

**AGENDA TABLE OF CONTENTS**

AGENDA..... pg 1

**ADMINISTRATIVE ITEMS**

I.A.1. JUNE 8, 2018 MEETING MINUTES.....pg 5

**ACTION ITEMS**

**APPEAL, AMEND, OR ADOPT FINAL RULES**

III.A.1. EXECUTIVE SUMMARY.....pg 10

III.A.1. NOTICE OF HEARING.....pg 12

**NEW CONTESTED CASES**

III.B.1. BER 2018-04 OC.....pg 17

III.B.2. BER 2018-05 OC.....pg 21

**PETITION FOR RULEMAKING**

III.C.1. OUTSTANDING RESOURCE WATER PETITION.....pg 25

BOARD OF ENVIRONMENTAL REVIEW  
FRIDAY, AUGUST 10, 2018  
METCALF BUILDING, ROOM 111  
1520 EAST 6<sup>th</sup> AVENUE, HELENA, MONTANA

**NOTE:** Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at [Lindsay.Ford@mt.gov](mailto:Lindsay.Ford@mt.gov) no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

**9:00 AM**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. The Board will vote on adopting the June 8, 2018, meeting minutes.

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATE**

1. Enforcement cases assigned to the Hearing Examiner
  - a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.** On April 12, 2018 hearing examiner Clerget issued a Scheduling Order in this case. On July 20, 2018 the parties requested a stay in the proceeding due to settlement negotiations. On July 23, 2018, Ms. Clerget issued an Order granting the stay and requiring the parties to file joint status reports every 30 days until the case is settled.
  - b. **In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.** At the January 5, 2018, special meeting, the parties waived the demeanor of witnesses and the BER appointed Sarah Clerget as hearing examiner to review the record and render a proposed decision. Ms. Clerget is in the process of reviewing the record and will be issuing a proposed order shortly.
  - c. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On July 16, 2018, Ms. Clerget issued her Proposed Findings of Fact Conclusions of Law and a separate order on exceptions. The parties requested an extension of time until September 17, 2018 in which to submit their exceptions to the Proposed Order. This matter will be fully briefed and before the Board at its December meeting.

- d. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.** On April 6, 2018, hearing examiner Clerget assumed jurisdiction of this case. A scheduling order was issued on May 31, 2018. On July 20, 2018 the parties filed a Joint Stipulation to Stay the Scheduling Order requesting until September 14<sup>th</sup> in which to file a joint status report. On July 24, 2018, an Order granting the stay was issued.
  - e. **In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.** On April 24, 2018 hearing examiner Clerget issued a Scheduling Order and the parties are proceeding accordingly.
  - f. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.** On April 6, 2018, hearing examiner Clerget assumed jurisdiction of this matter. A scheduling order implementing additional scheduling deadlines was issued on May 31, 2018, and the parties are proceeding accordingly. An additional party was added to the proceedings on July 3, 2018 as requested by Little Bear.
2. Non-enforcement cases assigned to the Hearings Examiner
- a. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On February 21, 2018, the parties filed a Joint Status Report indicating the District Court case MEIC and Sierra Club v. DEQ and Western Energy has been appealed to the Montana Supreme Court. The parties requested a stay pending the issuance of a decision in that case. On March 28, 2018, hearing examiner Clerget issued an order granting the stay, and directed parties to file a status report within 30 days of the Supreme Court's decision.
  - b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On March 1, 2018, a Scheduling Order was issued. On April 18, 2018, a Motion to Quash subpoena was filed by MEIC regarding two deposition notices and subpoenas. The motion was fully briefed by May 9, 2018. Oral Argument on this issue was held on May 23, 2018. On June 4, 2018, the Board was served as a named Defendant in Case No. DV-18-0869 in Montana Thirteenth Judicial District Court as the parties are seeking resolution from the District Court on the subpoena issue. Hearing Examiner Clerget issued an Order on June 5, 2018 extending all pretrial motion deadlines pending resolution of the District Court case.
  - c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** This matter was heard during a four-day hearing that concluded on March 22, 2018. The parties submitted their post-hearing filings on July 19, 2018. The

Hearing Examiner will review the filings and issue a Proposed Order to the Board by (date).

- d. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.** On April 20, 2018, DEQ filed a Motion for partial Summary Judgment. The motion is fully briefed and an oral argument was held on July 9, 2018. The remaining deadlines in the scheduling order have been vacated and a scheduling conference will be held once an order on summary judgment has been issued.
  - e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 15, 2018, the parties filed a Joint Status Report and Motion for Continued Stay. The parties indicated settlement is a possibility in this matter. On March 14, 2018, Ms. Clerget issued an Order granting the stay until August 24, 2018.
  - f. **In the matter of Violations of the Water Quality Act by JR Civil, LLC, Bozeman, Gallatin County, Montana (FID 2552, PERMIT MTG70826).** On July 12, 2018, the parties submitted a stipulation for dismissal pursuant to Rule 41(a)(1)(A)(ii) of the Montana Rules of Civil Procedure. On July 16, 2018 this matter was dismissed with prejudice.
  - g. **In the Matter of the Denial of Motor Vehicle Wrecking Facility License MVWF-0376, BER 2018-01 SW.** On April 6, hearing examiner Clerget assumed jurisdiction of this matter. On April 12, 2018 a Prescheduling Order was issued. On April 13, 2018, Payne Logging's counsel filed a motion to withdraw as counsel. Hearing examiner Clerget issued an Order on April 19, 2018, staying the deadlines in the Prescheduling Order until June 1, 2018, ordered Payne Logging to obtain counsel by June 1, 2018, or show cause why it will need an extension to do so. Payne never filed a notice of appearance nor requested an extension, so an Order Dismissing Appeal was issued on June 19, 2018. The Order dismissed the appeal without prejudice.
3. Contested Cases not assigned to a Hearing Examiner
- a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** On April 9, 2014, the hearing examiner issued Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. This matter was stayed while action in the District Court proceeded. On March 14, 2016, the Judge issued Order on Summary Judgment invalidating the permit modification and remanding the matter for consideration consistent with the opinion. On January 25, 2018, the Department of Environmental Quality entered a Stipulated Judgement resolving the issue of attorney's fees. The Department of Environmental Quality and Western Energy have appealed the District Court's Order on Summary Judgment to the Montana Supreme Court, opening briefs have been filed and appellees' response briefs are due September 11, 2018.

### III. ACTION ITEMS

#### A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. DEQ will propose that the Board initiate rulemaking to amend Administrative Rules of Montana (ARM) Title 17, chapter 30, subchapter 1, adopted under authority of Section 75-5-401, Montana Code Annotated (MCA), pertaining to state certification of activities requiring federal permits issued under Section 401 of the federal Clean Water Act, 33 USC Section 1341. The proposed amendments will clarify, and update policies and procedures related to the state Section 401 certification process.

#### B. NEW CONTESTED CASES

1. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC.** On July 2, 2018, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.
2. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on Behalf of the Residents of Walden Meadows Subdivisions. BER 2018-05 OC.** On July 5, 2018, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.

#### C. PETITION FOR RULEMAKING

1. On January 31, 2018 the Board received a petition from Cottonwood Environmental Law Center and The Gallatin Wildlife Association. Pursuant to MCA 75-5-316(3)(1), the petition requests that the Board classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water

### IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

### V. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

### VI. ADJOURNMENT

**BOARD OF ENVIRONMENTAL REVIEW  
MINUTES**

**June 8, 2018**

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, June 8, 2018, in Room 111 of the Metcalf Building, 1520 East 6<sup>th</sup> Avenue, Helena, Montana.

Attendance

**Board Members Present in person:** Chairperson Christine Deveny, Dexter Busby, Hillary Hanson, John DeArment, Chris Tweeten

**Board Members Present by Phone:** John Felton

**Board Members Absent:** Tim Warner

**Board Attorney Present:** Sarah Clerget, Attorney General's Office (AGO)

**Board Liaison Present:** George Mathieus

**Board Secretary Present:** Lindsay Ford

**Court Reporter Present:** Laurie Crutcher, Crutcher Court Reporting

**Department Personnel Present:** Melissa Schaar, Myla Kelly, Eugene Pizzini, Eric Urban, Tim Davis – WQD; Sandy Moisey-Scherer, Mark Lucas, Kurt Moser, Norm Mullen – Legal; Liz Ulrich, Rebecca Harbage, Dave Klemp, Carla Trueblood, Hoby Rash – AEMD

**Interested & Other Persons Present:** Alan Olsen – Montana Petroleum Association; Peggy Trenk – Treasure State Resources Association; Gordon Criswell – Talen Montana

**Interested Persons Present by Phone:** Alan Olson – Montana Petroleum Association

Roll was called: five Board members were present in person and one Board members was present via teleconference, providing a quorum.

## **I.A. Administrative Items – Review and Approve Minutes**

### **I.A.1. April 6, 2018, Meeting Minutes**

Mr. Tweeten MOVED to approve the meeting minutes. Mr. Busby SECONDED. The motion PASSED unanimously.

## **II.A.1. Briefing Items – Enforcement Cases assigned to the Hearing Examiner**

### **II.A.1.a. In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.**

Ms. Clerget stated the parties are proceeding through the scheduling order.

### **II.A.1.b. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.**

Ms. Clerget is still reviewing the record and has not issued an order yet.

### **II.A.1.c. In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ.**

Ms. Clerget said the parties wanted more time for their exceptions briefs and this case should be before the Board at the next meeting.

### **II.A.1.d. In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.**

This case is being handled in conjunction with the above-listed case, BER 2015-01 WQ, and its status is the same.

### **II.A.1.e. In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.**

Ms. Clerget said the scheduling order is in place and the and the parties are proceeding accordingly.

### **II.A.1.f. In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.**

Ms. Clerget stated the case is in the penalty phase and the parties are proceeding according to the scheduling order.

### **II.A.1.g. In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.**

Ms. Clerget said a scheduling order implementing additional scheduling deadlines was issued and the parties are proceeding accordingly.

## **II.A.2. Briefing Items – Non-Enforcement Cases Assigned to a Hearing Examiner**

**II.A.2.a. In the matter of Westmoreland Resources, Inc.’s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.**

Ms. Clerget said there is a stay and the parties will provide her with an update within thirty days of the Supreme Court’s decision.

**II.A.2.b. An appeal in the matter of amendment application AM3, Signal Peak Energy LLC’s Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

Ms. Clerget said the case is proceeding according to the scheduling order but the mine issued two subpoenas which the Montana Environmental Law Center has moved to quash on constitutional grounds. This matter has been stayed pending resolution of the District Court case. Ms. Clerget sought permission from the Board to file a Notice of Appearance and Notice of Non-participation in the District Court case.

The Board discussed and Ms. Clerget answered questions.

Ms. Hanson MOVED to have Ms. Clerget continue to represent the Board on this case and before the District Court. Mr. Busby SECONDED. The motion passed unanimously.

**II.A.2.c. In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.**

Ms. Clerget said the parties are working on their post hearing briefs.

**II.A.2.d. In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.**

Ms. Clerget said the summary judgement is pending. The hearing set for August 20 was vacated and the parties are waiting on summary judgment before setting a new schedule, if necessary.

**II.A.2.e. In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.**

Ms. Clerget said the case is stayed until August at which time the parties are to provide an update.

**II.A.2.f. In the matter of violation of the water quality act by JR Civil, LLC, Bozeman, Gallatin County, Montana (FID 2552, Permit MTG070826) BER 2017-07 WQ.**

Ms. Clerget said the case is stayed. The parties are filing a joint status report every 30 days and continuing to work on the settlement.



II.A.2.g. **In the Matter of the Denial of Motor Vehicle Wrecking Facility License MVWF-0376, BER 2018-01 SW.**

Ms. Clerget stated the case is stayed until June 1. Mr. Payne's counsel has withdrawn, and Mr. Payne cannot appear on his own behalf. He must have counsel since he is a corporation. The case cannot move forward without him having counsel, so another order dismissing the case will be issued shortly.

**II.A.3. Briefing Items – Contested Cases Not Assigned to a Hearing Examiner**

II.A.3.a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.**

Mr. Mullen said notices of appeal have been filed with the Supreme Court and the briefing schedule is in effect. He anticipates the case moving quickly under the briefing schedule.

**II.A.4. Briefing Items – Other Case Updates**

II.A.4.a. **Oilfield Rock and Logistics BDV 2018-451:**

Ms. Clerget stated the case has been appealed to the District Court.

**II.B. Other Briefing Items**

II.B.1. Eric Urban briefed the Board and answered questions on revising water quality standards for naturally high arsenic in surface waters, as well as other potential water quality rule changes for the fall of 2018.

**III.A. Action Items – APPEAL, AMEND, OR ADOPT FINAL RULES:**

III.A.1. **DEQ will propose that the Board initiate rulemaking to Amend ARM 17.8.505 Air Quality Operation Fees, to increase air quality operating fees to allow the department to collect sufficient revenue to support the appropriate implementation of the air quality program.**

Liz Ulrich briefed the Board and said the department recommends the Board initiate rulemaking to Amend ARM 17.8.505 Air Quality Operation Fees and to increase air quality operating fees.

Ms. Ulrich, Mr. Mullen, Mr. Klemp and Mr. Rash answered questions from the Board.

Chairperson Deveny opened the floor for public comment.

Mr. Olson complimented Ms. Ulrich and Mr. Klemp for the time they've taken to come to Billings and explain the fee increase. He explained that he has concerns about the program being run by the EPA out of Butte and would prefer that DEQ run the program.

Ms. Trenk said she supports the rulemaking going forward and appreciates all the work that's been done to date.

Mr. Tweeten MOVED to initiate rulemaking and to appoint the Board attorney as the Hearings Examiner for purposes of conducting a rulemaking hearing. Mr. DeArment SECONDED. The motion passed unanimously.

### **III.B. Petition for Rulemaking**

III.B.1. **On January 31, 2018 the Board received a petition from Cottonwood Environmental Law Center and The Gallatin Wildlife Association. Pursuant to MCA 75-5-316(3)(1), the petition requests that the Board classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water.**

Ms. Clerget briefed the Board answered questions on the process of the petition.

Mr. Davis explained the department compiled a cost analysis of a new or updated EIS and attempted to meet with the petitioners, but they were unable to meet.

Mr. Tweeten MOVED that the Board carry this agenda item to the next meeting and that the department make a concerted effort to contact the petitioners and ask them to appear at the next Board meeting. Chairperson Deveny SECONDED. The motion passed unanimously.

### **IV. Board Counsel Update**

Ms. Clerget had no updates.

### **V. General Public Comment**

None were offered.

### **VI. Adjournment**

Mr. Tweeten MOVED to adjourn. Ms. Hanson SECONDED. Chairperson Deveny adjourned the meeting at 10:20 a.m.

Board of Environmental Review June 8, 2018, minutes approved:

---

CHRISTINE DEVENY  
CHAIRPERSON  
BOARD OF ENVIRONMENTAL REVIEW

---

DATE

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY FOR PROPOSED NEW RULE**

**Agenda Item # III.A.1.**

**Agenda Item Summary** – The Department requests that the Board initiate rulemaking for proposed amendments to Administrative Rules of Montana (ARM) 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding 401 Certification.

**List of Affected Board Rules** –The proposed amendments will affect Board rules adopted under authority of § 75-5-401, Montana Code Annotated (MCA) at ARM Title 17, chapter 30, subchapter 1 establishing policies and procedures for state water quality certification of activities requiring federal permits under section 401 of the federal Clean Water Act, 33 USC § 1341.

**List of Affected Department Rules** – The proposed amendments will not affect any current department rules.

**Affected Parties Summary** – The proposed amendments will clarify and update the § 401 certification process and will affect parties applying for § 401 Water Quality Certifications, but the impact should not be significant.

**Background** – Under Section 401 of the federal Clean Water Act, states and tribes can review and approve, condition, or deny all Federal permits or licenses that might result in a discharge to State or Tribal waters, including wetlands. The major Federal licenses and permits subject to Section 401 are Section 402 and 404 permits (in non-delegated states), Federal Energy Regulatory Commission hydropower licenses, and Rivers and Harbors Act Section 9 and 10 permits. States and tribes may choose to waive their Section 401 certification authority.

States and Tribes make their decisions to deny, certify, or condition permits or licenses primarily by ensuring the activity will comply with state water quality standards. In addition, states and tribes look at whether the activity will violate effluent limitations, new source performance standards, toxic pollutants, and other water resource requirements of state/tribal law or regulation. The Section 401 review allows for better consideration of state-specific concerns.

The most substantial changes to the ARM are in Sections 17.30.103, 17.30.106, and 17.30.108. Section 17.30.103 was amended to clarify that the application is not deemed complete until all information needed for the review is received by the Department, including the appropriate fee. The automatic trigger deeming an application complete after 30 days of receipt was removed since this provision impedes coordination with the federal permitting agency, a process required for the 401 review to continue. Section 17.30.106 was amended to eliminate the automatic waiver of certification if the applicant is not notified within 30 days of the Department’s tentative determination. Automatically waiving 401 certification impedes review of federal permits authorizing discharges to Waters of the State and does not coincide with the federal permit review process. Finally, Section 17.30.108 was amended to clarify how the public notice is distributed and language was added to clarify that the Department can

continue to participate in the joint public notice process with the U.S. Army Corps of Engineers if the Department has received a complete application.

**Hearing Information** – The department recommends the Board appoint a hearing officer and conduct a public hearing to take public comment on the proposed new rule.

**Board Options** – The Board may:

1. Initiate rulemaking and issue the attached notice of public hearing on the proposed amendment of rule;
2. Determine that the amendment of rule is not appropriate and decline to initiate rulemaking; or
3. Modify the notice and initiate rulemaking.

**DEQ Recommendation** – The Department recommends that the Board initiate rulemaking, as proposed in the attached notice of public hearing, and appoint a hearings officer.

**Enclosures** –

1. Draft Administrative Register Notice of Public Hearing on Proposed Amendment of Administrative Rules of Montana 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding § 401 Certification.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of )  
ARM 17.30.103, 17.30.106, 17.30.108 ) NOTICE OF PUBLIC HEARING  
and 17.30.109 regarding 401 ) ON PROPOSED AMENDMENT  
Certification ) (WATER QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2018, at \_\_:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., \_\_\_\_\_, 2018, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.30.103 APPLICATION FOR CERTIFICATION (1) remains the same.

(2) An application for state water quality certification under this subchapter is not deemed complete until the permit fee required under ARM 17.30.201 is remitted to the department.

(2) remains the same, but is renumbered (3).

~~(3)~~ (4) The department may exempt an applicant from the information requirements of ~~(3)~~(2)(b), (c), and (e) of this rule, if the applicant's federal permit application is to the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, 33 USC 1344, as amended, and the federal permit application provides the information required under these sections.

(4) and (5) remain the same, but are renumbered (5) and (6).

~~(6)~~ (7) An application is deemed complete if: the applicant has provided all information included in ARM 17.30.103(3), and the fee required in (2).

~~(a) the department has not made a determination within 30 days after receipt of the application or, subsequent to receipt of the initial application, within 30 days of receipt of materials submitted by the applicant that supplement the application; or~~

~~(b) the department notifies the applicant that the application is complete.~~

AUTH: 75-5-401, MCA  
IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The proposed amendments are necessary to clarify that an application for certification is deemed complete upon submission of the information required in ARM 17.30.103(3) and the fee required in section (2). The information and fee are both necessary to facilitate and support the department's review of the application for certification.

Under Section 401 of the Clean Water Act, federal agencies, most often the U.S. Army Corps of Engineers, issue permits authorizing discharges to navigable waters. Prior to the federal agency's issuance of a permit, it must receive certification from a State that the activity complies with state water quality standards. Under federal law, a state has a reasonable period of time, not to exceed one year, within which to provide certification. The 30-day timeframe within which the department is required to determine completeness under the current rule does not allow the department to coordinate its review with that of the federal agency. Additionally, the 30-day timeframe does not allow the department sufficient time and flexibility to work with the applicant, review the project for compliance with state water quality standards, and coordinate with the federal permitting agency regarding certification of an activity under § 401 of the Clean Water Act, especially for more complex or controversial projects.

The proposed amendment to ARM 17.30.103 applies only to state certifications necessary for the issuance of a federal permit by a federal agency. The proposed amendment does not apply to the department's completeness review of applications for state-issued discharge permits under Section 75-5-403(1), MCA. Under this statute, the department has a maximum of 75 days to determine that an application for discharge permit is complete. An application is considered complete unless the applicant is notified of a deficiency within that review period.

17.30.106 TENTATIVE DETERMINATION BY THE DEPARTMENT (1) The department shall, within 30 days of receipt of a completed application, notify the applicant, the federal permitting or licensing agency, and the regional administrator of its tentative determination to either issue, issue with conditions, or deny certification. ~~If the department does not notify the applicant of a tentative determination within 30 days after the application is determined to be complete, the department is deemed to have waived certification.~~

(2) through (4)(i) remain the same.

(ii) a statement of conditions which the department deems necessary for allowing the discharge, including: ~~necessary monitoring requirements. Necessary monitoring requirements include, but are not limited to:~~

(A) ~~at least 7 days prior to the beginning of the discharge, the applicant shall notify the department of intent to commence the discharge;~~ necessary monitoring requirements; and

~~(B) within 7 days after the completion of the discharge, the applicant shall notify the department of the completion; and~~

~~(C)~~ (B) the applicant shall will be required to allow the department reasonable entry and access to the discharge site in order to inspect the discharge for compliance with the certification requirements applicable to the facility or activity.

(5) through (7) remain the same.

AUTH: 75-5-401, MCA  
IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The federal permitting agency treats waivers as permanent even if the project changes and the department does not want to waive its § 401 certification authority without proper consideration of potential project impacts. The proposed changes are necessary to prevent automatic waivers and ensure the department has the opportunity to review § 401 certification projects for compliance with state water quality standards.

17.30.108 PUBLIC NOTICE AND FINAL DETERMINATION BY THE DEPARTMENT (1) Except as provided in ~~(5)~~ (6) of this rule, the department shall provide public notice of the department's tentative determination. The department shall mail the notice to:

- (a) the applicant;
- (b) federal, state, and local government agencies with jurisdiction over the location of the proposed discharge;
- (c) affected states; and
- (d) any person on request.

(2) In addition, the department shall publish a legal notice ~~once weekly~~ for 2 consecutive weeks in a newspaper of general circulation that is circulated in the county in which the activity is proposed on the department's web page. The department may include additional notice which may involve:

- (a) through (c) remain the same, but are renumbered (i) through (iii).

~~(2)~~ (3) Notice under (1) and (2) of this rule shall contain the information required under ARM 17.30.106(3).

~~(3)~~ (4) If there is significant public interest in a proposed action under this rule, the department shall set a public hearing, which must be scheduled not less than 30 days after the hearing has been given public notice pursuant to (1) and (2) of this rule.

~~(4)~~ (5) The deadline for written comment is 30 days from the date of issuance of the public notice pursuant to (1) and (2) or, if a public hearing is conducted pursuant to ~~(3)~~ (4) of this rule, 14 days after the date of the hearing.

~~(5)~~ (6) A project applicant who has filed an application for a permit with the United States Army Corps of Engineers under 33 USC section 1344, as amended, to place dredged or fill material in navigable waters meets the The requirements of this section are met if the an application for a permit under 33 USC 1344 is given public notice by the United States Army Corps of Engineers, and the public notice contains a statement referencing the department's certification responsibility under section 401 of the federal Clean Water Act, 33 USC section 1341, as amended and the department has received a complete application under ARM 17.30.103.

~~(6)~~ (7) The department shall make its final decision within ~~30 days~~ a reasonable amount of time, not to exceed one year after the close of the comment period, as determined pursuant to ~~(4)~~ (5) of this rule or, if the project requires public notice under 33 USC section 1344, as amended, within ~~30 days~~ a reasonable

amount of time, not to exceed one year after the close of the comment period set by the United States Army Corps of Engineers pursuant to (6).

AUTH: 75-5-401, MCA

IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The proposed amendments are necessary to clarify and update public notice requirements and public comment timeframes for the department's tentative § 401 certification determinations. Applicants and other agencies with jurisdiction should be made aware that 401 certifications are being publicly noticed. The requirement to publicly notice in local newspapers was stricken because the department's website, emails and mailings have proven far more effective at disseminating the public notice to interested parties and making the general public aware of pending department actions. The requirement to publish the notice once weekly for two weeks is also stricken because the notice will be published for two consecutive weeks on the department's website. The Army Corps of Engineers, which is the primary authorizing federal agency associated with 401 actions, only publicly notices online. These amendments are necessary to allow the department to issue a joint public notice with the Army Corps of Engineers making certification information more accessible to the public by placing all the federal and state information in the same location instead of spread across federal and state webpages.

17.30.109 APPEAL TO THE BOARD (1) remains the same.

(2) If a decision of the department made under ARM 17.30.108 undergoes review by the board under this section, the department shall notify the licensing or permitting agency that certification is ~~denied~~ suspended for the period in which the department's decision is under review by the board.

(3) remains the same.

AUTH: 75-5-401, MCA

IMP: 75-5-402, 75-5-403, MCA

REASON: The change in ARM 17.30.109(2) is necessary to clarify the status of the department's certification when the decision is appealed to the board. Upon appeal, the department's certification decision is suspended while the decision is under review by the board. The use of the word "denied" erroneously suggests that the applicant would have to reapply for the state's certification.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [sscherer@mt.gov](mailto:sscherer@mt.gov), no later than 5:00 p.m. \_\_\_\_\_, 2018. To be guaranteed consideration, mailed comments must be postmarked on or before that date.



5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at [sscherer@mt.gov](mailto:sscherer@mt.gov), or may be made by completing a request form at any rules hearing held by the department.

6. Sarah Clerget, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the board has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/  
 EDWARD HAYES  
 Rule Reviewer

BY: /s/  
 CHRISTINE DEVENY  
 Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2018.

TO: Sarah Clerget, Hearing Examiner  
Board of Environmental Review

FROM: Lindsay Ford, Board Secretary  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: July 2, 2018

SUBJECT: Board of Environmental Review Case No. BER 2018-04 OC



BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL  
OF OPENCUT MINING PERMIT #2351  
ISSUED TO GOLDEN WEST PROPERTIES,  
LLC BY FRANK AND PAULETTE WAGNER  
REGARDING CONCERNS AND UNANSWERED  
QUESTIONS.

Case No. BER 2018-04 OC

The BER has received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Mark Lucas  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Ed Coleman, Bureau Chief  
Coal and Opencut Mining Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments

## Ford, Lindsay

---

**From:** Paulette Wagner <jasn1964@gmail.com>  
**Sent:** Monday, July 02, 2018 6:57 AM  
**To:** Ford, Lindsay  
**Cc:** DEQ AEMD OpenCut; commission@co.yellowstone.mt.gov; clint@bridgervc.com  
**Subject:** Appeal-Opencut Mining Permit #2351 Golden West Properties LLC

Frank & Paulette Wagner

3019 S 66<sup>th</sup> St W

Billings, MT 59106-4259

406-656-2181

[jasn1964@gmail.com](mailto:jasn1964@gmail.com)

July 2, 2018

Secretary

Board of Environmental Review

Lindsay Ford

P.O. Box 200901

Helena, MT 59620-0901

RE: Opencut Mining Permit #2351, Golden West Properties, LLC

Golden West Pit Site in Yellowstone County

Dear Secretary Lindsay Ford,

We are Frank & Paulette Wagner and wish to file an appeal representing ourselves as an individual per Montana Statute Section 82-4-427(1)(a). We reside at 3019 S 66<sup>th</sup> St W Billings, MT 59106, and have owned our property since 1970.

June 6, 2018, the Montana Department of Environmental Quality issued an Opencut Mining Permit #2351 to Golden West Properties LLC for the Golden West Pit site located in Yellowstone County, Montana. The mining operation will be occurring on property adjacent to Walden Meadows Subdivision which is where our property is located.

This letter is being written because we wish to file an appeal dated July 2, 2018, due to the fact that we have concerns and unanswered questions where we may be adversely affected by the opencut mining permit issued to Golden West Properties, LLC.

1. Our first concern and question is if we should lose our water or it were to become contaminated in what way would we be compensated by Golden West Properties LLC.? That issue to our knowledge has not been addressed in the application and neither does it indicate our Certificate of Water Right, dated October 4, 1988, registered with the State of Montana for our wells. Our concerns arise because our property is immediate to the impact area.
  
2. A second concern of ours is the heavy truck traffic on S 64<sup>th</sup> St W as well as Danford Road. According to the current application the documents show S 64<sup>th</sup> St W and Danford Road have load restrictions, please see page 105 of the application referencing Resolution No. 17-63 which was signed and dated July 11, 2017, by the Board of County Commissioners Yellowstone County. Resolution No. 17-63 is a modification from Ordinance No. 07-107 under the Zoning Compliance. Please see note 2) on page 105 stating, "The load restrictions for 64<sup>th</sup> St W from King Avenue West to Grand Avenue is hereby lifted." In our opinion, that does not indicate the load restrictions on S 64<sup>th</sup> St W(South of King Avenue W to Laurel Airport Road) or Danford Road were lifted at that time. In fact, point 3) on that same page states, "The remainder of the restrictions imposed by Ordinance No. 07-107 remain in effect." Also, the map page 107 indicate red lines(restricted) for both S 64<sup>th</sup> St W and Danford Road. The question is has there been another modification resolution for those two restricted roads since the, "DEQ issued the permit stating the revised application received on May 8, 2018 constituted an acceptable application?"

As an adjacent property owner to the mining operation, we Frank & Paulette Wagner have interests that are or may be adversely affected by the opencut mining permit issued to Golden West Properties, LLC.

We would greatly appreciate answers directed to the questions we have addressed in this letter.

Thank you for your time and attention to our concerns.

Sincerely,

(signed copy via US mail)

Frank & Paulette Wagner

July 2, 2018

Copy to: DEQ

Clint Lohman



TO: Sarah Clerget, Hearing Examiner  
Board of Environmental Review

FROM: Lindsay Ford, Board Secretary  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: July 9, 2018

SUBJECT: Board of Environmental Review Case No. BER 2018-05 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL  
OF OPENCUT MINING PERMIT #2351  
ISSUED TO GOLDEN WEST PROPERTIES,  
LLC BY DAVID WEYER ON BEHALF OF THE  
RESIDENTS OF WALDEN MEADOWS  
SUBDIVISION.

Case No. BER 2018-05 OC

The BER has received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Mark Lucas  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Ed Coleman, Bureau Chief  
Coal and Opencut Mining Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments

July 5, 2018

David Weyer  
3042 S 66<sup>th</sup> St W  
Billings MT 59106

Lindsay Ford, Secretary  
Board of Environmental Review  
POB 200901  
Helena MT 59620-0901

RE: DEQ Opencut Permit #2351 Appeal

On June 6, 2018, the Montana Department of Environmental Quality issued an Opencut Mining Permit #2351 to Golden West Properties LLC for the Golden West Pit site located in Yellowstone County, Montana, which is directly adjacent to Walden Meadows Subdivision. This letter is being written because I wish to file an appeal of the DEQ decision on behalf of the residents of Walden Meadows Subdivision.

There are six areas of concern for the residents of Walden Meadows Subdivision:

1. No open cut mine should be permitted AT ALL in an area so close to a very well established and grown-in subdivision, period. The residents of Walden Meadows subdivision firmly believe that ANY environmental impact statement which arrives at the conclusion that the existing environment will not be drastically and unalterably destroyed for the rest of the lives of many of the local residents, is not really an environmental impact statement at all, but an excuse to expropriate property from one group of people to the hands of a corporation whose principals are completely unaffected by the environmental destruction of its operations.

The permit essentially provides that the residents of Walden Meadows, and many residents of the surrounding area, are suddenly deprived of peace and quiet for eight hours per day, six days per week, are deprived of clean air for eight hours or more per day, six days per week, are deprived of their use and enjoyment of their ONLY easement connector for eight hours per day, six days per week, and are deprived of the full measure of their historical rights from 1970 onward of the abundant and unspoiled groundwater which the subdivision is built upon and which sustains the absolute value of the properties there.

The permit is prima facie evidence that no real environmental concern was given to the impact the open cut mine would have on the immediate developed area, some of which is less than 500' away. The rational has been heard many times that the mine is an asset to the community, will provide a few jobs, and that it is business, and all business is good; it is unfortunate, but the residents of Walden Meadows will just have to sacrifice for the good of all. We vehemently reject this argument as simply a canard for the underlying expropriation of property from a large group (the residents of Walden Meadows) into the hands of a few, and in our case at the hands and power of the state through the DEQ.

It is OUR environment, and we expect and demand the DEQ protect that environment. Instead the DEQ has ignored our calls and letters and proceeded as if the ultimate goal of the process was to

permit the mine, after sufficient reports were generated, and little blue boxes were checked on the application. The REAL environmental destruction in this case, the destruction of the air quality, water quality, ambient sound quality, ingress and egress quality, and wildlife diversity of the immediate impacted area, have essentially been ignored for pictures of soil samples, reclamation constructions, hydrologic reports, fueling conditions, overburden displacement, and similar issues. While all these have their place and are important to the environment as a whole, they are irrelevant to the immediate environmental impacts of essentially placing an open cut mine in the middle of a residential subdivision. It should NEVER have been considered in the first place, because there is NO way to mitigate the environmental devastation in that situation.

2. The residents of Walden Meadows would have expected that the DEQ would demand a full accounting of ALL groundwater sources in the impacted area, otherwise how could those sources be protected, or damage to them be mitigated, by the responsible parties? I can find no mention of many of the groundwater sources on the permit application, much less their water levels, water right origin dates, and production rates. I demand a full and complete accounting of ALL the groundwater sources in the impacted area, registered or not. They all have historical water rights and absolutely need to be accounted for on any environmental impact statement.

3. I find an incomplete accounting of the wildlife species of the area, and are surprised that the DEQ is apparently unaware that these species are active and living in the area. I ask again, what kind of environmental assessment is it that does not have a grasp of the nature and variety of the wildlife it will supposedly be protecting? I reject the DEQ evaluation of the wildlife species which will be impacted, and demand a FULL investigation into the wildlife diversity of the area.

4. We are living in an area with two open cut gravel mines. Thankfully, and with pressure from the residents of the area, these mines are minimizing the impacts they have on the surrounding neighborhoods. JTL agreed to many concessions in order to be a good neighbor, and has already had to do some mitigation on groundwater destruction. The physical location of these mines was such that very few residents of the area were impacted by their activities. Some neighbors will eventually be impacted, but they moved into the area after the mines were well established. Such is not the case with the Golden West Pit; it is attempting to move into the middle of an established neighborhood. Edge of town location of gravel mines was supposed to be just that, areas minimally impacted by the mine, but close enough that transportation of the material would not be prohibitive. The theory goes that by the time the mine is exhausted, the growth of the community will have surrounded it, and it can become a private lake, or even a commercial shopping establishment. Again, such is not the case with the Golden West Pit, the community is already here, and is being asked to surrender its whole reason for being here for the next twenty years to the interests of the mining project. I absolutely reject this proposition.

5. I can find no valid reason to permit another open cut mine in the area. According to conversations I have had with gravel haulers, the two existing mines are completely satisfying the requirements for aggregates that exist in the area, and at a competitive price that only large scale organizations can produce. There is no possible way that a smaller mine can compete with them. If this is so, there is no valid reason to burden the surrounding area with yet another mine, especially this one, with its devastating environmental effects on an existing community.

6. The Fisher mine often loads over 300 trucks per day. This figure may be scaled to get an approximate number of semi trucks which are being proposed to turn onto S 64th St West and then transit to Danford Drive to reach 72nd St West. Danford Road has a load limit of 16,000 GVW, as do most of the small connectors which have been designated off limits for heavy truck traffic by the county. Yet somehow, the DEQ has indicated on the permit that Golden West Pit trucks will be directed to Danford Drive as their access to 72nd St West even though the documents from the county clearly indicate that Danford Road is off limits to heavy trucks, as it should be.



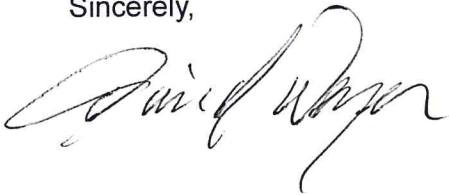
Danford Road is the ONLY egress the residents of Walden Meadows have. A daylong parade of heavy trucks will be absolutely devastating for the residents of Walden Meadows Subdivision. This easement is the only option for jogging, hiking, walking, biking and general enjoyment and recreation available to these residents. It is of course also their vehicular egress, and a bus pickup for all the school children in the area, with stops on all four streets. Running heavy trucks across this easement to reach 72nd St West is just insane, especially considering there may be up to one hundred of them each day. It will completely rob the residents of the area of their recreational use of the easement.

The DEQ should have routed all the trucks from the mine onto S 64th St West and on to Laurel Airport Road intersection, a road which has been reinforced by the county to deal with heavy truck traffic and which is shown on the permit documents to be such according to the county commissioners on page 99 " Zoning Compliance".

In summary I completely reject the environmental analysis the DEQ has done to permit an open cut mine on the border of Walden Meadows Subdivision. The analysis is short sighted, incomplete, and in error. It favors a particular business interest over actual environmental quality concerns of an established community of residences, and inherent proprietorships, and it ignores historical relationships between mining operations and primary residential/rural communities. The mine should be winding down, not starting up.

I oppose this permit on the grounds of inadequacy of environmental review and protections, and fiat expropriation of property, and I will pursue all avenues of redress and compensation available to us within the constraints of resources provided by the community of affected residents, and interested parties.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Weyer". The signature is written in dark ink and is positioned to the left of the printed name.

David Weyer

**A PETITION  
TO THE MONTANA BOARD OF ENVIRONMENTAL REVIEW  
FOR THE CONSIDERATION OF  
*The Gallatin River***

**AS AN OUTSTANDING RESOURCE WATER OF THE STATE OF MONTANA**

**By  
Cottonwood Environmental Law Center  
&  
Gallatin Wildlife Association**

**1. Request**

Pursuant to Mont. Code Ann. 75-5-316(3)(a), Cottonwood Environmental Law Center and the Gallatin Wildlife Association respectfully submit this petition for rulemaking. Cottonwood Environmental Law Center and the Gallatin Wildlife Association request that the Board of Environmental Review classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water. Based on the relevant criteria found within the following pages, this section of the Gallatin River is an exceptional natural resource water deserving of Outstanding Resource Water ("ORW") status. Cottonwood Environmental Law Center and the Gallatin Wildlife Association request that, pursuant to Mont. Code Ann. 75-5-316 the Montana Board of Environmental Review ("Board") accept and approve this nomination and recommend its findings to the Montana State Legislature ("Legislature") who might ultimately designate this section of the Gallatin River as an Outstanding Resource Water.

**2. Petitioners**

Cottonwood Environmental Law Center ("Cottonwood") is a conservation organization dedicated to protecting the people, forests, water and wildlife of the West. Located in Bozeman, Cottonwood maintains a committed membership of approximately 400 citizens. The members of Cottonwood use this section of the Gallatin River and its immediate area for hiking, camping, fishing, kayaking, canoeing, rafting, swimming, photography, scientific research, solitude, residence, family outings, and driving for pleasure, and other recreational and professional purposes.

The Gallatin Wildlife Association (“GWA”) is a non-profit volunteer wildlife conservation organization made up of dedicated hunters, anglers and other wildlife advocates in Southwest Montana and elsewhere. Our mission is to protect habitat and conserve fish and wildlife for this and future generations. We support sustainable management of fish and wildlife populations through fair chase public hunting and fishing opportunities that will ensure these traditions are passed on for future generations to enjoy. We also support the Montana constitution which states: “the opportunity to harvest wild game is a heritage that shall forever be preserved” and that “the legislature shall provide adequate remedies to prevent unreasonable depletion of natural resources.”

The long term protection of the water quality of the Gallatin River is important to Cottonwood and GWA’s members, as well as local businesses, ranchers, landowners, recreationists, the citizens of Montana, and the Nation because it possesses outstanding recreational, ecological, and economic significance. The value of the Gallatin River to Montana citizens and tourists alike is exemplified by more than the 1,500 individuals and business owners that signed the petition ([bit.ly/ProtectTheGallatin](http://bit.ly/ProtectTheGallatin)) supporting designating the Gallatin as an ORW. The information in this petition demonstrates the outstanding values of the Gallatin River. It also shows the appropriateness and need for the ORW designation.

Cottonwood and GWA have updated and refiled the petition initially filed in 2001 by American Wildlands. That petition was signed by more than 2,000 individuals, 75 businesses, and 21 conservation groups. Over the span of the following six years, an EIS was completed, but a Record of Decision was never issued. Cottonwood and GWA request that the Board now adopt the EIS Pursuant to the Administrative Rules of Montana (17.4.625) and issue a Record of Decision.

### **3. Legal Foundation**

Citizens have the power to petition this Board for rulemaking to classify waters as outstanding resource waters (ORW). Mont. Code Ann. 75-5-316(3)(a). Cottonwood Environmental Law Center, the Gallatin Wildlife Association, our respective members and the above mentioned individuals, businesses and conservation groups ask that the Board designate the section of the Gallatin River, from the border of Yellowstone National Park to the confluence with Spanish Creek, as an Outstanding Resource Water (ORW) based on the criteria provided in this petition, as required by MCA 75-5-316(3)(a). Classification of this section of the Gallatin River as an ORW is necessary to protect the outstanding resources of the water body and there is no other effective process available that will achieve the necessary protection (please see below for a more detailed discussion on the necessity and lack of other effective processes). *See also MCA 75-5-316(3)(c)*. Finally, as discussed in detail below, the Gallatin River satisfies the designation criteria.

#### **4. Location**

The Gallatin River originates above 9,500 feet as a very cold mountain stream in Gallatin Lake in Yellowstone National Park (YNP). Just outside of the YNP boundary, Bacon Rind Creek joins the Gallatin from the west. Bacon Rind Creek, along with Fan and Divide Creeks just within the Park boundary, more than double the flow of the Gallatin River and quickly make it into a mountain trout stream.<sup>1</sup>

The Gallatin then flows north through a pastoral valley for many miles and into the picturesque Gallatin Canyon, past Gallatin Gateway, Belgrade and Three Forks, and into the Missouri River. The portion of the Gallatin River in Yellowstone National Park is currently an Outstanding Resource Water (ORW). Mont. Code Ann. 75-5-103(20)(a). Cottonwood and GWA request ORW status for the segment of the Gallatin River from the boarder of Yellowstone National Park through the Gallatin Canyon to the confluence of Spanish Creek.

This segment of the Gallatin River flows through federal and private lands. The Gallatin National Forest is located on both sides of the River, interspersed with private lands. In several places private land occupies one side of the river, with Gallatin National Forest land on the other side. While the Gallatin River does not flow through any wilderness areas, the Lee Metcalf Wilderness Area and the Hylite-Porcupine Wilderness Study Area, are nearby.

#### **5. Basis For ORW Designation**

In Montana, outstanding resource waters are state waters that have been identified as possessing outstanding ecological “significance and subsequently have been classified as an ORW by the board” and approved by the legislature. ARM 17.30.702(18); 75-5-103(20)(b), MCA. The Montana Water Quality Act provides for the ORW designation process. First, the board shall initially review a petition using the criteria specified in the subsection 3(c) to determine whether the petition contains sufficient credible information for the board to accept the petition. MCA 75-5-316(a).

##### Listing Criteria

Subsection 3(c) contains three parts. Part one of subsection 3(c) provides that the board shall consider the following criteria in determining whether certain state waters are outstanding resource waters:

- 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;

---

<sup>1</sup> Yellowstone National Park website: <http://www.yellowstonenationalpark.com/gallatinriver.htm>

- 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).

Mont. Code Ann. 75-5-316(4).

Parts two and three of subsection 3(c) provide that the board may not adopt a rule classifying state waters as outstanding resource waters until it accepts a petition and finds that, based on a preponderance of the evidence: the classification is necessary to protect the outstanding resource identified under subsection 3(a) and there are no other effective processes available that will achieve the necessary protection. MCA 75-5-316(c)(ii-iii). (These two parts are addressed later in this petition).

The criteria listed above are simply the criteria the board shall consider when making their determination. There is **no** requirement that a water body must meet or contain one or all of these criteria to be designated as an ORW and the last criteria in reality captures all other relevant information. The Gallatin River clearly meets several of these criteria, detailed below, and possesses many additional environmental and economic values. These demonstrate that the Gallatin River is a river of outstanding ecological, recreational, and economic significance, and therefore should be classified as an ORW by the board.

The portion of the Gallatin River petitioned here is a clear, cold river, flowing out of Yellowstone National Park, through the scenic Gallatin Canyon. The river corridor provides habitat for many native aquatic species, including the sensitive westslope cutthroat trout, wildlife, birds, and plants.<sup>2</sup> The Gallatin provides significant recreational opportunities for locals and tourists/visitors alike, which in turn provides significant social and economic benefits to the state, and local communities. In addition, the Gallatin River provides downstream landowners and ranchers with clean, clear water. Below is a more detailed discussion of the reasons the Gallatin River is of outstanding recreational, economic, and ecological significance and should therefore be designated as an ORW.

---

<sup>2</sup> Westslope cutthroat trout were listed as a “sensitive” species for the Custer Gallatin National forest in 2011. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5366363.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5366363.pdf) A “sensitive species” is one whose “population viability is a concern, as evidenced by: a) significant current or predicted downward trends in population numbers or density or, b) significant current or predicted downward trends in habitat capability that would reduce a species’ existing distribution.”

## 6. Wild and Scenic River Designation

The first criterion for the board to consider is whether the Gallatin River has been designated as wild and scenic. The Gallatin River is not designated as a wild and scenic river under the Wild and Scenic Rivers Act of 1968 (PL 90-542). However, the Proposed Action-Revised Forest Plan for the Custer Gallatin National Forest (January 2018) identifies the Gallatin River as eligible for designation as a wild and scenic river. To be eligible for designation, a river must be free-flowing and, with its adjacent land area, must possess one or more “outstandingly remarkable” values. Examples of such values include scenic, geologic, historic, cultural, ecologic, or fish and wildlife habitat values. (Gallatin National Forest, Forest Plan, p. J-1).

The currently proposed Forest Plan finds that the Gallatin possesses several of these outstandingly remarkable values. When developing the Gallatin Forest Plan, the Forest Service completed an analysis which identified river segments within the Gallatin National Forest having “outstandingly remarkable” values as described in the Wild and Scenic Rivers Act. “The outstandingly remarkable values of the Gallatin river were its scenic, recreation and fisheries values.” (Gallatin National Forest, Forest Plan, p. J-3.)

Eligible river segments are assigned a potential classification of wild, scenic or recreational. The Gallatin was determined as a potential recreational river. In finding that the Gallatin River has potential for classification as a recreational river under the Wild and Scenic Rivers Act, the Forest Plan states:

The river segment begins at the National Forest boundary and extends upstream to the Yellowstone National Park boundary. The river is very popular for a variety of recreational activities including white water rafting and kayaking, fishing, and hiking. The Gallatin River fishery is nationally known. The scenic backdrop of the river is the Madison and the Gallatin Ranges which range from steep cliffs, to broad tree covered mountain sides and to snow capped peaks. The views of the river from the highway which parallels the entire segment are very scenic. The route is a main access route to Yellowstone National Park. The channel is largely unchanged by man’s activities however there is some evidence of rip rapping and some minor diversion structures. A portion of National Forest lands have been developed for recreational use and there is development on private lands. For these reasons, the river was potentially classified a Recreational River.

According to the current Forest Plan, Recreational rivers are “those rivers or sections of rivers that are readily accessible by roads, have some development along their shorelines and may have some history of impoundment or diversion” (Forest Plan, p. J-1). The forest plan goes on to say, “the outstandingly remarkable values of the Gallatin River were its scenic, recreation and fisheries values.” (Forest Plan, p. J-4.)

The next step in the wild and scenic designation process is a suitability study. The Forest Plan states that a separate suitability study will be completed for each eligible river segment at a later date. (Forest Plan J-3). However, this suitability study has not yet been initiated, shows no signs of occurring during the ongoing Forest Plan Revision Process.

The Gallatin River is recognized as containing outstandingly remarkable scenic, recreation and fisheries values, and is seemingly eligible for federal Wild and Scenic listing. The determination of outstandingly remarkable values for wild and scenic designation are similar to the outstanding ecological significance values for ORW designation, where fisheries, scenic, and recreation values are all taken into consideration. The eligibility of the Gallatin as a Wild and Scenic River, lends weight and credibility to its eligibility as an ORW.

## **7. Outstanding Recreational Fishery**

Another criteria the board shall consider is the presence of an outstanding recreational fishery. As mentioned above, the Gallatin River was determined to contain outstanding and remarkable fisheries values. The Gallatin River supports an outstanding recreational fishery in its waters. The scenic, water quality, and fisheries values of the Gallatin River draws anglers from around the state, the Nation, and the world. This recreational fishery provides opportunities for anglers of all ages and skill levels, and provides significant social and economic benefits to the State, and local communities.

The Gallatin is classified as a “Blue Ribbon” stream of national significance, and was listed initially in 1999 in Trout Unlimited’s Guide to America’s 100 Best Trout Streams (“Guide”) (Ross 2013). According to the Guide, the Gallatin River “holds something for anglers of all skill levels, from the greenest novice who’s yet to wet a wader, to the grizzled pro who’s been there and done that and plans to keep doing it forever.”

**The Environmental Impact Statement for the Gallatin Forest Plan states that fishing on the Gallatin National Forest is of national interest, and that the Gallatin river is one of three “blue ribbon” trout streams on the Forest of national significance (The other two are the Madison and Yellowstone Rivers). Forest Plan EIS III-33.**

The outstanding recreational fisheries value of the Gallatin has been well known for decades, and its popularity is continually growing. According to the Pacific Northwest Rivers Study conducted in 1988, high sport fishery values dominated the fishery assessment in the Gallatin River drainage. Eighty-five miles of the Gallatin and its two forks received a Class I or II sport fishery value. The 30-mile stretch of the Gallatin from the West Fork to Gallatin Gateway received a Class I (Outstanding) rating in sport fishery value. This stretch incorporates a portion of the segment within Gallatin Canyon being petitioned here for ORW designation. A Class I rating signifies that fish production is based on natural reproduction and trout are abundant. The rest of the reach within the Gallatin Canyon was rated as Class II (Substantial). (Graham 1988)

Fishing along the Gallatin River has increased in the past few decades. An assessment in the late 90's found, for the reach between the West Fork of the Gallatin and Spanish Creek, all of which is within the stretch proposed for ORW designation, a trout biomass of 275 pounds per 1,000 feet with 1,013 fishing days/year/mile. (Long Term Compliance Work Plan for Wastewater Treatment and Disposal, Big Sky, Montana, HKM Engineering p. 38 (hereinafter HKM Report)). This report found that fishing pressure for Spanish Creek to the headwaters was 21,745 angler days in 1997. Fishing pressure for this study was calculated for the entire reach, so that number includes some pressure in Yellowstone National Park. (HKM Report).

Two Gallatin River use surveys were completed for the Gallatin National Forest to address Gallatin River use and to be used for future management of the Gallatin River. One survey, entitled "A Survey of Gallatin River Users" (hereinafter "1997 Survey"), was completed in 1997 to collect information on Gallatin River user demographics and views associated with use conditions. This survey was a coordinated effort between Montana Department of Fish, Wildlife and Parks and the Gallatin National Forest. The second survey is discussed in the next section. The 1997 Survey reach extends from the Squaw Creek bridge upstream to where the West Fork of the Gallatin River enters the mainstem Gallatin River. (May 1997). This reach is completely within the stretch being petitioned for Outstanding Resource Water designation. According to the 1997 Survey, this reach of river accommodates a significant amount of angler use and nearly all floating use that occurs on the river. Also, in recent years, rafting of river sections upstream of the West Fork has increased. The 1997 Survey includes information developed for the "Know Your Watershed: Gallatin Workshop" (Stroock 1997) which:

indicated that fishing use of the entire Gallatin River increased by an estimated 58% between 1968 and 1995. Angling use was estimated at 42,485 angler days in 1968 and was 67,422 angler days in 1995. Within the Gallatin canyon, angler use has been approximately 30-40% of the total river use. In 1995, use within the Gallatin canyon was estimated at 20,069 angler days. During this same time period the demographics of anglers also changed substantially. In 1968, resident anglers (e.g. estimated at approximately 70%) were the dominant angling public using the Gallatin River. By 1995, nonresidents accounted for nearly 65% of the anglers using the river. The economic impact of these levels of angling use was viewed as significant (i.e. estimated at \$5.9 million in 1995; Stroock, 1997).

Of the anglers interviewed for this survey, the majority were from outside Montana. A substantial portion (77%) indicated that the Gallatin River was a target destination, and most (62%) had visited the river before. (May 1997).

The 1997 Survey asked participants to identify factors that had a positive influence on their river use. "[A]pproximately 50% referred to various aspects of the scenery of the area as being important. A relatively large number referred to the quality of the fishing experience (e.g. size of



fish, number of fish, type of fishing, etc.) as a positive factor. River beauty and river conditions (e.g. clarity, flows, habitat quality, etc.) were also identified as positive factors.” (May 1997)

The Montana Statewide Angling Pressure report of 2005 found that the Gallatin received 87,285 angler days. This report covers the entirety of the river, from its source in Yellowstone National Park to Three Forks. The same report, for 2013, showed that the Gallatin received over 65,000 more angler days than in 2005, with a total of 153,076. Pressure on this resource is steadily increasing and the river deserves every protection possible to keep it an enjoyable experience for everyone.

The petitioned stretch of the Gallatin River contains an outstanding recreational fishery of national significance, which provides benefits to locals and visitors alike. The Gallatin Rivers outstanding recreational fishery provides significant ecological, social, recreational and economic benefits to the state, and more specifically the surrounding communities. ORW designation will ensure that this outstanding recreational fishery will thrive for today and into the future.

## **8. Other Factors that Indicate Outstanding Environmental or Economic Values**

The board must also look at other factors that indicate outstanding environmental or economic values. The Gallatin River is outstanding not only as a recreational fishery but for other ecological and economic values. The clean, clear waters of the Gallatin River provide recreational, aesthetic and spiritual benefits to thousands of people each year, residents and visitors alike. The use of the Gallatin River for recreational purposes is of outstanding economic value to the state and local economies. According to the Gallatin Watershed Sourcebook and the two surveys mentioned above, demand for waters to provide recreation, as well as other uses of the water resource, is rising. This section will include a discussion of the different uses people make of the Gallatin River, such as fishing, rafting, kayaking, and other recreational pursuits, the demographics of Gallatin River users, and how they feel about their experiences on the river. In addition to recreational values, the Gallatin River contains outstanding ecological values. Native fish, birds and wildlife depend on the Gallatin River for habitat needs. There are unique springs that feed the Gallatin River and keep portions of it ice-free throughout the winter. These ecological values will be examined in more detail below.

It is important to note that in addition to the ecological, economic and recreational benefits within the area proposed for ORW designation, downstream users and landowners benefit from the clean water flowing out of the canyon and into lowland areas that are used for agriculture and ranching, fishing, hunting, wildlife viewing, and birding.

The ecological, recreational, and economic values of the River are inextricably linked. High quality ecological values provide exceptional recreational opportunities, which benefit the state and local economy. Clean water is important to support the numerous landowners, ranchers, fish,

wildlife and birds that live along and depend on the river. Healthy wildlife and bird populations provide additional recreational opportunities and economic benefits.

### *Recreational and Economic Values*

Recreation services contribute significantly to the Gallatin Valley's economy. In the early to mid-1990's it was estimated that recreation services employed over 500 persons at an annual payroll of 5 million dollars. "Flyfishing guides, rafting outfitters, innkeepers and sporting goods dealers are just a few of those directly employed in providing recreational services in the area." (Forrest 1997). These numbers have continued to grow substantially. The portion of the Gallatin River being petitioned for ORW designation is the source of commercial rafting adventures and commercial fly-fishing operations. The Gallatin is also important for other recreational activities.

The 1997 Gallatin River User Survey interviewed 426 river users during the summer (May) of 1997. This survey demonstrates that the Gallatin River is a specific destination for recreationists, that it is used for a variety of recreational activities, and that users will likely return to experience the Gallatin River in the future. The majority (69%) of people interviewed for the 1997 Survey were from outside of Montana compared with 31% of individuals from Montana. Seventy of the individuals interviewed resided in the Gallatin Valley or the Gallatin Canyon. Some of those from outside Montana were from foreign countries such as Germany, Canada, Belgium, Denmark and Norway. 76% of those surveyed indicated that the Gallatin River was a specific destination, and over half had visited the Gallatin River before. 62% of anglers and 53% of floaters indicated that they were on a repeat visit.

When asked about the primary nature of their river use, most (57%) indicated that fishing was the principle reason for being on the Gallatin River. Montana anglers comprised 33% of anglers interviewed. This was followed by individuals which had come to use the river for floating (34%). Montana residents also comprised 33% of floaters interviewed. Forty respondents (9%) indicated that they were using the river for other activities which included sight-seeing, photography, picnicking, painting and general enjoyment of nature. (May 1997).

White-water boating has increased substantially on the Gallatin River. The 1997 Survey found that white-water floating on the Gallatin River has increased substantially over the last two decades. In 1980, the first commercial rafting company began providing tours on the river with a volume of rafting use estimated at 300 rafter days. Through the 1980's, commercial rafting use increased substantially to an estimated level of 3,900 rafter days in 1990. (May 1997). Today there are four companies operating raft trips on the river and "commercial rafting use on the Gallatin River has grown at the explosive rate of 5,500% over the last 17 years. Gross value of the 1997 use was approximately \$750,000 (Stroock, 1997).

The Gallatin River springs from the snow-clad peaks of the Madison and Gallatin mountain ranges and courses for more than 90 miles before joining the Madison and Jefferson rivers at Three Forks. The Gallatin comes close to being an alpine stream as it spills through the scenic Gallatin Canyon, where frequent rapids alternate with deep, green pools alive with trout.

The upper 40 miles of the Gallatin River contain some of Montana's very finest whitewater with an abundance of technical rapids, tight turns, big rocks, and large waves. While much of Montana's whitewater consists of large drops separated by long stretches of flat water, the Gallatin distinguishes itself with its quantity of whitewater as well as its quality. Some stretches have nearly continuous action. Almost all of the Gallatin's whitewater is easily accessible as the river flows mostly through public land and generally runs close to U.S. Highway 191. Even though the Gallatin is a small river, it can sustain good boating well into the summer. (Fischer 1999).

Gallatin River users appreciate its spectacular scenery and river conditions. The 1997 Survey found that Gallatin canyon scenery was identified by the largest number of respondents as the single most important positive factor influencing their use of the Gallatin River. This was followed by positive comments associated with the river and river conditions (e.g. water clarity, white-water conditions, river beauty, etc.). Other positive factors included accessibility of the river and user facilities, commercial services, and the association with friends, family and acquaintances. Negative factors included the highway and associated traffic. There were both positive and negative comments associated with the amount and nature of development within Gallatin canyon.

Of floaters interviewed for the 1997 Survey (144), the majority were from outside Montana, and a substantial portion of the floaters (118) indicated that the Gallatin River was a target destination. The majority of floaters (62%) indicated that they were using the services of a commercial guide, and a majority of floaters (53%) indicated that they had visited the Gallatin River before. Factors that had a positive influence on their river use included commercial services and access as well as scenery and river conditions. In general, floaters did not view general river use levels as being undesirable.

The 1997 Survey also interviewed some river users not associated with angling or floating. "These users were drawn to the Gallatin River because of the area's beauty. Most were nonresidents traveling through the area. Approximately 37% had visited the Gallatin River canyon before."

In 1999, Ripple Marketing LLP, at the request of the Gallatin National Forest, collected data from various Gallatin River users and created a report summarizing the findings and gave recommendations. The purpose of the study was to better understand the activities, behavior and perceptions of those people that use the Gallatin River, and the area around it, for recreation. The

study was limited to the 11 mile stretch of the Gallatin River between Big Sky and Squaw (Storm Castle) Creek, all of which is within the area petitioned for designation as an Outstanding Resource Water. The results of this survey are similar to the 1997 Survey results, and shows significant use and appreciation of the river for recreational purposes.

The Ripple Marketing Survey (hereinafter “1999 Survey”) interviewed 100 people in the summer of 1999 (41 anglers, 38 rafters, 8 kayakers, 4 sightseers, and 9 other). Of those interviewed, 64% were from out of state and 36% were from Montana. Of the in-state respondents, 56% were from Bozeman and 44% from 11 other cities. The out-of-state respondents represented 28 different states and 2 different European countries. (1999 Survey). Of the respondents, 41% were first time Gallatin River users; of these, 98% were from out of state. 28% of respondents have been using the Gallatin River for over 9 years, and 64% of these were from Montana. Of these long-time users, 11% fish, 17% raft, 22% kayak and 50% use the river for different activities such as swimming, sightseeing, hiking, etc. Of the other users, 6% have used the Gallatin for 6-9 years, 8% for 3-6 years, and 17% for 1-3 years. “Of those that have been using the Gallatin River for 1-3 years, 47% were from Montana and 53% were from out-of-state. There were nearly the same number of anglers and rafters from both in and out of the state in this category.” (1999 Survey).

According to this study, the vast majority of Gallatin River users would revisit the Gallatin River for recreational use. 72% of Montana residents surveyed said that it is “Very Likely” that they will revisit the Gallatin for recreation. 61% of out-of-state visitors and 43% of out-of-state first time visitors also indicated that it is “Very Likely” that they will revisit for recreation. (Id.) One issue that arose in the 1999 Survey is the threat of Big Sky’s proposed sewage disposal into the Gallatin River. The substantial number of comments in the 1999 Survey and to the DEQ during the permit comment period against the proposed discharge shows a significant interest in and support for protecting the River’s high water quality. The dischargee issued was resolved for the better part of a decade, but it of growing concern again today.

**Although many in Big Sky do not want to directly discharge their effluent into the Gallatin River, without the protection of the ORW Designation, the potential for direct discharge will always be a threat to the health of the river, its resident species and the economies that depend on a healthy and clean Gallatin. The ORW designation will ensure the character of the Gallatin is protected for future generations.**

The pristine character of the Gallatin River made it a logical choice for filming many of the river scenes in the movie “A River Runs Through It.” The Gallatin River was used in the movie because the Blackfoot River, about which the book and movie was based, is not nearly as scenic as the Gallatin. There was also the issue of pollution that plagued the Blackfoot until the past decade.

The Gallatin Whitewater Festival is an annual event on the Gallatin River. It is an annual gathering of kayak and canoe enthusiasts, who compete in a series of recreational and

competitive river events for all abilities. The event has been a river runner's tradition since 1977, and draws boaters, recreationists, and spectators from around the region. The event also draws a number of spectators who come to watch the slalom, rodeo and downriver whitewater events.

The Wave Train kayak program uses the Gallatin River to teach local children how to kayak and safely appreciate the water. Wave Train is also one of the sponsors and organizers of the Gallatin Whitewater Festival. Wave Train provides a team learning environment for local children through the age of 18. It is in its fifth year, and there are currently about 20 kids in the program, which utilizes the Gallatin River to teach kayak technique and safety.

### Ecological Values

This portion of the Gallatin River is also special ecologically. The river corridor is home to a wide diversity of fish, bird, wildlife and plant species including threatened and endangered species such as wolf, grizzly bear, lynx, and bald eagle. There is a known wolf pack inhabiting the Gallatin Canyon within the area of the petitioned river section. Grizzly bear inhabit the Gallatin and Madison Mountain ranges on either side of the Gallatin River, and the upper portion of the petitioned river section is within the Greater Yellowstone core grizzly bear recovery area. Bald eagles often forage in the Gallatin Canyon.

Peregrine falcon, an endangered species, nest in and around the Gallatin Canyon, in the Gallatin River corridor. There has been an active peregrine falcon eyrie since 1994 near the confluence of the Gallatin River with Squaw Creek. It fledged 2 baby peregrines in 1997, 1 in 1998 and 2 in 1999.

Other important species present in the Gallatin Canyon include slender Indian paintbrush, large leafed balsamroot, discoid goldenweed, boreal owl, golden eagle, wolverine, bighorn sheep, moose, elk, and deer. (Montana Natural Heritage Program) The Gallatin Canyon is also home to the Gallatin Mountain snail. Slender Indian Paintbrush is a Forest Service sensitive species and a BLM watch species. It is located in wetlands along the Gallatin River and tributaries. According to the Gallatin National Forest, sensitive species are "those plant or animal species which are susceptible or vulnerable to activity impacts or habitat alterations" (Forest Plan FEIS VII-38).

The boreal toad and northern leopard frog are both Gallatin National Forest sensitive species that may be present in the Gallatin River corridor. (Bev Dixon, Biologist, Gallatin National Forest, personal communication 6/12/01). While their habitat is present in the wetlands and riparian areas along the Gallatin River, the presence of the northern leopard frog along the Gallatin River has not been confirmed. (Id.). The boreal toad has been documented as present along the petitioned section of the river. (Wally Mclure, Biologist, Gallatin National Forest, personal communication 6/12/01). These two species inhabit wetland or riparian areas, and both are considered "species of special concern" by the by the Montana Natural Heritage Program, Montana Fish Wildlife and Parks, and Montana American Fisheries Society. The term "species of special concern" includes taxa that are rare, endemic, disjunct, threatened or endangered

throughout their range or in Montana, vulnerable to extirpation from Montana, or in need of further research. The term also encompasses species that have a special designation by organizations or land management agencies in Montana, including: Bureau of Land Management Special Status and Watch species; U.S. Forest Service Sensitive and Watch species; and U.S. Fish and Wildlife Service Threatened, Endangered and Candidate species. (Montana Natural Heritage Program).

Riparian areas are important to the survival of many of the species present in the river corridor. According to the Gallatin Watershed Sourcebook:

Riparian areas are the green areas adjacent to rivers and streams. Healthy riparian areas usually contain a swath of lush growth of water-adapted plants. Healthy riparian areas are the key to maintaining healthy stream systems. Streamside vegetation helps stabilize streambanks (reducing siltation and streambank movement), helps slow water during peak flows, provides important breeding habitat and cover for wildlife, keeps water cooler in the summer for fisheries, prevents ice damage in winter, and traps and filters runoff that may contain sediments or pollutants from adjacent lands. (Forrest 1997).

The Gallatin's riparian vegetation consists of cottonwoods with an understory of dogwood, willow, alder, snowberry, chokecherry and grasses. The Wolfs Willow, a Forest Service sensitive species is located in the riparian areas along the Gallatin River.

The upper section of the river, before it enters the canyon, "is much favored by animals, which do not interfere with the fishermen but do add interest to the landscape by creating a wilderness aspect even though the highway is right beside you." (Yellowstone National Park website). In the canyon section "there are mountain sheep on the mountains and the canyon walls above the river and in May and sometimes June the sheep will come down along the river, giving one a rare glimpse of these creatures of the high places. One can also encounter moose or elk anywhere on this stream" (Id.)

Highway 191, which parallels the Gallatin River for most of the stretch in the canyon, and development have impacted a significant amount of the Gallatin's riparian areas. The River is essential to the health of the stream and the fish, birds and wildlife that depend on its riparian areas to protect the remaining riparian areas from further loss.

The Gallatin River is a relatively pristine, nutrient poor water body with clear, cold water. Riparian areas help keep the Gallatin in this condition. The lake from where it originates and the characteristics of the watershed make the Gallatin River a cool stream that is stable in temperature, only moderately mineral rich and well supplied with oxygen. (Yellowstone National Park website).

### Recreational Use

Recreational use of the Gallatin River has increased substantially over the past decade, and will continue to grow. (See Above). For many users, the Gallatin River is a specific destination, and visitors return to enjoy its spectacular scenery and recreational experiences. Numerous state and local businesses benefit from the recreational values of the Gallatin River including guide and recreation equipment businesses, restaurants, grocery stores, rental car agencies, travel agencies, hotels, airports, art galleries, and other retail businesses. ORW designation will not reduce the level of use of the Gallatin River. Instead, ORW designation will assure that the water quality of the Gallatin River remains high to support the expected levels of recreational use both within the designated section and downstream. This high quality water will continue to draw people to this beautiful canyon for its exceptional recreational experiences.

In addition, ORW designation will assure that the Gallatin River will continue to support the exceptional fish, wildlife, bird and plant species within the designated area and downstream. Whether appreciated for their ecological value, hunting, fishing, or viewing, these species make the Gallatin River and its surrounding area a special place appreciated by landowners and visitors.

### **9. The Classification Is Necessary to Protect the Resource and There Is No Other Effective Process Available That Will Achieve the Necessary Protection**

According to the Outstanding Resource Water provision of the Montana Water Quality Act, the board may not adopt a rule classifying state waters as outstanding resource waters until it accepts a petition and finds that, based on a preponderance of the evidence, the classification is necessary to protect the outstanding resource and there is no other effective process available that will achieve the necessary protection. MCA 75-5- 316(3)(c)(ii-iii). The preponderance of evidence standard is a low threshold. This means that the weight supporting the petition is greater than the weight opposing it, or that what the petition promotes is more probable than not.

Outstanding Resource Water designation is necessary to protect outstanding ecological and economic values of the Gallatin River, and there is no other effective process available that will achieve the necessary protection. *Water quality laws are generally designed to be reactive, not preventative.* As a result, if someone wants a permit to degrade water quality they, more often than not, get that permit. Once water quality is degraded, other mechanisms, such as TMDLs, attempt to restore water quality. No other mechanism other than ORW designation will continuously protect the Gallatin's high quality waters from degradation.

ORW protection is the tool state and local governments can use to take this active role in defining the management of Montana's water: For the Gallatin River it is the only tool to employ. The quality of the Gallatin River experience today is outstanding. In order to keep it this way, it is necessary, to manage our behavior and plan for future needs. ORW designation is the

mechanism to ensure that the outstanding ecological, recreational and economic values of the Gallatin River are retained for our future. **It is the only pro-active water quality protection tool provided by the Montana Water Quality Act.**

As explained above, the Gallatin River is a pristine, nutrient poor water body. The water is cold and clear, and landowners and river users appreciate it for this quality. However, land use activities on public and private lands and the substantial increase in development in the canyon has impacted the water quality of the Gallatin River by adding nutrients and sediments and impacting riparian areas. Tributary streams have been degraded and some are listed as impaired on the State's 303(d) list of impaired water bodies: Taylor Creek, the West Fork Gallatin River, the Middle Fork of the West Fork Gallatin River, and the South Fork of the West Fork Gallatin River. These tributaries bring pollutants into the Gallatin River. Absent the protections of an ORW designation, the Gallatin will be incrementally degraded by these and other causes. This has been the history of every main-stem waterbody in the state.

Many of the land management activities that have impacted the Gallatin River (and continue to do so) were done with little or no mitigation. To protect the River's water quality, it is necessary to ensure that all future development and land management activities in the Gallatin Canyon are done in a responsible manner. ORW designation will prohibit permanently degrading the water quality of the Gallatin River. For example, ORW designation may make it necessary for developers and land managers such as the Forest Service to implement improved conservation measures such as more advanced septic systems or larger stream buffers for logging activities. Such measures should be taken to preserve the ecological integrity and beauty of the Gallatin River for all users, including homeowners and visitors alike.

In many locations along the petitioned stretch of the Gallatin River, the water quality is at a level above the minimum allowed by state and federal law. ORW designation is necessary to keep the Gallatin's water quality at this higher than minimum level. Without ORW designation, activities may be permitted that would lower the water quality of the river to the minimum level allowable, and below.

Because the Gallatin is so cold and nutrient poor, a significant amount of pollutants, such as nutrients, could be added before reaching the allowable minimum level of water quality. Such changes will significantly alter the characteristics of the Gallatin River, reducing its clarity, increasing moss, algal and plant growth in the river, and changing the aquatic insect composition. No mechanism except ORW designation will protect this.



## **10. Gallatin River Reassessment**

In some instances, the Gallatin River's water quality has declined, especially near highly developed areas such as Big Sky. The Gallatin River, from Spanish Creek to the Montana State border, which is the stretch being petitioned here, is listed on the state's waterbody reassessment schedule. This reassessment schedule was developed in conjunction with the 303(d) list of degraded waters. Reassessment waterbodies are those for which the state did not have sufficient credible data to support a listing, and will be monitored and assessed as soon as possible to determine whether it is a threatened or impaired water body. This section of the Gallatin River fortunately has not been on a 303(d) list since 1996.

If, during its usual monitoring and assessment of the Gallatin River, the DEQ finds that the Gallatin River is neither threatened nor impaired, then ORW designation will prevent the Gallatin River from ever becoming threatened or impaired - preventing its addition to the State's 303(d) list of impaired waters, and preventing the need to spend money to clean it up. ORW designation requires that the water quality of the river be maintained or protected. As explained previously, future activities that may lower the water quality of the designated section of the river would be modified or mitigated to ensure there is no permanent lowering of the water quality of the ORW.

The state already has over 900 waterbodies that are considered polluted and in need of clean-up plans (Total Maximum Daily Loads, or TMDLs). These waters do not support some or all of their designated uses, such as drinking water, agriculture, cold or warm water fishery, and primary or secondary recreation. The DEQ currently spends a significant amount of time and money developing clean-up plans for these streams. ORW designation will prevent this outstanding section of the Gallatin River from being added to this list.

If during its usual monitoring and assessment the state determines that portions of the Gallatin River are in fact threatened or impaired, the state must develop a TMDL for each pollutant. This must happen regardless of ORW designation. ORW designation will not affect the requirement to do a TMDL, nor will it affect the implementation of the TMDL, and it will not require the state to make the TMDL more restrictive, since the DEQ must ensure that, after implementation of the TMDL, the waterbody meets state water quality standards and supports beneficial uses. However, ORW designation will proactively insure that the Gallatin does not become impaired and necessitate listing and restoration.

ORW designation is economically and ecologically sensible because preventing harm is always of more economic and ecologically beneficial than reclaiming harm already done. Moreover, this

proactive approach is the only way to insure that the River is not degraded. As discussed, Outstanding Resource Water designation is necessary to protect outstanding ecological and economic values of the Gallatin River, and there is no other effective process available that will achieve the necessary protection. Without this designation, the water quality of the Gallatin River could be permanently compromised and degraded so that it no longer supports its beneficial uses or meets state water quality standards. Because of its outstanding ecological, economic, and recreational values, the Gallatin River deserves this added protection and assurance that no permanent degradation will be allowed.

## **11. Conclusion**

For the foregoing reasons, Cottonwood Environmental Law Center and the Gallatin Wildlife Association respectfully request the Montana Board of Environmental Review recommend to the Montana State Legislature that the Gallatin River be designated as an ORW, from the Yellowstone National Park Boundary downstream to the confluence with Spanish Creek. An ORW designation is necessary to protect the outstanding character and quality of the Gallatin River.

Submitted on behalf of Petitioners, Gallatin Wildlife Association and Cottonwood Environmental Law Center, by:

---

John Meyer, Executive Director, Cottonwood Environmental Law Center

---

Glenn Hockett, Volunteer President, Gallatin Wildlife Association

On:

---

January 31, 2018

## Citations

Gallatin National Forest, Land and Resource Management Plan, Final EIS

Decker-Hess, Janet, Gael Bissell, Stewart Allen, Tom Ring, Nancy Johnson, Susan Reel. 1998.

Pacific Northwest Rivers Study, Final Report: Montana, May 1988

Fischer, Hank, Carol Fischer. 1999. Paddling Montana, 32 great rivers under the Big Sky, a Falcon Guide.

Forrest, Steve. 1997. The Gallatin Watershed Sourcebook: A Resident's Guide

May, Bruce, Kimberly Schlenker, Bruce Rich. 1997. A Survey of Gallatin River Users

Montana Fish, Wildlife, and Parks, Montana Statewide Angling Pressure Report, 2005, 2013

Montana Natural Heritage Program

Montana Rivers Information System

Ripple Marketing LLP. October 18, 1999. Gallatin River Usage Study; Prepared for the Gallatin National Forest.

Stroock, B. 1997. Water and land use trends in the Gallatin River watershed. Know Your Watershed: Gallatin Workshop. October 1996. p. 6-8.

Ross, John, 1999. Trout Unlimited's Guide to America's 100 Best Trout Streams

18