

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, OCTOBER 9, 2020
9:00 am – 11:00 am
DEQ ZOOM CONFERENCE

NOTE: Board members, the Board attorney, and secretary will be participating telephonically. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for Board members is available on the Board's Website (<http://deq.mt.gov/DEQAdmin/ber/board>) or from the Board Interim Secretary, Deb Sutliff (dsutliff@mt.gov). The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by e-mail at dsutliff@mt.gov, no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. **The Board will vote on adopting the August 7, 2020, meeting minutes.**

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

- a. **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 April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC filed a Notice of Appeal and Request for hearing with the Board.

- i. **Contested Case:** On April 9, 2020 CR/REF filed a Motion *in Limine* and a Motion for Summary Judgment on May 22, 2020. On June 9, 2020, Ms. Clerget issued an Order denying CR/REF's Motion in Limine. On July 9, 2020, Ms. Clerget held oral argument on CR/REFs Motion for Summary Judgement. That motion is fully briefed and awaiting decision. As of September 15, the parties have also fully briefed CR/REF's "Motion to Take Judicial Notice of Fact" and CR has also filed a "Motion to Strike" that is not yet fully briefed.
- ii. **District Court case:** [see Memo from Amy Christensen]

- b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** On July 22, 2020 Duane Murray filed a request for hearing with the Board. At its August 2020 meeting the Board appointed Sarah Clerget to preside over this contested case. On September 9, 2020 Ms. Clerget issued a Prescheduling Order. The parties have entered Notices of Appearance and their initial proposed scheduling orders are due to Ms. Clerget by October 2, 2020.

2. **Non-enforcement cases assigned to the Hearings Examiner**

- a. **In the matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920.** Ms. Clerget issued an Amended Scheduling Order on March 20, 2020, based on a Motion from the parties. Calumet Montana Refining, LLC has filed a motion to file brief as amicus curiae, Ms. Clerget issued an Order partially granting Calumet's request on May 18, 2020. The parties filed a motion for extension on August 4, 2020 requesting extension of the discovery and dispositive motions deadlines. Ms. Clerget issued an Order on August 6, 2020 extending those deadlines. On September 14, 2020 the parties filed a "Joint Notice of Pending Settlement." Ms. Clerget issued an Order vacating the remaining deadlines and directing the parties to file either a motion for dismissal or a joint status report by October 2, 2020.
- b. **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 was held on December 3-4, 2018. An oral argument on the parties' proposed FOFCOLs was held on May 7, 2019, making it ripe for decision from the hearing examiner. On July 24, 2019, the First Judicial District Court had issued its Order on cross motions for summary judgment in Cause No. CDV 2017-641, a declaratory relief action brought in District Court challenging DEQ's issuance of MPDES Permit No. MT0030279. While the District Court action was limited to conditions of the MPDES Permit that were not at issue before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this case. On September 13, 2019, DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order, which was granted on September 17, 2019. The parties have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The matter is fully briefed at the Supreme Court and awaiting decision. The parties will have 30 days in which to file a status report with Ms. Clerget once the Supreme Court issues a decision.
- c. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.** On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020 and an Amended Scheduling Order was issued on May 12, 2020. The parties are proceeding according to that order, with discovery closing in January 2021.

- d. **In the matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. On December 13, 2019, the Board issued an Order for Final Agency Decision adopting the Stipulation of Appeal Issues Nos. 3, 4, 6, 7, and partially No. 5. Ms. Clerget conducted scheduling conferences in January, March, and September and subsequently issued Orders continuing a stay in this case due to rulemaking regarding arsenic that has the potential to affect the remaining issues in the case. The parties have a status conference schedule for October 6, 2020 where they will update Ms. Clerget as to the potential settlement of this case.
- e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2019-01 WQ (CHS) for scheduling purposes, and therefore update on this case is the same as above.
- f. **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.**
 - i. **District Court Case:** [see Memo from Amy Christensen]
 - ii. **Contested Case:** August 18th-21st the parties participated in the contested case hearing. Proposed findings of fact and conclusions of law are due from the parties on November 9, 2020.
- g. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.** Between November 8, 2019 and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. On May 26, 2020, DEQ filed a Motion to Dismiss, which was fully briefed on June 9, 2020. On June 10, Petitioners filed a Notice that they were seeking a Declaratory Ruling from DNRC. On June 10th, Ms. Clerget ordered the parties to indicate whether they wanted a stay pending DNRC's ruling. The parties disagreed about whether a stay was necessary and on June 26, 2020, Ms. Clerget issued an order that the matter would proceed as scheduled through the dispositive motions deadline. On July 20, 2020, Ms. Clerget issued an Order denying DEQ's Motion to Dismiss. The same day, DEQ filed a Motion for Clarification, and Ms. Clerget issued an Order of Clarification. DEQ filed a partial motion for summary judgment on September 29, 2020. The parties should have the motion fully briefed by November 2020.
- h. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-03 OC and BER 2019-05 OC.** On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case for procedural

purposes only. At the Board's last meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties have cross moved for partial summary judgment, and the Motions are fully briefed and pending a decision from the hearing examiner.

- i. Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court). On June 6, 2019, the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). [See Memo from Amy Christensen]
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.** The permit appeal is stayed pending judicial review. On September 10, 2019, the Montana Supreme Court issued its opinion reversing the First Judicial District Court in Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company. The Montana Supreme Court reversed the District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). In so doing, the Court recognized that DEQ has the flexibility to exempt ephemeral waters from the water quality standards applicable to Class C-3 waters without the Board of Environmental Review reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly in regard to a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. The parties are proceeding in accordance with the scheduling order entered by the First Judicial District Court on remand.
 - b. **New Contested Cases**
 1. **In the matter of notice and appeal by Woodrock, Inc., regarding permit suspension order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT BER 2020-02 OC.** On August 19, 2020, the Board received a request for hearing from Woodrock, Inc. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.
 - c. **Action on Contested Cases**
 1. **In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.** This matter was stayed on February 10, 2020. As ordered, the parties filed a joint status report and proposed scheduling order on April 13, 2020. On April 20, 2020, Ms. Clerget issued an Amended Scheduling

Order and discovery closed in August. On September 14, 2020, the parties filed a “Stipulation and Request for Retention of Board Jurisdiction.” The Board needs to determine whether it will retain jurisdiction and issue the proposed order from the parties.

2. **In the matter of Westmoreland Resources, Inc.’s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing and Ms. Clerget assumed jurisdiction on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020 and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020 and September 9, 2020, which was granted on July 29, 2020 and September 9, 2020. On September 30, 2020 the parties filed a “Joint Motion to Remand and Suspension of Proceedings.” The Board needs to determine whether it will remand the case to DEQ pursuant to the settlement agreement and suspend proceedings.

III. ACTION ITEMS

A. RULE ADOPTION

1. **The Department will propose that the Board adopt proposed amendments to ARM:** 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, 17.30.1361, and 17.30.1372 to:
 - i. maintain consistency with the federal program,
 - ii. adopt the updated federal individual permit application forms, and
 - iii. provide clarity and reduce redundancy through editorial corrections.

B. CONTESTED CASES

1. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On May 17, 2019, Westmoreland Mining LLC and Westmoreland Rosebud Mining LLC filed a Notice of Contest with the Board. Sarah Clerget was appointed hearing examiner on May 22, 2019. On July 1, Talen gave notice “that the parties have not reached a settlement resolving this contested case hearing and that Talen will relinquish the MFSA certificate amendments challenged in this proceeding...” The parties filed a Joint Stipulation of Dismissal on September 29, 2020. The matter is therefore dismissed and closed.
2. **In the Matter of the Notice of Appeal By Nicholas and Janet Savko, Regarding Floodplains Setbacks, Gallatin County, MT, BER 2020-03 SUB.** On September 28, 2020 the Board of Environmental Review received a request for hearing.

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**

August 7, 2020

Call to Order

Chairperson Deveny called the meeting to order at 9:00 a.m.

Attendance

Board members present

By ZOOM: Chairperson Chris Deveny, David Lehnherr, Dexter Busby, John DeArment, Chris Tweeten, Jerry Lynch, Hillary Hanson

Board attorney present

Sarah Clerget, Attorney General's Office (AGO)

Department personnel present

Board liaison George Mathieus

Interim Board Secretary Deb Sutliff

Legal: Ed Hayes, Sandy Moisey-Scherer, Kirsten Bowers, Kurt Moser, Angie Colamaria, Sarah Christofferson, Norm Mullen

Enforcement: Chad Anderson

Air Quality: Dave Klemp, Troy Burrows, Shawn Juers, Liz Ulrich, Katie Alexander, Katy Callon, Julie Merkel

Water Quality: Tim Davis, Myla Kelly, Mike Suplee, Lauren Sullivan, Galen Steffens

Water Protection: Jon Kenning, Kristy Fortman, Rainey DeVaney, Christine Weaver

Waste Management & Remediation, Federal Superfund and Construction Bureau: Keith Large

IEMB: Jon Staldine, Ed Coleman,

Interested and other parties present

Laurie Crutcher, Laurie Crutcher Court Reporting; Amy Christensen, Attorney with Christensen and Prezeau

I.A. Administrative Items – Review and Approve Minutes

I.A.1. June 12, 2020, Meeting Minutes

Chairperson Deveny moved to approve the minutes. Mr. Lynch 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 violations of the Water Quality Act by reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the Matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.

Ms. Clerget stated she was continuing with the contested case while it's also going in district court. Ms. Clerget had a motion in limine that she ruled on denying the Copper Ridge and Reflections motion in limine briefed and pending in front of her that's waiting for a Decision.

Ms. Christensen added that the petition for judicial review in district court is really still in its infancy. DEQ has answered that. There was a little bit more time to file an amended brief while waiting to see what the Supreme Court was going to do in a separate case. Ms. Christensen stated that they are filing their motion to dismiss in this case last week on the same grounds as they filed in the Rosebud Mine case, which is they don't feel like the board should be a part of it when we're dealing with judicial review of one of the board's decisions. The answer brief to that will be due in another week and then it will be fully briefed and then wait for a decision from Judge Harada on that.

II.B. 1. In the Matter of the Notice of Appeal and Request for Hearing by Signal Peak Energy, LLC Regarding November 13, 2019 Notice of Violation and Administrative Compliance and Penalty Order, BER 2019-22 SM.

Ms. Clerget injected that this item has been dismissed and therefor inadvertently omitted from the agenda. The parties have settled.

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

II.A.2.a. In the Matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.

Ms. Clerget stated that on April 20th she issued an amended scheduling order and discovery is closing the end of August, so they're proceeding with that one.

II.A.2.b. In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920.

Ms. Clerget stated that she issued an order partially granting Calumet's request to file an amicus brief. That was on May 18th. Discovery is closing the beginning of August. She had just received a motion for extension on that, so that date will move but not by much, possibly in September.

II.A.2.c. **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 that Westmoreland Resources is working towards a settlement. They asked for a continued stay, which she granted on July 29th. They have until September 9th at which they're either going to be dismissed because they've stayed or they're going to ask for a schedule order.

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, BER2017-03 WQ.**

Mr. Clerget informed members that this is the one that's up in front of the Supreme Court on a parallel district court action that wasn't supposed to have anything to do with us but the decision in district court affected us. It's fully briefed in front of the Supreme Court right now and awaiting decision. They're going to file a status with her within 30 days of the decision so that's stayed until we get that decision from the Supreme Court.

II.A.2.e. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.**

Ms. Clerget stated that on July 1st Talen gave a notice; reading, "That the parties have not reached a settlement resolving this contested case hearing and that Talen will relinquish the certificate amendments challenged in this proceeding." They've agreed that they're going to Essentially the certificate. They're going to complete that relinquishment by August 31st and then move to dismiss by September 30th.

II.A.2.f. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.**

Ms. Clerget stated that this item has been actually renamed Navajo Transitional Energy Company after a transition of the certificate. She gave them an amended scheduling order on May12th. Discovery closes January 2021. They're proceeding per the schedule.

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

Ms. Clerget informed members This one is stayed pending actually the rulemaking that's in front of you today on the arsenic. Ms. Clerget has had a couple of scheduling conferences and continuing the stay until a conference on September 4th based on what happens today.

II.A.2.h. **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 informed members that CHS is Laurel Refinery and the same update as referenced above.

II.A.2.i. **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 informed members that this one Ms. Christensen is going to give the district court update. Ms. Clerget added, the contested case proceeds in front of her. They've done all of their prehearing briefing. There was a motion in limine that she issued, an order on on July 29. There is a prehearing conference set for August 11, and the hearing in this matter will go August 18th. She had just talked to the parties the day before yesterday and everybody has agreed that the hearing will done remotely and will probably take two to three days as it is new territory for all parties to do the trial remotely.

II.A.2.j. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.**

Ms. Clerget stated that this update and had said that there were no dispositive motions filed by the deadline and that she would schedule a conference. She was looking at a previous scheduling order so, in fact, the Association has another month to file dispositive motions. Discovery closes on August 5th and then we may or may not get dispositive motions on that case.

Ms. Christensen added that she did get the ruling from the Montana Supreme Court. The parties had taken a decision from the district court on some subpoena dispute up to the Montana Supreme Court. The Montana Supreme Court issued a ruling June 23rd. They felt that we did not have enough rulings from the board in order for the upper courts to make a decision on that they have remanded the matter back to the board to address some discovery issues and make some rulings before they can address the constitutional issues. This one is coming back and there will be some additional rulings required before it any further.

II.A.2.k. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-03 OC and BER 2019-05 OC.**

Ms. Clerget stated that the parties have cross-moved for partial summary judgment and the motions are fully pending in front of me. So that one is waiting for a decision by Ms. Clerget, but it's a big one so it takes some time.

II.A.2.L. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).**

Ms. Christensen informed members that this is one that was discussed the last meeting or two because the issue in that case is whether or not the board should be made a party on judicial review of one of its own decisions and because that issue was resurfacing in many cases, it

was decided to file a motion to dismiss before the district court to see if we could get the board out of the case. That motion to dismiss was denied. We filed a petition for writ of supervisory control with the Supreme Court, which is a kind of immediate appeal to see if the Court would jump in and make a decision before the district court action was complete. It's an extraordinary remedy and, unfortunately, the Supreme Court decided that we had not established sufficient urgency and need for that type of extraordinary remedy, that immediate appeal, and so they denied the writ, which means the district court judicial review had been stayed while the Supreme Court was considering the petition. The District Court is back on track now. We're filing an answer brief in that case today, which will be a very simple sort of statement that we believe that it's more appropriate for the parties to the case to present their positions rather than for the board to advocate in defense of its own decision. So essentially at some point we'll get a decision on the merits of the petition for judicial review from the district court and at that point we'll be in a position to appeal the issue of whether the board should be a party to the Supreme Court and at that point we could present the issue on its merits and the Court could consider it. They essentially denied our petition for a writ of supervisory control more on a technical issue, not on the merits of the argument that we were making, unfortunately, we're back in district court. We're going to have to ride this one out. There is probably going to be oral argument scheduled at some point. There is a little bit more briefing to do, but that case is kind of rolling along at this point.

II.A.3. Contested Cases not assigned to a Hearing Examiner

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

Ms. Bowers informed members that the next case is the Western Energy permit appeal that has been stayed on your agenda pending judicial review and that's associated with a case, MEIC and Sierra Club versus DEQ and Western Energy Company, that went to the Supreme Court. The Supreme Court, the Montana Supreme Court issued its opinion back in September of 2019 and remanded the case back to district court on certain questions of fact. We're still proceeding on remand before the district court in accordance with the district court scheduling order. The parties are conducting discovery.

III. A. Action Items – Adoption Final Rules

III.A.1. The Department requests the board adopt NEW RULE I

Mr. Mathieus informed members that back in April the Department of Environmental Quality (Department) requested initiation of rulemaking for arsenic standards. Mr. Mathieus introduced Myla Kelly, DEQ Water Quality Standards and Modeling Manager to make a presentation. Mr. Davis redirected the presentation to Michael Suplee, DEQ Water Quality Science Specialist with Standards and Modeling.

Mr. Suplee addressed the Board adding the request that the board adopt New Rule I as it was proposed. New Rule I pertains to natural and nonanthropogenic standards, including nonanthropogenic arsenic standards for four segments of the upper and middle Yellowstone River. Since rulemaking was initiated by this body in April, there has been the requisite public comment period in a hearing. A number of comments were received. All were addressed and

there were two major themes prevailing those comments. First, there was generally broad but not universal support for natural and nonanthropogenic standards and in particular the Yellowstone's nonanthropogenic arsenic standards. Further, there was phrase for the technical work the Department carried out to identify the Yellowstone's arsenic standards.

There were requests for alterations to the rule to allow for certain permitting flexibilities be made available, specifically intake credits and mixing zones. Careful consideration was given to the permitting flexibilities that were requested. In the end, however, it was concluded that the rule should be adopted as proposed without allowance for intake credits or mixing zones. Regarding intake credits, Mr. Suplee wanted to emphasize that when nonanthropogenic standards are developed in the way they were for arsenic on the Yellowstone River, the new standards already give dischargers credit for the naturally occurring concentrations above the current standard. As a result, any need for a water quality standard based intake credit is precluded by the nonanthropogenic standards themselves. Mixing zones, which was the other major permitting flexibility that was requested. The Department also recommends that they're only appropriate when the background condition of the receding water is below the applicable water quality standard. Since nonanthropogenic standards, like the Yellowstone River's arsenic standards are established right at the central tendency of the water body's nonanthropogenic concentration, the human-caused increase in the concentration will move the concentration away from its central tendency and away from the nonanthropogenic condition. Stated another way, mixing zones are not appropriate for nonanthropogenic standards because the water body has no submittal capacity above the nonanthropogenic standard.

Chair Deveny requested comments from the public.

Ms. Marquis introduced herself as a represent the CHS Laurel Refinery and added that CHS has previously submitted public comments both orally and at the last board meeting, at the public hearing, and in writing and beyond those comments, we just stand behind those comments and would reiterate those.

Chair Deveny requested comments regarding Proposed Rule I.

Mr. Schmidt introduced himself; as a Billings resident and serves as the Chair of the Yellowstone Valley Citizens Council, which is an affiliate of the Northern Plains Resource Council and speaking on behalf of the Yellowstone Valley Citizens Council. Given this information and our interest in protecting the water body for our county's residents and water users, we are supportive of the nonanthropogenic standard that is the most protective for human health and the environment. Additionally, we support DEQ's New Rule I as proposed specifically in not allowing mixing zones. They would also request the same explicative and prohibitive language on intake credits. By nature of a nonanthropogenic standard, there is no assimilative capacity rendering mixing zones and intake credits not applicable. They believe that such provisions are meant to circumvent environmental protections put in place through rulemaking. They thanked the Board for the opportunity to comment in favor of the adoption of New Rule I, as proposed.

Mr. Lehnerr directed questions to Dr. Suplee to further understand the concept of intake credits and mixing zones.

Mr. Suplee provided summary; the idea behind intake credits and mixing zones.

Mr. Lynch requested clarification in the credits and how that works.

Dr. Suplee offered a basic understanding on how it works on a concentration of a standard. Mr. Busby directed his question to the Department Lawyers; Since this is supposed to be implementing 75-5-222, if you look at the very first line of 75-5-222 it says, "The Department may not apply a standard to a water body for water quality that is more stringent than the nonanthropogenic condition of the water body." If you set a standard at 28 and a water body goes to whatever you model was about 60 at a maximum, how do you say this is not in conflict with the statute?

Mr. Moser addressed the question, explaining nonanthropogenic condition and suggesting Dr. Suplee might have more details.

Dr. Suplee added that when you look at a concentration in a water body like the Yellowstone or in most cases, it's not a single number all the time, obviously. It changes. It changes with season, weather, snow melt, et cetera. So, you have a range of numbers and what you went up with is -- and especially in the case of the Yellowstone River, I'm sure you've heard of the classic bell-shaped curve of a population of data and right in the middle of that bell curve is what we have concluded is basically the best description of the nonanthropogenic condition, its central tendency. It's where most of the data, most of the concentrations are most of the time in the river.

Mr. Tweeten voiced his concerns on technical questions on the Department's interpretation of the statute and the application of the data.

Mr. Davis spent some time breaking down the questions and continued explaining that the Department looked at several years of data that showed both the high and the lows that you see of arsenic in the river. That takes into account the periods when arsenic is above the proposed standard and below the proposed standard. The Department also looked at potentially a seasonal standard that would have had different numbers based on the season. After working with stakeholders, it was agreed that having a single annual average would both be protective and that average, that standard, is within that average fluctuation between the high and the low. It takes into account the protective and in the end, it does address the economics of treating down lower than the seasonal standard would have proposed. So, it takes into account that natural variation and that's why the Department proposed a standard and worked with the stakeholders to do so.

Ms. Clerget followed up with clarification adding the second sentence of statute says "for the parameter 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. The Department shall implement the standard in a manner that provides for the water quality standards for downstream waters to be attained and maintained."

Further explanation and breakdown for clarification went on between Mr. Moser, Mr. Davis.

Chair Deveny read the motion to adopt New Rule I as set forth in the notice of adoption and the House Bill 521 and 311 analyses, and this is pertaining to the natural and nonanthropogenic water quality standards.

Mr. Tweeten seconded the motion.

Chair Deveny asked for further discussion on the motion.

Mr. Busby opposed the motion, offering that the rule adoption has potential conflict with the statute it's trying to implement.

Chair Deveny asked for additional comments or discussion from board members prior to voting and commended the Department on their outreach to Stakeholders on this particular issue and for really delving into the science and basing their work on the science and offered her support of this rule. Hearing no further comments; all in favor with one opposing. The motion carried. Rule I had passed.

III.A.2. **The Department requests that the Board initiate rulemaking**

Ms. Ulrich addressed the Board, asking to initiate rulemaking to Amend ARM 17-8-501, 504, 505, and 510 pertaining to air quality operating fees for registered sand and gravel, asphalt, and concrete facilities.

Chair Deveny asked if there were any questions or comments about the proposal to initiate rulemaking or whether or not the Department should initiate rulemaking on this issue. Hearing none.

Mr. Busby moved for a motion to initiate rulemaking and assigning the case to, the rule for the hearing to Sarah Clerget.

Mr. Tweeten seconded the motion.

Members voted on the motion the initiate rulemaking and assigning the case to, the rule for the hearing to Sarah Clerget. The motion carries with no opposition.

Initiation of Rule Making

III.A.3.

Mr. Davis addressed the Board requesting the Board hold a special session on or near September 24th to initiate rulemaking on the Lake Kookanusa site-specific selenium standard.

Mr. Tweeten moved committing to having the special meeting on a date to be determined at the convenience of all the parties of the Department and the board members.

Mr. Lynch seconded the motion.

Chair Deveny asked for comments or questions. Hearing none.

Members voted to hold a meeting to consider the adoption, to consider the initiation of rulemaking for the Lake Kookanusa and Kootenai River. The motion carries.

III.B. New Contested Cases

III.B.1. **In the Matter of the Notice of Appeal by the Mr. Duane Murray, BER 2020-01, SUB-18-01.**

Ms. Clerget introduced the Notice of Appeal by Mr. Duane Murry. Mr. Clerget informed members of their options to make a decision and keep the case and act on all procedural and substantive matters or assign it to a hearing examiner keep it for substantive purposes and assign it for procedural purposes.

Mr. Lynch made the motion to assign the case to Agency Legal Services Bureau (ALSB) for all procedural and for all matters.

Mr. Tweeten seconded the motion.

Chair Deveny asked for comments or discussion. Hearing none. The motion carries unopposed.

IV. Board Counsel Update

The Board will discuss the cost of outside counsel, and decide how to proceed utilizing outside counsel in the future on current District and Supreme Court actions.

V. Public Comment

None were offered.

VI. Adjournment

Chairperson Deveny motioned to adjourn at 10:40, Mr. Tweeten seconded, motion was carried unopposed.

Board of Environmental Review August 7, 2020 minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE

MEMORANDUM

TO: Christine Deveny
Chair, Board of Environmental Review

FROM: Amy D. Christensen

RE: Pending litigation updates

DATE: October 1, 2020

For purposes of the Board of Environmental Review meeting on October 9, 2020, please find below a brief summary of the status of the cases our firm is currently handling:

1. *MEIC and Sierra Club v. DEQ, BER, Western Energy* (Montana Sixteenth Judicial District, Rosebud County)

In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit for the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegary denied the motion on March 12, 2020. BER filed a Petition for Writ of Supervisory Control with the Montana Supreme Court in May 2020, which stayed the proceedings in District Court. The Montana Supreme Court denied the Petition on July 14, 2020, and the parties proceeded with briefing their arguments regarding the petition for judicial review in District Court. The petition has been fully briefed, and the parties are in the process of scheduling oral argument for November or December 2020, before Judge Bidegary.

2. *Signal Peak Energy v. MEIC, BER, Pfister, and Charter*

Signal Peak Energy appealed a District Court Order denying its request to obtain discovery from two landowners, who are also members of MEIC. In the District Court matter, BER filed a Notice of Non-Participation, and we filed a similar Notice when the case was the appealed to the Montana Supreme Court. The Court dismissed the appeal and remanded to the BER for additional rulings on certain issues that were pertinent to the constitutional issues being raised on appeal.

3. *Copper Ridge Development v. BER and DEQ* (Montana Thirteenth Judicial District Court, Yellowstone County)

In March 2020, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC, filed a petition for immediate judicial review of BER's decision that denied a motion to separate the cases. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case hearing. The motion has been fully briefed, and oral argument is scheduled in Billings on October 7, 2020.



TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Deb Sutliff, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: August 20, 2020

SUBJECT: Appeal of an Order Suspending an Operating Permit under Section 82-4-442(1)(a), MCA, of the Opencut Mining Act.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW	
OF THE STATE OF MONTANA	
IN THE MATTER OF: NOTICE OF APPEAL BY WOOROCK, INC., REGARDING PERMIT SUSPENSION ORDER OF OPENCUT MINING PERMIT NO. 2677, STIPEK SITE, DAWSON COUNTY, MT	Case No. _____

On November 19, 2020 the BER has received the attached request for hearing.

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

Angela Colamaria
 Chief Legal Counsel
 Department of Environmental Quality
 P.O. Box 200901
 Helena, MT 59620-0901

Ed Coleman, Bureau Chief
 Opencut Mining Bureau
 Department of Environmental Quality
 P.O. Box 200901
 Helena, MT 59620-090

Ed Hayes
 Deputy Chief Legal Counsel
 Department of Environmental Quality
 P.O. Box 200901
 Helena, MT 59620-0901

Attachment

WOODROCK

1515 Dock Street, Suite 1, Tacoma, WA 98402
Phone 253-565-6090 Fax 253-507-8560

**Electronically Filed with the
Montana Board of
Environmental Review**

Leea Anderson
Environmental Enforcement Specialist
Phone: (406) 444-2711
Email: leea.anderson@mt.gov

**This 19th. day of August,
at 3:24 pm o'clock
By: Deb Sutliff**

RE: Permit Suspension Order due to Violations of Administrative Order on Consent, Docket No. OC-18-06
(Permit #2677; FID 2563)

Dear Ms. Anderson:

This letter is an appeal to Montana Department of Environmental Quality's (DEQ's) decision to suspend the Woodrock, Inc. Stipek Site Opencut Permit #2677. Woodrock has actively pursued compliance with DEQ's orders. However, circumstances beyond Woodrock's control resulted in missed deadlines of the consent order.

Due to illness, Woodrock was unable to respond to the letter dated January 15, 2020 from DEQ requesting an informal conference. Allied Engineering had previously requested to be copied on all related correspondence to help ensure compliance of the consent order. This request was not fulfilled as Allied Engineering did not receive a copy of the January 15, 2020 letter from DEQ. Woodrock understands that notification to a third party is not required by law as stated by DEQ. However, had DEQ honored the request, the permit suspension could have been avoided. Unfortunately, and due to the ongoing pandemic, Woodrock was not able to meet the 30-day reply to the March 30, 2020 suspension letter either.

Prior to and following the violation notification, Woodrock, Inc. has actively pursued an amendment to the permit. Woodrock was unable to comply with the violation provision of an approved amendment application due to the required written authorization from easement holders that was previously not required. Woodrock received verbal authorization from CHS Pipeline during a site meeting at the Stipek Site. Woodrock was following setback requirements communicated to them from the Western Power Administration. CHS Pipeline, Western Power Administration and the Dawson County Weed District were generally unresponsive to requests for written authorizations. They provided replies stating that they would address those requests and were willing to work with Woodrock, but it took two years to obtain written authorizations. This slow response resulted in the failure to meet deadlines of the Consent Order. These issues were addressed in deficiency replies submitted to DEQ. However, there was no response from DEQ addressing these Consent Order compliance issues. Therefore, Woodrock decided to reclaim the pit in hopes that this would help rectify the situation.

Woodrock proceeded to pursue the reclamation-only amendment in good faith. This approach required more time and resources to comply with DEQ reclamation-only requirements.

During conversations with Woodrock, DEQ stated that they understood that Woodrock inherited permit challenges following the assignment, and that they would work with Woodrock to address these issues. These statements were disingenuous and DEQ pursued enforcement while Woodrock spent considerable resources to comply with DEQ's consent order.

Woodrock has also paid \$10,000 in fines to DEQ so far. Based on how this process has unfolded, Woodrock views the additional fines as inappropriate and feels that DEQ has placed an unfair burden on Woodrock.

Therefore, Woodrock requests that DEQ approve the amendment application, allow Woodrock the opportunity to reclaim the site, and rescind the suspension order and the re-imposed \$13,557 portion of the settlement penalty.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doug Argo".

Doug Argo
Co-Owner
Woodrock Inc

Victoria A. Marquis
Matthew H. Dolphay
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
mhdolphay@hollandhart.com

Kirsten H. Bowers
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, Montana 59620-0901
Telephone: (406) 444-4222
kbowers@mt.gov

ATTORNEY FOR THE
DEPARTMENT OF
ENVIRONMENTAL QUALITY

ATTORNEYS FOR ALPINE PACIFIC
UTILITIES

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164</p>	<p>CAUSE NO. 2019-06 WQ</p> <p>STIPULATION AND REQUEST FOR RETENTION OF BOARD JURISDICTION</p>
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COME NOW Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), and hereby stipulate and agree as follows:

I. JURISDICTION AND PARTIES

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana

Ground Water Pollution Control System (“MGWPCS”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann.§ 2-15-3501. DEQ has statutory authority to administer Montana’s water quality statutes and rules, including the review and issuance of MGWPCS Permits under Mont. Code Ann.§ 75-5-402 and ARM 17.30.1024.

3. Alpine is a limited liability company registered to do business in Montana, located in Flathead County, Montana, and is the owner and operator of the MGWPCS-permitted public wastewater facility serving the Glacier Ranch Subdivision (the “Facility”).

4. The Glacier Ranch Subdivision consists of five phases. The current Certificate of Subdivision Plat Approval approves a wastewater flow of 52,000 gpd, but the expected actual sewer usage rate is 47,196 gpd.

II. BACKGROUND

5. The Facility has been issued MGWPCS Permit No. MTX000164.

6. MGWPCS Permit No. MTX000164 was modified on January 17, 2017 (the “2017 Permit”) to transfer the permit to the current owner/operator, Alpine Pacific Utilities. The 2017 Permit permitted a discharge of 52,000 gpd,

included a source specific groundwater mixing zone, and provided Numeric Effluent Limits (“2017 Permit Effluent Limits”) for Outfall 001 as follows:

Table 1. Numeric Effluent Limits for Outfall 001 (at the dose tank, prior to discharge to the drainfield)

Parameter	Daily Maximum Concentration (mg/L) ⁽¹⁾	90-Day Average Load ⁽¹⁾ (pounds per day)
Total Nitrogen, as N (TN) ⁽²⁾	26	6.51
Total Phosphorus, as P (TP)	2.5	1.08

(1) See definitions in Part V of this permit.

(2) Total Nitrogen (TN) is the sum of nitrate, nitrite (as N) and total Kjeldahl nitrogen (TKN).

7. On June 4, 2019, DEQ issued a renewal of MGWPCS Permit No. MTX000164 for the Glacier Ranch Subdivision with an effective date of August 1, 2019 (the “2019 Permit”). As issued, the 2019 Permit permitted a discharge of 100,000 gpd, did not provide a mixing zone, and included Effluent Limits for Outfall 001, based on Montana’s then-applicable numeric nutrient criteria for surface water as follows:

Parameter	Units	Daily Maximum
Nitrogen, Total (as N)	mg/L	0.28
Phosphorus, Total (as P)	mg/L	0.025

8. On July 3, 2019, Alpine timely appealed certain provisions of the 2019 Permit before the Board. *See* Notice of Appeal (filed July 3, 2019) (“Appeal”).

9. Pursuant to Admin. R. Mont. 17.30.1379, the effluent limits of the 2019 Permit were stayed and the effluent limits, monitoring requirements, conditions and other requirements, including the 52,000 gpd flow set forth in the April 4, 2007 MGWPCS (as modified in 2009 and 2017) remain effective and enforceable throughout this Appeal.

10. A Prehearing Order was issued in August 13, 2019, followed by a Scheduling Order on September 9, 2019.

11. On February 10, 2020, following a Joint Motion filed by the Parties, an Order Granting Motion to Stay was issued, directing the Parties “to file a joint status report within 30 days of this order, which must include a proposed amended scheduling order.”

12. On March 11, 2020, following a Joint Status Report and Motion for 30-Day Extension, an Order Granting Motion to Stay was issued, directing the parties to file either a proposed settlement or a proposed amended scheduling order within 30 days.

13. On April 13, 2020, the Parties filed a Joint Status Report and Proposed Amended Scheduling Order, noting that their good faith settlement efforts continued.

14. On April 20, 2020, an Amended Scheduling Order was issued, providing deadlines leading to a contested case hearing in early 2021.

15. On May 1, 2020 in an email to the Nutrient Work Group, DEQ announced that “EPA’s 2020 disapproval of Montana’s nutrient variance 12B, which followed litigation challenging those variances, triggers the removal of 12A [the numeric nutrient criteria].” The 2019 Permit included effluent limitations that were based on the numeric nutrient criteria in 12A.

16. Without numeric nutrient criteria, nutrients in surface water are once again governed by a narrative water quality standard, requiring surface waters to be “free from substances attributable to municipal, industrial, agricultural practices or other discharges that will ... create conditions which produce undesirable aquatic life.” Admin. R. Mont. 17.30.637(1)(e).

17. Alpine may propose increasing the maximum permitted discharge, which would make the facility a new or increased source that is subject to nondegradation evaluation. DEQ implements the state nondegradation policy in 75-3-303, MCA. If, in accordance with paragraph 20 of Section III below, Alpine proposes a modification application that increases the maximum permitted

discharge, the criteria in Admin. R. Mont. 17.30.715 will govern nondegradation review to determine whether the proposed activities will result in nonsignificant changes to water quality as follows:

a. Because nutrient water quality standards are currently narrative, changes in water quality for nutrients are “nonsignificant” if those changes “will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.” Admin. R. Mont. 17.30.715(1)(h).

b. For potential impacts to surface water, Admin. R. Mont. 17.30.715(1)(c) provides criteria for determining when discharges causing changes in nitrate are “nonsignificant” and not required to undergo further nondegradation review.

c. For potential impacts to ground water, Admin. R. Mont. 17.30.715(1)(d) provides that discharges causing the sum of the “predicted concentrations of nitrate at the boundary of any applicable mixing zone” that do not exceed 7.5 mg/L and do not cause degradation of surface water are “nonsignificant” and not required to undergo further nondegradation review. Additionally, for ground water, Admin. R. Mont. 17.30.715(1)(e) provides criteria for determining changes in total inorganic phosphorus in ground

water that are “nonsignificant” and not required to undergo further nondegradation review.

d. DEQ may consider the criteria in Admin. R. Mont.

17.30.715(2).

III. STIPULATION

18. Alpine shall submit the Monitoring Well Installation Plan for installation of MW-1E, described in Section I.D. on page 8 of the 2019 Permit, within 30 days of the Parties signing this Stipulation. Within 30 days of receipt, DEQ shall provide Alpine written approval or denial of the Monitoring Well Installation Plan. DEQ shall not unreasonably withhold its approval of the Monitoring Well Installation Plan.

19. Alpine shall install the approved monitoring well within six months of DEQ’s approval of the Monitoring Well Installation Plan.

20. Should Alpine propose increasing the maximum permitted discharge, subjecting the facility to nondegradation evaluation, Alpine will submit updated permit application information supporting the 100,000 gpd flow in the 2019 Permit, including nondegradation analysis (such as: a) updated modeling utilizing the QUAL2K water quality model or a widely accepted model used for water quality regulation, including permitting and compliance, wasteload allocations, and total maximum daily load (TMDL) development that: i) provides good

documentation and user support; ii) is endorsed by the U.S. Environmental Protection Agency (EPA), and iii) is capable of simulating the eutrophication variables of interest including dissolved oxygen, pH, total organic carbon, bottom-attached algal growth, and phytoplankton b) hydrogeologic investigation; and/or a fate and transport study) informed by data from the new monitoring well (noted above in paragraphs 18 and 19) and other information, to DEQ's Water Protection Bureau. The updated permit application information will require Alpine to pay the "Resubmitted application fee" totaling \$500.00 under Schedule I.D. in Admin. R. Mont. 17.30.201 to DEQ. Annual fees in Schedule III.A. in Admin. R. Mont. 17.30.201 must be paid and are not waived by DEQ.

21. Within 30 days after DEQ's receipt of Alpine's updated permit application information, DEQ and Alpine shall meet to discuss next steps, including whether additional information is needed and a timeline for DEQ issuance of a Modified 2019 Permit providing modified effluent limitations at the 100,000 gpd flow, considering the narrative nutrient criteria and nondegradation provision noted above.

22. Within 14 days after the meeting required in paragraph 21 above, the Parties will file a Joint Status Report with the Board outlining the timeline for issuance of a modified permit and proposing a process by which this Appeal will

be terminated; or, alternatively, the Parties will file a proposed scheduling order for a hearing within one year.

23. The Parties agree to file Joint Status Reports with the Board every three months, beginning November 1, 2020.

24. Upon reaching agreement to the terms and conditions of this stipulation as evidenced by their signatures, the Parties agree to suspend the deadline for discovery responses and the Parties further agree that this Appeal remains pending and that the Board retains jurisdiction over this Appeal. If, by the expiration date of the 2019 Permit (July 31, 2024), the Parties have not provided a process by which this Appeal may be terminated or scheduled for hearing, the Board may dismiss this Appeal with prejudice. Further, the Board may, if unsatisfied with any of the Joint Status Reports filed by the Parties, convene a status conference with the Parties or order the Parties to submit additional information and/or a proposed schedule for hearing.

IV. GENERAL PROVISIONS

25. Nothing in this Stipulation shall prohibit Alpine from also pursuing a surface water MPDES discharge permit from DEQ. If Alpine is issued an MPDES permit for the same discharge governed by the permit at issue in this Appeal, it will dismiss this Appeal with prejudice.

26. Nothing in this Stipulation shall waive Alpine's rights concerning any application it makes to DEQ or diminish DEQ's authority to review the application as provided by law.

27. Nothing in this Stipulation shall prohibit Alpine or DEQ from exercising any rights or authority under the Water Quality Act, including but not limited to the right to seek or issue permit modifications pursuant to Admin. R. Mont. 17.30.1030 or the right to seek a variance for any permit limit.

28. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

29. If for any reason the Board declines to enter this Stipulation in the form presented, the terms of this Stipulation may not be used as evidence in any litigation, administrative or judicial, between the Parties.

V. ENTRY OF STIPULATION

The Parties request that the Board enter this Stipulation. If the Board declines to enter this Stipulation in the form presented, the Parties respectfully request the Board provide some guidance on terms or edits that would make this Stipulation acceptable to the Board.

This Stipulation is hereby entered by the Board, the Board hereby stays the dates in the April 20, 2020 scheduling order and agrees to retain jurisdiction as

described above and orders the Parties to proceed in compliance with the terms described herein.

Dated this _____ day of September, 2020.

Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

The Parties, by their respective counsel, hereby consent to the terms and conditions of the Stipulation as set forth above and consent to the entry thereof.

Dated this 14th day of
September, 2020.

/s/ Kirsten H. Bowers
Kirsten H. Bowers
Montana Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

ATTORNEY FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

Dated this 14th day of
September, 2020.

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

ATTORNEYS FOR ALPINE PACIFIC
UTILITIES, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of September, 2020, 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:

Deb Sutliff Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue P.O. Box 200901 Helena, MT 59620-0901 DSutliff@mt.gov	<input 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
Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov asolem@mt.gov	<input 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
Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 kbowers@mt.gov sscherer@mt.gov	<input 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 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

/s/ Victoria A. Marquis

Kirsten H. Bowers
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901

*Attorney for Montana Department of
Environmental Quality*

John C. Martin
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P.O. Box 68
25 S. Willow Street
Jackson, WY 83001

William H. Mercer
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639

*Attorneys for Westmoreland Absaloka
Mining, LLC*

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

**IN THE MATTER OF:)
WESTMORELAND RESOURCES)
INC.'S APPEAL OF FINAL)
MPDES PERMIT NO. MT0021229) CASE NO. BER 2015-06 WQ
ISSUED BY DEQ FOR THE)
ABSALOKA MINE IN HARDIN,)
BIG HORN, COUNTY,)
MONTANA.)**

**JOINT MOTION FOR REMAND AND FOR SUSPENSION OF
PROCEEDINGS**

The Montana Department of Environmental Quality (“DEQ”), by counsel, and Appellant Westmoreland Absaloka Mining, LLC (“Westmoreland”) f/k/a Westmoreland Resources, Inc., by counsel, (collectively, “the Parties”) after consultation, submit this Joint Motion for Remand and Suspension of Proceedings. The Parties have negotiated and reached an agreement to settle this matter without further litigation. *See* Exhibit A (“Settlement Agreement”). Accordingly, the Parties jointly request that the Board remand this matter to DEQ for further consideration and suspend these proceedings until a final permit decision renewing the Permit as stipulated in the Settlement Agreement and until any administrative or judicial review of the Permit renewal is resolved.

DATED this 30th day of September, 2020.

/s/ John C. Martin

John C. Martin

William W. Mercer

HOLLAND & HART LLP

25 S. Willow Street, Suite 200

Jackson, WY 83001

jcmartin@hollandhart.com

*Attorneys for Westmoreland Absaloka
Mining, LLC*

/s/ Kirsten H. Bowers

Kirsten Bowers

Department of Environmental Quality

P.O. Box 200901

1520 E. Sixth Avenue

Helena, MT 59620-0901

*Attorney for Montana Department of
Environmental Quality*

CERTIFICATE OF SERVICE

I hereby certify on September 30, 2020 that I caused a true and accurate copy

of the foregoing to be emailed to:

Sarah Clerget, Hearing Examiner
Montana Department of Environmental
Quality
Board of Environmental Review
1520 E. 6th Avenue
Helena, MT 59601
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asolem@mt.gov

Deb Sutliff
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smmathiascheck@hollandhart.com;
tjdipaola@hollandhart.com;

*Attorneys for Defendant/
Intervenors and Appellants
Western Energy Company*

*Attorney for Defendant/
Intervenors and Appellants
Western Energy Company*



Sandy Scherer, Paralegal
DEPARTMENT OF ENVIRONMENTAL QUALITY

Settlement Agreement

This Settlement Agreement is made by and between the Montana Department of Environmental Quality (“DEQ”) and Westmoreland Absaloka Mining LLC (“Westmoreland”) and is effective as of the date when it has been signed by both Parties (“the Effective Date”).

WHEREAS the Environmental Protection Agency delegated to Montana the authority to implement the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, within the State according to the terms of the Montana Water Quality Act, § 75-5-101, MCA, *et seq.*;

WHEREAS DEQ is primarily responsible for administering the Water Quality Act and has the authority to approve Montana Pollutant Discharge Elimination System (“MPDES”) permits. § 75-5-402, MCA;

WHEREAS on August 31, 2015, DEQ issued MPDES Permit No. MT0021229 for discharges at Westmoreland’s Absaloka Mine (“Mine”) to Westmoreland’s predecessor-in-interest, Westmoreland Resources, Inc.;

WHEREAS on September 9, 2015, pursuant to ARM 17.30.1370, § 75-5-403, MCA, and § 75-5-611, MCA, Westmoreland submitted to the Board of Environmental Review a Notice of Appeal and Request for Hearing for review of certain conditions in Permit No. MT0021229, which matter was docketed as Case No. BER 2015-06 WQ (“Appeal”);

WHEREAS Westmoreland and DEQ agreed to stay the litigation pending resolution of a related case regarding the interpretation of ARM 17.30.637(4);

WHEREAS the Montana Supreme Court has issued its decision in the related case, *Montana Environmental Information Center v. Department of Environment Quality*, 2019 MT 213, addressing the interpretation of ARM 17.30.637(4);

WHEREAS MPDES Permit No. MT0021229 will expire on September 30, 2020;


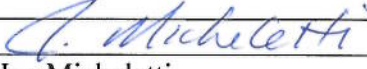
WHEREAS Westmoreland has submitted an application for a permit renewal (“Renewal Application”) on April 6, 2020;

NOW THEREFORE, in consideration of the mutual promises set forth herein, DEQ and Westmoreland agree as follows:

1. On or before September 30, 2020, Westmoreland and DEQ shall file a joint motion to remand Permit No. MT0021229 to DEQ to clarify the record on the hydrologic status of the receiving waters.
2. DEQ will consolidate its remand evaluation with its pending consideration of the Renewal Application.
3. DEQ commits to consider the instructions of the Supreme Court in *Montana Environmental Information Center v. Department of Environment Quality*, 2019 MT 213,

in the development of all discharge limits for outfalls where the receiving waters are determined to be ephemeral in any future permit issued for the Mine.

4. Westmoreland submitted additional information to DEQ in response to DEQ's May 8, 2020 notice of deficiency. The renewal application was deemed complete on August 19, 2020. The department may request additional information, including a site visit, from Westmoreland to clarify, modify, or supplement information within the pending renewal application.
5. On or before June 1, 2021, or after all additional information requested by DEQ has been submitted, whichever date is later, DEQ shall prepare a draft permit, give public notice, and make the draft permit available for public comment for at least 30-days pursuant to ARM 17.30.1372. If a public hearing is held, no less than 30-days' notice prior to the hearing shall be provided.
6. Within 90 days after the public comment period closes, DEQ shall make a final permit decision and issue a response to public comments pursuant to ARM 17.30.1377 and 17.30.1378.
7. Within 30 days after notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.
8. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.
9. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
10. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully-executed agreement.

 Shaun McGrath Director Montana Department of Environmental Quality September 30, 2020	 Joe Micheletti President, Westmoreland Absaloka Mining LLC September 29, 2020
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BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED AMENDMENT OF RULES

Agenda Item # III.A.1.

Agenda Item Summary – The Department requests that the Board amend ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, and 17.30.1361 exactly as proposed. The Department requests that the Board amend ARM 17.30.1372 as proposed and with the changes as set forth in the Notice of Amendment. The amended rules govern the issuance of discharge permits under the Montana Pollutant Discharge Elimination System Permit (MPDES). The Department is requesting these actions to maintain compliance with federal regulations governing discharge permits issued under the National Pollutant Discharge Elimination System (NPDES) program.

List of Affected Board Rules – This rulemaking amends ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, 17.30.1361, and 17.30.1372.

Affected Parties Summary – This rulemaking would affect owners or operators of new or existing facilities that discharge wastewater into state surface water, and are regulated under the Montana Pollutant Discharge Elimination System (MPDES) program, and persons or facilities who wish to obtain a discharge permit.

Background – The Board initiated rulemaking at its April 17, 2020 regular meeting. The proposed rulemaking was published on April 30, 2020, MAR Notice 17-411, at pages 750-764 of the 2020 Montana Administrative Register, Issue Number 8. Because of COVID-19 concerns and the Governor’s directives, an Amended Notice to Hold Virtual Public Hearing on Proposed Amendment was published on May 29, 2020, MAR Notice 17-411, at pages 942-943 of the 2020 Montana Administrative Register, Issue Number 10.

Hearing Information – The Board conducted a public hearing on the proposed rule package on June 16, 2020. Sarah Clerget served as the presiding officer for the hearing. The Board received oral comments from the public and has responded in the Notice of Amendment.

Board Options – The Board may:

1. Adopt the rule amendments as set forth in the Notice of Amendment, and the HB 521/311 analysis;
2. Adopt the rule amendments with revisions that the Board finds are appropriate and consistent with the scope of the Notice of Public Hearing and the record in this proceeding; or

3. Take no action on the proposed amendments.

DEQ Recommendation – The Department recommends that the Board adopt rulemaking, consistent with the Notice of Amendment, and the HB 521/311 analysis.

Enclosures –

1. Notice of Public Hearing on the proposed rulemaking
2. Amended Notice of Public Hearing on the proposed rulemaking
3. Presiding Officer Report on the Public Hearing
4. Notice of Amendment on the proposed rulemaking
5. House Bill 521/311 analysis

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.30.1202, 17.30.1203, 17.30.1304,)
17.30.1322, 17.30.1331, 17.30.1340,)
17.30.1341, 17.30.1342, 17.30.1344,)
17.30.1345, 17.30.1346, 17.30.1350,)
17.30.1354, 17.30.1361, and 17.30.1372)
pertaining to MPDES program updates)

NOTICE OF PUBLIC HEARING
ON PROPOSED AMENDMENT

(WATER QUALITY)

TO: All Concerned Persons

1. On June 16, 2020, at 1:00 p.m., the Board of Environmental Review (board) will hold a public hearing in Room 111 of the Metcalf Building, 1520 E. Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer no later than 5:00 p.m., June 9, 2020, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

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

17.30.1202 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) through (29) remain the same.

(30) "New facility" means any building, structure, facility, or installation that meets the definition of a "new source" in ~~ARM 17.30.1304(37)(a) and (b)~~ or "new discharger" in ~~ARM 17.30.1304(36)~~ and that is a greenfield or stand-alone facility, commences construction after January 17, 2002, and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased to accommodate the intake of additional cooling water. New facilities include only "greenfield" and "stand-alone" facilities. A greenfield facility is a facility that is constructed at a site at which no other source is located, or that totally replaces the process or production equipment at an existing facility. A stand-alone facility is a new, separate facility that is constructed on property where an existing facility is located and whose processes are substantially independent of the existing facility at the same site. New facility does not include new units that are added to a facility for purposes of the same general industrial operation (for example, a new peaking unit at an electrical generating station).

(a) through (38) remain the same.

AUTH: 75-5-304, MCA
IMP: 75-5-304, 75-5-401, MCA

REASON: The board is proposing to amend (30) to correct the references for the definitions of "new source" and "new discharger" by removing the erroneous subsections referred to in ARM 17.30.1304.

17.30.1203 CRITERIA AND STANDARDS FOR IMPOSING TECHNOLOGY-BASED TREATMENT REQUIREMENTS IN MPDES PERMITS - VARIANCE PROCEDURES (1) remains the same.

(2) For POTWs, effluent limitations must be based upon:

~~(a) secondary treatment as defined in 40 CFR Part 133, from date of permit issuance; and~~

~~(b) the best practicable waste treatment technology, not later than July 1, 1983.~~

(3) through (14) remain the same.

AUTH: 75-5-304, MCA
IMP: 75-5-304, 75-5-401, MCA

REASON: The board is proposing to amend (2) to maintain consistency with the federal regulations at 40 CFR 125.3, the federal rule implementing technology-based treatment requirements in permits. The board proposes to delete ARM 17.30.1203(2)(b) because it is outdated, and its corresponding federal requirement has been removed from 40 CFR 125.3.

The board is also proposing the editorial change of combining (2) and (2)(a) into one rule.

17.30.1304 DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in 75-5-103, MCA.

(1) and (2) remain the same.

~~(3)(a)~~ "Animal feeding operation" means:

(a) a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and

(ii) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(b) Two or more animal feeding operations under common ownership are considered, for the purposes of these rules, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(4) through (50) remain the same.

(51) "Pesticide discharges from pesticide application" means the discharges that result from the application of biological pesticides, and the application of chemical pesticides that leave a residue, from point sources into surface water. In the context of this definition, this does not include agricultural storm water discharges and return flows from irrigated agriculture.

(52) "Pesticide residue" means that portion of a pesticide application that is discharged from a point source into surface water and no longer provides pesticidal benefits. It also includes any degradates of the pesticide.

(51) through (79) remain the same but are renumbered (53) through (81).

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing to amend the definitions found in ARM 17.30.1304 to maintain consistency with requirements at 40 CFR 122.2, the federal rule defining terms used in the National Pollutant Discharge Elimination System regulations. The definitions will ensure consistency with federal regulatory updates found in 40 CFR 122.2.

The board is proposing editorial changes to (3) to maintain consistency with current Secretary of State formatting procedures.

The board is proposing to add (51) pesticide discharges from pesticide application to increase clarity regarding discharges that require MPDES permit coverage, and to be consistent with the federal regulations at 40 CFR 122.2.

The board is proposing to add a definition of pesticide residue to clarify which discharges from application of pesticides will require MPDES permits. Proposed (52) is consistent with the federal definition of pesticide residue at 40 CFR 122.2.

The board is also proposing to renumber current definitions (51) through (79) as (53) through (81).

17.30.1322 APPLICATION FOR A PERMIT (1) Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under ARM 17.30.1341, excluded under ARM 17.30.1310, or a user of a privately owned treatment works unless the department requires otherwise under ARM 17.30.1344, shall submit a complete application to the department in accordance with this rule and ARM 17.30.1364 and 17.30.1365, 17.30.1370 through 17.30.1379, and 17.30.1383.

(a) All applicants for MPDES permits shall submit applications on department permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the Water Protection Bureau at (406) 444-3080 5546; Department of Environmental Quality, Water Protection Bureau, 1520 East Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901; or on the department's web site at <http://deq.mt.gov/default.mcp>.

(b) through (5) remain the same.

(6) All applicants for MPDES permits, other than POTWs, shall provide the following information to the department, using the department's application Form 1. Additional information required of applicants is set forth in (7) through (17):

(a) and (b) remain the same.

(c) up to four standard industrial category (SIC) codes and up to four North American Industry Classification System (NAICS) codes which best reflect the principal products or services provided by the facility;

(d) the operator's name, address, telephone number, electronic mail address, ownership status, and status as federal, state, private, public, or other entity;

(e) through (g)(iii) remain the same.

(iv) those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area; ~~and~~

(h) a brief description of the nature of the business;

(i) an indication of whether the facility uses cooling water and the source of the cooling water; and

(j) an indication of whether the facility is requesting any of the variances at (13), if known at the time of the application.

(7) Existing manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits, except for those facilities subject to the requirements of (8), shall provide the following information to the department, using application forms provided by the department:

(a) through (g)(ix)(B) remain the same.

(x) where quantitative data are required in (7)(g)(i) through (ix), existing data may be used, if available, in lieu of sampling done solely for the purpose of application, provided that:

(A) all data requirements are met; sampling was performed, collected, and analyzed no more than four and one-half years prior to submission;

(B) all data are representative of the discharge; and

(C) all available representative data are considered in the values reported;

(h) through (9) remain the same.

(10) New manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits (except for new discharges of facilities subject to the requirements of (8) or new discharges of storm water associated with industrial activity that are subject to the requirements of (11)) shall provide the following information to the department, using application forms provided by the department:

(a) through (e)(vi) remain the same.

(vii) No later than ~~two years~~ 24 months after the commencement of discharge from the proposed facility, the applicant is required to complete and submit forms prescribed by the department. However, the applicant need not complete those portions of the forms requiring tests which he has already performed and reported under the discharge monitoring requirements of his MPDES permit;

(f) through (11) remain the same.

(12) Unless otherwise indicated, all new and existing publicly owned treatment works (POTWs) and other dischargers designated by the department, shall provide, at a minimum, the information in (a) through (h) to the department, using Form 2A. Permit applicants shall submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the department. The department may waive any requirement of (a) through (h), if the department has access to substantially identical information. The department may also waive any requirement of (a) through (h) that

is not of material concern for a specific permit, if approved by EPA. The waiver request to the EPA must include the department's justification for the waiver. The EPA's disapproval of the proposed waiver does not constitute final agency action, but does provide notice to the department and permit applicant that EPA may object to any MPDES permit issued in the absence of the required information.

(a) All applicants shall provide the following basic information:

(i) remains the same.

(ii) name, mailing address, ~~and~~ telephone number, and electronic mail address of the applicant and indication as to whether the applicant is the facility's owner, operator, or both;

(iii) through (viii)(C) remain the same.

(D) for effluent sent to another facility for treatment prior to discharge:

(I) remains the same.

(II) the name, mailing address, contact person, ~~and~~ phone number, and electronic mail address of the organization transporting the discharge, if the transport is provided by a party other than the applicant;

(III) the name, mailing address, contact person, phone number, electronic mail address, and MPDES permit number (if any) of the receiving facility; and

(IV) through (E) remain the same.

(ix) An indication of whether the applicant is operating under or requesting to operate under a variance as specified at (14), if known at the time of application.

(b) and (c) remain the same.

(d) As specified in (i) through (ix), all applicants shall submit to the department effluent monitoring information for samples taken from each outfall through which effluent is discharged to state surface waters. The department may allow applicants to submit sampling data for only one outfall, on a case-by-case basis, where the applicant has two or more outfalls with substantially identical effluent. The department may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone. For POTWs applying prior to commencement of discharge, data shall be submitted no later than 24 months after the commencement of discharge.

(i) through (ix) remain the same.

(e) All applicants shall provide an identification of any whole effluent toxicity tests conducted during the four and one-half years prior to the date of the application on any of the applicant's discharges or on any receiving water near the discharge. For POTWs applying prior to commencement of discharge, data shall be submitted no later than 24 months after the commencement of discharge.

(i) through (ix) remain the same.

(f) Applicants shall submit the following information about industrial discharges to the POTW:

(i) number of significant industrial users (SIUs) and non-significant categorical industrial users (NSCIUs), including SIUs and NSCIUs that truck or haul waste, discharging to the POTW; and

(ii) through (h) remain the same.

(i) All applicants shall provide the name, mailing address, telephone number, electronic mail address, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility.

(j) through (18) remain the same.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing to amend MPDES permit application requirements in this rule to maintain consistency with the federal rules in 40 CFR 122.21, which were amended in June 2019 to improve application consistency, accuracy, and usability. As an authorized state program, the MPDES program must collect all application information required in federal regulations at 40 CFR 122.21.

The board is proposing to amend (1)(a) to maintain consistency with the federal update at 40 CFR 122.21(a)(2) by updating department contact information for obtaining application forms. Providing up-to-date contact information will save the permitting authorities and the public time when they seek to inquire about application requirements.

The board is proposing to amend (6)(c) to maintain consistency with the federal rule at 40 CFR 122.21(f)(3). This federal rule requires all facilities except publicly owned treatment works to include North American Industry Classification System (NAICS) codes in addition to the Standard Industrial Classification (SIC) codes that reflect the products or services provided by the facility. While some Clean Water Act regulations use SIC codes, they have not been updated since 1987. The NAICS codes are the federal data standard typically used to identify and classify industrial operations. Applicants will be required to provide both codes.

The board is proposing to amend (6)(d) to maintain consistency with the federal rule at 40 CFR 122.21(f)(4). This federal rule requires applicants that are not POTWs to provide an electronic mailing address (email).

The board is proposing to amend (6) by adding (6)(i) and (6)(j) to maintain consistency with the federal rules found at 40 CFR 122.21(f)(9) and (f)(10), respectively. The new provision of (6)(i) will require applicants to indicate whether the facility uses cooling water, and the source of cooling water. The new provision of (6)(j) will require applicants to indicate whether the facility is requesting any of the variances at (13). By requiring indication of the use and source of cooling water, or the intent to request a variance, DEQ will receive key information necessary to effectively develop an MPDES permit for the facility.

The board is proposing to add new (7)(g)(x) to maintain consistency with the federal rule at 40 CFR 122.21(g)(7)(ix), which allows existing non-publicly-owned treatment works (Non-POTW) applicants to use data up to four and one-half years prior to the date of application, but does not require four and one-half years of data. This new regulation also clarifies that existing data may only be used where they remain representative of the current discharge characteristics.

The board is proposing to amend (10)(e)(vii) to maintain consistency with the federal rule 40 CFR 122.21(k)(5)(vi). This is an editorial change that provides clarity to the allowed timeframe for new dischargers to submit data.

The board is proposing to amend (12)(a)(ii) to maintain consistency with the federal rule at 40 CFR 122.21(j)(1)(ii) in requiring applicants to provide an electronic mailing address (email) of the facility's owner, operator, or both.

The board is proposing to amend (12)(a)(viii)(D)(II) to maintain consistency

with the rule at 40 CFR 122.21(j)(1)(viii)(D)(2) in requiring POTW applicants that send effluent to another facility for treatment prior to discharge to provide the email address of the organization transporting the effluent.

The board is proposing to amend (12)(a)(viii)(D)(III) to maintain consistency with the federal rule at 40 CFR 122.21(j)(1)(viii)(D)(3) in requiring POTW applicants that send effluent to another facility for treatment prior to discharge to provide the email address of the facility that receives the transported effluent.

The board is proposing new (12)(a)(ix) to maintain consistency with the federal rule at 40 CFR 122.21(j)(1)(ix). This federal rule requires new and existing POTWs to indicate on their application whether they are operating or requesting to operate under a variance as specified at (14).

The board is proposing to amend (12)(d) and (12)(e) to maintain consistency with the federal rules at 40 CFR 122.21(j)(4)(i) and (j)(5)(i), respectively. These federal rules specify deadlines for new POTW dischargers to submit data after commencement of discharge.

The board is proposing to amend (12)(f)(i) to maintain consistency with the federal rule at 40 CFR 122.21(j)(6)(i). This federal rule requires POTW applicants to indicate the number of non-significant categorical industrial users (NSCIUs) instead of categorical industrial users (CIUs). This will clarify whether wastewater accepted from these facilities might be uncharacteristic of domestic sewage, because CIUs are categorized as either SIUs or NSCIUs. The proposed amendment also requires applicants to include SIUs and NSCIUs that truck or haul waste to ensure that the reported number include all SIUs and NSCIUs that contribute waste to the POTW, not only those directly connected to the POTW.

The board is proposing to amend (12)(i) to maintain consistency with the federal rule at 40 CFR 122.21(j)(9) in requiring applicants to provide an electronic mailing address of contractors responsible for operational and maintenance of the facility.

17.30.1331 CONCENTRATED AQUATIC ANIMAL PRODUCTION FACILITIES AND AQUACULTURE PROJECTS (1) through (5) remain the same.

(6) The board hereby adopts and incorporates herein by reference Appendix C of 40 CFR Part 122 which is an appendix to a federal agency rule setting forth criteria for determining whether a facility or operation merits classification as a concentrated aquatic animal production facility. ~~See ARM 17.30.1303 for complete information about all materials incorporated by reference.~~

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend (6) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1340 NEW SOURCES AND NEW DISCHARGERS (1) Except as otherwise provided in an applicable new source performance standard, a source is a new source if it meets the definition of new source in ARM 17.30.1304(37), and:
(a) through (c) remain the same.

(2) A source meeting the requirements of (1)(a), (b), or (c) is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. (See ARM 17.30.1304(36).)

(3) remains the same.

(4) Construction of a new source as defined under ARM 17.30.1304(37) has commenced if the owner or operator has:

(a) through (9) remain the same.

~~(10) The board hereby adopts and incorporates herein by reference 40 CFR 125.3, which is a federal agency rule setting forth technology-based treatment requirements for point source dischargers. See ARM 17.30.1303 for complete information about all materials incorporated by reference.~~

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing to amend (1) and (4) to eliminate the incorrect referenced section of ARM 17.30.1304(37), which refers to indirect discharger instead of new source. The board is proposing to amend (2) by removing the incorrect referenced section of ARM 17.30.1304(36), which refers to impingement instead of new discharger. ARM 17.30.1304 is the board's rule that is equivalent to 40 CFR 122.2, the federal rule definitions terms for the NPDES program.

The board is proposing to remove as redundant (10). The board has internal rules at ARM 17.30.1203 which are equivalent to 40 CFR 125.3, the federal rules setting forth technology-based treatment requirements for point source dischargers. The changes will also maintain consistency with federal rules at 40 CFR 122.29, the federal rules which sets forth conditions for new sources and new dischargers. The board is proposing to remove the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1341 GENERAL PERMITS (1) through (3) remain the same.

(4) A person owning or proposing to operate a point source who wishes to operate under a MPDES general permit shall complete a standard MPDES application or notice of intent form available from the department for the particular general permit. Except for notices of intent, the department shall, within 30 days of receiving a completed application, either issue to the applicant an authorization to operate under the MPDES general permit, or shall notify the applicant that the source does not qualify for authorization under a MPDES general permit, citing one or more of the following reasons as the basis for denial:

(a) the specific source applying for authorization appears unable to comply with the following requirements:

(i) through (v) remain the same.

(vi) prohibition of any discharge which is in conflict with a plan or amendment thereto approved pursuant to section 208(b) of the federal Clean Water Act; and

(vii) through (13) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend (4)(a)(vii) to clarify this reference is to the federal Clean Water Act, not the Montana Water Quality Act.

17.30.1342 CONDITIONS APPLICABLE TO ALL PERMITS The following conditions apply to all MPDES permits. Additional conditions applicable to MPDES permits are set forth in ARM 17.30.1344. All conditions applicable to MPDES permits must be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these rules must be given in the permit.

(1) through (9) remain the same.

(10) Monitoring and records:

(a) Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity.

(b) through (11) remain the same.

(12) Reporting requirements:

(a) The permittee shall give notice to the department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

(i) through (e) remain the same.

(f) Twenty-four hour reporting:

(i) The permittee shall report any noncompliance which may endanger health or the environment. Any information must be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission must also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission must contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(ii) through (h) remain the same.

(13) Other noncompliance:

(a) The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of (b) and (c).

(b) through (d) remain the same.

(14) Upset Conditions:

(a) Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of (b) are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(b) Conditions necessary for demonstration of an upset: A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through

properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) through (iv) remain the same.

(c) Burden of proof: In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

(15) The board hereby adopts and incorporates herein by reference ~~(see ARM 17.30.1303 for complete information about all materials incorporated by reference)~~:

(a) and (b) remain the same.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing editorial changes to (10), (12) and (13) to maintain consistency with current Secretary of State formatting procedures.

The board is proposing editorial changes at (14) to clarify upset conditions and to maintain consistency with the current Secretary of State formatting procedures.

The board is proposing to amend (15) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1344 ESTABLISHING LIMITATIONS, STANDARDS, AND OTHER PERMIT CONDITIONS (1) remains the same.

(2) The board hereby adopts and incorporates herein by reference ~~(see ARM 17.30.1303 for complete information about all materials incorporated by reference)~~:

(a) through (i) remain the same.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing to amend (2) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1345 CALCULATING MPDES PERMIT CONDITIONS (1) remains the same.

(2) Production-based limitations.

(a) remains the same.

(b)(i) Except in the case of POTW's, or as provided in (3), calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) must be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production must be estimated using projected production. The time period of the measure of production must correspond to the time period of the calculated permit limitations; for example, monthly production must be used to calculate average monthly discharge limitations.

(3) and (4) remain the same.

(5) All permit effluent limitations, standards, or prohibitions for a metal must be expressed in terms of "total recoverable metal" as defined in 40 CFR Part 136

unless:

- (a) remains the same.
- (b) in establishing permit limitations on a case-by-case basis under ~~40 CFR 125.3~~ ARM 17.30.1203, it is necessary to express the limitation on the metal in the dissolved or valent or total form to carry out the provisions of the Act; or
- (c) through (7) remain the same.
- (8) Mass limitations:
 - (a) All pollutants limited in permits must have limitations, standards, or prohibitions expressed in terms of mass except:
 - (i) through (b) remain the same.
- (9) Pollutants in intake water:
 - (a) Upon request of the discharger, technology-based effluent limitations or standards must be adjusted to reflect credit for pollutants in the discharger's intake water if:
 - (i) through (e) remain the same.
- (10) Internal waste streams:
 - (a) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by ARM 17.30.1344, in accordance with 40 CFR 122.44(i), must also be applied to the internal waste streams.
 - (b) and (11) remain the same.
- (12) The board hereby adopts and incorporates herein by reference ~~(see ARM 17.30.1303 for complete information about all materials incorporated by reference)~~:

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing editorial changes to (2) to maintain consistency with the Secretary of State formatting procedures.

The board is proposing to amend (5)(b) to correct the reference for establishing effluent limitations on a case-by-case basis from 40 CFR 125.3 to the internal reference ARM 17.30.1203. ARM 17.30.1203 is the board's rule that is equivalent to 40 CFR 125.3.

The board is proposing editorial changes to (8), (9), and (10) to maintain consistency with current Secretary of State formatting procedures.

The board is proposing to amend (12) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1346 DURATION OF PERMITS (1) through (5) remain the same.

(6) The board hereby adopts and incorporates herein by reference sections 301(b)(2)(A), (C), (E), and (F) of the federal Clean Water Act, 33 USC 1251, et seq., which set forth deadlines for achieving effluent limitations and treatment of toxic pollutants. ~~See ARM 17.30.1303 for complete information about all materials~~

incorporated by reference.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend (6) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1350 SCHEDULES OF COMPLIANCE (1) The permit may, when appropriate, specify a schedule of compliance leading to compliance with the Act and rules adopted thereunder, ~~specifically including any applicable requirements under ARM Title 17, chapter 30, subchapter 12.~~

(a) Any schedules of compliance under this rule must require compliance as soon as possible, but not later than any the applicable statutory deadline under the Act or under the federal Clean Water Act ~~as codified at 33 USC 1311(b)(2)(A), (C), (D), (E), and (F).~~

(b) through (2) remain the same.

~~(3) The board hereby adopts and incorporates herein by reference the federal Clean Water Act 33 USC 1311(b)(2)(A), (C), (E), and (F) which set forth deadlines for achieving effluent limitations and treatment of toxic pollutants. See ARM 17.30.1303 for complete information about all materials incorporated by reference. Copies of these materials are available from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.~~

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend this rule to maintain consistency with the federal rules at 40 CFR 122.47. This federal rule sets forth conditions of compliance schedules for permits. The board is proposing to amend (1) by removing the reference to ARM Title 17, chapter 30, subchapter 12, which contains the board's rules for technology-based treatment requirements, to which compliance schedules do not apply.

The board is proposing to amend (1)(a) by removing the references to 33 USC 1311(b)(2)(A), (C), (E), and (F), which are outdated and no longer applicable.

The board is proposing to remove (3), which is outdated and no longer applicable.

17.30.1354 DISPOSAL OF POLLUTANTS INTO WELLS, INTO PUBLICLY OWNED TREATMENT WORKS, OR BY LAND APPLICATION (1) through (3) remain the same.

(4) ~~The board hereby adopts and incorporates herein by reference 40 CFR Part 125, subpart D, which is a series of federal agency rules setting forth criteria and standards for determining eligibility for a variance from effluent limitations based on fundamentally different factors (FDF). See ARM 17.30.1303 for complete information about all materials incorporated by reference.~~

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend (4) by removing the reference to ARM 17.30.1303, which was repealed in 2012.

17.30.1361 MODIFICATION OR REVOCATION AND REISSUANCE OF PERMITS (1) and (2) remain the same.

(3) The following are causes to modify or, alternatively, revoke and reissue a permit:

(a) remains the same.

(b) the department has received notification ~~(as required in the permit, see ARM 17.30.1362(12)(e))~~ of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer (ARM 17.30.1360(2)) but will not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(4) remains the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board is proposing to amend (3)(b) to maintain consistency with the equivalent federal rule at 40 CFR 122.62. This federal rule sets forth requirements for modification or revocation and reissuance of permits. The board proposes to remove the incorrect reference to ARM 17.30.1362(12)(c). The correct reference for the permittee to give notice to the department is ARM 17.30.1342, but its removal will eliminate redundancy.

17.30.1372 PUBLIC NOTICE OF PERMIT ACTIONS AND PUBLIC COMMENT PERIOD (1) through (4) remain the same.

(5) Public notice of activities described in (1)(a) must be given by the following methods:

(a) by mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this rule may waive his or her rights to receive notice for any classes and categories of permits):

(i) through (v) remain the same.

(vi)(A) to any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

~~(B)~~(vii) to each state agency having any authority under state law with respect to the construction or operation of such facility.

(b) and (c) remain the same.

(d) any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation-; and

(e) for major permits and MPDES general permits, in lieu of the requirement for publication of a notice in a daily or weekly newspaper, as described in (5)(b), the department may publish all notices of activities described in (1) to the permitting

authority's public website. If the department selects this option for a draft permit, as defined in ARM 17.30.1304, in addition to meeting the requirements in (6), the department must post the draft permit and fact sheet on the website for the duration of the public comment period.

(6) through (8) remain the same.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-401, MCA

REASON: The board is proposing editorial changes to (5)(a) to maintain consistency with current Secretary of State formatting procedures.

The board is proposing to add (5)(e) to maintain consistency with the equivalent federal rule set forth in 40 CFR 124.10(c)(2)(iv). This federal rule sets forth requirements for public notice of permit actions. The proposed addition provides an alternative method of providing notice of permit applications and hearings, and affirms flexibility in reaching the public through a variety of methods that would expand public access to applications and draft permits.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m., June 19, 2020. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. The board 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; solar and wind energy bonding, 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, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

hearing.

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

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: /s/ Christine Deveny
CHRISTINE DEVENY
Chair

Certified to the Secretary of State April 21, 2020.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.30.1202, 17.30.1203, 17.30.1304,)
17.30.1322, 17.30.1331, 17.30.1340,)
17.30.1341, 17.30.1342, 17.30.1344,)
17.30.1345, 17.30.1346, 17.30.1350,)
17.30.1354, 17.30.1361, and 17.30.1372)
pertaining to MPDES program updates)

AMENDED NOTICE TO HOLD
VIRTUAL PUBLIC HEARING ON
PROPOSED AMENDMENT

(WATER QUALITY)

TO: All Concerned Persons

1. On April 30, the Board of Environmental Review (board) published MAR Notice No. 17-411 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 750 of the 2020 Montana Administrative Register, Issue Number 8. The board scheduled a public hearing to receive public comment on the proposed rule amendments to be held on June 16, 2020, at 1:00 p.m. The location of the hearing was to be in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Due to the guidance issued by the Governor of the State of Montana on March 26, 2020, regarding the COVID-19 public health situation, the public hearing will be held virtually via the Zoom meeting platform and will be recorded. Persons wishing to attend the public hearing need to register in advance with Zoom. Registration with Zoom may be made at the following link: <https://mt.gov.zoom.us/j/9886583910?pwd=c0tUMm5Nd2F2OHhoWlJwd1loRnlyQT09>. After registering, you will receive a confirmation email containing information about joining the hearing.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer no later than 5:00 p.m., June 9, 2020, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m., June 19, 2020. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: /s/ Christine Deveny
CHRISTINE DEVENY
Chair

Certified to the Secretary of State May 19, 2020.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.30.1202, 17.30.1203, 17.30.1304,)
17.30.1322, 17.30.1331, 17.30.1340,) SCRIPT
17.30.1341, 17.30.1342, 17.30.1344,)
17.30.1345, 17.30.1346, 17.30.1350,)
17.30.1354, 17.30.1361, and 17.30.1372)
pertaining to MPDES program updates)

1. This hearing is called to order. Let the record show that it is June 16, 2020 at 1 p.m. This hearing is taking place via zoom due to Covid-19. This is the time and place set for the public hearing in the matter of the amendment of ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, 17.30.1361, and 17.30.1372 pertaining to MPDES program updates.

2. This public hearing is being recorded by Zoom and by Laurie Crutcher.

3. 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.

4. Copies of the notice of public hearing on the proposed rulemaking are available on the BER's website as well as the Secretary of State's website and can be emailed to interested persons. If you do not have a copy and wish to have a copy emailed to you, please type your email in the chat box via zoom or email sscherer@mt.gov. Anyone who wishes to make a statement or submit written materials at this hearing should use the "raise your hand" function and type their name, and whether you are a proponent or opponent in the chat box on Zoom. You can find the chat button on the bottom middle of your screen. [If there are people on the phone (not on a computer) who wish to make a comment, I will ask for those comments after we finish the comments from those who have raised their hand and given their name on Zoom.]

5. 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.

6. 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.

If you would like to be placed on a rulemaking interested persons list, please email Sandy Scherer at sscherer@mt.gov or call Ms. Scherer at 406-444-2630.

Notice of this hearing was contained in the Montana Administrative Register, Notice Number 17-411, published on April 30, 2020, in Issue No. 8, at pages 750 through 764. 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 and the Department 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 amendments and the reasons given by the Board for the amendment.

Paragraph 4 outlines the procedure for concerned persons to submit their comments regarding the proposed rule.

Paragraph 5 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 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 states the requirements of Mont. Code Ann. § 2-4-302 regarding bill sponsor notification does not apply.

Paragraph 8 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.

7. As stated in paragraph 4 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. To guarantee consideration by the Board, comments must have been received in person or postmarked no later than 5 p.m. on June 19, 2020.

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 and the Department to undertake this rulemaking is contained in Montana Code Annotated Section 75-5-304, 75,5,201, 75-5-401.

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 based on the chat list to make their statements, then those on the phone, for each category.

Because we are recording this hearing, please speak clearly, make sure you are unmuted and .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 indicated 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 June 19th 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. You should check the website to determine when this matter will be considered by the Board.

Hearing Statement (June 16, 2020)

Rainie DeVaney, Montana Pollutant Discharge Elimination (MPDES)

Montana Department of Environmental Quality

Good afternoon, for the record my name is Rainie DeVaney. I manage the Montana Pollutant Discharge Elimination System program for the Montana Department of Environmental Quality. I will now provide DEQ's hearing statement. The department requests that the board revise and update portions of the MPDES program rules. The proposed rule amendments have 2 purposes. The first is to maintain consistency with the federal regulations governing the state program, and the second is to provide clarity and reduce redundancy through editorial corrections.

In June 2019 EPA finalized revisions to the national permitting program regulations and adopted new application forms for individual permittees. To maintain consistency with the federal program, states have been allowed 1 year to make programmatic and regulatory changes, which include permit application form updates, public notice flexibility, and general permit definitions.

Permit application form updates are intended to promote submission of complete permit applications by clarifying timeline requirements for data submission, updating required industrial codes, requiring electronic mail addresses, requiring permittees to indicate whether cooling water is used, and requiring permittees to indicate whether they intend to request a variance. The federal permitting program is allowing flexibility to publish public notices on the Department's website, and will expand public access to draft permits without affecting DEQ's responsibility to ensure that all interested communities are informed. The 2 added definitions will maintain consistency with federal regulations by describing discharges that require MPDES permit coverage. The proposed rule amendments also include Montana-specific editorial corrections to provide clarity and reduce redundancy.

DEQ also submits Takings and Stringency Analysis for the record. This concludes DEQ's statement.

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment)
of ARM 17.30.1202, 17.30.1203,)
17.30.1304, 17.30.1322, 17.30.1331,))
17.30.1340, 17.30.1341, 17.30.1342,))
17.30.1344, 17.30.1345, 17.30.1346,))
17.30.1350, 17.30.1354, 17.30.1361,))
and 17.30.1372 pertaining to MPDES)
program updates.)

TRANSCRIPT OF PROCEEDINGS VIA ZOOM

June 16, 2020
1:00 p.m.

PREPARED BY: LAURIE J. CRUTCHER, RPR
P.O. Box 1192
Helena, MT 59624
lauriecrutcher@gmail.com

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 PRESIDING OFFICER CLERGET: I'll go
5 ahead and start. This hearing is called to order.
6 Let the record show that this is June 16th, 2020
7 at 1:01 p.m. This hearing is taking place via
8 Zoom due to the COVID-19 pandemic.

9 This is the time and place set for the
10 public hearing in the matter of the amendment of
11 ARM 17.30.1202, 1203, 1304, 1322, 1331, 1340,
12 1341, 1342, 1344, 1345, 1346, 1350, 1354, 1361,
13 and 1372, pertaining to the MPDES program updates.

14 This public hearing is being recorded
15 both by Zoom and by Laurie Crutcher, Court
16 Reporter. My name is Sarah Clerget. I'm an
17 Assistant Attorney General for the State of
18 Montana, and I've been assigned to the Agency
19 Legal Services Bureau.

20 The Board of Environmental Review has
21 designated an attorney from Agency Legal Services
22 Bureau to preside over and conduct this public
23 hearing, and I'm therefore acting as the Presiding
24 Officer.

25 Copies of the Notice of Public Hearing

1 on the proposed rulemaking are available on the
2 BER's website, as well as the Secretary of State's
3 website, and can be emailed to interested persons.
4 If you do not have a copy and wish to have a copy
5 emailed to you, please type your email in the chat
6 via the Zoom, or email sscherer@mt.gov.

7 Anyone who wishes to make a statement or
8 submit written materials at this hearing should
9 use the "raise your hand" function in the chat
10 portion of Zoom, type their name into the chat
11 portion, and whether you are a proponent,
12 opponent, or general commenter in the chat box.
13 You can find the chat button in the middle of your
14 screen at the bottom.

15 We do have one person on the phone, so I
16 will call on you in a minute. Those who don't
17 have access to the chat function on Zoom, I will
18 call on you when we do a roll call, and I'll ask
19 you to identify yourself and if you wish to make a
20 comment.

21 Montana Code Annotated 2-4-302(7)(a)
22 requires Presiding Officers at rule hearings to
23 read the Notice of Function of Administrative Rule
24 Review. The notice that I'm required to read is
25 as follows.

1 Notice of function of Administrative
2 Rule Review Committee. Administrative rule review
3 is a function of interim committees and the
4 Environmental Quality Council or EQC. These
5 interim committees and the EQC have administrative
6 rule review, program evaluation, and monitoring
7 functions for executive branch agencies and the
8 entities attached to the agencies for
9 administrative purposes. In this case, the EQC
10 has those functions for the Board of Environmental
11 Review.

12 These interim committees and the EQC
13 have the authority to make recommendations to an
14 agency regarding the adoption, amendment, or
15 repeal of a rule, or to request that the agency
16 prepare a statement of the estimated economic
17 impact of a proposal.

18 They also may poll the members of the
19 Legislature to determine if a proposed rule is
20 consistent with the intent of the Legislature, or
21 during a legislative session introduce a bill
22 repealing a rule, or directing an agency to adopt
23 or amend a rule, or a joint resolution
24 recommending that an agency adopt, amend, or
25 repeal a rule.

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The interim committees and the EQC⁵
welcome comments, and invite members of the public
to appear before them, or to send written
statements in order to bring their attention to
any difficulties with the existing or proposed
rules. The mailing address is Post Office Box
201706, Helena, Montana 59620-1706.

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

Montana Code Annotated 2-4-302(2)(a)
requires each agency, including 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 a list of person 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.

If you would like to be placed on the

1 rulemaking interested persons list, please email ⁶
2 Sandy Scherer at sscherer@mt.gov, or call her at
3 406-444-2630.

4 Notice of this hearing was contained in
5 the Montana Administrative Register Notice No.
6 17-411 published on April 30th, 2020 in Issue No.
7 8 at Pages 750 through 764.

8 Under Model Rule of the Attorney General
9 for the Montana Administrative Procedure Act,
10 which have been adopted by the Board of
11 Environmental Review, I am required to summarize
12 the major portions of the Notice of Public
13 Hearing.

14 Paragraph 1 of the notice gives notice
15 of this hearing.

16 Paragraph 2 states that the Board and
17 the Department will make reasonable accommodations
18 for persons with disability who wish to
19 participate in this public hearing.

20 Paragraph 3 of the notice provides the
21 text of the proposed amendments, and the given
22 reasons by the Board for the amendments.

23 Paragraph 5 gives notice that the
24 Department maintains a rulemaking interested
25 persons list, and indicates how one may join.

1 Paragraph 6 of the notice states that I
2 or another attorney from Agency Legal Services
3 have been designated to preside over the hearing.

4 Paragraph 7 states the requirements of
5 Montana Code Annotated 2-4-302 regarding bill
6 sponsor notification does not apply.

7 Paragraph 8 of the notice states that
8 the requirements of Montana Code Annotated 2-4-111
9 regarding significant impacts to small businesses
10 has been applied, and the Board has determined
11 that the adoption of the above-referenced rule
12 will not significantly or directly impact small
13 businesses.

14 As stated in Paragraph 4 of the notice,
15 written comments submitted after this hearing
16 should be addressed to the Board and delivered to
17 Sandy Scherer, legal secretary, at the Metcalf
18 Building, 1520 East Sixth Avenue, in Helena,
19 Montana, or mailed to the Board at Post Office Box
20 200901, Helena, Montana 59620-0901, or faxed to
21 406-444-4386, or emailed to Sandy Scherer
22 sscherer@mt.gov. To guarantee consideration by
23 the Board, comments must have been received in
24 person or postmarked no later than 5:00 p.m. on
25 June 19th, 2020.

1 A complete copy of the Notice of Public
2 Hearing will be included in the official record of
3 this hearing.

4 The authority of the Board of
5 Environmental Review and the Department to
6 undertake this rulemaking is contained in Montana
7 Code Annotated Sections 75-5-304, 75-5-201, and
8 75-5-401.

9 A Presiding Officer may ask questions of
10 persons making statements at a hearing, and may
11 allow others to ask questions upon request.

12 Persons making statements do not have an automatic
13 right to provide rebuttal or additional
14 information after they have given their statement.
15 However, a Presiding Officer may request further
16 information, and may allow further statements for
17 good cause, if requested.

18 So we are going to proceed this way.
19 First I will do a roll call. I've given everybody
20 a little bit more time to get on. Then the
21 Department will have the opportunity to summarize
22 or otherwise explain the proposed rulemaking and
23 its reasons for the proposed rule, and offer any
24 supporting information.

25 Second, the statements of proponents,

1 that is, persons in favor of the rulemaking will
2 be heard; third statements of opponents, that is,
3 persons opposed to the rulemaking; fourth, the
4 statements of anyone else wishing to be heard.
5 And then I shall call on persons based on the chat
6 list and my participants list that I have here,
7 and by the last three digits of the phone numbers
8 for those appearing by phone.

9 Because we are recording this hearing,
10 please speak clearly, make sure you are unmuted,
11 and prior to making your statement, please
12 identify yourself by name, address, and
13 affiliation, and whether you are a proponent,
14 opponent, or otherwise. If you intend to offer a
15 document for consideration, please make sure that
16 the document can be identified by reference to
17 your name, and email it to Sandy at the email
18 already provided.

19 Given the time we have available, and
20 based on the number of participants, I will allow
21 each person ten minutes to make oral statements.
22 If you have more to say than you're given time
23 allowed, you should submit written comments to the
24 Board by the June 19th deadline.

25 Roll call. I have present Ann Hedges

1 from MEIC; Keri -- I don't see Keri's last name --
2 appearing.

3 MS. ENRIGHT-KATO: Keri Enright-Kato,
4 K-A-T-O, from US Climate Alliance.

5 PRESIDING OFFICER CLERGET: All right.
6 Then we have a phone number with the last four
7 digits 108. Could you please identify yourself.

8 MR. MAKUS: Yes. This is Erik Makus
9 from the EPA office here in Helena.

10 PRESIDING OFFICER CLERGET: All right.
11 And then we have a phone number with the last four
12 digits 141. Could you please identify yourself.

13 MR. KENNING: This is Jon Kenning with
14 DEQ, Helena.

15 PRESIDING OFFICER CLERGET: All right.
16 And then I have Joanna McLaughlin, Kurt Moser,
17 Laurie Crutcher, Matt Gibson, Rainie Devaney,
18 Rhonda Wiggers, Sandy Scherer. Is there anyone
19 whose name I missed?

20 (No response)

21 PRESIDING OFFICER CLERGET: In the chat
22 icon I have Matt Gibson who is speaking as an
23 opponent, and Ann Hedges who is speaking as an
24 opponent. Would anybody on the phone like to
25 speak as either a proponent, opponent, or a

1 general commenter?

2 (No response)

3 PRESIDING OFFICER CLERGET: So hearing
4 none, it looks like we only have two opponents, so
5 we'll allow DEQ to make their opening statements,
6 and then we'll skip right to opponents, and I will
7 call on you one by one by name. So Rainie, I
8 believe this is you giving this presentation, so
9 go ahead.

10 MS. DeVANEY: Yes. Good afternoon. For
11 the record, my name is Rainie DeVaney, first name
12 R-A-I-N-I-E, last name D-E-V-A-N-E-Y. I manage
13 the Montana Pollutant Discharge Elimination System
14 Program for the Montana Department of
15 Environmental Quality. I will now provide DEQ's
16 hearing statement.

17 The Department requests that the Board
18 revise and update portions of the MPDES program
19 rules. The proposed rule amendment has two
20 purposes: The first is to maintain consistency
21 with the Federal regulations governing the State
22 program; and the second is to provide clarity and
23 reduce redundancy through editorial corrections.

24 In June 2019, EPA finalized revisions to
25 the national permitting program regulations, and

1 adopted new application forms for individual
2 permittees. To maintain consistency with the
3 Federal program, states have been allowed one year
4 to make programmatic and regulatory changes, which
5 include permit application form updates, public
6 notice flexibility, and general permit
7 definitions.

8 Permit application form updates are
9 intended to promote submission of complete
10 application forms by clarifying timeline
11 requirements for data submission, updating
12 required industrial codes, requiring electronic
13 mail addresses, requiring permittees to indicate
14 whether cooling water is used, and requiring
15 permittees to indicate whether they intend to
16 request a variance.

17 The Federal permitting program is
18 allowing flexibility to publish public notices on
19 the Department's website, and will expand public
20 access to draft permits without impacting DEQ's
21 responsibility to ensure all interested
22 communities are informed.

23 The two added definitions will maintain
24 consistency with Federal regulations by describing
25 discharges that require MPDES permit coverage.

1 The proposed rule amendments also include Montana
2 specific editorial corrections to provide clarity
3 and reduce redundancy.

4 DEQ also submits a takings and
5 stringency analysis for the record. This
6 concludes DEQ's statement.

7 PRESIDING OFFICER CLERGET: All right.
8 Thank you, DEQ. Matt Gibson, let's hear from you
9 as an opponent.

10 MR. GIBSON: Thank you. Hi, everybody.
11 Matt Gibson with the Montana Newspaper
12 Association, here to speak in opposition
13 specifically to the changes to Rule 1372 regarding
14 newspaper notice.

15 The Montana Newspaper Association does
16 not perceive a web notice on a government website
17 as fulfilling the necessary function of notice,
18 which is to create government transparency, engage
19 citizens in the process, and build trust between
20 the government and the people.

21 There are several problems with limiting
22 notices to government websites. Among them, it's
23 really difficult to verify that a notice appeared
24 on a government website. The authentication of
25 web postings, the technology is in its infancy,

1 whereas a newspaper notice creates a permanent
2 record of the notice being placed, and is
3 supported with a sworn affidavit.

4 In addition, due process requires an
5 independent party to publish the notice and verify
6 the notice, and a newspaper notice does that, as
7 opposed to publishing notice on a government
8 website.

9 More practically, citizens don't look at
10 government websites to find public notice with the
11 kind of reliability and predictability that they
12 look to newspapers to find notices. The Montana
13 Newspaper Association also facilitates that by
14 aggregating every public notice placed in the
15 state of Montana at mtpublicnotices.com, which is
16 a searchable data base of every public notice
17 placed in the state via a newspaper.

18 Overall, we don't understand the
19 Government's stated motive to expand public
20 participation or notice with this rule change by
21 not placing the notices in newspapers. The
22 Government can certainly -- DEQ can certainly
23 place notice in any variety of manners, but the
24 legal requirement is to place it in newspapers.

25 Newspapers are the most effective place

1 for notices, and we would encourage the Government
2 to go ahead and utilize other platforms for
3 noticing the public, including their website, but
4 giving up newspapers does not seem like the most
5 effective and efficient path forward to create the
6 government transparency that the notices are
7 intended to satisfy. I'll close there. Thanks,
8 everybody.

9 PRESIDING OFFICER CLERGET: Thank you.
10 Ann Hedges, go ahead as an opponent.

11 MS. HEDGES: Ann Hedges with the Montana
12 Environmental Information Center in Helena,
13 Montana.

14 We also have -- really our primary
15 concern regards the section having to do with
16 public notice. I included in the chat function a
17 citation to a State of Montana library map of
18 broadband DSL and fiberoptic technology in
19 Montana; and you can see, if you click on that
20 link, the lack of availability of reliable and
21 quick internet service across this state.

22 https://mslservices.mt.gov/legislative_snapshot/Broadband/Default.aspx#ITSDMaps.

24 We have a very large state, and a lot of
25 people simply don't have access to the web like

1 you and I do in Helena, Montana. And a lot of
2 MEIC members rely on their local newspapers to
3 read these notifications.

4 And I would argue that for major permits
5 and MPDES general permits, in fact those are even
6 more important to make sure that the public is
7 notified and has access to that information.

8 So I would argue that in 17.30.1372 that
9 this moves DEQ in exactly the wrong direction for
10 notifying the public that there is a DEQ action
11 being taken in an area, especially in rural
12 Montana. People simply will not be looking at
13 DEQ's website, either because it's not part of
14 their regular routine, or because they simply
15 don't have good access to the internet.

16 So I would argue in that Section (e),
17 that instead of the term "in lieu of," DEQ replace
18 that with "in addition to," so that for these
19 major permits that DEQ does both. It's very easy
20 to put stuff up on the internet, and people like
21 me do search the internet regularly, but a lot of
22 my members do not. They get their local papers,
23 their weekly papers, and they read those.

24 So I would argue in those instances that
25 are even more important than most other permits in

1 the water arena, that DEQ does both. It does both
2 a listing on its website, and make that very easy
3 to find -- it's not always easy to find -- but
4 also notify in the local papers, the local
5 weeklies in particular.

6 And other than that, we don't have
7 problems with this rule. Thank you.

8 PRESIDING OFFICER CLERGET: Thank you.
9 Just for the record, I have emailed the link that
10 Ann posted in the chat function to both Sandy
11 Scherer and Laurie, and you can please include the
12 address of that link in Ann's comments. Ann, you
13 don't have any objection to that, I'm assuming.

14 MS. HEDGES: No. That would be great.

15 PRESIDING OFFICER CLERGET: And I just
16 want to be clear. We don't have anyone else who
17 wishes to make a comment. If you do, please speak
18 up now.

19 MR. MAKUS: This is Erik Makus with the
20 EPA. Can I make a comment?

21 PRESIDING OFFICER CLERGET: Yes, you
22 can. Please identify whether you're a proponent,
23 opponent, or a general commenter.

24 MR. MAKUS: Sure. So I'm a proponent of
25 this rule change. The changes made here line up

1 DEQ regs with Federal regulations that govern some
2 of these permitting tasks.

3 In particular, I can speak to the one
4 that we've been discussing, the option to publish
5 on the DEQ's website. So that is in the Federal
6 regulations. Other regions use that. And really
7 what the intent of that in the Federal regulation
8 I believe is is to just provide flexibility to the
9 permitting authority to try and reach as many
10 people as they can.

11 So if a newspaper, at least how we look
12 at it is if a newspaper is the best way to reach
13 people, then we use a newspaper. If publishing on
14 the website is the best way to reach people, then
15 we do that. So I see this as just providing a
16 little more flexibility to DEQ to accomplish their
17 mission.

18 PRESIDING OFFICER CLERGET: Thank you.
19 Does anybody else wish to make a comment?

20 (No response)

21 PRESIDING OFFICER CLERGET: Hearing
22 none, I will conclude the oral statements. Thank
23 you for your attendance and statements. The
24 public comment portion of the hearing is hereby
25 concluded.

1 The Department and I will report to the
2 Board of Environmental Review about this hearing,
3 and give the Board a summary of comments that are
4 received within the time allowed.

5 The Board will consider the matter at a
6 public meeting. A schedule of Board meetings,
7 agenda, and Board materials can be found at the
8 Board website at deq.mt.gov/deqadmin/ber, and you
9 should check the website to determine when this
10 matter will be considered by the Board looking at
11 their agendas.

12 That's all, and I conclude this hearing.
13 Thank you.

14 (The proceedings were concluded

15 at 1:25 p.m.)

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 19 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal this 22 nd day of
June, 2020.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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LEGISLATIVE SNAPSHOT

Broadband

- Highlights
- Featured Maps
- Montana Online Services
- Comparing Data Bitrates (speeds)
- Montana Public Library Broadband Speeds by Percent of Service Population
- Montana Telecommunications Assets Broadband Map
- State Information Technology Service Division Broadband Maps

Montana's broadband connectivity is a critical resource for purposes of education and employment, to access eGovernment services, and to participate broadly in our global world

Highlights

- The State of Montana has over 200 services available online, such as driver history records, hunting licenses and unemployment insurance. Visit the online services page at: <http://mt.gov/services/default.aspx>
- Broadband speeds of 2.4 megabytes per second are required for DVD-quality Netflix streaming.
- Public libraries provide no cost high speed internet for the majority of the state population.
- 2014 concludes the state broadband mapping program, <http://mtbroadband.org>.
- The National Broadband Plan is available at <http://www.fcc.gov/national-broadband-plan>

[View full Map Gallery](#)

Featured Maps



Montana Online Services

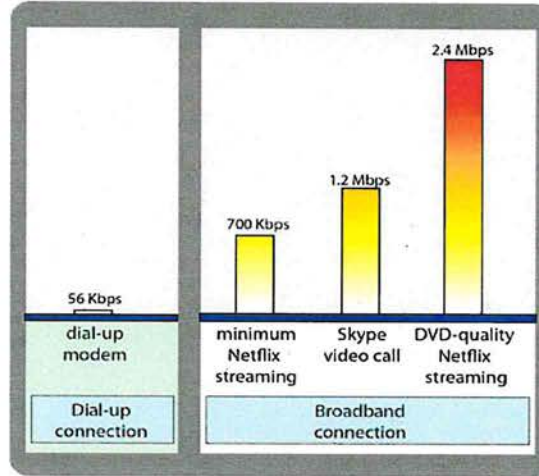
The official state website lists over 200 services in over 20 categories for available online services. Examples include:

- Driver History Records Service
- Hunting, Fishing, and Recreational Licenses
- Vehicle Registration Renewal Service

- Business Entity Annual Report
- Unemployment Insurance for You
- Child Support Payments
- Montana Cadastral
- Lookup Construction Licenses
- Hazardous Water Handlers

Visit the MONTANA.GOV Onlines Services page to find additional services: <http://mt.gov/services/>.

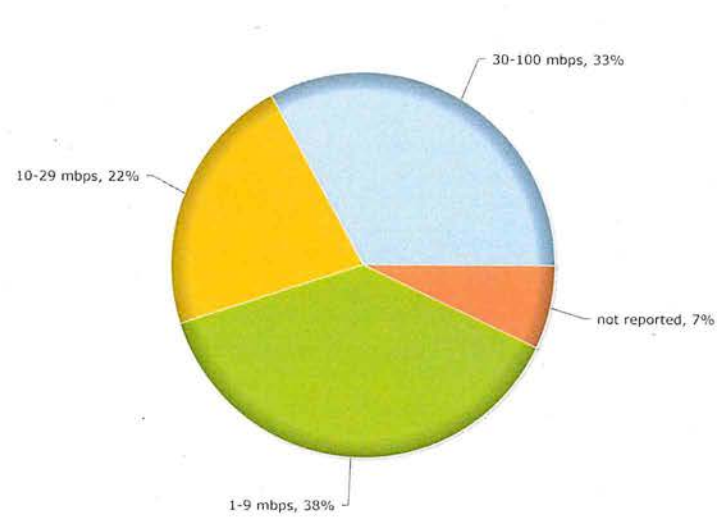
Comparing Data Bitrates (speeds)



Source

- State of Montana Broadband Website

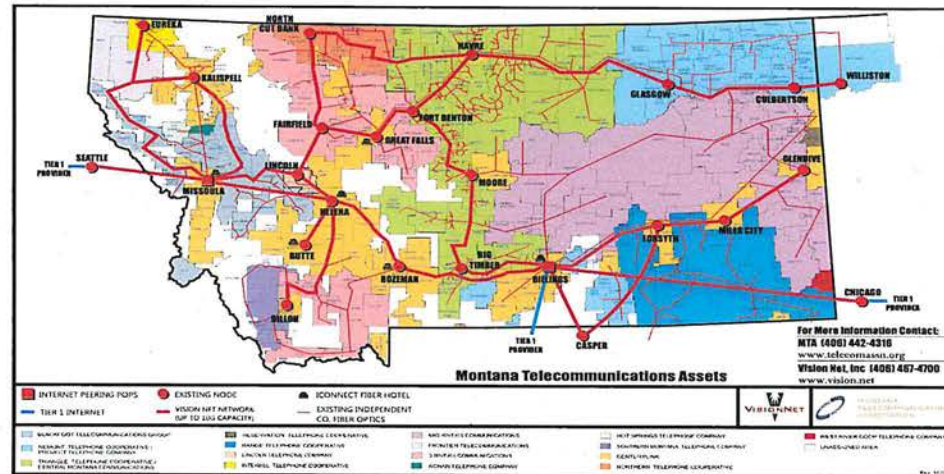
Montana Public Library Broadband Speeds by Percent of Service Population



Source

- Montana State Library, Statewide Library Resources Division
- Montana State Library, Statewide Library Resources Division, 2013 Public Library Statistics

Montana Telecommunications Assets Broadband Map



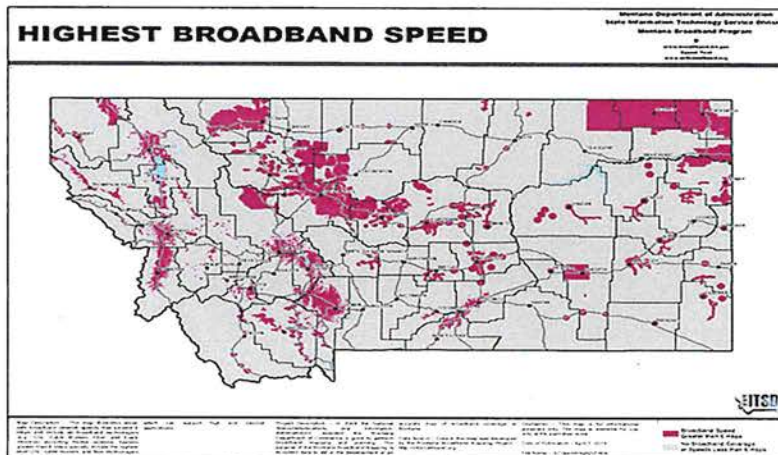
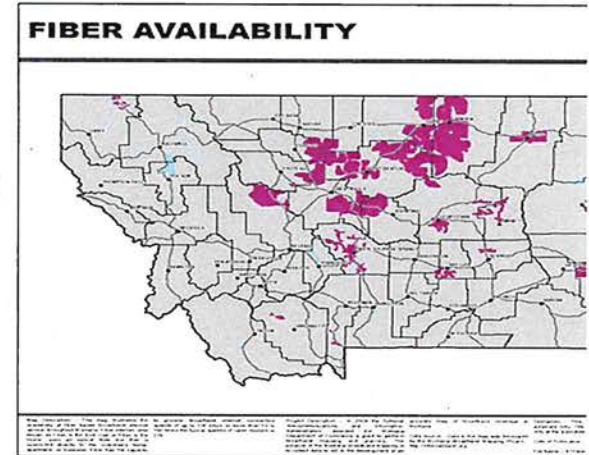
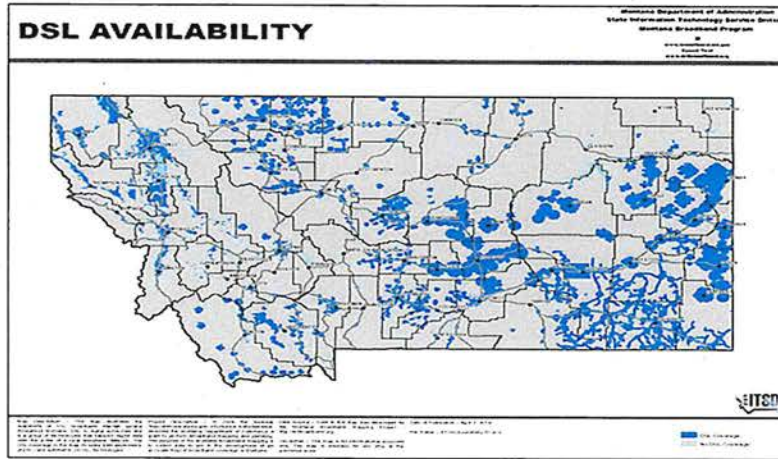
Source

- Montana Telecommunications Association

• Montana Telecommunications Association - Montana Telecommunications Assets, 2011

State Information Technology Service Division Broadband Maps

This broadband data was compiled with other states to create the National Broadband Map created and maintained by the National Telecommunications & Information Administration. Visit the National Broadband Map website at <http://www.broadbandmap.gov/technology> for additional information.



Source

- [Montana Department of Administration, State Information Technology Service Division, Montana Broadband Program](#)
- [Montana Department of Administration, State Information Technology Service Division, Montana Broadband Program - Static Maps](#)

[Skip to main content](#)



MEMORANDUM

To: Board of Environmental Review

From: Kurt R. Moser
DEQ Legal Counsel

Date: June 15, 2020

Re: HB 521 Analysis and Taking or Damaging Impact Assessment/Checklist

MAR Notice No. 17-411 - In the matter of the amendment of ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, 17.30.1361, and 17.30.1372 pertaining to MPDES program updates

HB 521 Analysis

(Comparing Stringency of State Rules to Any Comparable Federal Regulations or Guidelines)

Pursuant to House Bill 521, the Board, under § 75-5-203, MCA, may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstances, unless the Board and Department make certain written findings concerning the proposed rule after public hearing and comment.

The proposed amendments will maintain and ensure consistency with federal regulations and will remove outdated, redundant, or incorrectly referenced rules. The proposed amendments are also necessary to make certain editorial rule changes to maintain consistency with Secretary of State requirements and to provide necessary clarification. None of the proposed amendments concern the issue of stringency. However, to the extent the amendments may be considered for stringency purposes, the amendments are consistent with comparable federal regulations or guidelines and therefore no additional action is required per §75-5-203, MCA.

Private Property Assessment Act – HB 311

The Montana Private Property Assessment Act, §§ 2-10-101 through 2-10-112, MCA, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. An “action with taking or damaging implications” means:

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
17.30.1202, 17.30.1203, 17.30.1304,)	
17.30.1322, 17.30.1331, 17.30.1340,)	(WATER QUALITY)
17.30.1341, 17.30.1342, 17.30.1344,)	
17.30.1345, 17.30.1346, 17.30.1350,)	
17.30.1354, 17.30.1361, and 17.30.1372)	
pertaining to MPDES program updates)	

TO: All Concerned Persons

1. On April 30, 2020, the Board of Environmental Review published MAR Notice No. 17-411 pertaining to a notice of proposed amendments of the above-stated rules at pages 750-764 of the 2020 Montana Administrative Register, Issue Number 8.

2. The board has amended ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, and 17.30.1361 exactly as proposed.

3. The board has amended ARM 17.30.1372 as proposed but with the following changes, stricken matter interlined, new matter underlined:

17.30.1372 PUBLIC NOTICE OF PERMIT ACTIONS AND PUBLIC COMMENT PERIOD (1) through 5(d) remain as proposed.

(e) for major permits and MPDES general permits, in lieu of addition to the requirement for publication of notice in a daily or weekly newspaper, as described in (5)(b), the department may also publish all notices of activities described in (1) to the permitting authority's department's public website. ~~If the department selects this option for a draft permit, as defined in ARM 17.30.1304, in addition to meeting the requirements in (6), the department must post the draft permit and fact sheet on the website for the duration of the public comment period.~~

(6) through (8) remain the same.

4. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT NO. 1: We oppose ARM 17.30.1372(5)(e), which allows public notice for major permits and MPDES general permits on the permitting agency's website. Due process requires an independent party to publish and verify the public notice, and a newspaper notice does that, as opposed to a government website. We don't understand the Government's stated motive to expand public participation or notice by not placing notices in newspapers. The legal requirement is to place it in

newspapers.

RESPONSE: The board agrees, in part, with the comment. Section 2-3-103(1)(a), MCA, requires each agency to develop procedures for encouraging the public to participate in agency decisions of significant interest to the public. Government websites are increasingly becoming the avenue for the dissemination of information to the public and the proposed amendment aligns with federal rule amendments. However, to encourage public participation, the board will continue to require newspaper notice for major and MPDES general permits and will clarify that the department may, in addition, provide notice of proposed permit actions on its public website.

COMMENT NO. 2: Citizens don't use government websites to find public notice with the reliability and predictability that they look to newspapers to find notices. The technology of authenticating web postings is in its infancy, but a newspaper notice creates a permanent record and is supported with an affidavit. Also, the Montana Newspaper Association aggregates every public notice placed in the state of Montana on a searchable database.

RESPONSE: See response to NO. 1.

COMMENT NO. 3: ARM 17.30.1372(5)(e) should be revised to require public notice on the agency website in addition to the newspaper requirement for major permits and general permits. The Montana State Library has a map of broadband DSL and fiberoptic technology that demonstrates not all Montanans have access to reliable and quick internet service, especially in rural areas.

RESPONSE: See response to NO. 1.

COMMENT NO. 4: The option to publish public notice on the agency website is in the federal regulations, and other regions use it. The intent of ARM 17.30.1372(5)(e) is to provide flexibility to the permitting authority, so they may reach as many people as possible. A newspaper should be used if it is the best way to reach people, and an agency website should be used if it is the best way to reach people.

RESPONSE: The board agrees with the comment. See also response to NO. 1.

COMMENT NO. 5: "I am a proponent of this rule change, as it lines up DEQ regulations with federal regulations that govern permitting tasks."

RESPONSE: The board and the department thank you for the comment. See also response to NO. 1.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes

EDWARD HAYES

Rule Reviewer

BY: /s/

CHRISTINE DEVENY

Chair

Certified to the Secretary of State, October 13, 2020.

[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.

§ 2-10-103(1), MCA.

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. A completed Attorney General checklist for the proposed rules is attached. Based on the guidelines provided by the Attorney General, the proposed rule amendments do not constitute an "action with taking or damaging implications" in violation of the United States or Montana Constitutions.

Attachment A: Attorney General HB 311 Checklist

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

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

YES	NO		
<input checked="" type="checkbox"/>	<input type="checkbox"/>	1.	Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	2.	Does the action result in either a permanent or indefinite physical occupation of private property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	3.	Does the action deprive the owner of all economically viable uses of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	4.	Does the action deny a fundamental attribute of ownership?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	5.	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 5a. and 5b. and continue with question 6.]
<input type="checkbox"/>	<input type="checkbox"/>	5a.	Is there a reasonable, specific connection between the government requirement and legitimate state interests?
<input type="checkbox"/>	<input type="checkbox"/>	5b.	Is the government requirement roughly proportional to the impact of the proposed use of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	6.	Does the action have a severe impact on the value of the property?
<input type="checkbox"/>	<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 NO, do not answer questions 7a. – 7c.]
<input type="checkbox"/>	<input type="checkbox"/>	7a.	Is the impact of government action direct, peculiar, and significant?
<input type="checkbox"/>	<input type="checkbox"/>	7b.	Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
<input type="checkbox"/>	<input type="checkbox"/>	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, 4, 6, 7a, 7b, 7c; or if NO is checked in response to questions 5a or 5b.

If taking or damaging implications exist, the agency must comply with § 5 of the Private Property assessment Act, 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, Chair of the Board of Environmental Review of the State of Montana, by virtue of and pursuant to the authority vested in me by Sections 75-5-201, 75-5-304, 75-5-401, MCA, do promulgate and adopt the proposed amendments to-wit:

- AMD: 17.30.1202 Definitions
- 17.30.1203 Criteria and Standards for Imposing Technology-Based Treatment Requirements in MPDES Permits – Variance Procedures
- 17.30.1304 Definitions
- 17.30.1322 Application for a Permit
- 17.30.1331 Concentrated Aquatic Animal Production Facilities and Aquaculture Projects
- 17.30.1340 New Sources and New Dischargers
- 17.30.1341 General Permits
- 17.30.1342 Conditions Applicable to All Permits
- 17.30.1344 Establishing Limitations, Standards, and Other Permit Conditions
- 17.30.1345 Calculating MPDES Permit Conditions
- 17.30.1346 Duration of Permits
- 17.30.1350 Schedules of Compliance
- 17.30.1354 Disposal of Pollutants into Wells, into Publicly Owned Treatment Works, or by Land Application
- 17.30.1361 Modification or Revocation and Reissuance of Permits

and the proposed amendment as modified in response to public comment to-wit:

- AMD: 17.30.1372 Public Notice of Permit Actions and Public Comment Period

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 October 9, 2020

CERTIFIED TO THE
SECRETARY OF STATE October 13, 2020

BOARD OF ENVIRONMENTAL REVIEW

BY: /s/
CHRISTINE DEVENY, CHAIR

DRAFT



TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Deb Sutliff, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE:

SUBJECT: Board of Environmental Review Case No. BER 2020-03 SUB

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW	
OF THE STATE OF MONTANA	
IN THE MATTER OF: NOTICE OF APPEAL BY NICHOLAS AND JANET SAVKO, REGARDING FLOODPLAIN SETBACKS, GALATIN COUNTY, MT	Case No. <u>BER 2020-03 SUB</u>

On September 28, 2020 the BER has received the attached request for hearing.

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

Ed Hayes
Deputy Chief Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Kevin Smith, Ashley Kroon, Steve Lipetzky
Water Quality
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

CHRISTOPHER B. GRAY

GRAY LAW OFFICE

P.O. Box 1065
BOZEMAN, MT 59771
406-551-4511
CGRAY@CGRAYLAW.COM
WWW.CGRAYLAW.COM

Electronically Filed with the
Montana Board of
Environmental Review

This 28th day of September, 2020

at 9:24 am o'clock

By: Deb Sutliff



September 18, 2020

VIA EMAIL (Steven.Lipetzky@mt.gov) AND REGULAR MAIL

Mr. Steve Lipetzky, PE
Montana Department of Environmental Quality
Public Water and Subdivision Section
PO Box 200901
Helena, MT 59620-0901

NOTICE OF APPEAL and REQUEST FOR HEARING
Savko-COSA/RSR
EQ# 14-1784

Dear Lipetzky:

I represent Nicholas Savko who in turn is the representative for Janet Savko and Jennifer Connors as the owners the real property subject to EQ# 14-1784. On their behalf I submit this notice of appeal and request for hearing regarding your August 20, 2020 decision (Decision) set forth in the attached letter to Brandon Spitzer of Kerin & Associates.

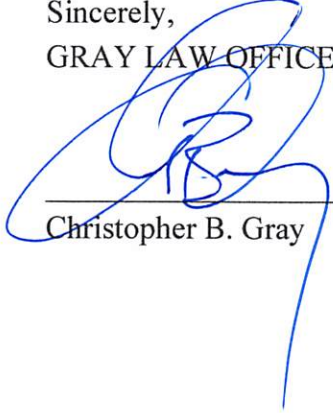
As directed this appeal notice of the Decision is made pursuant to Section 76-4-126, MCA and the Montana Administrative Procedures Act as well as other applicable legal authority.

Fully reserving all if its rights to present a full appeal, we state that generally the basis and grounds for the appeal and request for hearing are the arbitrary nature of the Decision which is not based on the substantive applications for approval, the misapplication of regulations relevant at the time of the applications, the procedural infirmities created by the Department of Environmental Quality, and the changed circumstances after the initial applications.

Consistent with these reasons, please note that Section 76-4-126(2), MCA requires the Department to refer this matter to local authorities under certain conditions. Based on the nature of the Decision, the grounds for denial of approval are based on non-compliance with local laws other than minimum standards for the control and disposal of sewage. In filing this appeal of the Decision, we reserve the ability to present issues which would merit referral to the Gallatin City-County Health Department.

Please contact me (or have DEQ legal counsel) with the next steps regarding this appeal.

Sincerely,
GRAY LAW OFFICE



Christopher B. Gray



August 20, 2020

Brandon Spitzer, PE
Kerin & Associates, P.C.
517 S. 22nd Ave., Suite #4
Bozeman, MT 59718

RE: Savko – COSA/RSR
Resubmittal Memo
Gallatin County
EQ # 14-1784

Dear Mr. Spitzer:

As discussed during our July 30th, 2020 conference call; the subject subdivision submittal has recently received County planning and floodplain approval, and you are preparing to resubmit the remaining information to continue review of the application to remove sanitary restrictions on the lot. During that phone call, we also discussed your planned steps moving forward. During that call, you also asked the Department's stance concerning the previously reviewed and approved setback waivers as well as the proposed steps outlined in your June 24, 2020 email. These planned steps include:

- Submittal of additional information to address previous deficiency identified including:
 - A waiver to allow less than 100-feet between the recirculating media trickling filter and a floodplain
 - County variances for 3 previously reviewed setback waivers; two previously approved (July 1, 2014): 1) drainfield to floodplain, 2) drainfield to surface water, and 3) RMTF to floodplain

Regarding the 'Planned Steps': the 100-foot RMTF setback to floodplain was previously submitted and denied on July 1, 2014. The waiver was denied because the rules in effect at the time the application was submitted did not allow a waiver from the setback. A letter was submitted on July 29, 2014 from Kerin & Associates requesting the submittal be reviewed pursuant to the administrative rules (Title 17 Chapter 36) effective August 8, 2014. These rules allowed for a waiver from the RMTF setback. The July 29, 2014 acknowledged that the rules would apply to the entire submittal. The waiver was resubmitted on May 13, 2016 but not reconsidered because of the on-going floodplain study at the time.

Regarding the previously approved setback waivers: the rules regarding the drainfield to floodplain and drainfield to surface water have changed in August 8, 2014. If the RMTF to floodplain setback is being reviewed against the rules in effect August 8, 2014 the drainfield setbacks will need to be reconsidered against those rules as well.

- Drainfield to Surface Water or Floodplain (ARM 17.36.323)
 - **Rule in effect when submitted** – 100-foot; (3) A waiver of the setback distance between

RE: Savko – COSA/RSR
Resubmittal Memo
Gallatin County
EQ # 14-1784

drainfields/sand mounds and surface waters, springs, and floodplains may be granted by the Department pursuant to ARM 17.36.601, only if: (a) the applicant demonstrates that groundwater flow at the drainfield site cannot flow into the surface water or spring; or (b) the surface water or spring seasonally high water level is a minimum of 100 feet horizontal distance from the drainfield and the bottom of the drainfield is at least two feet above the floodplain elevations.

- **Rule in effect August 8, 2014 (same as current)** – 100-foot; (11) the Department may require more separation from the floodplain or from surface water or springs if it determines that site conditions or water quality requirements indicate a need for the greater distance; and (14) after consultation with the local health department, a waiver may be granted by the Department, pursuant to ARM 17.36.601, if the applicant demonstrates that the surface water or spring seasonal high water level is at least a 100-foot horizontal distance from the drainfield **and** the bottom of the drainfield will be at least two feet above the maximum 100-year flood elevation.

If you wish to appeal the Department's denial of certification, you may request a hearing before the Board of Environmental Review, pursuant to Section 76-4-126, MCA and the Montana Administrative Procedures Act.

If you have any questions regarding the above, please contact me at the Water Quality Division at 406-444-5368, or email at Steven.Lipetzky@mt.gov.

Sincerely,



Steve Lipetzky, PE
Environmental Engineer
Public Water & Subdivision Section
Engineering Bureau

cc: file
Gallatin County Sanitarian
owner