

Appendix D

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The Petroleum Tank Release Fund Subcommittee requested a list of legal constraints under which the DEQ is operating with respect to underground storage tank site remediation and closure. The constitutional and statutory legal constraints are summarized below.

Montana Constitution

Montana's constitutional environmental provisions provide a backdrop under which the DEQ's underground storage tank site remediation and closure laws must adhere to. Those relevant constitutional provisions include:

Preamble: We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

Article II, Section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Article IX, Section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The Montana Supreme Court has defined the fundamental right to a clean and healthful environment that can be paraphrased as follows:

The constitutional right to a clean and healthful environment includes being free from unreasonable degradation (significant impact on the environment)...and this right is anticipatory and preventative in nature. This right must be read and interpreted in conjunction with Article IX, Section I; Article II, Section 3; and the preamble of the Montana Constitution.¹

¹ MEIC v. DEQ, 296 Mont. 207 (1999)

It is important to note that this right does not mean there cannot be any adverse change to the environment.

The Montana Supreme Court has also held that the environmental provisions of the Constitution apply not only to state actions but also private actions and therefore private parties.²

Each of the environmental regulatory statutes set out below, is specifically linked to the Montana environmental Constitutional provisions by the following language:

The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted this chapter. It is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.³

Montana Statutory Provisions

Underground Storage Tank Laws: The provisions of Title 75, chapter 11, provide for the installer licencing and permitting, tank clean-up and reimbursement, and tank leak reporting, inspections, remediation, and enforcement.

Water Quality Laws : The provisions of Title 75, chapter 5, provide regulatory guidance regarding prevention, abatement and control of the pollution of Montana waters.⁴ Water quality laws govern only certain state waters. Specifically regulated are surface or underground bodies of water, irrigation systems, or drainage systems.⁵

Outside this regulatory realm are ponds or lagoons used solely for treating, transporting, or impounding pollutants; or irrigation or land application disposal waters used up within the system and not returned to state waters.⁶ Montana water quality laws regulate every entity in the state, including individuals, businesses, organizations, and units of government.

Although any water use may cause an alteration, water quality laws regulate only certain uses. Regulated uses are those entailing potential pollution (either point source pollution or nonpoint

² Cape- France Enterprises v. the Estate of Lola H. Peed, 2001 MT 139* (2001)

³See 75-5-102(1), 75-11-202 (1), 75-11-301 (1), 75-11-502(1), MCA

⁴Great liberty has been taken here in terms of lifting much of the explanation of the Water Quality Laws under this section literally verbatim from the EQC Water Quality Handbook (2008).

⁵75-5-103(29)(a), MCA

⁶75-5-103(29)(b), MCA

source pollution) to state waters: that is, activities that threaten water quality, human or wildlife health, or established beneficial uses.⁷

Under the authority of Montana’s water quality laws in conjunction with the Federal Clean Water Act, state waters are classified, water quality standards are developed, and Montana’s nondegradation laws are implemented. The Board of Environmental Review classifies all state surface water and ground water according to the beneficial uses supported by each water body/segment.⁸ Given that the water quality issues surrounding underground storage tanks primarily involve ground water, an explanation of groundwater classification is necessary here.

Ground water classification involves four classes based on natural specific conductance: I, II, III, and IV.⁹

CLASS	BENEFICIAL USE	SPECIFIC CONDUCTANCE (microSiemens/cm at 25° C)
I	• Suitable for public and private water supplies, food processing, irrigation, etc., with little or no treatment required.	less than 1,000
II	• May be used for public and private water supplies where better quality water is not available. The primary use is for irrigation, stock water, and industrial purposes.	1,000-2,500
III	• Used primarily for stock water and industrial purposes.	2,500-15,000
IV	• Used primarily for industrial purposes.	greater than 15,000

The Board of Environmental Review is obligated to review classifications at least every 3 years and to revise them as needed.¹⁰ Water classifications cannot be lowered unless the Board finds an original misclassification occurred.¹¹

⁷75-5-103(2), (24), and (25) and 80-15-102(11), MCA

⁸75-5-301(1), MCA

⁹ARM 17.30.1005 and 17.30.1006

¹⁰75-5-301(3), MCA

¹¹75-5-302, MCA

Water quality standards specifying the maximum levels of alteration during use of state waters, are developed and adopted by the Board of Environmental Review. Water quality standard may either be numeric or narrative. There are exceptions with respect to water quality standards allowed under law that include temporary standards, short term authorizations, and mixing zones.

Of special interest here are short term authorizations that specifically to allow emergency remediation activities that have been approved, authorized, or required by the DEQ. In addition, Montana Water Quality Laws allow ground water mixing zones. Board of Environmental Review rules require these areas to have the smallest practicable size, a minimum effect on established beneficial uses, and definable boundaries.¹²

Montana contains an abundance of clean water. To protect these waters, the state adopted the nondegradation policy that applies to all new or increased discharges after April 1993. Under this policy, dischargers of pollutants are required to apply for an authorization to degrade and undergo a nondegradation review to evaluate the nature of the discharge in relation to the quality of the receiving waters.¹³ Overall, this policy outlines three levels of water protection, stipulating what degradation, if any, is allowable in each level.

¹²75-5-301(4), MCA

¹³75-5-303, MCA and Title 17, chapter 30, subchapter 7, ARM