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BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, AUGUST 9, 2019
METCALF BUILDING, ROOM 111
1520 EAST 6th 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 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 May 22, 2019 meeting minutes.
2. The Board will vote on adopting the May 31, 2019 meeting minutes.

Public Comment.

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 June 12, 2019, the parties filed a Joint Motion to Stay Schedule citing a potential settlement of this matter. Ms. Clerget issued an Order Granting Stay on June 17, 2019 and the parties filed a status report on July 17, 2019, indicating technical discussions regarding settlement are still underway.
2. Non-enforcement cases assigned to the Hearings Examiner
 - a. **In the matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. On July 8, 2019, the parties filed a Motion to Stay the Amended Scheduling Order citing settlement discussions. On July 15, 2019, Ms. Clerget granted the stay. The parties are to file either a stipulated settlement agreement or a joint motion with revised procedural dates for the remaining of the schedule by November 29, 2019.
 - b. **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.** This matter has been stayed since

March 28, 2018, pending the Montana Supreme Court decision in *MEIC and Sierra Club v. DEQ and Western Energy*. The parties will file a status report within 30 days of the Supreme Court's decision, which has not yet occurred.

- c. **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.** In the continuing Contested Case action, the parties have filed cross-motions for summary judgment. At its May 31, 2019 meeting, the Board voted to transfer jurisdiction to hearing examiner Clerget to render a proposed decision on the parties' cross-motions for summary judgment. Oral argument on the parties' motions is set for August 22, 2019. The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause No. DA 19-0299. The District Court has transmitted the record and the Supreme Court has set a briefing schedule. The BER has retained outside counsel to represent it before the Supreme Court.
- 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.** A two-day hearing on this matter on held on December 3-4, 2018. An oral argument on the parties' proposed FOFCOLs was held on May 7, 2019. Counsel for DEQ was unavailable for the August BER meeting and so the parties agreed this case would not go before the BER until the October meeting. Ms. Clerget will issue her Proposed FOFCOL and this matter will be before the Board at its October meeting.
- 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 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2019-01 WQ WQ for scheduling purposes. On July 8, 2019, the parties filed a Motion to Stay the Amended Scheduling Order citing settlement discussions. On July 15, 2019, Ms. Clerget granted the stay. The parties are to file either a stipulated settlement agreement or a joint motion with revised procedural dates for the remaining of the schedule by November 29, 2019.
- f. **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, and 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. BER 2018-05 OC.** The parties have filed several motions including (1) leave to file second amended complaint; (2) motion in *limine*; and (3) cross-motions for summary judgment. Oral Argument on all motions is set for August 5, 2019.

- g. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On May 22, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case on substantive and procedural issues. Based on the Motions and oral argument, Ms. Clerget issued an order on May 24, 2019 holding that the 15-day deadline in Admin. Rule 17.20.1803(d) did not apply and the case would proceed as a MAPA contested case. Pursuant to the Prescheduling Order of June 6, 2019, the parties submitted proposed schedules. The parties were able to agree on some of the dates and deadlines, and agreed that the hearing should be extremely expedited, but disagreed about whether there should be a dispositive motions deadline and whether the hearing should be held in December 2019 or January 2020. On June 28, 2019, Ms. Clerget issued a First Scheduling Order with an extremely expedited schedule that adopted the parties agreed-on dates, set dispositive motions deadlines for October, and set a hearing beginning on November 12, 2019. With the set schedule, this matter will be before the BER for decision at its December 12, 2019 meeting. The parties are proceeding according to the schedule.
- h. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.** On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. Ms. Clerget issued a Scheduling Order on June 21, 2019 and the parties are proceeding accordingly.
- i. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F.** On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case. Ms. Clerget issued a Scheduling Order on July 2, 2019, and the parties are proceeding according to that Order.

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 30, 2019, the Montana Supreme Court ordered Plaintiff and Appellees Montana Environmental Information Center and Sierra Club, and the Defendants and Appellants DEQ and Western Energy Company to submit addition simultaneous briefing on three issues: 1 – the legal basis for DEQ's representative monitoring protocol for precipitation-driven events; 2- the basis (based on data in the administrative record) for DEQ's selection of the 20 representative outfalls out of all the active outfalls; and 3 – address the 2014 modifications to MPDES Permit No. MT0023965 including evidence in the administrative record and arguments made before the Board that support or contradict the District Court's decision to invalidate the Permit as modified in 2014, and address Western Energy Company's argument that the District Court should not have reviewed the administrative decision to renew MPDES Permit No. MT0023965 until the 2014 modifications to the Permit were

complete. The parties submitted additional briefs on June 17, 2019, and await the Montana Supreme Court's decision.

- b. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).** On June 6, 2019 the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. Conservation Groups have contacted the BER regarding service and have served the Attorney General's office. The BER has retained outside counsel to represent it in this matter.

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. **The department requests the Board to initiate rulemaking to increase engineering review fees for public water and wastewater systems under ARM 17.38.106.**

Public Comment.

B. NEW CONTESTED CASE

1. **In the Matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities regarding issuance of MPDES permit no. MTX000164, BER 2019-06 WQ.** On July 3, 2019, 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.

Public Comment.

C. ACTION ON CONTESTED CASES

1. **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 February 8, 2019 the BER remanded these cases to Ms. Clerget on the owner/operator issue. Ms. Clerget conducted a one-day remand hearing on June 13, 2019 and issued her proposed Findings of Fact and Conclusions of Law (FOFCOL) on the owner/operator issue on July 8, 2019. DEQ has filed exceptions to the order, and CR/REF have responded to those exceptions. The Board will hear oral argument and then this matter is ripe for decision by the Board.

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**

May 22, 2019

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 2:00 p.m., on Wednesday, May 22, 2019, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chairperson Christine Deveny

Board Members Present by Phone: John DeArment, Melissa Hornbein, David Lehnherr, Dexter Busby

Board Members Absent: Hillary Hanson, Chris Tweeten

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: Dave Klemp, Sandy Scherer, Mark Lucas, Ed Hayes, Craig Jones

Interested & Other Persons Present: Rosario Doriott Dominguez, Jeremy Cottrell, Darrell James – Westmoreland Mining; Robert Cheren – Baker Hostetler; John Tabaracci – Northwestern Energy; Steve Wade – BKBH

Interested Persons Present by Phone: Marty Booher – Baker Hostetler; Rob Sterup – Brown Law Firm; Damon Obie, Joshua Frank – Talen Montana; Adam Haight – Montana AFL-CIO

Roll was called: Chairperson Deveny was present in person and four Board members were present via teleconference, providing a quorum.

I. Action Items

In the Matter of the Major Facility Siting Act Certificate for Colstrip Units 3 and 4 received by the Board on May 17, 2019.

Ms. Clerget briefed the Board on the purpose of the special meeting.

Chairperson Deveny moved to appoint Ms. Clerget as the hearing examiner, both for purposes of procedure and the findings of conclusions. Mr. Busby seconded the motion which passed unanimously.

II. General Public Comment

None were offered.

III. Adjournment

Ms. Hornbein moved to adjourn the meeting. Mr. Busby seconded the motion which passed unanimously. The meeting was adjourned at 2:20 p.m.

Board of Environmental Review May 22, 2019, minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

May 31, 2019

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 10:30 a.m., on Friday, May 31, 2019 in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chairperson Christine Deveny, John DeArment, Melissa Hornbein, Dexter Busby, Chris Tweeten, David Lehnherr

Board Members Present by Phone: Hillary Hanson

Board Members Absent: None

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: Sandy Scherer, Kirsten Bowers, Norm Mullen, Kurt Moser, Sarah Christopherson, Terry Mavencamp, Jon Morgan, Susan Bawden, Martin VanOort, Emily Hinz, David Klemp, Chris Yde, Liz Ulrich, Julie Merkel, Mark Lucas, Aaron Pettis, Eric Regensburger, Mike Suplee, Jon Kenning, Johanna McLaughlin, Derek Fleming, Tim Davis, Lauren Sullivan, Myla Kelly, Rebecca Harbage, Kevin Krogstad

Interested & Other Persons Present: Aleisha Solem – Agency Legal Services; John Martin, Samuel Yemington – Holland and Hart; Wade Steere – Western Energy Company; peggy Trenk – Treasure State Resources Association; Alan Olson – Montana Petroleum Association; Cody Ferguson – Northern Plains Resource Council; Shiloh Hernandez – Western Environmental Law Center, Derf Johnson, MEIC;

Interested & Other Persons Present by Phone: Travis Ross – Missoula County Health Department; Vicki Marquis – Holland and Hart

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

I.A. Administrative Items – Review and Approve Minutes

I.A.1. April 12, 2019 Meeting Minutes

Mr. Tweeten moved to approve the meeting minutes. Mr. Busby seconded the motion, which 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 said she held a scheduling conference on April 2, 2019. The parties agreed to a schedule for discovery. A scheduling order was issued, and the parties are proceeding accordingly.

II.A.1.b. 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.

Ms. Clerget stated there was a final prehearing schedule and it was decided there needed to be an additional factual hearing. The hearing is scheduled, and the case is proceeding.

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

II.A.2.a. In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC, BER 2019-04 MFSA.

Ms. Clerget said an emergency meeting was held. After the emergency meeting, a hearing was held. Talen moved to intervene, and the motion was granted. The parties have to decide whether or not to go directly to District Court or proceed down the contested case path in front of the Board.

II.A.2.b. In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC regarding issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.

Ms. Clerget issued a prescheduling order on 5/29 and will get a schedule in place.

II.A.2.c. In the matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.

Ms. Clerget stated this case has been consolidated with case BER 2015-07 WQ. A scheduling order has been issued and the parties are proceeding accordingly.

- II.A.2.d. **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 stated the case has been stayed since March 28, 2018 pending the resolution of the Supreme Court case Sierra Club v. DEQ.

- II.A.2.e. **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 a hearing was held, the parties submitted post hearing briefs and it's before her for a decision.

- II.A.2.f. **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 stated this case has been consolidated with BER 2019-01. A scheduling order is in place and the parties are proceeding accordingly.

- II.A.g. **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, and 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. BER 2018-05 OC.**

Ms. Clerget said the parties filed cross motions for summary judgment which are before her for decision.

II.A.3. 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.**

Ms. Bowers stated the Montana Supreme Court requested additional briefing and the briefs are due June 17, 2019.

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

- III.A.1. **The department requests that the board adopt proposed amendments to the Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.**

Dr. Suplee briefed the Board and answered questions regarding the adoption of proposed groundwater standards.

Mr. Ross stated Missoula City-County Health Department would be interested in working with the Department on the next steps but would like to see it move sooner than later.

Mr. Tweeten moved to adopt the rules as proposed. Mr. Busby seconded the motion which passed unanimously.

III.A.2. **In the matter of final adoption of New Rule I (17.30.1702) and the proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334, 17.36.103, 17.36.345, 17.38.101, 17.50.819 and Department Circulars DEQ-1, DEQ-2, and DEQ-3 as noticed in MAR 17-404 with modifications.**

Mr. Regensburger briefed the Board and answered questions regarding the adoption of proposed setback rules between sewage lagoons and wells.

Ms. Hornbein moved to adopt the rules as proposed. Chairperson Deveny seconded the motion which passed unanimously.

III.B. New Contested Cases

III.B.1. **In the Matter of the Notice of Appeal and Request for Hearing by Western Energy Company regarding approval of surface mining permit no. C2011003F, BER 2019-03 OC.**

Ms. Clerget gave the Board members their options, including consolidating this case and the below-mentioned case, BER 2019-05 OC, and assigning it to the Hearings Examiner.

Mr. Tweeten moved to consolidate cases BER 2019-03 OC and BER 2019-05 OC for procedural purposes and assign the matter entirely to the Hearings Examiner. Mr. Busby seconded the motion, which passed unanimously.

III.B.2. **In the Matter of the Notice of Appeal and Request for Hearing by the Montana Environmental Information Center and Sierra Club regarding approval of surface mining permit no. C2011003F, BER 2019-05 OC.**

(See above)

III.C. Action on Contested Cases

III.C.1. **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 briefed the Board and answered questions on the issues surrounding this case.

Mr. Tweeten moved that the Board refer to Counsel, acting as Hearing Examiner, the pending summary judgment motions in the matter of Signal Peak Energy, Bull Mountain Coal Mine No. 1, for the preparation of a proposed decision in accordance with MAPA, which would then be brought back to the Board for further proceedings.

Mr. DeArment seconded the motion. The Board then heard from the parties and asked questions. The board voted on the motion which passed unanimously.

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

Western Energy filed an Affidavit to Exclude Board Members Deveny and Lehnerr. The Board discussed the Affidavit. Board Members took no action so the Affidavit was denied for a lack of motion.

Western Energy filed a Motion to Strike which was withdrawn.

Board Member Tweeten moved to affirm the Hearing Examiner's Order on the Motions in Limine, incorporating the order into the proposed findings of fact and conclusion of law currently before the board. Board Member Busby seconded the motion which passed unanimously.

Board Member Busy moved to accept the Hearing Examiner's Proposed Findings of Facts adding language into the Proposed Order that any contrary findings of fact that have been offered by the parties are rejected as being contrary to the facts as found by the Hearing Examiner. Board Member Tweeten seconded the motion, which passed unanimously.

Chairperson Deveny moved to adopt the Conclusion of Law that places the burden of proof on the Petitioners, MEIC. Board Member Tweeten seconded the motion, which passed

Board Member Tweeten moved to amend Conclusion of Law No. 12 as follows:

Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated issuing the permit could result that the project at issue is not designed to prevent in land uses or beneficial uses of water from being adversely affected, water quality standards from being violated, or water rights from being impacted. Mont. Code Ann. §§ 82-4-203(31), 203(32), 222(1)(1), 226(8), 227(3)(a); Admin. R. Mont. 17.24.401-405; Signal Peak, BER-2-13-07-SM at 87.

amend Conclusion of Law No. 18 as follows:

Conservation Groups did not provide sufficient evidence to show ~~a more likely than not possibility~~ that the AM4 Amendment will result in is not designed to prevent "material damage" as defined in Mont. Code. Ann. §§ 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). Mont. Code Ann. §82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c).

Board Member Busby seconded the motion which passed 6 to 1. Board Member Hornbein dissenting.

Board Member Tweeten moved to accept Conclusions of Law Nos. 1 through 5. Board member Hornbein seconded the motion which passed 6 to 1. Board Member Hanson dissenting.

Chairperson Deveny moved to adopt Conclusions of Law Nos. 5 through 11. Board Member Tweeten seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusions of Law Nos. 13 through 17. Chairperson Deveny seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law No. 19. Board Member Busby seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law Nos. 20 through 27. Chairperson Deveny seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusions of Law Nos. 28 through 38. Board Member Busby seconded the motion which passed unanimously.

Board Member Busby moved to adopt Conclusions of Law Nos. 39 through 43. Board Member Tweeten seconded the motion.

Board Member Tweeten moved to Amend the motion. Mr. Tweeten moved to amend Subsection B of the discussion section of the Proposed FOFCOL on page 71 by striking the word "possibility" and inserting the word "probability" and then on page 76 striking the work "possibility" and inserting the word "probability" and then on page 88 in Conclusion of Law 39 after the word "above" insert the words, "As amended by the Board,". Board Member Busby seconded the amendment.

Board Member Tweeten withdrew the amendment (Tr. 206:2-18) in part, with respect to Conclusion of Law No. 39 and amended the motion to amend Conclusion of Law No. 39 on page 88 to read as follows:

Conservation Groups failed to present the evidence necessary to establish facts essential to a determination that the AM4 permit is not designed to prevent material damage.

Conclusion of Law No. 40 amended to add the words "Essential to a determination the AM4 permit was not designed to prevent material damage" in the second line of 40 after the words "AM4 permit."

Conclusion of Law No. 42 amended to add the words "The determination that the AM4 permit was not designed to prevent material damage to aquatic life use of EFAC" in the second line of 42 after the words "AM4 permit."

Board Member Busby seconded the motion to amend which passed unanimously.

The motion as amended passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law 44 and therefore it is ordered sub a and b paragraphs on page 90 of the Proposed Decision. The motion was withdrawn.

Board Member Tweeten moved to decline to adopt the discussion section of the proposed decision with the exception of subsection (b). Chairperson Deveny seconded the motion which passed 6 to 1. Board Member Hornbein dissenting.

Board Member Tweeten moved to adopt Conclusion of Law No. 44 and the order provisions of the “therefore it is ordered” paragraph including subparagraphs (a) and (b) found on page 90 of the hearing examiner’s proposed decision. Board Member Busby seconded the motion, which passed unanimously.

IV. Board Counsel Update

None were offered.

V. General Public Comment

None were offered.

VI. Adjournment

Ms. Hornbein moved to adjourn the meeting. Chairperson Deveny seconded the motion, which passed unanimously. Chairperson Deveny adjourned the meeting at 11:00 am.

Board of Environmental Review May 31, 2019 minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR AMENDMENT OF RULES AND PROPOSED NEW RULE I**

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) 17.36.805 and 17.38.106, and the adoption of New Rule I pertaining to certification under 76-4-127, MCA.

List of Affected Board Rules – ARM 17.38.106

List of Affected Department Rules – ARM 17.36.805 and New Rule I

Affected Parties Summary – The amendments to the Board’s rule in ARM 17.38.106 will affect anyone applying to the Department for public water and wastewater engineering approval, including anyone who submits a subdivision application that includes public water or wastewater facilities. The amendments to the Department’s rule in ARM 17.36.805 will affect anyone who submits a subdivision application to the Department or to a contracted county. New Rule I will affect any municipality or county water and/or sewer district that seeks to become a certifying authority for the municipal facilities exemption in 76-4-125 and -127, MCA, as well as any person who seeks to use that subdivision exemption.

Background – The Department requests that the Board initiate rulemaking to increase engineering review fees for public water and wastewater systems under ARM 17.38.106. Section 75-6-108(3), MCA, gives the Board rulemaking authority to prescribe fees to be assessed by the Department on persons who submit plans and specifications for construction, alteration, or extension of a public water supply system or public sewage system. These fees must be commensurate with the cost to the Department of reviewing the plans and specifications. Average expenses to the Department have exceeded average revenue by approximately 7 percent over the past two fiscal years. Assuming a conservative average increase in expenses of 2 percent per year, the Department’s Public Water and Wastewater Engineering Review program projects that a 40 percent increase in fees will be needed to support projected expenses through 2027.

As part of this joint rulemaking, the Department is proposing to increase subdivision review fees under ARM 17.36.805 for the same reasons. The Department is also proposing to adopt New Rule I, which is a subdivision rule that provides eligibility criteria for which municipalities and county water and sewer districts may act as certifying authorities for purposes of the municipal facilities exemption in the Sanitation in Subdivisions Act.

Hearing Information – The Department recommends the Board appoint a hearing officer and conduct a public hearing to take public comment on the adoption and amendment of these rules.

Board Options – The Board may:

1. Initiate rulemaking and issue the attached notice of public hearing on the proposed amendment and adoption of rule;
2. Determine that the amendment and adoption 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 and Adoption of Administrative Rules of Montana 17.36.805 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule I pertaining to certification under 76-4-127, MCA.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING
ARM 17.36.805 and 17.38.106)	ON PROPOSED AMENDMENT
pertaining to subdivision and public)	AND ADOPTION
water and wastewater review fees,)	
and New Rule I pertaining to)	(SUBDIVISIONS)
certification under 76-4-127, MCA)	(PUBLIC WATER AND SEWAGE
)	SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On September 16, 2019, at 10:00 a.m., the Board of Environmental Review and the Department of Environmental Quality 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 and department 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., September 9, 2019, 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:

17.36.802 FEE SCHEDULES (1) An applicant for approval under this subchapter shall pay the following fees:

- (a) type of lots:
 - (i) subdivision lot or parcel or townhouse \$ ~~125.00~~ 175.00
 - (ii) condominium/~~townhouse~~/trailer court/recreational camping vehicle
campground unit or space \$ ~~50.00~~ 70.00
 - (iii) resubmittal fee - previously approved lot, boundaries are not changed per
lot or parcel \$ ~~75.00~~ 100.00
- (b) type of water system:
 - (i) individual or shared water supply system (existing and proposed) per
unit \$ ~~85.00~~ 120.00
 - (ii) multiple-user system (non-public):
 - (A) - each new system \$ ~~315.00~~ 440.00
(plus \$ ~~105.00~~
150.00 / hour for

	review in excess of four hours)
(B) - new distribution system design per lineal foot	\$ 0.25 <u>0.50</u>
(C) - connection to distribution system per lot or unit	\$ 70.00 <u>100.00</u>
(iii) public water system:	
(A) new system per component	per ARM 17.38.106 fee schedule
(B) new distribution system design per lineal foot	\$ 0.25
(C) connection to distribution system per lot or structure	\$ 70.00
(c) type of wastewater disposal:	
(i) existing systems per unit	\$ 75.00 <u>105.00</u>
(ii) new gravity fed system per drainfield	\$ 95.00 <u>130.00</u>
(iii) new dosed system, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems:	
(A) per design	\$ 190.00 <u>250.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(B) per drainfield	\$ 50.00 <u>70.00</u>
(iv) gray water reuse systems, holding tanks, sealed pit privies, unsealed pit privies, seepage pits, waste segregation, experimental systems	\$ 95.00 <u>130.00</u> (plus \$ 405.00 <u>150.00</u> / hour in excess of two hours)
(v) multiple-user wastewater system (non-public):	
(A) - new collection system design per lineal foot	\$ 0.25 <u>0.35</u>
(B) - connection to collection system per lot or unit	\$ 70.00 <u>100.00</u>
(vi) new public wastewater system per component	per ARM 17.38.106 fee schedule
(A) - new collection system design per lineal foot	\$ 0.25
(B) - connection to collection system per lot or structure	\$ 70.00
(d) other:	
(i) deviation from circular per request or design	\$ 200.00 <u>300.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(ii) waiver from rule per request	\$ 200.00 <u>300.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)

(iii) reissuance of original approval statement per request	\$ 60.00 <u>90.00</u>
(iv) review of revised lot layout document per request	\$ 125.00 <u>175.00</u>
(v) municipal facilities exemption checklist (former master plan exemption) per application	\$ 400.00 <u>150.00</u>
(vi) nonsignificance determinations/categorical exemption reviews:	
(A) - individual/shared systems per drainfield	\$ 60.00 <u>90.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(B) - multiple-user non-public systems per lot or structure	\$ 30.00 <u>45.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(C) source specific mixing zone per drainfield	\$ 200.00 <u>275.00</u>
(D) - public systems per drainfield	per ARM 17.38.106 fee schedule
(vii) storm drainage plan review:	
(A) - exempt from Circular DEQ-8 <u>simple plan review</u> per lot	project \$ 40.00 <u>150.00</u>
(B) - plans subject to Circular DEQ-8 <u>standard plan</u> review:	
(I) per design <u>project</u>	\$ 480.00 <u>250.00</u>
(II) <u>plus</u> per lot	\$ 40.00 <u>60.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of 30 minutes per lot)
(viii) preparation of environmental assessments/environmental impact statements:	actual cost-
(ix) <u>review for compliance with ARM 17.30.718</u>	<u>\$900.00 (plus \$150 / hour for review in excess of 6 hours).</u>

AUTH: 76-4-105, MCA
IMP: 76-4-105, MCA

REASON: The department is proposing to increase subdivision fees to cover actual costs for reviewing plats and subdivisions, conducting inspections, and conducting enforcement activities. The last major change to the subdivision fees was in 2013. Previous fiscal year expenses and revenue were the following:

FY 17 Revenue \$ 826,213.53	Expenses \$ 921,385.02	Difference \$ -95,171.49
FY 18 Revenue \$ 955,232.33	Expenses \$ 971,050.56	Difference \$ -15,818.23

Average expenses exceeded average revenue by approximately 7 percent over the past two fiscal years. Expenses to the department grew by over 5 percent between FY 17 and FY 18. Assuming a conservative average increase in expenses of 2 percent per year, the department projects that fees will need to be increased by 40 percent to cover the department's actual costs through 2027. The department has projected expenses through this date to allow the department and contracted counties to budget and plan for future needs and to provide long-term predictability for the regulated community. The proposed fee increase used an average 40 percent increase per component, to the next five or ten cent or dollar increment. Approximately 800 subdivision files per year will be impacted by this fee increase, resulting in an approximate cumulative increase of \$382,093 per year. The department consulted with a broad representation of stakeholders, including developers, consultants, engineers, and others in the regulated community, and has received no negative feedback regarding these proposed fee increases.

In addition to this general increase in fees, the department is proposing to make the following other amendments to ARM 17.36.802.

The department is proposing to amend (1)(a)(i) and (ii) so that townhouse applications will be subject to the same fees as subdivision lots. Townhouses create new lots that take as much time to review as other subdivision lots, and the fees should reflect the time incurred in reviewing them. Together with the general fee increase discussed above, this change will result in an increased fee of \$125 for each townhouse. The department does not maintain separate data for townhouse applications, and each application contains a different number of townhouses. Nevertheless, the department estimates that it receives approximately twenty townhouse applications per year, with each project generally containing ten to twenty townhouses.

The department is proposing to delete (1)(b)(iii)(B) and (C) and (1)(c)(vi)(A) and (B), which are duplicative of (1)(b)(iii)(A) and (1)(c)(vi). This amendment will have no impact on fees; it will merely delete the duplicative rule sections.

The department is proposing to update the terminology in (1)(d)(vii)(A) and (B) to refer to "simple" and "standard" storm water plans instead of "exempt" and "non-exempt" plans. This is necessary to conform the rule language with the 2018 edition of Department Circular DEQ-8. Instead of applying the general 40 percent fee increase discussed above, the department is proposing to increase fees for simple plans from \$40 to \$150, but on a per-project basis instead of a per-lot basis. This is necessary because simple plans take a minimum of one hour of review time. Approximately 1/3 of all subdivision applications include simple storm water plans, or approximately 266 files per year. This will result in a cumulative increase of approximately \$29,620 per year. The department is proposing to amend (1)(d)(vii)(B)(I) to refer to the "project" instead of the "design" and to amend (1)(d)(vii)(B)(II) to say "plus per lot," both which are necessary to clarify the language in the fee.

The department is proposing that applicants pay to cover the costs of the department's review to classify a subsurface wastewater treatment system as level 1a, level 1b, or level 2 under ARM 17.30.718. This review takes approximately six hours of staff time. This new fee is necessary to cover the costs of this review

because currently applicants pay no fee for this review. The department receives approximately three of these applications per year.

17.38.106 FEES (1) remains the same.

(2) Department review will not be initiated until fees calculated under (2)(a) through (f) and (5) have been received by the department. If applicable, the final approval will not be issued until the calculated fees under (3) and (4) have been paid in full. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or subparts listed in these subsections:

(a) The fee schedule for designs requiring review for compliance with Department Circular DEQ-1 is set forth in Schedule I, as follows:

SCHEDULE I	
Policies	
ultra violet disinfection	\$ 700 <u>1,000</u>
point-of-use/point-of-entry treatment	\$ 700 <u>1,000</u>
Section 1.0 Engineering Report	\$ 280 <u>400</u>
Section 3.1 Surface water	
quality and quantity	\$ 700 <u>1,000</u>
structures	\$ 700 <u>1,000</u>
Section 3.2 Ground water	\$ 840 <u>1,200</u>
Section 4.1 Microscreening	\$ 280 <u>400</u>
Section 4.2 Clarification	
standard clarification	\$ 700 <u>1,000</u>
solid contact units	\$ 1,400 <u>2,000</u>
Section 4.3 Filtration	
rapid rate	\$ 1,750 <u>2,500</u>
pressure filtration	\$ 1,400 <u>2,000</u>
diatomaceous earth	\$ 1,400 <u>2,000</u>
slow sand	\$ 1,400 <u>2,000</u>
direct filtration	\$ 1,400 <u>2,000</u>
biologically active filtration	\$ 1,400 <u>2,000</u>
membrane filtration	\$ 1,400 <u>2,000</u>
micro and ultra filtration	\$ 1,400 <u>2,000</u>
bag and cartridge filtration	\$ 420 <u>600</u>
Section 4.4 Disinfection	\$ 700 <u>1,000</u>
Section 4.5 Softening	\$ 700 <u>1,000</u>
Section 4.6 Ion Exchange	\$ 700 <u>1,000</u>
Section 4.7 Aeration	
natural draft	\$ 280 <u>400</u>
forced draft	\$ 280 <u>400</u>
spray/pressure	\$ 280 <u>400</u>
packed tower	\$ 700 <u>1,000</u>
Section 4.8 Iron and manganese	\$ 700 <u>1,000</u>
Section 4.9 Fluoridation	\$ 700 <u>1,000</u>
Section 4.10 Stabilization	\$ 420 <u>600</u>
Section 4.11 Taste and odor control	\$ 560 <u>800</u>

Section 4.12 Adsorptive media	\$ 700 <u>1,000</u>
Chapter 5 Chemical application	\$ 980 <u>1,400</u>
Chapter 6 Pumping facilities	\$ 980 <u>1,400</u>
Section 7.1 Plant storage	\$ 980 <u>1,400</u>
Section 7.2 Hydropneumatic tanks	\$ 420 <u>600</u>
Section 7.3 Distribution storage	\$ 980 <u>1,400</u>
Chapter 8 Distribution system	
per lot fee	\$ 70 <u>100</u>
non-standard specifications	\$ 420 <u>600</u>
transmission distribution (per lineal foot)	\$ 0.25 <u>0.35</u>
rural distribution system (per lineal foot)	\$ 0.03 <u>0.04</u>
sliplining existing mains (per lineal foot)	\$ 0.15 <u>0.20</u>
Chapter 9 Waste disposal	\$ 700 <u>1,000</u>
Appendix A	
new systems	\$ 280 <u>400</u>
modifications	\$ 140 <u>200</u>

(b) The fee schedule for designs requiring review for compliance with Department Circular DEQ-2 is set forth in Schedule II, as follows:

SCHEDULE II

Chapter 10 Engineering reports and facility plans	
engineering reports (minor)	\$ 280 <u>400</u>
comprehensive facility plan (major)	\$ 1,400 <u>2,000</u>
Chapter 30 Design of sewers	
per lot fee	\$ 70 <u>100</u>
non-standard specifications	\$ 420 <u>600</u>
collection system (per lineal foot)	\$ 0.25 <u>0.35</u>
sliplining existing mains (per lineal foot)	\$ 0.15 <u>0.20</u>
Chapter 40 Sewage pumping station	
force mains (per lineal foot)	\$ 0.25 <u>0.35</u>
1000 gpm or less	\$ 700 <u>1,000</u>
greater than 1000 gpm	\$ 1,400 <u>2,000</u>
Chapter 60 Screening grit removal	
screening devices and comminutors	\$ 420 <u>600</u>
grit removal	\$ 420 <u>600</u>
flow equalization	\$ 700 <u>1,000</u>
Chapter 70 Settling	\$ 1,120 <u>1,500</u>
Chapter 80 Sludge handling	\$ 2,240 <u>3,000</u>
Chapter 90 Biological treatment	\$ 3,360 <u>4,700</u>
nonaerated treatment ponds	\$ 1,120 <u>1,500</u>
aerated treatment ponds	\$ 1,960 <u>2,800</u>
Chapter 100 Disinfection	\$ 900 <u>1,200</u>
Chapter 120 Irrigation and Rapid Infiltration Systems	\$ 980 <u>1,400</u>
Appendices A and C (per design)	\$ 980 <u>1,400</u>

(c) The fee schedule for designs requiring review for compliance with Department Circular DEQ-3 is set forth in Schedule III, as follows:

SCHEDULE III

Section 3.2 Ground water	\$ 840 <u>1,200</u>
Chapter 6 Pump facilities	\$ 420 <u>600</u>
Chapter 7 Finished storage/hydropneumatic tanks	\$ 420 <u>600</u>
Chapter 8 Distribution system	\$ 420 <u>600</u>

(d) The fee schedule for designs requiring review for compliance with Department Circular DEQ-4 is set forth in Schedule IV, as follows:

SCHEDULE IV

Chapter 4 Pressure Dosing	\$ 280 <u>400</u>
Chapter 5 Septic Tanks	\$ 280 <u>400</u>
Chapter 6 Soil Absorption Systems	\$ 280 <u>400</u>
Chapter 6, Subchapter 6.8 ETA and ET Systems	\$ 700 <u>1,000</u>
Chapter 7, Subchapters 7.1, 7.2, and 7.3 Filters	\$ 280 <u>400</u>
Chapter 7, Subchapter 7.4 Aerobic Treatment	\$ 700 <u>1,000</u>
Chapter 7, Subchapter 7.5 Chemical Nutrient-Reduction Systems	\$ 700 <u>1,000</u>
Chapter 7, Subchapter 7.6 Alternate Advanced Treatment Systems	\$ 700 <u>1,000</u>
Chapter 8 Holding Tanks, Pit Privy, Seepage Pits, Waste Segregation, Experimental Systems	\$ 280 <u>400</u>
Appendix D	\$ 280 <u>400</u>
Non-degradation Review	\$ 420 <u>600</u>

(e) The fee schedule for designs requiring review for compliance with Department Circular DEQ-10 is set forth in Schedule V as follows:

SCHEDULE V

Spring box and collection lateral	\$ 350 <u>500</u>
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(f) The fee schedule for designs requiring review for compliance with Department Circular DEQ-16 is set forth in Schedule VI, as follows:

SCHEDULE VI

Cisterns	\$ 420 <u>600</u>
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(3) Fees for review of plans and specifications not covered under (2) are established by the department based on a charge of ~~\$405~~ 150 per hour multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications will be determined by the review engineer and documented with time sheets.

(4) The fee for review of plans and specifications previously denied, for staff time over two hours, is ~~\$405~~ 150 per hour, assessed in half-hour increments, multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications must be determined by the review engineer and documented with time sheets.

(5) The fee for review of deviations is ~~\$200~~ 300 per deviation.

(6) and (7) remain the same.

AUTH: 75-6-108, MCA

IMP: 75-6-108, MCA

REASON: The board is proposing to amend ARM 17.38.106 to increase fees for department review of plans and specifications of public water supply and public wastewater systems. Such increases are necessary to cover department costs in conducting such reviews. The last major change to these fees was in 2010. Previous fiscal year expenses and revenue were the following:

FY 17 Revenue \$ 470,097.73	Expenses \$ 498,450.95	Difference \$ -28,353.22
FY 18 Revenue \$ 606,894.58	Expenses \$ 659,109.63	Difference \$ -52,215.05

Average expenses exceeded average revenue by approximately 7 percent over the past two fiscal years. Assuming a conservative average increase in expenses of 2 percent per year, the Public Water and Wastewater Engineering Review program projects that fees will need to be increased by 40 percent to cover the department's actual costs through 2027. Using this time frame allows the department to budget and plan for future needs and provides long-term predictability for the regulated community. The proposed fee increase used an average 40 percent increase per component, to the next five or ten cent or dollar increment. Approximately 400 public water and wastewater applications per year will be affected by these fee increases, resulting in a cumulative increase of approximately \$242,758 per year. The department consulted with a broad representation of stakeholders, including developers, consultants, engineers, and others in the regulated community, and has received no negative feedback regarding these proposed fee increases.

4. The new rule proposed provides as follows:

NEW RULE I CERTIFYING AUTHORITY UNDER 76-4-127, MCA

(1) A county water and/or sewer district is eligible to be a certifying authority under 76-4-127, MCA, if the district:

(a) is incorporated under Title 7, chapter 13;

(b) is in compliance with Title 75, chapters 5 and 6;

(c) is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1;

(d) has an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities; and

(e) has a utility master plan approved by the department within the past 10

years that addresses capacity of the water and wastewater systems to serve additional development in compliance with department design circulars.

(2) A municipality is eligible to be a certifying authority under 76-4-127, MCA, if the municipality:

(a) is in compliance with Title 75, chapters 5 and 6;

(b) is a first or second class municipality or is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1; and

(c) has an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater and storm water facilities.

AUTH: 76-4-104, MCA

IMP: 76-4-104, 76-4-125, 76-4-127, MCA

REASON: Under 76-4-125 and 76-4-127, MCA, a subdivision may be exempt from department review if a certifying authority certifies that the subdivision will have adequate storm water drainage and that the subdivision will be served by adequate water and wastewater facilities. Before 2019, this exemption was available to a subdivider only if the governing body of certain municipalities certified that the subdivision would be served by adequate municipal facilities. In 2019, the Legislature enacted HB 55, which, among other things, expanded the exemption to include county water and/or sewer districts and removed the statutory eligibility criteria for municipalities. HB 55 directed the department to adopt eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under 76-4-127, MCA.

The department proposes New Rule I to comply with HB 55. Section (1) of New Rule I provides the eligibility requirements for county water and/or sewer districts, while (2) provides the eligibility requirements for municipalities.

Sections (1)(a) and (1)(b) require county water and/or sewer districts to be incorporated under Title 7, chapter 13, and to be in compliance with Title 75, chapters 5 and 6. These requirements are necessary to be consistent with the statutory definition of "adequate county water and/or sewer district facilities" in 76-4-102, MCA.

Section (1)(c) requires the county water and/or sewer district to be within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1. This requirement ensures that county water and sewer districts have planned for future development and have already evaluated their water, wastewater, and storm water needs, making additional oversight by the department unnecessary.

Section (1)(d) requires the county water and/or sewer district to have an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities. Because the exemption will allow a subdivision to avoid department subdivision review, professional engineering certification is necessary to ensure that the county water and/or sewer district is familiar with department minimum design standards for those facilities.

Section (1)(e) requires the county water and/or sewer district to have a utility master plan approved by the department within the past ten years that addresses capacity of the water and wastewater system to serve additional development in compliance with department design circulars. A utility master plan is a planning and

engineering tool that provides a road map to ensure that water and wastewater facilities can reliably and efficiently serve the current and future needs of the county water and/or sewer district. The plan must include current demands on the facilities, proposed future demands, and an evaluation of the facilities' capacity to serve future additional demands when using this exemption.

The department considered adopting a minimum population threshold as the basis for determining county water and/or sewer district eligibility. The department rejected this approach because a population threshold would eliminate some smaller districts that have adequately planned for future utility service while allowing other districts that may not have done so.

Section (2)(a) requires municipalities to be in compliance with Title 75, chapters 5 and 6, MCA. This requirement is necessary to be consistent with the statutory definition of "adequate municipal facilities" in 76-4-102, MCA.

Section (2)(b) requires municipalities to be a first or second class municipality or to be within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, in order to be a certifying authority. First and second class municipalities generally have adequately planned for future development, making additional department oversight unnecessary. Municipalities with a growth policy also have planned for future development, including their water, wastewater, and storm water facility needs, making additional oversight by the department unnecessary.

Section (2)(c) requires a municipality to have an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities. Because the exemption will allow a subdivision to avoid department subdivision review, professional engineering certification is reasonably necessary to ensure that the municipality is familiar with department minimum design standards regarding water, wastewater, and storm water facilities.

5. 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, no later than 5:00 p.m. September 20, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. The board and department maintain 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; open-cut 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, or may be made by completing a request form at any rules hearing held by the board or department.

7. 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.

8. The bill sponsor contact requirements of 2-4-302, MCA, does apply. The sponsor was notified via regular mail on May 29, 2019.

9. With regard to the requirements of 2-4-111, MCA, the board and the department have determined that the amendment of the above-referenced rules will significantly and directly impact small businesses.

10. These rules will become effective January 1, 2020.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/
EDWARD HAYES
Rule Reviewer


BY: /s/
CHRISTINE DEVENY
Chair

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/
SHAUN McGRATH
Director

Certified to the Secretary of State, August 13, 2019.

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, 2019

SUBJECT: Board of Environmental Review Case No. BER 2019-06 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW	
OF THE STATE OF MONTANA	
IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164	Case No. BER 2019-06 WQ

On July 3, 2019 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.

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

Jon Kenning, Bureau Chief
Water Protection Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

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 P.O. Box 639
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 Telephone: (406) 252-2166
 Fax: (406) 252-1669
 vamarquis@hollandhart.com
 ATTORNEY FOR ALPINE PACIFIC
 UTILITIES

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164</p>	<p>CAUSE NO. _____</p> <p>NOTICE OF APPEAL</p>
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Pursuant to Mont. Code Ann. § 75-5-403(2) and Admin R. Mont. 17.30.1024(9), Alpine Pacific Utilities, as the permit applicant, appeals the issuance of, and requests a hearing before the Board of Environmental Review (“Board”) on, the Montana Ground Water Pollution Control System (“MGWPCS”) Permit No. MTX000164 (“Permit”) issued to Alpine Pacific Utilities by the Montana Department of Environmental Quality (“DEQ”). The Board has authority to hear contested case appeals of DEQ’s MGWPCS permitting decisions, such that the Board may affirm, modify, or reverse DEQ’s permitting action. Alpine Pacific

Utilities has raised issues with the Permit on multiple occasions with DEQ, submitted written comments to the draft Permit, and now timely appeals the Permit.

Alpine Pacific Utilities owns and manages the wastewater treatment system for the Glacier Ranch Subdivision, serving 152 residential homes and 11 commercial lots near Kalispell, Montana. The Permit, originally effective June 1, 2007 and expiring on May 31, 2012, was transferred to Alpine Pacific Utilities by Permit Modification dated January 17, 2017. Alpine Pacific Utilities then filed a Permit Modification application on October 6, 2017.

Several back-and-forth communications, including multiple emails, letters and in-person meetings, occurred between DEQ and Alpine Pacific Utilities after the modification application. The Permit Fact Sheet details some, but not all of those communications. Importantly, in July 2018, both parties recognized data indicating that the nearest surface water, Trumbull Creek, may be a losing stream¹ or may be perched water² such that it might not receive discharge from the Permitted facility. That circumstance would impact the effluent limitation calculations, non-degradation analysis and the informational needs for such calculations and analysis.

¹ A losing stream loses water as it flows downstream due to water infiltrating into the ground and recharging the local groundwater.

² Perched water is separated from the main body of groundwater by relatively impermeable layers.

The Permit Fact Sheet asserts that Alpine Pacific Utilities “requested a conservative permit” without appropriate effluent limitation determinations or non-degradation analysis considering the losing character of Trumbull Creek. Permit Fact Sheet, § 1.2. However, that is not Alpine Pacific Utilities’ recollection, nor was it their intent. Alpine Pacific Utilities serves residential homes in the Glacier Ranch Subdivision and requires a permit that allows continued, reasonable, cost-effective operation. The Permit requires what are likely cost-prohibitive treatment methods that are unrealistic and not feasible.

In light of these concerns and others, Alpine Pacific Utilities, in its comment letter to the draft Permit, respectfully requested that “the draft permit not be finalized at this time and that DEQ stay further proceedings on the draft permit until the following issues [the status of Trumbull Creek as a losing stream, the need for a fate and transport model (which Alpine Pacific Utilities offered to contract for, should DEQ require one after Trumbull Creek’s character as a losing stream is determined), and the design capacity of the wastewater treatment system] are addressed and appropriately resolved.” **Exhibit A**, APU Comment Letter, p. 1 (May 3, 2019). Alpine Pacific Utilities further requested that DEQ “contact us at your earliest convenience to arrange for resolution of the three [issues noted above].” Ex. A, p. 4. Instead, by email dated June 4, 2019, DEQ issued the draft Permit as final.

Based on DEQ's Response to Comment document, Alpine Pacific Utilities learned that DEQ now, without additional data, views Trumbull Creek as a confirmed gaining stream. That seems to require that a fate and transport model be completed; however, DEQ has issued the Permit as final without waiting for Alpine Pacific Utilities to contract for such a model, even though Alpine Pacific Utilities offered to do so in its Comment Letter. Further, the Response to Comment document now provides DEQ's view of the wastewater system design capacity issues, which appears contrary to previous communications with other programs at DEQ, without opportunity for Alpine Pacific Utilities to appropriately address and resolve the issue.

Although Alpine Pacific Utilities would rather not incur litigation expenses and burden the Board with issues that can likely be addressed through additional study and communications with DEQ, the issuance of the Permit as final requires this appeal.

Alpine Pacific Utilities objects to the Permit on multiple grounds:

1. Sections 1.2 through 1.4 of the Fact Sheet do not fairly or accurately represent the communications between DEQ and Alpine Pacific Utilities. Alpine Pacific Utilities has not requested a conservative approach to the permit limits. There is no mention of communications regarding the character of Trumbull Creek as a losing stream or a perched aquifer stream. Nor is there any discussion of the

mass balance analysis that DEQ originally suggested and that was completed and submitted to DEQ. There is no mention of the January 17, 2018 submittal from Alpine Pacific Utilities to DEQ. DEQ misstates conclusions reached during the April 3, 2018 meeting, where a fate and transport model was discussed. That April 3, 2018 meeting was *prior* to the data collection which suggests that Trumbull Creek is a losing stream in the vicinity of the discharge, which likely negates the need for complex fate and transport modeling.

2. Trumbull Creek has been incorrectly characterized as “downgradient” of the discharge in Section 1.4 and elsewhere in the Fact Sheet, in spite of data to the contrary that has been submitted to DEQ. Such incorrect characterization impacts the effluent limitations, mixing zone determination, special conditions, and compliance schedule in the Permit.

3. The Fact Sheet and Draft Permit, including Fact Sheet Sections 1.4, 4.0 and page 3 of the Draft Permit, should have, but failed to provide a mixing zone. No mixing zone analysis is provided, even though Alpine Pacific Utilities specifically requested a mixing zone and the current permit contains a mixing zone.

4. Section 2.2 of the Fact Sheet refers to a wastewater treatment system design capacity of 52,000 gpd and erroneously presumes that an additional drainfield is required for the 100,000 gpd capacity. This error impacts the effluent

limitations, mixing zone determination, special conditions, and compliance schedule in the Permit and requires a revised Environmental Assessment.

5. The Fact Sheet, including Sections 2.5 and 2.6, and the Draft Permit fail to note or consider any of the data provided to DEQ regarding the apparent losing character of Trumbull Creek. Such incorrect characterization impacts the effluent limitations, mixing zone determination, special conditions, and compliance schedule in the Permit.

6. The need for an ambient monitoring well referenced in Fact Sheet Sections 2.7 and 5.2A and on pages 8 and 12 of the Draft Permit was somewhat clarified by DEQ in its Response to Comments; however, given that the issue of whether Trumbull Creek is a losing stream or perched water remains unconfirmed, the need and purpose of the requested ambient monitoring well is not certain and likely erroneous.

7. Section 3.3 of the Fact Sheet notes two Bitterrooters for Planning, Inc. cases. This permit is distinguishable from those cases because here, data suggests that Trumbull Creek does not flow all the time and that it is a losing stream in the vicinity of the discharge. Therefore, any impacts from the discharge will not be seen in Trumbull Creek and the Bitterrooters cases provide no additional requirements for this situation. Such incorrect characterization of Trumbull Creek and inappropriate application of the caselaw impacts the effluent limitations,

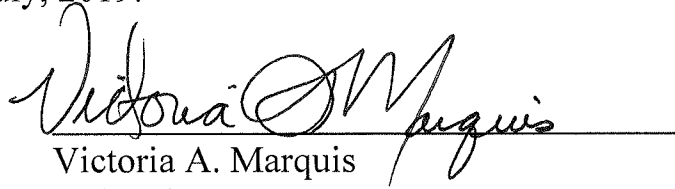
mixing zone determination, special conditions, and compliance schedule in the Permit.

8. Alpine Pacific Utilities objects to the effluent limitations provided in the Draft Permit and Fact Sheet. Alpine Pacific Utilities never requested the conservative approach taken by DEQ and the effluent limitations do not accurately reflect the losing character of Trumbull Creek, do not appropriately consider background concentrations of pollutants, and do not account for the fact that the discharge will first discharge underground where dilution and attenuation will impact its quality prior to any potential contact with surface water. Notably, the effluent limitations are more restrictive than the current permit limits by several orders of magnitude. Given that no violations have been cited under the current permit, the drastic change in limitations compared to the increased flow is unwarranted. The proposed effluent limitations likely require cost-prohibitive treatment methods that are unrealistic and not feasible.

9. The Permit fails to consider ambient nitrogen levels, resulting in inappropriate effluent limitations, an improper mixing zone determination, and unnecessary special conditions and compliance schedule in the Permit.

10. The Permit was issued without submission of “all of the requested information” in violation of Admin. R. Mont. 17.30.1024.

DATED this 3rd day of July, 2019.

A handwritten signature in black ink, reading "Victoria A. Marquis", written over a horizontal line.

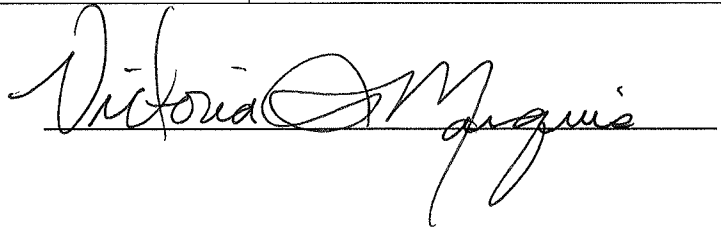
Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639

ATTORNEY FOR ALPINE PACIFIC
UTILITIES

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of July, 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

<p>Lindsay Ford [ORIGINAL] Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov asolem@mt.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 kbowers@mt.gov sscherer@mt.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Jon Kenning, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 jkenning@mt.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>





Victoria A. Marquis
Associate
Phone (406) 896-4612
Fax (406) 206-0084
vamarquis@hollandhart.com

SENT VIA EMAIL TO DEQWPBPUBLICCOMMENTS@MT.GOV

DEQ Water Quality Division
Water Protection Bureau
P.O. Box 200901
Helena, MT 59620

RE: Montana Ground Water Pollution Control System Draft Permit MTX000164

To Whom It May Concern:

Please accept these additional comments on behalf of Alpine Pacific Utilities for the draft permit MTX000164 proposed by DEQ. This letter reiterates some comments previously provided by letter dated April 3, 2019 from Justin Ahmann to Chris Boe. Please consider both that letter and this letter as public comments submitted on behalf of Alpine Pacific Utilities. Additionally, Alpine Pacific Utilities requests that the draft permit not be finalized at this time and that DEQ stay further proceedings on the draft permit until the following issues are addressed and appropriately resolved:

1. Clarify the status of Trumbull Creek as a losing stream in the vicinity of the discharge. As noted in the email exchange between Justin Ahmann and Eric Sivers in July 2018 (referenced and attached to the April 3, 2019 letter), evidence suggests that Trumbull Creek is a losing stream. Past monitoring of Trumbull Creek revealed that it was a losing stream and the more recent data confirms that the stream work did not change the character of the stream as losing within the vicinity of the discharge. *See attached* Glacier Ranch – Trumbull Creek Rehabilitation, Sheet 5 (RLK Hydro 2007). If that is the case, then additional modeling efforts seem unnecessary. Please let us know what additional information, including length of time, frequency, and type of data collection, is needed to confirm this condition. If this condition is confirmed, is additional modeling required?
2. As noted in the April 3, 2019 letter, despite repeated requests for information related to fate and transport modeling, Alpine Pacific Utilities was not aware of the previous QUAL2K modeling work done for this permit during the 2007 permitting effort, when the permit was under different ownership. Please provide all of that QUAL2K information, including inputs, calculations, and resulting data, as available. Should DEQ require modeling in addition to information that may confirm the losing character of Trumbull Creek, the previous QUAL2K modeling information is requested so that Alpine Pacific Utilities may, either

internally or by hiring an outside hydrologist, recreate or revise the model, as appropriate, to incorporate the now slightly deeper channel of Trumbull Creek.

3. DEQ’s draft Environmental Assessment (EA) for the draft permit erroneously suggests that the drainfield at the site must be expanded to process the proposed increase in wastewater volume. Although the design capacity of the treatment system listed in the Fact Sheet and Draft Permit is listed as 52,000 gpd, that does not include consideration of the fact that the system includes advanced treatment, which will be utilized at the 100,000 gpd level and allows for a reduction of the drainfield by 50 percent. *See* Section 7.1.1, Circular DEQ 4; DEQ, “List of Subsurface Wastewater Treatment Systems (SWTS) that are Approved as a Nitrogen-Reducing System” (Updated June 2018). Therefore, the EA’s references to “the future drainfield” are incorrect. The advanced treatment feature of the Santec system, which will be in use at the higher volume, means that no additional drainfield is needed for the 100,000 gpd design capacity.

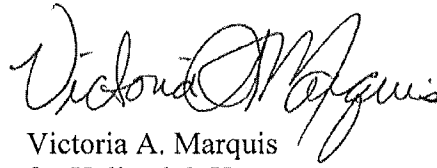
The following comments and questions pertain to the Permit Fact Sheet, Draft Permit and EA:

- As noted in the April 3, 2019 letter, Sections 1.2 through 1.4 of the Fact Sheet do not fairly or accurately represent the communications between DEQ and Alpine Pacific Utilities. Alpine Pacific Utilities has not requested a conservative approach to the permit limits. There is no mention of communications regarding the character of Trumbull Creek as a losing stream or a perched aquifer stream. Nor is there any discussion of the mass balance analysis that DEQ originally suggested and that was completed and submitted to DEQ. In fact, there is no mention at all of the January 17, 2018 submittal from Alpine Pacific Utilities to DEQ. DEQ misstates conclusions reached during the April 3, 2018 meeting, where a fate and transport model was discussed. Of course, that was prior to the data collection which suggests that Trumbull Creek remains a losing stream in the vicinity of the discharge, which seems to negate the need for complex fate and transport modeling.
- Trumbull Creek has been incorrectly characterized as “downgradient” of the discharge in Section 1.4 and elsewhere in the Fact Sheet, in spite of data to the contrary that has been submitted to DEQ.
- The Fact Sheet and Draft Permit, including Fact Sheet Sections 1.4, 4.0 and page 3 of the Draft Permit, should have, but failed to provide a mixing zone. No mixing zone analysis is provided, even though Alpine Pacific Utilities specifically requested a mixing zone and the current permit contains a mixing zone.

- As noted above in item #3, Section 2.2 of the Fact Sheet refers to a design capacity of 52,000 gpd and erroneously presumes that an additional drainfield is required for the 100,000 gpd capacity. This error seems to have impacted the EA and the Draft Permit and should be corrected.
- Sections 2.3, 2.8 and other areas of the Fact Sheet and Draft Permit refer to and seem based upon “reporting errors in regards to the submitted nitrogen data.” Alpine Pacific Utilities objects to this statement and to DEQ’s refusal to consider the data. Alpine Pacific Utilities is unaware of any reporting errors. Please provide more information on DEQ’s asserted reporting errors.
- The Fact Sheet, including Sections 2.5 and 2.6, and the Draft Permit fail to note or consider any of the data provided to DEQ regarding the apparent losing character of Trumbull Creek. This results in inappropriate permit conditions and requirements.
- The need for an ambient monitoring well referenced in Fact Sheet Sections 2.7 and 5.2A and on pages 8 and 12 of the Draft Permit is unclear. If the intent is to use the well to collect hydrology data regarding the losing character of Trumbull Creek, it does not appear designed to help with that analysis. Please explain the need for this new monitoring well.
- Section 3.3 of the Fact Sheet notes two Bitterrooters for Planning, Inc. cases. This permit is distinguishable from those cases because here, data suggests that Trumbull Creek does not flow all the time and that it is a losing stream in the vicinity of the discharge. Therefore, any impacts from the discharge will not be seen in Trumbull Creek and the Bitterrooters cases provide no additional requirements for this situation.
- Alpine Pacific Utilities objects to the effluent limitations provided in the Draft Permit and Fact Sheet. Alpine Pacific Utilities never requested the conservative approach taken by DEQ and the effluent limitations do not accurately reflect the losing character of Trumbull Creek or the fact that the discharge will first discharge underground where dilution and attenuation will impact its quality. Notably, the effluent limitations are more restrictive than the current permit limits by several orders of magnitude. Given that no violations have been cited under the current permit, the drastic change in limitations compared to the increased flow is unwarranted. The proposed effluent limitations likely require cost-prohibitive treatment methods that are unrealistic and not feasible.

Please contact us at your earliest convenience to arrange for resolution of the three numbered issues provided on pages 1 and 2 of this letter. Additionally, please confirm that DEQ will stay the issuance of this permit until the three numbered issues can be addressed and appropriately resolved.

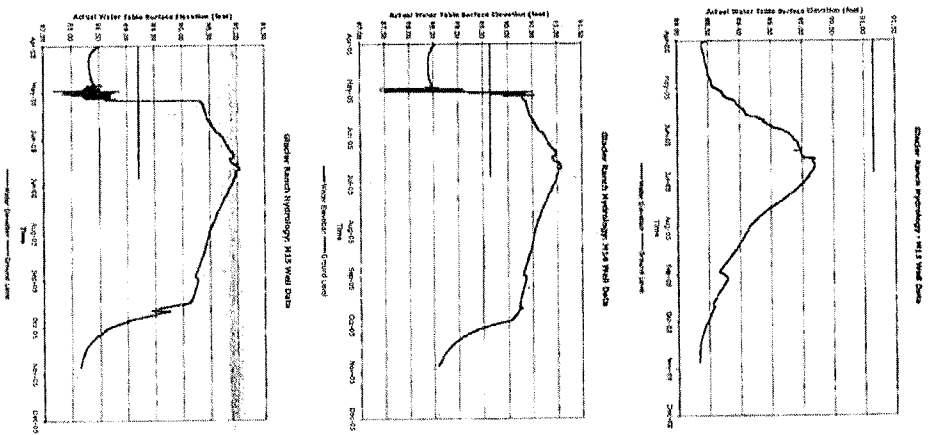
Sincerely,



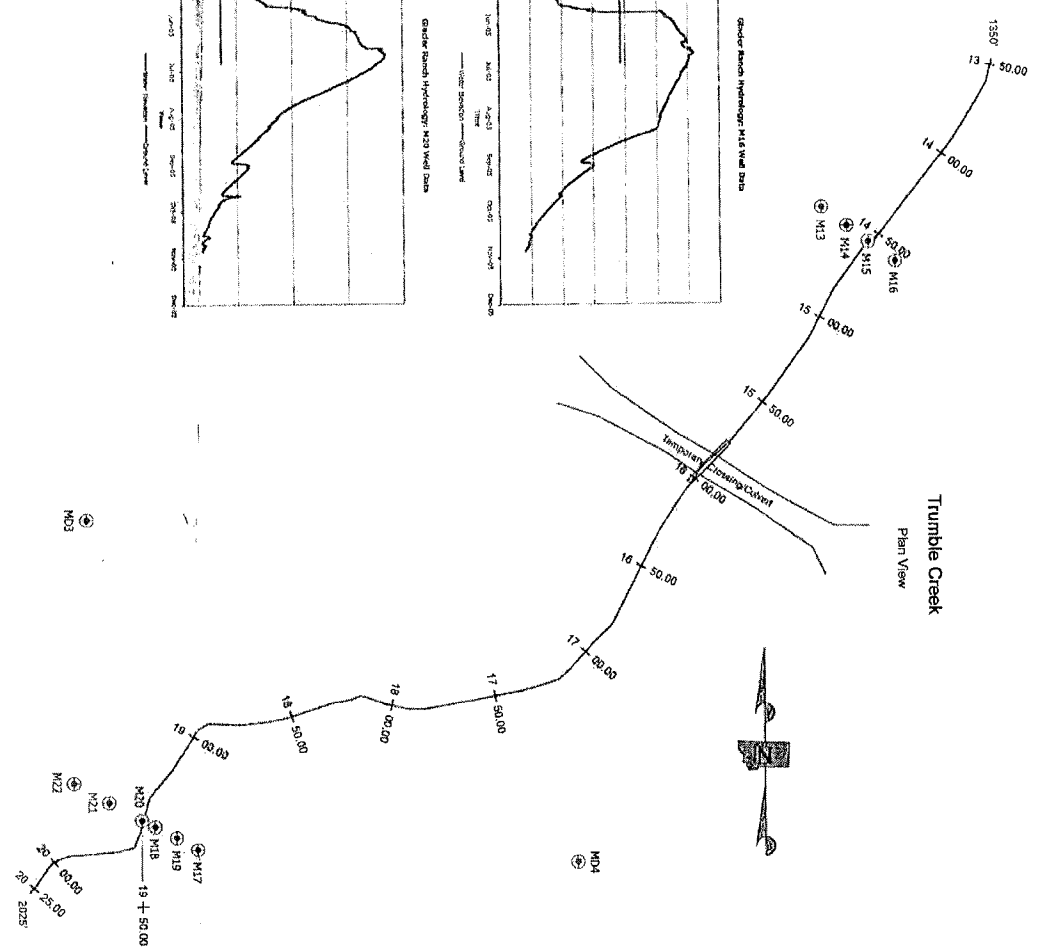
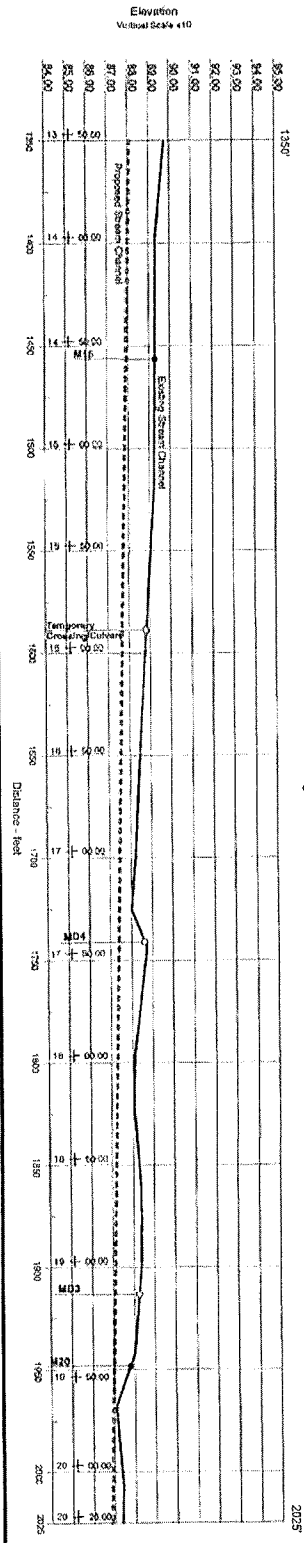
Victoria A. Marquis
for Holland & Hart LLP

VAM:asf
Enclosure
12439870_1.docx

Groundwater Monitoring Records



Trumble Creek
Longitudinal Profile



TITLE: Glacier Ranch - Trumble Creek Rehabilitation	
DESIGN BY: MMS	REVISION: VJM 08/06/07
DRAWN BY: VJM 04/15/05	REVISION:
REVIEWED BY:	REVISION: EXHIBIT A
APPROVED BY:	REVISION:

SCALE: 1" = 40'
Sheet 5

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