



AMERICAN FISHERIES SOCIETY MONTANA CHAPTER

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September 12, 2007

Richard Opper
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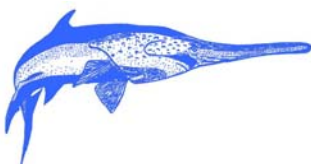
Dear Mr. Opper,

The Montana Chapter of the American Fisheries Society (MCAFS) is disappointed that the Yellowstone River was polluted by a house that fell into the river in Treasure County. Perhaps most troubling was that the potential for the house to fall in was identified early, lengthy correspondence between the responsible agencies ensued, no action was taken, and ultimately a house fell into the river. The MCAFS, an organization of over 200 professional fisheries scientists and students from multiple agencies, universities, and the private sector across Montana, promotes the conservation, development, and wise utilization of Montana's fisheries. The circumstances and process surrounding the house that fell into the Yellowstone River concern our membership and we hope by commenting on this problem future situations could be avoided.

The house falling into the Yellowstone was an unfortunate event, and one that could have been easily avoided if there was a better protocol for identifying legal responsibility and ensuring agency action in such situations. Although this particular situation presented a unique challenge because of the absentee or unclear ownership of the property in question, we hope in the future any similar situation could be dealt with in a more timely and effective manner. The intent of this letter is not to accuse individuals of fault but to draw attention to a breakdown in process and to prevent similar occurrences of pollution in the future.

To help understand how this situation occurred, the following is a timeline documenting the correspondence and process leading up the house falling in the river:

7 May 2006: The Montana Fish, Wildlife & Parks (FWP) Region 7 Fisheries manager notified Montana Department of Environmental Quality (DEQ) Complaint Management Section Chief that a house was going to fall into the Yellowstone River and provided pictures of the structure on the bank.



11 May 2006: DEQ requested a complaint form and information identifying ownership information and location. FWP supplied a complaint form and information identifying ownership information and location. Investigation by DEQ indicated that the identified landowner was currently living in Pennsylvania with a relative and may not have a permanent residence or the resources to remove the house. It later became unclear whether he was the actual property owner.

6 June 2006: DEQ sent a certified letter to the landowner that identified that the house threatening to fall into the river constituted a violation of section 75-5-605(1)(a), Montana Code Annotated, of the Water Quality Act and requested a written letter within 15 days to describe what steps would be taken to prevent the house from falling into the river.

31 July 2006: FWP contacted DEQ and noted that the 15 day limit had passed, questioned whether any progress had occurred, and sent pictures of additional bank erosion underneath the house. DEQ responded that the landowner had not accepted the certified letter and that the next step would be to start the formal enforcement process unless FWP or the Army Corps of Engineers (ACOE) had the means to remedy the situation. FWP responded that they agreed the formal enforcement process was the preferred alternative at this time.

5 September 2006: DEQ notified FWP that their legal department was not comfortable pursuing this matter in court and suggested that either the Conservation District or ACOE pursue this matter or one of the concerned agencies (FWP, ACOE) file a nuisance lawsuit in accordance with 27-30-101 et. seq., MCA since DEQ did not currently have the available resources.

23 October 2006: The house fell over the bank and began to deposit building material into the river.

20 June 2007: The house fell completely into the river and washed away, polluting the river with building materials for miles downstream. No preventative or enforcement action was taken since the 5 September 2006 correspondence between DEQ and FWP.

MCAFS membership is disappointed that no action was taken to prevent the house from falling in the river and feels that the following three statutes (Mont Code Ann. 75-5-605 (1) (a), 75-5-617, and 75-5-636) create a clear legal mandate to prevent such occurrences:

75-5-636 Investigation of complaints by other parties.

*A person, association, corporation, or agency of the state or federal government may notify the department of an alleged violation of this chapter. Based upon information submitted by the person, association, corporation, or agency, the department **shall** conduct an investigation to determine the validity of the complaint. If a violation is established by the department's investigation, the department **shall** initiate an appropriate enforcement response as described in [75-5-617](#). If the investigation proves the protest to have been without reasonable cause, the department may seek recovery of investigative costs from the person who made the notification.*

75-5-605 Prohibited activity -- exemption.



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(1) It is unlawful to:

(a) cause pollution, as defined in [75-5-103](#), of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters. Any placement of materials that is authorized by a permit issued by any state or federal agency is not a placement of wastes within the prohibition of this subsection if the agency's permitting authority includes provisions for review of the placement of materials to ensure that it will not cause pollution of state waters.

75-5-617 Enforcement response.

(1) Whenever, on the basis of information available to the department, the department finds that a person is in violation of this chapter, a rule adopted under this chapter, or a condition or limitation in a permit, authorization, or order issued under this chapter, the department shall initiate an enforcement response, which may include any of the following actions:

(a) issuance of a letter notifying the person of the violation and requiring compliance;

(b) issuance of an order requiring the person to correct the violation pursuant to [75-5-601](#), [75-5-611](#), [75-5-613](#), and [75-5-621](#);

(c) bringing a judicial action as authorized by [75-5-614](#) and [75-5-622](#); or

(d) seeking administrative or judicial penalties as provided under [75-5-611](#), [75-5-615](#), and [75-5-631](#) through [75-5-633](#).

(2) Unless an alleged violation represents an imminent threat to human health, safety, or welfare or to the environment, the department **shall** first issue a letter notifying the person of the violation and requiring compliance. If the person fails to respond to the conditions in the department's letter, then the department **shall** take further action as provided in subsection (1).

(3) The provisions of this chapter do not limit the authority of the department to bring a judicial action, which may include the assessment of penalties, prior to initiating any administrative action authorized by this chapter.

We feel the following two points from the above statutes identify a clear legal responsibility and agency process to pursue the landowner and initiate an enforcement response to prevent incidents such as this from occurring:

- 1) 75-5-605(1) (2) establishes that if there has been a violation of the chapter, 75-5-636 creates a clear legal duty for DEQ to do an investigation **and initiate an enforcement response**. Note the word shall.
- 2) While an "enforcement response" may be the letter that DEQ sent, because the certified letter was not picked-up by the owner, 75-5-617(2) required DEQ to take the next actions of issuance of an order and bringing a judicial action, which we feel did not occur as described in the above timeline on 5 September 2006. Additionally, the violation eventually "represented an imminent threat to human health, safety, or welfare or to the environment" thereby requiring further action. Thus, there has probably been a violation of clear legal agency duty in this situation. Note the word shall.


DEQ surely has an interest in preventing houses and other waste materials from polluting state waters. If existing enforcement options are unlikely to prevent pollution of state waters when



“imminent threat to human health, safety, or welfare or to the environment” requires immediate action, we feel that creation of an emergency fund or some other mechanism to address these situations is needed. MCAFS will support legislation, if necessary, to create an emergency action fund or other mechanism to better enable DEQ to take immediate action to prevent similar instances of pollution from occurring in the future.

Ultimately, MCAFS is disappointed that this pollution of Montana waters occurred despite the early identification of the threat and lengthy correspondence between the responsible agencies. However, we recognize that absentee or unclear property ownership may have been partly responsible for the process breaking down. Nevertheless, we maintain a very clear legal responsibility of agency representatives still exists in this situation and trust that the above statutes will help clarify these responsibilities and prevent similar occurrences in the future.

Sincerely,



David Schmetterling, President
Montana Chapter of the American Fisheries Society

cc: Brian Schweitzer, Governor, State of Montana
Chris Hunter, Fisheries Division Administrator, Montana Fish, Wildlife & Parks



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