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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, APRIL 17, 2020
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone at 444-5270, or by e-mail at lindsay.ford@mt.gov, at least 24 hours before the meeting to advise her of the nature of the accommodation(s) needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the January 24, 2020, meeting minutes.

2. The Board will vote on adopting the February 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. A hearings examiner was appointed to the contested case and, after a short stay, the parties filed cross-motions for Summary Judgment. The prior hearing examiner, Mr. Haladay, issued an Order granting in part and denying in part both parties' Motions for Summary Judgment on August 1, 2017. Ms. Clerget assumed jurisdiction as the hearing examiner on September 8, 2017. On February 22, 2018 she denied CR/REF's motion to reconsider Mr. Haladay's summary judgment rulings and ruled on the parties' motions in limine. She then conducted a three-day hearing on February 26-28, 2018. Based on that hearing, Ms. Clerget issued Proposed Findings of Fact and Conclusions of Law (FOFCOL) to the Board on July 16, 2018. At the December 7, 2018 meeting, the BER lost its quorum before it could reach a final decision. The BER then requested additional briefing from the parties regarding the owner/operator issue and set a special meeting for February 8, 2019 to continue oral argument. The parties each submitted additional briefs on the owner/operator issue on January 17, 2019. At the February 8, 2019 special meeting, the BER clarified and interpreted the definition of "owner or operator" in the Administrative Rule,

vacated the proposed FOFCOL, and remanded the matter back to Ms. Clerget for further proceedings. Consistent with the Board's instructions, Ms. Clerget reviewed the available record, consulted with the parties, issued Orders holding that the record would be re-opened with respect to the owner/operator issue, and set a second hearing schedule. On May 2 and 8, 2019, CR/REF filed *Motions in Limine*. Ms. Clerget heard oral argument on those motions at the pretrial conference on May 23, 2019 and prior to the hearing granted them. Ms. Clerget held a second, one-day hearing on June 13, 2019, on the owner/operator issue. On July 8, 2019, Ms. Clerget issued her proposed FOFCOL on the owner operator issue. The Board reviewed the second proposed FOFCOL and heard oral argument from the parties at its August 9, 2019 meeting. The Board then remanded the case back to Ms. Clerget for additional findings concerning the 4 photographs excluded by the grant of CR/REF's *Motions in Limine* prior to the June 13, 2019 owner/operator hearing. Consistent with the Board's instructions, Ms. Clerget consulted with the parties and set a new schedule for the third remand. On February 21, 2020 Ms. Clerget issued an Order denying CR/REF's motion to sever the two cases (CR and REF) and ordered that the cases proceed as combined for procedural purposes. The parties therefore continue to proceed according to the current Scheduling Order (issued November 25, 2019) for the third remand, with discovery closing at the end of April.

b. **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**. On December 16, 2019, the Board received an appeal from Signal Peak Energy, LLC. That same day, DEQ filed a Notice of Appearance and a Motion to Dismiss Claim. On December 26, 2019, Signal Peak filed a Motion for Extension of time. On December 30, 2019, Signal Peak filed a Joint Motion for Stay. On December 31, 2019, the Board Chair issued an Order Granting the Unopposed Joint Motion to Stay the Proceedings. On February 7, 2020 the Board assigned the case, in its entirety, to Sarah Clerget as hearing examiner. On March 26, 2020 the parties filed separate status reports, both requesting extensions of the stay, but for different periods (DEQ requested two weeks, and Signal Peak requested 60 days). On April 1, 2020 Ms. Clerget issued an order granting the stay and ordering the parties to either file a stipulation for dismissal based on settlement or a proposed litigation schedule by April 30, 2020.

2. Non-enforcement cases assigned to the Hearings Examiner

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**. On July 3, 2019 Alpine Pacific Utilities filed a request for hearing with the Board. The Board assigned Sarah Clerget as the hearing examiner on August 9, 2019. On February 7, 2020 DEQ and Alpine filed a joint motion for stay of proceedings. The parties indicated in their motion that they are in settlement discussions. Ms. Clerget issued an Order granting the stay on February 10, 2020 and directed the parties to file a status report with an amended proposed schedule within 30 days. The parties filed a joint status report as directed, made a joint motion for 30-day extension, and provided an alternative proposed amended schedule. On March 12, 2020, Ms. Clerget granted the joint motion to

stay. The parties are expected to file either a proposed settlement or a proposed amended schedule by April 13, 2020.

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 BER 2019-07 WQ.** On August 9, 2019, the City of Great Falls filed a request for hearing with the Board. The Board assigned Sarah Clerget as hearing examiner on October 4, 2019. A Prehearing Order was issued in this case on October 15, 2019 and the parties submitted an agreed upon schedule on October 29, 2019. Ms. Clerget issued a Scheduling Order on October 31, 2019. The parties submitted a joint motion to amend portions of the October Scheduling Order. Ms. Clerget granted that motion and Amended the scheduling order on March 20, 2020. Calumet Montana Refining, LLC has filed a motion to file brief as amicus curiae, which was fully briefed on March 2, 2020. Ms. Clerget will issue an order on that motion as soon as possible.

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.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing. A hearing examiner was assigned and Sarah Clerget assumed jurisdiction on September 8, 2017. When Ms. Clerget assumed jurisdiction, the case had been stayed pending a Montana Supreme Court decision. That decision was issued in September 2019. On November 22, 2019, the parties submitted a joint proposed schedule. Ms. Clerget issued a Scheduling Order on November 27, 2019, which set deadlines through dispositive motions, which will be fully briefed in December of 2020.

d. **In the Matter of the Notice of Appeal and Request for Hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.** Ms. Clerget conducted a two-day hearing on this matter on December 3-4, 2018. At the parties' request, Ms. Clerget also allowed oral argument before her on May 7, 2019, regarding the parties' proposed FOFCOLs. On August 19, 2019, Montanore filed a Notice of Supplemental Authority. The Notice stated that 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 by MEIC, Save Our Cabinets, and Earthworks challenging DEQ's issuance of MPDES Permit No. MT0030279). While the District Court action was ostensibly limited to conditions of the MPDES Permit that were not at issued before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this contested case. Through status reports filed 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. On September 17, 2019, Ms. Clerget granted the stay. The parties have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The appellants filed their opening briefs on January 24, 2020. The appellees have requested and were granted an extension of time until April 10, 2020 in which to file their response brief.

e. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC, BER 2019-04 MFSA**. 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 12, 2019, Talen filed a Motion to Dismiss Westmoreland's Appeal, which was fully briefed on August 8, 2019. On August 14, 2019, Ms. Clerget held oral argument on Talen's Motion to Dismiss, at which all parties appeared and argued. On August 20, 2019, Ms. Clerget issued an Order granting in part and denying in part Talen's Motion to Dismiss. The Order also reset some of the procedural deadlines. On November 13, 2019, the parties filed an "Expedited Joint Motion to Suspend Schedule." The parties sought to suspend the schedule for 30 days pending motions to govern proceedings. On December 17, 2019, the parties filed a Joint Motion to Govern Proceedings which suspended the proceedings through January 17, 2020. On January 17, 2020, Talen filed a Motion requesting a continued stay or, in the alternative, a return to active litigation. Westmoreland filed a Motion to Vacate, which essentially requests dismissal of the case. The motions are fully briefed and awaiting a decision from Ms. Clerget. The parties have also filed a Joint Notice of Executed Coal Supply Agreement. On March 12, 2020 Ms. Clerget asked the parties for additional briefing regarding the Joint Notice, which they completed. The supplemental briefing indicated that the Executed Coal Supply Agreement does not fundamentally change the parties' positions as stated in their briefs. Ms. Clerget will issue an order on the pending motions as soon as possible.

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, BER 2019-02 WQ**. On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. Ms. Clerget issued a Scheduling Order on June 21, 2019 setting October 31, 2019 as the deadline for parties to file proposed scheduling deadlines or a stipulation. By the October deadline the parties filed a Joint Motion for Extension of Time which was granted. The parties then filed two subsequent motions for extensions of time citing settlement negotiations, which Ms. Clerget granted, ordering that the parties will either file a stipulated settlement agreement or a joint proposed scheduling order by May 1, 2020.

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**. On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. On July 15, 2019, this contested case was stayed pending settlement of several of the contested issues in this case. The parties submitted a Stipulation on December 4, 2019 settling appeal issues Nos. 3, 4, 6, 7, and partially No. 5. 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 with the parties in January and March and subsequently issued Orders continuing a stay in this case due to pending DEQ rulemaking, which has the potential to affect the remaining issues in the case. A status conference will be held with the parties on April 24, 2020.

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.** 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.

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**.

I. **District Court Case:** The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause No. DA 19-0299. Opening briefs were filed September 20, 2019. The BER has retained Amy Christensen to represent it before the Supreme Court.

II. **Contested Case:** On May 31, 2019 the Board assigned the case to Ms. Clerget. Ms. Clerget issued an Order on Cross Motions for Summary Judgment on November 14, 2019, which granted partial summary judgment on one issue, and denied summary judgment on the remaining issues. A scheduling conference was held on November 26, 2019 and a two-day hearing is scheduled for April 2020. Consistent with the Scheduling Order, the parties all filed *Motions in Limine*, which were fully briefed on March 19, 2020. Ms. Clerget held telephonic oral argument on those *Motions in Limine* on March 30, 2020. Prior to the oral argument, the parties also discussed and agreed to reschedule the April in-person hearing due to the Covid-19 pandemic. The parties are discussing new hearing dates with the hearing assistant, but it seems likely the hearing will be rescheduled for mid-August 2020. Ms. Clerget will issue an order on the *Motions in Limine* as soon as possible.

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.** 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. On December 19, 2019, Ms. Clerget issued a Prescheduling Order seeking clarification as to the parties' representation in this matter. Several parties and the homeowner's association submitted notices of appearance. John De Groot (BER 2019-13 OC), Robert N. Beall, Robert Beall Jr., Keith Beall (BER 2019-21 OC), Stephen Richard and Victoria Angyus (BER 2019-09 OC) and Linda Slater (BER 2019-11 OC) failed to enter notices of appearances, and therefore their cases were dismissed on January 30, 2020. Attorneys for the Bloomquist Firm have since entered notices of appearance for the remaining individual residents and the homeowner's association. Pursuant to

the January 30, 2020 Scheduling Order and a stipulation of all parties, the HOA and Residents filed an amended Statement of Issues on Appeal on February 21, 2020. The parties are proceeding according to the Scheduling Order, with dispositive motions to be fully briefed by August 4, 2020.

3. Contested Cases not assigned to a Hearing Examiner

   a. **In the Matter of the Notice of Appeal and Request for Hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ**.
   On 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. On October 10, 2019, MEIC and Sierra Club (MEIC) filed a petition for rehearing to amend the Opinion arguing the Montana Supreme Court's remedy, reversing the District Court's summary judgment and remanding questions of fact to the District Court is in conflict with controlling decisions that were not addressed by the Montana Supreme Court. DEQ and WECo objected to MEIC's petition. On November 19, 2019, the Montana Supreme Court held its Order was not in conflict with a statute or controlling decision not addressed and MEIC's petition for rehearing was denied. On December 6, 2019, Westmoreland Rosebud Mining Company (formerly Western Energy Company) filed a motion for substitution of District Judge Seeley. Judge Seeley invited Judge Reynolds to assume jurisdiction of the case. Jurisdiction was assumed by Judge Reynolds on December 18, 2019. On April 7, 2020, Plaintiffs (MEIC and Sierra Club) filed a motion for scheduling conference.

III. ACTION ITEMS

A. APEAL, AMEND, OR ADOPT FINAL RULES

1. **The Department requests the Board initiate rulemaking for NEW RULE I.**
   The department has developed nonanthropogenic arsenic standards for segments of the Yellowstone River. The river originates in Yellowstone National Park, and the park's geothermal features are a natural source of elevated arsenic. As a result, arsenic concentrations are naturally elevated above the human health standard (10 µg/L) from the park to approximately Billings, MT. During the meeting the department will provide the scientific and technical background on the development of the

standards, recommend standards for four different river segments, and request the board initiate rulemaking.

Public comment.

2. **The Department will propose that the Board initiate rulemaking for 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:**
    a. maintain consistency with the federal program,
    b. adopt the updated federal individual permit application forms,
    c. provide flexibility in the public notice process by eliminating the requirement to publish notice in newspapers, and
    d. provide clarity and reduce redundancy through editorial corrections.

Public comment.

B. ACTION ON CONTESTED CASES

1. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.** On August 30, 2019, Ms. Clerget issued her Order on the parties' motions including (1) leave to file second amended complaint; (2) motion in limine; and (3) cross-motions for summary judgment. Golden West and DEQ requested a new pretrial motion deadline, which was granted on September 18, 2019. The parties submitted an amended agreed upon schedule and Ms. Clerget issued an Amended Scheduling Order on September 25, 2019. Pursuant to the schedule, DEQ and Golden West filed second motions for summary judgment, which (after several extensions) were fully briefed on November 21, 2019. On January 30, 2020, Ms. Clerget issued her Proposed Findings of Fact and Conclusions of Law to the Board, recommending dismissal the case based on the prior order on Motions to Dismiss and the Second Motions for Summary Judgment. On February 21, 2020, counsel for the Residents filed an Unopposed Motion to Dismiss Frank and Paulette Wagner from this case. That same day the parties filed a Stipulation for Dismissal of Appeal, which asks the Board to dismiss the case, but also enter the Proposed FOFCOL as the Board's final order.

2. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County)(District Court).** On June 6, 2019 the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. The BER has retained Amy Christensen to represent it in this matter at the District Court. On March 12, 2020 the Court issued an Order denying the Board's Motion to Dismiss.

3. **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, stating that the Board would revisit the assignment if/after dispositive motions were filed. Ms. Clerget has now presided over the procedural aspect of the case and the parties have proceeded according to her scheduling order. Discovery is now complete, and all of the parties have submitted partial motions for summary judgment, which are now all fully briefed. The Board must now decide whether it wishes to retain the summary judgment review and decision – and if so, the logistics and timing of that review with the parties – or assign the case to a hearing examiner in its entirety.

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

DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MINUTES

January 25, 2020

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, January 25, 2020 in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members resent in person: Chairperson Christine Deveny

Board Members present by telephone: John DeArment, David Lehnherr, Hillary Hanson, Chris Tweeten, Dexter Busby

Board members absent: None

Board attorney present: Sarah Clerget, Attorney General's Office (AGO)

Board Liaison Present: Tim Davis

Board Secretary Present: Sara Nelsen

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department personnel present: Aaron Pettis, Sandy Scherer, Angie Colamaria, and Ed Hayes, Rachel Clark

Roll was called: Chairperson Deveny attended in person, and five members attended via conference call, forming a quorum.

I. Action Item

In the Matter of the amendment of ARM 17.36.802 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule I pertaining to certification under 76-4-127, MCA (MAR 17-405). The board will review the proposed Notice of Amendment and Adoption.

Rachel Clark presented the Department's recommendation that the Board adopt the amendment to ARM 17.38.106, the stringency, takings, small business analysis, and the small business supplemental memorandum.

Chairperson Deveny asked the Department to apprise the Board of all their updates to the Environmental Quality Committee.

Chairperson Deveny moved to adopt the rules, Mr. Lehnherr seconded. The motion was amended by Chairperson Deveny; Mr. Lehnherr seconded. The motion passed 5 to 0 with Ms. Hanson abstaining.

II. Public Comment(s)

None

III. Adjournment

Chairperson Deveny adjourned the meeting at 9:24 a.m.

Board of Environmental Review January 24, 2020, minutes approved:

_____

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

_____

DATE

DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MINUTES

February 7, 2020

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, February 7, 2020, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members present in person: Chairperson Chris Deveny, Dexter Busby

Board Members Present by telephone: David Lehnherr, Hillary Hanson, Chris Tweeten

Board Members absent: John DeArment

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

Board Liaison Present: George Mathieus

Board Secretary Present: Sara Nelsen

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department personnel present:
Kirsten Bowers, Kurt Moser, Ed Hayes, Angie Colamaria, Sarah Christofferson, Sandy Scherer, William George, Galen Steffens, Derek Fleming, Mike Suplee, Jon Kenning, Joanna McLaughlin, Melinda Horne, Darryl Barton, Rainey DeVaney, Ed Coleman

Interested and other parties present: Vicki Marquis – Holland and Hart

Roll was called: two Board Members were present in person, and three members joined via conference call, forming a quorum.

I.A. Administrative Items - Review and Approve Minutes

I.A.1. **December 13, 2019, Meeting Minutes**

Chairperson Deveny moved to approve the meeting minutes. Mr. Busby seconded the motion, which passed unanimously.

II.A.1. Briefing Item - Contested Case Updates - Enforcement Cases Assigned to the Hearing Examiner

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

Ms. Clerget stated the case was dismissed.

II.A.1.b. **In the matter of violations of the Water Quality Act by reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and in the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ**.

Ms. Clerget stated a fully briefed motion to sever the cases is before her for decision. The case is proceeding according to the scheduling order.

II.A.2. Briefing Item - Contested Case Updates - Non-Enforcement Cases Assigned to the 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.**

The scheduling order is in place and the parties are proceeding accordingly.

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, BER 2019-07 WQ.**

The scheduling order is in place and the parties are proceeding accordingly.

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.**

The scheduling order is in place and the parties are proceeding accordingly.

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.**

The case is stayed pending the outcome of the Supreme Court appeal.

II.A.2.e. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision, BER 2018-05 OC.**

Ms. Clerget issued an order granting summary judgement. Parties have a schedule for exception briefs and will present oral arguments to the Board at the April meeting.

Chairperson Deveny noted the Board should plan on attending in-person, and Ms. Clerget emphasized the benefits to that, due to the number of parties and complexity. She added that the April date is quite definite.

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

The parties are amid negotiations. Ms. Clerget stated the case may be before the Board.

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

The parties have until February 28, 2020, to file a settlement agreement or ask for a scheduling order.

II.A.2.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**.

Ms. Clerget clarified this will be referred to as “Western Energy Area F” due to multiple-named cases. Parties have filed for partial summary judgement and a decision will be issued shortly.

II.A.2.i. **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**.

The case is stayed pending finalization of DEQ rulemaking.

II.A.2.j. **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.**

The case is stayed pending finalization of DEQ rulemaking.

II.A.2.k. **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.**

Chairperson Deveny read outside counsel Amy Christensen's update:

i. District Court Case

Signal Peak appealed the District Court's order denying its request to obtain discovery. BER filed a notice of non-participation. If the oral argument is not ordered by the court, the case will be submitted for decision after the reply brief is filed.

ii. Contested Case

The hearing is scheduled for April 2020.

II.A.2.l. **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 reminded the Board there were 14 separate cases that were combined for procedural purposes. Several of the appeals were dismissed, leaving the Homeowners Association and a few appellants who are proceeding according to the scheduling order.

II.A.3. Contested Cases Not Assigned to A Hearing Examiner

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

Ms. Bowers stated the case was remanded to the First Judicial District Court after the Montana Supreme Court's order.

II.A.3.b. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).**

Chairperson Deveny read outside counsel Amy Christensen's update: the motion is fully briefed and awaiting decision. The court issued an amended scheduling order and the case is ongoing.

II.B. Other Briefing Items

II.B.1. **The Department will update the Board about upcoming proposed rulemaking to establish a nonanthropogenic water quality standard for arsenic in the Yellowstone River.**

Dr. Suplee of DEQ gave a status update on this matter, and notified the Board of DEQ's intent to appear before the Board in April to request rulemaking for these standards.

Chairperson Deveny clarified the Board's expectation for a detailed summary of the proposal at the April meeting.

III.A.1. Action Item - Appeal, Amend, Or Adopt Final Rules

III.A.1. **The Department is requesting that the Board solicit comments from all interested persons on any water quality standard found in the Administrative Rules of Montana, Title 17, chapter 30.**

Ms. Steffens requested the water quality standards be opened a 60-day public comment period followed with a hearing, to initiate DEQ's mandated triennial review. Public outreach and input will continue, and Ms. Steffens intends to ask the Board to authorize rulemaking activities this summer.

Chairperson Deveny moved to direct the Department to solicit comments on the water quality standards, initiate public comment process, and assign the process to Hearings Officer Sarah Clerget. Mr. Tweeten seconded the motion which, passed unanimously.

III.B.1. Action Item – New Contested Case

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

Ms. Clerget gave the Board members their options, including assigning it to the Hearings Examiner for the totality of the case.

Mr. Busby moved to assign the case for all purposes to Ms. Clerget. Mr. Lehnherr seconded the motion which passed unanimously.

IV. Board Counsel Update

Ms. Clerget talked about the required rule review they're performing, with DEQ.

V. Public Comment

None were offered.

VI. Adjournment

Chairperson Deveny moved to adjourn the meeting. Mr. Busby seconded the motion which passed unanimously. Chairperson Deveny adjourned the meeting at 9:51 a.m.

Board of Environmental Review February 7, 2020, minutes approved:

_____

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

_____

DATE

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

Agenda Item # III.A.1.

Agenda Item Summary – The department requests the board initiate rulemaking for NEW RULE I.

The board has been granted authority to adopt nonanthropogenic water quality standards when the otherwise applicable standards are more stringent than the nonanthropogenic condition of the waterbody; correspondingly, the department may not apply a water quality standard to a water body that has a nonanthropogenic condition greater than the standard (75-5-222, MCA). In such cases, the nonanthropogenic condition is the standard. Further, it is not necessary to treat wastes to a condition purer than the natural condition (75-5-306, MCA). NEW RULE I establishes a framework for adopting water quality standards based on natural or nonanthropogenic conditions, and establishes nonanthropogenic-based arsenic standards for segments of the Yellowstone River. Natural or nonanthropogenic water quality standards are established because natural or nonanthropogenic effects on the landscape have resulted in pollutant concentrations in state surface waters that exceed the otherwise applicable water quality standards. NEW RULE I has been drafted so that standards for other parameters for named waterbodies, waterbody segments, or groups of waterbodies within specified geographic regions can can be incorporated under the same rule at a later time.

The first water quality standards incorporated under NEW RULE I are for elevated arsenic concentrations in the Yellowstone River. The standards are necessary because they provide more accurate representations of existing, nonanthropogenic arsenic conditions in one of the state's main waterways. From the human health perspective, they are the most protective expression of the nonanthropogenic arsenic standards from among several options the department considered. The standards also preclude application of unnecessarily stringent water quality standards for dischargers along the Yellowstone River who have an MPDES permit limit for arsenic.

List of Affected Board Rules – NEW RULE I will supersede surface water arsenic standards found in Department Circular DEQ-7 for the specified segments of the Yellowstone River.

Affected Parties Summary – NEW RULE I may affect parties applying for discharge permits to state waters, specifically the Yellowstone River. NEW RULE I may also affect parties subject to plan review for public water supply, wastewater treatment systems, or subdivisions along the Yellowstone River.

Scope of Proposed Proceeding –The department requests that the board initiate rulemaking and schedule a public hearing to take comments on the proposed rules.

Background – Currently there is a single human-health based arsenic standard of 10 µg/L for most state waters in Montana (Department Circular DEQ-7). It has been recognized for some time that arsenic concentrations are elevated above 10 µg/L in the upper and middle Yellowstone River, and that this is due to natural causes—from geothermal sources in Yellowstone National Park. Geothermal sources of arsenic from the park can reasonably be considered nonanthropogenic. In 2015, the department began a project to determine how much of the Yellowstone River's arsenic is nonanthropogenic, and to update arsenic standards for the river, if appropriate. The project comprised field data collection, quantification of human-caused arsenic sources, computer modeling, derivation of the new standards, and identification of methods to implement the standards; the work is described in three technical reports (DEQ, 2019a; 2019b; DEQ, 2020). Via this work, the department identified four Yellowstone River segments for which site-specific nonanthropogenic arsenic standards can be established at concentrations above the 10 µg/L human-health based standard. NEW RULE I will update the surface water quality standards for arsenic in the Yellowstone River from the Montana/Wyoming border to the confluence with the Clarks Fork of the Yellowstone.

The technical reports referenced above are:

DEQ (Montana Department of Environmental Quality). 2019a. *Demonstration of Nonanthropogenic Arsenic Levels: Yellowstone River, Montana*. Helena, MT: Montana Dept. of Environmental Quality.

DEQ (Montana Department of Environmental Quality). 2019b. *Derivation of Nonanthropogenic Arsenic Standards for Segments of the Upper and Middle Yellowstone River*. Helena, MT: Montana Dept. of Environmental Quality.

DEQ (Montana Department of Environmental Quality). 2020. *Addendum to Derivation of Nonanthropogenic Arsenic Standards for Segments of the Upper and Middle Yellowstone River*. Helena, MT: Montana Dept. of Environmental Quality.

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

Board Options – The board may:

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

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

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed Amendment
2. Three technical reports (cited above) which provide the technical foundation for the proposed standards.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to natural and nonanthropogenic water quality standards	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION (WATER QUALITY)

TO: All Concerned Persons

1. On June 17, 2020, at 10:00 a.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 adoption of the above-stated rule.

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 10, 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 rule proposed to be adopted provides as follows, stricken matter interlined, new matter underlined:

[NEW RULE I] NATURAL AND NONANTHROPOGENIC WATER QUALITY STANDARDS (1) Named waterbodies, waterbody segments, or waterbodies within geographic regions listed below have natural or nonanthropogenic concentrations for one or more parameters that exceed the applicable standards. For these waterbodies, the standards specified in (2) supersede the otherwise applicable water quality standards found elsewhere in state law.

(2) No person may violate the numeric water quality standards identified below:

(a) Mainstem Yellowstone River Nonanthropogenic Standards. Water quality standards for human health for total recoverable arsenic (CASRN number 7440-38-2). Average arsenic concentrations during a calendar year may not exceed the standards, and downstream water quality and applicable beneficial uses shall continue to be maintained. The standards, specified by segment, are as follows:

(i) From the Montana/Wyoming border (44.9925, -110.5172) to the mouth of Mill Creek (45.4165, -110.6548): 28 µg/L;

(ii) From the mouth of Mill Creek (45.4165, -110.6548) to the mouth of the Boulder River (45.8530, -109.9247): 22 µg/L;

(iii) From the mouth of the Boulder River (45.8530, -109.9247) to the mouth of the Stillwater River (45.6399, -109.2829): 16 µg/L; and

(iv) From the mouth of the Stillwater River (45.6399, -109.2829) to the mouth of the Clarks Fork of the Yellowstone River (45.6510, -108.7145): 13 µg/L.

(3) Named waterbodies, waterbody segments, or waterbodies within geographic regions specified in (2) have no assimilative capacity for the applicable natural or nonanthropogenic standards. Therefore, the department may not grant a mixing zone under ARM Title 17, chapter 30, subchapter 5 for these waterbodies and the specified standards.

AUTH: 75-5-201, 75-5-301, MCA
IMP: 75-5-222, 75-5-306, MCA

REASON: State law grants the board authority to adopt nonanthropogenic water quality standards when the otherwise applicable standards are more stringent than the nonanthropogenic condition of the waterbody. Correspondingly, the department may not apply a water quality standard to a water body that is more stringent that the nonanthropogenic condition of the waterbody (75-5-222, MCA). In such cases, the nonanthropogenic condition is the standard. Further, it is not necessary to treat wastes to a condition purer than the natural condition (75-5-306, MCA).

NEW RULE I establishes a framework for adopting water quality standards which are based on natural or nonanthropogenic conditions, and establishes nonanthropogenic-based arsenic standards for certain segments of the Yellowstone River. Natural or nonanthropogenic water quality standards are established because natural or nonanthropogenic effects on the landscape have resulted in arsenic concentrations in state surface waters that naturally exceed the otherwise applicable state water quality standards. NEW RULE I has been drafted so that standards for other named waterbodies, waterbody segments, or groups of waterbodies within specific geographic regions can all be incorporated into the rule at a later time.

The first standards being set under NEW RULE I are for arsenic concentrations in segments of the Yellowstone River. At present, there is a single human-health based arsenic standard of 10 µg/L for state waters across Montana (Department Circular DEQ-7). Arsenic concentrations are elevated above 10 µg/L in the upper and middle Yellowstone River, and that this is due to natural causes—from geothermal sources in Yellowstone National Park. Geothermal sources of arsenic from the park can reasonably be considered nonanthropogenic.

In 2015, the department began a project to determine how much of the Yellowstone River's arsenic is nonanthropogenic, and to update arsenic standards for the river, if appropriate. The project included field data collection, quantification of all human-caused arsenic sources, in-house computer modeling, derivation of the new standards, and identification of methods to implement the new standards; the work is described in three reports on the department's website (DEQ. 2019a; 2019b; DEQ. 2020). From this work, the department has identified four Yellowstone River segments for which site-specific nonanthropogenic arsenic standards can be established at concentrations above the current 10 µg/L human-health based standard. The new standards are being expressed as the annual median nonanthropogenic concentration, as specified in NEW RULE I(2).

The standards are necessary because they reflect existing, nonanthropogenic water quality in one of the state's main waterways. From the human health

perspective, they are the most protective expression of the nonanthropogenic arsenic standards from among several options considered by the department (DEQ. 2020). Because the nonanthropogenic standards are more accurate, they preclude application of unnecessarily stringent water quality standards for dischargers along the Yellowstone River who have an MPDES permit limit for arsenic.

Waterbodies identified in this rule have no assimilative capacity because the standards are being established at the existing, nonanthropogenic concentration. As a result, the waterbodies cannot assimilate discharges having concentrations higher than the standard because that would result in instream concentrations elevated above the nonanthropogenic condition. Therefore, mixing zones are not allowed. Establishing the standards at the nonanthropogenic concentration and disallowing mixing zones will prevent concentrations in the waterbodies from trending up due to human causes, and will maintain the nonanthropogenic condition characterized at the time the standards were established.

The technical reports referenced above are as follows:

DEQ (Montana Department of Environmental Quality). 2019a. *Demonstration of Nonanthropogenic Arsenic Levels: Yellowstone River, Montana*. Helena, MT: Montana Dept. of Environmental Quality.

DEQ (Montana Department of Environmental Quality). 2019b. *Derivation of Nonanthropogenic Arsenic Standards for Segments of the Upper and Middle Yellowstone River*. Helena, MT: Montana Dept. of Environmental Quality.

DEQ (Montana Department of Environmental Quality). 2020. *Addendum to Derivation of Nonanthropogenic Arsenic Standards for Segments of the Upper and Middle Yellowstone River*. Helena, MT: Montana Dept. of Environmental Quality.

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. The technical support documents referenced above may be viewed at this department website: https://deq.mt.gov/water/Surfacewater/standards. Copies of any of these documents may also be obtained by contacting Dr. Michael Suplee at (406) 444-0831 or msuplee@mt.gov.

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 rule will not significantly and directly impact small businesses.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ BY: */s/*

EDWARD HAYES
Rule Reviewer

CHRISTINE DEVENY
Chair

Certified to the Secretary of State, April 21, 2020.

Natural and Nonanthropogenic Water Quality Standards Rulemaking *Including* A Demonstration of Nonanthropogenic Arsenic Levels and Derivation of Arsenic Standards for the Yellowstone River

PREPARED BY:

MONTANA DEPT. OF ENVIRONMENTAL QUALITY, WATER QUALITY STANDARDS & MODELING SECTION

ASSISTANCE FROM THE WATER PROTECTION BUREAU

PRESENTED BY MICHAEL SUPLEE, PH.D.

APRIL 17, 2020, MEETING OF THE BOARD OF ENVIRONMENTAL REVIEW

DEQ
Montana Department
of Environmental Quality

Overview

- Regulatory Background
- Yellowstone River
  - Demonstration of Nonanthropogenic Arsenic Levels
  - Derivation of Nonanthropogenic Arsenic Standards
    - Implementation of the Standards

DEQ
Montana Department of Environmental Quality

Principal State Statutes

- 75-5-222 (1): For parameters for which the standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition

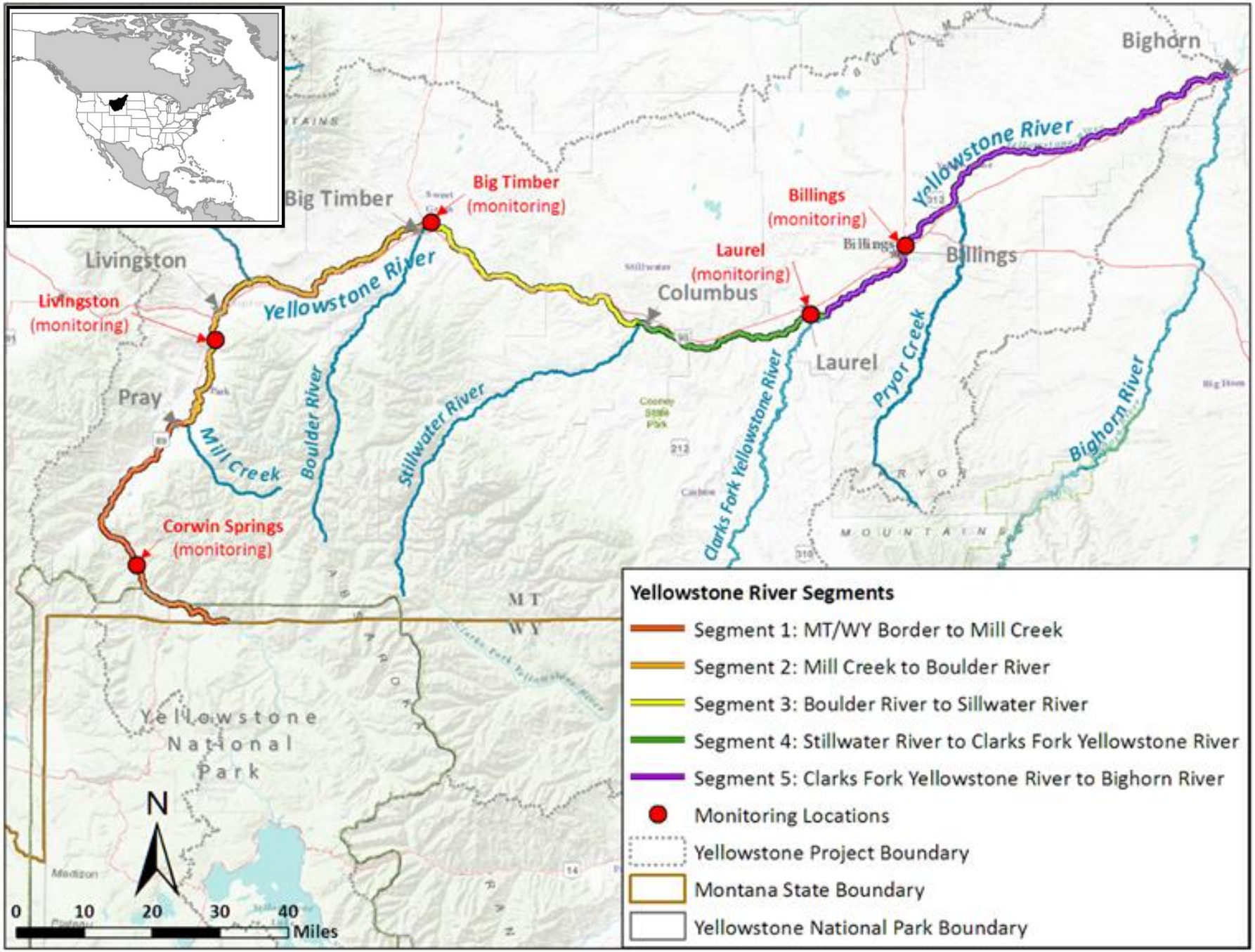
- 75-5-306: It is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements established under this chapter are met

- 75-5-301(2): The board shall formulate and adopt WQ standards, giving consideration to the economics of waste treatment and prevention

Today's Rulemaking

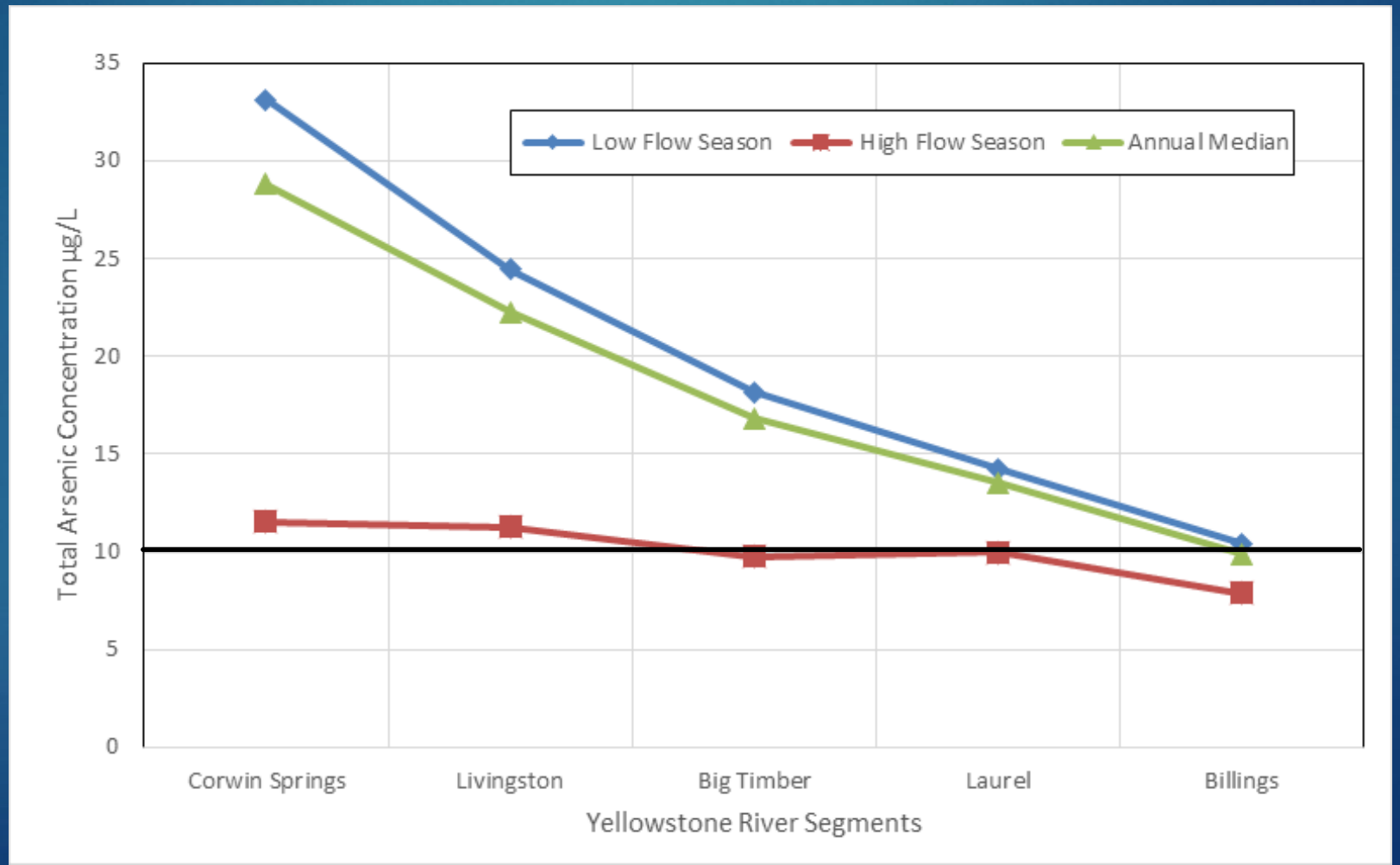
- First implementation of 75-5-222(1) nonanthropogenic WQ standards

- Only nonanthropogenic standards for the Yellowstone River are included, but the rule has been crafted so that it may incorporate future standards which fit the natural definition
  - Natural includes some human effects so long as those effects do not harm the beneficial uses (somewhat circular definition)


Big Timber
Big Timber (monitoring)
Livingston
Livingston (monitoring)
Pray
Mill Creek
Boulder River
Stillwater River
Yellowstone River
Columbus
Laurel (monitoring)
Billings (monitoring)
Billings
Laurel
Pryor Creek
Clarks Fork Yellowstone River
Bighorn River
Bighorn
Corwin Springs (monitoring)
MT
WY
Yellowstone National Park
N
0 10 20 30 40
Miles
Yellowstone River Segments
Segment 1: MT/WY Border to Mill Creek
Segment 2: Mill Creek to Boulder River
Segment 3: Boulder River to Sillwater River
Segment 4: Stillwater River to Clarks Fork Yellowstone River
Segment 5: Clarks Fork Yellowstone River to Bighorn River
Monitoring Locations
Yellowstone Project Boundary
Montana State Boundary
Yellowstone National Park Boundary

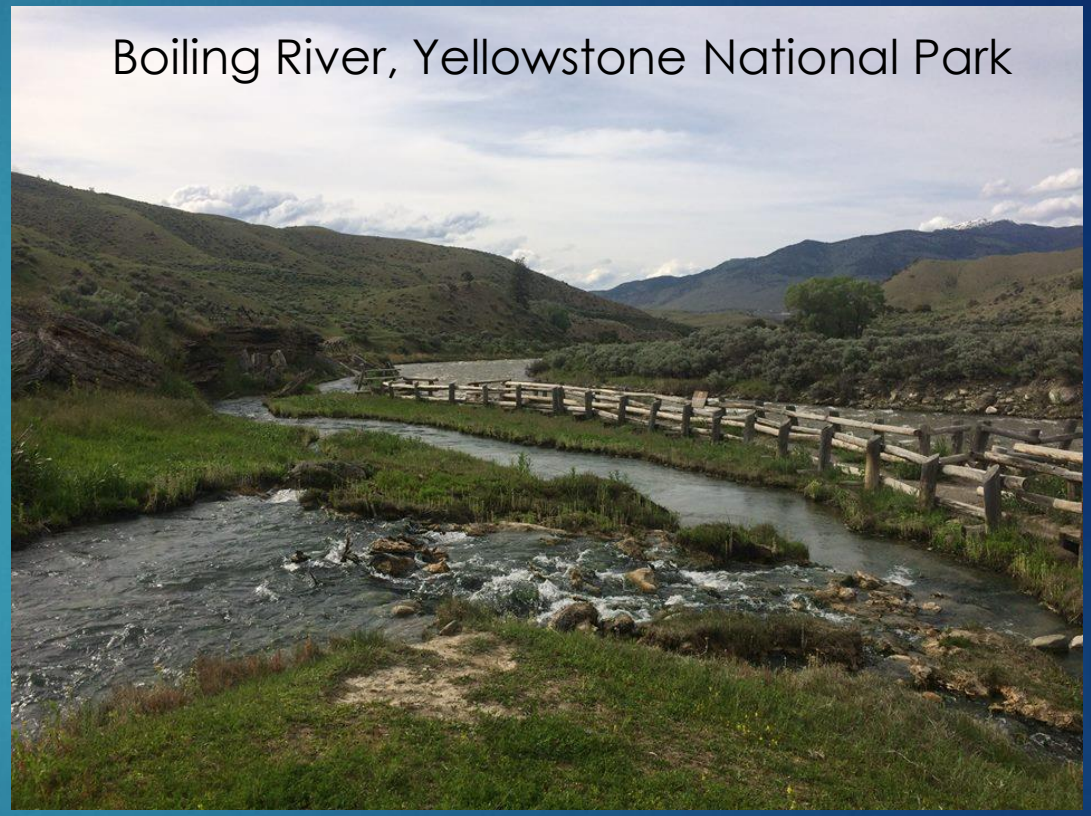
MT's Arsenic Standard vs. Yellowstone River's Ambient Concentrations

- Human health standard (surface, groundwater) = **10 µg/L**
- Aquatic Life standard = 340 µg/L (acute), 150 µg/L (chronic)



Main Arsenic Source:

Geothermal Features in Yellowstone National Park


Boiling River, Yellowstone National Park

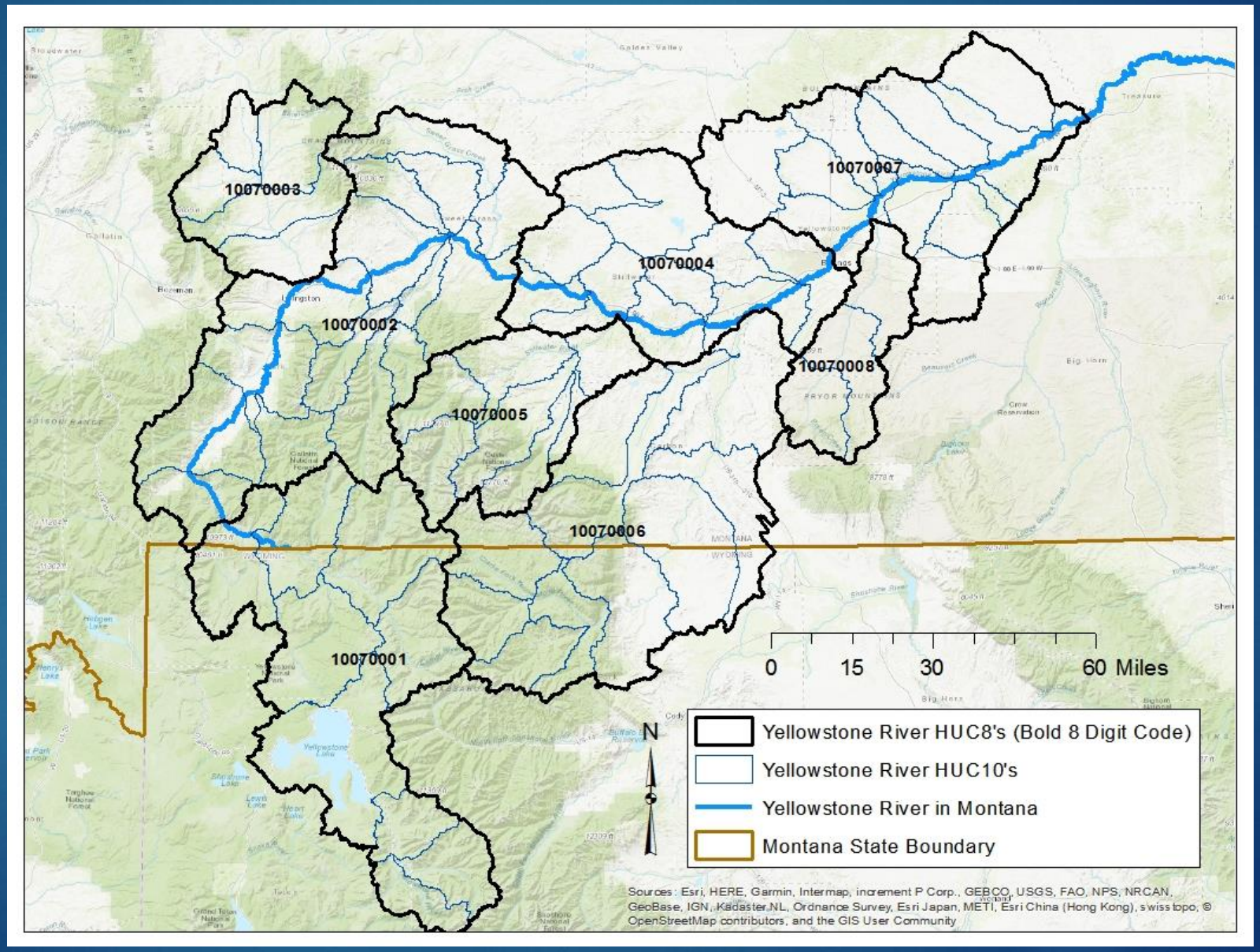
560 µg/L total arsenic, August 2015

The Boiling River flows into the Gardner River

85 µg/L, Gardner River at the mouth of the Yellowstone River, August 2015

1. Demonstration of Nonanthropogenic Arsenic Levels in the Yellowstone River

Define Hydrologic Region



Mainstem Hydrologic Segments

Segment	Beginning	End	Length (miles)	Median Annual Conc. (µg/L)*
1	Montana/Wyoming Border	Mill Creek near Pray	45	29
2	Mill Creek near Pray	Boulder River at Big Timber	54	22
3	Boulder River at Big Timber	Stillwater River near Columbus	37	17
4	Stillwater River near Columbus	Clarks Fork of the Yellowstone River near Laurel	27	14
5	Clarks Fork of the Yellowstone River near Laurel	Bighorn River at Bighorn	73	10

*Median of daily arsenic concentrations 2008-2018 derived from LOADEST model (Appendix C-1; DEQ, 2019).

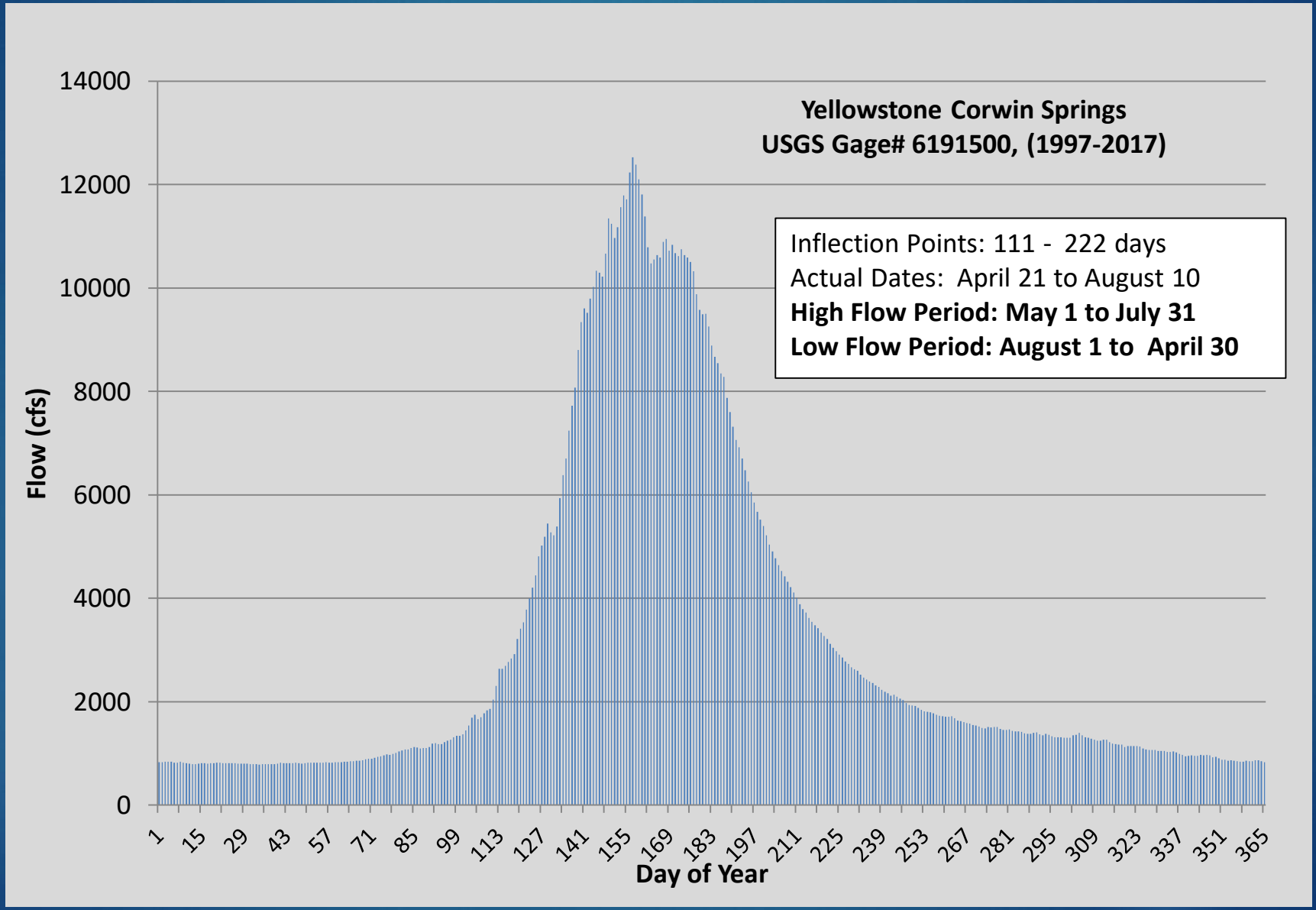
DEQ Montana Department of Environmental Quality

Mass Balance Model: The Basics

- Account for all major arsenic sources; **total arsenic load** (**TAL**)
  - Load from Yellowstone National Park
  - Point source loads along the river
  - Ground water loads along the river
  - Non-point source runoff loads along the river
  - Tributary loads (if not accounted for in previous loads)

- **Nonanthropogenic Load** = **TAL – (PSL + GWA + ROA)**
  - **PSL**: anthropogenic point source load
  - **GWA**: anthropogenic groundwater load
  - **ROA**: anthropogenic surface water runoff (tribs, etc.)

River Seasonal Patterns



Nonanthropogenic Arsenic Loads

Table 5-1: Nonanthropogenic Seasonal Arsenic Load Percentages, by Segment

Yellowstone River Segment				Yellowstone River Sampling Location	Proportion of Arsenic Load that is Nonanthropogenic [1]	
#	Beginning	End [2]	Length (miles)		High Flow Season [3]	Low Flow Season [3]
1	Montana/Wyoming Border	Mill Creek near Pray	45	Corwin Springs	99.0%	97.0%
2	Mill Creek	Boulder River at Big Timber	54	Livingston	98.9%	96.9%
3	Boulder River	Stillwater River near Columbus	37	Big Timber	98.9%	96.5%
4	Stillwater River	Clarks Fork of the Yellowstone River at Laurel	27	Laurel	98.9%	95.6%
5	Clarks Fork of the Yellowstone River	Bighorn River at Bighorn	73	Billings	98.7%	95.6%

[1] Based on the median of the LOADEST-modeled daily loads (See Appendix C).
[2] Each segment ends immediately before the confluence with the referenced tributary.
[3] High Flow season for the Yellowstone River was determined to be May – July, and the Low Flow Season was determined to be August - April.

DEQ estimates 7.5% cumulative model error across the study region (YNP to Bighorn River).

Beneficial Use Change Needed?

B-1, B-2, B-3: *Drinking water after conventional treatment*

- Coagulation, sedimentation, filtration, disinfection

- **No indication that Use Change is Needed**
  - DEQ sampling along Yellowstone River (Gardner, Billings)
    - Arsenite (+3) was non-detect
    - Arsenate (+5) was the arsenic form—removable by conventional treatment
    - Conventional treatment can remove ≥90% of Arsenic(+5) (EPA, 2000)
  - Segment 1 has the highest nonanthropogenic arsenic; DEQ drinking water engineers confirmed water there can be treated to ≤10 µg/L

2. Identifying the Nonanthropogenic Arsenic Standards for the Yellowstone River

An Objective Way to Assess the Best Expression of the Standards

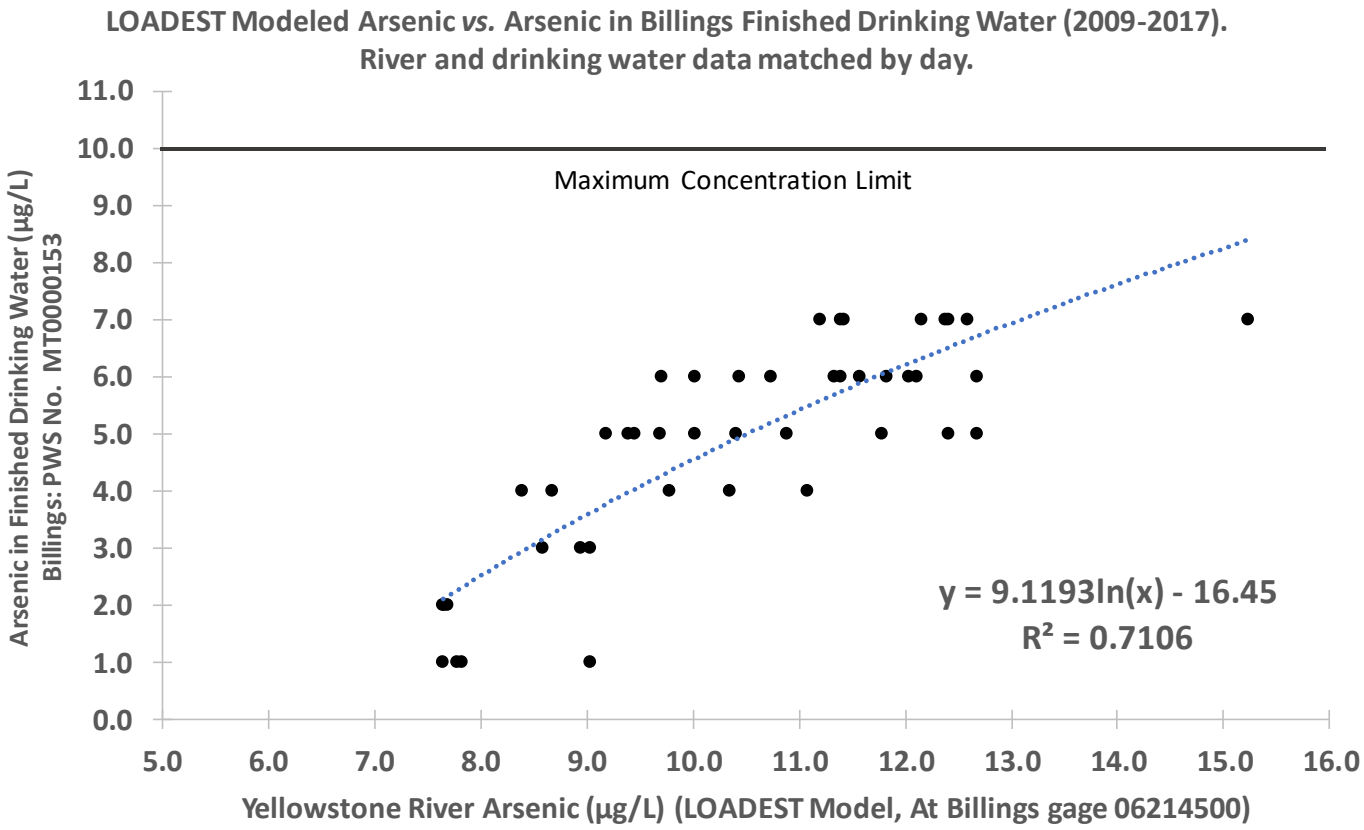
Line of Reasoning: If adopting nonanthropogenic arsenic standards in a particular way—while conforming with the statutes—can demonstrably decrease cancer risk for people using the Yellowstone River as a water supply, then that is the best expression of the standards.

Assessing Different Expressions of the Standards

- Explored effects on the drinking water beneficial use when nonanthropogenic standards are expressed in different ways
  - High Flow and Low Flow Seasonal Median Standards (2 values); vs.
  - Single Annual Median Standard (1 value).

Question: Which nonanthropogenic standards (2 Seasonal, or 1 Annual) result in lower cancer risk to people drinking water from the Yellowstone River downstream from permitted arsenic discharges?

- Must assume—or demonstrate—that arsenic in finished drinking water varies with river arsenic concentrations



Arsenic in Billings finished drinking water varies with river arsenic concentration

Similar findings elsewhere:

Wilson et al., 2002. *Arsenic removal in water treatment facilities: Survey of geochemical factors and pilot plant experiments.* Illinois Waste Management & Research Center.

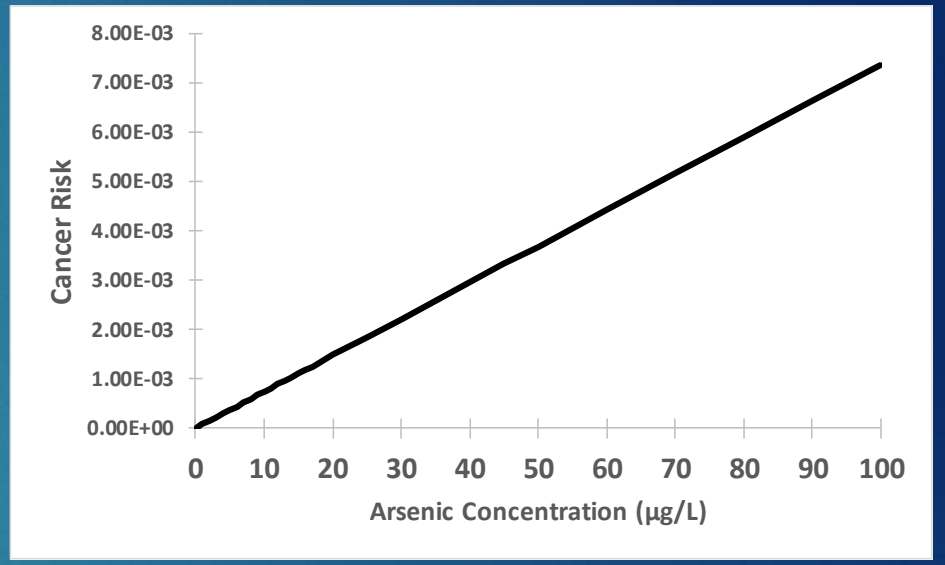
Other Principles and Assumptions

- Human cancer risk from a carcinogen like arsenic is continuous from origin (no safe lower conc.)
  - Maximum Contaminant Level Goal (MCLG) = zero
  - Arsenic is category A (known human carcinogen)

EPA Health Advisory, 2018

- Cancer risk computed using accepted EPA equations and risk factors, and assumptions adopted in DEQ-7:

Cancer Risk Computations	
Input Variables	
	Current
Cancer Potency Factor (q1*)	1.75
BCF	44
Body weight (kg)	80
Lifetime exposure (yrs)	70
Water consumed (L/day)	2.4
Fish consumed (kg/day)	0.0220
HH Standard (µg/L)	
At 10-6 risk:	0.0136
At 10-3 Risk:	**13.6**

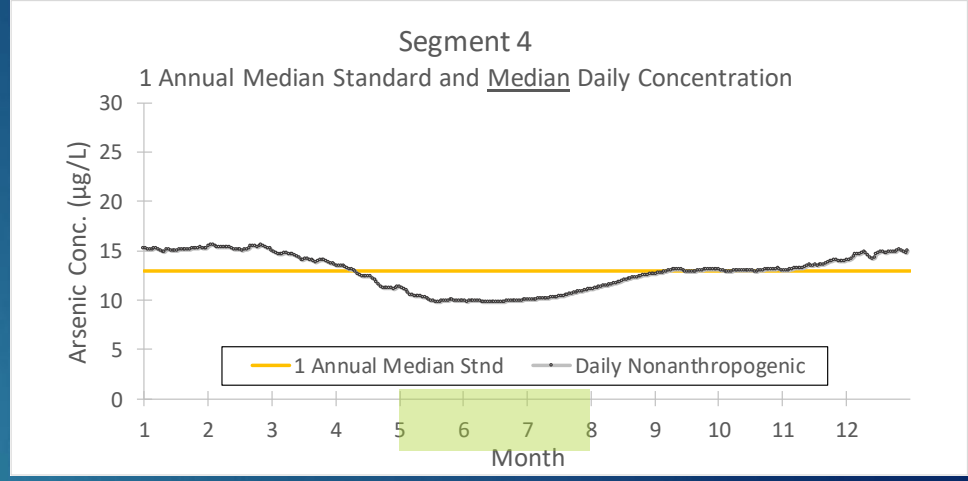


Arsenic vs. cancer risk based on current EPA methods and assumptions In DEQ-7

(MCL: 10 µg/L = 7.37 X10^{-4} risk)
(equals <1 excess case in 1000)

042

Methods



- 1. To meet 75-5-222, I asked "In each segment, does the annual median ever occur during high flow?"
  - Yes. Each annual median is within its corresponding nonanthropogenic high-flow conc. range
    - Annual medians are within the "nonanthropogenic condition"
    - Segment 4 example: **Annual median = 13.0 µg/L, High Flow$_{MAX}$ = 13.7 µg/L**

- 2. Computed new concentrations for each expression of the nonanthropogenic standards: **A.** River + discharge @ two seasonal standards, **B.** River + discharge @ one annual standard
  - Long-term river flows computed as harmonic means (EPA, 1991)

River ***Discharge***

$$C_{new} = [(C_1V_1) + (C_2V_2)] \div (V_1+V_2)$$

- 3. Calculated total cancer risk associated with river concentrations resulting from bullet 2

Summary of Findings

		Comparison of Total Cancer Risk Resulting from Different Expressions of the Standard*			
River Segment	**Segment Description**	**Two Seasonal Standards†**	**One Annual Standard†**	**Reduction in Risk Provided by the Lower-risk Expression of the Standard**	**More Protective Standard**
1	MT/WY Border to Mill Creek	2.04184E-03	2.04167E-03	**1.67E-07**	One Annual Standard
2	Mill Creek to Boulder River	1.55715E-03	1.55702E-03	**1.25E-07**	One Annual Standard
3	Boulder River to Stillwater River‡	1.18377E-03	1.18370E-03	**6.81E-08**	One Annual Standard
4	Stillwater River to Clarks Fork of the Yellowstone	9.71936E-04	9.71872E-04	**6.39E-08**	One Annual Standard
5	Clarks Fork of the Yellowstone to Bighorn River[a]	6.95312E-04	6.95312E-04	**0.00E+00**	Equal;future permitting may have effects

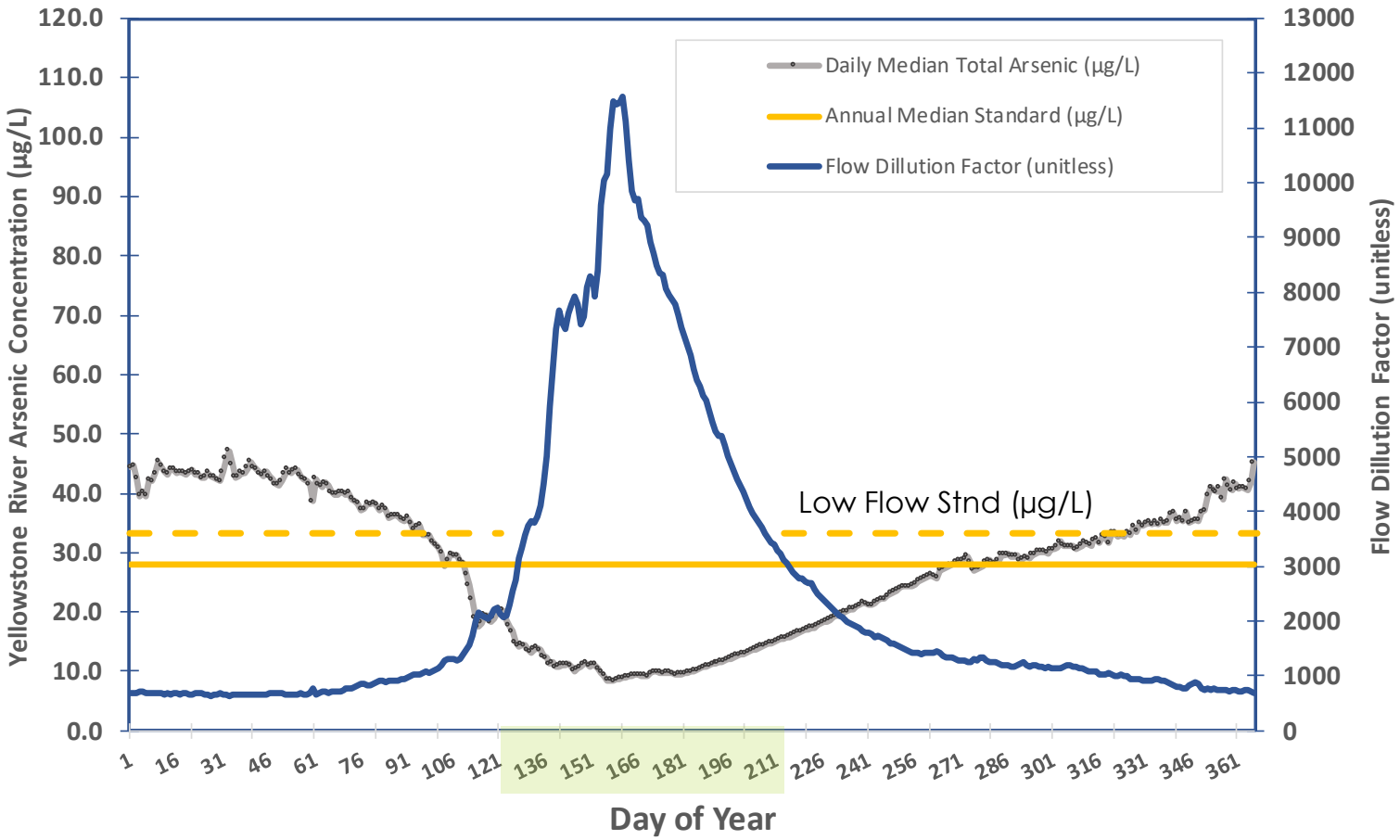
*Raw river water, no drinking water treatment considered. Drinking water treatment reduces arsenic conc. by ~50% at Billings.

†Standards were computed as the median of the nonanthropogenic concentration.

‡ There are no point sources in this segment. 1 MGD was input to the model to assess the standards.

[a] DEQ proposed DEQ-7 standard for High Flow, nonanthropogenic standard for Low Flow.

Why do the Annual Standards Better Reduce Cancer Risk?

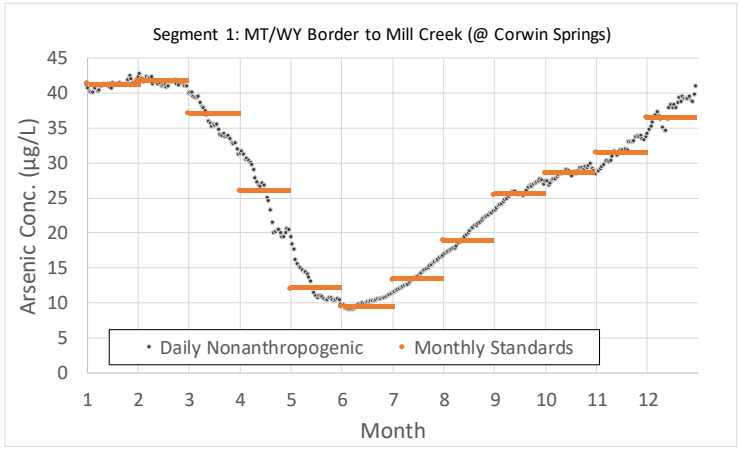


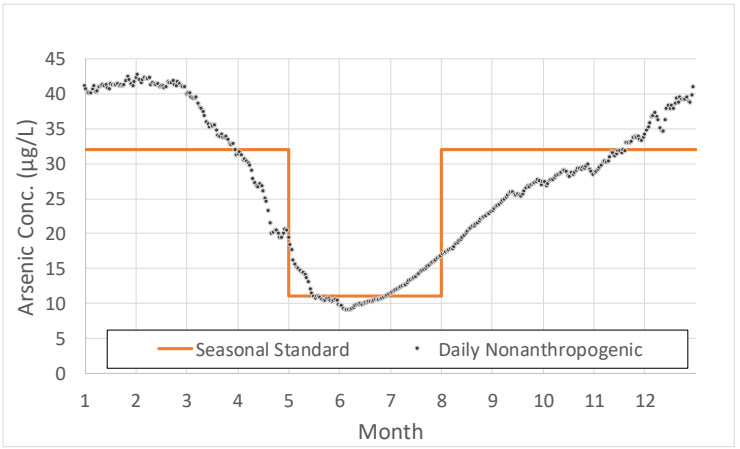
Greater dilution when it matters most…

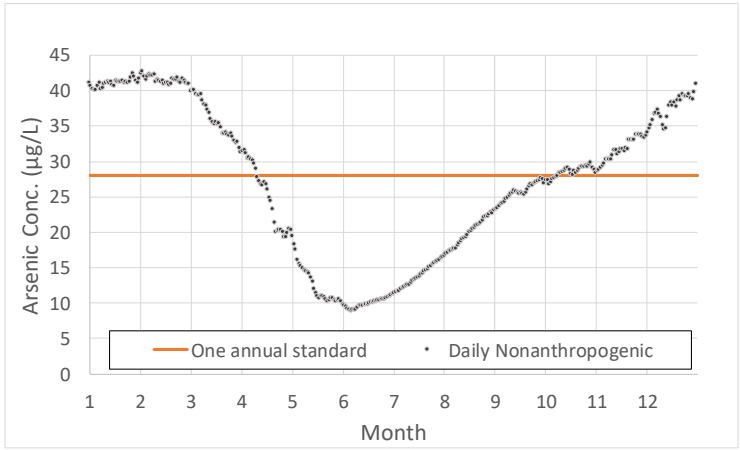
EXAMPLE: SEGMENT 1
(MT/WY BORDER TO MILL CREEK)

In Segment 1, cancer risk from the nonanthropogenic standards goes down incrementally as the standards are set to longer and longer timescales (monthly to seasonal, seasonal to annual)

In Segment 4, the pattern is not as consistent across the timescales, but the annual standard still has the lowest cancer risk.







Risk

Monthly Standards:
2.03525×10^{-3}

2 Seasonal Standards:
2.03511×10^{-3}

1 Annual Standard:
2.03494×10^{-3}

Other Findings

- Permitted discharge volumes would have to be far in excess of the Yellowstone River's highest flows to change the conclusions

Conclusions

- Increases and decreases in the Yellowstone River's arsenic concentrations are reflected in drinking water supplies that use the river

- *Therefore*: an annual nonanthropogenic median is the better expression of the nonanthropogenic standard compared to two seasonal median standards
  - Reduces cancer risk in segments 1-4
    - Cancer risk reductions are small, on the order of 1/10,000,000 to 1/100,000,000
  - Risk in segment 5 is the same via either approach
  - Risk in segment 5 is apparently the same under DEQ-7

Annual Standards Best Option

- Adopting the standards as annual nonanthropogenic medians meets the key statutes (Montana Code Annotated):
  - *Per* 75-5-222(1): All annual medians are of lower concentration than the corresponding max nonanthropogenic high-flow values
    - This means the annual medians are always within the "nonanthropogenic condition"
  - *Per* 75-5-301(2): Annual median standards are apparently more economical
  - *Per* 75-5-101: Annual median standards improve the quality and potability of water for public water supplies

Recommended Standards

River Segment	Yellowstone River Segment Description	Annual Nonanthropogenic Arsenic Standard (µg/L)
1	MT/WY Border to Mill Creek	28
2	Mill Creek to Boulder River	22
3	Boulder River to Stillwater River	16
4	Stillwater River to Clarks Fork of the Yellowstone	13
5	Clarks Fork of the Yellowstone to Bighorn River	n/a*

*In this segment the nonanthropogenic condition is not less that the standard so DEQ-7 standard would continue to apply.

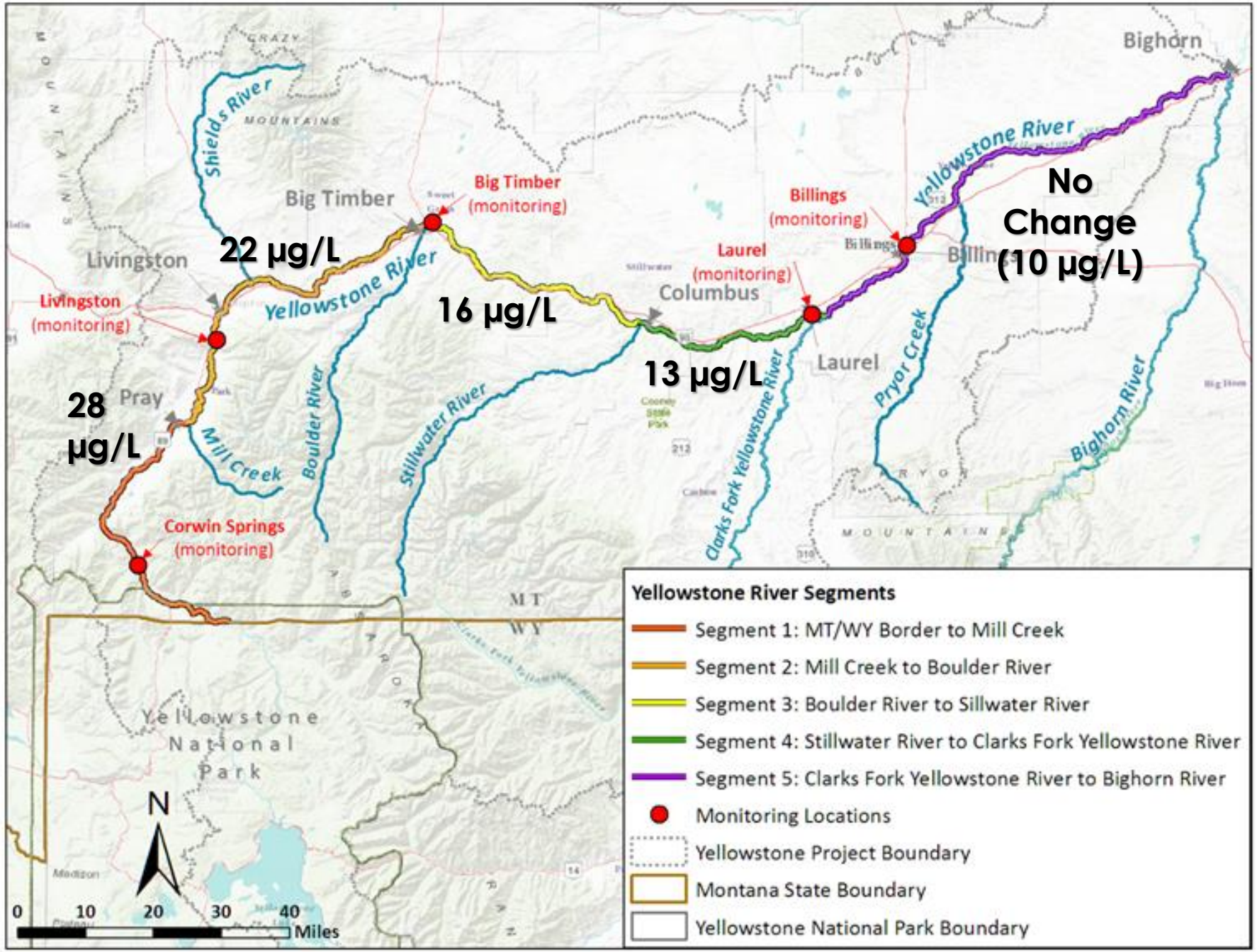
OTHER ASPECTS OF THE NON-ANTHROPOGENIC STANDARDS:

No use changes along the Yellowstone River are proposed

Standards apply end-of-pipe; no mixing zones

For permits, an average monthly limit and a maximum daily limit will be calculated per EPA (1991) methods; "no sample shall exceed" does not apply

Long-term ambient assessment will evaluate changes in river's median arsenic concentration


Bighorn
Shields River
Big Timber
Big Timber (monitoring)
22 µg/L
Livingston
Livingston (monitoring)
Yellowstone River
16 µg/L
Billings (monitoring)
Yellowstone River
No Change (10 µg/L)
Laurel (monitoring)
Columbus
13 µg/L
28 µg/L
Pray
Mill Creek
Boulder River
Stillwater River
Clarks Fork Yellowstone River
Laurel
Pryor Creek
Bighorn River
Corwin Springs (monitoring)
MT
WY
Yellowstone National Park
N
0 10 20 30 40 Miles
Yellowstone River Segments
Segment 1: MT/WY Border to Mill Creek
Segment 2: Mill Creek to Boulder River
Segment 3: Boulder River to Sillwater River
Segment 4: Stillwater River to Clarks Fork Yellowstone River
Segment 5: Clarks Fork Yellowstone River to Bighorn River
Monitoring Locations
Yellowstone Project Boundary
Montana State Boundary
Yellowstone National Park Boundary

DEQ
Montana Department
of Environmental Quality

Questions?

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

Agenda Item # III.A.2.

Agenda Item Summary – The Department is requesting that the Board initiate rulemaking to amend certain rules governing the issuance of discharge permits under the Montana Pollutant Discharge Elimination System (MPDES) program. 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 would 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, 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 other persons or facilities who wish to obtain a discharge permit.

Background – The Department is delegated authority to issue discharge permits in Montana under the National Pollutant Discharge Elimination System pursuant to Section 402 of the Federal Clean Water Act, 33 USC 1342. This rulemaking is necessary to maintain consistency with the federal regulations governing state programs that are delegated to implement the federal permitting program in accordance with 40 CFR 123.25. Equivalent federal regulations governing the issuance of NPDES permits are found in 40 CFR 122. The federal rules applicable to this rulemaking are: program definitions found in 40 CFR 122.2, application requirements found in 40 CFR 122.21, schedules of compliance found in 40 CFR 122.47, public notice requirements found in 40 CFR 124.10, and technology-based treatment requirements found in 40 CFR 125.3.

The proposed amendments to technology-based treatment requirements in ARM 17.30.1203 will maintain consistency with the federal regulations at 40 CFR 125.3 by removing an outdated provision that requires best practicable waste treatment technology by 1983.

The proposed amendments to definitions in ARM 17.30.1304 will maintain consistency with the federal regulations at 40 CFR 122.2. The added definition for “pesticide discharges from pesticide application” will describe the discharges that require MPDES permit coverage. The added definition for “pesticide residue” will describe the discharges from the application of pesticides that require MPDES permits. The proposed changes will also maintain consistency with current Secretary of State formatting requirements.

The proposed amendments to application requirements in ARM 17.30.1322 will maintain consistency with federal regulations at 40 CFR 122.21 by requiring electronic mailing addresses, indication of whether cooling water is used, indication of intent to request a

variance, and more representative industry codes. They will also clarify timeframes for sampling requirements to be consistent with the federal rules and update the Department's contact information.

The proposed amendments to schedules of compliance in ARM 17.30.1350 will maintain consistency with the federal rules at 40 CFR 122.47. The amendments include removing an erroneous reference, to which compliance schedules do not apply. The amendments will also include removal of outdated and inapplicable references.

The proposed amendments to public notice requirements in ARM 17.30.1372 will maintain consistency with federal regulations at 40 CFR 124.10 by providing 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. The amendments also maintain consistency with the current Secretary of State formatting requirements.

The Department is proposing additional editorial amendments at ARM 17.30.1202, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1354, and 17.30.1361 to correct references, remove inapplicable or redundant references, remove redundant conditions, and remove redundant and outdated incorporations by reference.

The proposed amendments to ARM 17.30.1202 will correct erroneous references to definitions. The proposed amendments to ARM 17.30.1331, 17.30.1340, 17.30.1342, 17.30.1344, 17.30.1346, 17.30.1350, and 17.30.1354 are necessary to remove references to a repealed rule. Additional editorial amendments to ARM 17.30.1342, are necessary to maintain consistency with the current Secretary of State formatting requirements.

The proposed amendments to ARM 17.30.1340 are necessary to correct references to definitions in ARM 17.30.1304 and to remove the reference to ARM 17.30.1303, which was repealed in 2012. The amendments also remove a redundant incorporation by reference to federal rules governing technology-based treatment requirements because the Board has equivalent internal rules.

The proposed amendment to ARM 17.30.1341 is necessary to clarify that this reference is to the federal Clean Water Act, not the Montana Water Quality Act.

The proposed amendments to ARM 17.30.1345 are necessary 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 which is the Board's equivalent rule. The amendments also remove the reference to ARM 17.30.1303, which was repealed in 2012, and incorporate editorial changes to maintain consistency with the current Secretary of State formatting requirements.

The proposed amendment to ARM 17.30.1361 is necessary to remove an erroneous and redundant reference.

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

Board Options – The Board may:

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

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

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed Amendment of Administrative Rules of Montana 17.30.1202, 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.

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 provides 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 deleting erroneous citations to subsections of 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 provision to conform with Secretary of State formatting requirements.

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. This definition 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 Secretary of State formatting requirements.

The board is proposing to define "pesticide discharges from pesticide application" to describe the discharges that require MPDES permit coverage and to be consistent with the federal regulations at 40 CFR 122.2.

The board is proposing to define "pesticide residue" to describe the discharges from application of pesticides that require MPDES permit coverage. 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.mcpx.

(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 paragraphs (7)(g)(i) through (ix) of this section, existing data may be used, if available, in lieu of sampling done solely for the purpose of application, provided that:

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

(2) All data are representative of the discharge; and

(3) 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)(IV) 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)(III) remains 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) through (c)(iii)(B) 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)(vi) 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 obtained 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 by POTWs might be uncharacteristic of domestic wastewater, 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) to delete 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 delete an incorrect reference to subsection (37) of ARM 17.30.1304. That subsection refers to an "indirect charger " rather than a "new source." The board is proposing to amend (2) to delete an incorrect reference to subsection (36) of ARM 17.30.1304. That subsection refers to an "impingement" rather than a "new discharger."

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 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 that the provision cited is a provision of 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 (12)(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 (12)(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 requirements.

The board is proposing editorial changes at (14) to maintain consistency with Secretary of State formatting requirements.

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) to delete 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 (8)(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) through (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)~~:

(a) through (f) remain the same.

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 Secretary of State formatting requirements.

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 40 CFR 125.3.

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

The board is proposing to amend (12) to delete 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) to delete 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) to delete 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) and (3) to delete the reference to 33 USC 1311(b)(2)(A),(C),(E), and (F). These provisions are 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) to delete 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)(c))~~ 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 proposes to delete the incorrect reference to ARM 17.30.1362(12)(c). The correct rule requiring the permittee to give notice to the department is ARM 17.30.1342. The board, however, is not including a reference to this rule to avoid 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 (5)(a)(v)(C) 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 Secretary of State formatting requirements.

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 rule will not significantly and directly impact small businesses.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ BY: */s/*

EDWARD HAYES
Rule Reviewer

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: NOTICE OF APPEAL OF OPENCUT MINING PERMIT #2351 ISSUED TO GOLDEN WEST PROPERTIES, LLC BY DAVID WEYER ON BEHALF OF THE RESIDENTS OF WALDEN MEADOWS SUBDIVISION.	**CASE NO BER 2018-05 OC**

HEARING EXAMINER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO BER[1]

This case concerns an appeal by individual residents of the Walden Meadows Subdivision (collectively Residents) to Permit #2351, issued by the Department of Environmental Quality (DEQ) to Golden West Properties, LLC, (Gold West) on June 6, 2018. On October 4, 2019, DEQ and Golden West filed (Second) Motions for Summary Judgment, which are now fully briefed and ripe for disposition. For the reasons set forth below, these motions will be granted.

[1] Because the conclusions reached herein would be fully dispositive of the case if adopted by the Board, the hearing examiner presents her decision as proposed "Findings of Fact and Conclusions of Law" (although on motions for summary judgment rather than after a hearing) as Mont. Code Ann. § 2-4-623(1)(a) requires a final agency action include "findings of fact and conclusions of law, separately stated." *See also id.*, § 2-4-621(2).

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PROCEDURAL HISTORY

There was extensive motions practice in this case from its beginning through August 2019. For brevity's sake, that procedural history is not repeated here, as it is set out in the "Order on Motions," issued on August 30, 2019 (herein "August Order," Exhibit A hereto). The August Order resolved all of the then-pending motions as it: granted the Residents' Motion to File Second Amended Notice, dismissed the Resident's second claim of relief, struck the Residents' expert witness disclosure, granted Golden West's Motion in *Limine*, granted in part Golden West's (First) Motion for Summary Judgment, granted in part DEQ's (First) Motion for Summary Judgment, and denied the Residents' Motion for Summary Judgment.

After the August Order, on September 5, 2019, Golden West filed a motion asking for a new deadline to file pretrial motions. In anticipation of responses the undersigned issued a "Notice of Telephonic Status Conference" the following day, at that conference on September 10, 2019, all parties appeared through counsel to discuss the status of the case and the need for new pretrial deadlines. On September 16, 2019, the Residents filed a Response to Golden West's Motion arguing that the pretrial motions would be duplicative and would constitute a "second bite at the apple." That same day, Golden West filed a Reply. On September 18, 2019, the undersigned granted Golden West's request for new

pretrial deadlines and issued a Scheduling Order setting October 4, 2019 as the deadline for any party to file additional dispositive motions.

On October 4, 2019, DEQ and Golden West each filed their (Second) Motions for Summary Judgment. Three days later, on October 7, 2019, the Residents filed a "Motion to Strike" and two days after that, on October 9, 2019, the Residents filed a "Motion to Stay Briefing Schedule." The following day, Golden West filed its opposition to the motions to strike and stay proceedings. The undersigned issued an "Order on Motions" on October 11, 2019, denying the Residents' requests to strike DEQ and Golden West's motions and setting a schedule for Residents to file a response to the second motions for summary judgment. Residents filed their Responses to DEQ and Golden West's Motions for Summary Judgment on October 31, 2019. DEQ filed its Reply on November 14, 2019, and Golden West filed their Reply on November 21, 2019.

FINDINGS OF UNDISPUTED FACTS

1. DEQ approved operator Golden West's application for Opencut Mining Permit on June 6, 2018. Residents' Statement of Disputed Facts (SDF)[2] (Golden West), ¶ 1.

[2] Citations are to the SDFs (which Residents filed either in response to Golden West or DEQ's "Statements of Undisputed Facts"), as it is within these SDFs that the Residents state the listed facts are "undisputed."

2. Prior to issuing the permit, DEQ held one public meeting regarding Golden West's application for Opencut Mining Permit on April 2, 2013, in Billings, Montana. Residents' SDF (Golden West), ¶ 2.

3. Also prior to issuing the permit, DEQ issued a total of five Deficiency Notices to Golden West regarding its application for Open Cut Mining Permit on July 19, 2013, November 3, 2014, January 4, 2016, February 9, 2018 and May 4, 2018. Residents' SDF (Golden West), ¶ 3.

4. Permit #2351 authorizes Opencut operations known as the "Golden West Pit site." Residents' SDF (Golden West), ¶ 4.

5. The permit compromises at total of 47.1 acres located in Yellowstone County, Montana. Residents' SDF (Golden West), ¶ 5.

6. Access to the Golden West pit is located on the west side of 64th Street West, 0.26 miles north of the intersection of 64th Street West and Danford Road in Billings, Montana. Residents' SDF (Golden West), ¶ 6.

7. The Golden West Pit will mine clay, gravel and sand. Residents' SDF (Golden West), ¶ 7.

8. The estimated quantity of mine material to be excavated and removed from the entire permit area is 670,000 cubic yards. Residents' SDF (Golden West), ¶ 8.

9. A residential subdivision neighbors the Golden West Pit site to the south. Residents' SDF (Golden West), ¶ 9.

10. This southern residential subdivision is called Walden Meadows. Residents that remain part of the above referenced matter have been residents of Walden Meadows. Residents' SDF (Golden West), ¶ 10.

11. As part of its Application, Golden West submitted a Plan of Operation which is incorporated into the Permit. Residents' SDF (Golden West), ¶ 11.

12. The Residents are precluded from presenting expert testimony in this matter. Residents' SDF (DEQ), ¶ 2.

13. The record is devoid of any deposition of the disclosed expert witnesses offered by both the Department and Golden West. Residents' SDF (DEQ), ¶ 3.

14. No dewatering is included in the permit, meaning that no water will be pumped from the pond for the purpose of lowering the water level in the pond. Residents' SDF (DEQ), ¶ 15.

15. DEQ's Deficiency Notices required the operator to submit scientific reports and work plans to ensure the protection of ground water quality. These include a hydrogeologic assessment, monitoring well installation plan, and groundwater monitoring plan. Residents' SDF (DEQ), ¶ 17.

LEGAL BACKGROUND AND STANDARD

Pursuant to Mont. Code Ann. § 82-4-427(1)(a), "a person whose interests are or may be adversely affected by a final decision of the department to approve … a permit application and accompanying material … under this part is entitled to a hearing before the board …." *See also* Mont. Code Ann. § 82-4-422(2)(c). The "contested case provisions of [MAPA] apply to a hearing held under this section." Mont. Code Ann. § 82-4-427(4). Summary judgment procedures may be used in contested cases under MAPA when the case satisfies the requirements of Mont. R. Civ. P. 56. *Matter of Peila*, 249 Mont. 272 (1991).

Summary judgment is appropriate when the record demonstrates that "there are no material facts in dispute and the movant is entitled to judgment as a matter of law." *Clark Fork Coal. v. Mont. Dep't of Envt'l Quality*, 2008 MT 407, ¶ 19; Mont. R. Civ. 56(c)(3). After the moving party satisfies this burden, a court may enter summary judgment against a non-moving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17. However, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but …

must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must produce "some evidence" that a genuine issue of material fact is in question. *Lewis v. Nine Mile Mines, Inc.*, 268 Mont. 336, 340 (1994).

DISCUSSION

A hearing is not necessary, as this case can be decided solely on the motions for summary judgment, the undisputed facts in the record, and the applicable law. The August Order granted partial summary judgment to DEQ and Golden West and denied the Residents' Motion for Summary Judgment—thereby narrowing the issues in the case substantially. That August Order is attached in its entirety hereto. Ex. A. The August Order disposed of all the claims in this case except for one: "The surviving claim is whether the Golden West Plan of operation fails to comply with Mont. Admin. R. 17.24.218(1)(g)(i) for failing to disclose ***all*** wells within 1,000 feet of the Permit Area." Resident Resp. to Golden West at 2 (emphasis added).

The law applicable to this remaining claim is as follows: DEQ may not accept or grant an application for a permit unless the application includes a "plan of operation," which in turn becomes part of the permit once it is issued. Mont. Code Ann. §§ 82-4-432(10), 82-4-434(1). DEQ "may not accept a plan of operation unless the plan provides: … that surface water and ground water will be

given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation…." Mont. Code Ann. § 82-4-434(2)(l). BER has in turn adopted Admin. R. Mont. 17.24.218, which states that "[t]he plan of operation must include the following: … a water resources section that includes: … The depths, water levels, and uses of water wells in and within 1,000 feet of the permit area…." Admin. R. Mont. 17.24.218(g)(i).

A. Interpretation of Admin. R. Mont. 17.24.218(g)(i).

The Residents' surviving argument is that the plan of operation is deficient because it did not "disclose ***all*** [water] wells within 1,000 feet of the Permit Area."[3] (Resp. to Golden West, at 2 (emphasis added)). However, Admin. R. Mont. 17.24.2189(g)(i) is clear on its face: it says the plan of operation must include "[t]he depths, water levels, and uses of water wells in and within 1,000 feet of the permit area." The rule does ***not*** say the plan must include "[t]he depths, water levels, and uses of ***all*** water wells in and within 1,000 feet of the permit area." The word "all" simply does not appear in the rule.

The residents therefore urge BER to interpret Admin. R. Mont.

3 The August Order found a genuine issue of material fact regarding whether the plan of operation did identify all wells within 1,000 feet. In other words, the parties disagreed, and it was not clear based on the motions, which existing wells were or were not identified by Golden West. In deciding these Second Motions for Summary Judgment, however, it can be assumed that there were wells that were not identified in the plan of operation, as "all reasonable inferences that might be drawn" should be drawn in favor of the Residents as the party opposing summary judgment. *Erker*, ¶ 17.

17.24.2189(g)(i) to say something that it does not say: that a plan of operation must disclose ***all*** water wells within 1,000 feet of the permit area. Adopting the Residents' interpretation of the Rule would thus require BER to insert the word "all" that was omitted by the rule. Inserting a word into a statute or rule is a violation of the rule of statutory construction codified in Mont. Code Ann. § 1-2-101, which states "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted…." The Residents' interpretation of the Rule must therefore be rejected as contrary to the law of statutory interpretation.

Additionally, Residents' interpretation of Admin. R. Mont. 17.24.2189(g)(i) is at odds with DEQ's interpretation of the rule, which (especially in the absence of any expert testimony to the contrary) is entitled to some difference. *Upper Mo. Waterkeeper v. Mont. Dept of Envtl. Quality*, 2019 MT 81, ¶13 (citing *Lewis v. B & B Pawnbrokers, Inc*., 1998 MT 302, ¶43; *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality*, 2008 MT 407, ¶20). The residents raise a valid concern (Resp. to DEQ, at 5) that was also raised by the undersigned during oral argument on the prior summary judgment motions: that DEQ's interpretation of Admin. R. Mont. 17.24.2189(g)(i) appears to have shifted over time. For example, in two of DEQ's deficiency notices to Golden West, DEQ stated that it required Golden West to

disclose "each well" within 1,000 feet. (Ex. 18 at 6; Ex. 19 at 10.) Requiring "each well" sounds a lot like DEQ was interpreting the rule to require "all wells" during at least the deficiency notice stage. However, DEQ noted at the hearing and in briefing that ultimately it did not pursue this requirement to identify "each well," as it required a hydrologic study instead, which rendered the well data unnecessary. DEQ thus seems to argue that it interprets the rule in order to get the data necessary to protect the water—sometimes data regarding "each well" (or all wells) is necessary (in the absence of a hydrologic study) and sometimes only data from some wells is necessary (if there is a hydrologic study). As discussed further below, the Residents have failed to provide any expert testimony to dispute DEQ's ultimate conclusion that additional well data was unnecessary. DEQ's somewhat mailable interpretation of this rule must therefore be accepted and given deference, as the only expert voice regarding what well data is necessary and when. It also makes sense as a matter of first impression, though, that the rule be flexible enough to allow for different or dynamic factual scenarios, as long as the ultimate purpose of the rule—the protection of the water—is not compromised. It does not serve the purpose of the rule to create the potential for a procedural "gotcha" untethered to actual science.

DEQ's interpretation of Admin. R. Mont. 17.24.2189(g)(i) is also not "plainly inconsistent with the spirit of the rule." *Upper Mo. Waterkeeper*, ¶13. The

purpose of the rule (on its face and according to DEQ's expert) is to require a plan of operation that will ensure "the protection of groundwater quality and quantity." Admin. R. Mont. 17.24.2189(g)(i); Mont. Code Ann. § 82-4-434(2)(l); *see also* Second Amended NOA, at ¶23. DEQ and its experts assert that DEQ does not need to identify *all* water wells within 1,000 feet in order to ensure that the quality and quantity of water is protected. (DEQ BIS, at 16-17; Ex. 2, at ¶¶ 10, 27). As discussed further below, the Residents have provided no evidence to refute DEQ's claim. It is a reasonable conclusion (especially absent any evidence to the contrary) that a plan of operation can identify only some (not all) of the "water wells in and within 1,000 feet," while still protecting the quality and quantity of water. Admin. R. Mont. 17.24.2189(g)(i).

This interpretation of the Rule makes the most sense: it avoids inserting what has been omitted from the Rule (in violation of Mont. Code Ann. § 1-2-101), it is flexible enough to adapt to different factual scenarios, it protects the purpose of the rule, and it gives appropriate deference to an agency's interpretation that is not "plainly inconsistent with the spirit of the rule" (per *Upper Mo. Waterkeeper*, ¶13).

The Residents proposed interpretation of the Rule, however, would do the opposite—it would insert the word "all" into the rule and it would be contrary to the agency's interpretation, in the absence of a plain inconsistency. It would also

create a mandate that DEQ identify *all* wells, regardless of whether such identification is necessary to protect the water, given the particular factual scenario or available scientific evidence. The Residents' interpretation of the rule must therefore be rejected: Admin. R. Mont. 17.24.2189(g)(i) does not necessarily require the plan of operation to identify ***all*** the wells, it only requires that wells be sufficiently identified to protect the quality and quantity of water (which may vary based on the facts of each case). Ultimately, to invalidate a permit based on Admin. R. Mont. 17.24.2189(g)(i), a petitioner must show by a preponderance of the evidence that the plan of operation did not identify wells sufficiently to protect the quality and quantity of water; said another way, that DEQ violated the law by granting the permit with a plan of operation that did not identify enough wells to ensure "that surface water and ground water will be given appropriate protection." Mont. Code Ann. § 82-4-434(2)(l); *MEIC*, 2005 MT 96, ¶ 16.

B. Permit #2351 Specifically

The ultimate question specific to this case then becomes: did DEQ and Golden West identify wells sufficiently to protect the quality and quantity of water? Admin. R. Mont. 17.24.2189(g)(i); Mont. Code Ann. § 82-4-434(2)(l); *MEIC*, ¶ 16. DEQ and Golden West argue in their motions for summary judgment that they have identified enough wells to protect the water. (*See, e.g.* DEQ BIS, at 16-17; Golden West BIS at 19.) To support this argument, DEQ and Golden West

cite to the hydrologic assessment done by Golden West and the affidavit of DEQ's expert, Chris Cronin. *Id.*; (DEQ Ex. 1, at 210-254; Ex. 2, at ¶¶ 10, 27). DEQ and Golden West argue that, even if BER were to require all wells to be identified, the failure to identify some wells in this case would be harmless error, because the identification of additional wells would not change the outcome of the hydrologic assessment, and therefore would make no practical difference in protecting the water or granting the permit. (DEQ BIS, at 16-17; Golden West BIS at 19.)

The Residents have not presented any expert testimony (or indeed any evidence at all) to refute DEQ's claims. In the initial summary judgment briefing, the Residents raised a disputed issue of fact about the existence and location of any additional wells. (Ex. A at 26-29.) However, the Residents have not ever provided sufficient evidence to raise an issue of material fact regarding whether such additional well information would have changed the hydrologic survey or the ultimate conclusion by DEQ. In other words, there may be a disputed fact about whether there are any additional wells to identify, or where those wells might be, but that dispute is immaterial because the Residents have presented no evidence that the additional well information would have made any difference in the ultimate outcome of the permit.

The Residents argue vaguely that "[w]ithout a full accounting of all wells and their depth, use and water levels, it would be impossible for the DEQ and the

operator to mitigate or remediate adverse impacts back to the baseline because no baseline data to assess impacts would exist." (Resp. to DEQ, at 8). However, the Residents provide absolutely no citation to any evidence supporting their conclusory assertion. "Unsupported arguments of counsel are not evidence and do not establish the existence of matters that are argued." *Ternes v. State Farm Fire & Cas. Co.*, 2011 MT 156, ¶27. The Residents do not, for example, provide an expert to explain how the identification of additional wells would have changed "baseline data" or altered the conclusions of the hydrologic assessment. There is nothing in the record, therefore, to even challenge (let alone overcome) the conclusions of the hydrologic assessment and DEQ's experts, which establish that the quality and quantity of the water will be sufficiently protected based on the available well information.

Additionally, even if the Residents had managed to raise enough evidence (with "all reasonable inferences" drawn in their favor, *Erker*, ¶ 17) at the summary judgment stage, it is certain that they will not be able to carry their ultimate burden at a hearing. *Celotex*, 477 U.S. at 322. At a hearing, the Residents must prove by a preponderance of the evidence that DEQ's approval of the permit violated the law. *MEIC*, ¶ 16. Residents did not disclose any expert, have admitted they will not use an expert at any eventual hearing, did not oppose Golden West's Motion in *Limine* to exclude expert testimony at the hearing, and will therefore not be able to use an

expert at any hearing in this case. This is fatal. Expert testimony is required to explain how the identification of additional wells may affect the plan of operation and why DEQ's expert's conclusion is wrong. Such knowledge of the effect of identifying wells on a hydrologic assessment is beyond the common knowledge and understanding. "Expert testimony is required in areas not within the range of ordinary training or intelligence." *Durbin v. Ross*, 276 Mont. 463, 477 (1996) (citing *Newville v. State, Dept. of Family Service*, 267 Mont. 237, 257 (1994)); Mont. R. Evid. 702. "Only expert witnesses are permitted to testify 'in the form of an opinion or inference…' which may 'embrace an ultimate issue to be decided by the trier of fact.'" Mont. R. Evid. 704. The "[f]ailure and refusal to identify an expert witness to support" a claim requiring expert testimony justifies summary judgment dismissing a claim. *Wylie v. Balaz*, 2014 MT 302N, ¶6 (citing *Dulaney f. State Farm*, 2014 MT 127, ¶¶ 12-16).

Without expert testimony to explain either (1) why identifying *all* the wells within 1,000 is necessary to protect the quality and quantity of water, or (2) why in this case identifying additional wells would or should have changed the outcome of the hydrologic assessment, the Residents cannot overcome DEQ's expert testimony to the contrary. Because expert testimony is required to understand how or why additional well information would change the conclusion of the hydrologic assessment—and thus the legality of DEQ's action in approving the permit—and

because the Residents will never have such expert testimony, as a matter of law they will never be able to meet their burden. The Residents will therefore be unable to "make a showing sufficient to establish the existence of an element essential to [their] case" and DEQ and Golden West are entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322.

The Residents attempt to overcome the absence of an expert witness by characterizing the violation of Admin. R. Mont. 17.24.2189(g)(i) as a "procedural" violation. (Resp. to DEQ, at 3-6.) Essentially, the Residents' argument is that, because (by their interpretation) Admin. R. Mont. 17.24.2189(g)(i) requires the identification of *all* wells within 1,000 feet, the failure to identify even a single well constitutes a "procedural" violation of the rule, regardless of whether or not that violation would have any actual effect on the Permit's ability to protect the water. (*Id.* at 3-6.[4]) This is a false syllogism that depends on the Residents' problematic interpretation of Admin. R. Mont. 17.24.2189(g)(i). It is the very procedural "gotcha" untethered to either science or the purpose of the rule that

[4] Residents cite to and analyze a large amount of federal case law regarding standing to pursue a procedural right, arguing that "Residents' success on its [sic] remaining claim is not dependent on a showing of harm or a showing that the DEQ would have not have issued Permit #2352." Id. at 3. This argument is legally incorrect for two reasons: First, it entirely fails to recognize the binding precedent of *MEIC*, 2005 MT 96, ¶ 16, and misunderstands the burden and standard of proof applicable to this case. Second, the case law it cites and analyzes apply to standing in a civil action for damages or injunctive relief, which is an entirely different type of case and very different legal framework from an appeal of a permit before the BER pursuant to Mont. Code Ann. § 82-4-427. As explained above, in order to succeed on this permit appeal, Residents are required to show that DEQ violated the law in issuing the permit (*MEIC*, 2005 MT 96, ¶ 16; § 82-4-427), and whether or not they were "harmed" (either by an injury-in-fact or otherwise) is irrelevant to that inquiry.

belies their interpretation of Admin. R. Mont. 17.24.2189(g)(i).

As shown above, however, Admin. R. Mont. 17.24.2189(g)(i) does not require the identification of *all* wells. Therefore, the failure to identify *all* the wells does not automatically mean that DEQ violated the law. Perhaps DEQ did not identify all the wells within 1,000 feet, but the question then becomes whether the failure to identify the wells resulted in a failure to adequately protect the water. Residents will never be able to answer that question without a scientific expert and therefore cannot "make a showing sufficient to establish the existence of an element essential to [their] case." *Celotex*, 477 U.S. at 322. In other words, a hearing is not necessary because, even if one were held, the Residents would never be able to meet their ultimate burden.

DEQ and Golden West, on the other hand, have shown—with evidence that was not adequately disputed—that the plan of operation included "the depths, water levels, and uses of water wells in and within 1,000 feet of the permit area…" sufficiently to provide "that surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation…." Admin. R. Mont. 17.24.218(g)(i); Mont. Code Ann. § 82-4-434(2)(l). DEQ and Golden West are therefore entitled to judgment as a matter of law and summary judgment should be granted in their favor.

CONCLUSIONS OF LAW

1. As "the party asserting the claim at issue," the Residents have the ultimate burden in this case "of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *MEIC*, ¶ 16.

2. Ultimately, to show that DEQ violated Admin. R. Mont. 17.24.2189(g)(i), Residents must show by a preponderance of the evidence that the plan of operation did not identify enough wells to ensure "that surface water and ground water will be given appropriate protection." Mont. Code Ann. § 82-4-434(2)(l); *MEIC*, 2005 MT 96, ¶ 16.

3. At summary judgment, DEQ and Golden West (the movants) have the initial burden to show: that there are no material facts in dispute regarding whether the plan of operation identified sufficient wells to afford "appropriate protection" to the "water quality and quantity" (Mont. Code Ann. § 82-4-434(2)(l)); and that DEQ and Golden West are entitled to judgment as a matter of law. *Clark Fork Coal.*, ¶ 19; Mont. R. Civ. P. 56(c)(3).

4. DEQ and Golden West have satisfied their burden with their Second Motions for Summary Judgment and the evidence attached thereto, particularly the affidavit of Chris Chronin and the hydrologic assessment. (DEQ Ex. 1, at 210-254; Ex. 2, at ¶¶ 10, 27.)

5. The burden thus shifts to the Residents, who must produce in response "some evidence" and "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248; *Lewis*, 268 Mont. at 340. In reviewing the evidence at the summary judgment stage, "all reasonable inferences that might be drawn" were drawn in favor of the Residents (as the party opposing summary judgment). *Erker*, ¶ 17.

6. Even viewing the evidence in the light most favorable to the Residents, however, the Residents' Responses (without an expert to refute DEQ's expert's conclusions to the contrary) do not establish a genuine issue of material that identifying additional wells in the plan of operation was required to provide "appropriate protection" to the "water quality and quantity." Admin. R. Mont. 17.24.2189(g)(i); Mont. Code Ann. § 82-4-434(2)(l).

7. Whether or how additional well information may have changed the conclusions of the hydrologic assessment, or shown that the "water quality and quantity" was not "given appropriate protection" (Mont. Code Ann. § 82-4-434(2)(l)), is not within the range of ordinary training or intelligence and requires expert testimony. Mont. R. Evid. 702. Summary judgment is appropriate where, as here, Residents failed to provide for an expert on a matter requiring expert testimony. *Wylie*, ¶6.

8. Without an expert, Residents will not be able to meet their ultimate

burden at a hearing of showing by a preponderance of the evidence that DEQ violated Admin. R. Mont. 17.24.2189(g)(i), by failing to identify in the plan of operation enough wells to ensure "that surface water and ground water will be given appropriate protection." Admin. R. Mont. 17.24.2189(g)(i); Mont. Code Ann. § 82-4-434(2)(l); *MEIC*, 2005 MT 96, ¶ 16.

9. The Residents thus failed to "make a showing sufficient to establish the existence of an element essential to [their] case" and on which they will bear the ultimate burden of proof at trial. *Celotex*, 477 U.S. at 322.

10. As there are no genuine disputes of material fact, and Golden West and DEQ are entitled to judgment as a matter of law, summary judgment is appropriate in favor of DEQ and Golden West. *Clark Fork Coal.*, ¶ 19; Mont. R. Civ. P. 56(c)(3).

PROPOSED ORDER

The undersigned finds and recommends that BER should enter the following order:

1. Based on the undisputed facts and conclusions of law set forth above, DEQ's Second Motion for Summary Judgment and Golden West's Second Motion for Summary Judgment are GRANTED.

2. The Board adopts the August Order (attached hereto as Exhibit A and incorporated herein by reference) as its final agency action with respect to the

Summary Judgment Motions decided therein (partially granting DEQ and Golden West's motions and denying the Residents' motion).

3. Judgment is entered against the Residents and their appeals of Opencut Mining Permit #2351 are dismissed.

DATED this 30th day of January 2020.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Motions to be mailed to:

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DATED: January 30, 2020

/s/ Aleisha Solem
Aleisha Solem, Paralegal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL OF OPENCUT MINING PERMIT #2351 ISSUED TO GOLDEN WEST PROPERTIES, LLC BY DAVID WEYER ON BEHALF OF THE RESIDENTS OF WALDEN MEADOWS SUBDIVISION.	**CASE NO BER 2018-05 OC**

ORDER ON MOTIONS

On July 2, 2018, Frank and Paulette Wagner (Wagners) filed a request for appeal with the Montana Board of Environmental Review (BER or Board) in the matter of the Opencut Mining Permit #2351 issued to Golden West Properties, LLC on June 6, 2018. On July 5, 2018, David Weyer (Weyer), "on behalf of the residents of Walden Meadows", filed a similar request for appeal with the BER relating to permit #2351. On August 10, 2018, the Board voted to consolidate the two maters into one contested case, and appointed Sarah Clerget as a hearing examiner to preside over the contested case.

On August 14, 2018, the undersigned issued a Prescheduling Order setting the general procedures governing this contested case. Additionally, the Prescheduling Order explained that, pursuant to Mont. Code Ann. §37-61-201 and Montana Ethics Opinion 000008, a corporation cannot represent itself *pro se*, but

must be represented by an attorney to prevent the unauthorized practice of law. The Prescheduling Order therefore imposed a deadline by which Mr. Weyer had to:

> …file a concise statement stating whether his appeal is limited to his individual capacity as a resident of Walden Meadows or if his appeal is in fact on behalf of the residents of Walden Meadows. If Mr. Weyer's appeal is on behalf of the residents of Walden Meadows, Mr. Weyer is directed to include a Notice of Appearance of Counsel or show cause why he is not subject to the provisions of Mont. Code Ann. §37-61-201.

Prescheduling Order at 9. The Prescheduling Order also required the parties to file a proposed schedule.

In response to the Prescheduling Order, on August 21, 2018, Mr. Weyer filed a statement indicating he "filed his appeal as an individual." DEQ Ex. 4. On August 24, 2019, Kristine Akland entered Notice of Appearance "on behalf of David Weyer." DEQ Ex. 7.

On August 23, 2018, the undersigned received an email from the Wagner's stating that they wished to "withdraw our appeal filed as an individual." DEQ Ex. 5. The Wagner's email was converted to a Motion to Dismiss and was granted the following day. Pursuant to Mont. R. Civ. Pro. R. 41(a)(1)(B) the dismissal was without prejudice.

On September 20, 2018, the undersigned issued a Scheduling Order in this matter and set October 19, 2018 as the deadline for the joinder/intervention of

additional parties. Eleven days before that deadline, on October 8, 2018, David Weyer filed a First Amended Notice of Appeal. DEQ Ex. 8. The first sentence on the first page of the First Amended Notice states "[t]his is a [sic] action brought by David Weyer and the residents of Walden Meadows Subdivision." *Id.* at 1. Additionally, the "Relief Requested" was (multiple times) requested on behalf of "Appellants" (plural). *Id.* at 6. No party responded or objected to the First Amended Notice of Appeal.

The parties filed their initial disclosures in November 2018, and expert disclosures in December 2018. In both of those documents (and almost all subsequent documents) submitted by Ms. Akland, she indicated that they are filed by "David Weyer on behalf of the Residents of Walden Meadows Subdivision."

On January 4, 2019, DEQ filed a Motion to Dismiss Petitioner's Property Value Impact Claims, Golden West joined the Motion. Residents filed a Response on January 18, 2019, and DEQ filed a reply on January 22, 2019. In its Reply, DEQ requested that the caption be amended *nunc pro tunc* to exclude the residents of Walden Meadows. On January 30, 2019, Ms. Akland filed a Second Notice of Appearance indicating that she represented Mr. Weyer "and the Residents of Walden Meadows Subdivision" and filed a Response to DEQ's request to amend the caption. On February 4, 2019 DEQ filed a Reply brief in support of amending the caption.

On February 22, 2019, Residents filed a "Motion for Leave to File Second Amended Notice of Appeal." The Motion stated that "DEQ indicates that they consent [to] this Motion. Golden West has indicated they oppose this Motion." Golden West filed a Response on March 11, 2019, (DEQ did not file a Response) and Residents filed a Reply on March 21, 2019.

On March 27, 2019, Residents filed a "Notice of Voluntary Dismissal of Petitioner's Second Claim for Relief." On April 19, 2019, Golden West Properties, LLC (Golden West) filed a "Motion *in Limine* re Expert Testimony."

By April 30, 2019, all three parties filed cross Motions for Summary Judgment, which were fully briefed by June 17, 2019. Oral arguments were held on August 20, 2019, in Helena and all parties appeared.

For the reasons set forth below, Weyer's "Motion for Leave to File Second Amended Appeal" is granted, Golden West's Motion *in Limine* and Motion for Summary Judgment are granted, DEQ's Motion for Summary Judgment is granted in part and denied in part, and Resident's Motion for Summary Judgment is denied.

I. UNDISPUTED FACTUAL BACKGROUND

1. DEQ approved operator Golden West's application for Opencut Mining Permit on June 6, 2018. SSUF ¶ 1[1]; DEQ Ex. 1.

1 DEQ and Mr. Weyer filed the Stipulated Statement of Undisputed Facts, Golden West does not appear to have agreed to these facts.

2. DEQ held one public meeting regarding Golden West's application for Opencut Mining Permit on April 2, 2013 in Billings, Montana. SSUF ¶ 2; DEQ Ex. 15.

3. DEQ issued a total of five (5) Deficiency Notices to Golden West regarding its application for Open Cut Mining Permit on July 19, 2013, November 3, 2014, January 4, 2016, February 9, 2018 and May 4, 2018. SSUF ¶ 3; DEQ Ex. 15.

4. DEQ issued Opencut Permit #2351 which authorizes Opencut operations known as the "Golden West Pit site." SSUF ¶ 4; DEQ Ex. 1.

5. The permit compromises at total of 47.1 acres located in Yellowstone County, Montana. SSUF ¶ 5; DEQ Ex. 1.

6. Access to the Golden West pit is located on the west side of 64th Street West, 0.26 miles north of the intersection of 64th Street West and Danford Road in Billings, Montana. SSUF ¶ 6; DEQ Ex. 1.

7. The Golden West Pit will mine clay, gravel and sand. SSUF ¶ 7; DEQ Ex. 1.

8. The estimated quantity of mine material to be excavated and removed from the entire permit area is 670,000 cubic yards. SSUF ¶ 8; DEQ Ex. 1.

9. A residential subdivision neighbors the Golden West Pit site to the south. SSUF ¶ 9; DEQ Ex. 16.

10. This southern residential subdivision is called Walden Meadows. SSUF ¶ 10.

II. LEGAL STANDARD

Summary judgment is proper when the pleadings and record demonstrate no genuine issue as to any material fact and when judgment is proper as a matter of law. Mont. R. Civ. Pro. 56(c)(3). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17, 296 Mont. 123, 988 P.2d 1221.

Montana Rules of Civil Procedure Rule 15 states a party may amend its pleading once as a matter of course within 21 days after serving it; or with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. Mont. R. Civ. Pro 15(a)(1)(a)-(b) and (2).

Additionally Montana Rules of Civil Procedure Rule 16 states that a scheduling order may be modified for "good cause" and with the judge's consent. Mont. R. Civ. Pro 16(b)(4).

The purpose of a motion *in limine* is to prevent the introduction of evidence that is immaterial, irrelevant or unfairly prejudicial. *City of Helena v. Lewis*, 260 Mont. 421, 425, 860 P.2d 698 (1993). Decisions granting or denying motions *in limine* are reviewed for abuse of discretion. *Nelson v. Nelson*, 2005 MT 263, ¶ 22, 329 Mont. 85, 122 P.3d 1196 (citation omitted). "The authority to grant or deny a

motion *in limine* 'rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.'" *Hulse v. State, Dept. of Justice*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75 citing *City of Helena*, 260 Mont. at 425-26, 860 P.2d at 700.

III. DISCUSSION

A. Motion for Leave to File Second Amended Appeal

Based on the proposed schedule from the parties, on September 20, 2018, the undersigned issued a Scheduling Order in this matter and set October 19, 2018 as the deadline for the joinder/intervention of additional parties. Eleven days before the deadline, on October 8, 2018, Ms. Akland filed a "First Amended Notice of Appeal" (First Amended Appeal). No party objected to the First Amended Appeal. In the First Amended Appeal, counsel states, "[t]his is a action brought by David Weyer and the residents of Walden Meadows Subdivision, whose interests are adversely affected by the final decision of the Montana Department of Environmental Quality." First Amd. Appeal ¶ 1. The First Amended Appeal did not seek to add any additional claims, but sought to add the Residents of the Subdivision as a party.

Mont. Rule Civ. Pro 16(b)(3)(A) requires that a Scheduling Order contain a time limit in which to join other parties. Mont. Rule Civ. Pro. 15(a)(2) states that the "court should freely give leave when justice so requires." Under both Rule 16

and Rule 15, therefore, it was appropriate for the undersigned to set a deadline for the joinder of parties, and for the Residents to join this action, through an amendment to the Notice of Appeal, within that deadline. This First Amended Notice of Appeal was thus timely submitted, well within the joinder deadline set by the Scheduling Order, and clearly stated that the appeal was brought not only by David Weyer but also the residents of Walden Meadows Subdivision (Residents).

On February 22, 2019, Mr. Weyer and the Residents, through Ms. Akland, filed a "Motion for Leave to File Second Amended Notice of Appeal" (Second Notice of Appeal). The Motion stated, "Residents request leave to file an Amended Notice of Appearance that individually names each of the 'Residents of Walden Meadows Subdivision' in the caption and in the body of the appeal." Mot for Leave p. 2. The Motion further asserted that "[t]he specific names of the 'Residents of Walden Meadows Subdivision' were provided to the opposing parties on November 12, 2018." *Id.* Additionally, the Second Notice of Appeal "contains no substantive difference from the First Notice of Appeal" except that it "individually names the 'Residents of Walden Meadows Subdivision.'" *Id* at p.3

Golden West filed its opposition to the Second Notice of Appeal on March 11, 2019 arguing that the amendment sought to "add 42 new parties (appellants) to this action well after the date for adding parties…." GW Opp to Mot p. 1. The

Residents Replied on March 21, 2019, arguing that the Residents were already parties to this case as of the First Amended Notice of Appeal.

The Residents are correct that they were part of this appeal from the First Amended Notice of Appeal, which was filed well before the joinder deadline set by the Scheduling Order and to which no party objected. As the Residents were already part of the appeal, there is no substantive difference caused by the Second Amended Notice of Appeal—it is essentially a clerical cleanup effort. Even if there were some substantive difference, however, the filings between October of 2018 and February 2019 provide "good cause" and "justice so require[d]" necessitating the clarification for the parties of naming the individual Residents in the Second Amended Notice of Appeal under both Rule 16 and Rule 15. In other words, if the confusion were genuine, then there would be reason to allow the clerical amendment.

Golden West's arguments of surprise and prejudice from the amendment are stretched, however. Whatever confusion may have existed with Mr. Weyers initial *pro se* filings and Ms. Akland's Notice of Appearance, Golden West has had notice, since at least October of 2018 when the First Amended Notice of Appeal was filed, that all the Residents of Walden Meadows were part of this appeal. Additionally, Ms. Akland has represented both in her filings and at Oral Argument, that Golden West has had the names of the individual Residents since at least

November of 2018, as part of discovery. Further, as discussed more below, at least eleven of those Residents have been engaged in this permitting process since before the permit was issued. There can be, therefore, little actual surprise about the identity of the individual Residents, how they are allegedly affected by this permit, or the fact that they wanted to appeal its issuance.

The Second Amended Notice of Appeal does not add any additional claims but seeks only to individually name, in the actual Notice, those Residents who were already added through general reference in the First Amended Notice of Appeal and individually named in discovery. Therefore, the Residents' Motion for Leave to File Second Amended Appeal is granted.

B. Voluntary Dismissal of Petitioner's Second Claim for Relief and Motion in Limine

On March 27, 2019, Residents' filed a "Notice of Voluntary Dismissal of Petitioner's Second Claim for Relief." In the Voluntary Dismissal, Residents, pursuant to Mont. Civ. Pro. Rule 41(a)(1)(A), moved to dismiss their second claim of relief, as set forth in paragraphs 24-26 of the First Amended Appeal and paragraphs 25-27 of their Second Amended Appeal.

Residents also requested that the undersigned strike their Expert Witness Disclosure because "[p]etitioners will no longer be calling upon expert witnesses at the hearing." Not. of Vol. Dismissal p. 2. On April 19, 2019, Golden West filed a

Motion *in Limine* requesting that Residents be prevented from presenting any argument, testimony or documents regarding the value of any property, water quality, water quantity, or any other issues that require expert testimony as it relates to the activity authorized by the permit in question. Residents filed a Notice of Position on Golden West's Motion *in Limine* indicating that they took no position on the Motion.

Residents' second claim of relief requests that Golden West provide additional procedures to protect against significant harm to the adjacent lands. Residents' expert disclosure states that an appraiser, a chemical and environmental engineer, and hydrologist would opine as to the value of properties and homes located at the various subdivisions affected by this permit and their anticipated valuation after mining has begun as well as to the impacts to the groundwater quality and quantity from the operation and reclamation of the Golden West Pit.

Because Residents' have taken no stance on Golden West's Motion *in Limine* and have requested that their expert disclosure be stricken from the record, the undersigned will grant both requests. Residents' second claim for relief related to the value of properties and homes located at the various subdivisions affected by this permit is dismissed. Further, Residents' expert disclosure will be stricken and Residents will therefore be precluded from presenting expert testimony at the hearing. Golden West's Motion *in Limine* is granted.

C. Golden West and DEQ's Motions for Summary Judgment Regarding Standing

Golden West has moved for summary judgment arguing that Petitioner David Weyer did not make any oral or written comments on its application for Open Cut Mining Permit #2351 (Permit) before DEQ issued the permit. Golden West cites Mont. Code Ann. §82-4-427(1)(b) as the operative statute requiring Weyer to submit comments prior to DEQ issuing the permit in order to appeal DEQ's permit decision. Without submitting comments, Golden West asserts Mr. Weyer does not have standing to bring an appeal. Golden West also asserts that it would be an impermissible extension of the jurisdiction granted by Mont. Code Ann. §82-4-427 for the BER to allow—through either Rule 15 or Rule 16—the Residents to file an appeal by amendment beyond the 30-day deadline for an appeal. GW Resp in Opp to Mot for Leave p. 1-2, 5-9; Oral Argument (August 20, 2019).

DEQ also moved for summary judgment arguing that some Residents did submit comments during the permitting process, but that the only Residents who filed comments and timely appealed the permit were Frank and Paulette Wagner, who withdrew their appeal. DEQ argues that because none of the Residents in this appeal commented and appealed the permit that this case should be dismissed in its entirety. DEQ goes one step further and argues that the principle of *res judicata*

applies to the Wagners and they should be precluded from participating in this appeal.

The Residents respond to Golden West's motion stating that their claims cannot be dismissed for failure to comment on the permit application. The Residents cites to *Darby v. Cisneros*, 509 U.S. 137 (1993) for the proposition that if an administrative appeal process does not automatically stay the challenged action, then the Doctrine of Exhaustion of Administrative Remedies does not apply. Further, they argues that because the action is not stayed and Golden West is allowed to proceed with its mining operations and that because this administrative appeal is at the administrative level, the issues raised cannot be dismissed for failure to exhaust. Additionally, the Residents quote *Darby* by stating that "courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [the APA]" and argue that they may bring a challenge to district court if the permit is not stayed by a pending administrative appeal. However, the Residents have not appealed to the District Court; instead they have asked the BER to review the decision of the DEQ in an administrative contested case under the Montana Administrative Procedures Act (MAPA). Here, the final agency action would be an Order from the BER, not issuance of the permit. Therefore, Mont. Code Ann.

§82-4-427(1)(b) is the controlling statute to determine whether Mr. Weyer and the Residents have standing.

The Residents argue that because some Residents submitted comments to the DEQ prior to the permit application being approved, the Residents collectively have placed DEQ on notice of issues with the permit and therefore not every single resident who has appealed has to submit individual comments and individual appeals. They also argue that those who have commented on the permit application are parties to this contested case as they initially authorized Mr. Weyer to appeal the DEQ's approval of the Permit.

Under Mont. Code Ann. §82-4-427(1)(b), there are two prerequisites to having standing: (1) that a person whose interests are or may be adversely affected by a final decision, submit in writing within 30 days a reason for the appeal; and (2) that if the application was publicly noticed, that the appeal be from a person who has either submitted comments to DEQ or submitted comments at a public meeting that was held under § 82-4-432. There is no dispute that the DEQ held a public hearing on this application. SSUF ¶ 2. There is also no dispute that Mr. Weyer filed a timely appeal with the BER. SSUF ¶ 40. What is disputed is whether Mr. Weyer has met both requirements under § 82-4-432 and whether he has preserved the Residents' standing by filing his initial appeal with the BER.

i. Did Mr. Weyer and the Residents Meet the First Requirement Under § 82-4-427 by Timely Filing an Appeal Within 30 Days of DEQ Issuing the Permit?

On July 5, 2018, Mr. Weyer filed an Appeal with the BER. Mr. Weyer's initial appeal states, "I wish to file an appeal of the DEQ decision on behalf of the residents of Walden Meadows Subdivision." Not. of Appeal p. 2 (July 5, 2018). In response to this statement, the undersigned issued a Prescheduling Order requiring Mr. Weyer to clarify whether his appeal was limited to his individual capacity as a resident of Walden Meadows or whether he represented (as an attorney) all the Residents of Walden Meadows (by September 3, 2018). As detailed in the Prescheduling Order, the undersigned was concerned that Mr. Weyer, as a pro se litigant, may have been unknowingly practicing law without a license by representing other individuals' interests. PreSched. Ord. ¶¶ 12-13. In compliance with the Prescheduling Order, on August 21, 2018, Mr. Weyer filed a statement indicating he was "filing the appeal in his individual capacity" and three days later on August 24, 2019, Ms. Akland filed her Notice of Appearance stating she represented Mr. Weyer. Therefore, Mr. Weyer met the first requirement under § 82-4-427 and timely filed an appeal.

The parties then proceeded to file a stipulated proposed schedule as directed by the Prescheduling Order, which included a date for amending the Notice. On September 20, 2018 the undersigned issued a Scheduling Order based on the

schedule agreed on and proposed by the parties. The Scheduling Order included the parties agreed upon deadline of October 19, 2018 for the joinder/intervention of additional parties.

On October 8, 2018, eleven days in advance of the October 19th deadline, Ms. Akland filed a First Amended Notice of Appeal in which she stated, "[t]his is a action brought by David Weyer and the residents of Walden Meadows Subdivision…." First Amended Notice p. 1 Thus, before the agreed-on amendment deadline Weyer amended the Notice to include all the Residents of Walden Meadows. This statement is, therefore, sufficient to join the Residents to this contested case without violating Rule 16 or the Scheduling Order. While it would have been helpful for Ms. Akland to also file a Notice of Appearance at that time listing the specific residents she was representing, or to list the individual residents in the First Amended Notice of Appeal, neither the Prescheduling Order nor the Scheduling Order required her to do so. And, after standing concerning the Residents became an issue, Ms. Akland did file a second Notice of Appearance on January 30, 2019. Further, neither DEQ nor Golden West raised this issue with the First Amended Notice until January 22, 2019, three months after it was filed.

DEQ first raised the issue in their Reply Brief on their Motion to Dismiss the property value impact claims. In that Reply Brief, DEQ requests that the caption be amended *nunc pro tunc* "unless any other persons a person (including Residents

of Walden Meadows Subdivision) whose interests are or may be adversely affected by DEQ's approval of the permit at issue come forward as provided and subject to § 82-4-427(1), MCA." Reply to Mot to Dismiss p. 1. As discussed above, the Residents had already 'come forward' via the First Amended Appeal and the amendment deadline in the Scheduling Order. Therefore, Mr. Weyer and the Residents have met the first requirement under § 82-4-427(1).

ii. Did Mr. Weyer and the Residents Meet the Second Requirement Under § 82-4-427(1)(b) by Submitting Comments to DEQ or Submitting Comments at a Public Meeting That was Held Under § 82-4-432?

Golden West and DEQ argue that Mr. Weyer specifically, did not comment on the permit application either via written comments or by submitting comments at the public meeting, until after DEQ had issued the permit. DEQ argues that some of the Residents, Mike Lensiak, Randy Pfeifle, Frank Wagner, Paulette Wagner, Bill Comstock, James Totten, Keith Heidecker, Louie Kuhar, Karen Kuhar, Deloris Lix, and Barry Six[2] were the only residents that either commented during the public meeting and/or submitted comments to DEQ during the application process as contemplated under § 82-4-427(1)(b).

2 Mr. Weyer argues that Barry Six has submitted comments on his wife Cindy Six's behalf. However, as previously ordered by the undersigned in her Prescheduling Order, a party cannot represent another parties' interest, therefore, Cindy Six lacks standing in this appeal.

As articulated above, the Residents respond by stating that Mr. Weyer's claims cannot be dismissed for failure to comment on the permit application. The Residents cite to *Darby v. Cisneros*, 509 U.S. 137 (1993) for the proposition that if an administrative appeal process does not automatically stay the challenged action, then the Doctrine of Exhaustion of Administrative Remedies does not apply. Further the Residents contend that because some of the Residents submitted comments to DEQ prior to the permit being issued, all the Residents have sufficiently placed DEQ on notice of issues with the permit and therefore not every single resident who has appealed has to submit individual comments and individual appeals. However, the Residents' arguments ignore the plain meaning of the statute, which is clear on its face:

> If an application was noticed publicly as required by this part, to be eligible to file for an appeal a person must have either submitted comments to the department on an application or submitted comments at a public meeting held under **82-4-432**.

Those Residents who did not comment during the public process have not put DEQ or Golden West on notice of their individual concerns with the permit. If the Residents' argument were to stand, any person who did not comment on the application during the approval process could come in after the issuance of the permit and assert a right on a person's behalf who did express concerns. This is directly opposite of the plain language of § 82-4-427 (1)(b).

Therefore, Golden West's Motion for Summary will be granted and DEQ's Motion will be granted in part and denied in part. Mr. Weyer does not have standing to participate in this appeal because he did not provide comments to the DEQ prior to the issuance of the Permit. However, those Residents who did comment during the public process and also timely appealed (through the First Amended Notice) may proceed. These Residents are: Mike Lensiak, Randy Pfeifle, Frank Wagner, Paulette Wagner, Bill Comstock, James Totten, Keith Heidecker, Louie Kuhar, Karen Kuhar, Deloris Lix, and Barry Six. These eleven Residents have met both requirements in § 82-4-427 and therefore have standing to participate in this appeal.

iii. The Wagners Are Not Precluded From Participating in This Appeal.

In DEQ's Motion for Summary Judgment they argue that because Frank and Paulette Wagner voluntarily dismissed their initial appeal under Mont. Rule Civ. Pro. Rule 41, they are precluded from "re-appealing" the permit. DEQ articulates that the Wagners are precluded under the doctrine of *re judicata* from re-litigating the permit. However, Rule 41 is clear that, unless the notice or stipulation states otherwise, the dismissal is without prejudice. The dismissal of the Wagners did not state the dismissal was with prejudice. Even if this were not true, the Wagners have not "litigated" anything in their appeal; they filed a notice of appeal and then

withdrew that individual appeal after the Prescheduling Order was issued, and timely joined the appeal (through the First Amended Notice) with the rest of the Residents of Walden Meadows. No issues of fact or law were "litigated." Additionally, as noted above, the Wagners have satisfied both prongs of Mont. Code Ann. § 82-4-427. Therefore, the Wagners have standing to participate in this appeal.

D. The Residents' Motion for Summary Judgment

The Residents in their Motion for Summary Judgment ask the undersigned to determine , as a matter of law, that the Golden West Plan of Operation (Pl. Op.) did not include a sufficient acknowledgment of consultation with the DNRC regarding impacts to existing water rights, and therefore did not provide sufficient measures to protect adversely affected water sources. The Residents also ask the undersigned to determine, as a matter of fact, that Golden West failed to disclose all the wells within 1,000 feet of the Permit Area, making it deficient as a matter of law. The Residents characterize both of these deficiencies at the Oral Argument as purely "procedural."

Golden West responds that they did, in fact, consult with the regional DNRC office and that the Pl. Op. incorporated into the Permit satisfies this requirement. Further, Golden West contends that it was not required to identify wells within 1,000 feet of the permit, but only required to attempt to locate wells to the "best of

[its] knowledge and belief based upon the exercise of due diligence." Golden West Resp Br. p. 15.

DEQ also responds that Golden West did consult with the regional office of DNRC and while the permit did not specifically state that "possible adverse impacts to existing water rights" was discussed, such discussion was unnecessary because ARM 17.24.218(1)(g)(v) states that an operator only has to acknowledge the requirements to obtain water rights and possible adverse impacts to existing water rights, which Golden West did in section D2(1)(e). DEQ further argues that proposed measures to protect water rights or adversely affected water sources was not necessary because negative impacts to water rights and sources is unlikely to occur as Golden West is not permitted to dewater the site at all. Regarding the well issue, DEQ argues that even if Golden West failed to disclose wells it was harmless error because DEQ uses the information as a screening analysis to determine the need for a hydrogeologic assessment, which DEQ ultimately required Golden West to participate in.

i. Did Golden West's Plan of Operation Include Acknowledgment of Consultation With the DNRC as Required Under ARM 17.24.218(1)(g)(v)?

In their Motion for Summary Judgment the Residents argue that the Pl. Op. fails to provide acknowledgment that the Operator, Golden West in this case, consulted with the DNRC regarding possible impacts to existing rights. The

residents acknowledge that there is discussion in the Pl. Op. regarding consulting with the DNRC but that that particular discussion relates to whether Golden West was required to obtain a water right for the Golden West Pit not the possible impacts to existing water rights. Further, the Residents argue that Golden West is not only required to provide acknowledgment but also documentation that it consulted with DNRC.

DEQ agrees that ARM 17.24.218(1)(g)(v) states that the Pl. Op. must contain a statement from the Operator that acknowledges the operator consulted with the regional office of DNRC regarding the requirements to obtain water rights and *possible* adverse impacts to existing water rights if the proposed operation involves or may result in diversion, capture, or use of water and agrees that Golden West was required to consult with DNRC regarding water rights. DEQ Resp. to Pet. MSJ p. 6-7. DEQ contends "that mining at the site will create a pit that fills up with groundwater and creates a pond from which Golden West may pump up to 35 gpm for its operations." DEQ Resp. to Pet. MSJ p. 6. DEQ acknowledges that there is no specific passage which states Golden West discussed possible adverse impacts to existing water rights but argues that such discussion was unnecessary because Golden West was not required by the DNRC to obtain a water right. Instead, DNRC informed Golden West that an exemption may be appropriate if the site did not exceed 35 gpm and 10 acre-feet per year, and when such exemption is

present, DNRC does not analyze possible adverse impacts to existing water rights See Aff. of Millicent Heffner p. 2. In other words, Golden West is not permitted to remove any more water than the DNRC exemption would cover.

Golden West argues that the ARM requires only an acknowledgment, not a detailed explanation or "transcript" of its consultation with DNRC. Additionally, Golden West argues it was required to affirm in the Pl. Op. which is incorporated into the Permit, that it had not only consulted with DNRC concerning the requirements to obtain water rights and possible adverse impacts to existing water rights, but also affirm they understand their requirements and take necessary precautions and measures to protect the water rights of other parties, which they did. See DEQ Ex. 1 at D2(1)(e) and D2(1)(d).

ARM 17.24.218(1)(g)(v) states in relevant part:

> The plan of operation must include the following:
> …a water resource section that includes:
> …in the event that the proposed opencut operation involves or may result in the diversion, capture, or use of water, acknowledgement that the operator consulted with the regional office of the Department of Natural Resources and Conservation, Water Resources Division, concerning the requirements to obtain water rights and possible adverse impacts to existing water rights;

The arm is clear that the Pl. Op. must contain an acknowledgment that the DNRC was consulted any time that the "use of water" is contemplated in the Pl. Op. The obvious assumption of the ARM is that DNRC will be consulted regarding any

potential impacts to water contemplated by the Pl. Op. However, there is no language that indicates the Operator must provide a detailed account of the meeting between the Operator and DNRC. Here, as any dewatering beyond the 35 gmp and10 acre ft/yr. exemption would be a violation of the permit, it does not really matter what exactly transpired when Golden West consulted with DNRC. It is obvious from the permit and DNRC's rules that, as long as Golden West complies with the issued permit, no water right should be effected, and that Golden West did "acknowledge that the operator consulted with DNRC." Golden West provided sufficient details in section D2(1)(d) and (e) regarding its consultation with the DNRC to show that it met the requirements of ARM 17.24.218(1)(g)(v).

Therefore, the Residents are not entitled to judgment as a matter of law that the Permit is deficient with respect to ARM 17.24.218(1)(g)(v) and their Motion for Summary Judgment on this issue is denied.

ii. Was Golden West's Plan of Operation Required to Provide Measures to Protect Adversely Affected Water Sources as Required Under ARM 17.24.218 (1)(h)(ii)(B)?

The Residents argue that the Pl. Op. does not contain any proposed measures to protect or replace water sources of other parties whose quantity may be adversely affected, and therefore is in violation of the Opencut Mining Act (the Act). The Residents state that because this is a violation of the Act, the public and DEQ have "inaccurate or incomplete information…and are therefore unable to

adequately ascertain the true impacts of the operation or determine whether the operation compl[ies] with the Act". Residents' MSJ p. 17. The relevant Administrative Rule states:

> The plan of operation must include the following:
> a water quality protection and management section that includes:
> an explanation of measures to prevent pollution of state waters or impairment of a water right including, but not limited to:
> an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has a beneficial use;

ARM 17.24.218(1)(h)(ii)(B)

DEQ explains in its Response Brief that Golden West is not permitted to conduct any dewatering at the site and therefore, no impairment of water right is expected to occur as a consequence of mining at the site. See DEQ Resp to Pet. MSJ pgs. 10-13; see also, Supra Sec (i). As part of the permitting and deficiency letter process, DEQ required Golden West to submit scientific reports and work plans such as a hydrogeologic assessment, monitoring well installation plan, and groundwater monitoring plan to ensure the protection of ground water quality. Further, DEQ argues that the Residents have not retained an expert to show that an impairment of a water right is expected to occur and the Residents will not be able to present evidence on this issue because making such a determination is not "within the range of ordinary training or intelligence". DEQ Resp. to Pet. MSJ p. 12.

Similarly Golden West argues that they have provided an environmental assessment and a groundwater monitoring plan that will monitor wells around the permit site to ensure that the water rights of others are protected and are in compliance with ARM 17.24.218(1)(h)(ii)(B). Golden West argues that the Residents have abandoned any testimony wherein someone could opine that the presence of any well in the aquifer would be affected therein rendering their requested relief an idle act, which is precluded under Mont. Code Ann. §1-3-223.

Because DEQ required Golden West to complete work plans such as a hydrogeologic assessment, monitoring well installation plan, and groundwater monitoring plan, and because the Permit does not include any dewatering that would effect a water right or require replacement of adversely affected water, Golden West's Pl. Op. has complied with ARM 17.24.218 (1)(h)(ii)(B). The Resident's Motion for Summary Judgment on this is denied.

iii. Did Golden West's Plan of Operation Fail to Disclose All The Wells Within 1,000 Feet of The Permit Area as Contemplated in ARM 17.24.218(1)(g)(i)

The Residents argue that ARM 17.24.218(1)(g)(i) requires Golden West to disclose *all* wells within 1,000 feet of the permit area and their depths, water levels, and uses. The Residents further argue that Golden West failed to collect information from individual landowners and to disclose 27 wells, five of which are registered in the DNRC's water rights query system, which is available to the

public. The residents point to the Opencut Mining Permit and Application Form which states: "[a]dditional information may be available from landowners or by conducting field measurements." Residents MSJ p. 22. The residents argue that there is no exception to this rule and because Golden West has failed to disclose at a minimum 5 wells, the permit does not comply with the Act and should be remanded back to DEQ.

As a matter of fact, Golden West disputes the location of the wells, and whether it disclosed all the wells within 1,000 ft. Golden West further disputes that, as a matter of law, ARM 17.24.222(3)(b) requires Golden West to provide all well information and argues rather that it requires Golden West to provide well information available "to the best of [its] knowledge and belief based upon the exercise of due diligence." Golden West also disagrees with the assertion that it was "required to interview all landowners in the area to determine if they had wells that were not of public record". Golden West Resp to MSJ p. 15. Golden West contends that no such requirement exists and argues that the undersigned cannot add such a requirement to the plain reading of the rule. *Glendive Med. Ctr., Inc. v. Mont. Dep't of Pub. Health & Human servs.,* 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560; (Golden West Resp to MSJ p. 15). Golden West maintains it exercised due diligence as required by ARM 17.24.222(3)(b).

DEQ also disputes, as a matter of fact, the location of the wells and whether (or which) were disclosed. Further, DEQ also argues, as a matter of law, that even if the Pl. Op. failed to disclose a number of wells within 1,000 feet of the Permit area, such non-disclosure is harmless error because the data from the wells is used as a screening analysis to determine if a hydrogeologic study is necessary, which ultimately DEQ required Golden West to conduct. DEQ also argues it has no statutory duty or rule that requires DEQ to verify well information that is submitted by an Operator. Instead, DEQ contends its practice of reviewing well information provided by applicants is consistent with current professionally accepted standards. DEQ articulates that once DEQ is provided the well information, DEQ uses the information to assess subsurface conditions and well construction practices in the area so that DEQ can determine whether an operator will be required to provide a hydrogeologic study to ensure protection of all groundwater in the vicinity. DEQ provides the Affidavit of Chris Cronin to explain that the Ground Water Information Center (GWIC) data is considered the essential source of well information and DNRC water rights queries are considered optional under the current professionally accepted standards. Cronin Aff. ¶¶ 19, 26. Once DEQ has analyzed the information and determined that either the information is lacking or that the groundwater in the area is sensitive to the proposed action, it will write a deficiency letter and ask for more information or that hydrogeologic studies be

completed. DEQ acknowledges that it issued a deficiency letter regarding this issue.

Summary judgment is proper when the pleadings and the record demonstrate no genuine issue as to any material fact and when judgment is proper as a matter of law. Mont. R. Civ. Pro. 56(c)(3). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17, 296 Mont. 123, 988 P.2d 1221. DEQ and Golden West have sufficiently raised disputed issues of material fact to survive summary judgment with regard to the wells within 1,000 ft. Additionally, DEQ has made arguments regarding 'harmless error' sufficiently to show both disputed issues of material fact and to forestall judgment as a matter of law. Therefore, the Residents have failed to show both that there are no disputed issues of material fact and that they are entitled to judgment as a matter of law. The eleven remaining Residents will proceed to a hearing on the merits.

IV. CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED:

1. Leave is Granted for filing of the Second Amended Notice.

2. Residents' second claim of relief is dismissed pursuant to Mont. Civ. Pro. 41(a)(1)(A).

3. Residents' Expert Witness Disclosure will be stricken from the record, and Golden West's Motion in *Limine* is Granted. Residents will not be allowed to present expert testimony as to impacts to the groundwater quality and quantity from the operation and reclamation of the Golden West Pit.

4. Golden West's Motion for Summary Judgment is Granted in Part as Mr. Weyer lacks standing to participate in this appeal, however, eleven Residents retain standing (as described below).

5. DEQ's Motion for Summary Judgment is Granted in Part and Denied in Part. Mr. Weyer lacks standing to participate in this appeal, however the following individuals have standing to participate in this appeal: Mike Lensiak, Randy Pfeifle, Frank Wagner, Paulette Wagner, Bill Comstock, James Totten, Keith Heidecker, Louie Kuhar, Karen Kuhar, Deloris Lix, and Barry Six.

6. The Residents' Motion for Summary Judgment is DENIED.

DATED this 30th day of August, 2019.

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Motions to be mailed to:

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DATED: 8/30/19 */s/ Aleisha Solem*
Aleisha Solem, Paralegal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL OF OPENCUT MINING PERMIT #2351 ISSUED TO GOLDEN WEST PROPERTIES, LLC BY DAVID WEYER ON BEHALF OF THE RESIDENTS OF WALDEN MEADOWS SUBDIVISION.	**CASE NO BER 2018-05 OC**

ORDER ON EXCEPTIONS AND NOTICE OF SUBMITTAL

The undersigned has issued Proposed Findings of Fact, Conclusions of Law (Proposed Order). The Proposed Order has been served on the parties. Mont. Code Ann. § 25-4-621 affords "each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision." *See* Mont. Admin. R. 1.3.223(1).

Mont. Code Ann. § 2-4-621(3) provides:

> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

The hearing examiner's Proposed Order is now before the BER, which constitutes the "officials who are to render the decision." Mont. Admin. R. 1.3.223 (1). The parties therefore have the opportunity to submit Exceptions and make oral arguments before the BER concerning the hearing examiner's Proposed Order. Based on the Proposed Order, any Exceptions, and any oral arguments presented, the BER will decide on the final agency action pursuant to the options stated in Mont. Code Ann. § 2-4-621.

The BER will hear oral arguments on this case it's next scheduled meeting on April 17, 2020. Therefore, the undersigned has set an Exceptions briefing schedule that will allow the BER to review the Proposed Order and exceptions briefs prior to the meeting, and then hear oral argument at the April meeting. If the parties find this schedule impossible, the undersigned will consult with the Board Chair regarding any extension requested, but parties are warned that such an extension is highly unlikely.

For these reasons, IT HEREBY ORDERED:

1. Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before **February 13, 2020**. If no party files exceptions this matter will be deemed submitted.

2. Each party may file one Response brief to any exceptions that are filed (there should, therefore, be no more than three responsive briefs filed total,

even if all three parties file Exceptions). Responses are due on or before **February 27, 2020**. Responses are **limited to 3,250 words**.

3. The parties may **not** file Reply briefs. Any arguments in reply to the Responses can be addressed at oral argument.

4. If any party believes that any current member of the BER should be disqualified from participating int the decision on this case because of "personal bias, lack of independence, disqualification by law, or other disqualification," that party will file "in good faith… a timely and sufficient affidavit" explaining the reasons why disqualification is appropriate. Mont. Code Ann. § 2-4-611(4). Such an affidavit must be filed "not less than 10 days before" the BER Meeting, i.e. **by April 7, 2020**. *Id.* **Failure to file such an affidavit will be deemed a waiver of the parties' right to argue that a BER member is unqualified to render a decision on the Proposed Order.**

5. This matter will be submitted for final agency action and placed on the **April 17, 2020** agenda of the BER as an action item for final agency action.

6. The parties may present oral argument, in person, in front of the board at the **April 17, 2020** meeting, or submit written statements in lieu of appearing and arguing in person. If a party chooses to submit a written statement rather than appear, it must be filed no later than **April 9, 2020**. Failing to appear in person or file a written statement will be deemed a waiver of the party's right to oral

argument in front of the BER.

7. The location, time, and agenda for the BER meeting, as well as the "Board packet" materials given to the BER members, will be publicly available on the BER's website http://deq.mt.gov/DEQAdmin/ber at least one week in advance of the BER meeting. The parties are encouraged to regularly check the Board's website for any additional updates on the meeting. Parties may attend the meeting telephonically if necessary, although they are encouraged to appear in person.

8. The undersigned, acting as Board Attorney, will prepare a memorandum outlining the MAPA process and standards to be used in reviewing the proposed decision for the Board, so the parties need not advise the Board of such their exceptions briefs. Prior examples of these memorandums, which are fairly standardized, are available in prior meeting materials on the Board's website. The memorandum for this case will included with the "Board packet," along with the Proposed Order (and the Order on Motions in Limine, which is an exhibit thereto) and the Exceptions and Response briefs.

9. To facilitate consideration by the BER members, the Proposed Order, Exceptions, and Responses may be provided to the BER serially, as they are filed, to give the BER more time to review them. The complete "Board packet" (including anything serially distributed to the BER) will be available to the parties (and the public) on the BER website one week prior to the BER meeting.

DATED this 30th day of January, 2020.

/s/ Sarah Clerget

SARAH CLERGET
Hearing Examiner
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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DATED: 1/30/20

/s/ Aleisha Solem
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Attorney for Residents

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Attorneys for Golden West Properties, LLC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL OF OPENCUT MINING PERMIT #2351 ISSUED TO GOLDEN WEST PROPERTIES, LLC BY DAVID WEYER ON BEHALF OF THE RESIDENTS OF WALDEN MEADOWS SUBDIVISION	CASE NO BER 2018-05 OC **STIPULATION FOR DISMISSAL OF APPEAL**

This *Stipulation for Dismissal of Appeal* is entered into by counsel of record for, and with the consent of, Golden West Properties, LLC ("Golden West") and Mike

Lensiak, Randy Pfeifle, Bill Comstock, James Totten, Keith Heidecker, Louie Kuhar, Karen Kuhar, Deloris Lix and Barry Six (collectively, the "Residents"). Golden West and the Residents hereby stipulate and agree:

1. On January 30, 2020, Hearing Examiner Sarah Clerget issued the *Hearing Examiner's Proposed Findings of Fact & Conclusions of Law to BER* (the "Order") in the above-captioned matter.

2. The Order provides, in part, proposed findings of fact and conclusions of law that explain why the motions for summary judgment filed by Golden West and the Montana Department of Environmental Quality should be granted, and the Resident's appeal should be dismissed.

3. The Residents have been advised that they have an opportunity to file exceptions to the Order.

4. The proposed Findings of Fact and Conclusions of Law should be adopted by the Board of Environmental Review without exception.

5. The Residents' appeal of the decision by the Montana Department of Environmental Quality ("MDEQ") to issue Opencut Mining Permit #2351 to Golden West should be dismissed with prejudice and the Residents hereby request and consent that their appeal in the above-captioned matter be dismissed with prejudice.

6. The proposed Order is filed together with this Stipulation. Counsel for the Residents and Golden West have contacted counsel for MDEQ and they do not oppose the relief requested in the proposed Order.

DATED this 21st day of February, 2020.

AKLAND LAW FIRM, PLLC

KRISTINE AKLAND, counsel
For Residents

KASTING, KAUFFMAN & MERSEN, P.C.

JOHN M. KAUFFMAN, counsel for
Golden West Properties, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of February, 2020 a true and correct copy of the foregoing STIPULATION and proposed ORDER were served, ( ) by U.S. Mail, postage prepaid, (X) by email, ( ) hand, upon the following at the following address:

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/s/ John M. Kauffman
John M. Kauffman

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL OF OPENCUT MINING PERMIT #2351 ISSUED TO GOLDEN WEST PROPERTIES, LLC BY DAVID WEYER ON BEHALF OF THE RESIDENTS OF WALDEN MEADOWS SUBDIVISION	CASE NO BER 2018-05 OC **ORDER ADOPTING HEARING EXAMINER'S PROPOSED FINDINGS OF FACT & CONCLUSION OF LAW AND DISMISSAL OF APPEAL**

On January 30, 2020, Hearing Examiner Sarah Clerget issued the *Hearing Examiner's Proposed Findings of Fact & Conclusions of Law to BER* (the "Order") in the above-captioned matter. On February __, 2020, the Residents who had appealed the decision of the Montana Department of Environmental Quality (the "MDEQ") to issue Opencut Mining Permit #2351 and the permit holder, Golden West Properties, LLC, filed a *Stipulation for Dismissal of Appeal.* The *Stipulation for Dismissal of Appeal* provides that this body should adopt the proposed findings and conclusions of law set forth in the Order and dismiss the above-captioned matter with prejudice. MDEQ consents to the same.

Upon review of the Order and the *Stipulation for Dismissal of Appeal*, IT IS HEREBY ORDERED that the Order is adopted in full and the above-captioned matter is dismissed with prejudice.

DATED this____ day of _____, 2020.

MONTANA BOARD OF ENVIRONMENTAL REVIEW

_____

By: _____

Its: _____

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DATED: _____ __, 2020

_____

today. Next is new contested cases, and we'll go back to Sarah for this.

MS. CLERGET: So in looking at your updated agenda -- we apologize for that, but that's the one that went out, I can't remember if it was yesterday or the day before -- that should have two contested cases, new contested cases on it.

One of them is the appeal for Western Energy Company regarding Permit No. DEQ-01103F, which I'm going to refer to as the Western Energy Area F case, so as to not confuse it with the current Western Energy case that's in front of us right now. That notice of appeal came in from Western Energy.

Then the second appeal is the same permit, appealing the same permit, and so I would ask that you probably combine those appeals for procedural purposes, since they're essentially cross appeals of the same permit, the one is by Western and one is by MEIC.

And I'll reiterate your options you have. You can keep one or both; you can assign them for procedural purposes, and keep the substantive decisions like summary judgment or

hearing; or you can assign it to me for all purposes.

CHAIR DEVENY: I have a question of you. Would there be any reason to keep them separate?

MS. CLERGET: I think as they were filed separately, and given separate case numbers, we should keep them separate, but combine them for procedural purposes.

CHAIR DEVENY: Any questions of Sarah on this procedure? Chris.

MR. TWEETEN: Just a practical one. Do you have time to take these on as the Hearing Examiner at this point, if we were to combine them for procedural purposes?

MS. CLERGET: I think so. That raises another question, which is just for the assignment purposes, I wanted to clarify with you guys that if I need help, there are other attorneys in my office who can help, and so when you assign a case to me, my assumption is that you assign it to me, and then I can delegate as necessary for work flow if needed. But ultimately I will be the one who will be presenting it to you, but I may need help from some other attorneys as these cases get larger and more. So can somebody just make sure,

orally make sure that that's okay?

MR. TWEETEN: I think that's understood, unless anybody has a different understanding.

CHAIR DEVENY: That's quite clear.

MS. CLERGET: So with that caveat, yes, I can take it.

MR. TWEETEN: Madam Chair, I would move to assign these, to consolidate these cases for prehearing purposes, and assign them to our Hearing Examiner, our Counsel to serve as Hearing Examiner.

CHAIR DEVENY: That assignment is in totality or for procedural purposes?

MR. TWEETEN: I think we start with procedural purposes, and then I think down the road we can make a determination if it appears that the case is susceptible to summary judgment, perhaps we could make a determination to expand the scope of the assignment to handle that, or to assign a hearing on the merits if it comes to that.

I think initially we ought to just get through the procedural matters, and then Sarah can report back to us, as she does at every meeting, and we can make a determination as to whether we

want to expand the scope or reference that point.

CHAIR DEVENY: Any other discussion on this?

(No response)

MR. TWEETEN: I think I made that in the form of a motion.

MR. BUSBY: I'll second.

CHAIR DEVENY: It's been moved and seconded. Further discussion on the motion to consolidate the cases and to assign to Sarah for procedural purposes?

(No response)

CHAIR DEVENY: Hearing none, all in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, the motion passes.

MS. CLERGET: I think that concludes the new cases.

CHAIR DEVENY: Then next we have some action on contested cases, and the Signal Peak. Sarah, would you provide --

MS. CLERGET: We don't have the table

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTERN ENERGY COMPANY REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-03 OC**
IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY THE MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-05 OC**

ORDER VACATING HEARING

On March 4, 2020, the undersigned issued an "Order Granting Extension, Order Setting Oral Argument" setting oral argument on the parties' cross-motions for partial summary judgment. Upon review of the record, the undersigned was appointed hearing examiner for procedural purposes and therefore lacks jurisdiction to hear oral argument on the parties' motions as the BER retained

substantive jurisdiction on any summary judgement decision. *See* BER Board Mtg. May 31, 2019 Tr. 27:3-30:19. That being the case,

IT IS HEREBY ORDERED:

1. The summary judgment oral argument scheduled before the undersigned for March 25, 2020, is vacated.

2. The decision of the BER members, along with the fact that there are cross-motions for partial summary judgment pending, will come before the current BER members as an action item on the agenda at the BER meeting on **April 17, 2020**. At that meeting, the undersigned will ask the current BER how they wish to proceed. At the BER's discretion, the parties may be heard on the issue.

3. All remaining deadlines in the March 4, 2020 Order remain in full force and effect.

DATED this 6th day of March, 2020.

/s/ Sarah Clerget
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DATED: 3/6/20

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Attorneys for Respondent Montana Department of Environmental Quality Air, Energy and Mining Division

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTERN ENERGY COMPANY REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-03 SM**
IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY THE MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-05 SM** **NOTICE OF SUBMITTAL**

NOW COMES the Montana Department of Environmental Quality ("DEQ"), by and through its undersigned counsel and respectfully provides notice that the parties'

Motions for Summary Judgment in the above-captioned matter are ripe for decision on the briefs pursuant to Mont. R. Civ. P. 56(c)(2) and the Hearing Examiner's July 2, 2019 First Scheduling Order ("Scheduling Order").

Mont. R. Civ. P. 56(c)(2) states that "The right to a hearing is waived unless a party requests a hearing within 14 days after the time for filing a reply brief has expired," and that "The court may set a hearing on its own motion." Paragraph 1.g. of the Hearing Examiner's Scheduling Order states, in part, "If any party requests oral argument on any dispositive motions, the hearing for such will be set at a later date."

The last brief filed on cross-motions for summary judgment in the above-captioned matter was filed on March 24, 2020.[1] It has been over 14 days since the time for filing a reply brief has expired in this case and the parties have not requested a hearing on their cross-motions for summary judgment. Therefore, the right to such a hearing has been waived by the parties. However, the Board of Environmental Review or the assigned Hearing Examiner may set oral argument on its own motion. The Hearing Examiner set oral argument on these cross-motions for March 25, 2020, in a March 4, 2020 Order Granting Extension, Order Setting Oral Argument. But on March 6, 2020, that oral argument was vacated by the Hearing Examiner's Order

[1] Petitioners Montana Environmental Information Center and the Sierra Club filed a Motion to Refile Reply Brief on March 24, 2020. Petitioners had filed an over-length brief on March 13, 2020, which was the deadline for summary judgment reply briefs pursuant to the Hearing Examiner's March 4, 2020 Order Granting Extension, Order Setting Oral Argument. Petitioners' motion to refile was granted by the Hearing Examiner on March 26, 2020. Subsequently, Petitioners' exhibit 1 attached to their motion to refile was added to the contested case record as the operative reply brief in the matter.

Vacating Hearing, which stated:

> The decision of the BER members [on whether to give the Hearing Examiner substantive jurisdiction in this case], along with the fact that there are cross-motions for partial summary judgment pending, will come before the current BER members as an action item on the agenda at the BER meeting on April 17, 2020. At that meeting, the undersigned will ask the current BER how they wish to proceed. At the BER's discretion, the parties may be heard on the issue.

Provided that the parties have not requested oral argument on their cross-motions for summary judgment, the parties hereby request that the BER or assigned Hearing Examiner decide the motions on the briefs. In light of the current circumstances, DEQ would ask for the BER to advise the parties as soon as possible if it will be requiring oral argument on the merits of the summary judgment motions at the April 17, 2020 BER meeting.

Dated: April 8, 2020

Respectfully submitted,

/s/ Sarah Christopherson

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DATED: April 8, 2020

/s/ Sarah Christopherson
DEQ Staff Attorney

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTERN ENERGY COMPANY REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-03 OC**
IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY THE MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB REGARDING APPROVAL OF SURFACE MINING PERMIT NO. C2011003F	**CASE NO. BER 2019-05 OC**

NOTICE TO THE PARTIES

On April 8, 2020, DEQ filed a "Notice of Submittal" asking "the BER to advise the parties as soon as possible if it will be requiring oral argument on the merits of the summary judgment motions at the April 17, 2020 BER meeting." It is the understanding of the undersigned, based on discussions with the BER Board Chair, that this matter will be set as an action item on the BER's April 17, 2020 meeting agenda. However, the action taken at that meeting will be procedural in nature: the Board will decide whether it wishes to retain the summary judgment review and decision – and if so, the logistics and timing of that review – or to

assign the case to a hearing examiner in its entirety. Whether the Board decides to retain jurisdiction or assign it, substantive review of the motions and exhibits (none of which are included in the "Board Packet" for the meeting) and further scheduling will be necessary. Therefore, the Board will not hear substantive arguments or engage in a substantive discussion of the Motions for Summary Judgment at the April 17, 2020 meeting. However, the parties should be present at the meeting (remotely, as the meeting will be held on Zoom), to answer any procedural questions the Board may have or discuss logistics.

DATED this 8th day of April, 2020.

/s/ Sarah Clerget
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DATED: 4/8/20

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