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## **AGENDA**

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, DECEMBER 3, 2010

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

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**NOTE:** Individual agenda items are not assigned specific times. For public notice purposes, the meeting will begin no earlier than the time specified; however, the Board might not address the specific agenda items in the order they are scheduled. Persons with disabilities, who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-6701.

**9:00 A.M.**

### **I. ADMINISTRATIVE ITEMS**

#### **A. REVIEW AND APPROVE MINUTES**

1. October 8, 2010, teleconference Board meeting.

#### **B. SET 2011 MEETING SCHEDULE**

### **II. BRIEFING ITEMS**

#### **A. CONTESTED CASE UPDATE**

1. Cases assigned to Hearing Officer Katherine Orr
  - a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.** On January 12, 2010, the Department filed a status report in the case stating that the parties agree that the case should continue to be stayed.
  - b. **In the matter of the Notice of Violations of the Montana Water Quality Act by North Star Aviation, Inc. at Ravalli County Airport, Ravalli County, BER 2009-10 WQ.** On September 13, 2010, a prehearing conference was held in which the parties asked for change in the hearing date to October 21, 2010. Ms. Orr granted this request. On September 30, 2010, the Board received a *DEQ Proposed Prehearing Order*. Ms. Orr issued an *Order Vacating Hearing Date* on October 19, 2010, setting a teleconference for December 18, 2010.
  - c. **In the matter of violations of the Clean Air Act of Montana by Todd Michael Mihalko, Jefferson County, Montana, BER 2010-10 AQ.** Hearing Examiner Katherine Orr issued a *First Prehearing Order* on July 20, 2010. The Board received an *Agreed Proposed Prehearing Schedule* from the Department on August 2, 2010, and on August 6, 2010, Ms. Orr issued a *First Scheduling Order*. A hearing is set for December 20, 2010. On November 19, 2010, the department informed the Board that an Administrative Order on Consent has been signed and that the penalty has been paid. The Board is currently waiting for a stipulation to dismiss the case.
  - d. **In the matter of the request for hearing regarding the revocation of certificate of approval ES#34-93-C1-4 for the Fort Yellowstone Subdivision, Park County, BER 2009-20/22 SUB.** The Department filed a third *Request for Extension* on October 1, 2010, and Ms. Orr issued a *Third Order Granting Extension* on October 25, 2010.

- e. **In the matter of violations of the Montana Underground Storage Tank Act by Jeanny Hlavka, individually and d/b/a J.R. Enterprise, LLC, at the Fort Peck Station, 301 Missouri Avenue, Fort Peck, Valley County, BER 2010-08 UST.** On September 24, 2010, the parties filed an *Agreed Proposed Prehearing Schedule*. On October 25, 2010, Ms. Orr issued a *Scheduling Order* setting a hearing for March 8, 2011. On November 17, 2010, the Board received a *Motion for Additional Time on Joinder and Brief in Support* from the Petitioner's attorney, requesting until December 3, 2010, the close of discovery, to determine whether to join the city of Fort Peck to this action.
- f. **In the matter of the appeal and request for hearing by Roseburg Forest Products Co. of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System Permit No. MTX000099, BER 2010-09 WQ.** The Department filed a *Proposed Schedule* on July 29, 2010, and Ms. Orr issued the *First Scheduling Order* on August 5, 2010. A hearing is set for February 28, 2011.
- g. **In the matter of the appeal and request for hearing by Holcim Incorporated regarding the DEQ's Notice of Final Decision for MPDES Permit No. MT 0000485, BER 2010-13 WQ.** The Board received a *Request for Second Extension of Time to Respond to First Prehearing Order* on September 21, 2010, and on September 22, a *Second Order Granting Extension of Time* was issued by the hearing examiner giving the parties through November 22, 2010, to reach a settlement or file a proposed schedule.

### III. ACTION ITEMS

#### A. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

The Department requests that the Board concur in its request to initiate rulemaking to:

1. Amend ARM 17.8.604 to require Department approval before moving and burning wood and wood byproducts and clarify compliance with BACT when contemplating and conducting open burning; amend ARM 17.8.610(2), 17.8.612(10), 17.8.613(8), 17.8.614(8), and 17.8.615(6) to be consistent with the direction of the legislature regarding the process for appealing air quality permits pursuant to 75-2-211, MCA.
2. Amend ARM 17.8.763 to set forth a method of alternative service in the event an owner or operator cannot be found for regular mail delivery when notifying an owner or operator of a source regulated under Title 17, Chapter 8, Subchapter 7 regarding the Department's intent to revoke a permit.
3. Amend ARM 17.30.201, water discharge permit fee schedule and ARM 17.30.1341 to add a general permit category for pesticides. The proposed amendments are intended to correct some clerical errors, provide some clarification, expand some definitions, and add a new non-stormwater general permit fee category (pesticides).
4. Amend ARM 17.30.617 to designate the mainstem Gallatin River from the Yellowstone National Park boundary to the confluence of Spanish Creek as an Outstanding Resource Water (ORW) and to amend ARM 17.30.638 to add a new subsection clarifying that discharges to ground water with a direct hydrologic connection to an ORW are within the statutory mandate prohibiting any permanent change in the water quality of an ORW resulting from point source discharges. The Department will request that the Board issue a notice of supplemental rulemaking to extend the comment period.

#### B. NEW CONTESTED CASE APPEALS

1. **In the matter of violations of the Public Water Supply Laws by Gregory C. MacDonald at Highwood Mobile Home Park, PWSID #MT0004681, Cascade County, Montana, BER 2010-14 PWS.** The Board received the appeal on September 23, 2010. Interim Hearings

Examiner, Ms. Orr, issued a *First Prehearing Order* on October 25, 2010, and she issued an *Order Granting Extension* on November 18, 2010. The Board may appoint a permanent hearings examiner or decide to hear the matter.

2. **In the matter of the appeal and request for hearing by Ronald and Debbie Laubach regarding the DEQ's final decision to amend the MATL's certificate of compliance, BER 2010-15 MFS.** The Board received the appeal on October 7, 2010. The Interim Hearings Examiner, Ms. Orr, issued a *First Prehearing Order* on November 18, 2010. The Board may appoint a permanent hearings examiner or decide to hear the matter.
3. **In the matter of the appeal and request for hearing by Maurer Farms, Inc.; Somerfeld & Sons Land & Livestock, LLC; Larry Salois, POA; Jerry McRae; and Katrina Martin regarding the DEQ's final decision to amend the MATL's certificate of compliance, BER 2010-16 MFS.** The Board received the appeal on October 7, 2010. The Interim Hearings Examiner, Ms. Orr, issued a *First Prehearing Order* on November 18, 2010. The Board may appoint a permanent hearings examiner or decide to hear the matter.
4. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC at Bull Mountain Mine #1, Roundup, Musselshell County, Montana, BER 2010-17 SM.** The Board received the appeal and request for hearing on October 7, 2010. Interim Hearings Examiner, Ms. Orr, issued a *First prehearing Order* on October 25, 2010. The Board may appoint a permanent hearings examiner or decide to hear the matter.
5. **In the matter of the appeal and request for hearing by Meat Production Inc., a.k.a. Stampede Packing Co., regarding the DEQ's notice of final decision for Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000100, BER 2010-18 WQ.** The Board received the appeal and request for hearing on November 3, 2010. The Interim Hearings Examiner, Ms. Orr, issued a *First Prehearing Order* on November 18, 2010. The Board may appoint a permanent hearings examiner or decide to hear the matter.

#### C. FINAL ACTION ON CONTESTED CASES

1. **In the matter of violations of the Montana Underground Storage Tank Act by Hi-Noon Petroleum, Inc., at Noon 456, Missoula County, Montana, BER 2010-11 UST.** The parties filed a joint Stipulation to Dismiss on October 20, 2010. An order to dismiss the case will be presented for signature.
2. **In the matter of the request for hearing by the City of Great Falls regarding the DEQ's notice of final decision for MPDES Permit No. MT0021920, BER 2009-21 WQ.** On October 13, 2010, the parties filed a joint *Stipulation and Request for Dismissal*. An *Order of Dismissal* will be presented for signature.
3. **In the matter of violations of the Clean Air Act of Montana by Sheep Mountain Properties, LLC, Jefferson County, BER 2009-11 AQ.** Hearing Examiner Katherine Orr issued a *Second Scheduling Order* on May 25, 2010. A hearing is set for October 19, 2010. On July 8, 2010, the Department filed a *Request to Consolidate* this case with the case, In the Matter of Violations of the Clean Air Act of Montana by Todd Michael Milhalko, Jefferson County, Montana, BER 2010-10 AQ. On August 20, 2010, the Board received the *Department's Motion for Summary Judgment with Supporting Brief*, and on August 23, 2010, the Department filed a *Motion to Substitute Affidavits*. On September 16, 2010, the Board received the *Department's Reply in Support of Motion for Summary Judgment*. On November 19, 2010, the Board received a *Stipulation to Dismiss* with an attached *Administrative Order on Consent*. An order to dismiss the case will be presented for signature by the Chair.

4. **In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.** Hearing Examiner Katherine Orr issued an *Order Setting Telephonic Status Conference*. On May 27, 2010, Ms. Orr issued an *Order Setting Hearing* and on July 21, 2010, Ms. Orr issued an *Order on Default*. On November 19, 2010, Ms. Orr issued an *Oder Clarifying Order on Default*, in which it is stated the Board must review and approve the *Order on Default*. An *Order of the Board Imposing Penalties* is provided for the Chairman's signature.

#### D. OTHER ACTION

1. The Gallatin Local Water Quality District (GLWQD) was created by the Gallatin County Commission with passage of County Resolution 1995-55, under the authority of Montana Code Annotated (MCA) 7-13-Part 45 and approved by the Montana Board of Environmental Review on June 20, 1997. The district boundaries have recently been expanded and the district has amended their program plan to include the new area. As required by MCA 7-5-311(7), the GLWQD Board will submit a program amendment to the Board of Environmental Review (provided for in 2-15-3502 MCA) at the December 3, 2010, meeting for their approval before implementing the local water quality program in areas that have been added to the District.
2. CONSIDERATION OF AND ACTION ON PUBLIC COMMENT REGARDING ADOPTION OF COPPER BIOTIC LIGAND MODEL, MODIFICATION OF EXISTING PESTICIDE STANDARDS, AND MODIFICATION OF CATEGORY CLASSIFICATION (CARCINOGEN DELISTING) FOR CERTAIN POLLUTANTS. The Department will summarize public comments, received during the triennial review of Montana water quality standards, recommending adoption of the copper biotic ligand model, modification to existing pesticide standards and modification of category classification for certain pollutants. The Department will recommend that the Board not propose rule amendments in response to these comments.
3. **In the matter of violations of the Montana Underground Storage Tank Act by Juniper Hill Farm, LLC, at Lakeside General Store, Lewis and Clark County, BER 2009-18 UST.** Hearing Examiner Katherine Orr issued an *Order Granting Motion for Summary Judgment on Liability* on May 27, 2010. A contested case hearing on the issue of the proper assessment of a penalty was held on June 4, 2010. On September 21, 2010, a *Proposed Order on Penalty* was issued by Ms. Orr in which the Petitioner was given until October 15, 2010, to file exceptions. On September 23, 2010, the Board received *The Department's Notice of Clerical Errors in Proposed Order on Penalties*, in which the department requested some corrections in the final judgment. On October 14, 2010, the Board received *Petitioner's Exceptions to Proposed Order on Penalties and Request and Review at the December 3, Environmental Quality Council Meeting*. The DEQ filed *The Department's Response to Petitioner's Exceptions to Proposed Order on Penalties with Supporting Brief* on October 27, 2010. On November 12, 2010, the Board received the Petitioner's *Supplemental Response Request for Board's Complete Review of Entire Record and Objections to Department's Responses*. The Board will review the exceptions, response to exceptions, and supplemental response to exceptions, and determine whether the *Proposed Order on Penalty* should be approved or modified, or whether the Board desires to hold a hearing on the factual basis for the penalties and make its own determination about the correct amount of penalties, if any, to be assessed.

#### IV. 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.

#### V. ADJOURNMENT

**MINUTES  
OCTOBER 8, 2010**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:03 a.m., on Friday, October 8, 2010, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present via Telephone: Chairman Russell, Robin Shropshire, Larry Mires, Heidi Kaiser, Joe Whalen, and Marvin Miller

Board Members Absent: Larry Anderson

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Misty Gable (Acting)

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director); John North and Norman Mullen – Legal; Judy Hanson – Permitting & Compliance Division; Jenny Chambers – Water Protection Bureau; Jon Dilliard and Eugene Pizzini – Public Water Supply & Subdivisions Bureau; David Klemp, Charles Homer, Bob Habeck, Becki Frankforter, and Debra Wolfe – Air Resources Management Bureau; John Arrigo – Enforcement Division;

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): No members of the public were in attendance

Mr. Livers did a roll call. Board members identified were Ms. Shropshire, Ms. Kaiser, Mr. Mires, Mr. Miller, and Chairman Russell. It was later noted that Mr. Whalen also was on the phone; however, he did not have voice capability so he could not be heard.

Mr. Livers took a moment to recognize the work of former board member Don Marble, who recently passed away.

I.A.1 Review and approve July 23, 2010, teleconference meeting minutes.

Mr. Mires MOVED to approve the July 23, 2010, meeting minutes. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM. [*No discussion took place regarding this agenda item.*]

II.A.1.b In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.

Ms. Orr stated that she had issued an order on default and that a final proposed order would be submitted to the Board for approval at its December meeting.

II.A.1.c In the matter of the Notice of Violations of the Montana Water Quality Act by North Star Aviation, Inc. at Ravalli County Airport, Ravalli County, BER 2009-10 WQ.

Ms. Orr said a status conference had been held and that the October 21 hearing date had been vacated. She said the parties were given 60 days to work out a settlement.

II.A.1.d In the matter of violations of the Clean Air Act of Montana by Sheep Mountain Properties, LLC, Jefferson County, BER 2009-11 AQ.

Ms. Orr said a motion for summary judgment had been filed and that oral argument on that motion is scheduled for October 19, 2010.

II.A.1.e In the matter of violations of the Clean Air Act of Montana by Todd Michael Mihalko, Jefferson County, BER 2010-10 AQ.

Ms. Orr said there was a motion for consolidation of this case with the Sheep Mountain case (BER 2009-11 AQ), but that she had not acted on that on motion, essentially letting it die.

II.A.1.f In the matter of violations of the Montana Underground Storage Tank Act by Juniper Hill Farm, LLC, at Lakeside General Store, Lewis and Clark County, BER 2009-18

UST.

Ms. Orr said there had been a hearing on the proposed penalties and that she issued a proposed order. She said errors in the order had been brought to her attention and that she would decide whether to amend the order. She said the Petitioner has through October 15 to file exceptions to the order.

- II.A.1.g In the matter of the request for hearing regarding the revocation of certificate of approval ES#34-93-C1-4 for the Fort Yellowstone Subdivision, Park County, BER 2009-20/22 SUB.

Ms. Orr said a request for extension was filed October 4, requesting extension until January 7, 2011, to determine whether to settle the case.

- II.A.1.h In the matter of the request for hearing by the City of Great Falls regarding the DEQ's notice of final decision for MPDES Permit No. MT0021920, BER 2009-21 WQ.

Ms. Orr said the parties are moving toward settlement with this case.

- II.A.1.i In the matter of violations of the Montana Underground Storage Tank Act by Jeanny Hlavki, individually and d/b/a J.R. Enterprises, LLC, at the Fort Peck Station, 301 Missouri Avenue, Fort Peck, Valley County, BER 2010-08 UST.

Ms. Orr said the parties have agreed on a proposed schedule and that she will issue an order adopting the proposed schedule.

- II.A.1.j In the matter of the appeal and request for hearing by Roseburg Forest Products Co. of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System Permit No. MTX000099, BER 2010-09 WQ. [No discussion took place regarding this item.]

- II.B.1 In the matter of the Department's report to the Board regarding the air quality permit fees anticipated for the next calendar year pursuant to ARM 17.8.510.

Mr. Habeck explained that the department has decided that the current fee schedule would suffice through 2011. He said the department significantly reduced expenses in order to avoid increasing the fees because the state has seen such severe economic adversity. Mr. Habeck said the application and administrative fees can also remain the same as currently published in the rules.

- III.A.1 In the matter of the DEQ's request for initiation of rulemaking to amend ARM 17.38.204 to correct adoption by reference of 40 CFR, Part 141.64(a)(1).

Mr. Pizzini explained that the intent of the rulemaking is to correct a mistake from a previous adoption that inadvertently omitted the adoption by reference of the MCLs for bromate and chloride. He said that this is a mandatory adoption, so the department

would like to do it without a public hearing. Mr. Pizzini also noted that a current primacy application is on hold with EPA because these MCLs were not adopted.

Chairman Russell called for a motion to initiate rulemaking. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Livers asked for clarification that the Board's intent was for the department to move forward with the rulemaking without a public hearing. Chairman Russell concurred.

- III.A.2 In the matter of DEQ's request to initiate rulemaking to update the air quality incorporation by reference rules at ARM 17.8.102.

Ms. Wolfe explained that this is the annual rulemaking to incorporate by reference the federal statute and regulation, and state administrative rules adopted during the previous year. She said a draft rule notice had been submitted for the Board's consideration.

Chairman Russell called for a motion to initiate rulemaking and appoint Ms. Orr as hearings officer. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. Chairman Russell called for public comment; there was no response. The motion CARRIED with a unanimous VOTE.

- III.B.1 In the matter of violations of the Montana Underground Storage Tank Act by Hi-Noon Petroleum, Inc., at Noon 456, Missoula County, BER 2010-11 UST.

Chairman Russell called for a motion to appoint Ms. Orr the permanent hearings officer for this case. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.B.2 In the matter of the appeal and request for hearing by Holcim Incorporated regarding the DEQ's Notice of Final Decision for MPDES Permit No. 0000485, BER 2010-13 WQ.

Chairman Russell called for a motion to appoint Ms. Orr the permanent hearings officer for this case. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.1 In the matter of violations of the Montana Septage Disposal and Licensure Laws by Steven Kunkel, d/b/a Montana Septic Service, at Great Falls Wastewater Treatment Plant, Great Falls, Cascade County, BER 2009-17 SDL.

Ms. Orr explained the relationship between this case and the next (BER 2010-12 SDL) and said there was a third case filed in District Court in which the parties agreed to dismiss both of these administrative actions. She recommended that the Board

adopt the dismissal order and have the Chairman sign it. She noted that a reference in the order to Montana Rules of Civil Procedure 41(a)(2) should be changed to 41(a)(1)(ii).

Chairman Russell called for a motion to authorize him to sign the order of dismissal with the change noted by Ms. Orr. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.2 In the matter of revocation of Septage Disposal License No. S-870 held by Steven Kunkel, d/b/a Montana Septic Service, BER 2010-12 SDL.

Ms. Orr asked that the Board adopt the order of dismissal for this case, as referenced in the previous case, with the noted change to the Rule of Civil Procedure.

Chairman Russell called for a motion to authorize him to sign the order with the noted change. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.3 In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC, at Bull Mountain Mine #1, Roundup, Musselshell County, BER 2009-23 SM.

Ms. Orr explained that the Board had not delegated this case. She said the parties entered into an Administrative Order on Consent and requested dismissal under 41(a). She recommended that the Board adopt the order.

Chairman Russell called for a motion to authorize him to sign the order. Ms. Kaiser RECUSED herself from this action. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.4 In the matter of the appeal and request for hearing by the City of Belgrade of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System permit No. MTX000116, Belgrade, Gallatin County, BER 2010-06 WQ.

Ms. Orr said there is a request for dismissal under 41(a)(1)(ii), that the parties have agreed to a reapplication, and that the permit will be withdrawn.

Chairman Russell called for a motion to authorize him to sign the order. Ms. Shropshire so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.5 In the matter of violations of the Montana Public Water Supply Laws by Aces Wild, LLC, at Aces and Eights Casino, PWSID #MT0003321, Glasgow, Valley County, BER 2010-07 PWS.

	<p>Ms. Orr said the order of dismissal is under Rule 41(a)(1)(ii).</p> <p>Chairman Russell called for a motion to authorize him to sign the order. Ms. Kaiser so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.</p>
III.D.1	<p>General Public Comment</p> <p>Chairman Russell called for public comment on matters that pertain to the Board's jurisdiction. No members of the public were present.</p> <p>The Board thanked Ms. Orr for all her work, noting that it was keeping her busy.</p> <p>Mr. Livers noted that three terms will be up at the end of the year: Ms. Kaiser, Mr. Mires, and Chairman Russell.</p>
IV.	<p>Adjournment</p> <p>Chairman Russell called for a motion to adjourn. Mr. Miller so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.</p> <p>The meeting adjourned at 9:49 a.m.</p>

Board of Environmental Review October 8, 2010, minutes approved:

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
DATE

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY FOR SETTING OF THE 2011 MEETING SCHEDULE**

**AGENDA # I.B.**

**AGENDA ITEM SUMMARY** - Setting of 2011 Meeting Schedule

**AFFECTED PARTIES SUMMARY** - Board members, Department personnel, and members of the public who appear before the Board will be affected.

**BACKGROUND** - Establishment of a 2011 Board meeting schedule at this meeting will enable Board members, the Department, and the public to plan and schedule matters that involve the Board and other activities far enough in advance to minimize scheduling conflicts and the need for emergency meetings.

**HEARING INFORMATION** - No hearing is necessary.

**BOARD OPTIONS** - The Board has authority to set whatever schedule it wishes to set. It is advisable for the Board to schedule meetings approximately two months apart. This allows the Board to adopt rules approximately four months after initiation of rule proceedings and provides adequate time for compilation of public comments and preparation of notices and hearing officer reports. In addition, should the Board at the 4-month meeting decide to ask for more information or major revisions, two-month intervals allow the Board to consider and take action on the matter at the next meeting without renoticing the matter in the Montana Administrative Register. Renoticing is required if notice of adoption is not published within 6 months of the notice of initiation.

Considering the factors listed above, the Department has developed a tentative meeting schedule for the Board's consideration. It is:

January 28  
March 25  
May 20  
July 22  
September 23  
December 2

**DEQ RECOMMENDATION** - The Department recommends that the Board consider the matter and set an appropriate schedule.

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM**

**EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION**

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

**Agenda Item Summary:** The Department requests the Board initiate rulemaking to amend the air quality open burning rules to: change the circumstances and conditions for burning certain prohibited materials, revise the permit appeals process, and correct a grammatical error.

**List of Affected Rules:** The Department is proposing the Board revise the following administrative rules regarding open burning: 17.8.604(1)(a), 17.8.610(2), 17.8.612(10), 17.8.613(8), 17.8.614(8), and 17.8.615(6). The Department proposes the Board add the following administrative rules: 17.8.612(11), 17.8.613(9), 17.8.614(9), and 17.8.615(7).

**Affected Parties Summary:** The proposed rule amendments would affect parties intending to conduct open burning.

**Scope of Proposed Proceeding:** The Department requests the Board initiate rulemaking and hold a public hearing to take comments and to consider the proposed amendments to the above-stated rules.

**Background:** Sometimes burning wood waste on the premises where it is generated can produce unacceptable amounts of smoke that cause or contribute to a violation of the National Ambient Air Quality Standards. This sort of impact can be avoided, for example, by removing tree debris following a severe wind storm in a city or moving piles of wood waste from the center of a town to a more remote location before burning. However, the current rule provides for case-by-case department decisions regarding the open burning of wood waste when it is moved from its place of origin. The proposed amendment to ARM 17.8.604(1)(a) would specify the circumstances under which moving wood waste from the location where it was generated and burning it may occur. The proposed amendment would require burners to comply with Best Available Control Technology when conducting such open burning.

The 2003 Legislature amended 75-2-211, MCA, to eliminate an automatic stay of the department's decision to issue a permit upon a permit appeal. Pursuant to that amendment, a permit decision is stayed only following a petition and a finding that the person requesting the stay is entitled to the relief demanded in the request for hearing or that continuation of the permit would cause the petitioner great or irreparable injury. Further, the petitioner is liable for costs and damages to the permit applicant if the board ultimately finds the permit was properly issued. The proposed amendments to ARM 17.8.612(10) and (11), 17.8.613(8) and (9), 17.8.614(8) and (9), and 17.8.615(6) and (7) reflect the

Legislature's revision of the process for appealing air quality permits pursuant to 75-2-211, MCA.

The proposed amendment to ARM 17.8.610(2) corrects a grammatical error.

**Hearing Information:** The Department recommends the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed amendments. Section 75-2-205, MCA, states no rule, rule amendment, or rule repeal under the Clean Air Act of Montana may take effect unless public hearing is held following due notice.

**Board Options:** The Board may:

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

**DEQ Recommendation:** The Department recommends the Board initiate rulemaking and appoint a presiding officer to conduct a public hearing as described in the proposed MAR notice.

**Enclosures:** 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 )  
17.8.604, 17.8.610, 17.8.612, 17.8.613, )  
17.8.614, 17.8.615 pertaining to open )  
burning )

NOTICE OF PUBLIC HEARING ON  
PROPOSED AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2011, at \_\_\_\_\_.m., the Board of Environmental Review will hold a public hearing [in/at address], 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 public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.604 MATERIALS PROHIBITED FROM OPEN BURNING (1) The following material may not be disposed of by open burning:

(a) any waste which is moved from the premises where it was generated, except as provided in ARM 17.8.604(2), 17.8.611, or 17.8.612(4)(a) or (4)(b), ~~or unless approval is granted by the department on a case-by-case basis;~~

(b) through (y) remain the same.

(2) A person may not conduct open burning of any wood waste that is moved from the premises where it was generated, except as provided in ARM 17.8.611 or 17.8.612(4)(a) or (4)(b), or unless the department determines:

(a) the material is wood or wood byproducts that have not been coated, painted, stained, treated, or contaminated by a foreign material; and

(b) alternative methods of disposal are unavailable or infeasible.

(3) A person conducting open burning of wood waste which is moved from the premises where it was generated shall comply with BACT.

(4) A person intending to conduct open burning of wood waste which is moved from the premises where it was generated shall contact the department by calling the number listed in ARM 17.8.601(1) prior to conducting open burning.

~~(2)~~ (5) Except as provided in ARM 17.8.606, ~~ne~~ a person may not open burn any nonprohibited material without first obtaining an air quality open burning permit from the department.

AUTH: 75-2-111, 75-2-203, MCA

MAR Notice No. 17-\_\_\_\_

IMP: 75-2-203, 75-2-211, MCA

17.8.610 MAJOR OPEN BURNING SOURCE RESTRICTIONS

(1) through (1)(d) remain the same.

(2) Proof of publication of public notice, consistent with this rule, must be submitted to the department before an application will be considered complete. An applicant for an air quality major open burning permit shall notify the public of the application for permit by legal publication, at least once, in a newspaper of general circulation in each airshed (as defined by the department) affected by the application. The notice must be published no sooner than ten days prior to submittal of an application and no later than ten days after submittal of an application. The form of the notice must be provided by the department and must include a statement that public comments concerning the application may be submitted to the department ~~concerning the application~~ within 20 days after publication of notice or filing of the application, whichever is later. A single public notice may be published for multiple applicants.

(3) through (5) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

17.8.612 CONDITIONAL AIR QUALITY OPEN BURNING PERMITS

(1) through (9) remain the same.

(10) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally adversely affected by the department's decision may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision, ~~and must include a~~ An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final ~~unless until~~ 15 days have elapsed from the date of the decision ~~and there is no request for a hearing under this section.~~ The filing of a request for a hearing ~~postpones~~ does not stay the effective date of the department's decision ~~until the conclusion of the hearing and issuance of a final decision by the board.~~ However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:

(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or

(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.

(11) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4) for undertakings on injunctions.

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AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-203, 75-2-211, MCA

17.8.613 CHRISTMAS TREE WASTE OPEN BURNING PERMITS

(1) through (7)(b)(iii) remain the same.

(8) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally adversely affected by the department's decision may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision, ~~and must include a~~An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final ~~unless~~ until 15 days have elapsed from the date of the decision and ~~there is no request for a hearing under this section.~~ The filing of a request for a hearing ~~postpones~~ does not stay the effective date of the department's decision ~~until the conclusion of the hearing and issuance of a final decision by the board.~~ However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:

(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or

(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.

(9) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4), MCA, for undertakings on injunctions.

AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-203, 75-2-211, MCA

17.8.614 COMMERCIAL FILM PRODUCTION OPEN BURNING PERMITS

(1) through (7) remain the same.

(8) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally adversely affected by the department's decision may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision, ~~and must include a~~An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final ~~unless~~ until 15 days have elapsed from the date of the decision and ~~there is no request for a hearing under this section.~~ The filing of a request for a hearing ~~postpones~~ does not stay the effective date of the department's decision ~~until the conclusion of the hearing and issuance of a final decision by the~~

board. However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:

(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or

(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.

(9) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4) for undertakings on injunctions.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

17.8.615 FIREFIGHTER TRAINING (1) through (5) remain the same.

~~(6) When the department approves or denies the application for a permit under this rule, a person who is jointly or severally adversely affected by the department's decision may request a hearing before the board. The request for hearing must be filed within 15 days after the department renders its decision, and must include a~~An affidavit setting forth the grounds for the request must be filed within 30 days after the department renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the board under this rule. The department's decision on the application is not final ~~unless~~ until 15 days have elapsed from the date of the decision ~~and there is no request for a hearing under this section.~~ The filing of a request for a hearing ~~postpones~~ does not stay the effective date of the department's decision ~~until the conclusion of the hearing and issuance of a final decision by the board.~~ However, the board may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that:

(a) the person requesting the stay is entitled to the relief demanded in the request for a hearing; or

(b) continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay.

(7) Upon granting a stay, the board may require a written undertaking to be given by the party requesting the stay for the payment of costs and damages incurred by the permit applicant and its employees if the board determines that the permit was properly issued. When requiring an undertaking, the board shall use the same procedures and limitations as are provided in 27-19-306(2) through (4) for undertakings on injunctions.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, 75-2-211, MCA

REASON: Sometimes burning wood waste on the premises where it is generated can produce unacceptable amounts of smoke that cause or contribute to

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a violation of the National Ambient Air Quality Standards. This sort of impact can be avoided, for example, by removing tree debris following a severe wind storm in a city or moving piles of wood waste from the center of a town to a more remote location before burning. However, the current rule provides for case-by-case department decisions regarding the open burning of wood waste when it is moved from its place of origin. The proposed amendment to ARM 17.8.604(1)(a) would specify the circumstances under which moving wood waste from the location where it was generated and burning it may occur. The proposed amendment would require burners to comply with Best Available Control Technology when conducting such open burning.

The 2003 Legislature amended 75-2-211, MCA, to eliminate an automatic stay of the department's decision to issue a permit upon a permit appeal. Pursuant to that amendment, a permit decision is stayed only following a petition and a finding that the person requesting the stay is entitled to the relief demanded in the request for hearing or that continuation of the permit would cause the petitioner great or irreparable injury. Further, the petitioner is liable for costs and damages to the permit applicant if the board ultimately finds the permit was properly issued. The proposed amendments to ARM 17.8.612(10) and (11), 17.8.613(8) and (9), 17.8.614(8) and (9), and 17.8.615(6) and (7) reflect the Legislature's revision of the process for appealing air quality permits pursuant to 75-2-211, MCA.

The proposed amendment to ARM 17.8.610(2) corrects a grammatical error.

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 Elois Johnson, 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 [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., \_\_\_\_\_, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, 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 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; 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 Elois Johnson, 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 Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

_____	BY: _____
DAVID RUSOFF	JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer	Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2010.

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM**

**EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION**

**Agenda # III.A.2.**

**Agenda Item Summary:** The Department requests the Board initiate rulemaking to set forth a process for notice by publication regarding the Department's intent to revoke a permit of a source regulated under Title 17, Chapter 8, subchapter 7. (MAQP).

**List of Affected Rules:** The Department is requesting the Board of Environmental Review propose revising ARM 17.8.763.

**Affected Parties Summary:** The proposed rule amendments would affect owners or operators of MAQP sources for which the Department has issued a MAQP.

**Scope of Proposed Proceeding:** The Department requests the Board initiate rulemaking and hold a public hearing to take comments and to consider the proposed amendments to the above-stated rule.

**Background:** The proposed revision to ARM 17.8.763 would provide a process for notice by publication of the department's intent to revoke a Montana Air Quality Permit issued under Title 17, chapter 8, subchapter 7 when an owner or operator cannot be found for service by certified mail. One of the common reasons for revocation is failure to pay annual operating fees, and there have been instances when the department has not been able to revoke a permit for failure to pay fees because the emission source was no longer operating and the owner or operator no longer was at the site and could not be found for mail delivery. Revoking the permit benefits the owner or operator because annual operating fees do not then continue to accrue. The proposed amendment also is necessary to allow the department to avoid expending resources preparing and mailing annual operating fee notices for the emission source. Notice by publication is acceptable in other contexts such as the Montana Rules of Civil Procedure.

**Hearing Information:** The Department recommends the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed amendments. Section 75-2-205, MCA, states no rule, rule amendment, or rule repeal under the Clean Air Act of Montana may take effect unless public hearing is held following due notice.

**Board Options:** The Board may:

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

**DEQ Recommendation:** The Department recommends the Board initiate rulemaking and appoint a presiding officer to conduct a public hearing as described in the proposed MAR notice.

**Enclosures:**

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 )	NOTICE OF PUBLIC HEARING ON
17.8.763 pertaining to revocation of )	PROPOSED AMENDMENT
permit )	
)	(AIR QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2011, at \_\_\_\_\_ .m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed amendment of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.763 REVOCATION OF PERMIT (1) and (2) remain the same.

(3) When the department has attempted unsuccessfully by certified mail, return receipt requested, to deliver a notice of intent to revoke a permit to a permittee at the last address provided by the permittee to the department, the permittee is deemed to have received the notice on the date that the department publishes the last of three notices of revocation, once each week for three consecutive weeks, in a newspaper published in the county in which the permitted facility was located, if a newspaper is published in the county or if no newspaper is published in the county in a newspaper having a general circulation in the county.

(3) and (4) remain the same, but are renumbered (4) and (5).

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

IMP: 75-2-211, MCA

REASON: The proposed revision to ARM 17.8.763 would provide a process for notice by publication of the department's intent to revoke a Montana Air Quality Permit issued under Title 17, chapter 8, subchapter 7 when an owner or operator cannot be found for service by certified mail. One of the common reasons for revocation is failure to pay annual operating fees, and there have been instances when the department has not been able to revoke a permit for failure to pay fees because the emission source was no longer operating and the owner or operator no longer was at the site and could not be found for mail delivery. Revoking the permit

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benefits the owner or operator because annual operating fees do not then continue to accrue. The proposed amendment also is necessary to allow the department to avoid expending resources preparing and mailing annual operating fee notices for the emission source. Notice by publication is acceptable in other contexts such as the Montana Rules of Civil Procedure.

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 Elois Johnson, 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 [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., \_\_\_\_\_, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, 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 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; 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 Elois Johnson, 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 Elois Johnson at [ejohnson@mt.gov](mailto:ejohnson@mt.gov), or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
DAVID RUSOFF  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2010.

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**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY FOR RULEMAKING**

**AGENDA ITEM # III.A.3.**

**AGENDA ITEM SUMMARY** -. Amend ARM 17.30.201, water discharge permit fee schedule and ARM 17.30.1341 to add a general permit category for pesticides. The proposed amendments are intended to correct some clerical errors, provide some clarification, expand some definitions and add a new non-stormwater general permit fee category (pesticides).

**LIST OF AFFECTED RULES** - ARM 17.30.201 and ARM 17.30.1341.

**AFFECTED PARTIES SUMMARY** - Persons or facilities holding permits or other authorizations issued pursuant to the Montana Water Quality Act, Title 75, chapter 5, MCA, and persons or facilities who wish to obtain a permit or authorization under the Act.

**SCOPE OF PROPOSED PROCEEDING** - The Department is requesting initiation of rulemaking and appointment of a hearing officer for a public hearing.

**BACKGROUND** - Pursuant to 75-5-516, MCA, the board must prescribe fees to be assessed by the Department for water quality permit applications, annual permit renewals, review of petitions for degradation, and for other water quality authorizations required under the Montana Water Quality Act, Title 75, chapter 5, MCA. Subject to specific statutory fee caps, the Act requires the board to adopt permit fees that are sufficient to cover the board and department costs of administering the permits and other authorizations required under the Act. In 2007 the United States Environmental Protection Agency (EPA) issued a rule exempting pesticide application from discharge permitting requirements under the federal Clean Water Act (CWA). The rule concluded that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act were exempt from CWA permitting. In January of 2009 the EPA rule was vacated by a federal court of appeals. The primary purpose of this proposed rulemaking is to provide an administrative framework to allow the Department to develop a general permit for pesticide application. This proposed rulemaking also sets the fees for pesticide permits, and makes minor changes to other sections of the fee rule as described in the rule notice.

**HEARING INFORMATION** - A hearing to take public comment will be held at a time and place established by the hearing officer.

**BOARD OPTIONS** - The Board may:

1. Initiate rulemaking, appoint a hearing officer, and schedule a hearing;
2. Determine that the adoption of rules is not appropriate and decline to initiate rulemaking; or
3. Direct the Department to modify the rulemaking and proceed.

**DEQ RECOMMENDATION** – The Department recommends that the Board initiate rulemaking and appoint a hearing officer to conduct a public hearing.

**ENCLOSURES** - Notice of Public Hearing on Proposed Amendment of ARM 17.30.201 pertaining to permit fees and 17.30.1341 pertaining to general permits.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF PUBLIC HEARING ON
17.30.201 and 17.30.1341 pertaining to )	PROPOSED AMENDMENT
permit application, degradation )	
authorization, and annual permit fees )	(WATER QUALITY)
and general permits )	

TO: All Concerned Persons

1. On \_\_\_\_\_, 2011, at \_\_\_\_\_ .m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed amendment of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.30.201 PERMIT APPLICATION, DEGRADATION AUTHORIZATION, AND ANNUAL PERMIT FEES (1) through (1)(h) remain the same.

(2) For purposes of this rule, the definitions contained in ARM Title 17, chapter 30, subchapter 10 and subchapter 13 are incorporated by reference. The following definitions also apply in this rule:

(a) through (e) remain the same.

(f) "multi-county," for pesticide permit fee purposes, means the general permit authorizing pesticide application within multiple counties that are within the same Montana Department of Agriculture field office district;

(f) through (i) remain the same, but are renumbered (g) through (j).

~~(j)~~ (k) "outfall" means a disposal system through which effluent or waste leaves the facility or site; and

(l) "pesticide" means:

(i) a substance or mixture of substances, including any living organism or any product derived from a living organism, intended for preventing, destroying, controlling, repelling, altering life processes, or mitigating any insects, rodents, nematodes, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living humans or other animals, that may infect or be detrimental to persons, vegetation, crops, animals, structures, or households or be present in any environment or that the Department of Agriculture declares a pest; and

(ii) a substance or mixture of substances intended for use as a plant

regulator, defoliant, or desiccant;

~~(k)~~ (m) "renewal permit" means a permit for an existing facility that has an effective discharge permit; and

(n) "single county," for pesticide permit fee purposes, means the general permit authorizing pesticide application within one county or within multiple counties that are not within the same Montana Department of Agriculture field office district.

(3) through (5) remain the same.

(6) The fee schedules for new or renewal applications for, or modifications of, a Montana pollutant discharge elimination system permit under ARM Title 17, chapter 30, subchapter 11 or 13, a Montana ground water pollution control system permit under ARM Title 17, chapter 30, subchapter 10, or any other authorization under 75-5-201, 75-5-301, or 75-5-401, MCA, or rules promulgated under these authorities, are set forth below as Schedules I.A, I.B, I.C, and I.D. Fees must be paid in full at the time of submission of the application. For new applications under Schedule I.A, the annual fee from Schedule III.A for the first year must also be paid at the time of application. For new applications under Schedule I.B and I.C, the annual fee is included in the new permit amount and covers the annual fee for the calendar year in which the permit coverage becomes effective.

(a) and (b) remain the same.

(c) The department may assess an administrative processing fee under Schedule I.D when a permittee makes substantial alterations or additions, requiring significant additional review, to a sediment control plan, waste management plan, nutrient management plan, pesticide discharge management plan, or storm water pollution prevention plan.

(d) Application fees are nonrefundable except, as required by 75-5-516(1)(d), MCA, if the permit or authorization is not issued the department shall return a portion of the application fee based on avoided enforcement costs. The department shall return 25% of the application fee if the application is withdrawn or if the department waives Federal Clean Water Act section 401 certification within 30 days after submittal.

(e) through (h) remain the same.

Schedule I.A remains the same.

#### Schedule I.B Application Fee for Non-Storm Water General Permits

Category	Renewal Fee	New Permit Fee (includes initial annual fee)
Concentrated animal feeding operation	\$ 600	\$ 1,200
Construction dewatering	400	900
Fish farms	600	1,200
Produced water	900	1,200

Suction dredge		
resident of Montana	25	<del>25</del> <u>50</u>
nonresident of Montana	100	<del>100</del> <u>200</u>
Sand and gravel	900	1,200
Domestic sewage treatment lagoon	800	1,200
Disinfected water	800	1,200
Petroleum cleanup	800	1,200
<u>Pesticides</u>		
<u>Single county</u>	<u>450</u>	<u>900</u>
<u>Multi-county</u>	<u>1,400</u>	<u>2,700</u>
Ground water remediation or dewatering	800	1,400
Ground water potable water treatment facilities	800	1,400
Other general permit, not listed above	600	1,200

(i) through (n) remain the same.  
Schedule I.C remains the same.  
(o) remains the same.

#### Schedule I.D Application Fee for Other Activities

Category	Amount
Short-term water quality standard, turbidity "318 authorization"	\$ 250
Short-term water quality standard, remedial activities and pesticide application "308 authorization"	<del>400</del> <u>250</u>
Federal Clean Water Act section 401 certification	See ARM 17.30.201(6)(o)
Review plans and specifications to determine if permit is necessary, pursuant to 75-5-402(2), MCA	2,000
Major modification	Renewal fee from Schedule I.A
Minor modification, includes transfer of ownership	500
Resubmitted application fee	500
Administrative processing fee	500

(7) remains the same.  
Schedule II remains the same.  
(8) and (8)(a) remain the same.  
Schedule III.A remains the same.

#### Schedule III.B Annual Fee for Non-Storm Water General Permits

Category	Amount
----------	--------

Concentrated animal feeding operation	\$600
Construction dewatering	450
Fish farms	450
Produced water	750
Portable suction dredges	
resident of Montana	25
nonresident of Montana	100
Sand and gravel production	750
Domestic sewage treatment lagoon	850
Disinfected water	750
Petroleum cleanup	750
<u>Pesticides</u>	
<u>Single county</u>	<u>450</u>
<u>Multi-county</u>	<u>1,400</u>
Ground water remediation or dewatering	800
Potable water treatment facilities	800
Other general permit, not listed above	800

(b) through (d) remain the same.

Schedule III.C remains the same.

(e) A facility that maintains compliance with permit requirements, including effluent limitations and reporting requirements, as determined by the previous year's discharge and compliance monitoring data, is entitled to a 25% reduction in its annual permit fee. A new permittee is not eligible for fee reduction in its first year of operation. A permittee that is under a formal enforcement order providing a compliance schedule for correction of permit violations is not eligible for a fee reduction until the violations are corrected. A permittee with a violation of any permit requirement during the previous year is not eligible for fee reduction.

(f) through (9)(b) remain the same.

(10) The department shall give written notice to each person assessed a fee under this rule of the amount of the fee that is assessed and the basis for the department's calculation of the fee. The fee is due 30 days after the date of the written notice. The fee must be paid by a check, money order, or electronic transfer payable to the state of Montana, Department of Environmental Quality. The fee also may be paid on line at the e-bill payment service site.

(11) through (11)(b) remain the same.

AUTH: 75-5-516, MCA

IMP: 75-5-516, MCA

REASON: Pursuant to 75-5-516, MCA, the board must prescribe fees to be assessed by the department for water quality permit applications, annual permit renewals, review of petitions for degradation, and for other water quality authorizations required under the Montana Water Quality Act, Title 75, chapter 5, MCA. Subject to specific statutory fee caps, the Act requires the board to adopt permit fees that are sufficient to cover the board and department costs of

administering the permits and other authorizations required under the Act.

In 2007, the United States Environmental Protection Agency (EPA) issued a rule exempting pesticide application from discharge permitting requirements under the federal Clean Water Act (CWA). The rule concluded that pesticides, applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act, were exempt from CWA permitting. In January of 2009, the EPA rule was vacated by a federal court of appeals. The primary purpose of this proposed rulemaking is to provide an administrative framework to allow the department to develop a general permit for pesticide application and to publish the draft permit for public comment. This proposed rulemaking also sets the fees for pesticide permits and makes minor changes to other sections of the fee rule as described below.

The proposed new definitions in ARM 17.30.201(2)(f), (l), and (m) are necessary to implement the pesticide general permit authority. The definition of "pesticide" in proposed ARM 17.30.201(2)(l) is taken from the statutory definition in the Montana Pesticides Act, Title 80, chapter 8, MCA. The definitions of "multi-county" and "single county" in ARM 17.30.201(2)(f) and (n) identify two types of general permit that the department intends to develop. The single county permit will authorize pesticide application in one county or in multiple counties that are not in the same field office district for the Montana Department of Agriculture (MDA). The multi-county permit will authorize pesticide application in multiple counties that are within the same MDA field office district.

The proposed amendment to ARM 17.30.201(6)(c) would add an administrative processing fee for substantial alterations or additions to a pesticide discharge management plan. This fee is necessary to recover the additional review costs associated with changes to pesticide management plans.

The proposed amendment to ARM 17.30.201(6)(d) is necessary to clarify that the allowance for a 25% refund of an application fee also applies when the department waives federal Clean Water Act section 401 certification as provided in ARM 17.30.105.

The proposed amendments to Schedule I.B set the application fees for the single county and multi-county pesticide general permits. The fees are necessary to recover the costs to the department of issuing and administering permits and authorizations under the pesticide general permit program. The amendments to Schedule I.B also make a correction to the suction dredge new permit fees. Because the new permit fees shown in Schedule I.B include both the application fee and the initial annual fee from Schedule III.B, the fee shown for suction dredges in Schedule I.B should be doubled. This is necessary to remain consistent with the statutory fee provisions for suction dredges set out in 75-5-516(12), MCA.

The proposed amendments to Schedule I.D would reduce the fee for short-term water quality standard 308 authorizations. This group currently includes pesticide 308 authorizations. Because the new general pesticide permit will address pesticide applications that have a potentially higher risk, the fees in the 308 category in Schedule I.D can be reduced.

The proposed amendments to Schedule III.B set the annual fees for the single county and multi-county pesticide general permits. The fees are necessary to recover the costs to the department of administering permits and authorizations under the pesticide general permit program.

The proposed amendment to ARM 17.30.201(8)(e) clarifies that a permittee whose violations are subject to a corrective action schedule in a formal enforcement order is not eligible for the fee reduction until the violations are corrected. This is necessary to comply with the requirement in 75-5-516(2), MCA, that the fee reduction is not available to permittees who are not in compliance with permit requirements.

The proposed amendment to ARM 17.30.201(10) clarifies that fees may be paid on line at the e-bill payment service site. This is necessary to afford permittees the convenience of using the e-bill system.

17.30.1341 GENERAL PERMITS (1) The department may issue general permits for the following categories of point sources which the board has determined are appropriate for general permitting under the criteria listed in 40 CFR 122.28 as stated in ARM 17.30.1105:

- (a) through (q) remain the same.
- (r) swimming pool discharge; ~~and~~
- (s) septic tank pumper disposal sites; and
- (t) pesticide application.
- (2) through (12)(e) remain the same.

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

IMP: 75-5-401, MCA

REASON: The proposed amendment to ARM 17.30.1341 would add pesticide application to the list of general permits that the department is authorized to issue. This amendment is necessary for pesticide application. See reason for amendments to ARM 17.30.201.

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 Elois Johnson, 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 ejohnson@mt.gov, no later than 5:00 p.m., \_\_\_\_\_, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, 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 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; 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 Elois Johnson, 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 Elois Johnson at [ejohnson@mt.gov](mailto:ejohnson@mt.gov), or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JAMES M. MADDEN  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2010.

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY FOR  
WATER QUALITY STANDARDS AMENDMENTS**

**AGENDA ITEM # III.A.4.**

**AGENDA ITEM SUMMARY:** The proposed rulemaking would amend rules to designate a portion of the Gallatin River as an Outstanding Resource Water (ORW).

**LIST OF AFFECTED RULES:** ARM 17.30.617 and 17.30.638.

**AFFECTED PARTIES SUMMARY:** The proposed designation of the Gallatin River from the Yellowstone National Park boundary to Spanish Creek as an ORW would prohibit new or increased point source discharges that would cause a permanent change of water quality. This includes individual and community waste water treatment systems or industrial sources that desire to discharge to the proposed ORW section of the Gallatin River or are determined to have a direct hydrologic connection to the Gallatin River.

**SCOPE OF PROPOSED PROCEEDING:** Issuance of a notice of supplemental rulemaking extending the comment period.

**BACKGROUND:** The Board received a petition from American Wildlands in December 2001 requesting that the Board initiate rulemaking to designate the mainstem Gallatin River from the Yellowstone National Park boundary to the confluence of Spanish Creek as an Outstanding Resource Water (ORW).

At the March, 2002, meeting the Board received comment on the petition and directed the Department to prepare an environmental impact statement (EIS) addressing the petition. The draft EIS was released for public comment in September, 2006. The comment period on the draft EIS closed on October 27, 2006. The final EIS was issued on January 9, 2007.

Notice of proposed rulemaking appeared in the October 5, 2006, Montana Administrative Register. The comment period on the proposed rulemaking closed on November 2, 2006. The Board received a number of comments objecting to the ORW designation on grounds that it would render a number of properties in the Big Sky area undevelopable. In response, the petitioners and several members of the development community commenced discussions regarding local and other actions that could eliminate the potential that an ORW designation would render properties undevelopable. They requested the Board to delay action on the rulemaking while they explored the feasibility of these options. The Board granted this request and has extended the comment period at approximately six-month intervals since then to allow those efforts to continue. The last extension expired on November 12, 2010. On November 9, 2010, the Board received a comment asking that the comment period be extended.

**HEARING INFORMATION:** The Board held a hearing on October 25, 2006.

**BOARD OPTIONS:**

The Board may:

1. Publish a supplemental notice extending the comment period;
2. Adopt the rule amendments as proposed or with modifications; or
3. Determine that it will not adopt the rule amendments, either affirmatively or by inaction.

**DEQ RECOMMENDATION:** Since the original publication of the notice, various interested parties have formed a collaborative called the "Wastewater Solutions Forum." The Forum has hired an engineering firm. The engineering firm has completed a feasibility study for engineering option that would protect the Gallatin

River without the need for an ORW. Comments received indicated that extension of the Big Sky Water and Sewer District service area along the Gallatin would provide more effective water quality protection than the ORW designation. The Forum was exploring funding options when the current economic downturn began. That downturn has resulted in an interruption of those efforts. However, the Department believes that these efforts should resume as the economy recovers. The Forum is currently evaluating conducting a pilot test to determine the feasibility of disposing of waste water using snow making. The Department therefore recommends that, rather than making a decision to adopt or not adopt the rule, the Board extend the comment period until April 29, 2011.

**ENCLOSURES:**

The following information is attached to this summary:

1. Public Comment
2. Notice of Extension of Comment Period on Proposed Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF EXTENSION OF
17.30.617 and 17.30.638 pertaining to )	COMMENT PERIOD ON
outstanding resource water designation )	PROPOSED AMENDMENT
for the Gallatin River )	
)	(WATER QUALITY)

TO: All Concerned Persons

1. On October 5, 2006, the Board of Environmental Review published MAR Notice No. 17-254 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2294, 2006 Montana Administrative Register, issue number 19. On March 22, 2007, the board published MAR Notice No. 17-257 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 328, 2007 Montana Administrative Register, issue number 6. On September 20, 2007, the board published MAR Notice No. 17-263 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 1398, 2007 Montana Administrative Register, issue number 18. On March 13, 2008, the board published MAR Notice No. 17-268 extending the comment period on the proposed amendment of the above-stated rules at page 438, 2008 Montana Administrative Register, issue number 5. On September 11, 2008, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1953, 2008 Montana Administrative Register, issue number 17. On February 26, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 162, 2009 Montana Administrative Register, issue number 4. On August 13, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1324, 2009 Montana Administrative Register, issue number 15. On February 11, 2010, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 264, 2010 Montana Administrative Register, issue number 3. On July 29, 2010, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1648, 2010 Montana Administrative Register, issue number 14.

2. During the initial comment period and extensions of the original comment period, the board was advised that members of the Big Sky community, which would be affected by this rulemaking, had formed a collaborative and had hired an engineering firm, which completed a feasibility study on extending the coverage of the Big Sky Water and Sewer district service area. The board received comments indicating that this would protect water quality in the Gallatin River as well as or better than adoption of the proposed rule. Members of the community were exploring funding options when the current economic downturn began. That downturn has resulted in an interruption of the efforts to find funding. However, the

MAR Notice No. 17-276

board believes that these efforts should resume as the economy recovers. On November 9, 2010, the board received a public comment requesting that the board further extend the comment period. The Department of Environmental Quality has recommended that the comment period be extended to allow resumption of efforts to obtain funding. The board has granted this request.

3. Written data, views, or arguments may be submitted to Elois Johnson, 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 [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than April 29, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

4. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking action or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., \_\_\_\_\_, 2010, to advise us of the nature of the accommodation that you need. Please contact the board secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or e-mail [ber@mt.gov](mailto:ber@mt.gov).

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2010.



**American Rivers**  
*Thriving By Nature*

November 9, 2010

Montana Board of Environmental Review  
1520 E. Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Dear Members of the Board of Environmental Review:

On behalf of American Rivers, I am writing to request that the Board of Environmental Review grant an extension of the comment period in ARM 17.30.617 and 17.30.630 pertaining to the Outstanding Resource Water (ORW) designation for the Gallatin River.

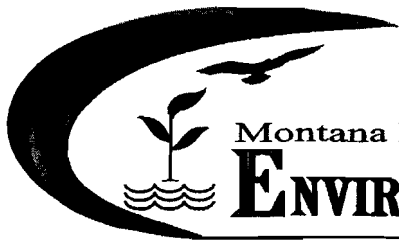
American Rivers is the nation's leading conservation organization fighting for healthy rivers so communities can thrive. Founded in 1973, American Rivers has more than 65,000 members and supporters, with offices in Washington, DC and nationwide. We opened our Northern Rockies office in Bozeman last year with the goal of protecting Montana's last, best headwaters, including the Gallatin River.

Although American Rivers was not involved in writing the original ORW petition, nor has it endorsed ORW designation for the Gallatin River, we believe it is important that it remain on the table as we explore other options for protecting water quality in the Gallatin River. We are active participants in the Wastewater Solutions Forum, which is a collaboration of conservation groups, Big Sky area developers, the three local ski areas, and the Big Sky Water & Sewer District, all of whom have joined together to study ways to maintain high water quality in the Gallatin River while enhancing the local economy.

In conclusion, while American Rivers prefers to address wastewater issues in the Gallatin River via a collaborative process, keeping ORW designation on the table ensures that all the aforementioned parties will remain committed to finding effective solutions in a timely manner.

Sincerely,

Scott Bosse  
Northern Rockies Director



Montana Department of  
**ENVIRONMENTAL QUALITY**

**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

FROM: Misty Gable, Interim Board Secretary  
Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: September 24, 2010

SUBJECT: Board of Environmental Review case, Case No. BER 2010-14 PWS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE PUBLIC WATER  
SUPPLY LAWS BY GREGORY C.  
MACDONALD AT HIGHWOOD MOBILE HOME  
PARK, PWSID #MT0004681, CASCADE  
COUNTY, MONTANA. [FID #1968,  
DOCKET NO. PWS-10-30]

Case No. BER 2010-14 PWS

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #1968, Docket No. PWS-10-30).

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

Carol Schmidt  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

John Arrigo, Administrator  
Enforcement Division  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments

BER 2010-14 PWS

**Gregory C. MacDonald**  
2929 3<sup>rd</sup> Avenue North, Suite 538  
Billings, MT 59101-1944  
(406) 252-3773

September 23, 2010

FILED this 23<sup>rd</sup> day of  
September AD 2010  
at 3:02 o'clock P.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: Misty Croft

Board Secretary  
Montana Board of Environmental Review  
PO Box 200901  
Helena, MT 59620-0901

FID# 1968

Re: Docket No. PWS-10-30

Via Fax: (406) 444-4386

Dear Board Secretary:

In accordance with Section 75-6-109(3), MCA, and in connection with the above referenced subject, I am appealing the related Order and request a hearing of this entire matter before the Montana Board of Environmental Review.

I can be reached at the following telephone number and address:

(406) 252-3773  
2929 3<sup>rd</sup> Avenue North, Suite 538  
Billings, MT 59101-1944

Thank you for your consideration and communication.

Sincerely,

Gregory C MacDonald  
Gregory C. MacDonald

GCM:amw

**Gregory C. MacDonald**  
**2929 3<sup>rd</sup> Avenue North, Suite 538**  
**Billings, MT 59101**  
**(406) 252-3773**  
**(406) 252-9512 - Fax**

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**F A X**

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**TO: Board Secretary** **FROM: Gregory C. MacDonald**

**COMPANY: Montana Board of Environmental** **DATE: September 23, 2010**  
**Review**

**FAX: 406-444-4386** **TOTAL NO. OF PAGES (INCLUDING COVER SHEET):**  
**2**

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☐ **URGENT** ☒ **FOR YOUR REVIEW**  
☐ **PER YOUR REQUEST** ☒ **PLEASE REPLY**

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**NOTES/COMMENTS:**

**This fax originates from fax number (406) 252-9512. If you have any problems with this transmittal, please call (406) 252-3773.**

***This transmittal is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosures under applicable law. If the reader of this transmittal is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this transmittal is strictly prohibited. If you receive this transmittal in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you!***

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE PUBLIC WATER  
SUPPLY LAWS BY GREGORY C.  
MACDONALD AT HIGHWOOD MOBILE  
HOME PARK, PWSID #MT0004681,  
CASCADE COUNTY, MONTANA.(FID #1968)

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE COMPLIANCE  
AND PENALTY ORDER

Docket No. PWS-10-30

**1. NOTICE OF VIOLATION**

Pursuant to the authority of Section 75-6-109(1), Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Gregory C. MacDonald (Respondent), as owner of the Highwood Mobile Home Park, of the following Findings of Fact and Conclusions of Law with respect to violations of the Public Water Supply Laws (PWSL) (Title 75, chapter 6, part 1, MCA) and Administrative Rules of Montana (ARM) (Title 17, chapter 38) adopted thereunder.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Department hereby makes the following Findings of Facts and Conclusions of Law:

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.

2. The Department administers the PWSL. *See* Section 75-6-104(9), MCA.

3. Respondent is a "person" as defined in Section 75-6-102(11), MCA.

4. Respondent owns and operates the public water supply system that serves the customers of Highwood Mobile Home Park (System) located at 3800 8<sup>th</sup> Avenue North in Great Falls, Cascade County, Montana. The System regularly serves water to at least 25 persons daily for any 60 or more days in a calendar year. Respondent is therefore a "supplier of water" and

1 subject to the requirements of the PWSL and the rules adopted thereunder. *See* ARM 17.38.202  
2 and 40 CFR 141.2 as incorporated therein.

3 5. The System regularly serves water to at least 25 year-round residents. Therefore,  
4 the System is a “community water system” within the meaning of Section 75-6-102(3), MCA.

5 6. The System is a consecutive connection to the City of Great Falls public water  
6 supply system.

7 7. Unless granted an exclusion by the Department, a consecutive system must comply  
8 with the requirements of 40 CFR 141 and applicable requirements of Title 75, chapter 6, MCA. *See*  
9 ARM 17.38.210. The Department has not granted Respondent's System an exclusion.

10 ***Failure to monitor for total coliform bacteria***

11 8. The supplier of water of a community public water supply system that is a  
12 consecutive system is required to monitor its water monthly for total coliform bacteria. *See*  
13 ARM 17.38.215(1)(a) and 40 CFR 141.21(a)(2) as incorporated therein.

14 9. According to records maintained by the Department, Respondent did not report  
15 analytical results for total coliform bacteria at the System for the December 2009 and the  
16 January, February and March 2010 monitoring periods.

17 10. The Department sent Respondent Violation Letters on the following dates:  
18 January 13, 2010; February 17, 2010; March 12, 2010 and April 16, 2010 for the missed total  
19 coliform monitoring listed in Paragraph 9. The Violation Letters notified Respondent in writing  
20 that it failed to monitor the System for total coliform bacteria and requested Respondent to  
21 resume monitoring for total coliform bacteria.

22 11. Respondent violated ARM 17.38.215(1)(a) four (4) times by failing to monitor  
23 the System for total coliform bacteria as required by the PWSL during the December 2009 and  
24 the January, February and March 2010 monitoring periods.

1 ***Failure to provide public notification***

2 12. Owners of public water supplies are required to give public notice for monitoring  
3 violations no later than one year after the public water system learns of the violation. *See* ARM  
4 17.38.239(1) and 40 CFR part 141, Subpart Q as incorporated therein. Within 10 days of  
5 completing the public notice, the owners or operators of a public water system must certify to the  
6 Department that they have complied with the public notification regulations. *See* ARM  
7 17.38.234(6)(a) and 40 CFR 141.31(d) as incorporated therein.

8 13. Records maintained by the Department indicate Respondent has not yet provided  
9 public notice for the total coliform bacteria monitoring violations listed in Paragraph 11, and has  
10 not certified to the Department that it had complied with the public notification requirements.

11 ***Administrative penalty***

12 14. Pursuant to Section 75-6-109(6)(a)(ii), MCA, the Department may assess an  
13 administrative penalty not to exceed \$500 for each day of violation pertaining to a public water  
14 supply system that serves no more than 10,000 persons per day.

15 15. The Department has calculated an administrative penalty in the amount of \$1,024 for  
16 the violations alleged in Paragraph 11. *See* Section 75-1-1001, MCA, and ARM 17.4.301 through  
17 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by reference herein.

18 **III. ADMINISTRATIVE ORDER**

19 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is issued  
20 to Respondent pursuant to the authority vested in the State of Montana, acting by and through the  
21 Department under the PWSL, Section 75-6-101, *et seq.*, MCA, and administrative rules adopted  
22 thereunder, ARM Title 17, chapter 38. Based on the foregoing Findings of Fact and Conclusions of  
23 Law and the authority cited above, the Department hereby ORDERS Respondent to take the  
24 following actions to comply with the PWSL within the timeframes specified in this Order.

1 16. No later than 30 days from the date of mailing of this Order, Respondent shall  
2 monitor the System for total coliform bacteria in accordance with the PWSL and send the  
3 samples to a laboratory certified by the State of Montana. Respondent shall send a copy of the  
4 analytical results to the Department within 10 days of receipt of the results. Until directed  
5 otherwise in writing by the Department, Respondent shall continue to monitor the System for  
6 total coliform bacteria once a month.

7 17. Respondent shall provide public notice for the December 2009 and January  
8 through March 2010 monitoring violations no later than one year from the date of each of the  
9 Department's Violation Letters listed in Paragraph 10. The notices shall meet the requirements  
10 of ARM 17.38.239(1). Within 10 days after Respondent gives the public notices, Respondent  
11 shall submit a copy of the public notice to the Department along with a certification that  
12 Respondent has fully complied with the public notice requirements of ARM 17.38.239(1).

13 18. Copies of any monitoring results and public notices required by this Order must  
14 be sent to:

15 Jon Dilliard, Chief  
16 Public Water Supply and Subdivisions Bureau  
17 Department of Environmental Quality  
18 1520 East Sixth Avenue  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 19. Respondent is hereby assessed an administrative penalty in the amount of \$1,024  
22 for the violations cited in this Order. Based upon the lack of prior history of violation as  
23 evidenced in the penalty calculation, the Department will exercise its enforcement discretion and  
24 suspend all but \$512 of the calculated penalty provided that Respondent fully complies with the  
requirements of this Order.

1        20.     No later than 60 days from the date of mailing of this Order, Respondent shall pay  
2 to the Department an administrative penalty in the amount of \$512 to resolve the violations cited  
3 herein. The penalty must be paid by check or money order, made payable to the "Montana  
4 Department of Environmental Quality," and shall be sent to:

5                     John Arrigo, Administrator  
6                     Enforcement Division  
7                     Department of Environmental Quality  
8                     1520 East Sixth Avenue  
9                     P.O. Box 200901  
10                    Helena, MT 59620-0901

11        21.     In the event Respondent fails to comply fully with any requirement of this Order,  
12 the Department may require Respondent to pay the suspended portion of the total penalty, in part  
13 or in full. This amount shall become due and payable in full within 30 days of the date of the  
14 Department's written notice of demand for payment.

15        22.     None of the requirements in this Order are intended to relieve Respondent from  
16 complying with all applicable state, federal, and local statutes, rules, ordinances, orders and  
17 permit conditions.

18        23.     The Department may take any additional enforcement action against Respondent,  
19 including the right to seek injunctive relief, civil penalties, and other available relief for any  
20 violation of, or failure or refusal to comply with, this Order.

21        24.     Failure to take the required corrective actions by the specified deadlines, as  
22 ordered herein, constitutes a violation of Title 75, chapter 6, part 1, MCA, and may result in the  
23 Department seeking a court order assessing civil penalties of up to \$10,000 per day of violation  
24 pursuant to Section 76-6-114, MCA.

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1 **IV. NOTICE OF APPEAL RIGHTS**

2 25. Respondent may appeal this Order under Section 75-6-109(3), MCA, by filing a  
3 written request for a hearing before the Montana Board of Environmental Review no later than  
4 30 days after service of this Order. Any request for a hearing must be in writing and sent to:

5 Board Secretary  
6 Board of Environmental Review  
7 P.O. Box 200901  
8 Helena, MT 59620-0901

9 26. Hearings are conducted as provided in the Montana Administrative Procedure Act,  
10 Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court  
11 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to the  
12 hearing may include formal discovery procedures, including interrogatories, requests for production  
13 of documents, and depositions. Respondent has the right to be represented by an attorney in any  
14 contested case hearing.

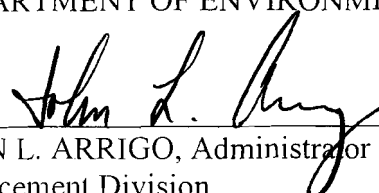
15 27. If a hearing is not requested within 30 days after service of this Order, the  
16 opportunity for a contested case appeal is waived.

17 28. This Order becomes effective on the date of service. Service by mail is complete  
18 on the date of mailing.

19 IT IS SO ORDERED:

20 DATED this 23 day of August, 2010.

21 STATE OF MONTANA  
22 DEPARTMENT OF ENVIRONMENTAL QUALITY

23   
24 JOHN L. ARRIGO, Administrator  
Enforcement Division

**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Worksheet**

Responsible Party Name:	Gregory C. MacDonald (Respondent) at Highwood Mobile Home Park (System)		
FID:	1968	PWSID MT0004681	
Statute:	Montana Public Water Supply Laws (PWSL)		
Date:	8/16/2010		
Name of Employee Calculating Penalty:	Daniel R. Kenney		
Maximum Penalty Authority:	\$500.00		

**Penalty Calculation #1**

Description of Violation:
Respondent violated ARM 17.38.215 by failing to monitor for total coliform bacteria for the December 2009 and the January, February and March 2010 monitoring periods.

**I. BASE PENALTY**

**Nature**

Explanation:	
The nature of the violation is administrative because the lack of analytical results impairs the Department's ability to determine if the public water supply is complying with the regulatory requirements used by the Department to assure the safety of a system's drinking water.	
Potential to Harm Human Health or the Environment	
Potential to Impact Administration	X

**Gravity and Extent**

Gravity Explanation:
ARM 17.4.303(5)(b)(ii) states that the gravity for the failure to monitor is a moderate violation. Therefore, gravity is moderate.
Extent Explanation:
Not applicable.

**Harm to Human Health or the Environment**

**Gravity**

Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	Gravity and Extent Factor:

**Impact to Administration**

**Gravity**

Major	Moderate	Minor	
.50	.40	.30	Gravity Factor: 0.40

**BASE PENALTY** (Maximum Penalty Authority x Gravity Factor):

**\$200.00**

## II. ADJUSTED BASE PENALTY

### A. Circumstances (up to 30% added to Base Penalty)

#### Explanation:

As owner and operator, Respondent should have known about the monitoring requirement for total coliform bacteria. Further, the Department notified Respondent in writing on: January 13, 2010; February 17, 2010; March 12, 2010 and April 16, 2010 of the violations. Respondent had complete control over the circumstances of the violations and did not monitor for total coliform bacteria as required. The Department is aggravating the penalty by 20% to reflect a moderate degree of culpability.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$40.00

### B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

#### Explanation:

Respondent did not promptly report the violations to the Department or voluntarily disclose facts related to the violations. Therefore, no reduction in the Base Penalty is calculated for Good Faith and Cooperation.

Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$0.00

### C. Amounts Voluntarily Expended (AVE) (up to 10% subtracted from Base Penalty)

#### Explanation:

The Department is not aware of any amounts Respondent voluntarily expended beyond what was required to return to compliance. Therefore, no reduction is being allowed.

AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

## ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$200.00
Circumstances	\$40.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$240.00</b>

## III. DAYS OF VIOLATION

#### Explanation:

Section 75-6-109(6)(a)(ii), MCA, states that the Department may assess an administrative penalty for each day of violation. For the purposes of calculating this penalty, the Department is considering each missed sampling event to be one day of violation. Respondent failed to monitor for total coliform bacteria in the December 2009 and the January, February and March 2010 monitoring periods. Therefore, the Department is seeking a penalty for four (4) days.

Number of Days:	4
<b>ADJUSTED BASE PENALTY x NUMBER OF DAYS:</b>	<b>\$960.00</b>

#### Other Matters as Justice May Require Explanation:

Not applicable.

<b>OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:</b>	<b>\$0.00</b>
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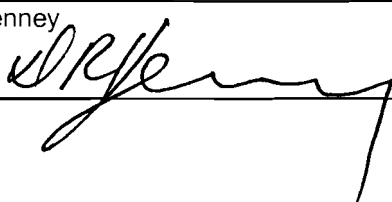
## IV. ECONOMIC BENEFIT

#### Explanation:

The Department uses EPA's BEN model to calculate the amount of economic benefit that a violator gains as a result of savings from avoided and delayed costs associated with the violations. The Department estimated the shipping and analytical costs (\$25 each) for the four total coliform bacteria samples that should have been collected by Respondent at \$100. The BEN model considers the effect of inflation and taxes on the amounts saved to calculate the time value of money. Using the BEN computer model, the Department determined Respondent gained an economic benefit of \$64 in avoided costs.

<b>ECONOMIC BENEFIT REALIZED:</b>	<b>\$64.00</b>
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**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Summary**

Responsible Party Name:	Gregory C. MacDonald (Respondent) at Highwood Mobile Home Park (System)
FID:	1968 PWSID MT0004681
Statute:	Montana Public Water Supply Laws (PWSL)
Date:	8/23/10
Signature of Employee Calculating Penalty:	Daniel R. Kenney 

**I. Base Penalty** (Maximum Penalty Authority x Matrix Factor)

	<b>Penalty Calculation #1</b>
Maximum Penalty Authority:	\$500.00
Percent Harm - Gravity and Extent:	0.00
Percent Impact - Gravity:	0.40
<b>Base Penalty:</b>	<b>\$200.00</b>

**II. Adjusted Base Penalty**

Base Penalty:	\$200.00
Circumstances:	\$40.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$240.00</b>

<b>Totals</b>
\$200.00
\$40.00
\$0.00
\$0.00
<b>\$240.00</b>

**III. Days of Violation or  
Number of Occurrences**

4

**Adjusted Base Penalty Total** \$960.00

\$960.00

**Other Matters as Justice May  
Require Total**

\$0.00

\$0.00

**IV. Economic Benefit** \$64.00

\$64.00

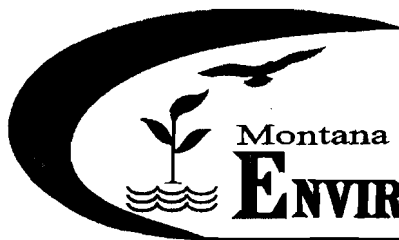
**V. History\***

\$0.00

**TOTAL PENALTY**

**\$1,024.00**

\*Respondent does not have a prior history of violations of the Public Water Supply Laws documented in either an administrative order, judicial order, or judgment within the last three years.



Montana Department of  
**ENVIRONMENTAL QUALITY**

**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary  
Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: October 14, 2010

SUBJECT: Board of Environmental Review case, Case No. BER 2010-15 MFS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:  
THE APPEAL AND REQUEST FOR HEARING  
BY RONALD AND DEBBIE LAUBACH  
REGARDING THE DEQ'S FINAL DECISION  
TO AMEND THE MATL'S CERTIFICATE OF  
COMPLIANCE.

Case No. BER 2010-15 MFS

The BER has received the attached request for hearing. Also attached is DEQ's administrative document(s) relating to this request.

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

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

Attachments

Ronald & Debbie Laubach  
1199 Wilson Road  
Power, MT 59468

October 5, 2010

Richard H. Oppen, Director  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Tom Ring  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Dear Mr. Oppen, Mr. Ring, and the Board of Environmental Review:

We are appealing your decision to amend the MATL Certificate of Compliance.

As you can clearly see from the accompanying map, there is only one feasible route possible. The route we are proposing is 1200 feet from the missile site and 1300 feet to our closest building, as opposed to DEQ's proposal of a mere 200 foot distance from our building.

This proposal would eliminate our having to farm around at least one less pole with guide wires in the middle of the field. It would also eliminate the crossing of three wetlands.

We are very concerned about the large concentration of electricity so close to the buildings that we use for farming purposes. As landowners we should have the right to say where the poles are placed on our land.

FILED this 7<sup>th</sup> day of  
October AD 2010  
at 10:38 Clock 4 M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by Misty Noble

As part of this formal appeal, we would like to request a meeting with the Board of Environmental Review. We would like to meet immediately because of the time constraints involved in this issue.

Sincerely,

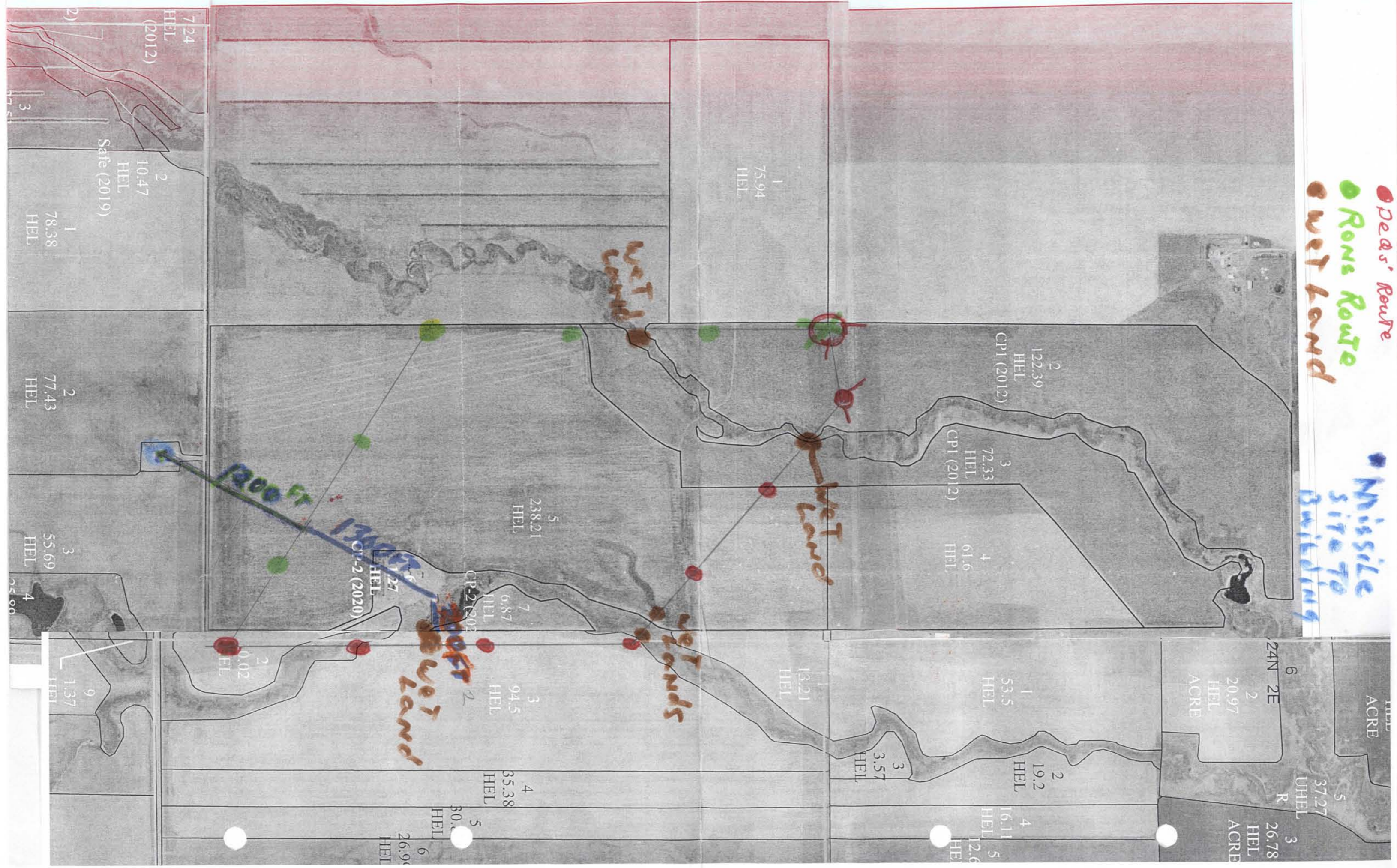
A handwritten signature in cursive script, appearing to read "Ronald Laubach".A handwritten signature in cursive script, appearing to read "Debbie Laubach".

Ronald Laubach

Debbie Laubach

● Rons Route  
● wetland

Missile  
Site to  
Building



Dear Chairman Russel and member of the board:

We (Ron and Debbie Laubach) Request that the board hear the whole case (#BER 2010-15 MFS) at your meeting Dec 3, 2010.

Our goal is that the board hears our case because of the negative impacts created on our property by such a huge project.

The proposed line causes several negative issues on our property, Livelihood, health issues, and the destruction of wildlife and wetlands. We will offer evidence of fact for the board.

There is an alternative route on our property that can be taken that would avoid all these negative impacts which we will present to the board at the meeting. My neighbors have offered their support for this alternative route and the company agrees it would be a better route.

Thank you  
Ron and Debbie Laubach  
Nov. 17 2010  
1199 Wilson road  
Power MT 59468  
406-463-2523  
Fax Same

Ccc:  
Harley Harris  
Katheryn Orv  
Ed Hayes



Montana Department of

**ENVIRONMENTAL QUALITY**

**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary  
Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: October 14, 2010

SUBJECT: Board of Environmental Review case, Case No. BER 2010-16 MFS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:

THE APPEAL AND REQUEST FOR HEARING  
BY MAURER FARMS, INC.; SOMERFELD &  
SONS LAND & LIVESTOCK, LLC; LARRY  
SALOIS, POA; JERRY MCRAE; AND  
KATRINA MARTIN REGARDING THE DEQ'S  
FINAL DECISION TO AMEND THE MATL'S  
CERTIFICATE OF COMPLIANCE.

Case No. BER 2010-16 MFS

The BER has received the attached request for hearing. Also attached is DEQ's administrative document(s) relating to this request.

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

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

Attachments

BER 7-10-10 MFS

**Gable, Misty**

**From:** Mari Lindsley [lindsley@lund-law.com]  
**Sent:** Thursday, October 07, 2010 1:35 PM  
**To:** Opper, Richard; DEQ BER  
**Cc:** 'Hertha Lund'  
**Subject:** Appeal of Amendment  
**Attachments:** 1007 Appeal.PDF

Dear Director and the Board of Environmental Review,

Please find attached an appeal of amendment to MATL's Certificate of Compliance. A hard copy will follow via certified U.S. mail.

If you have any questions, please do not hesitate to call. Thank you in advance for your usual courtesies.

Mari Lindsley

Mari Lindsley  
Office Manager/Paralegal\*  
Lund Law, PLLC  
502 S. 19th Street, Ste. 102  
Bozeman, MT 59718  
406.586.6254 direct  
406.586.6259 facsimile

\*I am able to enjoy a job-share work week and do not have access to e-mails on Fridays. Happy to respond to you upon my return to the office the following Monday. Thank you.

CONFIDENTIALITY NOTICE: This e-mail and all attachments are confidential and are protected by legal privilege. If you are not the intended recipient, any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited and considered privileged communication. If you have received this e-mail in error, please notify us immediately by returning it to the sender and deleting this copy from your system. Please call (406) 586-6254 for assistance. Thank you.

10/8/2010

**LUND LAW, PLLC**  
Attorney At Law

Hertha L. Lund  
502 South 19<sup>th</sup>, Ste. 102  
Bozeman, Montana 59718  
Direct: 406.586.6254  
Fax: 406.586.6259  
Lund@Lund-Law.com

FILED this <sup>11/6</sup> 7<sup>th</sup> day of  
October AD 2010  
at 1:35 o'clock P. M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by *M. J. Opper*

October 7, 2010

Via e-mail to: opper@mt.gov and ber@mt.gov  
**and Certified Mail, RRR**

Richard H. Opper, Director  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901

Re: Appeal of Amendment to MATL's Certificate of Compliance

Dear Director and Board of Environmental Review:

I am filing this appeal of behalf of my clients, Maurer Farms Inc.; Somerfeld & Sons Land & Livestock, LLC; Larry Salois, POA and legal guardian for Shirley J. Salois; Jerry McRae and Katrina Martin, who are aggrieved by the Montana Department of Environmental Quality's ("DEQ") final decision to amend Montana Alberta Tie Ltd. and MATL, LLP's ("MATL") Certificate of Compliance under the Major Facility Siting Act ("MFSA"). In addition to my clients not being provided enough time to participate in the public process, DEQ's amendment violates numerous federal and state laws.

**A. Violations of MFSA.**

MFSA in pertinent part provides:

- (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Major Facility Siting Act. It is the legislature's intent that the

requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

...

(5) The legislature also finds that it is the purpose of this chapter to:

- (a) ensure protection of the state's environmental resources, including but not limited to air, water, animals, plants and soils;
- (b) ensure consideration of socioeconomic impacts;
- (c) provide citizens with the opportunity to participate in facility siting decisions; and
- (d) establish a coordinated and efficient method for the processing of all authorizations required for regulated facilities under this chapter.

Mont. Code. Ann. § 75-20-102.

Pursuant to the MFSA, the DEQ had a duty to provide citizens with the opportunity to participate in facility siting decisions. Mont. Code. Ann. § 75-20-102(5)(c). In the amendment process, DEQ provided the public with three alternatives for public comment. Then, in the final decision the DEQ did not choose any of those alternatives. Therefore, the DEQ's chosen alternative was not presented for public comment and thus violates the MFSA.

Also, the MFSA requires that the DEQ ensure protection of the state's environmental resources. Mont. Code. Ann. § 75-20-102(5)(a). The DEQ's final decision violates this section of the MFSA for a variety of reasons. The decision:

- Is inconsistent with the original analysis in the first MFSA certificate;
- Allows construction within the prior 50-foot buffer zone around wetlands;
- Allows permanent impacts to wetlands;
- Is a material increase in the environmental impact;
- Results in greater damages to landowners' property;
- Is a material alteration to the findings that were the basis of the certificate;
- Negatively affects wetland soils that would take more than five years for revegetation;
- Increases sediment, which would negatively affect aquatic life;
- Negatively affects wetland vegetation communities;

- Negatively impacts endangered species and habitats;
- Negatively affects recreation and aesthetics;
- Negatively affects limited wetlands;
- Negatively impacts private property because there is no longer a 50-foot buffer; MATL changed the specifics by changing pole size and placement;
- Is primarily for the purpose of enabling MATL to make more money rather than for the public good or to benefit the environment; and,
- Fails to comply with the Environmental Protection Agency's comments on the original MFSA determination.

## **B. Violations of MEPA & NEPA.**

In 1971, the Montana Legislature, "mindful of its constitutional obligations under Article II, section 3 and Article IX of the Montana constitution, Mont. Code Ann. Section 75-1-102(1), and "recognizing the profound impact of human activity on the interrelations of all components of the natural environment," passed the Montana Environmental Policy Act ("MEPA") to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;" to "ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;" "attain the widest range of beneficial uses of the environment without degradation, risk to health of safety, or other undesirable and unintended consequences; protect the right to use and enjoy private property free from undue government regulation; preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice; achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." Mont. Code Ann. § 75-1-102(2)(a)-(g).

To the ends set forth in Sections 75-1-102 and 103, it is the legislature's intent that the requirements of MEPA, "provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered." To achieve this objective, MEPA requires that, to the fullest extent possible, "[t]he policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3 of Title 75 of the Montana Code. Mont. Code Ann. § 75-1-201(1)(a). Under Part 2 of MEPA statutes, "all agencies of the state (with limited exceptions) shall ... include in each recommendation or report on proposals for projects, programs and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided if the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of the human environment and the maintenance and enhance of long-term productivity, (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented, and (iv) the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal. Mont.

Code Ann. § 75-1-201(1)(b)(iv)(A)-(G). The statement required by MEPA is known as an Environmental Impact Statement ("EIS").

Prior to making the EIS, as provided by Montana Code Ann. Section 75-1-201(1)(b)(iv), the responsible state official "shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and with any local government, as defined in 7-12-1103, that may be directly impacted by the project." Mont. Code Ann. § 75-1-201(1)(c).

MEPA is a process statute and it requires that the DEQ provide the public with the right to comment. "Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA," the Montana Supreme Court stated in *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 137, 602 P.2d 147, 153. When the agency makes a final decision that does not include one of the alternatives that was provided to the public for public comment it is a violation of MEPA. *Russell County Sportsmen v. U.S. Forest Service*, 2010 WL 889870, United States District Court, D. Montana. In this case, the DEQ's final decision was not one of the alternatives that was reviewed and commented on by the public. Therefore, the final decision violates MEPA.

In addition to not following MFSA and MEPA process, the final decision was arbitrary and capricious for the following list of reasons that is not conclusive:

- It allows construction within the prior 50-foot buffer zone around wetlands;
- It allows permanent impacts to wetlands;
- It is a material increase in the environmental impact;
- It results in greater damages to landowners' property;
- It is a material alteration to the findings that were the basis of the certificate;
- It negatively affects wetland soils that would take more than five years for revegetation;
- It increases sediment, which negatively affects aquatic life;
- It negatively affects wetland vegetation communities;
- It negatively impacts endangered species and habitats;
- It negatively affects recreation and aesthetics;
- It negatively affects limited wetlands;
- It negatively impacts private property because there is no longer a 50-foot buffer;
- It fails to comply with the Environmental Protection Agency's comments on the original MFSA determination;
- It allows alternatives outside of the original NEPA/MEPA analysis;
- It extends the scope of the project outside of the original NEPA/MEPA analysis;
- It is inconsistent with the analysis in the NEPA/MEPA documents;
- It does not discuss costs as required;
- It was not analyzed by the Department of Energy under NEPA;

- It did not get the necessary input from necessary regulatory agencies;
- It would result in an alignment outside of the NEPA/MEPA study corridor because of the changes in allowing construction in wetlands that was previously not allowed;
- It was not analyzed under MEPA;
- There was no analysis of the cumulative impacts on wetlands;
- There would be an increased disturbance to wetlands that would be an increase in the unavoidable adverse impacts;
- It would cause additional irreversible and irretrievable impacts;
- MATL changed the specifics by changing pole size and placement; and,
- The main reason for the amendment is so MATL can make more money and the decision is not in the public good or to benefit the environment.

#### **C. Violations of the Private Property Assessment Act.**

Also, the Private Property Assessment Act ("PPAA") requires state agencies whose actions may have taking or damaging implications to private property to prepare an impact assessment of the proposed agency action. The DEQ failed to prepare an impact on private property statement.

#### **D. Violations of the Natural Streambed & Land Preservation Act.**

It is the policy of the "state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum." MCA §75-7-102(2). The DEQ failed to follow this law.

#### **E. Violations of EPA's Direction on Wetlands.**

During the EIS process, the Environmental Protection Agency ("EPA") provided very specific comments. See 1.1 of EA. More specifically, the EPA stated, "[w]e recommend that . . . a wetland buffer zone be used to avoid even inadvertent construction impacts to wetlands (e.g., 50 foot wetland buffer zone)." *Id.* Now, instead of following EPA's direction and without NEPA and adequate MEPA review, the DEQ has reversed itself and has chosen to allow construction within 50 feet of wetlands.

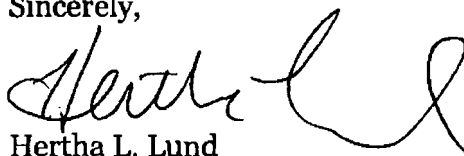
#### **F. Violations of the Antiquities Act and Other Laws Protecting Teepee Rings and Other Archeological Sites.**

In the EA document, the DEQ stated, "[o]n the Salois property the expanded approved location would allow avoidance of several stone circles and MATL would be required to avoid these features with structures and access trails." See 5.0 EA Checklist. This statement was for Alternative 2, which was not chosen. Based on this statement, DEQ is admitting that the chosen alternative will destroy teepee rings in violation of the

state and federal protections against destruction of archeological sites. Also, allowing the destruction of archeological sites is a violation of MEPA.

Based upon the foregoing, I file this appeal and request a hearing pursuant to the Montana Procedures Act.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Hertha L. Lund', written in black ink.

Hertha L. Lund

HLL/ml  
Encl.



Montana Department of

**ENVIRONMENTAL QUALITY**

**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary  
Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: October 13, 2010

SUBJECT: Board of Environmental Review case, Case No. BER 2010-17 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA STRIP  
AND UNDERGROUND MINE RECLAMATION  
ACT BY SIGNAL PEAK ENERGY, LLC AT  
BULL MOUNTAIN MINE #1, ROUNDUP,  
MUSSELSHELL COUNTY, MONTANA.  
[FID #1951, DOCKET NO. SM-10-03]

Case No. BER 2010-17 SM

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #1951, Docket No. SM-10-03).

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

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

John Arrigo, Administrator  
Enforcement Division  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments

PER 2010-17 SM

# Signal Peak Energy, LLC.

100 Portal Drive - Roundup MT 59072  
Tel. 406-323-4500

October 5, 2010

Certified Mail # 7010 1870 0001 2448 6135  
Return Receipt Requested

Board Secretary  
Board of Environmental Review  
1520 East Sixth Avenue  
PO Box 200901  
Helena, MT 59620-0901

FILED this 7th day of  
October AD 2010  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: [Signature]

Re: Notice of Violation and Administrative Penalty Order, Docket No. SM-10-03,  
Notices of Noncompliance No. 10-17-01 and 02 (FID #1951).

To: Board Secretary

Signal Peak Energy, LLC (Signal Peak) is hereby filing a letter of appeal and requesting a hearing regarding Notice of Violation and Administrative Penalty Order, Docket No. SM-10-03 (FID #1951). Signal Peak believes that the penalties associated with the violations are incorrectly calculated in one category or more (Gravity, Extent, Circumstances, Good Faith and Cooperation, Amounts Voluntarily Expended, Days of Violation, and Economic Benefit).

Respectfully,



Dennis L. Garnett  
Environmental Engineer  
Direct Dial: 406-656-6820

cc. John DeMichiei, President, Signal Peak Energy, LLC

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA STRIP  
AND UNDERGROUND MINE  
RECLAMATION ACT BY SIGNAL PEAK  
ENERGY, LLC AT BULL MOUNTAIN  
MINE #1, ROUNDUP, MUSSELSHELL  
COUNTY, MONTANA. (FID #1951)

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE PENALTY ORDER

Docket No. SM-10-03

**I. NOTICE OF VIOLATION**

Pursuant to the authority of Section 82-4-254, Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Signal Peak Energy, LLC (Signal Peak) of the following Findings of Fact and Conclusions of Law with respect to violations of the Montana Strip and Underground Mine Reclamation Act (the Act) codified at Title 82, chapter 4, part 2, MCA; the administrative rules implementing the Act set forth in Title 17, chapter 24, Administrative Rules of Montana (ARM); and/or the provisions of Signal Peak's operating permits.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.

2. The Department administers the Act pursuant to Section 82-4-205, MCA.

3. Signal Peak is a corporation registered with the State of Montana and, therefore, is a "person" within the meaning of Section 82-4-203(39), MCA.

4. Signal Peak operates an underground coal mine, known as the Bull Mountain Mine #1, under Permit No. 93017 (Permit), located near Roundup, Montana. The Permit was issued by the Department under the Act.

5. Signal Peak is an "operator" as defined by Section 82-4-203(35), MCA.

1           6.       As an operator, Signal Peak is subject to the requirements of the Act, the  
2 administrative rules adopted under the Act, and the provisions of the Permit.

3  
4 ***Violation #1 (NON 10-17-01): Failure to compact portions of the coal processing waste  
disposal site to 90% of maximum dry density***

5           7.       Under Section 82-4-231(10)(h), MCA, waste material must be disposed of in  
6 accordance with the rules of the Board of Environmental Review. ARM 17.24.932(8) and the  
7 Permit (pages 920-4 and 920-11) specify that coal processing waste is to be compacted to attain  
8 90% of the maximum dry density to prevent spontaneous combustion and to provide the strength  
9 required for stability of the coal processing waste structure.

10          8.       Pursuant to ARM 17.24.932(5)(a), all coal processing waste disposal areas must  
11 be inspected by a qualified licensed professional engineer in accordance with ARM 17.24.924.  
12 Pursuant to ARM 17.24.924(18)(d) and the Permit (page 920-8), the professional engineer must  
13 provide a certified report within seven working days after each inspection that verifies  
14 construction and maintenance of the waste disposal site as designed and in accordance with the  
15 approved plan and Title 17, chapter 24, subchapter 9 of the Administrative Rules of Montana.

16          9.       On February 24, 2010, a Department inspector observed that portions of the coal  
17 processing waste disposal site were not compacted to 90% of maximum dry density as required  
18 by ARM 17.24.932(8) and the Permit. In addition, Signal Peak did not have the coal waste  
19 disposal structure inspected by a qualified licensed professional engineer as required by ARM  
20 17.24.924.

21          10.      On April 9, 2010, the Department issued Notice of Noncompliance and Order of  
22 Abatement 10-17-01 (NON 10-17-01) alleging the conditions set forth above violated Section  
23 82-4-231(10)(h), MCA, and ARM 17.24.932(8). NON 10-17-01 ordered Signal Peak to abate  
24 the violation by:

1           a.       Identifying the extent of material that is not adequately compacted and  
2 submit a map to the Department showing the locations, elevations, and areas of the waste  
3 disposal site which do not meet the 90% compaction requirement. The areas of the waste  
4 disposal site which do not meet the compaction requirement must be staked so that  
5 inspectors and field personnel can identify what waste material is adequately compacted  
6 and which waste material must be addressed. Signal Peak must document the areas that it  
7 asserts are in compliance with the compaction requirement.

8           b.       Submitting a detailed plan for the removal and re-compaction of waste  
9 material that was not adequately compacted. The plan must specify the equipment to be  
10 used and include a schedule for the removal and re-compaction of distinct areas of the  
11 waste disposal site. The plan must require Signal Peak to completely remove the  
12 improperly compacted waste material and transport the waste material to a location where  
13 it can be spread in two-foot lifts and compacted to 90% of the maximum dry density.  
14 The plan must provide for the removal and re-compaction of all waste material that was  
15 not adequately compacted by September 1, 2010, unless otherwise approved by the  
16 Department prior to the ending date.

17           c.       The plan required under paragraph "b" above must also propose future  
18 inspection, testing, and reporting procedures for the waste disposal site so that a qualified  
19 licensed professional engineer is able to certify that the waste disposal site has been  
20 constructed as designed and in accordance with the approved plan as required by ARM  
21 17.24.932(5)(a).

22       11.       Signal Peak submitted a letter of mitigating circumstances to the Department on  
23 April 22, 2010. Signal Peak indicated that due to a new long wall equipment installation, a new  
24 //

1 coal preparation plant, and winter weather, Signal Peak was not able to make satisfactory  
2 adjustments to the equipment and to adequately dry the coal processing waste material.

3 12. On May 4, 2010, Signal Peak submitted a response, detailed plan, and  
4 accompanying maps to address the concerns raised in the Department's NON and to address the  
5 items of abatement.

6 13. On May 12, 2010, the Department issued a Termination of Abatement Order.

7 14. Signal Peak's failure to achieve 90% compaction of maximum dry density of coal  
8 processing waste material, as described above, constitutes a violation of Section 82-4-231(10)(h),  
9 MCA, and ARM 17.24.932(8). Signal Peak's failure to have the coal processing waste structure  
10 inspected by a qualified licensed professional engineer constitutes a violation of ARM  
11 17.24.924.

12  
13 ***Violation #2 (NON 10-17-02): Failure to submit certification that WDA Sedimentation Pond  
#1 was properly constructed***

14 15. Pursuant to ARM 17.24.639(1), sedimentation ponds must be constructed prior to  
15 any disturbance of an area which will drain into the pond.

16 16. ARM 17.24.639(22) states that sedimentation ponds must be inspected regularly  
17 during construction under the supervision of, and certified after construction by, a qualified  
18 licensed professional engineer experienced in the construction of impoundments. Immediately  
19 after construction, certifications must be made and reports filed with the Department under ARM  
20 17.24.642(4).

21 17. Pursuant to ARM 17.24.413(1)(b), a permittee is required to comply with any  
22 express conditions which the Department places on the permit to ensure compliance with the Act  
23 and the administrative rules promulgated under the Act.

24 //

1 18. Signal Peak started construction of WDA Sedimentation Pond #1 in 2008.

2 During construction of WDA Sedimentation Pond #1, Signal Peak determined that the pond  
3 would be overbuilt if constructed as designed. Signal Peak subsequently submitted Minor  
4 Revision 09-17-08 to reduce the capacity of the pond. In the Department's approval of Minor  
5 Revision 09-17-08 to Permit No. 93017 on November 4, 2009, the Department required Signal  
6 Peak to submit an as-built design for WDA Sedimentation Pond #1 after construction of the pond  
7 had been completed as required by ARM 17.24.639(1)(d) by December 15, 2009.

8 19. On December 18, 2009, a Department inspector observed that construction of  
9 WDA Sedimentation Pond #1 had not been completed. In the inspection report, the inspector  
10 reminded Signal Peak that the WDA Sedimentation Pond #1 was not approved to be left in its  
11 then current condition. As a maintenance item, the Department required Signal Peak to complete  
12 construction of WDA Sedimentation Pond #1 by February 15, 2010.

13 20. On February 24, 2010, the Department's inspector conducted a follow-up  
14 inspection and noted that Signal Peak had not completed construction of WDA Sedimentation  
15 Pond #1. The Department determined that it did not have a certification from a licensed  
16 professional engineer that WDA Sedimentation Pond #1 was properly constructed.

17 21. On April 26, 2010, the Department issued Notice of Noncompliance and Order of  
18 Abatement 10-17-02 (NON 10-17-02) alleging that the conditions set forth above violated ARM  
19 17.24.639 and 642(4). NON 10-17-02 ordered Signal Peak to abate the violation by submitting a  
20 certified as-built survey pursuant to ARM 17.24.639(1)(d).

21 22. On May 3, 2010, Signal Peak submitted a certified as-built survey to the  
22 Department.

23 23. Signal Peak submitted a Letter of Mitigating Circumstances to the Department on  
24 May 12, 2010. In its letter Signal Peak stated that the pond was more than adequate to contain a

1 10-year, 24-hour event, and winter weather prevented the company from completing the  
2 appropriate drawings in the required time frames.

3 24. The Department issued a Termination of Abatement Order on May 14, 2010.

4 25. The conditions described above constitute a violation of ARM 17.24.639 and  
5 642(4).

6 ***Administrative penalties***

7 26. Pursuant to Section 82-4-1001, MCA, and ARM 17.24.301, *et seq.*, the  
8 Department has calculated an administrative penalty of \$3,500 for NON 10-17-01 and \$7,200 for  
9 NON 10-17-02. The Penalty Calculation Worksheet is enclosed with this Order and is hereby  
10 incorporated by reference.

11 27. An administrative penalty in the amount of \$3,500 for NON 10-17-01 is a proper  
12 penalty for Signal Peak's failure to adequately compact portions of the coal processing waste  
13 material to 90% of maximum dry density.

14 28. An administrative penalty in the amount of \$7,200 for NON 10-17-02 is a proper  
15 penalty for Signal Peak's failure to submit certification that WDA Sedimentation Pond #1 was  
16 properly constructed.

17 29. In addition, \$1,650 has been added to the administrative penalties listed above for  
18 history of violation, for a total penalty of \$12,350.

19 **III. ADMINISTRATIVE PENALTY ORDER**

20 This Notice of Violation and Administrative Penalty Order (Order) is issued to Signal  
21 Peak pursuant to the authority vested in the State of Montana, acting by and through the  
22 Department under the Act. Now, therefore, based on the foregoing Findings of Fact and  
23 Conclusions of Law, and under authority of Section 82-4-254, MCA, the Department hereby  
24 ORDERS Signal Peak to do the following:



1 for production of documents, and depositions. Because Signal Peak is not an individual, Signal  
2 Peak must be represented by an attorney in any contested case hearing. *See* ARM 1.3.231(2) and  
3 Section 37-61-201, MCA.

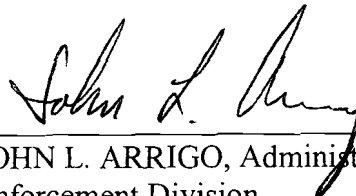
4 34. If Signal Peak does not request a hearing, or if it does not submit testimony at  
5 such hearing, Signal Peak forfeits its right to judicial review of the Department's determination  
6 of the violations or penalty.

7 35. If a hearing is not requested within 30 days after service of this Order, the  
8 opportunity for a contested case appeal is waived.

9 IT IS SO ORDERED:

10 DATED this 22<sup>nd</sup> day of September, 2010.

11 STATE OF MONTANA  
12 DEPARTMENT OF ENVIRONMENTAL QUALITY

13   
14 \_\_\_\_\_  
15 JOHN L. ARRIGO, Administrator  
16 Enforcement Division  
17  
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24

**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Worksheet - FID No. 1951**

Responsible Party Name:	Signal Peak Energy, LLC (Signal Peak) at Bull Mountain Mine #1
FID:	1951
Statute:	Montana Strip and Underground Mine Reclamation Act (Act)
Date:	7/1/2010
Name of Employees Calculating Penalty:	Bill Harbrecht
Maximum Penalty Authority:	\$5,000.00

**Penalty Calculation #1 [NON 10-17-01]**

Description of Violation:
Section 82-4-231(10)(h), MCA, requires that waste material must be disposed of in accordance with the rules of the Board of Environmental Review. ARM 17.24.932(8) and the Permit (pages 920-4 and 920-11) require that during the construction of a coal processing waste structure that coal processing waste must be spread in layers no more than 24 inches in thickness and compacted to attain 90% of the maximum dry density. Signal Peak violated Section 82-4-231(10)(h), MCA, ARM 17.24.932(8) and conditions of its Permit by failing to compact coal processing wastes to 90% of the maximum dry density.

**I. BASE PENALTY**

**Nature**

Explanation:	
The purpose of the 90% compaction requirement is to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste. The ignition of the waste or the structural failure of the waste processing area are events that have the potential to impact health and the environment. The nature of this violation, therefore, is that it has potential to harm the environment and human health.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

**Gravity and Extent**

Gravity Explanation:
Pursuant to ARM 17.4.303(5)(b)(ii), violations that have moderate gravity include "...a failure to construct or operate in accordance with a permit or approval." Signal Peak's failure to compact coal process waste to attain 90% of the maximum dry density constitutes a violation of moderate gravity.
Extent Explanation:
ARM 17.4.202(4) states "[in determining the extent of a violation, the factors that the department may consider include, but are not limited to, the volume, ... of the regulated substance..." The rule continues "a violation has a major extent if it constitutes a major deviation from the regulatory requirement." The Department has determined that the extent of deviation from the requirements for this violation is major because hundreds of thousands of yards of coal processing waste were not properly compacted. The expectation is that Signal Peak will fully comply with the require to properly compact coal processing waste.

**Harm to Human Health or the Environment**

**Gravity**

Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	Gravity and Extent Factor: 0.70

### Impact to Administration

Gravity			
Major	Moderate	Minor	
.50	.40	.30	Gravity Factor:

**BASE PENALTY** (Maximum Penalty Authority x Gravity and Extent Factor):

**\$3,500.00**

## II. ADJUSTED BASE PENALTY

### A. Circumstances (up to 30% added to Base Penalty)

Explanation:	
As a regulated entity, Signal Peak is expected to have knowledge of its permit and the requirements of the Act. Signal Peak had or should have had control of the circumstances that resulted in the violation, could foresee that the actions would result in a violation, and failed to take reasonable precautions to prevent the violation. Considering these factors, Signal Peak's behavior in this violation exhibits a moderate degree of culpability. Giving consideration to Signal Peak's claims in its Letter of Mitigating Circumstances that the violation occurred because of unanticipated conditions that arose during the start up of the new long wall operation and coal processing plant and the conditions that led to the violation were exacerbated by the onset of inclement winter weather, the Department is mitigating the degree of culpability to minor. The Base Penalty is being increased by 5% to reflect a minor degree of culpability.	
	Circumstances Percent: 0.05
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$175.00

### B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

In its Letter of Mitigating Circumstances, Signal Peak contends that it made significant adjustments to its coal preparation plant to rectify the problems that were the cause of the violation, including the retrofitting of its new coal preparation plant. The Department acknowledges that Signal Peak made an effort to comply promptly with the requirements, but was unable to promptly comply because of the condition of the material being placed in the waste processing area. Therefore, the Department is allowing a 5% reduction in the base penalty for good faith and cooperation.	
	Good Faith & Coop. Percent: 0.05
Good Faith & Coop. Adjustment (Base Penalty x G F & Coop. Percent)	\$175.00

### C. Amounts Voluntarily Expended (AVE) (up to 10% subtracted from Base Penalty)

Explanation:	
DEQ is not aware of any amounts voluntarily expended by Signal Peak to mitigate the violation and/or its impacts above and beyond what was required to return to compliance. Therefore, no reduction in the Base Penalty is calculated for Amounts Voluntarily Expended.	
	AVE Percent: 0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

## ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$3,500.00
Circumstances	\$175.00
Good Faith & Cooperation	-\$175.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$3,500.00</b>

### III. DAYS OF VIOLATION

Explanation:

Section 82-4-254(1), MCA, provides that a person or operator who violates any of the provisions of this part, rules adopted or orders issued under this part, or term or condition of a permit ... shall pay an administrative penalty of not less than \$100 or more than \$5,000 for the violation and an additional administrative penalty of not less than \$100 or more than \$5,000 for each day during which a violation continues and may be enjoined from continuing the violations as provided in this section. Although Signal Peak accrued a violation each day that it placed coal processing waste and did not properly compact the waste, the Department is choosing to assess a penalty for only one day of violation.

Number of Days:	1
-----------------	---

**ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$3,500.00**

Other Matters as Justice May Require Explanation:

Not applicable.

<b>OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:</b>	<b>\$0.00</b>
--	---------------

### IV. ECONOMIC BENEFIT

Explanation:

Signal Peak did not realize a significant economic benefit as a result of the violation. In fact, Signal Peak incurred a liability because Signal Peak had to excavate, move and compact the coal processing waste to correct the violation

<b>ECONOMIC BENEFIT REALIZED:</b>	<b>\$0.00</b>
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Responsible Party Name:	Signal Peak Energy, LLC (Signal Peak) at Bull Mountain Mine #1
FID:	1951
Statute:	Montana Strip and Underground Mine Reclamation Act (Act)
Date:	7/1/2010
Maximum Penalty Authority:	\$5,000.00

### Penalty Calculation #2 [NON 10-17-02]

Description of Violation:
Pursuant to ARM 17.24.639(22), sedimentation ponds must be inspected regularly during construction under the supervision of a qualified licensed professional engineer, and after construction, pond certifications must be submitted to the Department. Signal Peak failed to submit certification by a qualified licensed professional engineer that WDA Sedimentation Pond #1 was properly constructed, in violation of ARM 17.24.639 and 642(4).

### I. BASE PENALTY

#### Nature

Explanation:	
Signal Peak's failure to submit pond certification from a qualified licensed professional engineer stating that WDA Sedimentation Pond #1 had been properly constructed, impaired the Department's ability to determine if the pond is adequately sized and constructed properly. Therefore, the violation has the potential to impact Administration.	
Potential to Harm Human Health or the Environment	
Potential to Impact Administration	X

#### Gravity and Extent

Gravity Explanation:
Pursuant to ARM 17.4.303(5)(b)(ii), violations that have moderate gravity include ..." a failure to monitor, report, or make records" and has an adverse impact on the department's administration of the statute or rules. Signal Peak's failure to submit an engineer's certified as-built survey impaired the Department's ability to administer the Act. Therefore, the Gravity of the violation is Moderate.
Extent Explanation:
Not applicable.

#### Harm to Human Health or the Environment

##### Gravity

Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	Gravity and Extent Factor: 0.00

#### Impact to Administration

##### Gravity

Major	Moderate	Minor	
.50	.40	.30	Gravity Factor: 0.40

**BASE PENALTY** (Maximum Penalty Authority x Gravity Factor):

**\$2,000.00**

## II. ADJUSTED BASE PENALTY

### A. Circumstances (up to 30% added to Base Penalty)

Explanation:		
Signal Peak's behavior in this violation exhibited a moderate degree of culpability. As a regulated entity, Signal Peak is expected to have knowledge of the requirements of the Act, its associated rules, and Permit No. 93017, including the requirement that it was required to submit certification that WDA Sedimentation Pond #1 was constructed properly. During the December 18, 2009 inspection, Signal Peak was reminded of the need to complete construction of the pond in an approved manner. Signal Peak had control of the situation and should have been able to foresee that the failure to construct the pond as approved would result in a violation. The Base Penalty is being increased by 20% for Circumstances.		
	Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)		\$400.00

### B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

Explanation:		
Signal Peak did not report the violation and did not take immediate corrective action when requested by the Department. Therefore, no decrease in the Base Penalty is calculated for Good Faith and Cooperation.		
	Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)		\$0.00

### C. Amounts Voluntarily Expended (AVE) ( up to 10% subtracted from Base Penalty)

Explanation:		
The Department is not aware of any amounts voluntarily expended by Signal Peak to mitigate the violation and/or its impacts above and beyond what was required to return to compliance. Therefore, no reduction in the Base Penalty is calculated for Amounts Voluntarily Expended.		
	AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)		\$0.00

## ADUSTED BASE PENALTY SUMMARY

Base Penalty	\$2,000.00
Circumstances	\$400.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$2,400.00</b>

## III. DAYS OF VIOLATION

Explanation:	
When Minor Revision 09-17-08 was approved on November 4, 2009, Signal Peak was required to complete construction of WDA Sedimentation Pond #1 by December 15, 2009. An inspection on December 18, 2009 showed that the pond had not been completed. At that time, an extension until February 15, 2010 was given. On February 24, 2010, the Department conducted a follow-up inspection. That inspection revealed that the pond was still unfinished. The certified as-built survey was not submitted to the Department until May 3, 2010, a delay of 78 days after the February 15, 2010 deadline expired. The Department believes that calculating a penalty for 78 days of violation would result in a penalty that is in excess of what is required to provide an adequate deterrent. Therefore the Department will calculate the penalty using one day for each month or portion of a month that the sedimentation pond was not completed and certification was not provided to the Department. Seventy-eight days is two months and 18 days. The Department will use 3 days to calculated the penalty for this violation.	
	Number of Days:

3

**ADJUSTED BASE PENALTY x NUMBER OF DAYS:**

**\$7,200.00**

Other Matters as Justice May Require Explanation:	
Not applicable.	
<b>OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:</b>	<b>\$0.00</b>

#### IV. ECONOMIC BENEFIT

Explanation:	
DEQ believes that Signal Peak did not realize a significant economic benefit by failing to submit a certified as-built survey in a timely manner. Therefore, the Department will not calculate an amount for economic benefit.	
<b>ECONOMIC BENEFIT REALIZED:</b>	<b>\$0.00</b>

Responsible Party Name:	Signal Peak Energy, LLC (Signal Peak) at Bull Mountain Mine #1
FID:	1951
Statute:	Montana Strip and Underground Mine Reclamation Act (Act)
Date:	7/1/2010

## V. HISTORY

### Explanation:

Signal Peak has incurred a variety of violations documented in orders within the past three years. Use of all of these historical violations in the calculation of Total History Percent would exceed the 30% maximum. Therefore, the following four violations are used to calculate History of Violation: (1) NON 09-17-01 - Failure to receive approval for a minor revision prior to constructing two access roads. Nature = Potential to Impact Administration. (2) NON 09-17-02 - Failure to segregate topsoil and subsoil and not using approved soil stockpile locations. Nature = Potential to Harm Human Health or the Environment. (3) NON 09-17-03 - Failure to maintain complete and accurate blasting records. Nature = Potential to Impact Administration. (4) NON 09-17-04 - Failure to have a certified blaster on site at the time of detonation of explosives. Nature = Potential to Harm Human Health or the Environment.

**Historical Violation: Harm to Human Health or the Environment - 10%**


**Historical Violation: Impact to Administration - 5%**

Historical Violation #1 Percent:	0.05
Historical Violation #2 Percent:	0.10
Historical Violation #3 Percent:	0.05
Historical Violation #4 Percent:	0.10
<b>Total History Percent (cannot exceed 30%):</b>	<b>0.30</b>

Base Penalty Violation #1	\$3,500.00
Base Penalty Violation #2	\$2,000.00
<b>Total Base Penalties:</b>	<b>\$5,500.00</b>

**HISTORY ADJUSTMENT (Base Penalty x History Percent) \$1,650.00**

**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Summary**

Responsible Party Name:	Signal Peak Energy, LLC (Signal Peak) at Bull Mountain Mine #1
FID:	1951
Statute:	Montana Strip and Underground Mine Reclamation Act (Act)
Date:	9/22/2010
Signature of Employee Calculating Penalty:	 <div style="text-align: right;">Bill Harbrecht</div>

### I. Base Penalty (Maximum Penalty Authority x Matrix Factor)

	<b>Penalty #1</b>	<b>Penalty #2</b>
Maximum Penalty Authority:	\$5,000.00	\$5,000.00
Percent Harm - Gravity and Extent:	0.70	0.00
Percent Impact - Gravity:	0.00	0.40
<b>Base Penalty:</b>	<b>\$3,500.00</b>	<b>\$2,000.00</b>

## II. Adjusted Base Penalty

Base Penalty:	\$3,500.00	\$2,000.00
Circumstances:	\$175.00	\$400.00
Good Faith and Cooperation:	-\$175.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$3,500.00</b>	<b>\$2,400.00</b>

<b>Totals</b>
\$5,500.00
\$575.00
-\$175.00
\$0.00
\$5,900.00

### III. Days of Violation or

Number of Occurrences

1

3

<b>Adjusted Base Penalty Total</b>	\$3,500.00	\$7,200.00	<b>\$10,700.00</b>
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***Other Matters as Justice May***

**Require Total**

\$0.00

\$0.00

\$0.00

#### IV. Economic Benefit

\$0.00

\$0.00

	\$0.00
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## V. History

**\$1,650.00**

**TOTAL PENALTY**

\$12,350.00



**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary  
Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: November 3, 2010

SUBJECT: Board of Environmental Review Case No. BER 2010-18 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
THE APPEAL AND REQUEST FOR HEARING  
BY MEAT PRODUCTION INC., A.K.A.  
STAMPEDE PACKING CO., REGARDING THE  
DEQ'S NOTICE OF FINAL DECISION FOR  
MONTANA GROUND WATER POLLUTION  
CONTROL SYSTEM (MGWPCS) PERMIT NO.  
MTX000100.

Case No. BER 2010-18 WQ

The BER has received the attached request for hearing. Also attached is DEQ's administrative document(s) relating to this request.

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

Claudia Massman  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Jenny Chambers, Bureau Chief  
Water Protection Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments

PER 2010-18 WR

**BOARD OF ENVIRONMENTAL REVIEW**

IN RE Notice of Final Decision,  
Montana Ground Water Pollution  
Control System (MGWPCS)

Permit No. MTX000100

FILED this 3rd day of  
November AD 2010  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by [Signature]

**NOTICE OF APPEAL TO BOARD**

Having been notified that an appeal of the final decision to issue the above-referenced permit may be taken in accordance with 75-5-402 and 75-5-611 MCA, and as authorized by ARM 17.30.109, the undersigned applicant and permittee, who is adversely affected, in part, by the action taken, hereby appeals the departmental action to the board.

This written notice of appeal sets forth the position and bases for appeal, and alleges errors of fact or law made in issuing the permit as follows:

1. Pursuant to ARM 17.30.1032(5)(b), additional data and information with respect to the effluent quality may be submitted "with any MGWPC permit application," and while it is reasonable to provide DEQ with a few (maybe four) complete analyses, it is not reasonable on a monthly basis to require the additional supplemental effluent monitoring for characteristics outside those of regulatory limit or concern for the duration of the permit, and thereby impose great expense on a small company.

2. While applicant and permittee understands the concern of DEQ with respect to levels of TKN in the wastewater stream, and steps are to be taken and will be taken in conjunction with and under the oversight of DEQ to coordinate modeling, testing, and final improvement of design leading to appropriate construction, it is not reasonable to request frequent sampling and analysis of effluent for characteristics outside those of regulatory limit or concern, other than for TKN, Nitrite and Nitrate constituents.

3. In addition to what is reasonable and not reasonable for monitoring, the DEQ must take into consideration the financial burden for the sampling laboratory analysis alone, when it is seeking to have a small business solve a problem. The costs will exceed \$4,400 per year or \$22,000 for the duration of the permit, which is money well spent on a solution related to TKN, Nitrite and Nitrate constituents and not other effluent monitoring.

4. This appeal is taken, within the time frame permitted, to request modifications, by way of compromise without hearing, or by way of hearing, to adopt the frequency of supplemental sampling for this permit as follows:

<u>Parameter</u>	<u>Frequency</u>	<u>Reporting</u>
Effluent Flow Rate	Continuous	Monthly
pH	Quarterly - for 1 year	Quarterly
Conductivity	Quarterly - for 1 year	Quarterly

Total Nitrogen	Monthly	Monthly
Nitrite + Nitrate	Monthly	Monthly
TKN	Monthly	Monthly
Total Phosphorous	Quarterly - for 1 year	Quarterly
Ammonia	Quarterly - for 1 year	Quarterly
BOD	Quarterly - for 1 year	Quarterly
Chloride	Quarterly - for 1 year	Quarterly
Total Residual Chlorine	Quarterly - for 1 year	Quarterly
TDS	Quarterly - for 1 year	Quarterly
Oil and Grease	Quarterly - for 1 year	Quarterly
EColi	Quarterly - for 1 year	Quarterly

5. As a matter of fact, the operation of the business should not vary significantly over any one year or over five years. Therefore, the waste stream from the operation should not be expected to vary significantly over a year's span or over the five-year span covered by the permit. Quarterly sampling, as requested and as appealed herein, over a one-year period should provide sufficient information regarding the characteristics of applicant's/permittee's operating waste stream.

6. The applicant/permittee has relied upon the guidance and recommendations of William Boger, P.E., Tri-Core Engineering, and the time periods for testing as set forth in paragraph 4 are his recommendations, and in light of a need to solve a problem by a small business, it is respectfully submitted that the sampling periods of the permit be modified and changed to the sampling periods as set forth in paragraph 4.

Dated this 2nd day of November, 2010.

Meat Production Inc.  
Stampede Packing Co.  
P.O. Box 2096  
Kalispell, MT 59903

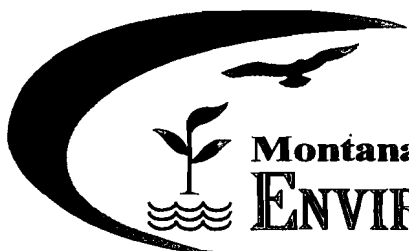
By

TS Laurens  
TS Laurens

#### **CERTIFICATE OF MAILING**

2nd, TS Laurens, on behalf of the applicant/permittee, certify that on the 2nd day of November, 2010, the original of this notice of appeal was mailed, first class, postage prepaid, to the Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901, and that a copy was mailed to Jenny Chambers, Chief, Water Protection Bureau, Permitting and Compliance Division, P.O. Box 200901, Helena, MT 59620-0901, and to Tillman McAdams, U.S. EPA Region 8, MT Office Federal Building, 10 W. 15th St. Suite 3200, Helena, MT 59626.

TS Laurens  
TS Laurens



**Montana Department of  
ENVIRONMENTAL QUALITY**

**Brian Schweitzer, Governor  
Richard H. Opper, Director**

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • [www.deq.mt.gov](http://www.deq.mt.gov)

October 6, 2010

TS Laurens  
Meat Production Inc.  
Stampede Packing Co.  
P.O. Box 2096  
Kalispell, MT 59903

RE: Notice of Final Decision, Montana Ground Water Pollution Control System (MGWPCS)  
Permit No.: MTX000100

Dear Mr. Laurens:

In accordance with the Administrative Rules of Montana (ARM) 17.30.1024, enclosed is a copy of the final wastewater discharge permit for the Stampede Packing discharge system. The Department is issuing this permit pursuant to the Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA). The public comment period closed September 22, 2010. No comments regarding permit number MTX000100 were received.

In accordance with ARM 17.30.1024(9), the Department must notify the permittee after making the final decision to issue the permit. The applicant may appeal this decision within a 30-day period in accordance with 75-5-403 and 75-5-611, MCA.

A copy of the permit should be made available to the person in charge of the wastewater treatment facilities so that person is aware of the requirements in the permit. Please take note of any revised monitoring requirements specified in Part I of the permit. The preprinted Discharge Monitoring Report (DMR) forms will be sent soon.

If you have any questions, please contact the permit writer, Louis Volpe at 406-444-6769.

Sincerely,

Jenny Chambers, Chief  
Water Protection Bureau  
Permitting and Compliance Division  
[jchambers@mt.gov](mailto:jchambers@mt.gov)

CC: Tillman McAdams, U.S. EPA Region 8, MT Office Federal Building, 10 W. 15th St. Suite  
3200, Helena, MT 59626  
William Boger, Tri-Core Engineering, P.O. Box 11195, Kalispell, MT 59904

Enclosure: Permit No.: MTX000100

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY**

Permitting and Compliance Division  
Water Protection Bureau  
P.O. Box 200901, Helena, MT 59620-0901

**Permit Fact Sheet  
Montana Ground Water Pollution Control System (MGWPCS)**

Applicant: Meat Production Inc.

Permit No.: MTX000100

Facility Name: Stampede Packing Company

Facility Location: 2095 Airport Road, Kalispell  
Section 20, Township 28 North, Range 21 East,  
Flathead County

Facility Address: Stampede Packing Co.  
2095 Airport Road  
P.O Box 2096  
Kalispell, MT 59903

Facility Contact: T.S. Laurens  
Stampede Packing Co.  
(406) 755-3380

Receiving Water: Class I Ground Water

Number of Outfalls: 1

Outfall(s)/Type: 001 – Subsurface Drainfield (Industrial Wastewater)

**I. PERMIT STATUS**

This is a renewal permit for the Meat Production Inc. (MPI) meat products processing facility for discharge of industrial wastewater to ground water. MPI is an existing facility that has current MGWPCS permit coverage. The original Montana Ground Water Pollution Control System (MGWPCS) permit was issued on October 17, 1997, and became effective on November 10, 1997. The Montana Department of Environmental Quality (Department) received a MGWPCS permit renewal application from MPI on April 23, 2007. The Department determined the application was incomplete on May 22, 2008. The Department provided MPI another deficiency letter on July 30, 2008. The

Department has not determined the application complete at this time. Due to inactivity on the part of the permittee to submit the requested information the Department will proceed with the permitting process.

## **II. FACILITY INFORMATION**

### **A. FACILITY HISTORY**

On August 23, 2007, Department personnel conducted a compliance inspection. During this site visit Department staff confirmed that MPI is discharging industrial wastewater to ground water. The Department made several recommendations to MPI at the time of the inspection. These include incorporating all wastewater streams to the wastewater treatment system. At the time of the inspection MPI was washing down their loading dock and allowing wash down water to infiltrate at the surface. The Department requested MPI provide the Department all information requested in the May 1, 2007 deficiency letter. Update and or upgrade their wastewater treatment system and discharge system to better treat the type of effluent they are discharging.

The Department issued several violation letters during the last permit cycle. The Department issued a violation letter on December 13, 2005 for exceedance of the total nitrogen (TN) effluent limit of 35mg/L with an effluent concentration of 48.2 mg/L. The Department issued a violation letter on October 20, 2008 for failure to submit Discharge Monitoring Reports (DMR). The Department issued a violation letter on December 19, 2008 for exceedance of the TN with an effluent concentration of 66.8 mg/L. The Department issued a violation letter on February 18, 2009 for exceedance of the TN with an effluent concentration of 70.3 mg/L. The Department issued a violation letter on June 3, 2009 for exceedance of the TN on with effluent concentrations of 87.3 mg/L and 70.3 mg/L for two previous monitoring periods. The Department issued a violation letter on September 24, 2009 for exceedance of the TN with an effluent concentration of 43.9 mg/L. The Department issued a violation letter on February 10, 2010 for failure to submit DMR. The Department issued a violation letter on February 11, 2010 for exceedance of the TN with effluent concentrations of 87.3, 43.9 and 50.0 mg/L for previous monitoring periods.

### **B. DESCRIPTION OF FACILITY**

MPI is an existing meat packing business located south of the city limits of Kalispell in Flathead County in Section 20, T28N, R21E. The renewal permit is for discharge of effluent to a subsurface drain field. The meat packing facility consists of meat cutting, curing, smoking, cooking and packaging in the processing of hams, bacon and sausage.

Wastewater is generated during cleanup of meat cutting, curing, smoking, cooking and packaging operations, laundry operations and one employee lavatory. Permit application materials indicate the contributory flows volumes of wastewater to the treatment system are approximately 570 gallons per day (gpd) of process wastewater generated from thawing and curing, cooking and cooling and sinks, 1,125 gpd wash down water, 105 gpd

of laundry wastewater, and 70 gpd of lavatory wastewater. This would generate a total of approximately 1,870 gpd. Volumes of water used in these processes are measured at the inflow to the MPI facility. Permit application materials indicate the design capacity of the wastewater treatment system to be 1,500 gpd. Measured maximum daily flows were reported as high as 3,190 gpd. This would mean the wastewater treatment system is receiving wastewater in excess of its design capacity.

Wastewater from the system first passes through a screening process consisting of a small concrete chamber with a removable screened basket and secondary screen. These screens remove most of the particles of waste and fat larger than one eighth inch. Wastewater from the screens will pass into two in series tanks and then to a pump (dosing) chamber from which it will be pumped to the drain field.

The first tank is a 1,500 gallon, two compartment system, designed to retain most of the solids. The primary chamber is periodically inspected and solids pumped. The second tank is a 2,000 gallon, two compartment system, designed with an access to accommodate an aerator if necessary. The second tank incorporates some filtration through a Orenco filter (Model 1548). The third tank is a pump chamber and has a 1,500 gallon capacity (which is equal to the anticipated daily flow). Drawdown is set for 12 inches, which is a dose of 485 gallons. The drain field is dosed an average of 3.1 times per day with an average pump run of 6.1 minutes. The chamber is equipped with a high water audio/visual alarm should the pump fail.

The drain field consists of 645 lineal feet of 1.5 inch diameter laterals in three, three foot wide trenches. The area of the drain field is 1935 square feet. A four inch PVC main will run from the pump chamber to the drain field. The drainfield will be identified as Outfall 001.

**Table 1: Outfall 001 Collection, Treatment and Disposal System Summary**

Description/Method of Disposal: Drainfield	
Outfall 001	Latitude: 48 10' 18.7" Longitude: -114 18' 29.3"
Effluent Monitoring Location: Tank 3 (pump chamber)	
Proposed Construction Date: Already constructed.	
Service Connections: None	
Average Flow (gpd): 1730	Daily Maximum Design Flow (gpd): 1500
Flow Monitoring Equipment: None	Flow monitoring location: None
Collection System:	
Primary Treatment: 1,500 gallon capacity , two compartment tank	
Advanced Treatment: None	Disinfection Method: None
Disposal Structure: Drainfield	

### C. DESCRIPTION OF DISCHARGE POINT

Outfall 001 (Table 1) is a drainfield that discharges commingled wastewater from the entire facility. Outfall 001 is located in the west central portion of the MPI complex, along the western boarder of the MPI facility. Outfall 001 consists of 645 linear feet of 1½" diameter laterals in three trenches. Total square footage of the drain field is 1935 square feet.

#### D. EFFLUENT CHARACTERISTICS

MCA 75-5-605(1)(a), and ARM 17.30.1023 allows the Department to require the applicant to disclose the quality of the effluent to be discharged; such that, potential pollutants can be identified and the proposed discharge can be examined by the Department to determine if it will cause pollution of state water. An estimate of effluent quality is provided in Table 2. Effluent quality data were derived from samples collected as a result of routine monitoring and sampling conducted by MPI and submitted to the Department in Discharge Monitoring Reports (DMR) or as supplemental information with the renewal application.

**Table 2: Estimated Effluent Quality – Outfall 001.**

Parameter <sup>(1)</sup>	Location	Units	Maximum Value	Average Value	Sample Size	Source of Data
Flow Rate	Effluent	gpd	NS	NS	0	NA
pH (Maximum) <sup>(2)</sup>	Effluent	s.u.	NS	NS	0	NA
pH (Minimum) <sup>(2)</sup>	Effluent	s.u	NS	NS	0	NA
Specific Conductance	Effluent	µmhos/cm	NS	NS	0	NA
Oil and Grease	Effluent	mg/L	NS	NS	0	NA
<i>Escherichia Coliform</i>	Effluent	Units/100mL	NS	NS	0	NA
Ammonia, Total, as N	Effluent	mg/L	51.3	17.93	21	3,4
Kjeldahl Nitrogen, as N	Effluent	mg/L	64.6	50.43	6	3
Nitrate, as N	Effluent	mg/L	NS	NS	0	NA
Nitrite, as N	Effluent	mg/L	NS	NS	0	NA
Nitrate + Nitrite, as N	Effluent	mg/L	3.56	0.67	6	3
Total Nitrogen, as N	Effluent	mg/L	87.3	46.14	17	4
Total Phosphorus	Effluent	mg/L	NS	NS	0	NA
	Effluent	lbs/day	NS	NS	0	NA
Total Dissolved Solids	Effluent	mg/L	NS	NS	0	NA

### Footnotes:

(1) Conventional and nonconventional pollutants only, table does not include toxics.

(2) Value provided in this column for “pH (Minimum)” row is the estimated minimum instead of maximum value.

**Data Sources:**

(3) Effluent data submitted with application

(4) Discharge Monitoring Reports

(5) NS= No sample taken.

(6) NA= Not applicable.

Discharges from MPI are considered continuous as contributory flows tend to stay relatively consistent. The primary contribution to the waste stream is wastewater generated from wash down of the facility. Wash down occurs in the meat cutting, curing, smoking, cooking and packaging operational areas. MPI commingles laundry waste water and domestic waste water from one employee lavatory. MPI discharges an estimated 1,870 gpd. No effluent flow monitoring equipment is currently utilized MPI, Flow volumes are estimates of fresh supply water prior to use.

During the washdown process MPI uses several cleaning products. MPI submitted material safety data sheets (MSDS) for chlorinated degreaser, caustic cleaner and concentrated descaler used in the cleaning process. MSDS indicate that chlorinated degreaser contains sodium hypochlorite, potassium hydroxide and decomposition products of this product include hypochlorous acid and chlorine. MSDS indicate the caustic cleaner contains sodium hydroxide. MSDS indicate the concentrated descaler contains phosphoric acid.

### III. PROPOSED MIXING ZONE

The Act at 75-5-103(18), MCA, states that a mixing zone is an area established in a permit issued by the Department where water quality standards may be exceeded, subject to conditions that are imposed by the Department and that are consistent with the rules adopted by the board.

A person applying to the Department for a mixing zone must indicate the type of mixing zone requested and supply information of sufficient detail for the Department to make a determination regarding the authorization of the mixing zone (ARM 17.30.515(2)). The applicant requested a standard 500' ground water mixing zone in their permit application.

The Department will authorize a mixing zone for the single parameter TN. The Department will grant MPI a standard mixing zone and calculate a water quality based effluent limit for TN at Outfall 001. Effluent limits will be established to ensure compliance with applicable water quality standards as discussed in Section IV. A.

A mixing zone has been designated in the first ground water encountered at approximately 30 feet beneath the ground surface. The mixing zone is approximately 215 feet wide as measure perpendicular to ground water flow at the source, extends 15 feet into the aquifer and extends 500 feet down gradient from the drain field. The length of the drain field was reported to the Department in application materials submitted during the application process. The Depth of the mixing zone (15 ft) and the length (500 ft) are standard.

ARM 17.30.517(1)(d)(iii)(B) states the mixing zone width ( $MZ_w$ ) at its terminus is the width of the source (SW), plus the distance determined by the tangent of  $5^\circ$  ( $0.0875$ ) times the length of the mixing zone ( $MZ_L$ ) times 2 or  $SW + (MZ_L * 0.0875) * 2 = MZ_w$ .  $MZ_w$  is equal to  $215 + (500 * 0.0875) * 2 = 302.5$  ft. The cross sectional area (A) is the area of the ground water flux boundary at the terminus of the mixing zone [ARM

17.30.517(1)(d)(iii)]. Accordingly, A is equal to the MZ depth multiplied by MZ width ( $MZ_d * MZ_w = A$ ). A equals  $15 * 302.5$  or  $4,537.5 \text{ ft}^2$ . Table 2 summarizes mixing zone information.

Ground water flow direction in the area of the MPI drainfield is to the east. The standard 500-foot ground water mixing zone for Outfall 001 will extend in an N 90° E direction. Ground water flow direction was established via wells installed onsite and within 1,000 feet from the discharge site. This flow direction is congruent with ground water flow direction estimates prepared by WMW engineering and submitted with permit application materials.

<b>Table 3: Mixing Zone Information</b>		
<b>Parameter</b>	<b>Units</b>	<b>Value</b>
Hydraulic Gradient (I)	ft/ft	0.0206
Hydraulic Conductivity (K)	feet/day	3.03
Ground Water Flow Direction	azimuth/bearing	N 90 E
Outfall Width, Perpendicular to Ground Water Flow Direction	feet	215
Width of MZ at Downgradient Boundary	feet	302.5
Thickness of Mixing Zone	feet	15
Length of Mixing Zone	feet	500
Volume of Ground Water Available for Mixing ( $Q_{GW}$ )	$\text{ft}^3/\text{day}$	283 (See Below)

MPI discharges to the shallow ground water found around the MPI site. Monitoring well MW-South is constructed in the shallow ground water cross gradient of the drainfield and shows a static water level of approximately 12.4 feet below ground surface (bgs). This well was finished at approximately 25.8 feet. The well log for MW-South indicates primarily coarse sands and silts. MPI submitted supplemental information from pump tests conducted on this well. The coarse sand makes up the majority of the aquifer and allows for the hydraulic conductivity of 3.03 ft/day.

Based on the dimensions of the standard mixing zone, the volume of ground water (Q) available to mix with the effluent is calculated using Darcy's Equation  $Q=KIA$  (ARM 17.30.517(d)(i)).

Where:

- Q = ground water flow volume ( $\text{ft}^3/\text{day}$ )
- K = hydraulic conductivity (ft/day)
- I = hydraulic gradient (ft/ft)
- A = cross-sectional area ( $\text{ft}^2$ ) of flow at the down-gradient boundary of the 500 ft. mixing zone.

$$Q = (3.03 \text{ ft/day})(0.0206 \text{ ft/ft})(4,537.5 \text{ ft}^2)$$

$$Q = 283 \text{ ft}^3/\text{day}$$

The permittee will be required to comply with all applicable ground water quality standards (ARM 17.30.508 (1)(a)), (ARM 17.30.1006(1)(a)) at the down-gradient edge of the mixing zone. The permittee must comply with the ground water mixing zone rules

pursuant to ARM 17.30 Subchapter 5. Ground water standards may be exceeded within the mixing zone, provided that all existing and future beneficial uses of the state waters are protected (ARM 17.30.1005).

#### IV. RATIONALE FOR PROPOSED DISCHARGE LIMITS AND CONDITIONS

Section IV presents the basis for discharge limitations in accordance with 75-5-402, MCA and the requirements at ARM 17.30.1031. Section IV.A. identifies the water use classification of the receiving water and the lowest applicable water quality standards for individual parameters and describes applicable nondegradation requirements for the proposed discharge. Section IV.B. develops effluent limits for each individual parameter based on the applicable standards pursuant to 75-5-402(1), MCA, ARM 17.30.1005(1) - (3), ARM 17.30.1006(1) and ARM 17.30.1031(3).

**A. WATER USE CLASSIFICATION & APPLICABLE WATER QUALITY STANDARDS**

ARM 17.30.1006 delineates the classifications, beneficial uses and applicable standards for state ground water. ARM 17.30.1006 states that Class I ground waters are those ground waters with a natural specific conductance that is less than or equal to 1,000 microSiemens/cm ( $\mu\text{S}/\text{cm}$ ) at 25 °C.

Sources of ambient ground water quality of the shallow aquifer were attained from MW-South. Table 4 summarizes ambient ground water quality.

Based on this data, the receiving water is classified as Class I ground water (ARM 17.30.1006) and, therefore, high quality waters of the state (75-5-103(10)(a), MCA). Table 4 summarizes water quality data from the upgradient well.

<b>Parameter</b>	<b>Units</b>	<b>Minimum Value</b>	<b>Maximum Value</b>	<b>Average Value</b>	<b>Median Value</b>	<b>No. of Samples</b>	<b>Source of Data</b>
Specific Conductivity @ 25°C	µS/cm	771.0	824.0	802.67	813	3	1
pH	s.u.	7.60	7.81	7.71	7.72	3	1
Nitrite	mg/L	0.01	0.05	0.03	0.03	3	1
Nitrate	mg/L	1.50	3.67	2.38	1.98	3	1
Nitrate + Nitrite, as N	mg/L	1.53	3.68	2.41	2.03	3	1
Total Dissolved Solids	mg/L	433.0	497.0	462.33	457	3	1
Total Kjeldahl Nitrogen	mg/L	0.24	1.01	0.71	0.89	3	1
Total Organic Carbon	mg/L	1.62	6.12	3.12	1.63	3	1
Chloride	mg/L	13.0	46.0	25.0	16	3	1

Sources of Data:  
 1. Ground water quality samples collected from cross gradient MW-South between 12/15/2009 and 6/3/2010.

The quality of Class I ground water must be maintained so that these waters are suitable for the following beneficial uses with little or no treatment (ARM 17.30.1006(1)(a)):

- Public and private water supplies,
- Culinary and food processing purposes,
- Irrigation,
- Drinking water for livestock and wildlife, and
- Commercial and industrial purposes.

Pursuant to ARM 17.30.1006 (1)(b)(i-iii) for Class I ground water, persons may not cause a violation of the following specific water quality standards in Class I ground water, except as provided in ARM 17.30.1005(2) (within a Mixing Zone).

- The human health standards for ground water listed in Circular DEQ-7 (2008);
- For concentrations of parameters for which human health standards are not listed in Circular DEQ-7 (2008), no increase of a parameter to a level that renders the water harmful, detrimental or injurious to the beneficial uses listed for Class I ground water. The Department may use any pertinent credible information to determine these levels;
- General water quality requisite to support designated beneficial uses listed above, and/or
- No increase of a parameter that causes a violation of the nondegradation provisions of 75-5-303.

The Water Quality Act (WQA) establishes that existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected (75-5-303, MCA). 75-5-605 (1) (d) prohibits degradation of state waters without authorization by the Department.

Montana's nondegradation rules (ARM 17.30.701 *et seq.*) implement Montana's nondegradation policy, which applies to any activity of man resulting in a new or increased source which may cause degradation (ARM 17.30.705(1)). In accordance with ARM 17.30.706 (2) the Department is required to determine whether a new or increased source may cause degradation.

MPI is an existing source as it began discharging prior to April 29, 1993. Therefore, the Department does not consider this discharge a new source pursuant to ARM 17.30.702 (18). The nondegradation policy cannot be used to develop effluent limitations for this reason.

The applicable ground water standards pursuant to ARM 17.30.1006 (1) are summarized in Table 5. See Section IV. B of this fact sheet for further explanation of applicable ground water standards.

<b>Table 5: Applicable Ground Water Quality Standards.</b>		
<b>Parameter<sup>(1)</sup></b>	<b>Water Quality Standard<sup>(2)</sup></b>	<b>National Secondary Drinking Water Standards<sup>(3)</sup></b>
Nitrate + Nitrite, as N	10.0	NA
<p>(1) Includes parameters of concern only.</p> <p>(2) Footnote 3 of Circular DEQ-7 states the concentration of no single sample may exceed the listed values; similarly, ARM 17.30.715(1)(d) indicates the applicable significance criterion for nitrate is also a no single sample shall exceed value.</p> <p>(3) Class I ground water must be maintained for the existing and future beneficial use of private and public water supplies, therefore, the National Secondary Drinking Water Standards are applied.</p>		

## B. WATER QUALITY BASED EFFLUENT LIMITS

ARM 17.30.1005 states that the ground water standards (See Section IV.A.) establish the maximum allowable changes in ground water quality, are the basis for limiting discharges to ground water, and may only be exceeded within a mixing zone authorized by the Department (see Section III.). ARM 17.30.1006 (1) (b) (ii) states that there shall be no increase of a parameter to a level that renders the water harmful, detrimental or injurious to the beneficial uses listed for Class I water and that the Department may use any pertinent credible information to determine the levels that render the waters harmful, detrimental or injurious to the beneficial uses. This section develops applicable effluent limits for each parameter of concern.

The most sensitive beneficial use for Class I waters is the use as a public and private drinking water supply. The Numeric Human Health Standard for ground water for the parameter nitrate plus nitrite, as N is listed in DEQ-7 (2008). DEQ-7 indicates a standard for nitrate plus nitrite, as N as 10 mg/L. The allowable discharge concentration for TN is derived from the mass balance water quality equation, which considers the allowable discharge concentration (10 mg/L), dilution and background concentration of the receiving water (USEPA, 2000).

$$C_2 = \frac{C_3(Q_1 + Q_2) - C_1 Q_1}{Q_2}$$

- $C_1$  = ambient ground water (background) concentration, mg/L  
 $C_2$  = allowable discharge concentration, mg/L  
 $C_3$  = ground water concentration limit for nitrate + nitrite, as N (from DEQ-7) at the end of the mixing zone.  
 $Q_1$  = ground water volume, ft<sup>3</sup>/day (determined in Section III)  
 $Q_2$  = maximum flow of discharge (ft<sup>3</sup>/day)

The design capacity reported by MPI for the wastewater treatment system and drainfields was 1,500 gpd (200.5 ft<sup>3</sup>/day), hydraulic conductivity (K) was estimated at 3.03 feet per day (ft/d), and the hydraulic gradient (I) was estimated at 0.0206 ft/ft. The cross sectional area (A) is 4,537.5 ft<sup>2</sup> and is calculated by the width of the source

perpendicular to the ground water flow direction, times a standard mixing zone depth in the ground water of 15 feet (See Section III of this fact sheet for further discussion).

Based on the treatment system and drainfield described in Section B, the Department assumes that the organic nitrogen load in the effluent will be converted to nitrate plus nitrite prior to mixing the receiving water; therefore, the effluent limit will be expressed as a total nitrogen (TN). The average background water quality data from the upgradient irrigation well indicated nitrate plus nitrite concentrations ranging from 1.53 mg/L to 3.68 mg/L for ambient ground water quality. An average concentration of nitrate plus nitrite of 2.41 mg/L is used in calculating the allowable total nitrogen (TN) concentration at the end of the standard mixing zone. The projected daily maximum concentration of TN in the effluent discharged to ground water must not exceed 20.7 mg/L at Outfall 001.

$$C_2 = \frac{10 \text{ mg/L} (200.5 \text{ ft}^3/\text{day}) + (4,537.5 \text{ ft}^3/\text{day}) - (2.41 \text{ mg/L}) (200.5 \text{ ft}^3/\text{day})}{(4,537.5 \text{ ft}^3/\text{day})}$$

$$C_2 = 20.7 \text{ mg/L}$$

For those parameters not listed in DEQ-7 or as NSDWS's, the Department will require that MPI not discharge wastewater with concentrations of these or other parameters that will limit beneficial uses. The applicable water quality standard for nitrate of 10 mg/L must not be exceeded at the end of the mixing zone.

The proposed effluent limits for Outfall 001 are summarized in Table 6.

<b>Table 6: Proposed Effluent Limits – Outfall 001.</b>			
<b>Parameter</b>	<b>Units</b>	<b>Daily Maximum<sup>(1)</sup></b>	<b>Rationale</b>
Total Nitrogen, as N	mg/L	20.7	Water Quality Standard
Footnotes:			
1. See definitions, Part I.A of the permit			

## C. FINAL EFFLUENT LIMITS

Based on the information and analysis presented in Sections IV and V and pursuant to 75-5-402(3) and ARM 17.30.1031(2) and 1005 (2), the Department proposes the following numerical effluent limits. The proposed final limits are a combination of the most stringent applicable limits for each individual parameter as developed in previous sections. Because the Human Health standards listed in DEQ-7 are expressed as "no single sample shall exceed" effluent limits are expressed as a daily maximum concentration. Table 7 and 8 summarize the proposed effluent limits.

The numeric effluent limit of 35 mg/L TN established in the previous permit was calculated using a value of 7.5 mg/L nitrate at the end of the mixing zone. A value of 10.0 mg/L nitrate should have been used. The value of 7.5 mg/L is only applicable to those facilities that need to comply with the Nondegradation rules of Arm 17.30.701-718. The Department has determined that this facility has been discharging prior to April 29, 1993. As defined in ARM 17.30.702 (18) this discharge can not be considered a new source. The permittee did not submit accurate effluent flow data for the Department to make a determination as to if the facility is an increased source.

A value of 10.0 mg/L nitrate was used in calculation of the new effluent limit. Application materials supplied the Department site specific hydrogeology data for use in effluent limit calculations. The combination of more accurate site specific hydrogeologic data and 10.0 mg/L nitrate yields a numeric effluent limit of 20.7 mg/L TN.

Interim limitations will be implemented to allow MPI to address potential facility upgrades and or operation and maintenance changes that will need to be performed to meet final effluent limits. A compliance schedule will be established aid in bringing the facility into compliance with final effluent limits (See Section VII). The current permit has an effluent limit established for TN of 35 mg/L. The interim limit will be not to exceed the existing permit limit of 35 mg/L TN. The interim limit outlined in table 7 will be in affect from the effective date of the permit until November 1, 2013.

<b>Table 7: Proposed Interim Effluent Limits – Outfall 001.</b>					
Parameter Name	Units	Effluent Limitation <sup>(1)</sup>		Minimum Sample Frequency	Sample Type
		Monthly Average	Daily Maximum <sup>(2)</sup>		
Total Nitrogen	mg/L	Report	35.0	Monthly	Grab
Notes:					
1. See definition in Part I.A of permit.					
2. Report highest measured daily value for monthly reporting period on Discharge Monitoring Report (DMR) form.					

The following final effluent limitation will become effective 1,095 days (November 1, 2013) from the effective date of the permit. These effluent limitations are based on the discussion in Section IV. B of this document.

<b>Table 8: Proposed Final Effluent Limits – Outfall 001.</b>					
Parameter Name/ Code	Units	Effluent Limitation <sup>(1)</sup>		Minimum Sample Frequency	Sample Type
		Monthly Average	Daily Maximum <sup>(2)</sup>		
Total Nitrogen	mg/L	Report	20.7	Monthly	Grab
Notes:					
1. See definition in Part I.A of permit.					
2. Report highest measured daily value for monthly reporting period on Discharge Monitoring Report (DMR) form.					

## **V. RATIONALE FOR MONITORING AND REPORTING REQUIREMENTS**

Pursuant to ARM 17.30.1031(5), effluent and ground water quality monitoring will be required. This section provides the basis for, and specifies monitoring and reporting requirements.

Pursuant to 17.30.1023(5)(b), the Department can require the submission of additional data and information with any MGWPC permit application where warranted by potential impacts of a source including waste flow diagrams showing water and material balances, chemical additions, waste volumes and concentrations before and after treatment including but not limited to oil and other floating material, biochemical oxygen demand, settleable and suspended solids, acids, alkalis, dissolved salts, organic materials, toxic materials, compounds producing taste and odor in water, and colored materials and dyes. As the permittee has submitted limited information and data with regards to characterization of the effluent quality, the Department is requiring additional effluent quality data be provided as a permit condition as supplemental monitoring.

### **A. EFFLUENT MONITORING**

The permittee is required to monitor and report the quality and quantity of the effluent. (see Part II of the Permit). Effluent quality sampling shall be conducted at the end of the pipe, immediately prior to discharge to the drainfield.

#### **1.) Compliance Monitoring**

Effluent monitoring is required to ensure compliance with permit limits developed to protect water quality. Final numeric effluent limits have been developed in this document with specific magnitudes and durations based on site specific conditions, in order to protect state water from degradation and ensure that the discharge does not cause or contribute to an exceedence of an applicable water quality standard (see Sections IV and V). ARM 17.30.1031(5) requires that all issued MGWPCS permits must contain monitoring requirements which will assure compliance with the ground water quality standards. Accordingly, the permittee is required to monitor and report the effluent quality for the parameters at the specified frequency in Table 9.

#### **2.) Supplemental Effluent Monitoring**

In addition to those parameters with effluent limits, supplemental effluent monitoring is also required to aid in characterization of the effluent stream, ensure proper operation, maintenance and aid in evaluation of exceedences of permit limits or conditions. Flow monitoring will be required to determine an accurate effluent flow volume. Daily flow shall be measured when required sampling is conducted. The permittee will be required to report the maximum daily flow. Effluent flow monitoring shall be conducted by using methods and equipment capable of producing a measurement that can be reported as summarized by Table 9.

**Table 9: Effluent Monitoring and Reporting Requirements – Outfall 001**

Parameter Name	Units	Monitoring Location	Sample Type <sup>(1)</sup>	Minimum Sample Frequency	Rationale
Effluent Flow Rate	gpd	001	NA	Continuous <sup>(1,3)</sup>	Effluent Characterization
pH	s.u	001	Grab	1/month	Effluent Characterization
Conductivity	µS/cm	001	Grab	1/month	Effluent Characterization
Total Nitrogen, as N	mg/L	001	Grab	1/month	Permit Compliance
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Nitrite+Nitrate, as N	mg/L	001	Grab	1/month	Permit Compliance
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Total Kjeldahl Nitrogen	mg/L	001	Grab	1/month	Effluent Characterization
Total Phosphorus, as P	mg/L	001	Grab	1/month	Effluent Characterization
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Ammonia, as N	mg/L	001	Grab	1/month	Effluent Characterization
Biological Oxygen Demand	mg/L	001	Grab	1/month	Effluent Characterization
Chloride	mg/L	001	Grab	1/month	Effluent Characterization
Total Residual Chlorine	mg/L	001	Grab	1/month	Effluent Characterization
Total Dissolved Solids (TDS)	mg/L	001	Grab	1/month	Effluent Characterization
Oil and Grease	mg/L	001	Grab	1/month	Effluent Characterization
Escherichia coli	cfu/100 mL	001	Grab	1/month	Effluent Characterization
footnotes: (1) See definitions in Part I.A. of the permit. (2) Load calculation: lb/day = (mg/L) x flow (gpd) x 8.34 x 10 <sup>-6</sup> (3) Requires recording device or totalizing meter; must be capable of recording daily effluent volume.					

## B. Ground Water Quality Monitoring

Pursuant to ARM 17.30.1031, MGWPCS permits may contain special conditions which will assure compliance with the ground water quality standards. These conditions may include monitoring well configuration; pollutants to be monitored; frequency of monitoring, recording and reporting; analytical and sampling methods; and recording and reporting procedures.

In addition, the permittee is required to conduct ground water quality monitoring on the down gradient edge of the mixing zone for the following site specific reasons:

- Presence of shallow ground water beneath Outfall 001.
- Chronic effluent limit violations from (see section II. A)
- The Departments need to determine any potential effects of discharges from MPI on the receiving water quality.

ARM 17.30.1031(e) and (d) authorize the Department to require self monitoring to include analytical and sampling methods recording and reporting procedures to be used

by the permittee. Ground water quality shall be monitored at the locations, frequency and for the parameters in Table 10 using sampling and analysis methods in accordance with ARM 17.30.1007.

<b>Table 10: Ground Water Monitoring Requirements</b>				
<b>Parameter (units)</b>	<b>Sample Type<sup>(1)</sup></b>	<b>Sample Location</b>	<b>Minimum Sampling Frequency</b>	<b>Reporting Requirements<sup>(2)</sup></b>
Static Water Level (SWL) (feet below the top casing)	Grab	MW-East	Quarterly	Quarterly
pH, su	Grab	MW-East	Quarterly	Quarterly
Specific Conductance, $\mu$ mhos/cm	Grab	MW-East	Quarterly	Quarterly
Chloride, mg/L	Grab	MW-East	Quarterly	Quarterly
Total Phosphorous, mg/L	Grab	MW-East	Quarterly	Quarterly
Total Nitrogen, as N mg/L	Grab	MW-East	Quarterly	Quarterly
Nitrate plus Nitrite, as N	Grab	MW-East	Quarterly	Quarterly
Ammonia, as N	Grab	MW-East	Quarterly	Quarterly
Escherichia coli, cfu/100 mL	Grab	MW-East	Quarterly	Quarterly
Oil and Grease, mg/L	Grab	MW-East	Quarterly	Quarterly
1. See definitions in Part I.A. of the permit. 2. Report highest measured daily value for quarterly reporting period on Discharge Monitoring Reports (DMR)				

### C. Effluent Flow Monitoring

Pursuant to ARM 17.30.1031(5), the Department can require conditions which will assure compliance with the ground water quality standards. The permittee will be required to monitor effluent flow. The Department requires that samples or measurements be representative of the volume and nature of the monitored discharge. Daily flow shall be measured when required sampling is conducted (flow measurement must correspond to sample collection). The permittee shall monitor the flow of the effluent continuously and report the maximum daily and average monthly flow on a quarterly basis.

Effluent flow shall be monitored at the last point of control prior to discharge in the drainfield. The measurement method shall be either by recorder or a totalizing flow meter. Dose counts or pump run-times will not be accepted.

## VI. SPECIAL CONDITIONS

In accordance with ARM 17.30.103, this section contains the basis for and specifies special permit conditions that are necessary in addition to the numeric permit limits to assure compliance with the ground water quality standards and the Act.

Pursuant to 17.30.1023(5), the Department can require the submission of additional data and information with any MGWPC permit application where warranted by potential

impacts of a source including but not limited to geologic conditions, ground water characteristics, and local hydrogeology. Section V. B. indicates the departments reasoning for requiring down gradient ground water quality monitoring. The following section describes those actions that PMI will be required to implement.

#### 1. Ground Water Monitoring Well Installation

- a. The permittee will submit a plan for approval outlining the location, design and development of a monitoring well down gradient of the standard 500 foot mixing zone. This monitoring well shall be located on land owned, or controlled by the permittee. If the monitoring well is to be installed on land not owned by the permittee, the permittee shall demonstrate access to the proposed monitoring well locations for the expected life of the facility.
- b. The permittee will provide conceptual drawings of the proposed well, and a description of the well development process.
- c. The permittee shall be responsible for sampling monitoring wells on a quarterly basis and reporting those results to the Department on a quarterly basis. Reports shall include water quality analytical results, potentiometric maps and ground water flow directions for each sampling event and ground water depths.
- d. The permittee will submit to the Department well logs for all wells used in the above mentioned analysis.

#### 3. Ground Water Monitoring Well Location

- a. One well will be installed on the down gradient edge of the standard mixing zone issued for the drainfield (Outfall 001). This well will be finished in the first 15-20 feet of the shallow aquifer. This well shall be located on the centerline of the terminus of the standard mixing zone. This well shall be deemed MW-East.

#### 4. Monitoring Well Sampling.

- a. The permittee shall monitor MW-East for those parameters and at the frequency listed in Table 10. Monitoring of monitoring well MW-East shall begin within 180 days of the effective date of the permit (April 28, 2011). Monitoring of newly installed wells should be commensurate with the compliance schedule in Section VII of this document.
- b. The permittee shall sample all monitoring wells at the frequency and for the parameters listed in Table 10. Sampling shall include, but not be limited to, those parameters listed in Table 10.
- c. The permittee shall analyze all ground water quality samples in accordance with EPA accepted 40 CFR 136 methods. If no EPA approved methodology exists for a parameter, the permittee shall analyze those samples via a Department approved method pursuant to

ARM 17.30.1007.

- d. The permittee shall sample the wells in accordance with the Departments Historical Non-Point Source Water Quality Standard Operating Procedures subpart 11.10 Ground Water Data Collection.
- e. The permittee shall document the methodology and equipment used to sample monitoring wells during all sampling events. Ground water monitoring well self monitoring records shall be maintained onsite in accordance with ARM 17.30.1031(5)(g).

If any monitoring well(s) are abandoned, destroyed or decommissioned during any activities at the facility or are no longer able to be sampled due to fluctuations in the ground water table, MPI shall install a new well to replace the abandoned, destroyed, decommissioned or the non-viable well(s). MPI may use existing monitoring wells provided that ground water quality data collected from them are representative of the aquifer conditions and ground water quality.

## **VII. COMPLIANCE SCHEDULE**

In accordance with 75-5-401(2), MCA and ARM 17.30.1031(2), this section contains the rationale for, and specifies the necessary permit compliance schedule.

Within 30 days of the effective date of the permit (December 1, 2010) the permittee shall begin monitoring the effluent and reporting the effluent quality for the parameters at the specified frequency in Table 9.

Within 60 days of the effective date of the permit (January 1, 2011), the permittee shall submit to the Department for approval a plan for ground water monitoring well installation as well as a brief summary of a monitoring, sampling and analysis plan for monitoring wells installed onsite. The plan shall include the location, conceptual design and construction methods of the planned ground water monitoring well, and the monitoring, sampling and analysis methods that will be used to meet the monitoring required in the permit. The plan should include, but not be limited to, the requirements of Section VI. of this fact sheet.

The permittee shall install the approved monitoring wells within 180 days of the effective date of the permit (April 28, 2011). After completion of monitoring well construction, the permittee shall submit to the Department a brief report or letter documenting the results of the monitoring well installation including the final location of the installed monitoring wells, construction details and or well logs for wells installed, aquifer properties of the wells, and a report on ground water quality from the wells. Ground water quality analysis shall include those parameters listed in Table 10. All ground water monitoring wells must be constructed by a licensed monitoring well constructor pursuant to monitoring well construction standards so as to obtain representative static water level data and ground water quality samples. Ground water quality monitoring of newly installed wells shall begin no later than (April 28, 2011) and continue at a quarterly frequency through the duration of the permit.

Within 210 days of the effective date of the permit (May 28, 2011), the permittee shall submit to the Department a report documenting the installation of monitoring wells.

Within 365 days from the effective date of the permit (November 1, 2011), the permittee shall install effluent flow monitoring equipment. The measurement method shall be either by recorder or a totalizing flow meter. Dose counts or pump run-times will not be accepted. See Section IV. C for further information on flow monitoring requirements.

Within 1,095 days from the effective date of the permit (November 1, 2013), the permittee shall be required to comply with the final effluent limits listed in table 8 of this document.

Completion of all actions or deliverables must be reported to the Department in accordance with Part II. E and Part IV. G of the permit. Table 11 summarizes these actions.

<b>Table 11: Compliance Schedule</b>		
<b>Authority</b>	<b>Action</b>	<b>Scheduled Completion Date</b>
ARM 17.30.1031	Comply with interim effluent limits	Upon effective date of permit
ARM 17.30.1031	Begin monitoring of effluent	December 1, 2010
ARM 17.30.1031	Submit plan to install monitoring wells	January 1, 2011
ARM 17.30.1031	Install monitoring wells	April 28, 2011
ARM 17.30.1031	Begin ground water quality monitoring	April 28, 2011
ARM 17.30.1031	Submit report documenting installation of monitoring wells and preliminary ground water quality monitoring	May 28, 2011
ARM 17.30.1031	Install and begin monitoring continuous effluent flow recording equipment	November 1, 2011
ARM 17.30.1031	Comply with the final effluent limits	November 1, 2013
Footnotes:		

## VIII. NONSIGNIFICANT DETERMINATION

The Department has determined that the discharge is not a new or increased source that discharges pollutants to high quality waters of the state (see Section IV. A.). Accordingly, the discharge is not subject to Montana Nondegradation Policy (75-5-303, MCA; ARM 17.30.705). The permit includes monitoring, reporting and corrective action requirements to establish, confirm and maintain compliance with the permit limits.

## IX. REFERENCES SITED

ARM (Administrative Rules of Montana), September 1999 Title 17, Chapter 30, Subchapter 5 – *Mixing Zones in Surface and Ground Water*.

ARM (Administrative Rules of Montana), March 2000, Title 17, Chapter 30, Sub-chapter 7 – *Nondegradation of Water Quality*.

ARM (Administrative Rules of Montana), March 2002, Title 17, Chapter 30, Sub-chapter 10 – *Montana Ground Water Pollution Control System (MGWPCS)*.

Circular DEQ-7, *Montana Numeric Water Quality Standards*, February 2008.

MCA (Montana Code Annotated), Title 75, Chapter 5, *Montana Water Quality Act*, 2003.

Prepared by **Lou Volpe, August, 2010**

## MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

### AUTHORIZATION TO DISCHARGE UNDER THE MONTANA GROUND WATER POLLUTION CONTROL SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Administrative Rules of Montana (ARM) 17.30. Subchapter 5, Subchapter 7, and Subchapter 10 *et seq.*,

**Meat Production Inc.**

**COPY**

is authorized to discharge from its Stampede Packing meat processing facility,

located Section 20, Township 28 North, Range 21 East, Flathead County,

to receiving waters, **Class I ground water**,

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit. The numeric effluent limits, water quality standards, and special conditions specified herein support the protection of the affected receiving water.

This permit shall become effective: **November 1, 2010**

This permit and the authorization to discharge shall expire at midnight, **October 31, 2015**

FOR THE MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY



Jenny Chambers, Chief  
Water Protection Bureau  
Permitting & Compliance Division

Issuance Date: October 6, 2010

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I. EFFLUENT LIMITATIONS, MONITORING REQUIREMENTS & OTHER CONDITIONS

A. Description of Discharge Points and Mixing Zone

The authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MGWPCS permit is a violation of the Montana Water Quality Act and could subject the person(s) responsible for such discharge to penalties under the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under Section 75-5-632 of the Montana Water Quality Act.

Outfall                      Description

001                      **Location:** From the East tailings impoundment, located at N 48° 10' 18.7" latitude, W -114° 18' 29.3" longitude.

**Mixing Zone:** The Department has granted a standard 500 foot ground water mixing zone.

**Treatment:** Primary treatment and filtration.

B. Effluent Limitations

1. Proposed Interim Effluent Limits

The interim limit will be not to exceed the existing permit limit of 35 mg/L TN. The interim limit outlined in table 1 will be in affect from the effective date of the permit until November 1, 2013.

Table 1: Proposed Interim Effluent Limits – Outfall 001.					
Parameter Name	Units	Effluent Limitation <sup>(1)</sup>		Minimum Sample Frequency	Sample Type
		Monthly Average	Daily Maximum <sup>(2)</sup>		
Total Nitrogen	mg/L	Report	35.0	Monthly	Grab
Notes:					
1. See definition in Part V. of permit.					
2. Report highest measured daily value for monthly reporting period on Discharge Monitoring Report (DMR) form.					

## 2. Final Effluent limits

The final effluent limit will be not to exceed 20.7 mg/L TN. The final effluent limit outlined in table 2 will be in affect from November 2, 2013 until the permit expires.

<b>Table 2: Proposed Final Effluent Limits – Outfall 001.</b>					
<b>Parameter Name/ Code</b>	<b>Units</b>	<b>Effluent Limitation<sup>(1)</sup></b>		<b>Minimum Sample Frequency</b>	<b>Sample Type</b>
		<b>Monthly Average</b>	<b>Daily Maximum<sup>(2)</sup></b>		
Total Nitrogen	mg/L	Report	20.7	Monthly	Grab
Notes:					
1. See definition in Part V. of permit.					
2. Report highest measured daily value for monthly reporting period on Discharge Monitoring Report (DMR) form.					

## C. Self-Monitoring Requirements

Samples representative of effluent quality will be collected from the last point of control:

Pump Chamber– Immediately prior to discharge in the drainfield;

No latter than November 1, 2010, the constituents in Table 3 shall be monitored at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge. The Department will not expect effluent flow volumes to be reported until effluent flow monitoring equipment is installed. The permittee will be required to install effluent flow monitoring equipment prior to November 1, 2011.

Monthly Discharge Monitoring Report Forms (EPA No. 3320-1) (DMRs) will be required every month, regardless of the operational status of the facility. If no discharge occurs during the entire monitoring period, it shall be stated on the DMR's that no discharge or overflow occurred.

Analytical methods must be 40 CFR 136 approved methods unless otherwise approved by the Department. Analysis must meet the Required Reporting Values listed in DEQ-7 (February 2008). PQL (Practical Quantification Limits) are not acceptable substitutions for RRV. The permittee will be required to report analytical data at the RRV listed in Table 3.

<b>Table 3: Effluent Monitoring and Reporting Requirements – Outfall 001</b>					
<b>Parameter Name</b>	<b>Units</b>	<b>Monitoring Location</b>	<b>Sample Type<sup>(1)</sup></b>	<b>Minimum Sample Frequency</b>	<b>Rationale</b>
Effluent Flow Rate <sup>(4)</sup>	gpd	001	NA	Continuous <sup>(1,3)</sup>	Effluent Characterization
pH	s.u	001	Grab	1/month	Effluent Characterization
Conductivity	μS/cm	001	Grab	1/month	Effluent Characterization
Total Nitrogen, as N	mg/L	001	Grab	1/month	Permit Compliance
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Nitrite+Nitrate, as N	mg/L	001	Grab	1/month	Permit Compliance
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Total Kjeldahl Nitrogen	mg/L	001	Grab	1/month	Effluent Characterization
Total Phosphorus, as P	mg/L	001	Grab	1/month	Effluent Characterization
	lb/day <sup>(2)</sup>	001	Calculate	1/month	
Ammonia, as N	mg/L	001	Grab	1/month	Effluent Characterization
Biological Oxygen Demand	mg/L	001	Grab	1/month	Effluent Characterization
Chloride	mg/L	001	Grab	1/month	Effluent Characterization
Total Residual Chlorine	mg/L	001	Grab	1/month	Effluent Characterization
Total Dissolved Solids (TDS)	mg/L	001	Grab	1/month	Effluent Characterization
Oil and Grease	mg/L	001	Grab	1/month	Effluent Characterization
Escherichia coli	cfu/100 mL	001	Grab	1/month	Effluent Characterization
footnotes: (1) See definitions in Part V. of the permit. (2) Load calculation: $\text{lb/day} = (\text{mg/L}) \times \text{flow (gpd)} \times 8.34 \times 10^{-6}$ (3) Requires recording device or totalizing meter; must be capable of recording daily effluent volume. (4) Effluent flow monitoring will not be required until flow meter is installed (November 1, 2011)					

D. Ground Water Monitoring

No later than April 28, 2011 and continuing through the term of the permit, the permittee shall monitor the ground water in the down-gradient monitoring well MW-East (to be installed as required under Part I. E. of this permit) for the parameters and at the frequency specified in Table 3.

<b>Table 3: Ground Water Monitoring Requirements</b>				
<b>Parameter (units)</b>	<b>Sample Type<sup>(1)</sup></b>	<b>Sample Location</b>	<b>Minimum Sampling Frequency</b>	<b>Reporting Requirements<sup>(2)</sup></b>
Static Water Level (SWL) (feet below the top casing)	Grab	MW-East	Quarterly	Quarterly
pH, su	Grab	MW-East	Quarterly	Quarterly
Specific Conductance, $\mu$ mhos/cm	Grab	MW-East	Quarterly	Quarterly
Chloride, mg/L	Grab	MW-East	Quarterly	Quarterly
Total Phosphorous, mg/L	Grab	MW-East	Quarterly	Quarterly
Total Nitrogen, as N mg/L	Grab	MW-East	Quarterly	Quarterly
Nitrate plus Nitrite, as N	Grab	MW-East	Quarterly	Quarterly
Ammonia, as N	Grab	MW-East	Quarterly	Quarterly
Escherichia coli, cfu/100 mL	Grab	MW-East	Quarterly	Quarterly
Oil and Grease, mg/L	Grab	MW-East	Quarterly	Quarterly
1. See definitions in Part V. of the permit. 2. Report highest measured daily value for quarterly reporting period on Discharge Monitoring Reports (DMR)				

E. Special Conditions

1. Monitoring Well Installation:

- a. No later than January 1, 2011 the permittee shall submit to the Department for approval a plan for ground water monitoring well installation. The plan shall include but not be limited to the location, conceptual design and construction methods of the planned ground water monitoring well(s), and the monitoring, sampling and analysis methods that will be used to meet the monitoring required in the Permit. The permittee is required to develop and implement a site specific Standard Operating Procedure (SOP) manual and a Sampling and Analysis Plan (SAP) for monitoring and sampling the ground water monitoring wells. A copy of the SOP manual and SAP must be maintained on-site.

- b. No later than April 28, 2011, the applicant is required to install one monitoring well down gradient of the drainfield in the centerline of the terminus on the standard ground water mixing zone. This well shall be identified as MW-East.

MW-East must be completed, in the top 15 feet of the first ground water-bearing zone. This well shall be screened from the top of the high water table to 15 feet below the low water table.

- c. Ground water quality monitoring shall begin no later than April 28, 2011 and continue at the frequency and for those parameters listed in Table 3 for the duration of the permit.
- d. No later than May 28, 2011 the permittee shall submit to the Department a brief report or letter documenting the results of the monitoring well installation including the final location of the installed monitoring wells, construction details and/or well logs for wells installed, and a report on ground water quality from all wells installed.
- e. Any monitoring wells installed shall be required to:
- Be located on permittee property and always accessible to assure continued accessibility for monitoring purposes;
  - If the monitoring well is to be installed on land not owned by the permittee, the permittee shall demonstrate access to the proposed monitoring well locations for the expected life of the facility.
  - All ground water monitoring wells must be constructed by a licensed monitoring well constructor pursuant to monitoring well construction standards so as to obtain representative static water level data and ground water quality samples.
  - Wells must be re-drilled if well construction is not adequate to capture ground water.
- f. The permittee shall monitor MW-East for those parameters and at the frequency listed in Table 3. Monitoring of monitoring well MW-East shall begin not later than April 28, 2011.
- g. Ground water quality samples will be collected in accordance with the Department's "Historical Nonpoint Source Water Quality Standard Operating Procedures", Section 11.10 "Groundwater Data Collection. Ground water sampling shall follow the procedures outlined in Section 11.10. <http://www.deq.mt.gov/wqinfo/monitoring/SOP/sop.mcp.x>. The permittee will document the methodology and equipment used to sample monitoring wells during all sampling events. Ground water

monitoring well self monitoring records shall be maintained onsite in accordance with ARM 17.30.1031(5)(g).

- h. The permittee shall analyze all ground water quality samples in accordance with EPA accepted 40 CFR 136 methods. If no EPA approved methodology exists for a parameter, the permittee shall analyze those samples via a Department approved method pursuant to ARM 17.30.1007.
- i. If any monitoring well(s) are abandoned, destroyed or decommissioned during any activities at the facility or are no longer able to be sampled due to fluctuations in the ground water table, the permittee shall install a new well to replace the abandoned, destroyed, decommissioned or the non-viable well(s). MPI may use existing monitoring wells provided that ground water quality data collected from them are representative of the aquifer conditions and ground water quality

2. Effluent flow Monitoring:

- a. By November 1, 2011, the permittee shall install effluent flow monitoring equipment. The measurement method shall be either by recorder or a totalizing flow meter. Dose counts or pump run-times will not be accepted.
- b. Effluent flow shall be monitored at the last point of control prior to discharge in the drainfield. Effluent flow monitoring shall be conducted using methods and equipment capable of producing measurements that can be reported as summarized by Table 3.
- c. Wastewater volumes will be reported as a volume (in gallons) that is representative of : 1) the maximum volume discharged in the same 24-hour period as the sampling event; 2) a 30-day average volume discharged (total volume/30 days). The permittee will report the duration of discharges to the drainfield based on the numbers of days the discharge occurred during a calendar month.

F. Reporting Schedule

The following table is a summary of reporting requirements.

<b>Table 4: Compliance Schedule</b>		
<b>Authority</b>	<b>Action</b>	<b>Scheduled Completion Date</b>
ARM 17.30.1031	Comply with interim effluent limits	Upon effective date of permit
ARM 17.30.1031	Begin monitoring of effluent	November 1, 2010
ARM 17.30.1031	Submit plan to install monitoring wells	January 1, 2011
ARM 17.30.1031	Install monitoring wells	April 28, 2011
ARM 17.30.1031	Begin ground water quality monitoring	April 28, 2011
ARM 17.30.1031	Submit report documenting installation of monitoring wells and preliminary ground water quality monitoring	May 28, 2011
ARM 17.30.1031	Install and begin monitoring continuous effluent flow recording equipment	November 1, 2011
ARM 17.30.1031	Comply with the final effluent limits	November 2, 2013
Footnotes:		

## II. MONITORING, RECORDING AND REPORTING REQUIREMENTS

### A. Representative Sampling

Samples taken in compliance with the monitoring requirements established under Part I of the permit shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

### B. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under Part 136, Title 40 of the Code of Federal Regulations, unless other test procedures have been specified in this permit. All flow-measuring and flow-recording devices used in obtaining data submitted in self-monitoring reports must indicate values within 10 percent of the actual flow being measured.

### C. Penalties for Tampering

The Montana Water Quality Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$25,000, or by imprisonment for not more than six months, or by both.

### D. Reporting of Monitoring Results

Self-monitoring results shall be submitted to the Department monthly. Monitoring results obtained during the previous monitoring period shall be summarized and reported on a Discharge Monitoring Report Form (EPA No. 3320-1), postmarked no later than the 28th day of the month following the completed reporting period. If no discharge occurs during the reporting period, "no discharge" shall be reported on the report form. Legible copies of these, and all other reports required herein, shall be signed and certified in accordance with the "Signatory Requirements" (see Part IV.G of this permit), and submitted to the Department at the following address:

Montana Department of Environmental Quality  
Water Protection Bureau  
PO Box 200901  
Helena, Montana 59620-0901  
Phone: (406) 444-3080

### E. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit shall be submitted no later than 14 days following each schedule date.

F. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using approved analytical methods as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

G. Records Contents

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

H. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Department at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this MPDES permit must be maintained on site during the duration of activity at the permitted location.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any serious incidents of noncompliance affecting the environment as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-3080 or the Office of Disaster and Emergency Services at (406) 841-3911. The following examples are considered serious incidents:
  - a. Any noncompliance which may seriously endanger health or the environment;
  - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities");
  - c. Any upset which exceeds any effluent limitation in the permit (See Part III.H of this permit, "Upset Conditions").
2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
  - a. A description of the noncompliance and its cause;
  - b. The period of noncompliance, including exact dates and times;
  - c. The estimated time noncompliance is expected to continue if it has not been corrected; and
  - d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
3. The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, at (406) 444-3080.
4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results".

J. Other Noncompliance Reporting

Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.D of this permit are submitted. The reports shall contain the information listed in Part II.I.2 of this permit.

K. Inspection and Entry

The permittee shall allow the head of the Department or the Director, or an authorized representative thereof, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- 3. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.**

### III. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Montana Water Quality Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the Department advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

B. Penalties for Violations of Permit Conditions

The Montana Water Quality Act provides that any person who violates a permit condition of the Act is subject to civil or criminal penalties not to exceed \$25,000 per day or one year in prison, or both, for the first conviction, and \$50,000 per day of violation or by imprisonment for not more than two years, or both, for subsequent convictions. MCA 75-5-611(a) also provides for administrative penalties not to exceed \$10,000 for each day of violation and up to a maximum not to exceed \$100,000 for any related series of violations. Except as provided in permit conditions on Part III.G of this permit, "Bypass of Treatment Facilities" and Part III.H of this permit, "Upset Conditions", nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

C. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

F. Removed Substances

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard.

G. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. 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 Parts III.G.2 and III.G.3 of this permit.
2. Notice:
  - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.
  - b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, "Twenty-four Hour Reporting".
3. Prohibition of bypass:
  - a. Bypass is prohibited and the Department may take enforcement action against a permittee for a bypass, unless:
    - 1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
    - 2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
    - 3) The permittee submitted notices as required under Part III.G.2 of this permit.
  - b. The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

#### IV. GENERAL REQUIREMENTS

A. Planned Changes

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:

1. The alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limitations in the permit; or
2. There are any planned substantial changes to the existing sewage sludge management practices of storage and disposal. The permittee shall give the Department notice of any planned changes at least 180 days prior to their implementation.

B. Anticipated Noncompliance

The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

C. Permit Actions

This permit may be revoked, modified and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

D. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of this permit.

E. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for revoking, modifying and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

F. Other Information

When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information with a narrative explanation of the circumstances of the omission or incorrect submittal and why they weren't supplied earlier.

G. Signatory Requirements

All applications, reports or information submitted to the Department shall be signed and certified.

1. All permit applications shall be signed by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by the Department shall be signed by a person described above or by a duly authorized representative of that person. A person is considered a duly authorized representative only if:
  - a. The authorization is made in writing by a person described above and submitted to the Department; and
  - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility, such as the position of plant manager, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters. (A duly authorized representative may thus be either a named individual or an individual occupying a named position.)
3. Changes to authorization. If an authorization under Part IV.G.2 of this permit is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part IV.G.2 of this permit must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this section shall make the following certification:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

H. Penalties for Falsification of Reports

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

I. Availability of Reports

All reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Department and the EPA. Permit applications, permits and effluent data shall not be considered confidential and shall also be available for public inspection.

J. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

K. Property or Water Rights

The issuance of this permit does not convey any property or water rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

L. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

M. Transfers

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the Department at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them;
3. The Department does not notify the existing permittee and the proposed new permittee of an intent to revoke or modify and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part IV.M.2 of this permit; and

4. Required annual and application fees have been paid.

N. Fees

The permittee is required to submit payment of an annual fee as set forth in ARM 17.30.201. If the permittee fails to pay the annual fee within 90 days after the due date for the payment, the Department may:

1. Impose an additional assessment consisting of 20% of the fee plus interest on the required fee computed at the rate established under 15-31-510(3), MCA, or
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. The Department may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under this sub-section. Suspensions are limited to one year, after which the permit will be terminated.

O. Reopener Provisions

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Water Quality Standards are Exceeded: If it is found that water quality standards or trigger values, excluding mixing zones designated by ARM 17.30.501-518, for parameters included in the permit or others, the department may modify the effluent limits or water management plan.

## V. DEFINITIONS

1. **"30-day (and monthly) average"** other than for fecal coliform bacteria, means the arithmetic average of all samples collected during a consecutive 30-day period or calendar month, whichever is applicable. Geometric means shall be calculated for fecal coliform bacteria. The calendar month shall be used for purposes of reporting self-monitoring data.
2. **"Bypass"** means the intentional diversion of waste streams from any portion of a treatment facility.
3. **"Composite samples"** shall be flow proportioned. The composite sample shall, as a minimum, contain at least four (4) samples collected over the compositing period. Unless otherwise specified, the time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours. Acceptable methods for preparation of composite samples are as follows:
  - a. Constant time interval between samples, sample volume proportional to flow rate at time of sampling;
  - b. Constant time interval between samples, sample volume proportional to total flow (volume) since last sample. For the first sample, the flow rate at the time the sample was collected may be used;
  - c. Constant sample volume, time interval between samples proportional to flow (i.e. sample taken every "X" gallons of flow); and,
  - d. Continuous collection of sample, with sample collection rate proportional to flow rate.
4. **"Continuous"** means the measurement of effluent flow which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance process changes, or other similar activities.
5. **"Daily Discharge"** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
6. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. Expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day.

Expressed as a concentration, it is the arithmetic average of all measurements taken that day.

7. **"Department"** means the Montana Department of Environmental Quality.
8. **"Discharge"** means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.
9. **"Grab"** sample means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.
10. **"Instantaneous"** measurement, for monitoring requirements, means a single reading, observation, or measurement.
11. **"Load Limits"** are mass-based discharge limits expressed in units such as lb/day
12. **"Mixing zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.
13. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.
14. **"Severe property damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
15. **"TMDL"** means the total maximum daily load limitation of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.
16. **"TSS"** means the pollutant parameter total suspended solids.

1 Jane B. Amdahl  
2 Department of Environmental Quality  
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4 1520 E. Sixth Avenue  
5 Helena, MT 59620-0901  
6 (406) 444-5690  
7 Attorney for the Department

8 Robert J. Sullivan  
9 Boone Karlberg P.C.  
10 201 West Main, Suite 300  
11 P.O. Box 9199  
12 Missoula, MT 59807-9199  
13 (406) 543-6646  
14 Attorney for Petitioner

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

11 **IN THE MATTER OF:**  
12 **VIOLATIONS OF THE MONTANA**  
13 **UNDERGROUND STORAGE TANK**  
14 **ACT BY HI-NOON PETROLEUM, INC.,**  
15 **AT NOON 456, MISSOULA COUNTY,**  
16 **MONTANA [FACILITY ID 32-03614;**  
17 **FID #1952; DOCKET NO. UST-10-06]**

**STIPULATION TO DISMISS**

**Case No. BER 2010-11 UST**

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Petitioner, H-Noon Petroleum, Inc., by counsel, and the Department of Environmental  
Quality, by counsel, hereby inform the Board of Environmental Review that the parties have  
resolved their differences and hereby stipulate to dismiss the above-captioned contested case  
with prejudice pursuant to Mont. R. Civ. P. 41(a). A copy of the Administrative Order on  
Consent by which this matter was settled is attached hereto as Exhibit A.

Each party to bear its own costs, including attorney fees.

//

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FILED this 20th day of  
October AD 2010  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: \_\_\_\_\_

1 IT IS SO STIPULATED:

2 DEPARTMENT OF ENVIRONMENTAL QUALITY

3  
4 By: Jane B. Amdahl  
5 Jane B. Amdahl, Attorney for the Department

Date: 10/20/10

6  
7 HI-NOON PETROLEUM, INC.

8  
9 By: Robert J. Sullivan  
10 Robert J. Sullivan, Attorney for Petitioner

Date: 10/14/2010

**Certificate of Service**

I hereby certify that on the 20<sup>th</sup> day of October, 2010, sent a true and correct copy of the foregoing Stipulation to Dismiss by interdepartmental mail service to Hearing Examiner Katherine Orr.

Jane B. Amdahl

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA  
UNDERGROUND STORAGE TANK ACT BY  
HI-NOON PETROLEUM, INC. AT NOONS  
457, MISSOULA COUNTY, MONTANA.  
[FACILITY ID 32-03614; FID 1952]

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE ORDER  
ON CONSENT

Docket No. UST-10-06

**I. NOTICE OF VIOLATION**

Pursuant to the authority of § 75-11-525, Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Hi-Noon Petroleum, Inc. (Hi-Noon) of the following Findings of Fact and Conclusions of Law with respect to violations of the Montana Underground Storage Tank Act (Act) (Title 75, chapter 11, part 5, MCA) and the administrative rules implementing the Act (Administrative Rules of Montana (ARM) Title 17, chapter 56). Concurrent with the issuance of this Notice of Violation and Administrative Order on Consent (Consent Order), the Department is terminating its June 15, 2010 Notice of Violation and Administrative Compliance and Penalty Order and is replacing it with this Consent Order.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of § 2-15-3501, MCA.

2. The Department administers the Act and the administrative rules implementing the Act.

3. Hi-Noon is a corporation and, therefore, meets the definition of "person" as defined in § 75-11-503(4), MCA.

4. On May 27, 2005, Hi-Noon notified the Department that it owns three underground storage tanks (USTs), designated as Tank No. 1339, Tank No. 1340, and Tank No.

1 1341. The three USTs, which are located at Noon's 457 (Facility), 540 East Broadway,  
2 Missoula, Montana, store and dispense petroleum products. Hi-Noon, therefore, meets the  
3 definition of an "owner" as defined in ARM 17.56.101(47). The Facility has been issued Facility  
4 ID #32-03614.

5 5. Hi-Noon was in control of, or had responsibility for, the daily operation of the  
6 Facility at the time of the violations alleged in this Order, and therefore, under ARM  
7 17.56.101(44), is the "operator" of the Facility.

8 6. The expiration date of the Facility's Operating Permit (Permit) was March 30, 2010.

9 7. On September 25, 2009, the Department received the results of a September 14,  
10 2009 compliance inspection (September Inspection) for the Facility's USTs. The September  
11 Inspection found that Hi-Noon did not have passing monthly release detection records available  
12 for some of the tanks during six of the previous 12 months.

13 8. In a Warning Letter and Corrective Action Plan (October CAP) dated October 7,  
14 2009, which Hi-Noon received on October 15, 2009, the Department notified Hi-Noon that it  
15 was required to correct deficiencies identified in the September Inspection by March 16, 2010.

16 9. On October 20, 2009, the Department conducted an Oversight Inspection  
17 (October Inspection) at the Facility. The Oversight Inspection identified that passing leak  
18 detection monitoring records were unavailable for six of the past 12 months.

19 10. In a Warning Letter and Corrective Action Plan (November CAP) dated  
20 November 25, 2009, which Hi-Noon received on December 2, 2009, the Department notified  
21 Hi-Noon that it was required to correct deficiencies identified in the October Inspection by  
22 March 16, 2010.

23 11. A compliance reinspection completed on March 7, 2010 (March Reinspection)  
24 identified that passing leak detection monitoring records were unavailable for four of the past 12

1 months.

2 12. In a Violation Letter and Corrective Action Plan (March CAP) dated March 17,  
3 2010, which Hi-Noon received on March 24, 2010, the Department notified Hi-Noon that it was  
4 required to correct deficiencies identified in the March CAP without further delay.

5 ***Failure to conduct leak detection monitoring***

6 13. Owners and operators of petroleum USTs are required to provide release  
7 detection for tanks and piping. *See* ARM 17.56.402(1).

8 14. Owners and operators of pressurized underground piping are required to monitor  
9 the piping for a release by either having an annual line tightness test or conducting monthly  
10 monitoring. Hi-Noon uses Statistical Inventory Reconciliation (SIR) to conduct monthly line  
11 leak detection. *See* ARM 17.56.402(1)(b)(i)(B).

12 15. ARM 17.56.409(1)(b), in part, requires UST owners and operators to maintain the  
13 results of any monitoring for at least one year.

14 16. The Department considers an owner or operator's failure to have passing release  
15 detection monitoring records available for inspection to be evidence that adequate monthly  
16 release detection is not being conducted as required by ARM 17.56.401(1) and ARM  
17 17.56.402(1)(b)(i)(B).

18 17. The March Reinspection found that passing tank release detection monitoring  
19 records and line leak detection records were not available for Tank No. 1339 for 4 months of the  
20 previous 12 months. Therefore, Hi-Noon was not adequately monitoring Tank No. 1339 for  
21 releases every 30 days.

22 18. Hi-Noon violated ARM 17.56.401(1) and ARM 17.56.402(1) by failing to  
23 adequately monitor its tank and piping for a release every 30 days during the previous 12 months  
24 prior to the March Reinspection.

1 ***Administrative Penalty***

2 19. The Department has calculated an administrative penalty in the amount of  
3 \$660.00 for the violations alleged herein. *See* § 75-1-1001, MCA, and ARM 17.4.301 through  
4 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by reference herein.

5 20. Hi-Noon does not admit to liability for the violations listed in the Consent Order.  
6 Hi-Noon is entering into this Consent Order to avoid expenditures associated with litigation.

7 **III. ADMINISTRATIVE ORDER**

8 This Consent Order is issued to Hi-Noon pursuant to the authority vested in the State of  
9 Montana, acting by and through the Department under the Act and pursuant to § 75-11-525,  
10 MCA. Based on the foregoing Findings of Fact and Conclusions of Law and the authority cited  
11 above, the Department hereby ORDERS and Hi-Noon AGREES to take the following actions to  
12 comply with the Act:

13 21. Within 30 days from the effective date of this Consent Order, Hi-Noon shall  
14 initiate action(s) to fulfill the requirements of the March CAP by conducting monthly tank and  
15 line release detection monitoring on Tank No. 1339, Tank No. 1340, and Tank No. 1341 and any  
16 associated underground piping.

17 22. Hi-Noon shall record and maintain the results of all monthly release detection  
18 monitoring in accordance with ARM 17.56.409.

19 23. For purposes of complying with this Consent Order, Hi-Noon shall submit to the  
20 Department, within 120 days of receipt of this Consent Order, monthly tank and line leak  
21 detection monitoring records for the three months immediately following the effective date this  
22 Consent Order.

23 24. In addition to the monthly tank release detection monitoring records required in  
24 Paragraph 23, Hi-Noon may, if available, submit consecutive monthly tank release detection

1 monitoring records for all tanks for up to nine months preceding the effective date of this  
2 Consent Order to make up the 12 consecutive months of release detection monitoring referred to  
3 in Paragraph 23. "Inconclusive" monitoring results do not satisfy the monthly monitoring  
4 requirements.

5 25. Within 15 days of completing 12 consecutive months of tank and line leak  
6 detection monitoring, Hi-Noon shall obtain a reinspection of the Facility UST system to determine  
7 compliance with the corrective actions required under this Consent Order and the March CAP.

8 26. Within 15 days of obtaining the reinspection required under Paragraph 25,  
9 Hi-Noon shall submit to the Department the results of the reinspection. The reinspection report  
10 must be signed by the licensed compliance inspector and by an authorized representative of  
11 Hi-Noon.

12 27. All documents required in Paragraphs 23, 24, and 26 and other documents  
13 required to comply with this Consent Order, shall be sent to:

14 Redge Meierhenry, UST Section Supervisor  
15 Department of Environmental Quality  
16 P.O. Box 200901  
Helena, MT 59620-0901

17 28. Within 60 days from the effective date of this Consent Order, Hi-Noon shall pay  
18 to the Department the \$660.00 administrative penalty to resolve the violations cited herein. Hi-  
19 Noon has paid the penalty and the Department acknowledges receipt thereof.

20 29. Failure to take the required corrective actions by the specified deadlines, as  
21 ordered herein, constitutes a violation of the Act and may result in the Department seeking a  
22 court order assessing civil penalties of up to \$10,000 per violation pursuant to § 75-11-516,  
23 MCA. Each day of violation constitutes a separate violation.

24 30. None of the requirements in this Order are intended to relieve Hi-Noon from

1 complying with all applicable state, federal, and local statutes, rules, ordinances, orders, and  
2 permit conditions.

3 31. The Department may take any additional enforcement action against Hi-Noon,  
4 including the right to seek injunctive relief, civil penalties, and other available relief for any  
5 violation of, or failure or refusal to comply with, this Order.

6 32. This Order shall terminate when the Department has determined that all actions  
7 required under this Order have been completed and has informed Hi-Noon of such determination  
8 in writing.

#### 9 **IV. CONSENT TO ADMINISTRATIVE ORDER**

10 33. Hi-Noon waives its right to administrative appeal or judicial review of the  
11 Findings of Fact and Conclusions of Law and Administrative Order on Consent set forth herein  
12 and agrees that this Consent Order is the final and binding resolution of the issues raised.

13 34. The terms of this Consent Order constitute the entire agreement between the  
14 Department and Hi-Noon with respect to the issues addressed herein notwithstanding any other  
15 oral or written agreements and understandings made and entered into between the Department  
16 and Hi-Noon prior to the date of this Consent Order.

17 35. Except as herein provided, no amendment, alteration, or addition to this Consent  
18 Order shall be binding unless reduced to writing and signed by both parties.

19 36. Hi-Noon agrees to waive defenses based upon the statute of limitations for the  
20 violations alleged herein and not to challenge the Department's right to seek judicial relief in the  
21 event that Hi-Noon fails to fully and satisfactorily comply with the terms of this Consent Order.

22 37. Hi-Noon agrees that the violations established by the Findings of Fact and  
23 Conclusions of Law may be considered by the Department as history of violation in calculating  
24 penalties for subsequent violations as permitted by Section 75-1-1001, MCA

1 38. Hi-Noon agrees that it has been notified that it has a right to be represented by an  
2 attorney in connection with this matter, and that it has exercised that right.

3 39. Each of the signatories to this Consent Order represents that he or she is  
4 authorized to enter into this Consent Order and to bind the party represented by him or her to the  
5 terms of the Consent Order.

6 40. This Consent Order becomes effective upon signature of the Director of the  
7 Department or his designee.

8 IT IS SO ORDERED:

9 DEPARTMENT OF ENVIRONMENTAL QUALITY

IT IS SO AGREED:

HI-NOON PETROLEUM, INC.

10 



11 JOHN L. ARRIGO, Administrator  
12 Enforcement Division

Signature

13 10/13/10

14 Date

DIRK N. COOPER

Print Name

VP/CFO

Title

10/7/10

Date

**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Worksheet**

Responsible Party Name:	Hi-Noon Petroleum, Inc (Hi-Noon) at Noons 457 (Facility)
FID:	1952 Facility ID 32-03614
Statute:	Montana Underground Storage Tank Act (Act)
Date:	6/15/2010
Name of Employee Calculating Penalty:	Darrick Turner
Maximum Penalty Authority:	\$500.00

Violation #1
Description of Violation:
Failure to perform monthly release detection monitoring - ARM 17.56.401(1), ARM 17.56.402(1) and ARM 17.56.409(1). The March 7, 2010 Reinspection (March Reinspection) noted that 4 months of release detection monitoring records were not available. The Department considers the lack of monthly release detection records as an indicator that release detection monitoring is not being performed.

**I. BASE PENALTY**

**Nature**

Explanation:	
The failure to perform monthly release detection monitoring has the potential to harm public health or the environment. Owners and operators (O/Os) of UST systems are required to conduct monthly release detection monitoring in order to ensure that the UST systems do not have a release and implement mitigation measures in order to minimize impacts to the environment in the event of a release.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

**Gravity and Extent**

Gravity Explanation:	
Pursuant to ARM 17.4.303(5)(b)(ii), the failure to perform monitoring has a moderate gravity.	
Extent Explanation:	
The Administrative Rules of Montana require O/Os to perform monthly release detection monitoring so that O/Os can detect whether a release occurred and implement immediate mitigation measures in the event that a release occurs. Hi-Noon failed to perform release detection monitoring, based on the lack of monitoring records for May, June, September and December 2009. The Department has determined that the failure to perform release detection monitoring based on the failure to maintain leak detection monitoring records to be a moderate deviation from the requirement. Therefore, the extent is moderate.	

**Harm to Human Health or the Environment**

		Gravity			
Extent		Major	Moderate	Minor	
Major		0.85	0.70	0.55	
Moderate		0.70	0.55	0.40	
Minor		0.55	0.40	0.25	
Gravity and Extent Factor:					0.55

**Impact to Administration**

		Gravity			
		Major	Moderate	Minor	
		.50	.40	.30	
Gravity Factor:					0.00

**BASE PENALTY** (Maximum Penalty Authority x Gravity and Extent Factor):

**\$275.00**

## II. ADJUSTED BASE PENALTY

### A. Circumstances (up to 30% added to Base Penalty)

#### Explanation:

As a regulated entity, Hi-Noon knew or should have known the regulatory requirement to conduct monthly release detection monitoring. Hi-Noon had control over the violation, but failed to perform monthly release detection monitoring. The violation is the result of Hi-Noon's failure to exercise reasonable care in adhering to program requirements appropriate to the particular circumstances. An upward adjustment of 20% for circumstances is appropriate.

Circumstances Percent: 0.20

Circumstances Adjustment (Base Penalty x Circumstances Percent) \$55.00

### B. Good Faith and Cooperation (up to 10% subtracted from Base Penalty)

#### Explanation:

The Department is not aware of any actions that Hi-Noon has taken to mitigate the violation. Therefore, no reduction is being applied to this penalty calculation for good faith and cooperation.

Good Faith & Coop. Percent: 0.00

Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent) \$0.00

### C. Amounts Voluntarily Expended (AVE) (up to 10% subtracted from Base Penalty)

#### Explanation:

The Department is not aware of any amounts that Hi-Noon voluntarily expended beyond what was required to return to compliance.

AVE Percent: 0.00

Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent) \$0.00

## ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$275.00
Circumstances	\$55.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$330.00</b>

## III. DAYS OF VIOLATION

#### Explanation:

The March Reinspection indicated that Hi-Noon lacked monitoring records for May, June, September and December 2009. The Department considers the lack of records to be an indication that Hi-Noon failed to conduct monthly leak detection. Pursuant to § 75-11-525, MCA, each occurrence of the violation and each day that it remains uncorrected constitutes a separate violation. The Department calculates four occurrences of the violation for this action.

Number of Days: 4

**ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$1,320.00**

#### Other Matters as Justice May Require Explanation:

The Department believes that calculating a penalty for each day of violation results in a penalty that is higher than what is necessary to provide a deterrent to future violations. Therefore, in exercising its enforcement discretion under Other Matters as Justice May Require, the Department will consider Hi-Noon's failure to maintain methods of leak detection as two days of violation. 2 days x \$330 = \$660.00

**OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$660.00**

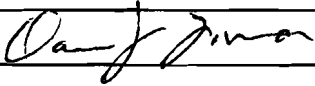
## IV. ECONOMIC BENEFIT

#### Explanation:

The Department uses EPA's BEN model to calculate the amount of economic benefit that a violator gains as a result of a violation. The BEN model considers the effects of inflation and taxes to calculate the time value of money. The Department has determined that the savings that Hi-Noon gained by failing to monitor for system leaks is insignificant. Therefore, the Department is choosing not to seek economic benefit for this violation.

**ECONOMIC BENEFIT REALIZED: \$0.00**

**Department of Environmental Quality - Enforcement Division**  
**Penalty Calculation Summary**

Responsible Party Name:	Hi-Noon Petroleum, Inc (Hi-Noon) at Noons 457 (Facility)
FID:	1952 Facility ID 32-03614
Statute:	Montana Underground Storage Tank Act (Act)
Date:	6/15/2010
Signature of Employee Calculating Penalty:	Darrick Turner 

**I. Base Penalty (Maximum Penalty Authority x Matrix Factor)**

	<b>Violation #1</b>
Maximum Penalty Authority:	\$500.00
Percent Harm - Gravity and Extent:	0.55
Percent Impact - Gravity:	0.00
<b>Base Penalty:</b>	<b>\$275.00</b>

**II. Adjusted Base Penalty**

Base Penalty:	\$275.00
Circumstances:	\$55.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$330.00</b>

<b>Totals</b>
\$275.00
\$55.00
\$0.00
\$0.00
<b>\$330.00</b>

**III. Days of Violation or  
Number of Occurrences**

4

**Adjusted Base Penalty Total** \$1,320.00

**\$1,320.00**

**Other Matters as Justice May  
Require Total** \$660.00

**\$660.00**

**IV. Economic Benefit** \$0.00

**\$0.00**

**V. History\***

**\$0.00**

**TOTAL PENALTY**

**\$660.00**

\*Hi-Noon does not have a prior history of violations of the Act documented in either an administrative order, judicial order, or judgment within the last three years.

1  
2  
3  
4  
5  
6 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
7 OF THE STATE OF MONTANA  
8

9 **IN THE MATTER OF:**  
10 **VIOLATIONS OF THE MONTANA**  
11 **UNDERGROUND STORAGE TANK**  
12 **ACT BY HI-NOON PETROLEUM, INC.,**  
**AT NOON 456, MISSOULA COUNTY,**  
**MONTANA [FACILITY ID 32-03614;**  
**FID #1952; DOCKET NO. UST-10-06]**

**DISMISSAL ORDER**  
**Case No. BER 2010-11 UST**

13 Petitioner, H-Noon Petroleum, Inc., by counsel, and the Department of Environmental  
14 Quality, by counsel, having informed the Board of Environmental Review that the parties have  
15 resolved their differences and have filed a Stipulation to Dismiss the above-captioned contested  
16 case with prejudice pursuant to Mont. R. Civ. P. 41(a), the it is hereby ORDERED that the case  
17 be DISMISSED WITH PREJUDICE. Each party to bear its own costs, including attorney fees.

18 Enter this 3<sup>rd</sup> day of December, 2010.

19 BOARD OF ENVIRONMENTAL REVIEW  
20

21 \_\_\_\_\_  
22 JOSEPH W. RUSSELL, Chairman  
23  
24

FILED this 13<sup>th</sup> day of  
October AD 2010  
at 11:50 o'clock A. M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: M. J. Goble

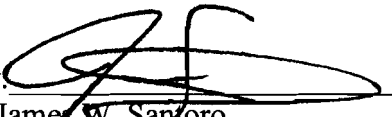
BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: )  
)  
) **Stipulation and Request**  
) **for Dismissal**  
)  
) CASE NO. BER 2009-21 WQ  
THE APPEAL BY THE CITY OF )  
GREAT FALLS WATER AND SEWER )  
DEPARTMENT REGARDING ITS MDEQ )  
PERMIT NO. MT 0021920 FOR ITS )  
WASTEWATER FACILITY )

**STIPULATION TO DISMISS**

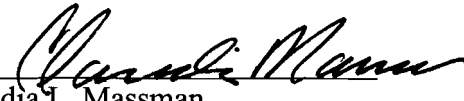
The Montana Department of Environmental Quality ("DEQ") and the City of Great Falls Water and Sewer Department ("the City") have reached a resolution of the matters in this appeal of MDEQ Permit No. MT 0021920. All matters having been resolved, the parties hereby stipulate to dismissal of the appeal without prejudice.

**CITY OF GREAT FALLS**  
**Water and Sewer Dept.**

By:   
James W. Santoro  
Attorney for City of Great Falls  
Water and Sewer Department

Date: 9/27/2010

**STATE OF MONTANA**  
**Department of Environmental**  
**Quality**

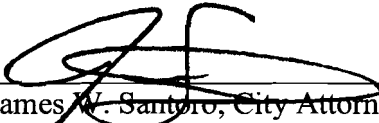
By:   
Claudia L. Massman  
Attorney for Department of  
Environmental Quality

Date: 10/5/10

## REQUEST FOR DISMISSAL

Pursuant to Rule 41(a)(ii), M.R.Civ.P., an action may be dismissed by the Plaintiff by filing a stipulation for dismissal signed by all of the parties who have appeared in the action. Pursuant to the stipulation of the parties set forth above and Rule 41(a)(ii), M.R.Civ.P., the City of Great Falls Water and Sewer Department respectfully request the Board to issue an Order dismissing the appeal without prejudice.

DATED this 27 day of September, 2010.

  
James W. Santoro, City Attorney  
Attorney for the City of Great Falls

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

---

IN THE MATTER OF:	)	CASE NO. BER 2009-21 WQ
APPEAL BY THE CITY	)	
OF GREAT FALLS WATER AND	)	
SEWER DEPARTMENT	)	
REGARDING ITS MDEQ	)	
PERMIT NO. MT 00021920 FOR ITS	)	
WASTEWATER FACILITY	)	

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**ORDER OF DISMISSAL**

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The City of Great Falls' Water and Sewer Department ("the City") has requested an Order dismissing the above-captioned appeal. The request for dismissal is based upon a Stipulation for Dismissal executed by the City and the Montana Department of Environmental Quality and Rule 41(a)(ii), M.R.Civ.P., which allows a Plaintiff to dismiss an action by filing a stipulation of dismissal signed by all parties who have appeared in the action. Therefore, upon stipulation of the parties and Rule 41(a)(ii), M.R.Civ.P., and good cause shown:

IT IS HEREBY ORDERED that the above-captioned matter before the Board of Environmental Review is DISMISSED without prejudice.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Joseph W. Russell, M.P.H., Chairman  
Montana Board of Environmental Review

1 Jane B. Amdahl  
Department of Environmental Quality  
2 P.O. Box 200901  
1520 E. Sixth Avenue  
3 Helena, MT 59620-0901  
(406) 444-5690  
4 Attorney for the Department  
  
5 Sheep Mountain Properties, LLC  
by Joseph Schmaus, member  
6 P.O. Box 115  
East Helena, MT 59635  
7 (406) 202-0602  
Petitioner  
8  
9

FILED this 19<sup>th</sup> day of  
November AD 2010  
at \_\_\_\_\_ o'clock \_\_\_\_\_  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by M. Gobb

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

12 IN THE MATTER OF:  
13 VIOLATIONS OF THE CLEAN AIR ACT  
OF MONTANA BY SHEEP MOUNTAIN  
14 PROPERTIES, JEFFERSON COUNTY,  
MONTANA. [FID #1767, DOCKET NO.  
AQ-09-05]

2009  
Case No. BER-~~2010~~-11 AQ

**STIPULATION TO DISMISS**

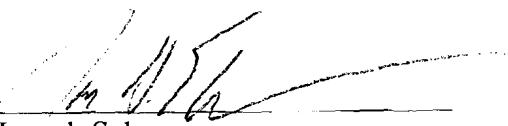
16 Petitioner, Sheep Mountain Properties, LLC, and the Department of Environmental  
17 Quality, by counsel, inform the Board of Environmental Review that they have settled their  
18 differences and, pursuant to Mont. R. Civ. P. 41(a), hereby stipulate that this cause of action  
19 shall be dismissed with prejudice, each party to bear its own costs.

20 Respectfully submitted this 19<sup>th</sup> day of November, 2010.

21 DEPARTMENT OF ENVIRONMENTAL  
22 QUALITY

23 By: Jane B. Amdahl  
Jane B. Amdahl,  
24 Attorney for the Department

1  
2 SHEEP MOUNTAIN PROPERTIES, LLC

3  
4 By:   
5 Joseph Schmaus,  
6 Member

7  
8 Certificate of Service

9 I hereby certify that on the 19<sup>th</sup> day of November, 2010, I sent a true and correct copy of the  
10 above Stipulation to Dismiss by to Katherine Orr, Hearing Examiner, through inter-departmental  
11 mail.

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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE CLEAN AIR  
ACT OF MONTANA BY SHEEP  
MOUNTAIN PROPERTIES, LLC,  
JEFFERSON COUNTY, MONTANA  
(FID 1767)

ADMINISTRATIVE ORDER  
ON CONSENT

Docket No.: AQ-09-05

**I. NOTICE OF VIOLATION**

Pursuant to the authority of Section 75-2-401, Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Sheep Mountain Properties, LLC (Sheep Mountain Properties) of the following Findings of Fact and Conclusions of Law with respect to violations of the Clean Air Act of Montana (CAA) and Administrative Rules of Montana (ARM) adopted under the CAA. Concurrent with the issuance of this Administrative Order on Consent (Consent Order), the Department is terminating its April 21, 2009 Notice of Violation and Administrative Penalty Order and is replacing it with this Consent Order.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Department hereby makes the following Findings of Fact and Conclusions of Law:

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
2. The Department administers the CAA and rules adopted under the CAA.
3. Sheep Mountain Properties is a limited liability company registered with the State of Montana and is, therefore, a "person" as defined in Section 75-2-103(14), MCA.

//

//

1 **Violation – Conducting an open burn after failing to obtain a ventilation forecast and**  
2 **complete the burning by nightfall during closed burning season.**

3 4. ARM 17.8.606(4) states that during December, January, or February, to conduct  
4 any minor open burning not prohibited by ARM 17.8.604, a minor open burning source, outside  
5 the eastern Montana open burning zone, must: submit a written request to the Department,  
6 demonstrating that the burn must be conducted prior to reopening of the burning season in  
7 March; receive permission for each specific burn from the Department; and adhere to the time  
8 periods set for burning by the Department that are available by calling the Department at (800)  
9 225-6779.

10 5. The Department sent Sheep Mountain Properties a letter dated January 6, 2009,  
11 granting Sheep Mountain Properties permission to burn slash piles located at Sections 31 and 32,  
12 Township 9 North, Range 3 West, in Jefferson County, Montana. According to the letter, during  
13 the closed wintertime open burning season, **a ventilation forecast must be obtained by calling**  
14 **John Coefield of the Air Resources Management Bureau at 444-5272.** The open burning  
15 must be completed by nightfall. [The bolded section in this paragraph was also bolded in the  
16 January 6, 2009 letter.]

17 6. On January 27, 2009, the Enforcement Division (ENFD) of the Department  
18 received a complaint regarding the open burning of slash piles on Sheep Mountain Road in  
19 Clancy, Montana. According to the complainant, the slash piles were lit on January 25, 2009 and  
20 were still smoldering on January 27, 2009.

21 7. ENFD contacted the Department's Air Resources Management Bureau to  
22 determine if Sheep Mountain Properties was in compliance with ARM 17.8.606(4). According  
23 to John Coefield, he did not provide a ventilation forecast or give permission to Sheep Mountain  
24 Properties to conduct open burning on January 25, 2009, or any other day after that. He did

1 | however provide a ventilation forecast and give permission to Todd Mihalko, logger, to conduct  
2 | open burning at Sheep Mountain Properties on January 24, 2009, but specifically told him the  
3 | approval was for that day only.

4 |       8.       On January 28, 2009, Lawrence Alheim, ENFD, conducted a field investigation at  
5 | the Sheep Mountain Properties site. He observed approximately 22 smoldering slash piles on the  
6 | site. According to Mr. Alheim, the slash piles on Lots 10, 12, and 15 were creating a large  
7 | amount of smoke with the remaining piles on various lots smoldering but not generating as much  
8 | smoke. He noted four of the piles had small flames in isolated areas of the piles with flame  
9 | lengths of two to six inches. Mr. Alheim was unable to locate any workers or individuals  
10 | monitoring the piles at the site.

11 |       9.       The Department issued a Violation Letter to Sheep Mountain Properties on  
12 | February 2, 2009 for conducting an open burn after failing to obtain a ventilation forecast or  
13 | completing the burning by nightfall during closed burning season in violation of ARM  
14 | 17.8.606(4). The Violation letter stated that based upon Sheep Mountain's failure to comply  
15 | with the requirements outlined in the January 6, 2009 letter, the Department is rescinding  
16 | permission to burn slash piles located at Sections 31 and 32, Township 9 North, Range 3 West,  
17 | in Jefferson County, Montana. The Violation Letter also stated that if Sheep Mountain  
18 | Properties wished to submit a written response for consideration by the Department, it should do  
19 | so within 15 days of receipt of the Violation Letter. The Department did not receive a response  
20 | from Sheep Mountain Properties.

21 |       10.      On February 3, 2009, Christine Weaver of the Department's Permitting and  
22 | Compliance Division observed at least three slash piles still smoldering and creating smoke.  
23 | According to Ms. Weaver, the smoldering piles were located on Lots 4, 5, and 10.

24 | //

1 11. Sheep Mountain Properties violated ARM 17.8.606(4) by failing to obtain a  
2 ventilation forecast and complete the burning by nightfall in accordance with the ARM and the  
3 permission letter dated January 6, 2009 during the closed burning season. Sheep Mountain  
4 Properties burned approximately 22 slash piles which were started on or about January 25, 2009  
5 and smoldered through at least February 3, 2009.

### 6 III. ADMINISTRATIVE ORDER ON CONSENT

7 This Consent Order is issued to Sheep Mountain Properties pursuant to the authority  
8 vested in the State of Montana, acting by and through the Department under the CAA, Section  
9 75-2-401, MCA. NOW, THEREFORE, THE DEPARTMENT ORDERS AND SHEEP  
10 MOUNTAIN PROPERTIES AGREES AS FOLLOWS:

11 12. Sheep Mountain Properties shall pay to the Department an administrative penalty  
12 in the amount of \$500 to resolve the violation cited herein.

13 13. Payment shall be made in accordance with the following schedule:

14 a. ~~By November 1, 2010, first payment in the amount of \$100, and~~ *SMS* *JA*

15 b. By December 1, 2010, ~~second payment in the amount of \$100; and~~ *1st SMS* *JA*

16 c. By January 2, 2011, ~~third payment in the amount of \$100; and~~ *2nd SMS* *JA*

17 d. By February 1, 2011, ~~fourth payment in the amount of \$100; and~~ *3rd SMS* *JA*

18 e. By March 1, 2011, ~~fifth and final payment in the amount of \$100.~~ *4th SMS* *JA*

19 14. ~~The penalty payments must be paid by check or money order, made payable to the~~ *f. By April 1, 2011, fifth and final payment \$100.* *JML* *JA*

20 "Montana Department of Environmental Quality," and shall be sent to:

21 John L. Arrigo, Administrator  
22 Enforcement Division  
23 Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

15. Sheep Mountain Properties agrees that if it fails to comply with any of the terms of this Consent Order, the full unpaid amount of the penalties become immediately due and owing.

#### IV. CONSENT TO ADMINISTRATIVE ORDER

16. Sheep Mountain Properties waives his right to administrative appeal or judicial review of the Findings of Fact and Conclusions of Law and Administrative Order on Consent set forth herein and agrees that this Consent Order is the final and binding resolution of the issues raised.

17. Sheep Mountain Properties agrees that the violations established by the Findings of Fact and Conclusions of Law may be considered by the Department as history of violation in calculating penalties for subsequent violations as permitted by Section 75-1-1001, MCA.

18. The terms of this Consent Order constitute the entire agreement between the Department and Sheep Mountain Properties with respect to the issues addressed herein notwithstanding any other oral or written agreements and understandings made and entered into between the Department and Sheep Mountain Properties prior to the effective date of this Consent Order.

19. Except as herein provided, no amendment, alteration, or addition to this Consent Order shall be binding unless reduced to writing and signed by both parties.

20. Each of the signatories to this Consent Order represents that he or she is authorized to enter into this Consent Order and to bind the parties represented by him or her to the terms of this Consent Order.

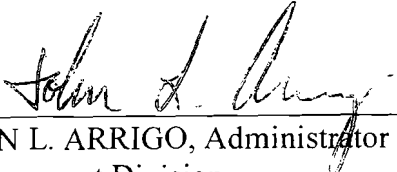
21. None of the requirements in this Consent Order are intended to relieve Sheep Mountain Properties from its obligation to comply with all applicable state, federal, and local statutes, rules, ordinances, orders, and permit conditions.

22. Sheep Mountain Properties affirms that he understands he has the right to be represented by counsel and has knowingly waived that right.

23. This Consent Order becomes effective upon signature of the Director of the Department or his designee.

IT IS SO ORDERED:

DEPARTMENT OF ENVIRONMENTAL QUALITY

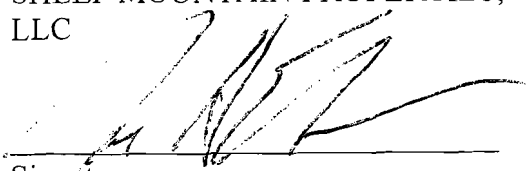
  
JOHN L. ARRIGO, Administrator  
Enforcement Division

Date

11/19/10

IT IS SO AGREED:

SHEEP MOUNTAIN PROPERTIES,  
LLC

  
Signature

Printed Name

H. Schmeiss  
Title

11/17/10  
Date

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

9 IN THE MATTER OF:  
10 VIOLATIONS OF THE CLEAN AIR ACT  
11 OF MONTANA BY SHEEP MOUNTAIN  
12 PROPERTIES, LLC, JEFFERSON COUNTY,  
MONTANA. [FID #1767, DOCKET NO.  
AQ-09-05]

Case No. BER 2009-11 AQ

**DISMISSAL ORDER**

13 Petitioner, Sheep Mountain Properties, LLC, and the Department of Environmental  
14 Quality, by counsel, having informed the Board of Environmental Review that the parties have  
15 resolved their differences and have filed a Stipulation to Dismiss the above-captioned contested  
16 case with prejudice pursuant to Mont. R. Civ. P. 41(a), the it is hereby ORDERED that the case  
17 be DISMISSED WITH PREJUDICE. Each party to bear its own costs, including attorney fees.

18 Enter this 3<sup>rd</sup> day of December, 2010.

19 BOARD OF ENVIRONMENTAL REVIEW

20  
21  
22 JOSEPH W. RUSSELL, Chairman  
23  
24

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

---

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF METAL MINE**  
5 **RECLAMATION ACT BY**  
6 **SATURDAY SUNDAY, L.L.C.,**  
7 **DEER LODGE COUNTY,**  
8 **MONTANA [FID #1711, DOCKET**  
9 **NO. MM-09-01]**

**CASE NO. BER 2009-02 MM**

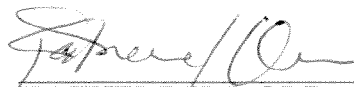
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7                   **ORDER CLARIFYING ORDER ON DEFAULT**

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9                   On July 21, 2010, the undersigned Hearing Officer issued an Order on  
10 Default (Order) on motion of the Department of Environmental Quality  
11 (Department). The Order was served on Counsel of record for the Appellant,  
12 Saturday Sunday. No challenge to the Order has been filed. The Order states that  
13 the Appellant, Saturday Sunday, shall pay the assessed penalty of \$1,262.00 to the  
14 Department and provides details as to payment. The Order is a proposed order and  
15 must be approved by the Board of Environmental Review (Board). It is the Board  
16 that must enter a final order making the assessment and ordering the method of  
17 payment if it approves of the Hearing Examiner's Order on Default. An Order for  
18 the Board approving of the penalty assessment and ordering a method of payment  
19 has been prepared for the Board.

20                   DATED this 19<sup>th</sup> day of November, 2010.

21  
22   
23 KATHERINE J. ORR  
24 Hearing Examiner  
25 Agency Legal Services Bureau  
26 1712 Ninth Avenue  
27 P.O. Box 201440  
Helena, MT 59620-1440

1 CERTIFICATE OF SERVICE

2 I hereby certify that I caused a true and accurate copy of the foregoing Order  
3 Clarifying Order on Default to be mailed to:

4 Ms. Joyce Wittenberg  
5 Secretary, Board of Environmental Review  
6 Department of Environmental Quality  
7 1520 East Sixth Avenue  
8 P.O. Box 200901  
9 Helena, MT 59620-0901  
10 **(original)**

11 Mr. Edward Hayes  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

16 Mr. John Arrigo, Administrator  
17 Enforcement Division  
18 Department of Environmental Quality  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 Mr. David Rodli  
22 David Rodli Law Offices  
23 2001 South Russell  
24 P.O. Box 2190  
25 Missoula, MT 59806

26 DATED: November 19, 2010 

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

---

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF METAL MINE**  
5 **RECLAMATION ACT BY**  
6 **SATURDAY SUNDAY, L.L.C.,**  
**DEER LODGE COUNTY,**  
**MONTANA [FID #1711, DOCKET**  
**NO. MM-09-01]**

**CASE NO. BER 2009-02 MM**

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7                   **ORDER OF THE BOARD IMPOSING PENALTIES**

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9                   On July 21, 2010, the Hearing Examiner entered an Order on Default (Order)  
10 pursuant to Mont. Admin. R. 1.3.214 and the argument presented. The Order  
11 reflects that on the day of the hearing set to determine the correct amount of  
12 penalties to be assessed, the Department of Environmental Quality (Department)  
13 made a motion for entry of a default order in which the order would impose the  
14 penalties assessed by the Department in the Notice of Violation and Administrative  
15 Compliance and Penalty Order dated January 13, 2009, namely \$1,262.00. The  
16 Order was sent to Counsel for the Appellant, Saturday Sunday, and there was no  
17 filing by Appellant in reaction to the Order on Default. On November 19, 2010, the  
18 Hearing Examiner entered an "Order Clarifying Order on Default" stating that the  
19 Order on Default had to be reviewed and approved by the Board.

20                  For background purposes, the Board entered an Order on January 25, 2010,  
21 approving the Hearing Examiner's Proposed Order on Cross Motions for Summary  
22 Judgment and ruling that the Appellant violated Montana Code Ann. § 82-4-331 to  
23 obtain an exploration License prior to starting exploration activities and that  
24 Appellant was liable for penalties to be correctly determined at an evidentiary  
25 hearing.

26                  With motion of the Department for entry of a default order as to penalties, no  
27 challenge by the Appellant and with entry of the Order on Default, there is no

1 necessity for a hearing on the penalties. The Board having reviewed and approved  
2 the Order on Default and there being good cause,

3 IT IS HEREBY ORDERED that a penalty amount of \$1,262.00 is assessed  
4 against the Appellant, Saturday Sunday, and the Appellant shall pay this amount to  
5 the Department by check or money order payable to the Montana Department of  
6 Environmental Quality within 30 calendar days of this order. The check shall be  
7 sent to Mr. John Arrigo, Administrator of the Enforcement Division as indicated on  
8 the Certificate of Service.

9 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

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JOSEPH W. RUSSELL, M.P.H.  
Chairman, Board of Environmental  
Review

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**CERTIFICATE OF SERVICE**

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

Ms. Joyce Wittenberg  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
**(original)**

Mr. Edward Hayes  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Mr. John Arrigo, Administrator  
Enforcement Division  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Mr. David Rodli  
David Rodli Law Offices  
2001 South Russell  
P.O. Box 2190  
Missoula, MT 59806

Ms. Katherine Orr  
Hearing Examiner  
1712 Ninth Ave.  
P.O. Box 201440  
Helena, MT 59620-1440

DATED: \_\_\_\_\_



Brian Schweitzer, Governor  
Richard H. Opper, Director

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • [www.deq.mt.gov](http://www.deq.mt.gov)

November 16, 2010

Joe Russell, Chairman  
Montana Board of Environmental Review  
P.O. Box 200901  
Helena, MT 59620-0901

RE: Recommendation to Approve Gallatin Local Water Quality District  
Amended Program

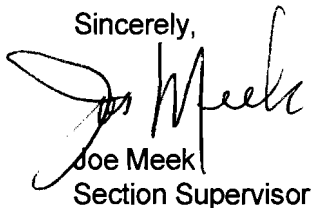
Dear Chairman Russell:

It is the recommendation of the Department that the Board of Environmental Review (Board) approve the amended Gallatin Local Water Quality District program. The staff of the Planning, Prevention and Assistance Division have reviewed the amended program application and finds the program to be consistent with the purposes and requirements of the Montana Water Quality Act as well as effective in protecting, preserving, and improving the quality of surface and ground water. Enclosed is a brief description of the program and the Five-Year Strategic Plan for Fiscal Years 2010 through 2014

The Gallatin County Board of Commissioners formed the district, set the district boundaries and appointed a board of directors in 1997. The Board of Environmental Review approved Gallatin Local Water Quality District program on June 20, 1997. The boundaries of the district were expanded in 2010 by the Gallatin Local Water Quality District board and the program plan was amended accordingly. Implementation of the program in the areas added to the district is subject to BER approval.

The department has determined the completeness of the amended program application and made the above recommendation in accordance with 75-5-311, Montana Code Annotated, and the Administrative Rules of Montana 16.20.505.

Sincerely,



Joe Meek  
Section Supervisor

Enclosures

Amended Program  
5-year Plan  
FY11 Budget



# Gallatin Local Water Quality District

1709 W. College St., Suite 104  
Bozeman, MT 59715  
(406) 582-3148    [www.gallatin.mt.gov/GLWQD](http://www.gallatin.mt.gov/GLWQD)



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## ISSUE:

The Gallatin Local Water Quality District (GLWQD) was created by the Gallatin County Commission with passage of County Resolution 1995-55, under the authority of Montana Code Annotated (MCA) 7-13-Part 45. The GLWQD program was approved by the Montana Board of Environmental Review on June 20, 1997, as required by MCA 75-5-202. The GLWQD provides an annual report to the Montana Department of Environmental Quality that evaluates the effectiveness of the district program. The GLWQD is funded by a \$6.00 per year fee assessed on improved properties within the District.

The Mission of the GLWQD is to protect, preserve, and improve the quality of surface waters and ground waters within the District. The GLWQD provides education and assistance to District residents, including information on water quality and quantity, proper care of ground water wells and septic systems, water quality testing, and safe handling and disposal of hazardous chemicals. The GLWQD also maintains a network of ground-water monitoring wells, routinely works with other agencies and organizations to monitor ground water and surface water quality, and periodically conducts special investigations to evaluate water quality issues.

It is the desire of the GLWQD Board to extend efforts to protect and preserve water quality to the north, south, and west of the original District boundary (see attached map). Pollution and degradation of ground water and surface water pose both immediate and long-term threats to the health, safety, and welfare of the citizens of Gallatin County. The costs to clean up contaminated ground water and surface water far exceed the costs to prevent contamination in the first place. The expansion of the District boundary to the north, west, and south of the original boundary will allow the GLWQD to expend funds and dedicate staff time to monitor water quality, assist residents in the area, and assess water quality issues in these growing areas.

The GLWQD Board determined that the program and boundary expansion is "consistent with the purposes and requirements of Title 75, chapter 5 MCA, and that the program is effective in protecting, preserving, and improving the quality of surface water and ground water, considering the administrative organization, staff, and financial and other resources available to implement the program" per 7-5-311(3) MCA. The GLWQD Board has heard and decided upon protests made against the proposed District boundary expansions and voted to adopt the resolutions to amend the District boundary.

## ACTION REQUESTED:

As required by 7-5-311(7) MCA the GLWQD Board will submit a program amendment to the Board of Environmental Review (provided for in 2-15-3502 MCA) at the Dec 3, 2010 meeting for their approval before implementing the local water quality program in areas that have been added to the District.

## CONTACT INFORMATION:

Alan English, Manager  
Gallatin Local Water Quality District  
[alan.english@gallatin.mt.gov](mailto:alan.english@gallatin.mt.gov) (406) 582-3148

# Gallatin Local Water Quality District

1709 W. College St., Suite 104  
Bozeman, MT 59715  
(406) 582-3148      [www.gallatin.mt.gov/GLWQD](http://www.gallatin.mt.gov/GLWQD)

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## **Existing or potential water pollution problems include:**

- Potential and known contamination of ground water from septic systems and public sewage systems. The District recently completed an inventory and mapping project that indicates there are currently 13,350 active septic systems in Gallatin County that discharge about 4 million gallons of effluent per day to ground water. In addition, at least 147 public sewage systems in the County were identified, that discharge about 8.5 million gallons of effluent per day to both ground water and surface water.
- Several areas in the District have been identified that have elevated levels of nitrate in ground water. These areas include the foothills along the southwest flank of the Bridger Range, the foothills along the north flank of the Gallatin Range, the River Rock area southwest of Belgrade, and the Logan area. Sources of elevated nitrate in ground water include fertilizer, decay of plant materials, stormwater runoff, and sewage disposal from public systems and septic systems.
- A recent review of public water system monitoring data indicates that some public water supply wells located south of Belgrade show an increasing trend in nitrate concentrations in ground water.
- Widespread and increasing use of pharmaceuticals results in these compounds being present in relatively high concentrations in wastewater, even after treatment. Some of the pharmaceutical compounds present in treated wastewater ultimately end up in ground water and surface water. A cooperative study between the Montana Bureau of Mines and Geology and the District showed that pharmaceuticals were present in most of the ground water and surface water samples collected in the District.
- Elevated levels of arsenic in ground water have been detected in the Amsterdam/Churchill area and the Logan area. This area was not formerly within the District so the District has not investigated the source(s) of the arsenic.
- As Gallatin County has grown, the volume of urban and suburban stormwater runoff has increased. Disposal of stormwater into the subsurface or into surface water bodies poses the risk of causing contamination problems. The District is currently working with the City of Bozeman and the County Health Department to determine the source of elevated levels of fecal coliform bacteria in a City storm sewer system.
- The District includes several State and Federal Superfund sites. These include the Bozeman Solvent Site and the Idaho Pole Site. In addition there are numerous active leaking underground storage tank sites within the District.
- Throughout the District there is widespread use of both fertilizers and pesticides, which both pose a threat to water quality if improperly used.
- Improper disposal of household hazardous waste and hazardous waste from businesses also pose a threat to water quality.

## **Location**

A map showing the previous District boundary and the new boundary with the three expansion areas included is attached. The original District covered 815 square miles and the area included within the District with the new expansion area covers 1,299 square miles within Gallatin County. The District includes the incorporated areas of Bozeman, Belgrade, and Manhattan, and the unincorporated communities of Big Sky, Churchill, Logan, and Four Corners.

# Gallatin Local Water Quality District

1709 W. College St., Suite 104  
Bozeman, MT 59715  
(406) 582-3148      [www.gallatin.mt.gov/GLWQD](http://www.gallatin.mt.gov/GLWQD)

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## **Water Resources in the District**

The District includes the Gallatin Valley Aquifer system, which is a large intermountain basin containing a mix of gravel, sand, silt, and clay. This aquifer is highly productive, with an estimated annual discharge of about 240,000 acre feet. Numerous smaller aquifers in the District include small alluvial aquifers along tributary streams and smaller mountain valleys. Surrounding the valley areas there are ground water resources within bedrock aquifers in the mountains and foothills. Surface water bodies include the West Gallatin River with an annual flow of about 500,000 acre-feet as it enters the Gallatin Valley, and numerous tributary streams that discharge about 198,000 acre-feet annually. In addition there is an extensive network of irrigation ditches within the District. Throughout the District there is extensive ground water-surface water interaction between the aquifers and rivers, streams, and ditches. The Montana Bureau of Mines and Geology is currently working on two Ground Water Investigations in the Gallatin Valley and also on characterization of water resources in both Gallatin and Madison Counties under the Ground Water Characterization Program.

Water rights are an important aspect of water resources within the District. The entire area is within the Upper Missouri River Closed Basin. Within the Closed Basin no new appropriations of surface water are generally allowed, and new appropriations of ground water are now being required to include some type of mitigation plan. There are over 13,000 exempt wells within the District, along with all of the irrigation facilities and permitted ground water discharges. While the District does not get directly involved in water rights issues, it does work with others to better understand the issues and the hydrogeology of the area.

## **Water Use in the District**

Information on water usage throughout the entire District has not been compiled, but previous work by the District to look at water usage within the Gallatin Valley, where the majority of the usage occurs, indicates that by far agricultural usage is the most significant, with an estimated consumptive use of 122,000 acre-feet/year. Consumptive use by Public Water Supply wells is about 3-4000 acre-feet/year, and by private (exempt wells) about 1,800 acre-feet/year.

## **District Program**

The Board of Directors reviews and approves the District's work plan on a Five-year basis with adoption of a Five-Year Strategic Plan. The District's program goals, objectives, and implementation schedule are described in the attached Five-Year Strategic Plan for Fiscal Years 2010-2014.

## **District Budget**

The District is funded by a The District budget is reviewed and approved by both the District Board and the Gallatin County Commission. The County Commission has the primary statutory authority over the District's budget. A detailed budget table is attached that shows the Fiscal-year 2011 budget as approved by the Board and Commission. The budget includes \$233,867 for personnel costs, which is used to cover a District Manager, a Water Quality Specialist, a Water Quality Technician, an Administrative Assistant, and a student intern. A total of \$7,600 is budgeted for office supplies and operating supplies. The remainder of the budget covers all operations costs, including office space, travel, phones, computers, and equipment.

# Gallatin Local Water Quality District

1709 W. College St., Suite 104  
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(406) 582-3148      [www.gallatin.mt.gov/GLWQD](http://www.gallatin.mt.gov/GLWQD)

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## **Cooperation with other Agencies and Organizations**

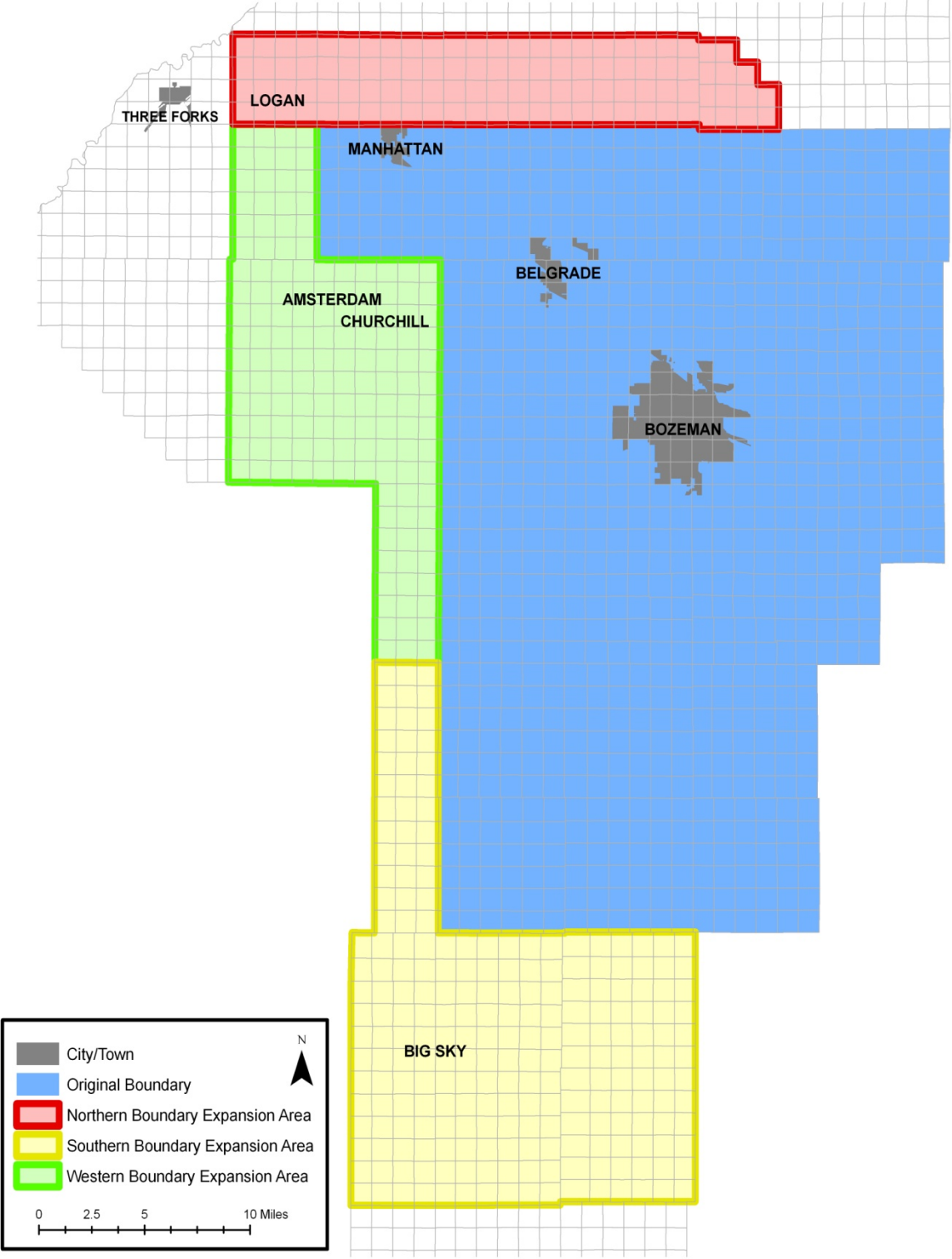
To avoid duplication of effort and help the District achieve its goals, the District works cooperatively with a number of agencies and organizations. The District regularly works with the Gallatin County Planning Department and Gallatin County Health Department. It also works with various divisions of DEQ, and DNRC. The District maintains a cooperative agreement with the Montana Bureau of Mines and Geology to monitor wells within the District, and works with several of the MBMG programs, including the Ground Water Information Center, the Ground Water Characterization Program and the Ground Water Investigations Program.

The District also works with several non-governmental agencies. District staff serves on the Board for the Greater Gallatin Watershed Council and the Gallatin Association of Agricultural Irrigators. The District participates in cooperative education efforts with the Montana Outdoor Science School each year, and also works with area schools to provide education on water related topics.

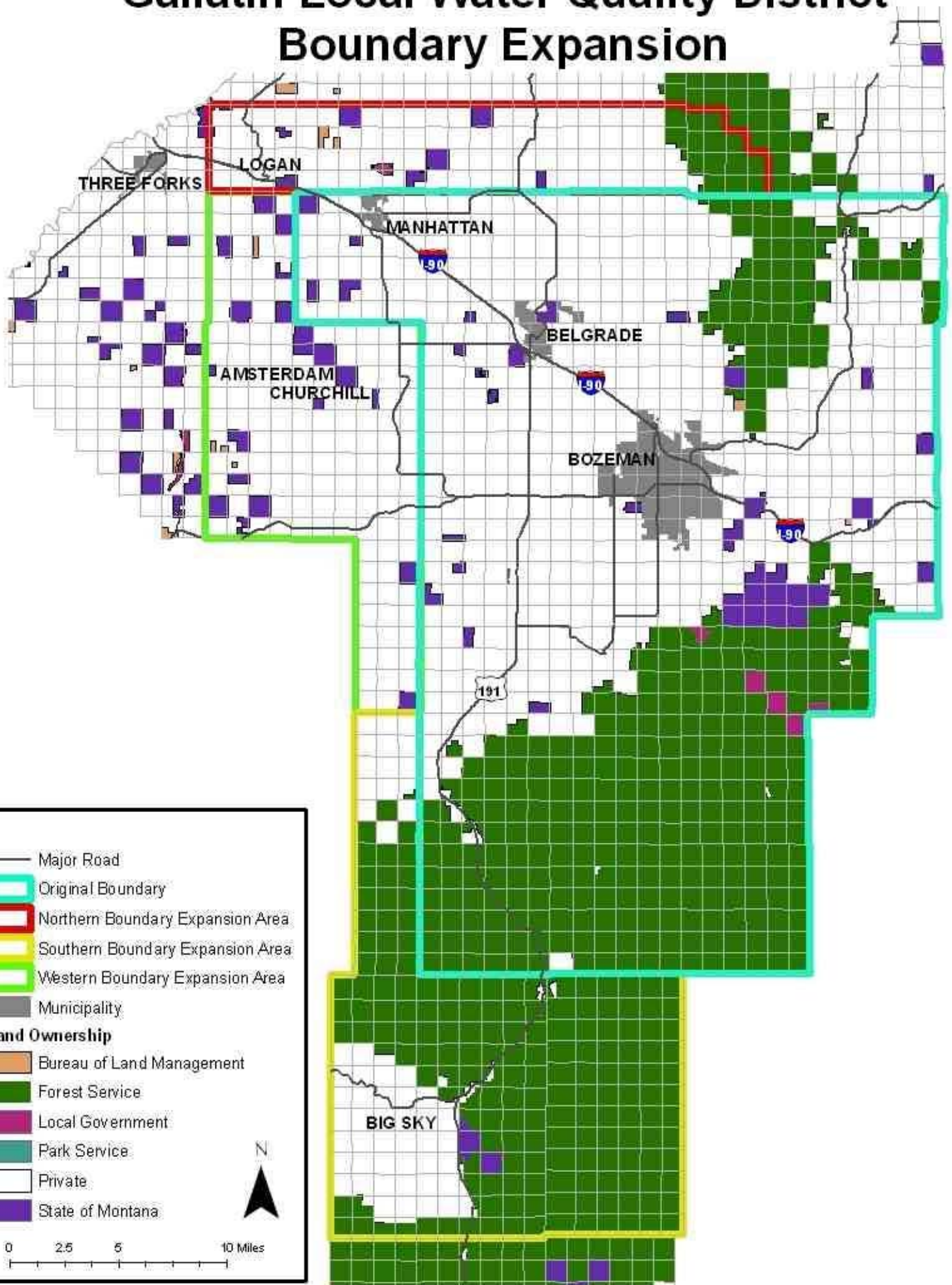
## **Permits, Ordinances, and Regulatory Enforcement**

The District is non-regulatory and does not propose to issue any type of permits, adopt any ordinances, or enforce local rules and regulations. The District was originally approved under this non-regulatory model, and there are no intentions to change it.

# Gallatin Local Water Quality District Boundary Expansion



# Gallatin Local Water Quality District Boundary Expansion



# **Gallatin Local Water Quality District Five-Year Strategic Plan For Fiscal Years 2010 Through 2014**

Prepared  
For  
Gallatin Local Water Quality District Board of Directors  
And  
Montana Department of Environmental Quality

By  
Alan English  
Gallatin Local Water Quality District Manager  
November 4, 2010



**View Looking northeast at the West Gallatin River in the Central Park Area**

## **ADOPTION**

The Gallatin Local Water Quality District Board of Directors adopted this five-year strategic plan by motion at the April 2, 2009 meeting of the Board of Directors.

## **AMENDMENTS**

On November 4, 2010 the Board approved revisions to the five-year strategic plan to incorporate work plans for areas recently added to the District boundary on the North, West, and South sides.

## **PURPOSE**

The purpose of this five-year strategic plan is to provide long-range guidance to the Gallatin Local Water Quality District (District) Board of Directors and staff for the five-year period from Fiscal-Year 2010 through Fiscal-Year 2014 (July 1, 2009 through June 30, 2014). Fiscal years are used for the five-year strategic plan to coincide with budget years. The plan is intentionally general in nature and is focused on achieving the District's Mission based on long-range goals and objectives.

More specific guidance is provided each fiscal-year by an Annual Work Plan outlining the District's priorities for the year. The five-year strategic plan is designed to provide the basis for setting priorities each fiscal-year. The Board recognizes that new objectives may be identified during the 5-year period, and some of the objectives listed may be removed or postponed based on new information, budget limitations, and staff workload. Any amendments to the five-year strategic plan will be made by Board motion, and documented in the Amendments section of the plan.

## **BACKGROUND**

### **Creation**

The Gallatin County Commission created the Gallatin Local Water Quality District on December 5, 1995, by Resolution Number 1995-55. A Gallatin Local Water Quality District Program Application was submitted to the Montana Department of Environmental Quality (MDEQ) on April 25, 1997. Based on a review of the District's Program Application, and an Environmental Assessment completed by MDEQ, the State of Montana Board of Environmental Review approved the Gallatin Local Water Quality District on June 20, 1997.

### **District Expansion**

In February 2010 the Board approved two resolutions to change the District Boundary, adding lands to the West of the original boundary (Amsterdam/Churchill area), and lands to the south of the original boundary (Big Sky area). In May 2010 the Board approved a third resolution to add lands to the north of the original boundary (Dry Creek-Logan area).

## **District Board**

The District was originally contained within the Environmental Health Division of the Gallatin City-County Health Department and governed by the Gallatin City-County Board of Health, with the addition of one Board member from the Gallatin Conservation District, and representatives from the City Councils of Bozeman, Belgrade and Manhattan. The District was reorganized in 1999 and is now a separate Department within Gallatin County and is governed by a dedicated Water Quality District Board of Directors consisting of members selected as required by Montana Code Annotated (MCA) 7-13-4516.

The Board of Directors consists of the following representatives:

Gallatin County Commissioner  
Gallatin Conservation District Supervisor  
Gallatin City-County Board of Health Member  
Bozeman City Council City Member  
City of Bozeman At-Large Member  
Belgrade City Council Member  
City of Belgrade At-Large Member  
Manhattan Town Council Member  
Town of Manhattan At-Large Member

## **Board Liaisons**

No incorporated areas were included in the three expansion areas recently approved by the Board. However, the Board has in recent years added several liaisons, which are non-voting representatives from other County Departments. Currently liaisons have been appointed to represent the Health Department (Environmental Health), the Planning Board, and the Planning Department. The potential for liaisons from the expansion areas will be evaluated and pursued to increase communication and effectiveness in these areas.

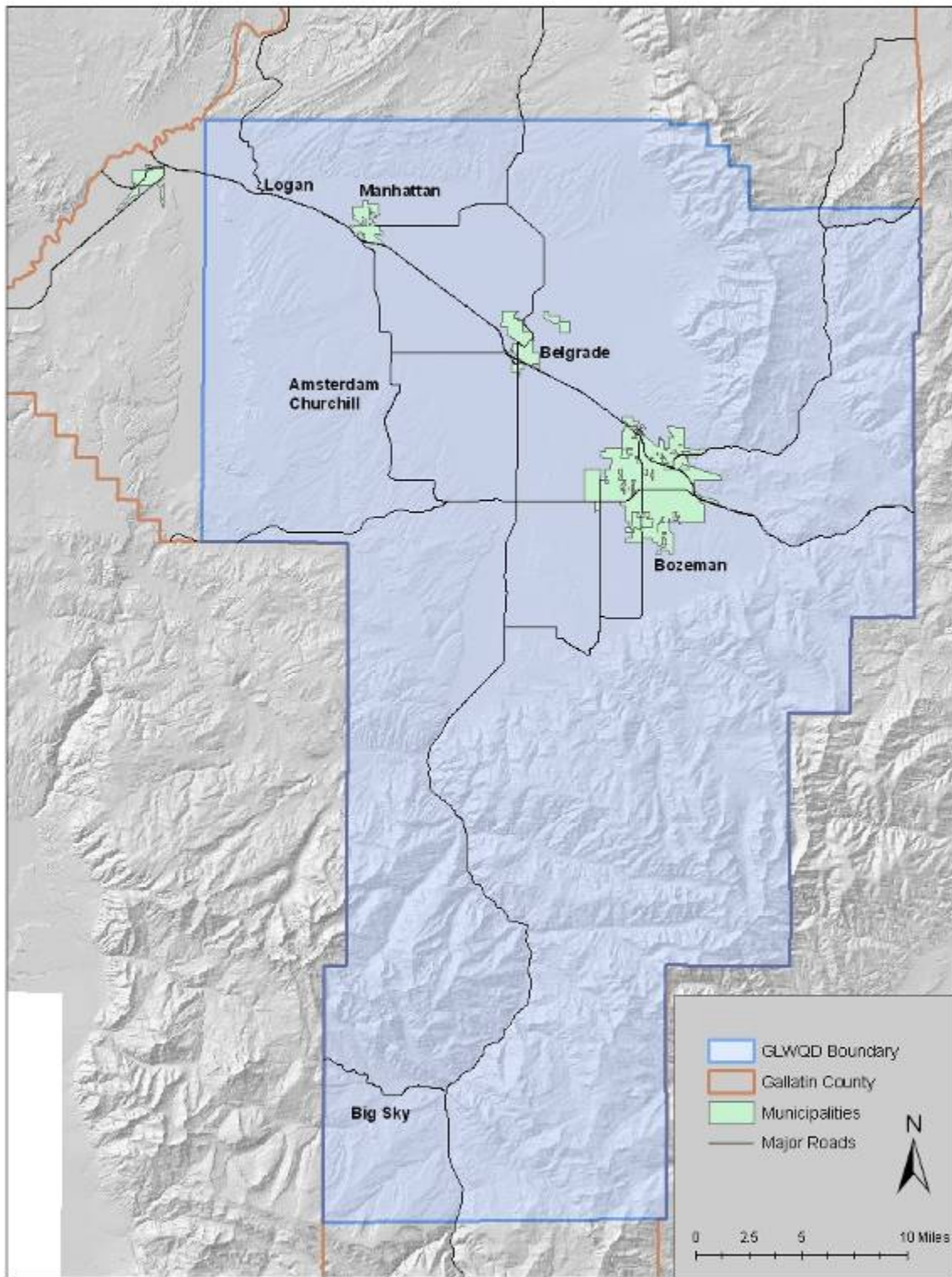
## **Staff**

District staff currently consists of a permanent full-time Manager, one permanent full-time Water Quality Specialist, one temporary Water Quality Specialist, and a permanent half-time Administrative Assistant. In addition, interns, and other temporary employees, including students from Montana State University, may be hired to assist with various projects.

Staffing is considered sufficient to address the workload in the new expansion areas. This is in part because existing staff have been providing some services in these areas already. Once District fees begin being collected in the expansion areas, funding for the second Water Quality Specialist position should also be more stable.

## **District Boundary**

The District overlays the middle portion of Gallatin County, covering an area of 1,299 square miles as shown in Figure 1. The District includes the City of Bozeman, City of Belgrade, and Town of Manhattan, and the Town of Churchill. The unincorporated areas of Big Sky (Gallatin County portion), Four Corners, Gallatin Gateway, and Logan area also included within boundaries of the District.



**Figure 1.** Map showing the location of the Gallatin Local Water Quality District, which covers 1,299 square miles within Gallatin County. The District includes the incorporated areas of Bozeman, Belgrade, and Manhattan, and the unincorporated communities of Big Sky, Churchill, Logan, and Four Corners.

## **WATER QUALITY DISTRICT MISSION AND PROGRAM APPROACH**

### **Mission Statement**

The Mission of the Gallatin Local Water Quality District is

*“To protect, preserve, and improve the quality of surface waters and ground waters within the Local Water Quality District”.*

While the District’s mission statement is focused on surface-water and ground-water quality, water-quantity issues are related to water-quality issues and are also considered.

### **District Service**

Built into all of the District’s programs and activities will be the general philosophy that the District is a place where citizens can get satisfactory answers to questions related to water resource issues. The District will strive to be a clearinghouse for information, and assist citizens with contacting other agencies and organizations as needed. This same level of service will be extended to local groups, organizations, and governmental agencies.

### **Watershed Perspective-Ground Water/Surface Water Interaction**

To aid in meeting the Mission of the District, programs and activities of the District will be based on a watershed perspective. Using this approach, the flow system is viewed as an interconnected whole rather than focusing on ground-water and surface-water features as separate resources. Development of a better understanding of the interactions between ground water and surface water is an important objective of the District. Although limited data are available, the hydrogeologic setting within the District suggests there is significant interaction between ground water and surface water due to the presence of shallow ground water in many areas, an extensive network of surface-water features, and the extensive use of irrigation within the boundaries of the District. Protecting and improving ground-water resources has a positive impact on surface-water resources and vice-versa.

### **Non-Regulatory Focus**

The District’s programs and activities will be focused on non-regulatory activities. Activities are not anticipated to include development of any District regulations. However, the Board of Directors, with concurrence from the Gallatin County Commission, may authorize the District to pursue enforcement authority from the State to enforce provisions of the Montana Water Quality Act as allowed by Administrative Rules of Montana (ARM) 17.30.1806 if warranted.

While the District’s programs will not include development of local regulations, this does not preclude other agencies or interested organizations from developing regulations based on data collected by the District. The District may be indirectly involved in regulatory issues by providing data or comments to other agencies or organizations, when the regulatory issue(s) pertain to water resources within the District and the regulatory activities may have a positive or negative impact on the District’s Mission. To aid in protecting water resources within the boundaries of the District, staff will aid local citizens by forwarding valid complaints regarding regulatory issues to the agencies responsible for enforcement of regulations designed to protect water resources.

## WORK PLAN GOALS AND OBJECTIVES

### Goals

The District's programs and activities will be focused on 1) maintaining an effective public education program, 2) maintaining a long-term water-quality and water-quantity monitoring network, and 3) collecting, compiling, and disseminating water resource information.

Research activities will be conducted as needed to complement these goals, and evaluate local water resource issues. As appropriate, the District will also track known water quality problems and advocate for remedial activities or corrective actions to protect water resources.

The following goals are established to guide the District during the strategic planning period:

**I. Education Goal:** *Conduct public education to increase public awareness and understanding of the importance of protecting and improving water resources within the District through District education programs and cooperation with educational programs conducted by other organizations.*

**II. Monitoring Goal:** *Maintain a long-term, water quality and quantity monitoring network, consisting of dedicated monitoring wells and selected surface-water sampling sites, to establish baseline data and begin long-term water quality and quantity monitoring.*

**III. Information Collection and Dissemination Goal:** *Collect, compile, and disseminate water-resource data and information for the benefit of all citizens, organizations, groups, and governmental agencies interested in water resources within the District.*

### Objectives

During the five-year strategic plan period District efforts will be focused on meeting the objectives listed below. Possible tasks to be completed to help meet each objective are listed below the objective. Many of these tasks are on-going activities.

#### *Education and Outreach Objectives*

##### **1. Coordinate District education activities with other organizations and agencies**

- Conduct outreach to educate other organizations and groups about the District
- Evaluate and use educational resources available from other organizations
- Participate with other organizations in cooperative education activities

##### **2. Develop District education resources**

- Maintain and Improve the District's Web site
- Provide links to other useful water resource web sites on the District web site
- Maintain and Improve the District's in-house reading library
- Develop and provide educational brochures and fact sheets on topics of interest
- Develop and provide educational presentations on topics of interest

##### **3. Develop District educational programs to supplement existing programs concerning:**

- District ground-water and surface-water interaction education
- Household hazardous waste minimization and disposal
- Pollution Prevention and proper handling of hazardous materials
- Non-point sources (stormwater, construction, agriculture, livestock)

- Wetlands (importance and protection)
- Source water protection for Public Water Supplies
- Water conservation practices
- Participate with and assist citizen groups interested in special studies
- Public education on private well and septic system care and maintenance.

#### **4. Conduct District outreach to improve public awareness of the District**

- Develop and distribute a periodic newsletter with educational information and a summary of District activities
- Develop and distribute an annual report summarizing yearly activities
- Provide presentations to home owners associations
- Provide presentations to area business, trade, and social organizations
- Participate in seminars, conferences, tours etc.
- Interact with and assist other County and City departments, and other agencies
- Use public media to increase public awareness of the District
- Offer information and assistance to District Public Water Supply and Wastewater Treatment Plant operators
- Assist other agencies with developing solutions for hazardous waste disposal

### ***District Monitoring Objectives***

#### **5. Maintain and improve a District-wide ground-water monitoring well network**

- Cooperate with the Montana Bureau of Mines and Geology (MBMG) to maintain and improve wells included in the Statewide Monitoring Program
- Incorporate continuous water-level monitoring into the monitoring well network
- Obtain access to existing monitoring wells installed by others when appropriate
- Secure grant funds for well construction, maintenance, and water quality sampling
- Establish new monitoring well location in the expansion areas and update the District's Long Term monitoring plan

#### **6. Monitor known sources of ground water contamination and advocate for remediation and/or infrastructure improvements to protect ground water quality**

- Track remediation activities at established State and Federal Superfund Sites and work with DEQ and EPA to advocate for timely and effective remediation (Bozeman Solvent Site, Idaho Pole, others)
- Track remediation activities at known leaking underground storage tank sites and work with DEQ to advocate for timely and effective remediation.
- Track ground water monitoring activities required by DEQ at landfills, wastewater treatment plants, and other sites, and advocate for corrective actions when appropriate
- Work with EPA to evaluate the use of Class V injections wells for disposal of non-domestic wastewater and advocate for improved treatment or closure when appropriate

#### **7. Establish a District-wide surface-water monitoring network**

- Evaluate and select surface water sites for long-term monitoring including the West Fork of the Gallatin in Big Sky, Dry Creek in the north expansion area, and Camp Creek and Godfrey Creek in the Amsterdam/Churchill area.
- Collect and compile surface-water quality data to establish baselines and trends

- Collect and compile surface-water flow data within District to the extent practical
- 8. Develop a program to monitor stormwater quality in cooperation with municipalities and Gallatin County**
  - Conduct sampling to document stormwater quality
  - Assess current methods of stormwater treatment and recommend improvements to protect water quality

### *Information Collection and Dissemination Objectives*

- 9. Cooperate with others to develop and maintain District-wide databases**
  - Provide ground-water data within the District to the MBMG Ground Water information Center (GWIC)
  - Develop and maintain a GIS compatible database for ground-water quality data to supplement the GWIC database
  - Develop and maintain a GIS compatible database for surface-water quality data to supplement the EPA STORET and Montana's EQuIS databases
  - Assist DEQ with updating its public water supply database
  - Coordinate with other departments, agencies and groups for data collection
- 10. Compile historical water resource data and enter in GIS data sets**
  - Compile water resource data from old subdivision files
  - Compile water-quality and water-quantity data from published reports
  - Compile aquifer property data from published reports and agency files
  - This effort will be expanded to include data from the new areas of the District
- 11. Construct GIS data layers for incorporation into the County's Internet map site**
  - Post a map layer showing the District's ground water monitoring well network
  - Create and post a map layer showing the District's surface water monitoring sites
  - Create and post a map layer showing known sources of ground water contamination
  - Post the map layer previously created for wetland and riparian areas
- 12. Support and conduct water resource research within the District**
  - Encourage and support research projects at MSU and other Universities
  - Encourage and support research by other agencies or groups
  - Evaluate stormwater impacts to water resources
  - Study ground-water level trends in District (declining water levels)
  - Study impacts to ground water and surface water from growth, including disposal of wastewater
  - Study hydrogeologic subareas within the District
  - Compile water resource data dealing with disaster response, in cooperation with Public Health, Environmental Health, and Emergency Response agencies
  - Conduct research to assess local water quality problems as they arise
  - Develop educational information for disaster related water resource issues
  - Conduct a hydrogeologic assessment in the Logan area to evaluate potential sources of contamination (nitrate, coliform bacteria, organic chemicals, arsenic)
  - Sample wells in the Amsterdam/Churchill area to determine the nature and extent of arsenic contamination in ground water in the area.

### *Development Review*

#### **13. Review and comment on proposed developments with regards to potential impacts to water resources**

- Review and comment on proposed major subdivisions in cooperation with other County departments.
- Review and comment on proposed minor subdivisions and conditional use permits when requested by other County departments
- Review and comment on other proposed developments or projects that may impact water resources on a discretionary basis.

### **CONTACT INFORMATION**

The Gallatin Local Water Quality District office is located in the Judge Guenther Memorial Building at the following address:

**Judge Guenther Memorial Building  
1709 West College Street, Suite 104  
Bozeman, Montana  
59715**

For information or questions regarding this work plan, or the current status of District activities, contact Alan English at the address listed above, or by phone at (406) 582-3148, or email at [alan.english@gallatin.mt.gov](mailto:alan.english@gallatin.mt.gov). You can also visit our website at [www.gallatin.mt.gov/GLWQD](http://www.gallatin.mt.gov/GLWQD).

Additional staff contacts:

Tammy Crone, Water Quality Specialist, (406) 582-3145, [tammy.crone@gallatin.mt.gov](mailto:tammy.crone@gallatin.mt.gov)

Erinn Zindt, Water Quality Specialist, (406) 582-3167, [erinn.zindt@gallatin.mt.gov](mailto:erinn.zindt@gallatin.mt.gov)

Nikki McGee, Administrative Assistant, (406) 582-3168, [nikki.mcgee@gallatin.mt.gov](mailto:nikki.mcgee@gallatin.mt.gov)

**Gallatin Local Water Quality District Preliminary Budget for Fiscal Year 2011 (Updated August 23, 2010)**

Code	Description	FY 2010 BUDGET	FY 2010 EXPENDED (April 30th)	FY 2011 PROPOSED	Comments	FY 2011 APPROVED (8/23/10)
110	Salaries and Wages (Perm.)	\$171,331	\$132,518	\$176,470	HR Numbers w/3% allowance	\$174,757
112	Temporary Employee	\$10,000	\$5,415	\$6,500	Student Temp(s)	\$8,000
140	Employer Contributions	\$49,152	\$36,639	\$50,626	HR Numbers w/3% allowance	\$51,110
<b>Subtotal Personnel</b>		<b>\$230,483</b>	<b>\$174,572</b>	<b>\$233,596</b>		<b>\$233,867</b>
210	Office Supplies	\$2,000	\$1,406	\$1,800		\$1,800
220	Operating Supplies	\$2,000	\$837	\$1,500	Supplies unique to District activities	\$1,500
221	Software	\$2,500	\$0	\$1,500	GIS Maintenance?	\$1,500
224	Food	\$750	\$92	\$200		\$200
226	Clothing & Uniforms	\$0	\$121	\$100	Line item not in original budget	\$100
	Repair and Maintenance Supplies	\$750	\$1,296	\$500	Stainless Steel Pump Repair	\$500
235	Equipment (not outlay)	\$3,000	\$721	\$2,000	Includes field equipment, office equip.	\$2,000
<b>Subtotal Supplies</b>		<b>\$11,000</b>	<b>\$4,473</b>	<b>\$7,600</b>		<b>\$7,600</b>
312	Postage	\$2,500	\$1,324	\$1,500		\$1,500
320	Printing & Duplicating	\$1,500	\$485	\$1,000		\$1,000
330	Subscriptions and Dues	\$400	\$0	\$200	Includes publications	\$200
331	Publication of Legal Notices	\$350	\$263	\$350	Agendas, RFPs	\$350
335	Membership Fees and Dues	\$400	\$0	\$200		\$200
337	Advertising	\$4,000	\$384	\$2,500		\$2,500
345	Telephone	\$4,700	\$3,441	\$4,152		\$4,152
346	Cell Phones	\$750	\$410	\$300	for 1 cell phone, dropping mine	\$300
350	Professional Services	\$84,548	\$9,023	\$21,378	Lab, drilling, other purchased services	\$40,198
360	Repair and Maintenance	\$2,000	\$0	\$2,000	For repair of field equipment	\$2,000
362	Office Machine Repair & Maint.	\$1,500	\$2,226	\$1,500	GIS Software Maintenance Taken from here	\$1,500
366	Building Maintenance	\$19,289	\$14,467	\$16,937	Decreased!	\$16,937
370	Travel	\$6,000	\$2,771	\$3,500		\$3,500
380	Training	\$2,000	\$420	\$1,000		\$1,000
390	Contracted Services	\$14,488	\$0	\$4,000		\$4,000
513	Liability Insurance	\$2,315	\$2,287	\$2,598		\$2,598
530	Rent	\$500	\$0	\$8,613		\$8,613
570	Licenses, filing fees	\$250	\$0	\$100		\$100
590	Indirect Costs	\$8,613	\$8,613	\$9,404	4.85% of Revenue (\$193,906)	\$9,404
630	Service Charges	\$100	\$2	\$20		\$20
630	Donations	\$500	\$350	\$400		\$400
940	Capital Outlay-Equipment	\$6,000	\$0	\$500		\$0
<b>Subtotal Operating</b>		<b>\$162,703</b>	<b>\$46,466</b>	<b>\$82,152</b>		<b>\$100,472</b>
<b>Total Personnel, Supplies, and Operating</b>		<b>\$404,186</b>	<b>\$225,511</b>	<b>\$323,348</b>		<b>\$341,939</b>

REVENUE					
Source	Projected	Actual	Projected		
District Fees (Real and Personal Property)	\$185,706	\$185,565	\$185,706	Based on 31,802 units @ \$6/unit	\$190,812
Fee Penalties and Interest	\$500	\$852	\$500		\$500
Investment Earnings	\$5,000	\$1,127	\$1,000	Significant decrease due to economics	\$1,000
Charges for Services	\$6,500	\$6,496	\$6,400	Includes MBMG well monitoring payments	\$6,400
Misc. Income	\$500	\$184	\$300	Well Caps, donations	\$300
Cash Carry Over	\$195,000	?	\$129,442	Estimated from April 30th trial balance	\$142,927
<b>TOTALS</b>	<b>\$393,206</b>		<b>\$323,348</b>		<b>\$341,939</b>

**BOARD OF ENVIRONMENTAL REVIEW**  
**AGENDA ITEM**  
**EXECUTIVE SUMMARY FOR**  
**WATER QUALITY STANDARDS AMENDMENTS**

**Agenda Item No.:** III-D-2.

**Agenda Item Summary:** To consider comments made on pesticides and the Biotic Ligand Model during the 2010 Triennial review.

**List of Affected Rules:** circular DEQ-7

**Affected Parties Summary:** principally the agricultural and the mining industries

**Scope of Proposed Proceeding:** The department will summarize public comments received during the triennial review of Montana water quality standards, requesting adoption of the biotic ligand model for copper, modification to existing pesticide standards and modification of category for certain pesticides. The Department will recommend that the board not propose rule amendments at this time, in response to these comments

**Background:** The board is conducted a triennial review of all water quality standards in 2010. During the 60 day comment period, which ended on 16 June 2010, a series of comments were received concerning pesticides and a comment was made to consider adoption the Biotic Ligand Model (BLM) for copper.

**Pesticides**

1) A comment received stated that the Atrazine and Simazine are incorrectly categorized as “carcinogens”. DEQ-7 uses a single category for carcinogen. We rely on EPA’s determination of carcinogenicity which is broken down into a series of categories as follows:

**Group Category**

**A** Human carcinogen

**B** Probable human carcinogen:

**B1** indicates limited human evidence

**B2** indicates sufficient evidence in animals and inadequate or no evidence in humans

**C** Possible human carcinogen

**D** Not classifiable as to human carcinogenicity

**E** Evidence of non-carcinogenicity for humans

The current version of DEQ-7 groups EPA categories A, B1, B2, and C as carcinogen (footnote two of DEQ-7) and the current DEQ-7 listing for both atrazine and simazine is “carcinogen”, consistent with EPA’s category C.

The EPA instituted new categories in late 2009, in EPA-OW *Table of Drinking Water Standards and Health Advisories*. This document leaves in place the old categorization system for those compounds that have not been reevaluated and institutes an entirely new carcinogen category scale for pollutants which have been registered or reregistered since 2003. The new categories are:

**Group Category**

• **(H)** Carcinogenic to humans

• **(L)** Likely to be carcinogenic to humans

• **(L/N)** Likely to be carcinogenic above a specified dose but not likely to be carcinogenic below that dose because a key event in tumor formation does not occur below that dose

• **(S)** Suggestive evidence of carcinogenic potential

• **(I)** Inadequate information to assess carcinogenic potential

• **(N)** Not likely to be carcinogenic to humans

Atrazine and Simazine have gone through re-registration and are now categorized as N, under the new EPA system. The weight of new scientific evidence has categorized the cancer risk as less than previously, but the adoption of the

new carcinogen categories will require redrafting footnote two of DEQ-7 to include the new carcinogen grouping system. Since EPA has not provided a way to translate between the old categories and the new categories, the Board needs to consider how it will use the new EPA categories to define pollutants in DEQ-7 (likely by modifying footnote two). We recommend that the Board take no action at this time on this issue and allow the Department to work with EPA, any interested stakeholders and the Water Pollution Control Advisory Council (WPCAC) to craft an approach to consistently use the EPA dual category system in future versions of DEQ-7. The Department plans to incorporate this new approach in the 2011 DEQ-7 revisions and will report back to the Board to initiate rulemaking.

2) A comment pointed out that the EPA 2009 *Table of Water Quality Standards and Health Advisories* raises the recommended human health advisory for Metolachlor from 100ug/L to 700ug/L. The Department agrees that this change has been published. This change came out too late to be included in the 2010 DEQ-7 updates. The Department will bring this change, along with other changes provided in this 2009 Standards update, back to the Board for initiation of rulemaking for the 2011 update to DEQ-7.

3) A comment stated that the standards for atrazine and metolachlor incorrectly incorporated quantification of degradates with their parent pollutant. The process of incorporating degradates with their parent pesticide is referred to as additivity. The commenter provided the detailed calculation of the Maximum Concentration Limit (MCL) standard, demonstrating that only the parent compound was used by EPA in deriving the MCL. The Department agrees with the method of derivation for the MCL. Atrazine and metolachlor are Montana Human Health standards, that originate as MCL's developed by EPA under the Safe Drinking Water Act.

The issue of whether to incorporate degradates in development of a State standard is a complex one, currently under review by the EPA Office of Pesticide Programs (OPP) on the federal level. We are also in discussions with the Montana Department of Agriculture (MDA), who's monitoring program often generates the need for the development of an interim standard for degradates under the Montana Agricultural Chemical Groundwater Protection Act.

As of this moment, there is no EPA guidance on the issue of additivity for pesticides, beyond the concept of the Hazard Index. This Index states that unless a Human Health Advisory (HHA) or standard has been developed for the degradate, it is assumed to have toxicity identical to the parent compound, and the total toxicity is represented by the addition of the concentration of all degradates with their parent compound (the principal of additivity). This is the current position that DEQ-7 has taken in determining a standard.

To date, degradates are individually listed in DEQ-7 when they are more toxic than their parent compound or have a different categorization (toxic vs. carcinogenic) than their parent compound. Pesticides within DEQ-7 have inconsistencies in how additivity has been applied, which the Department intends to address in proposed revisions to DEQ-7 next year. We want to create a consistent procedure regarding the application of degradate additivity.

A great deal of new information has become available on chemical mixtures and additivity in the past five years and the Department will review the additivity issue for all pesticides in DEQ-7, to confirm the status of current toxicology information. This review of pesticide additivity will be conducted by the Department in close collaboration with the EPA OPP, the Montana Dept. of Ag. and stakeholders.

The Department recommends that the Board take no action to change the additivity function of pesticide degradates for atrazine and metolachlor at this time. The Department will bring whatever changes are necessary to create consistency in the application of additivity to DEQ-7 back to the Board for initiation of rulemaking for the 2011 update to DEQ-7.

#### The Biotic Ligand Model for copper

A comment was submitted requesting that the Department adopt the 2007 EPA Recommended Aquatic Life Ambient Freshwater Quality Criteria for Copper, EPA 822-R-07-001, commonly referred to as the Biotic Ligand Model (BLM).

In DEQ-7, the generation of a copper standard requires a correction for the hardness of the water from which the sample was extracted. As hardness increases, the toxicity of copper to aquatic life decreases. An EPA formula provided in DEQ-7 simply takes the measure of copper with the hardness (the sum of the concentrations of calcium and magnesium) and performs the calculation to derive the standard. The Biotic Ligand Model was developed to take into account other protective factors present in the water that act to influence the toxicity of copper. These factors

include hardness, dissolved organic matter, pH, temperature, sulfates, sulfides chlorides, sodium, potassium, and total alkalinity as bicarbonate. All of these factors are fed simultaneously into a complex EPA developed formula, to determine the standard for copper.

The Department has been evaluating the BLM for over a year. The BLM does represent state of the art science but there are many considerations related to implementation and interpretation. These include such factors as the fact that the EPA BLM is based on measurements of dissolved copper, but the State of Montana utilizes total recoverable copper values to be more protective of the environment. While the new BLM protocol was recommended for adoption by the EPA in 2007, no state has yet adopted it, primarily due to the many issues raised in its implementation, such as, how the data collected over the past 10-20 years could be compared with the data generated by the BLM.

There is also an issue of cost. The BLM requires as many as ten ancillary measurements to be made simultaneously to allow its proper calculation, more than doubling the cost of a single copper standard determination. The Department is currently consulting with the EPA, and holding internal discussions regarding implementation issues. The Department has already carried out a preliminary evaluation of all data collected in the State over the past ten years, and found very little data with all the required parameters needed, to make a BLM calculation. In 2011, the Department is planning to use specific field sites in Montana to evaluate some of the issues around data inter-comparison between the current hardness corrected copper standard and the BLM standard.

We recommend that the Board take no action at this time on the adoption of the BLM method and allow the Department to work with EPA, programs within the department, any interested stakeholders and the Water Pollution Control Advisory Council (WPCAC) to develop an approach which minimizes implementation and interpretation issues.

**Hearing Information:** N/A

**Board Options:**

The Board may:

1. Take no action at this time
2. Direct the Department to prepare rule modifications for the Board to initiate rule making

**DEQ Recommendation:** DEQ recommends no action by the Board in response to comments at this time. The Department would like to address these issues as follows:

1. Corrections for matters related to pesticides (changes in categorization and new standard limits) would be addressed in the 2011 updates to circular DEQ-7. These items will be brought back before the Board to initiate rulemaking after discussion with stakeholders and WPCAC.
- 2) The issue of additivity for degradates will be addressed with the EPA OPP, WPCAC, stakeholders, and the Montana Department of Agriculture prior to requesting the initiation of rulemaking.
- 3) The issue of BLM adoption will be under study in 2011. The Department will hold further internal discussion regarding implementation and technical discussions with the EPA.

**Enclosures:** None

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

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3   **IN THE MATTER OF:**  
4   **VIOLATIONS OF THE MONTANA**  
5   **UNDERGROUND STORAGE TANK ACT**  
6   **BY JUNIPER HILL FARM, LLC AT**  
7   **LAKE SIDE GENERAL STORE, LEWIS**  
8   **AND CLARK COUNTY, MONTANA.**  
9   **[FACILITY ID 25-13657; FID 1799;**  
10   **DOCKET NO. UST-09-09]**

CASE NO. BER 2009-18 UST

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11                   **PROPOSED ORDER ON PENALTIES**

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12           On May 27, 2010, the undersigned Hearing Examiner entered an Order  
13   Granting Motion for Summary Judgment filed by the Department of Environmental  
14   Quality (Department) based in part upon the signature of the Petitioner Juniper Hill  
15   Farm, LLC, (Juniper Hill) of an Agreed Statement of Facts in which the Petitioner  
16   admitted liability for the violations cited in the Notice of Violation and  
17   Administrative Compliance and Penalty Order dated August 28, 2009. In the Agreed  
18   Statement of Facts, Petitioner admitted to having committed 16 violations of ARM  
19   17.56.401, 17.56.402 and 17.56.409 of failing to conduct monthly release detection  
20   monitoring over the course of a year on two underground storage tank systems.  
21   Tanks No. 1 and 2 located at Juniper Hill, 5330 York Road, near Helena, Lewis and  
22   Clark County, Montana.

23           On June 4, 2010, a contested case hearing was held on the remaining factual  
24   issues of the appropriate penalty to be paid by Appellant for the 16 violations. The  
25   Department called Mr. Frank Gessaman as a witness and Mr. Thomas C. Morrison  
26   (Tom) testified for the Appellant. The Department Exhibits 1, 12 through 16 were  
27   admitted and the Petitioner's Exhibits A through C were admitted. A table of the  
  exhibits is attached.

1 PROPOSED FINDINGS OF FACT

2 1. Mr. Gessaman is the Bureau Chief of the Case Management Bureau at  
3 the Department. It is his responsibility in part to review penalty calculations and to  
4 insure that the penalties calculated by Department staff properly apply the penalty  
5 calculation procedures contained in the administrative rules, ARM 17.4.301 through  
6 17.4.308. Testimony Gessaman.

7 2. Mr. Gessaman testified about the penalty calculation applied by the  
8 Department for violations of ARM 17.56.401, 17.56.402 and 17.56.409 referenced  
9 in the Notice of Violation and Administrative Compliance and Penalty Order. The  
10 violations involve the failure to perform monthly release detection monitoring.  
11 ARM 17.56.401 requires installed release detection measures for a tank or  
12 connected underground piping that contains product. ARM 17.56.402 requires  
13 owners and operators to provide release detection and requires that underground  
14 storage tanks be monitored for leaks at least every 30 days. ARM 17.56.409 requires  
15 underground storage tank owners and operators to maintain the results of any  
16 monitoring for at least a year.

17 3. The Department's September 2008, inspection documented that passing  
18 leak detection records were not available for five of the previous 12 months for  
19 Tank No. 1 and three of the previous 12 months for Tank No. 2. On November 5,  
20 2008, the Department sent a Warning Letter to notify Juniper Hill that the  
21 September 2008, inspection identified violations concerning release detection  
22 monitoring under the Underground Storage Tank Act. An April 2009, re-inspection  
23 by the Department revealed that passing monthly leak detection records were not  
24 available for five of the preceding 12 months for Tank No. 1 and 11 of the previous  
25 12 months for Tank No. 2. On April 30, 2009, the Department sent a Violation  
26 Letter to Juniper Hill. The Department deems that a lack of monthly line leak  
27

1 detection records are an indicator that proper release detection monitoring was not  
2 performed. Exhibits 12, 14.

3 4. The calculations of the Department follow the standards set forth in the  
4 applicable penalty rules. Specifically, the base penalty was determined by starting  
5 with the statutory maximum administrative penalty which is \$500.00. Testimony  
6 Gessaman, Exhibit 12. Paragraphs 6-10 below set forth the Department's process of  
7 determining a penalty.

8 5. Each occurrence of the violation and each day that it remains uncorrected  
9 constitutes a separate violation. Mont. Code Ann. § 75-11-525.

10 6. The base penalty was determined by reducing the maximum statutory  
11 penalty downward by a factor of .70 for "gravity and extent" because there was a  
12 potential for harm to public health or the environment. ARM 17.4.303. Gravity was  
13 determined to be moderate and the extent of harm was determined to be a major  
14 deviation because of the failure of the owner operator to have at least 6 months of  
15 monitoring records out of 12 months. Testimony Gessaman.

16 7. To the base penalty, the Department made an upward adjustment of 20%  
17 for the circumstances that the owner operator should have known the regulatory  
18 requirement to conduct monthly line leak detection monitoring and he failed to  
19 exercise reasonable care in adhering to program requirements appropriate to the  
20 circumstances. No adjustments downward were factored in for good faith and  
21 cooperation on amounts voluntarily expended over and above what is required to  
22 comply. ARM 17.4.304. Testimony Gessaman, Exhibit 12.

23 8. The Department determined that the number of days of violation amounted  
24 to 16 days, namely, 11 months for Tank No. 1 plus 5 months for Tank No. 2  
25 regarding which there were no monthly leak detection records generated. Testimony  
26 Gessaman, Exhibit 12.

1           9. The adjusted base penalty taking into account circumstances of failure to  
2 exercise reasonable care was calculated to be \$420.00. Multiplying this times the  
3 number of days of violation amounts to \$6,720.00. Testimony Gessaman, Exhibit  
4 12.

5           10. The Department decided to forgive \$4620.00 in penalties because it  
6 determined that a sufficient degree of deterrence would be achieved with a lower  
7 penalty. The Department determined that there were 11 months of violations for  
8 both tanks. The Department further reduced the number of days of violation to 5  
9 days of violation and assessed a penalty of \$2100.00 on the basis that \$2,100.00  
10 constitutes sufficient deterrence to the Petitioner. No additional adjustment upward  
11 was given for the economic benefit of non-compliance since the avoided cost of  
12 compliance was negligible. Testimony Gessaman.

13           11. The present owner of Juniper Hill, Mr. Morrison, acquired the station  
14 and store on 5330 York Road in Lewis and Clark County in 2006. His manager, Ms.  
15 Naomi Torick, left the store in the fall of 2009. It is believed Mr. Morrison became  
16 aware of the problem of violations concerning the failure to perform monthly  
17 release detection monitoring by December of 2008, because, according to his office  
18 file dates, he faxed Mr. Steve Robertson of the Northwest Fuel Systems on  
19 December 1, 2008, to contact Ms Torick to install a computerized "CSLD" device  
20 that can test for leaks even with low fuel levels in the tanks. Testimony Morrison.

21           12. Mr. Morrison testified that there was a misunderstanding about when  
22 and whether the leak detection monitoring device was installed for the two tanks.  
23 Mr. Morrison assumed that it had been installed as of December 2008, by Northwest  
24 Fuel Systems and he further assumed Ms. Torick had been notified by Northwest  
25 Fuel Systems about correcting the violations. Testimony Morrison.

26           13. Mr. Morrison did not testify that the calculation factors used by the  
27 Department to determine penalties were incorrectly applied. He did testify that there

1 were other matters as justice may require to reduce the penalties such as the fact that  
2 when he found out that there was a misunderstanding about installation of the CSLD  
3 device, he corrected the problem and that he voluntarily expended money to put in  
4 the CSLD device. Testimony Morrison.

5 14. As Mr. Gessaman testified, if Mr. Morrison had reviewed the tests to see  
6 if they were passing all along, he would have realized that the CSLD device had not  
7 been installed. Further, expenditure for the CSLD device was not voluntary and was  
8 required for compliance. Testimony Gessaman.

9 15. Mr. Morrison paid Northwestern Fuels \$1000.00 in May of 2009, for  
10 installation of the CSLD device, upon invoicing for installation of a computerized  
11 gauging system. Testimony Morrison. The invoice was not produced at the hearing.  
12 It is not known when the computerized monitoring device for reading low level tank  
13 leak tests was installed but it is reasonable to conclude it was installed after issuance  
14 of the April 2009, Violation Letter because there were no monitoring records  
15 generated until after that date.

16 16. The Department's large reduction by \$4620.00 of penalties that could  
17 have been assessed overcomes any arguments that the penalty assessment of  
18 \$2100.00 should be further reduced.

#### 19 PROPOSED CONCLUSIONS OF LAW

20 1. The Hearing Officer has jurisdiction over the contested case concerning  
21 a proper penalty determination.

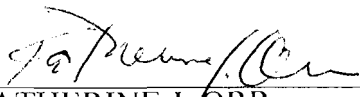
22 2. The penalty calculation of \$ 2100.00 of the Department was correctly  
23 assessed applying the penalty factors contained in ARM 17.4.301 through 17.4.308.

24 It is therefore recommended that Juniper Hill be ordered to pay \$2100.00  
25 in penalties to the Department upon final order of the Board of Environmental  
26 Review (Board).

#### 27 OPPORTUNITY TO FILE EXCEPTIONS

1 Pursuant to Mont. Code Ann. § 2-4-621, this Proposed Order on Penalty is a  
2 proposal for decision. The Petitioner has an opportunity to file exceptions and  
3 present briefs to the Board of Environmental Review. Such exceptions should be  
4 filed by the Petitioner by October 15, 2010, with the Board Secretary and the  
5 Hearing Examiner. The Department will have an opportunity to respond in writing  
6 with a filing of a response to the exceptions with the Board Secretary and the  
7 Hearing Examiner by October 29, 2010. Any exceptions and oral argument will be  
8 presented to the Board at its December 3, 2010, regularly scheduled meeting when  
9 the Board consider adoption of the Proposed Order on Penalties and the Order  
10 Granting Motion for Summary Judgment.

11  
12 DATED this 27 day of September, 2010.

13  
14   
15 KATHERINE J. ORR  
16 Hearing Examiner  
17 Agency Legal Services Bureau  
18 1712 Ninth Avenue  
19 P.O. Box 201440  
20 Helena, MT 59620-1440  
21  
22  
23  
24  
25  
26  
27

1 **CERTIFICATE OF SERVICE**

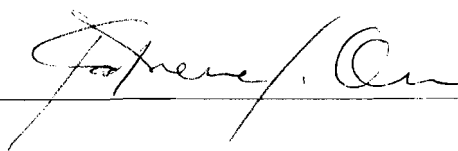
2 I hereby certify that I caused a true and accurate copy of the foregoing  
3 Proposed Order On Penalties to be mailed to:

4 Ms. Joyce Wittenberg  
5 Secretary, Board of Environmental Review  
6 Department of Environmental Quality  
7 1520 East Sixth Avenue  
8 P.O. Box 200901  
9 Helena, MT 59620-0901  
10 **(original)**

11 Ms. Jane Amdahl  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

16 Mr. John Arrigo  
17 Administrator, Enforcement Division  
18 Department of Environmental Quality  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 Mr. Thomas C. Morrison  
22 Morrison & Balukas Law Firm, PLLC  
23 111 N. Last Chance  
24 Arcade Building, Suite 3 B  
25 Helena, MT 59601-4144

26 DATED: September 21, 2010   
27

JUNIPER HILL FARM -BER 2009-18 UST

EXHIBIT LIST

DEPARTMENT'S EXHIBITS:

- Exhibit No. 1 – Fax dated December 1, 2008 from Mr. Morrison to Mr. Robertson
- Exhibit No. 12 - Notice of Violation and Administrative Compliance and Penalty Order
- Exhibit No. 13 – Department's Second Requests for Discovery
- Exhibit No. 14 – Agreed Statement of Facts and Conclusions of Law
- Exhibit No. 15 – ARM Rules 17.4.301–308 Environmental Quality Procedural Rules
- Exhibit No. 16 – MCA §75-1-1001 (2010) Penalty Factors

APPELLANT'S EXHIBITS

- Exhibit A – 04/08 – 08/08 Test Reports
- Exhibit B – Juniper Hill letter to DEQ dated May 11, 2009
- Exhibit C – Juniper Hill letter to DEQ undated

Jane B. Amdahl  
Department of Environmental Quality  
P.O. Box 200901  
1520 E. Sixth Avenue  
Helena, MT 59620-0901  
(406) 444-5690

Attorney for the Department

FILED this 23<sup>rd</sup> day of  
September AD 2010  
at 12:50 o'clock P. M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by Misty Gable

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

**IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA  
UNDERGROUND STORAGE TANK ACT  
BY JUNIPER HILL FARM, LLC AT  
LAKESIDE GENERAL STORE, LEWIS  
AND CLARK COUNTY, MONTANA  
[FACILITY ID 25-13657; FID #1799;  
DOCKET NO. UST-09-09]**

**CASE NO. BER 2009-18 UST**

**THE DEPARTMENT'S NOTICE OF CLERICAL ERRORS  
IN PROPOSED ORDER ON PENALTIES**

The Department of Environmental Quality (Department), by counsel, wishes to point out two apparent clerical errors in the Proposed Order on Penalties issued on September 21, 2010 in connection with the above-captioned contested case. Although those errors in no way affect the amount or justification for the proposed judgment, the Department requests that they be corrected in the final Judgment Order so that there is no misunderstanding about the basis for the penalty calculation or the facts underlying the violations.

First, in paragraph 6 of the Proposed Order on Penalties, the first sentence states, "The base penalty was determined by reducing the maximum statutory penalty *downward by a factor of .70* for 'gravity and extent' . . ." (emphasis added). That suggests that the base penalty was 70% lower than the maximum penalty, leaving in place only 30% of the maximum. In fact, the

1 base penalty was determined by “reducing the maximum statutory penalty *to 70% of that*  
2 *maximum* for ‘gravity and extent . . . .’” The Department requests that the Board substitute the  
3 Italicized language drafted by the Department for the Italicized language cited in the Proposed  
4 Order on Penalties to clarify how the penalty was calculated.

5 Second, the Department notes that in paragraph 8 of the Proposed Order on Penalties, it  
6 identifies certain months “regarding which there were no monthly leak detection records  
7 generated.” In fact, monthly leak detection test records were generated during each of those  
8 months, but those records indicated that the leak detection tests were “invalid” due to the fact  
9 that product levels in the tanks were too low for the leak detection system to function correctly.  
10 Accordingly, the Department requests that the final Judgment Order be revised to insert the word  
11 “valid” between the words “no” and “monthly,” so as to read: “. . . regarding which there were  
12 no *valid* monthly leak detection records generated.” That will clarify the facts underlying the  
13 violation.

14 WHEREFORE, the Department gives notice to the Board of two apparent clerical errors  
15 in the Proposed Order on Penalties issued on September 21 in the above-captioned contested  
16 case, and requests that the Board correct, in the manner described above, those clerical errors in  
17 the final Judgment Order issued by the Board. Neither of those errors in any way affects the  
18 final penalty amount or the reasoning underlying same.

19 Respectfully submitted this 23<sup>d</sup> day of September, 2010.

20 DEPARTMENT OF ENVIRONMENTAL QUALITY

21  
22 BY: \_\_\_\_\_

Jane B. Amdahl,  
23 Staff Attorney  
24

Certificate of Service

I hereby certify that on the 23<sup>d</sup> day of September, 2010, I mailed a true and correct copy of the foregoing Department's Notice of Clerical Errors in Proposed Order on Penalties, postage prepaid, to the following:

Juniper Hill Farm, LLC  
c/o Thomas C. Morrison  
111 N. Last Chance Gulch, Ste. 3B  
Helena, MT 59601-4144

I further certify that on the same date I sent a copy of the same document to Hearing Examiner Katherine Orr by Interdepartmental Mail.

Jane B. Amdahl

THOMAS C. MORRISON  
MORRISON & BALUKAS LAW FIRM, PLLC  
111 N. Last Chance Gulch (3B)  
Helena, MT 59601-4144  
406-443-1040 phone  
406-443-1041 fax  
Attorney for Juniper Hill Farm, LLC

FILED this 14<sup>th</sup> day of  
October AD 2010  
at 1:04 o'clock P. M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: Misty Cable

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

IN THE MATTER OF: )  
VIOLATIONS OF THE MONTANA )  
UNDERGROUND STORAGE TANK ACT BY )  
JUNIPER HILL FARM, LLC AT LAKESIDE )  
GENERAL STORE, LEWIS & CLARK )  
COUNTY, MONTANA. ) **Case NO. BER 2009-18-UST**  
[FACILITY ID 25-13657; FID 1799] )  
Docket No. UST-09-09 )

**PETITIONER'S EXCEPTIONS TO PROPOSED ORDER ON PENALTIES  
AND  
REQUEST FOR REVIEW AT THE DECEMBER 3, ENVIRONMENTAL QUALITY  
COUNCIL MEETING**

In response to the Proposed Order On Penalties, the petitioner submits the following exceptions and requests the following consideration by the Board of Environmental Review at its meeting on December 3, 2010. The Proposed Order requires these responses by October 15, 2010. These responses apply to the specific "Proposed Findings of Fact" in the Proposed Order on Penalties, dated September 21, 2010.

**Petitioner's Exception to Proposed Finding #6:**

The "gravity and extent" of the impact ;of the reporting incidents were both low. There was never any significant risk to the public health or to the environment. The fuel level in tanks #1 and #2 was always less than 20% . There were no spills/leaks of fuel. The Petitioner did have monitoring records, and the Petitioner did respond when it became aware that the level measuring sensors were not operating correctly.

The only media and pathway of potential risk is the shallow alluvial zone groundwater, which may be used as a potable water source in the vicinity; the tanks have not impacted the shallow groundwater. Thus the extent is low.

**Petitioner's Exception to Proposed Finding #7:**

The Petitioner has consistently responded in good faith and with full cooperation. As soon as the Petitioner was aware of the problem, the Petitioner aggressively pursued permanent solutions to minimize the risk to the public health and the environment. There certainly should be downward adjustment for both good faith and cooperation.

**Petitioner's Exception to Proposed Finding #10:**

There was no damage to the public health of the environment due to the violation; there were no leaks/spills of fuel. Thus the number of days the tanks may have impacted the public health or the environment is zero.

No deterrent is required to force the Petitioner to perform, since the Petitioner has already performed all the actions necessary to insure compliance and protection of the public health and the environment.

**Petitioner's Exception to Proposed Finding #15:**

Consistent with Mr. Morrison's testimony that the CSLD device improvement cost \$1,000.00, attached as Exhibit A is the invoice for the CSLD device and installation, reflecting total charges of \$1,016.75. Mr. Morrison voluntarily took the initiative to install this expensive device as the best solution (not the exclusive solution) for remedying the gas readout problem.

**Petitioner's Exception to Proposed Finding #16:**

Petitioner has shown above that several of the findings (#6, #7, #10, and #15 ) are incomplete or arbitrary or incorrect. Consequently, this finding is itself inaccurate or meaningless and a change in the proposed penalty is justified.

The problems with the tank level measurements and the fuel inventory reports have been resolved without any harm and the imposition of the \$2,100 penalty is unreasonable and unnecessary.

WHEREFORE IT IS PRAYED, that this Board considers Petitioner's requested exceptions to the Hearing Examiner's Proposed Order On Penalties.

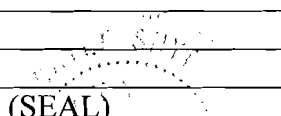
Dated this **13th day of October 2010.**

by: Thomas C. Morrison

THOMAS C. MORRISON

attorney for Juniper Hill Farm, LLC

**Sworn and subscribed to by the above named person, this 13th day of October 2010.**

	<u>Gayle Snyder</u>	<u>10/13/10</u>
	GAYLE SNYDER	date
(SEAL)	NOTARY PUBLIC for the State of MONTANA	
	Residing at TOWNSEND, MONTANA	
	My Commission expires on March 23, 2012	

**Northwest Fuel Systems, Inc.****P.O. Box 94****Kalispell, MT 59903****Phone: (406)755-4343 Fax: (406)755-4582****INVOICE****INVOICE NO. 0000076907****BILLING PHONE: (406) 227-5357****BILLING FAX: (406) 227-5357****ACCT. NO.: L0272****SOLD TO: LAKESIDE GENERAL STORE  
5330 YORK RD  
HELENA, MT 59602****SHIP TO: LAKESIDE GENERAL STORE  
5330 YORK RD  
HELENA, MT 59602**

SALES NO.	DATE OF ORDER	DATE OF INVOICE	DATE OF DELIVERY	DATE OF BILLING	TERMS	INVOICE DATE
				04/14/2009	Net 10th	04/14/2009
QUANTITY ORDERED	QUANTITY SHIPPED	QUANTITY IN STOCK	ITEM NO.	DESCRIPTION	UNIT PRICE	EXTENDED PRICE
1.0	1.0	0.0	L1	Service Maintenance Labor	64.00	64.00
1.0	1.0	0.0	VR330161-003	VR Console Software, CSLD	1,016.00	1,016.00
1.0	1.0	0.0	SU	Truck & Travel Surcharge	7.50	7.50
				GREG 4-7-9 INSTALLED CSLD CHIP IN TANK MONITOR AND PROGRAM FOR TANK TESTING.		
						1,087.50
						0.00
						0.00
						0.00
Thank You						1,087.50

*ju*

Jane B. Amdahl  
Department of Environmental Quality  
P.O. Box 200901  
1520 E. Sixth Avenue  
Helena, MT 59620-0901  
(406) 444-5690

Attorney for the Department

FILED this 27<sup>th</sup> day of  
October AD 2010  
at 9:25 o'clock A. M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: Misty Cost

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

**IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA  
UNDERGROUND STORAGE TANK ACT  
BY JUNIPER HILL FARM, LLC AT  
LAKESIDE GENERAL STORE, LEWIS  
AND CLARK COUNTY, MONTANA  
[FACILITY ID 25-13657; FID #1799;  
DOCKET NO. UST-09-09]**

**CASE NO. BER 2009-18 UST**

**THE DEPARTMENT'S RESPONSE TO PETITIONER'S EXCEPTIONS  
TO PROPOSED ORDER ON PENALTIES WITH SUPPORTING BRIEF**

The Department of Environmental Quality (Department), by counsel, responds to  
Petitioner's Exceptions to Proposed Order on Penalties and Request for Review at the December 3,  
Environmental Quality Council Meeting [sic] (Exceptions) as follows:

**BRIEF**

**A. Background**

At all times relevant to this contested case, Petitioner Juniper Hill Farm, LLC (Juniper Hill)  
owned and operated certain underground storage tank (UST) systems at the Lakeside General Store,  
5330 York Road, near Helena in Lewis and Clark County, Montana. On August 28, 2009, the  
Department issued a Notice of Violation and Administrative Compliance and Penalty Order to

1 Juniper Hill, alleging that Juniper Hill committed 16 violations of ARM 16.56.401, 402, and 409,  
2 by failing to conduct monthly release detection monitoring on its USTs. Juniper Hill appealed that  
3 Order to the Board of Environmental Review (Board).

4 In its response to a motion for summary judgment on the issue of liability filed by the  
5 Department in the contested case, Juniper Hill admitted liability for the violations, but objected to  
6 the Department's assessment of \$2,100 in administrative penalties. On June 4, 2010, Hearing  
7 Examiner Katherine Orr presided over a contested case hearing that was limited to the issue of  
8 penalties for the 16 admitted violations. The Hearing Examiner issued a Proposed Order on  
9 Penalties, finding the Department's penalty calculation of \$2,100 to have been based on a correct  
10 application of the penalty factors contained in ARM 17.4.301 through 17.4.308 and recommending  
11 that the Board issue a final order requiring Juniper Hill to pay a penalty in that amount.

12 Juniper Hill has filed five exceptions to the Hearing Examiner's Proposed Findings of Fact.  
13 Specifically, Juniper Hill has asserted exceptions to Proposed Findings of Fact Nos. 6, 7, 10, 15, and  
14 16. However, as explained more fully below, Juniper Hill's exceptions are baseless and the Board  
15 should adopt the Proposed Order on Penalties in its entirety, with the sole exception of correcting  
16 the two clerical errors previously pointed out by the Department.

17 **B. Standards for Considering Exceptions**

18 Section 2-4-621(3), MCA, of the Administrative Procedure Act governs the manner in  
19 which the full Board is to review the proposed findings of fact, conclusions of law, and order  
20 prepared by the Hearings Examiner. Specifically:

21 The [Board] in its final order may reject or modify the conclusions of law and the  
22 interpretation of administrative rules in the proposal for decision but may not reject or  
23 modify the findings of fact unless the [Board] first determines from a review of the complete  
24 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.

1 Section 2-4-621(3), MCA.

2 The Montana Supreme Court has held that where exceptions to factual findings of a hearing  
3 examiner are made, the role of the Board is to focus on whether the hearing examiner's findings are  
4 supported in the record. *Brackman v. Board of Nursing*, 258 Mont. 200, 851 P. 2d 1055, 1058  
5 (1993). Furthermore, the Board may not change a factual finding proposed by the Hearing  
6 Examiner unless the Board examines the complete record and determines that the Hearing  
7 Examiner's "findings of fact were not based upon competent substantial evidence" or that the  
8 Hearing Examiner did not "comply with essential elements of law." Section 2-4-621(3), MCA. In  
9 other words, the Board may not simply substitute its judgment for that of the Hearing Examiner on  
10 issues of credibility. See *Brander v. Director, Mt Dept. of Institutions*, 247 Mont. 302, 307-08; 806  
11 P.2d 530, 533 (1991). If there is competent, substantial evidence in the record to support the  
12 finding, the Board may not change it.

13 Furthermore, neither additional proposed findings of fact, nor additional evidence that could  
14 have been presented to the Hearing Examiner at the contested case hearing but was not, can be  
15 presented to the Board for consideration after the hearing examiner has submitted a proposed order.  
16 See *Brackman v. Board of Nursing*, 258 Mont. 200, 851 P. 2d 1055, 1058 (1993).

17 In this case, Juniper Hill has not asserted any exceptions to the conclusions of law, but only  
18 to specific findings of fact. Accordingly, unless a review of the complete record reveals to the  
19 Board no competent substantial evidence to support the challenged findings, the Board should  
20 affirm the Hearing Examiner's Findings of Fact and enter the Final Order without modifications  
21 other than to correct the clerical errors.

22 **C. Each of Juniper Hill's Five Exceptions is Baseless and Should Be Rejected.**

23 **1. Juniper Hill's Exception to Proposed Finding of Fact No. 6.**

1 Juniper Hill argues that the “gravity and extent” of the impact of the “reporting incidents”  
2 should both be assessed as “low,” based on an assertion that “there was never any significant risk to  
3 the public health or to the environment.” That Exception is not well-founded.

4 First of all, Proposed Finding of Fact No. 6 is merely a factual finding by the Hearing  
5 Examiner on how the Department calculated its proposed penalty. Juniper Hill has not suggested,  
6 much less demonstrated, that there was no competent, substantial basis in the record for Proposed  
7 Finding of Fact No. 2 to be an accurate description of how the Department conducted its  
8 calculations. Whether the calculation was correctly done was addressed in Proposed Conclusion of  
9 Law No. 2, to which Juniper Hill notably did NOT file an exception. Proposed Finding of Fact No.  
10 2 only addresses the fact that the Department calculated the penalty in the manner described – it was  
11 not an evaluation of that calculation by the Hearing Examiner or a decision as to which of two or  
12 more conflicting witnesses or pieces of evidence was more credible.

13 However, even assuming that the Board may address a subsequent conclusion of law based  
14 on an exception to a factual finding, Juniper Hill’s Exception still should be denied. True, the  
15 Department has no evidence that there was any release of fuel during the non-monitored months,  
16 and therefore has no evidence that any actual harm to human health or the environment occurred.  
17 But that is not necessary to the penalty calculation under ARM 17.4.303.

18 First of all, ARM 17.4.303(5)(b) specifically cites “failure to monitor” as having a  
19 “moderate” gravity, which is the level of gravity the Department did, in fact, assign in its penalty  
20 calculation for the Juniper Hill violations. And certainly there can be no doubt that failure to  
21 monitor for leaks involves a *potential* for harm to the environment, even if, as luck would have it,  
22 no actual leak is known to have occurred. Clearly, if a leak had occurred during a period when  
23 proper monitoring was not being conducted, it could have resulted in petroleum product leaking into  
24

1 the environment without being discovered for many months, which undeniably would constitute  
2 harm to the environment. On the other hand, to qualify for “minor” gravity (what the Department  
3 presumes Juniper Hill means when it uses the term “low”), the violation would have to present no  
4 risk at all of any harm to human health or the environment according to ARM 17.4.303(5)(c) –  
5 something that cannot be said of the violations asserted here. Risk there was aplenty.

6 As for the extent factor, the Department looks to ARM 17.4.303(4)(a), which states that a  
7 violation should be assigned a “major extent” if it constitutes a major deviation from the applicable  
8 requirements. Failing to monitor for a significant number of months, to which Juniper Hill  
9 conceded liability, is the greatest deviation that an owner or operator can commit from a  
10 requirement to conduct monitoring. As stated by Franklin Gessaman in his testimony, the  
11 Department has a policy of always assessing “major extent” for a failure to conduct monthly  
12 monitoring for six or more of the preceding 12 months, and there were substantially more than six  
13 months of violation admitted in this case.

14 In sum, a “moderate” gravity and a “major” extent are in complete compliance with the  
15 requirements of ARM 17.4.303 and consistent with Department practice, and the Board should  
16 adopt in full the Hearing Examiner’s Proposed Findings of Fact No. 6, as well as the conclusions of  
17 law resulting from it. There clearly was competent substantial testimony on these facts, upon which  
18 the hearing Examiner could base her finding, notwithstanding Juniper Hill’s unsupported plea for a  
19 lower assessment.

## 20 **2. Juniper Hill’s Exception to Proposed Finding of Fact No. 7.**

21 Once again, Juniper Hill asserts a challenge to a Proposed Finding of Fact describing how  
22 the Department completed a portion of its penalty calculation. Like its challenge to Proposed  
23 Finding of Fact No. 6 above, however, Juniper Hill does not argue that there was no competent,  
24

1 substantial evidence in the record to support the Proposed Finding of Fact that the Department  
2 actually did its penalty calculation as described, but instead Juniper Hill challenges the reasoning  
3 behind the Department's calculation. That is more appropriately done through a challenge to  
4 Proposed Conclusion of Law No. 2, which Juniper Hill did not raise. But, as with Juniper Hill's  
5 Exception to Proposed Finding of Fact No. 6, even if the underlying reasoning for the Department's  
6 calculation were appropriately challenged by this Exception, the challenge is without merit.

7 Juniper Hill claims that it has "consistently responded in good faith and with full  
8 cooperation" and that as soon as Juniper Hill was aware of the problem, it "aggressively pursued  
9 permanent solutions to minimize the risk to the public health and the environment."

10 ARM 17.4.304(3) requires that in calculating the Good Faith and Cooperation portion of the  
11 penalty calculation, the following factors are to be considered: (a) the violator's promptness in  
12 reporting and correcting the violation, and in mitigating the impacts of the violation; (b) the extent  
13 of the violator's voluntary and full disclosure of the facts related to the violation; and (c) the extent  
14 of the violator's assistance in the department's investigation and analysis of the violation.

15 Concerning factor (a) – promptness in reporting and correcting the violation and in  
16 mitigating the impacts – the Hearing Examiner entered into evidence Department Exhibit 13, which  
17 includes a copy of the inspection report for the compliance inspection completed in September  
18 2008, signed by a representative of Juniper Hill. That clearly is competent, substantial evidence  
19 showing Juniper Hill had notice that there were a total of eight violations of the monthly monitoring  
20 test requirements in September 2008. Juniper Hill offered no evidence that it took any action at that  
21 time to correct the violations. The "problem" was again brought to Juniper Hill's attention through  
22 the Warning Letter and enclosed corrective action plan that the Department sent to Juniper Hill by  
23 certified mail on November 5, 2008. Both the Warning Letter and corrective action plan were  
24

1 referenced in the Agreed Statement of Facts and Conclusions of Law, admitted into evidence at the  
2 hearing. Mr. Morrison testified that he thought he had called to arrange for the computer chip to be  
3 installed at that time, but even if he had placed that call, he never bothered to follow up on it, either  
4 with the installer or with any Juniper Hill employees, and the computer chip was not installed then.

5 It was not until the Department-required reinspection in April 2009 revealed that the  
6 problem still existed that Juniper Hill finally arranged to have the necessary part installed to allow  
7 the leak detection system to function properly and solve the “problem.” A delay of seven months –  
8 from September to April – can hardly be called acting “promptly” or “as soon as Petitioner was  
9 aware of the problem.” It may be that Juniper Hill’s principal, Mr. Morrison, was personally not  
10 aware of the “problem” until November 2008, but it is the company Juniper Hill, not Mr. Morrison  
11 personally, that is being penalized for its inaction. Actions (or inaction) by Juniper Hill’s other  
12 employees and their knowledge resulting from it can be imputed to the company. *See Empire Steel*  
13 *Manufacturing Co. v. Carlson*, 191 Mont. 189, 196, 622 P. 2d 1016, 1021 (1981). And even the  
14 lack of follow-through between November 2008 and April 2009 surely does not establish that  
15 Juniper Hill’s actions, or the actions of Mr. Morrison personally, were “prompt.”

16 In addition, Juniper Hill did not self-report the violations – something that could justify a  
17 reduction in the penalty if Juniper Hill had been the one to bring the violations to the Department’s  
18 attention. Juniper Hill’s Exhibit A shows that Juniper Hill had routinely collected printouts showing  
19 that the tests attempted by Juniper Hill’s automatic tank gauging system were “invalid” due to too  
20 little product in the tanks, but it was not until a compliance inspector reported those violations that  
21 the Department learned of them. It is clear that Juniper Hill’s employees simply collected the  
22 reports of invalid tests and then ignored them.

23 In sum, consideration of factor (a) does not support a reduction of the penalty.  
24

Factor (b), the extent of the violator's voluntary and full disclosure of the facts related to the violation, also does not support a reduction of the penalty. The facts related to the violation were first disclosed by the compliance inspection, not Juniper Hill. No other evidence was presented at the hearing to demonstrate any disclosures by Juniper Hill prior to the mandated disclosures during the contested case procedure.

Factor (c), the extent of the violator's assistance in the Department's investigation and analysis of the violation, does not weigh in favor of reducing the penalty either. No testimony or other evidence was presented to demonstrate any particular assistance in the Department's investigation, and as for the analysis of the violation, Juniper Hill disputed, and still disputes, the Department's analysis. There certainly was no evidence presented upon which the Hearing Examiner could have, much less *should* have, found that Juniper Hill assisted in the Department's analysis of the violation.

Considering the facts and factors together, the Board should deny Juniper Hill's Exception to Proposed Finding of Fact No. 7.

**3. Juniper Hill's Exception to Proposed Finding of Fact No. 10.**

Juniper Hill argues in this Exception that there was no damage to the public health or environment, and no fuel leaks as a result of the violations. Juniper Hill also argues that because it has already corrected the problem, there is no need for any deterrence at all.

Once again, Juniper Hill raises an exception to a Proposed Finding of Fact that merely found what the Department actually did in its penalty calculation. It was not a conclusion of law that is open for argument, nor did the Proposed Finding of Fact resolve issues of credibility. It merely reported the undisputed fact of how the Department completed the calculations. Juniper Hill did not

1 assert, much less establish, that there was no competent, substantial evidence to support the

2 Proposed Finding of Fact. As such, Juniper's exception is improper and should be denied.

3 . But, as with the first two of Juniper Hill's exceptions, even if we consider the exception to  
4 be a valid challenge to the basis of the Department's conclusions in the penalty calculation, the  
5 Exception still should be denied.

6 First of all, Proposed Finding of Fact No. 10 says nothing about damage to public health or  
7 the environment or lack thereof, and as noted above, the lack of an actual impact to public health or  
8 the environment is not necessary to establish a violation of the failure to monitor requirement or the  
9 level of penalty assessed for such violations. Accordingly, it is unclear why Juniper Hill raises the  
10 fact that "the number of days the tanks may have impacted the public health or the environment is  
11 zero." It is the number of monthly monitoring cycles that were missed that constitutes the number  
12 of days of violation for purposes of calculating a penalty, not the number of days that persons may  
13 have drunk contaminated water resulting from a release. ARM 17.56.401, 402, and 409 require that  
14 monitoring be completed according to certain standards every 30 days and that the records be kept  
15 for at least 12 months – that's all. If no release actually occurs, that does not excuse the failure to  
16 monitor for a release. And, as noted above, it is the *potential* for damage to the environment, not  
17 actual harm, that placed the gravity of the violation in the "moderate" zone under the factors that the  
18 Department, as well as the Board, must consider in assessing penalties according to ARM 17.4.303.

19 Juniper Hill also argues that because it has corrected the problem causing the violations, no  
20 deterrent is required to force it to perform. Presumably Juniper Hill is arguing that since it allegedly  
21 needs no deterrent to avoid future violations of the monthly monitoring requirements, the penalty  
22 should be reduced to zero. However, the need for deterrence is not measured solely by whether the  
23 violator is likely to commit the same violation again. Deterrence can also be directed at other  
24

1 potential violators. *Cf. Kills on Top v. State*, 279 Mont. 384, 423, 928 P. 2d 182, 206 (1996) and  
2 cases cited therein (discussing the deterrent effect of the death penalty on potential violators). If the  
3 Department assesses no penalty whatsoever for 16 monitoring violations occurring over a period of  
4 11 out of 12 consecutive months merely because the operator finally fixed the problem seven  
5 months after it came to light, UST operators all around the state would be given the message that  
6 they need not comply with the law unless and until the Department is on the verge of assessing a  
7 penalty, because there will be no consequences for violations of the law as long as they fix the  
8 problem after the Department discovers the violations but before penalties come due.

9 In addition, deterrence is not even listed as one of the factors that must be considered in  
10 assessing penalties pursuant to Section 75-1-1001, MCA. Therefore, Juniper Hill's argument,  
11 which seems to assume that a lack of any need for deterrence for Juniper Hill to comply with the  
12 monitoring requirements in the future can be used as the sole factor for eliminating the penalty  
13 entirely, is baseless. The Department considered deterrence under "other factors as justice may  
14 require" to take a substantial reduction.

15 Juniper Hill's Exception to Proposed Finding of Fact No. 10 is equivalent to a person  
16 arguing that a ticket issued to him for a DUI should be dismissed because he did not actually cause  
17 an accident when driving with a blood alcohol level significantly in excess of the legal limit, and  
18 because several months after the ticket was issued he joined Alcoholics Anonymous. The point is  
19 that the violations DID occur and should not go unpunished.

20 Juniper Hill's Exception to Proposed Finding of Fact No. 10 should be denied.

21 **4. Petitioner's Exception to Proposed Finding #15.**

22 Juniper Hill challenges Proposed Finding #15, arguing that Juniper Hill installed a device  
23 costing \$1,016.75 "as the best solution (not the exclusive solution) for remedying the gas readout  
24

1 problem.” To support its position, Juniper Hill attached to its Exceptions a copy of the alleged  
2 invoice for the installation, which had not been entered into evidence at the hearing.

3 First of all, it is entirely improper for a party to submit additional evidence to the Board that  
4 was not so much as offered, much less admitted, into evidence at the contested case hearing.  
5 *Brackman v. Board of Nursing*, 258 Mont. 200, 851 P. 2d 1055 (1993). Accordingly, the Board  
6 should not consider that invoice.

7 Second, what Juniper Hill seeks to change through its exception is unclear in the first place,  
8 even if the Board were to consider the invoice. Proposed Finding #15 states in its entirety:

9 Mr. Morrison paid Northwestern fuels \$1000.00 in May of 2009, for installation of the  
10 CSLD device, upon invoicing for installation of a computerized gauging system. Testimony  
11 Morrison. The invoice was not produced at the hearing. It is not know when the  
12 computerized monitoring device for reading low level tank leak tests was installed but it is  
reasonable to conclude it was installed after issuance of the April 2009, violation Letter  
because there were no monitoring records generated until after that date.

13 The invoice adds nothing different to the facts set forth in Proposed Finding #15, other than  
14 that the actual cost of installing the computerized gauging system was a few dollars more than the  
15 \$1,000 Mr. Morrison stated at the hearing. But Mr. Morrison states in his Exception that the cost  
16 referenced in the invoice was “consistent with Mr. Morrison’s testimony that the DSLC device  
17 improvement cost \$1,000.” So Juniper Hill apparently is not disputing the Hearing Examiner’s  
18 Proposed Finding of Fact that the computer chip cost approximately \$1,000.

19 Juniper Hill may be challenging the finding that the monitoring device “presumably” was  
20 installed after the Violation Letter was issued in April, despite the fact that no evidence was  
21 produced at the hearing as to the actual date of the installation, other than that it was some time  
22 around April 2009 when the Violation Letter was sent. However, even if it was not installed after  
23 Juniper Hill received the Violation Letter, it clearly was installed after the April re-inspection  
24 required by the Department.

1 To the extent Juniper Hill is claiming that its owner, Mr. Morrison, “took the initiative to  
2 install this expensive device as the best solution (not the exclusive solution) for remedying the gas  
3 readout problem,” it may be that Juniper Hill is seeking to insert a factual finding of voluntariness in  
4 the hope of reducing the penalty based on credit for “good faith and cooperation” or perhaps  
5 “amounts voluntarily expended.” However, that attempt fails for two reasons.

6 First, the record contains ample information that Juniper Hill first learned of the violations in  
7 September, following the inspection. It did not correct the problem at that time. Then the  
8 Department sent Juniper Hill a Warning Letter in November – a second chance to fix the problem.  
9 Although Mr. Morrison testified that he thought he had arranged for Northwestern Petroleum to fix  
10 the problem in December, the evidence is undisputed that he never followed through to make sure it  
11 was done. It wasn’t. Juniper Hill did not actually fix the problem causing the violations until April  
12 – seven months after the violations were first made known to it and five months after Juniper Hill  
13 received the Warning Letter and corrective action plan. That is hardly prompt action so as to  
14 constitute good faith and cooperation.

15 Second, to describe Juniper Hill’s installation of the computer chip as “voluntary” is to  
16 stretch the term beyond recognition. The sole reason for installing the \$1,000 computer chip was to  
17 make it possible for Juniper Hill to bring its UST leak detection systems into compliance in  
18 response to the Department’s demands. The fact that there may have been one or more other  
19 options available to Juniper Hill, some costing more<sup>1</sup> than the installation of the computer chip and,  
20 presumably, some costing less, does not change that fact. Juniper Hill chose the method it preferred

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21  
22 <sup>1</sup> One example that comes to mind would have been for Juniper Hill to keep sufficient  
23 product in the tank for the existing leak detection monitoring system to work, but that would have  
24 cost substantially more than \$1,000, assuming a price of even \$2.00 per gallon, much less a price of  
\$3.00 per gallon or more, which gas and diesel have reached and surpassed in recent years.

1 and never offered any testimony or other evidence that any other method existed. Even if it had  
2 offered such evidence, it would not have made a difference. The manner of compliance is up to  
3 Juniper Hill. The expenditure did nothing more than make the system do what the Department and  
4 its rules required.

5 Finally, Juniper Hill does not state which fact in Proposed Finding of Fact #15 is wrong, nor  
6 does Juniper Hill point to any place in the record to establish that any such fact was not supported  
7 by competent, substantial evidence. Juniper Hill merely alleges additional facts with a twist that  
8 makes them sound favorable to its position. The Board should reject Petitioner's Exception to  
9 Proposed Finding #15.

10 **5. Juniper Hills' Exception to Proposed Finding of Fact No. 16,**

11 Proposed Finding of Fact No. 16 states that any challenge to the penalty amount is  
12 overcome by the fact that the Department had already reduced the total assessed penalty amount by  
13 \$4,620, leaving only \$2,100 for the final assessed penalty. Juniper Hill claims that this Proposed  
14 Finding of Fact is based on other "incomplete or arbitrary or incorrect" findings, so that it is itself  
15 "inaccurate or meaningless." Juniper Hill also repeats its refrain that the problem has been resolved  
16 without harm, and that the penalty, therefore, is unnecessary.

17 As explained above, Juniper Hill's exceptions to Proposed Findings of Fact Nos. 6, 7, 10,  
18 and 15 are baseless. But even assuming the Department did not add any increase for  
19 "Circumstances," and allowed the full possible reduction for "Good Faith and Cooperation" and  
20 "Amounts Voluntarily Expended," that would still result in a total penalty, before the Department  
21 reduced it under "other factors as justice may require," of \$4,480<sup>2</sup> – more than twice the penalty

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22  
23 <sup>2</sup> This is based on following the Penalty Calculation Worksheet and inputting the same Gravity and Extent results  
24 (which follow the applicable administrative rules and Department policy), with the other adjustments made in the  
manner most favorable to Juniper Hill, regardless of the actual facts.

1 ultimately assessed. There is simply no basis for finding the \$2,100 penalty to be “unreasonable” or  
2 “unnecessary” or that the Hearing Examiner erred in her Proposed Finding of Fact No. 16: “The  
3 Department’s large reduction by \$4620.00 of penalties that could have been assessed overcomes  
4 any arguments that the penalty assessment of \$2,100.00 should be further reduced.” The Board  
5 should reject Juniper Hill’s Exception to Proposed Finding of Fact No. 16.

### 6 CONCLUSION

7 For the reasons explained above, the Department requests that the Board reject Juniper  
8 Hill’s Exceptions to Proposed Order on Penalties in its entirety and adopt the Hearing Examiner’s  
9 proposed Order on Penalties as written, except for correcting the two clerical errors referenced in  
10 the previously filed Department’s Notice of Clerical Errors.

11 Respectfully submitted this 27<sup>th</sup> day of October, 2010.

12 DEPARTMENT OF ENVIRONMENTAL QUALITY

13  
14 BY: Jane B. Amdahl  
15 Jane B. Amdahl,  
16 Staff Attorney  
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22  
23  
24

Certificate of Service

I hereby certify that on the 27<sup>th</sup> day of October, 2010, I mailed a true and correct copy of the foregoing Department's Response to Petitioner's Exceptions to Proposed Order on Penalties, postage prepaid, to the following:

Juniper Hill Farm, LLC  
c/o Thomas C. Morrison  
111 N. Last Chance Gulch, Ste. 3B  
Helena, MT 59601-4144

Jane B. Amodeo

THOMAS C. MORRISON  
MORRISON & BALUKAS LAW FIRM, PLLC  
111 N. Last Chance Gulch (3B)  
Helena, MT 59601-4144  
406-443-1040 phone  
406-443-1041 fax  
Attorney for Juniper Hill Farm, LLC

FILED this 12<sup>th</sup> day of  
December AD 2010  
at \_\_\_\_\_ o'clock \_\_\_\_\_ A.M.  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
by: M. Galt

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

IN THE MATTER OF: )  
VIOLATIONS OF THE MONTANA )  
UNDERGROUND STORAGE TANK ACT BY )  
JUNIPER HILL FARM, LLC AT LAKESIDE )  
GENERAL STORE, LEWIS & CLARK )  
COUNTY, MONTANA. )  
[FACILITY ID 25-13657; FID 1799] )  
Docket No. UST-09-09 )

Case NO. BER 2009-18-UST

**SUPPLEMENTAL RESPONSE  
REQUEST FOR BOARD'S COMPLETE REVIEW OF ENTIRE RECORD  
&  
AND OBJECTIONS TO DEPARTMENT'S RESPONSES**

This is a supplemental response to the Department's Proposed Order On Penalties and a request for a complete review of the entire record by the Board of Environmental Review at its meeting on December 3, 2010, as provided under 2-4-621 (3) and objects to the Department's responses:

The Petitioner believes important evidence, submitted at the DEQ hearing, should be considered by the Board in its review of the proposed penalties.

The proposed penalty relates to the petitioner's failure to provide complete gas read-out information on the gas tank levels at the Lakeside General Store. This information was needed

to assure there was no tank leakage in the Store's fiberglass gas tanks. Previously the Lakeside General Store had already installed new and expensive electronic equipment for reading the gas levels in lieu of hand measuring devices. The low-level read-out problem occurred because the new electronic equipment did not record low fuel levels.

The hearing examiner acknowledges that after receiving a notice on November 5, 2008, Mr. Morrison took timely steps (not later than December 1, 2008) to remedy the low-level readout problem by asking Northwest Fuels to install the CSLD device that would allow a reading of lower fuel levels. (Finding ¶3 and ¶11) The fuel tanks were part of the operation of the Lakeside General Store, then managed by Naomi Torick. Due to a miscommunication with the vendor, the chip was not installed. The fuel level problem persisted without Mr. Morrison's actual knowledge until informed by the Department's notice in April 2009. This is because the Lakeside Store and gas station operation was operated by a hired manager, Ms. Torick. When Mr. Morrison discovered the CSLD chip had not been installed, he immediately initiated action to have computer chip installed and it was.

Although the hearing examiner acknowledges that the CSLD chip cost about \$1,000, she notes that no invoice was produce to corroborate Mr. Morrison's testimony, as if his testimony was not credible. Nevertheless the hearing examiner assumed the chip was installed since no further readout problems has since occurred. In response, the petitioner has secured and submitted an invoice corroborating the cost of the CSLD, which slightly more than \$1,000. For some reason, the Department still will not concede the cost. It is unclear why the Department is so unwilling to accept the likelihood that the CSLD chip cost what it did. As a courtesy to the petitioner, if for no other reason, the Department should be willing to at least concede this point.

The petitioner submits the following additional objections to the statements in the Department's RESPONSE TO PETITIONER'S EXCEPTIONS TO PROPOSED ORDER:

1. The Department's responses to Petitioner are generally arbitrary and capricious and lack focus on the issues.

2. Petitioner's exceptions are not baseless (as asserted by the Department), but rather the exceptions are based on the State's own criteria. The gravity and extent were low. There was no spill and there was no risk to the public health or the environment. Petitioner responded in good faith and with full cooperation.

3. The findings of fact, as reported by the Department, do not reflect the responsiveness and commitment of Petitioner.

4. The Hearing Examiner did not objectively review the information presented by Petitioner. Such information has clearly shown that Petitioner responded in such a manner as to protect the public health and the environment.

5. Petitioner has specifically asserted exceptions to the conclusions of law.

6. There is a sound, valid basis for each of Petitioner's exceptions. The Department's statement that the exceptions are "baseless" is unfair and unfounded rhetoric.

7. Petitioner's exception to finding No.6 is well founded and based on the physical and chronological facts of the issue. The Department's position on No. 6 is based on opinion and degree and not on fact. There was no harm and there was effective response action.

8. The Department claims "Risk there was aplenty". This "cute" phrase is not in touch with reality. There was no completed exposure pathway to potential down gradient receptors and thus no immediate risk.

9. The Department policy of always assessing “major extent” is arbitrary and capricious.

10. Petitioner has not necessarily disputed the Department’s analysis of the violation, but Petitioner does dispute the fact that the Department has imposed an arbitrary and unreasonable penalty when the issue has been corrected.

11. The Department claims that the fine would be a deterrence that can be directed at other potential violators. This is an outrageous and ridiculous statement. The objective should be to get the problem corrected not to fine the business owners who have corrected the problem.

12. The analogy (page 10, lines 15-19) is ridiculous and irrelevant.

13. The Department requested the invoice, and then the Department claimed the invoice was not properly submitted. This is a typical bureaucratic road block to resolving an issue in a simple manner.

14. The Department’s concluding argument is poorly written and states that the penalty should not be reduced because the penalty should not be reduced. This is no argument.

It is difficult to understand the vigor with which the Department pursues the disputed penalty in this case. The facts are clear. No harm ever resulted to the public. Analogies to DUI convictions are very off point. In this case, there was no intentional wrongdoing. The Petitioner at all times acted in good faith. The equipment failure giving rise to the gas readout problem was resolved by the petitioner voluntarily making an expensive improvement to the gas readout system. The Board has the right to consider all facts in the record as well as those set forth in the hearing examiner’s findings. When it does the petitioner prays that the Board will find it more appropriate to forgive or at least mitigate the proposed penalty in this case.

WHEREFORE IT IS PRAYED, that this Board consider this REQUEST FOR A COMPLETE REVIEW OF ENTIRE RECORD and consider these FURTHER OBJECTIONS TO DEPARTMENT'S RESPONSES.

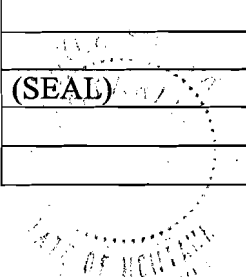
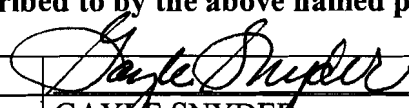
Dated this 10<sup>TH</sup> day of November, 2010.

by: Thomas C. Morrison

THOMAS C. MORRISON

attorney for Petitioner.

Sworn and subscribed to by the above named person, this 10<sup>TH</sup> day of November, 2010.

		11/10/2010
	GAYLE SNYDER	date
	NOTARY PUBLIC for the State of MONTANA	
	Residing at TOWNSEND, MONTANA	
	My Commission expires on March 23, 2012	

## **PROOF OF SERVICE BY MAIL**

On the below-indicated date, this certifies that a true and correct copy of the foregoing was emailed and simultaneously mailed, with prepaid postage, by first class United States mail, to:

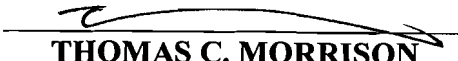
**The Honorable Katherine J. Orr  
Hearing Examiner  
Agency Legal Services  
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**Joyce Wittenberg  
Secretary of the Board  
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