



Montana Board of Environmental Review

P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: www.deq.state.mt.us

TELECONFERENCE AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, MARCH 25, 2011

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

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. It is expected that most or all available Board members will be participating via teleconference. One or more Board members may be present at the location stated above, as well as the Board's attorney and secretary. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for the Board members is available from the Board secretary at (406) 444-2544 or at <http://www.deq.mt.gov/ber/index.asp>. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at jwittenberg@mt.gov no later than 24 hours prior to the meeting to advise her of the nature of the accommodation you need.

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. January 28, 2011, Board meeting.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Cases assigned to Hearing Examiner 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 January 26, 2011, the Board received *Notice of Continued Appearance of Counsel for North Star Aviation, Inc.*
 - c. **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.** Hearing Examiner Katherine Orr issued the *First Scheduling Order* on January 11, 2011. A hearing is scheduled for June 22, 2011.
 - d. **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 January 4, 2011, the Department filed *The Department's Motion for Summary Judgment*. The Board received the Respondent's *Response to Motion for Summary Judgment* and the Department's *Reply Brief in Support of the Department's Motion for Summary Judgment* on January 28, 2011. On March 3, 2011, Hearing Examiner Katherine Orr issued an *Order Vacating Hearing Date* to allow the hearing examiner additional time to rule on the Motion for Summary Judgment.

- e. **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.** On February 1, 2011, the Board received the Appellant's *Motion to Amend Scheduling Order*. Hearing Examiner Katherine Orr issued the *Second Scheduling Order* on February 2, 2011, setting a hearing date of June 20, 2011.
- f. **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.** On January 24, 2011, the Board received the Appellant's *Request for Fourth Extension of Time to Respond to First Prehearing Order*. Hearing Examiner Katherine Orr issued a *Fourth Order Granting Extension of Time* giving the parties through February 25, 2011, to reach settlement or file a proposed hearing schedule. On February 28, 2011, the Board received the Appellant's *Request for Fifth Extension of Time to Respond to First Prehearing Order* and on March 3, 2011, Ms. Orr issued the *Fifth Order Granting Extension of Time*, giving the parties through March 31, 2011, to reach settlement or file a proposed prehearing schedule.
- g. **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.** On January 6, 2011, a hearing on MATL's Motion to Dismiss was held. On January 7, 2011, an *Order for Additional Briefing* was issued. On January 11, 2011, the Board received *Notice of Deposition of Ronald Laubach* from MATL. The Board received *MATL's Supplemental Brief in Support of its Motion to Dismiss the Laubach Appeal* on January 14, 2011, and *Appellant Laubach's Additional Briefing* on January 18. On January 19, 2011, the Board received *MATL's Notice of Submittal of Motion to Dismiss the Laubach Appeal* and on January 21 it received MATL's *Amended Notice of Telephonic Deposition of Ronald Laubach*. On February 1, 2011, the Board received *Appellant Laubach's Response to Interrogatories*, and on February 3, 2011, the Board received *Intervenor MATL's List of Witnesses and Exhibits*. On March 3, 2011, Hearing Examiner Katherine Orr issued an *Order Vacating Hearing and Resetting Prehearing and Hearing Dates*, setting the hearing for March 29, 2011.
- h. **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.** On January 14, 2011, the Board received MATL's *Notice of Serice[sic] of MATL's First Discovery Requests to Appellant Maurer Farms, Inc.* A *Notice of Appearance* and a *Response Brief to MATL's Combined Motion to Dismiss* was filed by Alan Joscelyn, attorney for the appellants, on January 20, 2011. On January 25, the Board received *MATL's List of Individuals Likely to Have Discoverable Information and Potential Exhibits*. Hearing Examiner Katherine Orr issued a *Second Amended Scheduling Order* on January 26, 2011. On January 27, the Board received *MATL's Reply Brief in Support of Motion to Dismiss*. The Board received *Appellant's Response to MATL's First Discovery Requests* on February 17, 2011. On February 22, 2011, the Board received MATL's *Unopposed Motion to Amend Scheduling Order*. Ms. Orr issued a *Third Amended Scheduling Order* on March 1, 2011, setting a hearing on MATL's Motion for Summary Judgment for April 12, 2011. On March 7, 2011, the Board received *Appellants' Supplemented Response to MATL's First Discovery Requests*.
- i. **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. On January 11, 2011, Hearing Examiner Katherine Orr issued an *Order Granting Extension of Time*, giving the parties until January 28, 2011, to reach a settlement or file a proposed schedule.

- j. **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.** On February 3, 2011, the Board received an *Agreed Hearing Dates* from the parties, requesting a two-day hearing during the week of July 11, 2011, in Kalispell. Hearing Examiner Katherine Orr issued a *First Scheduling Order* on March 1, 2011.
 - k. **In the matter of violations of the Montana Public Water Supply Laws by Bellecreeke, LLC, at Belle Creeke Dental, PWSID #MT0004553, Butte, Silver Bow County, BER 2010-20 PWS.** The Board received a *Request for Extension* on January 21, 2011. On January 28, 2011, Hearing Examiner Katherine Orr issued an *Order Granting Extension of Time*, giving the parties through February 17 to reach settlement or file a proposed schedule. On March 1, 2011, at the request of DEQ counsel, Ms. Orr issued a *Second Order Granting Extension of Time* giving the parties until March 10, 2011, to file a hearing schedule.
2. Cases not assigned to a Hearing Examiner
- a. **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 2010-19 SM.** At its January 28, 2011, meeting, the Board voted to hear this matter itself. Interim Hearing Examiner Katherine Orr issued the *First Prehearing Order* on December 23, 2010, giving the parties until January 13, 2011, to file a proposed schedule.
 - b. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Carbon County Holdings, LLC, at Carbon County Holdings, Carbon County, BER 2011-01 SM.** At its January 28, 2011, meeting, the Board voted to hear this matter itself. Interim Hearing Examiner Katherine Orr issued the *First Prehearing Order* on January 25, 2011.

B. GENERAL CORRESPONDENCE

The Board will be briefed on the following correspondence received:

- 1. January 20, 2011, letter from EPA, re: EPA's action on revisions to Montana's surface water quality standards.

III. ACTION ITEMS

A. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

The Department will propose that the Board initiate rulemaking to:

- 1. Amend 17.38.101 to correct a reference error and to create a new system type for purposes of engineering review and fee collection. This proposed amendment will have the effect of reducing engineering review fees for this new type of system. In addition, the Department is proposing amendments to clarify the water hauler requirements as defined in Title 17, chapter 38, subchapter 5.
- 2. Amend ARM 17.36.922 and ARM 17.36.924 to include additional criteria for use by the department when it hears appeals of local health board variance decisions, to clarify department procedures for variance review, and to make the rules consistent with statute.

B. REPEAL, AMENDMENT, OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of air quality rules. The amendment to ARM 17.8.604 would require Department approval before moving and burning wood and wood byproducts and clarify compliance with BACT when contemplating and conducting open burning. The proposal also amends ARM 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. In the matter of the amendment of air quality rules. The amendment of ARM 17.8.763 sets 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.

C. FINAL ACTION ON CONTESTED CASES

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.** On February 15, 2011, the Board received a joint Stipulation for Dismissal. An order dismissing the case will be presented for signature by the Chair.

D. NEW CONTESTED CASES

1. **In the matter of violations of the Opencut Mining Act by Deer Lodge Asphalt, Inc., at the Olsen Pit, Powell County, Montana, BER 2011-02 OC.** The Board received the appeal on March 8, 2011. The Board may appoint a permanent hearings examiner or decide to hear the matter.

E. OTHER ACTION ON CONTESTED CASES

1. **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.** At its December 3, 2010, meeting, the Board reviewed the exceptions, response to exceptions, and supplemental response to exceptions on the *Proposed Order on Penalty*, and approved the proposed order. On January 13, 2011, the Board received *Request for Rehearing* from Juniper Hill, requesting a hearing date after February. On January 20, 2011, the Board received *The Department's Response to Petitioner's Request for Rehearing* requesting that the Board reject the request for rehearing.

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



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: www.deq.state.mt.us

**TELECONFERENCE MINUTES
JANUARY 28, 2011**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:05 a.m., on Friday, January 28, 2011, via teleconference, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Larry Mires

Board Members Present (via telephone): Chairman Joseph Russell, Marvin Miller, Heidi Kaiser, Robin Shropshire, Larry Anderson, and Joe Whalen

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

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director); John North and David Rusoff – Legal; Judy Hanson – Permitting & Compliance Division; Jon Dilliard, Eugene Pizzini, and Shelley Nolan – Public Water Supply & Subdivisions Bureau; David Klemp and Debra Wolfe – Air Resources Management Bureau; John Arrigo – Enforcement Division

Interested Persons Present: *no members of the public were present*

- I.A.1 | Review and approve December 3, 2010, Board teleconference meeting minutes.
- Mr. Mires MOVED to approve the December 3, 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.
- II.A.1.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.
- II.A.1.c | 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, BER 2009-20/22 SUB.
- No discussion took place regarding II.A.1.a, II.A.1.b, and II.A.1.c.
- II.A.1.d | 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.
- Ms. Orr noted that a motion for summary judgment had been filed, as well a response to the motion. She said a reply could be forthcoming.
- II.A.1.e | 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.
- Ms. Orr said a hearing on this matter is scheduled for February 28, but that it could be moved to May or June.
- II.A.1.f | 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.
- Ms. Orr said she had issued a fourth order granting extension of time for the parties to file a proposed schedule.
- II.A.1.g | 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.
- Chairman Russell and Ms. Kaiser both noted that the appellant had contacted them trying to discuss the case. Each said they informed Mr. McDonald that they could not discuss the matter with him.

- II.A.1.h 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.
- II.A.1.i 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.
- Ms. Orr said the MATL had filed a motion to dismiss in both these cases and that Mr. Laubach had submitted a briefing in response. She said oral argument for BER 2010-16 MFS is scheduled for February 3.
- II.A.1.j 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.
- II.A.1.k 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.
- No discussion took place regarding items II.A.1.i and II.A.1.j.
- II.A.2.a 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 Juniper Hill had filed a motion for rehearing, and that the DEQ had filed opposition to that motion. She indicated that disposition, in some form, would occur at the next meeting.
- III.A.1 In the matter of the amendment of ARM 17.38.204 regarding the adoption by reference of 40 CFR 141.65(a).
- Mr. Pizzini said the Board had initiated the rulemaking at its October 8, 2010, meeting and, as proposed, no hearing was held. He said notices of the rulemaking were sent to interested parties and that no comments were received. He said the DEQ recommends the Board adopt the rule amendments as proposed.
- Chairman Russell asked if there was anyone in the audience who would like to speak to the matter. No one responded.
- Chairman Russell called for a motion to adopt the rule as written and accept the 521/311 Analysis. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.A.2 | In the matter of the amendment of ARM 17.8.102 regarding the Air Quality Incorporation by Reference rules.
- Ms. Wolfe provided background information on the rulemaking; she said a hearing was held December 6, 2010, and no comments were received. She said the DEQ recommends adoption of the amendments as proposed.
- Chairman Russell called for public comment on the matter. No one responded.
- Chairman Russell called for a motion to adopt the amendments, and to accept the Presiding Officer's report and the 521/311 Analysis. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.B.1 | In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC, at the Bull Mountain Mine #1, Roundup, Musselshell County, BER 2010-19 SM.
- Mr. Whalen MOVED for the Board to hear this matter. Mr. Anderson SECONDED the motion. Ms. Kaiser RECUSED herself from taking action on this item. The motion CARRIED with a unanimous VOTE.
- III.B.2 | In the matter of violations of the Montana Public Water Supply Laws by Belle Creeke Dental, PWSID #MT0004553, Butte, Silver Bow County, BER 2010-20 PWS.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearing examiner for this matter. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.B.3 | In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Carbon County Holdings, LLC, at Carbon County Holdings, Carbon County, BER 2011-01 SM.
- Chairman Russell called for a motion. Ms. Whalen MOVED for the Board to hear this matter. Ms. Anderson SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.1 | In the matter of violations of the Clean Air Act of Montana by Todd Michael Mihalko, Jefferson County, Montana, BER 2010-10 AQ.
- Ms. Orr explained that this case was settled under Rule 41(a).
- Chairman Russell called for a motion to authorize the Board Chair to sign the dismissal order. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV. General public comment

Chairman Russell asked if any member of the public would like to comment on issues before the Board. There was no response.

V. Adjournment

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

The meeting adjourned at 9:30 a.m.

Board of Environmental Review January 28, 2011, minutes approved:

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

DATE



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

JAN 20 2011

RECEIVED

JAN 28 2011

Ref: 8EPR-EP

Joseph W. Russell, Chairperson
Montana Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

**DEQ
DIRECTOR'S OFFICE**

Subject: EPA's Action on Revisions to
Montana's Surface Water
Quality Standards

Dear Mr. Russell:

The U.S. Environmental Protection Agency Region 8 (EPA) has completed its review of Montana's revised water quality standards (WQS) in Department Circular DEQ-7 (DEQ-7), and I am pleased to inform you that today the Region is approving the revisions described in the enclosure. The Montana Board of Environmental Review (the Board) adopted these revisions on July 23, 2010, and submitted them to EPA for review with a letter dated November 18, 2010, from Richard H. Oppen, Director of Montana Department of Environmental Quality (DEQ). The submittal package included: (1) a copy of the notice of proposed amendments and notice of extension of the comment period; (2) notice of final adoption of the amendments with the State's response to comments; (3) revised DEQ-7 (August 2010 edition); and (4) a letter certifying that the amendments were adopted in accordance with State law. Receipt of the submittal package on November 23, 2010, initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA or the Act) and the implementing federal water quality standards regulation (40 CFR Part 131). EPA commends the Board and DEQ for adopting significant improvements to the State's WQS.

The principal revisions to DEQ-7 include:

- Eighteen new and one revised human health criteria for pesticides;
- Three new human health criteria consistent with EPA's national criteria recommendations published pursuant to CWA Section 304(a);
- Four revised human health criteria consistent with EPA's criteria recommendations;

- Addition of duration (averaging period) and revision of the allowable exceedence frequency for both acute and chronic aquatic life criteria to be consistent with long-standing EPA guidance; and
- Six aquatic life criteria revised to reflect the change in exceedence frequency consistent with EPA's CWA Section 304(a) criteria recommendations.

A detailed rationale for our approval of these provisions under the CWA can be found in the attached enclosure.

Agency Review

The CWA Section 303(c)(2), requires States and authorized Indian Tribes to submit new or revised water quality standards to EPA for review. EPA is to review and approve, or disapprove, the submitted standards. Pursuant to CWA Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall notify the State or authorized Tribe and specify the changes to meet the requirements. If such changes are not adopted by the State or authorized Tribe within ninety days after the date of notification, EPA is to propose and promulgate such standard pursuant to CWA Section 303(c)(4). The Region's goal has been, and will continue to be, to work closely with States and authorized Tribes throughout the standards revision process as a means to avoid the need for such disapproval and promulgation actions. Pursuant to EPA's Alaska Rule (40 CFR Section 131.21(c)), new or revised state standards submitted to EPA after May 30, 2000, are not effective for CWA purposes until approved by EPA.

Endangered Species Act Requirements

It is important to note that EPA's approval of Montana's Water Quality Standards is considered a federal action which may be subject to the Section 7(a)(2) consultation requirements of the Endangered Species Act (ESA). Section 7(a)(2) of the ESA states that "each federal agency ... shall ...insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical..."

EPA's approval of the water quality standards revisions, therefore, may be subject to the results of consultation with the U.S. Fish and Wildlife Service (Service) pursuant to Section 7(a)(2) of the ESA. Nevertheless, EPA also has a Clean Water Act obligation, as a separate matter, to complete its water quality standards action. Therefore, in approving the State's WQS today, EPA is completing its CWA Section 303(c) responsibilities. However, should the consultation process with the U.S. Fish and Wildlife Service identify information regarding impacts on listed species or designated critical habitat that supports amending EPA's approval, EPA will, as appropriate, revisit and amend its approval decision for those new or revised water quality standards.

WQS Approved Without Condition

EPA is approving the following WQS without condition:

- Eighteen new and one revised human health criteria for pesticides;
- Three new human health criteria consistent with EPA's national criteria recommendations published pursuant to CWA Section 304(a); and
- Four revised human health criteria consistent with EPA's criteria recommendations.

WQS Approved Subject to ESA Consultation

Several revisions to aquatic life criteria are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA. The Region has initiated consultation with the U.S. Fish and Wildlife Service on the following provisions:

- Addition of duration (averaging period) and revision of the allowable exceedence frequency for both acute and chronic aquatic life criteria to be consistent with long-standing EPA guidance;
- Six aquatic life criteria revised to reflect the change in exceedence frequency consistent with EPA's CWA Section 304(a) criteria recommendations; and
- Deletion of the Endosulfan Sulfate aquatic life criteria.

Provisions for Which EPA is Taking no Action

There are several provisions that EPA is not acting on today (see the attached enclosure). In general, editorial revisions such as updating references or adding synonymms for pollutants do not constitute new or revised WQS. In addition, a number of the new WQS jointly address surface water and ground water, as required by Montana's Agricultural Chemical Groundwater Protection Act. Although EPA supports the protection of ground water quality and has a number of programs invested in the protection of that resource, our CWA Section 303(c) approval and disapproval authority does not apply to ground water. Therefore, EPA is taking no action on the ground water WQS.

Indian Country

The water quality standards approvals in today's letter apply only to waterbodies in the State of Montana, and do not apply to waters that are within Indian country, as defined in 18 U.S.C. Section 1151. "Indian country" includes the Fort Peck, Flathead, Rocky Boy's, Blackfeet, Fort Belknap, Crow and Northern Cheyenne Indian Reservations; any land held in trust by the United States for an Indian tribe and any other areas defined as "Indian country" within the meaning of 18 U.S.C. 1151. Today's letter is not intended as an action to approve or disapprove water quality standards applying to

waters within Indian country. EPA, or authorized Indian tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian country.

Conclusion

EPA commends the Board and DEQ for the significant improvements to Montana's WQS and looks forward to continuing the work of protecting and improving Montana's surface waters. If you have questions concerning this letter, the most knowledgeable person on my staff is Tonya Fish at 303-312-6832.

Sincerely,

A handwritten signature in cursive script that reads "Carol L. Campbell".

Carol L. Campbell
Assistant Regional Administrator
Office of Ecosystems Protection
and Remediation

Enclosure

cc: Richard Opper, Director of Montana Department of Environmental Quality

Rationale for EPA's Action on Montana's Revised Surface Water Quality Standards

WQS Approved Without Condition

New and Revised Pesticide Criteria for the Protection of Human Health

Montana's Agricultural Chemical Ground Water Protection Act (ACGWPA) requires that the Board adopt numeric WQS for ground water for agricultural chemicals (pesticides) that are known or predicted to occur in the State's ground water (MCA 80-15-201). As a result, DEQ-7 is regularly updated with new human health-based standards for pesticides. In adopting the new and revised standards for pesticides, the Board elected to apply those standards to both ground water and surface water. EPA supports this decision. In the Agency's view, the Board has taken a prudent public health protection position in applying the new and revised standards to both ground water and surface water. Because EPA's CWA Section 303(c) approval authority is limited to WQS for surface water, today's EPA action is limited to the application of the criteria discussed below to surface water.

ACGWPA requires that the numeric WQS must be the same as any promulgated¹ or nonpromulgated² federal standards published by EPA, unless new technical information justifies a different standard. In general, the State uses the Maximum Contaminant Level (MCL) established by EPA under the Safe Drinking Water Act. MCLs are the maximum permissible level of a contaminant in water delivered to users of a public water system (40 CFR Section 141.2). If there is no MCL, the State uses the EPA Lifetime Health Advisory (LHA), which considers the health effects of a chemical on a person weighing 70 kilograms and drinking 2 liters of water per day over a lifetime (the standard exposure scenario for drinking water). If there is no MCL or LHA, the State requests the assistance of EPA Region 8 in establishing a standard consistent with Montana Code Annotated (MCA) 80-15-201(3). EPA has not published an MCL or LHA for any of the pesticides in today's action. In letters dated February 25, 2009 and September 25, 2009, the State requested the assistance of the Region in developing WQS for the pesticides in today's action. The Region responded with letters dated March 4, 2009 and October 8, 2009. The Region used the following health advisory (HA) formula:

$$HA = RfD \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times RSC$$

where RfD = a Chronic Reference Dose, or safe exposure level, based on toxicity information, and RSC = the Relative Source Contribution, or the proportion of the total permissible dose that is derived from water, versus other exposure routes. The RSC is

¹ Defined as a Maximum Contaminant Levels (MCLs) established by EPA under the provisions of the Safe Drinking Water Act, a national primary drinking water standard, or an interim drinking water regulation or other EPA regulation based on federal law (MCA 80-15-102(18)).

² Defined as a health advisory or a suggested no adverse response level that is published by EPA (MCA 80-15-102(12)).

applied to ensure that the total exposure to the chemical from all environmental media (drinking water, food, and air) is below the RfD. In the absence of reliable information from food and air, the EPA Drinking Water Program uses a value of 0.2 for the RSC. The calculated value is rounded to one significant digit.

The general equation for a HA based on the Oral Cancer Slope Factor is:

$$HA = \text{Target Cancer Risk} \times 70 \text{ kg} \times 1 \text{ day}/2 \text{ L} \times 1/\text{Oral Cancer Slope Factor}$$

Montana uses a Target Cancer Risk level of 10^{-5} (1 in 100,000). The calculated value is rounded to one significant digit.

For chemicals considered to be Possible Human Carcinogens (Group C), the EPA Pesticide Program has determined that a linear low-dose extrapolation using the Oral Cancer Slope Factor is not appropriate based on the mode of action³ of the chemical and an Oral Cancer Slope Factor is not calculated. For these chemicals, the Pesticide Program has determined that the RfD is protective of the cancer endpoint.⁴ This approach was used for Difenconazole, Dimethenamid, Propiconazole, Pyrasulfotole, and Tebuconazole.

For each pesticide in today's action, the basis for the adopted revisions is summarized below (listed in the order they appear in the August 2010 DEQ-7).

1. Aminopyralid (page 9)

The EPA Pesticide Program RfD is 0.5 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.5 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day}/2 \text{ Liters} \times 0.2 = 4 \text{ mg/L (4,000 } \mu\text{g/L)}$$

Reference: Aminopyralid; Pesticide Tolerance (70 Fed. Reg. 46,419-46,428, August 10, 2005)

2. Azinphos methyl and degredate azinphos methyl oxon (page 10)

The EPA Pesticide Program RfD is 0.00149 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.00149 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day}/2 \text{ Liters} \times 0.2 = 0.01 \text{ mg/L (10 } \mu\text{g/L)}$$

Reference: Azinphos-methyl; Reregistration Eligibility Decision, July 31, 2006

³ The term "*mode of action*" is defined as a sequence of key events and processes, starting with interaction of an agent with a cell, proceeding through operational and anatomical changes, and resulting in cancer formation. See *Guidelines for Carcinogen Risk Assessment* Section 1.3.2. at <http://www.epa.gov/osa/mmoaframework/pdfs/CANCER-GUIDELINES-FINAL-3-25-05%5B1%5D.pdf>.

⁴ See *Guidelines for Carcinogen Risk Assessment* Section 3.3.1. and 3.3.4.

3. Difenconazole (page 24)

The EPA Pesticide Program RfD is 0.01 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.01 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.07 \text{ mg/L (70 } \mu\text{g/L)}$$

Reference: Difenconazole; Pesticide Tolerance (73 Fed. Reg. 1,503-1,508, January 9, 2008)
Difenconazole; Risk Assessment, November 9, 2007

4. Dimethenamid and degredate demethenamid OA (page 24)

The EPA Pesticide Program RfD is 0.05 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.05 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.4 \text{ mg/L (400 } \mu\text{g/L)}$$

Reference: Dimethenamid; Petition for Tolerance (68 Fed. Reg. 11,850-11,855, March 12, 2003)

5. Ethion (page 28)

The EPA Pesticide Program RfD is 0.0005 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.0005 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.004 \text{ mg/L (4 } \mu\text{g/L)}$$

Reference: Ethion; Reregistration Eligibility Decision, April 27, 2001

6. Ethofumesate (page 29)

The EPA Pesticide Program RfD is 1.3 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 1.3 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 9 \text{ mg/L (9,000 } \mu\text{g/L)}$$

Reference: Ethofumesate; Pesticide Tolerance (71 Fed. Reg. 51,510-51,516, August 30, 2006)
Ethofumesate; Reregistration Eligibility Decision, September 2005
Ethofumesate; Risk Assessment, April 24, 2006

7. Fenbuconazole (page 29)

The EPA Pesticide Program Oral Cancer Slope Factor of $3.59 \times 10^{-3} \text{ (mg/kg-day)}^{-1}$,
Based on the standard formula, the advisory is:

$$HA = 10^{-5} \times 1 \text{ day/2 L} \times 70 \text{ kg} \times 1/[3.59 \times 10^{-3} \text{ (mg/kg-day)}^{-1}] = 0.1 \text{ mg/L (100 } \mu\text{g/L)}$$

Reference: Fenbuconazole; Pesticide Tolerance (73 Fed. Reg. 50,556-50,563,
August 27, 2008)
Fenbuconazole; Risk Assessment, June 12, 2008

8 and 9. Flucarbazonone and metabolite Flucarbazonone sulfonamide (page 29) (listed
separately in DEQ-7, but rationale is the same)

The EPA Pesticide Program RfD is 0.36 mg/kg-day. Based on the standard formula, the
advisory is:

$$HA = 0.36 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 3 \text{ mg/L (3,000 } \mu\text{g/L)}$$

Reference: Flucarbazonone-sodium; Pesticide Tolerance (71 Fed. Reg. 76,927-76,932,
December 22, 2006)
Flucarbazonone-sodium; Time-Limited Pesticide Tolerances (65 Fed. Reg.
58,364-58,375, September 29, 2000)
EPA Pesticide Fact Sheet for Flucarbazonone-sodium, September 29, 2000

10. Imazalil (page 33)

The EPA Pesticide Program Oral Cancer Slope Factor of $6.11 \times 10^{-2} \text{ (mg/kg-day)}^{-1}$,
Based on the standard formula, the advisory is:

$$HA = 10^{-5} \times 1 \text{ day/2 L} \times 70 \text{ kg} \times 1/[6.11 \times 10^{-2} \text{ (mg/kg-day)}^{-1}] = 0.006 \text{ mg/L (6 } \mu\text{g/L)}$$

Reference: Imazalil; Reregistration Eligibility Decision, September 30, 2003

11. Imazapic (page 33)

The EPA Pesticide Program RfD is 0.5 mg/kg-day. Based on the standard formula, the
advisory is:

$$HA = 0.5 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 4 \text{ mg/L (4,000 } \mu\text{g/L)}$$

Reference: Imazapic – Report of the Hazard Identification Assessment Review
Committee, May 3, 2001
Imazapic – Report of the FQPA Safety Factor Committee, June 21, 2001
Imazapic - Results of the Health Effects Division Metabolism Assessment
Review Committee, June 7, 2001

12. Imazethapyr (page 33)

The EPA Pesticide Program RfD is 2.5 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 2.5 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 20 \text{ mg/L (20,000 } \mu\text{g/L)}$$

Reference: Imazethapyr; Pesticide Tolerance (67 Fed. Reg. 55,323-55,331, August 29, 2002)

13. Propiconazole (page 44)

The EPA Pesticide Program RfD is 0.1 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.1 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.7 \text{ mg/L (700 } \mu\text{g/L)}$$

Reference: Propiconazole; Pesticide Tolerance (71 Fed. Reg. 55,300-55,307, September 22, 2006)
Propiconazole; Risk Assessment, June 28, 2006

14. Prosulfuron (page 45)

The EPA Pesticide Program RfD is 0.02 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.02 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.1 \text{ mg/L (100 } \mu\text{g/L)}$$

Reference: Prosulfuron; Pesticide Tolerance (61 Fed. Reg. 26,843-26,844, May 29, 1996)
Prosulfuron; Petition for Tolerance (67 Fed. Reg. 79,914-79,918, December 31, 2002)

15. Pyrasulfotole (page 45)

The EPA Pesticide Program RfD is 0.01 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.01 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.07 \text{ mg/L}$$

Reference: Pyrasulfatole; Pesticide Tolerance (72 Fed. Reg. 45,643-45,649, August 15, 2007)
Pesticide Fact Sheet, Pyrasulfotole, August 2007

16. Sulfometuron, methyl (page 45)

This criterion was revised from 1750 µg/L to 2000 µg/L. The EPA Pesticide Program RfD is 0.275 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.275 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 2 \text{ mg/L (2000 } \mu\text{g/L)}$$

Reference: Reregistration Eligibility Decision on Sulfometuron Methyl, September 2008

17. Sulfosulfuron (page 46)

The EPA Pesticide Program Oral Cancer Slope Factor of $1.03 \times 10^{-3} \text{ (mg/kg-day)}^{-1}$, Based on the standard formula, the advisory is:

$$HA = 10^{-5} \times 1 \text{ day/2 L} \times 70 \text{ kg} \times 1/[1.03 \times 10^{-3} \text{ (mg/kg-day)}^{-1}] = 0.3 \text{ mg/L (300 } \mu\text{g/L)}$$

Reference: Sulfosulfuron; Pesticide Tolerance (64 Fed. Reg. 27,186-27,192, May 19, 1999; 70 Fed. Reg. 69,457-69,464; 72 Fed. Reg. 54,569-54,574, September 26, 2007)

18. Tebuconazole (page 46)

The EPA Pesticide Program RfD is 0.029 mg/kg-day. Based on the standard formula, the advisory is:

$$HA = 0.029 \text{ (mg/kg-day)} \times 70 \text{ kg} \times 1 \text{ day/2 Liters} \times 0.2 = 0.2 \text{ mg/L (200 } \mu\text{g/L)}$$

Reference: Tebuconazole; Pesticide Tolerance (73 Fed. Reg. 27,748-27,756, May 14, 2008; 73 Fed. Reg. 47,065-47,072, May 14, 2008)
Tebuconazole; Risk Assessment, April 18, 2008

These revisions to DEQ-7 have added a significant level of public health protection to Montana's water quality standards, and EPA commends the Board and the Department for making these changes. These health-based standards were calculated using EPA's recommended approach for appropriate application of exposure assumptions and toxicity information. EPA, therefore, has concluded that the new and revised human health criteria discussed above are scientifically defensible and are consistent with the requirements of the Clean Water Act and EPA's implementing regulation at 40 CFR Section 131.11. Accordingly these revisions are approved.

In addition, Acetochlor was revised to exclude metabolites Acetochlor ESA and Acetochlor OA, but the numeric criterion was not revised. EPA approved the Acetochlor criterion on September 4, 2008. Montana intends to assume degradates of unknown toxicity have the same toxicity as the parent compound and will list them together in DEQ-7 (i.e., the criterion for Acetochlor includes the degradates of unknown toxicity).

Degradates having their own health advisory will be listed separately in DEQ-7. Metabolites Acetochlor ESA and Acetochlor OA have independent health advisories, so it is the State's intent to adopt separate criteria for these metabolites and list them separately in DEQ-7. EPA supports this approach and concludes this revision is consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and is approved.

New Human Health Criteria for Non Priority Pollutants

The State adopted three new non priority pollutant human health criteria: Nitrosamines, Nitrosodibutylamine, N, and Nitrosodiethylamine, N (all on DEQ-7 page 39). These criteria are consistent with EPA's National Recommended Water Quality Criteria (Criteria Table) published pursuant to CWA Section 304(a).⁵ Therefore, these revisions are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and are approved.

Revised and Deleted Human Health Criteria

The State revised four human health criteria to be consistent with EPA's Criteria Table.

1. Acrolein (DEQ-7 page 7) was revised from 190 to 60 µg/L consistent with the new EPA recommendation published on June 10, 2009.
2. Barium (page 10) was revised from 2,000 to 1,000 µg/L consistent with EPA's non priority pollutant recommendation.
3. Dinitrotoluene, 2,4- (page 25) was revised from 0.5 to 1.1 µg/L consistent with EPA's priority pollutant recommendation.
4. Trichlorophenol, 2,4,5- was revised from 7 to 1800 µg/L consistent with EPA's non priority pollutant recommendation.

These criteria are consistent with EPA's Criteria Table. Therefore, these revisions are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and are approved.

In addition, Endosulfan (page 27) was revised from 110 to 62 µg/L. EPA has no recommendation for Endosulfan, but 62 µg/L is EPA's priority pollutant recommendation for human health for alpha- and beta-Endosulfan and Endosulfan Sulfate. Montana has adopted EPA's recommended human health criteria of 62 µg/L for alpha- and beta-Endosulfan, and Endosulfan Sulfate. The State intends to use the Endosulfan criterion of 62 µg/L in those instances where the alpha- and beta- isomers cannot be distinguished by the analytic technique and the number reported represents the sum of the two isomers. This provides an additional level of protection and EPA believes these criteria will be adequate to protect designated uses, therefore, this revision is consistent with the

⁵ Available at <http://water.epa.gov/scitech/swguidance/waterquality/standards/current/index.cfm>.

requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and is approved.

Montana also revised the criterion for Radon 222 from 15 picocuries/liter to 300 picocuries/liter. EPA published a draft MCL of 300 picocuries/liter in 1999 (65 Fed. Reg. 59,246, 59,252, November 2, 1999) and this recommendation is still listed in the 2009 Edition of the Drinking Water Standards and Health Advisories.⁶ EPA believes this criterion will provide adequate protection for human health. This revision is consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and is approved.

Hexachlorocyclohexane was deleted from DEQ-7. Our understanding is that the State intends to adopt EPA's non priority pollutant recommendation for Hexachlorocyclohexane-Technical in the next WQS rulemaking. Montana has adopted human health criteria for alpha, beta, and gamma hexachlorocyclohexane, and EPA believes these criteria will be adequate to protect designated uses even in the absence of a criteria for Hexachlorocyclohexane-Technical. Therefore, this revision is consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and is approved.

WQS Approved Subject to ESA Consultation

Aquatic Life Criteria Duration and Frequency

The State revised DEQ-7 Footnote 3 and 4 to: (1) add a duration (averaging period) of 1-hour for acute aquatic life criteria and 96-hour for chronic aquatic life criteria; and (2) change the allowable exceedence frequency for both acute and chronic aquatic life criteria from never-to-exceed to one exceedence in three years. Aquatic organisms do not experience constant, steady exposure, but rather fluctuating exposures. EPA's aquatic life criteria are intended to protect against short-term (acute) effects like death and immobilization, and long-term (chronic) effects such as growth and reproduction. Since 1985,⁷ EPA has recommended an averaging period of 1-hour for acute criteria and an averaging period of 4 days or 96 hours for chronic criteria. EPA recommends an average frequency for excursions of both acute and chronic criteria not to exceed once in 3 years. EPA selected the 3-year average frequency of criteria exceedence with the intent of providing for ecological recovery from a variety of severe stresses. This return interval is roughly equivalent to the critical flow design condition used in developing permit effluent limits. EPA believes the revised duration and frequency will be adequate to protect designated aquatic life uses. These revisions are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and are approved.

⁶ See <http://water.epa.gov/action/advisories/drinking/upload/dwstandards2009.pdf>

⁷ See EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* at http://water.epa.gov/scitech/swguidance/waterquality/standards/upload/2009_01_13_criteria_85guidelines.pdf

The State also revised six aquatic life criteria to reflect the change in exceedence frequency. EPA's 1980 criteria method resulted in never-to-exceed acute criteria, whereas the 1985 criteria method resulted in 1-hour average acute criteria that included a 1-in-3 year allowable exceedence frequency. For acute aquatic life criteria derived using the 1980 EPA aquatic life criteria method (see Footnote G in EPA's Criteria Table), EPA recommends dividing by a factor of two in order to approximate an acute criterion that would result from the 1985 aquatic life criteria method. The following acute aquatic life criteria were divided by two consistent with Footnote G in EPA's Criteria Table: Chlordane (DEQ-7 page 16), Endosulfan I and II (page 27), Heptachlor (page 31), and p,p'-Dichlorodiphenyltrichloroethane (page 41, listed as 4,4'-DDT in EPA's Criteria Table). Endrin was also divided by two, but does not have to be. The Footnote G in EPA's Criteria Table indicates Endrin only needs to be divided by two for the saltwater criterion. Silver is also listed in Footnote G, but because the State excluded Silver from DEQ-7 Footnote 3, it does not have to be divided by two because it remains a never-to-exceed acute criterion. These revisions are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and are approved.

Endosulfan Sulfate

The State deleted the Endosulfan Sulfate aquatic life criteria from DEQ-7. EPA has a CWA Section 304(a) recommendation for human health, but not for aquatic life. Montana has adopted EPA's recommended aquatic life criteria for alpha- and beta-Endosulfan (the parent compounds of endosulfan sulfate), therefore, EPA believes these criteria will be adequate to protect designated uses even in the absence of an aquatic life criterion for Endosulfan Sulfate. This revision is consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Section 131.11 and is approved.

Provisions for Which EPA is Taking No Action

There are several provisions that EPA is not acting on today because EPA has determined they are not WQS requiring EPA review and approval under CWA Section 303(c). EPA considers provisions that define, change, or establish magnitude, duration, or frequency to be applied, for example, in state/tribal attainment decisions to be new or revised WQS.⁷ The following provisions do not constitute new or revised WQS:

- Updated references to DEQ-7 (ARM 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.102, 17.56.507, 17.56.608);
- Revisions to the introduction to DEQ-7;
- Addition of synonyms for the parameters listed in the first column of DEQ-7;
- Changes to CASRN, NIOSH, or SAX numbers in the second column of DEQ-7;
- Editorial revisions and updated references in Footnote 2, 9, 14, 17;
- Deletions from Footnote 16 (the same language regarding the total recoverable procedure still exists in Footnote 9);

⁷ See EPA's July 6, 2005 *Determination on Referral Regarding Florida Administrative Code Chapter 62-303 Identification of Impaired Surface Waters*.

- Deletion of Footnote 3 from the Human Health column heading in DEQ-7, and revision to Footnote 16 (clarifies the allowable exceedance frequency remains never-to-exceed for all human health criteria);
- Addition of Footnote 36 (provides clarification, but simply restates the requirements of MCA 75-5-301(2)(b)(i), which was approved by EPA on January 26, 1999); and
- Any criteria applicable to ground water. EPA's CWA Section 303(c) approval and disapproval authority does not apply to ground water.

In addition, EPA is not acting on the new human health criterion for delta-Hexachlorocyclohexane. This pollutant was listed in the 2008 DEQ-7, but had no criterion. The State adopted 0.2 µg/L in error and has informed the Region the intent is to delete this criterion in the next rulemaking. This parameter is listed as delta-BHC in EPA's Criteria Table for priority pollutants, but does not include a numeric criterion recommendation.

Imidacloprid was listed in error as a new pesticide criterion. That criterion was approved by EPA in an action letter dated September 4, 2008, therefore, no additional EPA action is required.

EPA is not acting on the addition of Triclopyr to DEQ-7 at the request of the State.

The State adopted the new acute aquatic life criteria for acrolein consistent with EPA's CWA Section 304(a) criteria recommendation published in September 2009. However, the State inadvertently did not include the chronic criterion in DEQ-7. EPA's understanding is that this will be corrected in the next rulemaking, so we will not take action until the chronic criterion is adopted.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR RULE AMENDMENT**

AGENDA # III.A.1

AGENDA ITEM SUMMARY - The department requests approval of amendments to the public water supply rules to:

1. Amend existing public water supply engineering fee rules to lower fees for reviewing plans and specifications for rural water distribution systems;
2. Amend water hauler rules for clarification of existing requirements; and
3. Amend public water supply engineering review rules to correct an internal reference.

LIST OF AFFECTED RULES - ARM 17.38.101, 106, 502, 511, and 513

AFFECTED PARTIES SUMMARY - Owners of "rural water distribution systems", water haulers regulated as public water supply systems, and owners that may seek a deviation from adopted design standards during plan review.

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

BACKGROUND - Section 75-6-108(3), MCA, states, "The board shall by rule prescribe fees to be assessed by the department on persons who submit plans and specifications for construction, alteration, or extension of a public water supply system or public sewage system. The fees must be commensurate with the cost to the department for reviewing the plans and specifications." Some rural water distribution systems have long stretches of main with relatively simple construction and few service connections. The Department is proposing a lower fee for reviewing plans and specification for these systems, to reflect reduced costs of review.

The remaining proposed changes are intended to clarify existing requirements and correct an error in a reference. The water hauler rules have not been significantly modified since they were transferred from DHES. Unfortunately, the existing language can be misread so as to cause confusion for both regulators and the regulated public. The proposed amendments are not intended to add new requirements, but to clarify existing requirements as they are currently applied. The final proposed amendment is intended to correct a citation reference. A previous change in rule numbering created a situation where a reference is made to an unrelated section. The proposed change will correct the internal reference to conform to the original intent of the rule.

HEARING INFORMATION - The Department recommends the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed amendments.

BOARD OPTIONS - The Board may:

1. Initiate rulemaking, 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 initiation of rulemaking and appointment of a hearing officer for a public hearing.

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)
17.38.101, 17.38.106, 17.38.502,)
17.38.511, and 17.38.513 pertaining to)
plans for public water supply or)
wastewater system, fees, definitions,)
water supply, and chemical treatment of)
water)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

(PUBLIC WATER AND SEWAGE
SYSTEM REQUIREMENTS)

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:

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) and (2) remain the same.

(3) As used in this rule, the following definitions apply in addition to those in 75-6-102, MCA:

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

(f) "Rural distribution system" means those portions of a water distribution system that are outside the limits of a city or town and that:

(i) have fewer than one service connection per mile on average;

(ii) are constructed of water mains six inches in diameter or less; and

(iii) do not provide fire flows.

(f) through (l)(ii) remain the same, but are renumbered (g) through (m)(ii).

(4) A person may not commence or continue the construction, alteration, extension, or operation of a public water supply system or wastewater system until the applicant has submitted a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and has received written approval. Three sets of plans and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or wastewater system consistent with the approved design

MAR Notice No. 17-____

report, plans, and specifications. Failure to construct or operate the system according to the approved plans and specifications or the department's conditions of approval is an alteration for purposes of this rule. Design reports, plans, and specifications must meet the following criteria:

(a) through (i) remain the same.

(j) the department may grant a deviation from the standards referenced in (4)(a) through (f) (e) when the applicant has demonstrated to the satisfaction of the department that strict adherence to the standards of this rule is not necessary to protect public health and the quality of state waters. Deviations from the standards may be granted only by the department.

(5) through (18) remain the same.

AUTH: 75-6-103, MCA

IMP: 75-6-103, 75-6-112, 75-6-121, MCA

17.38.106 FEES (1) remains the same.

(2) Department review will not be initiated until fees calculated under (2)(a) through (e) and (5) have been received by the department. If applicable, the final approval will not be issued until the calculated fees under (3) and (4) have been paid in full. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or subparts listed in these citations.

(a) The fee schedule for designs requiring review for compliance with Department Circular DEQ-1 is set forth in Schedule I, as follows:

SCHEDULE I

Policies

ultra violet disinfection	\$ 700
point-of-use/point-of-entry treatment.....	\$ 700
Section 1.0 Engineering Report.....	\$ 280
Section 3.1 Surface water	
quality and quantity.....	\$ 700
structures.....	\$ 700
Section 3.2 Ground water.....	\$ 840
Section 4.1 Clarification	
standard clarification.....	\$ 700
solid contact units	\$ 1,400
Section 4.2 Filtration	
rapid rate	\$ 1,750
pressure filtration	\$ 1,400
diatomaceous earth	\$ 1,400
slow sand.....	\$ 1,400
direct filtration	\$ 1,400
biologically active filtration	\$ 1,400
membrane filtration	\$ 1,400
micro and ultra filtration	\$ 1,400
bag and cartridge filtration	\$ 420
Section 4.3 Disinfection	\$ 700

Section 4.4 Softening	\$ 700
Section 4.5 Aeration	
natural draft	\$ 280
forced draft	\$ 280
spray/pressure	\$ 280
packed tower	\$ 700
Section 4.6 Iron and manganese	\$ 700
Section 4.7 Fluoridation	\$ 700
Section 4.8 Stabilization	\$ 420
Section 4.9 Taste and odor control	\$ 560
Section 4.10 Microscreening	\$ 280
Section 4.11 Ion exchange	\$ 700
Section 4.12 Adsorptive media	\$ 700
Chapter 5 Chemical application	\$ 980
Chapter 6 Pumping facilities	\$ 980
Section 7.1 Plant storage	\$ 980
Section 7.2 Hydropneumatic tanks	\$ 420
Section 7.3 Distribution storage	\$ 980
Section 7.4 Cisterns	\$ 420
Chapter 8 Distribution system	
per lot fee	\$ 70
non-standard specifications	\$ 420
transmission distribution (per lineal foot)	\$ 0.25
rural distribution system (per lineal foot)	\$ 0.03
Chapter 9 Waste disposal	\$ 700
Appendix A	
new systems	\$ 280
modifications	\$ 140

(b) through (7) remain the same.

AUTH: 75-6-108, MCA

IMP: 75-6-108, MCA

REASON: The proposed amendments to ARM 17.38.101 provide a definition for "rural water system" and correct an erroneous internal reference in ARM 17.38.101(4)(j). The proposed definition of "rural water system" is necessary to implement the reduced design review fees for those systems as proposed in the amendments to ARM 17.38.106, discussed below. Rural water systems are those that are outside of cities and that have mains with relatively simple construction and long stretches of main without service connections.

ARM 17.38.101(4)(j) authorizes deviations from standards referenced in (4)(a) through (f). The standards that were intended to be referenced were those in (4)(a) through (e), which are department circulars and rules incorporated in this rule by reference. The proposed amendment is necessary to conform the language of the rule to the original intent.

The proposed amendment to ARM 17.38.106 adds a new fee category for

rural distribution systems. The new rate will reduce fees for review of those systems. These systems have large distribution systems but are fairly simple to review. The new lower fee rate is necessary in order for the review fee to reflect actual review costs to the department, as required under 75-6-108(3), MCA. Systems that would submit plans under this new definition and fee schedule would see a significant reduction in their review fees, from 25 cents/lineal foot to three cents/lineal foot. The department does not have sufficient information to estimate the number of fee payers nor the lineal feet of distribution systems that may be affected by the reduced fee.

17.38.502 DEFINITIONS (1) remains the same.

(2) "Water hauler" is a person engaged in the business of transporting water, ~~to be used for human consumption through a non-piped conveyance,~~ from a water source to a cistern or other reservoir ~~by ten or more families or~~ to be used for human consumption in a public water supply system. As defined in 75-6-102, MCA, a public water supply system is a system that has at least 15 service connections or that regularly serves at least 25 or more persons daily for at least any 60 or more days of ~~the~~ in a calendar year.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendment to ARM 17.38.502 is necessary to clarify that the water hauler requirements apply only to non-piped means of delivery. The amendments also conform the rule to the current definition of "public water supply system" set forth in 75-6-104(14), MCA.

17.38.511 WATER SUPPLY (1) Water to be hauled must be taken from a ~~supply approved by the department~~ approved community public water supply system and from a department-approved water loading station that meets the requirements of Department Circular DEQ-1.

(2) ~~Periodical~~ Water haulers shall collect bacteriological samples will be collected from the water hauling equipment by the department or its authorized representatives at least once per month for each approved public water supplier the hauler uses that month.

(3) If a water hauler's public water supplier is in compliance with the monitoring and maximum contaminant level requirements set forth in ARM title 17, chapter 38, subchapter 2, the water hauler is not required to duplicate the entry point sampling of the supplier unless specifically required to do so by the department.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.511(1) clarify that a water hauler's supply must be a department-approved community public water supply system. Because water haulers are regulated as community systems, the water they haul must be received from a system designed and monitored as such.

MAR Notice No. 17-____

The proposed amendments also clarify that water loading stations require department approval. This amendment is necessary to comply with existing department requirements for loading stations in Department Circular DEQ-1. Proposed (2) removes the reference to the department or its representatives conducting biological sampling. This has not been actual department practice because of limited staff resources, and amending the rule is necessary to clarify that bacteriological sampling is the obligation of the water hauler. Finally, proposed (3) provides that water haulers are not required to duplicate the entry point sampling of their supplier if the supplier is in compliance with the requirements in ARM Title 17, chapter 38, subchapter 2. This amendment is necessary to help regulated haulers in determining applicable sampling requirements.

17.38.513 CHEMICAL TREATMENT OF WATER (1) ~~Each~~ Except as provided in (3), water haulers shall dose each load of water shall be dosed with enough chlorine to provide a free chlorine or total chlorine residual of at least 0.4 parts per million at the time the water hauling equipment is filled and at the time the water is delivered to the receiving system. ~~The w~~Water haulers shall have DPD test kits use department-approved methods to check monitor the chlorine residual concentration.

(2) ~~Sufficient chlorine must be added when delivering water into the cistern to have a chlorine residual of 0.4 parts per million detected when the cistern is filled. Water haulers shall monitor each load of water, and shall record and report chlorine residual results on department-approved forms. Results must be reported to the department by the tenth day of the month following delivery. Only the lowest residual values monitored for each load must be recorded and reported or, if multiple loads are hauled in a day, only the lowest residual values monitored for the day per supplier must be recorded and reported.~~

(4) Water haulers using an approved chloraminated source of water shall monitor, record, and report residuals as required in (1) and (2), but are not required to adjust total chlorine levels.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.513(1) clarify that the residual of 0.4 mg/L of free or total chlorine is a minimum that must be maintained at the time the water hauling equipment is filled and at the time the water is delivered to the receiving system. Water haulers are not responsible for the quality of the water after it enters the receiving system. The amendments also require that the hauler use department-approved methods to monitor chlorine residuals. The proposed amendments to ARM 17.38.513(2) provide that each load of hauled water must be monitored, and specify the time and manner of reporting the results to the department. Proposed (3) clarifies the requirements for haulers that utilize a chloraminated source of water. Because of the complications associated with adding chlorine to chloraminated water, as well as the regulatory requirements applicable to the supplier, haulers utilizing chloraminated sources of water are required only to monitor and report the chloramines level of the water, and are not

required to treat the water. The proposed amendments to this rule are necessary to ensure the safety of hauled water, which has an increased potential of being exposed to sources of contamination.

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., January 20, 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: _____
JAMES M. MADDEN	JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer	Chairman

Certified to the Secretary of State, _____, 2011.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR RULE AMENDMENT**

AGENDA ITEM # III.A.2.

AGENDA ITEM SUMMARY - The Department requests amendment of the Board's subsurface wastewater treatment rules to:

1. Modify the criteria for Department review of variance decisions of local boards of health; and
2. Clarify the procedures used by the Department in review of local board variance decisions.

LIST OF AFFECTED RULES - ARM 17.36.922 and ARM 17.36.924

AFFECTED PARTIES SUMMARY – Persons who request a variance from local board of health wastewater treatment standards, and who file an appeal with the Department regarding the local board's decision.

SCOPE OF PROPOSED PROCEEDING - The Department is requesting initiation of rulemaking with a public hearing.

BACKGROUND - As required by the Montana Water Quality Act, the Board has adopted minimum standards for subsurface wastewater disposal. Local boards of health must adopt regulations that are not less stringent than these state minimum standards. The Board rules must include criteria for reviewing requests for variances from the minimum standards. By statute, applicants for a variance can appeal a local board variance decision to the Department.

The Board's current rules allow local boards to adopt variance criteria in addition to those in the Board's rules. The rules also allow the Department to use the local variance criteria when the Department hears a variance appeal. It was recently determined that this is contrary to statute. Local variance criteria must be "identical" to the state board criteria, and the Department must use only the state Board's criteria in hearing variance appeals. Section 50-2-116(1)(k), MCA, and § 75-5-304(4), MCA. To comply with the statutes, it is necessary to amend ARM 17.36.922 and ARM 17.36.924 to provide a complete set of variance criteria for use by both local boards and the Department.

Local variance criteria typically require a variance applicant to make a showing of hardship to justify a variance. The proposed amendments to the Board rules would add hardship criteria to the Board's existing variance criteria. Based on recommendations from local health departments, the proposed amendments would adopt four additional variance criteria that are intended to limit variances to unusual circumstances that create hardship for the applicant. The Board's existing variance criteria, which will remain in effect, will ensure that variances do not adversely affect human health or the environment. The proposed amendments would also clarify

the procedures used by the Department when it reviews local board variance decisions.

HEARING INFORMATION - The Department recommends initiation of rulemaking and appointment of a hearing officer for a public hearing.

BOARD OPTIONS - The Board may:

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

DEQ RECOMMENDATION - The Department recommends initiation of rulemaking.

ENCLOSURES -- Draft Notice of 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
17.36.922 and 17.36.924 pertaining to)	PROPOSED AMENDMENT
local variances and variance appeals to)	
the department)	(SUBDIVISIONS/ON-SITE
)	SUBSURFACE WASTEWATER
)	TREATMENT)

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:

17.36.922 LOCAL VARIANCES (1) As provided in this rule, a local board of health, as defined in 50-2-101, MCA, may grant variances from the requirements in this subchapter and in Department Circular DEQ-4, ~~2004 edition~~ except for requirements established by statute.

(2) The local board of health may grant a variance from a requirement only if it finds ~~that all conditions in these rules regarding the variance are met, and that all~~ of the following criteria are met:

(a) granting the variance will not:

(a) through (f) remain the same, but are renumbered (i) through (vi).

(g) (vii) cause a nuisance due to odor, unsightly appearance or other aesthetic consideration;

(b) compliance with the requirement from which the variance is requested would result in undue hardship to the applicant;

(c) the variance is necessary to address extraordinary conditions that the applicant could not reasonably have prevented;

(d) no alternatives that comply with the requirement are reasonably feasible;
and

(e) the variance requested is not more than the minimum needed to address the extraordinary conditions.

~~(3) The local board of health may adopt variance criteria in addition to those~~

~~set out in (2).~~

(4) remains the same, but is renumbered (3).

AUTH: 75-5-201, 75-5-305, MCA

IMP: 75-5-305, MCA

REASON: As required by 75-5-305(2)(a), MCA, this subchapter sets out the board's minimum requirements for control and disposal of sewage. Local boards of health are required to adopt sewage regulations that are not less stringent than these minimum standards. Section 50-2-116(1)(k), MCA. The board is also required to adopt criteria for variances from the minimum standards, and the statutes provide for an appeal to the department of local board decisions on variances from the minimum standards. Section 75-5-305(3), MCA. The board's variance criteria are set out in ARM 17.36.922(2).

The current variance criteria in ARM 17.36.922(2) prohibit variances that would cause adverse health or environmental effects. When adopted, these criteria were not intended to be exclusive. ARM 17.36.922(3) authorizes local boards to adopt criteria in addition to those in ARM 17.36.922(2). The current rules treat the state variance criteria, like the state substantive standards, as minimum requirements that local boards may supplement.

A recent department legal opinion determined that the state variance criteria rules were not consistent with statutory requirements. Section 50-2-116(1)(k), MCA, requires that local variance criteria be "identical" to the state board criteria. ARM 17.36.922(3), which allows additional local variance criteria, is inconsistent with 50-2-116(1)(k), MCA. In addition, 75-5-305(4), MCA, requires that the department use the state Board of Environmental Review's variance criteria when reviewing local variance decisions. ARM 17.36.924(9), which allows the department to apply local variance criteria in variance appeals, is inconsistent with 75-5-305(4), MCA. The proposed repeal of ARM 17.36.922(3) and 17.36.924(9) is necessary to conform the board rules to these statutory requirements.

Local variance criteria typically require a variance applicant to make a showing of hardship to justify a variance. Because the department may not use local criteria when reviewing variances, the board is proposing to adopt hardship criteria in the state rules. Based on recommendations from local health departments and sanitarians, the board is proposing to adopt four additional variance criteria.

Proposed ARM 17.36.922(2)(b) requires a showing that compliance with the requirement from which the variance is requested would result in undue hardship for the applicant. This provision is necessary to limit variances to situations in which compliance with a requirement creates a significantly greater burden for the applicant than for others to whom the requirement applies.

Proposed ARM 17.36.922(2)(c) requires a showing that the variance is necessary to address extraordinary conditions that the applicant could not reasonably have prevented. This provision is necessary to limit variances to situations that are not typical, and to require applicants to use reasonable care to avoid placing themselves in those situations.

Proposed ARM 17.36.922(2)(d) requires a showing that there are no reasonably feasible alternatives for complying with the requirement. This provision

is necessary to limit variances to situations in which no reasonable alternative exists.

Finally, proposed ARM 17.36.922(2)(e) requires a showing that the variance requested is not more than the minimum needed to address the extraordinary conditions. This provision is necessary to limit the scope of a variance to what is needed to alleviate the particular conditions that create undue hardship.

The proposed amendments also make several changes for clarification. The reference to the 2004 edition of DEQ-4 in ARM 17.36.922(1) is proposed to be deleted because the current edition of DEQ-4 is 2009, which is correctly referenced in ARM 17.36.914(2). ARM 17.36.922(1) is amended to clarify that local boards cannot grant variances from statutory requirements, such as the restrictions on gray water irrigation set out in ARM 17.36.919(3)(c). Finally, a minor change is proposed to ARM 17.36.922(2) to delete a requirement for compliance with other rule conditions when granting a variance. This provision is inconsistent with the authority of local boards to grant variances to any of the requirements in this subchapter and DEQ-4, except those established by statute.

17.36.924 VARIANCE APPEALS TO THE DEPARTMENT (1) through (3) remain the same.

~~(4) If the appeal fulfills the requirements of (2), the department shall conduct a hearing on the appeal proceed to review the local variance decision under the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.~~

~~(5) The hearing must be conducted under the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA. Except as provided in (7), the department must conduct the hearing within 90 days of the department's written notice to the appellant that the appeal meets the requirements of (2).~~

~~(6) The department shall review each application under ARM Title 17, chapter 4, subchapter 6 to determine if the department's action may result in significant effects to the quality of the human environment, thereby requiring an environmental impact statement.~~

~~(7) If the department's analysis indicates that an environmental impact statement is required, the department shall have 60 days from the date of issuance of the final environmental impact statement to conduct a hearing under this rule.~~

~~(8) After conducting the hearing, the department may allow up to 14 days for written comments to be submitted concerning the appeal.~~

~~(9) The department shall apply the local government variance requirements at issue in the case, provided the requirements meet the minimum requirements stated in ARM 17.36.913 and 17.36.922.~~

(5) As provided in 2-4-612, MCA, the common law and statutory rules of evidence apply in department proceedings to review local board variance decisions. The parties may provide evidence and testimony to the department in addition to that presented to the local board.

(6) In evaluating the local board variance decision, the department shall apply the variance criteria in (2), and may not consider local variance criteria. The department may substitute its judgment for that of the local board as to the interpretation and application of the variance criteria in (2). However, the department shall be bound by the local board's interpretation of other local board

rules in effect at the time of the local board's decision.

(7) Challenges to the applicability or validity of a rule of the local board are outside the scope of department review. Variance requests that do not seek to go below a state minimum standard are also outside the scope of department review. If a variance is requested from a local requirement that is more stringent than the requirements in this subchapter, the department may review the local board's decision only if the variance, if granted, would also require a variance from the requirements in this subchapter.

(10) (8) The department shall issue a formal decision, including findings of fact and conclusions of law, within 30 days after the hearing process is completed.

AUTH: 75-5-201, 75-5-305, MCA

IMP: 75-5-305, MCA

REASON: The proposed amendments to ARM 17.36.924(4) and repeal of ARM 17.36.924(9) implement the statutory requirement that the department use the state Board of Environmental Review's variance criteria when hearing appeals of local board variance decisions. See Reason statement for the amendments to ARM 17.36.922.

The proposed repeal of ARM 17.36.924(5) would eliminate the requirement that hearings be held within 90 days of filing a complete appeal. Pursuant to 75-5-305(4), MCA, appeals must be conducted under the contested case procedures of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA (MAPA). Under MAPA procedures, pre-hearing steps such as discovery and motions can take longer than 90 days. Repealing the 90-day requirement is necessary to allow the parties to fully utilize MAPA. The current rule requiring MAPA procedures is proposed to be moved from ARM 17.36.924(5) to ARM 17.36.924(4).

The proposed repeal of ARM 17.36.924(6) and (7) would eliminate the requirement for the department to conduct environmental review under the Montana Environmental Policy Act (MEPA) when it issues a decision in a local variance appeal. Repeal of this provision is necessary because MEPA does not require environmental review when the department issues a decision in a variance contested case.

The proposed amendments would repeal ARM 17.36.924(8), which allows comments for two weeks following a hearing. Repeal is necessary because this comment process does not follow MAPA contested case procedures. Variance appeals are typically conducted by hearing examiners. Under MAPA, the parties to variance appeals must be given an opportunity to file post-hearing exceptions and briefs and make oral arguments to the director. Section 2-4-621(1), MCA. MAPA does not limit the post-hearing exceptions and briefing process to two weeks.

Proposed new ARM 17.36.924(5), (6), and (7) set out procedural requirements applicable to the department contested case proceedings to review a local variance decision. These requirements are based on statutory provisions and past precedent. The proposed new sections are necessary to provide guidance to parties about the contested case process.

The proposed amendment to ARM 17.36.924(10), renumbered as (8), clarifies that the statutory 30-day period starts to run after the MAPA hearing

process is completed and the matter is fully submitted for final department decision. The MAPA hearing process includes an oral argument hearing before the department director if the evidentiary hearing is held by a hearing examiner and a party files exceptions to the hearing examiner's proposed decision.

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, 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, _____, 2011.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE ADOPTION

Agenda # III.B.1.

Agenda Item Summary: The Board has proposed amending the air quality regarding open burning 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: ARM 17.8.604, 17.8.610, 17.8.612, 17.8.613, 17.8.614, and 17.8.615.

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

Scope of Proposed Proceeding: The Board is considering final action on adoption of amendments to the above-referenced rules as proposed in the Montana Administrative Register.

Background: The proposed revision to ARM 17.8.604(1)(a) changes the circumstances in which moving wood waste from the location where it was generated and burning the material may occur. The current rule allows the Department to make a determination, on a case-by-case basis, regarding the appropriateness of moving wood material for purposes of disposal by open burning. The revised rule requires burners to ensure compliance with Best Available Control Technology prior to any such movement and subsequent burning. An example of wood waste movement and subsequent burning that would benefit public health includes 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 to minimize or eliminate the health effects of smoke emissions.

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

The proposed revisions and additions to ARM 17.8.612(10), 17.8.613(8), 17.8.614(8), and 17.8.615(6) reflect the Legislative revision of the process for appealing air quality permits pursuant to 75-2-211, MCA.

The 2003 legislature revised the statute to eliminate an automatic stay for a permit appeal. Pursuant to the revision, a permit decision is only stayed following a petition and 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 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.

Hearing Information: Katherine Orr conducted a public hearing on January 13, 2011, to take comment on the proposed amendments. No public comments or testimony were received on the proposed amendments.

Board Options: The Board may:

1. Adopt the proposed amendments as set forth in the attached Notice of Public Hearing on Proposed Amendment;
2. Adopt the proposed amendments with revisions that the Board finds are appropriate and that are within the scope of the Notice of Public Hearing on Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the proposed amendments.

DEQ Recommendation: The Department recommends that the Board adopt the rules as proposed in MAR Notice No. 17-311 published on December 23, 2010.

Enclosures:

1. Notice of Public Hearing on Proposed Amendment;
2. Presiding Officer's Report;
3. HB 521 and 311 Analysis;
4. Draft Notice of 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
17.8.604, 17.8.610, 17.8.612, 17.8.613,) PROPOSED AMENDMENT
17.8.614, and 17.8.615 pertaining to)
open burning) (AIR QUALITY)

TO: All Concerned Persons

1. On January 13, 2011, at 2:00 p.m., or upon the conclusion of the public hearing for MAR Notice No. 17-310, the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this 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., January 3, 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, ~~no~~ 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

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), MCA.

for undertakings on injunctions.

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), MCA, 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), MCA, 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 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, no later than 5:00 p.m., January 20, 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

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

BY: /s/ Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, December 13, 2010.

BEFORE THE BOARD OF ENVIROMENTAL 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 and 17.8.615 pertaining
to open burning

PRESIDING OFFICER REPORT

1. On January 13, 2011, at 2 p.m., the undersigned Presiding Officer conducted the public hearing held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned proposed amendments. The amendments specify circumstances under which wood waste may be moved from the premises where it was generated and then disposed of through open burning. The amendments remove grammatical errors and make the rules consistent with legislative revisions to Mont. Admin. Code Ann. § 75-2-211(11) concerning the appeal of air quality permits.

2. Notice of the hearing was contained in the Montana Administrative Register (MAR), Notice No. 17-311, published on December 23, 2010, in Issue No. 24. A copy of the notice is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

3. The Court Reporter, Susan Johnson, of the reporting service of Lesofski Court Reporting, Inc., of Helena, MT recorded the hearing.

4. At the hearing, the Presiding Officer identified and summarized the MAR notice and read the Notice of Function of Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a).

SUMMARY OF HEARING

5. Ms. Deborah Wolfe, a planner with the Air Resources Management Bureau of the Montana Department of Environmental Quality (Department), submitted a written statement supporting the amendments and gave a brief oral summary of the amendments at the hearing. (The written statement is attached.)

6. No other testimony or written comments were submitted during or after the hearing.

7. A written memorandum was submitted from Department staff attorney, David Rusoff with HB 521 and HB 311 reviews of the proposed amendments and a Private Property Assessment Act Checklist. (Mr. Rusoff's memorandum is attached to this report.)

8. None of the proposed amendments would make the state rules more stringent than comparable federal regulations or guidelines. No further HB 521 analysis is required.

9. With respect to HB 311 (the Private Property Assessment Act, Mont. Code Ann. §§ 2-10-101 through 105), the State is required to assess the taking or damaging implications of a proposed rule or amendments affecting the use of private real property. This rulemaking affects the use of private real property. A Private Property Assessment Act Checklist was prepared, which shows that the proposed amendments do not have taking or damaging implications. Therefore, no further assessment is required.

10. The period to submit comments ended at 5 p.m. on January 20, 2011.

PRESIDING OFFICER COMMENTS

11. The Board of Environmental Review (Board) has jurisdiction to make the proposed amendments. See Mont. Code Ann. §§ 75-2-111 and 75-2-203.

12. The conclusions in the memorandum of Mr. Rusoff concerning House Bill 521 (1995) and House Bill 311 (1995) are correct.

13. The procedures required by the Montana Administrative Procedure Act, including public notice, hearing, and comment, have been followed.

14. The Board may adopt the proposed rule amendments, reject them, or adopt the rule amendments with revisions not exceeding the scope of the public notice.

15. Under Mont. Code Ann. § 2-4-305(7), for the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by June 23, 2010.

Dated this _____ day of March, 2011.

KATHERINE J. ORR
Presiding Officer



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

OFFICE MEMORANDUM

TO: Board of Environmental Review

FROM: David M. Rusoff, DEQ Staff Attorney *DMR*

SUBJECT: House Bill 521 and House Bill 311 review for Amendment of
Open Burning Rules

ARM Notice No. 17-311

DATE: January 20, 2011

HB 521 REVIEW

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

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

In this proceeding, the Board is proposing to:

Amend ARM 17.8.604 to specify circumstances under which wood waste may be moved from the premises where it was generated and then disposed of through open burning;

Amend ARM 17.8.604(5) and 17.8.610(2) by making minor editorial revisions; and

Amend 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), to reflect legislative revisions to the air quality permit appeal process provided in Section 75-2-211, MCA, of the Clean Air Act of Montana.

None of the proposed amendments would make the state rules more stringent than comparable federal regulations or guidelines. There are no federal air quality open burning regulations or guidelines under the federal Clean Air Act. The only federal regulations or

guidelines related to open burning are found in the federal solid waste regulations at 40 CFR 257.3-7 and 40 CFR § 258.24, prohibiting most open burning at solid waste landfills, generally, and prohibiting most open burning at municipal solid waste landfills, respectively, and in 40 CFR § 265.382, prohibiting open burning of hazardous waste, except detonation of waste explosives. Therefore, no further House Bill 521 analysis is required.

HB 311 REVIEW
(Assessing Impact On Private Property)

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

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

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

The present proposed action involves rules affecting use of private real property, and the Board has discretion legally not to take the action.

I've completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. The proposed rule amendments would not:

- * result in either a permanent or indefinite physical occupation of private property;
- * deprive any owner of all economically viable uses of private property;
- * deny a fundamental attribute of private property ownership;
- * require a private property owner to dedicate a portion of property or grant an easement;

- * have a severe impact on the value of private property; or
- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based upon completion of the attached Attorney General's Checklist, the proposed rulemaking does not have taking or damaging implications, and no further House Bill 311 assessment is required.

Enc.

cc: Deb Wolfe, ARMB

DMR

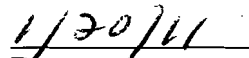
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

DOES THE PROPOSED AGENCY ACTION HAVE TAKING OR DAMAGING IMPLICATIONS
UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

YES NO

X		1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
	X	2. Does the action result in either a permanent or indefinite physical occupation of private property?
	X	3. Does the action deprive the owner of all economically viable uses of the property?
	X	4. Does the action deny a fundamental attribute of ownership? (Ex.: right to exclude others; right to dispose of the property)
	X	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a and 5b and continue with question 6.]
		5a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?
		5b. Is the government requirement roughly proportional to the impact of the proposed use of the property?
	X	6. Does the action have a severe impact on the value of the property? (Consider economic impact, investment-backed expectations, and the character of the government action.)
	X	7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO, do not answer questions 7a - 7c.]
		7a. Is the impact of government action direct, peculiar, and significant?
		7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
		7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?
	X	Taking or damaging implications? (Taking or damaging implications exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, or 7c; or if NO is checked in response to question 5a or 5b.


Signature of Reviewer


Date

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
17.8.604, 17.8.610, 17.8.612, 17.8.613,)
17.8.614, and 17.8.615 pertaining to) (AIR QUALITY)
open burning)

TO: All Concerned Persons

1. On December 23, 2010, the Board of Environmental Review published MAR Notice No. 17-311 regarding a notice of public hearing on proposed amendment of the above-stated rule at page 2880, 2010 Montana Administrative Register, issue number 24.

2. The board has amended the rules exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

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

Certified to the Secretary of State, _____, 2011.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE ADOPTION

Agenda # III.B.2.

Agenda Item Summary: The Board has proposed amending the air quality rules 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: 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 Board is considering final action on adoption of amendments to the above-referenced rules as proposed in the Montana Administrative Register.

Background: The proposed revision to ARM 17.8.763 would set forth a process for notice by publication regarding the Department's intent to revoke a permit for a source regulated under Title 17, chapter 8, subchapter 7. The current rule fails to set forth a method of alternative service in the event an owner or operator cannot be found for regular mail delivery.

Hearing Information: Katherine Orr conducted a public hearing on January 13, 2011, to take comment on the proposed amendments. No public comments or testimony were received on the proposed amendments.

Board Options: The Board may:

1. Adopt the proposed amendments as set forth in the attached Notice of Public Hearing on Proposed Amendment;
2. Adopt the proposed amendments with revisions that the Board finds are appropriate and that are within the scope of the Notice of Public Hearing on Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the proposed amendments.

DEQ Recommendation: The Department recommends the Board adopt the rules as proposed in MAR Notice No. 17-310 published on December 23, 2010.

Enclosures:

1. Notice of Public Hearing on Proposed Amendment;
2. Presiding Officer's Report;
3. HB 521 and 311 Analysis;
4. Draft notice of 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 January 13, 2011, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, 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., January 3, 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

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, no later than 5:00 p.m., January 20, 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

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

BY: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, December 13, 2010.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of the amendment
of ARM 17.8.763 pertaining to
Revocation of Permit

PRESIDING OFFICER REPORT

1. On January 13, 2011, at 1:30 p.m., the undersigned Presiding Officer conducted the public hearing held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned proposed amendment. The amendment sets forth a process for notice by publication regarding the intent of the Department of Environmental Quality to revoke a Montana Air Quality Permit issued under Admin. R. Mont. Title 17, Chapter 8, Subchapter 7 (preconstruction permits) when an owner or operator cannot be found for service by certified mail.

2. Notice of the hearing was contained in the Montana Administrative Register (MAR), Notice No. 17-310, published on December 23, 2010, in Issue No. 24. A copy of the notice is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

3. Ms. Susan Johnson of Lesofski Court Reporting, Inc., in Helena, MT, recorded the hearing.

4. At the hearing, the Presiding Officer identified and summarized the MAR notice and read the Notice of Function of Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a).

SUMMARY OF HEARING

5. Ms. Debra Wolfe, a planner with the Air Resources Management Bureau with the Montana Department of Environmental Quality (“Department”), submitted a written statement supporting the amendment. (The written statement is attached.)

6. No other testimony or written comments were submitted during or after the hearing.

7. A written memorandum was submitted from the Department staff attorney, David Rusoff, with HB 521 and HB 311 reviews of the proposed amendment and a Private Property Assessment Act Checklist. (Mr. Rusoff’s memorandum is attached to this report.)

8. As to the HB 521 analysis, there are no federal regulations that specify procedures for revocation of air quality preconstruction permits and therefore, no further HB 521 analysis is required.

9. With respect to HB 311 (the Private Property Assessment Act, Mont. Code Ann. §§ 2-10-101 through 105), the Board is required to assess the taking or damaging implications of a proposed rule or amendments affecting the use of private real property. A Private Property Assessment Act Checklist was prepared, which shows that the proposed amendments do not have taking or damaging implications. Therefore, no further assessment is required.

10. The period to submit comments ended at 5 p.m. on January 20, 2011.

PRESIDING OFFICER COMMENTS

11. The Board of Environmental Review (Board) has jurisdiction to make the proposed amendments. See Mont. Code Ann. §§ 75-2-111 and 75-2-204.

12. The conclusions in the memorandum of Mr. Rusoff concerning House Bill 521 (1995) and House Bill 311 (1995) are correct.

13. The procedures required by the Montana Administrative Procedure Act, including public notice, hearing, and comment, have been followed.

14. The Board may adopt the proposed rule amendment, reject it or adopt the rule amendment with revisions not exceeding the scope of the public notice.

15. Under Mont. Code Ann. § 2-4-305(7), for the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by July 20, 2011.

Dated this _____ day of March, 2011.

KATHERINE J. ORR
Presiding Officer



Brian Schweitzer, Governor
Richard H. Opper, Director

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

OFFICE MEMORANDUM

TO: Board of Environmental Review

FROM: David M. Rusoff, DEQ Staff Attorney *DMR*

SUBJECT: House Bill 521 and House Bill 311 review for Amendment of Air Quality Permit Revocation Rule, ARM Notice No. 17-310

DATE: January 20, 2011

HB 521 REVIEW

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

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

In this proceeding, the Board is proposing to:

Amend ARM 17.8.763 to provide a procedure for notifying a permittee by publication of the Department's intent to revoke an air quality permit when the Department has been unable to deliver the notice by certified mail.

The proposed amendment would not make the state rules more stringent than comparable federal regulations or guidelines. There are no federal air quality regulations or guidelines specifying procedures for revocation of air quality preconstruction permits. Therefore, no further House Bill 521 analysis is required.

HB 311 REVIEW

(Assessing Impact On Private Property)

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

2-10-103(1), MCA, "action with taking or damaging implications" means:

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

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

The present proposed action involves rules affecting use of private real property, and the Board has discretion legally not to take the action.

I've completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. The proposed rule amendments would not:

- * result in either a permanent or indefinite physical occupation of private property;
- * deprive any owner of all economically viable uses of private property;
- * deny a fundamental attribute of private property ownership;
- * require a private property owner to dedicate a portion of property or grant an easement;
- * have a severe impact on the value of private property; or
- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based upon completion of the attached Attorney General's Checklist, the proposed rulemaking does not have taking or damaging implications, and no further House Bill 311 assessment is required.

Enc.

cc: Deb Wolfe, ARMB
DMR

Name of Project: Proposed Amendment of Air Quality Permit Revocation Rule
MAR Notice No. 17-310

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

DOES THE PROPOSED AGENCY ACTION HAVE TAKING OR DAMAGING IMPLICATIONS
UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

YES NO

X		1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
	X	2. Does the action result in either a permanent or indefinite physical occupation of private property?
	X	3. Does the action deprive the owner of all economically viable uses of the property?
	X	4. Does the action deny a fundamental attribute of ownership? (Ex.: right to exclude others; right to dispose of the property)
	X	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a and 5b and continue with question 6.]
		5a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?
		5b. Is the government requirement roughly proportional to the impact of the proposed use of the property?
	X	6. Does the action have a severe impact on the value of the property? (Consider economic impact, investment-backed expectations, and the character of the government action.)
	X	7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO, do not answer questions 7a - 7c.]
		7a. Is the impact of government action direct, peculiar, and significant?
		7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
		7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?
	X	Taking or damaging implications? (Taking or damaging implications exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, or 7c; or if NO is checked in response to question 5a or 5b.


Signature of Reviewer


Date

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.8.763 pertaining to revocation of)
permit)
NOTICE OF AMENDMENT
(AIR QUALITY)

TO: All Concerned Persons

1. On December 23, 2010, the Board of Environmental Review published MAR Notice No. 17-310 regarding a notice of public hearing on proposed amendment of the above-stated rule at page 2878, 2010 Montana Administrative Register, issue number 24.

2. The board has amended the rule exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

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

Certified to the Secretary of State, _____.

✓JW

FILED this 15th day of
February AD 2011
at 9:58 o'clock A M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: Misty Crab

Carol E. Schmidt
Special Assistant Attorney General
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, Montana 59620-0901
Attorney for Department

Gregory C. MacDonald
2929 3rd Avenue North, Suite 538
Billings, MT 59101-1944

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)
VIOLATIONS OF THE MONTANA PUBLIC) Case No. BER 2010-14 PWS
WATER SUPPLY LAWS BY GREGORY)
MACDONALD AT HIGHWOOD MOBILE HOME) Stipulation for Dismissal
PARK, PWSID #MT0004681, CASCADE)
COUNTY, MONTANA [FID # 1968;)
DOCKET NO. PWS-10-30.])

COME NOW the parties and stipulate, pursuant to Rule 41(a), M.R.Civ.P., to the
dismissal of this appeal. The parties have reached a resolution of the matters at issue and
Appellant hereby withdraws its appeal and request for hearing. The parties request that the
Board issue an Order dismissing this matter with prejudice, with each party to bear its own costs
and, if any, attorney fees.

STATE OF MONTANA
Department of Environmental Quality

By: Carol E. Schmidt
Carol E. Schmidt
Attorney for Department

APPELLANT
Gregory C. MacDonald

By: Gregory C. MacDonald
Gregory C. MacDonald
Highwood Mobile Home Park

February 14, 2011
Date

FEBRUARY 10, 2011
Date

1 Carol E. Schmidt
Special Assistant Attorney General
2 Department of Environmental Quality
P.O. Box 200901
3 1520 E. Sixth Avenue
Helena, Montana 59620-0901
4 Telephone: (406) 444-1422
Attorney for Department
5
6
7

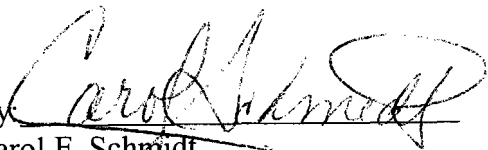
8 IN THE MATTER OF:)
VIOLATIONS OF THE MONTANA PUBLIC)
9 WATER SUPPLY LAWS BY GREGORY C.)
MACDONALD AT HIGHWOOD MOBILE) SETTLEMENT AGREEMENT
10 HOME PARK, PWSID #MT0004681, CASCADE)
COUNTY, MONTANA. [FID#1968, DOCKET) Case No. BER 2010-14
11 NO. PWS-10-30])

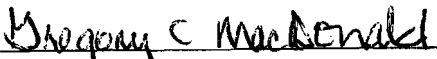
12 Based on information recently received, the Department of Environmental Quality
13 (Department) has determined to vacate the Notice of Violation and Administrative Compliance
14 and Penalty Order (Order). As stated in the Order, according to the records maintained by the
15 Department, Mr. MacDonald did not report analytical results for total coliform bacteria at the
16 System, PWSID #0004681, for the December 2009 and the January, February and March 2010
17 monitoring periods. The Department, however, recognizes that miscommunications between the
18 Department and Mr. MacDonald may have likely occurred that led to Mr. MacDonald not
19 collecting the needed samples. Since April 2010, Mr. MacDonald has collected the samples as
20 required by the public water supply laws. Mr. MacDonald agrees to continue to abide by the
21 public water supply laws, to request the dismissal of the appeal to the Board of Environmental
22 Review, and not to pursue any action against the Department for issuing the Order or for the
23 assessment of the original penalty. In light of the above, the Department has determined in its
24 discretion to vacate the Order and not to pursue the assessed penalty.

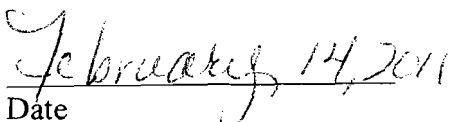
Each party will bear its own costs and any incurred attorney fees in this matter.

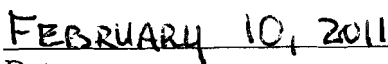
STATE OF MONTANA
Department of Environmental Quality

APPELLANT
Gregory C. MacDonald

By: 
Carol E. Schmidt
Attorney for Department

By: 
Gregory C. MacDonald
Highwood Mobile Home Park


Date


Date

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8 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
9 OF THE STATE OF MONTANA

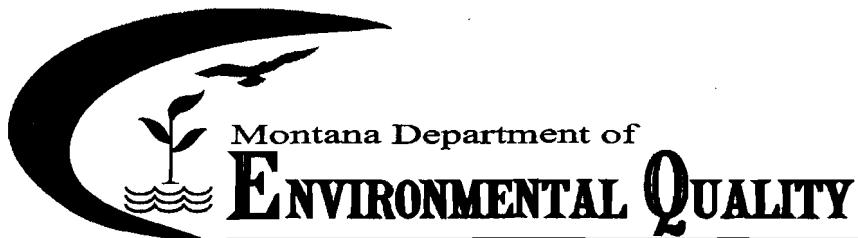
10 IN THE MATTER OF:)
11 VIOLATIONS OF THE MONTANA PUBLIC) Case No. BER 2010-14 PWS
12 WATER SUPPLY LAWS BY GREGORY C.)
13 MACDONALD AT HIGHWOOD MOBILE) ORDER OF DISMISSAL
14 HOME PARK, PWSID #MT0004681, CASCADE)
15 COUNTY, MONTANA [FID # 1968, DOCKET)
16 NO. PWS-10-30)].)

17 The parties have filed a Stipulation for Dismissal pursuant to Montana Rule of Civil
18 Procedure 41(a) stating that Appellant has withdrawn its appeal and its request for a hearing in
19 this matter. As provided in the parties' Stipulation for Dismissal,

20 IT IS HEREBY ORDERED THAT this appeal is dismissed with prejudice. Each party
21 shall bear its own costs and attorney fees.

22 DATED this _____ day of _____, 2011.
23
24

JOSEPH W. RUSSELL, M.P.H., Chairman
Montana Board of Environmental Review



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: March 9, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-02 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING ACT
BY DEER LODGE ASPHALT, INC. AT THE
OLSEN PIT, POWELL COUNTY, MONTANA
[FID #1998, DOCKET NO. OC-11-02]

Case No. BER 2011-02 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #1998, Docket No. OC-11-02).

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

Jane Amdahl
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

Bel 2011-02 OC

LAW OFFICES
KARL KNUCHEL, P.C.

116 West Callender Street
P.O. Box 953
Livingston, MT 59047

Karl Knuchel karl@knuchelpc.com
Courtney Lawellin courtney@knuchelpc.com

March 8, 2011

BOARD SECRETARY
BOARD OF ENVIRONMENTAL REVIEW
P O BOX 200901
HELENA MT 59620-0901

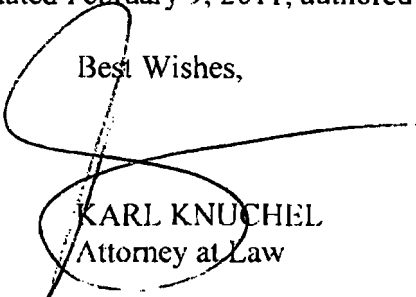
SENT VIA FAX: 406 444 4386
& U.S. MAIL

Re: Appeal of Notice of Violation and Administrative Compliance and Penalty Order of the
Opencut Mining Act (Docket No. OC-11-02; FID #1998)

Please be advised that we represent Deer Lodge Asphalt. Deer Lodge Asphalt notifies the Board that it is appealing the administrative order proposed in this matter. The order was dated February 9, 2011.

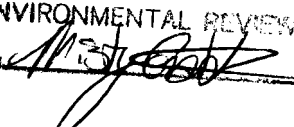
This appeal is made pursuant to the letter dated February 9, 2011, authored by Robert Smith.

Best Wishes,



KARL KNUCHEL
Attorney at Law

KK/lc
xc: Bruce Anderson

FILED this 8th day of
March AD 2011
at _____ o'clock _____ M
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: 

LAW OFFICES
KARL KNUCHEL, P.C.

116 West Callender Street
P.O. Box 953
Livingston, MT 59047

Karl Knuchel karl@knuchelpc.com
Courtney Lawellin courtney@knuchelpc.com

FACSIMILE TRANSMISSION

TO: ATTN: BOARD SECRETARY

FAX # 406 444 4386

FROM: KARL KNUCHEL

DATE 3/8/11

NUMBER OF PAGES (including cover) 2

HARD COPY TO FOLLOW: yes ☒ no ☐

MESSAGE:

This message is intended only for the use of the person or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone at the above listed number and return the original to us at the above address.

If the message you received was incomplete or not legible, please contact our office immediately.

LAW OFFICES
KARL KNUCHEL, P.C.

116 West Callender Street
P.O. Box 953
Livingston, MT 59047

Karl Knuchel karl@knuchelpc.com
Courtney Lawellin courtney@knuchelpc.com

March 8, 2011

BOARD SECRETARY
BOARD OF ENVIRONMENTAL REVIEW
P O BOX 200901
HELENA MT 59620-0901

SENT VIA FAX: 406 444 4386
& U.S. MAIL

Re: Appeal of Notice of Violation and Administrative Compliance and Penalty Order of the
Opencut Mining Act (Docket No. OC-11-02; FID #1998)

Please be advised that we represent Deer Lodge Asphalt. Deer Lodge Asphalt notifies the Board that it is appealing the administrative order proposed in this matter. The order was dated February 9, 2011.

This appeal is made pursuant to the letter dated February 9, 2011, authored by Robert Smith.

Best Wishes,

KARL KNUCHEL
Attorney at Law

KK/lc
xc: Bruce Anderson

FILED this 9th day of
March AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: Misty Galt

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY DEER LODGE ASPHALT, INC. AT
THE OLSEN PIT, POWELL COUNTY,
MONTANA (FID NO. 1998)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE AND
PENALTY ORDER

Docket No. OC-11-02

I. NOTICE OF VIOLATION

Pursuant to the authority of Section 82-4-441, Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Deer Lodge Asphalt, Inc. (DLA) of the following Findings of Fact and Conclusions of Law with respect to violations of the Opencut Mining Act (the Act), Title 82, chapter 4, part 4, MCA, and the Administrative Rules of Montana (ARM) adopted thereunder, Title 17, chapter 24, sub-chapter 2.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department 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 Act.
3. The Department is authorized under Section 82-4-441, MCA, to issue this Notice of Violation and Administrative Compliance and Penalty Order (Order) to DLA to address the alleged violations of the Act and the administrative rules implementing the Act, and to obtain corrective action for the alleged violation.
4. ARM 17.24.225 provides that "[a]n operator shall comply with the provisions of its permit, this subchapter, and the Act."

1 5. DLA is a corporation and, therefore, is a "person" within the meaning of Section
2 82-4-403(10), MCA.

3 6. Section 82-4-431(1), MCA, requires that an operator may not, without a permit,
4 remove materials or overburden from a site from which a total of 10,000 cubic yards or more of
5 materials and overburden in the aggregate has been removed.

6 7. DLA engaged in or controlled an opencut operation at the Olsen Pit (Site) and,
7 therefore, is an "operator" within the meaning of Section 82-4-403(8), MCA. Accordingly, DLA
8 is subject to the requirements of the Act and the rules adopted thereunder.

9 8. On May 6, 1993, the Department received an application from DLA to obtain a
10 permit to mine gravel on property located in Township 8 North, Range 9 West, Section 27 in
11 Powell County, Montana.

12 9. On May 12, 1993, the Department responded to DLA, stating that the application was
13 incomplete in that the bond submitted by the operator was not sufficient. DLA did not respond.

14 10. On December 17, 1996, the Department sent corrected application materials to
15 DLA to sign. and informed DLA that upon receipt of the signed materials, the Department would
16 issue DLA a permit. DLA did not respond.

17 11. On March 22, 2005, Jo Stephen of the Department's opencut program conducted
18 an inspection of the Site and documented mining activities. During the inspection, Stephen met
19 with Bruce Anderson of DLA and again asked DLA to apply for a permit.

20 12. On May 19, 2008, a representative of Montana Tech prepared a complete
21 application for DLA. The application was sent to DLA for signature, but was never signed and
22 submitted to the Department.

23 13. On February 24, 2009, J.J. Conner of the Department's opencut program
24 conducted an inspection of the Site and again told DLA it needed a permit. During the

1 inspection, Conner documented that DLA's opencut operation had disturbed approximately 14.7
2 acres without a permit.

3 14. On July 2, 2009, DLA submitted a permit application.

4 15. On October 16, 2009, the Department sent DLA a detailed deficiency letter
5 requesting more information for the permit. As of the date of this Order, DLA has not responded
6 to the deficiency letter.

7 16. On August 18, 2010, the Department sent DLA a violation letter for conducting
8 an opencut operation without a permit on approximately 14.7 acres.

9 *Failure to obtain an opencut permit*

10 17. "Opencut operation" is defined as the following activities if they are conducted
11 for the primary purpose of sale or utilization of materials: (a) (i) removing the overburden and
12 mining directly from the exposed natural deposits; or (ii) mining directly from natural deposits of
13 materials; (b) mine site preparation, including access; (c) processing of materials within the area
14 that is to be mined or contiguous to the area that is to be mined or the access road; (d)
15 transportation of materials on areas referred to in subsections (7)(a) through (7)(c); (e) storing or
16 stockpiling of materials on areas referred to in subsections (7)(a) through (7)(c); (f) reclamation
17 of affected land; and (g) any other associated surface or subsurface activity conducted on areas
18 referred to in subsections (7)(a) through (7)(c). See Section 82-4-403(7), MCA.

19 18. During the February 24, 2009 inspection of the Site, Department staff observed
20 that DLA had disturbed approximately 14.7 acres without a permit.

21 19. As of the date of this Order, the Department has not issued a permit for the Site.

22 20. DLA violated Section 82-4-431, MCA, by conducting an opencut mining
23 operation on 14.7 acres without a valid permit.

24 //

III. ADMINISTRATIVE ORDER

This Order is issued to DLA pursuant to the authority vested in the State of Montana, acting by and through the Department under the Act and administrative rules adopted thereunder. Based on the foregoing Findings of Fact and Conclusions of Law and the authority cited above, the Department hereby ORDERS DLA to do the following:

21. Immediately upon receipt of this Order, DLA shall cease all mining activities until a permit is obtained.

22. Within 30 days of service of this Order, DLA shall submit to the Department a complete application for an opencut mining permit for the site, including an adequate bond for the permitted area.

23. The permit application and bond must be submitted to:

Chris Cronin
Industrial and Energy Materials Bureau
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

24. The Department has calculated a penalty of \$27,600.00 for conducting opencut operations without a permit.

25. No later than 60 days after service of this Order, DLA shall pay to the Department the administrative penalty in the amount of \$27,600.00 for the violation specified above. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and sent to:

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

26. Failure to comply with the requirements of this Order by the specified deadlines, as ordered herein, may result in the Department seeking a court order assessing civil penalties of up to \$5,000 for each day the violation continues pursuant to Section 82-4-441(3), MCA.

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

28. Pursuant to Section 82-4-441(6), MCA, the Department reserves its option to seek injunctive relief from the district court if DLA fails to satisfactorily remedy the violation cited herein.

IV. NOTICE OF APPEAL RIGHTS

29. DLA may appeal this Order under Section 82-4-441, MCA, by filing a written request for a hearing before the Montana Board of Environmental Review no later than 30 days after service of this Order. Service of this Order is complete three business days after mailing. Any request for a hearing must be in writing and sent to:

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

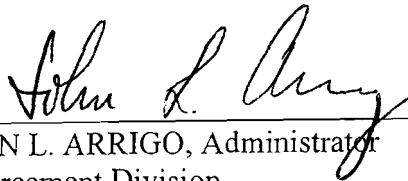
30. Hearings are conducted as provided in the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to the hearing may include formal discovery procedures, including interrogatories, requests for production of documents, and depositions. Because DLA is not an individual, DLA must be represented by an attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-61-201, MCA.

1 31. If a hearing is not requested within 30 days after service of this Order, the
2 opportunity for a contested case appeal is waived.

3 IT IS SO ORDERED:

4 DATED this 9th day of February, 2011.

5 STATE OF MONTANA
6 DEPARTMENT OF ENVIRONMENTAL QUALITY

7 
8 _____
9 JOHN L. ARRIGO, Administrator
10 Enforcement Division
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Department of Environmental Quality - Enforcement Division
Settlement Penalty Calculation Worksheet

Responsible Party Name:	Deer Lodge Ashpalt, Inc. (DLA)
FID:	1998
Statute:	Opencut Mining Act (Act)
Date:	2/1/2011
Name of Employee Calculating Penalty:	Robert D. Smith
Maximum Penalty Authority:	\$1,000.00

Penalty Calculation #1

Description of Violation:
DLA violated Section 82-4-431(1), MCA, by conducting opencut operations without a Department-issued permit. During its March 22, 2005 and February 24, 2009 site inspections, the Department observed that DLA had conducted mining operations without a Department-issued permit at the Olsen Pit.

I. BASE PENALTY

Nature

Explanation:	
Conducting an opencut operation prior to obtaining a permit or an approved permit amendment creates the potential to harm human health or the environment. Unless the Department has reviewed and approved an application for a permit or an amendment to an existing permit, the public has no assurance that an opencut operation will be conducted in compliance with state law or that it will mitigate impacts to the environment and/or human health. Conducting opencut operations prior to completing the permitting process also circumvents the public's opportunity to provide input into the permitting process and to have any concerns addressed. Finally, if adequate bond has not been posted, resources may not be available to reclaim the disturbance.	
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)(a), operating without a required permit has a major gravity.
Extent Explanation:
The Department's expectation is that an opencut operator will not mine without having obtaining a permit. The Department has determined that the fact that DLA mined 14.7 acres without a permit constitutes a major deviation from the regulatory requirement.

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: 0.85

Impact to Administration

Gravity

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

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$850.00**

II. ADJUSTED BASE PENALTY

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

Explanation:

As an entity engaged in a heavily regulated industry such as mining, DLA should have been knowledgeable about the regulations governing opencut activities. Further, the Department notified DLA of the permitting requirement on several occasions. DLA had control over the circumstances surrounding the violation and should have foreseen that conducting opencut operations before its permit was issued would result in a violation. DLA has been given several opportunities to comply and should be knowledgeable about the requirements of the Act. Therefore, an upward adjustment of 20% for circumstances is appropriate.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$170.00

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

Explanation:

DLA did not promptly report or voluntarily disclose facts related to the violation to the Department. 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 voluntarily expended by DLA to mitigate the violation or its impact beyond what was necessary to come into 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	\$850.00
Circumstances	\$170.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$1,020.00
MAXIMUM STATUTORY PENALTY	\$1,000.00

III. DAYS OF VIOLATION

Explanation:

Section 82-4-441((2), MCA, provides, in part, that the Department may assessed an administrative penalty for the violation and an additional administrative penalty for each day the violation continues. The Department does not have information to determine how many days DLA conducted opencut mining operation to disturb 14.7 acres. Using its discretion, the Department is choosing to use five (5) days of violation to calculate the administrative penalty assessed for the first acre of unpermitted disturbance and an additional day of violation for each remaining acre that was mined without a permit. The rationale for choosing to use 5 days of violation for the first acre of unpermitted disturbance is that the definition of "opencut operation" includes the following five activities: site preparation, mining, processing, transportation and stockpiling. See Section 82-4-403(7)(a) – (e), MCA. The Department is assigning one day of violation for each of the activities. Using this rationale, the Department has calculated a penalty for nineteen (19) days of violation for DLA's conducting opencut operations on 14.7 acres.

Number of Days:	19
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ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$19,000.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:
--

\$0.00

IV. ECONOMIC BENEFIT


Explanation:

If DLA had obtained a permit to cover the 14.7 acres that it mined, DLA would have been required to post a bond in the amount of \$215,000. The Department calculates that at the market rate of 2% per year, such a bond would have cost DLA \$4,300 per year. Using the two-year period allowed by the statute of limitations for the violation, the cost to obtain a bond for the last two years would have been \$8,600. Accordingly, the Department calculates that by failing to obtain a permit and post the necessary bond for the past two years, DLA enjoyed a direct economic benefit of \$8,600. In addition, the Department estimates it would cost approximately \$5,000 to prepare an application. However, because that is a cost that DLA will need to bear in any event, the Department is choosing not to consider the economic benefit of delaying that expense in its calculation of the economic benefit.

ECONOMIC BENEFIT REALIZED:

\$8,600.00

Department of Environmental Quality - Enforcement Division
Settlement Penalty Calculation Summary

Responsible Party Name:	Deer Lodge Ashpalt, Inc. (DLA)
FID:	1998
Statute:	Opencut Mining Act (Act)
Date:	2/9/2011
Signature of Employee Calculating Penalty:	Robert D. Smith 

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

	Penalty #1
Maximum Penalty Authority:	\$1,000.00
Percent Harm - Gravity and Extent:	0.85
Percent Impact - Gravity:	0.00
Base Penalty:	\$850.00

II. Adjusted Base Penalty

Base Penalty:	\$850.00
Circumstances:	\$170.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$1,020.00
Maximum Statutory Penalty	\$1,000.00

Totals
\$850.00
\$170.00
\$0.00
\$0.00
\$1,020.00
\$1,000.00

III. Days of Violation or

Number of Occurrences 19

Adjusted Base Penalty Total \$19,000.00

\$19,000.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit \$8,600.00

\$8,600.00

V. History*

\$0.00

TOTAL PENALTY

\$27,600.00

*DLA does not have a prior history of violations of the Opencut Mining Act documented in an administrative order, judicial order, or judgment within the last three years.

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 20th day of
January AD 2011
at 9 o'clock AM
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by *M. J. O'Connell*

**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
REQUEST FOR REHEARING**

The Department of Environmental Quality (Department), by counsel, responds to the Request for Rehearing filed by Petitioner, Juniper Hill Farm, LLC (Juniper Hill), as follows:

BRIEF

Juniper Hill raises two arguments in its Request for Rehearing. First, Juniper Hill argues that in oral argument on December 10, 2010, before the Board of Environmental Review (Board), the Board improperly did not consider reducing the proposed administrative penalty of \$2,100 that the Hearing Examiner recommended the Board affirm, despite Juniper Hill's request for such reduction, because counsel for the Board failed to advise the Board that it could reduce the penalty "as justice may require." Second, Juniper Hill argues that the Board should dismiss the proceedings with prejudice because the Hearing Examiner, Katherine Orr, before and during the time of the

1 hearing, was “also serving as counsel to the Department of Environmental Quality,” which Juniper
2 Hill claims constitutes a conflict of interest, thereby depriving Juniper Hill of its constitutional right
3 to due process.

4 As explained below, both of these arguments are based on factual mistakes and legal
5 misunderstandings and provide no basis for relief. Accordingly, the Department requests that the
6 Board deny Juniper Hill’s request for a rehearing.

7 **A. The Hearing Examiner Did Not Ignore Section 75-1-1001(1)(g), MCA or ARM**
8 **17.4.308 in Her Order, Nor Was There any Error in Counsel for the Board Not**
9 **Specifically Reminding the Board of Those Provisions During the Board Meeting on**
10 **December 3, 2010.**

11 **1. The Hearing Examiner clearly took ARM 17.4.308 into account in her Proposed Order**
12 **for Penalties.**

13 In its Motion for rehearing, Juniper Hill alleges that although in the original hearing it had
14 requested the Hearing Examiner to reduce the \$2,100 penalty “as justice may require,” the Hearing
15 Examiner did not do so. (Request for Hearing at ¶ 3.) Juniper Hill also alleges that because the
16 Hearing Examiner did not specifically mention in her Proposed Order on Penalties anything about
17 the applicability of ARM 17.4.308, which discusses the applicability of raising or reducing penalties
18 based on other matters that justice may require, “[i]t must be assumed that hearing examiner
19 Katherine J. Orr failed to consider the applicability of DEQ regulation, 17.4.308.” (Request for
20 Rehearing, ¶¶ 6-7.) Nothing could be farther from the truth.

21 In her Proposed Order on Penalties, the Hearing Examiner specifically referenced the
22 testimony of Frank Gessaman , who stated his responsibilities as Bureau Chief of the Case
23 Management Bureau in the Department’s Enforcement Division include insuring “that the penalties
24 Calculated by Department staff properly apply the penalty calculation procedures contained in the
administrative rules. ARM 17.4.301 through 17.4.308.” (Proposed Order on Penalties, at Proposed
Finding of Fact 1, p. 2.) The Hearing Examiner went on to state in that Proposed Order that “Mr.

1 Gessaman testified about the penalty calculation applied by the Department” for the violations
2 alleged in this contested case. (Proposed Order on Penalties, at Proposed Finding of Fact 2, p. 2.)
3 The Hearing Examiner found that “[t]he Department decided to forgive \$4260.00 in penalties
4 because it determined that a sufficient degree of deterrence would be achieved with a lower
5 penalty.” (Proposed Order on Penalties, at Proposed Finding of Fact 10, p. 4.) A review of the
6 Penalty Calculation Worksheet attached to the administrative order that was the subject of the
7 appeal in this case, which was also entered into evidence at the hearing, reveals that the Department
8 “forgave” the \$4,260 in penalties pursuant to its discretion to raise or lower penalties based on
9 “other matters that justice may require,” as provided in § 75-1-1001(1)(g), MCA and ARM
10 17.4.308. The Hearing Examiner found that “[t]he Department’s large reduction by \$4620.00 of
11 penalties that could have been assessed overcomes any arguments that the penalty assessment of
12 \$2100.00 should be further reduced.” (Proposed Order on Penalties, at Proposed Finding of Fact
13 16, p. 5.) Finally, the Hearing Examiner concluded, “The penalty calculation of \$2100.00 of the
14 Department was correctly assessed applying the penalty factors contained in ARM 17.4.301 through
15 17.4.308.” (Proposed Order on Penalties, at Proposed Conclusion of Law 16, p. 5.)

16 Those findings and conclusions set forth in the Proposed Order on Penalties, taken in
17 consideration with the Penalty Calculation Worksheet, make it abundantly clear that the Hearing
18 Examiner did, indeed, take ARM 17.4.308 into account in the Proposed Order on Penalties and
19 determined that Juniper Hill had failed to establish that the penalty should be reduced by more than
20 the \$4,260 that the Department had already deducted.

21 **2. There was no error in counsel for the Board not specifically reminding the Board of**
22 **Section 75-1-1001(1)(g), MCA or ARM 17.4.308 during the Board meeting on**
December 3, 2010.

23 Juniper Hill claimed that at the December 3, 2010 Board meeting, one Board member “was
24 clearly sympathetic to [Juniper Hill’s] case and she asked Katherine J. Orr to explain the criteria for

1 calculating the penalty.” (Request for Rehearing at ¶ 11.) Juniper Hill alleges in its Request for
2 Rehearing that Board Attorney Orr allegedly advised the Board on the criteria for calculating
3 penalties set forth in ARM 17.4.301 through 17.4.307, but improperly failed to advise the Board
4 that ARM 17.4.308 provided “additional discretionary authority . . . to mitigate the penalty as it
5 determined ‘justice might require.’” (Request for Rehearing at ¶¶ 12 & 13.) As a result of this
6 alleged omission, Juniper Hill argues, “the Board was unaware that it could mitigate the amount of
7 the penalty as ‘justice might require.’” (Request for Rehearing at ¶ 15.) As explained below, these
8 allegations are based on incorrect facts, in addition to a misunderstanding as to whose obligation it
9 is to bring to the Board’s attention the law underlying the arguments of a party.

10 The portion of the Board meeting that addressed the arguments of counsel and discussions
11 of the Board about Juniper Hill’s challenges to the Proposed Order on Penalties is found on pages
12 122 through 139 of the official transcript of the Board meeting of December 3, 2010. A true and
13 correct copy of those pages is attached hereto as Exhibit A. An examination of those pages does not
14 support Juniper Hill’s description of what was said. For example:

15 (1) Nowhere in the transcript is there a request by any Board member to Ms. Orr or anyone else
16 for an explanation of the criteria for calculating the penalty as Juniper Hill asserted in paragraph 11
17 of the Request for Rehearing. Board Member Robin Shropshire did ask whether there was an actual
18 release to the environment from a leak, but explained that she was just trying to understand the
19 “gravity” factor – whether it requires an actual release or whether a potential for contamination is
20 sufficient. (Transcript at pp. 134-36.) She did not ask about, nor did anyone else raise, any matter
21 concerning any other penalty factors.

22 (2) Nowhere in the transcript does Board Attorney Orr advise the Board about the criteria used
23 to calculate the proposed administrative penalty under ARM 17.4.301 through 307 as Juniper Hill
24 alleged in paragraph 12 of its Request for Hearing. Ms. Orr did explain that the exceptions filed by

1 | Juniper Hill challenged findings of fact, and explained that in order to change the findings of fact,
2 | the Board “has to determine from a review of the complete record that the findings of fact are not
3 | supported by the record.” (Transcript at p. 123-24.) Ms. Orr also pointed out that the Board could
4 | decide to change the conclusions of law. (Transcript at p. 124.) But nowhere did she discuss the
5 | different penalty factors or even mention ARM 17.4.301 through 307.

6 | (3) Concerning Juniper Hill’s claim that the Board had no knowledge that it could reduce a
7 | penalty further because Ms. Orr did not specifically state so during the hearing, it should be obvious
8 | that Ms. Orr did not need to point out something that was obvious to the Board. First of all, the
9 | members of the Board were all provided with a copy of the Proposed Order on Penalties prior to
10 | December 3 and it was the members’ responsibility to decide whether to adopt the Proposed Order
11 | as written, to modify it before adopting it, or to reject it in its entirety. Ms. Orr and Board Chairman
12 | Russell made that clear in their various statements during the hearing and the Proposed Order was in
13 | the packets of materials before members during the Board meeting. There was ample opportunity
14 | for the members to review it and it should be presumed that they did. The Proposed Order made it
15 | very clear how the penalty calculation was made. A copy of the penalty calculation was also
16 | attached to the Department’s Response to Juniper Hill’s Exceptions, which was also provided to all
17 | Board Members well in advance of the Board meeting.

18 | Furthermore, it is not the role of the Board’s attorney to make legal arguments on behalf of
19 | either party. If a party wants the Board to be informed of a particular legal authority to support its
20 | position, it is the obligation of that party to provide the Board with that information. *See, e.g., Old*
21 | *Republic National Title Insurance Company v. Realty Title Company*, 1999 MT 69, ¶ 21, 294 Mont.
22 | 6, 12, 978 P. 2d 956, 959 (failure to cite legal authority for argument referenced in brief constitutes
23 | waiver of argument). Nowhere in Petitioner’s Exceptions to Proposed Order on Penalties and
24 | Request for Review at the December 3, Environmental Quality Council Meeting [sic] did Juniper

1 Hill mention ARM 17.4.308. Nowhere in those Exceptions was any language remotely close to the
2 phrase “other matters as justice may require.” In fact, Juniper Hill challenged numerous other
3 factors, such as “Gravity and Extent” and “Good Faith and Cooperation,” but Juniper Hill’s only
4 challenge to the Hearing Examiner’s findings on “Other Matters as Justice May Require” was to
5 assert: (1) that because there was no actual release from the tanks, there should be zero days of
6 violation: and (2) that because Juniper Hill had fixed the problem causing the monitoring failures,
7 Juniper Hill needed no deterrent to avoid violations in the future. (Petitioner’s Exceptions to
8 Proposed Order on Penalties at Petitioner’s Exception to Proposed Finding #10.) Both of those
9 grounds are baseless. The first issue was addressed during the discussion with Board member
10 Shropshire as described above, where it was explained that the potential for an impact to the
11 environment was sufficient – no actual impact need occur according to the administrative rules.
12 Days of violation in this case are based on the number of months when no valid monitoring test was
13 conducted, not on how many days the environment was impacted. The second issue misconstrues
14 who is to be deterred. Deterrence is addressed not only to the violator, but also to all other potential
15 future violators, as the Department explained in its Response to Petitioner’s Exceptions to Proposed
16 Order on Penalties with Supporting Brief.

17 Finally, as Chairman Russell noted at the hearing, the Board has been working with the
18 penalty statute, rules, and penalty calculation worksheet since their inception. The Board’s
19 members are hardly unfamiliar with the various penalty factors.

20 In sum, it is the obligation of counsel for the parties to inform the Board of the legal
21 authority that supports his client’s arguments and there was no error in the fact that counsel for the
22 Board did not specifically advise the Board on December 3 about its authority to reduce the penalty
23 further based on “other matters as justice may require.”
24

1 **B. Juniper Hill's Challenge to Hearing Examiner, Katherine Orr's alleged Conflict of**
2 **Interest Is Based on Factual Error, Is Untimely, and Raises Constitutional Issues that**
3 **the Board Has No Jurisdiction to Address.**

4 **1. Juniper Hill's Assertion that Katherine Orr is an employee of, or represents the**
5 **Department, is in error.**

6 As the Board well knows, Hearing Examiner Katherine Orr is employed by the Department
7 of Justice/Office of the Attorney General, Agency Legal Services, not the Department. She
8 represents the Board, not the Department. The Department has no authority to hire or fire Ms. Orr,
9 or to regulate her activities. That is the sole prerogative of her employer, the Department of Justice
10 and the Attorney General, and her client, the Board. The Department may not, and does not, discuss
11 the merits of a contested case ex parte with Ms. Orr. If Ms. Orr prepares a proposed order that is
12 unfavorable to the Department, the Department's options are exactly the same as those of the
13 Petitioner or any other party to a contested case – to file exceptions with the Board, and if the Board
14 rules against the Department, the Department's option is to appeal the ruling to the District Court.
15 Ms. Orr has no reason to favor the Department in her rulings. Neither her job nor her income is
16 dependent upon ruling in the Department's favor. The Department has no relationship with Ms. Orr
17 that would constitute even a constructive conflict of interest. In sum, Juniper Hill's claim that there
18 is a conflict of interest is erroneous and should not be the basis for a new hearing.

19 **2. Even if there had been a conflict of interest, Juniper Hill's challenge is untimely.**

20 Even if Ms. Orr did have a conflict of interest (which the Department vehemently asserts
21 she did not and does not), the time to raise such challenge is not seven months after the hearing and
22 a still longer period after Ms. Orr was first appointed as hearing examiner. The Montana
23 Administrative Procedure Act, which governs this contested case, expressly states:

24 On the filing by a party . . . in good faith of a timely and sufficient affidavit of
 personal bias, lack of independence, disqualification by law, or other disqualification of a
 hearing examiner . . . the agency shall determine the matter as a part of the record and
 decision in the case. . . . The affidavit must state the facts and the reasons for the belief that

1 the hearing examiner should be disqualified and **must be filed not less than 10 days before**
2 **the original date set for the hearing.**

3 § 2-4-611(4), MCA (emphasis added).

4 In this case, Juniper Hill's assertion that Ms. Orr had a conflict of interest because of who
5 her employer and/or client are, is based on information that is a matter of public record. It would
6 have been a simple matter for Juniper Hill to have ascertained those facts immediately upon Ms.
7 Orr's appointment by the Board to hear the case. It must not be forgotten that Juniper Hill is owned
8 by, and has from the beginning been represented by, an attorney, so ignorance of the law clearly is
9 no excuse. There is simply no reason why Juniper Hill should be allowed to wait until after the
10 hearing was held and yielded a result unfavorable to its position, and after its appeal to the Board
11 also yielded an unfavorable result, before raising an argument based on facts fully available to it
12 from the beginning. The Montana Administrative Procedure Act requires such motions to be filed
13 at least ten days prior to the original hearing, and the belated argument should not be the basis for
14 giving Juniper Hill another bite at the apple simply because Juniper Hill was unsatisfied with its first
15 two bites, even if there had been a conflict of interest (which there was and is not).

16 **3. The Board has no jurisdiction to hear Constitutional arguments.**

17 Juniper Hill argues that this alleged "conflict of interest" deprives Juniper Hill of due
18 process. But even if Juniper Hill had its facts correct and had raised the issue in a timely fashion,
19 the law is clear that constitutional arguments may not be raised at the administrative hearing level --
20 they must be reserved for an appeal to the District Court. "Constitutional questions are properly
21 decided by a judicial body, not an administrative official, under the constitutional principle of
22 separation of powers. Art. III, Section 1, 1972 Mont. Const." *Jarussi v. Board of Trustees*
23 (1983), 204 Mont. 131, 135-136, 664 P.2d 316, 318. That is especially true when the
24 constitutionality of the administrative board's own actions are at issue. *Schneeman v. Dept. of*

1 *Labor and Industry* (1993), 257 Mont. 254, 259, 848 P.2d 504, 507. So even if Juniper Hill had
2 established facts demonstrating a deprivation of due process (which it has not), and had raised
3 the issue in a timely fashion (which it did not), the Board cannot address the issue. It must await
4 review in the District Court. Accordingly, the Board should deny relief on this ground.

5 **CONCLUSION**

6 For the reasons explained above, the Department requests that the Board reject Juniper
7 Hill's Request for Rehearing in its entirety.

8 Respectfully submitted this 20th day of January, 2011.

9 DEPARTMENT OF ENVIRONMENTAL QUALITY

10
11 BY: Jane B. Amdahl
12 Jane B. Amdahl,
Staff Attorney

13
14 **Certificate of Service**

15 I hereby certify that on the 20th day of January, 2011, I mailed a true and correct copy of
16 the foregoing Department's Response to Petitioner's Request for Rehearing, postage prepaid, to
the following:

17 Juniper Hill Farm, LLC
18 c/o Thomas C. Morrison
111 N. Last Chance Gulch, Ste. 3B
19 Helena, MT 59601-4144

20 Jane B. Amdahl
21
22
23
24

1 series of sampling stations along the creek within
2 Butte; and if we were to apply that standard
3 throughout the run of the creek at existing
4 standard stations, and two of them, the biotic
5 ligand model would generate a lower standard; at
6 four of them, it would generate a higher standard;
7 and a considerably higher standard below the
8 wastewater treatment plant.

9 So we're talking about a factor of three
10 or four difference in terms of the level of
11 standard generated by the BLM versus the hardness
12 model.

13 CHAIRMAN RUSSELL: Any further
14 questions?

15 (No response)

16 CHAIRMAN RUSSELL: At this time, I think
17 at least by recommendation, we're going to wait to
18 see what comes up in the WQB7. So thanks for
19 coming up and talking to us, and we'll await your
20 next comments regarding this.

21 MS. SHROPSHIRE: It's not WQB7.

22 MR. BUKANTIS: DEQ7 now.

23 CHAIRMAN RUSSELL: Thanks, Bob. I
24 appreciate your presentation.

25 The last, almost the last matter is

1 violations of the Underground Storage Tank Act by
2 Juniper Hill Farms, LLC. Katherine, I'm going to
3 let you tee this up.

4 MS. ORR: Mr. Chairman, members of the
5 Board, we are at the juncture here where a
6 decision was issued regarding -- again, there was
7 a contested case hearing on the issue of the
8 proper penalty to be assessed, and that hearing
9 occurred on June 4th, and then on September 21st,
10 a proposed order on the penalty was issued by me.

11 And according to the Montana
12 Administrative Procedure Act, Section 2-4-621,
13 there is an opportunity for the party adversely
14 affected to file exceptions to the decision that
15 the Hearing Officer makes, and that has happened.
16 And in the proposed order, I invited the parties
17 to file exceptions, and response to exceptions,
18 and that has been done, and those are in your
19 packet.

20 And the decision point today basically
21 for the Board is whether upon argument there is a
22 necessity for the Board to change the findings of
23 fact. And I'll back up one step there. In order
24 to do that, the Board has to determine from a
25 review of the complete record that the findings of

1 fact are not supported by the record. And just to
2 kind of go further into this statute, the Board
3 can make decisions today, for example, regarding
4 whether there should be a change to the
5 conclusions of law.

6 That's easy. But that's not what's
7 before the Board. There are exceptions that have
8 been filed, and they delve into somewhat the
9 findings of fact that have been proposed; and also
10 the exceptions address admission of additional
11 evidence that wasn't part of the record, so that
12 raises a difficulty.

13 But what should happen right now is that
14 you hear oral argument, and decide for yourselves
15 whether or not the fact record that's been
16 established through the proposed findings of fact
17 should somehow be reopened, and so I would counsel
18 you to just hear these arguments, and you will
19 make that decision.

20 The one other small wrinkle is that the
21 Department filed a notice of clerical errors, and
22 I have reviewed those, and if you were
23 hypothetically to today move and decide to adopt
24 the proposed findings of fact, you could instruct
25 me to enter proposed, a final proposed findings of

1 fact that would take into account whatever those
2 proposed clerical errors are, if that makes sense.

3 So the first order of business is to
4 hear the parties on their exceptions. And it's
5 Mr. Morrison who is here representing Juniper Hill
6 who filed exceptions, and then the Department is
7 here represented by Ms. Jane Amdahl, and she filed
8 a response, and then Mr. Morrison filed sort of
9 supplemental exceptions. So I'm sure you'll hear
10 about that today.

11 MR. MORRISON: Mr. Chairman and members
12 of the Board, and Ms. Orr, Hearing Examiner Orr,
13 this process is foreign to me. I'm an attorney,
14 but I'm a tax lawyer who happened to unfortunately
15 use my sole -- I'm also in conflict because I own
16 Juniper Hill Farm, LLC, which bought the Lakeside
17 General Store Station. That's a small convenience
18 store out by Lakeside. I apologize to all of you
19 for having to take your time today, and I don't
20 want to take much of it. I know it's your lunch
21 hour, so I will make this very brief.

22 But I just want to give you a background
23 of what this is all about. I'm not Hi-Noon,
24 somebody that knows a lot about running filling
25 stations. I just happen to have a store because

1 it's next door to where I live. And when I first
2 bought the store, the owner that had the store had
3 a reputation for having problems with complying
4 with DEQ.

5 And I had some elderly ladies that ran
6 the store, and they were going to have to go out
7 dip big sticks in the ground to see what the fuel
8 levels were. I spent quite a bit of money
9 avoiding that problem when I bought the store
10 installing this expensive equipment to read the
11 fuel levels.

12 And one of the problems that I didn't
13 know was going to be a problem, after spending all
14 that money, was that apparently the equipment that
15 was installed wasn't capable of reading lower fuel
16 levels, and we -- very, very low fuel levels, and
17 with the cost of fuel, and the low amount of sales
18 that we had in the store, especially during the
19 winter, we didn't like to -- I don't want to have
20 10,000 gallons of gas that it took me ten months
21 to sell, so we kept fairly low levels of fuel in
22 these tanks.

23 I didn't realize it was a problem until,
24 as the record indicates, in November of 2008, I
25 got a notice that we weren't reporting to DEQ the

1 fuel levels that we should have been reporting.
2 And the best that I could establish from my own
3 memory was the facts, which is in the record, that
4 shows I indicated to DEQ I tried to get Northwest
5 Fuel -- I learned that there was a computer chip.
6 Too bad it wasn't installed in the first place
7 when they put this equipment in -- but I could buy
8 this for an extra \$1,000, buy this computer chip.
9 The Hearing Examiner, I think, at least her record
10 shows she does agree that it cost \$1,000 to put
11 this little clip in that would allow the fuel
12 tanks to read the right fuel levels.

13 And I thought that was taken care of
14 until the following April, I got a notice that we
15 were still not in compliance. The lady that ran
16 the store, she wasn't really experienced much in
17 running -- This is a small convenience store out
18 in the country here. So I don't know what all
19 happened. The records show all this, and I've
20 taken exceptions to the Hearing Examiner's -- some
21 of the things she said.

22 If the government had offered to settle
23 this for \$500 like that other case I heard this
24 morning, I wouldn't be here, and we wouldn't be
25 wasting your time. So I'm simply asking you to

1 use whatever authority you have to be a little bit
2 more understanding.

3 We have fiberglass tanks, fairly new
4 tanks in the store. It's a fairly new store. I'm
5 apologetic again that this even ever had to
6 happen. I would ask, if you have any authority,
7 to understand what I'm asking. I would certainly
8 appreciate if there is some way you could reduce
9 -- I don't want to ask you to totally eliminate
10 the fine that's involved here, but I would
11 certainly appreciate it if you could help me out
12 on that. Thank you.

13 CHAIRMAN RUSSELL: Jane, do you want to
14 respond?

15 MS. AMDAHL: I guess it's good afternoon
16 by now. Mr. Chairman, members of the Board, my
17 name is Jane Amdahl. I'm an attorney with the
18 Montana Department of Environmental Quality, and I
19 do represent the Department in this contested
20 case.

21 I do not want to repeat everything I set
22 forth in my brief in response to the exceptions
23 filed by Juniper Hill. I trust that the Board
24 members are certainly fully capable of reading
25 those arguments.

1 I would like to point out, however, as
2 Ms. Orr stated already, when a party files
3 exceptions to findings of fact, the Board may not
4 make any changes in the finding of fact unless
5 they review the record as a whole, and determines
6 that there is no competent substantial evidence to
7 support the finding. The Board may not merely
8 make its own credibility determination. That is
9 solely in the hands of the Hearing Examiner, which
10 in this case of course was Ms. Orr.

11 In this case, to my knowledge, no record
12 has been presented to the Board to review. That
13 is the obligation of the person or entity that is
14 raising the appeal or the challenge, and the last
15 time I checked with the Court Reporter, she told
16 me that no record had been ordered. So the Board
17 has no basis on which to do what is necessary in
18 order to make any changes to the findings of fact.

19 So I would suggest that on that basis
20 alone, that the Board should deny the exceptions
21 raised by Juniper Hill.

22 Secondly, one other issue that I believe
23 I pointed out in the hearing, I don't recall that
24 I pointed it out in my actual response to the
25 exceptions, and that is: The Board should keep in

1 mind that Juniper Hill property is not the same as
2 Mr. Thomas Morrison. He may own the company, but
3 the company includes its employees.

4 For instance, if General Motors, merely
5 because the COE is not aware of something that
6 happened in one of its offices or car dealerships,
7 does not mean that General Motors is still not
8 liable or responsible for the actions just because
9 the COE or the shareholders are not aware of it.

10 In this case the evidence is clear that
11 Juniper Hill was made aware, through its employee
12 who signed for a copy of the inspection report in
13 September 2008, that there were at least eight
14 violations of monitoring requirements from the
15 prior year.

16 Nothing was done until Mr. Morrison
17 received the warning letter, in which case he
18 stated at the hearing that he communicated with
19 Northwest Fuels to have a chip put in. There was
20 no follow up by Mr. Morrison; there was no follow
21 up by anybody else at Juniper Hill. It was not
22 done. Juniper Hill did not have it installed. It
23 was not until April of 2009 that any action
24 actually was taken to prevent future violations
25 because during that whole time, violations were

1 continuing to occur.

2 So I would simply ask the Board to
3 remember that Juniper Hill is a company. It is
4 not Mr. Morrison. You are to look at what Juniper
5 Hill knew, what Juniper Hill did, not what Mr.
6 Morrison personally may have known or done.

7 I would also remind the Board that the
8 initial penalty assessed for the 16 different
9 violations that were established in the prior one
10 year would have resulted, and the Department
11 calculation came to a penalty of \$6,720. The
12 Department determined that that was more money
13 than was truly necessary to act as a deterrent,
14 not only to Juniper Hill, but to other operators,
15 and unilaterally reduced that penalty to \$2,100.

16 Even if we take all of Mr. Morrison's
17 arguments into account, and take all penalty
18 factors in favor of Juniper Hill where there is
19 any discretion -- such as whether there was deemed
20 significant cooperation, good faith -- and do not
21 take any of the discretionary things against
22 Juniper Hill, some of the other factors, the
23 penalty still ultimately comes out to be a penalty
24 higher than the penalty that was assessed, \$2,100.

25 The Hearing Examiner stated that in her

1 proposed order. So even if some of the arguments
2 Juniper Hill made were true, ultimately that the
3 Department already reduced the penalty by well
4 over \$4,000, and a \$2,100 penalty was appropriate.
5 I would simply ask the Board members to review the
6 filings and make their determination based on
7 that. I'm open to any questions.

8 CHAIRMAN RUSSELL: I think we'll direct
9 our questions to Katherine.

10 MS. AMDAHL: Okay. Thank you very much.

11 CHAIRMAN RUSSELL: First of all,
12 Katherine, a question for you. When you acted on
13 behalf of the Board, you reviewed the Department's
14 record on how they calculated the penalties.

15 MS. ORR: Mr. Chairman, that is correct.
16 And we had an evidentiary hearing with testimony,
17 cross-examination, on the proper assessment of
18 penalties.

19 CHAIRMAN RUSSELL: And you didn't modify
20 those penalties because that wouldn't be a
21 position you should take if you take up the
22 findings as they were presented as accurate and
23 factual.

24 MS. ORR: Well, I think the
25 determination at that hearing was whether the

1 facts existed to support the conclusions -- Well,
2 let me put it another way -- whether the facts
3 existed such that the way the rule was applied was
4 correct.

5 CHAIRMAN RUSSELL: The only point I'm
6 trying to make is it was several years ago that we
7 had adopted a formal process to assess penalties,
8 and over the last four years that that's been in
9 effect, four plus -- I can't remember -- we've
10 allowed the Department to use a very specific
11 penalty assessment process. And I'm guessing that
12 the reduction of the initial penalty that was
13 higher was allowed in that process, but the
14 Department does not act arbitrarily in their
15 assessment of penalties. We made that when we
16 adopted the rule on how to assess those penalties,
17 as I recall, John, many years ago now.

18 So at least from my perspective -- and I
19 speak only for myself at this point -- over the
20 years that I've watched the Department bring
21 penalties to us, they've been based on -- those
22 conclusions based on the findings, and they've
23 been accurately assessed and fairly judged.

24 So that certainly is my opinion, and I
25 know that some of the older Board members can

1 agree or disagree with me, but that's been my
2 position over the years of watching these
3 penalties come, even to the fact that we would
4 have literally five, four or five in a row that
5 were assessed the exact same penalty because they
6 were literally the exact same violations that the
7 Department noted.

8 So that is my opinion. We can argue
9 this more, but I would certainly entertain a
10 motion to support the Hearing Examiner's position
11 and assess a \$2,100 penalty.

12 MS. KAISER: So moved.

13 CHAIRMAN RUSSELL: It's been moved by
14 Heidi. Second?

15 MR. WHALEN: Second.

16 CHAIRMAN RUSSELL: Seconded by Joe.
17 Further discussion? We certainly have more time
18 for discussion here.

19 MS. SHROPSHIRE: Mr. Chairman, I always
20 have trouble with some of these things in terms of
21 questions that are appropriate to the case, but is
22 it fair to ask if there was impact to the
23 environment in this case, or it was a failure to
24 monitor?

25 MS. ORR: Mr. Chairman, Ms. Shropshire,

1 I would say a little of both. In the penalty
2 calculation, the question was whether there was a
3 possible exposure to the environment of the
4 contaminants -- "potential" I guess is the word in
5 the rule -- and that's why the Department
6 suggested that it apply the gravity and extent
7 factors the way it did.

8 And yes, the underlying admitted
9 violation was a failure to monitor correctly.
10 There were monitoring results, but they were not
11 valid because of the testing method that was used.

12 MS. SHROPSHIRE: Follow up. Did the
13 tank leak?

14 MS. ORR: No, there was nothing in the
15 record that showed an actual leak.

16 CHAIRMAN RUSSELL: And I guess I'm going
17 to be very careful here, but I went through, when
18 the UST program literally got off its feet. If
19 you can't monitor, you don't know if you have a
20 leak. This is a prevention oriented program. If
21 you cannot monitor for the presence or absence of
22 a leak, then how do you know it's not leaking?
23 This could have been a grave environmental
24 disaster, and it would have never been picked up.

25 And the reason why monitoring became so

1 important in the 1990s, I think 1992 was a real
2 benchmark time, that you couldn't monitor before,
3 and a stick test isn't accurate. The stick test
4 changes with temperatures. So you really have to
5 -- I mean you buy this equipment, and you buy the
6 chip, so you can accurately monitor for the
7 presence or absence of a product in your tank
8 which would indicate a leak.

9 MS. SHROPSHIRE: I'm just -- I do --
10 Trust me, I appreciate that. Just in terms of how
11 the -- If the gravity is applied to -- what the
12 gravity is applied to. It's not applied to impact
13 to the environment, but potential impact to the
14 environment, so I'm just trying to make that
15 clarification.

16 CHAIRMAN RUSSELL: I think that's
17 probably why some of the \$4,600 of the initial
18 fine was reduced. Not seeing the calculations
19 right now, but --

20 Further comments? And we really should
21 be directing most of our comments to Katherine and
22 between ourselves. Since there's a motion, let's
23 direct them between ourselves or Katherine.

24 Further?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, I'll
2 call for the question. All those in favor,
3 signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Thank you for your
8 time. I believe we're done.

9 MS. ORR: Mr. Chairman, there is one
10 thing that I was addressing, if I may, and that
11 there is a proposal to change my order slightly,
12 and that was characterized as clerical orders by
13 the Department. And I have reviewed those, and if
14 you would allow me, I can change the wording of
15 the order to address and incorporate at least the
16 intent of those comments regarding the clerical
17 errors.

18 CHAIRMAN RUSSELL: Was this the "S" and
19 the "K"? Was that one of them?

20 MS. ORR: One is to say that there were
21 no -- there was no valid -- I plugged it in here
22 in the order. One is in Paragraph 8. The
23 Department determined that -- My finding of fact
24 is the Department determined that the number of
25 days of violation amounted to sixteen days, namely

1 eleven months for Tank No. 1, plus five months for
2 Tank No. 2, regarding which there were no monthly
3 leak detection records generated; and the
4 suggested change is valid leak detection records
5 generated, and I would agree with that. That's a
6 good change. So I would suggest putting that in
7 the order.

8 And then the second one is in finding of
9 fact -- well, the first one actually the way it
10 appeared in the request -- is as to finding of
11 fact No. 6, and the suggested language is to
12 clarify that the 70 percent -- or the .7 gravity
13 and extent factor did not result in a reduction to
14 70 percent of the -- she's saying that it seemed
15 like there was an implication that it was reduced
16 down to 30 percent, and that wasn't the intent.

17 So I guess what I would add is something
18 like, "The base penalty was determined by reducing
19 the maximum statutory penalty downward by applying
20 a factor of .7 for gravity and extent to yield a
21 base penalty of \$350, which is .7 times \$500." So
22 all by way of indicating that it wasn't reduced
23 down to 30 percent, it was reduced down to 70
24 percent, if I could do that.

25 CHAIRMAN RUSSELL: All right. Because

1 we can get this closed up if we do that, we'll
2 entertain a motion to allow Katherine to make
3 those changes to her order.

4 MR. MIRES: So moved.

5 CHAIRMAN RUSSELL: It's been moved by
6 Larry. Second?

7 MR. MILLER: Second.

8 CHAIRMAN RUSSELL: It's been seconded by
9 Marv. Any other comments?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, all
12 those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries
17 unanimously. Thank you. That actually went
18 smoother than I thought it would.

19 We are at the time of the agenda that we
20 allow general public comment. This is the time
21 for the public to speak to matters that the Board
22 has jurisdiction over. I know that you've stuck
23 around to talk to us. Please be careful that we
24 do not start talking about a contested case,
25 because we are not here to hear your case. Okay?

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 147 - pages contain a
true record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal

this 4th day of December, 2010.

Laurie Crutcher

LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2012.

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January 13, 2011

mailed this date

courtesy copy faxed this date

Board of Environmental Review

Attn: Joyce Wittenberg

POB 200901

Helena, MT 59620-0901

406-444-6701 fon

406-444-4386 fax

DATE FOR RE-HEARING

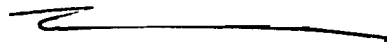
JUNIPER HILL FARM, LLC,

Case NO. BER 2009-18-UST

Dear Board:

I request a hearing date sometime after February, inasmuch as my wife and I have planned a trip for the last two weeks at the end of February.

Very truly yours,



THOMAS C. MORRISON

ENC:

REQUEST FOR REHEARING

CC:

Ms. Jane B. Amdahl, Staff Attorney

POB 200901

Helena, MT 59620-0901

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January 13, 2011

Board of Environmental Review

1520 East 6th Ave.

POB 200901

Helena, MT 59620-0901

REQUEST FOR RE-HEARING

JUNIPER HILL FARM, LLC,

Case NO. BER 2009-18-UST

FILED this 13th day of
January AD 2011
at 1:05 o'clock P. M.
MON. OF
ENVIRONMENTAL
by Misty Gish

Dear Board:

Please file the attached REQUEST FOR RE-HEARING and, as I mentioned, I understand that you will hand deliver the copies to the Honorable Katherine J. Orr, Hearing Examiner and Jane B. Amdahl, Staff Attorney.

Very truly yours,



THOMAS C. MORRISON

ENC:

REQUEST FOR REHEARING

**THOMAS C. MORRISON
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111 N. Last Chance Gulch (3B)
Helena, MT 59601-4144
406-443-1040 phone
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Attorney for Juniper Hill Farm, LLC**

**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**

REQUEST FOR REHEARING

Pursuant to 2-4-702 (MCA), the petitioner requests a rehearing on the Board's order, dated December 15, 2010.

IN SUPPORT OF THIS REQUEST FOR REHEARING, the petitioner respectfully states the following:

1. Before and during the relevant periods of time, Katherine J. Orr was and continues to be employed as an assistant attorney general for the State of Montana and provides legal services to the Montana Department of Environmental Quality (DEQ).

2. This Board designated Katherine J. Orr to serve as a formal hearing examiner for the purpose of reviewing DEQ's proposed penalty in this case.

3. During the administrative hearing before Katherine J. Orr, the petitioner orally requested that she consider the applicability of DEQ regulation, 17.4.308, for the purpose of mitigating the proposed penalty in this case.

4. DEQ regulation, 17.4.308, provides:

17.4.308 OTHER MATTERS AS JUSTICE MAY REQUIRE

(1) The department may consider other matters as justice may require to increase or decrease the total penalty.

5. On 9/21/2010, as the hearing examiner, Katherine J. Orr proposed an order, sustaining the DEQ recommendation that the petitioner pay a \$2,100 penalty and in so doing did not mention the applicability of DEQ regulation, 17.4.308.

6. It must be assumed that hearing examiner Katherine J. Orr failed to consider the applicability of DEQ regulation, 17.4.308.

7. On 12/3/2010, this Board heard the petitioner's appeal from the hearing examiner's proposed adverse order.

8. At the hearing before this Board (as well as the administrative hearing before the hearing examiner, Katherine J. Orr), petitioner submitted evidence, including testimony, summarized as follows:

8.1. during periods in issue, the petitioner owned and operated the Lakeside General Store, LLC, a small country gas station, on York Road, Montana.

8.2. during periods in issue, the Lakeside General Store had minimal fuel sales.

8.3. upon the petitioner's acquisition of the Lakeside General Store, the petitioner had engaged Northwest Fuels to install electronic equipment for reading electronically the fuel levels in petitioner's two fuel tanks.

8.4. the petitioner was motivated to make these expensive improvements to save its store employees from having to manually measure gas levels in the cold and to assure timely and accurate reporting of fuel levels to the DEQ.

8.5. during the periods in issue, the Lakeside General Store purposely kept its two fuel tanks at moderate levels to avoid being at financial risk, due to the extreme volatility in gas prices and the low fuel sales at the Lakeside store.

8.6. in spite of the above improvements, petitioner's new electronic measuring equipment failed read low levels of in petitioner's two fuel tanks.

8.7. the imposition of the penalty in this case arose from the inability of petitioner's equipment to read low fuel levels.

8.8. after being notified by the DEQ of the inability to read fuel levels, the petitioner immediately sought to rectify the situation and learned that the problem could be rectified by installing a computer chip that would improve the ability of the electronic equipment to read lower fuel levels.

8.9. the petitioner contacted Northwest Energy in a timely manner and requested Northwest Fuels install the needed computer chip.

8.10. due to an apparent miscommunication between the petitioner and Northwest Energy, Northwest Energy failed to install a needed computer chip.

8.11. when being later notified by the DEQ that the fuel readout problem persisted, the petitioner immediately contacted Northwest Fuels again and learned that they had not installed the computer chip.

8.12. the petitioner then again requested Northwest Fuels to install the needed computer chip, which was done thereafter in a timely manner and at a cost of slightly over \$1000.

8.13. petitioner believes that petitioner has acted responsibly and in good faith.

- 9.** At the hearing before this Board, Katherine J. Orr served as its legal counsel to the Board.
- 10.** At the hearing before this Board, the Board asked Katherine J. Orr, as its legal counsel, to explain the criteria for calculating the penalty in this case.
- 11.** At the hearing before this Board, at least one Board member was clearly sympathetic to the petitioner's case and she asked Katherine J. Orr to explain the criteria for calculating the penalty.
- 12.** In her capacity as legal counsel to the Board, Katherine J. Orr advised that the criteria used for calculating the proposed administrative penalty arose under administrative regulations 17.4.301 through 17.4.307 which supported the DEQ penalty determination as well as her own proposed order as the hearing examiner.
- 13.** In her capacity as legal counsel to the Board, Katherine J. Orr did not apprise the Board of its additional discretionary authority under administrative regulation 17.4.308, to mitigate the penalty as it determined "justice might require."
- 14.** The petitioner's counsel was not given an additional opportunity to correct this omission.
- 15.** Without being properly advised by its legal counsel, Katherine J. Orr, the Board was unaware that it could mitigate the amount of the penalty as "justice might require."

16. Petitioner provided substantial reasons which would justify the Board's reducing the previously imposed penalty.

17. Petitioner submits that if the Board had been appropriately advised of its discretionary authority to mitigate the penalty, it could have and would have found good reason as "justice might require" to reduce the proposed penalty.

18. Petitioner submits that if the Board had been appropriately advised of its authority, it would have imposed a reasonable penalty of not more than \$250.00.

19. Alternatively, petitioner submits that Katherine J. Orr, as an employee of the State of Montana, was impermissibly conflicted while serving as an "impartial" hearing examiner and also serving as counsel to the Department of Environmental Quality.

20. Consequently, petitioner submits this impermissible conflict of interest violated petitioner's constitutional rights by depriving the petitioner of due process. See *Caperton, et al. v. Massey Coal Company, et al.*, 129 S. Ct. 2252; 173 L. Ed. 2d 1208; 2009 U.S. LEXIS 4157 (2009).

1. that this Board consider its discretionary authority under DEQ regulation, 17.4.308, which would allow it to reduce the proposed penalties as “justice might require.”

2. That this Board reduce the proposed penalty as “justice” should require, which would justify a penalty of \$250.00.

3. That this Board impose a penalty of \$250.00 as a penalty that “justice would require.”

4. That alternatively, this Board dismiss the proceedings with prejudice against the State of Montana for violating petitioner's constitutional rights by depriving the petitioner of due process.

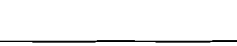

Dated this **13th day of January 2011.**

by: Thomas

THOMAS C. MORRISON

attorney for Juniper Hill Farm, LLC

Sworn and subscribed to by the above named person, this 13th day of January 2011.

		1/13/2011
	GAYLE SNYDER	date
	NOTARY PUBLIC for the State of MONTANA	
	Residing at TOWNSEND, MONTANA	
My Commission expires on March 23, 2012		

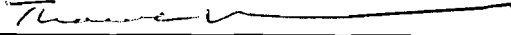
PROOF OF SERVICE BY MAIL

On the below-indicated date, this certifies that a true and correct copy of the foregoing was handdelivered to:

**The Honorable Katherine J. Orr, Hearing Examiner
through the Office of Department of Environmental Quality
1520 E. 6th Ave.
Helena, MT 59620-0901
406-444-5690**

**Jane B. Amdahl, Staff Attorney
through the Office of Department of Environmental Quality
1520 E. 6th Ave.
Helena, MT 59620-0901
406-444-5690**

1. 13. 2011
date


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