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Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 9 day of November 2016  
at 1:33 o'clock P.m.  
By: Hillary Howe

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

**IN THE MATTER OF:  
TERMINATION BY DEQ OF THE  
APPLICATION BY PAYNE LOGGING,  
INC. REQUESTING TO MOVE  
BOUNDARIES OF THE PAYNE LOGGING  
FACILITY IN LIBBY, LINCOLN COUNTY,  
MONTANA.**

**Case No. BER 2015-08 JV**

**DEQ'S RESPONSE BRIEF IN  
OPPOSITION TO PAYNE LOGGING'S  
LIST OF EXCEPTIONS TO THE  
HEARING EXAMINER'S PROPOSAL  
FOR DECISION**

On October 11, 2016, Payne Logging (Payne) filed its List of Exceptions to Hearing Examiner's Proposal for Decision (Exceptions). Pursuant to a stipulated briefing scheduled between the parties and the Hearing Examiner (Examiner), the Department of Environmental Quality (DEQ) hereby files the following Response in opposition to Payne's Exceptions.

**DEQ'S RESPONSE TO PAYNE'S EXCEPTIONS**

**I. BACKGROUND**

Payne's appeal arises out of DEQ's denial of Payne's application to expand his motor vehicle wrecking facility (MVWF). The indisputable facts in this case are: 1) On July 20, 2015, DEQ received an application from Payne to modify the boundaries of an existing motor vehicle

wrecking facility (MVWF); 2) DEQ gave notice to Lincoln County, where the Payne MVWF is located and, on August 28, 2015, the Lincoln County Board of County Commissioners held a public hearing to discuss Payne Logging's application; 3) On September 2, 2015, Lincoln County Commissioners adopted Resolution No. 947 opposing the application; 4) The Lincoln County Commission forwarded Resolution No. 947 to DEQ; and, 5) On September 24, 2015, DEQ denied Payne's application. DEQ's denial was "due to the denial at the county level." Attached as Exhibit 1, Christensen Letter, September 24, 2015. On October 23, 2015, Payne Logging filed a Notice of Appeal and Request for Hearing.

## II. ARGUMENT

### A. **Under the Plain Text of the Governing Statute, DEQ Could Not, Under Any Circumstances, Have Issued Payne A Permit After Lincoln County Denied Payne's Application**

It is indisputable that the critical statute at issue in this case is Section 75-10-516 of the Montana Code Annotated (MCA), stating:

**75-10-516. Motor vehicle wrecking facilities and motor vehicle graveyards -- licensing process -- decision criteria.** (1) When an application for a motor vehicle wrecking facility or motor vehicle graveyard is filed with the department, the department shall notify by mail:

- (a) each owner of property adjoining the proposed facility;
- (b) the governing body of the county in which the proposed facility is to be located; and
- (c) a newspaper of general circulation in the area where the proposed facility is to be located.

(2) Within 30 days of receipt of the notification in subsection (1)(b), the governing body of the county may:

- (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community; and

(b) adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department.

(3) The department may not grant a license to a facility that a governing body has opposed under subsection (2)(b).

(4) In making its decision to grant or deny a license application, the department shall consider the effect of the proposed facility on adjoining landowners and land uses.

§ 75-10-516, MCA (2016) (emphasis added).

When interpreting a statute, a reviewing authority must look to the “plain meaning of the words used, and if interpretation of the statute can be so determined” the authority may not “go further and apply any other means of interpretation.” *State v. Trull*, 2006 MT 119, P32. “In the search for plain meaning, ‘the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.’” A reviewing authority must look at the statute “to ascertain what it contains, ‘not to insert what has been omitted nor to omit what has been inserted.’” *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 427 (Mont. 1986).

In keeping with these rules of statutory interpretation, the Board should, first and foremost, look to the plain text of the governing statute. Generally, Section 75-10-516(1) prescribes the ways in which DEQ must give notice to various parties after receiving a MVWF application, Section 75-10-516(2) describes the relevant county’s options for expressing either concerns or approval of the proposed MVWF, Section 75-10-516(3) constrains DEQ’s approval of a MVWF, and, finally, Section 75-10-516(4) describes the factors that DEQ must take into account in granting or denying a MVWF application when the county has not objected to approval.

Looking again to the text, under Section 75-10-516(2), a county “may”:

- (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community; and
- (b) adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department.

There are two parts: Subpart “a” permitting the county to hold a hearing and Subpart “b” permitting the county to adopt a resolution. However, the next subsection is the critical portion of the statute reflecting constraints on DEQ’s permitting authority:

(3) The department may not grant a license to a facility that a governing body has opposed under subsection (2)(b).

§ 75-10-516(3), MCA (Emphasis added).

In interpreting the use of the words “may” and “may not” in determining statutory meaning, “the word ‘may’ generally designates discretionary conduct”... whereas, “courts that have construed legislative use of the phrase ‘may not’ have consistently held that the phrase is mandatory.” *Van Der Hule v. Mukasey*, 2009 MT 20, P11. When looking at Section 75-10-516 in this light, there is no qualification on whether or how DEQ must address the county’s denial of a MVWF. The statute does not direct DEQ to determine whether the county conducts a hearing, how the county conducts that hearing, what notice the county gives, to whom, or how far in advance of the hearing notice is given, or anything of the like. Rather, the statute clearly and unequivocally commands that DEQ may not grant a license if the county has adopted a resolution in opposition to a MVWF pursuant to MCA § 75-10-516(2)(b).

Here, the Board is generally conferred authority by Section 75-10-515, MCA to hear appeals regarding denial of a MVWF application as a contested case proceeding under the Montana Administrative Procedure Act. Section 75-10-515, MCA states:

**Appeals.** A decision by the department to issue, deny, or revoke a motor vehicle wrecking facility or graveyard license may be appealed to the board within 30 days after receipt of official notice of the department's decision.

However, that authority is limited, by its express language, to “[a] decision by the department.” DEQ does not dispute that, on or about September 24, 2015, DEQ’s Christensen denied Payne’s application for modification of his existing MVWF. However, Christensen’s

letter was not a “decision” from DEQ. Rather, Christensen’s denial was a purely non-discretionary act as a result of Christensen’s receipt of Lincoln County’s opposition resolution.

In passing Section 75-10-516 giving counties a sort-of “right of first refusal,” the legislature denied DEQ decision making power specifically those instances where the County exercises its right to oppose. By extension, the legislature denied the Board the power to decide any appeal from a non-discretionary DEQ denial of a county-opposed MVWF, as is the case here. In his proposed order, the hearing examiner recognized this fact in his Proposed Order when he noted “[e]ven assuming, *arguendo*, that the Board were to overturn or remand DEQ’s decision, Mont. Cod Ann. § 70-10-516(3)[sic] would prohibit DEQ from granting Payne its license.” Proposal for Decision, p. 6.

On September 2<sup>nd</sup>, 2015, Lincoln County exercised its prerogative to adopt a resolution opposing Payne’s application pursuant to § 75-10-516(2)(b). DEQ is absolutely constrained by this statute in regards to Payne’s application after Lincoln County adopted its resolution. The Board’s analysis need not look any further than the plain text of this statute to deny adopt the Examiner’s Proposal for Decision.

#### **B. Payne’s Remedy, If Any, Is Not Against DEQ**

Contrary to Payne’s assertion that DEQ erred in denying Payne’s application, Payne’s remedy, if any, is not as against DEQ, nor, by extension, before this Board. It is clear from Payne’s briefing that he considers himself aggrieved by Lincoln County’s decision to oppose his application, although he is directing this appeal at DEQ. Payne faults Lincoln County for inadequate notice of its public meeting during which the County adopted its resolution opposing Payne’s application. Payne Exceptions, p. 2. Payne also faults DEQ for failing to supervise

Lincoln County's procedure for adopting the resolution and failing to investigate whether the County violated Payne's rights as a result of its resolution. To state the obvious, Lincoln County is not part of DEQ and DEQ has no control over the Lincoln County Commissioners. There is no part of the statutory scheme governing motor vehicle wrecking facilities that gives DEQ either the authority or the obligation to direct a county government in how or whether it makes a decision to support or oppose a MVWF application.

Notably, Section 75-10-516(3), in directing DEQ to deny county-opposed MVWF applications specifically references only Section 75-10-516(2)(b), the portion of the statute regarding adoption of resolutions. The statute does not require DEQ to consider whether the County exercised its option to hold a hearing regarding the MVWF's impacts, or lack thereof, on local quality of life pursuant Section 75-10-516(2)(a), only that DEQ deny any application opposed by resolution of the proper county. If Payne believes Lincoln County acted improperly, he may have had, or may still have, other legal mechanisms to contest the County's alleged misconduct, but this Board is not the appropriate forum for doing so, nor is DEQ a proper party.

**C. Any Typographical Errors In the Proposed Decision Are Harmless and Can Be Corrected By Order Of The Board**

On Page 1 of Payne's Exceptions, Payne contends that "[t]he Proposal for Decision repeatedly cites to MCA Section 70-10-515 as the operative and controlling statute...[t]hus, the Proposal for Decision is erroneous on its face, and may not be adopted by the full Board as the Decision is affected by an error of Law." Payne's Exceptions, p. 1. Far from an error of law, the Proposal for Decision is a harmless typographical error. *See e.g. State v. McKenzie*, 186 Mont. 481, 514 (Mont. 1980) *holding* "'Harmless error' refers to technical errors, which do not

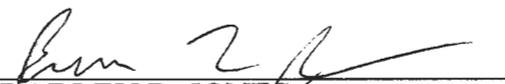
require reversal.” Payne correctly points out that any reference to Title 70 should instead refer to Title 75. The Proposal for Decision can easily be amended to correct the Examiner’s error by order of the Board prior to its adoption by the Board.

**III. CONCLUSION**

The clearest reading of the statutes at issue in this appeal, specifically Sections 75-10-515 and 75-10-516, when read together, is that DEQ had no authority to approve Payne’s application for a MVWF after receipt of Lincoln County’s Resolution #947. While Payne’s Exceptions make much of Lincoln County’s alleged misconduct, the County is not a party to this appeal and this Board has no more authority to grant Payne relief from the County’s alleged misconduct than DEQ did when it denied Payne’s application. As a result, the Board should adopt the Examiner’s Proposal for Decision with the caveat that it be corrected to reference Title 75, rather than Title 70 of the Montana Code in all relevant parts.

DATED this 9<sup>th</sup> day of November, 2016.

STATE OF MONTANA  
DEPARTMENT OF ENVIRONMENTAL QUALITY

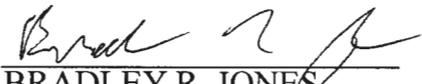
By:   
BRADLEY R. JONES  
Special Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that on 11/9/2016, I caused a true and accurate copy of the foregoing caption to be emailed and mailed to:

James Brown, Esq.  
30 South Ewing Street, Suite 100  
Helena, MT 59601

Benjamin Reed  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620

DATED:   
BRADLEY R. JONES

  
Date



September 24, 2015

Robert Payne  
Payne Logging, Inc.  
PO Box 381  
Libby, MT 59923

Dear Mr. Payne,

On July 20, 2015, the Motor Vehicle Recycling and Disposal Program (MVRDP) received your application to move the boundaries of your wrecking facility within your property. Notifications were sent to adjoining land owners and the County Commissioners regarding this change. On September 2, 2015, the Lincoln County Commissioners opposed any change to your current license under Resolution 947, (enclosed), until full compliance with the motor vehicle recycling regulations are achieved regarding your original application. The MVRDP has terminated the application requesting to move the boundaries of your facility due to the denial on the county level.

In order to re-apply for a boundary change you must first be compliant at your original location to the satisfaction of the County Commissioners regarding the shielding of the facility.

I have enclosed an Ariel image of the original boundary of your wrecking facility. Please note that any vehicle(s) that meets the definition of a junk vehicle and all component parts must be moved to within this area and shielded from public view.

If you have any questions please feel free to contact me.

Sincerely,

Brady Christensen, CHMM  
Motor Vehicle Recycling and Disposal Program  
(406) 444-3048 or email at [bchristensen@mt.gov](mailto:bchristensen@mt.gov)

cc Jennifer Nelson, 418 Mineral Ave, Libby, MT 59923  
Kathi Hooper, 418 Mineral Ave, Libby, MT 59923

Enc. Resolution No. 947  
Ariel image of wrecking facility boundary