

## **AGENDA TABLE OF CONTENTS**

**AGENDA** \_\_\_\_\_ pg 001

### **ADMINISTRATIVE ITEMS**

I.A.1. FEBRUARY 8, 2019 MEETING MINUTES \_\_\_\_\_ pg 005

### **ACTION ITEMS**

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

III.A.1. EXECUTIVE SUMMARY \_\_\_\_\_ pg 010

III.A.1. NOTICE OF PUBLIC HEARING \_\_\_\_\_ pg 012

III.A.1. AMENDED NOTICE \_\_\_\_\_ pg 028

III.A.1 HEARING SCRIPT \_\_\_\_\_ pg 030

III.A.1. STRINGENCY REVIEW \_\_\_\_\_ pg 034

III.A.1. DRAFT ADMINISTRATIVE ORDER \_\_\_\_\_ pg 039

### **NEW CONTESTED CASES**

III.B.1. NOTICE OF APPEAL \_\_\_\_\_ pg 040

BOARD OF ENVIRONMENTAL REVIEW  
FRIDAY, APRIL 12, 2019  
METCALF BUILDING, ROOM 111  
1520 EAST 6<sup>th</sup> AVENUE, HELENA, MONTANA

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

**10:30 AM**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. The Board will vote on adopting the February 8, 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.** This matter has been stayed at the request of the parties since July 23, 2018. In December 2018, Ms. Clerget held a scheduling conference to place this matter back on a litigation schedule. Ms. Clerget issued an Amended Scheduling Order on January 8, 2019 and on March 4, 2019, the parties requested an additional stay. Ms. Clerget held a scheduling conference on April 2, 2019, and issued a Second Amended Scheduling Order on April 4, 2019.
  - 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.** On July 16, 2018, Ms. Clerget issued her Proposed Findings of Fact Conclusions of Law and a separate order on exceptions. Copper Ridge, Reflections at Copper Ridge, and DEQ submitted their exceptions to the Proposed Order and the matter was fully briefed and before the Board for oral argument at the December meeting. The Board however, lacked a quorum at its December meeting. The Board requested additional briefing from the parties on the owner/operator issue, which the parties submitted. At the February meeting, the board vacated the Proposed Findings of Fact and Conclusions of Law and Order on Summary Judgment and remanded the matter for further proceedings, consistent with the Board's interpretation of the statute. Ms. Clerget determined that the facts in the record were insufficient

with respect to the owner/operator issue and set a factual hearing, limited to the owner/operator issue, for June of 2019.

- c. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.** On March 8, 2019, the parties Stipulated to dismissal with prejudice. This matter is now closed.
  - d. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.** On February 22, 2019, the parties stipulated to Dismissal with prejudice. This matter is now closed.
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. Ms. Clerget issued a Scheduling Order on March 13, 2019 and the parties are proceeding accordingly.
  - 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.** The parties have filed cross-motions for summary judgment. Replies to those motions are due April 5, 2019. A decision on the parties motions will be issued thereafter.
  - d. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** Ms. Clerget conducted a four-day hearing in this matter that concluded on March 22, 2018. After several extensions, the parties submitted their post-hearing filings on September 27, 2018. On October 23, 2018, Western Energy filed a notice of bankruptcy. On November 16, 2018, the parties held a status conference and agreed that the bankruptcy filing does not stay this proceeding. Ms. Clerget has issued her proposed findings of fact and conclusions of law and set deadlines by which the parties must file exceptions to the order and responses to the exceptions. This matter will be before the Board at its May meeting.
  - 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, BER2017-03 WQ.** A two-day hearing on this

matter on held on December 3-4, 2018. Ms. Clerget issued a Scheduling Order setting the deadlines for post-hearing submissions on January 9, 2019. The parties have submitted their proposed FOFCOLs and responses, and oral argument on those proposed FOFCOLs is set for May 7, 2019.

- 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.** 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 for scheduling purposes. Ms. Clerget issued a Scheduling Order on March 13, 2019 and the parties are proceeding accordingly.
- g. **In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.** The parties appeared before the Board at its October 2018 meeting for oral argument on the proposed Findings of Fact and Conclusions of law. At the meeting, the parties reached a settlement and the Board stayed the case until February 2019.
- h. **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.** On January 3, 2019, counsel for Golden West Properties filed an unopposed motion to modify the scheduling order in this matter. The motion was granted on January 8, 2019, and the parties are proceeding according to that schedule.

3. Contested Cases not assigned to a Hearing Examiner

- a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** On April 9, 2014, the hearings examiner issued Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. This matter was stayed while action in the First Judicial District Court proceeded. On March 14, 2016, the Judge issued Order on Summary Judgment invalidating the permit renewal and modification and remanding the matter for consideration consistent with the opinion. On January 25, 2018, the Department of Environmental Quality entered a Stipulated Judgement resolving the issue of attorney's fees. The Department of Environmental Quality and Western Energy appealed the District Court's Order on Summary Judgment to the Montana Supreme Court. The matter has been briefed and oral argument was held before the Montana Supreme Court on March 13, 2019. The Parties are awaiting the final Order of the Montana Supreme Court.

### III. ACTION ITEMS

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

1. **In the matter of final adoption of the proposed amendment to ARM 17.8.744 and adoption of New Rules I-IX to establish an air quality registration program for certain portable sources of emissions, as noticed in MAR Notice No. 17-402.**

Public Comment.

#### B. NEW CONTESTED CASE

1. **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 February 12, 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.

### 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**

**February 8, 2019**

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, February 8, 2019 in Room 111 of the Metcalf Building, 1520 East 6<sup>th</sup> Avenue, Helena, Montana.

Attendance

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

**Board Members Present by Phone:** None

**Board Members Absent:** John Felton

**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:** Kirsten Bowers, Ed Hayes, Kurt Moser, Sarah Christofferson, Sandy Scherer, Nick Whittaker, Aaron Pettis – LEGAL; Mindy McCarthy, Myla Kelly, Rainie Devaney, Eric Urban, Tim Davis, Jon Kenning, Joanne McLaughlin, Derek Fleming – WQD; Susan Bawden – ENF; Amy Reynolds – WMRD; Chris Yde – AEMD

**Interested & Other Persons Present:** Vicki Marquis – Holland and Hart; John Tietz, Cathy Laughner– BKBH; Landy Leep – Copper Ridge Development; Peggy Trenk – Treasure State Resources Association; Brad Longcake – Montana Petroleum Marketers and Convenience Stores

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

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

### **I.A.1. December 7, 2018 Meeting Minutes**

Mr. DeArment 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 there is a scheduling order in place and the parties are proceeding accordingly.

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

Ms. Clerget stated the parties have come to an agreement in principal and a status conference is set for February 11, 2019.

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

Ms. Clerget said the case was dismissed with prejudice.

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

Ms. Clerget stated the parties are to file a status report and she anticipates it will be settled shortly.

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

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

Ms. Clerget stated the case is stayed and she's waiting on the decision in MEIC and Sierra Club v. DEQ and Western Energy currently before the Supreme Court.

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

Ms. Clerget said the parties have submitted summary judgement motions and the motions will be ripe for decision soon.

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

Ms. Clerget stated she has the proposed findings of facts and conclusions of law from the parties and will have a decision to the Board soon.

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

Ms. Clerget stated the proposed findings of facts and conclusions of law are due to her and a hearing is set for March 22, 2019.

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

Ms. Clerget stated she would discuss this in combination with the new contested case, agenda item III.B.1.

**II.A.2.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.**

Ms. Clerget has issued a scheduling order and the parties are proceeding accordingly.

**II.A.2.g. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.**

Mr. Moser stated the parties have engaged in discussions about the site. In October, DEQ staff visited the site and determined it would no longer need to have a discharge permit and because of that, the agency filed a notice of intent to terminate the permit and is currently out for public notice. Ms. Laughner stated CFAC had nothing to add and would wait until the public comment period closes.

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

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

Ms. Bowers stated the matter is fully briefed before the Supreme Court and oral argument is set for March 13.

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

- III.A.1. **The department requests that the board extend the comment period by 45 days for proposed amendments to Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.**

Mr. Urban briefed the Board and answered questions.

Ms. Marquis commented that Talon Montana supports the Department's request for a 45-day extension and asked for further information be provided by the Department at the beginning of the extended comment period.

Ms. Trenk stated Treasure State Resources, the Montana League of Cities and Towns and the Montana Association of Realtors supports the Department's request.

Mr. Olson stated the Montana Petroleum Association supports the Department's request.

Mr. Longcake stated the Montana Petroleum Marketers and Convenience Store Association supports the Department's request.

Mr. Tweeten MOVED to extend the comment period by 45 days, to add a second hearing to be held on March 19 and to assign the hearing to the Hearing Officer. Mr. Busby SECONDED. The motion PASSED unanimously.

### III.B. New Contested Cases

- III.B.1. **In the Matter of: 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 new contested case has the same permit number as agenda item II.A.2.e. She gave the Board members their options, including assigning it to the Hearings Examiner and answered questions.

Mr. Moser and Ms. Marquis briefed the Board and answered questions on the original and new case.

Mr. DeArment moved to combine the two cases for procedural purposes and to assign the matter to the Hearings Examiner for the totality of the case. Chairperson Deveny seconded the motion, which passed unanimously.

### III.C. Action on Contested Cases

- III.C.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.**

The Board heard oral arguments from parties and held discussion. Board Member Busby moved to grant Copper Ridge and Reflections at Copper Ridge's Motion for

Summary Judgment and reverse the Hearing Examiner's decision that Copper Ridge and Reflections at Copper Ridge are owner/operators. Board Member Hanson seconded the motion.

Board Member Tweeten moved to substitute the motion by vacating the Proposed Findings of Fact and Conclusions of Law and Order on Summary Judgment finding that the conclusions of law were incorrect and there were insufficient facts before the Board for a decision and remanded the matter for further proceedings, consistent with the Board's interpretation of the statute: that the statutory definition of owner/operator speaks to the person who owns, operates, or supervises the project at the time that the storm water discharges take place and that having had the opportunity to take steps that might have controlled those discharges at some point in the past does not make one an owner or operator for purposes of the statute. Board Member Hanson seconded the motion, which passed unanimously.

Board Member Tweeten moved to direct the hearing examiner to place the burden of proof on the Department of Environmental Quality under the appropriate legal standard as stated above. The Board left it to the discretion of the Hearing Examiner to determine if there were sufficient facts on the record to make findings of fact and conclusions of law consistent with the Board's interpretation of the statute and burden of proof, or whether an additional fact-finding hearing was necessary. Board Member Busby seconded the motion, which passed unanimously.

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

Ms. Clerget had no updates.

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

None were offered.

#### **VI. Adjournment**

Mr. Tweeten moved to adjourn the meeting. Ms. Hanson seconded the motion, which passed unanimously. Chairperson Deveny adjourned the meeting at 1:52 p.m.

Board of Environmental Review February 8, 2019 minutes approved:

---

CHRISTINE DEVENY  
CHAIRPERSON  
BOARD OF ENVIRONMENTAL REVIEW

---

DATE

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM**

**EXECUTIVE SUMMARY FOR ACTION ON RULE AMENDMENT AND ADOPTION**

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

**Agenda Item Summary:** The board is considering adoption of a rulemaking to amend an existing air quality rule and adopt New Rules to establish an air quality registration system for certain sources of emissions.

**List of Affected Rules:** This rulemaking would amend Administrative Rules of Montana (ARM) 17.8.744 and adopt New Rules I through IX.

**Affected Parties Summary:** The New Rules and rule amendment would affect approximately 156 entities that currently hold Montana air quality permits for facilities that would be eligible to register. It would also affect an unknown number of additional owners or operators of facilities that are currently below the permitting threshold but that would be required to register under the proposed new program.

**Scope of Proposed Proceeding:** The board is considering final action on the amendment and adoption of the above-referenced rules. The Notice of Public Hearing on Proposed Amendment and Adoption was published in MAR Notice No. 17-402, 2018 MAR 2430, on December 21, 2018. Please see enclosure no. 1. The proposed amendment and adoption are contained in the Draft Notice of Amendment and Adoption. Please see enclosure no. 2.

**Background:** At the December 7, 2018, Board of Environmental Review meeting, the board initiated rulemaking to amend and adopt rules to establish a new registration program for portable sources of emissions. Please see Notice of Public Hearing on Proposed Amendment and Adoption, enclosure no. 1.

The board is proposing to amend and adopt the rules to establish a registration system that would streamline the process by which the department applies air quality requirements to certain types of sources. The registration system would apply to certain crushing and screening plants, concrete batch plants, and asphalt plants, and would take the place of the existing case-by-case permitting process for these sources.

The registration system consists of nine New Rules that address program definitions, applicability, requirements associated with the registration process, emission limitations and control requirements, notification of physical locations of operation, recordkeeping and reporting, and the deregistration process. The amendment to ARM 17.8.744 would provide an exemption from the requirement to obtain a Montana air quality permit for facilities that register with the department in accordance with the proposed New Rules.

The New Rules and rule amendment, together with existing administrative rules that remain applicable, comprise a program of air quality protection that is at least as stringent as the current permitting system.

The department prepared a programmatic Environmental Assessment to analyze the potential impacts of implementing the proposed new registration program. This document was available for review and comment alongside the proposed rules on the department's website at <http://deq.mt.gov/Public/publiccomment>.

**Hearing Information:** The board's hearing officer, Sarah Clerget, presided over a public hearing on January 23, 2019, to take comment on the proposed amendment and adoption of these New Rules. Please see the Hearing Officer Report, enclosure no. 3.

The department submitted HB 521 and 311 analyses on January 24, 2019. Please see enclosure no. 4.

**Board Options:** The board may:

1. Amend and adopt the rules as set forth in the Draft Notice of Amendment and Adoption, enclosure no. 2; and adopt the department's HB 521 and 311 Analyses, enclosure no. 4;
2. Decide not to amend and adopt the rules as set forth in enclosure no. 2.

**DEQ Recommendation:** The department recommends that the board amend ARM 17.8.744 and adopt New Rules I through IX as set forth in the Draft Notice of Amendment and Adoption, enclosure no. 2, and adopt the HB 521 and 311 Analyses, enclosure no. 4.

**Enclosure:**

1. Notice of Public Hearing on Proposed Amendment and Adoption
2. Draft Notice of Amendment and Adoption
3. Hearing Officer's Report
4. HB 521 and 311 Analyses
5. Draft Administrative Order

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF PUBLIC HEARING
17.8.744 and adoption of New Rules I	)	ON PROPOSED AMENDMENT
through IX implementing a registration	)	AND ADOPTION
system for certain facilities that currently	)	
require a Montana air quality permit	)	(AIR QUALITY)

TO: All Concerned Persons

1. On January 23, 2019, at 2:00 p.m., the Board of Environmental Review will hold a public hearing in Room 45 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Board of Environmental Review (board) will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., January 16, 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](mailto:sscherer@mt.gov).

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

17.8.744 MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS

(1) A Montana air quality permit is not required under ARM 17.8.743 for the following:

(a) through (l) remain the same.

(m) any facility that has been registered with the department in accordance with ARM Title 17, chapter 8, subchapter 17 or 18.

AUTH: 75-2-111, 75-2-204, 75-2-234, MCA

IMP: 75-2-211, 75-2-234, MCA

REASON: The board is proposing to amend an existing rule and adopt new rules to implement a registration system for certain facilities that currently require a Montana air quality permit. The facilities proposed to be included in the new registration system include nonmetallic mineral processing plants (commonly known as crushing and screening operations), asphalt plants, and concrete batch plants. These sources are often considered portable based on their ability to move locations and will be referred to as "portable sources." Currently, with specified exemptions, the administrative rules adopted under the Clean Air Act of Montana require the owner or operator of a source of air pollution that meets certain criteria to obtain a

permit prior to construction or operation. Section 75-2-234, MCA, authorizes the board to adopt a registration system in lieu of permitting.

The proposed new rules would provide a system for the owner or operator of a portable source facility to register with the department in lieu of submitting a permit application and obtaining a permit. The owner or operator of a registered facility still would be required to supply information that is consistent with the type and amount of information currently required in a permit application. Registered facilities would still be required to follow rules of operation that are similar to current permit conditions. These rules of operation would include emission limitations, air pollution control equipment installation and operation requirements, and requirements for testing, monitoring, and reporting. The proposed rules of operation are consistent with what is required at facilities across the state and, as such, are considered reasonable. Should more stringent, cost-effective technologies become widely available, the board could consider initiating a process to update the rules. The owner or operator of a registered facility still would be required to comply with any other applicable requirements.

Registration in lieu of permitting is appropriate for source categories in which there are a large number of homogeneous sources subject to identical requirements and for which there is no substantial benefit from individual permitting. For these homogeneous facilities, the permit conditions and environmental impacts vary little from facility to facility. The facilities proposed to be included in this registration system fit into this category of sources. Implementing a registration system would allow the department to use air program staff more efficiently and focus on major source permitting issues and compliance assistance in the field.

4. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS For the purposes of this subchapter, the following definitions apply:

(1) "Asphalt plant" means a facility used to manufacture asphalt by heating and drying aggregate and mixing it with asphalt cement.

(2) "Concrete batch plant" means a facility that combines various ingredients, such as sand, water, aggregate, fly ash, potash, cement, and cement additives, to form concrete.

(3) "Deregister" means to revoke a registration.

(4) "Drop point" means a location at which air emissions are generated from the transfer of materials, such as loading raw materials into a hopper or transferring materials between conveyers.

(5) "Dust suppression control" means the use of water, water spray bars, chemical dust suppression, wind fences, enclosures, or other dust control techniques.

(6) "Facility" means any real or personal property that is either portable or stationary and is located on one or more contiguous or adjacent properties under the control of the same owner or operator and that emits or has the potential to emit any air pollutant subject to regulation under the Clean Air Act of Montana or the Federal Clean Air Act and that has the same two-digit standard industrial classification code. A facility may consist of one or more emitting units.

(7) "Nonmetallic mineral" has the meaning given in 40 CFR Part 60, subpart 000.

(8) "Nonmetallic mineral processing plant" means a facility consisting of equipment that is used to crush, grind, or screen nonmetallic minerals and associated material-handling equipment and transfer points. The term does not include facilities in underground mines or at other stationary sources subject to Montana air quality permitting.

(9) "Permanent location" means a physical location at which a registered facility may remain or does remain for more than 12 months.

(10) "Registered facility" means a facility that has been registered in accordance with this subchapter.

(11) "Registration" means the submission to the department of the completed registration notification under [NEW RULE III].

(12) "Temporary location" means a physical location at which a registered facility remains for no more than 12 months.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule I is necessary to define terms that are used by the new rules and not defined elsewhere in ARM Title 17, chapter 8.

Section (3) defines "deregister" to provide that the process to remove authorization to operate as a registered facility is the same process used elsewhere to remove authorization to operate under an air quality permit. "Revoke" is used in statute to describe this process for permitted facilities and, for the purposes of this subchapter, "deregister" is defined as having the same meaning.

In (5), the term "dust suppression control" is defined to include a range of possible dust control methods, including the use of water applied by a spray bar or other application method, or chemical dust suppression if application of water is not feasible.

Section (6) carries forward the definition of "facility" that currently exists in ARM Title 17, chapter 8, subchapter 7. Because these new rules would replace the permitting requirements in subchapter 7 for specific sources of air pollution, it is reasonable to use the same word to describe the regulated unit, a "facility," as that is used in the rules for the existing permitting program.

Section (8) defines "nonmetallic mineral processing plant" to exclude from regulation under this subchapter facilities located at underground mines or other stationary sources subject to Montana air quality permitting. Those types of facilities are included in the permits for the stationary sources with which they are associated and should not be eligible for registration as separate sources.

Sections (9) and (12) define the terms "permanent location" and "temporary location" to distinguish between two types of locations at which a facility may operate. This is important for the specific types of facilities subject to these new rules because of their tendency to be portable and move around the state, as well as out of the state, from job site to job site. The key difference between a permanent and temporary location, as defined, is whether the facility remains, meaning equipment is present but not necessarily operating, at the location for more than 12

months. The reason the definition of "permanent location" is permissive is to allow an owner or operator to identify a location as being permanent, and comply with the requirements applicable at permanent locations, before the facility has actually remained at the location for more than 12 months. No facility may remain at a temporary location for longer than 12 months.

In (11), the term "registration" is defined to include the submission of required information to the department.

NEW RULE II APPLICABILITY (1) This subchapter applies to the following facilities:

(a) Nonmetallic mineral processing plants with annual production of less than 8,000,000 tons as a rolling 12-month total.

(b) Concrete batch plants with annual production of less than 1,000,000 cubic yards as a rolling 12-month total.

(c) Asphalt plants that:

(i) combust natural gas, propane, distillate fuel, waste oil, diesel, or biodiesel; and

(ii) have annual production of less than:

(A) 996,000 tons as a rolling 12-month total for drum mix plants; or

(B) 324,000 tons as a rolling 12-month total for batch mix plants.

(d) Engines, such as power generators and other internal combustion engines, associated with any facility described in (a) through (c).

(2) An owner or operator of a facility that is not listed in (1) shall comply with the applicable application and permitting requirements of this chapter.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule II is necessary to describe the facilities that are eligible for registration. The eligibility of the facilities described in (1)(a) through (c) is based on annual production levels. The annual production levels were calculated as surrogates for emission limits using federal emission factors for the specific types of processes included in each source category. The emission factors come from the U.S. Environmental Protection Agency's Compilation of Air Pollutant Emission Factors (AP-42). Using the appropriate emission factors, the production limits were set at levels that ensure that no major stationary source, as defined in ARM Title 17, chapter 8, subchapters 8, 9, or 10, would be eligible to register under this subchapter. For each type of facility, the production levels equate to maximum mass emissions below major source thresholds. The reason for limiting registration-eligible facilities to below major source thresholds is that the simplified analysis associated with registration is not appropriate for major sources, which may have emissions and environmental impacts that differ from facility to facility and which therefore require case-specific impact analysis.

For nonmetallic mineral processing plants, particulate matter with an aerodynamic diameter of 10 microns or less (PM-10) is the primary pollutant of concern. The annual production limit of 8,000,000 tons as a rolling 12-month total results in maximum mass emissions of PM-10 of less than 63 tons per year from any

single facility. A facility emitting 100 tons per year of PM-10 would trigger additional permitting requirements as a major stationary source.

For concrete batch plants, PM-10 is also the primary pollutant of concern. The annual production limit of 1,000,000 cubic yards as a rolling 12-month total results in maximum mass emissions of less than 12 tons of PM-10 per year from any single facility.

For asphalt plants, carbon monoxide (CO) is the primary pollutant of concern because the majority of emissions from this source category results from fuel combustion. CO emissions differ depending on the type of fuel that is burned. The annual production limits account for a variety of the most common fuel types, which are listed in (1)(c)(i). The asphalt plants using fuel types not listed in this rule would require case-by-case permitting and would not be eligible for registration. In Montana, most of the permitted asphalt plants are drum mix plants. However, because the CO emission factors differ greatly between drum mix plants and batch mix plants, it is necessary to include two production limits. Each annual production limit results in maximum mass emissions of about 66 tons of CO per year from any single facility. A facility emitting 100 tons per year of CO would trigger additional permitting requirements as a major stationary source. This limit is low enough to allow for additional combustion emissions from associated generator engines, which often locate with portable equipment, and still result in a facility not exceeding major source limits.

A generator engine or other nonroad internal combustion engine used in association with one of the other three eligible source categories would also be eligible for registration. The facilities subject to this subchapter often operate at locations without line power and must therefore sometimes be powered using generator engines or other similar engines that are designed to be moved from one location to another. The engines to which the new rules apply are those associated with a listed type of registration-eligible facility, and not engines used as part of any facility not covered by this subchapter. Engine operating limits are discussed in New Rule V.

Section (2) is necessary to emphasize that a facility exceeding the annual production described in (1) is not eligible for registration and would be required to follow the existing permitting process in ARM Title 17, chapter 8 for a Montana air quality permit. The additional scrutiny provided by existing case-by-case permitting is more appropriate than registration for major sources of emissions.

Preparation of an environmental assessment for registration of a facility is not necessary as long as the facility meets the applicability criteria. Facilities meeting the applicability criteria will not have a significant environmental impact. The department has made this determination through preparation of a programmatic environmental assessment. See paragraph 5 immediately following the statement of reasonable necessity for proposed New Rule IX.

### NEW RULE III REGISTRATION PROCESS AND INFORMATION

(1) Except as provided in (3), the owner or operator of a facility that meets the applicability criteria of [NEW RULE II] and that commences operation after [the effective date of this rule] shall:

(a) register the facility with the department prior to beginning initial operations; or

(b) register the facility with the department and request revocation of the associated Montana air quality permit (MAQP), if the owner or operator holds a valid MAQP for the facility.

(2) Except as provided in (3), the owner or operator of a facility that meets the applicability criteria of [NEW RULE II] and that commenced operation prior to [the effective date of this rule] shall:

(a) register the facility with the department no later than December 31, 2019; and

(b) request revocation of the associated MAQP, if the owner or operator holds a valid MAQP for the facility.

(3) An engine that meets the applicability criteria of [NEW RULE II] is exempt from the registration requirement if the engine will be located at temporary locations only.

(4) To register, the owner or operator shall submit a complete registration notification to the department on the form provided by the department. The notification information must include the following:

(a) Company name and mailing address;

(b) Owner or operator's name, mailing address, telephone number, and email address;

(c) Contact person's name, mailing address, telephone number, and email address;

(d) Physical location(s) of known permanent location(s), initial temporary location(s) if no permanent location is proposed, or business location if no in-state location of operation has been identified (legal description to the nearest 1/4 section);

(e) Physical location(s) of each permanent or temporary location not included in (d) of an existing facility for which the owner or operator holds a valid MAQP;

(f) Equipment-specific information, as applicable, including:

(i) Unit type;

(ii) Manufacturer's name;

(iii) Date of manufacture; and

(iv) Horsepower.

(g) Acknowledgement of the owner or operator's duty to comply with this subchapter;

(h) Other information required by the department.

(5) A facility is considered registered upon the department's receipt of the notification required in (4).

(6) Within 15 calendar days after registration, the department shall publish acknowledgment of the registration on the department's website at <http://deq.mt.gov/Air/PublicEngagement>.

(7) An owner or operator of a registered facility may not operate for the first 15 calendar days following the date of registration, unless the owner or operator holds a valid MAQP for the facility at the time of registration. Registration does not supersede any other local, state, or federal requirements associated with the operation of registered facilities.

(8) An owner or operator of a registered facility shall provide notification to the department, in a manner prescribed by the department, of any change(s) to the equipment-specific information required in (4)(f) by March 15th of each calendar year.

(9) If the owner or operator of a registered facility changes, the new owner or operator shall, prior to operating the facility, register with the department by submitting the notification required in (4).

(10) An owner or operator of a registered facility shall update the registration information by submitting notification to the department, in a manner prescribed by the department, to identify a location as a permanent location in advance of remaining at the location for longer than 12 months.

(11) Registration under this subchapter is valid provided the registered facility continues to meet the applicability criteria in [NEW RULE II].

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule III is necessary to describe when and how an owner or operator must register with the department. Section (1) applies to any registration-eligible facility that begins operation after these rules become effective. Any registration-eligible facility that is not already permitted by the department must be registered prior to beginning initial operations. If the owner or operator has already obtained a Montana air quality permit for the facility and the facility is eligible to register under New Rule II, the owner or operator must register the facility and request revocation of the permit at the time of registration. The purpose of this provision is to ensure that all facilities meeting the applicability criteria in New Rule II register in lieu of permitting. Registration of eligible facilities is mandatory. Only facilities that are not registration-eligible would be allowed to obtain a Montana air quality permit. This is reasonably necessary to allow the department to appropriately streamline the registration of homogeneous types of facilities.

Section (2) establishes a deadline of December 31, 2019, for registration of facilities in operation prior to the effective date of these rules. It may not be feasible for the owners and operators of existing facilities to immediately register upon adoption of these rules. Existing facilities with valid Montana air quality permits that are registration-eligible must also request revocation of the permit by the same deadline. The reason is the same as for (1).

Section (3) provides an exception to the registration requirement for engines that are otherwise eligible for registration but that will not be located at a permanent location. Power generators and the other nonroad engines at facilities regulated under this subchapter are sources of emissions that are generally considered to be mobile because they can be transported from one location to another. Mobile emitting units, including the nonroad engines listed in New Rule II, are generally excluded from the permitting requirements of this chapter. See ARM 17.8.744(1)(b). Therefore, it is reasonable to exclude such engines from the requirement to register. However, under Title 40, C.F.R. 89.2, internal combustion engines that would otherwise be considered nonroad engines are no longer considered mobile when they remain at a location for longer than 12 consecutive months. Therefore, these

engines would no longer qualify for the mobile emitting unit exclusion from permitting requirements if they remain at a location for longer than 12 months. Similarly, it is reasonable to require that they be registered under the proposed new rules if they remain at a location for longer than 12 months. Owners and operators of engines eligible for registration are required to request revocation of any existing MAQPs. The reason is the same as for (1).

Section (4) is necessary to list the information an owner or operator is required to provide to register a facility. A registration notification that is missing any of the listed information would be considered incomplete.

Sections (5), (6), and (7) prohibit operation of a registered facility for 15 days following the date of registration. The purpose of this delay is to allow time for the department to publish notification of the registration on the department's website and to determine if the registration notification submitted by the owner or operator contains complete information.

Section (8) requires the owner or operator of a registered facility to submit any changes to the required equipment-specific registration information no later than March 15 of each calendar year. Possible changes to the equipment-specific information include the addition or removal of emitting units from the list of registered equipment. Although changes must be submitted at least once per year, there is no limit on the number of times an owner or operator may submit changes to the registration. The purpose of requiring submission of the changes is to keep equipment-specific registration information current.

Section (9) is necessary to keep information identifying the entity that owns or operates registered facilities current.

Section (10) is reasonably necessary to provide a process by which an owner or operator may add or remove permanent locations included in the registration information.

Section (11) is reasonably necessary because registered facilities might change production levels or equipment in such a manner that the facility would no longer be eligible to operate as a registered facility under this subchapter.

NEW RULE IV GENERAL OPERATING REQUIREMENTS (1) Registration of a facility under this subchapter does not relieve an owner or operator of the responsibility to comply with:

- (a) applicable federal, state, or local statutes, rules, or orders; and
- (b) control strategies contained in the Montana State Implementation Plan.

(2) The department may require an owner or operator to conduct a test, emission or ambient, under ARM 17.8.105. Emission source testing must comply with ARM 17.8.106.

(3) An owner or operator of a facility required to be registered under this subchapter:

- (a) shall install, operate, and maintain all equipment to provide the maximum air pollution control for which it was designed;

- (b) shall employ dust suppression control that is installed, maintained, and operated to ensure that the facility complies with this chapter. Dust suppression control for crushing, screening, and/or conveyor transfer points consisting of water spray bars and/or chemical dust suppression must be operating if any visible

emissions equal to or greater than 10 percent opacity averaged over six consecutive minutes are present;

(c) shall allow the department's representatives access to the operations at any facility at all reasonable times to inspect or conduct surveys, collect samples, obtain data, audit any monitoring equipment or observe any monitoring or testing, and otherwise conduct all necessary functions related to the administration of this chapter; and

(d) may not operate an engine that is subject to the requirements of this subchapter at any permanent location when the combined horsepower hours of those sources exceed the following limits:

- (i) 6,000,000 horsepower-hours per rolling 12-month period; or
- (ii) 3,500,000 horsepower-hours per rolling 12-month period, if an asphalt plant is also located at the permanent location.

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule IV is necessary to provide general requirements for facilities that are eligible to be registered under this subchapter. Other federal, state, or local regulations and provisions of the Montana State Implementation Plan may be applicable to the registration-eligible facility. For example, subchapter 3 of this chapter contains opacity limitations and incorporates federal New Source Performance Standards, both of which will continue to apply to registration-eligible facilities. Section (1) is necessary to inform an owner or operator that registration of a facility under this subchapter does not affect the duty of that entity to comply with these other applicable requirements.

Section (2) is necessary to inform an owner or operator that facilities eligible to be registered under this subchapter are still subject to the testing requirements in ARM 17.8.105. The required testing may include source tests specifically required under a Federal New Source Performance Standard. Because some of the facilities that would be subject to this subchapter are required to conduct specific testing, the board believes it appropriate to include this reference even though ARM 17.8.105 and 17.8.106 apply to such sources regardless of whether those rules are incorporated here.

Subsection (3)(a) is necessary to ensure that the owner or operator installs, operates, and maintains all equipment to achieve the maximum pollution control for which the equipment was designed. The purpose of this rule is to require good operating and maintenance practices, which will result in decreased emissions.

Subsection (3)(b) is necessary to establish the required level of dust suppression for facilities required to register under this subchapter. Because different types of facilities are subject to different opacity limits, this rule requires that the owner or operator use a dust suppression technique that is sufficient to comply with the limits applicable to that facility.

For crushing, screening, and conveyor transfer points, (3)(b) requires the use of water spray bars and/or chemical dust suppression if visible emissions have an opacity of greater than 10 percent. It is necessary that owners and operators of these types of facilities not only have available but operate such dust suppression to

ensure that the facility complies with applicable opacity limits. Depending on the applicable limit, the facility may be allowed to have emissions with opacity greater than 10 percent, but the controls must be operating whenever opacity exceeds 10 percent.

Subsection (3)(c) requires that the owner or operator provide department representatives access to the plant site at reasonable times so the department can conduct necessary site inspections, monitoring, observations, and/or data collection. This will allow the department to perform its functions and subject an owner or operator that did not allow access to compliance or enforcement actions.

Subsection (3)(d) establishes limits on the operation of registration-eligible engines at permanent locations. These operating limits are necessary to limit the emissions from such engines at locations where they would be considered stationary sources. No limits would apply at temporary locations, where these sources would be considered mobile, because mobile sources are not subject to the permitting requirements of this chapter. The horsepower-hour limits ensure that the additional emissions produced by engines do not create a major source, as defined in ARM Title 17, chapter 8, subchapters 8, 9, or 10, when added to the emissions from other associated emitting units at the facility. The reason for this requirement is the same as for New Rules II and III(1).

NEW RULE V NOTICE OF LOCATION (1) Unless the owner or operator of a facility required to be registered under this subchapter has previously submitted the location of a facility under [NEW RULE III](4), the owner or operator shall submit to the department a notice of location for each facility, on a form provided by the department. The owner or operator shall submit the form at least 15 calendar days before commencing operation of the facility.

(2) If there is more than one type of facility listed in [NEW RULE II] at the same location, the owner or operator shall submit a notice of location for each facility type.

(3) Upon receipt of a complete notice of location, the department shall publish notification on the department's website at <http://deq.mt.gov/Air/PublicEngagement>.

(4) The owner or operator shall confirm the location, in a manner prescribed by the department, within 10 calendar days after commencing operation at the location.

(5) The owner or operator shall notify the department, in a manner prescribed by the department, within 10 calendar days after removing all equipment of a single type from the location. Following such notification, the owner or operator shall comply with (1) through (4) prior to operating equipment of that type at the location again.

(6) An owner or operator may transfer equipment between any locations that have been identified under (1) and (2), unless the owner or operator has notified the department under (5) that all equipment of the same type has been removed from the location.

(7) A registered facility may not remain at a temporary location for more than twelve months. Before twelve months have elapsed, the owner or operator of the registered facility shall either:

- (a) remove all equipment from the temporary location, according to the applicable requirements in this rule; or
- (b) register the location as a permanent location.

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule V is necessary to describe the process an owner or operator or a registered facility must follow to provide notice of all locations of operation. This process is necessary because the facilities that are eligible to register under this subchapter are portable and may be relocated. It is the board's intent that the public and the department be informed, in advance, of all locations at which registered facilities may operate.

Section (1) requires that the owner or operator submit a notice of location to the department for each registered facility at least 15 days prior to operating that facility. This is necessary to ensure that the department has advance notice of each potential location of operation. The advance notice allows the department to notify interested parties and the public and raise any concerns that may exist regarding a specific location. Advance notice would be considered to have been given for locations the owner or operator provided to the department with the registration notification under New Rule III(4). Therefore, additional notice for such locations would not be required under this section.

Section (2) requires that the owner or operator of a registered facility notify the department of the locations where each type of registered facility may operate. This is necessary because the different types of registered facilities have different emission profiles and different operating requirements. The department must be able to keep accurate records of the locations of different types of emissions to ensure areas continue to meet the emission standards in the federal Clean Air Act and the Clean Air Act of Montana and implementing rules.

Section (3) requires the department to publish notification on its website of all complete notices of location. This is necessary to notify interested parties and the public of the possibility that sources of emissions may locate at a particular site. The website publication would also confirm to the owner or operator that the department had received the appropriate location notice.

Section (4) requires that the owner or operator of a registered facility provide confirmation of a location within ten days after beginning to operate at that location. This is necessary because the owners and operators of the facilities eligible to register under this subchapter may submit multiple potential locations to the department in advance of deciding where the equipment will actually be located. Section (5) requires the owner or operator to notify the department within ten days after removing all equipment of a single type from the location. The notices in (4) and (5) are necessary to ensure the department maintains an accurate record of the locations at which each type of registered facility is operating. Such a record is reasonably necessary for the department to efficiently perform required site visits and compliance checks, appropriately respond to complaints, and ensure compliance with emission standards.

Section (6) provides that an owner or operator may move equipment between locations if the owner or operator has identified the locations under (1) and (2). This clarification is necessary because the process in this subchapter differs from the process required under ARM Title 17, chapter 8, subchapter 7. For facilities registered under this subchapter, the owner or operator is not required to submit additional notification to move equipment between previously identified locations.

Section (7) prohibits a registered facility from remaining at a temporary location for longer than twelve months and establishes the options for an owner or operator if equipment has been at a temporary location for twelve months. It is necessary for the owner or operator to either remove equipment from a temporary location or identify the location as a permanent location before twelve months have elapsed because the requirements for registration-eligible engines differ depending on whether the engine is located at a permanent or temporary location.

NEW RULE VI DEREGISTRATION (1) The department may deregister a facility:

- (a) on written request of the owner or operator, or
- (b) for a violation of this chapter.

(2) To deregister a facility under (1)(b), the department shall notify the owner or operator in writing of its intent to deregister by certified mail, return receipt requested, to the owner or operator's last known address. The department shall advise the owner or operator of the right to request a hearing before the board under 75-2-211, MCA.

(3) If the department does not receive a return receipt for the notice of intent to deregister in (2), the department may give notice to the owner or operator by publishing the notice of intent to deregister. The publication must occur once each week for three consecutive weeks in a newspaper published in the county where the owner or operator's mailing address set forth in the registration is located. If no newspaper is published in that county, then the notice may be published in a newspaper having a general circulation in that county.

(4) When the department has published notice under (3), the owner or operator is deemed to have received the notice on the date the last notice was published.

(5) A hearing request must be in writing and must be filed with the board within 15 days after receipt of the department's notice of intent to deregister. Filing a hearing request postpones the effective date of the department's decision until issuance of a final decision by the board.

(6) If no hearing request is filed, the department's decision to deregister a facility is final when 15 days have elapsed from the date the owner or operator received notice.

(7) A hearing under this subchapter is governed by the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule VI is necessary to provide the department the authority to deregister a facility, either at the request of the registered entity or by the department based on an owner or operator's violation of the air quality rules in the operation of a registered facility. The new rule also necessarily provides for an appeal of the deregistration of a facility by the owner or operator to satisfy due process requirements. These provisions are nearly identical to those in ARM 17.8.763 for the revocation of a Montana air quality permit.

NEW RULE VII RECORDKEEPING AND REPORTING (1) An owner or operator of a facility required to be registered under this subchapter shall make records that include:

- (a) the location at which the facility was operated;
  - (b) daily production rates and rolling 12-month total production in the units used in [NEW RULE II](1);
  - (c) daily pressure drop readings, including daily water input rate or pressure, if applicable;
  - (d) daily horsepower hours of engines and rolling 12-month total horsepower hours, if applicable; and
  - (e) a log of required facility inspections, repairs, and maintenance.
- (2) The owner or operator shall maintain the records in (1) for at least five years following the date the record was created.

(3) The owner or operator shall maintain the records in (1) at the facility location or at another convenient location. The owner or operator shall make the records available to the department for inspection and submit the records to the department upon request.

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule VII is necessary to provide the general recordkeeping and reporting requirements for facilities registered under this subchapter. Facilities would be required to maintain records of information necessary for the department to verify compliance with the requirements of this chapter. An owner or operator would be required to maintain these records for at least five years and must make them available for inspection upon request of the department. The recordkeeping and reporting requirements would be substantially the same under the registration process as under traditional permitting.

NEW RULE VIII REQUIREMENTS FOR CONCRETE BATCH PLANTS

(1) Except as provided in (2), an owner or operator of a concrete batch plant required to be registered under this subchapter shall control particulate emissions from the facility at all times during operation using:

- (a) a fabric filter dust collector or equivalent on each cement silo, cement storage silo, or similarly enclosed storage bin or weigh hopper; and
- (b) a particulate containment boot or equivalent on every product loadout opening.

(2) If a concrete batch plant required to register under this subchapter that commenced operation prior to [the effective date of this rule] does not have the control equipment in (1) installed at the time of registration, the owner or operator of the facility shall install the equipment no later than twelve months after registration.

(3) In addition to the general requirements in [NEW RULE VII], the owner or operator shall conduct a monthly inspection of each operating facility for fugitive dust. If visible emissions from the fabric filter are present, the inspection must include an inspection of the fabric filter for evidence of leaking, damaged, or missing filters. The owner or operator shall take appropriate corrective actions to restore the filter system to proper operation before resuming normal operations.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule VIII is necessary to provide performance standards for registration-eligible concrete batch plants. These source-specific air pollution control requirements are consistent with existing permit conditions and constitute Best Available Control Technology for this source category. Section (2) would provide a period of twelve months after registration for the owner or operator of an existing facility to install any required control equipment not present at the time of registration. This is necessary because it may not be feasible for an owner or operator to install the equipment immediately upon registration. The reason for the monthly inspection required in (3) is to determine whether the required control equipment is operating correctly and is achieving the expected level of emission control. If it is not, (3) requires the owner or operator to correct the issue, which is necessary to ensure appropriate emission control.

NEW RULE IX REQUIREMENTS FOR ASPHALT PLANTS (1) An owner or operator of an asphalt plant required to register under this subchapter:

(a) shall limit particulate matter emissions to no more than:

(i) 0.04 grains per dry standard cubic foot; or

(ii) 0.10 grains per dry standard cubic foot, for a facility that holds a valid MAQP containing this limit at the time of registration;

(b) shall control emissions from each dryer or mixer at all times during operation using control equipment capable of achieving the applicable emission limit;

(c) shall shut down an emitting unit using a baghouse control device needing a bag replacement until the replacement bag is installed;

(d) shall install and maintain a device to measure the pressure drop on the control device, such as a magnehelic gauge or manometer. The pressure drop must be measured in inches of water and recorded daily; and

(e) shall install and maintain temperature indicators at the control device inlet and outlet; and

(f) may not allow the asphalt production rate to exceed the average production rate during the last source test demonstrating compliance. The owner or operator may retest at a higher production rate at any time.

(2) Records made and maintained under [NEW RULE VII] must include daily pressure drop readings from the control device and the daily water input rate or the water input pressure, if applicable.

AUTH: 75-2-111, 75-2-234, MCA  
IMP: 75-2-234, MCA

REASON: Proposed New Rule IX is necessary to provide performance standards for registration-eligible asphalt plants. These source-specific air pollution control requirements are consistent with existing permit conditions and constitute Best Available Control Technology for this source category.

Under (1)(a), an existing facility that holds a valid MAQP would be allowed to continue to operate with the same particulate matter emission limit that is in the permit. This is because the limit included in the permit was determined to be appropriate based on a case-specific review that included consideration of the age of the facility. As of the effective date of this rule, any registration-eligible facility that does not hold a valid MAQP containing a different particulate matter limit would be required to meet the limit in (1)(a)(i). This is because the lower limit is representative of the standard achievable using available pollution control technology for new facilities.

5. Concerned persons may submit their data, views, or arguments in writing to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [sscherer@mt.gov](mailto:sscherer@mt.gov), no later than 5:00 p.m., January 25, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date. In addition, the department has prepared an environmental assessment demonstrating that the facilities eligible to register under proposed New Rule II do not have significant environmental impacts. That environmental assessment may be viewed on the department's web site at <http://deq.mt.gov/public/publiccomment>. An electronic or hard copy of that document may also be obtained from Sandy Scherer at the addresses listed above. Oral or written comments on the environmental assessment may also be submitted in the same manner as for the proposed rule amendments.

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

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine

reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at [sscherer@mt.gov](mailto:sscherer@mt.gov), or may be made by completing a request form at any rules hearing held by the department.

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

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes  
EDWARD HAYES  
Rule Reviewer

BY: /s/ Christine Deveny  
CHRISTINE DEVENY  
Chairman

Certified to the Secretary of State, December 11, 2018.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT
ARM 17.8.744 and adoption of New	)	AND ADOPTION
Rules I through IX implementing a	)	
registration system for certain facilities	)	(AIR QUALITY)
that currently require a Montana air	)	
quality permit	)	

TO: All Concerned Persons

1. On December 21, 2018, the Board of Environmental Review published MAR Notice No. 17-402 regarding the proposed amendment and adoption of the above-stated rules at page 2430, 2018 Montana Administrative Register, Issue Number 24.

2. The board has amended the rule exactly as proposed. The board has adopted New Rule I (17.8.1801), New Rule II (17.8.1802), New Rule III (17.8.1805), New Rule IV (17.8.1806), New Rule V (17.8.1807), New Rule VI (17.8.1810), New Rule VII (17.8.1811), New Rule VIII (17.8.1812), and New Rule IX (17.8.1815) exactly as proposed.

3. The following comments were received and appear with the board's response:

COMMENT NO. 1: The board received a comment in support of the proposed amendment and adoption of new rules. The commenter recognized the efforts of the department to work with industry stakeholders in developing a proposed new registration system that is both fair and protective of the environment.

RESPONSE: The board thanks the commenter for the comments.

COMMENT NO. 2: The board received a comment regarding the particulate matter (PM) limits for asphalt plants in proposed New Rule IX. The commenter noted that the proposed PM limit of 0.04 grains per dry standard cubic foot (Gr/DSCF) for all new and/or previously unpermitted asphalt plants comes from a federal New Source Performance Standard (NSPS) that is applicable only to asphalt plants that commenced construction or modification after June 11, 1973. The commenter suggested that the PM emission limits in rule be set in accordance with not just the level but the applicability of the NSPS, allowing a plant that does not meet the applicability requirements of the NSPS to operate without meeting the PM limits of the NSPS.

RESPONSE: The board appreciates the comment. The commenter is correct that the PM emission limit of 0.04 Gr/DSCF is consistent with that set forth in the NSPS. However, the board clarifies that the proposed limit is not simply a surrogate for the NSPS, which, the board notes, remains an applicable federal regulation for certain asphalt plants due to its incorporation by reference into the board's generally

applicable emission standards in ARM 17.8.302. Rather, the proposed limit represents the present-day standard achievable with best available control technology or "BACT." Under existing permitting rules, a company seeking a new Montana air quality permit for an asphalt plant, regardless of its age, would be required to install the maximum air pollution control capability that is technically practicable and economically feasible following a case-by-case BACT analysis. The department has written Montana air quality permits for many asphalt plants over the last decade that have included a BACT analysis and resultant PM emission limit of 0.04 Gr/DSCF.

The board decided not to apply the 0.04 Gr/DSCF limit to existing asphalt plants that hold valid Montana air quality permits containing different limits because those limits were determined to be appropriate based on thorough analyses at the times of issuance. In the absence of any modification of a plant that would require a new evaluation, it would not be reasonable to change the limits for those plants simply because the board has adopted new rules. However, the board believes that any new case-by-case analysis of those or similar asphalt plants would result in a limit of 0.04 Gr/DSCF, in line with the requirements in proposed New Rule IX and consistent with the NSPS. Therefore, the board did not make changes to the PM emission limits based on this comment.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/  
\_\_\_\_\_  
EDWARD HAYES  
Rule Reviewer

By: /s/  
\_\_\_\_\_  
CHRISTINE DEVENY  
Chairman

Certified to the Secretary of State \_\_\_\_\_, 2019.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of )  
ARM 17.8.744 and adoption of New Rules I )  
through IX implementing a registration )  
system for certain facilities that currently )       Hearing Script  
require a Montana air quality permit )

1. This hearing is called to order. Let the record show that it is January 23, 2019 at 2:00 p.m. This hearing is taking place in Room 45 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana. This is the time and place set for the public hearing in the matter of the amendment of ARM 17.8.744 and adoption of New Rules I through IX implementing a registration system for certain facilities that currently require a Montana air quality permit. This public hearing is being recorded by Laurie Crutcher.

2. My name is Sarah Clerget. I am an assistant Attorney General for the State of Montana, assigned to the Agency Legal Services Bureau. The Board of Environmental Review has designated an attorney from Agency Legal Services Bureau to preside over and conduct this public hearing, and I am therefore acting as the presiding officer for this hearing.

3. Copies of the notice of public hearing on the proposed rulemaking are available on the table near the door for anyone who has not received a copy. Anyone who wishes to make a statement or submit written materials at this hearing should fill out a Testimony form that looks like \*this\* and give it to me as soon as possible, if you have not done so already. [I have already collected the Testimony forms left near the door.]

4. Mont. Code Ann. § 2-4-302(7)(a) requires presiding officers at rule hearings to read the Notice of Function of Administrative Rule Review Committee. The notice that I am required to read is as follows:

Notice of functions of Administrative Rule Review Committee

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for executive branch agencies and the entities attached to agencies for administrative purposes. In this case, the EQC has those functions for the Department of Environmental Quality and for the Board of Environmental Review.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or

to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena MT 59620-1706.

### **That completes the reading of the Notice of Function of Administrative Rule Review Committee.**

5. Mont. Code Ann. § 2-4-302(2)(a) requires each agency, which includes boards, to create and maintain a list of interested persons and the rulemaking subject or subjects in which each person on the list is interested. A person who submits a written comment or attends a hearing regarding proposed agency rulemaking must be informed of the list by the agency. The Department of Environmental Quality maintains lists of persons interested in various areas of rulemaking conducted by the Department and by the Board of Environmental Review so that the Department can provide these persons with notice of proposed rulemaking actions.

On the table near the door are forms for interested persons to designate their areas of interest in rulemaking so the Department can notify them of proposed rulemaking actions in their areas of interest. If you would like to be placed on a rulemaking interested persons list, please complete one of the forms and leave it on the table.

Notice of this hearing was contained in the Montana Administrative Register, Notice Number 17-402, published on December 21, 2018, in Issue No. 24, at pages 2430 through 2445. Under Model Rule of the Attorney General's Model Rules for the Montana Administrative Procedure Act, which have been adopted by the Department of Environmental Quality, I'm required to summarize the major provisions of the notice of public hearing.

Paragraph 1 of the notice gives notice of this hearing.

Paragraph 2 states the Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing and gives details and contact information for requesting an accommodation.

Paragraph 3 of the notice provides the text of the proposed amendment of Rule 17.8.744 and the reason given by the Department of Environmental Quality for the amendment.

Paragraph 4 of the notice provided the text of the proposed new rules and the reason given by the Department for the amendment.

Paragraph 5 outlines the procedure for concerned persons to submit their comments regarding the proposed rule.

Paragraph 6 of the notice states that I, Sarah Clerget, or another attorney for the Agency Legal Services Bureau have been designated to preside over this hearing.

Paragraph 7 gives notice that the Department maintains a rulemaking interested persons list and indicates how a person may have his or her name placed on the list to receive notification from the Department or from the Board of rulemaking matters.

Paragraph 8 states the requirements of Mont. Code Ann. § 2-4-302 regarding bill sponsor notification do not apply.

Paragraph 9 of the notice states that the requirements of Mont. Code Ann. ¶ 2-4-111 regarding significant impacts to small businesses has been applied and the Board has determined that the adoption of the above-referenced rule will not significantly and directly impact small businesses.

6. As stated in paragraph 5 of the Notice, written comments submitted after this hearing should be addressed to the Board and delivered to Sandy Scherer, Legal Secretary at the Metcalf Building, 1520 East Sixth Avenue, in Helena, Montana, or mailed to the Board at P.O. Box 200901, Helena, Montana 59620-0901, or faxed to (406) 444-4386, or emailed to [sscherer@mt.gov](mailto:sscherer@mt.gov). To guarantee consideration by the Board, comments must have been received in person or postmarked no later than 5 p.m. on January 25, 2019.

A complete copy of the notice of public hearing will be included in the official record of this hearing.

The authority of the Board of Environmental Review to undertake this rulemaking is contained in Montana Code Annotated Section 75-2-111, 75-2-204, 75-2-211, and 75-2-234.

A presiding officer may ask questions of persons making statements at a hearing and may allow others to ask questions upon request. Persons making statements do not have an automatic right to provide rebuttal or other additional information after they have completed their statements. However, a presiding officer may request further information and may allow further statements for good cause, if requested.

The order of presentation by persons making statements will be as follows:

First, the Department will have the opportunity to summarize or otherwise explain the proposed rulemaking and its reasons for proposing the rules, and to offer any supporting information;

Second, the statements of proponents—that is, persons in favor of the rulemaking.

Third, the statements of opponents—that is, persons opposed to the rulemaking.

Fourth, the statements of anyone else wishing to be heard.

I shall call on persons to come forward to make their statements based on the Notice to Presiding Officer forms that are on the table near the door and that have been filled out and provided to me. If anyone wishing to speak has not filled out a form, please do so at this time and bring it to me.

Because we are recording this hearing, all persons making statements will be asked to come forward to the microphone. Prior to making your statement, please identify yourself by name, address, and affiliation, and whether you are a proponent, opponent, or otherwise. If you intend to offer a document for consideration, please make sure that the document can be identified by reference to your name.

Given the time we have available, and based on the number of people who have filled out Testimony forms indicating that they wish to speak, I will allow each person \_\_\_ [ten] minutes to make oral statements. If you have more to say than your given time allows, you should submit written comments to the Board by the January 25<sup>th</sup> deadline.

## ORAL STATEMENTS

DEQ statement re: proposed rulemaking

Proponents

Opponents

Others

## CONCLUDE HEARING

Thank you for your attendance and statements. The public comment portion of this hearing is hereby concluded.

The Department and I will report to the Board of Environmental Review about this hearing and give the Board a summary of comments that are received within the time allowed. The Board will consider the matter at a public meeting. A schedule of Board meetings, agendas, and Board materials can be found on the Board's website at: [deq.mt.gov/DEQAdmin/ber](http://deq.mt.gov/DEQAdmin/ber). You should check the website to determine when this matter will be considered by the Board.

**TO:** Board of Environmental Review  
**FROM:** Norman J. Mullen, Department of Environmental Quality Staff Attorney   
**SUBJECT:** Stringency and Takings review of rulemaking concerning the amendment of ARM 17.8.744 and adoption of New Rules I through IX implementing a registration system for certain portable facilities; MAR Notice No. 17-402 (publ. 12/21/18)  
**DATE:** January 24, 2019

HB 521 STRINGENCY REVIEW  
(Comparing Stringency of State and Local Rules  
to Any Comparable Federal Regulations or Guidelines)

Sections 75-2-111 and 207, MCA, codify the air quality provisions of House Bill 521, from the 1995 legislative session, by requiring that the Board of Environmental Review (Board), prior to adopting a rule to implement the Clean Air Act of Montana that is more stringent than a comparable federal regulation or guideline that addresses the same circumstances, make certain written findings after a public hearing and receiving public comment.

In this proceeding, the Board is proposing to amend ARM 17.8.744 and adopt New Rules I through IX to create and implement a registration system for certain “portable” facilities, including gravel crushers, concrete batch plants, and asphalt plants, that currently require a Montana air quality permit.

Summary: None of the proposed amendments would make the state rules more stringent than comparable federal regulations or guidelines. Therefore, no further House Bill 521 analysis is required.

Analysis: In 2002, the Board replaced existing rules for permitting minor sources of air pollution with new rules. In that rulemaking, the Board adopted the memorandum of the Department’s attorney concerning stringency and takings. That memorandum concluded that the stringency provisions were intended to apply to air quality standards such as ambient standards and emission limits, and were not intended to apply to procedural rules. It found most of the proposed rule changes to be procedural, and thus not subject to a stringency analysis. It also found that the proposed changes were not more stringent than comparable federal regulations or guidelines because there were no comparable federal regulations. Federal air quality regulations do not address air pollution from minor sources. A regulation of the federal Environmental Protection Agency (EPA) at 40 CFR § 51.160(b) requires that states adopt implementation plans (SIPs) that include procedures to prevent construction that will result in a violation of a control strategy for a nonattainment area or that will interfere with attainment or maintenance of the national ambient air quality standards (NAAQS). Montana’s preconstruction permitting program

in ARM Title 17, chapter 8, subchapter 7, covers both major sources, which are covered by similar federal regulations, and minor sources, which are not covered by federal regulations. Because there was no comparable federal regulation or guideline, the Department's attorney stated that the new minor source permitting rules were not more stringent than a comparable federal regulation or guideline.

In 2006, the Board amended some rules and adopted new rules for an oil and gas registration program. In that rulemaking, the Board also adopted the memorandum of the Department's attorney concerning stringency and takings. In that memorandum, the Department's attorney discussed that there was no comparable federal regulation or guideline, because oil and gas facilities allowed to register under the new Board rules were minor sources, and there was no federal minor source program, and no federal minor source registration program. There are now federal EPA regulations, at 40 C.F.R. Part 49, for oil and gas well facility registration in Indian Country. Those federal regulations require compliance with new source performance standards (NSPSs) and other existing regulatory requirements. Montana's oil and gas rules require compliance with those same standards and regulatory requirements. However, the federal regulations are not comparable to the Montana oil and gas regulatory program, and do not address the same or similar circumstances. The federal regulations were adopted only in Indian Country and in response to problems with attaining and maintaining the NAAQS. Because there has been no determination that oil and gas well facility emissions are causing difficulties in attaining or maintaining the NAAQS in Montana, the EPA regulations are not comparable to, and do not address the same or similar circumstances as, Montana's oil and gas registration rules.

The logic of these memoranda applies to the current rulemaking. The proposed changes are largely procedural, in that they would substitute a streamlined registration process for the current individual permitting process. A source that does not meet the criteria for registration will still be able to obtain an individual permit. Therefore, the changes are not intended to be covered by the stringency requirement. In addition, there is no comparable federal regulation that addresses the same or similar circumstances for portable minor sources for states such as Montana. There are federal NSPSs for those sources at 40 C.F.R. Part 60, subpart OOO; those requirements are adopted in Montana rule at ARM 17.8.302(1)(a) and would not be altered by this rulemaking.

The federal EPA has adopted regulations, at 40 C.F.R. Part 49, that authorize the use of general permits for air pollution from portable sources in Indian Country. This was done as part of a federal implementation plan developed because EPA determined it was necessary to attain or maintain the NAAQS. However, these regulations are not comparable and do not address the same or similar circumstances as Montana's rules, because they establish a general permit program, not a registration program, and they were adopted because of nonattainment concerns about portable sources in Indian Country, and those concerns do not apply to Montana.

Stringency and Takings Memo for  
Air Quality Portable Source Registration Rulemaking  
MAR Notice No. 17-402 (publ. 12/21/18)  
January 24, 2019  
Page 3

Therefore, there is no comparable federal regulation or guideline addressing the same or similar circumstances as this proposed rulemaking, and the stringency requirements of § 75-2-207, MCA, do not apply.

HB 311 REVIEW  
(Assessing Impact on Private Property)

Sections 2-10-101 through 105, MCA, codify House Bill 311, the Private Property Assessment Act, from the 1995 legislative session, by requiring that, prior to taking an action that has taking or damaging implications for private real property, a state agency must prepare a taking or damaging impact assessment. Under Section 2-10-103(1), MCA, "action with taking or damaging implications" means:

a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications.

I reviewed the guidelines and researched whether the adoptions of the proposed amendment to ARM 17.8.744 and the adoption of New Rules I-IX would constitute a deprivation of real property in violation of the federal or state constitution. I determined that they would not, and have completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. No further House Bill 311 assessment is required.

**PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST**  
 (using form prepared by Montana Department of Justice, Jan. 2011)

In the matter of the amendment of  
 ARM 17.8.744 and adoption of New  
 Rules I through IX implementing a  
 registration system for certain facilities  
 that currently require a Montana air  
 quality permit; MAR Notice No. 17-402  
 (publ. 12/21/18)

**DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE  
 PROPERTY ASSESSMENT ACT?**

**YES      NO**

- |       |                                           |                                                                                                                                                                                                                             |
|-------|-------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| _____ | _____ <input checked="" type="checkbox"/> | 1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?                                                                                         |
| _____ | _____ <input checked="" type="checkbox"/> | 2. Does the action result in either a permanent or indefinite physical occupation of private property?                                                                                                                      |
| _____ | _____ <input checked="" type="checkbox"/> | 3. Does the action deprive the owner of all economically beneficial use of the property?                                                                                                                                    |
| _____ | _____ <input checked="" type="checkbox"/> | 4. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 4a and 4b and continue with question 5.]                                        |
| _____ | _____                                     | 4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?                                                                                                           |
| _____ | _____                                     | 4b. Is the government requirement roughly proportional to the impact of the proposed use of the property?                                                                                                                   |
| _____ | _____ <input checked="" type="checkbox"/> | 5. Does the action deny a fundamental attribute of ownership?                                                                                                                                                               |
| _____ | _____ <input checked="" type="checkbox"/> | 6. Does the action have a severe impact on the value of the property?                                                                                                                                                       |
| _____ | _____ <input checked="" type="checkbox"/> | 7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is <b>NO</b> , do not answer questions 7a-7c.] |
| _____ | _____                                     | 7a. Is the impact of government action direct, peculiar, and significant?                                                                                                                                                   |

\_\_\_\_\_ 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?

\_\_\_\_\_ 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implications exist if **YES** is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 5, 6, 7a, 7b, 7c; or if **NO** is checked in response to questions 4a or 4b.

If taking or damaging implications exist, the agency must comply with Mont. Code Ann. § 2-10-105, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

STATE OF MONTANA

BOARD OF ENVIRONMENTAL REVIEW

(1) I, Christine Deveny, Chairman of the Board of Environmental Review of the State of Montana, by virtue of and pursuant to the authority vested through 75-2-111, 75-2-112, 75-2-234, MCA, do promulgate and adopt the annexed rules to-wit:

- AMD: 17.8.744 Montana Air Quality
- NEW: I 17.8.1801 Definitions
- II 17.8.1802 Applicability
- III 17.8.1805 Registration Process and Information
- IV 17.8.1806 General Operating Requirements
- V 17.8.1807 Notice of Location
- VI 17.8.1810 Deregistration
- VII 17.8.1811 Recordkeeping and Reporting
- VIII 17.8.1812 Requirements for Concrete Batch Plants
- IX 17.8.1815 Requirements for Asphalt Plants

as permanent rules of this board.

(2) This order, after first being recorded in the order register of this board, shall be forwarded to the Secretary of State for filing.

APPROVED AND ADOPTED \_\_\_\_\_, 2019

CERTIFIED TO THE SECRETARY OF STATE \_\_\_\_\_, 2019

BOARD OF ENVIRONMENTAL REVIEW

BY: /s/ \_\_\_\_\_  
CHRISTINE DEVENY, CHAIRMAN

Victoria A. Marquis  
Holland & Hart LLP  
401 North 31st Street  
Suite 1500  
P.O. Box 639  
Billings, Montana 59103-0639  
Telephone: (406) 252-2166  
Fax: (406) 252-1669  
vamarquis@hollandhart.com

ATTORNEYS FOR SPRING CREEK COAL LLC

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

<b>IN THE MATTER OF:</b>  <b>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY SPRING CREEK COAL, LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0024619</b>	<b>CAUSE NO. BER 2019-_____-WQ  NOTICE OF APPEAL</b>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------

Pursuant to Mont. Code Ann. § 75-5-403(2) and Admin R. Mont. 17.30.1370(4), Spring Creek Coal LLC (“Spring Creek”), as the permit applicant, appeals the issuance of, and requests a hearing before the Board of Environmental Review (“Board”) on, the Montana Pollutant Discharge Elimination System (“MPDES”) Permit No. MT0024619 (“Permit”) issued to Spring Creek by the Montana Department of Environmental Quality (“DEQ”). The Board has authority to hear contested case appeals of DEQ’s MPDES permitting decisions and the Board may affirm, modify, or reverse a permitting action of DEQ. Spring Creek has raised issues regarding the Permit on multiple occasions with DEQ, submitted written comments to the draft Permit, met with DEQ and provided additional written explanation of its position, and at DEQ’s request, submitted supplemental, clarifying comments. Spring Creek now timely appeals the Permit, which was issued December 27, 2018 and received by Spring Creek on January 3, 2019.

## **I. Permit Provisions Appealed**

Spring Creek appeals the effluent limits for Electrical Conductivity (“EC”) and Sodium Adsorption Ratio (“SAR”) provided in Tables 2 and 3 of Section I.B. and referenced elsewhere in the Permit. Spring Creek also appeals the Compliance Schedule provided in Section I.C. and referenced elsewhere in the Permit.

## **II. Basis for Appeal**

Spring Creek appeals the Permit Provisions noted above on multiple grounds, including:

1. DEQ improperly applied water quality standards for EC and SAR that are more stringent than the natural conditions of the receiving stream, in violation of Mont. Code Ann. § 75-5-222(1).

2. DEQ improperly requires treatment of wastes for EC and SAR to a purer condition than the natural condition of the receiving stream, in violation of Mont. Code Ann. § 75-5-306(1).

3. DEQ improperly applied EC and SAR limits in violation of the Board’s interpretation of the EC and SAR water quality standards as expressed, and relied upon by the regulated public, during rulemaking. 8 Mont. Admin. Reg. 792 (April 24, 2003) (“when water quality standards are naturally exceeded, discharges which will not make the instream water quality worse are allowed.”).

4. DEQ relied upon the wrong EC and SAR water quality standard, in violation of Mont. Code Ann. § 75-5-222(1) (“[f]or the parameters for which the applicable standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition of the parameter in the water body.”)

5. DEQ included a compliance schedule that does not provide a “reasonable opportunity to attain compliance,” in violation of Admin. R. Mont. 17.30.1350(1)(b).

In response to one of Spring Creek’s comments on the EC and SAR limits and compliance schedule, the Department “acknowledges it can take many years to pursue a site-specific standard for receiving waters,” yet nothing in the Permit commits the Department to initiate a site-specific standard setting process. Similarly, there is no certainty that a site-specific standard setting process will be completed prior to the Permit’s mandatory compliance date of January 31, 2024. Finally, it is not clear how the Department would treat a permit modification application to extend the Permit’s required compliance date if necessary to allow the completion of the site-specific standard setting process.

Spring Creek may be amicable to resolution of these concerns through the addition of clarifying Permit language and the creation of a schedule for the site-specific standard and/or use change process as it pertains to the receiving waters affected by the EC and SAR limits in the Permit.

Spring Creek understands that the EC and SAR effluent limits and compliance plan will be stayed pending this appeal, but that those provisions are severable from the remaining Permit provisions, such that the remaining Permit provisions, as they apply to all outfalls listed in the Permit, may take effect. Admin. R. Mont. 17.30.1379.

DATED this 1st day of February, 2019.

*Victoria A. Marquis* for VAM

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

ATTORNEYS FOR SPRING CREEK COAL LLC

## CERTIFICATE OF MAILING

I hereby certify that on this 1st day of February, 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:

Lindsay Ford ( <b>original</b> ) Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov	<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
Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 KBowers@mt.gov	<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
Jon Kenning, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 jkenning@mt.gov	<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

  
\_\_\_\_\_

11990459\_2