

**RESPONSIVENESS SUMMARY  
FOR FINAL DEQ ADMINISTRATIVE ORDER ON CONSENT  
WITH EXXONMOBIL PIPELINE COMPANY FOR THE SILVERTIP PIPELINE OIL  
DISCHARGE INTO THE YELLOWSTONE RIVER**

## **1.0 INTRODUCTION**

The Montana Department of Environmental Quality (DEQ) solicited public comment on the proposed DEQ Administrative Order on Consent (AOC) with ExxonMobil Pipeline Company (ExxonMobil) for the Silvertip Pipeline Oil Discharge into the Yellowstone River on or about July 1, 2011 (Discharge) during a public comment period that ran from January 19 to February 21, 2012. DEQ received six written comments during the public comment period. DEQ would like to thank the six individuals or entities who submitted written comments.

### **1.1 Community Involvement Background**

It is the intent of DEQ that the citizens of Montana have the opportunity to be actively involved in the DEQ decision-making process with respect to Administrative Orders on Consent. DEQ has made a concerted effort to involve the community, including local officials and residents, in all aspects of the investigation and cleanup of the Discharge.

### **1.2 Notification of Public Comment Period**

DEQ published notice about the AOC public comment period in the major daily newspaper in the area most affected, the *Billings Gazette*, and it appeared in the *Gazette's* printed publication and online version. The AOC and the notice of public comment were also posted on the DEQ website under the "Public Comments" section. DEQ also placed a link on its homepage to the ExxonMobil Silvertip Oil Spill webpage, which included the AOC and notice of the public comment period. DEQ sent the notice of the public comment period to approximately 200 people on its mailing list for the Discharge, including landowners. DEQ provided notice of the public comment period to members of state, local and federal government - elected officials, such as county commissioners, city council members and legislators, and non-elected officials, such as emergency responders and Riverstone Health Department officials.

DEQ also distributed a news release to an extensive news media list of local, state and national news organizations, and to the State of Montana NewsLinks service. DEQ included an article about the AOC and the notice of public comment period in its quarterly petroleum-related newsletter that goes to business, cities and counties, health departments and sanitarians.

DEQ distributed fact sheets that included information about the AOC public comment period, both electronically and via regular mail. DEQ also hand-delivered several fact sheets for public placement at various libraries and city and county public buildings.

### **1.3 Toll-free Hotline and Webpage**

DEQ maintains an in-state toll-free number (1-800-246-8198) for people who want to contact DEQ about the Discharge or other sites. DEQ Remediation Division staff direct calls to appropriate project officers. The toll-free number is answered in person during business hours. In

addition, DEQ maintains an ExxonMobil Silvertip Oil Spill webpage at: <http://deq.mt.gov/silvertipoilspill/default.mcp.x>.

#### **1.4 Mailing List**

DEQ maintains a private mailing list that is periodically updated. DEQ has actively solicited additions to the mailing list in communications with the public. In accordance with state law, the mailing list is generally not released to the public.

#### **1.5 Administrative Record**

All public comments submitted to DEQ during the public comment period; all documents cited within the properly submitted written public comments; and all documents cited, considered or relied upon by DEQ in DEQ's responses are part of the administrative record for the AOC. This Responsiveness Summary is part of the administrative record for the AOC. It does not include legal citations such as those found in the Montana Code Annotated (MCA), Administrative Rules of Montana (ARM), United States Code, and Code of Federal Regulations.

#### **1.6 Document Repository**

The complete administrative record is located at:

Montana Department of Environmental Quality  
Remediation Division  
Hazardous Waste Site Cleanup Bureau  
1100 North Last Chance Gulch  
Helena, MT 59601  
Telephone: (406) 841-5000

A partial compilation of the administrative record can be found on DEQ's website at <http://deq.mt.gov/silvertipoilspill/default.mcp.x>.

#### **1.7 Explanation of Responsiveness Summary**

All comments received during the public comment period on the AOC have been reviewed and considered by DEQ in the decision-making process and are addressed in this Responsiveness Summary. In order to avoid duplication of some responses, DEQ has paraphrased similar comments and responded to each group of similar comments.

### **2.0 RESPONSES TO WRITTEN COMMENTS**

1. DEQ received several comments stating that the AOC should not release ExxonMobil from all future lawsuits by all State agencies.

RESPONSE:

The AOC does not release ExxonMobil from all future lawsuits from all State agencies. The AOC does not have any impact on future lawsuits unrelated to the investigation and remediation of the Discharge. The AOC does not address any other environmental

investigation or cleanup in Montana that is not related to the Discharge. This means that if ExxonMobil has another oil spill or otherwise causes contamination unrelated to the Discharge, the State may bring a lawsuit against ExxonMobil.

As provided in Section XXI (“Covenant Not to Sue by DEQ/Release”), the matters for which ExxonMobil received the release from liability are as follows: “any and all claims and allegations of any nature whatsoever for the investigation and remediation of the Discharge, performance of the Work, the Discharge, Past or Future Costs or to assess further civil or administrative penalties related to the Discharge arising from violations of State law, federal law, and any other provisions of law, including, but not limited to, the WQA , CECRA and the SWMA....”

In addition, the AOC does not release ExxonMobil from all future lawsuits related to the Discharge. For example, as provided in Section XXII (Reservation of Rights by DEQ), the AOC specifically reserves, “liability for damages for injury to, destruction of, or loss of natural resources and for the costs of assessing and litigating any claims for natural resource damages.” There is a substantial body of law on natural resource damages, and Montana has in the past recovered significant natural resource damage amounts for injured Montana natural resources. As a general matter, State natural resources would include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State or local government. The AOC does not preclude the State from a full recovery of damages for the loss of, and injuries to, such resources and the services they provide, including the cost to restore the resources, and the value of their lost uses and lost passive uses, such as lost recreational and existence values.

Additionally, the AOC does not address any criminal investigations or claims that the State may pursue against ExxonMobil.

Finally, DEQ may enforce the AOC if ExxonMobil fails to comply with any of the terms of the AOC. As provided in Section XIX (“Stipulated Penalties”), DEQ may impose stipulated penalties if ExxonMobil violates the AOC. Also, DEQ may seek an injunction to stop ExxonMobil’s violation of the AOC or sue ExxonMobil to comply with the AOC. In addition to the stipulated penalties, DEQ also may seek penalties of \$25,000 per day of substantial noncompliance with the AOC under the Water Quality Act. Section XXII (“Reservation of Rights by DEQ”).

Also, if ExxonMobil stops doing the work outlined in the AOC, is seriously or repeatedly deficient or late in its performance of the work, or is implementing the work in a manner which may cause an endangerment to public health, safety or welfare or the environment, DEQ may take over the work from ExxonMobil, and recover its costs for doing so.

DEQ does not believe that these comments require changes to the AOC; instead the above clarifications should address the public’s concerns.

2. Several commenters stated that the penalty of \$1.6 million is far too low, given ExxonMobil's profits. Commenters questioned whether the penalty was high enough to address lost use of the Yellowstone River; whether the penalty will cover the cost of all work remaining for the Discharge, such as weed control, ongoing oil clean up, future well water issues, and adverse wildlife effects; and whether the penalty includes natural resource damages. Another commenter stated that the damage mitigation should be handled with the utmost care with regards to compensation for the State.

RESPONSE:

ExxonMobil is paying \$1.6 million in penalties, of which \$1.3 million will be spent on environmentally beneficial projects within the State. This is a significant penalty that—along with the reimbursement of the State's past and future costs, the amount that ExxonMobil has already spent on cleanup under order of the Environmental Protection Agency, and the requirements within the AOC that ExxonMobil continue investigative and cleanup activities—is a strong statement reflecting the value Montana citizens place on cleanup of their natural environment.

Note that if DEQ had sought a civil penalty under the Water Quality Act in court, the court could have awarded DEQ up to \$25,000 per day of violation. § 75-5-631, MCA. However, at the conclusion of a potentially lengthy litigation process, the court-determined penalty may not have been greater than the negotiated penalty of \$1.6 million.

The penalty of \$1.6 million is in addition to the reimbursement of past costs and the cost of any future cleanup and work related to the Discharge. None of the future costs to address the Discharge will come out of the \$1.6 million penalty. Section XVI ("Reimbursement of Costs") requires ExxonMobil to pay all of the State's future costs for cleanup and oversight, in addition to the \$1.6 million penalty.

Through the AOC, ExxonMobil is paying the State for all of the costs that the State expended on the investigation and cleanup of the Discharge, through December 31, 2011. This is the \$760,390.61 of "past costs" contained within the AOC.

Additionally, ExxonMobil has complied with all of DEQ's cleanup and investigation requirements for the Discharge, and as part of its compliance, has expended tens of millions of dollars.

Under the AOC, ExxonMobil is required to investigate and clean up the Discharge, as outlined in Attachment A. This work includes noxious weed control, revegetation and reclamation, groundwater monitoring, and natural attenuation monitoring. Also, Section XXVIII ("Additional Work") of the AOC requires ExxonMobil to conduct any additional work that DEQ determines is necessary to protect public health, welfare, or safety, or the environment.

For the above reasons, DEQ does believe that the AOC is addressing these concerns and is in the best interest of the State, and that the AOC adequately reflects the value that the State places on cleanup of Montana's natural environment.

Also, as stated in Response to Comment # 1, the AOC does not address or affect natural resource damages, or the costs of assessing and litigating natural resource damages. All liability for natural resource damages is reserved by the State, and not addressed under the AOC. This would include any claims for lost use of the Yellowstone River and its diminished existence value, and any natural resource damages resulting from adverse wildlife effects.

DEQ does not believe that these comments require changes to the AOC; instead, the above clarifications should address the public's concerns.

3. One commenter stated that the standard for completing the work cannot be met, because the Discharge will always "pose a risk to the public health, welfare or safety, or the environment."

RESPONSE:

Under Section XXI of the AOC, the AOC may only be terminated if DEQ determines that all of the activities required under the AOC have been satisfactorily completed. The language to which the commenter refers to is contained within Section XXIX (Notice of Completion). This section provides that ExxonMobil may request a "Notice of Completion" for a particular section of the Yellowstone River (River Division A, B or C) or media (sediment, groundwater, surface water or soil) from DEQ. DEQ will approve the "Notice of Completion" if DEQ determines "ExxonMobil has complied with the requirements of this AOC with respect to a River Division or contaminated medium and that such River Division or contaminated medium does not pose a risk to the public health, welfare or safety, or the environment..."

DEQ agrees with the commenter that it is likely not possible for the Discharge to pose **absolutely no risk** to the public health, welfare or safety, or the environment. However, the intent of this section is to provide that cleanup achieve compliance with applicable standards, screening levels, DEQ-approved background levels, and (potentially) DEQ-approved site-specific cleanup levels to screen sample results from various media (soil, water, sediment). These standards and levels are used to determine that public health, safety, and the environment are protected. When compliance with these standards and levels is achieved, DEQ will determine that the River Division or contaminated medium does not pose a risk and issue a notice of completion.

Moreover, under Section III ("Statement of Purpose") and Attachment A of the AOC, ExxonMobil must continue investigation, characterization and cleanup of the Discharge until all applicable State requirements are met. The AOC contemplates the potential discovery of emerging and/or unknown pollution associated with the Discharge that would require ExxonMobil to conduct additional work.

DEQ does not believe that the comment requires a change to the AOC; instead, the above clarifications should address the public's concerns.

4. Two commenters stated that the permitting process should do more to protect against these types of spills in the future. One commenter said that the Discharge should be considered when deciding whether to permit Keystone XL Pipeline.

Comment noted. Under the Montana Major Facility Siting Act, § 75-20-101, MCA, *et seq.*, DEQ cannot regulate crude oil pipelines under a certain diameter. The ExxonMobil Silvertip pipeline has a diameter of less than the regulatory threshold, and therefore DEQ could not exercise permitting authority under that Act.

By Executive Order on July 20, 2011, Governor Schweitzer established the Montana Oil Pipeline Safety Review Council to investigate pipeline river crossings in Montana and recommend steps to prevent breaks and spills. A state and federal investigation this fall found at-risk pipelines. The State has required that the companies complete the necessary repairs by spring runoff. DEQ Director Richard Opper chairs the Council. DNRC Director Mary Sexton and Montana Department of Transportation Director Tim Reardon serve with him. The Council has held three meetings and meets again in April. The meetings are generally held at the Montana State Capitol in Helena.

The AOC does not make any regulatory decisions as to the Keystone XL Pipeline. However, under the Montana Major Facility Siting Act, the Department has authority to regulate the siting (location) of the Keystone Pipeline. In determining the sites of Keystone Pipeline river crossings, the Department will, subject to other requirements, require crossings to be placed in areas with low potential for scouring and for channel migration. For more information about this process, please see: <http://deq.mt.gov/mfs/KeystoneXL/KeystoneXLIndex.mcp>. State authority over design, construction, and operation standards for interstate pipelines, such as the Keystone Pipeline, is preempted by federal law. *See* 49 U.S.C. § 60104(c). These functions are performed by the Pipeline and Hazardous Materials Safety Administration, a federal agency.

Finally, it should also be noted that Keystone's plans call for the pipeline to be buried 35 to 40 feet below the beds of the Milk, Missouri, and Yellowstone Rivers.

The comment does not require a change to the AOC.

5. One commenter was concerned that ExxonMobil upgraded its estimates of the amount of oil released during the Discharge after DEQ stated that the number of barrels spilled was not relevant to fines.

RESPONSE:

DEQ would like to clarify that DEQ made the statement about the penalties not being based upon the number of barrels spilled **in response** to ExxonMobil increasing its estimate of the number of barrels spilled.

However, under Montana's Water Quality Act, the amount of a penalty is not based on the number of barrels of oil spilled. Instead, the penalty is based upon the days of violation. If DEQ were to prevail in a lawsuit, a court may award up to \$25,000 per day of violation of the Water Quality Act. § 75-5-631, MCA. Please see DEQ's Response to Comment # 2 regarding the adequacy of the penalty amount.

The comment does not require a change to the AOC.

6. One commenter stated that the cleanup should not be expected to be completed within one year.

RESPONSE:

DEQ agrees that the work required under the AOC will likely not be completed within one year. As outlined in Attachment A of the AOC, the requirements for monitoring and revegetation are not necessarily expected to be completed within one year. For example, in Item #7 of Attachment A of the AOC, DEQ has required ExxonMobil to monitor oil weathering and degradation at 45 locations along the Yellowstone River where oil was left in place because its removal would have caused "more harm than good." That monitoring has the potential to continue until 2016. Additionally, it is expected that some reclamation work may require more than one year to satisfactorily complete.

DEQ may also require additional work that may last beyond one year. Under the terms of the AOC, ExxonMobil must continue investigation, characterization and cleanup until the areas impacted by the Discharge meet applicable State regulatory and cleanup requirements, regardless of how many years are involved. The AOC contemplates the potential discovery of emerging and/or unknown pollution associated with the Discharge that would require ExxonMobil to conduct additional work.

The comment does not require a change to the AOC.

7. One commenter expressed concern that the emergency response to the Discharge and the replacement of the pipeline mandated a delay in responding to the flooding itself. This delay in responding to the flooding increased the damage to the Riverside Park in Laurel, and the citizens have been without use of the park since the Discharge. The commenter requested that ExxonMobil make Laurel whole.

RESPONSE:

As stated in Response to Comment # 1, the AOC does not address or affect natural resource damages, or the costs of assessing and litigating natural resource damages. Lost

use of riverfront parks such as this one, are not addressed under the AOC, and are reserved for potential recovery by the State.

The comment does not require a change to the AOC.

8. One commenter stated that ExxonMobil's riverbank reclamation and revegetation has been inconsistent. For example, on the commenter's property, ExxonMobil placed brush, trees and small branches on the river bank for stabilization, whereas on an adjacent property, ExxonMobil used riprap.

RESPONSE:

Areas disturbed by investigation and cleanup activities must be revegetated as specified in the DEQ-Approved *Framework Document for the Reclamation of Disturbed Vegetation* (Framework Document). AOC, Attachment A. The Framework Document does not specifically require one type of reclamation, such as riprap. The Framework Document provides as follows regarding wood: "Cut-up tree parts are to be manually distributed in a random, natural manner to naturally degrade and provide habitat for insects and small mammals." As provided in Paragraph 10 of Attachment A of the AOC, ExxonMobil must "obtain all necessary permits and comply with all applicable or relevant local, state or federal environmental requirements, criteria, or limitations" when conducting reclamation activities.

In general, on private property, ExxonMobil and the property owner used the ExxonMobil claims process to address reclamation activities. However, where ExxonMobil has not reached an agreement that is acceptable to the private property owner, DEQ will ensure that ExxonMobil's reclamation of private property is in compliance with the AOC. DEQ has followed up directly with the commenter to inspect the commenter's property to determine whether additional reclamation and revegetation is necessary.

ExxonMobil and the State of Montana will be inspecting the revegetation and reclamation of all public lands disturbed by the investigation and cleanup in spring of 2012. At the request of private property owners, DEQ and ExxonMobil will also inspect revegetation and reclamation of private properties. Depending on the results of these investigations, DEQ may require additional reclamation activities, if necessary.

The comment does not require a change to the AOC.

9. One commenter stated that an area used by ExxonMobil as a right of way and a staging area has been infested with noxious weeds, including leafy spurge, spotted knapweed, hounds tongue, Canadian thistle, salt cedar, and milkweed.

RESPONSE:

Attachment A of the AOC provides: “Areas disturbed by investigation and cleanup activities shall be protected from weed infestation and revegetated as specified in the DEQ-Approved *Framework Document for the Reclamation of Disturbed Vegetation*. ExxonMobil shall collaborate with the Yellowstone County Weed Board and the affected landowner to ensure proper weed control and revegetation. Revegetation may be a permit requirement.” AOC, Attachment A, ¶ 11.

As required in the Framework Document, DEQ and/or ExxonMobil will be inspecting the reclaimed areas in spring 2012, and identifying areas that require additional reclamation and revegetation.

DEQ will identify areas that require additional noxious weed control after the spring 2012 inspection. ExxonMobil will be required to satisfactorily address any noxious weed infestation in areas disturbed by Discharge investigation and cleanup activities until the requirements of the AOC and the Framework Document are met.

The comment does not require a change to the AOC.

10. Two commenters expressed concern about the way that ExxonMobil has or has not compensated private landowners for their time, lost use of property, and the impact on property values.

RESPONSE:

The AOC does require ExxonMobil to clean up to State standards and conduct reclamation and revegetation on private lands, but it does not address claims for compensation to private landowners. The Water Quality Act and the Comprehensive Environmental Cleanup and Responsibility Act do not authorize DEQ to recover or require compensation for private parties, and DEQ therefore has no authority to do so. Instead, the AOC requires ExxonMobil to pay the State’s past costs, conduct the remaining investigation and cleanup, pay the penalty, and pay the State’s future costs. Although DEQ understands the commenters’ frustration, the AOC cannot address the issue of individual compensation to private landowners.

The comment does not require a change to the AOC.

11. One commenter disagreed with Section VIII (“Designation of Contractors and Project Coordinators”) of the AOC. The commenter stated that DEQ should select a neutral third-party contractor, that ExxonMobil should not be allowed to use ARCADIS as its lead contractor, and that DEQ should be able to decline to accept a contractor for any reason deemed valid by DEQ.

RESPONSE:

The Water Quality Act (WQA) allows persons responsible for pollution to state waters to conduct DEQ-required work, including cleanup activities. Work paid for by responsible

persons under the direction and supervision of DEQ is an important process because DEQ does not have the resources to conduct cleanup work on multiple contaminated sites throughout Montana. DEQ does not typically select a contractor unless DEQ is doing the work itself (e.g., where the party responsible has refused to conduct the DEQ-required work). DEQ generally retains the right to disapprove a contractor in administrative orders. DEQ retains this right under the AOC. See AOC ¶ 31.

Although ARCADIS is not a neutral third-party contractor, DEQ is providing field oversight and review of all of the data and documents submitted by ARCADIS on behalf of ExxonMobil. DEQ's oversight and review by trained scientists and managers provides an important safeguard on the veracity of the information provided. This is the typical process followed when DEQ requires work under both the WQA and the Comprehensive Environmental Cleanup and Responsibility Act.

ARCADIS has the technical qualifications to conduct the DEQ-required work under the AOC, and is familiar with the Discharge. The AOC allows DEQ to disapprove of ARCADIS or any other contractor in the event of "(i) any violation of law that materially impairs the Contractor's or subcontractor's ability to perform the required Work; or (ii) any deficiencies in the Contractor's or subcontractor's qualifications or ability to reasonably perform the required Work." These situations provide sufficient ability to disapprove of ARCADIS (or any other ExxonMobil contractor), if DEQ determines that it is necessary.

The comment does not require a change to the AOC.

12. One commenter expressed concern that Stipulated Penalties will be tolled during the pendency of a Dispute Resolution period under the AOC. The commenter expressed concern that this provision might incentivize ExxonMobil to invoke dispute resolution without adequate basis.

RESPONSE:

The AOC is a negotiated document between ExxonMobil and DEQ. DEQ determined that a negotiated AOC was the most effective means to ensure and facilitate cleanup of the Discharge.

DEQ entered AOC negotiations with ExxonMobil only after the company demonstrated that it was acting in good faith and had already spent tens of millions of dollars in its response to and cleanup of the Discharge. If ExxonMobil did not demonstrate good faith, DEQ would not have entered into the AOC.

Moreover, Section XVII ("Dispute Resolution") places truncated timelines on the dispute resolution period, with the intention of facilitating the work and avoiding delay in cleanup.

DEQ retains significant discretion in enforcement of the AOC. If, in the future, ExxonMobil appears to be abusing the Dispute Resolution provisions of the AOC, DEQ may use this information in exercising its discretion in whether to assess Stipulated Penalties or sue ExxonMobil to enforce the provisions of the AOC or to seek penalties under the Water Quality Act, for violations of the AOC.

The comment does not require a change to the AOC.

### **3.0 OUTCOME OF DEQ REVIEW OF COMMENTS**

After carefully reviewing and considering all of the public comments that were timely submitted during the public comment period, DEQ has signed the AOC. The AOC was signed by ExxonMobil on January 19, 2012, prior to the start of the public comment period. The AOC was signed by DEQ on February 28, 2012, which is the “Effective Date” of the final AOC.

A copy of this Responsiveness Summary can be found at: <http://deq.mt.gov/silvertipoilspill/default.mcp>. DEQ will publish a notice and a brief description of the final AOC in the major daily newspaper in the area most affected, the *Billings Gazette*. DEQ will make the final AOC and Responsiveness Summary available to the public at:

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Remediation Division  
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