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BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, JUNE 8, 2018
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

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

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the April 6, 2018, meeting minutes.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.** On April 12, 2018 hearing examiner Clerget issued a Scheduling Order in this case. The parties are proceeding through the schedule.
 - b. **In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.** At the January 5, 2018, special meeting, the parties waived the demeanor of witnesses and the BER appointed Sarah Clerget as hearing examiner to review the record and render a proposed decision. Ms. Clerget is in the process of reviewing the record and will be issuing a proposed order shortly.
 - c. **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.** On May 1, 2018, the parties submitted their post-hearing filings. The parties indicated that they did not want an expedited schedule to get a decision before the Board at the June meeting. Ms. Clerget will render proposed decision to the Board shortly and anticipates this matter will be on the Board's agenda for decision at the next meeting in August.
 - d. **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.** This case is being handled in conjunction with the above-listed case, BER 2015-01 WQ, and its status is the same.

- e. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.** On April 6, 2018, hearing examiner Clerget assumed jurisdiction of this case. The parties on May 29, 2018 submitted a proposed scheduling order. A scheduling order was issued on May 31, 2018, and the parties are proceeding according to that schedule.
 - f. **In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.** On April 24, 2018 hearing examiner Clerget issued a Scheduling Order and the parties are proceeding accordingly.
 - g. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.** On April 6, 2018, hearing examiner Clerget assumed jurisdiction of this matter. On May 9, 2018 she issued a partial scheduling order and the parties held a scheduling conference on May 30, 2018 to discuss the scheduling of the remaining deadlines. A scheduling order implementing additional scheduling deadlines was issued on May 31, 2018, and the parties are proceeding accordingly.
2. Non-enforcement cases assigned to the Hearings Examiner
- a. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On February 21, 2018, the parties filed a Joint Status Report indicating the District Court case MEIC and Sierra Club v. DEQ and Western Energy has been appealed to the Montana Supreme Court. The parties requested a stay pending the issuance of a decision in that case. On March 28, 2018, hearing examiner Clerget issued an order granting the stay, and directed parties to file a status report within 30 days of the Supreme Court's decision.
 - b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On March 1, 2018, a Scheduling Order was issued and the parties are proceeding under that Order.
 - c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** This matter was heard during a four-day hearing that concluded on March 22, 2018. The parties are in the process of submitting their post-hearing filings.
 - 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.** On October 18, 2017, Ms. Clerget issued a scheduling order and the parties are proceeding according to that order. A motion for summary judgment is fully briefed and oral argument is being scheduled. A two-day hearing is set for August 20, 2018.

- e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 15, 2018, the parties filed a Joint Status Report and Motion for Continued Stay. The parties indicated settlement is a possibility in this matter. On March 14, 2018, Ms. Clerget issued an Order granting the stay until August 24, 2018.
 - f. **In the matter of Violations of the Water Quality Act by JR Civil, LLC, Bozeman, Gallatin County, Montana (FID 2552, PERMIT MTG70826).** On February 16, 2018, the parties filed a Joint Motion to Vacate the Remaining Scheduling Order Dates and to Stay Proceedings. The parties have agreed in principle and are working on a proposed resolution to this case. On May 14, 2018, the parties filed a joint status report indicating they are in the process of reviewing settlement documents. Another status report is due in this matter on June 13, 2018.
 - g. **In the Matter of the Denial of Motor Vehicle Wrecking Facility License MVWF-0376, BER 2018-01 SW.** On April 6, hearing examiner Clerget assumed jurisdiction of this matter. On April 12, 2018 a Prescheduling Order was issued. On April 13, 2018, Payne Logging's counsel filed a motion to withdraw as counsel. Hearing examiner Clerget issued an Order on April 19, 2018, staying the deadlines in the Prescheduling Order until June 1, 2018, ordered Payne Logging to obtain counsel by June 1, 2018, or show cause why it will need an extension to do so.
3. Contested Cases not assigned to a Hearing Examiner
- a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** On April 9, 2014, the hearings examiner issued Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. This matter was stayed while action proceeded. On March 14, 2016, the Judge issued Order on Summary Judgment invalidating the permit modification and remanding the matter for consideration consistent with the opinion. On January 25, 2018, the Department of Environmental Quality entered a Stipulated Judgement resolving the issue of attorney's fees. The Department of Environmental Quality and Western Energy have appealed the District Court's Order on Summary Judgment to the Montana Supreme Court and opening briefs are due June 13, 2018.
4. Other Case Updates
- a. **Oilfield Rock and Logistics BDV 2018-451:** On May 10, 2018, Oilfield filed a Petition for Judicial Review with the First Judicial District Court, Lewis and Clark County. The BER secretary must file an administrative record in this matter by June 11, 2018. Periodic updates will be given to the Board as the litigation proceeds.

B. OTHER BRIEFING ITEMS

1. The Department would like to brief the Board on revising water quality standards for naturally high arsenic in surface waters, as well as other potential water quality rule changes for the fall of 2018.

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. DEQ will propose that the Board initiate rulemaking to Amend ARM 17.8.505 Air Quality Operation Fees, to increase air quality operating fees to allow the department to collect sufficient revenue to support the appropriate implementation of the air quality program.

B. PETITION FOR RULEMAKING

1. On January 31, 2018 the Board received a petition from Cottonwood Environmental Law Center and The Gallatin Wildlife Association. Pursuant to MCA 75-5-316(3)(1), the petition requests that the Board classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

VI. ADJOURNMENT

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

April 6, 2018

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, April 6, 2018, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

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

Board Members Present by Phone: John Felton, Chris Tweeten

Board Members Absent: Tim Warner

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

Board Liaison Present: George Mathieus

Board Secretary Present: Lindsay Ford

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Jon Kenning, Tim Davis, Myla Kelly, Melissa Schaar, Johanna McLaughlin, Eric Urban – WQD; Sandy Moisey-Scherer, Mark Lucas, Aaron Pettis, Ed Hayes – Legal; Susan Bawden, Rich Jost – ENF; Liz Ulrich, Rebecca Harbage, Julie Merkel, Chris Cronin – AEMD

Interested & Other Persons Present: John Meyer – Cottonwood Environmental Law Center; Aleisha Solem – AGO Agency Legal Services Bureau; Sarah Coefield – Missoula City-County Health Department; Peggy Trenk – Treasure State Resources Association; DarAnne Dunning – Northern Plains Resource Council

Interested Persons Present by Phone: Alan Olson – Montana Petroleum Association

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

I.A. Administrative Items – Review and Approve Minutes

I.A.1. February 9, 2018, Meeting Minutes

Mr. Busby MOVED to approve the meeting minutes. Ms. Hanson SECONDED. The motion PASSED unanimously.

II.A.1. Briefing Items – Enforcement Cases assigned to the Hearing Examiner

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

Ms. Clerget stated the parties are in settlement discussions and will be providing an update and proposed schedule shortly.

II.A.1.b. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.

Ms. Clerget is still reviewing the record and has not issued an order yet.

II.A.1.c. 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.

Ms. Clerget said there was a three-day hearing and the parties are currently in the process of providing her with proposed findings of fact and conclusions of law.

II.A.1.d. 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.

This case is being handled in conjunction with the above-listed case, BER 2015-01 WQ, and its status is the same.

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

Ms. Clerget said she's in the process of scheduling the penalty phase of the case and the parties are working on a proposed schedule.

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

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

Ms. Clerget said there is a stay and the parties will provide her with an update within thirty days of the Supreme Court's decision.

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

Ms. Clerget said the case is proceeding according to the scheduling order that she issued.

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

Ms. Clerget finished a four-day hearing since the last Board meeting and the parties are in the process of providing her with proposed findings of fact and conclusions of law.

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.**

Ms. Clerget said the scheduling order is in place and the parties are proceeding based on that order. They are currently in the middle stages of discovery.

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

Ms. Clerget said the case is stayed until August at which time the parties are to provide an update.

II.A.2.f. **In the matter of violation of the water quality act by JR Civil, LLC, Bozeman, Gallatin County, Montana (FID 2552, Permit MTG070826) BER 2017-07 WQ.**

Ms. Clerget said a scheduling order is in place and the parties have requested a stay. The parties are working on the settlement agreement and will either file a status update every thirty days or a motion to dismiss.

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

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

Mr. Hayes said notices of appeal have been filed with the Supreme Court and the briefing schedule is in effect. He anticipates the case moving quickly under the briefing schedule.

II.B. Other Briefing Items

II.B.1. Liz Ulrich briefed the Board on the Air Quality Bureau's two substantial rulemakings that will be before the Board in 2018; a fee increase and a new registration program. Ms. Ulrich discussed the process, content, and timelines for each of these proposed rulemakings.

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

- III.A.1. | **DEQ will propose that the Board adopt New Rule 1 which implements MCA 75-5-222 Part 2, describing conditions under which variances from water quality standards may be issued.**

Myla Kelly briefed the Board and said the department is requesting adoption of New Rule 1.

Chairperson Deveny opened the floor for public comment.

Ms. Dunning had concerns, and suggested changes be made before the rule is final.

Mr. DeArment recused himself from the rule discussion.

Ms. Kelly, Ms. Bowers, Mr. Mathieus, and Mr. Davis answered questions from the Board.

Mr. Tweeten MOVED to adopt the rule as proposed by the department on page 62 of the agenda packet materials. Mr. Busby SECONDED.

Mr. Tweeten then MOVED to amend the draft rule by deleting the strikeout of the words “The Department determines in writing that,” and then to insert the word “the” before the word “following” and to then adopt the underscored language as proposed by the department. Chairperson Deveny SECONDED. The amendment PASSED unanimously.

The Board then voted on adopting the rule with the amendment. The motion PASSED unanimously.

III.B. Other Action Items

- III.B.1. | **Amend Rule 4.112 Wildfire Smoke Episodes of the Missoula County Air Stagnation and Emergency Episode Avoidance Plan.**

Ms. Ulrich and Ms. Coefield briefed the Board and answered questions from the Board.

Chairperson Deveny opened the floor for public comment. None were offered.

Ms. Hanson MOVED to accept the rules. Chairperson Deveny SECONDED. The motion PASSED unanimously.

III.C. New Contested Cases

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

Ms. Clerget gave the Board members their options, including assigning it to a hearings examiner.

Ms. Hanson MOVED to assign the matter to hearing Examiner for the totality of the case. Chairperson Deveny SECONDED. The motion PASSED unanimously.

III.C.2. **In the Matter of the Denial of Motor Vehicle Wrecking Facility License MVWF-0376, BER 2018-01 SW.**

Ms. Clerget gave the Board members their options, including assigning it to a hearings examiner.

Ms. Hanson MOVED to assign the matter to hearings examiner Clerget for the totality of the case. Mr. DeArment SECONDED. The motion PASSED unanimously.

III.C.3. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.**

Ms. Clerget gave the Board members their options, including assigning it to a hearings examiner.

Mr. DeArment MOVED to assign the matter to hearings examiner Clerget for the totality of the case. Chairperson Deveny SECONDED. The motion PASSED unanimously.

III.D. Action on Contested Cases

III.D.1. **In the matter of Appeal of Oil Field Rock and Logistics, Docket No. OC-16-12 (FID2506), Redstone, Montana, BER 2016-11 OC.**

The Board heard oral arguments from the parties.

Mr. Tweeten MOVED to adopt hearing examiner Clerget's proposed decision in it's entirety as the Board's final order. Chairperson Deveny SECONDED. The motion PASSED unanimously.

III.E. Petition for Rulemaking

III.E.1. On January 31, 2018 the Board received a petition from Cottonwood Environmental Law Center and The Gallatin Wildlife Association. Pursuant to MCA 75-5-316(3)(1), the petition requests that the Board classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water.

Mr. Mathieus and Mr. Davis briefed the Board on the general process, explained the history of a similar petition and answered questions from the Board.

Mr. Meyer briefed the Board about why the organizations are petitioning for the rulemaking and answered questions from the Board.

Chairperson Deveny opened the floor for public comment.

Mr. Lewis asked the Board to consider moving forward with the rulemaking.

Chairperson Deveny MOVED to ask DEQ to make a cost estimate on a new EIS before the Board move to accept or reject the petition. Mr. Tweeten SECONDED. The motion PASSED unanimously.

IV. Board Counsel Update

Ms. Clerget and the Board discussed options for reviewing case records.

V. General Public Comment

None were offered.

VI. Adjournment

Mr. Busby MOVED to adjourn. Chairperson Deveny SECONDED. Chairperson Deveny adjourned the meeting at 11:50 a.m.

Board of Environmental Review April 6, 2018, minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION

Agenda # III.A.1.

Agenda Item Summary: The department requests that the board initiate rulemaking to amend the air quality rules to revise the air quality operation fees for registered oil and gas well facilities and the air quality operation fees, both the administrative fee and the per ton of emissions fee, for facilities other than portable facilities.

List of Affected Rules: This rulemaking would amend Administrative Rules of Montana (ARM) 17.8.505.

Affected Parties Summary: The proposed rule amendments to the air quality operation fees would affect approximately 1,500 facilities: 1,225 oil and gas facilities and 281 permitted facilities.

Scope of Proposed Proceeding: The department requests that the board initiate rulemaking and designate a hearing officer to hold a public hearing to consider the proposed amendments to the above-stated rule.

Background: Under 75-2-220, Montana Code Annotated (MCA), the department assesses air quality permit application, registration fees, and annual air quality operation fees that are sufficient to cover the reasonable costs, direct and indirect, of developing and administering the permitting and registration requirements of the Clean Air Act of Montana. Under ARM 17.8.510, the structure and the amount of the fees are to be determined and reviewed annually by the board. The amount of revenue the department needs to generate through the collection of air quality fees depends primarily on the amount of the legislative appropriation, projected expenditures, and projected revenue.

Annual air quality operation fees are required for all facilities that hold a Montana air quality permit, that have been issued an air quality operating permit, or that are registered oil and gas well facilities. The air quality operation fee for facilities other than portable facilities or registered oil and gas well facilities consists of a flat administrative fee plus a fee based on the actual, or estimated actual, tonnage of certain air pollutants emitted by the facility during the previous calendar year. This per-ton fee is assessed for PM-10 (particulate matter with a diameter less than 10 micrometers), sulfur dioxide, lead, oxides of nitrogen, and volatile organic compounds emitted. Portable facilities and oil and gas well facilities are assessed a flat fee only.

The last time the board raised air quality operation fees was in 2009; for that year, the reported emissions were more than 90,000 tons. In 2017, roughly 49,000 tons of

pollutants were emitted. With decreased emissions, unstable federal funding, and a decrease in the money received from the state general fund, the department needs to ensure that adequate fee revenue is collected. The proposed fee increase would allow the department's air quality bureau to collect sufficient revenue to support the appropriate implementation of the air quality program.

The board is proposing to increase both the flat fee for oil and gas well facilities and the administrative fee for facilities other than portable facilities from \$800 to \$900. In addition, the board is proposing that the operation fee be set at an amount not to exceed \$45.37 per ton of emissions. If the board initiates rulemaking, it will consider adopting a definite amount when it considers adopting final rule amendments at the October 5, 2018, board meeting.

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

Board Options: The board may:

1. Initiate rulemaking and issue the attached Notice of Public Hearing on Proposed Amendment;
2. Modify the Notice and initiate rulemaking; or
3. Determine that the amendment of the rules is not appropriate and deny the department's request to initiate rulemaking.

DEQ Recommendation: The department recommends that the board initiate rulemaking and appoint a hearing officer to conduct a public hearing, as described in the attached proposed MAR notice.

Enclosures:

1. Draft Notice of Public Hearing on Proposed Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.8.505 pertaining to air quality operation)
fees)
)
) (AIR QUALITY)

TO: All Concerned Persons

1. On _____, 2018, at __:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Board of Environmental Review (board) will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., _____, 2018, 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 amended provide as follows, stricken matter interlined, new matter underlined:

17.8.505 AIR QUALITY OPERATION FEES (1) through (6) remain the same.

(7) The air quality operation fee for facilities other than portable facilities or registered oil and gas well facilities is: ~~based~~
(a) an administrative fee of \$900; and
(b) a tonnage fee of [not to exceed \$45.37] per ton of ~~on~~ the actual, or estimated actual, ~~amount~~ emissions of the following air pollutants ~~emitted~~ by the facility during the previous calendar year; ~~and is an administrative fee of \$800, plus \$38.24 per ton of PM-10, sulfur dioxide, lead, oxides of nitrogen, and volatile organic compounds emitted.~~

(8) remains the same.

(9) The air quality operation fee for registered oil and gas well facilities is ~~\$800~~ \$900.

(10) through (13) remain the same.

AUTH: 75-2-111, 75-2-220, 75-2-234, MCA
IMP: 75-2-211, 75-2-220, 75-2-234, MCA

REASON: Under 75-2-220, MCA, a person required to obtain a permit or to register a facility under the Clean Air Act of Montana is required to submit to the

department fees set by the board that are sufficient to cover the reasonable costs, direct and indirect, of developing and administering the permitting and registration requirements for the Clean Air Act of Montana. Under ARM 17.8.510, the structure and the amount of the fees are to be determined and reviewed annually by the board. The amount of revenue the department needs to generate through the collection of air quality fees depends primarily on the amount of the legislative appropriation, projected expenditures, and projected revenue.

The last time the board raised air quality operation fees was in 2009; for that year, the reported emissions were more than 90,000 tons. In 2017, roughly 49,000 tons of pollutants were emitted. With decreased emissions, unstable federal funding, and a decrease in the money received from the state general fund, the department needs to ensure that adequate fee revenue is collected. The proposed fee increase would allow the department's air quality bureau to collect sufficient revenue to support the appropriate implementation of the air quality program.

Annual air quality operation fees are required for all facilities that hold a Montana air quality permit, that have been issued an air quality operating permit, or that are registered oil and gas well facilities. The air quality operation fee for facilities other than portable facilities or registered oil and gas well facilities consists of a flat administrative fee plus a fee based on the actual, or estimated actual, tonnage of certain air pollutants emitted by the facility during the previous calendar year. This per-ton fee is assessed for PM-10 (particulate matter with a diameter less than 10 micrometers), sulfur dioxide, lead, oxides of nitrogen, and volatile organic compounds emitted. Portable facilities and oil and gas well facilities are assessed a flat fee only.

The board is proposing to increase both the flat fee for oil and gas well facilities and the administrative fee for facilities other than portable facilities from \$800 to \$900. In addition, the board is proposing to set the operation fee at an amount not to exceed \$45.37 per ton of emissions. If the board initiates rulemaking, it will consider adopting a definite amount when it considers adopting final rule amendments at the October 5, 2018, board meeting.

There would be a monetary impact on approximately 1,500 facilities because of this proposed action. The \$100 increase for the oil and gas well facilities would impact 1,225 facilities, generating revenue of \$122,500. The 281 permitted facilities that pay the flat administrative fee and the per-ton operating fee would experience the \$100 increase in the administrative fee plus an increase not to exceed \$7.13 per ton of emissions. In 2017, the 281 facilities emitted 49,000 tons of pollutants for which the tonnage fee is assessed. Based on this tonnage and the number of facilities paying the administrative fee, the air quality program will would receive an additional \$377,470, which would will be paid proportionally by the permitted facilities.

If adopted, these amended fees would be billed in calendar year 2018 to fund the department's activities in fiscal year 2019 and would be based on emissions reported for calendar year 2017.

4. Concerned persons may submit their data, views, or arguments in writing to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m., _____, 2018. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. 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.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

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/
EDWARD HAYES
Rule Reviewer

BY: /s/
CHRISTINE DEVENY
Chairman

Certified to the Secretary of State, _____, 2018.

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU



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MEMORANDUM

TO: The Board of Environmental Review

FROM: Sarah Clerget, Assistant Attorney General

RE: Outstanding Resource Water Statutory Process

DATE: April 23, 2018

INTRODUCTION

This memorandum responds to the board's request at its April 6, 2018 meeting for a legal analysis and breakdown of Mont. Code Ann. § 75-5-316 as well as the Board's options with regard to Cottonwood Environmental Law Center's Petition to classify the Gallatin River as an outstanding resource water (ORW), received on January 31, 2018. Cottonwood's petition asks the Board classify a section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an ORW.

ANALYSIS

A person may petition the Board to classify state waters as an ORW. Once the Board receives a petition, Mont. Code Ann. § 75-5-316 outlines a very specific process and criterion for the Board to use in deciding whether or not to adopt a rule designating an ORW. This process consists of three basic steps:

- (1) An "initial review" to determine whether the petition contains sufficient information;
- (2) A decision to adopt or reject the petition;
- (3) A MAPA Rulemaking process

This process is laid out visually in the attached flow chart.

1. Initial Review

The board shall initially review the petition against certain criteria to determine if “the petition contains *sufficient credible information* for the Board to accept the petition.” Mont. Code Ann. § 75-5-316(3)(a).

If the Board determines there IS “sufficient credible information,” then it can proceed to step 2, described below. If the Board determines there is NOT “sufficient credible information,” then it may reject the petition by making a written statement giving “the reasons for the rejection and the petitions deficiencies.” Mont. Code Ann. § 75-5-316(3)(b).

2. Accept or Reject the Petition

The Board must next decide whether it intends to accept or reject the petition. Mont. Code Ann. § 75-5-316(3)(c). This decision involves an analysis of whether, based on the preponderance of the evidence:

1. the water constitutes an outstanding water resource based on criteria outlined in (4)(a)-(f) (below);
2. increased protection is necessary to protect the water because the water is at risk of having one or more of the below criterion, compromised as a result of pollution; and
3. classification is necessary because there is no other effective process to achieve the necessary protection (including the nondegradation policy¹).

¹ 75-5-303 is the nondegradation policy which provides that existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected. The statute directs that high-quality waters must be maintained and that DEQ may not degrade high-quality waters unless by a preponderance of evidence the following conditions are met:

- i. degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;
- ii. the proposed project will result in important economic or social development and the benefits of the development exceeds the costs to society of allowing degradation;
- iii. existing and anticipated use of state water will be fully protected; and
- iv. the least degrading water quality protection practices will be implemented by the applicant prior to and during the proposed activity.

Mont. Code Ann. § 75-5-316(3)(c)-(d). The subsection (4) criterion the Board must consider include:

- a. whether the waters have been designated as wild and scenic;
- b. the presence of endangered or threatened species in the waters;
- c. the presence of an outstanding recreational fishery in the waters;
- d. whether the waters provide the only source of suitable water for a municipality or industry;
- e. whether the waters provide the only source of suitable water for domestic water supply; and
- f. other factors that indicate outstanding environmental or economic values not specifically mentioned in this subsection.

Mont. Code Ann. § 75-5-316(4).

If the board determines that all of these factors necessitate accepting the petition, then it must make a written finding explaining its reasoning in detail and indicating that it *intends* to accept the petition. Mont. Code Ann. § 75-5-316(3)(c), (5).

The Board must then give the public notice that it intends to adopt the petition, through the process described in Mont. Code Ann. § 75-5-316(5). *Id.* After the public process is complete (if that process does not change the Board's position), then the Board must issue a written decision accepting or rejecting the petition. Mont. Code Ann. § 75-5-316(5)(f).

After the petition is accepted, the Board must direct the department to prepare an Environmental Impact Statement (EIS). Mont. Code Ann. § 75-5-316(6). The petitioner must pay the cost of the EIS (Mont. Code Ann. § 75-5-316(6)(b)(i)) and the Board may not grant or deny a petition (step 3, below) until the cost of the EIS is paid in full. Mont. Code Ann. § 75-5-316(7). The Board must consult with other relevant state and local agencies or governments before moving to step 3. Mont. Code Ann. § 75-5-316(7).

After the EIS is complete and the Board has consulted with everyone necessary, the Board may deny the petition for one of the two following reasons:

- i. the requirements of (1)-(3) listed in section 2 above (from 3)(c)), are not met; or
- ii. based on information available from the EIS or otherwise, classification as an ORW would "cause significant adverse environmental, social, or economic impacts."

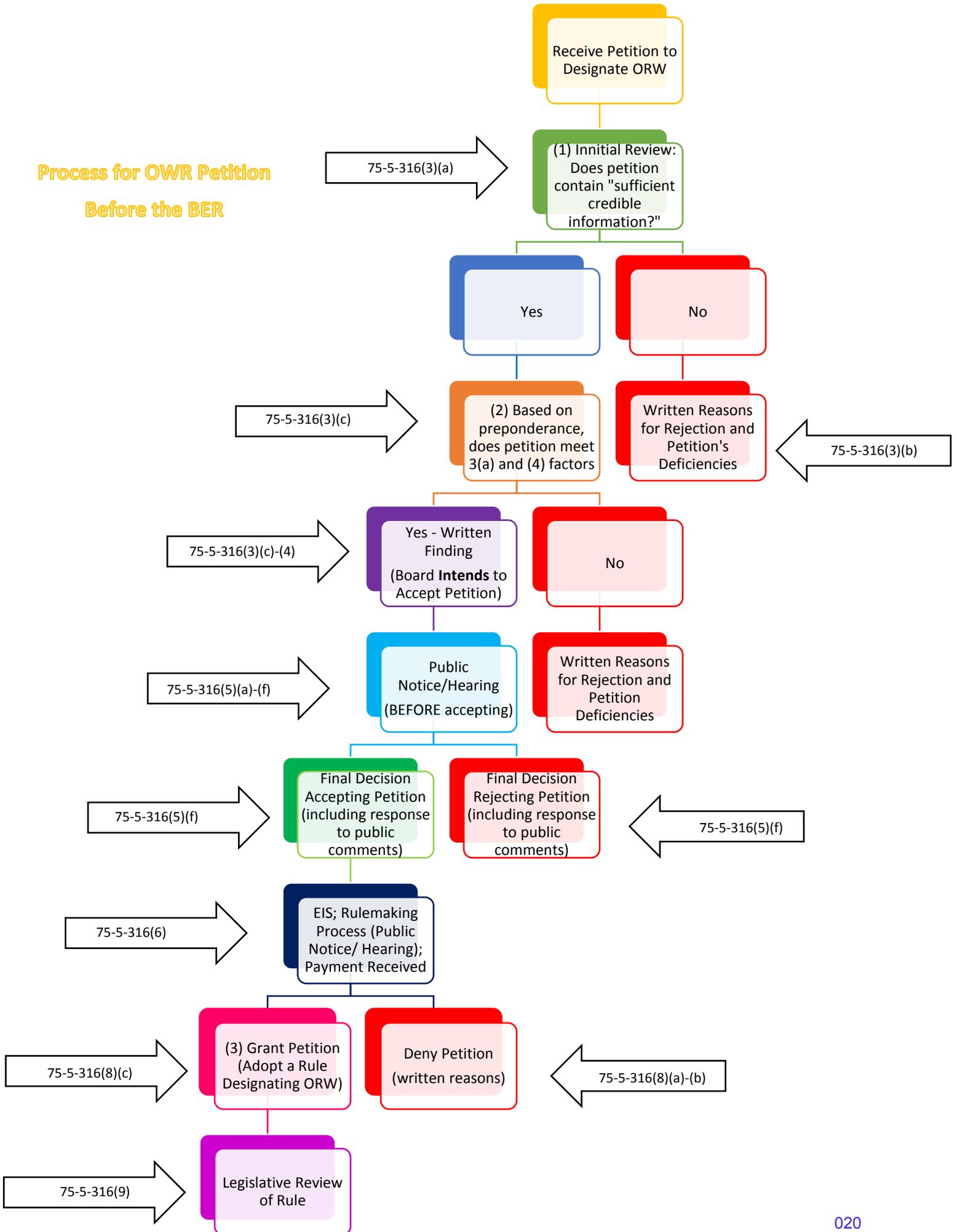
If the Board still wishes to proceed after the EIS and consultation is complete, then it grants the petition and proceeds to step (3), below.

3. Rulemaking

Once the Board grants the petition for rulemaking, it must propose a rule identifying the ORW and go through the regular MAPA rulemaking procedure (including notice, hearing, comments, etc.). Mont. Code Ann. § 75-5-316(8)(c). After the public process is complete, the Board may (if it wishes) adopt the rule designating the ORW. Such a rule does not become effective until the legislature approves it. Mont. Code Ann. § 75-5-316(9).

smc/clr

Process for OWR Petition
Before the BER



TO: Cottonwood Environmental Law Center, Gallatin Wildlife Center, Montana Board of Environmental Review

FROM: Tim Davis, Division Administrator, Department of Environmental Quality

DATE: May 30, 2018

SUBJECT: Gallatin River Outstanding Resource Water Costs

As was described in the April 6, 2018 Board of Environmental Review (BER) meeting, the process of designating a waterbody as an Outstanding Resource Water (ORW), requires the development of an Environmental Impact Statement (EIS). In 2003, the MT Water Quality Act was amended by the legislature to require all future ORW petitioners to pay all costs associated with gathering and compiling information and completing the EIS. Petitioners must pay the estimated cost of the EIS before DEQ can begin working on it.

The Department's Montana Environmental Policy Act program has advised that the EIS costs for an ORW petition for the Gallatin River would be a minimum of \$250,000. This estimate considers that some work from the original Gallatin ORW EIS (finalized in 2007) will be used, and supplemented and updated as necessary. This cost is only a preliminary estimate. If the process were to move to this stage, the petitioner would provide the funds, and the Department would then administer the formal Request for Proposal process to secure a contractor. Once the contract is secure, we would expect that completion of the EIS would take a minimum of 18 months.