legislature, understanding the requirements of applicable federal law and the uniqueness of Montana's water resource, recognizes that certain state waters are of such environmental, ecological, or economic value that the state should, upon a showing of necessity, prohibit, to the greatest extent practicable, changes to the existing water quality of those waters. Outstanding resource waters must be afforded the greatest protection feasible under state law, after thorough examination.

(2) The purpose of 75-5-316 and this section is to provide this protection, when necessary, and to provide guidance to the board in establishing rules to accomplish that level of protection."

**Section 2.** Section 75-5-316, MCA, is amended to read:

**"75-5-316. Outstanding resource water classification -- rules -- criteria -- limitations -- procedure -- definition.** (1) As provided under the provisions of 75-5-301 and this section, the board may adopt rules regarding the classification of waters as outstanding resource waters.

(2) The department may not:

(a) grant an authorization to degrade under 75-5-303 in outstanding resource waters; or

(b) allow a new or increased point source discharge that would result in a permanent change in the water quality of an outstanding resource water.

(3) (a) A person may petition the board for rulemaking to classify state waters as outstanding resource waters. The board shall initially review a petition against the criteria identified in subsection (3)(c) to determine whether the petition contains sufficient credible information for the board to accept the petition.

(b) The board may reject a petition without further review if it determines that the petition does not contain the sufficient credible information required by subsection (3)(a). If the board rejects a petition under this subsection (3)(b), it shall specify in writing the reasons for the rejection and the petition's deficiencies.

(c) The board may not adopt a rule classifying state waters as outstanding resource waters until it accepts a petition and ~~finds~~ makes a written finding containing the provisions enumerated in subsection (3)(d) that, based on a preponderance of the evidence:

(i) the waters identified in the petition constitute an outstanding resource based on the criteria provided in subsection (4);

(ii) the increased protection under the classification is necessary to protect the outstanding resource identified under subsection (3)(a) because of a finding that the outstanding resource is at risk of having one or more of the criteria provided in subsection (4) compromised as a result of point source discharges; and

(iii) classification as an outstanding resource water is necessary because of a finding that there is no other effective process available that will achieve the necessary protection.

(d) The written finding provided for in subsection (3)(c) must:

(i) identify the criteria provided in subsection (4) that the board believes serve as justification for the determination that the water is an outstanding resource;

(ii) specifically identify the criteria that are at risk and explain why those criteria are at risk; and

(iii) specifically explain why other available processes, including the requirements of 75-5-303, will not achieve the necessary protection.

(4) The board shall consider the following criteria in determining whether certain state waters are outstanding resource waters. However, the board may determine that compliance with one or more of these criteria is insufficient to warrant classification of the water as an outstanding resource water. The board shall consider:

(a) whether the waters have been designated as wild and scenic;

(b) the presence of endangered or threatened species in the waters;

(c) the presence of an outstanding recreational fishery in the waters;

(d) whether the waters provide the only source of suitable water for a municipality or industry;

(e) whether the waters provide the only source of suitable water for domestic water supply; and

(f) other factors that indicate outstanding environmental or economic values not specifically mentioned in this subsection (4).

(5) Before accepting a petition, the board shall:

(a) publish a notice and brief description of the petition in a daily newspaper of general circulation in the area affected and make copies of the proposal available to the public. The cost of publication must be paid by the petitioner.

(b) provide for a 30-day written public comment period regarding whether the petition contains sufficient credible information, as provided in subsection (3)(b), prior to the hearing required in subsection (5)(c);

(c) hold a public hearing regarding the petition and its contents and allow further written and oral testimony at the hearing;

(d) issue a proposed decision, including:

(i) the written finding provided for in subsection (3)(c); and

(ii) the board's acceptance or rejection of the petition;

(e) provide for a 30-day public comment period regarding the board's proposed decision; and

(f) issue a final decision on acceptance or rejection of the petition, which must include a response to comments that were received by the board, and make copies of this decision available to the public.

(5)(6) (a) After acceptance of a petition, the board shall ~~require the preparation of~~ direct the department to prepare an environmental impact statement, as provided under Title 75, chapter 1, part 2, and this section when classification as an outstanding resource water may cause significant adverse impacts to the environment, including significant adverse impacts to social or economic values.

(b) (i) The petitioner is responsible for all of the costs associated with gathering and compiling data and information, and completing the environmental impact statement.

(ii) Before the department may initiate work on the environmental impact statement, the petitioner shall pay the estimated cost of completing the environmental impact statement, as determined by the department.

(iii) Upon completion of the environmental impact statement, the petitioner shall pay the department any costs that exceeded the estimated cost. If the cost of the environmental impact statement was less than the estimated cost paid by the petitioner, the department shall reimburse the difference to the petitioner.

(iv) The board may not grant or deny a petition until full payment for the environmental impact statement

has been received by the department.

~~(6)(7)~~ The board shall consult with other relevant state agencies and county governments when reviewing outstanding resource water classification petitions.

~~(7)(8)~~ (a) ~~In accordance with 2-4-315, the~~ After completion of an environmental impact statement and consultation with state agencies and local governments, the board may deny an accepted outstanding resource water classification petition if it finds that:

(i) the requirements of subsection (3)(c) have not been met; or

(ii) based on information available to the board from the environmental impact statement or otherwise, approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts.

(b) If the board denies the petition, it shall identify its reasons for petition denial.

~~(c) If the board grants the petition, the board shall initiate rulemaking to classify the waters as outstanding resource waters.~~

~~(8)(9)~~ A rule classifying state waters as outstanding resource waters under this section may be adopted but is not effective until approved by the legislature.

~~(9)(10)~~ The board may not postpone or deny an application for an authorization to degrade state waters under 75-5-303 based on pending:

(a) board action on an outstanding resource water classification petition regarding those waters; or

(b) legislative approval of board action designating those waters as outstanding resource waters.

~~(11) As used in this section, "petitioner" means an individual, corporation, partnership, firm, association, or other private or public entity that petitions the board to adopt rules to classify waters as outstanding resource waters."~~

**NEW SECTION. Section 3. Severability.** 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.

**NEW SECTION. Section 4. Effective date.** [This act] is effective on passage and approval.

**NEW SECTION. Section 5. Retroactive applicability.** (1) Except as provided in subsection (2), [this act] applies retroactively, within the meaning of 1-2-109, to any petition filed with the board of environmental

review after December 31, 2002.

(2) [Section 2(6)(b)] applies retroactively, within the meaning of 1-2-109, to any petition filed with the board of environmental review after June 30, 2001.

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