



Montana Board of Environmental Review

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

TELECONFERENCE AGENDA

FRIDAY, JULY 22, 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. May 13, 2011, Board meeting.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **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.** A hearing is set for September 21, 2011.
 - b. **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.** Following is a list of recent documents received by the Board:
 - April 15, 2011
 - *DEQ Motion for Summary Judgment*
 - *Motion to Strike Appellants' Defense and Enter Judgment in Favor of the DEQ on its Revocation Action* (Intervenor Gardiner-Park County Water and Sewer District)
 - May 2, 2011
 - *Appellants, John J. McInerney, Bob G. Haney and Marwin E. Hofer's Response to DEQ's Motion for Summary Judgment*
 - *Appellants, John J. McInerney, Bob G. Haney and Marwin E. Hofer's Response to Gardiner Park County Water District's Motion to Strike Appellants' Max and Sue Berg's Defense and Enter Judgment in Favor of DEQ on its Revocation Action*
 - May 13, 2011
 - *DEQ Request for Oral Argument on Motions for Summary Judgment*
 - *DEQ Reply Brief in Support of DEQ's Motion for Summary Judgment and response Brief to Appellant Berg's Cross-Motion for Summary Judgment*
 - May 16, 2011 – *Reply Brief in Support of Gardiner-Park's Motion to Enter Judgment in Favor of the DEQ on its Revocation Action.*
 - May 20, 2011 – *Berg's Combined Response to DEA's Motion for Summary Judgment and Gardiner-Park County Water District's Motion to Strike Appellants' Defense and Enter Judgment in Favor of DEQ*
 - May 26, 2011 – *Motion to Strike* (Intervenor Gardiner-Park County Water District)

- June 7, 2011 – *Berg’s List of Witnesses and Exhibits*
 - June 10, 2011 – *Order Vacating Prehearing and Hearing Dates and Setting Hearing on Motions*
 - June 13, 2011 – *Appellants McInerney, Haney and Hofer Final Witness and Exhibit List*
 - June 22, 2011 – Hearing on the Motion for Summary Judgment, Cross Motion for Summary Judgment, and Motion to Strike
- c. **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 March 3, 2011, the Hearing Examiner issued an *Order Vacating Hearing Date* to allow additional time for ruling on the motion for summary judgment.
 - d. **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.** A hearing is set for August 17, 2011. On June 8, 2011, counsel for DEQ submitted *The Department’s Motion for Summary Judgment on the Issue of Liability* and *Brief in Support of the Department’s Motion for Summary Judgment on the Issue of Liability*. The Board received *Deer Lodge Asphalt’s Witness and Exhibit List* on June 17, 2011, and *Deer Lodge Asphalt, Inc.’s, Response to the Department’s Motion for Summary Judgment on the Issue of Liability and Cross-Motion and Brief for Summary Judgment* on June 29, 2011. On July 11, 2011, the DEQ filed a *Reply Brief in Support of the Department’s Motion for Summary Judgment on the Issue of Liability*.
 - e. **In the matter of violations of the Opencut Mining Act by Concrete Materials of Montana, LLC, at the Mauritzson Site, Yellowstone County, BER 2011-04 OC.** On April 27, 2011, a *First Prehearing Order* was issued. On May 6, 2011, the Board received *Agreed Proposed Schedule* from the parties. A *First Scheduling Order* was issued on May 13, 2011. A hearing is set for December 1, 2011.
 - f. **In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.** A *First Prehearing Order* was issued May 11, 2011. On June 6, 2011, Hearing Examiner Katherine Orr issued an *Order Granting Extension of Time*, giving the parties until August 5, 2011, to reach settlement or file a proposed hearing schedule.
 - g. **In the matter of violations of the Montana Septage Disposal and Licensure Laws by James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL.** A *First Prehearing Order* was issued May 11, 2011. On May 20, 2011, counsel for the department filed an *Agreed Proposed Schedule*, proposing a hearing date of December 14, 2011. A *First Scheduling Order* was issued June 6, 2011, setting a hearing date of December 14, 2011.
2. Other cases assigned to the Hearing Examiner
 - 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 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.** A hearing is scheduled for June 20, 2011. On May 27, 2011, counsel for the department filed a *Request for Extension* requesting that the prehearing conference and hearing dates be vacated and extended by approximately

3 months, with a hearing during the week of October 10, 2011. On June 6, 2011, a *Third Scheduling Order* was issued with a hearing date of October 12, 2011.

- c. **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 April 21, 2011, a contested case hearing was held.
 - d. **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.** A hearing on the *Appellants' Motion for Summary Judgment* was held on April 12, 2011. On July 12, 2011, an *Order Denying the Motion to Dismiss and the Motion for Summary Judgment and Cross Motion for Summary Judgment* was issued.
 - e. **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 May 5, 2011, the Board received an *Unopposed Motion to Modify the First Scheduling Order* from the parties. On May 17, 2011, the Hearing Examiner issued a *First Amended Scheduling Order* setting a new hearing date of August 29, 2011. The Board received *DEQ Exchange of Witness List and Exhibits* on June 13, 2011. On July 7, 2011, a prehearing conference was held. A new hearing date has been set for September 20, 2011.
3. Cases not assigned to a Hearing Examiner
- a. **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. On May 31, 2011, counsel for the department submitted an *Agreed Proposed Prehearing Schedule* proposing a hearing the week of October 3, 2011. A *First Scheduling Order* was issued June 6, 2011, setting a hearing date of October 17, 2011.

B. GENERAL BOARD CORRESPONDENCE

The Board will be briefed on the following correspondence received:

1. May 13, 2011, Battelle submittal of 2010 Hydrologic/Water Quality Study of Cow and Pony Creek Drainages, Rosebud County, Montana.

III. ACTION ITEMS

A. REPEAL, AMENDMENT, OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of 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. In the matter of the amendment of 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. FINAL ACTION ON CONTESTED CASES

1. **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 May 13, 2011, the Board received *Holcim (US) Inc.'s Notice of Dismissal* requesting

dismissal with prejudice under Montana Rules of Civil Procedure Rule 41(a)(1). An Order of Dismissal will be presented for signature by the Chair.

2. **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.** On May 16, 2011, the Board received a Stipulation for Dismissal from the parties. An Order of Dismissal will be presented for signature by the Chair.
3. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC, at Bull Mountain Mine #1, Roundup, Musselshell County, BER 2010-19 SM.** At its January 28, 2011, meeting, the Board voted to hear this matter itself. On June 15, 2011, the Board received a *Stipulation to Dismiss*, signed by both parties. An order to dismiss the case will be presented for signature by the Chair.
4. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC at Bull Mountain Mine #1, Roundup, Musselshell County, Montana, BER 2010-17 SM.** On July 12, 2011, the Board received a *Stipulation to Dismiss* signed by the parties. An order to dismiss the case will be presented for signature by the Chair.

C. NEW CONTESTED CASES

1. **In the matter of violations of the water Quality Act by Circle B, LLC at Circle B Feedyard, Hysham, Treasure County, BER 2011-07 WQ.** The Board received a letter by fax on May 23, 2011, appealing the Penalty Order. A *First Prehearing Order* was issued June 6, 2011, giving the parties until June 24, 2011, to file a proposed schedule. On July 7, 2011, the DEQ filed a *Request for Extension* to allow the parties to conduct settlement discussions. The Board may assign a permanent hearing examiner or decide to hear the matter.
2. **In the matter of the appeal and request for hearing by the City of Helena regarding the DEQ's Notice of Final Decision for Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0022641, BER 2011-08 WQ.** The Board received the appeal on June 16, 2011. A *First Prehearing Order* was issued on July 11, 2011. The Board may assign a permanent hearing examiner or decide to hear the matter.
3. **In the matter of violations of the Public Water Supply Laws by Olson's Lolo Hot Springs, Inc. at Lolo Hot Springs, PWSID #MT0000805, Missoula County, BER 2011-09 PWS.** The Board received the request for hearing on June 28, 2011. A *First Prehearing Order* was issued on July 11, 2011. The Board may assign a permanent hearing examiner or decide to hear the matter.

IV. GENERAL PUBLIC COMMENT

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

V. ADJOURNMENT

**MINUTES
MAY 13, 2011**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:03 a.m., on Friday, May 13, 2011, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Larry Mires, Joe Whalen, Robin Shropshire, Larry Anderson

Board Members Present via Telephone: Heidi Kaiser

Board Members Absent: Marvin Miller

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: Richard Oppen (Director); Tom Livers (Deputy Director); John North, Claudia Massman, Jim Madden, David Rusoff – Legal; Judy Hanson – Permitting & Compliance Division; Jenny Chambers, Freddi Haab – Water Protection Bureau; Jon Dilliard – Public Water Supply & Subdivisions Bureau; David Klemp, Vickie Walsh, Debra Wolfe – Air Resources Management Bureau; Bob Bukantis, Art Compton, Mark Bostrom – Water Quality Planning Bureau; Ed Coleman – Industrial and Energy Minerals Bureau; John Arrigo – Enforcement Division; Todd Teegarden, Technical & Financial Assistance Bureau;

Interested Persons Present: Gerald Douthit and Mac Mader, Montana Gold and Sapphire; Gail Abercrombie, Gaila Consulting; Jason Gildra, Environmental Protection Agency; Jon Metropoulis, Fidelity Exploration; Anne Hedges, Montana Environmental Information Center; Brenda Lindlief-Hall, Tongue River Water Users Association

Interested Persons Present via Telephone: Mark Fix, Roger Muggli, and Charlie, Tongue River Water Users Association;

I.A.1 | Review and approve March 25, 2011, meeting minutes.

Chairman Russell called for a motion to approve the March 25, 2011, meeting minutes. Mr. Whalen so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.

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

II.A.1.b | In the matter of Notice of Violations of the Montana Water Quality Act by North Star Aviation, Inc., at Ravalli County Airport, Ravalli County, BER 2009-10 WQ. *(No discussion took place regarding this item.)*

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, Park County, BER 2009-20/22 SUB.

Ms. Orr said a motion for summary judgment, a response to the motion for summary judgment, a motion to strike the defense, and a motion to enter judgment in favor of the department had all been filed and are pending.

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. *(No discussion took place regarding this item.)*

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. *(No discussion took place regarding this item.)*

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. *(No discussion took place regarding this item.)*

II.A.1.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. *(No discussion took place regarding this item.)*

II.A.1.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. *(No discussion took place regarding this item.)*

- II.A.1.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, BER 2010-17 SM. *(No discussion took place regarding this item.)*
- II.A.1.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.
- Ms. Orr noted that there had been a request to change the hearing date and the schedule leading up to it, and that the new hearing date will be August 29 in Kalispell.
- II.A.1.k In the matter of violations of the Montana Public Water Supply Laws by Bellecreeke, LLC, at Bellecreeke Dental, PWSID #MT0004553, Butte, Silver Bow County, BER 2010-20 PWS. *(No discussion took place regarding this item.)*
- II.A.1.l In the matter of violations of the Opencut Mining Act by Deer Lodge Asphalt, Inc., at the Olsen Pit, Powell County, BER 2011-02 OC. *(No discussion took place regarding this item.)*
- II.A.2.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. *(No discussion took place regarding this item.)*
- II.A.2.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. *(No discussion took place regarding this item.)*
- II.B.1 Legislative Briefing
- Mr. Livers noted that DEQ took some budget reductions, as did all departments.
- Mr. North provided a handout outlining legislation that 1) will require rulemaking action by the Board; 2) are major amendments to statutes that the Board hears contested cases on and adopts rules on, but that won't require rulemaking by the Board; and 3) are general bills that pertain to the Administrative Procedures Act.
- Mr. North responded to a few questions from the Board.
- III.A.1 In the matter of Updated Rationale for EC & SAR Standards.
- Mr. Livers provided a brief background of the initiation of the triennial review.
- Mr. Compton talked about the history of the EC/SAR Standards and showed a PowerPoint while providing the Board with information regarding the results of the Triennial Review. He said DEQ recommends that the board move to not initiate rulemaking at this time. He said the department intends to submit the updated

rationale to EPA Region 8 and ask them to reapprove the standards adopted in 2003 and the non-deg approach adopted in 2006.

Chairman Russell asked if any member of the public wanted to speak.

Mr. Fix said it was not worth going through the whole rulemaking process again; that they should go with the current standards.

Mr. Muggli indicated that crops have decreased yields and they can't get the production back. He said the standards are not protective enough.

Mr. Metropoulis said Fidelity Exploration does not believe any change in the standards is necessary, and it supports the department's recommendation.

Ms. Lindlief-Hall said the Tongue River Water Users support the department's recommendations, including resubmitting to the EPA. She noted that non-deg has not been applied to date and should be.

Ms Chambers, Mr. Compton, and Mr. Bukantis discussed the non-deg issue and responded to questions from the Board.

Mr. Livers noted that the Board had several options for formal action. He reminded that the DEQ recommends reaffirming the standards, and said the Board can disagree, choose to take no action, or initiate rulemaking.

Chairman Russell stated that based on the information that the Board has received today, that the current standards in rule for EC and SAR are necessary for water quality and soil protection. Mr. Whalen so MOVED. Mr. Mires SECONDED. The motion CARRIED unanimously.

III.B.1 In the matter of the department's request to initiate rulemaking to amend rules implementing the Montana Pollutant Discharge Elimination System Permit Program.

Ms. Chambers said the department requests that the Board concur with its request to initiate rulemaking, and that the rule amendments are to maintain compliance with federal regulations. Ms. Chambers responded to questions from the Board.

Discussion took place regarding whether Ms. Shropshire needed to recuse herself since she works for a power plant outside of Montana, but that could come into Montana at some point in the future. She did not recuse herself.

Chairman Russell called for public comment. There was no response. He called for motion to initiate the rulemaking and to appoint Ms. Orr as the permanent hearings examiner. Mr. Mires so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

- III.B.2 In the matter of the department's request to initiate rulemaking to amend ARM 17.8.801, 17.8.804, 17.8.818, 17.8.820, 17.8.822, 17.8.825, 17.8.901, 17.8.904, and 17.8.1007 to incorporate provisions for major source permitting regarding the emissions of fine particulate matter (PM-2.5).
- Ms. Wolfe provided details of the rulemaking and said the department requests that the Board initiate the rulemaking and appoint a hearings examiner.
- Ms. Shropshire recused herself from this rulemaking.
- Ms. Wolfe discussed the reasoning for initiating rules now that were set by the EPA in 2006, in response to questions from the Board.
- Chairman Russell called for a motion to initiate the rulemaking and appoint Ms. Orr as the hearings examiner. Mr. Whalen so moved. Mr. Mires SECONDED the motion. Chairman Russell called for public comment; there was no response. The motion CARRIED with a unanimous vote.
- III.B.3 In the matter of the department's request to initiate rulemaking to amend ARM 17.30.617 to designate a portion of the Gallatin River as an Outstanding Resource Water (ORW) and to amend ARM 17.30.638 to add a new subsection for clarity.
- Mr. Livers said the department is requesting extension of the rulemaking again. He said although it has been going on for several years, the department still believes it is the right course of action. He also noted that progress continues.
- Chairman Russell called for public comment. There was no response. He called for a motion to extend the rulemaking. Ms. Shropshire so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.C.1 In the matter of final action regarding the amendment of ARM 17.30.201, water discharge permit fee schedule, and ARM 17.30.1341 to add a general permit category for pesticides.
- Ms. Chambers said the department requests that the Board adopt the final rules. She said a public hearing took place in January and noted that over 30 comments were received during the comment period. She also pointed out the need to correct an error on page 2 of the notice.
- Discussion took place and Mr. Madden responded to questions from the Board.
- Chairman Russell called for public comment; no one responded. He called for a motion to adopt the rules as amended, with the changes noted by Ms. Chambers, and accept the Presiding Officer's report, the House Bill 521 and 311 analyses, and the responses to comments. Mr. Whalen so moved. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

- III.D.1 In the matter of violations of the Opencut Mining Act by M.K. Weeden Construction, Inc., at the Stahl Pit, Fergus County, BER 2011-03 OC.
- Ms. Orr provided details of the case and said the penalty had been paid.
- Chairman Russell called for a motion to authorize him to sign the dismissal order. Mr. Anderson so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.E.1 In the matter of violations of the Opencut Mining Act by Concrete Materials of Montana, LLC, at the Mauritzson Site, Yellowstone County, BER 2011-04 OC.
- Ms. Orr provided details of the case.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Shropshire so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.E.2 In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.
- Chairman Russell noted that he was contacted by a representative of the company in this case, but that he referred the person to the Board secretary.
- Ms. Orr explained that this was an appeal of an amended notice of violation.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearing examiner for this case. Mr. Whalen so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.E.3 In the matter of violations of the Montana Septage Disposal and Licensure Laws by James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL.
- Ms. Orr provided details of the case.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearing examiner for this case. Mr. Anderson so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.
- IV. General Public Comment
- Chairman Russell called for public comment. There was no response.
- Mr. Livers reminded everyone that the next meeting is scheduled for July 22, but he was unsure if it would be a teleconference or in-person meeting. He also noted that

the four members who were reappointed were also successfully confirmed by the Senate.

V. Adjournment

Chairman Russell called for a motion to adjourn. Mr. Whalen so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

The meeting adjourned at 12:47 p.m.

Board of Environmental Review May 13, 2011, minutes approved:

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

DATE

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

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June 6, 2011

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

Dear Mr. Russell,

Enclosed is the report "2010 Hydrologic/Water Quality Study of Cow and Pony Creek Drainages, Rosebud County, Montana." According to the agreement between PPL Montana, LLC and Genie Land Company and the Statement of Work under which Battelle-Pacific Northwest Division is currently operating for these companies, we are sending a copy of this report to all signatories of the 12(d) stipulation, their heirs, and other interested parties.

If you have any questions about the report, please call me at the number listed above.

Sincerely,



Chris Thompson
Senior Research Scientist
Environmental Systems

CJT:dt

Enclosure

2010 Hydrologic/Water Quality Study of Cow and Pony Creek Drainages, Rosebud County, Montana

CJ Thompson
KB Olsen
PD Thorne

PJ Chamberlain
SR Jennings
PS Blicher

Battelle
Pacific Northwest Division
Richland, Washington 99352

Prepared for
PPL Montana LLC, Billings, Montana
Genie Land Company, Colstrip, Montana
under Contract No. 2002116413

May 2011

Executive Summary

Battelle-Pacific Northwest Division and Reclamation Research Group, LLC, have monitored and collected water quality data in the drainage basins of Cow Creek and Pony Creek in Rosebud County, Montana, since 1984. This work is performed for the signatories of stipulation 12(d) under contract with PPL Montana LLC, Billings, Montana. This report presents the collection, analysis, and interpretation of the water quality and hydrologic data that were obtained during 2010.

The objective of the 2010 water monitoring study was to determine whether there were changes in water quality and hydrological parameters downgradient of the effluent holding pond east of Colstrip Power Plant Units 3 and 4 on Genie Land Company property since the 1985–1986 baseline study was completed. A further objective was to establish the current characteristics and conditions of water quality and hydrological parameters so that effects of any ongoing or future events associated with the effluent holding pond and related operations could be evaluated. Conductivity values and boron and sulfate concentrations have been monitored since 1985 as indicators of leakage from the effluent holding pond.

Precipitation during 2010 totaled 18.07 in., approximately 17% above the long-term average of 15.5 in. Groundwater levels in most of the monitored wells during 2010 were higher than the 2009 measurements for both June and September measurements, averaging 0.4 ft higher in 2010. Depth to water in wells completed in the alluvium ranged from approximately 5.0 ft to 33.2 ft in 2010. The measuring point elevations for 8 wells were resurveyed this year; the largest change occurred at Genie new well (GNW) 5, where a 33.62 ft lower elevation for the top of casing was observed. Elevation increases between 0.01 and 2.64 ft. were observed at the other resurveyed wells. No major changes in groundwater flow patterns were indicated in Cow Creek or South Fork Cow Creek.

Statistical analyses of conductivity, sulfate, and boron data identified six site-level and three drainage-level trends where water quality had changed from previous years. A statistically significant increasing drainage-level trend was found for boron at South Fork Cow Creek. At Pony Creek, increasing trends were found for both boron and sulfate. No drainage-level trends were discovered at Cow Creek. Statistically significant trends at South Fork Cow Creek were an increase in conductivity at site GNW 7 and a decrease in sulfate at Genie old well (GOW) 11. At Pony Creek, statistically significant increasing trends were found for conductivity at GOW 4 and Genie spring (GSP) 4 and for boron at GSP 6. At the Cow Creek drainage, a statistically significant increasing trend was found for sulfate at GNW 4, although the magnitude of this recent increase is negligible. For Cow Creek and South Fork Cow Creek, these findings do not indicate any definitive impacts on groundwater quality from the operations of the effluent holding pond.

Bromide was formally added as a monitoring constituent in 2010 in response to PPL Montana LLC's recent addition of bromide to the flue gas scrubber solution. Initial bromide results do not reveal any obvious trends when background levels and measurement variability are considered.

A continuous monitoring probe that measured depth to water, temperature, and electrical conductivity was installed in well PW 736 in December 2010. Initial data from the system indicate this probe will be a useful tool for understanding changes in water quantity and quality in shallow alluvial wells.

Using data from the entire observation period (1985–1987 and 1990–2009) and based on the selected sampling sites, Pony Creek drainage was found to be the lowest in conductivity, sulfate, and boron. Cow Creek drainage was distinctly highest in conductivity and sulfate, and the South Fork Cow Creek drainage means fell between the values of the other drainages except for boron, whose mean did not differ from that of Cow Creek.

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

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 adopt fees commensurate with the cost of conducting plan and specification reviews, as required by statute;
2. Amend existing water hauler rules for clarification of existing requirements; and
3. Amend existing public water supply engineering review rules to correct an incorrect reference.

LIST OF AFFECTED RULES - ARM 17.38.101, 106, 501, 502, 511, and 513

AFFECTED PARTIES SUMMARY - Owners of all public water supply and public sewage systems. Examples of these systems include cities, towns, water and sewer districts, subdivisions, mobile home parks, businesses, and schools.

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 legislature requires the department to collect fees commensurate with the cost of reviewing plans and specifications. MCA, 75-6-108(3), 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." Past legislative audits identified that the department was not recovering its costs for conducting engineering review. Based on those findings the BER adopted increased engineering fees. During testimony the department stated that if a fee rate was found to be excessive it would return to the BER with a request to correct that issue. The proposed engineering review change acts upon that pledge.

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 only remove a source of confusion as the reference is currently nonsensical.

HEARING INFORMATION - Katherine Orr conducted a public hearing on May 11, 2011, on the proposed amendments. The Presiding Officer's Report and the draft Notice of Amendment, with public comments and proposed responses, are attached to this executive summary.

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 consistent with the scope of the Notice of Public Hearing on Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the amendments.

DEQ RECOMMENDATION - The Department recommends adoption of the proposed amendments as set forth in the attached Notice of Public Hearing on Proposed Amendment.

ENCLOSURES -

1. Notice of Public Hearing on Proposed Amendment
2. Presiding Officer's Report
3. HB521 and 311 Analysis
4. Public Comments
5. 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
17.38.101, 17.38.106, 17.38.502,)	PROPOSED AMENDMENT
17.38.511, and 17.38.513 pertaining to)	
plans for public water supply or)	(PUBLIC WATER AND SEWAGE
wastewater system, fees, definitions,)	SYSTEM REQUIREMENTS)
water supply, and chemical treatment of)	
water)	

TO: All Concerned Persons

1. On May 11, 2011, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, Department of Environmental Quality, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules. In addition, the department will hold an informal question/answer session at 1:00 p.m., at the same address, to answer questions regarding those proposed amendments.

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., April 25, 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 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 distribution system" and correct an erroneous internal reference in ARM 17.38.101(4)(j). The proposed definition of "rural distribution 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 distribution systems are those that are outside of cities and that have mains with relatively simple construction and long stretches of mains 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. 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 (ppm), not to exceed 4.0 ppm, at the time the water hauling equipment is filled and at the time the water is delivered to the receiving system. The wWater 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 chlorine residual results on department-approved forms. Haulers shall retain the records of chlorine residual results for each load and shall provide the records to the department upon request. By the tenth of the month following a delivery, haulers shall report the following to the department on department-approved forms:

(a) one chlorine residual result for each day water is delivered, taken from the load with the lowest monitored residual result; and

(b) for days that a hauler obtains and delivers water from multiple public water suppliers, one chlorine residual result per supplier per day, taken from the loads with the lowest monitored residual result.

(3) 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., May 12, 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/ James M. Madden

JAMES M. MADDEN

Rule Reviewer

BY: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,

Chairman

Certified to the Secretary of State, April 4, 2011.

**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 systems, fees,
definitions, water supply, and
and chemical treatment of water

Presiding Officer Report

On May 11, 2011, the undersigned presided over and 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 primary purpose of the proposed amendments is to clarify the water hauler rules and reduce the design review fees for systems referenced in the amendments.

1. The Notice of Public Hearing on Proposed Amendment was contained in the 2011 Montana Administrative Register (MAR) Issue No.7, MAR Notice No. 17-318, published on April 14, 2011 on pages 521 through 526. A copy of the Notice of Public Hearing on Proposed Amendment is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

2. The hearing began at 1:30 p.m. The proceeding was tape recorded and the tape is in the possession of the Public Water Supply Section of the Department of Public Health.

3. The undersigned announced that persons at the hearing would be given an opportunity to submit their data, views, or arguments concerning the proposed action, either orally or in writing. At the hearing, the undersigned identified and summarized the MAR notice, read the Notice of Function of

Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a), recited the authority to make the proposed rule, announced the opportunity to present matters at the hearing or in writing, as stated in the MAR notice, and explained the order of presentation.

SUMMARY OF HEARING

4. Mr. Eugene Pizzini of the Public Water Supply and Subdivisions Bureau of the Department of Environmental Quality (DEQ) gave a brief oral statement and provided a written statement recommending that the amended rules and proposed new rules be adopted as proposed in the MAR notice with a modification to the definition of “water hauler.”

5. No one other than Department personnel appeared at the hearing to present oral testimony.

SUMMARY OF WRITTEN MATERIALS

6. Two written comments were submitted after the hearing. Ms. Kathy Moore asked for clarification concerning water haulers. Mr. James Melstad suggested a clarification on service connections. These comments are addressed in the Notice of Amendment.

7. The Department submitted a memorandum from Department staff attorney, Carol Schmidt with HB 521 and HB 311 reviews of the proposed amendments and a Private Property Assessment Act Checklist. Ms. Schmidt’s memorandum is attached to this report.

8. HB 521 does not apply to the propose amendments because there are not any comparable federal regulations. 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 State is required to assess the taking or

damaging implications of a proposed rule 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 amendment and new rules 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 May 12, 2011.

PRESIDING OFFICER COMMENTS

11. The Board has the jurisdiction to adopt, modify or reject proposals for the rule amendments herein under Mont. Code Ann. §§ 76-4-103 and 75-6-108.

12. House Bill 521 (1995) generally provides that the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines, unless the Board makes written findings after public hearing and comment. The proposed amendments are not comparable to any federal regulation or guideline. Therefore written findings concerning the stringency of the proposed amendments are not required.

13. House Bill 311 (1995), the Private Property Assessment Act, codified as Mont. Code Ann. § 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. The proposed amendments affect real property. A Private Property Assessment Act Checklist was prepared in this matter. The proposed amendments do not have taking or damaging implications. Therefore, no further HB 311 assessment is necessary.

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

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

16. 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 October 14, 2010.

Dated this _____ day of July, 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

MEMORANDUM

To: Board of Environmental Review

From: Carol Schmidt
DEQ Staff Attorney

Re: HB 521 Analysis and Takings Checklist

MAR Notice No. 17-318

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.

Date: May 10, 2011

HB 521 Analysis

Pursuant to § 75-6-116, MCA ("HB 521"), the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstances.

The proposed amendment to ARM 17.38.101 provides a definition for "rural distribution system" and corrects an erroneous internal reference in ARM 17.38.101(4)(j). 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 rural distribution systems because these types of systems are fairly simple to review. No HB 521 findings are necessary for these amendments because there are no comparable federal rules establishing a "rural distribution system" or a comparable fee structure for a design review of these systems. Special findings are also not needed because the amendments implement § 75-6-108(3), MCA, which requires the Board to adopt fees that are commensurate with the Department costs of review. The specific rulemaking directive in Mont. Code Ann. § 75-6-108(3), which does not require a federal stringency analysis, supplants the general requirement for stringency analysis in § 75-6-116, MCA.

The proposed amendments to 17.38.502, 17.38.511 and 17.38.513 address the rules regulating water haulers. No HB 521 findings are necessary for these amendments because there are no comparable federal rules regulating water haulers.

Private Property Assessment Act

Section 2-10-101, MCA, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. "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 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. A completed Attorney General checklist for the proposed rules is attached. Based on the guidelines provided by the Attorney General, the proposed rule amendments do not constitute an "action with taking or damaging implications" in violation of the United States or Montana Constitutions.

Attachment: Attorney General HB 311 Checklist

Board of Environmental Review
MAR Notice No. 17-318

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.

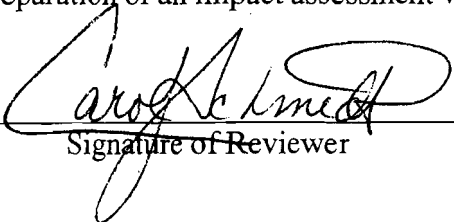
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

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

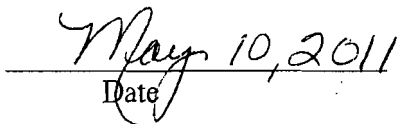
YES NO

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 deny a fundamental attribute of ownership? (ex.: right to exclude others, disposal of property)
	X	4. Does the action deprive the owner of all economically viable uses of the property?
	X	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If no, go to (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, character of 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?
	X	7a. Is the impact of government action direct, peculiar, and significant?
	X	7b. Has government action resulted in the property becoming practically inaccessible, waterlogged or flooded?
	X	7c. Has government action lowered 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	Takings 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, 7c; or if NO is checked in response to questions 5a or 5b; the shaded areas)

If taking or damaging implications exist, the agency must comply with §5 of the Private Property Assessment Act, to include the preparation of a taking or damaging impact assessment. Normally, preparation of an impact assessment will require consultation with agency legal staff.



Signature of Reviewer



Date

Johnson, Elois

From: Kathy Moore [helenaklm@yahoo.com]
Sent: Wednesday, May 11, 2011 4:59 PM
To: Johnson, Elois
Subject: Comment on Proposed Amendment ARM 17.38.502(2)

Question regarding proposed ARM 17.38.502(2). Does the department intend that only haulers that haul to cisterns or other reservoirs are water haulers for purposes of this rule?

Thank you,
Kathy Moore

Johnson, Elois

From: James D Melstad [JimAMEngineers@bresnan.net]
Sent: Wednesday, April 27, 2011 1:01 PM
To: Johnson, Elois
Subject: Comments on proposed changes to ARM 17.38.101,106, 502, 511 and 513

I support the proposed rule revisions referenced above with one exception/comment:

I believe that 17.38.101(3)(f)(i) should read "have fewer than four service connections per mile on average;"

I believe that the proposed language is too restrictive and may limit the ability of the department to implement the intent of the rule change. "Rural" water systems are gaining in popularity for good reasons. The proposed requirement for "fewer than one service connection per mile" could unintentionally discourage the creation of rural water extensions to areas that contain existing small farms or Ranchettes. The DEQ plan review time for extensions serving fewer than four service connections per mile should be no greater than those serving fewer than one connection per mile.

Otherwise, I believe that the proposed rule changes should be adopted as written. Thank you for the opportunity to comment.

Jim Melstad, P.E.
Anderson-Montgomery Consulting Engineers
1064 N. Warren St.
Helena, MT 59601
(406) 449-3303
jimamengineers@bresnan.net

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
17.38.101, 17.38.106, 17.38.502,)	
17.38.511, and 17.38.513 pertaining to)	(PUBLIC WATER AND SEWAGE
plans for public water supply or)	SYSTEM REQUIREMENTS)
wastewater system, fees, definitions,)	
water supply, and chemical treatment of)	
water)	

TO: All Concerned Persons

1. On April 14, 2011, the Board of Environmental Review published MAR Notice No. 17-318 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 521, 2011 Montana Administrative Register, issue number 7.

2. The board has amended ARM 17.38.106 and 17.38.511 exactly as proposed and has amended ARM 17.38.101, 17.38.502, and 17.38.513 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

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

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

(a) through (e)(ii) remain as proposed.

(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~~ four service connections per mile on average;

(ii) through (18) remain as proposed.

17.38.502 DEFINITIONS (1) remains as proposed.

(2) "Water hauler" is a person water supplier that is a public water supply system, as defined in 75-6-102, MCA, and that is engaged in the business of transporting water, through a non-piped conveyance, from a water source to a cistern or other reservoir 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 any 60 or more days in a calendar year facility.~~

17.38.513 CHEMICAL TREATMENT OF WATER (1) remains as proposed.

(2) Water haulers shall monitor each load of water, and shall record chlorine residual results on department-approved forms. Haulers shall retain the records of chlorine residual results for each load and shall provide the records to the department upon request. Chlorine residual records must be retained for ten years.

as required by 40 CFR, Part 141.33, which is incorporated by reference in ARM 17.38.234. By the tenth of the month following a delivery, haulers shall report the following to the department on department-approved forms:

(a) through (3) remain as proposed.

3. The following comments were received and appear with the board's responses:

COMMENT NO. 1: The proposed definition of "rural distribution system" in ARM 17.38.101(3)(f)(i) is too limiting. It should allow the "rural" designation for systems that have fewer than four service connections per mile on average. Rural water systems are gaining in popularity for good reasons. The proposed requirement for fewer than one service connection per mile could discourage the creation of rural water extensions to areas that contain existing small farms or ranchettes. Department costs for review should not be greater for extensions with fewer than four service connections per mile than for extensions with fewer than one connection per mile.

RESPONSE: ARM 17.38.101(3)(f)(i) has been amended as shown above in response to the comment.

COMMENT NO. 2: The proposed amendments to the definition of "water hauler" in ARM 17.38.502 indicate that only water haulers that haul to public water systems are "water haulers" for purposes of these rules.

RESPONSE: The proposed amendments to ARM 17.38.502 were intended to conform the definition of "water hauler" to the current statutory definition of "public water supply system" in 75-6-102, MCA. As the commentor notes, the proposed amendments narrowed the rule definition to include only water haulers whose customers are themselves public systems. This was an inadvertent result, and is contrary to the statute. The statute includes any water hauler with a sufficient number of customers to meet the statutory criteria for a public water supply system, regardless of whether the customers themselves are public systems. The proposed definition has been amended to ensure that it is consistent with the statute.

COMMENT NO. 3: Does the department intend that the definition of "water hauler" in ARM 17.38.502(2) apply only to haulers that haul to cisterns or other reservoirs?

RESPONSE: Water haulers that haul to other facilities would meet the public water supply definition in 75-6-102, MCA, if they haul to 15 or more service connections or regularly serve water to at least 25 persons for any 60 or more days in a calendar year. The restriction in the existing rule definition to water hauled to cisterns and reservoirs is contrary to the statute and has been eliminated.

COMMENT NO. 4: The proposed amendments to ARM 17.38.513(2) do not indicate how long a water hauler must maintain its chlorine residual reporting records.

RESPONSE: Record retention requirements are described in ARM 17.38.234, which adopts the federal rules in 40 CFR, Part 141.33. The federal rules

require a ten-year retention period for chemical analyses. ARM 17.38.513(2) has been modified to include a reference to the ten-year retention requirement.

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 RULE ADOPTION**

AGENDA ITEM # IIIA.II

AGENDA ITEM SUMMARY - On April 14, 2011, the Board published MAR Notice No. 17-319 regarding proposed amendments to ARM 17.36.922 and ARM 17.36.924 pertaining to local variances and variance appeals to the Department. The Department requests that the Board adopt the amendments as proposed, with responses to public comment as set out in the attached draft Notice of Adoption.

LIST OF AFFECTED RULES - ARM 17.36.922 and 17.36.924

AFFECTED PARTIES SUMMARY - Local health departments and 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 Board is considering final action on the adoption of amendments to the above-referenced rules as proposed in the Montana Administrative Register MAR Notice No. 17-319.

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. However, under applicable statutes, local variance criteria must be "identical" to the state Board's 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 amendments to the Board rules will add hardship criteria to the Board's existing variance criteria. Based on recommendations from local health departments, the amendments will 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 amendments also will clarify the procedures used by the Department when it reviews local board variance decisions.

HEARING INFORMATION - A public hearing was held on May 11, 2011. The Presiding Officer's Report and the draft Notice of Amendment, with public comments and proposed responses, are attached to this executive summary.

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 amendments as proposed in the Notice of Proposed Amendment, with responses to public comments as set forth in the attached draft Notice of Adoption.

ENCLOSURES -

1. Notice of Public Hearing on Proposed Amendment
2. Presiding Officer's Report
3. HB 521 and 311 Analysis
4. Public Comments
5. 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
17.36.922 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 May 11, 2011, at 2:00 p.m., or upon the conclusion of the public hearing for MAR Notice No. 17-318, the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, Department of Environmental Quality, 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., April 25, 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 ARM 17.36.922(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 ARM 17.36.922(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., May 12, 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/ James M. Madden

JAMES M. MADDEN
Rule Reviewer

BY: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, April 4, 2011.

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

In the matter of the amendment
of ARM 17.36.922 and 17.36.924
pertaining to local variances and variance
appeals to the Department

Presiding Officer Report

On May 11, 2011, the undersigned presided over and 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 to ARM 17.36.922 and 17.36.924. The amendments pertain to amendment of rules setting out minimum requirements for control and disposal of sewage. These proposed amendments are necessary to conform the Board rules to applicable statutory requirements and to clarify the Department variance review procedures.

The Notice of Public Hearing on Proposed Amendment was contained in the 2010 Montana Administrative Register (MAR) No. 7, MAR Notice No. 17-319, published on April 14, 2011. A copy of the Notice of Public Hearing on Proposed Amendment is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

2. The hearing began at 2 p.m. The hearing was recorded by Eugene Pizzini of the Public Water Supply Section of the Department of Environmental Quality (Department)

3. The undersigned announced that persons at the hearing would be given an opportunity to submit their data, views, or arguments concerning the proposed action, either orally or in writing. At the hearing, the undersigned 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). The undersigned announced the opportunity to present matters at the hearing or in writing, as stated in the MAR notice, and explained the order of presentation.

SUMMARY OF HEARING

4. Mr. Jim Madden, Counsel for the Department, gave a brief oral statement explaining the amendments and the rationale for the amendments.

5. At the hearing the following people provided comments: Mr. Tim Roark of the Gallatin City-County Health Department spoke at the hearing and submitted written comments prepared by himself and Ms. Gretchen Rupp Chair, Gallatin City County Board of Health. They endorsed the amendments. Mr. Ken Wallace of the Lewis and Clark City-County Board of Health testified and submitted written comments which consisted of requests for answers to two questions involving the concepts of “undue hardship” and “reasonably feasible.” These comments are appropriately addressed in the Notice of Amendment.

SUMMARY OF WRITTEN MATERIALS

6. After the hearing, written comments were received by the Missoula City-County Health Department Environmental Health Department, specifically from Mr. Jim Carlson, Environmental Health Director, Ms. Martha McClain, Chief Deputy County Attorney and Ms. Shannon Therriault, Environmental Health Supervisor. See attached. These comments are appropriately addressed in the Notice of Amendment.

7. The Department also submitted a memorandum from Department Counsel, Mr. Jim Madden, with HB 521 and HB 311 reviews of the proposed amendments and a Private Property Assessment Act Checklist. Mr. Madden’s memorandum is attached to this report.

8. HB 521 does not apply to the propose amendment and new rules because they are not more stringent than any comparable federal regulations. 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 State is required to assess the taking or damaging implications of a proposed rule 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 amendment and new rules 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 May 12, 2011.

PRESIDING OFFICER COMMENTS

11. The Board and the Department have the authority to adopt, modify or reject proposals for rule amendments under Mont. Code Ann. § 75-2-201 and 75-5-305.

12. House Bill 521 (1995) generally provides that the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines, unless the Board makes written findings after public hearing and comment. There are no comparable federal regulations and no special findings are required under HB 521.

13. House Bill 311 (1995), the Private Property Assessment Act, codified as Mont. Code Ann. § 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. The proposed amendments affect real property. A Private Property Assessment Act Checklist was prepared in this matter. The proposed amendments do not have taking or damaging implications. Therefore, no further HB 311 assessment is necessary.

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

15. The Board may adopt the proposed rule amendment and new rules, or reject them, or adopt the rule amendment and new rule with revisions not exceeding the scope of the public notice.

16. 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 October 14, 2011.

Dated this _____ day of July, 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

MEMORANDUM

To: Board of Environmental Review

From: Jim Madden
DEQ Legal Counsel *JM*

Re: **In the matter of the amendment of ARM 17.36.922 and 17.36.924 pertaining to local variances and variance appeals to the department. MAR Notice No. 17-319.**

HB 521 Analysis and Takings Checklist

Date: May 11, 2011

Background

In this rulemaking, the Board is proposing to amend its rules setting out 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 requirements. The Board rules include criteria for review, by the Department, of local board variance decisions, and include procedures for Department variance review proceedings. The proposed amendments are necessary to conform the Board rules to applicable statutory requirements and to clarify the Department variance review procedures.

HB 521 Analysis

The Board's authority to adopt the proposed amendments to the permit fee rule is found at §§ 75-5-201 and 305, MCA. Pursuant to § 75-5-203, MCA, the Board may not adopt a rule to implement Title 75, Chapter 5, that is more stringent than comparable federal regulations or guidelines that address the same circumstances, unless the Board makes certain written findings establishing the need for the rule. Section 75-5-309, MCA, requires similar written findings before the Board may adopt rules to implement Title 75, Chapter 5, MCA, that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria.

There are no comparable federal regulations, guidelines, or criteria that apply to local health boards in their regulation of sewage disposal. Consequently, no special findings are required under HB 521 for the Board to adopt the proposed amendments.

Private Property Assessment Act

Section 2-10-101, MCA, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. "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 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. A completed Attorney General checklist for the proposed rules is attached. Based on the guidelines provided by the Attorney General, the proposed rule amendments do not constitute an "action with taking or damaging implications" in violation of the United States or Montana Constitutions.

Board of Environmental Review
MAR Notice No. 17-319

In the matter of the amendment of ARM 17.36.922 and 17.36.924 pertaining to local variances and variance appeals to the department.

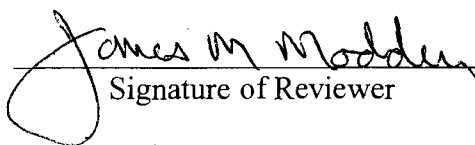
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

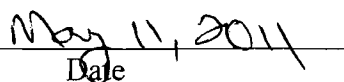
**DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS OR DAMAGINGS IMPLICATIONS
UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?**

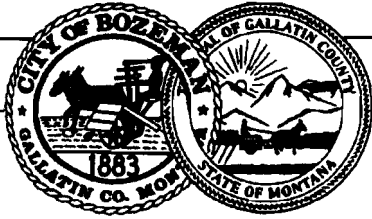
YES NO

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 deny a fundamental attribute of ownership? (ex.: right to exclude others, disposal of property)
	X	4. Does the action deprive the owner of all economically viable uses of the property?
	X	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If no, go to (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, character of 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?
	X	7a. Is the impact of government action direct, peculiar, and significant?
	X	7b. Has government action resulted in the property becoming practically inaccessible, waterlogged or flooded?
	X	7c. Has government action lowered 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	Takings 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, 7c; or if NO is checked in response to questions 5a or 5b; the shaded areas)

If taking or damaging implications exist, the agency must comply with §5 of the Private Property Assessment Act, to include the preparation of a taking or damaging impact assessment. Normally, preparation of an impact assessment will require consultation with agency legal staff.


Signature of Reviewer


Date



www.gallatin.mt.gov/health

Gallatin City-County Health Department

Human Services
215 W. Mendenhall, Rm 117
Bozeman, MT 59715-3478
(406) 582-3100 • Fax (406) 582-3112

Environmental Health Services
215 W. Mendenhall, Rm 108
Bozeman, MT 59715-3478
406-582-3120 • Fax: 406-582-3128

April 28, 2011

Board of Environmental Review
Attn: Elois Johnson
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

FILED this 29th day of
April AD 2011
at _____ Clerk _____
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
BY *Misty*

Re: Proposed Amendments to 17.36.922 and 17.36.924 ARM

To Members of the Board of Environmental Review,

The Gallatin City-County Board of Health (GCCBOH) fully endorses the proposed amendments to ARM 17.36.922 and 17.36.924. If adopted, the rules will allow local boards of health the ability and flexibility to address the unique circumstances encountered when deliberating on local septic variance requests.

As the local health authority in one of the fastest growing counties in Montana, the GCCBOH must have the ability to weigh the myriad of factors involved in the placement, design and construction of wastewater treatment systems. Regulatory conflicts often emerge when replacing septic systems in long established homesteads since the original systems were often built without regulatory oversight. Conversely, siting septic systems on undeveloped lots often present challenges that are not clearly addressed in existing regulations. Without these proposed amendments, the GCCBOH does not have the necessary regulatory tools to address these disparate circumstances.

Since the legal interpretation that set this proposed rule-making in motion, the GCCBOH has regularly communicated with Montana Department of Environmental Quality personnel on this issue and, in fact, suggested much of the language included in proposed amendments. The GCCBOH encourages the Montana Board of Environmental Review to adopt these necessary regulatory amendments to 17.36.922 and 17.36.924 ARM.

Sincerely,

Gretchen Rupp

Gretchen Rupp
Chair, Gallatin City-County Board of Health

Testimony of Tim Roak:

For the record, my name is Tim Roark, I am the Departmental Health Director for the Gallatin County City Health Department. I believe, I'd like to start that the board should have received a letter signed by the chairman of the Gallatin City County board of Health, dated April 28, 2011 regarding this proposed amendments to ARM 17.36.922 and 924 I will paraphrase that letter since it's already been sent and I presume it's entered into the record already. If I may I'll just read that into the record. To Members of the Board of Environmental Review. The Gallatin City –County Board of Health fully endorses the proposed amendments to Arm 17.36.922 and 17.36.924. If adopted, the rules will allow boards of health the ability and flexibility to address the unique circumstances encountered when deliberating on local septic variance requests.

As th local health authority in one of the fastest growing counties in Montana, the Gallatin City – County Board of Health must have the ability to weigh the myriad of factors involved in the placement, design and construction of wastewater treatment systems. Regulatory conflicts often emerge when replacing septic systems in long established homesteads since the original systems were often built without regulatory oversight. Conversely, siting septic systems on undeveloped lots often present challenges that are not clearly addressed in existing regulations. Without these proposed amendments, the Gallatin City –County Board of Health does not have the necessary regulatory tools to address these disparate circumstances.

Since the legal interpretation that set this proposed rule-making in motion, the Gallatin City – County Board of Health has regularly communicated with Montana Department of Environmental Quality personnel on this issue and, in fact, suggested much of the language included in proposed amendments. The Gallatin City –County Board of Health encourages the Montana Board of Environmental Review to adopt these necessary regulatory amendments to Arm 17.36.922 and 17.36.924.

Sincerely, Gretchen Rupp, Chair, Gallatin City –County Board of Health

On a personal note, I just want to emphasize the importance of these amendments. Since two years ago when the understanding came out the board has heard several requests and quite frankly Mr. Madden put it very aptly as saying without these amendments those minimum on-site standards were floors and consequently they took away a lot of the ability for the board to address the individual circumstances needed to successfully address and safely dispose of sewage so we strongly endorse these proposed amendments.

Testimony of Ken Wallace:

My name is Ken Wallace I live at 1889 Dry Gulch Drive in Helena and the chair of the Lewis and Clark City Board of Health and we are submitting a copy. We support these proposed changes as well. We would like to thank the DEQ for the opportunity to comment today on the proposed amendments to Arm 17.36.922 and 17.36.924. The health department and board of health administer the on-site waste water program in Lewis and Clark County and the Board of Health considers and makes findings and recommendations and approves or disapproves the variance requests. These proposed changes reflect the real challenges faced by some homeowners which is that extraordinary conditions can arise and reasonably feasible actions may not be available that would not result in hardship to the applicant. We must at times issue decisions for request that would appear to meet all the new proposed criteria and the proposed rules should help to define and constrain the circumstances for which variances may be issued. We would like the department to address the following questions at some point following this hearing or after the calm period is completed as well, and that is how should local health boards define undue hardship. A member of our health department staff has communicated I believe with someone at DEQ as well. (pause in tape) The guidance won't be forthcoming that you are, (pause in tape) some flexibility for what the boards to make their own interpretations never the less if there is we would appreciate that. In particular, concerning undue hardship are we to understand that this term relates primarily to an applicant's ability to pay for a system that would not require a variance and therefore undue hardship would vary according to not only the costs associated with the conforming system but the specific applicants economic standing.

Reasonably for feasible is another term used in 922 (pause in tape) but we're not sure if it's defined in here and we wonder as well if there will be guidance forthcoming. (pause in tape) we appreciate that the department is providing, is allowing flexibility for local jurisdictions to interpret theses rules and changes described in 17.36.924 variance appeals to the department of recognizes this flexibility by acknowledging that local boards will have some judgments to make interpreting defining various criteria. We think that judgment is important at the local level and we hope that the board of environmental review will follow similar decision making processes if there are appeals (pause in tape). We would like to thank you very much for the opportunity of (pause in tape) I will ask one further question that is not in our written comments but struck me while I was looking though the proposals again today and I believe Jim Madden at the beginning mentioned that there local entities cannot have any other variance criteria than the State (pause in tape) in 17.36.924 concerning variance appeals to the department paragraph six, notes midway through, "the department may substitute it's judgment for that of the local board as to the interpretation and application of the variance criteria, however the department shall be bound by the local boards interpretation of the other local board rules I effect at the time of the local boards decision". And, I assume that means other local, other rules, not variance criteria, but other rules that may be more stringent that the department would have to be bound by those, I wonder if that doesn't set up a defacto variance condition if you have other local rules that are more stringent but (pause in tape) So thanks again for the opportunity to comment again. (Someone asked where he was reading from) It may be just a clarification for me but, if I could read midway through that paragraph it says that, the department may substitute it's judgment concerning that variance requests, "the department may substitute it's judgment for that of the local board as to the interpretation and application of the variance criteria, however the department shall be bound by the local boards interpretation of the other local board rules I effect at the time of the local boards decision". So probably, this is just a clarification, on one hand the rules are saying that local entities may not have more stringent variance criteria or other variance criteria for that matter, but this paragraph does seem to acknowledge that there could be other rules in local regulations that would create different conditions that have to be considered in a variance, I'm not sure if that's a conflict or not, so thank you.

There were no other comments and the hearing was closed.



MEMORANDUM

TO: Chairman Russell and the Board of Environmental Review
FROM: Jim Carlson, Environmental Health Director
Martha McClain, Chief Civil Deputy County Attorney
Shannon Therriault, Environmental Health Supervisor
DATE: May 12, 2011
RE: Proposed Amendment of 17.36.922 and 17.36.924

Thank you for the opportunity to comment on proposed changes to ARM 17.36.922 and ARM 17.36.924, regulating the Department of Environmental Quality's (DEQ) review of local variance denials. We want to commend DEQ for involving local health departments early in the process. We recognize and appreciate that several of our informal comments have been incorporated into the final rule proposal.

First, we support the proposed additions to the minimum requirements in ARM 17.36.922, which more closely reflect what counties apply when evaluating variances.

However, the proposed criteria that the variance has to be "necessary to address extraordinary conditions that the applicant could not reasonably have prevented," is too general. We request the Board also include the following criteria:

- Special circumstances must exist that are unique to the applicant's property or situation.
- The need for a variance cannot be the result of an illegal action on the part of the applicant or caused by the applicants action or inaction.

Our concern is that the general criteria will not go far enough in insuring that variances not become a tool of scofflaws or people with lots of money who want to develop lands that are not developable under normal and general regulatory requirements. Floodplain and very high groundwater areas are good examples of non-developable lands.

The Northwest Sanitarian's Association made this same comment in their letter of March 12th, 2010.

Secondly, we disagree with the deletion of 17.36.922(3). The rules as proposed by the Board do not meet the requisites for validity articulated in §2-4-305(5) MCA. They do not recognize the authority of local boards of health under §50-2-116(2) to adopt rules that are more stringent than state minimum standards, including variances. The Board may not, through the adoption of an administrative rule, restrict the statutory authority of a local health board to adopt and administer local rules. The proposed rules go beyond what is authorized in §75-5-305(3) MCA.

Section 50-2-116 MCA enumerates the powers and duties of local boards of health. The duties that local boards of health shall carry out are listed first at §50-2-116(1) MCA. Subsection (k) states that local boards of health are required to adopt necessary regulations that are not less stringent than state standards for the control and disposal of sewage. At §50-2-116(2), one finds a list of actions that may be taken by a local board of health. Subsection (2)(c)(iii) MCA allows local boards to adopt regulations that do not conflict with rules adopted by the department for sanitation in public and private buildings and facilities that affects public health and for the maintenance of sewage treatment systems that do not discharge effluent directly into state water and that are not required to have an operating permit as required by rules adopted under 75-5-401.

The rules proposed by the Board do not acknowledge the clear intent of the Legislature to empower local boards of health to adopt and administer rules that go beyond state minimum standards, including variance requirements. The Board has previously recognized and correctly recognized this explicit authority in ARM17.36.922(3).

Further, the proposed rules exceed the Board's authority as expressed in §75-5-305 MCA. Section 75-5-305 MCA does not authorize the Board to impose variance standards on local boards of health. Section 75-5-305(2) requires the board to establish minimum standards for the control and disposal of sewage from public and private buildings, including standards and procedures for variances from the requirements. Section 75-5-305(3) provides a right of appeal to applicants who have sought a variance from minimum requirements adopted by a local board. Section 75-5-305(4) MCA requires the department to base its decision on the Board's standards for a variance. The rules proposed by the Board seek to create rules for local boards of health instead of adopting rules applicable to the Board.

As proposed, ARM 17.36.924(6) allows the department to substitute its judgment for that of the local board as to the interpretation and application of the variance criteria in ARM.36.922(2). The rationale states that this requirement is based on statutory provisions and past precedent but does not identify what they are. As proposed, the rules permit a de novo application for a variance. The rules should be limited to an appeal, requiring the applicant to identify and justify the basis for an appeal. Section 75-5-305 MCA does not authorize the department to substitute its judgment for that of the local health board.

The proposed rules should be revised to address the authority of local boards in §50-2-116(c) (2) and the authority of the Board under §75-5-305 to avoid the adoption of invalid administrative rules.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
17. 36.922 and 17.36.924 pertaining to)	
local variances and variance appeals to)	(SUBDIVISIONS/ON-SITE
the department)	SUBSURFACE WASTEWATER
)	TREATMENT)

TO: All Concerned Persons

1. On April 14, 2011, the Board of Environmental Review published MAR Notice No. 17-319 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 528, 2011 Montana Administrative Register, issue number 7.

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

3. The following comments were received and appear with the board's responses:

COMMENT NO. 1: Two county boards of health submitted comments in support of the proposed rules.

RESPONSE: The board acknowledges the comments.

COMMENT NO. 2: One of the new variance criteria in ARM 17.36.922(2) requires the applicant to show that, without a variance, compliance with a requirement would result in undue hardship. Another criterion requires the applicant to show that no alternatives to a variance are reasonably feasible. Does the department or board intend to issue guidance about the meaning of the terms "undue hardship" and "reasonably feasible?"

RESPONSE: At this time, the board does not plan to further define the terms "undue hardship" and "reasonably feasible." These terms are intended to provide flexibility to local boards as they evaluate variance requests on a case-by-case basis.

COMMENT NO. 3: The variance criteria in ARM 17.36.922(2) should include "Special circumstances must exist that are unique to the applicant's property or situation."

RESPONSE: The term "special circumstances" is already addressed in ARM 17.36.922(2)(c), which requires the applicant to show that the variance is necessary to address "extraordinary conditions" that the applicant could not reasonably have prevented. The requirement that the circumstances be "unique to the applicant's property or situation" is too restrictive. The term "unique" implies that only one applicant could obtain a variance under a particular set of circumstances, whereas there could be more than one party in the same hardship situation.

COMMENT NO. 4: The variance criteria in ARM 17.36.922(2) should include "The need for a variance cannot be the result of an illegal action on the part of the applicant or caused by the applicant's action or inaction."

RESPONSE: ARM 17.36.922(2)(c) requires the applicant to show that the variance is necessary to address extraordinary conditions that the applicant could not reasonably have prevented. In most cases, this criterion would disallow a variance that was the result of an illegal action taken by the applicant. In general, applicants can reasonably be expected to avoid taking illegal actions. However, there may be cases where an illegal action would not in itself preclude a variance. For example, an applicant may have installed a residence in a floodplain based on advice - later found to be erroneous - from the county floodplain office. When the applicant applies for a variance to install a septic system, the illegality of the home construction might not preclude the variance if the applicant had reasonably relied on the representation of the county floodplain office. As proposed, ARM 17.36.922(2)(c) will allow counties to consider what the applicant could reasonably have done to avoid the need for a variance.

The requirement that the need for a variance not be caused by the applicant's "action or inaction" is overbroad. Every variance situation could be tied to some action or inaction of the applicant. The criterion in ARM 17.36.922(2)(c) properly focuses on whether the applicant could reasonably have prevented the need for the variance.

COMMENT NO. 5: The board should not delete the current ARM 17.36.922(3), which allows local boards of health to adopt variance criteria in addition to those set out in the state rules. Statutes governing local health boards provide that local sewage regulations must not be "less stringent" than state standards. The clear intent of the Legislature was to allow local boards of health to adopt and administer rules that go beyond state minimum standards, including variance requirements. The statutes do not give the board authority to dictate the rules that local boards must use.

RESPONSE: Other than setting minimum standards for sewage disposal as required by the Montana Water Quality Act, the Montana Board of Environmental Review (BER) generally cannot dictate to local boards how to regulate sewage. However, there is an exception for the variance criteria for the state minimum standards. Section 50-2-116(1)(k), MCA, makes a clear distinction between local sewage standards, which must be "not less stringent than state standards," and local variance criteria, which must be "identical" to state criteria. By statute, local boards may not use minimum standard variance criteria other than those promulgated by the BER. The former provision in ARM 17.36.922(3) was deleted because it was in direct conflict with 50-2-116(1)(k), MCA.

COMMENT NO. 6: As proposed, the amendments to ARM 17.36.924 allow the department to rehear the original variance request, rather than reviewing the local board decision in an appellate review based on the local record. What is the authority for this?

RESPONSE: Pursuant to 75-5-305(4), MCA, the department variance hearing process is a contested case under the Montana Administrative Procedure

Act, Title 2, chapter 4, part 6, MCA (MAPA). MAPA provides for pre-hearing discovery, an evidentiary hearing subject to the formal rules of evidence, testimony under oath, and findings of fact and conclusions of law by the department. These procedures are intended to provide a fact-finding hearing similar to an original proceeding in district court, not an appellate review based solely on the local board records. The department's final decision may be reviewed by a district court in an appellate proceeding. Title 2, chapter 4, part 7, MCA.

COMMENT NO. 7: The proposed new ARM 17.36.924(6) allows the department to substitute its judgment for that of the local board as to the interpretation and application of the variance criteria in ARM 17.36.922. What is the authority for this?

RESPONSE: In reviewing the local board variance decision, the department may adopt the local board's interpretation of the variance criteria. However, if the department were strictly bound by the local board's interpretation of the variance criteria, the department could not reach a conclusion different from that of the local board. The department must have the ability to independently apply the variance criteria in order to implement the statute requiring the department to "grant, conditionally grant, or deny" the requested variance. Section 75-5-305(4), MCA.

COMMENT NO. 8: When the department hears a variance appeal, the proposed new ARM 17.36.924(6) would allow the department to overturn the local board's interpretation of the variance criteria. But the same rule says that the department will be bound by the local board's interpretation of other local rules. Does that create a conflict?

RESPONSE: There should not be any conflict between these provisions. Section 75-5-305, MCA, requires the department to hold a hearing on the applicant's variance request and to apply the state variance criteria. In order to implement that statute, the department must be able to independently interpret the variance criteria and apply them to the circumstances of the applicant's case. On the other hand, the variance appeal statutes do not give the department authority to overturn a county's interpretation of its substantive rules. The department must accept the county's determination as to which local substantive rules apply, and how they apply, to the applicant's project. The department then will apply the variance criteria to determine whether a variance from the substantive rules is appropriate. If the department decision is appealed to district court, the court would have authority to review the local board's interpretation and application of local substantive rules.

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.

William W. Mercer
Holland & Hart LLP
401 North 31st Street
Suite 1500
P. O. Box 639
Billings, Montana 59103-0639

ATTORNEY FOR HOLCIM (US) INC.

FILED this 13th day of
May AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: Misty Crab

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

IN THE MATTER OF:)	CASE NO. BER 2010-13 WQ
THE APPEAL AND REQUEST FOR)	
HEARING BY HOLCIM)	
INCORPORATED REGARDING THE)	HOLCIM (US) INC.'S
DEQ'S NOTICE OF FINAL DECISION)	NOTICE OF DISMISSAL
FOR MPDES PERMIT NO. MT0000485)	

COMES NOW Holcim (US) Inc. by and through its attorney, William W. Mercer, to
move for dismissal with prejudice of this appeal pursuant to Rule 41(a)(1) of the Montana Rules
of Civil Procedure.

Dated this 12th day of May, 2011.



William W. Mercer
Holland & Hart LLP
401 North 31st Street
Suite 1500
P. O. Box 639
Billings, Montana 59103-0639

ATTORNEY FOR HOLCIM (US) INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2011, I caused a true and accurate copy of the foregoing to be mailed to:

Ms. Joyce Wittenberg (**original**)
Secretary, Board of Environmental Review
Department of Environmental Quality
P. O. Box 200901
Helena, MT 59620-0901

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

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

Mr. Greg Gannon
Environmental Manager
Holcim (US) Inc.
4070 Trident Road
Three Forks, MT 59752

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



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

3 _____
4 IN THE MATTER OF:) Case No. BER 2010-13 WQ
5 THE APPEAL AND REQUEST FOR)
6 HEARING BY HOLCIM INCORPORATED)
7 REGARDING DEQ'S NOTICE OF FINAL)
8 DECISION FOR MPDES PERMIT)
9 NO. MT0000485)

10 _____
11 **ORDER GRANTING NOTICE OF DISMISSAL**
12 _____

13 UPON NOTICE OF DISMISSAL filed by Holcim, Inc. and good cause appearing
14 therefore:

15 IT IS HEREBY ORDERED that the above captioned appeal is dismissed.

16 DATED this _____ day of July, 2011.

17 _____
18 JOSEPH W. RUSSELL, MPH
19 Chairman
20 Montana Board of Environmental Review
21
22
23
24

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order Granting Notice of Dismissal was mailed, first class, this ____ day of July, 2011, to:

Ms. Misty Gable, Acting Secretary
Ms. Joyce Wittenberg, Secretary
Board of Environmental Review
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
(original)

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

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

Mr. William W. Mercer
Holland & Hart LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639

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
Tim McKittrick
6 Strain Building, Suite 622
410 Central Avenue
7 P.O. Box 1184
Great Falls, MT 59403
8 Attorney for Appellant

FILED this 16th day of
May AD 2011
at 11:29 A.M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
By: May 16, 2011

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

10 IN THE MATTER OF:)
11 VIOLATIONS OF THE MONTANA PUBLIC) Case No. BER 2010-20 PWS
WATER SUPPLY LAWS BY BELLE CREEKE,)
12 LLC AT BELLE CREEKE DENTAL, PWSID) Stipulation for Dismissal
#MT0004553, BUTTE, SILVER BOW COUNTY,)
13 MONTANA. (FID # 1984))

14 COME NOW the parties and stipulate, pursuant to Rule 41(a), M.R.Civ.P., to the
15 dismissal of this appeal. The parties have reached a resolution of the matters at issue and
16 Appellant hereby withdraws its appeal and request for hearing. The parties request that the
17 Board issue an Order dismissing this matter with prejudice, with each party to bear its own costs.
18

19 STATE OF MONTANA
Department of Environmental Quality

APPELLANT
Belle Creeke, LLC

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

21 By: Tim McKittrick
22 Tim McKittrick
Attorney for Belle Creeke, LLC

23
24 Date May 16, 2011

Date May 5, 2011

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

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, MONTANA. (FID #1984)

AMENDED NOTICE OF VIOLATION
AND
ADMINISTRATIVE ORDER ON
CONSENT
Docket No. PWS-10-32

I. AMENDED NOTICE OF VIOLATION

Pursuant to the authority of Section 75-6-109(1), Montana Code Annotated (MCA), the Department of Environmental Quality (Department) issuing this amended Notice of Violation to BelleCreeke, LLC (Respondent). Based on information received from the Respondent and its analytical laboratory after the issuance of the Department's November 24, 2010 Notice of Violation and Administrative Order (Order), the Department is amending the Findings of Facts and Conclusion of Law as follows. Any language that is being deleted is "interlined" and language that is being added is "underlined."

II. AMENDED 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 PWSL and the administrative rules adopted thereunder.
3. Section 75-6-112(3), MCA, states that a person may not violate any provision of the PWSL or a rule adopted under the PWSL. Respondent is a "person" as defined in Section 75-6-102(11), MCA.
4. Respondent operates the public water supply system that serves Belle Creeke Dental, PWSID #MT0004553, (System) located in Butte, Montana. The System regularly

1 serves water to at least 25 persons daily for any 60 or more days in a calendar year. Respondent
2 is therefore a “supplier of water” within the meaning of ARM 17.38.202 and subject to the
3 requirements of the PWSL and the rules adopted thereunder. See ARM 17.38.202 and 40 Code
4 of Federal Regulations (CFR) 141.2 as incorporated therein.

5 5. The System is not a community system and does not regularly serve water to at
6 least 25 of the same persons over six months per year and is, therefore, a “transient noncommunity
7 water system” within the meaning of ARM 17.38.202 and 40 CFR 141.2 as incorporated therein.

8 6. The System is supplied by ground water.

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

10 7. The supplier of water of a transient noncommunity public water supply system
11 that uses ground water to provide drinking water is required to monitor its water monthly for
12 total coliform bacteria, unless the water system receives written authorization from the
13 Department to sample quarterly. See ARM 17.38.215(1)(b) and 40 CFR 141.21(a)(2) as
14 incorporated therein. The Department has not authorized Respondent to decrease its monitoring
15 frequency for total coliform bacteria from monthly to quarterly.

16 8. According to records maintained by the Department, Respondent did not report
17 any analytical results for total coliform bacteria from its System for the monitoring periods of
18 April and June ~~and August~~ 2010.

19 9. The Department sent Respondent Violation Letters on May 17, 2010; and July 23,
20 2010 ~~and September 20, 2010~~ for the total coliform monitoring violations listed in Paragraph 8.
21 The Violation Letters notified Respondent that it had failed to monitor its System for total
22 coliform bacteria and requested Respondent to resume monitoring for total coliform bacteria.

23

24

10. Respondent violated ARM 17.38.215(1)(b) ~~three times~~ twice by failing to monitor its System for total coliform bacteria and failing to report the analytical results for total coliform bacteria as required by the PWSL for the monitoring periods listed in Paragraph 8.

Public notification

11. Owners of public water supplies are required to give public notice for monitoring violations not later than one year after the public water system learns of the violation. *See* ARM 17.38.239(1) and 40 CFR part.141, Subpart Q as incorporated therein. The notice must remain in place for as long as the violation, variance, exemption, or other situation persists, but in no case less than seven days (even if the violation or situation is resolved). Within 10 days of completing the public notice, the owners or operators of a public water system must certify to the Department that they have complied with the public notification regulations. *See* ARM 17.38.234(6)(a) and 40 CFR 141.31(d) as incorporated therein.

Administrative penalty

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

13. The Department has calculated an administrative penalty in the amount of ~~\$768.00~~ \$512.00 for the violations alleged in Paragraph 10. *See* Section 75-1-1001, MCA, and ARM 17.4.301 through 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by reference herein.

Settlement

13 a. On December 14, 2010, Respondent appealed the Order to the Board of Environmental Review (BER).

13b. The matter is pending before the BER.

13c. The Department and Respondent have reached an agreement, as set forth in the
Administrative Order on Consent below, to resolve the violations alleged in the Department's
Order.

ADMINISTRATIVE ORDER ON CONSENT

14. NOW, THEREFORE, the Department ORDERS and Respondent hereby
AGREES as to the following:

15. Respondent shall continue to monitor its System monthly until notified by the
Department otherwise in writing. Respondent shall send the samples for analysis to a laboratory
certified by the State of Montana. Respondent shall send a copy of the analytical results to the
Department within 10 days of receipt of the results.

16. Copies of the monitoring results required by this Order must be sent to:

Jon Dilliard, Chief
Public Water and Subdivisions Bureau
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

17. Not later than the date listed for each violation, Respondent shall provide public
notice as follows:

Monitoring violations for which public notice must be given	Date by which public notice must be given
April 2010	May 17, 2011
June 2010	July 23, 2011
August 2010	September 20, 2011

Each public notice must meet the requirements of ARM 17.38.239(1). Within 10 days after
Respondent gives public notice, Respondent shall submit a copy of the public notice to the
Department along with a certification that it has fully complied with the public notice
requirements of ARM 17.38.239(1). The copy of the public notice and certification required by

1 this Order must be sent to the address in Paragraph 19 above.

2 18. Respondent is hereby assessed an administrative penalty in the amount of \$768.00
3 for the violations cited in this Order. Based upon prior history as evidenced in the penalty
4 calculation, the Department will exercise its enforcement discretion and suspend all but ~~\$389.00~~
5 \$256.00 of the calculated penalty provided that Respondent fully complies with the requirements
6 of this Order. See ARM 17.38.607.

7 19. No later than 60 days from receipt of this Order, Respondent shall pay to the
8 Department an administrative penalty in the amount of ~~\$389.00~~ \$256.00. The penalty must be
9 paid by check or money order, made payable to the "Montana Department of Environmental
10 Quality," and sent to the address in Paragraph 20.

11 20. The public notice with certification and penalty payment required by this Consent
12 Order shall be sent to:

13 John L. Arrigo, Administrator
14 Enforcement Division
15 Department of Environmental Quality
16 1520 East Sixth Avenue
17 P.O. Box 200901
18 Helena, MT 59620-0901

19 21. Further, Respondent's failure to take the required corrective actions and pay the
20 assessed penalty by the specified deadlines, as ordered herein, constitutes a violation of Title 75,
21 chapter 6, part 1, MCA, and may result in the Department seeking a court order assessing civil
22 penalties of up to \$10,000 per day of violation pursuant to Section 75-6-114, MCA.

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

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

4 **IV. CONSENT TO ADMINISTRATIVE ORDER**

5 24. Respondent shall sign a Stipulation to Dismiss the contested case before the
6 Board of Environmental Review.

7 25. Respondent waives its right to administrative appeal or judicial review of the
8 Findings of Fact, Conclusions of Law, and Administrative Order on Consent set forth herein and
9 agrees that this Consent Order is the final and binding resolution of the issues raised.

10 26. Respondent agrees that the violations established by the Findings of Fact and
11 Conclusions of Law may be considered by the Department as history of violation in calculating
12 penalties for subsequent violations as permitted by Section 82-4-1001, MCA.

13 27. The terms of this Consent Order constitute the entire agreement between the
14 Department and Respondent with respect to the issues addressed herein notwithstanding any
15 other oral or written agreements and understandings made and entered into between the
16 Department and Respondent prior to the date of this Consent Order.

17 28. Except as herein provided, no amendment, alteration, or addition to this Consent
18 Order shall be binding unless reduced to writing and signed by both parties.

19 29. Each of the signatories to this Consent Order represents that he or she is
20 authorized to enter into this Consent Order and to bind the parties represented by him or her to
21 the terms of the Consent Order.

22 30. None of the requirements in this Consent Order are intended to relieve
23 Respondent from its obligation to comply with all applicable state, federal, and local statutes,
24 rules, ordinances, orders, and permit conditions.

1 31. Respondent agrees to waive defenses based upon the statute of limitations for the
2 violations alleged herein and not to challenge the Department's right to seek judicial relief in the
3 event that Respondent fails to fully and satisfactorily comply with the terms of this Consent
4 Order.

5 32. Each party shall bear its own costs incurred in this action, including any attorney
6 fees.

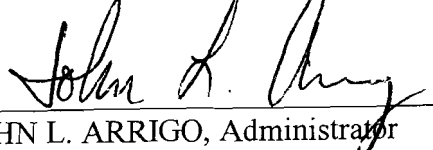
7 33. This Consent Order becomes effective upon signature of the Director of the
8 Department or his designee.

9 IT IS SO ORDERED:

IT IS SO AGREED:

10 STATE OF MONTANA
11 Department of Environmental Quality

BELLECCREEKE, LLC

12 
13 JOHN L. ARRIGO, Administrator
14 Enforcement Division


Signature

15 5/13/11
Date

DR Duane E. Neill
Printed Name

16 _____
Title

17 _____
18 25 APRIL 2011
Date

19 _____

20 _____

21 _____

22 _____

23 _____

24 _____

Department of Environmental Quality - Enforcement Division

Penalty Calculation Summary

Responsible Party Name:	BelleCreeke, LLC (Respondent) at Belle Creeke Dental (System)
FID:	1984 PWSID MT0004553
Statute:	Montana Public Water Supply Laws (PWSL)
Date:	3/4/2011
Signature of Employee Calculating Penalty:	Franklin Gessaman, Chief

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

	Violation #1
Maximum Penalty Authority:	\$500.00
Percent Harm - Gravity and Extent:	0.00
Percent Impact - Gravity:	0.40
Base Penalty:	\$200.00

II. Adjusted Base Penalty

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

Totals
\$200.00
\$40.00
\$0.00
\$0.00
\$240.00

Days of Violation or
Number of Occurrences 2

III. Total Adjusted Penalty \$480.00

IV. Economic Benefit \$32.00

V. History*

TOTAL PENALTY

\$480.00
\$32.00
\$0.00
\$512.00

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

Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet

Responsible Party Name:	BelleCreeke, LLC (Respondent) at Belle Creeke Dental (System)
FID:	1984 PWSID MT0004553
Statute:	Montana Public Water Supply Laws (PWSL)
Date:	3/4/2011
Name of Employee Calculating Penalty:	Franklin Gessaman, Chief, Case Management Bureau
Maximum Penalty Authority:	\$500.00

Violation #1
Description of Violation:
Respondent violated ARM 17.38.215(2) by failing to monitor its public water supply system for total coliform bacteria during April and June 2010.

I. BASE PENALTY

Nature

Explanation:
Respondent's failure to monitor for total coliform bacteria during April, June, and August, as required by ARM 17.38.215, impaired the Department's ability to determine compliance with the requirements of the PWSL; thereby, making the violation administrative in nature.
Potential to Harm Human Health or the Environment
Potential to Impact Administration
X

Gravity and Extent

Gravity Explanation:
ARM 17.38. 303(5)(b)(ii) specifies that a failure to monitor is a violation that has moderate gravity.
Extent Explanation:
Not applicable.

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

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

BASE PENALTY (Maximum Penalty Authority x Gravity Factor):

\$200.00

II. ADJUSTED BASE PENALTY

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

Explanation:

Respondent exhibited moderate culpability by failing to monitor for total coliform bacteria. As a public water supply owner, Respondent knew or should have known the requirements of the PWSL. Additionally, the Department notified Respondent in writing of the failure to monitor for total coliform bacteria and Respondent still failed to comply. Further, Respondent was in control of the circumstances that resulted in the violations and could have monitored for total coliform bacteria at any time during the compliance periods. The Department is adding 20% to the base penalty.

Circumstances Percent: 0.20

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

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

Explanation:

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

Good Faith & Coop. Percent: 0.00

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

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

Explanation:

The Department is not aware of any amounts voluntarily expended by the Respondent to mitigate the violations or their impact. Therefore, the Department is choosing not to subtract any amount from the penalty.

AVE Percent: 0.00

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

ADJUSTED BASE PENALTY SUMMARY

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

III. DAYS OF VIOLATION

Explanation:

Respondent failed to monitor for total coliform bacteria during April and June 2010. Therefore, the Department is seeking penalties for two days of violation.

Number of Days: 2

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$480.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

IV. ECONOMIC BENEFIT

Explanation:

The Department has determined that the violations resulted in the following savings to Respondent in the form of avoided costs:

Failure to monitor for total coliform bacteria:

2 samples @ \$22.00 ea. for analysis	\$44.00
2 samples @ \$3.00 ea. for shipping and handling	<u>\$ 6.00</u>
Total avoided costs:	\$50.00

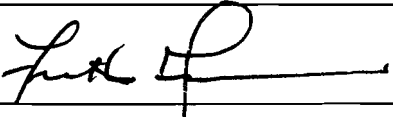
Results from the application of the BEN Model:

The Department uses EPA's BEN Model to calculate the amount of economic benefit that a violator gains as a result of savings from avoided and delayed costs associated with the violations. The BEN Model considers the effect of inflation and taxes on the amounts saved to calculate the time value of money. In this case, the violations resulted in a savings of \$50.00 in avoided costs. Using the BEN computer model, the Department determined that Respondent enjoyed an economic benefit of \$32.00 as a result of the avoided costs associated with the violations.

ECONOMIC BENEFIT REALIZED:

\$32.00

Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary

Responsible Party Name:	BelleCreeke, LLC (Respondent) at Belle Creeke Dental (System)
FID:	1984 PWSID MT0004553
Statute:	Montana Public Water Supply Laws (PWSL)
Date:	3/4/2011
Signature of Employee Calculating Penalty:	 Franklin Gessaman, Chief

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

	Violation #1
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Percent Impact - Gravity:	0.40
Base Penalty:	\$200.00

II. Adjusted Base Penalty

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

Totals
\$200.00
\$40.00
\$0.00
\$0.00
\$240.00

Days of Violation or
Number of Occurrences 2

III. Total Adjusted Penalty \$480.00

\$480.00

IV. Economic Benefit \$32.00

\$32.00

V. History*

\$0.00

TOTAL PENALTY

\$512.00

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

IMPORTANT INFORMATION ABOUT YOUR DRINKING WATER
Monitoring Requirements Not Met for
BELLE CREEKE DENTAL, PWSID MT0004553

Our water system violated several drinking water standards over the past year. Even though these were not emergencies, as our customers, you have a right to know what happened and what we are doing to correct these situations.

We are required to monitor your drinking water for specific contaminants on a regular basis. Results of regular monitoring are an indicator of whether or not our drinking water meets health standards. During 2010, we did not complete all monitoring for total coliform bacteria and, therefore, cannot be sure of the quality of our drinking water during that time.

What should I do?

There is nothing you need to do at this time. The table below lists the contaminants we did not properly test for, how often we are supposed to sample, number of samples that were taken, when samples should have been taken, and the date on which we last sampled.

Contaminant	Required Sampling Frequency	Number of Samples Taken	When Samples Should Have Been Taken	When Sampling Was Resumed
Total Coliform	one per month	0	April and June 2010	July, 2010

Total Coliform: Coliform are bacteria that are naturally present in the environment and are used as an indicator that other potentially harmful bacteria may be present.

What happened? What is being done?

Our system is required to sample monthly for total coliform bacteria. In addition, we are required to take additional samples when the routine monthly sample is unsatisfactory. We failed to meet the requirements as described above. We are issuing this notice to inform our customers of the violations. We are working with the Department of Environmental Quality to return to compliance with the monitoring requirements.

For more information, please contact: Daniel J. O'Neill, 3310 Monroe, Butte, MT 59701; (406) 494-1316

General guidelines on ways to lessen the risk of infection by microbes and general information about federal drinking water regulations and standards are available from the EPA Safe Drinking Water Hotline at (800) 426-4791.

This notice is being sent to you by: BelleCreeke, LLC

Please share this information with all the other people who drink this water, especially those who may not have received this notice directly. You can do this by posting this notice in a public place or distributing copies by hand or mail.

System Name: Belle Creeke Dental

State Water System ID#: MT0004553

Certification

I, Dan O'Neill, certify that I have given public notice as required by ARM 17.38.239 for the violations listed above by:

Signed: Dan O'Neill Title: President Date: 25 Apr 11

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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 2010-20 PWS
12 WATER SUPPLY LAWS BY BELLE CREEKE,)
13 LLC AT BELLE CREEKE DENTAL, PWSID) ORDER OF DISMISSAL
14 #MT0004553, BUTTE COUNTY, MONTANA.)
15 [FID # 1984])

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

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

21 DATED this _____ day of _____, 2011.

22 _____
23 JOSEPH W. RUSSELL, M.P.H., Chairman
24 Montana Board of Environmental Review

CERTIFICATE OF SERVICE

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

Mr. Tim McKittrick
Strain Building, Suite 622
410 Central Avenue
P.O. Box 1184
Great Falls, MT 59403

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

I further certify that I caused a true and accurate copy of the foregoing Order of Dismissal
to be served by hand delivery to:

Ms. Carol E. Schmidt, Legal Counsel
Department of Environmental Quality
1520 E. Sixth Avenue, Metcalf Building
P.O. Box 200901
Helena, MT 59620-0901

Secretary for the Board of Environmental Review

FILED IN 154
June 15, 2011
at 10:00 AM
MONTANA
by Misty Croft

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

Steven T. Wade
Browning, Kaleczyc, Berry & Hoven, P.C.
825 Great Northern Blvd., Suite 105
P.O. Box 1697
Helena, MT 59624-1697
Attorney for the Petitioner

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

IN THE MATTER OF:)	
VIOLETIONS OF THE MONTANA STRIP AND)	CASE NO. BER 2010-19 SM
UNDERGROUND MINE RECLAMATION ACT)	
BY SIGNAL PEAK ENERGY, LLC AT BULL)	
MOUNTAIN MINE #1, ROUNDUP,)	STIPULATION TO DISMISS
MUSSELSHELL COUNTY, MONTANA.)	
[FID #2000, DOCKET NO. SM-10-04])	

Petitioner, Signal Peak Energy, LLC, by counsel, and the Department of Environmental Quality, by counsel, hereby inform the Board of Environmental Review that they have resolved their differences through an Administrative Order on Consent, a copy of which is attached hereto as Exhibit A.

WHEREFORE, the parties stipulate that this contested case should be dismissed with prejudice pursuant to Rule 41(a) of the Montana Rules of Civil Procedure, each party to bear its own costs.

Dated this 15th day of June, 2011.

1 DEPARTMENT OF ENVIRONMENTAL QUALITY

2
3 BY: Jane B. Amdahl
4 Jane B. Amdahl
5 Attorney for the Department

6 SIGNAL PEAK ENERGY, LLC

7
8
9 BY: St. T. Wade
10 Steven T. Wade
11 Attorney for the Petitioner

12 **Certificate of Service**

13 I hereby certify that on the 15th day of June, 2011, I sent a true and
14 correct copy of the foregoing Stipulation to Dismiss by the State of Montana's Interdepartmental
Delivery System to the following:

15 Katherine Orr
16 Hearing Examiner
17 Department of Justice
18 Agency Legal Services

19
20
21
22
23
24 Jane B. Amdahl

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE MONTANA STRIP
AND UNDERGROUND MINE RECLAMATION
ACT BY SIGNAL PEAK ENERGY, LLC AT
BULL MOUNTAIN MINE #1, ROUNDUP,
MUSSELSHELL COUNTY, MONTANA.
(FID Nos. 1951 and 2000)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE ORDER ON
CONSENT

Docket Nos. SM-10-03
and SM-10-04

I. NOTICE OF VIOLATION

This Administrative Order on Consent (Consent Order) is issued to resolve and conclude enforcement actions (FID Nos. 1951 and 2000) initiated by the State of Montana, acting by and through the Department of Environmental Quality (Department), against Signal Peak Energy, LLC (Signal Peak) for alleged violations of the Montana Strip and Underground Mine Reclamation Act (the Act) codified at Title 82, chapter 4, part 2, MCA; the administrative rules implementing the Act set forth in Title 17, chapter 24, Administrative Rules of Montana (ARM); and/or the provisions of Signal Peak's operating permits.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Department is an agency of the executive branch of government, created and existing under authority of Section 2-15-3501, MCA. The Department is charged with the administration and enforcement of the Act and the administrative rules adopted under the Act.

2. Signal Peak operates a surface coal mine, known as the Bull Mountain Mine #1, under Permit No. 93017 (Permit) located near Roundup, Montana. The Permit was issued by the Department under the Act, Section 82-4-201, MCA, *et seq.*

3. Signal Peak is subject to the requirements of the Act, the administrative rules adopted under the Act (Administrative Rule of Montana (ARM), Title 17, chapter 24, subchapter 3, *et seq.*), and provisions of the Permit

1 4. On September 22, 2010, the Department issued to Signal Peak a Notice of
2 Violation and Administrative Penalty Order, Docket No. SM-10-03, FID 1951, (September
3 Order) that alleged that Signal Peak violated Section 82-4-231(10)(h), MCA, by failing to
4 achieve 90% compaction of maximum dry density of coal processing waste material in violation
5 of ARM 17.24.932(8), by failing to have the coal processing waste structure inspected by a
6 qualified licensed professional engineer in violation of ARM 17.24.924 (NON 10-17-01); and by
7 failing to submit in a timely fashion certification that a sedimentation pond was properly
8 constructed in violation of ARM 17.24.639 and 642(4) (NON 10-17-03). The September Order
9 assessed a \$12,350 penalty for the violations.

10 5. On October 5, 2010, Signal Peak requested a hearing before the Board of Environmental
11 Review on the issue of whether the penalty assessed by the September Order was proper.

12 6. On November 19, 2010, the Department issued Signal Peak a Notice of Violation
13 and Administrative Penalty Order, Docket No. SM-10-04, FID 2000, (November Order) alleging
14 that Signal Peak violated Section 82-4-232(4), MCA, by failing to properly salvage and stockpile
15 soil in violation of ARM 17.24.702(2) (NON 10-17-03). The November Order assessed a \$3,000
16 penalty for the violation.

17 7. On December 3, 2010, Signal Peak requested a hearing before the Board of
18 Environmental Review on the issue of whether the penalty assessed by the November Order was proper.

19 8. The Department and Signal Peak have reached an agreement, as set forth in this
20 Consent Order, to resolve the violations alleged in the September Order and the November Order.

21 **III. ADMINISTRATIVE ORDER ON CONSENT**

22 NOW, THEREFORE, THE DEPARTMENT ORDERS AND SIGNAL PEAK AGREES
23 AS FOLLOWS:

24 //

1 9. The Findings of Fact and Conclusions of Law set forth in the September Order
2 and the November Order are hereby incorporated by reference into this Consent Order.

3 10. The Department assesses and Signal Peak agrees to pay administrative penalties
4 in the amount of \$2,400 for Violation No. 1 (NON 10-17-01) and \$8,400 for Violation No. 2
5 (NON 10-17-02), as alleged in the September Order, for a total penalty of \$10,800 for Violations
6 No. 1 and 2.

7 11. The Department assesses and Signal Peak agrees to pay administrative penalties
8 in the amount of \$3,000 for the violation (NON 10-17-03) alleged in the November Order.

9 12. Signal Peak agrees to execute a Stipulation to Dismiss Signal Peak's pending appeals
10 to the Board of Environmental Review, Case Nos. BER 2010-17 SM and BER 2010-19 SM.

11 13. Within 30 days of the effective date of this Consent Order, Signal Peak shall pay
12 to the Department administrative civil penalties totaling \$13,800 to settle all claims for penalties
13 in the September Order and the November Order.

14 14. The penalties must be paid by check or money order, made payable to the
15 "Montana Department of Environmental Quality," and shall be sent to:

16 John L. Arrigo, Administrator
17 Enforcement Division
18 Department of Environmental Quality
19 1520 East Sixth Avenue
20 P.O. Box 200901
21 Helena, MT 59620-0901

22 **IV. CONSENT TO ADMINISTRATIVE ORDER**

23 15. Signal Peak waives its right to administrative appeal or judicial review of this Consent
24 Order and agrees that this Consent Order is the final and binding resolution of the issues raised.

25 16. The terms of this Consent Order constitute the entire agreement between the
26 Department and Signal Peak with respect to the issues addressed herein notwithstanding any

1 other oral or written agreements and understandings made and entered into between the
2 Department and Signal Peak prior to the effective date of this Consent Order.

3 17. Except as herein provided, no amendment, alteration, or addition to this Consent
4 Order shall be binding unless reduced to writing and signed by both parties.

5 18. None of the requirements in this Consent Order are intended to relieve Signal
6 Peak from its obligation to comply with all applicable state, federal, and local statutes, rules,
7 ordinances, orders, and permit conditions.

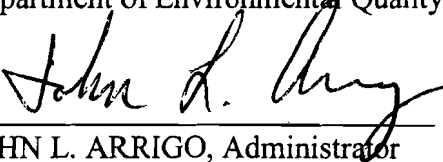
8 19. Each party shall bear its own cost incurred in this action, including attorney fees.

9 20. Each of the signatories to this Consent Order represents that he or she is
10 authorized to enter into this Consent Order and to bind the parties represented by him or her to
11 the terms of this Consent Order.

12 21. This Consent Order becomes effective upon signature of the Director of the
13 Department or his designee.

14 IT IS SO ORDERED:

15 STATE OF MONTANA
16 Department of Environmental Quality

17 

18 JOHN L. ARRIGO, Administrator
19 Enforcement Division

20 6/6/11

21 Date

IT IS SO AGREED:

SIGNAL PEAK ENERGY, LLC



Signature

Edward A. Viren III

Printed Name

VP Engineering

Title

5/26/11

Date

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

8 IN THE MATTER OF:
9 VIOLATIONS OF THE MONTANA STRIP
10 AND UNDERGROUND MINE
11 RECLAMATION ACT BY SIGNAL PEAK
12 ENERGY, LLC AT BULL MOUNTAIN
MINE #1, ROUNDUP, MUSSELSHELL
COUNTY, MONTANA. [FID #2000,
DOCKET NO. SM-10-04]

Case No. BER 2010-19 SM

DISMISSAL ORDER

13 This matter comes before the Board of Environmental Review on a Stipulation to
14 Dismiss filed by Petitioner, Signal Peak Energy, LLC, and the Department of Environmental
15 Quality. Finding the Stipulation to Dismiss to be well-taken, this contested case is hereby
16 dismissed with prejudice pursuant to Rule 41(a) of the Montana Rules of Civil Procedure, each
17 party to bear its own costs and expenses.

18 Enter this ____ day of _____, 2011.

19 **BOARD OF ENVIRONMENTAL REVIEW**

20
21 By: _____
22 Joseph Russell, Board Chairman
23
24

✓ 10

FILED this 12th day of July AD 2011
at Helena, Montana
by [Signature]
[Signature]

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

Steven T. Wade
Browning, Kaleczyc, Berry & Hoven, P.C.
P.O. Box 1697
825 Great Northern Blvd., Ste. 105
Helena, MT 59624-1697
(406) 443-6820
Attorney for the Petitioner

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

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

Case No. BER 2010-17 SM

STIPULATION TO DISMISS

Petitioner, Signal Peak Energy, LLC, by counsel, and the Department of Environmental
Quality, by counsel, hereby inform the Board of Environmental Review that the parties have
resolved their differences and hereby stipulate to dismiss the above-captioned contested case
with prejudice pursuant to Rule 41(a) of the Montana Rules of Civil Procedure. A copy of the
Administrative Order on Consent memorializing this settlement is attached hereto as Exhibit A.
Each party shall bear its own costs, including attorney fees.

//

//

1 IT IS SO STIPULATED:

2 DEPARTMENT OF ENVIRONMENTAL QUALITY

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

Date: 7/11/11

7 SIGNAL PEAK ENERGY, LLC

8
9 By: St T Wade
Steven T. Wade, Attorney for Petitioner

Date: 7-7-11

12 **Certificate of Service**

13 I hereby certify that on the 12th day of July, 2011, I sent a true and correct
14 copy of the above Stipulation to Dismiss to Katherine Orr, Hearing Examiner, through inter-
departmental mail.

15 Jane B Amdahl
16
17
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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE MONTANA STRIP
AND UNDERGROUND MINE RECLAMATION
ACT BY SIGNAL PEAK ENERGY, LLC AT
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II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Department is an agency of the executive branch of government, created and existing under authority of Section 2-15-3501, MCA. The Department is charged with the administration and enforcement of the Act and the administrative rules adopted under the Act.

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1 4. On September 22, 2010, the Department issued to Signal Peak a Notice of
2 Violation and Administrative Penalty Order, Docket No. SM-10-03, FID 1951, (September
3 Order) that alleged that Signal Peak violated Section 82-4-231(10)(h), MCA, by failing to
4 achieve 90% compaction of maximum dry density of coal processing waste material in violation
5 of ARM 17.24.932(8), by failing to have the coal processing waste structure inspected by a
6 qualified licensed professional engineer in violation of ARM 17.24.924 (NON 10-17-01); and by
7 failing to submit in a timely fashion certification that a sedimentation pond was properly
8 constructed in violation of ARM 17.24.639 and 642(4) (NON 10-17-03). The September Order
9 assessed a \$12,350 penalty for the violations.

10 5. On October 5, 2010, Signal Peak requested a hearing before the Board of Environmental
11 Review on the issue of whether the penalty assessed by the September Order was proper.

12 6. On November 19, 2010, the Department issued Signal Peak a Notice of Violation
13 and Administrative Penalty Order, Docket No. SM-10-04, FID 2000, (November Order) alleging
14 that Signal Peak violated Section 82-4-232(4), MCA, by failing to properly salvage and stockpile
15 soil in violation of ARM 17.24.702(2) (NON 10-17-03). The November Order assessed a \$3,000
16 penalty for the violation.

17 7. On December 3, 2010, Signal Peak requested a hearing before the Board of
18 Environmental Review on the issue of whether the penalty assessed by the November Order was proper.

19 8. The Department and Signal Peak have reached an agreement, as set forth in this
20 Consent Order, to resolve the violations alleged in the September Order and the November Order.

21 **III. ADMINISTRATIVE ORDER ON CONSENT**

22 NOW, THEREFORE, THE DEPARTMENT ORDERS AND SIGNAL PEAK AGREES
23 AS FOLLOWS:

24 //

1 9. The Findings of Fact and Conclusions of Law set forth in the September Order
2 and the November Order are hereby incorporated by reference into this Consent Order.

3 10. The Department assesses and Signal Peak agrees to pay administrative penalties
4 in the amount of \$2,400 for Violation No. 1 (NON 10-17-01) and \$8,400 for Violation No. 2
5 (NON 10-17-02), as alleged in the September Order, for a total penalty of \$10,800 for Violations
6 No. 1 and 2.

7 11. The Department assesses and Signal Peak agrees to pay administrative penalties
8 in the amount of \$3,000 for the violation (NON 10-17-03) alleged in the November Order.

9 12. Signal Peak agrees to execute a Stipulation to Dismiss Signal Peak's pending appeals
10 to the Board of Environmental Review, Case Nos. BER 2010-17 SM and BER 2010-19 SM.

11 13. Within 30 days of the effective date of this Consent Order, Signal Peak shall pay
12 to the Department administrative civil penalties totaling \$13,800 to settle all claims for penalties
13 in the September Order and the November Order.

14 14. The penalties must be paid by check or money order, made payable to the
15 "Montana Department of Environmental Quality," and shall be sent to:

16 John L. Arrigo, Administrator
17 Enforcement Division
18 Department of Environmental Quality
19 1520 East Sixth Avenue
20 P.O. Box 200901
21 Helena, MT 59620-0901

22 **IV. CONSENT TO ADMINISTRATIVE ORDER**

23 15. Signal Peak waives its right to administrative appeal or judicial review of this Consent
24 Order and agrees that this Consent Order is the final and binding resolution of the issues raised.

 16. The terms of this Consent Order constitute the entire agreement between the
Department and Signal Peak with respect to the issues addressed herein notwithstanding any

1 other oral or written agreements and understandings made and entered into between the
2 Department and Signal Peak prior to the effective date of this Consent Order.

3 17. Except as herein provided, no amendment, alteration, or addition to this Consent
4 Order shall be binding unless reduced to writing and signed by both parties.

5 18. None of the requirements in this Consent Order are intended to relieve Signal
6 Peak from its obligation to comply with all applicable state, federal, and local statutes, rules,
7 ordinances, orders, and permit conditions.

8 19. Each party shall bear its own cost incurred in this action, including attorney fees.

9 20. Each of the signatories to this Consent Order represents that he or she is
10 authorized to enter into this Consent Order and to bind the parties represented by him or her to
11 the terms of this Consent Order.

12 21. This Consent Order becomes effective upon signature of the Director of the
13 Department or his designee.

14 IT IS SO ORDERED:

15 STATE OF MONTANA
16 Department of Environmental Quality

17 
18 JOHN L. ARRIGO, Administrator
19 Enforcement Division

20 Date

21 6/6/11

IT IS SO AGREED:

SIGNAL PEAK ENERGY, LLC

Signature

Printed Name

22 VP Engineering
23 Title

24 Date

5/26/11

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2
3
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5
6 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
7 **OF THE STATE OF MONTANA**

8
9 IN THE MATTER OF:
10 VIOLATIONS OF THE MONTANA STRIP
11 AND UNDERGROUND MINE
12 RECLAMATION ACT BY SIGNAL PEAK
ENERGY, LLC AT BULL MOUNTAIN
MINE #1, ROUNDUP, MUSSELSHELL
COUNTY, MONTANA. [FID #1951,
DOCKET NO. SM-10-03]

Case No. BER 2010-17 SM

DISMISSAL ORDER

13
14 This matter comes before the Board of Environmental Review on a Stipulation to
15 Dismiss filed by Petitioner, Signal Peak Energy, LLC, and the Department of Environmental
16 Quality. Finding the Stipulation to Dismiss to be well-taken, this contested case is hereby
17 dismissed with prejudice pursuant to Rule 41(a) of the Montana Rules of Civil Procedure, each
18 party to bear its own costs and expenses.

19 Enter this ____ day of _____, 2011.

20
21 **BOARD OF ENVIRONMENTAL REVIEW**

22
23 By: _____
Joseph Russell, Board Chairman

1 Jane B. Amdahl
Department of Environmental Quality
2 P.O. Box 200901
1520 E. Sixth Avenue
3 Helena, MT 59620-0901
(406) 444-5690
4 Attorney for the Department

5 Steven T. Wade
Browning, Kaleczyc, Berry & Hoven, P.C.
6 P.O. Box 1697
825 Great Northern Blvd., Ste. 105
7 Helena, MT 59624-1697
(406) 443-6820
8 Attorney for the Petitioner

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Montana Department of

ENVIRONMENTAL QUALITY

MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: May 23, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-07 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY
ACT BY CIRCLE B, LLC AT CIRCLE B
FEEDYARD, HYSHAM, TREASURE COUNTY,
MONTANA. (PERMIT NO. MTG010265,
FID #2036, DOCKET NO. WQ-11-08]

Case No. BER 2011-07 WQ

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2036, Docket No. WQ-11-08).

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

James Madden
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

Circle B LLC

PO Box 17 Bighorn, MT 59010

Voice (406) 342-5450 Fax (406) 342-5451

MEMO

Date: 5/23/2011

From: Fred Boorman

Re: Pocket # WQ-11-08; FID # 2036

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

Dear Maureen:

Please be informed that Circle B LLC
is appealing the Penalty Order from R.E.R.
Letter Dated 5/4/2011.

Also, please inform us of the next actions
required by us.

Sincerely, Fred

Circle B LLC

PO Box 17 Bighorn, MT 59010

Voice (406) 342-5450 Fax (406) 342-5451

MEMO

Date:

5/23

From:

Fred Borman

Re:

Letter to Board Secretary

FILED this 24th day of
May AD 2011
at _____ o'clock _____ AM
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by Mary Cobb

Dan,

Enclosed is copy of letter Faxed
5/23/11 to Board Secretary for your
records.

Thanks for your time last week!
We look forward to getting this matter
behind us.

Sincerely,

Fred Borman

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY
ACT BY CIRCLE B, LLC AT CIRCLE B
FEEDYARD, HYSHAM, TREASURE
COUNTY, MONTANA. (PERMIT NO.
MTG010265, FID #2036)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE AND
PENALTY ORDER

Docket No. WQ-11-08

I. NOTICE OF VIOLATION

Pursuant to the authority of Sections 75-5-611 and 75-5-617, Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Circle B, LLC (Respondent) of the following Findings of Fact and Conclusions of Law with respect to violations of Water Quality Act (WQA) (Title 75, chapter 5, part 6, MCA) and the Administrative Rules of Montana (ARM) (Title 17, chapter 30) adopted thereunder.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
2. The Department administers the WQA.
3. Respondent is a "person" as defined in Section 75-5-103(23), MCA.
4. Pursuant to Section 75-5-103(33)(a), MCA, state waters means a body of water, irrigation system, or drainage system, either surface or underground.
5. Section 75-5-605(1)(b), MCA, states that it is unlawful for any person to violate any provision set forth in a permit or stipulation, including but not limited to limitations and conditions contained in the permit.

1 6. ARM 17.30.1342(1) requires, in part, that a permittee shall comply with all
2 conditions of a permit.

3 7. Respondent owns and operates the Circle B Feedyard (Feedyard), which is a
4 Concentrated Animal Feeding Operation (CAFO) as defined in ARM 17.30.1330(1).

5 8. On September 25, 2008, the Department issued General Permit, Permit No.
6 MTG010000 for CAFOs (General Permit) effective November 1, 2008 through October 31,
7 2013.

8 9. In September 2009, the Department received a complaint alleging Respondent
9 was operating a 5,000-head animal feedlot operation without a permit and that the operation
10 would impact groundwater and a ditch (Feedyard ditch) that runs through the Feedyard.

11 10. The Feedyard ditch discharges into Sarpy Creek which is a tributary to the
12 Yellowstone River. The Feedyard ditch, Sarpy Creek and the Yellowstone River are state waters
13 pursuant to Section 75-5-103(33)(a), MCA.

14 11. On October 14, 2009, the Department sent a letter informing Respondent that it
15 was in violation of the Act and requested that it submit a CAFO application to the Department
16 within 60 days.

17 12. On or about November 30, 2009, the Department received a Montana Pollution
18 Discharge Elimination System (MPDES) Application for New and Existing CAFO and Aquatic
19 Animal Production Facilities (Application) from the Respondent; however, the Department
20 deemed that the application was incomplete.

21 13. On February 9, 2010, Respondent submitted a completed Application and a
22 Nutrient Management Plan (NMP) to the Department.

23 14. On April 23, 2010, the Department sent a letter informing Respondent that based
24 on the information in the Application and NMP, the Feedyard qualified to operate under the

1 General Permit and issued Respondent Authorization Number MTG010265 (Authorization) for
2 coverage under the General Permit and approved the NMP. The Authorization required that the
3 Feedyard facility be designed, constructed and operated to contain all process-generated
4 wastewaters, plus 2.6 inches of precipitation from the runoff of a 25-year, 24-hour rain event.
5 Respondent was required to either use the Hysham, Montana, weather station (HYSM8) or
6 maintain a comparable precipitation gauge at the Feedyard to determine the amount of
7 precipitation. The Authorization and General Permit are collectively referred to herein as the
8 Permit.

9 15. On September 8, 2010, Respondent left a telephone message with the Department
10 indicating that, due to recent heavy rains, it discharged wastewater to the Feedyard ditch
11 yesterday [September 7, 2010], then began discharging wastewater onto the field adjacent to the
12 Feedyard.

13 16. During a September 8, 2010 telephone conversation, the Department informed
14 Respondent that it was not allowed to discharge wastewater from the Feedyard to the adjacent field
15 without approval. The adjacent field where the wastewater was discharged is not part of the NMP.

16 17. On September 9, 2010, Respondent submitted to the Department a "Discharge
17 Notification" informing the Department that the Feedyard received slightly over two inches of
18 water from approximately 6 pm on August 29, 2010 to 4 pm on August 30, 2010 and that an
19 employee mistakenly assumed that the Feedyard had met the 25-year, 24-hour criteria for
20 discharge and began pumping water from waste control structure [WCS] #2. As a result,
21 Respondent discharged approximately 22,000 gallons of wastewater from WCS #2 to the
22 Feedyard ditch.

23 18. The Department conducted a compliance evaluation inspection (CEI) at the
24 Feedyard on September 15, 2010 (September 2010 CEI). Based on information obtained during

1 the CEI, the Department estimated that approximately 121,500 gallons of Facility wastewater
2 were discharged to the Feedyard ditch and onto the adjacent field.

3 19. On October 21, 2010, the Department sent Respondent a letter (October 2010
4 Violation Letter) informing it of the September 2010 CEI results and that it was in violation of
5 the following Permit conditions:

- 6 • Part III.A. by incorrectly reporting data for the September 2010 discharge event.
- 7 • Part II.A. by not having a bentonite liner in the waste control structures and failing to prevent a discharge of manure, litter, or process wastewater from the
8 production area into state waters.
- 9 • Part III.C by failing to install a depth marker in the manure, litter, and process wastewater impoundment and failing to conduct required inspections.
- 10 • Part I.B. by failing to submit required permit application or identifying information of monitor well locations and correct well logs.
- 11 • Part III.F. by failing to keep animals out of direct contact with water in the Feedyard ditch.
- 12 • Part III.C., D., F. and K. by failing to maintain records or meet record keeping requirements.

13 The Department further informed Respondent that the above-listed violations were violations of
14 the Permit and therefore violations of Section 75-5-605(1)(b), MCA. and ARM 17.30.1342(1).
15 Further, the Department informed Respondent that it considered the discharge of wastewater to
16 be a significant violation and would be subject to a formal enforcement action.

17 ***Unauthorized discharge of wastewater to state waters***

18 20. Part II. A. of the Permit requires that there shall be no discharge of manure, litter
19 or process-wastewater pollutants from the production area to state waters except that whenever
20 precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the
21 overflow may be discharged to state waters provided that the production area is designed,
22 constructed, operated and maintained to contain all manure, litter, and process wastewater
23 including the runoff and the direct precipitation from a 25-year, 24-hour rainfall.

24 //

1 21. According to meteorological data obtained from HYSM8, the Hysham area
2 received 1.88 inches of precipitation during the period of August 29 through August 30, 2010
3 which does not meet the criteria for a 25-year, 24-hour rainfall.

4 22. In September 2010, Respondent informed the Department that it discharged
5 wastewater from WCS #2 into the Feedyard ditch and onto the field adjacent [east] to the
6 Feedyard.

7 23. The Department's October 2010 Violation Letter notified Respondent that it was
8 in violation of the Permit, Section 75-5-605(1)(b), MCA, and ARM 17.30.1342(1) for the
9 unauthorized discharge of wastewater from the Feedyard to state waters.

10 24. Respondent violated Part II. A of the Permit and ARM 17.30.1342(1) by
11 discharging wastewater from the WCS to the Feedyard ditch.

12 25. Respondent violated Section 75-5-605(1)(b), MCA, one time by failing to comply
13 with the Permit by discharging wastewater from the WCS to state waters.

14 ***Failure to comply with Permit conditions***

15 26. Part II.A.3 of the Permit requires that animal waste management systems or
16 components constructed after February 23, 2006 conform to the standards set forth in
17 Department Circular DEQ 9 (February 2006).

18 27. Part III.A.1.b. of the Permit requires that, in addition to the oral notification
19 required under Part III.A.1 of the Permit, the written submission include the period of discharge,
20 including the exact dates and times of the discharge.

21 28. Part III.C.1.a. and c. of the Permit requires the permittee to, at a minimum,
22 conduct and keep records of the following: a. Weekly inspections of all storm water diversion
23 devices, runoff diversion structures, and devices channeling contaminated storm water to the
24 wastewater and manure storage and containment structure; and ...c. Weekly inspections of the

1 manure, litter, and process wastewater impoundments. The inspection will note the level in
2 liquid impoundments as indicated by a depth marker. All open surface liquid impoundments
3 must have a depth marker which clearly indicates the minimum capacity necessary to contain the
4 runoff and direct precipitation of a 25-year, 24-hour rainfall event.

5 29. Part III.D.3 of the Permit requires that the permittee maintain on site a copy of
6 their site-specific nutrient management plan (NMP).

7 30. Part III.F.2 of the Permit requires that the permittee implement the applicable
8 production area best management practice requirements as specified in Section 4, Table 4 of
9 Department Circular DEQ 9 (February 2006).

10 31. Part III.H of the Permit requires that when the permittee becomes aware that it
11 failed to submit any relevant facts in a permit application, or submitted incorrect information in a
12 permit application or any report to the Department, it shall promptly submit such facts or
13 information with a narrative explanation of the circumstances of the omission or incorrect
14 submittal and why they weren't supplied.

15 32. During its September 2010 CEI, the Department documented violations of
16 Respondent's Permit.

17 33. The Department's October 2010 Violation Letter notified Respondent that it was
18 in violation of the Permit.

19 34. Respondent violated Parts II and III of the Permit and ARM 17.30.1342(1) by
20 failing to comply with the Permit conditions listed in Paragraph 19.

21 35. Respondent violated Section 75-5-605(1)(b), MCA, seven times by failing to
22 comply with the Permit conditions listed in Paragraphs 26 through 31.

23 //

24 //

1 ***Exceeding Permit effluent limits***

2 36. The Permit established 7.5 milligrams per liter (mg/l) as the effluent limit for
3 nitrite plus nitrate as nitrogen (Nitrogen) at Outfall MWA-2.

4 37. According to records maintained by the Department, Respondent exceeded
5 effluent limits for Nitrogen during the December 2010 monitoring period.

6 38. The Department sent a Violation Letter on March 17, 2011, notifying Respondent
7 in writing of the Nitrogen effluent limit exceedance that occurred during the December 2010
8 monitoring period.

9 39. Respondent violated the Permit and ARM 17.30.1342(1) by exceeding the
10 permitted effluent discharge limit for Nitrogen during the December 2010 monitoring period.

11 40. Respondent violated Section 75-5-605(1)(b), MCA, one time by failing to comply
12 with ARM 17.30.1342(1) and Permit conditions by exceeding the permitted effluent discharge
13 limit for Nitrogen during the December 2010 monitoring period.

14 ***Administrative penalty***

15 41. Pursuant to Section 75-5-611(9), MCA, the Department may assess an
16 administrative penalty not to exceed \$10,000 for each day of each violation; however, the
17 maximum penalty may not exceed \$100,000 for any related series of violations.

18 42. The Department has calculated an administrative penalty in the amount of \$8,400
19 for the violation alleged in Paragraph 25 above. *See* Section 75-1-1001, MCA, and ARM
20 17.4.301 through 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by
21 reference herein.

22 **III. ADMINISTRATIVE ORDER**

23 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is
24 issued to Respondent pursuant to the authority vested in the State of Montana, acting by and

1 through the Department under the WQA and administrative rules adopted thereunder. Based on
2 the foregoing Findings of Fact and Conclusions of Law and the authority cited above, the
3 Department hereby ORDERS Respondent to take the following actions to comply with the WQA
4 within the timeframes specified in this Order:

5 43. Respondent shall comply with all provisions of the Permit, including but not
6 limited to:

- 7 • Not discharge waste from the WCS to state water or outside the production
8 area unless the discharge is due to a 25-year, 24-hour event. If Respondent
9 wishes to utilize liquid waste outside the production area, it must request a
10 modification to the NMP in writing. Any modification to the NMP must be
11 approved by the Department prior to discharge;
- 12 • Report noncompliance within 24 hours and submit a written report within five
13 days after becoming aware of the noncompliance;
- 14 • Prohibit access of confined animals to state waters; and
- 15 • Conduct and maintain records of all required inspections and sampling.

16 44. All reports required by this Order, inspection reports or other information
17 requested by the Department must be signed by an authorized person as described in ARM
18 17.30.1323 or accompanied by a letter from the authorized person indicating the party who
19 submitted the information is authorized.

20 45. Within 45 days from receipt of this Order, Respondent shall submit to the
21 Department at the address listed in Paragraph 50, the following:

- 22 a. A compliance plan and schedule, including a completion date, to install
23 bentonite liners and depth markers in the WCSs;

- b. Plans and specifications which document the WCSs have been properly designed to meet the capacity requirements specified by the Permit;
- c. The actual locations, including latitude and longitude, of the monitoring wells; and
- d. Copies of well logs associated with the monitoring wells.

The Department will provide comments to Respondent in writing on the adequacy of the compliance plan and schedule.

46. The compliance schedule required by Paragraph 45 will be incorporated by reference into this Consent Order as enforceable requirements upon written notification to Respondent by the Department.

47. Respondent may not commence or continue the construction, alteration, or extension of the WCS prior to Department approval of plans and specifications. If deficiencies are found in the plans and specifications, Respondent shall respond to any Department request for additional information and remedy any deficiency noted by the Department within 60 days after the request for information or notice of deficiency is mailed.

48. Respondent must achieve and maintain compliance with the Permit by the final date specified in the compliance plan. If implementation of the plan fails to achieve permanent compliance, the Department may order further steps and/or seek penalties for noncompliance.

49. Respondent is hereby assessed an administrative penalty in the amount of \$8,400 for the violation cited in Paragraph 25.

50. Within 60 days from receipt of this Order, Respondent shall pay to the Department the \$8,400 administrative penalty to resolve the violation cited herein. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and shall be sent to:

//

John L. Arrigo, Administrator
Enforcement Division
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

51. Failure to complete the required corrective actions by the specified deadlines, as ordered herein or in additional Department correspondence, constitutes a violation of Title 75, chapter 5, part 6, MCA, and may result in the Department seeking a court order compelling compliance and assessing civil penalties of up to \$25,000 per day of violation pursuant to Section 75-5-631, MCA.

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

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

IV. NOTICE OF APPEAL RIGHTS

54. Respondent may appeal this Order under Section 75-5-611(4), 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. Any request for a hearing must be in writing and sent to:

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

55. 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

1 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings
2 prior to the hearing may include formal discovery procedures, including interrogatories, requests
3 for production of documents, and depositions. Because Respondent is not an individual,
4 Respondent must be represented by an attorney in any contested case hearing. See ARM
5 1.3.231(2) and Section 37-61-201, MCA.

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

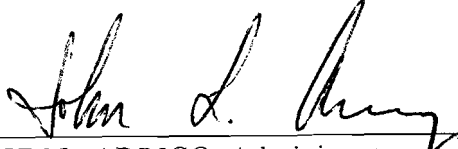
8 57. This Order becomes effective upon the date of service.

9 58. Service is complete on the date of mailing

10 IT IS SO ORDERED:

11 DATED this 4th day of May, 2011.

12 STATE OF MONTANA
13 Department of Environmental Quality

14 
15 _____
16 JOHN L. ARRIGO, Administrator
17 Enforcement Division
18
19
20
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**Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet**

Responsible Party Name:	Circle B, LLL (Respondent) at Circle B Feedyard (Feedyard)	
FID:	2036	MTG010265 (Permit)
Statute:	Water Quality Act	
Date:	5/2/2011	
Name of Employee Calculating Penalty:	Daniel R. Kenney	
Maximum Penalty Authority:	\$10,000.00	

Violation #1
Description of Violation:
Unauthorized discharge of wastewater to state waters. Respondent discharged approximately 22,500 gallons of wastewater from its waste control structure to the Feedyard ditch, a state water, in violation of Part II.A of the Permit and ARM 17.30.1342(1), and therefore violated Section 75-5-605(1)(b), MCA.

I. BASE PENALTY

Nature

Explanation:	
The unauthorized discharge of 22,500 gallons of wastewater to state waters has the potential to adversely impact the quality of state waters and therefore the nature of the violation is one that poses the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
The Gravity of the violation is Major pursuant to ARM 17.4.303(5)(a) because the discharge of wastewater from the Feedyard to state waters poses a serious potential to harm human health or the environment.
Extent Explanation:
The Extent of the violation is Moderate pursuant to ARM 17.4.303(4) because the purpose of the Permit is to ensure Respondent prevents any unauthorized discharge of manure, litter or process-wastewater pollutants to state waters. The discharge of approximately 22,500 gallons of Feedyard wastewater to state waters is a moderate deviation from the regulatory requirement to keep wastewater from the Feedyard out of state waters.

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

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

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

\$7,000.00

II. ADJUSTED BASE PENALTY

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

Explanation:

As a permitted entity, Respondent should know of the regulatory requirements of the Permit and had control over the circumstances that resulted in the violation. Respondent did not take reasonable precautions to prevent the violation. For Circumstances, the Department calculates a moderate degree or a 20% increase in the Base Penalty.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$1,400.00

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

Explanation:

Respondent did not exhibit any good faith and cooperation to resolve the violation; therefore, the Department is not reducing the base penalty 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 money spent above and beyond what was required by law or rule to mitigate the violation or the impacts of the violation. Therefore, the Department is not decreasing the base penalty for amounts voluntarily expended.

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$7,000.00
Circumstances	\$1,400.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$8,400.00

III. DAYS OF VIOLATION

Explanation:

During a September 8, 2010 telephone conversation, Respondent informed the Department that due to recent heavy rains, it discharged wastewater from the waste control structure to the Feedyard ditch on September 7, 2010. The discharge was not authorized by the Department. For the purpose of calculating this penalty, the Department is seeking a penalty for one day of violation for the unauthorized wastewater discharge that occurred on September 7, 2010.

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

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$8,400.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00
--	---------------

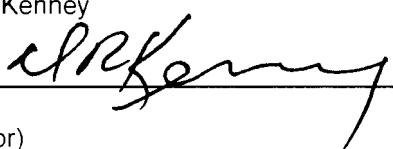
IV. ECONOMIC BENEFIT

Explanation:

The Department assumes that Respondent did not gain an economic advantage by discharging wastewater from the waste control structure to the Feedyard ditch.

ECONOMIC BENEFIT REALIZED:	\$0.00
-----------------------------------	---------------

Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary

Responsible Party Name:	Circle B, LLL (Respondent) at Circle B Feedyard (Feedyard)
FID:	2036 MTG010265 (Permit)
Statute:	Water Quality Act
Date:	5/4/11
Signature of Employee Calculating Penalty:	Daniel R. Kenney 

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

	Penalty Calculation #1
Maximum Penalty Authority:	\$10,000.00
Percent Harm - Gravity and Extent:	0.70
Percent Impact - Gravity:	0.00
Base Penalty:	\$7,000.00

II. Adjusted Base Penalty

Base Penalty:	\$7,000.00
Circumstances:	\$1,400.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$8,400.00

Totals
\$7,000.00
\$1,400.00
\$0.00
\$0.00
\$8,400.00

III. Days of Violation or

Number of Occurrences 1

Adjusted Base Penalty Total \$8,400.00

\$8,400.00

Other Matters as Justice May

Require Total \$0.00

\$0.00

IV. Economic Benefit \$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$8,400.00

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

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE WATER**
5 **QUALITY ACT BY CIRCLE B, LLC AT**
6 **CIRCLE B FEEDYARD, HYSHAM,**
7 **TREASURE COUNTY, MONTANA.**
8 **[PERMIT NO. MTG010265, FID #2036,**
9 **DOCKET NO. WQ-11-08]**

CASE NO. BER 2011-07 WQ

10 **FIRST PREHEARING ORDER**

11 Mr. Fred Borman, on behalf of Circle B. LLC, has requested a hearing on the
12 appeal of the Montana Pollutant Discharge Elimination System General Permit
13 (MPDES) Permit No. MTG010265. The following guidelines and rules are
14 provided to assist the parties in an orderly resolution of this matter.

15 1. REFERENCES: This matter is governed by the Montana
16 Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont.
17 Admin. R. 17.4.101, by which the Board of Environmental Review ("Board) has
18 adopted the Attorney General's Model Rules for contested cases, Mont. Admin. R.
19 1.3.211 through 1.3.225, and by Mont. Code Ann. Tit. 75, ch. 5, pts. 4 and 6.

20 2. FILING: Except for discovery requests and responses (which are not
21 routinely filed), original documents shall be sent for filing with the Board, addressed
22 as follows:

23 JOYCE WITTENBERG
24 Secretary, Board of Environmental Review
25 Department of Environmental Quality
26 1520 East Sixth Avenue
27 P.O. Box 200901
Helena, MT 59620-0901

1 One copy of each document that is filed should be sent to the Hearing
2 Examiner addressed as follows:

3 KATHERINE J. ORR
4 Hearing Examiner
5 Agency Legal Services Bureau
6 1712 Ninth Avenue
7 P.O. Box 201440
8 Helena, MT 59620-1440

9 Although discovery documents are not normally filed, when a motion or brief
10 is filed making reference to discovery documents, the party filing the motion or
11 brief should also attach the relevant discovery documents.

12 3. SERVICE: Copies of all documents filed with the Board and
13 provided to the Hearing Examiner, including correspondence, must be served upon
14 the opposing party. A certificate of service should be provided.

15 4. EX PARTE COMMUNICATIONS: The Montana Administrative
16 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model
17 Rule 18 in Mont. Admin. R. 1.3.222, prohibit *ex parte* communications with a
18 hearing examiner concerning any issue of fact or law in a contested case. In
19 addition to observing this rule, please contact the opposing party before you
20 communicate with the Hearing Examiner even on purely procedural matters such as
21 the need for a continuance.

22 5. SCHEDULING: The undersigned requests the parties to consult with
23 each other and propose a schedule to me upon which they agree by **June 24, 2011**.
24 The schedule should include the following dates:

- 25 (a) for joinder/intervention of additional parties;
26 (b) for disclosure by each party to the other parties of: (1) the
27 name and address of each individual likely to have discoverable information that the
disclosing party may use to support its claims or defenses, and (2) a copy of, or a
description by category and location of, all documents and tangible things that are in

1 the possession, custody, or control of the disclosing party and that the disclosing
2 party may use to support its claims or defenses;

3 (c) for completion of discovery (if any party wishes to conduct
4 discovery);

5 (d) for exchange of lists of witnesses and copies of documents that
6 each party intends to offer at the hearing;


7 (e) for submitting any motions and briefs in support;

8 (f) for a prehearing conference to hear argument on any motions
9 and resolve other prehearing matters; and

10 (g) for the contested case hearing, as well as the place of hearing.

11 6. If the parties are unable to agree upon the date for any item set forth in
12 the preceding paragraph, each party should submit a proposed schedule to the
13 Hearing Examiner who will then set a schedule.

14 DATED this 6th day of June, 2011.

15
16 
17 KATHERINE J. ORR
18 Hearing Examiner
19 Agency Legal Services Bureau
20 1712 Ninth Avenue
21 P.O. Box 201440
22 Helena, MT 59620-1440
23
24
25
26
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing First
3 Prehearing Order to be mailed to:

4 Ms. Joyce Wittenberg
5 Secretary, Board of Environmental Review
6 Department of Environmental Quality
7 1520 East Sixth Avenue
8 P.O. Box 200901
9 Helena, MT 59620-0901
10 **(original)**

11 Mr. James Madden
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. John Arrigo
17 Administrator, Enforcement Division
18 Department of Environmental Quality
19 P.O. Box 200901
20 Helena, MT 59620-0901

21 Mr. Fred Borman
22 Circle B LLC
23 P.O. Box 17
24 Bighorn, MT 59010

25 DATED: June 6, 2011 



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: June 21, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-08 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE APPEAL AND REQUEST FOR HEARING
BY THE CITY OF HELENA REGARDING THE
DEQ'S NOTICE OF FINAL DECISION FOR
MONTANA POLLUTANT DISCHARGE
ELIMINATION SYSTEM (MPDES) PERMIT
NO. MT0022641.

Case No. BER 2011-08 WQ

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

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

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

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

Attachments

2011-08 WQ



CITY OF HELENA

Office of the City Attorney
316 North Park Avenue
Helena, MT 59623
Telephone: (406) 457-8595

Kim Sell, Paralegal
ksell@ci.helena.mt.us

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Luke M. Berger, Deputy City Attorney
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Marlene Wiegand, Admin. Asst. I
mwiegand@ci.helena.mt.us

June 15, 2011

Board Secretary
Board of Environmental Review
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

FILED this 16th day of
June AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: Misty Webb

**RE: Final Decision MPDES Permit Number MT0022641
Request for Hearing**

Dear Secretary of the Board:

The City of Helena was served with a copy of the Notice of Final Decision, MPDES Permit Number MT0022641, in regard to its domestic wastewater treatment facility. Pursuant to §§75-5-403 and 75-5-611, Montana Code Annotated (MCA), and Administrative Rules of Montana (ARM) 17.30.1370, the City of Helena appeals the Department's final decision to issue the permit in disregard of City's comments and the City further requests a hearing on this appeal.

Sincerely yours,

DAVID L. NIELSEN
City Attorney

c: Ron Alles, Helena City Manager
John Rundquist, Helena Public Works Director
Jenny Chambers, Chief, Water Protection Bureau, MT DEQ



Brian Schweitzer, Governor
Richard H. Opper, Director

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

May 26, 2011

Mr. Ronald J. Alles, City Manager
City of Helena
316 N Park Ave
Helena MT 59623

RE: Notice of Final Decision, Montana Pollutant Discharge Elimination System (MPDES) Permit Number MT0022641

Dear Mr. Alles:

In accordance with the Administrative Rules of Montana (ARM) 17.30.1377, enclosed is the Response to Comments and a copy of the proposed permit issued to the City of Helena for its domestic wastewater treatment facility. The permit is issued by the Department under the authority of 75-5-402, Montana Code Annotated (MCA) and Sections 303 and 402 of the federal Clean Water Act.

The Response to Comments addresses issues that were identified during the public comment period. The public comment period closed May 18, 2011, Public Notice MT-11-10.

No changes were made in the draft permit in response to public comments:

In accordance with ARM 17.30.1378, the Department's final decision to issue the permit is effective 30 days after service of this notice. Under ARM 17.30.1370, the applicant may appeal this decision within the 30 day period in accordance with 75-5-403 and 75-5-611, MCA. Pursuant to 40 CFR 122.44, the Regional Administrator may object to or make recommendations to the proposed permit.

A copy of the permit should be made available to the person(s) in charge of the operation of the wastewater treatment facilities so they are aware of the requirements in the permit. Please take note of any revised monitoring requirements specified in Part I of the permit. Also, the final permit contains special conditions requiring actions on the part of the permittee. Please refer to Part I of the permit for additional information. The preprinted Discharge Monitoring Report (DMR) forms will be sent soon.

If you have any questions, please contact the permit writer, Jeff May, at (406) 444 -5326.

Sincerely,

Jenny Chambers, Chief
Water Protection Bureau
Permitting and Compliance Division

Enclosure: Response to Comments
Permit MT0022641

cc: Rosemary Rowe, USEPA Helena Office

**Response to Comments
City of Helena WWTP
MPDES Permit # MT0022641**

On April 18, 2011 the Department of Environmental Quality (Department) issued Public Notice MT-11-10, stating the Department's intent to issue a Montana Pollutant Discharge Elimination System (MPDES) wastewater discharge permit to the City of Helena for its wastewater treatment facility. The notice stated that the Department had prepared a draft permit, fact sheet, and environmental assessment.

The public notice required that all substantive comments must be received or postmarked by May 18, 2011 in order to be considered in formulation of the final determination and issuance of the permit. The Department has considered the following comments in preparation of the final permit and decision.

Table 1, below identifies individuals supplying written or oral comments on the issuance of MPDES permit MT0022641.

List of Persons Submitting Comments on Draft MPDES Permit MT0022641

Number	Commentor
1	Ronald J. Alles, City Manager, City of Helena

Commentor 1: Ronald J. Alles, City Manager, City of Helena

Comment 1: In fairness to the City of Helena taking leadership in the nutrient problem with \$12 million capital improvements designed to remove nitrogen and phosphorus from reclaimed waste water, the statement of basis should note the significant nutrient reductions the City has already achieved. We suggest adding the following paragraph to the Statement of Basis, II. Facility Information following the second paragraph:

"The nutrient removal facilities completed in 2001 have improved nutrient removal efficiency at the plant substantially. The City has also continued to improve performance of the system and compared with 2004 to 2006 averages has achieved 21% better performance for Nitrogen removal and 50% better performance for phosphorus removal for the 2009 to 2010 averaging period."

Response: The fact sheet/statement of basis provides the technical basis for the draft permit posted for public comment. In responding to comments the Department evaluates the comments and makes a determination as to whether or not a change should be made to the draft permit before a decision is made to issue the final permit. Editorial changes are not made to the fact sheet or statement of basis during this process because the response to the comment itself provides the additional basis for making any proposed change.

However, in making the comment during the formal comment period the statement proposed above will be included in the administrative record for the permit.

No change will be made to the draft permit in response to this comment.

Comment 2: From data obtained from the "Framework Water Quality Restoration and TMDLs for the Lake Helena Watershed Planning Area" Montana DEQ 2006, relative efficiencies of municipal treatment relative to on-site waste treatment can be established. The plan notes that in the Lake Helena watershed a population of 22,407 is served by on-site waste disposal systems contributing a total of 101.5 tones of nitrogen per year to Lake Helena. This yields a unit contribution of 0.025 lb/day/person. Assuming 2.5 persons per household, an average on-site disposal system contributes 0.062 lbs/day.

The plan also estimates Helena's contribution of Nitrogen to Lake Helena at 31.8 tons per year and in 2006, Helena's service population was about 28,000. This equates to about 0.006 lb/day/person or 0.016 lb/day/household.

On average from the plan, for each household changing from on-site waste disposal to Helena municipal sewer service, the net reduction in nitrogen to Lake Helena can be estimated at $0.062 - 0.016 = 0.046$ lb/day/household. Attached is documentation that the City has connected 45 homes that were previously served by on-site systems since 2006. The City requests an additional nitrogen load credit of $0.046 \times 45 = 2.0$ lbs/day be added (to the) nitrogen limits proposed in the permit. This would change the monthly and weekly limits to 240 lb/day and 313 lb/day respectively.

We recognize that no formal policy for load trading has been established. However, the Watershed Plan provides that load trading may be implemented in the current phase. The septic systems that Helena took on were mostly failing systems which were likely contributing higher levels of nitrogen (not to mention other contaminants) to the watershed. Given the benefit to the watershed, we feel this trade/credit is rational, reasonable, and consistent with the framework plan.

Response: While the Department has the authority to incorporate nutrient trading into MPDES permits, the level of detail provided in the comment is insufficient to allow an increase of the nutrient limits established in the draft permit. Should the City wish to pursue nutrient trading in the discharge permit, additional information should be submitted with an application for permit modification. As stated in the fact sheet, the City has already paid the fees for a future permit modification. The Department recommends the City submit the necessary information for incorporating nutrient credits from failed septic systems into the permit with that modification. At this time the minimum information necessary for the Department to consider such nutrient trading would include:

- GIS mapping of septic system locations
- Annual nutrient loading at the edge of the septic system discharge

- Nutrient delivery ratio and uncertainty ratio based on site-specific conditions

As the Department works through the complex issues related to non-point to point source nutrient trading, additional information that may be necessary will be determined at the time an application is submitted. The Department recommends the City work closely with Department staff in preparing an application that will request to incorporate nutrient trading into the permit.

No changes will be made to the draft permit in response to this comment.

Comment 3: The City operates an Industrial Pretreatment Program under the primacy of the USEPA. The program requirements of the draft permit may conflict with our programs approved by the USEPA and regular audits conducted by USEPA. We strongly recommend that all paragraphs following the first (a.) on page 13 of the draft permit be deleted and the first paragraph of page 13 be revised as follows:

The permittee shall operate an industrial pretreatment program in accordance with the USEPA requirements developed pursuant to Section 402(b)(8) of the Clean Water Act, the General Pretreatment Regulations (40 CFR Part 403) and the USEPA approved pretreatment program submitted by the Permittee to the USEPA. The pretreatment program was approved on July 24, 1986 and has subsequently incorporated substantial modification as approved by the USEPA. The USEPA approved pretreatment program, and any approved modifications thereto, are hereby incorporated by reference.

Response: As noted in the comment, the USEPA administers the pretreatment program in Montana. The pretreatment language is required in discharge permits by 40 CFR122.44 (j). Because the primary regulatory mechanism for the pretreatment program is via MPDES (NPDES) permits, and the USEPA administers that program in Montana, the specific pretreatment language in the draft permit was included at the request of USEPA.

No change will be made to the draft permit in response to this comment.

Major POTW
w/Industrial Pretreatment
Permit No.: MT0022641

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

AUTHORIZATION TO DISCHARGE UNDER THE MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251 *et seq.*,

City of Helena

is authorized to discharge from its **domestic wastewater treatment plant**

located at **2108 Custer Avenue East,**

to receiving waters named **Prickly Pear Creek**

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit.

This permit shall become effective **July 1, 2011.**

This permit and the authorization to discharge shall expire at midnight, **June 30, 2016.**

FOR THE MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

Jenny Chambers, Chief
Water Protection Bureau
Permitting & Compliance Division

Issuance Date: May 26, 2011

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I. EFFLUENT LIMITATIONS, MONITORING REQUIREMENTS & OTHER CONDITIONS

A. Description of Discharge Points and Mixing Zone

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

Outfall

Description

001

Location: At the end of the pipe, discharging into Prickly Pear Creek, located at approximately 46°38'36" N latitude, 111°59'4" W longitude.

Mixing Zone: Instantaneous.

Treatment Works: Major, POTW, 5.4 mgd, activated sludge, mechanical treatment plant with UV disinfection and continuous discharge to surface water.

B. Effluent Limitations

Outfall 001

Interim Limitations

Effective immediately and lasting through midnight xx/xx/xxxx (59 months after permit effective date), the quality of effluent discharged by the facility shall, as a minimum, meet the limitations as set forth below.

Parameter	Units	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾	Maximum Daily Limitation ⁽¹⁾
Biochemical Oxygen Demand (BOD ₅)	mg/L	30	45	--
	lb/day	1,351	2,027	--
Total Suspended Solids (TSS)	mg/L	30	45	--
	lb/day	1,351	2,027	--
<i>Escherichia coli</i> (<i>E. coli</i>) Bacteria, summer ⁽²⁾	cfu/100 mL	126	252	--
<i>E. coli</i> Bacteria, winter ⁽³⁾	cfu/100 mL	630	1,260	--
Oil and Grease	mg/L	--	--	< 10
Total Ammonia as N	mg/L	1.67	3.83	--
Total Nitrogen Load ⁽⁴⁾	lb/day	238	311	--
Total Phosphorus Load	lb/day	133	204	--
Footnotes:				
(1) See Definition section at end of permit for explanation of terms.				
(2) This limit applies during the period April 1 through October 31.				
(3) This limit applies during the period November 1 through March 31.				
(4) Calculated as the sum of Total Kjeldahl Nitrogen (TKN) and nitrate plus nitrite as N concentrations.				

pH: Effluent pH from Outfall 001 shall remain between 6.5 and 9.0 standard units (instantaneous minimum and instantaneous maximum). For compliance purposes, any single analysis or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

85 Percent (%) Removal Requirement for BOD₅: The arithmetic mean of the BOD₅ for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on BOD₅.

85 Percent (%) Removal Requirement for TSS: The arithmetic mean of the TSS for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on TSS.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

There shall be no discharge which causes visible oil sheen in the receiving stream.

Final Limitations

Effective xx/xx/xxxx (60th month of permit cycle) and lasting through the term of the permit, the quality of effluent discharged by the facility shall, as a minimum, meet the limitations as set forth below:

Parameter	Units	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾	Maximum Daily Limitation ⁽¹⁾
BOD ₅	mg/L	30	45	--
	lb/day	1,351	2,027	--
TSS	mg/L	30	45	--
	lb/day	1,351	2,027	--
<i>E. coli</i> Bacteria, summer ⁽²⁾	cfu/100 mL	126	252	--
<i>E. coli</i> Bacteria, winter ⁽³⁾	cfu/100 mL	630	1,260	--
Oil and Grease	mg/L	--	--	< 10
Total Ammonia as N	mg/L	1.67	3.83	--
Total Nitrogen Load ⁽⁴⁾	lb/day	238	311	--
Total Phosphorus as P Load	lb/day	133	204	--
Copper, Total Recoverable	mg/L	0.009	--	0.013
Zinc, Total Recoverable	mg/L	0.11	--	0.11
Footnotes: (1) See Definition section at end of permit for explanation of terms. (2) This limit applies during the period April 1 through October 31. (3) This limit applies during the period November 1 through March 31. (4) Calculated from the sum of Nitrate + Nitrite as N and Total Kjeldahl Nitrogen (TKN) concentrations.				

pH: Effluent pH from Outfall 001 shall remain between 6.5 and 9.0 standard units (instantaneous minimum and instantaneous maximum). For compliance purposes, any single analysis or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

85 Percent (%) Removal Requirement for BOD₅: The arithmetic mean of the BOD₅ for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on BOD₅.

85 Percent (%) Removal Requirement for TSS: The arithmetic mean of the TSS for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on TSS.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

There shall be no discharge which causes visible oil sheen in the receiving stream.

C. Monitoring Requirements

As a minimum, upon the effective date of this permit through the term of the permit, the following constituents shall be monitored at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge. If no discharge occurs during the entire monitoring period, it shall be stated on the Discharge Monitoring Report (DMR) Form (EPA No. 3320-1) that no discharge or overflow occurred.

Samples shall be collected, preserved, and analyzed at the RRV in accordance with approved procedures listed in 40 CFR 136. The Required Reporting Value (RRV) is the detection level that must be achieved in reporting surface water monitoring or compliance data to the Department. The RRV is the Department's best determination of a level of analysis that can be achieved by the majority of the commercial, university, or governmental laboratories using EPA-approved methods or methods approved by the Department.

Influent flow is measured with a Parshall flume (primary device) and ultrasonic meter (secondary device). In order to be representative of the nature and volume of the flow being monitored, influent sample collection and flow monitoring must occur prior to equalization or any recycle flow returns. Effluent flow monitoring occurs post UV disinfection system at a Cipolletti weir and staff gauge with an ultrasonic meter secondary device. The permittee shall monitor the discharge from Outfall 001 at the last point of control following treatment (post UV system) prior to entering the effluent ditch.

Parameter	Unit	Sample Location	Sample Frequency	Sample Type ⁽¹⁾	RRV
Flow	mgd	Influent	Continuous	⁽²⁾	--
	mgd	Effluent	Continuous	⁽²⁾	--
BOD ₅	mg/L	Influent	5/Week	Composite	2
	mg/L	Effluent	5/Week	Composite	2
	lb/day	Effluent	1/Month	Calculated	--
	% Removal ⁽³⁾	Effluent	1/Month	Calculated	--
TSS	mg/L	Influent	5/Week	Composite	10
	mg/L	Effluent	5/Week	Composite	10
	lb/day	Effluent	1/Month	Calculated	--
	% Removal ⁽³⁾	Effluent	1/Month	Calculated	--
pH	s.u.	Effluent	Daily	Instantaneous	0.1
Temperature	°C	Effluent	Daily	Instantaneous	--
<i>E. coli</i> Bacteria ⁽⁴⁾	cfu/100 mL	Effluent	5/Week	Grab	1
Total Ammonia as N	mg/L	Effluent	1/Week	Composite	0.1
Nitrate + Nitrite as N	mg/L	Effluent	1/Week	Composite	0.05
Total Kjeldahl Nitrogen	mg/L	Effluent	1/Week	Composite	0.1
Total Nitrogen ⁽⁵⁾	mg/L	Effluent	1/Week	Calculated	--
	lb/day	Effluent	1/Month	Calculated	--
	tons/year	Effluent	1/Year	Calculated	--
Total Phosphorus as P	mg/L	Effluent	1/Week	Composite	--
	lb/day	Effluent	1/Month	Calculated	--
	tons/year	Effluent	1/Year	Calculated	--
Oil and Grease (visual)	presence	Effluent	1/Day	Visual	--
Oil and Grease ⁽⁶⁾	mg/L	Effluent	1/Month	Grab	1
Total Dissolved Solids	mg/L	Effluent	1/Quarter	Grab	10
Whole Effluent Toxicity, Chronic ⁽⁷⁾	% Effluent	Effluent	1/Quarter	Composite	--

Footnotes:

- (1) See Definition section at end of permit for explanation of terms.
- (2) Requires recording device or totalizer; permittee shall report maximum daily and average monthly flow on DMR.
- (3) Percent Removal shall be calculated using the monthly average values.
- (4) Report Geometric Mean if more than one sample is collected during the reporting period.
- (5) Calculated as the sum of Nitrate + Nitrite as N and Total Kjeldahl Nitrogen (TKN) concentrations.
- (6) Collect a sample and analyze using EPA Method 1664 Revision A: N-Hexane Extractable Material (HEM).
Sampling is only required on any day a visual sheen is observed on the secondary clarifiers.
- (7) Sampling is required starting the first full calendar quarter following the effective date of the permit.

Parameter	Units	Sample Frequency	Sample Type ⁽¹⁾	RRV/ML
Aluminum, Dissolved ⁽²⁾	mg/L	1/Quarter	Composite	0.030
Antimony, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.003
Arsenic, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.003
Cadmium, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.00008
Copper, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.001
Lead, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.0005
Zinc, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.010
Beryllium, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.001
Chromium, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.001
Mercury, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.00001
Nickel, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.010
Selenium, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.001
Silver, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.0005
Thallium, Total Recoverable ⁽²⁾	mg/L	1/Year	Composite	0.0002
Cyanide, Total ⁽³⁾	mg/L	1/Year	Grab	5
Phenols, Total ⁽³⁾	mg/L	1/Year	Grab	10
Total Hardness, as CaCO ₃ ⁽³⁾	mg/L	1/Quarter	Composite	10
Volatile Organic Pollutants ⁽⁴⁾	mg/L	1/Year	Composite	⁽⁵⁾
Semi-Volatile, Acid Compounds ⁽⁴⁾	mg/L	1/Year	Composite	⁽⁵⁾
Semi-Volatile, Base Neutral ⁽⁴⁾	mg/L	1/Year	Composite	⁽⁵⁾

Footnotes:

- (1) See Definition section at end of permit for explanation of terms.
- (2) Both influent and effluent shall be sampled. Metals shall be analyzed as total recoverable with the exception of dissolved aluminum; use EPA Method (Section) 4.1.4 [EPA 600/4-79-020, March 1983] or equivalent.
- (3) Effluent samples only.
- (4) Both influent and effluent shall be sampled in accordance with 40 CFR 122, Appendix D, Table II. Analysis results will not be submitted on a DMR; complete laboratory analysis reports shall be submitted with the applicable DMR for the reporting period.

Samples shall be collected in different calendar quarters each year so that at least one sample is collected in each calendar quarter over the term of the permit.

- (5) See approved method for minimum level of detection (ML).

1. Whole Effluent Toxicity Testing – Chronic Toxicity

Starting in the first calendar quarter following the effective date of the permit, the permittee shall, at least once each quarter conduct chronic static replacement toxicity tests on a composite sample of the effluent. Testing will employ two species per quarter and will consist of 5 effluent concentrations (100, 50, 25, 12.5, 6.25 percent effluent) and a control. The control shall consist of receiving water. Moderately hard laboratory reconstituted water may be used if the receiving stream is dewatered, or if the receiving water exhibits toxicity. Samples shall be collected on a two day progression; i.e., if the first quarterly sample is on a Monday, the second quarter sample shall be on a Wednesday, etc. Saturdays, Sundays and Holidays will be skipped in the progression.

The static toxicity tests shall be conducted in general accordance with the procedures set out in the latest revision of *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms*, EPA-821-R-02-013 and the “*Region VIII EPA NPDES Acute Test Conditions-Static Renewal Whole Effluent Toxicity*”. The permittee shall conduct a chronic 3-brood static renewal toxicity test using one crustacean (*Ceriodaphnia dubia*.) and a chronic 7-day static renewal toxicity test using fathead minnows (*Pimephales promelas*).

Chronic toxicity occurs when a statistically significant difference in either lethal or sub-lethal effects is observed between any concentration and the control for either species. For tests to be acceptable, control survival must be 80% or greater. At the end of the test, the average dry weight of surviving seven-day old fathead minnows in the controls must equal or exceed 0.25 mg. In *Ceriodaphnia dubia* controls, 60% or more of the surviving females must have produced their third brood in 7 ± 1 days, and the number of young per surviving female must be 15 or greater. If these acceptability criteria are not met, the test is considered invalid and shall be repeated until satisfactory results are achieved.

If toxicity occurs in a routine test, an additional test shall be conducted within 14 days of the date of the initial sample. Should toxicity occur in the second test (resample), testing shall occur once a month until further notified by the Department. In all cases, the results of all toxicity tests must be submitted to the Department in accordance with Part II of this permit.

The quarterly results from the laboratory shall be reported along with the Discharge Monitoring Report (DMR) form submitted for the end of the reporting calendar quarter (e.g., whole effluent results for the reporting quarter ending March 31 shall be reported with the March DMR postmarked by April 28th with the remaining quarterly reports submitted with the June, September, and December DMR's). The format for the laboratory report shall be consistent with the latest revision of Region VIII Guidance for Acute Whole Effluent Reporting, and shall include all chemical and physical data as specified.

If the results for four consecutive quarters of testing indicate no chronic toxicity, the permittee may request a reduction to quarterly chronic toxicity testing on only one species on an alternating basis. The Department may approve or deny the request based on the results and other available information without an additional public notice. If the request is approved, the test procedures are to be the same as specified above.

6. Toxicity Reduction Evaluation / Toxicity Identification Evaluation:

Should chronic toxicity be detected in the required resample, a TIE-TRE shall be undertaken by the permittee to establish the cause of the toxicity, locate the source(s) of the toxicity, and develop control or treatment for the toxicity. Failure to initiate or conduct an adequate TIE-TRE, or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan must be submitted to the Department within 45 days after confirmation of the continuance of effluent toxicity (resample).

2. Reporting Requirements

Load Calculations

In addition to reporting the concentration values, the monthly loads expressed in pounds per day (lb/day) must be calculated and reported for BOD₅, TSS, total phosphorus as P and total nitrogen. The monthly loads must be calculated using the average daily flow rate and daily average parameter concentration as shown in the following equations:

Load (lb/day)

$$\text{Parameter concentration (mg/L)} \times \text{Effluent Flow Rate (mgd)} \times (8.34)$$

Percent (%) Removal

The percent removal shall be calculated using the following formula:

$$\% \text{ Removal} = \frac{(\text{Influent Concentration}) - (\text{Effluent Concentration})}{(\text{Influent Concentration})} \times 100$$

Where:

Influent Concentration = Corresponding 30-day average influent concentration based on the analytical results of the reporting period.

Effluent Concentration = Corresponding 30-day average effluent concentration based on the analytical results of the reporting period.

Average Monthly Limit (AML)

The AML or 30-day average is the Arithmetic Average or mean (except for *E. coli* bacteria) of all of the Daily Discharge samples collected during a calendar month, as defined in Part V of the permit. If only one sample is collected then it is considered to be the 30-day average and reported on the DMR.

Average Weekly Limit (AWL)

The AWL or 7-day average is the Arithmetic Average or mean (except for *E. coli* bacteria) of all of the Daily Discharge samples collected during a calendar week, as defined in Part V of the permit. If only one sample is collected during the calendar week it is considered the 7-day average. The highest 7-day average of the monitoring period shall be reported on the 7-day average blank on the DMR. In cases where only one sample is collected during the entire monitoring period, that sample shall be reported as both the 30-day and 7-day averages.

D. Special Conditions

1. Sewage Sludge:

The use or disposal of sewage sludge must be in conformance with the Environmental Protection Agency (EPA) General Permit MTG650000 or an equivalent permit issued pursuant to 40 CFR 503. A notice of intent must be filed with the EPA and the Department in accordance with the timeframes and procedures identified in the applicable permit. All materials required by the General Permit to be submitted to the Department shall be signed in accordance with Part IV.G and sent to the address provided in Part II.D of this permit.

The permittee shall not dispose of sewage sludge such that any portion thereof enters any state water, including ground water. The permittee shall notify the Department in writing 45 days prior to any change in sludge management at the facility.

2. Starting the first full calendar year of the permit cycle (2012) and lasting for the duration of the Special Condition, an annual report shall be submitted to the Department with the December DMR (postmarked no later than January 28th). The reports shall describe the milestones accomplished and the steps planned for each year towards compliance with the final effluent limitations for total recoverable copper and total recoverable zinc.
3. During calendar years 2012 and 2013 the permittee shall conduct a study of dissolved oxygen concentrations in the effluent channel and the receiving water. The study shall be conducted between July 15 and September 15 each year. DO samples shall be collected weekly at three locations: In Prickly Pear Creek

upstream of the effluent channel, in Prickly Pear Creek downstream of the effluent channel, and within the effluent channel prior to discharge to and outside the influence of Prickly Pear Creek. Results shall be submitted in a written report. The report must document the location, date, and time of each analysis. All analyses must be conducted using 40 CFR 136 approved methods. The written report shall be submitted to the Water Protection Bureau, postmarked no later than December 31 following each study (2012 and 2013).

4. Facility Optimization Study for TN and TP – The permittee shall conduct a facility optimization study to improve treatment efficiency for TN and TP and submit a plan for achieving optimization by the expiration date of the permit. Effluent limits will be developed from the optimization study and will be applied in the next permit renewal. The permittee shall adhere to the following schedule with respect to optimization:
 - a. The facility optimization study shall be completed and submitted to the Department postmarked no later than July 1, 2012. The study must identify the long term average (LTA) concentrations of TN and TP achievable by the facility in its present configuration. Effluent load limits for TN and TP will be developed based on these LTA and the design flow of the facility following the method use to develop the IWLA in this permit. The smaller of either the optimization-based load limits or the IWLA in this permit will be incorporated into the next permit renewal as effluent limits for TN and TP.
 - b. No later than July 1, 2013, the permittee must submit a plan for implementing the optimization study and achieving the effluent concentrations and load limits described above. The plan must include achievement of these effluent limits no later than the expiration date of this permit.
 - c. At the end of each calendar year following the submission of the above plan, the permittee shall submit an annual report describing progress made towards implementation of the optimization study and compliance with the effluent limits described above. Progress reports for the previous year shall be submitted and postmarked no later than January 28th.
5. Irrigation of the WWTF Campus – Upon Department review and approval of plans and specifications, the permittee may commence irrigation of the facility grounds with treated effluent. This authorization applies to the facility grounds only as stated in the Fact Sheet. Upon Department approval of plans and specifications the permittee must submit a letter to the Water Protection Bureau indicating the planned date for commencement of irrigation and the anticipated volume of treated effluent that will be used for this purpose. The letter must be submitted prior to the use of effluent for irrigation, and no later than December 31, 2011.

E. Industrial Pretreatment Program - Contributing Industries and Pretreatment Requirements

- a. The Permittee shall operate an industrial pretreatment program in accordance with the following permit requirements developed pursuant to Section 402(b)(8) of the Clean Water Act, the General Pretreatment Regulations (40 CFR Part 403) and the approved pretreatment program submitted by the Permittee. The pretreatment program was approved on July 24, 1986 and has subsequently incorporated substantial modifications as approved by the Approval Authority. The approved pretreatment program, and any approved modifications thereto, is hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:
 - i. Industrial user information shall be updated at a minimum of once per year or at that frequency necessary to ensure that all Industrial Users are properly permitted and/or controlled. The records shall be maintained and updated as necessary;
 - ii. The Permittee shall sample and inspect each Significant Industrial User (SIU) at least once per calendar year (40 CFR Section 403.8(f)(2)(v)). This is in addition to any industrial self-monitoring activities. If the Permittee performs sampling for any SIU, then the Permittee shall perform any repeat sampling and analysis within 30 days of becoming aware of the violation (40 CFR Section 403.12(g)(2);
 - iii. The Permittee shall evaluate whether each SIU needs a plan to control Slug Discharges. SIUs must be evaluated within 1 year of being designated an SIU. Where needed, the Permittee shall require the SIU to prepare or update, and then implement the plan. Where a slug prevention plan is required, the Permittee shall ensure that the plan contains at least the minimum elements required in 40 CFR Section 403.8(f)(2)(vi). If required, the Permittee shall incorporate slug control requirements into the control mechanism for the SIU. (40 CFR, Section 403.8(f)(1)(iii)(B)(6)).;
 - iv. The Permittee shall investigate instances of non-compliance with Pretreatment Standards and requirements indicated in reports and notices required under 40 CFR Section 403.12, or indicated by analysis, inspection, and surveillance activities.
 - v. The Permittee shall enforce all applicable Pretreatment Standards and requirements and obtain remedies for noncompliance by any industrial user;
 - vi. The Permittee shall control, through the legal authority in the approved pretreatment program, the contribution to the Publicly Owned Treatment Works (POTW) by each industrial user to ensure compliance with applicable Pretreatment Standards and requirements. In the case of industrial users identified as significant under 40 CFR Section 403.3(v), this control shall be achieved through permit, order, or similar means and shall contain, at a minimum, the following conditions:
 - (A) Statement of duration (in no case more than five (5) years);

- (B) Statement of non-transferability without, at a minimum, prior notification to the Permittee and provision of a copy of the existing control mechanism to the new owner or operator;
 - (C) Effluent limits, including Best Management Practices, based on applicable Pretreatment Standards, Categorical Pretreatment Standards, local limits, and State and local law;
 - (D) Self-monitoring, sampling, reporting, notification and record keeping requirements, including an identification of the pollutants to be monitored, sampling location, sampling frequency, and sample type, including documentation on BMP compliance, based on the applicable Pretreatment Standards in 40 CFR Part 403, Categorical Pretreatment Standards, local limits, and State and local law; and,
 - (E) Statement of applicable civil and criminal penalties for violation of Pretreatment Standards and requirements, and any applicable compliance schedule. Such schedules may not extend the compliance date beyond deadlines mandated by federal statute or regulation.
 - (F) Requirements to control Slug Discharges, if determined by the POTW to be necessary.
- vii. The Permittee shall provide adequate staff, equipment, and support capabilities to carry out all elements of the pretreatment program as required by 40 CFR Section 403.8(f)(3);
 - viii. The approved program shall not be substantially modified by the Permittee without the approval of the EPA. Substantial and non-substantial modifications shall follow the procedures outlined in 40 CFR Section 403.18;
 - ix. The Permittee shall develop, implement, and maintain an enforcement response plan as required by 40 CFR Section 403.8(f)(5); and
 - x. The Permittee shall notify all Industrial Users of the users' obligations to comply with applicable requirements under Subtitles C and D of the Resource Conservation and Recovery Act (RCRA) as required by 40 CFR Section 403.8(f)(2)(iii).
- b. The Permittee shall establish and enforce specific local limits to implement the provisions of 40 CFR Section 403.5(a) and (b), as required by 40 CFR Section 403.5(c). The Permittee shall continue to develop these limits as necessary and effectively enforce such limits.

In accordance with EPA policy and with the requirements of 40 CFR sections 403.8(f)(4) and 403.5(c), the Permittee shall determine if technically based local limits are necessary to implement the general and specific prohibitions of 40 CFR sections 403.5(a) and (b).

This evaluation should be conducted in accordance with the latest revision of the "EPA Region VIII Strategy for Developing Technically Based Local Limits", and after review of EPA's "Local Limits Development Guidance" July 2004. Where the Permittee determines that revised or new local limits are necessary, the Permittee shall submit the proposed local limits to the Approval Authority in an approvable form in accordance with 40 CFR Section 403.18.

- c. The Permittee shall analyze the treatment facility influent and effluent for the presence of the toxic pollutants listed in 40 CFR Part 122 Appendix D (NPDES Application Testing Requirements) Table II at least once per year and the toxic pollutants in Table III at least four times per year. If, based upon information available to the Permittee, there is reason to suspect the presence of any toxic or hazardous pollutant listed in Table V, or any other pollutant in a quantity or concentration known or suspected to adversely affect POTW operation, receiving water quality, or solids disposal procedures, analysis for those pollutants shall be performed at least four times per year on both the influent and the effluent.
 - i. Along with the Permittee's pretreatment annual report, the Permittee will submit a list of compounds included in Table V that are suspected or known to be present in its influent wastewater. This determination shall be based on a review of the Permittee's pretreatment program records. The state permitting authority and/or Approval Authority may review and comment on the list and the list may be revised if, in the opinion of the state permitting authority and/or Approval Authority, the list is incomplete. The Permittee will perform analysis four times per year on the influent for the revised list of compounds for which there are acceptable testing procedures.
 - ii. Where the pollutants monitored in accordance with this section are reported as being above the method detection limit, the results for these pollutants shall be reported in the Permittee's pretreatment annual report, if required by EPA.
- d. The Permittee shall analyze the treatment facility sludge (biosolids) prior to disposal, for the presence of toxic pollutants listed in 40 CFR 122 Appendix D (NPDES Application Testing Requirements) Table III at least once per year. If the Permittee does not dispose of biosolids during the calendar year, the Permittee shall certify to that in the Pretreatment Annual Report and the monitoring requirements in this paragraph shall be suspended for that calendar year.
 - i. The Permittee shall review the pollutants in 40 CFR Part 122, Appendix D, tables II and V. If any of the pollutants in these tables were above detection in the influent samples during the previous 2 years or the last two analyses, whichever is greater, the Permittee shall sample and analyze its sewage sludge for these pollutants. The Permittee shall perform this evaluation and analysis at least once per year.
 - ii. The Permittee shall use sample collection and analysis procedures as approved for use under 40 CFR Part 503 or specified in the EPA Region 8 General Permit for biosolids.

- iii. The Permittee shall report the results for these pollutants in the Permittee's pretreatment annual report, if required by EPA.
- e. All analyses shall be in accordance with test procedures established in 40 CFR Part 136. Where sampling methods are not specified, the influent and effluent samples collected shall be composite samples consisting of at least twelve (12) aliquots collected at approximately equal intervals over a representative 24-hour period and composited according to flow. Where automated composite sampling is inappropriate, at least four (4) grab samples shall be manually taken at equal intervals over a representative 24-hour period, and composited prior to analysis using approved methods; alternatively, the individual grab samples may be analyzed separately and the results from the respective grab samples mathematically combined based on flow (i.e., flow weighted) for the final result.
- f. The Permittee shall prepare annually a list of industrial users, which during the preceding twelve (12) months have significantly violated Pretreatment Standards or requirements. This list is to be published annually in a newspaper of general circulation in the Permittee's service area as required by 40 CFR Section 403.8(f)(2)(viii).

In addition, on or before March 28, the Permittee shall submit a pretreatment program annual report to the Approval Authority and the state permitting authority that contains the information requested by EPA, or at a minimum the following information:

- i. An updated list of all SIUs as defined at 40 CFR 403.3(v). For each SIU listed the following information shall be included:
 - (A) All applicable Standard Industrial Classification (SIC) codes and categorical determinations, as appropriate. In addition, a brief description of the industry and general activities;
 - (B) Permit status. Whether each SIU has an unexpired control mechanism and an explanation as to why any SIUs are operating without a current, unexpired control mechanism (e.g. permit);
 - (C) A summary of all monitoring activities performed within the previous twelve (12) months. The following information shall be reported:
 - Total number of SIUs inspected; and
 - Total number of SIUs sampled.
- ii. For all industrial users that were in Significant Non-Compliance during the previous twelve (12) months, provide the name of the violating industrial user; indicate the nature of the violations, the type and number of actions taken (administrative order, criminal or civil suit, fines or penalties collected, etc.) and current compliance status. Indicate if the company returned to compliance and the date compliance was attained. Determination of Significant Non-Compliance shall be performed as defined at 40

CFR Section 403.8(f)(2)(viii)(A-H).

- iii. A summary of all enforcement actions not covered by the paragraph above conducted in accordance with the approved Enforcement Response Plan, as required in 40 CFR, Section 403.8(f)(5).
 - iv. A list of all SIUs whose authorization to discharge was terminated or revoked during the preceding twelve (12) month period and the reason for termination;
 - v. A report on any Interference, Pass Through, upset or NPDES permit violations known or suspected to be caused by non-domestic discharges of pollutant and actions taken by the Permittee in response;
 - vi. Verification of publication of industrial users in Significant Non-Compliance;
 - vii. Identification of the specific locations, if any, designated by the Permittee for receipt (discharge) of trucked or hauled waste, if modified;
 - viii. Information as required by the Approval Authority or state permitting authority on the discharge to the POTW from the following activities:
 - (A) Ground water clean-up from underground storage tanks;
 - (B) Trucked or hauled waste; and,
 - (C) Groundwater clean-up from RCRA or Superfund sites.
 - ix. A description of all changes made during the previous calendar year to the Permittee's pretreatment program that were not submitted as substantial or non substantial modifications to EPA.
 - x. The Permittee shall evaluate actual pollutants loadings against the approved Maximum Allowable Headworks Loadings (MAHLs). Where the actual loading exceeds the MAHL, the Permittee shall immediately begin a program to either revise the existing local limit and/or undertake such other studies as necessary to evaluate the cause(s) of the exceedence. The Permittee shall provide a summary of its intended action.
 - xi. Other information that may be deemed necessary by the Approval Authority.
- g. The Permittee shall prohibit the introduction of the following pollutants into the POTW:
- i. Pollutants which create a fire or explosion hazard in the publicly owned treatment works (POTW), including, but not limited to, wastestreams with a closed cup flashpoint of less than sixty (60) degrees Centigrade (140 degrees Fahrenheit) using the test methods specified in 40 CFR Section 261.21;
 - ii. Pollutants which will cause corrosive structural damage to the POTW, but in no case discharges with pH lower than 5.0, unless the works are specifically designed to

accommodate such discharges;

- iii. Solid or viscous pollutants in amounts which will cause obstruction to the flow in the POTW, or other interference with the operation of the POTW;
 - iv. Any pollutant, including oxygen demanding pollutants (e.g., BOD), released in a discharge at a flow rate and/or pollutant concentration which will cause Interference with the POTW;
 - v. Heat in amounts which will inhibit biological activity in the POTW resulting in Interference but in no case heat in such quantities that the temperature at the POTW treatment plant exceeds forty (40) degrees Centigrade (104 degrees Fahrenheit) unless the Approval Authority, upon request of the POTW, approves alternate temperature limits;
 - vi. Petroleum oil, non-biodegradable cutting oil, or products of mineral oil origin in amounts that will cause Interference or Pass Through;
 - vii. Pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems;
 - viii. Any trucked or hauled pollutants, except at discharge points designated by the POTW; and,
 - ix. Any specific pollutant that exceeds a local limitation established by the POTW in accordance with the requirements of 40 CFR Section 403.5(c) and (d).
 - x. Any other pollutant which may cause Pass Through or Interference.
- h. The Permittee shall provide the pretreatment Approval Authority with adequate notice of any substantial change in the volume or character of pollutants being introduced into the treatment works by any SIU introducing pollutants into the treatment works at the time of application for the discharge permit. For the purposes of this section, "substantial change" shall mean a level of change which has a reasonable probability of affecting the Permittee's ability to comply with its permit conditions or to cause a violation of stream standards applied to the receiving water.
- Adequate notice shall include information on: (1) the quality and quantity of effluent to be introduced into the treatment works, and (2) any anticipated impact of the change on the quality or quantity of effluent to be discharged from the publicly owned treatment works.
- i. Section 309(f) of the Act provides that EPA may issue a notice to the POTW stating that a determination has been made that appropriate enforcement action must be taken against an industrial user for noncompliance with any Pretreatment Standards and requirements. The notice provides the POTW with thirty (30) days to commence such action. The issuance of such permit notice shall not be construed to limit the authority of the permit

issuing authority or Approval Authority.

- j. The state permitting authority and/or the EPA retains, at all times, the right to take legal action against the industrial contributor for violations of a permit issued by the Permittee, violations of any Pretreatment Standard or requirement, or for failure to discharge at an acceptable level under national standards issued by EPA under 40 CFR, chapter I, subchapter N. In those cases where a NPDES permit violation has occurred because of the failure of the Permittee to properly develop and enforce Pretreatment Standards and requirements as necessary to protect the POTW, the state permitting authority and/or Approval Authority shall hold the Permittee responsible and may take legal action against the Permittee as well as the Indirect Discharger(s) contributing to the permit violation.

II. MONITORING, RECORDING AND REPORTING REQUIREMENTS

A. Representative Sampling

Samples taken in compliance with the monitoring requirements established under Part I shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge. Sludge samples shall be collected at a location representative of the quality of sludge immediately prior to use-disposal practice.

B. Monitoring Procedures

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

C. Penalties for Tampering

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

D. Reporting of Monitoring Results

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

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

E. Compliance Schedules

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

F. Additional Monitoring by the Permittee

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

G. Records Contents

Records of monitoring information shall include:

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

H. Retention of Records

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

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any serious incident of noncompliance affecting the environment as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-3080 or the Office of Disaster and Emergency Services at (406) 841-3911. The following examples are considered serious incidents:

- a. Any noncompliance which may seriously endanger health or the environment;
 - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities"); or
 - c. Any upset which exceeds any effluent limitation in the permit (See Part III.H of this permit, "Upset Conditions").
2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
 - a. A description of the noncompliance and its cause;
 - b. The period of noncompliance, including exact dates and times;
 - c. The estimated time noncompliance is expected to continue if it has not been corrected; and
 - d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
 3. The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, (406) 444-3080.
 4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results".

J. Other Noncompliance Reporting

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

K. Inspection and Entry

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

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.

III. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply

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

B. Penalties for Violations of Permit Conditions

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

C. Need to Halt or Reduce Activity not a Defense

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

D. Duty to Mitigate

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

E. Proper Operation and Maintenance

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

F. Removed Substances

1. Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard. Sludge shall not be directly blended with or enter either the final plant discharge and/or waters of the United States.
2. Any sludges removed from the facility shall be disposed of in accordance with 40 CFR 503, 258 or other applicable rule. EPA and MDEQ shall be notified at least 180 days prior to such disposal taking place.
3. The permittee shall provide certification that all applicable provisions of 40 CFR Parts 503 and 258 have been met for the land application or landfill disposal of sewage sludge. Certification shall be submitted annually with the sludge reporting form and must contain the following statement:

“I certify under penalty of law, that all of the applicable provisions of 40 CFR Part (503/258) have been met when municipal sewage sludge is (beneficially used/disposed of at a landfill). This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that 40 CFR Part (503/258) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.”

G. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Parts III.G.2 and III.G.3 of this permit.
2. Notice:
 - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of the bypass.
 - b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, “Twenty-four Hour Reporting”.

3. Prohibition of bypass:

- a. Bypass is prohibited and the Department may take enforcement action against a permittee for a bypass, unless:
 - (1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - (2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
 - (3) The permittee submitted notices as required under Part III.G.2 of this permit.
- b. The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

H. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of Part III.H.2 of this permit are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations).
2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
 - a. An upset occurred and that the permittee can identify the cause(s) of the upset;
 - b. The permitted facility was at the time being properly operated;
 - c. The permittee submitted notice of the upset as required under Part II.I of this permit, "Twenty-four Hour Notice of Noncompliance Reporting"; and

- d. The permittee complied with any remedial measures required under Part III.D of this permit, "Duty to Mitigate".
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

IV. GENERAL REQUIREMENTS

A. Planned Changes

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

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

B. Anticipated Noncompliance

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

C. Permit Actions

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

D. Duty to Reapply

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

E. Duty to Provide Information

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

F. Other Information

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

G. Signatory Requirements

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

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

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

H. Penalties for Falsification of Reports

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document

submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

I. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Department. As required by the Clean Water Act, permit applications, permits and effluent data shall not be considered confidential.

J. Oil and Hazardous Substance Liability

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

K. Property or Water Rights

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

L. Severability

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

M. Transfers

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

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

N. Fees

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

1. Impose an additional assessment consisting of 20% of the fee plus interest on the required fee computed at the rate of 12% per year, or
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. The Department may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under this sub-section. Suspensions are limited to one year, after which the permit will be terminated.

O. Reopener Provisions

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

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Water Quality Standards are Exceeded: If it is found that water quality standards or trigger values in the receiving stream are exceeded either for parameters included in the permit or others, the department may modify the effluent limits or water management plan.
3. TMDL or Wasteload Allocation: TMDL requirements or a wasteload allocation is developed and approved by the Department and/or EPA for incorporation in this permit.
4. Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
5. Sewage Sludge: There have been substantial changes (or such changes are planned) in sludge use or disposal practices; applicable management practices or numerical limitations for pollutants in sludge have been promulgated which are more stringent than the requirements in this permit; and/or it has been determined that the permittee's sludge use or disposal practices do not comply with existing applicable state or federal regulations.

V. DEFINITIONS

1. **"Act"** means the Montana Water Quality Act, Title 75, chapter 5, MCA.
2. **"Administrator"** means the administrator of the United States Environmental Protection Agency.
3. **"Acute Toxicity"** occurs when 50 percent or more mortality is observed for either species (See Part I.C of this permit) at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.
4. **"Annual Average Load"** means the arithmetic mean of all 30-day or monthly average loads reported during the calendar year for a monitored parameter.
5. **"Arithmetic Mean" or "Arithmetic Average"** for any set of related values means the summation of the individual values divided by the number of individual values.
6. **"Average Monthly Limitation"** means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.
7. **"Average Weekly Limitation"** means the highest allowable average of daily discharges over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.
8. **"BOD₅"** means the five-day measure of pollutant parameter biochemical oxygen demand.
9. **"Bypass"** means the intentional diversion of waste streams from any portion of a treatment facility.
10. **"CBOD₅"** means the five-day measure of pollutant parameter carbonaceous biochemical oxygen demand.
11. **"Composite Samples"** shall be flow proportioned. The composite sample shall, as a minimum, contain at least four (4) samples collected over the compositing period. Unless otherwise specified, the time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours. Acceptable methods for preparation of composite samples are as follows:
 - a. Constant time interval between samples, sample volume proportional to flow rate at time of sampling;

- b. Constant time interval between samples, sample volume proportional to total flow (volume) since last sample. For the first sample, the flow rate at the time the sample was collected may be used;
 - c. Constant sample volume, time interval between samples proportional to flow (i.e. sample taken every "X" gallons of flow); and,
 - d. Continuous collection of sample, with sample collection rate proportional to flow rate.
12. **"Daily Discharge"** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
13. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. Expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day. Expressed as a concentration, it is the arithmetic average of all measurements taken that day.
14. **"Department"** means the Montana Department of Environmental Quality (MDEQ) established by 2-15-3501, MCA.
15. **"Director"** means the Director of the Montana Department of Environmental Quality.
16. **"EPA"** means the United States Environmental Protection Agency.
17. **"Federal Clean Water Act"** means the federal legislation at 33 USC 1251, *et seq.*
18. **"Geometric Mean"** means the value obtained by taking the N^{th} root of the product of the measured values.
19. **"Grab Sample"** means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.
20. **"Indirect Discharge"** means the introduction of pollutants into a POTW from any non-domestic source regulated under Section 307(b), (c) or (d) of the Federal Clean Water Act.
21. **"Industrial User"** means a source of Indirect Discharge.

22. **"Instantaneous Maximum Limit"** means the maximum allowable concentration of a pollutant determined from the analysis of any discrete or composite sample collected, independent of the flow rate and the duration of the sampling event.
23. **"Instantaneous Measurement"**, for monitoring requirements, means a single reading, observation, or measurement.
24. **"Interference"** means a discharge which, alone or in conjunction with other contributing discharges
 - a. Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and
 - b. Therefore causes a violation of any requirement of the POTW's MPDES permit (including an increase in the magnitude or duration of a violation) or causes the prevention of sewage sludge use or disposal in compliance with the following statutes and regulations: Section 405 of the Clean Water Act; 40 CFR Part 503 - Standards for the Use and Disposal of Sewage Sludge; Resource Conservation and Recovery Act (RCRA); 40 CFR Part 258 - Criteria for Municipal Solid Waste Landfills; and/or any State regulations regarding the disposal of sewage sludge.
24. **"Maximum Daily Discharge Limitation"** means the highest allowable daily discharge.
25. **"Mixing Zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.
26. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.
27. **"Pass Through"** means a discharge which exits the POTW into waters of the State of Montana in quantities or concentrations which, alone or in conjunction with other discharges, is a cause of a violation of any requirement of the POTW's MPDES permit (including an increase in the magnitude or duration of a violation).
28. **"POTW"** means a publicly owned treatment works.
29. **"Regional Administrator"** means the administrator of Region VIII of EPA, which has jurisdiction over federal water pollution control activities in the state of Montana.

30. **"Severe Property Damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
31. **"Sewage Sludge"** means any solid, semi-solid or liquid residue generated during the treatment of domestic sewage and/or a combination of domestic sewage and industrial waste of a liquid nature in a treatment works. Sewage sludge includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated during the incineration of sewage sludge or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.
32. **"TIE"** means a toxicity identification evaluation.
33. **"TMDL"** means the total maximum daily load limitation of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.
34. **"TRE"** means a toxicity reduction evaluation.
35. **"TSS"** means the pollutant parameter total suspended solids.
36. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

**DEPARTMENT OF ENVIRONMENTAL QUALITY
PERMITTING and COMPLIANCE DIVISION
MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM
(MPDES)**

Fact Sheet

PERMITTEE: City of Helena

PERMIT NUMBER: MT0022641

RECEIVING WATER: Prickly Pear Creek via City of Helena Effluent Ditch

FACILITY INFORMATION:

Name: City of Helena Wastewater Treatment Plant

Location: 2108 Custer Avenue East
Helena, MT 59601

Contact: Don Clark, Water and Wastewater Superintendent
2108 Custer Avenue East
Helena, MT 59601
(406) 457-8556

FEE INFORMATION:

Number of Outfalls: 1 (for fee determination purposes)

Type of Outfall: 001 – Major, Publicly-Owned Treatment Works (POTW),
5.4 million gallon per day (mgd) activated sludge
mechanical treatment plant with UV disinfection and
continuous discharge to surface water.

I. Permit Status

The current Montana Pollutant Discharge Elimination System (MPDES) permit for the City of Helena Wastewater Treatment Plant (WWTP) was issued December 11, 1996 and became effective on January 1, 1997. It expired at midnight, October 31, 2001. It was modified February, 7, 1997; July 1999; March 28, 2000; and February 28, 2001. On March 12, 2001, the permittee submitted an application and the associated fees for the renewal of the MPDES permit using MT Short Form 2A. In accordance with ARM 17.30.1313, the permit was administratively extended at that time.

At the request of the Department of Environmental Quality (Department), the permittee submitted application form EPA-2A with updated information regarding the WWTP signed and dated October 22, 2002. A second updated application package including forms DEQ-1 and EPA 2A was submitted February 9, 2009, again at the Department's request.

The permittee submitted an application package and the fees associated with a request for a new outfall discharging to a new receiving water signed and dated February 16, 2010. An application deficiency letter from the Department was sent to the permittee March 23, 2010. On April 12, 2010, following a meeting with the permittee, their consultants, and the Department, it was determined that:

- this permit renewal would not include a new outfall;
- the Department and permittee would work together to obtain the information needed to permit a new outfall to a new receiving water; and
- the permittee can apply for a major modification of permit during the next permit cycle to include Outfall 002, towards which the fees received March 5, 2010 (applicable to permitting a new outfall) will be applied.

II. Facility Information

A. Facility Description

The Helena WWTP serves the residents and businesses of the City of Helena (City) and annexed areas of Lewis and Clark County, with service to an estimated population of 30,000 (2010 renewal application for EPA 2A). The 1976-built WWTP [design flow 6 million gallons per day (mgd),] most recently underwent upgrades in 1999-2000 [Operations and Maintenance (O&M) Manual, Morrison-Maierle, Inc. (MMI) December 2000] to install biological nutrient removal and ultra-violet light (UV) disinfection capabilities.

The current WWTP is an activated sludge, biological nutrient removal treatment plant with two-stage anaerobic sludge digestion. Design average flow is 5.4 million gallons per day (mgd), peak daily flow is 7.3 mgd, and peak hourly flow is 22.0 mgd. Decreased inflow and infiltration (I/I) due to reduction efforts on the part of the City have resulted in lowered flows to the POTW while service population increased. Minimum detention time is approximately 20 hours (based on volumes available in the WWTP Operation and Maintenance Manual, December 2000). Continuous discharge is to the City of Helena ditch constructed solely for the transport of treated effluent to Prickly Pear Creek via Outfall 001. The effluent is disinfected seasonally (April through October) using UV.

Influent flow is measured with a Parshall flume (primary device) and ultrasonic meter (secondary device). Effluent flow monitoring occurs post UV disinfection system at a Cipolletti weir and staff gauge with an ultrasonic meter secondary device. Table 1 is a summary of the Helena WWTP design criteria from the Morrison-Maierle, Inc. 2000 Operation and Maintenance Manual.

Table 1. Current Design Criteria Summary – Helena WWTP

Facility Description: Continuous discharge, biological nutrient removal, activated sludge treatment system with UV disinfection and anaerobic sludge digestion.	
Construction Date: 1976, major upgrades in 2000	Modification Date: 2000
Design Year: 2020	
Design Population: 37,000	Population Served: ~30,000
Design Flow, Average Daily (mgd): 1976 - 6.0 2000 - 5.4	Design Flow, Peak Daily (mgd): 1976 – 7.1, 2000 – 7.3
Minimum Detention Time (BNR Sludge System): approximately 20 hours	
Design Biochemical Oxygen Demand Removal (%): 95	Design BOD ₅ Load (lb/day): 9,300
Design Total Suspended Solids Removal (%): 95	Design TSS Load (lb/day): 11,900
Design Total Ammonia Removal (%): 90	Design Ammonia Load (lb/day): 950
Collection System: Combined [] Separate [X]	
SSO Events: none reported	Number: NA
Bypass Events: none reported	Number: NA
Inflow and Infiltration Contribution (mgd): 0.120	Source: storm events, surface infiltration through manholes, old sewer mains
Disinfection: Yes	Type: UV
Discharge Method: Continuous	
Effluent Flow Primary Device: Cipolletti weir	
Effluent Secondary Flow Device: ultrasonic flow meter	
Sludge Storage: anaerobic digester	
Sludge Disposal: composting and land application	EPA Authorization Number: MTG650005

The collections system consists of approximately 174 miles of gravity sewers with only four miles of force main. It serves the population of the City of Helena and areas of Lewis and Clark County (30,000 people) with approximately 9,575 residential (92%) and commercial (8%) connections covering an area of over 9,600 acres. Fifty percent of the collection system is between 50 and 75 years old; 30 percent is between 25 and 50 years old, and the remainder is less than 20 years old. There are currently five lift stations with plans to upgrade one existing lift station and to add a sixth. Inflow and Infiltration (I/I) are estimated to be 120,000 mgd primarily due to storm events and surface infiltration through manholes and old sewer mains (Utility Superintendent, personal communication, April 2010).

The permittee maintains authorization MTG650005 under the United States Environmental Protection Agency (EPA) Region VIII Permit Number MTG650000, General Permit for Facilities/Operations that Generate, Treat, and/or Use/Dispose of Sewage Sludge by Means of Land Application, Landfill, and Surface Disposal Under the National Pollutant Discharge Elimination System. Biosolids are sent to a local composting facility and are land applied.

The Industrial Pretreatment Program was approved by Region 8 of the US Environmental Protection Agency (EPA) on July 24, 1986. The City currently has permitted two Industrial Users (IU) and one Categorical Industrial User (CIU) [(2009 Industrial Pretreatment Program (IPP) Annual Report], as follows:

- the IU Montana Rail Link rail yard [Standard Industrial Classification (SIC) code 4011] is permitted for the batch discharge of approximately 280 gallons per day (gpd) of collected and treated (oil/water separation) run-off water with IPP permit limits for benzene and benzene, toluene, ethylbenzene and xylene (BTEX);
- the IU Jolly O's (SIC code 5541) intermittent discharge of approximately 5,230 gpd from the groundwater gas extraction wells following air stripping treatment with IPP permit limits for benzene and BTEX. The business Jolly O's has been shut down since December 2009 and they have not requested the permit to be terminated; and
- the CIU Decorative Industrial Plating (North American Industrial Classification System code 332812) subject to the new source performance standards in the federal Effluent Limitation Guidelines (ELG) metal finishing subcategory [40 Code of Federal Regulations (CFR) Chapter I, Subchapter N, Part 433.17(a)]. IPP permit limits have been established by the City for total recoverable metals (including arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, and zinc) and total cyanide. Monitoring for total toxic organics as defined in Part 433.11(e) is required by the IPP.

On June 25, 2009, the City was issued a Findings of Violation and Order for Compliance, CWA-08-2009-0052 (AOC) by the EPA regarding the City's IPP in response to the introduction of elevated levels of hexavalent chromium to the POTW and the subsequent violation of the MPDES permit for total ammonia as N in the effluent. As of April 2010, the City has complied with all action items associated with the AOC (personal communication EPA MT Office, March 2010).

B. Effluent Characteristics

Effluent data from the facility Discharge Monitoring Reports (DMR) for the Period of Record (POR) January 2005 through December 2009 are summarized in Table 2. Elevated concentration values known to be due to an upset condition at the POTW that affected the biological nutrient removal process for nitrogen were not used in this analysis.

Table 2. DMR Effluent Characteristics for POR January 2005 through December 2009.

Parameter	Location	Units	Previous Permit Limit	Minimum Value	Maximum Value	Average Value	Number of Samples
Flow, Daily Average	Effluent	mgd	(1)	2.47	4.98	2.72	60
Biochemical Oxygen Demand (BOD ₅)	Influent	mg/L	(1)	231	369	288	60
	Effluent	mg/L	45/30 ⁽²⁾	4.2	18.2	8.3	60
	Effluent	% removal	85	92.8	98.2	97.1	60
	Effluent	lb/day	1,404 ⁽³⁾	103	389	189	60
Total Suspended Solids (TSS)	Influent	mg/L	(1)	224	347	270	60
	Effluent	mg/L	45/30	2.0	11.3	5.5	60
	Effluent	% removal	85	95.2	99.2	97.9	60
	Effluent	lb/day	1,501 ⁽³⁾	104	241	125	60
Fecal Coliform Bacteria ⁽⁴⁾ , 30-day median value	Effluent	Number per 100 mL	varied based on month	4	83	15	25
pH, median value	Effluent	s.u.	6.0-9.0	6.0	8.1	6.8	60
Temperature	Effluent	°C	--	--	--	--	0
Total Residual Chlorine	Effluent	mg/L	2.0	--	--	--	0
Total Ammonia as N minus upset data	Effluent	mg/L	varied based on month	<0.10	3.62	0.77	59
TKN minus upset data	Effluent	mg/L	(1)	0.57	11.2	3.31	58
Nitrate + Nitrite as N minus upset data	Effluent	mg/L	(1)	2.8	6.92	4.61	58
Total Nitrogen (TN) ⁽⁵⁾ minus upset data	Effluent	mg/L	(1)	4.0	15.1	8.1	58
		lb/day	(1)	104	349	180	58
Total Phosphorus as P (TP)	Effluent	mg/L	(1)	0.27	7.73	3.83	60
		lb/day	(1)	6.01	181.8	86.8	60
Aluminum, Dissolved	Effluent	mg/L	(1)	ND	ND	ND	0
Antimony, Total Recoverable	Effluent	mg/L	(1)	<0.100	0.005	<0.0032	9
Arsenic, Total Recoverable	Effluent	mg/L	(1)	<0.001	0.005	0.0045	20
Cadmium, Total Recoverable	Effluent	mg/L	(1)	<0.0005	0.001	<0.001	20
Copper, Total Recoverable	Effluent	mg/L	(1)	<0.001	0.070	0.019	20
Lead, Total Recoverable	Effluent	mg/L	(1)	<0.001	0.010	<0.0082	20
Zinc, Total Recoverable	Effluent	mg/L	(1)	<0.035	0.200	<0.100	20
Whole Effluent Toxicity, chronic	Effluent	Pass/Fail	(1)	--	--	Pass	17

Footnotes: ND means "no data"

- (1) No effluent limitation in previous permit, monitoring requirement only.
- (2) Average Weekly/Average Monthly Values.
- (3) Nondegradation load value. BOD₅ and TSS loads were based on removal efficiency (percent).
- (4) Sample period is April 1 through October 31.
- (5) TN is calculated as the sum of Nitrate + Nitrite as N and Total Kjeldahl Nitrogen (TKN) concentrations.

C. Compliance History

Review of the DMRs shows that the permittee violated the monthly effluent limitation for total ammonia as N in November of 2008 at 10.48 mg/L while the limitation was 3.03 mg/L as a 30-day average. The loss of ammonia removal was first noted by plant personnel October 21, 2008 (self-reported) and lasted until the re-establishment of full treatment around November 25, 2008 after aggressive trouble-shooting efforts by the permittee. This loss of treatment was at first attributed to the presence of dead animals in the effluent UV channel. However, subsequent events and monitoring at the WWTP identified toxic inhibition of the nitrification treatment process most likely caused by the introduction of hexavalent chromium to the WWTP.

This series of suspected toxic releases to the POTW resulted in a Findings of Violation and Order for Compliance (CWA-08-2009-0052, June 2009) by the EPA for alleged violations of the City's IPP, specifically the failure to control discharges from all significant industrial users and to prepare and maintain an IU survey. As of April 2010, the City has complied with all action items associated with the AOC (personal communication EPA MT Office, March 2010).

A number of MPDES compliance inspections have been conducted since January 2005: March 24, 2006; April 27, 2006 (reconnaissance/enforcement response inspection); May 2, 2006 (Sanitary Sewer Overflow Inspection); May 30 through June 1, 2006 (performance audit); May 15, 2007; and February 17, 2010. Primary issues of concern were identified as the quality assurance/quality control practices and procedures used in the in-house laboratory and reporting calculation errors. A violation letter resulting from the inspection conducted February 17, 2010 cited the following violations of permit conditions:

- Time-proportioned 24-hour composite samples were being collected, not flow-proportioned as required by permit;
- DMR load calculations for BOD₅, TSS, TN, and TP were performed incorrectly; and
- Field and laboratory instruments lacked calibration logs.

The permittee corrected these violations and responded to the Department March 29, 2010.

A Sanitary Sewer Overflow (SSO) inspection was conducted by Department personnel on May 2, 2006. On July 30, 2009, a citizen complaint was filed (CVID number 13373) due to an overflow event. It was attributed to pumping of sewer water into the street by a contractor during clean up and repairs of a failed lateral line. The complaint was resolved by City and Lewis and Clark County Health Department personnel and was subsequently closed by the Department.

A citizen complaint was filed March 31, 2006 (CVID number 10123) alleging that WWTP personnel purposefully by-pass untreated wastewater to the effluent ditch. Department personnel conducted an inspection April 27, 2006 and could not validate the assertions made in the citizen complaint. The Department closed the complaint.

III. Proposed Technology-based Effluent Limits (TBELs)

A. Applicability

The Board of Environmental Review has adopted by reference 40 CFR 133 which set minimum treatment requirements for secondary treatment or equivalent for POTW (ARM 17.30.1209). Secondary treatment is defined in terms of effluent quality as measured by BOD₅, TSS, percent removal of BOD₅ and TSS, and pH [National Secondary Standards (NSS)]. National secondary treatment requirements are described in 40 CFR 133 and incorporated into all municipal permits.

The regulations in 40 CFR 133.105 allow for the application of treatment equivalent-to-secondary effluent limitations (TES) or Alternative State Requirements for TSS (ASR) to facilities that meet specific criteria. To qualify for TES, the facility must use either a trickling filter or waste stabilization pond as the principle process of treatment as stated in 40 CFR 133.101(g)(2). The Helena WWTP does not use these treatment processes. Technology-based effluent limitations established in the previous permit cycle reflected the use of NSS. These limitations for BOD₅, TSS, BOD₅ and TSS percent removal, and pH will be maintained in this permit renewal.

ARM 17.30.1345(8) requires that all effluent limitations be expressed in terms of mass except for pollutants which cannot be appropriately expressed in terms of mass. The previous mass-based limitations utilized the design flow of 6.0 mgd. Because the new facility average daily design flow is actually 5.4 mgd versus the original average daily design flow of 6.0 mgd (O&M Manual, MMI December 2000), it is necessary to recalculate the mass-based load limitations.

The following equation was used to calculate mass-based loading limits in pounds per day (lb/day) using NSS limitations at the upgraded new average daily design flow of 5.4 mgd.

$$\text{Load (lb/day)} = \text{Design Flow} \times \text{Concentration Limit (mg/L)} \times 8.34 \text{ (lb}\cdot\text{L)/(mg}\cdot\text{gal)}$$

BOD₅ and TSS Mass-based Load Limitations at Upgraded Flow:

$$30\text{-day average load (lb/day)} = (5.4 \text{ mgd})(30 \text{ mg/L})(8.34) = 1,351 \text{ lb/day}$$

$$7\text{-day average load (lb/day)} = (5.4 \text{ mgd})(45 \text{ mg/L})(8.34) = 2,027 \text{ lb/day}$$

Loading limits for technology-based parameters of concern (BOD₅ and TSS) will apply to the effluent and will be maintained at the more stringent of the nondegradation allocations or mass-based loading limits calculated in this Fact Sheet.

B. Nondegradation Load Allocations

The provisions of ARM 17.30.701 - 718 (Nondegradation of Water Quality) apply to new or increased sources of pollution [ARM 17.30.702(18)]. Sources that are in compliance with the conditions of their permit and do not exceed the limitations established in the permit or determined from a permit previously issued by the Department are not considered new or increased sources.

Nondegradation threshold values for the Helena WWTP were calculated for Total Nitrogen (TN), Total Phosphorus (TP), BOD₅ and TSS as part of the renewal of the permit in 1996 using an average daily design flow of 6.0 mgd. The Department calculates nondegradation load allocations for parameters for which numeric water quality standards exist and for which permit limitations were in place on April 29, 1993. The TN and TP load allocations presented in the fact sheet for the previous permit, which were used to determine whether the discharge would constitute a “new or increased” source Montana’s nondegradation rules, no longer apply. That is because the receiving stream is no longer “high quality” in terms of nutrients, since it is listed for nutrients on the Montana 303(d) list of impaired waters. Therefore, the TN and TP allocations in the previous fact sheet will not be used to establish permit limits in this renewal.,

The BOD₅ and TSS loads were calculated using the 85 percent removal criteria for these parameters. Nondegradation load values are calculated using the loading equation presented above, not the TBEL for removal efficiency. Therefore, the corrected nondegradation load calculations are presented herein.

Corrected BOD₅ and TSS Nondegradation Load Values:

$$\text{Monthly average load (lb/day)} = (6.0 \text{ mgd})(30 \text{ mg/L})(8.34) = 1,501 \text{ lb/day}$$

$$\text{Weekly average load (lb/day)} = (6.0 \text{ mgd})(45 \text{ mg/L})(8.34) = 2,252 \text{ lb/day}$$

The actual average loads discharged from the facility for the POR are presented below in Table 3. Actual average loads for BOD₅ and TSS were calculated from the facility DMR data. These data indicate that the facility did not exceed the nondegradation load values calculated for BOD₅ and TSS.

Table 3. Nondegradation and Actual Loads for POR

Parameter	Units	Nondegradation Allocated Average Load	Actual Annual Average Load				
			2005	2006	2007	2008	2009
BOD ₅	lb/day	1,501 (corrected)	177	188	193	198	189
TSS	lb/day	1,501	112	152	123	135	106

C. Proposed TBELS

Table 4. Outfall 001 Proposed TBELS

Parameter	Concentration (mg/L)		Load (lb/day)	
	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾
BOD ₅	30	45	1,351	2,027
TSS	30	45	1,351	2,027
pH, s.u	Within the range of 6.0 to 9.0 (instantaneous)			
BOD ₅ Percent Removal	85 %			
TSS Percent Removal	85 %			
(1) See Definition section at end of permit for explanation of terms				

IV. Water Quality-based Effluent Limits (WQBELs)

A. Scope and Authority

The Montana Water Quality Act (Act) states that a permit may only be issued if the Department finds that the issuance or continuance of the permit will not result in pollution of any state waters [75-5-401(2), Montana Code Annotated (MCA)]. Montana water quality standards at ARM 17.30.637(2) require that no wastes may be discharged such that the waste either alone or in combination with other wastes will violate or can reasonably be expected to violate any standard. ARM 17.30.1344(1) adopts by reference 40 CFR 122.44 which states that MPDES permits shall include limits on all pollutants which will cause, or have a reasonable potential to cause an excursion of any water quality standard, including narrative standards. The purpose of this section is to provide a basis and rationale for establishing WWTP effluent limits, based on Montana water quality standards that will protect designated uses of the receiving stream.

In accordance with 75-5-703(6)(b), MCA, after completion and approval of a Total Maximum Daily Load (TMDL), the Department shall incorporate the TMDL-developed waste load allocation(s) for point sources into the appropriate discharge permits. This permit renewal incorporates the Lake Helena Watershed TMDL (EPA, Ref. 8-MO, September 27, 2006.)

B. Receiving Water

The Helena WWTP discharges via the ditch constructed solely to transport the treated effluent to Prickly Pear Creek (PPC) at a point approximately six miles above the mouth at Lake Helena. PPC is in the Upper Missouri River watershed as identified by USGS Hydrologic Unit Code 10030101. Discharge is to Montana stream segment MT41I006_020, Helena WWTP Discharge Ditch to Lake Helena.

This segment of PPC is classified “I” according to ARM 17.30.610(1)(a)(ix) as it does not fully support any one of its beneficial uses according to the 1996 303(d) list of impaired waterbodies in need of a TMDL. The goal is for class I waters to fully support: drinking, culinary and food processing purposes after conventional treatment; bathing, swimming and recreation; growth and propagation of fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supplies [ARM 17.30.628(1)].

The probable causes for the 1996 impairment listing are flow alteration, metals, nutrients, un-ionized ammonia, siltation, suspended solids, and other habitat alterations. Probable sources are identified as agriculture, pasture land, irrigated crop production, placer mining, resource extraction, subsurface mining, highway/road/bridge construction, domestic wastewater lagoons, and municipal point sources.

The 2008 303(d) lists this segment of the creek as not supporting aquatic life; cold and warm water fisheries; and drinking water. PPC is partially supportive of agricultural, industrial, and primary contact recreation. Probable causes of impairment are identified as metals (dissolved aluminum, antimony, arsenic, cadmium, copper, lead, and zinc), un-ionized ammonia, temperature, sedimentation/siltation, low flow alterations, physical substrate habitat alterations, and alteration in stream-side or littoral vegetative covers. The probable sources of these impairments include grazing in riparian or shoreline zones, irrigated crop production, on-site treatment systems (septic and similar decentralized systems), acid mine drainage, contaminated sediments, industrial point source discharge, habitat modification (other than hydromodification), and impacts from abandoned mine lands (inactive).

The segment of PPC immediately upstream of the receiving water is MT41I006_030 - PPC between Wylie Drive and the Helena WWTP effluent ditch. According to the Source Assessment for the Lake Helena Watershed Planning Area, Part C.3.1.4, [*Water Quality Restoration Plan and Total Maximum Daily Loads (TMDLs) for the Lake Helena Watershed Planning Area: Volume I – Appendices*, USEPA, December 2004; hereinafter referred to as the TMDL Vol. I.], PPC in this segment experiences “severely depleted stream flows in summer”. The stream was rated as “non-functional” with the most detrimental impact identified as stream dewatering and “source assessment features included a dry streambed”. It is noted that the stream regains flow from groundwater discharge at the lower end of the segment just above the WWTP ditch.

Part C.3.1.5 of the TMDL Vol. I, characterizes stream segment MT41I006_020 PPC from the Helena WWTP Discharge Ditch to Lake Helena as “non-functional”. Upstream dewatering of the channel influences flow dynamics and there are some groundwater contributions to flow in the segment below the WWTP discharge. However, flow data in the area of discharge are minimal.

In 1995, the permittee provided an assessment of the receiving water flows for proposed permit modifications (Black & Veatch, July 1995). These data were collected in PPC at a point approximately 100 meters upstream of the confluence with the discharge ditch. In that report, zero flow was assumed for the months of December and February for limit calculations. Between 2005 and 2009, the Montana Department of Natural Resources and Conservation

collected flow data at the crossing of PPC and York Road, approximately one mile upstream of the discharge point. Those data show flows during April through November vary between 1.8 cubic feet per second (cfs) and 665 cfs. Because flow data for the winter months are lacking and past effluent limits were based on a low flow condition of zero cfs, zero cfs will be used as the low flow criterion for limitation development in this permit renewal.

The Montana Fish, Wildlife and Parks (MFWP) MFISH website identifies river miles 7.3 to 18.5 (the segment of PPC encompassing the point of discharge) as an area of chronic dewatering where dewatering is a significant problem in all years of the assessment (MFWP 1991, 1997, 2003, and 2005). Fish species commonly present as year-round residents include the mottled sculpin, longnose sucker, and white sucker. The brook trout is present as a rare species year-round. The rainbow is commonly present and the brown trout is abundant; both species primarily migrate through this segment. The longnose dace is a year-round resident of unknown abundance (MFISH website, April 2010). Early life stages of each of these species can be present year-round (*Spawning Times of Montana Fishes* D. Skaar, MFWP, March 2001).

For the purpose of characterizing the receiving water, data were obtained from a variety of upstream sources. These data are summarized in Table 5:

- Between 2003 and 2009, the EPA conducted sampling of PPC in support of on-going watershed monitoring in association with the Lake Helena TMDL:
 - In East Helena at the Highway 12 bridge;
 - In East Helena, 200 yards upstream of Wylie Drive;
 - At the Canyon Ferry Road bridge;
 - Upstream of the Helena WWTP Discharge;
 - At the York Road bridge.
- The City of East Helena collected downstream data between 2003 and 2008 in support of the MPDES permit, approximately 1 mile downstream of Wylie Drive.
- The USGS collected some data between 1990 and 2007 from:
 - Gauging station 06062000-PPC at East Helena;
 - Gauging station 06602100-PPC below East Helena;
 - USGS 463701111573901-PPC at Canyon Ferry Road near Helena, MT;
 - USGS 46381111590101-PPC above Helena effluent canal at Helena; and
- Between May of 2006 and November 2009, the City of Helena has collected data from PPC at a point approximately 100 meters upstream of the confluence with the discharge ditch.

Table 5. Ambient Water Quality for Prickly Pear Creek Upstream of Outfall 001

Parameter	Units	Minimum Value	Maximum Value	Long Term Average	Number of Samples
pH, median value	s.u.	5.36	9.36	7.85	114
Temperature	°C	-0.1	24.2	10	124
Dissolved Oxygen	mg/L	6.3	13.8	9.7	49
Total Nitrogen	mg/L	<0.43	1.61	<0.96	27 (calc.)
Total Ammonia as N	mg/L	<0.01	1.60	0.39	28
Total Phosphorus as P	mg/L	0.013	0.149	0.038	47
Chlorophyll <i>a</i>	mg/m ²	<0.5	92.4	<43.8	11
Total Hardness as CaCO ₃	mg/L	46	149	104	52
Aluminum, Dissolved	µg/L	--	--	32	1
Antimony, Total Recoverable	µg/L	--	--	<1	1
Arsenic, Total Recoverable	µg/L	4	30	11	8
Cadmium, Total Recoverable	µg/L	<0.20	0.36	<0.28	8
Copper, Total Recoverable	µg/L	<2	14	4	8
Lead, Total Recoverable	µg/L	<4	6.7	<5	8
Zinc, Total Recoverable	µg/L	14	110	67	7

C. Applicable Water Quality Standards

Pursuant to ARM 17.30.628(2) discharges to “T” class waters may not violate the specific water quality standards listed under ARM 17.30.628(2)(a through k). In addition, discharges are subject to ARM 17.30.635 through 637, 641, 645, and 646. ARM 17.30.635(4) requires that the design condition for disposal systems must be based on the seven-day, ten-year low flow condition (7Q10) of the receiving water.

In September of 2006, the EPA approved the TMDL for the Lake Helena TMDL Planning Area (US EPA Ref. 8-MO, September 27, 2006). Enclosure 2 of the detailed EPA TMDL review acknowledges that phased Waste Load Allocations (WLA) are proposed for nutrient discharges from point sources. The adaptive management strategy (Part 3.2.3.1., Volume II, Final Report, August 2006) allows for the modification of TMDL-developed WLA through the rule-making process associated with the adoption of Montana nutrient standards and/or the adaptive management process, itself.

The Lake Helena TMDL presents a three-phased plan to reduce nutrient loading from the City of Helena WWTP (Appendix I., Volume II, Final Report, August 2006). The phased approach is proposed in recognition of the fact that the permittee has committed significant amounts of money to upgrade and operate the facility and that further upgrades to reduce nutrient loading may pose both financial and technical challenges.

The TMDL three-phased approach is summarized as follows. Phase I is described as the voluntary “No Increase” phase for the Helena WWTP for TN and TP (Appendix I., Volume II, Final Report, August 2006). Phase I proposes adherence to the current WWTP performance at current daily flow rates for this permit cycle.

Phase I TMDL-proposed action items are:

- An ambient water quality monitoring program for Prickly Pear Creek,
- A Facility Optimization Study to define the maximum extent that nutrient concentrations/loads can be reduced given current facility infrastructure and available funding, and
- A Feasibility Study/Alternatives Analysis (FS/AA) to determine if, and how, the nutrient targets presented in the TMDL can be met. The FS/AA should consider both technical and economic feasibility relative to in-plant alternatives (i.e., engineering solutions) and influent/effluent alternatives. Examples of the latter may include: alternative discharge points, agricultural reuse, land application, septic system sludge management, wetlands treatment, and any other methods that may reduce nutrient loading.

Phase II is the “Optimization” phase where WLA limits for TN and TP may be “based on the literature to determine what is considered attainable”, with load limits based on design flows.

Phase II action items are:

- Implement enhanced level of treatment based on results of facility optimization study.
- Allowance for increased loading through trading (adaptive management; conceptual).

Phase III is “water quality-based”, whereby WLA limits for TN and TP may be based on the best available data to meet instream interim nutrient targets; with load limits developed using the design flow of the facility. The TMDL adaptive management strategy allows for the modification of Phase III interim nutrient limits if deemed appropriate or necessary in the future. This would be accomplished through the rule-making process associated with the adoption of Montana nutrient standards and/or the adaptive management process, itself.

D. Mixing Zone

A mixing zone is an area where the effluent mixes with the receiving water and certain water quality standards may be exceeded [ARM 17.30.502(6)]. The Department must determine the applicability of currently granted mixing zones [ARM 17.30.505(1)]. Mixing zones allowed under a permit issued prior to April 29, 1993 will remain in effect unless there is evidence that previously allowed mixing zones will impair existing or anticipated uses [ARM 17.30.505(1)(c)]. Pollutant concentrations in the effluent must meet the applicable water quality standards at the

end of pipe unless a mixing zone is recognized by the Department for that specific parameter in the permit.

In accordance with ARM 17.30.507(1)(b), acute water quality standards for aquatic life may not be exceeded in any portion of the mixing zone unless the Department finds that allowing minimal initial dilution will not threaten or impair existing uses. The discharge must also comply with the general prohibitions of ARM 17.30.637(1) which require that state waters, including mixing zones, must be free from substances which will:

- a. settle to form objectionable sludge deposits or emulsions beneath the surface of the water or upon adjoining shorelines;
- b. create floating debris, scum, a visible oil film (or be present in concentrations at or in excess of 10 milligrams per liter) or globules of grease or other floating materials;
- c. produce odors, colors or other conditions as to which create a nuisance or render undesirable tastes to fish flesh or make fish inedible;
- d. create concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life; and
- e. create conditions which produce undesirable aquatic life.

Although certain standards may be exceeded in the mixing zone, an effluent in its mixing zone may not block passage of aquatic organisms nor may it cause acutely toxic conditions [ARM 17.30.602(16)]. No mixing zone will be granted that will impair beneficial uses [ARM 17.30.506(1)]. Aquatic life-chronic, aquatic life-acute and human health standards may not be exceeded outside of the mixing zone [ARM 17.30.507(1)(a)].

A standard mixing zone may be granted for facilities which discharge less than 1 mgd or when mixing is nearly instantaneous [ARM 17.30.516(3)(d)]. Nearly instantaneous mixing is assumed if the discharge is through an effluent diffuser, when the mean daily flow exceeds the 7-day, 10-year low flow (dilution ratio <1) or the permittee demonstrates through a Department approved study plan that the discharge is nearly instantaneous. A nearly instantaneous mixing zone may not extend downstream more than two (2) river widths.

Effluent discharges which do not qualify for a standard mixing zone must apply for a source specific mixing zone in accordance with ARM 17.30.518 and must conform to the requirements of 75-5-301(4), MCA which states that mixing zones must be the smallest practicable size; have minimal effects on uses; and, have definable boundaries. ARM 17.30.515(2) states that a person applying for a mixing zone must indicate the type of mixing zone and provide sufficient detail for the Department to make a determination regarding the authorization of the mixing zone under the rules of Subchapter 5.

Review of the administrative file shows that the Department defined the mixing zone in the 1996-issued permit as nearly instantaneous because the discharge flow of 8.35 cfs is larger than

the instream low flow criterion of zero cfs. This permit renewal will maintain the nearly instantaneous mixing zone. Effluent limitations developed will apply to the discharge at the end-of-pipe.

Compliance and monitoring will apply at the last point of control, the effluent weir before discharge to the effluent ditch rather than at the confluence of the discharge ditch and PPC. Because the confluence with PPC is on private property and difficult to access during the winter months, this compliance/monitoring point will facilitate timely, accessible, and safe monitoring and sampling of the effluent for compliance purposes.

E. Basis and Proposed WQBELs

Parameters typically present in municipal wastewater that may cause or contribute to a violation of water quality standards include the conventional pollutants such as, biological material (as measured by BOD₅), suspended solids, oil & grease, pathogenic bacteria, and pH; the non-conventional pollutants such as total residual chlorine, total ammonia as N, TN, and TP; and the carcinogenic and toxic pollutants such as volatile organic carbon substances and metals which can include, but is not limited to, aluminum, antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, and zinc.

ARM 17.30.1345 requires WQBELs to be developed for any pollutant for which there is reasonable potential (RP) for discharges to cause or contribute to exceedences of instream numeric or narrative water quality standards. RP calculations utilize the receiving water concentration, the maximum projected effluent concentration, the design flow of the wastewater treatment facility, and the applicable receiving water flow.

The Department uses a mass balance equation to determine RP (*Equation 1*).

$$C_{RP} = \frac{C_E Q_E + C_S Q_S}{Q_E + Q_S} \quad (Eq. 1)$$

Where:

C_{RP}	=	receiving water concentration (RWC) after mixing, mg/L
C_E	=	maximum projected effluent concentration, mg/L
C_S	=	RWC upstream of discharge, mg/L
Q_S	=	applicable receiving water flow, mgd
Q_E	=	facility design flow rate, mgd

The Department is proposing effluent limits for pollutants with RP for which adequate data exists.

1. Conventional Pollutants

TSS and BOD₅: The facility provides a significant reduction in biological material and solids through secondary treatment (Section III). No additional WQBELs will be required for these parameters.

Oil and Grease (O&G): ARM 17.30.637 (1) identifies general prohibitions to municipal discharges. State surface waters must be free from substances attributable to municipal discharges that will create a visible oil film, or be present at or in excess of 10 mg/L. A numeric limitation for O&G was applied in the previous permit cycle as an instantaneous maximum value of 15 mg/L; however, no effluent monitoring or reporting was required. The narrative limitation prohibiting visible oil sheen in the receiving water [ARM 17.30.637(b)] was implemented. To adhere to ARM 17.30.637(1), the standard of <10 mg/L as a maximum daily limitation will be applied to discharges from Outfall 001 with this permit renewal. Monitoring of the effluent shall be required.

***Escherichia coli* Bacteria:** The Montana state standards for *Escherichia coli* (*E. coli*) bacteria replaced fecal coliform bacteria effective February 1, 2006. The applicable standards for *E. coli* are:

- a. April 1 through October 31, of each year, the geometric mean number of the microbial species *E. coli* must not exceed 126 colony forming units (cfu) per 100 milliliters (mL), nor are 10% of the total samples during any 30-day period to exceed 252 cfu per 100 mL [ARM 17.30.628(2)(a)(i)]; and
- b. November 1 through March 31, of each year, the geometric mean number of *E. coli* shall not exceed 630 cfu per 100 mL and 10% of the samples during any 30-day period may not exceed 1,260 cfu per 100 mL [ARM 17.30.628(2)(a)(ii)].

The permit will incorporate the Montana state standards for *E. coli* bacteria. The Department is not granting a mixing zone for *E. coli* based on the following considerations: the potentially effluent-dominated nature of the receiving water (low flow criterion equal to zero) and ARM 17.30.637(1)(e) which requires that state waters must be free from substances that are harmful or toxic to humans. ARM 17.30.505(2) states that if the Department determines that a mixing zone may interfere with or threaten a beneficial use, discharge limitations will be modified and if necessary, require the applicable numeric water quality criteria to be met at the end of the discharge pipe.

2. Nonconventional Pollutants

Total Ammonia as N: Total ammonia as N limitations in the previous permit were based on variable conditions and available monthly in stream dilution. In accordance with 17.30.628(2)(j), the Department is proposing to revise the WQBEL for ammonia to be based on the design criteria given in 17.30.635(4) which requires the use of the 7Q10 stream flow.

Existing baseline data are used to estimate in-stream values for total ammonia as N, pH, and temperature which may be present in the receiving water at the design (critical) flow condition. The critical conditions for pH and temperature in the receiving water are taken to be the 75th percentiles of the baseline data. These values represent the upper bounds of the interquartile range (IQR) of the baseline data.

For a POTW, these criteria are established as the low flow condition of the receiving water, the critical combination of pH and temperature of the receiving stream for standard calculation in accordance with Circular DEQ-7, the critical discharge concentration, the presence or absence of salmonid species, and the presence or absence of fish in early life stages. Salmonid fishes and their early life stages are presumed present year-round.

Table 6, presents the total ammonia as N water quality standards for PPC using the ambient water quality data in Table 5.

Table 6. Total Ammonia as N Water Quality Standards for PPC

Condition	Period	Salmonids Present	Early Life Stages Present	Ambient Condition		Water Quality Standard ⁽¹⁾ (mg/L)
				pH	Temperature °C	
Acute	Annual	Yes	Yes	8.20 ⁽²⁾	NA	1.67
Chronic	Annual	Yes	Yes	8.20 ⁽²⁾	15.6 ⁽²⁾	3.83

Footnotes: NA – Not Applicable
 (1) 30-day average concentration, based on Department Circular DEQ-7 (February 2008)
 (2) Based on 75th percentile of the data set.

To determine if the total ammonia as N concentrations in the effluent will contribute to or create an exceedence of the state acute standard in PPC, an RP analysis was completed using *Equation 1* (presented in Attachment A-1). The projected maximum effluent concentration for total ammonia as N was found following the method recommended by the EPA *Technical Support Document for Water Quality-based Toxics Control* (TSD, 1991).

A multiplier of 1.5 was determined using Table 3-2 in the TSD (given a coefficient of variation of 0.87 and a sample size of 59 at the 95% confidence interval). The maximum reported effluent total ammonia as N concentration for the dataset was 3.62 mg/L. The elevated concentration values known to be due to an upset condition at the POTW that affected the ammonia removal process were not used in this analysis. The projected maximum effluent concentration used in *Eq. 1* is the multiplier times the maximum reported concentration ($1.5 \times 3.62 \text{ mg/L} = 5.43 \text{ mg/L}$).

The projected maximum concentration of 5.43 mg/L total ammonia as N exceeds the acute and chronic standards for total ammonia as N; therefore RP is shown to exist for this parameter and applicable limitations will be developed in this permit renewal. With no dilution flow available for mixing, the Average Weekly Limitation (AWL) is 3.83 mg/L and Average Monthly Limitation (AML) is 1.67 mg/L.

Nutrients (TN and TP): Currently there are no numeric water quality standards for TN and TP that apply to PPC. This does not allow for an RP assessment at this time. The actual nutrient loads discharged by the Helena WWTP are presented in Table 7.

Table 7. Effluent Nutrient Load over POR

Parameter	Units	2005	2006	2007	2008	2009
Total Nitrogen	lb/day	175	210	186	157	167
Total Phosphorus as P	lb/day	103	113	82	70	66

Pursuant to 75-5-703(6)(b), MCA, the Department is incorporating the applicable portions of Phase I and Phase II of the EPA-developed and approved TMDL as Interim Adaptive Management Waste Load allocations (IWLA) in this permit renewal (described in Section IV.C. of this Fact Sheet).

Lacking numeric water quality standards for TN and TP, IWLA are developed as average monthly and average weekly loads using the TSD and are based on the current plant flow and the performance of the WWTP. This approach uses the existing nutrient loads as obtained from the corrected DMRs for Outfall 001 over the POR. Elevated TN load values known to be due to upset conditions at the POTW that affected the biological nutrient removal process were not used in this analysis. IWLA calculations and results are presented in Attachment B-1.

The Average Weekly Load (AWLd) and Average Monthly Load (AMLd) were developed using the long term average of the data set and the long term average (LTA) multipliers for the 99th percentile based on the statistics of the data set (TSD, 1991). These IWLA take into account the variability of the effluent quality and will apply to the effluent prior to mixing with the WWTP effluent ditch at Outfall 001 (no mixing zone). The formulae used are as follows:

$AWLd = LTA \cdot e^{[2.326S - 0.5(S \cdot S)]}$, use EPA TSD, Table 5-2 for 99th percentile,

$AMLd = LTA \cdot e^{[2.326S - 0.5(S \cdot S)]}$, use EPA TSD, Table 5-2 for 99th percentile, $n = 4$

Table 8. Proposed Nutrient Interim Waste Load Allocations for Outfall 001

Parameter	Units	Load	
		Average Monthly ⁽¹⁾	Average Weekly ⁽¹⁾
Total Nitrogen ⁽²⁾	lb/day	238	311
Total Phosphorus as P	lb/day	133	204

Footnotes:
 (1) See Definition section at end of permit for explanation of terms.
 (2) Calculated from the sum of Nitrate + Nitrite as N and Total Kjeldahl Nitrogen (TKN) concentrations.

The Department recognizes that these IWLA are part of the adaptive management TMDL phased wasteload allocation. As such, these IWLA are subject to change based on the on-going efforts on the part of the permittee, local watershed groups, the Department, and the EPA to address:

- point source/nonpoint source issues (effluent trading credits);
- the watershed approach to nutrient reductions (sewerage failing domestic treatment systems);

- TMDL-driven alternatives analysis/feasibility studies; and
- the potential adoption of numeric water quality standards for TN and TP for the receiving water and the resultant variance process.

The permittee can apply for a major permit modification to incorporate changes in the IWLA based on the above efforts if necessary during the permit cycle.

More specifically, as part of the adaptive management phased WLA the permittee will be required to conduct the facility optimization study from Phase I of the TMDL. Nutrient concentrations and resulting loads from the optimization study will be incorporated into the next permit renewal as effluent limits. The limits will be based on the optimization study-derived concentrations and the plant design flow. In no case will the new effluent limits result in TN and TP load limits greater than the IWLA proposed above. Upon completion of the optimization study the permittee will be required to develop and submit a plan for attaining the optimized effluent concentrations for TN and TP. Between the submission of this plan and the next permit renewal, the permittee will submit annual reports documenting progress towards attaining the optimized effluent concentrations. See Part VIII, Special Conditions for additional detail and compliance dates.

Dissolved Oxygen (DO): Low DO levels can be a typical pollutant of concern for POTWs. Freshwater aquatic life standards are specific to the fishes (cold- or warm-water) present and by the presence or absence of fish in early life stages (Circular DEQ-7, February 2008); they are presented in Table 9, below. Standards are further defined based on a specific period of time and required in-stream DO levels. DO levels in PPC have been monitored by the permittee at in-stream sample points in previous permit cycles during the low-flow, high-temperature month of August. It was shown that DO minima met the in-stream standards for that particular month.

The effluent is transported over one mile through the open effluent discharge ditch to the confluence with PPC. It is anticipated that DO may be enhanced in the effluent through the presence of built-in cascades after the effluent weir at the head of the effluent ditch and throughout the one-mile length of the ditch. No limitation for DO is necessary in this permit cycle. However, to allow for a year-round RP assessment during the next permit renewal, a two-year DO monitoring study will be required as a special condition to characterize the DO interaction of the effluent and the receiving water.

Table 9. DO Standards For Waters Classified as "I" (Circular DEQ-7).

Condition	30-Day Mean (mg/L)	7-Day Mean (mg/L)	7-Day Mean Minimum (mg/L)	1-Day Minimum ⁽¹⁾ (mg/L)
Early Life Stages ⁽²⁾	NA ⁽³⁾	6.0	NA ⁽³⁾	5.0
Other Life Stages	5.5	NA ⁽³⁾	4.0	3.0
Footnotes: (1) All minima should be considered as instantaneous concentrations to be achieved at all times. (2) Includes all embryonic and larval stages and all juvenile forms of fish to 30-days following hatching. (3) NA = Not Applicable				

Total Residual Chlorine (TRC): At present, the permittee utilizes UV disinfection rather than chlorination. TRC monitoring and limits are not proposed in this renewal. Any future discharge of TRC will require an updated MPDES application and permit modification prior to the use of chlorine.

pH: Pursuant to ARM 17.30.628(2)(c), the induced variation of hydrogen ion concentration within the range of 6.5 to 9.5 must be less than 0.5 pH units. Natural pH outside this range must be maintained without change. Natural pH above 7.0 must be maintained above 7.0. The TBEL for pH requires effluent pH to be maintained between 6.0 and 9.0 s.u. To assure both the WQBEL and TBEL for pH in the effluent is met, the pH range will be maintained between 6.5 and 9.0 s.u.

Temperature: Temperature standards for I class streams are stated in ARM 17.30.628(2)(e), no increase in naturally occurring temperature is allowed which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife. Effluent temperature has not been monitored in previous permit cycles and the data are lacking to conduct an RP analysis. Due to the length of the effluent ditch (over one mile), it is likely that the effluent temperatures will approach ambient levels as measured in PPC. However, monitoring of the effluent for temperature will be required in this permit renewal to allow for an RP assessment in the next permit renewal.

3. Toxic Pollutants

ARM 17.30.628(2)(h) states that concentrations of toxic, carcinogenic, or harmful parameters may not commence or continue which lower, or are likely to lower, the overall water quality of these waters.

Metals - All metals discussions refer to the metals in their "total recoverable" fraction with the exception of aluminum which is regulated and monitored in the dissolved form. In previous permit cycles, no assessment for metals in the effluent has been conducted due to the "I" classification of PPC. However, the 1996 and 2008 303(d) lists both indicate that the stream is impaired for metals and, as such, limitations must be assessed for discharge to continue. Specifically, the stream is listed as impaired for aluminum, antimony, arsenic, cadmium, copper, lead, and zinc.

The Permittee has collected effluent data for total recoverable metals (antimony, arsenic, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thallium, and zinc) in support of the IPP (see Table 2). However, some of these data did not meet Department Required Reporting Values (RRV), specifically cadmium, lead, mercury, silver, and zinc.

The RRV is the detection level that must be achieved in reporting surface water monitoring or compliance data to the Department as listed in Circular DEQ-7 (February 2008). The RRV is the Department's best determination of a level of analysis that can be achieved by the majority of the commercial, university, or governmental laboratories using EPA-approved methods or methods approved by the Department.

In-stream metals data are presented in Table 5 for the seven metals of concern; only one data point is available for both aluminum and antimony. Applicable PPC aquatic life and human health surface water standards for the seven listed metals are summarized in Table 10. These standards are calculated using the 25th percentile value for the upstream total hardness data set, 91 mg/L as CaCO₃). The 25th percentile, low hardness condition is used to be protective of the receiving water year-round.

Table 10. PPC Metals Surface Water Standards (Circular DEQ-7, February 2008)

Parameter	Units	Required Reporting Value (RRV)	Human Health Standard	Aquatic Life Standard ⁽¹⁾	
				Acute	Chronic
Aluminum (Dissolved)	mg/L	0.030	--	0.750	0.087
Antimony, Total Recoverable	mg/L	0.003	0.0056	--	--
Arsenic, Total Recoverable	mg/L	0.003	0.010	0.34	0.15
Cadmium, Total Recoverable	mg/L	0.00008	0.005	0.0019	0.0003
Copper, Total Recoverable	mg/L	0.001	1.30	0.0128	0.0086
Lead, Total Recoverable	mg/L	0.0005	0.015	0.0724	0.0028
Zinc, Total Recoverable	mg/L	0.010	2.00	0.111	0.111
Footnotes:					
(1) Applicable metals standards calculated using the 25 th percentile upstream total hardness value of 91 mg/L as CaCO ₃					

Where data are sufficient, RP will be assessed.

- There are no effluent data available for dissolved aluminum; an RP assessment cannot be conducted at this time. Monitoring of the effluent at the RRV will be required to allow for an RP assessment during the next permit renewal.
- For antimony, the human health standard of 0.0056 mg/L is the most protective of the in-stream standards. An RP assessment is presented in Attachment C-1. RP is not shown to exist for this parameter and no effluent limitation is required.
- For arsenic, the human health standard of 0.010 mg/L is the most protective of the in-stream standards. An RP assessment is presented in Attachment C-2. RP is not shown to exist for this parameter and no effluent limitation is required.

- For cadmium, effluent data do not meet the RRV for this parameter, as a result it is feasible that cadmium is present at lower levels than those reported and the level of detection of the analysis may falsely drive RP for the chronic condition as potentially seen in Attachment C-3. Due to the unavailability of data reported at the required level of sensitivity, no limitation for cadmium will be developed during this permit cycle. Monitoring of the effluent at the RRV will be required to allow for an RP assessment during the next permit renewal.
- For copper, an RP assessment is presented in Attachment C-4. The projected maximum concentration of 0.1044 mg/L exceeds both the acute and chronic standards for copper; RP is shown to exist for this parameter and applicable limitations will be developed in this permit renewal. With no dilution flow available for mixing, the AML is 0.0086 mg/L and the MDL is 0.0128 mg/L.
- For lead, effluent data do not meet the RRV for this parameter, as a result it is feasible that lead is present at lower levels than those reported and the level of detection of the analysis may falsely drive RP for the chronic condition as potentially seen in Attachment C-5. Therefore, no limitation for lead will be developed during this permit cycle. Monitoring of the effluent at the RRV will be required to allow for an RP assessment during the next permit renewal.
- For zinc, an RP assessment is presented in Attachment C-6. The projected maximum concentration of 0.242 mg/L exceeds both the acute and chronic standards for zinc; therefore RP is shown to exist for this parameter and applicable limitations will be developed in this permit renewal. With no dilution flow available for mixing, the AML is 0.111 mg/L and the MDL is 0.111 mg/L.
- Monitoring of the influent and effluent at the RRV for the other total recoverable metals from Table III, 40 CFR Part 122 Appendix D (beryllium, chromium, mercury, selenium, silver, thallium) will be required in support of the IPP and to allow for an RP assessment during the next permit renewal.
- Monitoring of the effluent for total hardness as mg/L CaCO_3 will be required in support of the IPP.

Total Phenols and Total Cyanide: Monitoring of the influent and effluent at the RRV for these two other toxic pollutants from Table III, 40 CFR Part 122 Appendix D will be required in support of the IPP. Monitoring of the effluent at the RRV will be required to allow for an RP assessment during the next permit renewal.

Organic Toxic Pollutants: As a facility with an EPA-required pretreatment program, the permittee was required to submit at least three sets of effluent organic toxic pollutants data (Table II, 40 CFR 122 Appendix D) with the renewal application (Part D. of EPA application Form 2A). These data have not been submitted to the Department. There is a lack of information available to perform an RP assessment. As a facility with a design flow of greater

than 5 mgd and lacking historic organic toxic pollutant data from which to characterize the effluent quality, monitoring of the influent and effluent for the organic toxic pollutants in Table II, 40 CFR 122 Appendix D (volatile organic pollutants, acid compounds, and base/neutral compounds) to support the IPP and the renewal process will be required for the duration of the permit cycle.

Whole Effluent Toxicity (WET) Testing: ARM 17.30.637(1)(d) requires that state water be free from substances attributable to municipal waste that create conditions which are harmful or toxic to human, animal, plant or aquatic life, except the Department may allow limited toxicity in a mixing zone provided that there is no acute lethality to organisms. The previous permit required chronic WET testing on two species due to the effluent dominated nature of the receiving water.

The permittee will be required to continue monitoring potential toxicity in the effluent by means of quarterly chronic WET testing on two species, in accordance with the EPA Region VIII NPDES *Whole Effluent Toxics Control Program*, August 1997, ARM 17.30.1322(6)(j), and the permit due to the nature of the discharge (no dilution flow for mixing) and the presence of an EPA-required Industrial Pretreatment Program.

V. Effluent Limitations

The proposed final effluent limitations are a combination of the more stringent of the nondegradation, technology-based, TMDL-developed WLA, and water quality-based effluent limitations as developed in Sections III and IV.

Outfall 001

Interim Limitations

The following interim effluent limitations will be applied to the discharge at Outfall 001 on the effective date of the permit and remain in effect through the 59th month of the 5 year permit cycle.

Table 11. Outfall 001 Interim Limitations

Parameter	Units	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾	Maximum Daily Limitation ⁽¹⁾
BOD ₅	mg/L	30	45	--
	lb/day	1,351	2,027	--
TSS	mg/L	30	45	--
	lb/day	1,351	2,027	--
<i>E. coli</i> Bacteria ⁽²⁾	cfu/100 mL	126	252	--
<i>E. coli</i> Bacteria ⁽³⁾	cfu/100 mL	630	1,260	--
Oil and Grease	mg/L	--	--	<10
Total Ammonia as N	mg/L	1.67	3.83	--
Total Nitrogen Load ^(4, 5)	lb/day	238	311	--
Total Phosphorus as P Load ⁽⁵⁾	lb/day	133	204	--

Footnotes:

(1) See Definition section at end of permit for explanation of terms.

(2) This limitation applies during the period April 1 through October 31.

(3) This limitation applies during the period November 1 through March 31.

(4) Calculated as the sum of Total Kjeldahl Nitrogen (TKN) and nitrate plus nitrite as N concentrations.

(5) Interim adaptive management Waste Load Allocations

pH: Effluent pH from Outfall 001 shall remain between 6.5 and 9.0 standard units (instantaneous minimum and instantaneous maximum). For compliance purposes, any single analysis or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

85 Percent (%) Removal Requirement for TSS and BOD₅: The arithmetic mean of the BOD₅ and TSS and for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on BOD₅ and TSS.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

There shall be no discharge which causes visible oil sheen in the receiving stream.

Final Limitations

The following final effluent limitations will be applied to the discharge at Outfall 001 beginning the last calendar month of the permit cycle and will remain in effect through the duration of the permit.

Table 12. Outfall 001 Final Limitations and Interim Waste Load Allocations

Parameter	Units	Average Monthly Limitation ⁽¹⁾	Average Weekly Limitation ⁽¹⁾	Maximum Daily Limitation ⁽¹⁾
BOD ₅	mg/L	30	45	--
	lb/day	1,351	2,027	--
TSS	mg/L	30	45	--
	lb/day	1,351	2,027	--
<i>E. coli</i> Bacteria ⁽²⁾	cfu/100 mL	126	252	--
<i>E. coli</i> Bacteria ⁽³⁾	cfu/100 mL	630	1,260	--
Oil and Grease	mg/L	--	--	<10
Total Ammonia as N	mg/L	1.67	3.83	--
Total Nitrogen Load ^(4, 5)	lb/day	238	311	
Total Phosphorus as P Load ⁽⁵⁾	lb/day	133	204	
Copper, Total Recoverable	mg/L	0.009	--	0.013
Zinc, Total Recoverable	mg/L	0.11		0.11

Footnotes:
 (1) See Definition section at end of permit for explanation of terms.
 (2) This limitation applies during the period April 1 through October 31.
 (3) This limitation applies during the period November 1 through March 31.
 (4) Calculated as the sum of Total Kjeldahl Nitrogen (TKN) and nitrate plus nitrite as N concentrations.
 (5) Interim adaptive management Waste Load Allocations.

pH: Effluent pH from Outfall 001 shall remain between 6.5 and 9.0 standard units (instantaneous minimum and instantaneous maximum). For compliance purposes, any single analysis or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

85 Percent (%) Removal Requirement for TSS and BOD₅: The arithmetic mean of the BOD₅ and TSS and for effluent samples collected in a period of 30 consecutive days shall not exceed 15% of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85% removal). This is in addition to the concentration limitations on BOD₅ and TSS.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

There shall be no discharge which causes visible oil sheen in the receiving stream.

VI. Self-Monitoring Requirements

A. Monitoring and Reporting

As a minimum, the following constituents shall be monitored in the influent and effluent at the frequencies and with the types of measurements indicated. Self-monitoring requirements are summarized in Table 13. Additional effluent self-monitoring requirements can be found in Table 14. Monitoring frequencies are established to assess compliance with daily, weekly and monthly effluent limitations and for an activated sludge treatment system with an IPP and short retention times (design approximately 20 hours).

Samples or measurements shall be representative of the volume and nature of the monitored discharge. Samples shall be collected, preserved and analyzed at the RRV in accordance with approved procedures listed in 40 CFR 136. The RRV is the detection level that must be achieved in reporting surface water monitoring or compliance data to the Department (Circular DEQ-7, February 2008). The RRV is the Department's best determination of a level of analysis that can be achieved by the majority of the commercial, university, or governmental laboratories using EPA-approved methods or methods approved by the Department.

Influent flow is measured with a Parshall flume (primary device) and ultrasonic meter (secondary device). In order to be representative of the nature and volume of the flow being monitored, influent sample collection and flow monitoring must occur prior to equalization or any recycle flow returns. Effluent flow monitoring occurs post UV disinfection system at a Cipolletti weir and staff gauge with an ultrasonic meter secondary device. The permittee shall monitor the discharge from Outfall 001 at the last point of control following treatment (post UV disinfection system) prior to entering the effluent ditch.

TSS and BOD₅: Monitoring of both the influent and effluent for TSS and BOD₅ will be required by 24-hour flow-proportional composite samples five days per week. Reporting of the influent and effluent TSS and BOD₅ monthly averages and maximum weekly concentrations and loads is required to assess compliance with monthly and weekly limitations, including percent removal criteria.

Oil and Grease (O&G): Monitoring of the effluent for O&G will be required by grab sample once per month. Reporting of the maximum daily concentration is required to assess compliance with limitations.

***Escherichia coli* (*E. coli*) Bacteria:** Monitoring of the effluent for *E. coli* bacteria will be required by grab sample five days per week. Reporting monthly geometric mean and maximum weekly geometric mean *E. coli* bacteria numbers is required to assess compliance with monthly and weekly limitations.

Total Ammonia as N: Monitoring of the effluent for total ammonia as N will be required by 24-hour flow-proportional composite samples once per week. Reporting of the effluent total ammonia as N monthly average and maximum weekly average concentrations is required to assess compliance with monthly and weekly limitations.

Nutrients (TN and TP): Monitoring of the effluent for TN (calculated as the sum of nitrite plus nitrate as N and Total Kjeldahl Nitrogen concentrations) and TP will be required by 24-hour flow-proportional composite samples once per week. Reporting of the effluent TN and TP average monthly and maximum weekly average concentrations and loads will be required in this permit renewal to assess compliance with monthly and weekly limitations.

Dissolved Oxygen (DO): Monitoring of the effluent will be required by grab sample (field reading acceptable) on a daily basis. Reporting of the effluent monthly average and daily minimum DO concentrations will be required in this permit renewal to allow for assessment of RP in future permit cycles.

pH: pH of the effluent will be monitored on a daily basis. Reporting of the instantaneous maximum and instantaneous minimum values measured during the month is required to assess compliance with the limitations.

Temperature: Temperature of the effluent will be monitored on a daily basis. Reporting of the instantaneous maximum and instantaneous minimum values measured during the month on the DMR is required to allow for RP assessment in future permit cycles.

Metals - All metals discussions refer to the metals in their “total recoverable” fraction with the exception of aluminum which is regulated and monitored in the dissolved form.

- For aluminum, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required due to the PPC impairment listing for aluminum, in support of the IPP, and to allow for an RP assessment in the next permit cycle. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For antimony, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required due to the PPC impairment listing for antimony and in support of the IPP. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For arsenic, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required due to the PPC impairment listing for arsenic and in support of the IPP. The permittee shall report the monthly average and maximum daily concentrations on the DMR;

- For cadmium, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required due to the PPC impairment listing for cadmium, in support of the IPP, and to allow for an RP assessment in the next permit cycle. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For copper, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required in support of the IPP and to assess compliance with the limitations. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For lead, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required due to the PPC impairment listing for lead, in support of the IPP, and to allow for an RP assessment in the next permit cycle. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For zinc, monthly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required in support of the IPP and to assess compliance with the limitations. The permittee shall report the monthly average and maximum daily concentrations on the DMR;
- For the other total recoverable metals from Table III, 40 CFR Part 122 Appendix D (beryllium, chromium, mercury, selenium, silver, thallium), quarterly monitoring of the influent and effluent by 24-hour flow-proportional composite samples at the RRV will be required in support of the IPP. The permittee shall report the quarterly average and maximum daily concentrations on the DMR;
- For total hardness as CaCO_3 , quarterly monitoring of the effluent by grab sample at the RRV will be required in support of the IPP. The permittee shall report the quarterly average and maximum daily concentrations on the DMR.

Total Phenols and Total Cyanide: Monitoring of the influent and effluent by grab sample at the RRV will be required for these toxic pollutants from Table III, 40 CFR Part 122 Appendix D will be required in support of the IPP and to allow for an RP assessment during the next permit renewal. The permittee shall report the quarterly average and maximum daily concentrations on the DMR.

Organic Toxic Pollutants: Monitoring of the influent and effluent on a semi-annual basis for the volatile, acid, and base/neutral organic toxic pollutants in Table II, 40 CFR 122 Appendix D, by the sample method appropriate for the analysis will be required in support of the IPP and to allow for an RP assessment in the next permit cycle. Analysis results must meet the RRV or minimum level as determined by the analysis method.

Starting the first full calendar quarter after the effective date of the permit (January 1, 2011 through March 31, 2011) and lasting through midnight, December 31, 2013, the first semi-annual samples shall be collected in the first calendar quarter of the year (the months of January,

February, or March); the second semi-annual samples shall be collected in the third calendar quarter of the year (July, August, or September). The analysis results will not be submitted on a DMR; instead, complete laboratory analysis reports shall be submitted with the applicable DMR for the reporting period.

Effective January 1, 2014, and lasting through the term of the permit, the first semi-annual samples shall be collected in the second calendar quarter of the year (during the months of April, May, or June); the second semi-annual samples shall be collected in the fourth calendar quarter of the year (October, November, or December). The analysis results will not be submitted on a DMR; instead, complete laboratory analysis reports shall be submitted with the applicable DMR for the reporting period.

Whole Effluent Toxicity (WET) Testing: Monitoring potential toxicity in the effluent by means of quarterly chronic WET testing on two species, in accordance with the EPA Region VIII NPDES *Whole Effluent Toxics Control Program*, August 1997, ARM 17.30.1322(6)(j), and the permit will be required. Complete laboratory analysis reports shall be submitted with the applicable DMR for the reporting period.

Table 13. Self-Monitoring Requirements

Parameter	Unit	Sample Location	Sample Frequency	Sample Type ⁽¹⁾	RRV
Flow	mgd	Influent	Continuous	⁽²⁾	--
	mgd	Effluent	Continuous	⁽²⁾	--
5-Day Biochemical Oxygen Demand (BOD ₅)	mg/L	Influent	5/Week	Composite	2
	mg/L	Effluent	5/Week	Composite	2
	lb/day	Effluent	1/Month	Calculated	--
	% Removal ⁽³⁾	Effluent	1/Month	Calculated	--
Total Suspended Solids (TSS)	mg/L	Influent	5/Week	Composite	10
	mg/L	Effluent	5/Week	Composite	10
	lb/day	Effluent	1/Month	Calculated	--
	% Removal ⁽³⁾	Effluent	1/Month	Calculated	--
pH	s.u.	Effluent	Daily	Instantaneous	0.1
Temperature	°C	Effluent	Daily	Instantaneous	--
<i>E. coli</i> Bacteria ⁽⁴⁾	cfu/100 mL	Effluent	5/Week	Grab	1
Total Ammonia as N	mg/L	Effluent	1/Week	Composite	0.05
Nitrate + Nitrite as N	mg/L	Effluent	1/Week	Composite	0.01
Total Kjeldahl Nitrogen	mg/L	Effluent	1/Week	Composite	--
Total Nitrogen ⁽⁵⁾	mg/L	Effluent	1/Week	Calculated	--
	lb/day	Effluent	1/Month	Calculated	--
Total Phosphorus as P	mg/L	Effluent	1/Week	Composite	0.001
	lb/day	Effluent	1/Month	Calculated	--
Dissolved Oxygen	mg/L	Effluent	Daily	Grab	0.05
Oil and Grease ⁽⁶⁾	mg/L	Effluent	1/Month	Grab	1
Total Dissolved Solids	mg/L	Effluent	1/Quarter	Grab	10
Whole Effluent Toxicity, Chronic ⁽⁷⁾	% Effluent	Effluent	1/Quarter	Composite	--

Footnotes:

- (1) See Definition section at end of permit for explanation of terms.
- (2) Requires recording device or totalizer; permittee shall report maximum daily and average monthly flow on DMR
- (3) Percent Removal shall be calculated using the monthly average values
- (4) Report Geometric Mean if more than one sample is collected during the reporting period.
- (5) Calculated as the sum of Nitrate + Nitrite as N and Total Kjeldahl Nitrogen (TKN) concentrations.
- (6) Collect a sample and analyze using EPA Method 1664 Revision A: N-Hexane Extractable Material (HEM).
- (7) Sampling is required starting the first full calendar quarter following the effective date of the permit.

Table 14. Additional Monitoring Requirements

Parameter	Units	Sample Frequency	Sample Type ⁽¹⁾	RRV
Aluminum, Dissolved ⁽²⁾	mg/L	1/Month	Composite	0.030
Antimony, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.003
Arsenic, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.003
Cadmium, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.00008
Copper, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.001
Lead, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.0005
Zinc, Total Recoverable ⁽²⁾	mg/L	1/Month	Composite	0.010
Beryllium, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.001
Chromium, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.001
Mercury, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.00001
Nickel, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.010
Selenium, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.001
Silver, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.0005
Thallium, Total Recoverable ⁽²⁾	mg/L	1/Quarter	Composite	0.0002
Cyanide, Total ⁽³⁾	mg/L	1/Quarter	Grab	0.005
Phenols, Total ⁽³⁾	mg/L	1/Quarter	Grab	0.010
Total Hardness as CaCO ₃ ⁽³⁾	mg/L	1/Quarter	Composite	10
Volatile Organic Pollutants ⁽⁴⁾	mg/L	2/year	Composite	⁽⁵⁾
Semi-Volatile, Acid Compounds ⁽⁴⁾	mg/L	2/year	Composite	⁽⁵⁾
Semi-Volatile, Base/Neutral ⁽⁴⁾	mg/L	2/year	Composite	⁽⁵⁾

Footnotes:

- (1) See Definition section at end of permit for explanation of terms.
 (2) Both influent and effluent shall be sampled. Metals shall be analyzed as total recoverable with the exception of aluminum, which is analyzed in the dissolved form. Use EPA Method (Section) 4.1.4 [EPA 600/4-79-020, March 1983] or equivalent.
 (3) Effluent sample only.
 (4) Both influent and effluent shall be sampled in accordance with 40 CFR 122, Appendix D, Table II. Analysis results will not be submitted on a DMR; complete laboratory analysis reports shall be submitted with the applicable DMR for the reporting period.

Starting the first full calendar quarter after the effective date of the permit (January 1, 2011 through March 31, 2011) and lasting through midnight, December 31, 2013, the first semi-annual influent and effluent samples shall be collected in the first calendar quarter of the year (the months of January, February, or March); the second semi-annual influent and effluent samples shall be collected in the third calendar quarter of the year (July, August, or September).

Effective January 1, 2014, and lasting through the term of the permit, the first semi-annual influent and effluent samples shall be collected in the second calendar quarter of the year (during the months of April, May, or June); the second semi-annual influent and effluent samples shall be collected in the fourth calendar quarter of the year (October, November, or December). Results will not be entered on a DMR but shall be submitted with the next quarter's DMR when due.

- (5) See approved method for minimum level.

VII. Nonsignificance Determination

As discussed in the previous sections, the proposed effluent limits and discharge flows for the Helena WWTP discharge do not allow for, or constitute, a new or increased source of pollutants pursuant to ARM 17.30.702(18). Therefore, a nonsignificance analysis is not required [ARM 17.30.705(1)].

VIII. Special Conditions

Copper and Zinc - Final effluent limitations for total recoverable copper and total recoverable zinc are effective xx/xx/xxxx (59 months after permit effective date). The permittee is being given time to optimize treatment in order to meet the new water quality-based effluent limitations for total recoverable metals.

1. Starting the first full calendar year of the permit cycle (2012) and lasting for the duration of the Special Condition, an annual report shall be submitted to the Department with the December DMR (postmarked no later than January 28th). The reports shall describe the milestones accomplished and the steps planned for each year towards compliance with the final effluent limitations for total recoverable copper and total recoverable zinc.

Facility Optimization Study for TN and TP – The permittee shall conduct a facility optimization study to improve treatment efficiency for TN and TP and submit a plan for achieving optimization by the expiration date of the permit. Effluent limits will be developed from the optimization study as previously described and will be applied in the next permit renewal. The permittee shall adhere to the following schedule with respect to optimization:

2. The facility optimization study shall be completed and submitted to the Department no later than 1 year after the effective date of the permit. The study must identify the long term average (LTA) concentrations of TN and TP achievable by the facility in its present configuration. Effluent load limits for TN and TP will be developed based on these LTA and the design flow of the facility following the method used to develop the IWLA in this permit. The smaller of either the optimization-based load limits or the IWLA in this permit will be incorporated into the next permit renewal as effluent limits for TN and TP.
3. No later than two years after the permit effective date, the permittee must submit a plan for implementing the optimization study and achieving the effluent concentrations and load limits described above. The plan must include achievement of these effluent limits no later than the expiration date of this permit.
4. At the end of each calendar year following the submission of the above plan, the permittee shall submit an annual report describing progress made towards implementation of the optimization study and compliance with the effluent limits described above. Progress reports for the previous year shall be submitted and postmarked no later than January 28th.

Irrigation of WWTF Campus – Upon Department review and approval of plans and specifications, the permittee may commence irrigation of the facility grounds with treated effluent. This authorization applies to the irrigation of facility grounds only. Any other land application of treated effluent will require the submission of an updated permit application, including DEQ Form LA-1. Once the plan and specification approval is granted by the Department, the permittee must submit a letter to the Water Protection Bureau indicating the planned date for the commencement of irrigation and the anticipated volume of treated effluent that will be used for this purpose. The letter must be submitted prior to the use of effluent for irrigation, and no later than December 31, 2011.

IX. Other Information

On September 21, 2000, a US District Judge issued an order stating that until all necessary total maximum daily loads (TMDLs) under Section 303(d) of the Clean Water Act are established for a particular water quality-limited segment, the State is not to issue any new permits or increase permitted discharges under the MPDES program. The order was issued under the lawsuit Friends of the Wild Swan vs. US EPA, et al., CV 97-35-M-DWM, District of Montana, Missoula Division.

The renewal of this permit does not conflict with Judge Molloy's order because the permit includes effluent limits that prohibit any increases above previously-allowed authorized amounts.

X. Information Sources

1. Administrative Rules of Montana Title 17 Chapter 30 - Water Quality
 - a. Sub-Chapter 2 - *Water Quality Permit and Application Fees*, December 2009.
 - b. Sub-Chapter 5 - *Mixing Zones in Surface and Ground Water*, March 2006.
 - c. Sub-Chapter 6 - *Montana Surface Water Quality Standards and Procedures*, March 2006.
 - d. Sub-Chapter 7- *Nondegradation of Water Quality*, March 2006.
 - e. Sub-Chapter 10 - *Montana Ground Water Pollution Control System*, June 2006.
 - f. Sub-Chapter 12 - *Montana Pollutant Discharge Elimination System (MPDES) Standards*, March 2007.
 - g. Sub-Chapter 13 - *Montana Pollutant Discharge Elimination System (MPDES) Permits*, June 2006.
2. Clean Water Act § 303(d), 33 USC 1313(d) *Montana List of Waterbodies in Need of Total Maximum Daily Load Development*, 1996 and 2008.
3. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387, October 18, 1972, as amended 1973-1983, 1987, 1988, 1990-1992, 1994, 1995 and 1996.
4. Montana Code Annotated Title 75 - Environmental Protection Chapter 5 - Water Quality, 2007.

5. Montana Department of Environmental Quality Circular DEQ-2, *Design Standards for Wastewater Facilities*, September 1999.
6. Montana Department of Environmental Quality Circular DEQ-7, *Montana Numeric Water Quality Standards*, February 2008.
7. Montana Department of Fish Wildlife and Parks, *Spawning Times of Montana Fishes*, March 2001.
8. Montana Pollutant Discharge Elimination System (MPDES) Permit Number MT0022641
 1. Administrative Record.
 2. Renewal Application Forms DEQ-1 and EPA Form 2A, February 16, 2010.
9. *Wastewater Treatment Facility Operation and Maintenance Manual*, Helena, Montana, Black & Veatch, February 1977.
10. *City of Helena, Montana Proposed DEQ Discharge Permit Modifications Report*, Black & Veatch, July 1995.
11. *Operations Manual*, Helena WWTP, Morrison-Maierle, Inc., December 2000.
12. *City of Helena Wastewater Collection System Master Plan* (planning period 2005-2025), City of Helena, 2008.
13. US Code of Federal Regulations, 40 CFR Parts 122-125, 130-133, & 136.
14. US Code of Federal Regulations, 40 CFR Part 403 – *General Pretreatment Regulations for Existing and New Sources of Pollution*.
15. US Code of Federal Regulations, 40 CFR Part 503 – *Standards for the Use or Disposal of Sewage Sludge*.
16. US Department of the Interior US Geological Survey, *Statistical Summaries of Streamflow in Montana and Adjacent Areas, Water Years 1900 through 2002*, Scientific Investigations Report 2004-5266, 2004.
17. US EPA *Technical Support Document for Water Quality-Based Toxics Control*, EPA/505/2-30-001, March 1991.
18. US EPA NPDES *Permit Writers' Manual*, EPA 833-B-96-003, December 1996.
19. US EPA Region VIII NPDES *Whole Effluent Toxics Control Program*, August 1997.
20. US EPA NPDES *Compliance Inspection Manual*, EPA 305-X-03-004, July 2004.

21. US EPA for Montana Department of Environmental Quality *Framework Water Quality Restoration Plan and Total Maximum Daily Loads (TMDLs) for the Lake Helena Watershed Planning Area*:
 - a. Volume I – Appendices, December 2004.
 - b. Volume II – Final Report, August 2006.
22. US EPA Ref. 8-MO, TMDL Approvals, *Lake Helena Total Maximum Daily Load Planning Area* and Enclosures, September 27, 2006.
23. US EPA *NPDES Permit Writers' Course Manual*, EPA-833-B-91-001, March 2009.

Prepared by: MK Valett, May 25, 2010
Jeff May, August 17, 2010 and April 2011

Attachment A-1

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Ammonia as N						
	Variables	Units	Acute Condition		Chronic Condition	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₉	5.430	C ₉₉	5.430
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0
C _s	Concentration in Stream	mg/L		0.39		0.39
C _r	Concentration Down Stream	mg/L		5.43		5.43
	Stream Standards	mg/L	CMC 1-h	1.67	CCC 30-d	3.83
RP				yes		yes
7Q10		cfs		0		
CV				0.87		
n				59		
[max], mg/L				3.62		
TSD multiplier, Table 3-2 (95/95)				1.5		
C ₉₅ is the projected maximum effluent concentration ([max, mg/L] * TSD multiplier)				5.43		

Attachment B-1

Month	Helena WWTP Interim Nutrient Waste Load Allocations	Total Nitrogen TN (lb/d)	Total Phosphorus as P TP (lb/d)
Jan-05		199	Jan-05
Feb-05		207	Feb-05
Mar-05		133	Mar-05
Apr-05		253	Apr-05
May-05		210	May-05
Jun-05		159	Jun-05
Jul-05		156	Jul-05
Aug-05		132	Aug-05
Sep-05		154	Sep-05
Oct-05		170	Oct-05
Nov-05		169	Nov-05
Dec-05		161	Dec-05
Jan-06		188	Jan-06
Feb-06		280	Feb-06
Mar-06		250	Mar-06
Apr-06		190	Apr-06
May-06		171	May-06
Jun-06		235	Jun-06
Jul-06		349	Jul-06
Aug-06		162	Aug-06
Sep-06		177	Sep-06
Oct-06		153	Oct-06
Nov-06		182	Nov-06
Dec-06		186	Dec-06
Jan-07		186	Jan-07
Feb-07		169	Feb-07
Mar-07		181	Mar-07
Apr-07		165	Apr-07
May-07		168	May-07
Jun-07		182	Jun-07
Jul-07		179	Jul-07
Aug-07		227	Aug-07
Sep-07		170	Sep-07

Oct-07		184	Oct-07
Nov-07		212	Nov-07
Dec-07		209	Dec-07
Jan-08		189	Jan-08
Feb-08		183	Feb-08
Mar-08		150	Mar-08
Apr-08		141	Apr-08
May-08		173	May-08
Jun-08		179	Jun-08
Jul-08		138	Jul-08
Aug-08		148	Aug-08
Sep-08		117	Sep-08
Oct-08	TN value removed due to POTW upset		127
Nov-08	TN value removed due to POTW upset		101
Dec-08		153	Dec-08
Jan-09		177	Jan-09
Feb-09		178	Feb-09
Mar-09		138	Mar-09
Apr-09		144	Apr-09
May-09		136	May-09
Jun-09		193	Jun-09
Jul-09		104	Jul-09
Aug-09		104	Aug-09
Sep-09		112	Sep-09
Oct-09		274	Oct-09
Nov-09		231	Nov-09
Dec-09		208	Dec-09
n =		58	60
Average		180	86.8
Standard Deviation		44.0	37.2
Coefficient of Variation (CV)		0.24	0.43
Average Weekly - LTA Multiplier *		1.73	2.35
Average Monthly- LTA Multiplier **		1.33	1.53
		TN	TP
Average Weekly Load (AWL), lb/day		311	204
Average Monthly Load (AML), lb/day		238	133

* Source: EPA, 1994, TSD, Table 5.2, MDL 99th Percentile

** Source: EPA, 1994, TSD, Table 5.2, AML 99th Percentile, n=4

Attachment C-1

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Antimony								
	Variables	Units	Human Health (no sample shall exceed)		Aquatic Life Support (Antimony)		Aquatic Life Support (Antimony)	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350				
C _d	Concentration in Discharge	mg/L	C ₉₅	0.0019	C ₉₅		C ₉₅	
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0		0	
C _s	Concentration in Stream	mg/L		0.011				
C _d	Concentration Down Stream	mg/L		0.0019				
			hh	0.0056	als-a		als-c	
RPS				no				
7Q10		cfs		0				
EFF CV				0.654				
EFF n				9				
EFF [max], mg/L				0.001				
TSD multiplier, Table 3-2 (95/95)				1.91				
C ₉₅ is the projected maximum effluent concentration ([max, mg/L]* TSD multiplier)				0.0096				

Attachment C-2

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Arsenic								
	Variables	Units	Human Health (no sample shall exceed)		Aquatic Life Support (Acute)		Aquatic Life Support (Chronic)	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₅	0.006	C ₉₅	0.006	C ₉₅	0.006
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0	0	0
C _s	Concentration in Stream	mg/L		0.011		0.011		0.011
C _s	Concentration Down Stream	mg/L		0.0058		0.0058		0.0058
			hh	0.010	als-a	0.340	als-c	0.150
RP				no		no		no
7Q10		cfs		0		0		0
CV				0.268		0.268		0.268
n				20		20		20
[max], mg/L				0.005		0.005		0.005
TSD multiplier, Table 3-2 (95/95)				1.168		1.168		1.168
C ₉₅ is the projected maximum effluent concentration ([max, mg/L]*TSD multiplier)				0.0058		0.0058		0.0058

Attachment C-3

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Cadmium								
	Variables	Units	Human Health (no sample shall exceed)		Aquatic Life Support (Acute)		Aquatic Life Support (Chronic)	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₅	0.001	C ₉₅	0.001	C ₉₅	0.001
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0	0	0
C _s	Concentration in Stream	mg/L		<i>0.011</i>		<i>0.011</i>		<i>0.011</i>
C _r	Concentration Down Stream	mg/L		<i>0.0011</i>		<i>0.0011</i>		<i>0.0011</i>
			hh	0.005	als-a	0.0019	als-c	0.0003
RP				no		no		yes
7Q10		cfs		0		0		0
CV				0.115		0.115		0.115
n				20		20		20
[max], mg/L				0.001		0.001		0.001
TSD multiplier, Table 3-2 (95/95)				1.1		1.1		1.1
C ₉₅ is the projected maximum effluent concentration ([max, mg/L] * TSD multiplier)				0.0011		0.0011		0.0011

Values in *italics* were reported as less than/equal to the method reporting level.

Attachment C-4

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Copper								
	Variables	Units	Human Health (no sample shall exceed)		Aquatic Life Support (Acute)		Aquatic Life Support (Chronic)	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₅	0.104	C ₉₅	0.104	C ₉₅	0.104
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0	0	0
C _s	Concentration in Stream	mg/L		0.005		0.005		0.005
C _r	Concentration Down Stream	mg/L		0.1044		0.1044		0.1044
			hh	1.30	als-a	0.0128	als-c	0.0086
RP				no		yes		yes
7Q10		cfs		0		0		0
CV				0.791		0.791		0.791
n				20		20		20
[max], mg/L				0.070		0.070		0.070
TSD multiplier, Table 3-2 (95/95)				1.491		1.491		1.491
C ₉₅ is the projected maximum effluent concentration ([max], mg/L)*TSD multiplier)				0.1044		0.1044		0.1044

Attachment C-5

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Lead								
	Variables	Units	Human Health (no one shall exceed)	Aquatic Life Short Term (Acute)	Aquatic Life Long Term (Chronic)	Human Health (no one shall exceed)	Aquatic Life Short Term (Acute)	Aquatic Life Long Term (Chronic)
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₅	0.013	C ₉₅	0.013	C ₉₅	0.013
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0	0	0
C _s	Concentration in Stream	mg/L		0.005		0.005		0.005
C _r	Concentration Down Stream	mg/L		0.0125		0.0125		0.0125
		hh	0.015	als-a	0.0724	als-c	0.0028	
RP			no		no		yes	
7Q10		cfs		0		0		0
CV				0.450		0.450		0.450
n				20		20		20
[max], mg/L				0.010		0.0100		0.0100
TSD multiplier, Table 3-2 (95/95)				1.25		1.25		1.25
C ₉₅ is the projected maximum effluent concentration ([max, mg/L]*TSD multiplier)				0.0125		0.0125		0.0125

Attachment C-6

Helena WWTP Discharge to Prickly Pear Creek RP Analysis for Total Recoverable Zinc								
	Variables	Units	Human Health (no sample shall exceed)		Aquatic Life Support (Acute)		Aquatic Life Support (Chronic)	
Q _d	Discharge Flow (Design Q for POTW)	cfs		8.350		8.350		8.350
C _d	Concentration in Discharge	mg/L	C ₉₅	0.242	C ₉₅	0.242	C ₉₅	0.242
Q _s	Applicable Stream Flow (% of 7Q10)	cfs	0	0	0	0	0	0
C _s	Concentration in Stream	mg/L		0.067		0.067		0.067
C _t	Concentration Down Stream	mg/L		0.242		0.242		0.242
			hh	2.00	als-a	0.111	als-c	0.111
RP			no		yes		yes	
7Q10		cfs		0		0		0
CV				0.311		0.311		0.311
n				20		20		20
[max], mg/L				0.200		0.200		0.200
TSD multiplier, Table 3-2 (95/95)				1.21		1.21		1.21
C ₉₅ is the projected maximum effluent concentration ([max, mg/L] * TSD multiplier)				0.242		0.242		0.242

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

3 **IN THE MATTER OF:**
4 **THE APPEAL AND REQUEST FOR**
5 **HEARING BY THE CITY OF HELENA**
6 **REGARDING THE DEQ'S NOTICE OF**
7 **FINAL DECISION FOR MONTANA**
8 **POLLUTANT DISCHARGE**
9 **ELIMINATION SYSTEM (MPDES)**
10 **PERMIT NO. MT0022641.**

CASE NO. BER 2011-08 WQ

11 **FIRST PREHEARING ORDER**

12 Mr. David L. Nielsen, on behalf of the City of Helena, has requested a
13 hearing on its appeal of the Montana Pollutant Discharge Elimination System Permit
14 (MPDES) Permit No. MT0022641. The following guidelines and rules are provided
15 to assist the parties in an orderly resolution of this matter.

16 1. REFERENCES: This matter is governed by the Montana
17 Administrative Procedure Act, Contested Cases, Mont. Code Ann. Tit. 2, ch. 4,
18 pt. 6, and Mont. Admin. R. 17.4.101, by which the Board of Environmental Review
19 (Board) has adopted the Attorney General's Model Rules for contested cases, Mont.
20 Admin. R. 1.3.211 through 1.3.225, and by Mont. Code Ann. Tit. 75, Ch. 5, pts. 4
21 and 6.

22 2. FILING: Except for discovery requests and responses (which are not
23 routinely filed), original documents shall be sent for filing with the Board, addressed
24 as follows:

25 MS. JOYCE WITTENBERG
26 Secretary, Board of Environmental Review
27 Department of Environmental Quality
 1520 East Sixth Avenue
 P.O. Box 200901
 Helena, MT 59620-0901

1 One copy of each document that is filed should be sent to the Hearing
2 Examiner addressed as follows:

3 KATHERINE J. ORR
4 Hearing Examiner
5 Agency Legal Services Bureau
6 1712 Ninth Avenue
7 P.O. Box 201440
8 Helena, MT 59620-1440

9 Although discovery documents are not normally filed, when a motion or brief
10 is filed making reference to discovery documents, the party filing the motion or
11 brief should also attach the relevant discovery documents.

12 3. SERVICE: Copies of all documents filed with the Board and
13 provided to the Hearing Examiner, including correspondence, must be served upon
14 the opposing party. A certificate of service should be provided.

15 4. EX PARTE COMMUNICATIONS: The Montana Administrative
16 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model
17 Rule 18 in Mont. Admin. R. 1.3.222, prohibit ex parte communications with a
18 hearing examiner concerning any issue of fact or law in a contested case. In
19 addition to observing this rule, please contact the opposing party before you
20 communicate with the undersigned, even on purely procedural matters such as the
21 need for a continuance.

22 5. SCHEDULING: The undersigned Hearing Examiner requests the
23 parties consult with each other and propose to the undersigned a schedule upon
24 which they agree by **July 29, 2011**. The schedule should include the following
25 dates:

- 26 (a) for joinder/intervention of additional parties;
27 (b) for disclosure by each party to the other parties of: (1) the
name and address of each individual likely to have discoverable information that the
disclosing party may use to support its claims or defenses, and (2) a copy of, or a

1 description by category and location of, all documents and tangible things that are in
2 the possession, custody, or control of the disclosing party and that the disclosing
3 party may use to support its claims or defenses;

4 (c) for completion of discovery (if any party wishes to conduct
5 discovery);

6 (d) for exchange of lists of witnesses and copies of documents that
7 each party intends to offer at the hearing;

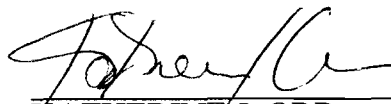
8 (e) for submitting any motions and briefs in support;

9 (f) for a prehearing conference to hear argument on any motions
10 and resolve other prehearing matters; and

11 (g) for the contested case hearing, as well as the place of hearing.

12 6. If the parties are unable to agree upon the date for any item set forth in
13 the preceding paragraph, the Hearing Examiner shall set a schedule.

14 DATED this 7th day of July, 2011.

15
16 

17 KATHERINE J. ORR
18 Hearing Examiner
19 Agency Legal Services Bureau
20 1712 Ninth Avenue
21 P.O. Box 201440
22 Helena, MT 59620-1440
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Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(original)

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

Mr. David L. Nielsen
Office of the City Attorney
316 North Park Avenue
Helena, MT 59623

DATED:

July 11, 2011 



Montana Department of

ENVIRONMENTAL QUALITY

MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: June 28, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-09 PWS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:

VIOLATIONS OF THE PUBLIC WATER
SUPPLY LAWS BY OLSON'S LOLO HOT
SPRINGS, INC. AT LOLO HOT SPRINGS,
PWSID #MT0000805, LOLO, MISSOULA
COUNTY, MONTANA. FID #2043,
DOCKET NO. PWS-11-09]

Case No. BER 2011-09 PWS

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2043, Docket No. PWS-11-09).

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

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

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

Attachments

Wittenberg, Joyce

From: Rose Chute [rchute@graywolfmt.com]
Sent: Tuesday, June 28, 2011 2:39 PM
To: Wittenberg, Joyce
Cc: Ryan Shaffer
Subject: DEQ Docket No. PWS-11-09; PWSID #MT0000805
Attachments: 2011-06-28 Request for Administrative Hearing.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: BER

Good afternoon,

Please file the attached Request for Administrative Hearing today. The original is being sent via Federal Express today as well. Please call with any questions. Thank you.

Sincerely,

Rose Chute
Legal Assistant
SHAFFER LAW OFFICE, P.C.
405 S. First Street West
Missoula, MT 59801
Phone: (406) 543-6929
Fax: (406) 721-1799

Please be advised that this transmittal may be a confidential attorney-client communication or may otherwise be privileged or confidential. If you are not the intended recipient, please do not read, copy or re-transmit this communication. If you have received this communication in error, please notify us by e-mail (rchute@graywolfmt.com) or by telephone and delete this message and any attachments. Thank you in advance for your cooperation and assistance.

SHAFFER LAW OFFICE, P.C.

405 S. First St. W. · Missoula, MT 59801 · (406) 543-6929 · ryan@shafferlawoffice.net

June 28, 2011

Via Fax: (406) 444-4386 and Federal Express

Board Secretary

Montana Board of Environmental Review

P.O. Box 200901

Helena, MT 59620-0901

FILED this 29th day of
June AD 2011
at _____
RECEIVED
ENVIRONMENTAL REVIEW
by Misty C.

**Re: *DEQ Docket No. PWS-11-09; PWSID #MT0000805;*
Request for Administrative Hearing**

Dear Secretary,

On behalf of Olson's Lolo Hot Springs, and pursuant to Mont. Code Ann. § 75-6-109(3), I am requesting an administrative hearing on the Notice of Violation and Administrative Compliance Order issued by the Montana Department of Environmental Quality in the above referenced matter (issued May 31, 2011).

At your earliest convenience, please forward to me a copy of any informal rules used by the Board of Environmental Review or its hearing administrators in these matters. I will of course be happy to reimburse the Board for copy expenses, if any, related to this request.

Sincerely,



Ryan R. Shaffer

cc: Olson's Lolo Hot Springs
Brent Olson (via email only)
Andy Mefford (via email only)

SHAFFER LAW OFFICE, P.C.

405 S. First St. W. · Missoula, MT 59801 · (406) 543-6929 · ryan@shafferlawoffice.net

June 28, 2011

Via Fax: (406) 444-4386 and Federal Express

Board Secretary
Montana Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

**Re: *DEQ Docket No. PWS-11-09; PWSID #MT0000805;*
*Request for Administrative Hearing***

Dear Secretary,

On behalf of Olson's Lolo Hot Springs, and pursuant to Mont. Code Ann. § 75-6-109(3), I am requesting an administrative hearing on the Notice of Violation and Administrative Compliance Order issued by the Montana Department of Environmental Quality in the above referenced matter (issued May 31, 2011).

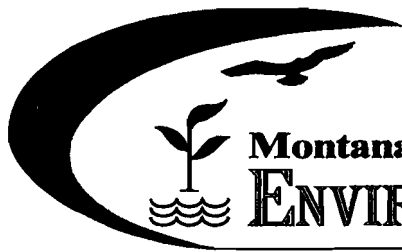
At your earliest convenience, please forward to me a copy of any informal rules used by the Board of Environmental Review or its hearing administrators in these matters. I will of course be happy to reimburse the Board for copy expenses, if any, related to this request.

Sincerely,



Ryan R. Shaffer

cc: Olson's Lolo Hot Springs
Brent Olson (via email only)
Andy Mefford (via email only)



**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

May 31, 2011

Brent Olson
Olson's Lolo Hot Springs, Inc.
38500 Highway 12 West
Lolo, MT 59847

**CERTIFIED MAIL #7009 2820 0000 5734 9053
Return Receipt Requested**

**RE: Notice of Violation and Administrative Compliance Order, Docket No. PWS-11-09
(PWSID #MT0000805, FID #2043)**

Dear Mr. Olson:

The Department of Environmental Quality (Department) is issuing the enclosed Notice of Violation and Administrative Compliance Order (Order) to Olson's Lolo Hot Springs, Inc. (Lolo Hot Springs). The Order addresses violations of the Montana Public Water Supply Laws (PWSL) and Administrative Rules of Montana (ARM) that have occurred at Lolo Hot Springs (System) in Missoula, Montana.

The Order requires Lolo Hot Springs to complete corrective actions in order to return the System to compliance. Please refer to Section III of the Order for a description of the required corrective actions and timeframes for completion.

Pursuant to Section 75-6-109(3), Montana Code Annotated, Lolo Hot Springs is entitled to a hearing before the Board of Environmental Review if a written request is submitted to the Board no later than 30 days after service of the Order. Section IV of the Order explains the request procedure and hearing process.

Should any part of this letter conflict with the terms of the Order, the Order is controlling. If there are any questions, please contact me at the telephone number listed below.

Sincerely,

Rich Jost
Environmental Enforcement Specialist
Enforcement Division
(406) 444-2857; Fax (406) 444-1923
email: rjost@mt.gov

Enclosure

cc w/Order: Carol Schmidt, DEQ Legal Unit
Jon Dilliard / Shelley Nolan, DEQ PWSSB
Julie DalSoglio, EPA-Montana

cc: Missoula County Sanitarian, 301 W. Alder St., Missoula, MT 59802

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE PUBLIC WATER
SUPPLY LAWS BY OLSON'S LOLO HOT
SPRINGS, INC. AT LOLO HOT SPRINGS,
PWSID #MT0000805, LOLO, MISSOULA
COUNTY, MONTANA. (FID #2043)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
ORDER

Docket No. PWS-11-09

I. NOTICE OF VIOLATION

Pursuant to the authority of Section 75-6-109(1), Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Olson's Lolo Hot Springs, Inc. (Respondent) of the following Findings of Fact and Conclusions of Law with respect to violations of the Public Water Supply Laws (PWSL) (Title 75, chapter 6, part 1, MCA) and Administrative Rules of Montana (ARM) (Title 17, chapter 38) adopted thereunder.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department hereby makes the following Findings of 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 PWSL.
3. Respondent is a corporation registered with the State of Montana, and is therefore a "person" as defined in Section 75-6-102(11), MCA.
4. Respondent owns and operates the public water supply system that serves the customers of Lolo Hot Springs (System), PWSID #MT0000805, Lolo, Montana. The System regularly serves water to at least 25 persons daily for any 60 or more days in a calendar year. Respondent is therefore a "supplier of water" and subject to the requirements of the PWSL and the rules adopted thereunder. *See* ARM 17.38.202 and 40 CFR 141.2 as incorporated therein.

1 5. The System does not regularly serve water to at least 25 of the same persons over
2 six months per year. Therefore, the System is a “transient non-community water system” within
3 the meaning of ARM 17.38.202 and 40 CFR 141.2 as incorporated therein.

4 6. The System is supplied by springs.

5 ***Failure to install filtration***

6 7. A public water system that uses a surface water source or a ground water source
7 under the direct influence of surface water, and does not meet all of the criteria to avoid
8 filtration, must install and properly operate filtration and disinfection treatment within 18 months
9 of the failure to meet one of the filtration avoidance criteria. *See* ARM 17.38.208 and 40 CFR
10 141.70-73 (Surface Water Treatment Rule) as incorporated therein.

11 8. On May 22, 2009, the Department notified Respondent in writing, via certified
12 mail, that Respondent was in violation of the Surface Water Treatment Rule and that it had 18
13 months to achieve compliance by providing filtration treatment, finding a new source, or
14 correcting construction issues at the current source in order to change the source classification.

15 9. On August 11, 2009, Professional Consultants, Inc. sent the Department a letter
16 certifying that interim treatment had been installed at the System as outlined in the plans
17 submitted to the Department on June 19, 2009.

18 10. On December 17, 2009, the Department notified Respondent in writing, via
19 certified mail, that the System’s spring had been classified by the Department as groundwater
20 under the direct influence of surface water (GWUDISW) and therefore the System was subject to
21 the Surface Water Treatment Rule. The December 17, 2009 letter further notified Respondent
22 that the Surface Water Treatment Rule required Respondent to provide filtration treatment, find
23 an approved new source, correct the System’s construction issues to ensure the System is no
24 longer classified as GWUDISW, or meet the filtration avoidance criteria as outlined in 40 CFR

1 141.71. Finally, the December 17, 2009 letter notified Respondent that it was required to
2 comply with the Surface Water Treatment Rule within 18 months of the May 22, 2009 Surface
3 Water Treatment Rule Violation Letter sent by the Department.

4 11. On September 7, 2010, the Department notified Respondent in writing that
5 Respondent's installation of a small micron cartridge filter, an ultra-violet light disinfection
6 component and a chlorine disinfection process was considered interim treatment because only
7 the small micron cartridge filter had been approved by the Department and the treatment did not
8 address all the requirements of the Surface Water Treatment Rule.

9 12. On December 7, 2010, the Department notified Respondent in writing, via
10 certified mail, that Respondent was still in violation of the Surface Water Treatment Rule and in
11 order to return to compliance, Respondent must provide filtration treatment in accordance with
12 ARM 17.38.208 or find an approved new source. The December 7, 2010 letter further notified
13 Respondent that it was required to provide tier 2 public notification in accordance with ARM
14 17.38.239 for the failure to provide filtration treatment for the System.

15 13. Respondent posted public notice for failing to provide filtration treatment for the
16 System on December 12 and 16, 2010, and submitted to the Department representative copies of
17 each type of notice that it distributed to the public.

18 14. Respondent violated and continues to violate ARM 17.38.208 by failing to
19 provide filtration treatment for a public water system supplied by a groundwater source under the
20 direct influence of surface water.

21 **III. ADMINISTRATIVE ORDER**

22 This Notice of Violation and Administrative Compliance Order (Order) is issued to
23 Respondent pursuant to the authority vested in the State of Montana, acting by and through the
24 Department under the PWSL, Section 75-6-101, *et seq.*, MCA, and administrative rules adopted

1 thereunder, ARM Title 17, chapter 38. Based on the foregoing Findings of Fact and Conclusions
2 of Law and the authority cited above, the Department hereby ORDERS Respondent to take the
3 following actions to comply with the PWSL within the timeframes specified in this Order:

4 15. Within 60 days from the mailing date of this Order, Respondent shall submit to
5 the Department for its review and approval a compliance plan and schedule (Plan) that identifies
6 a corrective action that will return Respondent to compliance with the Surface Water Treatment
7 Rule. *See* ARM 17.38.208 and 40 CFR 141.70-73 as incorporated therein. The Plan must
8 include plans and specifications that have been designed in accordance with ARM 17.38.101(4).
9 If the Plan includes a corrective action that is of a complexity that would require a professional
10 engineer, Respondent shall retain a licensed professional engineer to submit the Plan to the
11 Department. Respondent should consult with the Department's engineers to determine whether a
12 licensed professional engineer is required for the corrective action. The Plan shall be sent to:

13 John L. Arrigo, Administrator
14 Enforcement Division
15 Department of Environmental Quality
16 1520 East Sixth Avenue
17 P.O. Box 200901
18 Helena, MT 59620-0901

19 16. The Department will provide a written review to Respondent on the adequacy of the
20 Plan. Respondent shall respond to any deficiencies in the Plan within the timeframe noted in the
21 Department's review letter.

22 17. Respondent shall not commence with the construction or installation of any
23 corrective action prior to receipt of written approval from the Department.

24 18. The Plan will be incorporated by reference into this Order as enforceable
requirements upon written approval by the Department.

24 //

1 19. Within 60 days from the mailing date of the Department's written approval of the
2 Plan, Respondent shall commence with the installation and/or construction of the approved
3 corrective action.

4 20. Respondent must achieve and maintain compliance with the Surface Water
5 Treatment Rule by the compliance date specified in the approved Plan. If implementation of the
6 Plan fails to achieve compliance, the Department will require Respondent to implement additional
7 corrective action under this Order, and/or the Department may seek penalties in accordance with
8 Section 75-6-109(6)(a)(ii), MCA.

9 21. If any event occurs that may delay completion of construction activities required by
10 this Order, Respondent shall notify the Department in writing within ten (10) days after Respondent
11 becomes aware of the event. The notice of delay must include: (a) an explanation of the reasons for
12 the delay; (b) the expected duration of the delay; and (c) a description of all action taken or to be
13 taken to prevent or minimize the delay and a schedule for implementation of those actions. The
14 notice must be sent to the address listed in Paragraph 15.

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

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

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

24 //

1 **IV. NOTICE OF APPEAL RIGHTS**

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

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

9 26. Hearings are conducted as provided in the Montana Administrative Procedure Act,
10 Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court
11 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to the
12 hearing may include formal discovery procedures, including interrogatories, requests for production
13 of documents, and depositions. Because Respondent is not an individual, Respondent must be
14 represented by an attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-61-
15 201, MCA.

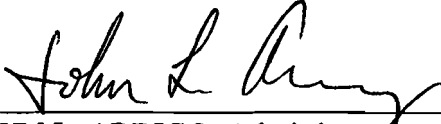
16 27. If a hearing is not requested within 30 days after service of this Order, the
17 opportunity for a contested case appeal is waived.

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

20 IT IS SO ORDERED:

21 DATED this 31st day of May, 2011.

22 STATE OF MONTANA
23 DEPARTMENT OF ENVIRONMENTAL QUALITY

24 

JOHN L. ARRIGO, Administrator
Enforcement Division

**IN THE MATTER OF:
VIOLATIONS OF THE PUBLIC WATER
SUPPLY LAWS BY OLSON'S LOLO
HOT SPRINGS, INC. AT LOLO HOT
SPRINGS, PWSID #MT0000805, LOLO,
MISSOULA COUNTY, MONTANA. FID
#2043, DOCKET NO. PWS-11-09**

FIRST PREHEARING ORDER
PAGE 1

One copy of each document that is filed should be sent to the Hearing Examiner addressed as follows:

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

Although discovery documents are not normally filed, when a motion or brief is filed making reference to discovery documents, the party filing the motion or brief should also attach the relevant discovery documents.

3. SERVICE: Copies of all documents filed with the Board and provided to the Hearing Examiner, including correspondence, must be served upon the opposing party. A certificate of service should be provided.

4. EX PARTE COMMUNICATIONS: The Montana Administrative Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model Rule 18 in Mont. Admin. R. 1.3.222, prohibit *ex parte* communications with a hearing examiner concerning any issue of fact or law in a contested case. In addition to observing this rule, please contact the opposing party before you communicate with the Hearing Examiner even on purely procedural matters such as the need for a continuance.

5. SCHEDULING: The parties are requested to consult with each other and propose a schedule upon which they agree to the Hearing Examiner by **July 29, 2011**. The schedule should include the following dates:

- (a) for joinder/intervention of additional parties;
- (b) for disclosure by each party to the other parties of: (1) the name and address of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, and (2) a copy of, or a description by

- 1 category and location of, all documents and tangible things that
2 are in the possession, custody, or control of the party and that
3 the disclosing party may use to support its claims or defenses;
4 (c) for completion of discovery (if any party wishes to conduct
5 discovery);
6 (d) for exchange of lists of witnesses and copies of documents that
7 each party intends to offer at the hearing;
8 (e) for submitting any motions and briefs in support;
9 (f) for a prehearing conference to hear argument on any motions
10 and resolve other prehearing matters; and
11 (g) for the contested case hearing, as well as the place of hearing.

12 DATED this 11 day of July, 2011.

13
14 

15 KATHERINE J. ORR
16 Hearing Examiner
17 Agency Legal Services Bureau
18 1712 Ninth Avenue
19 P.O. Box 201440
20 Helena, MT 59620-1440
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Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(original)

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

Mr. Ryan R. Shaffer
Shaffer Law Office, P.C.
405 S. First St. W.
Missoula, MT 59801

DATED:

Missoula, MT 59801

July 11, 2011

[Signature]