

# MEMORANDUM

April 13, 2022

TO: Interested parties at the Montana DNRC Conservation Districts Bureau and Montana DNRC Forestry Division

FROM: Caitlin Overland, legal counsel for MT DNRC CD Bureau  
Mark Phares, legal counsel for MT DNRC Forestry Division

RE: Jurisdictional determinations under the Natural Streambed and Land Preservation Act of 1975 (Mont. Code Ann. 75-7-101, et seq) and the Streamside Management Zone (Mont. Code Ann. 77-5-301, et seq).

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This Memorandum seeks to clarify the jurisdiction and responsibilities of the DNRC Forestry Division and Conservation Districts statewide pertaining to streams, streambanks and adjacent lands. It is impossible to cover all possible scenarios and further questions should be directed to the parties' respective legal counsel.

## **Policy**

The Natural Streambed and Land Preservation Act of 1975, known as the "310 Law" contains the following policy statement:

It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved.

Sec. 76-7-102, MCA.

In comparison, the purpose of the Streamside Management Zone is referenced to be (in part):

(5) The purposes of this part are:

- (a) to protect the legitimate public interest in the quality and quantity of forest waters;
- (b) to provide for standards, oversight, rehabilitation, and penalties to ensure that forest practices are conducted in a manner that conserves the integrity of Montana's streamside zones;
- (c) to provide guidelines for the management of wildlife habitat in streamside zones; and
- (d) to allow operators necessary flexibility to use practices appropriate to site-specific conditions in the streamside management zone.

Sec. 77-5-301, M.C.A.

Notably, both pieces of legislation highlight the intention to protect the waterways in conjunction with regulation of streamside activity. However, there is one notable difference: the SMZ law applies to forest waters and is directly associated with forest practices as outlined in the SMZ law. *See* Mont. Code Ann. § 77-5-302(3).

### **Jurisdiction**

Conservation districts exercise permitting authority for projects which occur on natural, perennial flowing streams. Both the definition of “project” and the definition of “stream” factor into the jurisdictional determinations:

“Project” means a physical alteration or modification that results in a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks

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"Stream" means any natural, perennial-flowing stream or river, its bed, and its immediate banks except a stream or river that has been designated by district rule as not having significant aquatic and riparian attributes in need of protection or preservation under 75-7-102.

Sec. 75-7-103, M.C.A.

The “immediate banks” means “the area above the mean high water mark and directly adjacent to the stream which when disturbed will physically alter or modify the state of a stream in contravention of 75-7-102, MCA.” A.R.M. 36.2.402. The definition of project does not state the activity need be immediately in or on a perennially flowing stream, only that such activity impacts a stream. Stated another way, if the

conservation district determines an off-stream project may impact or disturb a stream it may be subject to permitting requirements.

The Streamside Management Zone is defined as:

Streamside management zone" or "zone" means a stream, lake, or other body of water and an adjacent area of varying width where management practices that might affect wildlife habitat or water quality, fish, or other aquatic resources need to be modified. The streamside management zone encompasses a strip at least 50 feet wide on each side of a stream, lake, or other body of water, measured from the ordinary high-water mark, and extends beyond the high-water mark to include wetlands and areas that provide additional protection in zones with steep slopes or erosive soils.

Sec. 77-5-302(8), M.C.A.

The owner (or operator) undertaking forest practices is responsible for complying with the provisions and rules within the Streamside Management Zone. § 77-5-305, M.C.A. If the owner/operator does not comply with said rules and regulations, they may be subject to civil penalty levied by the Department of Natural Resources and Conservation and be required to rehabilitate the site in question.

Based on these statutory and rule definitions there are instances in which a party undertaking a forest practice near a stream needs to comply with *both* the 310 permit requirements and that of the SMZ. The 310 law describes jurisdiction of the area above the mean high water mark and “directly adjacent to the stream” when such activity causes a disturbance on the stream. The SMZ law provides a slightly more concrete jurisdictional definition by describing “50 feet wide”<sup>1</sup> but also includes the catch-all for jurisdiction to extend beyond the high-water mark “to provide additional protection” in certain areas.

### **Regulation of activity**

The requirements imposed upon the person undertaking the activity or forest practice differ between the 310 law and the SMZ. The 310 law requires the person undertaking the project receive a

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<sup>1</sup> The SMZ is extended beyond 50 feet when there is a wetland adjacent to the stream, lake or other body of water. In such instances, the SMZ is extended to include the wetland. *See* ARM 36.11.302(2)(a).

permit from the local conservation district **prior to** engaging in any activity. § 75-7-112(8), M.C.A. By comparison, the SMZ law requires an owner/operator comply with the adopted regulations but does not require a preemptive permit application process. § 77-5-305, M.C.A. In this way, owner/operators who commence forest practices under the SMZ law may be in violation of the 310 law if proceeding without obtaining a 310 permit first. Further, an activity which complies with the *Standards for Forest Practices in Streamside Management Zones* (§ 77-5-303, M.C.A.) may not be permissible under the 310 law and rules of the local conservation district. Under both laws it is incumbent upon the person who desires to undertake a forest practice follow the requirements and rules of both entities.

If the owner/operator undertaking the forest practice violates both the 310 law and the SMZ regulations, both the local conservation district and the DNRC have the authority to issue penalties and require remedial action. §§ 75-7-123, and 77-5-305, M.C.A. While the authorities exist independently of each other, collaboration between the conservation district and the DNRC to remediate the project is preferred and best practice. Both legal entities must follow their policy mandates to protect Montana's waterways and cooperation best achieves those results.

## **Conclusion**

Local conservation districts and the DNRC have overlapping jurisdiction when forest practices occur near natural, perennial flowing streams. Given the similar policy objectives of the SMZ and 310 law, both entities must work together in regulation and protection of the natural resource.