



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

TELECONFERENCE AGENDA

FRIDAY, SEPTEMBER 23, 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. July 22, 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. On August 19, 2011, counsel for DEQ filed *Unopposed Request for Extension of Time to Exchange Lists of Witnesses and Copies of Exhibits*. The hearing examiner issued *Order Granting Extension* giving the parties through August 26, 2011, to exchange lists of witnesses and copies of exhibits. On August 29, 2011, the Board received *North Star Aviation's Amended Witness and Exhibit Lists*.
 - 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.** On June 22, 2011, a hearing took place for the Motion for Summary Judgment, Cross Motion for Summary Judgment, and Motion to Strike. On September 9, 2011, the hearing examiner issued a *Recommended Order on Summary Judgment*. This item on the agenda may as applicable be deemed to be in the final action portion of the agenda or at this agenda designation.
 - c. **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.** On August 15, 2011, the Board received *Agreed Statements of Facts and Conclusions of Law* signed by the parties. The Hearings Examiner issued *Order Vacating Hearing Date and Setting Hearing Date* on August 23, 2011, rescheduling the August 17 hearing for September 19, 2011.

- d. **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.** A hearing is set for December 1, 2011.
 - e. **In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.** On August 10, 2011, Hearing Examiner Katherine Orr issued *Second Order Granting Extension of Time*, giving the parties through October 5, 2011, to reach settlement or file a proposed hearing schedule.
 - f. **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 hearing is scheduled for December 14, 2011. On August 5, 2011, the Board received *Motion for Protective Order*, filed by Any Time Septic, requesting an order prohibiting the DEQ's first and second discovery requests. The Board received *Department's Answer Brief to Motion for Protective Order* on August 12, 2011. On August 17, 2011, the Board received *Reply to Department's Answer* from the appellant.
 - g. **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.** On August 3, 2011, the hearing examiner issued *Order Granting Extension*, giving the parties through August 26, 2011, to reach settlement or file a proposed schedule. On August 25, 2011, the Board received *Proposed Hearing Schedule* from the appellant's attorney, suggesting a March 8, 2010, hearing.
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 DEQ 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 October 12, 2011. On August 26, 2011, the Board received *Notice of Substitution of Counsel* and *Unopposed Motion to Vacate Current Scheduling Order* on behalf of Roseburg Forest Products.
 - c. **In the matter of the appeal and request for hearing by Maurer Farms, Inc.; Somerfeld & Sons Land & Livestock, LLC; ~~Larry Salois, POA~~; Jerry McRae; and Katrina Martin regarding the DEQ's final decision to amend the MATL's certificate of compliance, BER 2010-16 MFS.** On August 8, 2011, at the request of counsel for MATL, the hearing examiner issued *Order Setting Scheduling Conference*, setting a scheduling conference for August 15, 2011. On August 16, 2011, the Board received *Notice of Withdrawal of Appeal* from appellant Larry Salois, POA. On August 24, 2011, the Hearing Examiner issued *Fourth Amended Scheduling Order and Acknowledgment of Withdrawal of Appeal and Notice of Change of Caption*, scheduling the hearing for October 19, 2011, and changing the caption of the case to acknowledge Appellant Larry Salois' withdrawal of his appeal. On August 25, 2011,

the Board received *MATL's Motion to Reconsider (Alter or Amend) Rulings on Dismissal and Summary Judgment, and Brief*.

- d. **In the matter of the appeal and request for hearing by Meat Production Inc., a.k.a. Stampede Packing Co., regarding the DEQ's notice of final decision for Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000100, BER 2010-18 WQ.** The hearing examiner issued *Seconded Amended Scheduling Order* on July 12, 2011, setting a new hearing date of September 20, 2011. On August 3, 2011, she issued *Order Continuing Prehearing Conference*, scheduling the prehearing conference for September 7, 2011.
 - e. **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.** On August 3, 2011, the hearing examiner issued *Order Granting Extension*, giving the parties through September 2, 2011, to reach settlement or file a proposed schedule.
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. A hearing is presently scheduled for October 17, 2011, but will be moved, upon notice, to a regularly-scheduled Board meeting date.

B. OTHER BRIEFING ITEMS

1. Air Quality Permit Fees – The DEQ will give the Board a report regarding the air quality permit fees anticipated for the next calendar year, pursuant to ARM 17.8.510.

III. ACTION ITEMS

A. REPEAL, AMENDMENT, OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of ARM 17.30, Subchapter 12, rules establishing effluent limitations, standards of performance, and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program. The proposed revisions fall into the following categories: (1) eliminating existing incorporations by reference adopted prior to 1989 and adopting the text of some of those federal regulations into state rules; (2) adopting the text of relatively recent federal regulations that impose treatment requirements on cooling water intake structures; (3) updating incorporations by reference of federal rules that are too cumbersome to publish into state rules; (4) repeal existing incorporations by reference that are either duplicative or inapplicable to state permit programs; (5) clarifying existing language.
2. In the matter of the amendment of 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).

B. FINAL ACTION ON CONTESTED CASES

1. **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 July 27, 2011, the Board received *Stipulation to Dismiss Appeal, with Prejudice*, signed by the parties.

2. **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.** On July 19, 2011, the Board received *Stipulation for Dismissal* signed by the parties.
3. **In the matter of the request for hearing by Western Energy Company, Permit No. C1985003C, regarding the DEQ's Notice of Noncompliance and Abatement Order No. 11-03-01, BER 2011-10 SM.** The Board received the appeal on July 20, 2011. Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* on July 25, 2011. On August 3, 2011, the Board received *Withdrawal of Request for a Hearing* from Western Energy Company.
4. **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 *Order Vacating Hearing Date* to allow additional time for ruling on the summary judgment motion. On August 31, 2011, the hearings examiner issued *Recommended Order on Motion for Summary Judgment*, recommending the Board grant the DEQ's Motion for Summary Judgment, and giving the parties until September 2 to file notice of their intention to file exceptions. No exceptions were filed.

C. NEW CONTESTED CASES

1. **In the matter of violations of the Opencut Mining Act by Ell Dirt Works, LLC, at the Gene Foss Pit 1, Richland County, BER 2011-11 OC.** The Board received the appeal July 28, 2011. On August 3, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until August 19, 2011, to propose a hearing schedule. On August 16, 2011, the Board received *Agreed Motion for Extension of Time to Submit Agreed Schedule*, and on August 24, 2011, the Hearing Examiner issued *Order Granting Extension of Time*, giving the parties through September 16, 2011, to reach settlement or file a proposed hearing schedule. The Board may appoint a permanent hearing examiner or decide to hear the matter.
2. **In the matter of the request for hearing by Marshall Warrington, Jr., regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-12 OC.** The Board received the request for hearing August 2, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit*. The Board may appoint a permanent hearing examiner or decide to hear the matter.
3. **In the matter of the request for hearing by Patricia Warrington, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-13 OC.** The Board received the request for hearing August 2, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative,*

for Summary Judgment with a Supporting Brief and Affidavit. The Board may appoint a permanent hearing examiner or decide to hear the matter.

4. **In the matter of the request for hearing by Steven K. Endicott & Ruth Ann Endicott, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-14 OC.** The Board received the request for hearing August 2, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit.* The Board may appoint a permanent hearing examiner or decide to hear the matter.
5. **In the matter of the request for hearing by Nancy Scott, Dale Whitton, Kimberly Mole, Jess Hodge, Katherine G. Potter, Sharon B. Johnson, Clinton C. Johnson, James, D. Ward, and Korrie L. Ward regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-15 OC.** The Board received the request for hearing August 3, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit.* The Board may appoint a permanent hearing examiner or decide to hear the matter.
6. **In the matter of the request for hearing by Glenn Miller, Rick Sant, Ralph & Edna Neils, Berneisee A. Zucker, Patricia Anderson, Tina K. Moore, Marc Zahner, Donald E. White, Jacki Bruemmer, Betty Longo, Tracy Nicely, Michael Dunn, Dennis Thayer, James Hopkins, Debbie Zahner, James P. Tomlin, Howard C.A. Hunter, George Stachecki, Marie Mabree, Harold Mabree, Patricia Warrington, Lily S. Parker, Linda S. Fisher, Steven E. Fisher, Connie Karns, John Ritchie, Grant Denton, Karen & Ben Pelzel, Richard L. Johnson, N.E.W. Boss, Jane O. Drayton, Leonard H. Drayton, Warren Robbe, Katherine G. Potter, Robert B. Potter, Bonnie Gannon, Kim F. Taylor, Linda Cochran, Helen R. Lockard, Marshall Warrington, Jr., Bruce Kinney, Devan Kinney, Jon Kinney, Joel Kinney, Karen Legue, Angeline R. Allen, Gary Allen, Bonnie Sonnenberg, Bud Biddle, Eunice Boeve, Ron Boeve, Kathleen Burbridge, Harold Lewis, Ken Mole, and Lois M. Mole, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-16 OC.** The Board received the request for hearing August 3, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit.* The Board may appoint a permanent hearing examiner or decide to hear the matter.
7. **In the matter of the request for hearing by John Hutton regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-17 OC.** The Board received the request for hearing August 4, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit.* The Board may appoint a permanent hearing examiner or decide to hear the matter.

8. **In the matter of the request for hearing by Robert W. Gambill regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-18 OC.** The Board received the request for hearing August 8, 2011. On August 31, 2011, Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until September 16, 2011, to propose a hearing schedule. On August 29, 2011, the DEQ filed a *Motion to Dismiss or in the Alternative, for Summary Judgment with a Supporting Brief and Affidavit*. The Board may appoint a permanent hearing examiner or decide to hear the matter.
9. **In the matter of the appeal by Jerry McRae of Section A. Diamond Valley South – Laubach Amendment portion of the DEQ’s final decision to amend MATL, LLP’s Certificate of Compliance, BER 2011-19 MFS.** The Board received the appeal August 5, 2011. On August 18, 2011, the Board received *Permittee MATL’s Notice of Election to Proceed to District Court Pursuant to § 75-20-223(1)(c), MCA*.
10. **In the matter of violations of the Water Quality Act by SK Construction, Inc. on US Highway 2 near Bainville, Roosevelt County, BER 2011-20 WQ.** The Board received the appeal on August 24, 2011. The Board may appoint a permanent hearing examiner or decide to hear the matter.

D. HEARINGS

1. Lewis & Clark County Outdoor Air Quality Regulations

Lewis and Clark County is requesting the Board approve regulations primarily focused on the control of fine particulate emissions from residential woodstove burning during periods of poor air quality. On September 1, 2011, the Lewis and Clark County Commission approved the regulations following public notice and comment that fulfilled local processes and the requirements of Mont. Code Ann. 75-2-301. The Board will hold a public hearing and take action to approve or disapprove the proposed program revisions.

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



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TELECONFERENCE MINUTES

JULY 22, 2011

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:04 a.m., on Friday, July 22, 2011, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present via Telephone: Chairman Joseph Russell, Heidi Kaiser, Larry Mires, Joe Whalen, Robin Shropshire, Larry Anderson

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: Tom Livers (Deputy Director); John North and Jim Madden, – Legal; Ed Coleman – Industrial and Energy Minerals Bureau; John Arrigo – Enforcement Division; Tom Ring and Lisa Boettcher – Environmental Management Bureau; Jon Dilliard, Steve Kilbreath, and Eugene Pizzini – Public Water Supply and Subdivisions Bureau

Interested Persons Present: *No interested parties or members of the public were present or on the phone.*

- I.A.1 | Review and approve May 13, 2011, meeting minutes.
- Chairman Russell called for a motion to approve the May 13, 2011, meeting minutes. Mr. Mires so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- II.A.1.a | 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 matter.)*
- II.A.1.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. *(No discussion took place regarding this matter.)*
- II.A.1.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. *(No discussion took place regarding this matter.)*
- II.A.1.d | 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 matter.)*
- II.A.1.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. *(No discussion took place regarding this matter.)*
- II.A.1.f | In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS. *(No discussion took place regarding this matter.)*
- II.A.1.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. *(No discussion took place regarding this matter.)*
- II.A.2.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 matter.)*
- II.A.2.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. *(No discussion took place regarding this matter.)*
- II.A.2.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.

Ms. Orr said a hearing on this matter was held April 21, 2011, and that a decision is forthcoming.

- II.A.2.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.

Ms. Orr said she issued a decision denying the motions for summary judgment.

- II.A.2.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. *(No discussion took place regarding this matter.)*

- II.A.3.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. *(No discussion took place regarding this matter.)*

- II.B.1 In the matter Battelle's submittal of 2010 Hydrologic/Water Quality Study of Cow and Pony Creek Drainages, Rosebud County, Montana.

Mr. Ring provided background information regarding the monitoring, and a summary of the report. He responded to questions from Board members.

- III.A.1 In the matter of the amendment of ARM 17.38.101 and 17.38, Subchapter 5.

Mr. Pizzini provided background and details regarding the rulemaking. He clarified the pronunciation of "potable," and discussed comments received concerning the rules. He said the department recommends adoption of the rules.

Chairman Russell called for a motion to adopt the rules, the Presiding Officer's Report, the 521 and 311 Analyses, and the responses to comments. Mr. Anderson so MOVED. Ms. Kaiser SECONDED the motion. Chairman Russell called for public comment; there was no response. The motion CARRIED with a unanimous vote.

- III.A.2 In the matter of the amendment of ARM 17.36.922 and 17.36.924.

Mr. Madden provided background information regarding the rulemaking and discussed comments received. He said the department recommends the Board adopt the rules as proposed. Discussion took place and Mr. Madden responded to questions from the Board.

Chairman Russell called for a motion to adopt the rulemaking, the Presiding Officer's report, the 521 and 311 Analyses, and the responses to comments. 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.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.
- Ms. Orr introduced the item and provided details of the appeal. She said the parties have reached resolution and are seeking dismissal under 41(a).
- Chairman Russell called for a motion to authorize him to sign the dismissal order. Mr. Mires so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED unanimously.
- III.B.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.
- Ms. Orr introduced the item and provided details of the violation notice and the appeal of it. She said the parties have reached agreement.
- Chairman Russell called for a motion to authorize the Board Chair to sign the dismissal order. Mr. Anderson so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.B.3 In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC, at Bull Mountain Mine #1, Roundup, Musselshell County, BER 2010-19 SM.
- Ms. Orr introduced the item and provided details of the appeal.
- Chairman Russell called for a motion to authorize him to sign the order dismissing the appeal. Mr. Mires so MOVED. Mr. Whalen SECONDED the motion. Ms. Kaiser recused herself from this action and from item IIIB4. The motion CARRIED 5-0.
- III.B.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, BER 2010-17 SM. (*Ms. Kaiser previously recused herself from this matter.*)
- Ms. Orr introduced the matter and provided details of the violations. Chairman Russell noted that it was being dismissed pursuant to Rule 41(a).
- Chairman Russell called for a motion to authorize him to sign the dismissal order. Mr. Whalen so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a 5-0 vote.

- III.C.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.
- Ms. Orr introduced the item and provided details of the violations. She also noted that a Stipulation to Dismiss had been received, but will be addressed at the September meeting.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner for this matter. Ms. Kaiser so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.C.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.
- Ms. Orr introduced the matter and provided details of the appeal, and said she had issued a First Prehearing Order.
- Ms. Kaiser recused herself from this matter.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearing examiner for this matter. Mr. Mires so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED 5-0.
- III.C.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.
- Ms. Orr provided details regarding this matter.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearing examiner for this matter. Mr. Mires so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED unanimously.
- IV. | General Public Comment
- Mr. Livers noted that the next meeting is September 23.
- Chairman Russell called for public comment. There was no response.
- V. | Adjournment
- Chairman Russell called for a motion to adjourn. Mr. Whalen so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- The meeting adjourned at 10:05 a.m.

Board of Environmental Review July 22, 2011, minutes approved:

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

DATE

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

3 **IN THE MATTER OF:**
4 **THE REQUEST FOR HEARING**
5 **REGARDING THE REVOCATION OF**
6 **CERTIFICATE OF APPROVAL ES#34-**
7 **93-C1-4 FOR THE FORT**
8 **YELLOWSTONE SUBDIVISION, PARK**
9 **COUNTY**

CASE NO. BER 2009-20 SUB
 BER 2009-22 SUB

ORDER ON MOTION FOR SUMMARY JUDGMENT

 The Department of Environmental Quality (“Department”) filed “DEQ
Motion for Summary Judgment” on April 15, 2011. On April 15, 2011, Intervenor
Gardiner-Park County Water and Sewer District (“Gardiner-Park”) filed a “Motion
to Strike Appellants’ Defense and Enter Judgment in Favor of the DEQ on its
Revocation Action.” On April 28, 2011, Appellants filed “Appellants, John J.
McInerney, Bob G. Haney and Marwin E. Hofer’s Response to DEQ’s Motion for
Summary Judgment.” On April 29, 2011, Appellants, Max and Sue Berg, filed
“Berg’s Combined Response to DEQ’s Motion for Summary Judgment and
Gardiner-Park County Water District’s Motion to Strike Appellant’s Defense and
Enter Judgment in Favor of DEQ.” This filing contains a cross motion for summary
judgment. The Department filed its “DEQ Reply Brief in Support of DEQ’s Motion
for Summary Judgment and Response Brief to Appellant Berg’s Cross Motion for
Summary Judgment” on May 13, 2011, together with a Request for Oral Argument.
The Intervenor, Gardiner-Park, filed a “Reply Brief in Support of Gardiner-Park’s
Motion to Enter Judgment in Favor of the DEQ on its Revocation Action” on
May 13, 2011. On May 25, 2011, Intervenor, Gardiner-Park filed a Motion to
Strike regarding Appellants’ (Berg’s) response brief. Oral argument was held on
June 22, 2011.

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1 water main. The water main and the road were installed in the time frame of 1994-
2 1996. The water main was activated by the District. No service connections were
3 made to the main that was installed. The retaining wall has never been installed.
4 Because of the threat of erosion which could expose the water main and cause it to
5 fail which in turn could cause the sewer main serving the towns of Gardiner and
6 Mammoth to fail, the District, in 2007 disconnected the Fort Yellowstone water
7 main and replaced it with a new main at the top of the slope next to Highway 89.

8 On October 2, 2009, the Department issued a letter of intent to revoke the
9 Fort Yellowstone COSA. The letter stating that the water system for the subdivision
10 had not been constructed in accordance with the plans approved by the Department,
11 was sent to the Bergs and to McInerney and Haney who are public record owners of
12 building sites in the subdivision. The grounds of the proposed revocation are that
13 the Bergs violated Mont. Code Ann. § 76-4-130 which states that a person may not
14 construct or use a facility that deviates from a COSA without Department approval
15 of the deviation. The deviations from the COSA are that the retaining wall for the
16 Fort Yellowstone water main has not been installed and the originally approved
17 water main for Fort Yellowstone has been disconnected and is no longer available
18 for service.

19 **COLLATERAL PROCEDURAL MATTERS**

20 On April 15, 2011, the Intervenor filed a “Motion to Strike Appellants’
21 Defense and Enter Judgment in Favor of the DEQ on its Revocation Action.” The
22 Intervenor argues that the revocation should be upheld and the defense of the Berg’s
23 asserted in a discovery response (that a Park County Planner had agreed with the
24 Bergs that the retaining wall did not need to be built until the lots were sold that
25 were affected by the area where the wall would be constructed) should be stricken
26 since it did not represent the view of the “reviewing authority” under Mont. Code
27 Ann. § 76-4-130.

The Appellants, Mr. McInerney, Mr. Haney and Mr. Hofer in their response to the Department's Motion for Summary Judgment dated April 28, 2011, argue that there are genuine issues of fact and they are entitled to relief in the form of an order resolving the revocation and addressing requirements to restore Appellants' (McInerney, Haney and Hofer) rights and use of their property such that they could be provided with marketable title as represented when they purchased their property.

On May 25, 2011, the Intervenor filed a Motion to Strike the Appellants' (Bergs) cross motion for summary judgment on the basis that it was untimely.

As to these matters, the recommended ruling of granting the Department's Motion for Summary Judgment and awarding the relief of revoking the COSA issued to the Fort Yellowstone Subdivision addresses these responses.

At the hearing, Counsel for the Bergs stated that their cross motion for summary judgment would be based on a finding that the retaining wall referenced in the plans was related to road as opposed to stabilization for the water and sewer. As stated below, the Hearing Examiner does not make this finding or a finding that the failure to construct the retaining wall is a basis to award summary judgment. Therefore, the Bergs' cross-motion for summary judgment is denied.

STANDARD OF REVIEW

Summary judgment should be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56 (c). Summary judgment motions may be entertained in the administrative context. See In the Matter of Peila, 249 Mont. 242; 815 P.2d 139 (1991). The rationale for a summary judgment disposition is that the parties are afforded the opportunity to present evidence and arguments at the summary judgment stage through briefing and presentation of sworn evidence and if there are no material factual issues then as matter of economy there is no need for an

1 evidentiary hearing and the case may be resolved as a matter of law. Klock v. Town
2 of Cascade, 284 Mont. 167; 943 P.2d 1262. (1997)

3 **DISCUSSION**

4 This case is ripe for summary judgment disposition because there is no
5 disputed issue of fact as to the unauthorized deviation from the approved COSA
6 wherein the originally Department approved water main was disconnected and is no
7 longer in service. The Appellants in their brief agreed to the undisputed facts as to
8 the non-existence of the retaining wall and as to disconnection of the water main at
9 the bottom of the slope. Appellants stated at the hearing that they did not dispute
10 that the disconnection of the water main below occurred, that the construction of a
11 new water main at the top of the subdivision on Highway 89 constituted a deviation
12 from the approved plans and that this deviation would be a basis for revocation of
13 the subdivision approval. On this basis alone, the revocation of the COSA (with the
14 exception of site #12 which has separately approved plans) should be upheld.

15 Montana Code Annotated § 76-4-130 prohibits a person from constructing or
16 using a water or sewer facility that deviates from the certificate of subdivision
17 approval until the reviewing authority (the Department) has approved the deviation.
18 Here, it is undisputed that the Department approved main was disconnected and a
19 new main, not approved for the Fort Yellowstone subdivision was installed in a
20 different location. The plans approved by the 1993 COSA do not show the
21 subdivision water main in its current location at the top of the slope along Highway
22 89. Montana Code Annotated § 76-4-108(5) authorizes the Department to revoke
23 the COSA if a violation has occurred. When as here there is an appeal to the Board,
24 the Board may determine if there are grounds to uphold the revocation. There is no
25 dispute that there are grounds to uphold the revocation.

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RECOMMENDED ORDER

The Hearing Examiner recommends that the Board enter an Order granting the Department’s Motion for Summary Judgment and awarding the relief requested by the Department, namely revocation of the COSA E.S. #34-93-C1-4 for the Fort Yellowstone subdivision with the exception of site #12.

PROCEDURE FOR FILING EXCEPTIONS

Because the Board will be issuing a final decision on this recommended disposition the parties pursuant to Mont. Code Ann. § 2-4-621 may file written exceptions and present brief and oral argument to the Board on their exceptions prior to the time the Board members make their final decision. The parties are given until September 16, 2011. Any party seeking to file exceptions and present oral argument before the Board on September 23, 2011, must by September 13, 2011, file a notice with the Hearing Examiner and the Board Secretary that they will be filing exceptions.

DATED this _____ day of September, 2011.

KATHERINE J. ORR
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order
on Motion for Summary Judgment to be mailed to:

Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(original)

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225 E. Mendenhall
Bozeman, MT 59715

DATED:_____

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

AGENDA ITEM # III.A.1.

AGENDA ITEM SUMMARY - The Board has proposed amending rules establishing treatment requirements for the Montana Pollutant Discharge Elimination System Permit (MPDES) program in ARM Title 17, Chapter 30, subchapter 12. The amendments were proposed in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program.

LIST OF AFFECTED RULES - ARM Title 17, Chapter 30, subchapter 12

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

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 – This rulemaking action is intended to update rules establishing effluent limitations, standards of performance, and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program, according to 40 CFR 123.25. That regulation requires delegated states to adopt the technology-based effluent limitations and standards found in subparts A,B,D,H,I, and N of 40 CFR Part 125; 40 CFR Part 133; 40 CFR Part 129, and 40 CFR Chapter I, subchapter N. The Board's existing rules, set forth in ARM Title 17, chapter 30, subchapter 12, incorporate by reference the technology-based effluent limitations and standards of performance that were promulgated by the U.S. Environmental Protection (EPA) prior to 1989. The proposed revisions are necessary, in part, to adopt effluent limitations and standards promulgated by EPA after 1989. The proposed revisions are also necessary to eliminate some federal requirements that are not applicable to the Montana Pollutant Discharge Elimination System (MPDES) permit program (e.g., federal requirements for ocean discharges and pretreatment requirements), clarify existing language, and provide ease of access to federal requirements that are applicable to permits issued by a delegated state.

The proposed revisions fall into the following categories: (1) eliminating existing incorporations by reference adopted prior to 1989 and adopting the text of some of those federal regulations into state rules; (2) adopting the text of relatively recent federal regulations that impose treatment requirements on cooling water intake structures; (3) updating incorporations by reference of federal rules that are too cumbersome to publish into state rules; (4) repealing existing incorporations by reference that are either duplicative or inapplicable to state permit programs; and (5) clarifying existing language.

Hearing Information: Kathryn Orr conducted a public hearing on July 7, 2011, on the proposed amendments.

Board Options: The Board may:

1. Adopt the proposed amendments as set forth in the attached Notice of Public Hearing on Proposed Amendment;
2. Adopt the proposed amendments with revisions that the Board finds are appropriate and that are 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 that the Board adopt the amendments as proposed.

Enclosures:

1. Notice of Public Hearing on Proposed Amendment
2. Presiding Officer's Report
3. HB 521 and 311 Analysis
4. Draft Notice of Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.30.1201, 17.30.1202, 17.30.1203,)	PROPOSED AMENDMENT,
17.30.1206, and 17.30.1207; the)	ADOPTION, AND REPEAL
adoption of new rules I through V; and)	
the repeal of ARM 17.30.1208 and)	(WATER QUALITY)
17.30.1209 pertaining to Montana)	
pollutant discharge elimination system)	
effluent limitations and standards,)	
standards of performance, and treatment))	
requirements)	

TO: All Concerned Persons

1. On July 7, 2011, at 1:00 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal 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., June 13, 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:

17.30.1201 PURPOSE AND SCOPE (1) The purpose of this subchapter is to establish effluent limitations and standards, treatment ~~standards~~ requirements, standards of performance, and other requirements for point sources discharging wastes into state surface waters. These requirements, together with the rules in subchapters 13 ~~and 14~~, are adopted to discharge the responsibilities of the board ~~and department~~ under Title 75, chapter 5, parts 3 and 4, Montana Code Annotated, the Montana Water Quality Act, to adopt effluent limitations and standards, standards of performance, and treatment requirements ~~and to require compliance with such standards in for~~ permits issued to point sources discharging into state surface waters. These requirements are adopted in a manner that implements the national pollutant discharge elimination system (NPDES) established ~~and administered for the EPA~~ under sections 301, 302, 304, 306, 307, 316, 318, and 402 of the federal Clean Water Act.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1202 DEFINITIONS ~~For the purposes of this subchapter, the~~ following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under section 316(a) of the federal Clean Water Act and this subchapter.

(2) "Annual mean flow" means the average of daily flows over a calendar year. Historical data, up to ten years, must be used where available.

(3) "Applicable standards and limitations" is defined in ARM 17.30.1304.

(4) "Balanced, indigenous community" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic changes, presence of necessary food chain species, and a lack of domination by pollution-tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the federal Clean Water Act, and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a) of the federal Clean Water Act.

(1) remains the same, but is renumbered (5).

(6) "Closed-cycle recirculating system" means a system designed, using minimized makeup and blowdown flows, to withdraw water from a natural or other water source to support contact and/or noncontact cooling uses within a facility. The water is usually sent to a cooling canal or channel, lake, pond, or tower to allow waste heat to be dissipated to the atmosphere and then is returned to the system. Some facilities divert the waste heat to other process operations. New source water (make-up water) is added to the system to replenish losses that have occurred due to blowdown, drift, and evaporation.

(7) "Conventional pollutant" means the following list of pollutants:

(a) biochemical oxygen demand (BOD);

(b) total suspended solids (nonfilterable) (TSS);

(c) pH;

(d) fecal coliform; and

(e) oil and grease.

(8) "Cooling water" means water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises. Cooling water that is used in a manufacturing process, either before or after it is used for cooling, is considered process water for the purposes of calculating the percentage of a new facility's intake flow that is used for cooling purposes in [New Rule II(6)].

(9) "Cooling water intake structure" means the total physical structure and

any associated constructed waterways used to withdraw cooling water from state surface water. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps.

(2) remains the same, but is renumbered (10).

(11) "Design intake flow" means the value assigned, during the facility's design, to the total volume of water withdrawn from a source waterbody over a specific time period.

(12) "Design intake velocity" means the value assigned, during the design of a cooling water intake structure, to the average speed at which intake water passes through the open area of the intake screen, or other device, against which organisms might be impinged or through which they might be entrained.

(13) "Effluent limitation" means any restriction or prohibition imposed by the department on quantities, discharge rates, and concentrations of chemical, physical, biological, and other constituents that are discharged from point sources, other than new sources, into state surface waters, including schedules of compliance.

(14) "Effluent limitations guidelines" means a regulation published by EPA in 40 CFR Chapter I, Subchapter N, pursuant to the requirements in section 304(b) of the federal Clean Water Act to adopt or revise effluent limitations.

(15) "Effluent standard" is defined in 75-5-103, MCA, and is synonymous with the term "effluent limitation," as defined in this subchapter, with the exception that it does not include a schedule of compliance.

(16) "Entrainment" means the incorporation of all life stages of fish and shellfish with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.

(3) remains the same, but is renumbered (17).

(18) "Existing facility" means any facility that is not a new facility.

(19) "Existing Source" is defined in ARM 17.30.1304.

(4) remains the same, but is renumbered (20).

(21) "Freshwater river or stream" means a lotic (free-flowing) system that does not receive significant inflows of water from oceans or bays due to tidal action. For the purposes of this subchapter, a flow-through reservoir with a retention time of seven days or less will be considered a freshwater river or stream.

(22) "Hazardous substance" means any element or compound designated by EPA pursuant to section 311(b)(2)(A) of the federal Clean Water Act and listed in 40 CFR 116.4.

(23) "Hydraulic zone of influence" means that portion of the source waterbody hydraulically affected by the cooling water intake structure withdrawal of water.

(24) "Impingement" means the entrapment of all life stages of fish and shellfish on the outer part of an intake structure or against a screening device during periods of intake water withdrawal.

(25) "Lake or reservoir" means any inland body of open water with some minimum surface area free of rooted vegetation and with an average hydraulic retention time of more than seven days. Lakes or reservoirs might be natural water bodies or impounded streams, usually fresh, surrounded by land or by land and a man-made retainer (e.g., a dam). Lakes or reservoirs might be fed by rivers,

streams, springs, and/or local precipitation. Flow-through reservoirs with an average hydraulic retention time of seven days or less should be considered a freshwater river or stream.

(26) "Maximize" means to increase to the greatest amount, extent, or degree reasonably possible.

(27) "Minimize" means to reduce to the smallest amount, extent, or degree reasonably possible.

(5) remains the same, but is renumbered (28).

(29) "Natural thermal stratification" means the naturally-occurring division of a waterbody into horizontal layers of differing densities as a result of variations in temperature at different depths.

(30) "New facility" means any building, structure, facility, or installation that meets the definition of a "new source" in ARM 17.30.1304(37)(a) and (b) or "new discharger" in ARM 17.30.1304(36) and that is a greenfield or stand-alone facility, commences construction after January 17, 2002, and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased to accommodate the intake of additional cooling water. New facilities include only "greenfield" and "stand-alone" facilities. A greenfield facility is a facility that is constructed at a site at which no other source is located, or that totally replaces the process or production equipment at an existing facility. A stand-alone facility is a new, separate facility that is constructed on property where an existing facility is located and whose processes are substantially independent of the existing facility at the same site. New facility does not include new units that are added to a facility for purposes of the same general industrial operation (for example, a new peaking unit at an electrical generating station).

(a) Examples of "new facilities" include, but are not limited to, the following scenarios:

(i) A new facility is constructed on a site that has never been used for industrial or commercial activity. It has a new cooling water intake structure for its own use;

(ii) A facility is demolished and another facility is constructed in its place. The newly constructed facility uses the original facility's cooling water intake structure, but modifies it to increase the design capacity to accommodate the intake of additional cooling water;

(iii) A facility is constructed on the same property as an existing facility, but is a separate and independent industrial operation. The cooling water intake structure used by the original facility is modified by constructing a new intake bay for the use of the newly constructed facility or is otherwise modified to increase the intake capacity for the new facility.

(b) Examples of facilities that would not be considered a "new facility" include, but are not limited to, the following scenarios:

(i) A facility in commercial or industrial operation is modified and either continues to use its original cooling water intake structure or uses a new or modified cooling water intake structure.

(ii) A facility has an existing intake structure. Another facility (a separate and independent industrial operation), is constructed on the same property and connects

to the facility's cooling water intake structure behind the intake pumps, and the design capacity of the cooling water intake structure has not been increased. This facility would not be considered a "new facility" even if routine maintenance or repairs that do not increase the design capacity were performed on the intake structure.

(31) "New source" is defined in ARM 17.30.1304.

(32) "Publicly owned treatment works" (POTW) is defined in ARM 17.30.1304.

(33) "Representative important species" means species that are representative, in terms of biological needs, of a balanced, indigenous community of shellfish, fish, and wildlife in the body of water into which a discharge of heat is made.

(34) "Source water" means the state waterbody (state surface waters) from which the cooling water is withdrawn.

(35) "Standard of performance" is defined in 75-5-103, MCA.

(36) "Toxic pollutant" means any pollutant designated by EPA under section 307(a)(1) of the federal Clean Water Act and listed in 40 CFR 401.15.

(37) "Variance" means any mechanism or provision under sections 301 or 316 of the federal Clean Water Act, or in the applicable "effluent limitations guidelines," which allows modification to, or waiver of, the generally applicable effluent limitation requirements or time deadlines. This includes provisions that allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), or 316(a) of the federal Clean Water Act.

(38) The board adopts and incorporates by reference the following federal regulations as part of the Montana pollutant discharge elimination system:

(a) 40 CFR 401.15 (July 1, 2010), which identifies the list of toxic pollutants designated pursuant to section 307(a)(1) of the federal Clean Water Act.

(b) 40 CFR 116.4 (July 1, 2010), which identifies elements and compounds designated as hazardous substances pursuant to section 311(b)(2)(A) of the federal Clean Water Act.

(c) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1203 CRITERIA AND STANDARDS FOR IMPOSING TECHNOLOGY-BASED TREATMENT REQUIREMENTS IN MPDES PERMITS - VARIANCE PROCEDURES

(1) The board hereby adopts and incorporates herein by reference 40 CFR Part 125, which is a series of federal agency rules setting forth criteria and standards for the imposition of technology-based treatment requirements in MPDES permits. Copies of 40 CFR Part 125 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. Technology-based treatment requirements under section 301(b) of the federal Clean Water Act represent the minimum level of control that must be imposed in MPDES permits. Unless a more stringent effluent limitation applies under ARM 17.30.1344, permits

issued by the department must contain the applicable technology-based treatment requirements provided in (2) and (3), according to the applicable deadlines.

(2) The criteria and standards incorporated and adopted herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. For POTW's, effluent limitations must be based upon:

(a) Secondary treatment as defined in 40 CFR Part 133, from date of permit issuance; and

(b) The best practicable waste treatment technology, not later than July 1, 1983.

(3) For dischargers other than POTWs except as provided in ARM 17.30.1340(5), effluent limitations must require:

(a) The best practicable control technology currently available (BPT) in accordance with the following schedules:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(ii) for effluent limitations established on a case-by-case basis based on best professional judgment (BPJ) under (5) in a permit issued after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(iii) for all other BPT effluent limitations compliance is required from the date of permit issuance.

(b) For conventional pollutants, the best conventional pollutant control technology (BCT) in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no case later than such limitations are promulgated, and in no case later than March 31, 1989;

(ii) for effluent limitations established on a case-by-case basis based on (BPJ) under (5) in a permit issued after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989.

(c) For all toxic pollutants identified in 40 CFR 401.15, the best available technology economically achievable (BAT) in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(ii) for permits issued on a case-by-case basis based on (BPJ) under (5) after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989.

(d) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no

case later than March 31, 1989;

(ii) for permits issued on a case-by-case basis based on (BPJ) under (5) after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than March 31, 1989.

(4) The following variances from technology-based treatment requirements may be applied for and incorporated into MPDES permits:

(a) for dischargers other than POTWs, a variance from effluent limitations promulgated under sections 301 and 304 of the federal Clean Water Act based on fundamentally different factors in accordance with 40 CFR Part 125, Subpart D;

(b) for dischargers other than POTWs, a water quality related variance from BAT for certain nonconventional pollutants under section 301(g) of the federal Clean Water Act; and

(c) a thermal variance from BPT, BCT and BAT under section 316(a) of the federal Clean Water Act in accordance with [New Rule I].

(5) Technology-based treatment requirements may be imposed through one of the following methods provided in (a) through (c):

(a) application of EPA promulgated effluent limitations guidelines for dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations must be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations pursuant to 40 CFR, Part 125, Subpart D;

(b) on a case-by-case basis using best professional judgment (BPJ) to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in (6) and shall consider:

(i) the appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

(ii) any unique factors relating to the applicant.

(c) through a combination of the methods described in (a) and (b). Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the federal Clean Water Act;

(d) limitations developed under (6)(b) may be expressed, where appropriate, in terms of toxicity (e.g., "the LC50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the federal Clean Water Act.

(6) In setting case-by-case limitations pursuant to (5), the permit writer shall consider the following factors:

(a) For BPT requirements:

(i) the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

(ii) the age of equipment and facilities involved;

(iii) the process employed;

(iv) the engineering aspects of the application of various types of control techniques;

(v) process changes; and

(vi) non-water quality environmental impact (including energy requirements).

(b) For BCT requirements:

(i) the reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

(ii) the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;

(iii) the age of equipment and facilities involved;

(iv) the process employed;

(v) the engineering aspects of the application of various types of control techniques;

(vi) process changes; and

(vii) non-water quality environmental impact (including energy requirements).

(c) For BAT requirements:

(i) the age of equipment and facilities involved;

(ii) the process employed;

(iii) the engineering aspects of the application of various types of control techniques;

(iv) process changes;

(v) the cost of achieving such effluent reduction; and

(vi) non-water quality environmental impact (including energy requirements).

(7) Technology-based treatment requirements are applied prior to or at the point of discharge.

(8) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(a) the technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(b) the discharger agrees to waive any opportunity to request a variance under section 301(c), (g), or (h) of the federal Clean Water Act; and

(c) the discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(9) Technology-based effluent limitations must be established under this rule for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(10) The department may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which must not be subject to modification under section 301(c) or (g) of the federal Clean Water Act where:

(a) effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant; or

(b) the limitation reflects BAT-level control of discharges of one or more toxic pollutants that are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(c) the permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(d) the fact sheet required by ARM 17.30.1371 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in (c), and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(11) The department may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(a) effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance; or

(b) the limitation reflects BAT-level control of discharges, or an appropriate level determined under section 301(c) or (g) of the federal Clean Water Act, of one or more hazardous substance(s) that are present in the waste stream, and a specific BAT or other appropriate limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(c) the permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(d) the fact sheet required by ARM 17.30.1371 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in (c), and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(e) Hazardous substances that are also toxic pollutants are subject to (10).

(12) The department may not set a more stringent limit under the preceding sections if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(13) Toxic pollutants identified under (10) remain subject to the requirements of ARM 17.30.1343(1)(a) (notification of increased discharges of toxic pollutants above levels reported in the application form).

(14) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR Part 133 (July 1, 2010), which sets forth the level of effluent quality attainable through the application of secondary treatment or equivalent treatment for POTWs;

(b) 40 CFR Part 125, Subpart D (July 1, 2010), which sets forth criteria and standards for determining fundamentally different factors under section 301 of the federal Clean Water Act;

(c) 40 CFR 401.15 (July 1, 2010), which is a list of toxic pollutants identified by EPA under section 307(a)(1) of the federal Clean Water Act.

(d) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA
IMP: 75-5-304, 75-5-401, MCA

17.30.1206 TOXIC POLLUTANT EFFLUENT STANDARDS (1) The board hereby adopts and incorporates herein by reference 40 CFR Part 129 which is a series of federal agency rules setting forth standards and prohibitions applicable to owners and operators of specified point source dischargers discharging into state waters. Copies of 40 CFR Part 129 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. This rule is applicable to owners or operators of facilities specified in 40 CFR Part 129 that discharge into state surface waters.

(2) The toxic pollutant effluent standards and prohibitions incorporated and adopted herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. The effluent standards or prohibitions for toxic pollutants established in 40 CFR Part 129 shall be applicable to the sources and pollutants set forth in 40 CFR Part 129, and may be incorporated into any MPDES permit, renewed MPDES permit, or permit modification, in accordance with the provisions of 40 CFR Part 129.

(3) The effluent standards and prohibitions established in 40 CFR Part 129 apply to the following toxic pollutants:

(a) Aldrin, which means the compound aldrin as identified by the chemical name, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro-1,4 -endo-5,8-exo-dimethanonaphthalene and Dieldrin, which means the compound dieldrin as identified by the chemical name 1,2,3,4,10,10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo-5,8-exo-dimethanonaphthalene;

(b) DDT, which means the compounds DDT, DDD, and DDE as identified by the chemical names: (DDT)-1,1,1-trichloro-2,2-bis(p-chlorophenyl) ethane and someo,p'-isomers; (DDD) or (TDE)-1,1-dichloro-2,2-bis(p-chlorophenyl) ethane and some o,p'-isomers; and (DDE)-1,1-dichloro-2,2-bis(p-chlorophenyl) ethylene;

(c) Endrin, which means the compound as identified by the chemical name 1,2,3,4,10,10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo-5,8-endodimethanonaphthalene;

(d) Toxaphene, which means a material consisting of technical grade chlorinated camphene having the approximate formula of C₁₀H₁₀Cl₈ and normally containing 67-69 percent chlorine by weight;

(e) Benzdine, which means the compound benzdine and its salts as identified by the chemical name 4,4'-diaminobiphenyl;

(f) Polychlorinated biphenyls (PCBs), which means a mixture of compounds composed of the biphenyl molecule which has been chlorinated to varying degrees.

(4) The board adopts and incorporates by reference 40 CFR Part 129 (July 1, 2010), which establishes toxic effluent standards pursuant to section 307 of the federal Clean Water Act, as part of the Montana pollutant discharge elimination system. A copy of the incorporated federal regulation may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1207 EFFLUENT LIMITATIONS AND STANDARDS OF PERFORMANCE (1) ~~The board hereby adopts and incorporates herein by reference 40 CFR Subpart N (except 40 CFR Part 403), which is a series of federal agency rules setting forth effluent limitations for existing point source dischargers and standards of performance for new point source dischargers discharging into state waters. Copies of 40 CFR Subpart N (except 40 CFR Part 403) may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. Permits issued to point source dischargers, other than POTWs, must include effluent limitations or standards of performance applicable to the point source that are set forth in 40 CFR Chapter I, Subchapter N, as provided below:~~

(a) for existing sources, effluent limitations representing the degree of effluent reduction attainable by the application of:

(i) the best practicable control technology currently achievable (BPT) for all pollutants;

(ii) the best available technology economically achievable (BAT) for toxic and non-conventional pollutants; and

(iii) the best conventional pollutant control technology (BCT) for conventional pollutants;

(b) for new sources, new source performance standards (NSPS) reflecting the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge.

(2) ~~The effluent limitations and standards of performance adopted and incorporated herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. The department shall ensure that the applicable effluent limitations or standards of performance set forth in 40 CFR Chapter I, Subchapter N, are included in any new MPDES permit, renewed MPDES permit, or permit modification issued in accordance with ARM Title 17, chapter 30, subchapter 13.~~

(3) ~~40 CFR Part 403, which is excluded from this incorporation by reference, sets forth general pretreatment requirements for new and existing sources of pollution. Montana pretreatment requirements appear in ARM Title 17, chapter 30, subchapter 14. The board adopts and incorporates by reference 40 CFR Chapter I, Subchapter N (except 40 CFR Part 403) (July 1, 2010), which sets forth federal effluent limitations and standards for existing sources and standards of performance for new sources, which are promulgated by EPA under sections 301, 304(b), 306(b), and 316(b) of the federal Clean Water Act. 40 CFR Part 403, which is excluded from this incorporation by reference, sets forth general pretreatment requirements for new and existing sources. A copy of the incorporated federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.~~

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

4. The proposed new rules provide as follows:

NEW RULE I CRITERIA AND STANDARDS FOR DETERMINING
ALTERNATIVE EFFLUENT LIMITATIONS FOR THERMAL DISCHARGES

(1) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations, if the discharger demonstrates to the satisfaction of the department that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made. This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

(2) In determining whether or not the protection and propagation of the affected species will be assured, the department may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the EPA under section 304(a) of the federal Clean Water Act, or any other information the department deems relevant.

(3) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any such demonstrations must show:

(a) that no appreciable harm has resulted from the normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or

(b) that, despite the occurrence of such previous harm, the desired alternative effluent limitations, or appropriate modifications thereof, will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.

(4) In determining whether or not prior appreciable harm has occurred under (3)(a), the department shall consider the length of time that the applicant has been discharging and the nature of the discharge.

(5) Any initial application for a variance from thermal effluent limitations pursuant to section 316(a) of the federal Clean Water Act must include the following early screening information:

(a) description of the alternative effluent limitation requested;

(b) a general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

(c) a general description of the type of data, studies, experiments, and other information which the discharger intends to submit for the demonstration; and

(d) such data and information as may be available to assist the department in selecting the appropriate representative important species.

(6) After submitting the early screening information under (5), the discharger shall consult with the department at the earliest practicable time, but not later than 30 days after the application is filed, to discuss the discharger's early screening information. Within 60 days after the application is filed, the discharger shall submit for department approval a detailed plan of study that the discharger will undertake to support its demonstration for a variance under section 316(a). The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical, and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration must be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the department shall either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies that the department subsequently determines are necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger may provide any additional information or studies that the discharger feels are appropriate to support the demonstration.

(7) Any discharger that intends to apply for a renewal of a section 316(a) thermal variance must notify the department of its intent in writing. Within 60 days after receipt of the notification, the department shall request that the discharger include in its renewal application only such information described in (5) and (6) that the department determines is necessary to evaluate the request.

(8) In making the demonstration, the discharger shall consider any information or guidance published by EPA to assist in making such demonstrations.

(9) If an applicant desires a ruling on a section 316(a) variance before the ruling on any other necessary permit terms and conditions, it shall make such request upon filing its application under (5). This request must be granted or denied at the discretion of the department.

(10) At the expiration of the permit, any discharger holding a thermal variance must support the continuation of the variance with studies based on the discharger's actual operation experience.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE II TECHNOLOGY-BASED REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) The purpose of this rule is to establish technology-based requirements that apply to the location, design, construction, and capacity of the cooling water intake structures at new facilities. This rule implements section 316(b) of the federal Clean Water Act for new facilities. These requirements are implemented through MPDES permits.

(2) Section 316(b) of the federal Clean Water Act provides that any standards established pursuant to sections 301 or 306 of the federal Clean Water Act and applicable to a point source must require that the location, design, construction, and capacity of cooling water intake structures reflect the best

technology available for minimizing adverse environmental impact.

(3) New facilities that do not meet the threshold requirements regarding amount of water withdrawn or percentage of water withdrawn for cooling water purposes in (4) must meet requirements determined on a case-by-case, best professional judgment (BPJ) basis. The owner or operator of a new facility that does not meet the threshold requirements in (4) must submit the application information required in 40 CFR 122.21(r).

(4) This rule applies to a new facility if it:

(a) is a point source that uses or proposes to use a cooling water intake structure;

(b) has at least one cooling water intake structure that uses at least 25 percent of the water it withdraws for cooling purposes as specified in (6); and

(c) has a design intake flow greater than two million gallons per day (MGD).

(5) Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier, or multiple suppliers, of cooling water if the supplier or suppliers withdraw(s) water from state surface waters. Use of cooling water does not include obtaining cooling water from a public water system or the use of treated effluent that otherwise would be discharged to a state surface water. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source.

(6) The threshold requirement that at least 25 percent of water withdrawn be used for cooling purposes must be measured on an average monthly basis. A new facility meets the 25 percent cooling water threshold if, based on the new facility's design, any monthly average over a year for the percentage of cooling water withdrawn is expected to equal or exceed 25 percent of the total water withdrawn.

(7) The owner or operator of a new facility that will withdraw equal to or greater than 10 MGD shall comply with either the requirements of (9) or the following:

(a) reduce the facility's intake flow, at a minimum, to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system;

(b) design and construct each cooling water intake structure at the facility to a maximum through-screen design intake velocity of 0.5 feet per second;

(c) design and construct the cooling water intake structure at the facility such that the total design intake flow from all cooling water intake structures at the facility meets the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow;

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(d) select and implement design and construction technologies or operational measures for minimizing the impingement mortality of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or

tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure;

(ii) based on information submitted by any fishery management agency or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the department that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) it is determined by the department, based on information submitted by any fishery management agency or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in (7)(a), (b), and (c), would still contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

(e) select and implement design and construction technologies or operational measures for minimizing entrainment of entrainable life stages of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) based on information submitted by any fishery management agency or other relevant information, there are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the department and the department determines that the proposed facility, after meeting the technology-based performance requirements in (7)(a), (b), and (c), would still contribute unacceptable stress to the protected species, critical habitat of those species, or these species of concern;

(f) submit the application information required in 40 CFR 122.21(r) and [New Rule III(2)];

(g) implement the monitoring requirements specified in 40 CFR 125.87; and

(h) implement the record-keeping requirements in 40 CFR 125.88.

(8) The owner or operator of a new facility that will withdraw equal to or greater than 2 MGD and less than 10 MGD, and that chooses not to comply with (7), shall comply with either the requirements of (9) or the following:

(a) design and construct each cooling water intake structure at the facility to a maximum through-screen design intake velocity of 0.5 feet per second;

(b) design and construct the cooling water intake structure at the facility such that the total design intake flow from all cooling water intake structures at the facility meets the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow;

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(c) select and implement design and construction technologies or operational measures for minimizing the impingement mortality of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or tribal species, or critical habitat for these species, within the hydraulic zone of

influence of the cooling water intake structure;

(ii) based on information submitted by any fishery management agency or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the department that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) it is determined by the department, based on information submitted by any fishery management agency or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in (8)(a) and (b), would still contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

(d) select and implement design and construction technologies or operational measures that minimize entrainment of entrainable life stages of fish and shellfish;

(e) submit the application information required in 40 CFR 122.21(r) and [New Rule III(2)(b),(c),(d)];

(f) implement the monitoring requirements specified in 40 CFR 125.87; and

(g) implement the recordkeeping requirements specified in 40 CFR 125.88.

(9) The owner or operator of a new facility that will withdraw equal to or greater than 2 MGD, and that chooses not to comply with (7) or (8), shall comply with the following:

(a) demonstrate to the department that the technologies employed will reduce the level of adverse environmental impact from the cooling water intake structure located at the facility to a level comparable to that which would be achieved if the facility implemented the requirements of (7)(a) and (b). This demonstration must include a showing that the impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to those that would result if the facility implemented the requirements of (7)(a) and (b). This showing may include consideration of impacts other than impingement mortality and entrainment, including measures that will result in increases in fish and shellfish, but it must demonstrate comparable performance for species that the department identifies as species of concern. In identifying such species, the department may consider information provided by any fishery management agency along with data and information from other sources;

(b) design and construct the cooling water intake structure such that the total design intake flow from all cooling water intake structures at the facility meet the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow; and

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(c) submit the application information required in 40 CFR 122.21(r) and [New Rule III(3)];

(d) implement the monitoring requirements specified in 40 CFR 125.87; and

(e) implement the recordkeeping requirements specified in 40 CFR 125.88.

(10) In addition to the technology-based requirements of (7), (8), and (9), the owner or operator of a new facility must comply with any more stringent requirements relating to the location, design, construction, and capacity of a cooling water intake structure or monitoring requirements that the department determines are reasonably necessary to comply with applicable water quality standards adopted by the board pursuant to 75-5-301 and 75-5-303, MCA.

(11) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR 125.87 (July 1, 2010), which sets forth monitoring requirements for new facilities with cooling water intake structures;

(b) 40 CFR 125.88 (July 1, 2010), which sets forth record and reporting requirements for new facilities with cooling water intake structures; and

(c) 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intake structures.

(d) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE III INFORMATION REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) The owner or operator of a new facility with cooling water intake structures shall submit to the department a statement specifying its intent to comply with the technology-based requirements in either (7), (8), or (9) of [New Rule II].

(2) The owner or operator of a new facility that chooses to comply with the requirements of either (7) or (8) of [New Rule II] shall, in addition to meeting the application requirements of 40 CFR 122.21(r), collect and submit to the department the following information, when applying for a new or reissued permit, to demonstrate compliance with (7) or (8) of [New Rule II]. (The information required under (a) applies only to an owner or operator that chooses to comply with (7) of [New Rule II]):

(a) flow reduction information demonstrating a reduction in flow to a level that is commensurate with that which can be attained by a closed-cycle recirculating cooling water system, including:

(i) a narrative description of the facility's system that has been designed to reduce the facility's intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system and any engineering calculations, including documentation demonstrating that make-up and blowdown flows have been minimized; and

(ii) if the flow reduction requirement is met entirely, or in part, by reusing or recycling water withdrawn for cooling purposes in subsequent industrial processes, documentation that the amount of cooling water that is not reused or recycled has been minimized;

(b) velocity information demonstrating that the facility complies with the requirement to meet a maximum through-screen design intake velocity of no more

than 0.5 feet per second at each cooling water intake structure as required in (7)(b) and (8)(a) of [New Rule II], including:

- (i) a narrative description of the design, structure, equipment, and operation used to meet the velocity requirement; and

- (ii) design calculations showing that the velocity requirement will be met at minimum ambient source water surface elevations, based on best professional judgment using available hydrological data, and maximum head loss across the screens or other device;

- (c) source waterbody flow information demonstrating that the facility's cooling water intake structure meets the flow requirements in (7)(c) and (8)(b) of [New Rule II], including:

- (i) for cooling water intake structures located in a freshwater river or stream, the annual mean flow and any supporting documentation and engineering calculations to show that the facility's cooling water intake structure meets the flow requirements; and

- (ii) for cooling water intake structures located in a lake or reservoir, a narrative description of the waterbody thermal stratification and any supporting documentation and engineering calculations to show that the natural thermal stratification and turnover pattern will not be disrupted by the total design intake flow. In cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish, supporting documentation and a written concurrence from any fisheries management agency with responsibility for fisheries potentially affected by the facility's cooling water intake structure(s); and

- (d) a design and construction technology plan demonstrating compliance with (7)(d) and (e) or (8)(c) and (d) of [New Rule II], including:

- (i) information to demonstrate whether or not the facility meets the criteria of (7)(d) and (e) or (8)(c) and (d) of [New Rule II];

- (ii) delineation of the hydraulic zone of influence for the facility's cooling water intake structure; and

- (iii) new facilities required to install design and construction technologies and/or operational measures must develop a plan explaining the technologies and measures that have been selected based on information collected for the source water biological baseline characterization required by 40 CFR 122.21(r)(3).

(Examples of appropriate technologies include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, and similar technologies. Examples of appropriate operational measures include, but are not limited to, seasonal shutdowns or reductions in flow, continuous operations of screens, and similar measures.) The plan must contain the following information:

- (A) a narrative description of the design and operation of the design and construction technologies, including fish-handling and return systems, that will be used to maximize the survival of those species expected to be most susceptible to impingement, including species-specific information that demonstrates the efficacy of the technology;

- (B) a narrative description of the design and operation of the design and construction technologies that will be used to minimize entrainment of those species

expected to be the most susceptible to entrainment, including species-specific information that demonstrates the efficacy of the technology; and

(C) design calculations, drawings, and estimates to support the descriptions provided in (2)(d)(iii)(A) and (B).

(3) The owner or operator of a new facility that chooses to comply with (9) of [New Rule II] shall, in addition to meeting the application requirements of 40 CFR 122.21(r), collect and submit to the department the following information, when applying for a new or reissued permit, to demonstrate compliance with (9) of [New Rule II]:

(a) source waterbody flow information to demonstrate that the facility's cooling water intake structure meets the source waterbody requirements in (9)(b) of [New Rule II]:

(i) for cooling water intake structures located in a freshwater river or stream, the annual mean flow and any supporting documentation and engineering calculations to show that the facility's cooling water intake structure meets the flow requirements; and

(ii) for cooling water intake structures located in a lake or reservoir, a narrative description of the waterbody thermal stratification, and any supporting documentation and engineering calculations to show that the natural thermal stratification and turnover pattern will not be disrupted by the total design intake flow. In cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish, supporting documentation and a written concurrence from any fisheries management agency with responsibility for fisheries potentially affected by the facility's cooling water intake structure(s);

(b) a comprehensive demonstration study to characterize the source water baseline in the vicinity of the cooling water intake structure(s), to characterize operation of the cooling water intake(s), and to confirm that the technology(ies) proposed and/or implemented for the facility's cooling water intake structure reduce the impacts to fish and shellfish to levels comparable to those achieved by implementing the requirements of (7)(a) and (b) in [New Rule II]. To meet the "comparable level" requirement, the owner or operator shall demonstrate that:

(i) there is a reduction in both impingement mortality and entrainment of all life stages of fish and shellfish to 90 percent or greater of the reduction that would be achieved through (7)(a) and (b) of [New Rule II]; or

(ii) if the demonstration includes consideration of impacts other than impingement mortality and entrainment, that the measures taken will maintain the fish and shellfish in the waterbody at a level substantially similar to that which would be achieved through (7)(a) and (b) of [New Rule II];

(c) a plan containing a proposal for how information will be collected to support the comprehensive demonstration study required in (3)(b). The plan must include:

(i) a description of the proposed and/or implemented technology(ies) to be evaluated in the study;

(ii) a list and description of any historical studies characterizing the physical and biological conditions in the vicinity of the proposed or actual intakes and their relevancy to the proposed study. If an owner or operator proposes to rely on existing source waterbody data, it must be no more than five years old, and the

owner or operator must demonstrate that the existing data are sufficient to develop a scientifically valid estimate of potential impingement and entrainment impacts and provide documentation showing that the data were collected using appropriate quality assurance and quality control procedures;

(iii) any public participation or consultation with federal or state agencies undertaken in developing the plan; and

(iv) a sampling plan for data that will be collected using actual field studies in the source waterbody. The sampling plan must document all methods and quality assurance procedures for sampling and data analysis. The proposed sampling and data analysis methods must be appropriate for a quantitative survey and must be based on consideration of methods used in other studies performed in the source waterbody. The sampling plan must include:

(A) a description of the study area, including the area of influence of the cooling water intake structure and at least 100 meters beyond;

(B) taxonomic identification of the sampled or evaluated biological assemblages, including all life stages of fish and shellfish; and

(C) a description of all sampling and data analysis methods; and

(d) documentation of the results of the comprehensive demonstration study required in (3)(b), including:

(i) a source water biological study, which must include:

(A) a taxonomic identification and characterization of aquatic biological resources including:

(I) a summary of historical and contemporary aquatic biological resources;

(II) determination and description of the target populations of concern (those species of fish and shellfish and all life stages that are most susceptible to impingement and entrainment); and

(III) a description of the abundance and temporal/spatial characterization of the target populations based on the collection of multiple years of data to capture the seasonal and daily activities (such as, spawning, feeding, and water column migration) of all life stages of fish and shellfish found in the vicinity of the cooling water intake structure;

(B) an identification of all threatened or endangered species that might be susceptible to impingement and entrainment by the proposed cooling water intake structure(s); and

(C) a description of additional chemical, water quality, and other anthropogenic stresses on the source waterbody;

(ii) an evaluation of potential cooling water intake structure effects, which must include:

(A) calculations of the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would need to be achieved by the technologies that have been selected to implement and to meet requirements under (9) of [New Rule II]. In order to do the calculation, the owner or operator shall determine the reduction in impingement mortality and entrainment that would be achieved by implementing the requirements of (7)(a) and (b) of [New Rule II] at the facility; and

(B) an engineering estimate of efficacy for the proposed or implemented technologies used to minimize impingement mortality and entrainment of all life

stages of fish and shellfish and maximize survival of impinged life stages of fish and shellfish. The estimate of efficacy must include a demonstration that the proposed or implemented technologies reduce impingement mortality and entrainment of all life stages of fish and shellfish to a comparable level to that which would be achieved if the requirements in (7)(a) and (b) of [New Rule II] were implemented. The efficacy projection must also include a site-specific evaluation of the technology's suitability for reducing impingement mortality and entrainment based on the results of the source water biological study described in (3)(d)(i). The efficacy estimates may be determined based on case studies that have been conducted in the vicinity of the cooling water intake structure or site-specific technology prototype studies;

(iii) an evaluation of proposed restoration measures, if the owner or operator proposes to use restoration measures to maintain the fish and shellfish as allowed in (9)(a) of [New Rule II]. The evaluation must include the following:

(A) information and data to show coordination with the appropriate fishery management agency(ies); and

(B) a plan that provides a list of the measures proposed to be implemented and an explanation of how the owner or operator will demonstrate and continue to ensure that the proposed restoration measures will maintain the fish and shellfish in the waterbody to a substantially similar level to that which would be achieved through (7)(a) and (b) of [New Rule II]; and

(iv) a verification monitoring plan that must include:

(A) a plan to conduct, at a minimum, two years of monitoring to verify the full-scale performance of the proposed or implemented technologies and operational measures. The verification plan must begin at the start of operations of the cooling water intake structure and continue for a sufficient period of time to demonstrate that the facility is reducing the level of impingement and entrainment to the level documented in (3)(d)(ii). The plan must describe the frequency of monitoring and the parameters to be monitored. The department will use the verification monitoring to confirm that the facility is meeting the level of impingement mortality and entrainment reduction required in (9) of [New Rule II]; and

(B) a plan to conduct monitoring to verify that the restoration measures will maintain the fish and shellfish in the waterbody to a substantially similar level as that which would be achieved through (7)(a) and (b) of [New Rule II].

(4) The department shall review the materials submitted by an owner or operator of a new facility with cooling water intake structures and impose appropriate requirements and conditions in permits to ensure compliance with [New Rule II], in accordance with 40 CFR 125.89.

(5) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR 125.89 (July 1, 2010), which sets forth procedures and requirements for imposing permit conditions for new facilities with cooling water intake structures; and

(b) 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intake structures.

(c) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT

59620.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE IV ALTERNATIVE REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) Any interested person may request that alternative requirements less stringent than those required in [New Rule II(7) through (10)] be imposed in a permit. The department may establish alternative requirements less stringent than the requirements of [New Rule II(7) through (10)] only if:

- (a) there is an applicable requirement under [New Rule II(7) through (10)];
 - (b) the department determines that data specific to the facility indicate that compliance with the requirement at issue would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirement at issue or would result in significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets;
 - (c) the alternative requirement requested is no less stringent than justified by the wholly out of proportion costs or the significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets; and
 - (d) the alternative requirement will ensure compliance with other applicable provisions of the Montana Water Quality Act, Title 75, chapter 5, MCA, and the federal Clean Water Act.
- (2) The burden is on the person requesting the alternative requirement to demonstrate that alternative requirements should be authorized.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE V TECHNOLOGY-BASED REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR EXISTING FACILITIES (1) The purpose of this rule is to establish technology-based requirements that apply to the location, design, construction, and capacity of the cooling water intake structures at existing facilities. This rule implements section 316(b) of the federal Clean Water Act for existing facilities. These requirements are implemented through MPDES permits.

(2) Section 316(b) of the federal Clean Water Act provides that any standards established pursuant to section 301 and 306 of the federal Clean Water Act and applicable to point sources shall require that the location, design, construction, and capacity of the cooling water intake structure reflect the best technology available for minimizing adverse environmental impact.

(3) Existing facilities with cooling water intake structures that are not subject to technology-based requirements under [New Rule II] must meet the requirements of section 316(b) of the federal Clean Water Act, as determined by the department on a case-by-case, best professional judgment (BPJ) basis.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

5. The rules proposed to be repealed are as follows:

17.30.1208 HAZARDOUS SUBSTANCES (AUTH: 75-5-304, MCA; IMP, 75-5-304, 75-5-401, MCA), located at page 17-2892, Administrative Rules of Montana.

17.30.1209 SECONDARY TREATMENT (AUTH: 75-5-304, MCA; IMP, 75-5-304, 75-5-401, MCA), located at page 17-2892, Administrative Rules of Montana.

REASON: The board is proposing amendments to rules establishing effluent limitations, standards of performance, and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program, as set forth in 40 CFR 123.25. That regulation requires delegated states to adopt the technology-based effluent limitations and standards found in subparts A, B, D, H, I, and N of 40 CFR Part 125, 40 CFR Part 133, 40 CFR Part 129, and 40 CFR Chapter I, subchapter N. The board's existing rules, set forth in ARM Title 17, chapter 30, subchapter 12, incorporate by reference the technology-based effluent limitations and standards of performance that were promulgated by the U.S. Environmental Protection Agency (EPA) prior to 1989. The proposed amendments are necessary, in part, to adopt effluent limitations and standards promulgated by EPA after 1989. The proposed amendments are also necessary to eliminate some federal requirements that are not applicable to Montana's MPDES program (e.g., federal requirements for ocean discharges and pretreatment requirements), clarify existing language, and provide ease of access to federal requirements that are applicable to permits issued by a delegated state.

The proposed amendments fall into the following categories: (1) eliminating existing incorporations by reference adopted prior to 1989 and adopting the text of some of those federal regulations into state rules; (2) adopting the text of relatively recent federal regulations that impose treatment requirements on cooling water intake structures; (3) updating incorporations by reference of federal rules that are too cumbersome to publish into state rules; (4) repealing existing incorporations by reference that are either duplicative or inapplicable to state permit programs; and (5) clarifying existing language.

ARM 17.30.1201 - Purpose

The board is proposing to amend the text of ARM 17.30.1201 to clarify that the standards adopted in ARM Title 17, chapter 30, subchapter 12 are technology-based treatment requirements promulgated by EPA, and different from the standards relating to water quality adopted by the board in ARM Title 17, chapter 30, subchapter 6. This amendment is necessary because the existing language simply refers to "standards" for MPDES permits, which would include both technology-based and water quality-based standards. Other minor amendments are proposed to clarify that the rules apply only to surface water discharges and to eliminate

reference to pre-treatment rules in ARM Title 17, chapter 30, subchapter 14, because the department has not been delegated the authority to administer the federal Clean Water Act's pretreatment program.

ARM 17.30.1202 - Definitions

The board is proposing to amend the definitions in ARM 17.30.1202 to include the statutory definitions in Montana's Water Quality Act, Title 75, chapter 5, MCA, and add new definitions that explain the terms of the technology-based requirements that are proposed for adoption in this rulemaking. This amendment is necessary in order to clarify the meaning of technical terms used in New Rules I through V and in the amended text of ARM 17.30.1203, 17.30.1206, and 17.30.1207.

ARM 17.30.1203 - Criteria and Standards for MPDES

The board is proposing to amend ARM 17.30.1203 to eliminate the incorporation by reference of 40 CFR Part 125 and replace it with the text of 40 CFR 125.3 (July 1, 2010 edition). Other federal regulations, which will be eliminated by removing the incorporation by reference of 40 CFR Part 125, are addressed in other amendments proposed by the board, including incorporating some of those regulations by reference into the revised text of ARM 17.30.1203 and 17.30.1207 and adopting the text of some of those federal regulations in New Rules I through V.

The board is proposing this revision because 40 CFR 125.3 establishes the framework for imposing minimum technology-based treatment requirements mandated by section 301 of the federal Clean Water Act. Adoption of the text will assist the regulated community in understanding which technology-based requirements will apply to any new, revised, or modified MPDES permit for an existing point source discharge. The proposed amendment is necessary in order to provide transparency to the criteria used when imposing technology-based standards in the permitting process and also to maintain the required elements of a state-delegated permit program, as set forth in 40 CFR 123.25.

The proposed revision will not result in a change in existing permit requirements, because 40 CFR 125.3 is one of the federal rules that were incorporated by reference in 1989. Since 40 CFR 125.3 has not been revised by EPA since it was incorporated into state rules, this amendment will not result in new permit requirements.

The board is also proposing to amend ARM 17.30.1203 in order to incorporate by reference the following federal regulations: 40 CFR Part 133 (July 1, 2010 edition), which establishes secondary treatment requirements for publicly owned treatment works (POTWs); 40 CFR Part 125, subpart D (July 1, 2010 edition), which allows variances from certain technology-based limits based upon fundamentally different factors; and 40 CFR 401.15 (July 1, 2010 edition), which is a list of toxic pollutants identified by EPA under section 307(a)(1) of the federal Clean Water Act. These updates to the incorporations by reference of federal regulations do not result in new permit requirements, because these federal regulations have not been revised since they were originally incorporated into ARM Title 17, chapter

30, subchapter 12. Updating these incorporations by reference is necessary because these regulations are referenced as applicable federal requirements in the amendments to ARM 17.30.1203. Incorporating these federal regulations is also necessary to maintain compliance with federal rules governing delegated states' permit programs. See, 40 CFR 123.25(a)(36), (37).

ARM 17.30.1206 - Toxic Effluent Standards

The board is proposing to amend ARM 17.30.1206 in order to clarify that the technology-based requirements in 40 CFR Part 129 apply only to specific facilities that discharge specific toxic pollutants. The proposed amendment does not result in new permit requirements, because the provisions of 40 CFR Part 129 have not been revised by EPA since those provisions were originally incorporated by reference into state rules in 1989. The board is also proposing to update the incorporation by reference of 40 CFR Part 129 in order to maintain compliance with rules governing a state's delegated program. See, 123.25(a)(37).

ARM 17.30.1207 - Effluent Limitations and Standards of Performance

The board is proposing to amend ARM 17.30.1207 in order to clarify how the effluent limitations and standards of performance promulgated by EPA and published in 40 CFR Chapter I, subchapter N will be applied to new and existing point sources. The board is also proposing to update the incorporation by reference of 40 CFR Chapter I, subchapter N, so that any effluent limitations and standards of performance that have been promulgated by EPA since 1989 will be adopted into state rule. Updating the incorporation by reference of these federal regulations is necessary, because they are a required element of a delegated state's permit program. See, 40 CFR 123.25(a)(37).

New Rule I - Criteria and Standards for Determining Alternative Effluent Limitations for Thermal Discharges

The board is proposing to adopt the text of 40 CFR 125.72 and 40 CFR 125.73 into New Rule I in order to make the requirements for obtaining alternative effluent limitations for thermal discharges readily available to the regulated community. Adoption of New Rule I will not result in new requirements for Montana permittees because the text of the federal regulations has not changed since 1989, when they were first incorporated into state rule. See, 40 CFR Part 125, subpart H.

Since the board is proposing to adopt the text of federal requirements for thermal discharges, the board is also proposing to amend ARM 17.30.1202 in order to include the special definitions that apply to alternative requirements for thermal discharges. The proposed adoption of New Rule I and the inclusion of special definitions in ARM 17.30.1202 are necessary because the federal criteria and standards for allowing alternative effluent limitations for thermal discharges are required elements of a delegated state's permit program. See, 40 CFR 123.25(a)(36).

New Rules II through IV

The board is proposing to adopt portions of the text of 40 CFR Part 125, subpart I, into New Rules II through IV. The board is also proposing to incorporate by reference the remaining portions of 40 CFR Part 125, subpart I, which will not be adopted as text within the new rules. The federal regulations proposed for adoption into New Rules II through IV were promulgated by EPA in 2001 for the purpose of establishing technology-based treatment requirements for cooling water intake structures at new facilities. The board is proposing to adopt New Rules II through IV, because the federal regulations in 40 CFR Part 125, subpart I, are required elements of a delegated state's permit program. See, 40 CFR 123.25(a)(36). A more detailed explanation of the content of New Rules II through IV is provided below.

New Rule II - Technology-Based Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule II, which contains the text of 40 CFR 125.80, 40 CFR 125.81, and 40 CFR 125.84. The text proposed for adoption explains the purpose of adopting federal requirements for cooling water intake structures, provides thresholds for determining which new facilities are subject to those requirements, and provides three options among which an owner or operator may choose in order to comply with the technology-based requirements in section 316(b) of the federal Clean Water Act. In addition, the board proposes to incorporate by reference into New Rule II the following federal regulations: 40 CFR 125.87 (July 1, 2010), which sets forth monitoring requirements for cooling water intake structures at new facilities; 40 CFR 125.88 (July 1, 2010), which sets forth record and reporting requirements for new facilities; and 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intakes. These proposed incorporations by reference are necessary because the text of New Rule II requires owners or operators of cooling water intake structures at new facilities to comply with these federal regulations.

New Rule III - Information Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule III, which contains the text of 40 CFR 125.86. The text of that federal regulation describes the information that must be submitted by an owner or operator of a new facility with a cooling water intake structure when applying for a new or renewed MPDES permit.

In addition, the board is proposing to incorporate by reference the following federal regulations: 40 CFR 125.89, which establishes the procedures and requirements the department must follow when imposing permit requirements for new facilities with cooling water intake structures; and 40 CFR 122.21(r), which sets forth application requirements for new facilities with cooling water intake structures. The proposed incorporations by reference are necessary because the text of New Rule III requires compliance with those regulations.

New Rule IV - Alternative Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule IV, which contains the text of 40 CFR 125.85. The text of that regulation authorizes the department to establish alternative requirements less stringent than the requirements of New Rule II, provided that the person requesting the alternative requirements demonstrates that they should be allowed.

New Rule V - Technology-Based Requirements for Cooling Water Intake Structures for Existing Facilities

The board is proposing to adopt New Rule V, which establishes technology-based treatment requirements for existing facilities with cooling water intake structures. Adoption of New Rule V is necessary to comply with federal requirements governing a delegated state's permit program. See, 40 CFR 123.25(a)(36).

Repeal of ARM 17.30.1208 – Hazardous Substances

The board is proposing to repeal ARM 17.30.1208, which incorporates by reference a list of hazardous substances identified by EPA under section 311(b) of the federal Clean Water Act. Section 311(b) prohibits the discharge of oil and hazardous substances into the navigable waters of the United States and its adjoining shorelines and is administered by EPA and the U.S. Coast Guard. Since states have no delegated authority to administer and enforce section 311(b), the board is repealing the rule implementing that provision of the federal Clean Water Act.

Repeal of ARM 17.30.1209 – Secondary Treatment

The board is proposing to repeal ARM 17.30.1209, which currently incorporates by reference federal regulations establishing secondary treatment for POTWs. Since the proposed amendments to ARM 17.30.1203 clarify the application of minimum treatment requirements, including the application of secondary treatment requirements to POTWs, the existing incorporation by reference in ARM 17.30.1209 is no longer necessary.

6. 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., July 8, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. 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.

8. 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.

9. 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, May 16, 2011.

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

In the matter of the amendment of ARM)
17.30.1201, 17.30.1202, 17.30.1203,)
17.30.1206, and 17.30.1207; the)
adoption of new rules I through V; and)
the repeal of ARM 17.30.1208 and)
17.30.1209 pertaining to Montana)
pollutant discharge elimination system)
effluent limitations and standards,)
standards of performance, and treatment)
requirements)

Presiding Officer Report

1. On July 7, 2011, at 1 p.m., 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 changes in this rulemaking establish effluent limitations, standards of performance and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program. The changes adopt effluent limitations and standards promulgated by the Environmental Protection Agency after 1989. The changes also eliminate some requirements that are not applicable to the Montana MPDES (Montana Pollutant Discharge Elimination) program, clarify existing language and provide ease of access to federal requirements by adopting some text from the federal rules into the State of Montana (State) rules.

2. The Notice of Public Hearing was contained in the 2011 Montana Administrative Register (MAR) Notice No. 17-322, in Issue No. 10 and was published on May 26, 2011. A copy of the notice is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

3. The Court Reporter, Cheryl Romsa, recorded the hearing.

4. There were no members of the public who testified at the hearing. At the hearing, the Presiding Officer identified and summarized the MAR notice, and read the Notice of Function of Administrative Rule Review Committee statement as required by Mont. Code Ann. § 2-4-302(7)(a).

SUMMARY OF HEARING

5. Mr. Tom Reid of the Water Protection Bureau of the Montana Department of Environmental Quality presented oral testimony providing an overview and an explanation of the need and basis for the rules. (Mr. Reid's testimony is attached.)

6. No written comments were submitted.

SUMMARY OF WRITTEN MATERIALS

7. After the hearing, written comments were timely received from the Montana-Dakota Utilities Co. Its comments are attached. The comments are properly summarized in the final Notice of Amendment, Adoption and Repeal.

8. The Department also submitted a memorandum from Department staff attorney, Ms Claudia L. Massman, with HB 521 (Mont. Code Ann. §§ 75-5-203 and 75-5-309) and HB 311 reviews of the proposed amendments and new

rules together with a Private Property Assessment Act Checklist. Ms. Massman's memorandum is attached to this report.

9. Ms. Massman concluded that under HB 521, the amendments and new rules do nothing more than adopt federal regulations either through incorporation by reference or through publishing the text of federal rules into State rules. As a result no written findings are required.

10. 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 amendments and new rules affecting the use of private real property. This rulemaking affects the use of private real property. A Private Property Assessment Act Checklist was prepared, which shows that the proposed amendments and new rules do not have taking or damaging implications. Therefore, no further assessment is required.

11. The period to submit comments ended at 5 p.m. on July 8, 2011.

PRESIDING OFFICER COMMENTS

12. The Board of Environmental Review (Board) has jurisdiction to adopt the amendments referenced in this rulemaking pursuant to Mont. Code Ann §§ 75-5-304, 75-5-305 and 75-5-401.

13. House Bill 521 (1995), codified in Mont. Code Ann. § 75-5-203 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 and new

rules are not more stringent than the comparable to federal regulation or guidelines. Therefore written findings are not necessary.

14. The conclusions in the memorandum of Ms. Massman concerning House Bill 521 (1995) and House Bill 311 (1995) are correct.

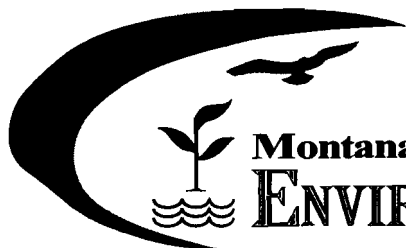
15. The procedures required by the Montana Administrative Procedure Act, including public notice, hearing, and comment, have been followed.

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

17. 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 November 26, 2011.

Dated this _____ day of September, 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

To: Board of Environmental Review

From: Claudia L. Massman, Attorney Specialist

Date: July 5, 2011

Subject: House Bill 521 and House Bill 311 Review for the Amendment of ARM 17.30.1201, 17.30.1202, 17.30.1203, 17.30.1206, 17.30.1207, and the adoption of New Rules I through V, pertaining to Montana Pollutant Discharge Elimination System effluent limitations and standards, standards of performance, and treatment requirements

HB 521 REVIEW

House Bill (HB) 521 (1995), codified in the Montana Water Quality Act at § 75-5-203, MCA, requires the Board of Environmental Review to make certain written findings after a public hearing and public comment prior to adopting a rule that is more stringent than a comparable federal standard or guideline.

In addition, § 75-5-309, MCA, requires the board of Environmental Review to make certain written findings that are accompanied by a board opinion evaluating the environmental and public health information in the record prior to adopting a rule that is more stringent than corresponding draft or final federal regulations, guidelines, or criteria.

The Board is proposing amendments to rules establishing effluent limitations, standards of performance, and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program, as set forth in 40 CFR 123.25. That regulation requires states to adopt the technology-based effluent limitations and standards found in subparts A,B,D, H, I, and N of 40 CFR Part 125, 40 CFR Part 133, 40 CFR Part 129, and 40 CFR Chapter I, subchapter N. The Board's existing rules, set forth in ARM Title 17, chapter 30, subchapter 12, incorporate by reference the technology-based effluent limitations and standards of performance that were promulgated by the U.S. Environmental

Protection Agency (EPA) prior to 1989. The proposed amendments are necessary in part, to adopt effluent limitations and standards promulgated by EPA after 1989. The proposed amendments are also necessary to eliminate some requirements that are not applicable to Montana's MPDES program (e.g., federal requirements for ocean discharges and pretreatment requirements), clarify existing language, and provide ease of access to federal requirements by adopting them in state rules.

In general, the proposed amendments and new rules will: (1) eliminate existing incorporations by reference adopted into state rules prior in 1989 and adopt the text of some of those federal regulations into state rules; (2) adopt the text of relatively recent federal regulations that impose treatment requirements on cooling water intake structures; (3) update incorporations by reference of federal rules that are too cumbersome to publish into state rules; (4) repeal existing incorporations by reference that are either duplicative or inapplicable to Montana's MPDES permit program; and (5) clarify existing language.

Since the proposed amendments and new rules do nothing more than adopt federal regulations either through incorporation by reference or through publishing the text of federal rules into state rules, no written findings are required under § 75-5-203, MCA, and § 75-5-309, MCA.

HB 311 Review

HB 311 (1995), the Private Property Assessment Act, codified as § 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.

§ 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. I have completed an Attorney General's "Private Property Assessment Act Checklist," which is attached to this memo. Based upon completion of the checklist, the proposed rulemaking does not have taking or damaging implications and no further HB 311 assessment is required.

Attachment to HB 311 analysis for the amendment of rules pertaining to effluent limitations and standards, standards of performance, and treatment requirements in Title 17, Chapter 30 subchapter 12.

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

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

YES	NO		
<input checked="" type="checkbox"/>	<input type="checkbox"/>	1.	Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	2.	Does the action result in either a permanent or indefinite physical occupation of private property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	3.	Does the action deprive the owner of all economically viable uses of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	4.	Does the action deny a fundamental attribute of ownership?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	5.	Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a. and 5b. and continue with question 6.]
<input type="checkbox"/>	<input type="checkbox"/>	5a.	Is there a reasonable, specific connection between the government requirement and legitimate state interests?
<input type="checkbox"/>	<input type="checkbox"/>	5b.	Is the government requirement roughly proportional to the impact of the proposed use of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	6.	Does the action have a severe impact on the value of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	7.	Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO, do not answer questions 7a. – 7c.]
<input type="checkbox"/>	<input type="checkbox"/>	7a.	Is the impact of government action direct, peculiar, and significant?
<input type="checkbox"/>	<input type="checkbox"/>	7b.	Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
<input type="checkbox"/>	<input type="checkbox"/>	7c.	Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

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.

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, the preparation of an impact assessment will require consultation with agency legal staff.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT,
17.30.1201, 17.30.1202, 17.30.1203,)	ADOPTION AND REPEAL
17.30.1206, and 17.30.1207; the)	
adoption of new rules I through V; and)	(WATER QUALITY)
the repeal of ARM 17.30.1208 and)	
17.30.1209 pertaining to Montana)	
pollutant discharge elimination system)	
effluent limitations and standards,)	
standards of performance, and treatment)	
requirements)	

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 ARM 17.30.1201, 17.30.1202, 17.30.1203, 17.30.1206, and 17.30.1207, adopted New Rules I (17.30.1210), II (17.30.1211), III (17.30.1212), IV (17.30.1213), and V (17.30.1214), and repealed ARM 17.30.1208 and 17.30.1209 exactly as proposed.

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

COMMENT NO. 1: The board should incorporate as much of the federal rule by reference into ARM 17.30.1202 and 17.30.1203 that specifically applies to those rules and only provide detail where the board rules and federal rules differ or provide explanation of how they are connected within the different rules. This should prevent any inadvertent disconnection between subchapter 12 and the federal rules and potential errors.

RESPONSE: The board is proposing to adopt the text of the federal rule establishing minimum treatment requirements into ARM 17.30.1203 to provide ease of access to the regulated community regarding federal minimum treatment requirements that apply to all MPDES permits. The board is also adopting the text of certain federal definitions into ARM 17.30.1202 to assist the regulated community in understanding the technical terms used throughout subchapter 12. The definitions and minimum treatment requirements proposed for adoption in ARM 17.30.1202 and 17.30.1203 do not differ from the federal regulations, because the text of the federal rules - with minor adjustments for style - is being adopted without any changes. Finally, the board is adopting by reference the federal rules that, when combined with all of the other federal regulations establishing treatment requirements, are too cumbersome to adopt into state rules.

COMMENT NO. 2: EPA has recently proposed new 316(b) rules requiring impingement and entrainment reductions at new and existing facilities which are the subject of New Rules II and III and some of the definitions in ARM 17.30.1202. We believe it would be prudent for the board to postpone the new rules and applicable definitions until the EPA has finalized its 316(b) rule. There could be differences in the EPA rule that would require the board to reopen New Rules II and III and the applicable definitions.

RESPONSE: The board is proposing to adopt the existing federal regulations pertaining to new cooling water intake structures that were first adopted by the U.S. Environmental Protection Agency (EPA) in 2001 and later amended in 2003. The board is also proposing to adopt EPA's current requirements for existing cooling water intake structures in New Rule V. Although EPA has recently proposed new rules that would make substantial changes to the requirements for existing facilities and make minor modifications to the current rules for new facilities, the board does not agree that it should postpone adopting the federal regulations that are currently in effect for these facilities. As the comment points out, if EPA actually adopts the proposed rules, then the board may simply amend the rules it is currently adopting to reflect any changes that EPA's new rules may require.

COMMENT NO. 3: Montana-Dakota appreciates that New Rule IV allows for alternative compliance requirements at cooling water intake structures if initial compliance costs are determined to be wholly disproportionate to other factors or results in impact to other resources. We recommend that the board remove the reference in New Rule IV to comparing the cost of this determination to the costs EPA considered since technology costs will change in the future and this should be up to the department's discretion.

RESPONSE: New Rule IV adopts into state rule the decision criteria in 40 CFR 125.85(a) for granting alternative requirements to new facilities that are less stringent than New Rule II requires. Since 40 CFR 125.85(a) allows an alternative (i.e., less stringent) requirement only if the cost of compliance with the requirement is "wholly out of proportion to the costs EPA considered" when establishing the requirements for new facilities, the board declines to remove the reference to the costs EPA considered in order to be consistent with, and no less stringent than, the federal regulation.

COMMENT NO. 4: The board should expand the text in New Rule IV to specifically include the consideration of a result where the cost of compliance would be wholly disproportionate from the actual benefit of implementation controls.

RESPONSE: The board declines to expand the criteria in New Rule IV to include a consideration of costs that are "wholly disproportionate" to the benefit of implementing the controls, because expanding the criteria from the list provided in 40 CFR 125.85 may result in permit requirements that are less stringent than required by the federal rule.

COMMENT NO. 5: We agree that best professional judgment in New Rule V is appropriate for determining impingement and entrainment reductions at cooling water intakes at existing facilities on a case-by-case, region, site, or waterway

segment basis. We also believe that the wholly disproportionate cost analysis included in New Rule IV would be appropriate to reference in New Rule V, unless that is universally understood to be already considered under a case-by-case determination in New Rule V.

RESPONSE: Permit limits for existing facilities subject to the Section 316(b) requirements under New Rule V will be based on a cost benefit determination using the best professional judgment (BPJ) of the permit writer. Since existing facilities are not expected to meet the impingement and entrainment criteria required for new facilities, the wholly disproportionate criterion is not applicable.

COMMENT NO. 6: The board should extend the comment period on the proposed rules, because Montana Dakota Utilities Co. has not had much time to review the rules in order to provide more accurate comments on the proposed rules relating to cooling water intake structures.

RESPONSE: In response to this comment, the department contacted the person who had submitted the comment on behalf of Montana Dakota Utilities Co. to ascertain whether an extension was necessary to accommodate the request for more accurate comments. The department was informed that the company no longer believed that an extension of time was necessary, since the board's proposed rules did not differ from EPA's existing rules governing cooling water intake structures.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

JAMES M. MADDEN
Rule Reviewer

By: _____
JOSEPH W. RUSSELL, M.P.H.
Chairman

Certified to the Secretary of State, _____, 2011.

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

Agenda #.III.A.2.

Agenda Item Summary: The Board has proposed amending air quality rule provisions in Title 17, Chapter 8, subchapters 8, 9, and 10 to update requirements for PM-2.5 from sources subject to major source permit rules.

List of Affected Rules: 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.

Affected Parties Summary: The proposed rule amendments would affect owners and operators of major sources.

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.

Background: This rulemaking action will update Montana's rules to incorporate requirements for major source permitting regarding airborne emissions of particulate matter having an aerodynamic diameter of less than or equal to 2.5 micrometers in diameter (PM-2.5).

In 2008, EPA updated the following regulations: EPA's regulations for nonattainment areas and Prevention of Significant Deterioration of Air Quality (PSD); Major New Source Review (NSR); establishing PM-2.5 significant emission rates (SERs) that trigger NSR; requirements for consideration of precursors to PM-2.5 in determining the significance of PM-2.5 emissions; and nonattainment area offset ratios for PM-2.5 emissions. 73 FR 28321. On October 20, 2010, EPA promulgated additional PM-2.5 PSD regulations, including: maximum allowable increases in ambient concentrations ("increments") applicable to PSD Class I, II, and III areas; requirements for determining baseline areas and baseline dates for applicability of PSD increments; PSD significant impact levels (SILs), used to determine whether the ambient impacts of a proposed new major stationary source or major modification would be significant enough to require modeling of cumulative emissions from the source and existing sources; and PSD significant monitoring concentrations (SMCs), used to determine whether it is necessary for the applicant to conduct pre-application monitoring of background ambient concentrations. 75 FR 64864.

The Department supports the Board adopting these federal preconstruction review requirements. In order for Montana to retain its primacy to regulate construction of major air pollutant emission sources in the state, the state is required to adopt at least the minimum federal standards applicable to preconstruction review applicable to emissions of a NAAQS pollutant. Also, adding nonattainment area and PSD preconstruction review requirements for PM-2.5 is necessary in order for the Department to ensure that PM-2.5 offsets are properly obtained for emissions from

major stationary sources and major modifications that would be located in PM-2.5 nonattainment areas and that PM-2.5 emissions from any proposed new major stationary source or major modification would not cause or contribute to air pollution in excess of applicable requirements. These rule amendments would make Montana's rules consistent with the minimum federal requirements.

Hearing Information: Katherine Orr, attorney for the Board, conducted a public hearing on July 7, 2011.

Board Options: The Board may:

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

DEQ Recommendation: The Department recommends the Board adopt the rules as proposed in the Notice of Public Hearing on Proposed Amendment.

Enclosures:

1. Notice of Public Hearing on Proposed Amendment
2. Presiding Officer's Report
3. HB 521 and 311 Analysis
4. Draft Notice of Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
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 pertaining to definitions,)
ambient air increments, major stationary)
sources, source impact analysis, source)
information, sources impacting federal)
class I areas, definitions, when air)
quality permit required, baseline for)
determining credit for emissions and air)
quality offsets)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On July 7, 2011, at 2:00 p.m., or upon the conclusion of the public hearing for MAR Notice No. 17-322, the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., June 13, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.801 DEFINITIONS (1) through (2)(c) remain the same.

(3) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable in 40 CFR 81.327 in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than one $\mu\text{g}/\text{m}^3$ (annual average) of the pollutant for which the minor source baseline date is established, except baseline areas for PM-2.5 are designated when a major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than 0.3 $\mu\text{g}/\text{m}^3$ as an annual average for PM-2.5.

(a) through (20)(b)(vii) remain the same.

(21) The following apply to the definitions of the terms "major source baseline date" and "minor source baseline date":

(a) "major source baseline date" means:

- (i) in the case of ~~particulate matter~~ PM-10 and ~~sulfur dioxide~~ SO₂, January 6, 1975; ~~and~~
 - (ii) in the case of ~~nitrogen dioxide~~ NO₂, February 8, 1988; ~~and~~
 - (iii) in the case of PM-2.5, October 20, 2010.
- (b) "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or a major modification subject to 40 CFR 52.21 or to regulations approved pursuant to 40 CFR 51.166 submits a complete application under the relevant regulation. The trigger date is:
- (i) in the case of ~~particulate matter~~ PM-10 and ~~sulfur dioxide~~ SO₂, August 7, 1977; ~~and~~
 - (ii) in the case of ~~nitrogen dioxide~~ NO₂, February 8, 1988; ~~and~~
 - (iii) in the case of PM-2.5, October 20, 2011.
- (c) through (26) remain the same.
- (27) The following apply to the definition of the term "significant":
- (a) "significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions
15 tpy of PM-10 emissions
PM-2.5: 10 tpy of direct PM-2.5 emissions, 40 tpy of SO₂ emissions, or 40 tpy of NO₂ emissions unless demonstrated not to be a PM-2.5 precursor
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H₂S): 10 tpy
Total reduced sulfur (including H₂S): 10 tpy
Reduced sulfur compounds (including H₂S): 10 tpy
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2 * 10^{-6}$ megagrams per year ($3.5 * 10^{-6}$ tpy)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)
(b) through (29) remain the same.

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

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.804 AMBIENT AIR INCREMENTS (1) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be

limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
CLASS I	
Particulate matter:	
PM-2.5, annual arithmetic mean	<u>1</u>
PM-2.5, 24-hr maximum	<u>2</u>
PM-10, annual arithmetic mean	4
PM-10, 24-hr maximum	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
CLASS II	
Particulate matter:	
PM-2.5, annual arithmetic mean	<u>4</u>
PM-2.5, 24-hr maximum	<u>9</u>
PM-10, annual arithmetic mean	17
PM-10, 24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
CLASS III	
Particulate matter:	
PM-2.5, annual arithmetic mean	<u>8</u>
PM-2.5, 24-hr maximum	<u>18</u>
PM-10, annual arithmetic mean	34
PM-10, 24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

(2) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) through (6) remain the same.

(7) The department may exempt a proposed major stationary source or major modification from the requirements of ARM 17.8.822, with respect to monitoring for a particular pollutant, if:

(a) the emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

- (i) carbon monoxide--: $575 \mu\text{g}/\text{m}^3$, eight-hour average;
- (ii) nitrogen dioxide--: $14 \mu\text{g}/\text{m}^3$, annual average;
- (iii) PM-2.5: $4 \mu\text{g}/\text{m}^3$, 24-hour average;
- ~~(iii)~~ (iv) ~~particulate matter--PM-10~~: $10 \mu\text{g}/\text{m}^3$ ~~PM-10~~, 24-hour average;
- ~~(iv)~~ (v) sulfur dioxide--: $13 \mu\text{g}/\text{m}^3$, 24-hour average;
- ~~(v)~~ (vi) ozone--: no de minimus air quality level is provided for ozone.

However, any net increase of 100 tons per year or more of volatile organic compounds subject to this subchapter ~~would be required to perform~~ requires an ambient impact analysis, including the gathering of ambient air quality data;

- ~~(vi)~~ (vii) lead--: $0.1 \mu\text{g}/\text{m}^3$, three-month average;
 - ~~(vii)~~ (viii) fluorides--: $0.25 \mu\text{g}/\text{m}^3$, 24-hour average;
 - ~~(viii)~~ (ix) total reduced sulfur--: $10 \mu\text{g}/\text{m}^3$, one-hour average;
 - ~~(ix)~~ (x) hydrogen sulfide--: $0.2 \mu\text{g}/\text{m}^3$, one-hour average;
 - ~~(x)~~ (xi) reduced sulfur compounds--: $10 \mu\text{g}/\text{m}^3$, one-hour average; or
- (b) and (c) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.820 SOURCE IMPACT ANALYSIS (1) remains the same.

(2) For purposes of PM-2.5, the demonstration required in (1) is made if the emissions increase from the new stationary source alone or from the modification alone would cause in all areas, air quality impacts less than the following amounts:

<u>Pollutant</u>	<u>Averaging time</u>	<u>Class I area</u>	<u>Class II area</u>	<u>Class III area</u>
<u>PM-2.5</u>	<u>Annual</u>	<u>$0.06 \mu\text{g}/\text{m}^3$</u>	<u>$0.3 \mu\text{g}/\text{m}^3$</u>	<u>$0.3 \mu\text{g}/\text{m}^3$</u>
	<u>24-hour</u>	<u>$0.07 \mu\text{g}/\text{m}^3$</u>	<u>$1.2 \mu\text{g}/\text{m}^3$</u>	<u>$1.2 \mu\text{g}/\text{m}^3$</u>

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.822 AIR QUALITY ANALYSIS (1) through (8) remain the same.

(9) Nitrogen oxides are presumed to be precursors to PM-2.5 in an area, unless the applicant demonstrates that emissions of nitrogen oxides from sources in the area are not a significant contributor to that area's ambient PM-2.5

concentrations.

(10) Volatile organic compounds and ammonia are presumed not to be precursors to PM-2.5 unless emissions of volatile organic compounds or ammonia from sources in the area are a significant contributor to that area's ambient PM-2.5 concentrations.

(11) PM-2.5 emissions and PM-10 emissions include gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

(12) Applicability determinations for PM-2.5 made prior to January 1, 2011, without accounting for condensable particulate matter, are not subject to (11).

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

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.825 SOURCES IMPACTING FEDERAL CLASS I AREAS--
ADDITIONAL REQUIREMENTS (1) through (3) remain the same.

(4) The owner or operator of a proposed source or modification may demonstrate to the federal land manager that the emissions from such source would have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the federal land manager concurs with such demonstration and so certifies to the department, the department may, provided that applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over the minor source baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
<u>PM-2.5</u>	
<u>annual arithmetic mean</u>	<u>4</u>
<u>24-hr maximum</u>	<u>9</u>
Particulate matter:	
PM-10, annual arithmetic mean	17
PM-10, 24-hr maximum	30
Sulfur dioxide:	
annual arithmetic mean.....	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide:	
annual arithmetic mean.....	25

(5) through (6) remain the same.

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

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.901 DEFINITIONS (1) through (15) remain the same.

(16) "Precursor" means:

(a) volatile organic compounds and nitrogen oxides in ozone nonattainment areas; and

(b) sulfur dioxide in PM-2.5 nonattainment areas.

(16) and (17) remain the same, but are renumbered (17) and (18).

~~(18)~~ (19) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

<u>Pollutant and Emission Rate</u>	
Carbon monoxide:	100 tons per year (tpy)
Nitrogen oxides:	40 tpy
Sulfur dioxide:	40 tpy
Particulate matter:	25 tpy of particulate matter emissions <u>or</u>
<u>PM-2.5</u>	15 tpy of PM-10 emissions <u>10 tpy of direct PM-2.5 emissions, 40 tpy of sulfur dioxide emissions, or 40 tpy of nitrogen oxide emissions unless demonstrated not to be a PM-2.5 precursor</u>
Lead:	0.6 tpy

(19) and (20) remain the same, but are renumbered (20) and (21).

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

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.904 WHEN MONTANA AIR QUALITY PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, obtain from the department a Montana air quality permit in accordance with subchapter 7 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ARM 17.8.744 and 17.8.745 which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, still be required to obtain a Montana air quality permit and comply with the requirements of ARM 17.8.748, 17.8.749, 17.8.756, 17.8.759, and 17.8.760 and with all applicable requirements of this subchapter.

(2) remains the same.

(3) Sulfur dioxide is a precursor to PM-2.5 in a PM-2.5 nonattainment area.

(4) Nitrogen oxides are presumed to be precursors to PM-2.5 in a PM-2.5 nonattainment area, unless the applicant demonstrates that emissions of nitrogen

oxides from sources in the PM-2.5 nonattainment area are not a significant contributor to that area's ambient PM-2.5 concentrations.

(5) Volatile organic compounds and ammonia are presumed not to be precursors to PM-2.5 in a PM-2.5 nonattainment area unless emissions of volatile organic compounds or ammonia from sources in the area are a significant contributor to that area's ambient PM-2.5 concentrations.

(6) PM-2.5 emissions and PM-10 emissions shall include gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

(7) Applicability determinations made prior to January 1, 2011, without accounting for condensable particulate matter, are not subject to (5).

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

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1007 BASELINE FOR DETERMINING CREDIT FOR EMISSIONS AND AIR QUALITY OFFSETS (1) For the purposes of this subchapter, the following requirements shall apply:

(a) ~~†~~The requirements of ARM 17.8.906, except that 17.8.906(7) through (9) are not applicable do not apply to offsets required under this subchapter;

(b) ~~e~~Emission offsets must be reductions in actual emissions for the same pollutant obtained from the same source or other sources which are located in the same general area of the proposed major stationary source or modification, and that contribute to or would contribute to the violation of the national ambient air quality standard;

(c) In meeting the emissions offset requirements in this subchapter, emissions offsets for direct PM-2.5 emissions or emissions of precursors of PM-2.5 may be satisfied by offsetting reductions in direct PM-2.5 emissions or emissions of any precursor;

~~(c)~~ (d) ~~i~~In the case of emission offsets involving volatile organic compounds and oxides of nitrogen, offsets will generally be acceptable if they are obtained from within the areas specified in (1)(b). If the proposed offsets would be from sources located at considerable distances from the new source, the department shall increase the ratio of the required offsets and require a showing by the applicant that nearby offsets were investigated and reasonable alternatives were not available;

~~(d)~~ (e) ~~i~~In the case of emission offsets involving sulfur dioxide, particulates, and carbon monoxide, areawide mass emission offsets are not acceptable, and the applicant shall perform atmospheric simulation modeling to ensure that emission offsets provide a positive net air quality benefit. The department may exempt the applicant from the atmospheric simulation modeling requirement if the emission offsets provide a positive net air quality benefit, are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height; and

~~(e)~~ (f) ~~n~~No emissions credit shall be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977).

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

REASON: Pursuant to the federal Clean Air Act, areas within a state are designated as nonattainment, attainment, or unclassifiable for compliance with the National Ambient Air Quality Standards (NAAQS). Major stationary sources and major modifications that would be located in nonattainment areas are subject to nonattainment area major new source review (NSR) requirements, and major sources and major modifications that would be located in attainment or unclassifiable areas are subject to Prevention of Significant Deterioration (PSD) NSR requirements.

In 1997, the U.S. Environmental Protection Agency (EPA) promulgated NAAQS for fine particulate matter, known as PM-2.5, which includes particles with an aerodynamic diameter less than or equal to 2.5 micrometers. EPA revised the NAAQs in 2006.

On May 16, 2008, EPA promulgated nonattainment area and PSD NSR regulations establishing: PM-2.5 significant emission rates (SERs) that trigger NSR; requirements for consideration of precursors to PM-2.5 in determining the significance of PM-2.5 emissions; and nonattainment area offset ratios for PM-2.5 emissions. 73 Fed. Reg. 28321. On October 20, 2010, EPA promulgated additional PM-2.5 PSD regulations, including: maximum allowable increases in ambient concentrations (increments) applicable to PSD Class I, II, and III areas; requirements for determining baseline areas and baseline dates for applicability of PSD increments; PSD significant impact levels (SILs), used to determine whether the ambient impacts of a proposed new source or modification would be significant enough to require modeling of cumulative emissions from the source and existing sources; and PSD significant monitoring concentrations (SMCs), used to determine whether it is necessary for the applicant to conduct pre-application monitoring of background ambient concentrations. 75 Fed. Reg. 64864. The federal requirements for state nonattainment area NSR provisions related to PM-2.5 are codified at 40 CFR § 51.165(a)(1)(x)(A), (C) and (D) and 40 CFR § 51.165(a)(11), and the federal requirements for state PSD provisions are found at 40 CFR § 51.166(b)(14), (15) and (23), (k), and (p).

The board is proposing in this rulemaking to adopt these federal preconstruction review requirements. In order for Montana to retain its primacy to regulate construction of major air pollutant emission sources in the state, the state is required to adopt at least the minimum federal standards applicable to preconstruction review applicable to emissions of a NAAQS pollutant. Also, adding nonattainment area and PSD preconstruction review requirements for PM-2.5 is necessary in order for the department to ensure that PM-2.5 offsets are properly obtained for emissions from major stationary sources and major modifications that would be located in PM-2.5 nonattainment areas and that PM-2.5 emissions from any proposed new major stationary source or major modification would not cause or contribute to air pollution in excess of applicable requirements.

The board also is proposing minor editorial revisions that are not intended to have any substantive effect.

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., July 8, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

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

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

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

Certified to the Secretary of State, May 16, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.8.801, 17.8.804, 17.8.818, 17.8.820,)
18.8.822, 17.8.825, 17.8.901, 17.8.904)
and 17.8.1007 pertaining to definitions,)
ambient air increments, major stationary)
sources, source impact analysis, source)
information, sources impacting federal)
class I areas, definitions, when air)
quality permit required, baseline for)
determining credit for emissions and air)
quality offsets)

Presiding Officer Report

1. On July 7, 2011, at 2 p.m., the undersigned Presiding Officer conducted the public hearing held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned proposed amendments. The amendments implement minor editorial revisions and they amend the State of Montana's (State's) major new source review rules to add provisions related to PM-2.5 promulgated by the Environmental Protection Agency in 2008 and 2010. The proposed amendments relating to new source review conform the State's rules to the comparable federal regulations.

2. Notice of the hearing was contained in the Montana Administrative Register (MAR), Notice No. 17-323, published on May 26, 2011, in Issue No.10. A copy of the notice is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

3. The Court Reporter, Cheryl Romsa, recorded the hearing.

4. There were no members of the public who testified at the hearing. At the hearing, the Presiding Officer identified and summarized the MAR notice and read the Notice of Function of Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a).

SUMMARY OF HEARING

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

6. No other written comments were submitted.

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

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

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

10. The period to submit comments ended at 5 p.m. on July 8, 2011.

PRESIDING OFFICER COMMENTS

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

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

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

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

15. Under Mont. Code Ann. § 2-4-305(7), for the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by November 26, 2011.

Dated this _____ day of September, 2011.

KATHERINE J. ORR
Presiding Officer



Brian Schweitzer, Governor
Richard H. Opper, Director

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

OFFICE MEMORANDUM

TO: Board of Environmental Review

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

SUBJECT: House Bill 521 and House Bill 311 review for rulemaking to conform rules to federal major new source review requirements related to PM-2.5

ARM Notice No. 17-323

DATE: May 25, 2011

HB 521 REVIEW

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

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

In this proceeding, in addition to proposing minor editorial revisions that are not intended to have any substantive effect, the Board is proposing to:

Amend the State's major new source review rules to add provisions related to PM-2.5 promulgated by the U.S. Environmental Protection Agency in 2008 and 2010.

The proposed substantive amendments would conform the State's rules to the comparable federal regulations and would not make the State rules more stringent than comparable federal regulations or guidelines. Therefore, no further House Bill 521 analysis is required.

- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

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

Enc.

DMR

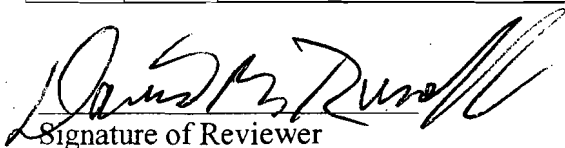
Name of Project: Proposed Amendment of Air Quality Major New Source Review Rules to Conform Rules to Amendments to Federal Major New Source Review Requirements Related to PM-2.5, MAR Notice No. 17-323

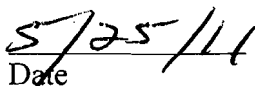
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

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

YES NO

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


Signature of Reviewer


Date

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.8.801, 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 pertaining to definitions,)
ambient air increments, major stationary)
sources, source impact analysis, source)
information, sources impacting federal)
class I areas, definitions, when air)
quality permit required, baseline for)
determining credit for emissions and air)
quality offsets)

NOTICE OF AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On May 26, 2011, the Board of Environmental Review published MAR Notice No. 17-323 regarding a notice of public hearing on proposed amendment of the above-stated rule at page 799, 2011 Montana Administrative Register, issue number 10.

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

3. No public comments or testimony were received.

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.

Linda M. Deola
John M. Morrison
Jonathan R. Motl
Frederick F. Sherwood
David K. W. Wilson, Jr.

kwilson@mmslawgroup.com



MORRISON, MOTL & SHERWOOD PLLP

Attorneys at Law
401 North Last Chance Gulch
Helena, Montana 59601
www.mmslawgroup.com

Brenda Lindlief Hall
Andrée Larose
Brian J. Miller

(406) 442-3261

(406) 443-7294 FAX

July 26, 2007

FILED this 27th day of
July AD 2011
at _____ o'clock _____
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by Misty Galt

Ms. Joyce Wittenberg
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620

Re: Laubach MATL Appeal, Case No. BER 2010-15 MFS

Dear Joyce:

Enclosed please find the Stipulation to Dismiss the Appeal signed by the Appellants, the Laubachs, and myself on MATL's behalf. I understand that DEQ will separately file a consent to the dismissal.

Please feel free to contact me if you have any questions. Thank you.

Sincerely,

David K. W. Wilson, Jr.

cc: Harley Harris
Ed Hayes
Ron and Debbie Laubach
Katherine Orr

David K. W. Wilson, Jr.
MORRISON, MOTL AND SHERWOOD
401 North Last Chance Gulch
Helena, MT 59601
(406) 442-3261
k.w.83@hotmail.com
Attorney for Montana Alberta Tie, Ltd.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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

CASE NO. BER 2010-15 MFS

STIPULATION TO DISMISS APPEAL,
WITH PREJUDICE

Appellants Ron and Debbie Laubach, and Intervenor MATL, have reached a settlement of this matter. Therefore, pursuant to MAPA and Rule 41 (a), Mont. Rules of Civ. Proc., the Parties hereby stipulate to dismiss this matter, with prejudice. A proposed order is attached hereto.

DATED this 26 day of July, 2011.

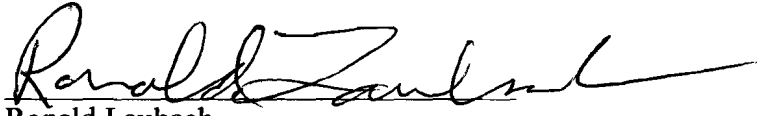
MORRISON, MOTL AND SHERWOOD

By 

David K.W. Wilson, Jr.

Attorneys for MATL

DATED this 21 day of July, 2011.


Ronald Laubach


Debbie Laubach
Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26 day of July, 2010, a true and correct copy of the foregoing was served via first-class mail, postage prepaid, addressed as follows:

Ms. Katherine Orr
Agency Legal Services
1712 Ninth Ave.
P.O. Box 201440
Helena, MT 59620

Ms. Joyce Wittenberg, Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620

Mr. Ed Hayes
DEQ
P.O. Box 200901
Helena, MT 59620

Ronald and Debbie Laubach
1199 Wilson Road
Power, MT 59468

BY: 

1
2
3
4
5
6
7
8 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
9 OF THE STATE OF MONTANA

10 IN THE MATTER OF:)
11 THE APPEAL AND REQUEST FOR HEARING) Case No. BER 2010-15 MFS
12 BY RONALD AND DEBBIE LAUBACH)
13 REGARDING THE DEQ'S FINAL DECISION) ORDER OF DISMISSAL
14 TO AMEND THE MATL'S CERTIFICATE OF.)
15 COMPLIANCE)

16 The parties have filed a Stipulation for Dismiss Appeal With Prejudice pursuant to
17 Montana Rule of Civil Procedure 41(a) stating that Ron and Debbie Laubach and MATL have
18 reached a settlement of this matter and stipulating to dismissal of the matter with prejudice. As
19 provided in the parties' Stipulation for Dismiss Appeal With Prejudice,

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

22 DATED this _____ day of _____, 2011.

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

1
2
3 CERTIFICATE OF SERVICE

4 I hereby certify that on the ____ day of _____, 2011, I caused a true and
5 accurate copy of the foregoing Order of Dismissal to be mailed to:

6 Ronald and Debbie Laubach
7 1199 Wilson Road
8 Power, MT 59468

9 Kim Wilson
10 Attorney for MATL
11 Morrison, Motl and Sherwood
12 401 North Last Chance Gulch
13 Helena, MT 59601

14 Katherine Orr, Hearing Examiner
15 Agency Legal Services Bureau
16 1712 Ninth Avenue
17 P.O. Box 201440
18 Helena, MT 59620-1440

19 I further certify that on the ____ day of _____, 2011, I caused a true and accurate
20 copy of the foregoing Order of Dismissal to be served by hand delivery to:

21 Edward Hayes, Legal Counsel
22 Department of Environmental Quality
23 1520 E. Sixth Avenue, Metcalf Building
24 P.O. Box 200901
Helena, MT 59620-0901

Secretary for the Board of Environmental Review

1 James M. Madden
2 Special Assistant Attorney General
3 Department of Environmental Quality
4 P.O. Box 200901
5 Helena, Montana 59620-0901
6 (406) 444-4009
7 Attorney for Department

8 Fred Borman
9 Circle B, LLC
10 P.O. Box 17
11 Bighorn, MT 59010

FILED this 19th day of
July AD 2011
at 9:24 o'clock A.M.
MONTANA
by Misty Bork

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

10 IN THE MATTER OF:)
11 Violations of the Water)
12 Quality Act by Circle B, LLC at)
13 Circle B Feedyard, Hysham,)
14 Treasure County, Montana.)
[Permit No MTG010265, FID #2036)
Docket No. WQ-11-08])

Case No. BER 2011-07 WQ

Stipulation for Dismissal

15
16 The parties hereby stipulate, pursuant to Rule 41(a), M.R.Civ.P., to the dismissal of this
17 appeal. The parties have reached a resolution of the matters at issue and Appellant withdraws its
18 appeal and request for hearing.

19 STATE OF MONTANA
20 Department of Environmental Quality

APPELLANT
Circle B, LLC

21 by:

22 James M. Madden
23 James M. Madden
24 Attorney for Department

by:

[Signature]

25 Date

7/19/11

Date

7-18-11

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)

ADMINISTRATIVE ORDER
ON CONSENT

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 (Circle B) 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. Concurrent with the issuance of this Administrative Order on Consent (Consent Order), the Department is terminating its May 4, 2011 Notice of Violation and Administrative Compliance and Penalty Order and is replacing it with this Consent Order.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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. Circle B 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.

1 5. Section 75-5-605(1)(b), MCA, states that it is unlawful for any person to violate
2 any provision set forth in a permit or stipulation, including but not limited to limitations and
3 conditions contained in the permit.

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

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

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

10 9. On September 28, 2009, the Department received a complaint alleging Circle B
11 was operating a 5,000-head animal feedlot operation without a permit and that the operation
12 would impact groundwater and a ditch (Feedyard ditch) that runs through the Feedyard.

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

16 11. On October 14, 2009, the Department sent a letter informing Circle B that it was
17 in violation of the Act and requested that it submit a CAFO discharge permit application to the
18 Department within 60 days.

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

23 13. On February 9, 2010, Circle B submitted a completed Application and a Nutrient
24 Management Plan (NMP) to the Department.

1 14. On April 23, 2010, the Department sent a letter informing Circle B, that based on
2 the information in the Application and NMP, the Feedyard qualified to operate under the General
3 Permit and issued Circle B Authorization Number MTG010265 (Authorization) for coverage
4 under the General Permit and approved the NMP. The Authorization required that the Feedyard
5 facility be designed, constructed and operated to contain all process-generated wastewaters, plus
6 2.6 inches of precipitation from the runoff of a 25-year, 24-hour rain event. Circle B was
7 required to either use the Hysham, Montana, weather station (HYSM8) or maintain a comparable
8 precipitation gauge at the Feedyard to determine the amount of precipitation. The Authorization
9 and General Permit are collectively referred to herein as the Permit.

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

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

17 17. On September 9, 2010, Circle B submitted to the Department a "Discharge
18 Notification" informing the Department that the Feedyard received slightly over two inches of
19 water from approximately 6:00 pm on August 29, 2010 to 4:00 pm on August 30, 2010 and that
20 an employee mistakenly assumed that the Feedyard had met the 25-year, 24-hour criteria for
21 discharge and began pumping water from waste control structure [WCS] #2. As a result, Circle
22 B discharged approximately 22,000 gallons of wastewater from WCS #2 to the 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 Circle B 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
7 event.
- 8 • Part II.A. by not having a bentonite liner in the waste control structures and
9 failing to prevent a discharge of manure, litter, or process wastewater from the
10 production area into state waters.
- 11 • Part III.C by failing to install a depth marker in the manure, litter, and process
12 wastewater impoundment and failing to conduct required inspections.
- 13 • Part I.B. by failing to submit required permit application or identifying
14 information of monitor well locations and correct well logs.
- 15 • Part III.F. by failing to keep animals out of direct contact with water in the
16 Feedyard ditch.
- 17 • Part III.C., D., F. and K. by failing to maintain records or meet record keeping
18 requirements.

13 The Department further informed Circle B that the above-listed violations were violations of the
14 Permit and therefore violations of Section 75-5-605(1)(b), MCA, and ARM 17.30.1342(1).

15 Further, the Department informed Circle B that it considered the discharge of wastewater to be a
16 significant violation and would be subject to a formal enforcement action.

17 20. On June 10, 2011, Circle B submitted a compliance plan and schedule, satisfying
18 the requirement of Paragraph 42.

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

20 21. Part II. A. of the Permit requires that there shall be no discharge of manure, litter
21 or process-wastewater pollutants from the production area to state waters except that whenever
22 precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the
23 overflow may be discharged to state waters provided that the production area is designed,
24 //

constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall.

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

23. In September 2010, Circle B informed the Department that it discharged wastewater from WCS #2 into the Feedyard ditch and onto the field adjacent [east] to the Feedyard.

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

25. Circle B violated Part II. A of the Permit and ARM 17.30.1342(1) by discharging wastewater from the WCS to the Feedyard ditch.

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

Failure to comply with Permit conditions

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

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

29. Part III.C.1.a. and c. of the Permit requires the permittee to, at a minimum, conduct and keep records of the following: a. Weekly inspections of all storm water diversion

1 | devices, runoff diversion structures, and devices channeling contaminated storm water to the
2 | wastewater and manure storage and containment structure; ... and c. Weekly inspections of the
3 | manure, litter, and process wastewater impoundments. The inspection will note the level in
4 | liquid impoundments as indicated by a depth marker. All open surface liquid impoundments
5 | must have a depth marker which clearly indicates the minimum capacity necessary to contain the
6 | runoff and direct precipitation of a 25-year, 24-hour rainfall event.

7 | 30. Part III.D.3 of the Permit requires that the permittee maintain on site a copy of
8 | their site-specific nutrient management plan (NMP).

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

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

17 | 33. During its September 2010 CEI, the Department documented violations of Circle
18 | B's Permit.

19 | 34. The Department's October 2010 Violation Letter notified Circle B that it was in
20 | violation of the Permit.

21 | 35. Circle B violated Parts II and III of the Permit and ARM 17.30.1342(1) by failing
22 | to comply with the Permit conditions listed in Paragraph 19.

23 | 36. Circle B violated Section 75-5-605(1)(b), MCA, seven times by failing to comply
24 | with the Permit conditions listed in Paragraphs 27 through 32.

1 ***Administrative penalty***

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

5 38. The Department has calculated an administrative penalty in the amount of \$7,000
6 for the violation alleged in Paragraph 26 above. See Section 75-1-1001, MCA, and ARM
7 17.4.301 through 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by
8 reference herein.

9 **III. ADMINISTRATIVE ORDER ON CONSENT**

10 This Consent Order is issued to Circle B pursuant to the authority vested in the State of
11 Montana, acting by and through the Department under the WQA and administrative rules adopted
12 thereunder. Based on the foregoing Findings of Fact and Conclusions of Law and the authority
13 cited above, the Department hereby ORDERS and Circle B AGREES to take the following actions
14 to comply with the WQA within the timeframes specified in this Consent Order:

15 39. Circle B shall sign a Stipulation to Dismiss Case No. BER 2011-07-WQ, which is
16 currently pending before the Board of Environmental Review.

17 40. Circle B shall comply with all provisions of the Permit, including but not limited to:

- 18 • Cease the discharge wastes from the WCS to state waters or outside the
19 production area unless, the discharge is caused by a 25-year, 24-hour
20 precipitation event. If Circle B wants to use liquid waste outside the production
21 area, it must request a modification to the NMP in writing. Any modification to
22 the NMP must be approved by the Department prior to discharge;
- 23 • Report noncompliance within 24 hours and submit a written report within five
24 days after becoming aware of the noncompliance;

- Prohibit access of confined animals to state waters; and
- Conduct and maintain records of all required inspections and sampling.

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

42. Within 45 days from receipt of this Consent Order, Circle B shall submit to the Department at the address listed in Paragraph 48, the following:

- a. A compliance plan and schedule, including a completion date, to install 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 review the Plan and send a review letter to the Respondent. The letter will notify the Respondent if the Plan is approved or disapproved. If disapproved, the letter will request the Respondent to modify the Plan in accordance with the review comments and resubmit the Plan within a defined timeframe. If the resubmitted Plan is not approvable, Respondent agrees to meet with the Department as soon as is possible to discuss an approvable Plan. Compliance actions and dates from the approved Plan will be incorporated by reference into this Consent Order as enforceable requirements upon written notification to Respondent by the Department.

43. The approved compliance plan and schedule will be incorporated by reference into this Consent Order as enforceable requirements upon written notification to Circle B by the Department.

1 44. By September 30, 2011, Circle B shall fully complete all corrective actions
2 outlined in this Consent Order and the approved Plan.

3 45. Circle B may not commence or continue the construction, alteration, or extension
4 of the WCS prior to Department approval of plans and specifications. If deficiencies are found
5 in the plans and specifications, Circle B shall respond to any Department request for additional
6 information and remedy any deficiency noted by the Department within 30 days after the request
7 for information or notice of deficiency is mailed.

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

11 47. Circle B is hereby assessed an administrative penalty in the amount of \$7,000 for
12 the violation cited in Paragraph 26. The Department shall suspend all but \$5,000 of the penalty
13 provided that Circle B complies with the terms of this Consent Order.

14 48. Within 60 days from the effective date of this Consent Order, Circle B shall pay
15 to the Department the \$5,000 administrative penalty to resolve the violation cited herein. The
16 penalty must be paid by check or money order, made payable to the "Montana Department of
17 Environmental Quality," and shall be sent to:

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

24 49. If Circle B fails to comply with any requirement set forth in this Consent Order,
the Department may demand and Circle B shall pay to the Department the remaining \$2,000
balance of the \$7,000 administrative penalty assessed herein. The demand shall become due and

1 payable in full within 30 days after the date of the Department's written notice of demand for
2 payment and sent to the address in Paragraph 48.

3 50. If any event occurs that may delay completion of corrective actions and cause a
4 failure to meet a compliance deadline, Circle B shall notify the Department in writing within ten
5 (1) days after it becomes aware of the event. The notice must be sent to the address listed in
6 Paragraph 48. The notice of delay must include: (a) an explanation of the reasons for the delay;
7 (b) the expected duration of the delay; and (c) a description of all actions taken or to be taken to
8 prevent or minimize the delay and a schedule for implementation of those actions.

9 51. The Department will review the notice submitted by Circle B under Paragraph 50
10 and will exercise its enforcement discretion to determine if it is appropriate to waive any portion
11 of the suspended \$2,000 balance of the \$7,000 administrative penalty

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

17 53. None of the requirements in this Consent Order are intended to relieve Circle B
18 from complying with all applicable state, federal, and local statutes, rules, ordinances, orders,
19 and permit conditions.

20 54. The Department may take any additional enforcement action against Circle B
21 including the right to seek injunctive relief, civil penalties, and other available relief for any
22 violation of, or failure or refusal to comply with, this Consent Order.

23 //

24 //

IV. CONSENT TO ADMINISTRATIVE ORDER

55. Circle B waives the right to administrative appeal or judicial review of this Consent Order set forth herein and agrees that this Consent Order is the final and binding resolution of the issues raised.

56. Circle B agrees that the violations established by the Findings of Fact and Conclusions of Law may be considered by the Department as history of violation in calculating penalties for subsequent violations as permitted by Section 75-5-1001, MCA.

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

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

59. None of the requirements in this Consent Order are intended to relieve Circle B from the obligation to comply with all applicable state, federal, and local statutes, rules, ordinances, orders, and permit conditions.

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

61. This Consent Order terminates upon determination by the Department and written notification to Circle B that it has fully complied with its requirements.

62. This Consent Order shall be effective on the date signed by the Director of the

Department or his designee

IT IS SO ORDERED:

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: John L. Arrigo
JOHN L. ARRIGO, Administrator
Enforcement Division

Date

7/19/11

IT IS SO AGREED:

CIRCLE B, LLC

By: Fred Borman
Signature

Printed Name

Title

Date

Fred Borman

Managing Partner

7-18-11

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

Responsible Party Name:	Circle B, LLC (Circle B) at Circle B Feedyard (Feedyard)	
FID:	2036	MTG010265 (Permit)
Statute:	Water Quality Act	
Date:	6/30/2011	
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. Circle B 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 Circle B 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, Circle B should know of the regulatory requirements of the Permit and had control over the circumstances that resulted in the violation. Circle B took reasonable precautions, under the circumstances, to minimize impacts from the violation. For Circumstances, the Department calculates a minor degree or a 10% increase in the Base Penalty.

Circumstances Percent:	0.10
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$700.00

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

Explanation:

Circle B notified the Department and responded to its request to cease the discharge to state water; therefore, the Department is decreasing the base penalty by 10% for good faith and cooperation.

Good Faith & Coop. Percent:	0.10
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$700.00

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	\$700.00
Good Faith & Cooperation	-\$700.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$7,000.00

III. DAYS OF VIOLATION

Explanation:

During a September 8, 2010 telephone conversation, Circle B 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
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ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$7,000.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00
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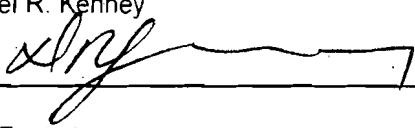
IV. ECONOMIC BENEFIT

Explanation:

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

ECONOMIC BENEFIT REALIZED:	\$0.00
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**Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary**

Responsible Party Name:	Circle B, LLC (Circle B) at Circle B Feedyard (Feedyard)	
FID:	2036	MTG010265 (Permit)
Statute:	Water Quality Act	
Date:	7/8/2011	
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:	\$700.00
Good Faith and Cooperation:	-\$700.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$7,000.00

Totals
\$7,000.00
\$700.00
-\$700.00
\$0.00
\$7,000.00

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

1

Adjusted Base Penalty Total \$7,000.00

\$7,000.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit

\$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$7,000.00

*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.

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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 Water)
12 Quality Act by Circle B, LLC at)
13 Circle B Feedyard, Hysham,)
14 Treasure County, Montana.)
[Permit No MTG010265, FID #2036)
Docket No. WQ-11-08])
_____)

Case No. BER 2011-07 WQ

Order of Dismissal

15
16 The parties have filed a Stipulation pursuant to Rule 41(a), M.R.Civ.P requesting that the
17 Board issue an Order dismissing this matter with prejudice, with each party to bear its own costs.
18 As provided in the parties' Stipulation and for good cause appearing:

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

21 DATED this _____ day of _____, 2011

22
23 BOARD OF ENVIRONMENTAL REVIEW

24 By: _____
25 JOSEPH W. RUSSELL, M.P.H.
Chairman

✓sw
Scot W. Anderson
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Telephone: 303.892.7383
Facsimile: 303.893.1379

FILED this 3rd day of
August AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by M. J. [Signature]

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF MONTANA

IN THE MATTER OF NOTICE OF)	NOTICE OF NONCOMPLIANCE
NONCOMPLIANCE AND ORDER OF)	
ABATEMENT)	No. 11-03-01
)	
WESTERN ENERGY COMPANY,)	WITHDRAWAL OF REQUEST FOR
PERMIT NO. C1985003C)	A HEARING

Western Energy Company, through its undersigned counsel, hereby withdraws its request for a hearing on Notice of NonCompliance No. 11-03-01. Western Energy Company has reached an agreement with the Montana Department of Environmental Quality ("DEQ") resolving the issues related to Notice of Non-Compliance No. 11-3-01.

Western Energy Company has conferred with counsel for DEQ, and DEQ does not object to the withdrawal of the request for a hearing.

Respectfully submitted this 1st day of August, 2011.

DAVIS GRAHAM & STUBBS LLP



Scot W. Anderson
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Telephone: 303.892.7383
Facsimile: 303.893.1379

ATTORNEYS FOR WESTERN ENERGY COMPANY

CERTIFICATE OF SERVICE

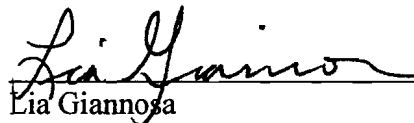
I hereby certify that on this 1st day of August, 2011, I mailed the foregoing
WITHDRAWAL OF REQUEST FOR A HEARING by United States mail, first class, postage
prepaid, to the following:

Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 E. Sixth Ave
P.O. Box 200901
Helena, Montana 59620-0901

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

Ms. Jane Amdahl
Legal Counsel
Department of Environmental Counsel
P.O. Box 200901
Helena, MT 59620-0901

Mr. Ed Coleman, Bureau Chief
Industrial and Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901


Lia Giannozza

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CASE NO. BER 2011-10 SM

On July 18, 2011, Western Energy Company (Western) filed a Request for a Hearing challenging the Notice of Non-Compliance and Order of Abatement issued by the Department of Environmental Quality on June 27, 2011. On August 1, 2011, Western filed a “Withdrawal of Request for a Hearing.” There being no objection from the Department and there being good cause, Western’s request for a contested case hearing in the matter is dismissed without prejudice.

JOSEPH W. RUSSELL
Chairman
Board of Environmental Review

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CERTIFICATE OF SERVICE

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

Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(original)

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

Mr. Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. Scot W. Anderson
Davis, Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver, CO 80202

DATED:_____

JW

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

**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, MONTANA.
[FACILITY ID 53-04496; FID 1896,
DOCKET NO. UST-10-01]**

CASE NO. BER 2010-08 UST

RECOMMENDED ORDER ON MOTION FOR SUMMARY JUDGMENT

On January 4, 2011, the Department of Environmental Quality, "Department" filed "The Department's Motion for Summary Judgment with Exhibit A ("Responses to Department's First Requests for Discovery") and Exhibit B (Affidavit of Mr. Redge Meierhenry) with attached Exhibits 1-7 and 8 (a) through (m). From his Affidavit, Mr. Meierhenry is the Department's Underground Storage Tank, (UST) section supervisor and the custodian of records. On January 18, 2011, Counsel for the Appellant, Jeanny Hlavka individually and d/b/a J.R. Enterprise, LLC, hereinafter "Ms. Hlavka or Appellant" filed a "Response to Summary Judgment Motion" with three letters attached. The Department filed "Department of Environmental Quality's Reply Brief in Support of Motion for Partial Summary Judgment on January 28, 2011.

STANDARD OF REVIEW

Summary judgment motions may be entertained in the administrative context. See In the Matter of Peila, 249 Mont. 272, 815 P.2d 139 (1991). The rationale for motions for summary judgment is that the parties are afforded the opportunity to present evidence and arguments in the summary judgment stage without the necessity for a full hearing through briefing and presentation of sworn evidence.

1 If there are no material factual issues, there is no need for an evidentiary hearing and
2 the case may be resolved as a matter of law.

3 In determining whether there are any material factual issues, the party
4 moving for summary judgment bears the initial burden of informing the decision-
5 maker of the basis of its motion and identifying those portions of the record,
6 depositions, answers to interrogatories, and admissions on file, together with sworn
7 affidavits, if any, that it believes demonstrate the absence of any genuine issue of
8 material fact. Where the moving party has met its initial burden with a properly
9 supported motion, the burden shifts to the opposing party to prove, by more than
10 mere denial and speculation, that a genuine issue does exist. State v. Stewart, 2003
11 MT 003 ¶ 7, 315 Mont. 335, ¶ 7, 68 32d 712, ¶ 7 (2003); Mont. R. Civ. P. 56(e).
12 The non-moving party may do this by use of affidavits (including her own),
13 depositions, answers to interrogatories, and admissions.

14 Only disputes over facts that might affect the outcome of the suit under the
15 governing law are "material" and will properly preclude entry of summary
16 judgment. At the summary judgment stage, the decision-maker's function is not to
17 weigh evidence or determine the truth of the matter, but rather to determine whether
18 there is a genuine issue for hearing. For the reasons cited below, the Hearing
19 Examiner has determined that the Department has demonstrated that there are no
20 genuine issues of material fact as to ownership and liability and that the
21 Department's Motion for Partial Summary Judgment should be granted as a matter
22 of law.

23 **BACKGROUND FACTS**

24 The following facts are undisputed facts. The Appellant is the owner of Fort
25 Peck Station located at 301 Missouri Avenue, Fort Peck, Valley County, Montana,
26 and she has owned this property since 1994. (Exhibit A, Response to Request for
27 Admission No. 1, p.1; Exhibit 1). Ms. Hlavka submitted a Notification for

1 Underground Storage Tanks in August 1994, indicating that she was the owner of
2 four underground storage tanks, Exhibit 1. The four tanks, from Department
3 inspection reports certified by Mr. Meierhenry as true and correct Department
4 documents, were identified as being on the premises at the Fort Peck Station,
5 Exhibits 3 and 4. There are no sworn or authenticated records submitted by Ms.
6 Hlavka to indicate she is not the owner of the four tanks at the Fort Peck Station.
7 Two inspection reports prepared by the Department, Exhibit 3 and Exhibit 4, reveal
8 that none of the four UST systems has adequate overfill, spill or corrosion
9 protection, i.e. that all are "substandard." The inspection report, Exhibit 5, indicates
10 that the four tanks are inactive. None of the four UST tanks has been used to store a
11 regulated substance since before November 1989, Exhibit 2. The dispensers for the
12 tanks have been removed but the interior of each UST is fully accessible through the
13 access pipe. Of the four tanks, three have vent pipes. (Meierhenry Affidavit ¶ 9).
14 The four tanks were never upgraded to meet the standards required of all UST's in
15 existence as of December 22, 1998. No permit was issued by the Department to any
16 entity to do the work necessary to upgrade the tanks. Meierhenry Affidavit, ¶ 12.
17 The Department inspections confirm that the UST's have not been upgraded.
18 Meierhenry Affidavit, ¶¶ 9, 10, 11. Ms. Hlavka is in violation of Admin. R. Mont.
19 17.56.701(3). Ms. Hlavka received at least nine enforcement letters through March
20 30, 2010, from the Department notifying her that she was out of compliance with
21 Admin. R. Mont. 17.56.701. Exhibit 8 (c) through (k). On January 7, 2010, the
22 Department issued a Notice of Violation and Administrative Compliance Order
23 ("Order") to Ms. Hlavka requiring her to comply with a Corrective Action Plan
24 dated June 30, 2009.

25 The corrective action plan outlined the existing violations pursuant to Admin.
26 R. Mont. 17.56.701 and the corrective actions required to return the property to
27 compliance prior to September 9, 2009. The plan stated that in order for Ms.

1 Hlavka to return to compliance, she would have to remove the UST systems.
2 Exhibit 6. The plan directed Ms. Hlavka to apply for a permit to close the selected
3 tanks, hire a licensed (by the Department) installer or remover to do the work and to
4 complete closure documents. When the non-complying tanks had not been updated
5 or permanently closed by January 7, 2010, by Ms. Hlavka, the Department issued a
6 Notice of Violation and Administrative Compliance Order to Ms. Hlavka requiring
7 her to comply with a Corrective Action Plan dated July 9, 2009.

8 **DISCUSSION**

9 The Department demonstrates through appropriate evidence in the
10 documentation supporting its Motion for Summary Judgment that none of the four
11 of the underground storage tanks at Fork Peck Station meets the minimum
12 corrosion protection requirements, and the four USTs at Fort Peck Station have not
13 been in use during Ms. Hlavka's ownership. Exhibit B, Exhibit 2. It is established
14 that Ms. Hlavka owned the four tanks at Fort Peck Station, Exhibit 1. Also, the
15 Department has shown that none of the tanks have spill and overfill protection or
16 corrosion protection. Finally, none of the tanks was upgraded by 1998. Therefore,
17 the Department has proven that, under Mont. Admin. R. 17.56.701(3), the four
18 USTs should have been permanently closed but weren't.

19 Ms. Hlavka argues in her Response to Summary Judgment that she has
20 created a material issue of fact as to ownership and location of the four USTs. She
21 states there has been no survey conducted to determine the exact location of the four
22 tanks. She also argues that the language in Mont. Code Ann. § 75-11-504 limits the
23 Department's power to force closure of underground tanks that were not in use after
24 November 22, 1989. She apparently argues that because the tanks were not in use
25 after November 22, 1989, the Department has no authority to require that the tanks
26 be closed.

1 Once the party moving for summary judgment has met the burden of
2 establishing the absence of any genuine issue of fact, the party opposing the motion
3 must supply appropriate evidence supporting the existence of a genuine issue of
4 fact. Pretty on Top v. Hardin, 182 Mont. 311, 597 P.2d 58 (1979).

5 Ms. Hlavka's arguments are not supported by appropriate sworn or
6 authenticated evidence, sworn discovery or affidavit testimony. In order to raise a
7 genuine issue of fact or to effectively rebut the sworn affidavit testimony provided
8 by the Department, Ms. Hlavka must provide sworn testimony or other reliable
9 evidence that shows that the tanks are not owned by her. Mont. R. Civ. Pro. 56(e).
10 she cannot merely deny or speculate that she does not own the tanks especially when
11 she signed the Notification of Tanks form affirming the truth of the information on
12 the form. The letters she supplies do not conclusively address non-ownership or
13 even placement of the four tanks at the Fort Peck Station. The burden shifted to Ms.
14 Hlavka to prove that she does not own the four underground storage tanks and she
15 has not met this burden.

16 As to Ms. Hlavka's argument that Mont. Code Ann. § 75-11-504 limits the
17 Department's authority to require closure of inactive tanks since the four tanks were
18 not in use after November 22, 1989, this misinterprets the statutory provisions
19 regarding the Department's enforcement authority and the enumerated powers of the
20 Department.

21 The enumerated powers in Mont. Code Ann. § 75-11-504 are discretionary
22 with the Department not restrictive. The statutory section begins with permissive
23 not mandatory language that "[t]he department **may**... (d) enter property and
24 permanently close an underground storage tank that was in use after
25 November 22, 1989." Mont. Code Ann. § 75-11-504(1(d)). The tanks at Fort Peck
26 Station were not in use after 1988, Exhibit 2, but there this statute does not
27 specifically restrict what the Department may require of tank owners regarding

1 closure of tanks. This section simply authorizes the Department within its discretion
2 to itself close tanks in use after November 22, 1989.

3 The statutory section, Mont. Code Ann. § 75-11-512 (1) empowers the
4 Department, without restriction as to the age of a tank, by way of an administrative
5 enforcement action to require a tank owner, when as here there is a violation of the
6 part or rules (here, the rule is Admin. R. Mont. 17.56.701 as it references Admin. R.
7 Mont. 17.56.201 and 17.56.202 and closure pursuant to Admin. R. 17.56.702
8 through 17.56.706) to close the tanks pursuant to corrective action. This section
9 states that the Department may serve a written notice of violation on an owner with
10 an order to take the necessary corrective action. The course of action the
11 Department has taken in this case of issuing a notice of violation and ordering
12 corrective action by way of proper and permanent closure of the tanks at the Fort
13 Peck Station owned by Ms. Hlavka is authorized under Mont. Code Ann. § 75-11-
14 512(1). Under Mont. Code Ann. § 75-11-512(2), the Board may affirm or modify
15 the Department's order. The order issued by the Board may prescribe the date by
16 which the violation must cease and may prescribe time limits for a particular action.

17 As indicated in the supporting documentation supplied by the Department,
18 the Appellant is the owner of four USTs that are in violation of Mont. Admin. Rule
19 17.56.701(3) which requires that out of service USTs that do not meet the corrosion
20 protection requirements of Admin. R. Mont. 17.56.201 or 17.56.202 must be
21 permanently closed in accordance with Admin. R. Mont. 17.56.702 through
22 17.56.706. The Notice of Violation and Administrative Compliance Order is
23 affirmed.

24 **RECOMMENDED ORDER**

25 The Hearing Examiner recommends that the Board enter an Order granting
26 the Motion for Summary Judgment filed by the Department based upon the above
27 reasons. The Department has established that there is no genuine issue of material

1 fact as to ownership and that there was a violation of Admin. R. Mont. 17.56.701.
2 As a matter of law, the Notice of Violation and Administrative Compliance Order
3 (Order) should be affirmed. It is recommended that the corrective action referenced
4 in the Order, which in turn references the 2009 Corrective Action Plan for removal
5 of the tanks must be implemented within 60 days of the issuance of a final order of
6 the Board of Environmental Review.

7 **PROCEDURE FOR FILING EXCEPTIONS**

8 Because the Board will be issuing a final decision on this recommended
9 disposition, the parties pursuant to Mont. Code Ann. § 2-4-621 may file written
10 exceptions and present briefs and oral argument to the Board on their exceptions
11 prior to the time the board members make their final decision. The Appellant, Ms.
12 Hlavka is given until September 7, 2011, to file exceptions or to file a request to
13 postpone consideration by the Board of this proposed order at the
14 September 23, 2011, Board meeting. The Department may file a written response to
15 the exceptions by September 14, 2011. Any party seeking to file exceptions and
16 present oral argument before the Board on September 23, 2011, must by
17 September 2, 2011, file a notice with the Hearing Examiner that they will be filing
18 exceptions.

19 DATED this 31st day of August, 2011.

20
21 

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order
on Motion for Summary Judgment to be mailed to:

Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(original)

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

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

Ms. Katie S. Knierim
Christoffersen & Knierim, P.C.
321 Klein Avenue
P.O. Box 29
Glasgow, MT 59230

DATED: August 31, 2011 

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE MONTANA**
5 **UNDERGROUND STORAGE TANK ACT**
6 **BY JEANNY HLAVKA, INDIVIDUALLY**
7 **AND D/B/A J.R. ENTERPRISE, LLC, AT**
8 **THE FORT PECK STATION, 301**
 MISSOURI AVENUE, FORT PECK,
 VALLEY COUNTY, MONTANA.
 [FACILITY ID 53-04496; FID 1896,
 DOCKET NO. UST-10-01]

CASE NO. BER 2010-08 UST

9 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

11 On April 28, 2010, Ms. Jeanny Hlavka requested a contested case hearing
12 before the Board of Environmental Review (Board) regarding the issuance of the
13 Notice of Violation and Administrative Compliance Order (Notice of Violation) by
14 the Department of Environmental Quality (Department) dated January 7, 2010. The
15 Notice of Violation states that Ms. Hlavka, individually and d/b/a J.R. Enterprise,
16 LLC (Ms. Hlavka or Appellant) notified the Department that she owned four
17 underground storage tanks and that she failed to close these non-complying tanks.

18 On January 4, 2011, the Department filed "Department's Motion for
19 Summary Judgment" seeking a ruling that as a matter of law, Ms. Hlavka should be
20 required to close the four tanks on her property at the Fort Peck Station. On
21 January 18, 2011, Appellant's Counsel filed "Appellant's Response to Motion for
22 Summary Judgment." The Department filed its "Reply Brief in Support of
23 Department's Motion for Summary Judgment."

24 On August 31, 2011, the Hearing Examiner issued a Recommended Order on
25 Motion for Summary Judgment in which she recommends that the Motion for
26 Summary Judgment be granted because the Appellant failed to raise a genuine issue
27 of fact and to successfully rebut the sworn evidence submitted by the Department.

1 The Hearing Examiner found that the Department proved with qualifying evidence
2 supporting its Motion for Summary Judgment that none of the four tanks at the Fort
3 Peck Station owned by Ms. Hlavka, has adequate overfill, spill or corrosion
4 protection, none of the four tanks were upgraded by 1998 and that the tanks were
5 not properly closed as required by Admin. R. Mont. 17.56. 701.

6 Pursuant to Mont. Code Ann. § 75-11-512(2), the Hearing Examiner
7 recommended that the Department's Notice of Violation be affirmed. Pursuant to
8 Mont. Code Ann. § 2-5-621, the parties were given until September 2, 2011, to file a
9 notice that the party would file exceptions. No exceptions were filed.

10 **ORDER**

11 The Hearing Examiner's Recommended Order on Motion for Summary
12 Judgment has been adopted by the Board. The Board hereby rules that the
13 Appellant violated Admin. R. Mont. 17.56.701(3) requiring closure of the four
14 tanks. Within 60 days from receipt of this Order, Ms. Hlavka shall complete all
15 actions necessary to fulfill the requirements of the July 2009 Corrective Action Plan
16 referenced in the Administrative Order portion of the Notice of Violation
17 specifically by removing Tanks Nos. 1, 2, 3 and 4 and any associated underground
18 piping according to all applicable closure requirements. All required documentation
19 establishing that the tanks were properly closed shall be sent to:

20 Mr. Redge Meierhenry, UST Section Supervisor
21 Department of Environmental Quality
22 P.O. Box 200901
Helena, MT 59620-0901

23 Failure to take the required corrective action by the specified deadline shall
24 be addressed as referenced in Administrative Order section of the Notice of
25 Violation. The Notice of Violation is hereby affirmed and the relief as set forth in
26
27

1 the Administrative Order in the Notice of Violation is hereby adopted and
2 incorporated by reference herein.

3 DATED this _____ day of September, 2011.

4

5

6

JOSEPH W. RUSSELL
Chairman
Board of Environmental Review

7

8

9

CERTIFICATE OF SERVICE

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

12

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)

13

14

15

16

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

17

18

19

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

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21

22

Ms. Katie S. Knierim
Christoffersen & Knierim, P.C.
321 Klein Avenue
P.O. Box 29
Glasgow, MT 59230

23

24

25

26 DATED: _____

27



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: July 28, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-11 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY ELL DIRT WORKS, L.L.C. AT
THE GENE FOSS PIT 1, RICHLAND
COUNTY, MONTANA [FID #2047,
DOCKET NO. OC-11-05]

Case No. BER 2011-11 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2047, Docket No. OC-11-05).

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

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

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

Attachments

PER 2011-11 CC

Ell Dirt Works, LLC.

4751 Highway 1804

Williston, ND. 58801-8638

Office 701-572-3478

Fax 701-572-1008

7/26/2011

FILED this 28th day of
July AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
Misty Cobb

Montana Department of Environmental Quality

To: Board Secretary
Board of Environmental Review

From: John W. Ell
Ell Dirt Works LLC

Dear Sir or Mss ,

I am writing this letter to request a hearing as a letter you sent me dated June 28, 2011. It is reference Docket # OC-11-05; FID #2027. I am requesting the hearing because the facts of this case are not truly represented in your letter. I have been attempting to locate a lawyer to represent me in Montana. This has proved to be difficult since I have few contacts in Montana. I can be contacted via My Cell phone (701)570-2533 or Home (701)-572-8506 or Office (701)572-3478 or my address which you have on file.

Thank You,

John W. Ell

John W. Ell

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY ELL DIRT WORKS, L.L.C. AT
THE GENE FOSS PIT 1, RICHLAND
COUNTY, MONTANA (FID NO. 2047)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. OC-11-05

I. NOTICE OF VIOLATION

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

2. The Department administers the Act.

3. The Department is authorized under Section 82-4-441, MCA, to issue this Notice of Violation and Administrative Compliance and Penalty Order (Order) to Respondent to address the alleged violations of the Act and the administrative rules implementing the Act, and to obtain corrective action for the alleged violation.

4. ARM 17.24.225 provides that "[a]n operator shall comply with the provisions of its permit, this subchapter, and the Act."

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

3 6. Respondent engaged in or controlled an opencut operation at the Gene Foss Pit 1
4 (Site) and, therefore, is an "operator" within the meaning of Section 82-4-403(8), MCA.
5 Accordingly, Respondent is subject to the requirements of the Act and the rules adopted
6 thereunder.

7 7. Section 82-4-431(1), MCA, requires that an operator may not conduct opencut
8 mining operations that result in the removal of 10,000 cubic yards or more of material and
9 overburden until the Department has issued a permit to the operator.

10 8. On November 1, 2010, Respondent submitted an Opencut Mining Permit
11 Application to the Department to conduct opencut mining operations on 23.1 acres at the Site
12 located in Township 26 North, Range 55 East, Section 1 in Richland County, Montana.

13 9. On December 7, 2010, the Department sent Respondent a letter (Deficiency
14 Letter) which identified numerous deficiencies in the Opencut Mining Permit Application and
15 supporting materials and informed Respondent that the deficiencies must be corrected before
16 the Department could issue an Opencut Mining Permit for the Site.

17 10. On December 8, 2010 (December 2010 Inspection), the Department conducted a
18 routine inspection at the Site.

19 11. On December 21, 2010, the Department sent Respondent a violation letter
20 (December 2010 Violation Letter) for conducting opencut operations without a permit at the
21 Site. The Department provided Respondent with a copy of the December 2010 Inspection
22 report.

23 //

24 //

1 ***Failure to obtain an opencut permit***

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

11 13. During the December 2010 Inspection of the Site, the Department observed that
12 Respondent had disturbed approximately 10.2 acres without a permit.

13 14. As of the date of this Order, Respondent has not responded to the Deficiency
14 Letter and the Department has not issued a permit for the Site.

15 15. Respondent violated Section 82-4-431, MCA, by conducting an opencut mining
16 operation on 10.2 acres without a valid permit.

17 **III. ADMINISTRATIVE ORDER**

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

22 16. Immediately upon receipt of this Order, Respondent shall cease all opencut
23 operations at the Site until a permit is obtained from the Department.

1 17. Within 30 days of service of this Order, Respondent shall submit to the
2 Department revised application materials that correct the deficiencies identified in the
3 Deficiency Letter from the Department dated December 7, 2010, including an adequate bond for
4 the permitted area.

5 18. The revised application materials and bond must be submitted to:

6 Chris Cronin
7 Industrial and Energy Materials Bureau
8 Department of Environmental Quality
9 1520 East Sixth Avenue
10 P.O. Box 200901
11 Helena, MT 59620-0901

12 19. The Department has calculated a penalty of \$14,000 for conducting opencut
13 operations without a permit.

14 20. No later than 60 days after service of this Order, Respondent shall pay to the
15 Department the administrative penalty in the amount of \$14,000 for the violation specified
16 above. The penalty must be paid by check or money order, made payable to the "Montana
17 Department of Environmental Quality," and sent to:

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

23 21. Failure to comply with the requirements of this Order by the specified deadlines, as
24 ordered herein, may result in the Department seeking a court order assessing civil penalties of not
more than \$5,000 for each day the violation continues pursuant to Section 82-4-441(3), MCA.

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

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

IV. NOTICE OF APPEAL RIGHTS

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

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

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

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

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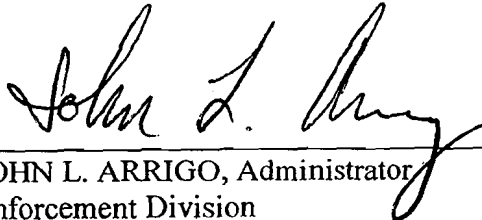
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1 27. This Order becomes effective on the date of service.

2 IT IS SO ORDERED:

3 DATED this 28th day of June, 2011.

4 STATE OF MONTANA
5 DEPARTMENT OF ENVIRONMENTAL QUALITY

6 
7 _____
8 JOHN L. ARRIGO, Administrator
9 Enforcement Division

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

Responsible Party Name:	ELL Dirt Works, L.L.C. (Respondent)
FID:	2047
Statute:	Opencut Mining Act (Act)
Date:	6/27/2011
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	\$1,000.00

Penalty Calculation #1
Description of Violation:
Respondent violated Section 82-4-431(1), MCA, by conducting opencut operations without a Department-issued permit. During the December 2010 inspection, the Department observed that Respondent had conducted opencut operations without a Department-issued permit at the Gene Foss Pit 1 site.

I. BASE PENALTY

Nature

Explanation:	
Conducting an opencut operation and removing more than 10,000 cubic yards prior to obtaining a permit or an approved permit amendment creates the potential to harm human health or the environment. Unless the Department has reviewed and approved an application for permit or an amendment to an existing permit, the public has no assurance that an opencut operation will be conducted in compliance with state law or that it will mitigate impacts to the environment and/or human health. Conducting opencut operations prior to completing the permitting process also circumvents the public's opportunity to provide input into the permitting process and to have any concerns addressed. Finally, if adequate bond has not been posted, resources may not be available to reclaim the disturbance.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Pursuant to ARM 17.4.303(5)(a), operating without a required permit has a major gravity.
Extent Explanation:
The Department's expectation is that an opencut operator will not conduct opencut operations without having obtained a permit. The Department has determined that the fact that Respondent conducted opencut operations on 10.2 acres without a permit constitutes a major deviation from the regulatory requirement.

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

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

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

\$850.00

II. ADJUSTED BASE PENALTY

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

Explanation:

As an entity engaged in a regulated industry such as mining, Respondent should have been knowledgeable about the regulations governing opencut activities. Further, Respondent submitted an opencut mining application and, therefore, knew of the requirements. Respondent had control over the circumstances surrounding the violation and should have foreseen that conducting opencut operations before a permit was issued would result in a violation. Therefore, an upward adjustment of 20% for circumstances is appropriate.

Circumstances Percent: 0.20

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

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

Explanation:

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

Good Faith & Coop. Percent: 0.00

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

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

Explanation:

The Department is not aware of any amounts voluntarily expended by Respondent to mitigate the violation or its impact beyond what was necessary to come into compliance; therefore, no reduction is being allowed.

AVE Percent: 0.00

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$850.00
Circumstances	\$170.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$1,020.00
MAXIMUM STATUTORY PENALTY	\$1,000.00

III. DAYS OF VIOLATION

Explanation:

Section 82-4-441(2), MCA, provides, in part, that the Department may assess an administrative penalty for the violation and an additional administrative penalty for each day the violation continues. The Department does not have information to determine how many days Respondent conducted an opencut mining operation to disturb the 10.2 acres. Using its discretion, the Department is choosing to use five (5) days of violation to calculate the administrative penalty assessed for the first acre of unpermitted disturbance and an additional day of violation for each remaining acre where non-permitted opencut operations occurred. The rationale for choosing to use 5 days of violation for the first acre of unpermitted disturbance is that the definition of "opencut operation" includes the following five activities: site preparation, mining, processing, transportation and stockpiling. See Section 82-4-403(7)(a) – (e), MCA. The Department is assigning one day of violation for each of the activities. Using this rationale, the Department has calculated a penalty for 14 days of violation for Respondent's conducting non-permitted opencut operations on 10.2 acres.

Number of Days: 14

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$14,000.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

IV. ECONOMIC BENEFIT

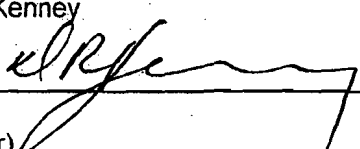
Explanation:

If Respondent had obtained a permit to cover the 10.2 acres, Respondent would have been required to post a bond in the amount of \$19,208. The Department calculates that at the market rate of 2% per year, such a bond would have cost Respondent \$384 per year. Using the one-year period from the time the violation was determined, the cost to obtain a bond for the last year would have been \$384. Accordingly, the Department calculates that by failing to obtain a permit and post the necessary bond for the past year, Respondent enjoyed an economic benefit of \$384. In addition, the Department estimates it would cost approximately \$5,000 to prepare an application. However, because that is a cost that Respondent will need to bear in any event, the Department is choosing not to consider the economic benefit of delaying that expense in its calculation of the economic benefit.

ECONOMIC BENEFIT REALIZED:

\$384.00

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

Responsible Party Name:	ELL Dirt Works, L.L.C. (Respondent)
FID:	2047
Statute:	Opencut Mining Act (Act)
Date:	9/27/11
Signature of Employee Calculating Penalty:	Daniel R. Kenney 

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

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

II. Adjusted Base Penalty

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

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

III. Days of Violation or

Number of Occurrences 14

Adjusted Base Penalty Total \$14,000.00

\$14,000.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit \$384.00

\$384.00

V. History*

\$0.00

**TOTAL PENALTY
TOTAL MAXIMUM PENALTY**

**\$14,384.00
\$14,000.00**

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

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE OPENCUT**
5 **MINING ACT BY ELL DIRT WORKS,**
6 **L.L.C. AT THE GENE FOSS PIT 1,**
7 **RICHLAND COUNTY, MONTANA [FID**
8 **#2047, DOCKET NO. OC-11-05]**

CASE NO. BER 2011-11 OC

7 **FIRST PREHEARING ORDER**

9 On July 28, 2011, John W. Ell on behalf of Ell Dirt Works, LLC, hereafter
10 “Appellant,” filed a Request for Hearing to appeal the Notice of Violation and
11 Administrative Compliance and Penalty Order, Docket No. OC-11-05 pertaining to
12 the violation of legal requirements and imposition of penalties under the Opencut
13 Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and administrative rules
14 adopted under the Act in Title 17, Chapter 24, Subchapter 2, Administrative Rules
15 of Montana (ARM). Accordingly, the following guidelines and rules are provided
16 to assist the parties in an orderly resolution of this matter.

17 1. REFERENCES: This matter is governed by the Montana
18 Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont.
19 Admin. R. 17.4.101, by which the Board of Environmental Review (“Board”) has
20 adopted the Attorney General’s Model Rules for contested cases, Mont. Admin. R.
21 1.3.101, 1.3.102, 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4,
22 pt. 4.

23 2. FILING: Except for discovery requests and responses (which are not
24 routinely filed), original documents shall be sent for filing with the Board, addressed
25 as follows:
26
27

1 JOYCE WITTENBERG
2 Secretary, Board of Environmental Review
3 Department of Environmental Quality
4 1520 East Sixth Avenue
5 P.O. Box 200901
6 Helena, MT 59620-0901

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

9 KATHERINE J. ORR
10 Hearing Examiner
11 Agency Legal Services Bureau
12 1712 Ninth Avenue
13 P.O. Box 201440
14 Helena, MT 59620-1440

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

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

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

5. SCHEDULING: The undersigned requests that the parties consult
with each other and propose a hearing schedule to the undersigned upon which they
agree by **August 19, 2011**. The schedule should include the following dates:

(a) for joinder/intervention of additional parties;

- 1 (b) for disclosure by each party to the other parties of: (1) the
2 name and address of each individual likely to have discoverable
3 information that the disclosing party may use to support its
4 claims or defenses, and (2) a copy of, or a description by
5 category and location of, all documents and tangible things that
6 are in the possession, custody, or control of the disclosing party
7 and that the disclosing party may use to support its claims or
8 defenses;
- 9 (c) for completion of discovery (if any party wishes to conduct
10 discovery);
- 11 (d) for exchange of lists of witnesses and copies of documents that
12 each party intends to offer at the hearing;
- 13 (e) for submitting any motions and briefs in support;
- 14 (f) for a prehearing conference to hear argument on any motions
15 and resolve other prehearing matters; and,
- 16 (g) for the contested case hearing.

17 DATED this 5th day of August, 2011.

18 

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

1 **CERTIFICATE OF SERVICE**

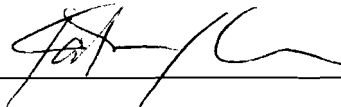
2 I hereby certify that I caused a true and accurate copy of the foregoing First
3 Prehearing Order to be mailed to:

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 Ms. Jane Amdahl
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

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

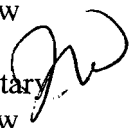
21 Mr. John W. Ell
22 Ell Dirt Works, LLC
23 4751 Highway 1804
24 Williston, ND 58801-8638

25
26
27
DATED: August 3, 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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-12 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:

THE REQUEST FOR HEARING BY MARSHALL
WARRINGTON, JR., REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.

Case No. BER 2011-12 OC

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.

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

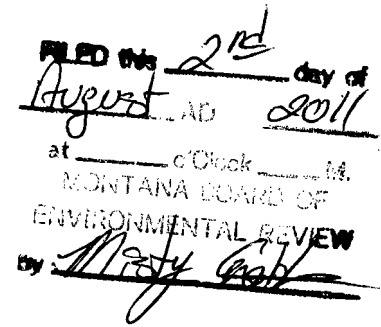
Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

VER 2011-12 DC

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620



From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

We the nearby, undersigned, property owners and residents of the Bull Lake Region and general area of Lincoln County of Montana impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners and Nearby Residents of Lincoln County

CC: Montana Governor Brian Schweitzer, PO Box 200801, Helena, MT 59620
Senator Chas Vincent, 34 Paul Bunyan Ln, Libby, MT 59923
State Representative Jerry Bennett, 784 Taylor Rd, Libby, MT 59923
Lincoln County Commissioner Ron Downing, 1210 E Missoula Ave, Troy, MT 59935
Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 1101 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923
Stimson Lumber Company, 60 Port Blvd, Suite 100, Libby, MT 59923

Signature: Marshall Warrington Jr Date: 7.24.2011

Print Name: MARSHALL WARRINGTON JR

Address: 700 HALO DR. TROY, MT 59935-9420

Phone No: 406-295-4007

Permit #: 487

OPENCUT MINING PERMIT

Amendment #: 1

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[1], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels** site. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
8. Unless the Operator is a governmental entity, a bond has been posted to ensure the site is reclaimed. If the site is not reclaimed as and when required, the DEQ may pursue forfeiture of the bond. If the bond is cancelled or invalidated, the Operator shall provide a valid bond within 30 days. If not provided, the DEQ may suspend the permit and require the Operator to cease operations.
9. The Operator may apply to amend the permit at any time. If approved, the amendment becomes part of the permit for all purposes. The DEQ may occasionally review the permit and require revisions.
10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY



Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor
TitleJuly 8, 2011
Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:


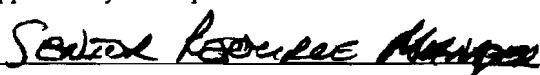
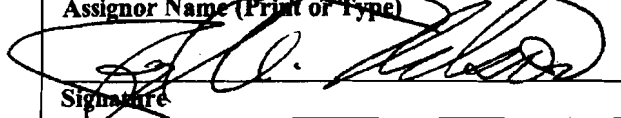
1. Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
2. Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
3. Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
4. Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
5. Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
6. All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West Kalispell, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.

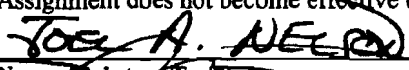
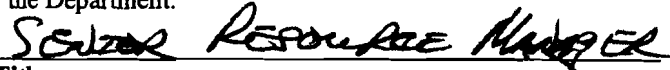
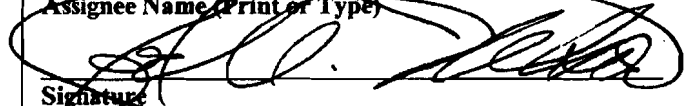
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

 Assignor Name (Print or Type)	 Title
 Signature	6/9/11. Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

 Assignee Name (Print or Type)	 Title
 Signature	6/9/11. Date

RECEIVED

JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Acreage Breakdown

Mine Area	6.0	acres
Facility Area	0.3	acres
Access Roads		acres
Partial Release Area		acres
Undisturbed	12.8	acres
Total permit area	19.1	

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	1,650	20	3:1	9,167	total
			1:1	0	9,167

Highwall backfill (describe)					
			1:1	0	total
			1:1	0	0

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				0	total
				0	0

mine soil and OB replacement	7	inches soil	10	inches overburden	total	17
facility soil replacement	7	inches soil			total	7
access road soil replacement	0	inches soil			total	0

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		9,167 cu yds	\$1 per cubic yard	\$9,167
mine area grading		6.0 acres	\$200 per acre	\$1,200
mine area ripping		6.0 acres	\$100 per acre	\$600
mine soil and OB replacement	17 inches	6.0 acres	\$135 per inch/per acre	\$13,770
facility area grading		0.3 acres	\$100 per acre	\$30
facility area ripping		0.3 acres	\$100 per inch/per acre	\$30
facility soil replacement	7 inches	0.3 acres	\$135 per inch/per acre	\$284
access road area grading		0.0 acres	\$100 per acre	\$0
access road area ripping		0.0 acres	\$100 per inch/per acre	\$0
access road soil replacement	0 inches	0.0 acres	\$135 per inch/per acre	\$0
seeding or other revegetation		6.3 acres	\$200 per acre	\$1,260
fencing		0 linear ft	\$1 per linear foot	\$0
weed control		6.3 acres	\$100 per acre	\$630
asphalt or concrete recycle pile	0 cu yds	0 miles	\$0.20 per cubic yard/mile	\$0
partially released acres		0.0 acres	\$300 per acre	\$0
undisturbed acres		12.8 acres	\$0 per acre	\$0
Planting tree seedlings		6.0 acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		6.0 acres	\$150 per acre	\$900

mobilization	3 loads	15.0 miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	Thompson falls			

DEQ administrative costs - 10% of subtotal

\$2,849

Total acreage = 19.1

Per acre rate = \$1,640.51

Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

✓
JW

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

3 **IN THE MATTER OF:**
4 **THE REQUEST FOR HEARING BY**
5 **MARSHALL WARRINGTON, JR.,**
6 **REGARDING OPENCUT PERMIT NO.**
7 **487 ISSUED TO PLUM CREEK**
8 **TIMBERLANDS, L.P., FOR THE DORR**
9 **SKEELS SITE IN LINCOLN COUNTY,**
10 **MONTANA.**

CASE NO. BER 2011-12 OC

8 **FIRST PREHEARING ORDER**

10 On August 2, 2011, Mr. Marshall Warrington, Jr. (hereafter Appellant), filed
11 his Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum
12 Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title
13 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17,
14 Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM).

15 Accordingly, the following guidelines and rules are provided to assist the
16 parties in an orderly resolution of this matter.

17 1. REFERENCES: This matter is governed by the Montana
18 Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and ARM
19 17.4.101, by which the Board of Environmental Review (Board) has adopted the
20 Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102,
21 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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

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3 KATHERINE J. ORR
4 Hearing Examiner
5 Agency Legal Services Bureau
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8 Helena, MT 59620-1440

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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 ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
18 concerning any issue of fact or law in a contested case. In addition to observing this
19 rule, please contact the opposing party before you communicate with the
20 undersigned, even on purely procedural matters such as the need for a continuance.

21 5. SCHEDULING: The undersigned requests the parties to consult with
22 each other and to propose a schedule to the undersigned upon which they agree by
23 **September 16, 2011**. The schedule should include the following dates:

- 24 (a) for joinder/intervention of additional parties;
- 25 (b) for disclosure by each party to the other parties of: (1) the
26 name and address of each individual likely to have discoverable
27 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

1 are in the possession, custody, or control of the disclosing party
2 and that the disclosing party may use to support its claims or
3 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 31st day of August, 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
21
22
23
24
25
26
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing 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 Ms. Jane Amdahl
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Ed Coleman, Bureau Chief
17 Industrial & Energy Minerals Bureau
18 Department of Environmental Quality
19 P.O. Box 200901
20 Helena, MT 59620-0901

21 Mr. Marshall Warrington, Jr.
22 900 Halo Dr.
23 Troy, MT 59935-9420

24 DATED: August 31, 2011 [Signature]
25
26
27



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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-13 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE REQUEST FOR HEARING BY PATRICIA
WARRINGTON, REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.

Case No. BER 2011-13 OC

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.

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

Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

1

2

BER 2011-13 OC

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620

FILED this 2nd day of
August AD 2011
at _____ o'clock _____ A.M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
By Marty [Signature]

From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

We the nearby, undersigned, property owners and residents of the Bull Lake Region and general area of Lincoln County of Montana impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners and Nearby Residents of Lincoln County

CC: Montana Governor Brian Schweitzer, PO Box 200801, Helena, MT 59620
Senator Chas Vincent, 34 Paul Bunyan Ln, Libby, MT 59923
State Representative Jerry Bennett, 784 Taylor Rd, Libby, MT 59923
Lincoln County Commissioner Ron Downing, 1210 E Missoula Ave, Troy, MT 59935
Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 1101 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923
Stimson Lumber Company, 60 Port Blvd, Suite 100, Libby, MT 59923

Signature: Patricia Warrington Date: 8/1/11

Print Name: Patricia Warrington

Address: 900 Halo Drive Troy, MT 59935


Phone No: 406-295-4007

Permit #: **487**Amendment #: **1****OPENCUT MINING PERMIT**

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[1], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels site**. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
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10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor

Title

July 8, 2011

Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:


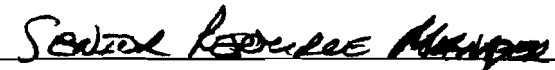
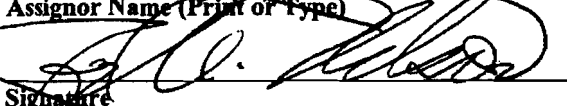
- Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
- Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
- Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
- Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
- Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
- All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West Kalispell, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.



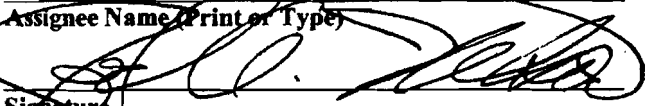
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

 Assignor Name (Print or Type)	 Title
 Signature	6/9/11. Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The Reclamation Bond includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

 Assignee Name (Print or Type)	 Title
 Signature	6/9/11. Date

RECEIVED
JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Acreage Breakdown

Mine Area	<u>6.0</u> acres
Facility Area	<u>0.3</u> acres
Access Roads	<u> </u> acres
Partial Release Area	<u> </u> acres
Undisturbed	<u>12.8</u> acres
Total permit area	<u>19.1</u>

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	<u>1,650</u>	<u>20</u>	<u>3:1</u>	<u>9,167</u>	total
			<u>:1</u>	<u>0</u>	<u>9,167</u>

Highwall backfill (describe)					
			<u>:1</u>	<u>0</u>	total
			<u>:1</u>	<u>0</u>	<u>0</u>

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				<u>0</u>	total
				<u>0</u>	<u>0</u>

mine soil and OB replacement	<u>7</u> inches soil	<u>10</u> inches overburden	total	<u>17</u>
facility soil replacement	<u>7</u> inches soil		total	<u>7</u>
access road soil replacement	<u>0</u> inches soil		total	<u>0</u>

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		<u>9,167</u> cu yds	\$1 per cubic yard	\$9,167
mine area grading		<u>6.0</u> acres	\$200 per acre	\$1,200
mine area ripping		<u>6.0</u> acres	\$100 per acre	\$600
mine soil and OB replacement	<u>17</u> inches	<u>6.0</u> acres	\$135 per inch/per acre	\$13,770
facility area grading		<u>0.3</u> acres	\$100 per acre	\$30
facility area ripping		<u>0.3</u> acres	\$100 per inch/per acre	\$30
facility soil replacement	<u>7</u> inches	<u>0.3</u> acres	\$135 per inch/per acre	\$284
access road area grading		<u>0.0</u> acres	\$100 per acre	\$0
access road area ripping		<u>0.0</u> acres	\$100 per inch/per acre	\$0
access road soil replacement	<u>0</u> inches	<u>0.0</u> acres	\$135 per inch/per acre	\$0
seeding or other revegetation		<u>6.3</u> acres	\$200 per acre	\$1,260
fencing		<u>0</u> linear ft	\$1 per linear foot	\$0
weed control		<u>6.3</u> acres	\$100 per acre	\$630
asphalt or concrete recycle pile	<u>0</u> cu yds	<u>0</u> miles	\$0.20 per cubic yard/mile	\$0
partially released acres		<u>0.0</u> acres	\$300 per acre	\$0
undisturbed acres		<u>12.8</u> acres	\$0 per acre	\$0
Planting tree seedlings		<u>6.0</u> acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		<u>6.0</u> acres	\$150 per acre	\$900

mobilization	<u>3</u> loads	<u>15.0</u> miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	<u>Thompson falls</u>			

DEQ administrative costs - 10% of subtotal \$2,849

Total acreage = 19.1 Per acre rate = \$1,640.51 Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

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✓fw

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

**IN THE MATTER OF:
THE REQUEST FOR HEARING BY
PATRICIA WARRINGTON,
REGARDING OPENCUT PERMIT NO.
487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.**

CASE NO. BER 2011-13 OC

FIRST PREHEARING ORDER

On August 2, 2011, Ms. Patricia Warrington (Appellant), filed her Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17, Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM). Accordingly, the following guidelines and rules are provided to assist the parties in an orderly resolution of this matter.

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont. Admin. R. 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102, 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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

MS. JOYCE WITTENBERG
Secretary, Board of Environmental Review
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 requests the parties to consult with
23 each other and to propose a schedule to the undersigned upon which they agree by
24 **September 16, 2011**. 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

1 category and location of, all documents and tangible things that
2 are in the possession, custody, or control of the disclosing party
3 and that the disclosing party may use to support its claims or
4 defenses;

5 (c) for completion of discovery (if any party wishes to conduct
6 discovery);

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

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

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

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

13 DATED this 31st day of August, 2011.

14
15 

16 KATHERINE J. ORR
17 Hearing Examiner
18 Agency Legal Services Bureau
19 1712 Ninth Avenue
20 P.O. Box 201440
21 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. Jane Amdahl
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Ms. Patricia Warrington
900 Halo Drive
Troy, MT 59935

DATED: August 31, 2011 Ten



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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-14 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE REQUEST FOR HEARING BY STEVEN
K. ENDICOTT & RUTH ANN ENDICOTT,
REGARDING OPENCUT PERMIT NO. 487
ISSUED TO PLUM CREEK TIMBERLANDS,
L.P., FOR THE DORR SKEELS SITE IN
LINCOLN COUNTY, MONTANA.

Case No. BER 2011-14 OC

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.

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

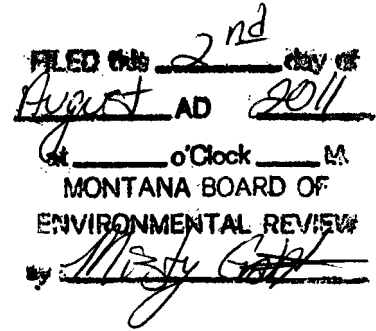
Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BER 2011-14 OC

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620



From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

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We the nearby, undersigned, property owners and residents of the Bull Lake Region and general area of Lincoln County of Montana impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

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Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 1101 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923

Signature:  Date: 7/31/2011

Print Name: Steven K. Endicott

Address: 110 Holly Dr Troy, MT 59935

Phone No: 406-295-5372

Signature:  Date: July 31, 2011

Print Name: Ruth Ann Endicott

Address: 110 Holly Dr., Troy, MT. 59935

Phone No.: 406-295-5372

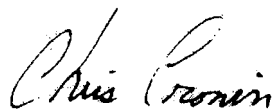
Permit #: **487**Amendment #: **1****OPENCUT MINING PERMIT**

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12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY



Opencut Mining Program Supervisor

July 8, 2011

Industrial & Energy Minerals Bureau

Title

Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:

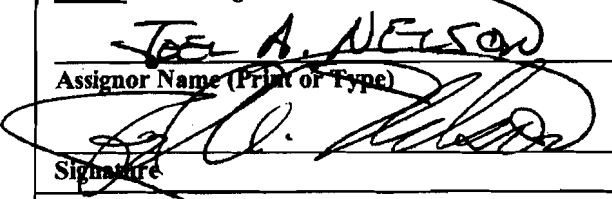
- Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
- Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
- Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
- Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
- Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
- All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West Kalispell, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.

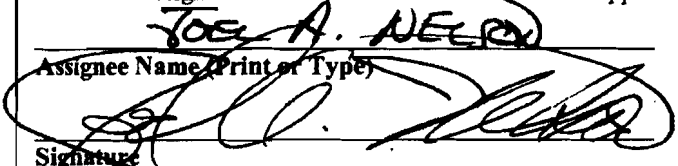
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

Assignor Name (Print or Type) <u>JOE A. NELSON</u>	Title <u>Senior Resource Manager</u>
Signature 	Date <u>6/9/11.</u>

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

Assignee Name (Print or Type) <u>JOE A. NELSON</u>	Title <u>Senior Resource Manager</u>
Signature 	Date <u>6/9/11.</u>

RECEIVED
JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Acreage Breakdown

Mine Area	<u>6.0</u> acres
Facility Area	<u>0.3</u> acres
Access Roads	<u> </u> acres
Partial Release Area	<u> </u> acres
Undisturbed	<u>12.8</u> acres
Total permit area	<u>19.1</u>

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	<u>1,650</u>	<u>20</u>	<u>3:1</u>	<u>9,167</u>	total
			<u>:1</u>	<u>0</u>	<u>9,167</u>

Highwall backfill (describe)					
			<u>:1</u>	<u>0</u>	total
			<u>:1</u>	<u>0</u>	<u>0</u>

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				<u>0</u>	total
				<u>0</u>	<u>0</u>

mine soil and OB replacement	<u>7</u>	inches soil	<u>10</u>	inches overburden	total	<u>17</u>
facility soil replacement	<u>7</u>	inches soil			total	<u>7</u>
access road soil replacement	<u>0</u>	inches soil			total	<u>0</u>

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		<u>9,167</u> cu yds	\$1 per cubic yard	\$9,167
mine area grading		<u>6.0</u> acres	\$200 per acre	\$1,200
mine area ripping		<u>6.0</u> acres	\$100 per acre	\$600
mine soil and OB replacement	<u>17</u> inches	<u>6.0</u> acres	\$135 per inch/per acre	\$13,770
facility area grading		<u>0.3</u> acres	\$100 per acre	\$30
facility area ripping		<u>0.3</u> acres	\$100 per inch/per acre	\$30
facility soil replacement	<u>7</u> inches	<u>0.3</u> acres	\$135 per inch/per acre	\$284
access road area grading		<u>0.0</u> acres	\$100 per acre	\$0
access road area ripping		<u>0.0</u> acres	\$100 per inch/per acre	\$0
access road soil replacement	<u>0</u> inches	<u>0.0</u> acres	\$135 per inch/per acre	\$0
seeding or other revegetation		<u>6.3</u> acres	\$200 per acre	\$1,260
fencing		<u>0</u> linear ft	\$1 per linear foot	\$0
weed control		<u>6.3</u> acres	\$100 per acre	\$630
asphalt or concrete recycle pile	<u>0</u> cu yds	<u>0</u> miles	\$0.20 per cubic yard/mile	\$0
partially released acres		<u>0.0</u> acres	\$300 per acre	\$0
undisturbed acres		<u>12.8</u> acres	\$0 per acre	\$0
Planting tree seedlings		<u>6.0</u> acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		<u>6.0</u> acres	\$150 per acre	\$900

mobilization	<u>3</u> loads	<u>15.0</u> miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	<u>Thompson falls</u>			

DEQ administrative costs - 10% of subtotal \$2,849

Total acreage = 19.1 Per acre rate = \$1,640.51 Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

JS

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

**IN THE MATTER OF:
THE REQUEST FOR HEARING BY
STEVEN K. ENDICOTT & RUTH ANN
ENDICOTT, REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM
CREEK TIMBERLANDS, L.P., FOR THE
DORR SKEELS SITE IN LINCOLN
COUNTY, MONTANA.**

CASE NO. BER 2011-14 OC

FIRST PREHEARING ORDER

On August 2, 2011, Mr. Steven K. Endicott and Ms. Ruth Ann Endicott (hereafter Appellants), filed their Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17, Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM). Accordingly, the following guidelines and rules are provided to assist the parties in an orderly resolution of this matter.

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and ARM 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102, 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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

MS. JOYCE WITTENBERG
Secretary, Board of Environmental Review
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 ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
18 concerning any issue of fact or law in a contested case. In addition to observing this
19 rule, please contact the opposing party before you communicate with the
20 undersigned, even on purely procedural matters such as the need for a continuance.

21 5. SCHEDULING: The undersigned requests the parties to consult with
22 each other and to propose a schedule to the undersigned upon which they agree by
23 September 16, 2011. The schedule should include the following dates:

- 24 (a) for joinder/intervention of additional parties;
25 (b) for disclosure by each party to the other parties of: (1) the
26 name and address of each individual likely to have discoverable
27 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

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

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

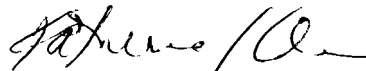
6 (d) for exchange of lists of witnesses and copies of documents that
7 each party intends to offer at the hearing;

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 31st day of August, 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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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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-15 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:

THE REQUEST FOR HEARING BY NANCY
SCOTT, DALE WHITTON, KIMBERLY MOLE,
JESS HODGE, KATHERINE G. POTTER,
SHARON B. JOHNSON, CLINTON C.
JOHNSON, JAMES D. WARD, AND KORRIE
L. WARD REGARDING OPENCUT PERMIT
NO. 487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.

Case No. BER 2011-15 OC

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.

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

Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BER 2011-15 DC

Contact Persons:

Kimberly Mole
322 Dorr Skeels Road
Troy, MT 59935

Phone No. 295-5425

Bob & Kathy Potter
1280 Doonan Mtn Road
Troy, MT 59935

Phone No. 295-9745

FILED this 3rd day of
August AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by Marty Potter

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620

From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

The below signatures represent the land owners that live within half a mile of the Opencut mining site impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners

CC: Montana Governor Brian Schweitzer, PO Box 200801, Helena, MT 59620
Senator Chas Vincent, 34 Paul Bunyan Ln, Libby, MT 59923
State Representative Jerry Bennett, 784 Taylor Rd, Libby, MT 59923
Lincoln County Commissioner Ron Downing, 1210 E Missoula Ave, Troy, MT 59935
Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 31374 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923
Stimson Lumber Company, 60 Port Blvd, Suite 100, Libby, MT 59923

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Nancy Scott Date: 7/26/2011

Print Name: Nancy Scott

Address: 1288 Doonan Mtn. Rd Troy 59935

Phone No: 406 295-9786

*Signature: Dale Whitton Date: 7/26/2011

Print Name: Dale Whitton

Address: 1288 Doonan Mtn. Road Troy

Phone No: 406 295 9786

*Signature: Kim Mole Date: 07-26-11

Print Name: KIMBERLY MOLE

Address: 322 DORR SKEELS RD, TROY, MT 59935

Phone No: (406) 295-5425

*Signature: Jess Hodge Date: 7-27-2011

Print Name: Jess Hodge

Address: ¹²⁶⁴¹And Lake rd. Troy 59935

Phone No: NO PHONE

*Signature: Katherine G. Potter Date: 7-28-11

Print Name: KATHERINE G. POTTER

Address: 1280 DOONAN Mtn. Rd

Phone No: 406-295-9745

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Sharon B. Johnson Date: July 28, 2011

Print Name: SHARON B. JOHNSON

Address: 1274 Doonan View Rd. Troy, MI 59935

Phone No: (406) 295-5896

*Signature: Clinton C. Johnson Date: 28 July 2011

Print Name: CLINTON C. JOHNSON

Address: 1274 Doonan View Road Troy MI 59935

Phone No: (406) 295-5896

*Signature: [Signature] Date: 7/28/11

Print Name: JAMES D. WARD

Address: 719 DOONAN MOUNTAIN RD TROY MI, 59935

Phone No: (406) 291-7814

*Signature: Korrie L Ward Date: 7-28-11

Print Name: Korrie L Ward

Address: 719 Doonan mountain Rd Troy MI 59935

Phone No: _____

*Signature: _____ Date: _____

Print Name: _____

Address: _____

Phone No: _____

PUBLIC NOTIFICATION FOR OPENCUT MINING PERMIT

Notice required for compliance with Opencut Mining Act (MCA 82-4-432[5])

OPERATOR:

Plum Creek Timberlands, L.P.

2050 Hwy 2 West

Kalispell, Mt. 59901

(406) 751-2415

Total acreage in permit area: 19.1 acres

Acreage to be mined: 6.3 acres

Material to be removed: Topsoil, Overburden and Gravel

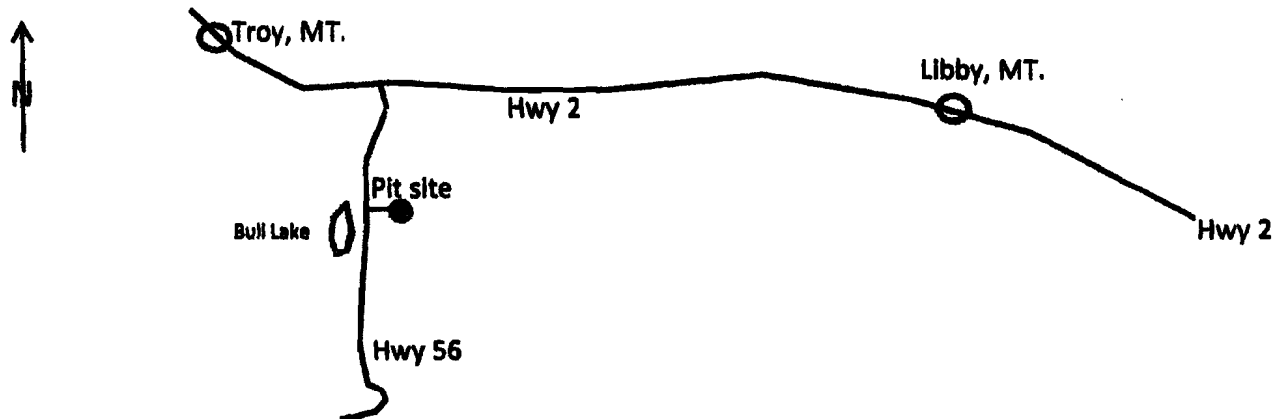
Estimated volume of mined gravel: 142,000 cubic yards over 19 years.

Facilities: There will be no facilities permanently installed at the site associated with gravel processing. Gravel will be temporarily stored on site.

Estimated duration of activities: Sporadically through the spring and summer months until reclamation in 2030.

Access: Starting at the junction of hwy 56 and hwy2, (Troy, MT), head south on hwy 2 for approximately 12.5 miles. Turn left off of hwy 56, .5 miles south of milepost 22. The access spur road is currently gated; however, the permit area is just a short distance beyond the gate. No new access roads will be constructed.

Legal description: Section 20, Township 29N, RANGE 33W, Lincoln County, Montana



For further information, please contact Plum Creek at (406) 751-2415.

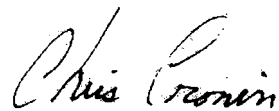
Requests for a public meeting regarding this opencut mining operation should be directed to the D.E.Q. Opencut Mining Program, P.O. Box 200901, Helena, MT. 59620-0901; Ph: (406) 444-4970; Fax: (406) 444-4988; Email: deqopencut@mt.gov

Permit #: **487**Amendment #: **1****OPENCUT MINING PERMIT**

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[11], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels site**. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
8. Unless the Operator is a governmental entity, a bond has been posted to ensure the site is reclaimed. If the site is not reclaimed as and when required, the DEQ may pursue forfeiture of the bond. If the bond is cancelled or invalidated, the Operator shall provide a valid bond within 30 days. If not provided, the DEQ may suspend the permit and require the Operator to cease operations.
9. The Operator may apply to amend the permit at any time. If approved, the amendment becomes part of the permit for all purposes. The DEQ may occasionally review the permit and require revisions.
10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY


Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor

Title

July 8, 2011

Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:


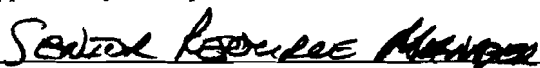
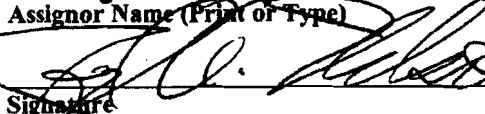
- Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
- Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
- Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
- Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
- Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
- All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West KalisPELL, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.

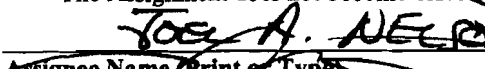
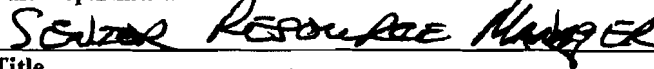
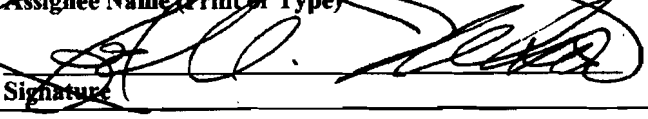
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

 Assignor Name (Print or Type)	 Title
 Signature	6/9/11. Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

 Assignee Name (Print or Type)	 Title
 Signature	6/9/11. Date

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JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Acreage Breakdown

Mine Area	<u>6.0</u> acres
Facility Area	<u>0.3</u> acres
Access Roads	<u> </u> acres
Partial Release Area	<u> </u> acres
Undisturbed	<u>12.8</u> acres
Total permit area	<u>19.1</u>

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	<u>1,650</u>	<u>20</u>	<u>3:1</u>	<u>9,167</u>	total
			<u>:1</u>	<u>0</u>	<u>9,167</u>

Highwall backfill (describe)					
			<u>:1</u>	<u>0</u>	total
			<u>:1</u>	<u>0</u>	<u>0</u>

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				<u>0</u>	total
				<u>0</u>	<u>0</u>

mine soil and OB replacement	<u>7</u> inches soil	<u>10</u> inches overburden	total	<u>17</u>
facility soil replacement	<u>7</u> inches soil		total	<u>7</u>
access road soil replacement	<u>0</u> inches soil		total	<u>0</u>

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		<u>9,167</u> cu yds	\$1 per cubic yard	\$9,167
mine area grading		<u>6.0</u> acres	\$200 per acre	\$1,200
mine area ripping		<u>6.0</u> acres	\$100 per acre	\$600
mine soil and OB replacement	<u>17</u> inches	<u>6.0</u> acres	\$135 per inch/per acre	\$13,770
facility area grading		<u>0.3</u> acres	\$100 per acre	\$30
facility area ripping		<u>0.3</u> acres	\$100 per inch/per acre	\$30
facility soil replacement	<u>7</u> inches	<u>0.3</u> acres	\$135 per inch/per acre	\$284
access road area grading		<u>0.0</u> acres	\$100 per acre	\$0
access road area ripping		<u>0.0</u> acres	\$100 per inch/per acre	\$0
access road soil replacement	<u>0</u> inches	<u>0.0</u> acres	\$135 per inch/per acre	\$0
seeding or other revegetation		<u>6.3</u> acres	\$200 per acre	\$1,260
fencing		<u>0</u> linear ft	\$1 per linear foot	\$0
weed control		<u>6.3</u> acres	\$100 per acre	\$630
asphalt or concrete recycle pile	<u>0</u> cu yds	<u>0</u> miles	\$0.20 per cubic yard/mile	\$0
partially released acres		<u>0.0</u> acres	\$300 per acre	\$0
undisturbed acres		<u>12.8</u> acres	\$0 per acre	\$0
Planting tree seedlings		<u>6.0</u> acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		<u>6.0</u> acres	\$150 per acre	\$900

mobilization	<u>3</u> loads	<u>15.0</u> miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	<u>Thompson falls</u>			

DEQ administrative costs - 10% of subtotal \$2,849

Total acreage = 19.1 Per acre rate = \$1,640.51 Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

✓*ju*

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

**IN THE MATTER OF:
THE REQUEST FOR HEARING BY
NANCY SCOTT, DALE WHITTON,
KIMBERLY MOLE, JESS HODGE,
KATHERINE G. POTTER, SHARON B.
JOHNSON, CLINTON C. JOHNSON,
JAMES D. WARD, AND KORRIE L.
WARD, REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM
CREEK TIMBERLANDS, L.P., FOR THE
DORR SKEELS SITE IN LINCOLN
COUNTY, MONTANA.**

CASE NO. BER 2011-15 OC

FIRST PREHEARING ORDER

On August 3, 2011, Ms. Nancy Scott, Mr. Dale Whitton, Ms. Kimberly Mole, Mr. Jess Hodge, Ms. Katherine G. Potter, Ms. Sharon B. Johnson, Mr. Clinton C. Johnson, Mr. James D. Ward, and Ms. Korrie L. Ward (hereafter, Appellants), filed their Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17, Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM).

Accordingly, the following guidelines and rules are provided to assist the parties in an orderly resolution of this matter.

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and ARM 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102, 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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

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

12 KATHERINE J. ORR
13 Hearing Examiner
14 Agency Legal Services Bureau
15 1712 Ninth Avenue
16 P.O. Box 201440
17 Helena, MT 59620-1440

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

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

24 4. EX PARTE COMMUNICATIONS: The Montana Administrative
25 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model
26 Rule 18 in ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
27 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.

1 5. SCHEDULING: The undersigned requests the parties to consult with
2 each other and to propose a schedule to the undersigned upon which they agree by
3 September 16, 2011. The schedule should include the following dates:

- 4 (a) for joinder/intervention of additional parties;
5 (b) for disclosure by each party to the other parties of: (1) the
6 name and address of each individual likely to have discoverable
7 information that the disclosing party may use to support its
8 claims or defenses, and (2) a copy of, or a description by
9 category and location of, all documents and tangible things that
10 are in the possession, custody, or control of the disclosing party
11 and that the disclosing party may use to support its claims or
12 defenses;
13 (c) for completion of discovery (if any party wishes to conduct
14 discovery);
15 (d) for exchange of lists of witnesses and copies of documents that
16 each party intends to offer at the hearing;
17 (e) for submitting any motions and briefs in support;
18 (f) for a prehearing conference to hear argument on any motions
19 and resolve other prehearing matters; and
20 (g) for the contested case hearing, as well as the place of hearing.

21 DATED this 31st day of August, 2011.

22
23 

24 KATHERINE J. ORR
25 Hearing Examiner
26 Agency Legal Services Bureau
27 1712 Ninth Avenue
 P.O. Box 201440
 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. Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Bob and Kathy Potter
1280 Doonan Mtn. Road
Troy, MT 59935

DATED: August 31, 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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-16 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:

THE REQUEST FOR HEARING BY GLENN MILLER, RICK SANT, RALPH & EDNA NEILS, BERNEIEE A. ZUCKER, PATRICIA ANDERSON, TINA K. MOORE, MARC ZAHNER, DONALD E. WHITE, JACKI BRUEMMER, BETTY LONGO, TRACY NICELY, MICHAEL DUNN, DENNIS THAYER, JAMES HOPKINS, DEBBIE ZAHNER, JAMES P. TOMLIN, HOWARD C.A. HUNTER, GEORGE STACHECKI, MARIE MABEE, HAROLD MABEE, PATRICIA WARRINGTON, LILY S. PARKER, LINDA S. FISHER, STEVEN E. FISHER, CONNIE KARNS, JOHN RITCHIE, GRANT DENTON, KAREN & BEN PELZEL, RICHARD L. JOHNSON, N.E.W. BOSS, JANE O. DRAYTON, LEONARD H. DRAYTON, WARREN ROBBE, KATHERINE G. POTTER, ROBERT B. POTTER, BONNIE GANNON, KIM F. TAYLOR, LINDA COCHRAN, HELEN R. LOCKARD, MARSHALL WARRINGTON, JR., BRUCE KINNEY, DEVAN KINNEY, JON KINNEY, JOEL KINNEY, KAREN LEGUE, ANGELINE R. ALLEN, GARY ALLEN, BONNIE SONNENBERG, BUD BIDDLE, EUNICE BOEVE, RON BOEVE, KATHLEEN BURBRIDGE, HAROLD LEWIS, KEN MOLE, AND LOIS M. MOLE REGARDING OPENCUT PERMIT NO. 487 ISSUED TO PLUM CREEK TIMBERLANDS, L.P., FOR THE DORR SKEELS SITE IN LINCOLN COUNTY, MONTANA.

Case No.

BER 2011-16 OC

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.

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

Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BER 2011-16 DC

Contact Persons:

Kimberly Mole
322 Dorr Skeels Road
Troy, MT 59935

Phone No. 295-5425

Bob & Kathy Potter
1280 Doonan Mtn Road
Troy, MT 59935

Phone No. 295-9745

FILED this 3rd day of
August AD 2011
at _____ o'clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by Mary Potter

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620

From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

We the nearby, undersigned, property owners and residents of the Bull Lake Region and general area of Lincoln County of Montana impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners and Nearby Residents of Lincoln County


Petition to Protest and Appeal the denial of a Public Hearing

*Signature:  Date: 7/30/2011

Print Name: GLENN MILLER

Address: 64 HALO DRIVE TRAY

Phone No: 406-295-4325

*Signature:  Date: 7/30/2011

Print Name: RICK SANT

Address: 80 HALO DRIVE

Phone No: 406-544 7721

*Signature: Ralph & Edna Neils Date: 7/30/2011

Print Name: Ralph & Edna Neils

Address: HALO DR.


Phone No: 295-5076

*Signature:  Date: 13 July 11

Print Name: Bernice A. Zucker

Address: 464 BeTheL Dr.

Phone No: _____

*Signature:  Date: 7-30-11

Print Name: Patricia Anderson

Address: 455 BeTheL Dr.

Phone No: 295-4078

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Tina K. Moore Date: 7/29/11

Print Name: Tina K. Moore

Address: PO Box 5 · 209 E. Kootenai Ave., Troy

Phone No: (406) 295-9121

*Signature: [Signature] Date: 7/29/11

Print Name: Maure Zahner

Address: 643 3rd Ave East, Kalispell, MT 59901

Phone No: 406-291-0777

*Signature: Donald E White Date: 7/30/11

Print Name: DONALD E WHITE

Address: KOOTENAI^{Ave} PO, Box 475 Troy, MT

Phone No: 509-723-3573

*Signature: Jacki Bruenmer Date: 7/30/11

Print Name: Jacki Bruenmer

Address: PO Box 224 Troy, MT 59935

Phone No: 406-295-5107

*Signature: Betty Longo Date: 7/30/11

Print Name: Betty Longo

Address: 469 Bethel Dr Troy, MT 59935

Phone No: 406-295-2310

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Tracy Nicely Date: 7/29/11

Print Name: Tracy Nicely

Address: 650 Doonan Mtn Rd, Troy, MT 59935

Phone No: 406 295 5624

*Signature: Michael Dunn Date: 7/29/11

Print Name: Michael Dunn

Address: 650 Doonan Mtn. Rd. Troy, MT 59935

Phone No: 406 295-5624

*Signature: _____ Date: _____

Print Name: Dennis Taylor

Address: 13 Halo Dr Troy MT.

Phone No: 295-4439

*Signature: [Signature] Date: 7-30-11

Print Name: JAMES HOPKINS

Address: 102 HALO DR TROY, MT 59935

Phone No: 406-295-4639

*Signature: [Signature] Date: 7-30-11

Print Name: Debbie Zahner

Address: 146 Halo Drive

Phone No: 406 871-8802

Debbie Zahner

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: James P. Tomlin Date: 7/28/11
Print Name: James P. Tomlin
Address: 654 Halo Dr, Troy Mt 59935
Phone No: 295-7778

*Signature: Howard C.A. Hunter Date: 7/28/11
Print Name: HOWARD C.A. HUNTER
Address: 644 HALO DR
Phone No: X

*Signature: George Stached Date: 7/28/10
Print Name: GEORGE STACHED
Address: 546 Halo
Phone No: 295-5527

*Signature: Marie Mabee Date: 7/28/2011
Print Name: Marie Mabee
Address: 408 Halo, Troy, mt.
Phone No: 406-295-5090

*Signature: Harold Mabee Date: 7/28/2011
Print Name: HAROLD MABEE
Address: 408 Halo Troy, mt.
Phone No: 406-295-5090

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Patricia Warrington Date: 7/28

Print Name: Patricia Warrington

Address: 900 Halo Drive

Phone No: 295-4007

*Signature: Lily S. Parker Date: 7/28

Print Name: Lily S. Parker

Address: 826 Halo Drive

Phone No: 406-295-5160

*Signature: ~~Linda S. Fisher~~ Date: 7/28

Print Name: Linda S. Fisher

Address: 688 Halo Drive

Phone No: 406-295-4315

*Signature: Steven E. Fisher Date: 7/28/2011

Print Name: STEVEN E. FISHER

Address: 688 HALO DR.

Phone No: 406-295-4315

*Signature: Connie Karns Date: 7-28-11

Print Name: Connie Karns

Address: 370 SE Parkhill Dr, Chukalis, WA

Phone No: 360-880-9133

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: [Signature] Date: 7/28/11

Print Name: John Ritchie

Address: 18 Halo CT N

Phone No: 295-9118

*Signature: [Signature] Date: 8/28/11

Print Name: GRANT DENTON

Address: 861 Halo Dr, Troy, MT 59935

Phone No: _____

*Signature: Karen + Ben Pelzel Date: 7/28/11

Print Name: Karen + Ben Pelzel

Address: 861 Halo Dr.; Troy, MT.

Phone No: 707-467-7324

*Signature: [Signature] Date: 7-28-11

Print Name: RICHARD L. JOHNSON

Address: 749 HALO DR TROY MT. 59935

Phone No: 406-295-4531

*Signature: N.E.W. BOSS Date: 7/28/11

Print Name: N.E.W. BOSS

Address: 16941 Bull Lake Rd. Troy, MT

Phone No: 295-5616

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Jane O. Drayton Date: 7-26-11

Print Name: JANE O. DRAYTON

Address: 401 SWANSON LODGE Rd, Troy 59935

Phone No: 295-9971

*Signature: Leonard H. Drayton Date: 7-26-2011

Print Name: LEONARD H. DRAYTON

Address: 401 SWANSON LODGE ROAD TROY, MT 59935

Phone No: 406-295-9971

*Signature: Walter J. Rabbe Date: 7-26-11

Print Name: WALTER J. RABBE

Address: 3291 DULIS LAKE RD

Phone No: 406-295-9743

*Signature: Katherine G. Potter Date: 7-26-11

Print Name: KATHERINE G. POTTER

Address: 1280 DOONAN MTL. RD. TROY, MT 59935

Phone No: 406-295-9745

*Signature: Robert B. Potter Date: 7/26/11

Print Name: ROBERT B. POTTER

Address: 1280 DOONAN MTL. ROAD, TROY MT 59935

Phone No: 406/295-9745

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Bonnie Gannon Date: 7-27-11

Print Name: Bonnie Gannon

Address: 118 Kootenai Ave, Troy CampHost
DORR Skeels

Phone No: 406-291-6234 / 406-295-5618

*Signature: Kim Taylor Date: 7/27/11

Print Name: Kim Taylor

Address: 1624 Tamrack Ln CF MT 59912

Phone No: 406 890-9654

*Signature: Linda Cochran Date: 7/27/2011

Print Name: LINDA COCHRAN

Address: 40 HALO DR, Troy, MT 59935

Phone No: _____

*Signature: Helen R. Lockard Date: 7/28/11

Print Name: Helen R. Lockard

Address: 914 Halo Dr., Troy MT 59935

Phone No: 406-295-4766

*Signature: Marshall Warrington, Jr. Date: 7-28-2011

Print Name: MARSHALL WARRINGTON, JR.

Address: 900 HALO DR. TROY MT 59935 -

Phone No: 406-295-4007

Arizer Islands
* Owners 140 Holly Dr, Troy, MT.
Petition to Protest and Appeal the denial of a Public Hearing 59935

*Signature: Bruce Kinney Date: 7/31/11

Print Name: Bruce Kinney

* Address: 7023 172nd St., Arlington, WA 98223

Phone No: (360) 474-1567

*Signature: Dewan Kinney Date: 7/31/11

Print Name: Dewan Kinney

* Address: 7023 172nd St. NE, Arlington, WA 98223

Phone No: (360) 474-1567

*Signature: _____ Date: _____

Print Name: Jon Kinney

* Address: Circle Drive, Spokane, WA, 99206

Phone No: (509)

*Signature: _____ Date: _____

Print Name: Joel Kinney

Address: Colbert, WA

Phone No: (509)

*Signature: _____ Date: _____

Print Name: Karen Leque

* Address: 210 Bayside Rd., Bellingham, WA 98225

Phone No: (360) 733-4597

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Angeline R. Allen Date: 7-30-2011

Print Name: ANGELINE R. ALLEN

Address: 378 Bethel Dr, Troy, MT

Phone No: 406-295-8801

*Signature: Gary Allen Date: 7-30-011

Print Name: GARY ALLEN

Address: 378 Bethel Dr, Troy, MT

Phone No: (406) 295-8801

*Signature: Bonnie Sonnenberg Date: 7-30-11

Print Name: Bonnie Sonnenberg

Address: 50 Holly Dr.

Phone No: 406 295-9870

*Signature: ~~DELIA~~ BIDDLE Date: 07-30-11

Print Name: BUD BIDDLE

Address: Box 3017 ^{BULLACE RD} TROY MT 59935

Phone No: 800 479-8531

*Signature: _____ Date: _____

Print Name: _____

Address: _____

Phone No: _____

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Eunice A. Boeve Date: 7-30-11

Print Name: Eunice Boeve

Address: 382 Bethel Dr Troy Mt 59535

Phone No:

*Signature: Ken Boeve Date: 7-30-11

Print Name: Ken Boeve

Address: 382 Bethel Dr Troy, Mt 59535

Phone No:

*Signature: Kathleen Burbidge Date: 7/30/11

Print Name: KATHLEEN BURBRIDGE

Address: 329 Bethel

Phone No: (406) 295-5498

*Signature: Harold S. Lewis Date: 7/30/11

Print Name: HAROLD LEWIS

Address: 132 Holly Dr

Phone No:

*Signature: Date:

Print Name:

Address:

Phone No:

Petition to Protest and Appeal the denial of a Public Hearing

*Signature: Ken Mole Date: 7-29-11

Print Name: KEN MOLE

Address: 116 MICHELLE LN, Libby

Phone No: —

*Signature: Lois M. Mole Date: 7-29-11

Print Name: Lois M. Mole

Address: 116 Michelle Lane,

Phone No: —

*Signature: _____ Date: _____

Print Name: _____

Address: _____

Phone No: _____

*Signature: _____ Date: _____

Print Name: _____

Address: _____

Phone No: _____

*Signature: _____ Date: _____

Print Name: _____

Address: _____

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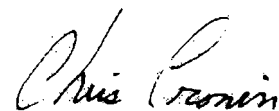
Permit #: **487**Amendment #: **1****OPENCUT MINING PERMIT**

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[1], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels site**. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
8. Unless the Operator is a governmental entity, a bond has been posted to ensure the site is reclaimed. If the site is not reclaimed as and when required, the DEQ may pursue forfeiture of the bond. If the bond is cancelled or invalidated, the Operator shall provide a valid bond within 30 days. If not provided, the DEQ may suspend the permit and require the Operator to cease operations.
9. The Operator may apply to amend the permit at any time. If approved, the amendment becomes part of the permit for all purposes. The DEQ may occasionally review the permit and require revisions.
10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY



Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor

Title

July 8, 2011

Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:


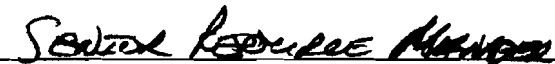
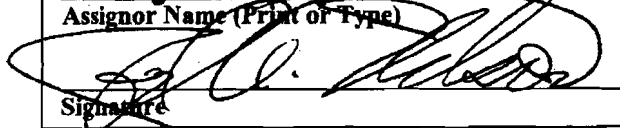
1. Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
2. Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
3. Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
4. Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
5. Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
6. All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West Kalispell, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.


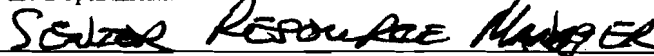
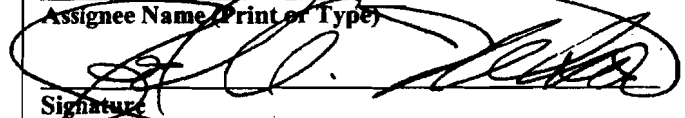
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

 Assignor Name (Print or Type)	 Title
 Signature	6/9/11. Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

 Assignee Name (Print or Type)	 Title
 Signature	6/9/11. Date

RECEIVED

JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Acres Breakdown

Mine Area	6.0	acres
Facility Area	0.3	acres
Access Roads		acres
Partial Release Area		acres
Undisturbed	12.8	acres
Total permit area	19.1	

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	1,650	20	3:1	9,167	total
			1:1	0	9,167

Highwall backfill (describe)					
			1:1	0	total
			1:1	0	0

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				0	total
				0	0

mine soil and OB replacement	7	inches soil	10	inches overburden	total	17
facility soil replacement	7	inches soil			total	7
access road soil replacement	0	inches soil			total	0

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		9,167 cu yds	\$1 per cubic yard	\$9,167
mine area grading		6.0 acres	\$200 per acre	\$1,200
mine area ripping		6.0 acres	\$100 per acre	\$600
mine soil and OB replacement	17	inches	\$135 per inch/per acre	\$13,770
facility area grading		0.3 acres	\$100 per acre	\$30
facility area ripping		0.3 acres	\$100 per inch/per acre	\$30
facility soil replacement	7	inches	\$135 per inch/per acre	\$284
access road area grading		0.0 acres	\$100 per acre	\$0
access road area ripping		0.0 acres	\$100 per inch/per acre	\$0
access road soil replacement	0	inches	\$135 per inch/per acre	\$0
seeding or other revegetation		6.3 acres	\$200 per acre	\$1,260
fencing		0 linear ft	\$1 per linear foot	\$0
weed control		6.3 acres	\$100 per acre	\$630
asphalt or concrete recycle pile	0	cu yds	\$0.20 per cubic yard/mile	\$0
partially released acres		0.0 acres	\$300 per acre	\$0
undisturbed acres		12.8 acres	\$0 per acre	\$0
Planting tree seedlings		6.0 acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		6.0 acres	\$150 per acre	\$900

mobilization	3	loads	15.0	miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	Thompson falls					

DEQ administrative costs - 10% of subtotal \$2,849

Total acreage = 19.1 Per acre rate = \$1,640.51 Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

JS

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

**IN THE MATTER OF:
THE REQUEST FOR HEARING BY
GLENN MILLER, RICK SANT, RALPH
& EDNA NEILS, BERNEIEE A. ZUCKER,
PATRICIA ANDERSON, TINA K.
MOORE, MARC ZAHNER, DONALD E.
WHITE, JACKI BRUEMMER, BETTY
LONGO, TRACY NICELY, MICHAEL
DUNN, DENNIS THAYER, JAMES
HOPKINS, DEBBIE ZAHNER, JAMES P.
TOMLIN, HOWARD C.A. HUNTER,
GEORGE STACHECKI, MARIE MABEE,
HAROLD MABEE, PATRICIA
WARRINGTON, LILY S. PARKER,
LINDA S. FISHER, STEVEN E. FISHER,
CONNIE KARNS, JOHN RITCHIE,
GRANT DENTON, KAREN & BEN
PELZEL, RICHARD L. JOHNSON,
N.E.W. BOSS, JANE O. DRAYTON,
LEONARD H. DRAYTON, WARREN
ROBBE, KATHERINE G. POTTER,
ROBERT B. POTTER, BONNIE
GANNON, KIM F. TAYLOR, LINDA
COCHRAN, HELEN R. LOCKARD,
MARSHALL WARRINGTON, JR.,
BRUCE KINNEY, DEVAN KINNEY, JON
KINNEY, JOEL KINNEY, KAREN
LEGUE, ANGELINE R. ALLEN, GARY
ALLEN, BONNIE SONNENBERG, BUD
BIDDLE, EUNICE BOEVE, RON BOEVE,
KATHLEEN BURBRIDGE, HAROLD
LEWIS, KEN MOLE, AND LOIS M.
MOLE REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM
CREEK TIMBERLANDS, L.P., FOR THE
DORR SKEELS SITE IN LINCOLN
COUNTY, MONTANA.**

CASE NO. BER 2011-16 OC

FIRST PREHEARING ORDER

On August 3, 2011, Glenn Miller, Rick Sant, Ralph Neils, Edna Neils,
Berneiee A. Zucker, Patricia Anderson, Tina K. Moore, Marc Zahner, Donald E.
White, Jacki Bruemmer, Betty Longo, Tracy Nicely, Michael Dunn, Dennis Thayer,
James Hopkins, Debbie Zahner, James P. Tomlin, Howard C.A. Hunter, George

1 Stachecki, Marie Mabee, Harold Mabee, Patricia Warrington, Lily S. Parker, Linda
2 S. Fisher, Steven E. Fisher, Connie Karns, John Ritchie, Grant Denton, Karen
3 Pelzel, Ben Pelzel, Richard L. Johnson, N.E.W. Boss, Jane O. Drayton, Leonard H.
4 Drayton, Warren Robbe, Katherine G. Potter, Robert B. Potter, Bonnie Gannon,
5 Kim F. Taylor, Linda Cochran, Helen R. Lockard, Marshall Warrington, Jr., Bruce
6 Kinney, Devan Kinney, Jon Kinney, Joel Kinney, Karen Legue, Angeline R. Allen,
7 Gary Allen, Bonnie Sonnenberg, Bud Biddle, Eunice Boeve, Ron Boeve, Kathleen
8 Burbridge, Harold Lewis, Ken Mole and Lois M. Mole (hereafter Appellants), filed
9 their Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum
10 Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title
11 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17,
12 Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM).

13 Accordingly, the following guidelines and rules are provided to assist the
14 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 has adopted the
18 Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102,
19 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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 MS. 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 ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
18 concerning any issue of fact or law in a contested case. In addition to observing this
19 rule, please contact the opposing party before you communicate with the
20 undersigned, even on purely procedural matters such as the need for a continuance.

21 5. SCHEDULING: The undersigned requests the parties to consult with
22 each other and to propose a schedule to the undersigned upon which they agree by
23 **September 16, 2011**. The schedule should include the following dates:

- 24 (a) for joinder/intervention of additional parties;
- 25 (b) for disclosure by each party to the other parties of: (1) the
26 name and address of each individual likely to have discoverable
27 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

1 are in the possession, custody, or control of the disclosing party
2 and that the disclosing party may use to support its claims or
3 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 31st day of August, 2011.

13 
14 KATHERINE J. ORR
15 Hearing Examiner
16 Agency Legal Services Bureau
17 1712 Ninth Avenue
18 P.O. Box 201440
19 Helena, MT 59620-1440
20
21
22
23
24
25
26
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing 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 Ms. Jane Amdahl
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Ed Coleman, Bureau Chief
17 Industrial & Energy Minerals Bureau
18 Department of Environmental Quality
19 P.O. Box 200901
20 Helena, MT 59620-0901

21 Ms. Kimberly Mole
22 322 Dorr Skeels Road
23 Troy, MT 59935

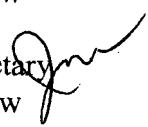
24 Bob and Kathy Potter
25 1280 Doonan Mtn. Road
26 Troy, MT 59935
27

18
19 DATED: August 31, 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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-17 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE REQUEST FOR HEARING BY JOHN
HUTTON, REGARDING OPENCUT PERMIT
NO. 487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.

Case No. BER 2011-17 OC

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.

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

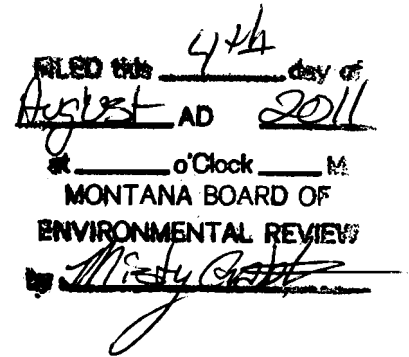
Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BCR 2011-170C

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620



From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

The below signatures represent the land owners that live within half a mile of the Opencut mining site impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners

CC: Montana Governor Brian Schweitzer, PO Box 200801, Helena, MT 59620
Senator Chas Vincent, 34 Paul Bunyan Ln, Libby, MT 59923
State Representative Jerry Bennett, 784 Taylor Rd, Libby, MT 59923
Lincoln County Commissioner Ron Downing, 1210 E Missoula Ave, Troy, MT 59935
Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 1101 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923

Signature: 

Date: 8-1-11

Print Name: John W. Hutton

Address: 11832 W. 22 St, Phoenix, AZ 85028

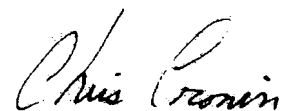
Phone No: 602.531.7963

Permit #: **487**Amendment #: **1****OPENCUT MINING PERMIT**

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[11], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels site**. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
8. Unless the Operator is a governmental entity, a bond has been posted to ensure the site is reclaimed. If the site is not reclaimed as and when required, the DEQ may pursue forfeiture of the bond. If the bond is cancelled or invalidated, the Operator shall provide a valid bond within 30 days. If not provided, the DEQ may suspend the permit and require the Operator to cease operations.
9. The Operator may apply to amend the permit at any time. If approved, the amendment becomes part of the permit for all purposes. The DEQ may occasionally review the permit and require revisions.
10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor
TitleJuly 8, 2011
Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:


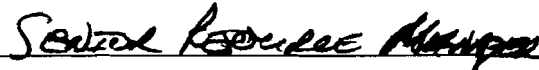
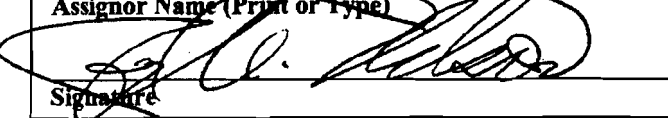
1. Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
2. Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
3. Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
4. Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
5. Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
6. All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit) a. Name: Plum Creek Timberlands, L.P. b. Address: 2050 Hwy 2 West Kalispell, MT. 59901 c. Office Phone: 406-751-2415 d. Cell Phone: 406-261-8247 e. Email address: steve.perrone@plumcreek.com	2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site: a. Name: Steve Perrone b. Office Phone: 406-751-2415 c. Cell Phone: 406-261-8247 d. Email address: steve.perrone@plumcreek.com
3. Assignor name: Plum Creek Timber Company, L.P.	4. Assignor phone number: 406-751-2415
5. Current permit number: 487	6. Current permitted acreage: 1.3
7. Site name: Door Skeels	8. County: Lincoln
9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in <i>How To Obtain And Comply With An Opencut Mining Permit</i>) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, this application is deficient and will not be processed.	

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.

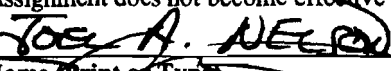
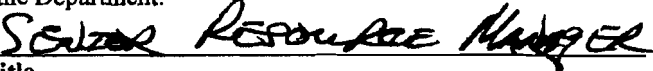
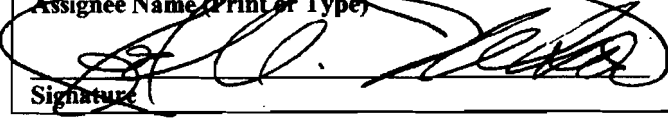
NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

 Assignor Name (Print or Type)	 Title
 Signature	6/9/11. Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

 Assignee Name (Print or Type)	 Title
 Signature	6/9/11. Date

RECEIVED

JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP
 Site: Door Skeels
 Prepared by: Steve Perrone- Plum Creek
 Date: 6/7/2011

Acreage Breakdown

Mine Area	<u>6.0</u> acres
Facility Area	<u>0.3</u> acres
Access Roads	<u> </u> acres
Partial Release Area	<u> </u> acres
Undisturbed	<u>12.8</u> acres
Total permit area	<u>19.1</u>

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	<u>1,650</u>	<u>20</u>	<u>3:1</u>	<u>9,167</u>	total
			<u>:1</u>	<u>0</u>	<u>9,167</u>

Highwall backfill (describe)					
			<u>:1</u>	<u>0</u>	total
			<u>:1</u>	<u>0</u>	<u>0</u>

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				<u>0</u>	total
				<u>0</u>	<u>0</u>

mine soil and OB replacement	<u>7</u>	inches soil	<u>10</u>	inches overburden	total	<u>17</u>
facility soil replacement	<u>7</u>	inches soil			total	<u>7</u>
access road soil replacement	<u>0</u>	inches soil			total	<u>0</u>

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		<u>9,167</u> cu yds	\$1 per cubic yard	\$9,167
mine area grading		<u>6.0</u> acres	\$200 per acre	\$1,200
mine area ripping		<u>6.0</u> acres	\$100 per acre	\$600
mine soil and OB replacement	<u>17</u> inches	<u>6.0</u> acres	\$135 per inch/acre	\$13,770
facility area grading		<u>0.3</u> acres	\$100 per acre	\$30
facility area ripping		<u>0.3</u> acres	\$100 per inch/acre	\$30
facility soil replacement	<u>7</u> inches	<u>0.3</u> acres	\$135 per inch/acre	\$284
access road area grading		<u>0.0</u> acres	\$100 per acre	\$0
access road area ripping		<u>0.0</u> acres	\$100 per inch/acre	\$0
access road soil replacement	<u>0</u> inches	<u>0.0</u> acres	\$135 per inch/acre	\$0
seeding or other revegetation		<u>6.3</u> acres	\$200 per acre	\$1,260
fencing		<u>0</u> linear ft	\$1 per linear foot	\$0
weed control		<u>6.3</u> acres	\$100 per acre	\$630
asphalt or concrete recycle pile	<u>0</u> cu yds	<u>0</u> miles	\$0.20 per cubic yard/mile	\$0
partially released acres		<u>0.0</u> acres	\$300 per acre	\$0
undisturbed acres		<u>12.8</u> acres	\$0 per acre	\$0
Planting tree seedlings		<u>6.0</u> acres	<u>\$35</u> per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		<u>6.0</u> acres	<u>\$150</u> per acre	\$900

mobilization	<u>3</u> loads	<u>15.0</u> miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	<u>Thompson falls</u>			

DEQ administrative costs - 10% of subtotal \$2,849

Total acreage = 19.1 Per acre rate = \$1,640.51 Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

✓ *JW*

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

**IN THE MATTER OF:
THE REQUEST FOR HEARING BY
JOHN HUTTON, REGARDING
OPENCUT PERMIT NO. 487 ISSUED TO
PLUM CREEK TIMBERLANDS, L.P.,
FOR THE DORR SKEELS SITE IN
LINCOLN COUNTY, MONTANA.**

CASE NO. BER 2011-17 OC

FIRST PREHEARING ORDER

On August 4, 2011, Mr. John Hutton (hereafter Appellant), filed his Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17, Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM). Accordingly, the following guidelines and rules are provided to assist the parties in an orderly resolution of this matter.

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Mont. Code Ann. Tit. 2, Chapter 4, Part 6, and ARM 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102, 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, Chapter 4, Part 4.

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

MS. JOYCE WITTENBERG
Secretary, Board of Environmental Review
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 ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
18 concerning any issue of fact or law in a contested case. In addition to observing this
19 rule, please contact the opposing party before you communicate with the
20 undersigned, even on purely procedural matters such as the need for a continuance.

21 5. SCHEDULING: The undersigned requests the parties to consult with
22 each other and to propose a schedule to the undersigned upon which they agree by
23 **September 16, 2011**. The schedule should include the following dates:

- 24 (a) for joinder/intervention of additional parties;
- 25 (b) for disclosure by each party to the other parties of: (1) the
26 name and address of each individual likely to have discoverable
27 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

1 are in the possession, custody, or control of the disclosing party
2 and that the disclosing party may use to support its claims or
3 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 31st day of August, 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. Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901**

Mr. John Hutton
11832 N. 22nd St.
Phoenix, AZ 85028

DATED: August 31, 2011 Test R



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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-18 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE REQUEST FOR HEARING BY ROBERT
W. GAMBILL, REGARDING OPENCUT
PERMIT NO. 487 ISSUED TO PLUM CREEK
TIMBERLANDS, L.P., FOR THE DORR
SKEELS SITE IN LINCOLN COUNTY,
MONTANA.

Case No. BER 2011-18 OC

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.

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

Ed Coleman, Bureau Chief
Industrial & Energy Minerals Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

BER 2011-18 DC

Date: July 24, 2011

To: Appeal to the Board of Environmental Review
PO Box 200901
Helena, Montana 59620



From: Lincoln County Bull Lake area land home owners

Regarding: Public notification for Opencut Mining Permit by Plum Creek Timberlands in Lincoln County of Montana on Highway 56 pass milepost 22, site Dorr Skeels. Legal Description, Section 20, Township 29N, Range 33W.

Why was a public hearing denied to area land owners when the application per MCA 82-4-432(9) was submitted before the June 18, 2011 deadline? No one was contacted regarding any decisions until a phone call was placed to DEQ on July 18, 2011. At which time we were informed that no Public hearing would be held and the permit was granted to Plum Creek Timberlands to this Opencut Mining Quarry that will allegedly remove 142,000 cubic yards of topsoil, overburden and gravel material during the spring and summer months until the year 2030 (19 years). We were then informed that only three of the applications were accepted out of the many submitted as they had to be residents within half a mile of the site per Montana 2009 HB678.

The matter of an opencut mining rock quarry site that was proposed by the Plum Creek Timberlands will impact our region's quality of life and the water quality of Bull Lake in a negative manner. The prevailing winds will blow dust and dirt particles onto our properties and into Bull Lake, not to mention the noise and the major and potentially dangerous problem with the big truck traffic coming and going from the opencut site. Montana State considers Highway 56 to be a scenic road, called Bull River Valley scenic drive. This opencut mining rock site will be across the road where the entrance to the Dorr Skeels State campground is located. This highway is traveled by tourist, township and area people that use the Dorr Skeels Recreation Area, access to town trips or just to view the beauty and wildlife.

We the nearby, undersigned, property owners and residents of the Bull Lake Region and general area of Lincoln County of Montana impacted by the DEQ decision, submit this letter in protest over being denied our rights to the Public Hearing.

Please address this issue and notify us of the outcome. We all believe this opencut mine quarry operation will be a significant detriment to the region.

Respectfully submitted,

Community of Bull Lake Property Owners and Nearby Residents of Lincoln County

CC: Montana Governor Brian Schweitzer, PO Box 200801, Helena, MT 59620
Senator Chas Vincent, 34 Paul Bunyan Ln, Libby, MT 59923
State Representative Jerry Bennett, 784 Taylor Rd, Libby, MT 59923
Lincoln County Commissioner Ron Downing, 1210 E Missoula Ave, Troy, MT 59935
Attorney General Steve Bullock, PO Box 201401, Helena, MT 59620
State of Montana, DNRC, 2701 Prospect Ave, Helena, MT 59601
Montana Fish, Wildlife and Parks, 385 Fish Hatchery Rd, Libby, MT 59923
US Forest Service, 1101 US Highway 2, Libby, MT 59923
Kootenai National Forest Service, 128 US Hwy 2, Troy, MT 59935
Plum Creek Timberlands, 2050 Highway 2 West, Kalispell, MT 59901
Earth Justice, 313 East Main St, Bozeman, MT 59715
Sierra Club, PO Box 1290, Bozeman, MT 59771
Western News, PO Box 1377, Libby, MT 59923
Stimson Lumber Company, 60 Port Blvd, Suite 100, Libby, MT 59923

Signature: Robert W. Gambill Date: 3 August 2011

Print Name: ROBERT W. GAMBILL

Address: 276 1120 Dr. Troy, MT 59935

Phone No: 406-295-5718


Permit #: **487****OPENCUT MINING PERMIT**Amendment #: **1**

Pursuant to the Opencut Mining Act (MCA Title 82, chapter 4, part 4), the State of Montana, Department of Environmental Quality (DEQ) is authorized to issue Opencut Mining Permits when it finds the requirements of the Act and its implementing rules (ARM Title 17, chapter 24, subchapter 2) can be carried out and will be observed. The Act further authorizes the DEQ to issue permit amendments in accordance with Sections 82-4-422[1], 82-4-432[11], 82-4-434[5], and 82-4-436, MCA.

The DEQ issues this **amended permit** to **Plum Creek Timberlands, L.P.** (Operator). The permit comprises a total of **19.1 acres** located in **Section 20, Township 29 N, Range 33 W** in **Lincoln County**, Montana, to be known as the **Dorr Skeels site**. The following provisions apply to this permit:

1. The DEQ approves the Operator's assignment and **amendment** applications and incorporates them into the permit for all purposes. The Operator is hereby authorized to conduct Opencut operations in compliance with requirements of the permit, Act, and rules.
2. If the Operator violates the permit, Act, or rules the DEQ can take enforcement action which may include the assessment of penalties as specified in MCA 82-4-441.
3. The permit does not relieve the Operator's obligation to: *a)* comply with any other applicable federal, state, county, or local statutes, regulations, or ordinances, and *b)* obtain any other permits, licenses, approvals, etc. required for any part of the operation.
4. The Operator may allow another party to conduct Opencut operations only if the Operator: *a)* retains control over that party's activities and *b)* ensures there are no violations of the permit, Act, and rules. The Operator is accountable for violations at the permit site, even if the violations result from the activities of another person.
5. The Operator shall pay the annual fee on the total amount of materials mined at the site, including materials mined by other parties. The Operator's annual progress report shall indicate the total amount of materials mined.
6. The DEQ can only enforce requirements of the permit, Act, and rules. Therefore, Operator arrangements with another party (including the Landowner) should be stated in a separate written agreement between the two parties.
7. The Operator shall conduct reclamation: *a)* in accordance with the approved plan of operation; *b)* as concurrent with operations as feasible; and *c)* within one year of termination of the right to conduct operations, or the cessation of operations. If reclamation is not completed in the approved timeframe, after 30 days written notice the DEQ may order the Operator to cease operations. If operations do not cease, the DEQ may issue an order to reclaim, institute action to enjoin further operations, and sue for damages.
8. Unless the Operator is a governmental entity, a bond has been posted to ensure the site is reclaimed. If the site is not reclaimed as and when required, the DEQ may pursue forfeiture of the bond. If the bond is cancelled or invalidated, the Operator shall provide a valid bond within 30 days. If not provided, the DEQ may suspend the permit and require the Operator to cease operations.
9. The Operator may apply to amend the permit at any time. If approved, the amendment becomes part of the permit for all purposes. The DEQ may occasionally review the permit and require revisions.
10. The Operator shall allow the DEQ and its representatives to access the site at any time to determine if Opencut operations are being carried out in compliance with the permit, Act, and rules.
11. The permit is for **19.1 acres** and the reclamation bond is for **6.3 acres**. The Operator must provide revised information and an updated bond approved by the DEQ before commencing Opencut operations on any part of the **12.8 acres** of "Non-Bonded" area included in the permit.
12. This permit is effective upon approval below by the DEQ.

APPROVED BY: STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY



Industrial & Energy Minerals Bureau

Opencut Mining Program Supervisor
Title

July 8, 2011
Date

APPLICATION FOR ASSIGNMENT OF OPENCUT MINING PERMIT

Instructions:

1. Review the document *How To Obtain And Comply With An Opencut Mining Permit* available at <http://www.deq.mt.gov/opencut/forms/HowToObtain.pdf>.
2. Review the current permit documents. These may be available at <http://searchopencutpermits.mt.gov>. If not, email to DEQOpencut@mt.gov an information request including the current operator name, site name, and permit number.
3. Submit a *Request For Pre-Application Meeting* form if site-specific guidance from a Program scientist is desired.
4. Submit the following documents to the Opencut Mining Program in Helena as one package: a) Application, b) Reclamation Bond Spreadsheet, c) Reclamation bond, d) Amendment application, if required for the permit to meet current requirements or update it for proposed new operations.
5. Ensure the site boundary is marked on the ground (see Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*).
6. All fields below must be completed. Write "none" if that is the correct response.

1. Assignee (party assuming permit)
 a. Name: Plum Creek Timberlands, L.P.
 b. Address: 2050 Hwy 2 West
 Kalispell, MT. 59901
 c. Office Phone: 406-751-2415
 d. Cell Phone: 406-261-8247
 e. Email address: steve.perrone@plumcreek.com

2. Person who will be familiar with the Plan of Operation and on-the-ground activities at the site:
 a. Name: Steve Perrone
 b. Office Phone: 406-751-2415
 c. Cell Phone: 406-261-8247
 d. Email address: steve.perrone@plumcreek.com

3. Assignor name: Plum Creek Timber Company, L.P.

4. Assignor phone number: 406-751-2415

5. Current permit number: 487

6. Current permitted acreage: 1.3

7. Site name: Door Skeels

8. County: Lincoln

9. Are the main permit area, access roads included in the permit, and Non-Bonded areas marked on the ground? (See Step 6, bullet 4 in *How To Obtain And Comply With An Opencut Mining Permit*)
☒ Yes ☐ No If No, this application is deficient and will not be processed.

ASSIGNOR CERTIFICATION

Assignor certifies the above information is true and correct. Assignor understands the permit will be transferred to the Assignee upon approval by the Department, and that the Assignee then assumes responsibility for all outstanding permit and site issues.

NOTE: The Assignor's bond will be released when this Assignment is approved by the Department.

Assignor Name (Print or Type)

Title

Signature

Date

ASSIGNEE CERTIFICATION

Assignee understands that upon approval of this Assignment by the Department:

- Assignee assumes responsibility for all outstanding permit and site issues.
- Assignee is responsible for compliance with all terms of the permit, including all provisions of the plan of operation.
- The Opencut Mining Program may inspect the site to evaluate the existing permit, and may require submittal of an Amendment application to be processed concurrent with this Assignment application.
- The *Reclamation Bond* includes the cost for the Department to reclaim all previously disturbed land within the permit area.
- Assignee confirms that it has a complete copy of the approved permit and assignment materials.
- The Assignment does not become effective until approved by the Department.

Assignee Name (Print or Type)

Title

Signature

Date

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JUN 15 2011

Reclamation Bond Spreadsheet

INSTRUCTIONS: Enter your data in the shaded boxes. See page 3 for detailed instructions.

Operator: Plum Creek Timberlands, LP

Site: Door Skeels

Prepared by: Steve Perrone- Plum Creek

Date: 6/7/2011

Comments:

Assumptions are that mining will progress south into a 20' highwall to daylight out to the current pit floor on the north, there will be no livestock allowed to graze the area, 8 inches of soil will be replaced, no recycle material will be imported to the site and no access roads are necessary.

Acreage Breakdown

Mine Area	6.0	acres
Facility Area	0.3	acres
Access Roads		acres
Partial Release Area		acres
Undisturbed	12.8	acres
Total permit area	19.1	

Highwall reduction, backfilling, soil and overburden replacement

Highwall cut/fill (describe)	linear feet	height	slope ratio	cubic yards	
Main highwall	1,650	20	3:1	9,167	total
			:1	0	9,167

Highwall backfill (describe)					
			:1	0	total
			:1	0	0

Pit backfill (describe)	acres	depth	compaction %	cubic yards	
				0	total
				0	0

mine soil and OB replacement	7	inches soil	10	inches overburden	total	17
facility soil replacement	7	inches soil			total	7
access road soil replacement	0	inches soil			total	0

ITEM	UNIT	AMOUNT	RATE	TOTAL
highwalls and backfill		9,167 cu yds	\$1 per cubic yard	\$9,167
mine area grading		6.0 acres	\$200 per acre	\$1,200
mine area ripping		6.0 acres	\$100 per acre	\$600
mine soil and OB replacement	17 inches	6.0 acres	\$135 per inch/per acre	\$13,770
facility area grading		0.3 acres	\$100 per acre	\$30
facility area ripping		0.3 acres	\$100 per inch/per acre	\$30
facility soil replacement	7 inches	0.3 acres	\$135 per inch/per acre	\$284
access road area grading		0.0 acres	\$100 per acre	\$0
access road area ripping		0.0 acres	\$100 per inch/per acre	\$0
access road soil replacement	0 inches	0.0 acres	\$135 per inch/per acre	\$0
seeding or other revegetation		6.3 acres	\$200 per acre	\$1,260
fencing		0 linear ft	\$1 per linear foot	\$0
weed control		6.3 acres	\$100 per acre	\$630
asphalt or concrete recycle pile	0 cu yds	0 miles	\$0.20 per cubic yard/mile	\$0
partially released acres		0.0 acres	\$300 per acre	\$0
undisturbed acres		12.8 acres	\$0 per acre	\$0
Planting tree seedlings		6.0 acres	\$35 per acre	\$210
Alternative (woody debris) re-vegetation (soil augmentation)		6.0 acres	\$150 per acre	\$900
mobilization	3 loads	15.0 miles	\$9.00 per round trip mile	\$405
round trip miles to the town of	Thompson falls			
DEQ administrative costs - 10% of subtotal				\$2,849
Total acreage = 19.1		Per acre rate = \$1,640.51		Total bond = \$31,334

RECEIVED

JUN 15 2011

DEQ/TEMB

✓ ju

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

3 **IN THE MATTER OF:**
4 **THE REQUEST FOR HEARING BY**
5 **ROBERT W. GAMBILL, REGARDING**
6 **OPENCUT PERMIT NO. 487 ISSUED TO**
7 **PLUM CREEK TIMBERLANDS, L.P.,**
8 **FOR THE DORR SKEELS SITE IN**
9 **LINCOLN COUNTY, MONTANA.**

CASE NO. BER 2011-18 OC

7 **FIRST PREHEARING ORDER**

9 On August 8, 2011, Robert W. Gambill (hereafter, Appellant), filed his
10 Request for Hearing to appeal Opencut Mining Permit No. 487, issued to Plum
11 Creek Timberlands, L.P. under the Opencut Mining Act, Montana Code Ann. Title
12 82, Chapter 4, Part 4 and administrative rules adopted under the Act in Title 17,
13 Chapter 24, Subchapter 2, Administrative Rules of Montana (ARM).

14 Accordingly, the following guidelines and rules are provided to assist the
15 parties in an orderly resolution of this matter.

16 1. REFERENCES: This matter is governed by the Montana
17 Administrative Procedure Act, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and ARM
18 17.4.101, by which the Board of Environmental Review (Board) has adopted the
19 Attorney General's Model Rules for contested cases, ARM 1.3.101, 1.3.102,
20 1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 4.

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

24 MS. JOYCE WITTENBERG
25 Secretary, Board of Environmental Review
26 Department of Environmental Quality
27 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 ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner
18 concerning any issue of fact or law in a contested case. In addition to observing this
19 rule, please contact the opposing party before you communicate with the
20 undersigned, even on purely procedural matters such as the need for a continuance.

21 5. SCHEDULING: The undersigned requests the parties to consult with
22 each other and to propose a schedule to the undersigned upon which they agree by
23 **September 16, 2011**. The schedule should include the following dates:

- 24 (a) for joinder/intervention of additional parties;
- 25 (b) for disclosure by each party to the other parties of: (1) the
26 name and address of each individual likely to have discoverable
27 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

1 are in the possession, custody, or control of the disclosing party
2 and that the disclosing party may use to support its claims or
3 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 31st day of August, 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
21
22
23
24
25
26
27

1 **CERTIFICATE OF SERVICE**

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

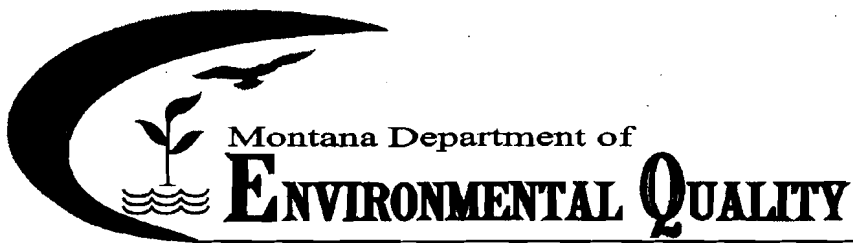
4 Ms. Joyce Wittenberg
5 Secretary, Board of Environmental Review
6 Department of Environmental Quality
7 1520 East Sixth Avenue
8 P.O. Box 200901
9 Helena, MT 59620-0901
10 **(original)**

11 Ms. Jane Amdahl
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Ed Coleman, Bureau Chief
17 Industrial & Energy Minerals Bureau
18 Department of Environmental Quality
19 P.O. Box 200901
20 Helena, MT 59620-0901

21 Mr. Robert W. Gambill
22 276 Halo Dr.
23 Troy, MT 59935

24
25
26
27
DATED: August 31, 2011 John / [Signature]



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: August 9, 2011

SUBJECT: Board of Environmental Review Case No. BER 2011-19 MFS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE APPEAL BY JERRY MCRAE OF
SECTION A. DIAMOND VALLEY SOUTH -
LAUBACH AMENDMENT PORTION OF THE
DEQ'S FINAL DECISION TO AMEND MATL,
LLP'S CERTIFICATE OF COMPLIANCE.

Case No. BER 2011-19 MFS

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

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

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

Attachments

BER 20 19 MFS

Gable, Misty

From: Hertha Lund [lund@lund-law.com]
Sent: Friday, August 05, 2011 4:46 PM
To: Opper, Richard; DEQ BER
Subject: appeal
Attachments: 080511 Appeal.pdf

Attached is an appeal of the Diamond Valley South – Laubach Amendment.

Hertha L. Lund
Lund Law, PLLC
502 S. 19th Ave, Ste. 306
Bozeman, MT 59718
406.586.6254 direct
406.586.6259 facsimile

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

LUND LAW, PLLC
Attorney At Law

Hertha L. Lund
502 South 19th, Ste. 306
Bozeman, Montana 59718
Direct: 406.586.6254
Fax: 406.586.6259
Lund@Lund-Law.com

August 5, 2011

Via e-mail to: opper@mt.gov and ber@mt.gov

and Certified Mail, RRR # 7010 0290 0000 7841 9497 Opper
7010 0290 0000 7841 9503 Board

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

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

Re: Appeal of Diamond Valley South – Laubach Amendment

Dear Director and Board of Environmental Review:

I am filing this appeal of behalf of my client, Jerry McRae who is aggrieved by the Montana Department of Environmental Quality's ("DEQ") final decision to amend Montana Alberta Tie Ltd. and MATL, LLP,'s ("MATL") Certificate of Compliance under the Major Facility Siting Act ("MFSA"). In addition to my clients not being provided enough time to participate in the public process, DEQ's amendment violates numerous federal and state laws.

A. Violations of MFSA.

MFSA in pertinent part provides:

- (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Major Facility Siting Act. It is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life

support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

...

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

Mont. Code. Ann. § 75-20-102.

Pursuant to the MFSA, the DEQ had a duty to provide citizens with the opportunity to participate in facility siting decisions. Mont. Code. Ann. § 75-20-102(5)(c). In the amendment process, DEQ provided the public a draft Environmental Assessment ("EA"). Then, in the final decision the DEQ significantly modified the EA. Therefore, the public, including McRae, were not provided the opportunity for public comment on DEQ's proposed action thus violates the MFSA.

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

- Is inconsistent with the original analysis in the first MFSA certificate;
- Is a material increase in the environmental impact;
- Results in greater damages to landowners' property;
- Is a material alteration to the findings that were the basis of the certificate;
- Negatively impacts water quality;
- Negatively impact terrestrial, avian and aquatic life;
- Negatively impact endangered species and habitats;
- Negatively affects recreation and aesthetics;
- Negatively affects limited wetlands;
- Negatively impacts private property; and,
- Is primarily for the purpose of enabling MATL to make more money rather than for the public good or to benefit the environment.

B. Violations of MEPA & NEPA.

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

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

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

MEPA is a process statute and it requires that the DEQ provide the public with the right to comment. "Because MEPA is modeled after NEPA, it is appropriate to look

to the federal interpretation of NEPA," the Montana Supreme Court stated in *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 137, 602 P.2d 147, 153. When the agency makes a final decision that does not include its environmental assessment in the Draft EA it is a violation of MEPA. *Russell County Sportsmen v. U.S. Forest Service*, 2010 WL 889870, United States District Court, D. Montana. In this case, the DEQ's final decision included environmental assessment that was not reviewed and commented on by the public. Therefore, the final decision violates MEPA.

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

- It is a material increase in the environmental impact;
- It results in greater damages to landowners' property;
- It is a material alteration to the findings that were the basis of the certificate;
- Negatively impacts water quality;
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- Negatively affects recreation and aesthetics;
- Negatively affects limited wetlands;
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- It fails to comply with the Environmental Protection Agency's comments on the original MFSA determination;
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- It would cause additional irreversible and irretrievable impacts; and,
- The main reason for the amendment is so MATL can make more money and the decision is not in the public good or to benefit the environment.

C. Violations of the Private Property Assessment Act.

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

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

It is the policy of the "state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit

unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum." MCA §75-7-102(2). The DEQ failed to follow this law.

E. Additional Violations.

The DEQ erred when it determined that the Diamond Valley South Amendment would reduce aesthetic impacts. Also, the Amendment will cause serious adverse impacts to the agricultural activities on neighboring property. And, the Amendment will cause adverse impacts to neighboring private property, including damage to aesthetics, to a house site, to seven miles of shelter belt, and to recreational hunting sites.

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

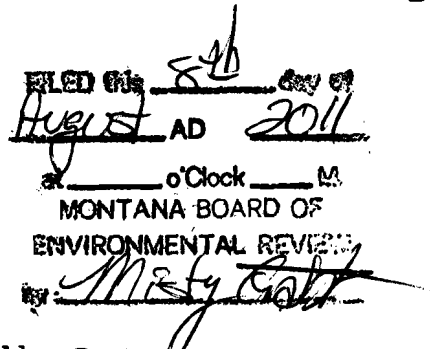
Sincerely,

A handwritten signature in black ink, appearing to read 'Hertha L. Lund', with a large, stylized flourish extending to the right.

Hertha L. Lund

LUND LAW, PLLC
Attorney At Law

Hertha L. Lund
502 South 19th, Ste. 306
Bozeman, Montana 59718
Direct: 406.586.6254
Fax: 406.586.6259
Lund@Lund-Law.com



August 5, 2011

Via e-mail to: opper@mt.gov and ber@mt.gov

and Certified Mail, RRR # 7010 0290 0000 7841 9497 Opper
7010 0290 0000 7841 9503 Board

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

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

Re: Appeal of Diamond Valley South – Laubach Amendment

Dear Director and Board of Environmental Review:

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

Sincerely,



Hertha L. Lund

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of the Application of
Montana Alberta Tie Ltd. and MATL LLP. to Amend their
Certificate of Compliance under the Major Facility Siting Act.

On June 16, 2011 Montana Alberta Tie Ltd. and MATL LLP (collectively referred to as MATL) submitted an application to amend their Certificate of Compliance issued by the Department of Environmental Quality (the Department) on October 22, 2008. MATL's proposed amendment would change the language in the Certificate and Environmental Specifications to allow it relocate the approved location in two areas

On June 28, 2011 the Department issued an Environmental Assessment analyzing the proposed amendment (Proposed Action), and a No Action alternative (the existing approved location would remain the same).

Under MATL's proposed action the certificate amendment would allow modification of the location for the line in two areas: a 1.3-mile relocation roughly 8.7 miles east of Dutton, MT (T24N, R2E, sections 6, 7, and 8) and second 1- mile relocation about 6.5 miles northeast of Valier, MT (T30N, R4W, sections 5 and 8). Specifically MATL requested:

A. Diamond Valley South – Laubach Amendment:

At the Laubachs' request, the transmission line corridor would be modified from milepost 30/2 to 31/4 as depicted in Figure 1. This proposed alignment amendment shifts the transmission line away from a planned, future home site. This proposed alignment amendment also reduces the number of drainage crossings and reduces the potential impacts to wetlands and to wildlife habitat associated with unfarmed coulees.

B. Bullhead Coulee North - Swanson Amendment:

At the Swansons' request, the transmission line corridor would be modified from milepost 84/5 to 85/3 as depicted in Figure 2. This proposed alignment amendment allows for future pivot irrigation in the southeast quarter of Section 5 in T30N, R4W, by placing the alignment on property boundaries and/or established crop edges. This proposed alignment amendment also eliminates the need for a guyed structure in a cultivated field at milepost 85/3.

In addition, in its application for the amendment, MATL requested the following conditions be imposed:

“(1) If the Department approves the amendment and an appeal is timely filed under Section 75-20-223(2), MCA, by any person, then the amendment(s) shall be void and the approved location of the transmission line corridor shall be that set forth in the Certificate as issued on October 22, 2008.

(2) If the Department approves the amendment and the United States Department of Energy has not issued on or before August 17, 2011, a determination under 10 CFR 1021.314(c)(2)(iii) that no further NEPA documentation is required on account of the requested realignment of the transmission line corridor, then the amendment(s) shall be void and the approved location of the transmission line corridor shall be that set forth in the Certificate as issued on October 22, 2008."

In its comment letter to the Draft EA, however, MATL withdrew its request for the first condition that would void the amendment if an appeal were filed.

Under the No-Action Alternative, the language and approved location in the Certificate and Environmental Specifications would remain unchanged. In this case MATL would construct the line within the corridor approved on October 22, 2008.

DEPARTMENT DECISION

Pursuant to Section 75-20-219(1), MCA, if the Department determines that the proposed change would result in a material increase in any environmental impact of the facility, or a substantial change in the location of all or a portion of the facility as set forth in the certificate. The Department is required to grant, deny or modify the amendment with conditions it considers appropriate. Under Section 75-20-219(2), MCA, if the Department determines that the proposed change in the facility would not result in a material increase in any environmental impact or a substantial change in the location of all or a portion of the facility as set forth in the certificate, the Department is required to automatically grant the amendment either as applied for or upon terms or conditions that the Department considers appropriate. Therefore, whether or not there is a material increase or a substantial change in the location of all or part of the facility, the Department has the authority to grant and condition its approval of the amendment.

When the proposed amendment is compared to the currently approved location, the Department has determined that, on balance, the proposed amendment does not result in a material increase in any environmental impact or a substantial change to a portion of the facility. In regard to the Laubach amendment, impacts to the property owned by Ron and Debbie Laubach and Adam and Barbara Dahlman would be reduced. The existing corridor generally runs adjacent to the eastern border of Laubach's property. While a portion of the corridor is on the Laubach property, the majority of the corridor and the pole placements under the approved corridor are located on the Dahlman property. The Laubachs have requested that the impacts to an existing, although vacant, house site and hunting areas that are located in the northern portion of their property be avoided by relocating the approved transmission line corridor to the western border of their property. While this relocation would result in the placement of poles in a field cultivated by the Laubachs at their request, the poles (with the possible exception of one) that would have been placed in fields cultivated by the Dahlmans would be avoided. The amendment shifts approximately one mile of the transmission line about 0.5 of a mile to the west.

The Department acknowledges, however, that the amendment will move the transmission line closer to property owned by Jerry McRae than the currently approved location of the corridor. The relocation may increase the visual impacts to an area of his property that Mr. McRae uses for hunting and to a site on which Mr. McRae has expressed intent to build a house at some point in the future.

The Bullhead Coulee North amendment would allow for future development of a center-pivot irrigation system and move the line to better follow property and field boundaries. It is endorsed by all property owners involved and does not result in a material increase in any environmental impact or a substantial change to a portion of the facility. The corridor is wide enough to avoid additional crossings of Bullhead Coulee and avoids a known wetland area. The amendment shifts approximately one mile of the transmission line about 0.2 mile to the west.

The Department selects the Proposed Action with the following conditions:

- The approved location of the facility would be changed in the Diamond Valley South area as indicated in Figure 1 and the Bullhead Coulee North area in Figure 2. The Department will update and maintain in its files a topographic map having a scale of 1:24,000 showing section lines and the revised approved locations for the facility.
- For the Diamond Valley South amendment, the following language from the Environmental Specifications (Appendix A, Land Use) would not apply: "Whenever reasonably possible, structures should be located along field boundaries." In addition, the west side and northern portion of the Diamond Valley South amendment would be entirely located on Ronald and Debbie Laubach's property in the E1/2 of Section 6 and 7 in T24N R2E, and outside the easement held by the United States Air Force (USAF) restricting above ground structures near its missile silo unless allowed by the USAF.

The Department declines to impose the condition that would void the amendment if the United States Department of Energy has not issued on or before August 17, 2011, a determination under 10 CFR 1021.314(c)(2)(iii) that no further NEPA documentation is required on account of the requested realignment of the transmission line corridor.

Conditions set forth in the Certificate of Compliance and amendment dated September 22, 2010 would remain in full force and effect.

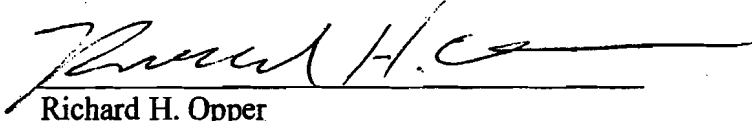
The No Action alternative was not selected because following the appeal period for the Certificate, new information has been received which indicates a landowner driven desire to further minimize the potential for unintentional impacts.

In conclusion, the Department conditionally approves MATL's application to amend its Certificate of Compliance as indicated above. All other provisions of MATL's amended

Certificate of Compliance including the Environmental Specifications and selected location remain in effect, unless they conflict with this Amendment.

A person aggrieved by the final decision of the Department on an application for amendment of a certificate may within 15 days appeal the decision to the Board of Environmental Review as provided in Section 75-20-223(2), MCA.

Dated this 22th day of July, 2011.

A handwritten signature in black ink, appearing to read "Richard H. Opper", is written over a horizontal line.

Richard H. Opper

Director

Montana Department of Environmental Quality

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of the Application of
Montana Alberta Tie Ltd. (MATL) for a
Certificate of Compliance under the
Major Facility Siting Act.

Findings Necessary for Certification
and Certification Determination

On December 1, 2005, Montana Alberta Tie Ltd. (MATL) submitted an application to the Montana Department of Environmental Quality (DEQ) under the Major Facility Siting Act (MFSA), Section 75-20-101, *et seq.*, MCA, for a Certificate of Compliance for the construction of an international 230 kilovolt (kV) alternating current merchant (private non-utility) transmission line. MATL is a private Canadian corporation owned by Tonbridge Power. Amendments to the application continued through August 6, 2008. The proposed transmission line would originate at the existing NorthWestern Energy (NWE) 230-kV Switchyard near Great Falls, Montana, and extend north to a new substation to be constructed northeast of Lethbridge, Alberta, crossing the U.S.-Canada international border north of Cut Bank, Montana. In Montana the length of the proposed line is approximately 130 miles. The proposed line would be part of the Western Interconnection (Western grid).

In addition to certification by the State of Montana under MFSA, MATL also must obtain a Presidential permit from the U.S. Department of Energy (DOE) and a right-of-way grant from the U.S. Bureau of Land Management before constructing the proposed transmission line.

In March of 2007, DEQ and DOE issued a document entitled Draft Environmental Impact Statement which served as a draft environmental impact statement for DEQ and an environmental assessment for DOE. Based on public comments received on this document, DEQ decided to prepare a supplemental environmental impact statement to further assess 1) impacts resulting from construction of the transmission line on the cost of farming in the project area; and 2) socioeconomic impacts following substantial changes to state tax law. Also based on public comments received on the March 2007 document, DOE determined that an environmental impact statement was the proper level of review. In February of 2008, the resulting state Supplemental Draft Impact Statement and federal Draft Environmental Impact Statement were jointly issued. In September of 2008, DEQ and DOE issued the Final

Environmental Impact Statement (EIS) regarding MATL's proposed transmission line. These environmental review documents provide the basis for the following findings. Chapter 2 of the EIS provides a description of the proposed project and alternatives considered by DEQ.

Findings

1. The Basis of the Need for the Facility: In order to determine that there is a need for a proposed electric transmission line, DEQ must make one of the findings listed in Administrative Rules of Montana (ARM) 17.20.1606. Pursuant to subsection (1)(a) of that administrative rule, insufficient power transfer capacity at adequate voltage levels under normal operating conditions may form a basis of need if DEQ finds that the transfer capacity of the proposed facility will be required within two years of the date the proposed facility is to be placed in service.

MATL held Open Seasons in 2005 and 2006 during which bids could be submitted for transmission rights on the proposed 600 MW transmission line. Four developers of proposed wind farms, listed on Table 4.1-1 of the Final EIS, purchased all of the transmission line's shipping capacity. Based on the purchase of the transmission capacity by the developers of proposed wind farms, DEQ finds that there is a need for the proposed transmission line.

2. Nature of the Probable Environmental Impacts: Segments of the transmission line would be constructed across cropland and the following unavoidable impacts would occur. More effort and expense would be required to farm around transmission line structures than if structures were not present. Mechanical irrigation; automated farming methods; use of farming equipment with wide toolbars for fertilizer, pesticide and herbicide application; cultivation; harvesting and crop dusting would also be affected. Areas would be taken out of production around the base of support structures and angle structures. Structures located near but not at the edge of a field may prevent equipment from reaching the edge of the field. Production costs would increase where farmers divert equipment around structures, make additional passes, take additional time to maneuver equipment, skip areas, or reseed, retreat or refertilize areas. The efficiency of some large, differentially corrected global positioning system (DGPS)-guided equipment might be adversely affected due to line interference with satellite communications.

Some rangeland and pastureland vegetation would be unavoidably damaged or removed by the construction of access roads and structures and at construction staging areas. Ground

disturbance and increased vehicular traffic during line construction and maintenance could unavoidably increase the risk of noxious weed spread.

Construction activities such as site clearing, site grading, and development of access roads and staging areas would unavoidably result in a temporary loss of vegetation and wildlife habitat. While a portion of the disturbed areas would be reclaimed upon completion of construction activities, permanent habitat loss would occur within the footprints of structures and access roads. Noise, fugitive dust, and activities associated with site clearing and grading, installation of support structures, construction of access roads and support facilities, and associated equipment could unavoidably disturb and displace wildlife within and adjacent to impact areas. During operation of the transmission line, direct unavoidable impacts to avian species could occur as a result of collisions with the proposed transmission line. MATL would apply *Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006* developed by the Edison Electric Institute, the Avian Power Line Interaction Committee, and the California Energy Commission (2006), reducing the potential for avian electrocution. MATL would install line marking devices at stream and wetland crossings to reduce the potential for birds to collide with the overhead ground wire or conductors.

Construction of the transmission line would have varying degrees of unavoidable long-term visual impacts, depending in large part on the viewer's proximity to the transmission line. Structures within the immediate foreground and foreground (1/2 mile) of residences, immediate foreground of recreation sites, within areas of Class B scenic quality as described in the EIS, or within the immediate foreground or foreground of primary use travel corridors would result in a major impact. Structures within the foreground of recreation sites and within the middleground (1/2 to 1 mile) of residences and primary use corridors would result in a minor impact. Views of the transmission line within the middleground and background of recreation sites, within the background of primary use travel corridors, within the background of residences or within the middleground and background of secondary use travel corridors would result in a very minor impact.

Construction of tall buildings or structures or use of tall equipment or other objects within the right-of-way that may interfere with safe operation of the transmission line would be unavoidably restricted. Minimum transmission line clearances are specified in the National Electrical Safety Code.

The probable impacts to all resources (including land use, geology, soils, safety, hazardous material management, electric and magnetic fields, water, wetlands, vegetation, wildlife, fish, special status species, air quality, noise, socioeconomics, paleontological resources, cultural resources, transportation, utilities, and visual resources) are described in Section 3.1 through 3.17 and summarized in Table 3.18-1 of the Final EIS.

3. Minimization of Adverse Environmental Impacts: Construction and operation of the transmission line as proposed with modifications made by DEQ minimizes adverse environmental impacts considering the state of available technology and the nature and economics of the various alternatives. Measures proposed by MATL to minimize adverse environmental impacts are set forth in Attachment 1 that is incorporated by reference as enforceable provisions of this Certificate of Compliance. Environmental specifications developed by DEQ to minimize adverse environmental impacts are set forth in Attachment 2 that is incorporated by reference as enforceable provisions of this Certificate of Compliance. Should there be a conflict between the measures developed by MATL and the environmental specifications developed by DEQ, the more environmentally protective provision would apply.

A.) Reasonable alternatives were considered by DEQ. These alternatives are described in the EIS. Three alternatives were considered in detail along with other alternatives that were not considered reasonable and dropped from detailed consideration. (See Section 2.8 of the EIS). In addition DEQ considered local routing options for line location. (See Section 2.6 of the EIS). Under any of the action alternatives MATL would provide compensation for the impact to farmers by making pole payments for each structure and annual payments to offset the increased cost of farming around the structures.

DEQ did not select Alternative 3 because it crosses more crop and irrigated land diagonally than Alternatives 2 and 4 and Alternative 3 had the lowest general public acceptance based on comments received throughout the review process. In general, Alternative 3, although paralleling an existing 115-kV line and providing the shortest route between Great Falls and Cut Bank, resulted in the greatest estimated costs to farmers because of the estimated high number of H-frame structures that would be located in the interior of cultivated fields. Although Alternative 3 north of Cut Bank is the shortest route, it is not preferred because it does not join with Canada's approved route at the U.S.-Canada border. South of Cut Bank, Alternative 3 was

developed to closely parallel an existing 115-kV line that was built in the 1960s prior to passage of MFSA.

In comparing Alternatives 2 and 4, DEQ considered costs to landowners including increased costs to farmers, MATL's proposed landowner compensation package, and costs to MATL. The additional cost to MATL of constructing Alternative 4 over Alternative 2 was found to be greater than the additional cost to farmers of Alternative 2 over Alternative 4. The local routing options do not add significantly to MATL's overall costs. The selected location consists of portions of Alternatives 2 and 4 as modified by local routing options and is indicated on Attachment 3. The selected location minimizes the net present value of costs to MATL and to the public after mitigation measures are considered.

Alternative 1, the No Action Alternative, did not meet the need for the project. Other available alternatives including energy conservation, alternative transmission technologies, or alternative levels of reliability also did not meet the need for the project.

B.) Environmental impacts that could not be quantified in monetary terms were considered. These impacts were not significantly adverse enough to alter DEQ's determination that the selected location and design for the transmission line minimizes the net present value of costs among alternatives.

C.) The costs associated with the mitigation measures included in the environmental specifications for the project (Attachment 2) were considered in DEQ's determination that the selected location and design for the transmission line minimize the net present value of costs among alternatives.

D.) MATL is required to construct the transmission line in the location depicted in Attachment 3. The selected location represents the best balance of preferred location criteria listed in Circular MFSA-2, including avoidance of impacts to farmland, cost, avoidance of houses, public acceptance, paralleling existing corridors, and use of public lands.

Beginning at the Great Falls Switchyard at Milepost 0, the selected location includes a 27.3 mile segment of Alternative 4 because it better avoids cultivated and CRP land than Alternative 2. Compared to Alternative 2, this portion of Alternative 4 crosses 5.79 fewer miles of farmland, crosses 7.73 fewer miles of farmland diagonally, and has fewer nearby residences. Overall, this segment is 0.39 miles longer than the corresponding Alternative 2 segment and crosses 2.46 miles less state land. Much of this line segment parallels the Western

Area Power Administration's 230-kV line that was sited during the 1980s to avoid cropland where possible.

From Milepost 27.3 to Milepost 31, DEQ's selected location coincides with Alternative 2. From Milepost 31, DEQ's selected location follows the Diamond Valley South Local Routing Option as far as Milepost 39.2. While the Diamond Valley South option is 1.7 miles longer than the corresponding segment of Alternative 2, it better avoids diagonal crossings of farmland and houses. Compared to the Diamond Valley North Local Routing Option, it parallels fewer miles of field roads, better avoids a grain bin, and has two fewer crossings of NorthWestern Energy's 115-kV line.

At the crossing of the Teton River (Milepost 39.2), DEQ's selected location incorporates the Teton River Local Routing Option because this crossing would remain higher above the river channel than Alternative 2, avoiding potential flood inundation, and largely remains along field edges north of the river.

Between Milepost 48.1 and Milepost 75.5, Alternative 4 is not selected. Compared to Alternative 2 as modified by Local Routing Options, this portion of Alternative 4 is 5.33 miles longer, resulting in additional environmental impacts and construction and maintenance costs. This portion of Alternative 4 also crosses 1.05 miles of additional farmland. Although this portion of Alternative 4 crosses 11.09 fewer miles of farmland diagonally than under Alternative 2 as modified by the Local Routing Options, MATL has committed to working with landowners to place interior structures along field strip boundaries where the landowner farms in strips that are narrower than a full quarter section. About half of this portion of Alternative 2 could be located on range or on field strip boundaries. Finally, DEQ has modified Alternative 2 to require the same use of monopoles wherever cropland and lands enrolled in CRP are crossed as would have been required under Alternative 4.

From the Teton River, DEQ's selected location coincides with Alternative 2 as far as Milepost 56.2. Here, the selected location uses the Southeast of Conrad Local Routing Option that locates the line on rangeland and field boundaries better than Alternative 2. From Milepost 59.2 to Milepost 69.3 the selected location coincides with Alternative 2. Between Mileposts 69.3 and 72.2, the Northwest of Conrad Local Routing Option was selected because it better avoids crossing farmland diagonally by using the range and pasture land available in the area.

From Milepost 72.2 to approximately Milepost 74 (the beginning of the Belgian Hill Local Routing Option), the selected location coincides with Alternative 2. From Milepost 74 to Milepost 76.8 the Belgian Hill Local Routing Option was selected to avoid close proximity to several houses.

From Milepost 76.8 to Milepost 79.5, DEQ's selected location coincides with Alternative 2. From Milepost 79.5 to Milepost 81.2, the Bullhead Coulee South Local Routing Option was selected because, at the request of an affected landowner, it would allow construction of a wind turbine that would otherwise be precluded by Alternative 2.

From Milepost 81.2 to Milepost 85.5, the selected location coincides with Alternative 2. From Milepost 85.5 to Milepost 87.2, the Bullhead Coulee North Local Routing Option was selected to reduce the amount of cropland crossed diagonally. From Milepost 87.2 to Milepost 100.5, the selected location coincides with Alternative 2. The preferred alternative would cross BLM-owned land between Milepost 93.4 and Milepost 94.0. Beginning at Milepost 100.5, the selected location uses the South of Cut Bank Local Routing Option because it would locate the line on field boundaries and better avoid a house without a large increase in line length. North of Milepost 103.1, the selected location coincides with Alternatives 2 and 4 to join with Canada's approved route at the border crossing.

MATL shall construct the transmission line using monopoles wherever the transmission line crosses cropland and land enrolled in the Conservation Reserve Program at the time of construction. Currently, approximately 83.6 miles of the 133.5 miles of line in Montana cross cropland and land enrolled in the Conservation Reserve Program.

E.) The location of the transmission line selected by DEQ does not cross any of the following areas: national wilderness areas, national primitive areas, national wildlife refuges and ranges, state wildlife management areas and wildlife habitat protection areas, national parks and monuments, state parks, national recreation areas, corridors of rivers in the National Wild and Scenic Rivers system and rivers eligible for inclusion in the system, roadless areas of 5,000 acres or greater in size managed by federal or state agencies to retain their roadless character, and specially managed buffer areas surrounding national wilderness areas and national primitive areas. The transmission line would cross isolated areas with rugged topography on slopes greater than 30 percent. Vegetation may be destroyed during the construction process and soil may be exposed to erosion on these steep slopes. MATL has proposed a plan to control erosion

during project construction and would be required to implement a Storm Water Pollution Prevention Plan under Montana water quality statutes. MATL shall submit to DEQ the bond(s) identified in the environmental specifications to ensure that areas disturbed during construction are reclaimed and revegetated.

F.) Reasonable alternative locations for the transmission line were considered in selecting the final location.

G.) The final location for the transmission line will result in less cumulative adverse environmental impact and economic cost than siting the facility in any other reasonable location, based on identification of any probable significant adverse environmental impacts, identification of reasonable mitigation for these significant adverse environmental impacts, and adoption of acceptable mitigation and monitoring plans set forth in the environmental specifications included as Attachment 2.

The selected location does not cross 1) state or federal waterfowl production areas; 2) National Natural Landmarks, Natural Areas, Research Natural Areas, Areas of Critical Environmental Concern, special interest areas, Research Botanical Areas, Outstanding Natural Areas designated by the National Park Service, the USDA Forest Service, the USDI Bureau of Land Management (BLM), or the State of Montana; 3) designated critical habitat for state or federally listed threatened or endangered species; 4) habitats occupied at least seasonally by resident state or federally listed threatened and endangered species; 5) municipal watersheds; 6) streams and rivers listed in Montana Fish, Wildlife and Parks' (FWP) river database as being Class I or II streams or rivers; 7) major elk summer security areas; 8) habitats occupied at least seasonally by bighorn sheep and mountain goats; 9) surface supplies of potable water; and 10) any undeveloped land or water areas that contain known natural features of unusual scientific, educational or recreational significance; 11) areas with geologic units or formations that show a high probability of including significant paleontological resources; 12) areas where the presence of the facility would be incompatible with published visual management plans or regulations designed to protect viewsheds adopted by federal, state, or local governments; 13) sage grouse breeding or wintering areas; or 14) winter ranges for elk, moose, mountain goat and bighorn sheep.

The transmission line would cross prehistoric sites and sites nominated to or designated by the State Historic Preservation Office; or cultural sites for which there has been no

determination of eligibility. MATL is required to conduct a class III cultural resources survey any unsurveyed portions of the line with a high potential for discovery of new cultural resource sites. For all the cultural sites described, MATL is required to construct the line to avoid disturbing the cultural sites by bypassing or spanning over sensitive cultural features. MATL shall also design and construct access roads and pole locations to avoid all identified features at cultural resource sites. For cultural sites identified as 24PN24, 24PN148 and 24PN150 in the EIS and similar sites that may be discovered during survey, MATL shall have an archeologist onsite to monitor line construction. These measures avoid significant adverse effects to cultural resources.

The transmission line would cross streams listed by DEQ as not attaining designated beneficial uses of water (Lake Creek, Teton River, Pondera Coulee, Dry Fork of the Marias River, Marias River, and Old Maids Coulee). Minor short-term adverse impacts to surface water quality could occur by temporarily increasing sources of sediment from the initiation of construction to successful revegetation of the disturbed areas. This impact would be mitigated by avoiding disturbance of water and riparian areas and by implementing a Storm Water Pollution Prevention Plan to reduce sediment transport. No construction would be allowed within 50 feet of a stream or wetland. MATL is required to submit a bond to ensure that areas disturbed during construction are reclaimed.

The transmission line would cross very limited areas of highly erodible soils. MATL would be required to implement a Storm Water Pollution Prevention Plan and to submit a bond to ensure that disturbed areas are reclaimed.

The selected location would cross areas that are used by deer and pronghorn during the winter. Pronghorn and mule deer does with fawns could be displaced by activities during late spring and early summer, but disturbance within a given portion of the line would be temporary, and animals could easily use adjacent habitat during disturbance periods. In the event that activities would occur in the winter, animals could be disturbed and potentially displaced; however, disturbance in a specific area would be temporary. The selected location would cross mule deer winter range, and there would be some permanent loss of habitat as a result of structures and access roads.

The line would cross a portion of one standing water body greater than 20 acres in size, Hay Lake. The area would be spanned and no construction would be allowed within 50 feet of the wetland.

The selected location would cross or be located near sharp-tailed grouse breeding and wintering areas. Impacts on sharp-tailed grouse leks could result from disturbance during the breeding season in April and early May, and to nesting hens during May and early June. However, based on MATL's commitment to curtail construction in any sharp-tailed grouse nesting habitat during the nesting season and to use raptor perch deterrents as appropriate, few impacts to breeding sharp-tailed grouse would be expected. All support structures that would cross within a 2-mile wide buffer area around the documented leks would be fitted with raptor perch deterrents to reduce predation.

The selected location does not cross areas with high waterfowl population densities including prime waterfowl habitat identified through consultation with FWP and other areas identified by FWP or the US Fish and Wildlife Service as waterfowl concentration areas or low-level feeding flight paths. However, DEQ identified areas of waterfowl concentration at several wetlands and ephemeral lakes near the proposed line. Avian collisions would be reduced in these areas because line marking devices would be installed within ¼ mile of these wetlands and lakes. Annual mortality surveys would be conducted within these areas to ensure that the line marking devices are functioning properly. In addition, to ensure that adverse effects would be avoided, MATL would complete an Avian Protection Plan that would outline the elements of the MATL project that would reduce avian risks and mortality.

The selected location is located near sites that have or may have religious or heritage significance and value to Native Americans. In these areas, MATL would include Blackfeet tribal monitors during cultural surveys and establish a Memorandum of Understanding that includes the Blackfeet Tribal Historic Preservation Office. These measures would help avoid significant adverse effects to Traditional Cultural Properties.

4. Noise limits: MATL shall construct and operate the transmission line so that average annual noise levels of the transmission line, as expressed by an A-weighted day-night scale (L_{DN}), do not exceed 50 decibels at the edge of the right-of-way in residential and subdivided areas unless the affected landowner waives this condition.

5. Radio and television interference: MATL shall investigate and correct unacceptable interference with stationary radio, television, and other communication systems such as GPS and Differential GPS as identified in Section 4.3 of Environmental Specifications for the project.

6. National Electrical Safety Code compliance: MATL shall adhere to the national electrical safety code regarding transmission lines.

7. Electric field strength limits: MATL shall construct and operate the transmission line so that the electrical field at the edge of the right-of-way does not exceed one kV per meter measured one meter above the ground in residential or subdivided areas unless the affected landowner waives this consideration. MATL shall construct and operate the transmission line so that the electric field at road crossings under the facility does not exceed seven kV per meter measured one meter above the ground.

8. Federal Aviation Administration standards: MATL shall consult with the Federal Aviation Administration (FAA) after final design is completed and comply with the identification and marking standards established by the FAA.

9. Undergrounding, regional plans, and reliability: None of the transmission line will be located underground. The transmission line is consistent with regional plans for expansion of the Western transmission system. The transmission line will serve the interest of utility system economy and reliability.

10. Conformance with state and local laws and regulations: Construction of the transmission line in accordance with the Findings set forth in this Certificate of compliance conforms to applicable state and local laws and regulations.

11. Public Interest, Convenience and Necessity: In order for DEQ to find that the proposed transmission line will serve the public interest, convenience and necessity, the Department must find and determine that the discounted net present value of benefits is greater for the transmission line than for any other reasonable alternative. The proposed transmission line would be built to meet the need for additional transfer capacity and transmission access for new wind power generators. The alternative would be that the transmission line is not constructed, potentially delaying the development of wind power generation in the area. Under this scenario, MATL would not accrue profits from the line and potential profits to the developers of wind generation facilities would be delayed. Also, benefits to local residents, the State of Montana and to the Western Grid from the line would not occur. As previously

indicated, the selected location for the transmission line minimizes the net present value of costs. Building the line as described in this Certificate of Compliance maximizes the net present value of benefits of the alternatives examined in the EIS.

The benefits to the public and the State of Montana outweigh the costs to landowners from the line. For example, using the highest estimated 2008 farming costs, farming costs (the main cost to landowners from this line) would be just over \$210,000 per year after compensation. Tax revenue benefits alone would be about \$730,000 per year to the State of Montana. This does not include other benefits discussed below. Other environmental costs that cannot easily be assigned a monetary value, including visual impacts, loss of wildlife habitat, soil erosion, and cultural resource impacts are not sufficiently large to outweigh these benefits.

Benefits to the applicant would be the monetary profit from operating the transmission line. The amount of the expected profit is unknown. Benefits to the State of Montana, and to the public include local tax revenues to counties in which the line is located, state tax revenues from the line, a short-term boost to local economies from construction, access to the grid for future electricity generation, and potentially easier access to new spot electricity markets within which Montana utilities could buy and sell electricity. The Western grid may also operate more efficiently.

Estimated property tax revenue from the line is estimated to be approximately \$730,000. Estimated jobs created from construction of the line would be 55 employees over a six-month period, resulting in about \$4.6 million in income.

Direct economic impacts due to the proposed transmission line would be minimal at a state level. Construction benefits would be short term. Line maintenance employment benefits and tax benefits would be long term but likely small at both the county and state level except for Pondera County which could earn up to \$240,000 per year in tax revenue. Farmers would experience greater costs from loss of farming acreage and increased difficulty with farming due to structure locations in fields. Some of these costs would be mitigated by payments from MATL. Payments under right-of-way agreements and annual payments made to landowners to compensate for presence of the transmission line (including the additional costs to farm around the transmission line structures) are negotiated between the landowners and MATL. As indicated in the EIS, farmers affected by the transmission line taken as a whole would be expected to come out roughly even based on MATL's proposed compensation and estimated

2007 prices for farming inputs and crop prices. Using estimated 2008 prices, which represent historically high prices, farmers as a whole may not be fully compensated for their additional costs.

In addition, the transmission line is likely to result in indirect benefits and costs due to increased wind farm construction and operation in the area. Construction of wind farms that would utilize the proposed transmission line's capacity would create approximately 530 to 1400 short term jobs for Montanans, with construction workers earning \$20-\$53 million. Over 20 years of operation of these wind farms, Montanans would earn approximately \$2.3-\$6.0 million annually from plant operations and maintenance expenditures. The wind projects would generate another \$2.3-\$8.0 million per year in county revenue from property taxes along with \$1.0-\$2.7 million per year in payments to local landowners who have turbines on their land, bringing the annual operational total economic benefit from wind farms in the area to about \$6-\$16 million. Other indirect jobs related to the purchases of goods and services would also be created or supported. Potential environmental costs include visual impacts, habitat fragmentation, avian mortality, and land use changes due to the operation of wind farms. These environmental costs cannot reasonably be quantified in monetary terms.

Adverse affects to public health welfare and safety will be reduced by the line conforming to the requirements of the National Electrical Safety Code. MATL has committed to raising the minimum conductor height over farmland to 27.2 feet to further reduce risks of accidental shocks and electrocutions. The line would conform to the requirements of the National Electrical Safety Code and DEQ standards for electric field strength in residential or subdivided areas and at road crossings. Sensitive receptors such as residences, schools, and hospitals would be located at distances sufficient that even the most restrictive suggested standards for magnetic fields would be met under normal operating conditions. Structure designs would be used that discourage pole climbing by members of the public. The transmission line would present an obstacle to crop dusters working near the line.

Construction and operation of the transmission line as approved minimizes adverse impacts to soil, water, and aquatic resources.

12. Air and water quality decisions, opinions, orders, and certifications: Construction and operation of the transmission line does not require any air or water quality decision, opinion,

13. Use of public lands: DEQ evaluated the use of public lands for location of the transmission line. MATL's proposed alignment was modified to make better use of land under the jurisdiction of the BLM north of the Marias River. State lands were considered and used where the use of State lands resulted in less environmental impact than the use of private lands. However, in some cases, the transmission line was located on private land rather than State land to reduce impacts to farming and increase distance from residences.

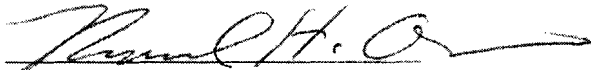
14. Time limits: Unless extended pursuant to Section 75-20-303, MCA, construction of the transmission line must be completed within ten years of the date of this Certificate.

15. Monitoring expenses: Pursuant to Section 75-20-402, MCA, MATL shall pay all expenses related to the monitoring plan contained in the environmental specifications.

Certificate of Compliance

Pursuant to Section 75-20-301, MCA, DEQ certifies that the design, location, construction, operation, maintenance and decommissioning of the MATL transmission line in conformance with the provisions set forth herein complies with the requirements of the Major Facility Siting Act. All terms, conditions and modifications set forth above are enforceable provisions of the certificate.

Dated this 22nd day of October, 2008.



Richard H. Oppen

Director

Montana Department of Environmental Quality

AGREEMENT TO COMPLY

We, the undersigned Applicants for a Certificate of Compliance for the Montana Alberta Tie 230-kV Transmission Line agree, as a condition subsequent to the issuance of the Certificate, to comply fully and completely with the requirements of the Major Facility Siting Act set forth in Section 75-20-101, *et. seq.*, M.C.A., and the conditions of the Certificate of Compliance.

MONTANA ALBERTA TIE, LTD

BY Jelan van der Merwe

POSITION Director

DATED October 22, 2008.

Linda M. Deola
John M. Morrison
Jonathan R. Motl
Frederick F. Sherwood
David K. W. Wilson, Jr.

info@mmslawgroup.com



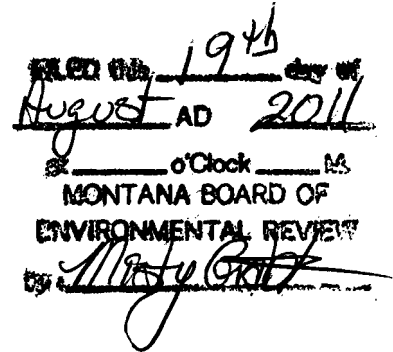
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August 18, 2011



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

Re: *In the Matter of the appeal by Jerry McRae*
Case No. BER 2011-19 MFS

Dear Ms. Wittenberg:

Enclosed for filing in the above-named matter, please find PERMITTEE MATL'S NOTICE OF ELECTION TO PROCEED TO DISTRICT COURT PURSUANT TO § 75-20-223(1)(c), MCA. Please advise me of your filing this document by date-stamping the enclosed copy and returning it to me in the envelope provided.

Should you have any questions, please do not hesitate to call.

Sincerely,

Jami Welch
Assistant to David K. W. Wilson

Enc.

David K. W. Wilson, Jr.
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kwilson@mmslawgroup.com
Attorney for Montana Alberta Tie, Ltd. and
MATL, LLP

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the appeal by Jerry McRae of
Section A. Diamond Valley South – Laubach
Amendment portion of the DEQ’s final decision
to amend Montana Alberta Tie, Ltd. and MATL,
LLP’s Certificate of Compliance

CASE NO. BER 2011-19 MFS


*PERMITTEE MATL’S NOTICE OF
ELECTION TO PROCEED TO
DISTRICT COURT PURSUANT TO § 75-
20-223 (1) (c) MCA.*

On August 5, 2011, Appellant Jerry McRae filed an administrative appeal of the
Section A Diamond Valley South - Laubach Amendment portion of the DEQ’s final
decision to amend Montana Alberta Tie, Ltd and MATL, LLP’s (MATL’s) Certificate of
Compliance. MATL is the “applicant or permittee”, and as such, hereby gives Notice, to
the Board and to the parties, pursuant to § 75-20-223 (1) (c), MCA that it elects to have
this matter submitted directly to district court for judicial review of the agency decision.

RESPECTFULLY SUBMITTED this 18th day of August, 2011.

////

MORRISON, MOTL AND SHERWOOD

By 
David K.W. Wilson, Jr.
Attorneys for MATL

CERTIFICATE OF SERVICE

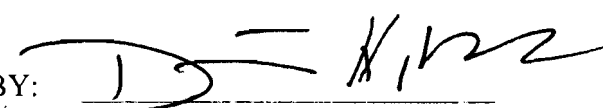
The undersigned hereby certifies that on this 18th day of August, 2011, a true and correct copy of the foregoing *Notice of Election* was served via first-class mail, postage prepaid, addressed as follows:

Ms. Joyce Wittenberg, Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620
Original

Hertha L. Lund
Lund Law, PLLP
502 S. 19th, Suite 102
Bozeman, MT 59718

Mr. Ed Hayes
DEQ
P.O. Box 200901
Helena, MT 5920

Ms. Katherine Orr
Agency Legal Services
1712 Ninth Ave.
P.O. Box 201440
Helena, MT 59620

BY: 



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: August 24, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-20 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:

VIOLATIONS OF THE WATER QUALITY ACT
BY SK CONSTRUCTION, INC. ON US
HIGHWAY 2 NEAR BAINVILLE, ROOSEVELT
COUNTY, MONTANA. [MTR103291,
FID #2035, DOCKET NO. WQ-11-16]

Case No. BER 2011-20 WQ

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2035, Docket No. WQ-11-16).

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

KAKUK LAW OFFICES, P.C.
P.O. Box 624
WHITE SULPHUR SPRINGS, MT 59645

FILED ON 24th day of
August AD 2011
at _____ o'clock _____
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
Misty Galt

MICHAEL S. KAKUK, ATTY.
LICENSED IN MONTANA,
WISCONSIN (INACTIVE),
AND U.S. PATENT BAR

PHONE: 406-594-0515
EMAIL: INFO@KAKUK.COM
WEB: WWW.KAKUK.COM

AUGUST 22, 2011

BOARD SECRETARY
MONTANA BOARD OF ENVIRONMENTAL REVIEW
P.O. Box 200901
HELENA, MT 59620-0901

RE: DOCKET NUMBER WQA-11-16

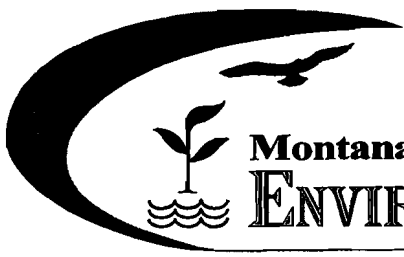
I have been asked by SK Construction Inc. to represent their interests in the above captioned matter. I request that this letter serve as my notice of appearance, notice of appeal, and request for a hearing. A copy of this letter has been forwarded to the DEQ Enforcement Division for their records.

Sincerely,



Michael S. Kakuk
Attorney

Cc: John Arrigo, DEQ
Client File
Client



**Montana Department of
ENVIRONMENTAL QUALITY**

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

August 1, 2011

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

Kelly Redmond, Vice President
SK Construction, Inc.
P.O. Box 18276
Missoula, MT 59808

**CERTIFIED MAIL #7009 2820 0000 5734 9527
Return Receipt Requested**

RE: Notice of Violation and Administrative Compliance and Penalty Order, Docket No. WQA-11-16, for Violations of the Montana Water Quality Act at SK Construction - Bainville East and West construction site, Roosevelt County, Montana (Permit #MTR103291, FID #2035)

Dear Mr. Redmond:

The Department of Environmental Quality (Department) is issuing SK Construction, Inc. (SK) the enclosed Notice of Violation and Administrative Compliance and Penalty Order (Order) to address violations of the Montana Water Quality Act that occurred at the SK Construction - Bainville East and West construction site (Site). The Department has calculated and the enclosed Order assesses an administrative penalty for the violations. Please refer to the enclosed Penalty Calculation Worksheet and the Order for an explanation of the penalty.

The Order requires SK to pay the assessed penalty and complete corrective actions in order to return the Site 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 75-5-611(4), MCA, SK is entitled to a hearing before the Board of Environmental Review (Board) 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,

Daniel R. Kenney
Environmental Enforcement Specialist
Enforcement Division
(406) 444-1453; fax (406) 444-1923
E-mail: dkenney@mt.gov

Enclosures

cc w/Order: Jim Madden, DEQ Legal
Jenny Chambers/Kari Smith, DEQ Water Protection Bureau
Julie DalSoglio, EPA-Montana (via email)
Roosevelt County Sanitarian (via email)

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY
ACT BY SK CONSTRUCTION, INC. ON US
HIGHWAY 2 NEAR BAINVILLE,
ROOSEVELT COUNTY, MONTANA.
(MTR103291, FID #2035)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. WQ-11-16

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 SK Construction, Inc. (Respondent) of the following Findings of Fact and Conclusions of Law with respect to violations of the 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. Section 75-5-103(29)(a), MCA, defines "state waters" as a body of water, irrigation system, or drainage system, either surface or underground.
5. ARM 17.30.1105(1)(a) provides that any person who discharges or proposes to discharge storm water from a point source must obtain coverage under a Montana Pollutant Discharge Elimination System (MPDES) general permit or an MPDES permit for discharges associated with construction activities. A person who discharges or proposes to discharge storm

1 | water associated with a construction activity shall submit to the Department a notice of intent
2 | (NOI) pursuant to Section 75-5-401(1)(c), MCA, and ARM 7.30.1115.

3 | 6. Section 75-5-605(1)(b), MCA, states that it is unlawful for any person to violate
4 | any provision set forth in a permit or stipulation, including but not limited to limitations and
5 | conditions contained in the permit.

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

8 | 8. On February 11, 2009, Respondent submitted an NOI for coverage under the
9 | MPDES general permit. The NOI listed Shotgun Creek, Little Muddy Creek and Red Bank
10 | Creek (the Site) located in Roosevelt County as the receiving surface waters. Shotgun Creek,
11 | Little Muddy Creek and Red Bank Creek are considered state waters pursuant to Section 75-5-
12 | 103(29)(a), MCA. In addition to the NOI, Respondent submitted a Storm Water Pollution
13 | Prevention Plan (SWPPP) form to the Department.

14 | 9. On February 19, 2009, the Department issued to Respondent Authorization
15 | Number MTR103291 to discharge storm water under the General Permit for Storm Water
16 | Discharge Associated with Construction Activity (Permit). Coverage under the Permit remains
17 | in effect until Respondent submits a Notice of Termination (NOT) certifying that final
18 | stabilization has been achieved at the Site and that all applicable fees have been paid.

19 | 10. Pursuant to Part VI. 14. of the Permit, "significant sediment means sediment,
20 | solids, or other wastes discharged from construction site, or a facility or activity regulated under
21 | the General Permit which exceeds 1.0 cubic foot in volume in any area of 100 square feet that
22 | may enter state surface water or a drainage that leads directly to state surface water."

23 | //

24 | //

1 11. The Department conducted a compliance evaluation inspection (CEI) at the Site
2 on September 1, 2010 (September 2010 CEI) and documented "that significant sediment, as
3 defined in the Permit, had left the site and entered state waters."

4 12. On October 22, 2010, the Department sent Respondent a letter (October 2010
5 Violation Letter) informing it of the results of the September 2010 CEI and that it was in
6 violation of "section IV.H, which requires BMPs to minimize or prevent a discharge of
7 significant sediment to state waters." The Department further informed Respondent that the
8 Permit violation was also a violation of Section 75-5-605(1)(b), MCA, and was considered to be
9 a significant violation and would be subject to a formal enforcement action. The Department
10 also informed Respondent that in order to return to compliance it must immediately complete
11 "appropriate corrective actions."

12 13. Respondent violated Part IV.H. of the Permit and ARM 17.30.1342(1), and
13 therefore violated Section 75-5-605(1)(b), MCA, by failing to prevent the discharge of
14 significant sediment to Little Muddy Creek and Red Bank Creek.

15 ***Administrative penalty***

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

19 15. The Department has calculated an administrative penalty in the amount of \$16,800
20 for the violation alleged in Paragraph 13 . See Section 75-1-1001, MCA, and ARM 17.4.301
21 through 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by 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 16. Within 60 days from receipt of this Order, Respondent shall install, replace and/or
6 repair all BMPs necessary to prevent the discharge of significant sediment and other pollutants to
7 state waters, as required by the Permit.

8 17. Within 90 days from receipt of this Order, Respondent shall submit a written
9 report describing the actions taken to install, replace and/or repair BMPs at the Site and to
10 remove and dispose of the significant sediment that was discharged to state waters. The report
11 shall include photographic documentation of the sediment cleanup and be sent to the address
12 listed in Paragraph 19.

13 18. Respondent is hereby assessed an administrative penalty in the amount of \$16,800
14 for the violation cited in Paragraph 13.

15 19. Within 60 days from receipt of this Order, Respondent shall pay to the
16 Department the \$16,800 administrative penalty. The penalty must be paid by check or money
17 order, made payable to the "Montana Department of Environmental Quality," and sent to:

18 John L. Arrigo, Administrator
19 Enforcement Division
20 Department of Environmental Quality
21 1520 East Sixth Avenue
22 P.O. Box 200901
23 Helena, MT 59620-0901
24

22 20. Failure to take the required corrective actions and pay the assessed penalty by the
23 specified deadlines, as ordered herein, constitutes a violation of Title 75, chapter 5, part 6, MCA,

1 and may result in the Department seeking a court order assessing civil penalties of up to \$25,000
2 per day of violation pursuant to Section 75-5-631, MCA.

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

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

9 IV. NOTICE OF APPEAL RIGHTS

10 23. Respondent may appeal this Order under Section 75-5-611(4), MCA, by filing a
11 written request for a hearing before the Montana Board of Environmental Review no later than
12 30 days after service of this Order. Any request for a hearing must be in writing and sent to:

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

16 24. Hearings are conducted as provided in the Montana Administrative Procedure
17 Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to
18 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings
19 prior to the hearing may include formal discovery procedures, including interrogatories, requests
20 for production of documents, and depositions. Because Respondent is not an individual,
21 Respondent must be represented by an attorney in any contested case hearing. *See ARM*
22 *1.3.231(2)* and Section 37-61-201, MCA.

23 25. If a hearing is not requested within 30 days after service of this Order, the
24 opportunity for a contested case appeal is waived.

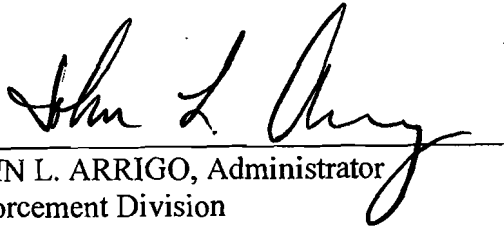
1 26. Service by mail is complete on the date of mailing.

2 27. This Order becomes effective upon signature of the Director of the Department or
3 his designee.

4 IT IS SO ORDERED:

5 DATED this 1st day of August, 2011.

6 STATE OF MONTANA
7 DEPARTMENT OF ENVIRONMENTAL QUALITY

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

Responsible Party Name:	SK Construction, Inc. (Respondent)
FID:	2035 MTR103291 (Permit)
Statute:	Water Quality Act
Date:	7/25/2011
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	\$10,000.00

Violation #1
Description of Violation:
Discharge of significant sediment to state waters. Respondent discharged significant sediment to Little Muddy Creek and Red Bank Creek, state waters, in violation of Part IV.H of the General Permit and ARM 17.30.1342(1), and therefore violated Section 75-5-605(1)(b), MCA.

I. BASE PENALTY

Nature

Explanation:	
The discharge of significant sediment 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 Moderate pursuant to ARM 17.4.303(5)(b)(ii) because the discharge of significant sediment to state waters has the potential to harm the quality of state waters.
Extent Explanation:
The Extent of the violation is Major pursuant to ARM 17.4.303(4) because the primary purpose of the Permit is to prevent erosion and the discharge of sediment to state waters. The discharge of significant sediment to state waters is a major deviation from the regulatory requirement to keep sediment 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 that submitted an NOI, Respondent knew 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:

Since July 2009, Respondent reported four (4) instances of noncompliance that resulted in the release of significant sediment to state waters. During its September 1, 2010 Compliance Evaluation Inspection, the Department observed that significant amounts of sediment still remained in Little Muddy Creek and Red Bank Creek. By not expeditiously removing the significant sediment from the creeks, Respondent did not exhibit any good faith and cooperation; 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 the September 2009 Compliance Evaluation Inspection, the Department observed that significant sediment was discharged and still remained in Little Muddy Creek and Red Bank Creek. The Department assumes that significant sediment was discharged to each creek over several events. However, for the purpose of calculating this penalty, the Department is considering each significant sediment discharge to Little Muddy Creek and Red Bank Creek to be a separate violation or one (1) day of violation for the sediment discharge to each creek. Therefore, the Department is seeking a penalty for two (2) days of violation.

Number of Days: 2

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$16,800.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

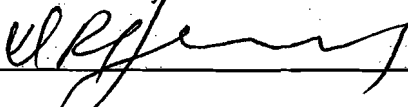
IV. ECONOMIC BENEFIT

Explanation:

The Department assumes that Respondent did not gain an economic advantage by discharging significant sediment to state waters.

ECONOMIC BENEFIT REALIZED: \$0.00

Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary

Responsible Party Name:	SK Construction, Inc. (Respondent)
FID:	2035
Statute:	Water Quality Act
Date:	8/1/11
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 2

Adjusted Base Penalty Total \$16,800.00

\$16,800.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit

\$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$16,800.00

*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.

MONTANA BOARD OF ENVIRONMENTAL REVIEW

AGENDA ITEM

EXECUTIVE SUMMARY REGARDING ACTION ON LEWIS AND CLARK COUNTY AIR POLLUTION CONTROL PROGRAM REVISION

Agenda # [].

Agenda Item Summary: The Lewis and Clark Board of County Commissioners (LCCBOCC) requests the Board approve amendments to the Lewis and Clark County local air pollution control program (County Program).

List of Affected Rules: The proposed amendments to the County Program are generally described as follows:

- Changes in general structure, including rearrangement of subchapters and paragraphs within subchapters, grammatical revisions, and updates to references for internal and external citations.
- Revisions to Chapter 1 – A severability subchapter has been added.
- Revision of and additions to definitions in Chapter 2.
- Revisions to Chapter 3 – Air Quality Action Stages including moving the definitions of Good, Watch and Poor to the definitions section; changing the averaging period from 24-hours to 8-hours; setting the average PM at a percentage of applicable state or federal standards rather than at a numeric level; including a 20% opacity limit for all stoves including exempted stoves; allowing a 4-hour grace period for residents to shut their stoves down; and including a contingency option for the Health Department to take additional action should a poor episode exceed 48 hours in length.
- Removal of old Chapter 4 regarding public notification. Public notification is part of the policy and procedure in the department.
- Removal of old Chapter 5 regarding air quality monitoring. All specific air quality monitoring methods, equipment and requirements are contained in the department's annual contract with DEQ. Since the methods, equipment and requirements are subject to change, this change allows the department to be more flexible.
- Revisions to old Chapter 6 which becomes new Chapter 4 – Solid Fuel/Visible Emissions/Incineration, includes a ban on burning coal and identifying the reference method for opacity determinations.
- Revisions to old Chapter 7 which becomes new Chapter 5 –Exemptions and Variances which includes a new section incorporating public comment by specifying that solid fuel burning devices meeting a 7.5 gram per hour emission rate for PM2.5 are exempt from the regulations and also includes a more specific descriptions of how a variance can be obtained.
- Revisions to old Chapter 8 which becomes new Chapter 6 – Enforcement and Penalties and includes significant expansion based on public comment outlining state civil and criminal penalties, local penalties for solid fuel burning devices, and increased local penalties for violation.
- New Chapter 7 incorporating public commenting and including administrative and appeal procedures and processes.
- Revisions to old Chapter 9 which becomes new Chapter 8. Changes include eliminating reference to total suspended particulate matter and adding a repealer and effective date.

Affected Parties Summary: The proposed amendments to the County Program will affect the following persons:

- Persons in the Lewis and Clark County Air Pollution Control District who own or operate solid fuel burning devices;
- Persons who conduct outdoor burning within the Lewis and Clark County Air Pollution Control District ; and
- Persons who idle diesel engines for greater than 2 hours every 12 hour period; and
- Persons who operate incinerators within the Lewis and Clark County Air Pollution Control District .

Scope of Proposed Proceeding: The LCCBOCC requests that the Board conduct a public hearing and consider approval of the proposed amendments to the program.

Background: The County Program is operated under regulations approved by the Board pursuant to Section 75-2-301, MCA, which states that a municipality or county may establish and administer a local air pollution control program if the program is consistent with the Clean Air Act of Montana and is approved by the Board.

The present version of the regulations was approved by the LCCBOCC on January 25, 2002. The current air pollution control regulations control sources of emissions contributing to ambient air concentrations exceeding the level of the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter of 10 microns or less (PM-10).

In September 2006, EPA revised the National Ambient Air Quality Standards for particulate matter with a diameter of 2.5 microns or less (PM-2.5) from 65 $\mu\text{g}/\text{m}^3$ to 35 $\mu\text{g}/\text{m}^3$.

Based on monitoring and speciation studies to determine the sources of PM-2.5, the Lewis and Clark City-County Board of Health determined the sources of contributing emissions are residential woodstove operation. As a result, this activity is targeted for regulatory control measures under the County Program.

Hearing Information: The Department and LCCBOCC request that the Board conduct a public hearing at its September 23, 2011 meeting to take comment on the proposed amendments.

Board Options: The Board may:

1. Approve the proposed amendments;
2. Disapprove the proposed amendments; or
3. Request additional information from the BOCC and consider the amendments at a future date.

Enclosures: The following information is attached to this executive summary:

- a. Draft memorandum and order
- b. Exhibit A – amended program regulations;
- c. Map of air pollution control district;
- d. County public notice of intent to amend regulations;
- e. Stringency analysis; and
- f. Cities' concurrence.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of the Application of)
Lewis and Clark County) MEMORANDUM
Approval of Amendments to) AND ORDER
Its Local Air Pollution)
Control Program.)

MEMORANDUM

1. Lewis and Clark County (the County) has filed an application with the Board of Environmental Review (Board) seeking approval of amendments to the County's local air pollution control program. The Board conducted a public hearing to consider the County's application at the Board's public meeting on September 23, 2011, in Helena, Montana.

2. The County operates a local air pollution control program approved by the Board ("Program"). The Program was first approved by the Board's predecessor on March 7, 1986, and revisions to the Program were approved by the Board on January 25, 2002.

3. The Program regulations are known as the Lewis and Clark County Outdoor Air Quality Regulations.

4. The Program encompasses the greater Helena Valley in Lewis and Clark County, including the municipalities of Helena and East Helena.

5. The County seeks approval of amendments to the Program. A copy of the Program's regulations as amended is attached to this Order as Exhibit A.

6. The amendments include:

(a) Changes in general structure, including rearrangement of subchapters and paragraphs within subchapters, grammatical revisions, and updates to references for internal and external citations.

1 (b) Revisions to Chapter 1 – A severability subchapter has been added.

2 (c) Revision of and additions to definitions in Chapter 2.

3 (d) Revisions to Chapter 3 – Air Quality Action Stages including moving the
4 definitions of Good, Watch and Poor to the definitions section; changing the averaging period
5 from 24-hours to 8-hours; setting the average PM at a percentage of applicable state or federal
6 standards rather than at a numeric level; including a 20% opacity limit for all stoves including
7 exempted stoves; allowing a 4-hour grace period for residents to shut their stoves down; and
8 including a contingency option for the Health Department to take additional action should a poor
9 episode exceed 48 hours in length.

10 (e) Removal of old Chapter 4 regarding public notification. Public notification is part
11 of the policy and procedure in the department.

12 (f) Removal of old Chapter 5 regarding air quality monitoring. All specific air
13 quality monitoring methods, equipment and requirements are contained in the department's
14 annual contract with DEQ. Since the methods, equipment and requirements are subject to
15 change, this change allows the department to be more flexible.

16 (g) Revisions to old Chapter 6 which becomes new Chapter 4 – Solid Fuel/Visible
17 Emissions/Incineration, includes a ban on burning coal and identifying the reference method for
18 opacity determinations.

19 (h) Revisions to old Chapter 7 which becomes new Chapter 5 –Exemptions and
20 Variances which includes a new section incorporating public comment by specifying that solid
21 fuel burning devices meeting a 7.5 gram per hour emission rate for PM2.5 are exempt from the
22 regulations and also includes a more specific descriptions of how a variance can be obtained.

23 (i) Revisions to old Chapter 8 which becomes new Chapter 6 – Enforcement and
24 Penalties and includes significant expansion based on public comment outlining state civil and

1 criminal penalties, local penalties for solid fuel burning devices, and increased local penalties for
2 violation.

3 (j) New Chapter 7 incorporating public comment and including administrative and
4 appeal procedures and processes.

5 (k) Revisions to old Chapter 9 which becomes new Chapter 8. Changes include
6 eliminating reference to total suspended particulate matter and adding a repealer and effective
7 date.

8 7. Under Section 75-2-301(1) and (2), MCA, if a local air pollution control program
9 proposed by a county would encompass all or part of a municipality, the county and each
10 municipality must approve the program after a public hearing. The Program amendments were
11 presented to the joint City of Helena-Lewis and Clark County Commissions on August 4, 2011.
12 The City of Helena issued a letter of support on August 10, 2011. The amendments were
13 presented to the East Helena City Council on August 2, 2011, and the City Council issued a
14 resolution in support on August 16, 2011. After publishing notice to the public, and after public
15 hearing, the Lewis and Clark County Commissioners approved the Program amendments on
16 September 1, 2011.

17 8. Under Section 75-2-301(3)(a), the Board, by order, may approve a local air
18 pollution control program that:

19 a. provides by ordinance or local law for requirements compatible with, more
20 stringent than, or more extensive than those imposed by Sections 75-2-203, 75-2-204, 75-2-211,
21 75-2-212, 75-2-215, 75-2-217 through 75-2-219, and 75-2-402, MCA, and rules adopted under
22 those sections;

23 b. provides for enforcement of requirements by appropriate administrative and
24 judicial processes; and

25 c. provides for administrative organization, staff, financial resources, and other
resources necessary to effectively and efficiently carry out the program.

1 9. The Program, as amended, provides for requirements compatible or more
2 stringent than those imposed by the applicable sections of the Clean Air Act of Montana and
3 implementing rules.

4 10. The Program, as amended, would provide for enforcement of its requirements by
5 appropriate administrative and judicial processes.

6 11. The Program, as amended, would provide for administrative organization, staff,
7 financial resources, and other resources necessary to effectively and efficiently carry out the
8 Program.

9 12. The Program satisfies the requirements for Board approval set forth in Section
10 75-2-301(3)(a), MCA.

11 13. Implementation of the Program is not intended in any way to interfere with
12 retention of jurisdiction by the Montana Department of Environmental Quality over those
13 emission sources and activities not expressly subject to County jurisdiction.

14 14. Under Section 75-2-301(1), MCA, a municipality or county may establish and
15 administer a local air pollution control program if the program is consistent with the Clean Air
16 Act of Montana and is approved by the Board.

17 15. The proposed amendments would make the Program more stringent than
18 comparable state or federal air quality regulations or guidelines in one respect, by prohibiting the
19 use of coal as a solid fuel. The County performed a stringency analysis as required by 75-2-
20 301(4), MCA, and made a written finding after public hearing and based on peer-reviewed
21 studies in the record that the proposed prohibition on coal:

22 (a) protects public health and the environment;

23 (b) can mitigate harm to the public health or the environment; and

24 //

1 (c) is achievable with current technology.

2 16. Adequate notice to the public and the opportunity for public participation has
3 been provided in accordance with Title 2, chapter 3, part 1, MCA.

4 17. Pursuant to Section 75-2-301(13)(b), MCA, at least 30 days prior to adoption of
5 the Program amendments the County gave written public notice of its intended action, and the
6 notices met the requirements of Section 75-2-301(13)(c), MCA.

7 18. Pursuant to Section 75-2-301(13)(e), MCA, at least 30 days prior to adoption of
8 the Program amendments, copies of the proposed Program amendments were made available by
9 electronic mail to all persons on the interested persons list maintained by the County under
10 Section 75-2-301(13)(a), MCA.

11 19. The County prepared a written response to all comments submitted in writing or
12 presented at the local public hearings on the proposed Program amendments.

13 20. The County will inform all persons who submitted written comments or attended
14 the local public hearings of the final action on the proposed Program amendments.

15 **ORDER**

16 1. The Board hereby approves the amended Lewis and Clark County Outdoor Air
17 Quality Regulations, as set forth in Exhibit A.

18 2. The County shall inform all persons who submitted written comments or attended
19 the local public hearings of the final action on the proposed Program amendments.

20 3. The Department shall retain control over any air pollutant sources regulated under
21 the Clean Air Act of Montana that are not covered by the Lewis and Clark County Air Pollution
22 Control Program.

23 //

24 //

1
2 DATED this _____ day of _____, 2011.

3
4 BOARD OF ENVIRONMENTAL REVIEW

5 By: _____
6 JOSEPH W. RUSSELL, M.P.H.,
7 Chairperson
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LEWIS AND CLARK COUNTY OUTDOOR AIR QUALITY REGULATIONS

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LEWIS AND CLARK COUNTY OUTDOOR AIR QUALITY REGULATIONS

CHAPTER 1 PROGRAM AUTHORITY AND ADMINISTRATION

Rule 1.101 - Title

These regulations shall be known and cited as the Lewis and Clark County Outdoor Air Quality Regulations.

Rule 1.102 - Authorities for Program

The authorities to promulgate these regulations are provided in Article XI, Section 4(b) of the Constitution of the State of Montana and in §75-2-301, Montana Code Annotated (MCA).

Rule 1.103 - Intent and Purpose

- (1) It is the purpose of these regulations to achieve and maintain such levels of outdoor air quality as will protect human health and safety in Lewis and Clark County.
- (2) The intent of these regulations is to maintain the level of air pollutants at or below those standards set forth in §17.8.2 and 17.8.3, Administrative Rules of Montana (ARM).

Rule 1.104 - Scope

- (1) The provisions of these regulations apply to all sources of air pollution within the area defined in the attached Air Pollution Control District Map and legal description with the exception of air pollution sources over which jurisdiction is retained by the Montana Board of Environmental Review pursuant to §75-2-301 (5), MCA.
- (2) The provisions of these regulations do not supersede the provisions set forth in Chapter 9 of the State of Montana Air Quality Control Implementation Plan: Emergency Episode Avoidance Plan.

Rule 1.105 - Severability

In the event any section, subsection or other portion of these regulations is for any reason held invalid or unconstitutional by a court of competent jurisdiction, such section, subsection or portion will be considered a separate provision of these regulations and

such holding will not affect the validity of the remaining portions of these regulations which will remain in full force and effect.

CHAPTER 2

DEFINITIONS

- (1) “Air Pollution Control District” means the area within which the Lewis and Clark County Outdoor Air Quality Regulations are enforced.
- (2) “Air Quality Ratings” are “Good”, “Watch” and “Poor”.
 - (a) “Good” means
 - (i) ambient air particulate matter (PM) concentrations averaged over an eight hour period are less than 60% of any state or federal ambient 24-hour standard established for PM 2.5, and
 - (ii) scientific and meteorological data indicate the average PM 2.5 concentrations over any eight-hour period may be reasonably expected to remain below 60% of any state or federal ambient 24-hour standard for the next 24 hours.
 - b) “Watch” means
 - (i) ambient air PM concentrations averaged over an eight-hour period are between 60% and 80% of any state or federal ambient 24-hour standard established for PM 2.5, and
 - (ii) scientific and meteorological data indicate the average PM 2.5 concentrations over any eight-hour period may be reasonably expected to remain below 80% of any state or federal ambient 24-hour standard for the next 24 hours.
 - (c) “Poor” means
 - (i) ambient air PM concentrations averaged over an eight-hour period are 80% or more of any state or federal ambient 24-hour standard established for PM 2.5, and
 - (ii) scientific and meteorological data indicate the average PM 2.5 concentrations over any eight-hour period may be reasonably expected to exceed 80% of any state or federal ambient 24-hour standard for the next 24 hours.
- (3) “Board” means the Lewis and Clark City - County Board of Health.

- (4) “Bonfire” means a ceremonial fire or small recreational fire for the purpose of celebrating a particular organization related event, or for a social gathering, picnic, campout or other related event.
- (5) “Health Department” means the Lewis and Clark City - County Health Department.
- (6) “Incinerator” means any single- or multiple-chambered combustion device that burns combustible material, alone or with a supplemental fuel or with catalytic combustion assistance, primarily for the purpose of removal, destruction, disposal, or volume reduction of any portion of the input.

Incinerator does not include:

- (a) Safety flares used to combust or dispose of hazardous or toxic gases at industrial facilities, such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants, or elemental phosphorus plants;
 - (b) Space heaters that burn used oil;
 - (c) Wood-fired boilers; or
 - (d) Wood waste burners, such as tepee, wigwam, truncated cone, or silo burners.
- (7) “Management burning” means any person conducting any outdoor burning for any purpose including but not limited to forestry/wildlife management, licensed landfill management, firefighter training exercises, commercial film productions or fuel hazard reduction that is designated as necessary by a fire protection agency.
- (8) “Opacity” means the degree, expressed in percent, to which emissions reduce the transmission of light and obscure the view of an object in the background.
- (9) “Open burning” means outdoor combustion of material with or without a receptacle, including but not limited to bonfires and small recreational fires.
- (10) “Particulate matter” or “PM” means any material, except water in uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions. For the purposes of this definition, standard conditions are defined in the applicable test method in CFR 40 Part 50, Appendix L and Appendix J; Part 51, Appendix M; and Part 53.
- (11) “PM 2.5” means particulate matter with an aerodynamic diameter of less than or equal to a nominal 2.5 micrometers as measured by a reference method based on

40 CFR Part 50, Appendix L and designated in accordance with 40 CFR Part 53, or by an equivalent method designated in accordance with 40 CFR Part 53.

- (12) "Pellet stove" means a commercially sold stove that burns only automatically fed biomass, pelletized fuels.
- (13) "Person" means any individual, partnership, institution, joint-stock company, unincorporated association, or society or government agency, or other corporation of any character whatsoever.
- (14) "Regulations" means the Lewis and Clark County Outdoor Air Quality Regulations.
- (15) "Solid fuel burning device" means any fireplace, fireplace insert, wood stove, wood burning heater, wood-fired boiler or similar device burning any solid fuel used for aesthetic, cooking, or heating purposes.

CHAPTER 3

AIR QUALITY ACTION STAGES

Rule 3.101 - Prohibitions and Actions

- (1) When the Health Department declares a Good stage no specific action is required.
- (2) When the Health Department declares a Watch stage it shall request voluntary reductions in the use of solid fuel burning devices.
- (3) When the Health Department declares a Poor stage:
 - (a) A person may not operate a solid fuel burning device unless it is exempt under Rule 5.101(4) or a variance or exemption has been granted under these regulations.
 - (b) A person owning, operating or in control of a solid fuel burning device may not cause, allow or discharge any emissions from such a device that are of an opacity greater than twenty percent. Emissions produced during the building of a new fire for a period or aggregated periods not exceeding 15 minutes in any 24-hour period are exempt from opacity requirements.
 - (c) A person may not idle diesel or locomotive engines for over two hours in any 12-hour period.
 - (d) A person may not conduct open burning.

- (e) A person may not operate an incinerator.
- (f) Operators of solid fuel burning devices have four (4) hours to discontinue their use before warnings and/or violation may be issued by the Health Department.
- (g) If the Poor rating lasts for longer than 48 hours, and meteorological data indicate that air quality may reasonably be expected to continue to decline, the Health Department may identify additional suspected significant contributors of particulates and may order suspected contributing activities/operations to cease. Such activities may include, but are not limited to construction activities, restaurants of a type known for particulate emissions, and management burns. The Health Department may pursue suspension of activities beyond the Air Pollution Control District that are suspected of contributing to deterioration of air quality within the District.

CHAPTER 4

SOLID FUEL/VISIBLE EMISSIONS//INCINERATION

Rule 4.101 - Prohibited Burning

- (1) Within the Air Pollution Control District, a person may not:
 - (a) Burn any material in a residential solid fuel burning device except regular black and white newsprint, untreated Kraft paper, untreated wood and lumber, and wood and paper products manufactured for the sole purpose of use as heating fuel;
 - (b) Burn coal as a solid fuel at any time.
- (2) A person may not operate an incinerator in violation of the requirements of §17.8.316, ARM which are hereby adopted and incorporated by reference.

Rule 4.102 - Visible Emissions

- (1) A person owning, operating, or in control of a residential solid fuel burning device may not cause, allow, or discharge emissions that exhibit an opacity of 40% or greater averaged over 6 consecutive minutes.
 - (a) Emissions produced during the building of a new fire for a period or aggregated periods not exceeding 15 minutes in any 24-hour period are exempt from opacity requirements.

- (2) Only Health Department personnel or designees who have successfully completed the Visual Emissions Evaluation Course and hold current certification may determine opacity.
- (3) An opacity determination must follow all requirements, procedures, specifications and guidelines set forth in 40 CFR Part 60, Appendix A, method 9 or by an in-stack transmissometer that complies with all requirements, procedures, specification and guidelines contained in 40 CFR Part 60, Appendix B, performance specification 1. Where the presence of uncombined water is the only reason for failure of an emission to meet an applicable opacity limitation contained in these regulations that limitation shall not apply.

CHAPTER 5

EXEMPTIONS AND VARIANCES

Rule 5.101 - Exemptions

- (1) A person who has an economic need to burn solid fuel for residential space heating purposes may apply for a low-income exemption to burn during Poor air quality days. A person may demonstrate such a need by certifying his or her eligibility for energy assistance according to economic guidelines established by the U.S. Office of Management and Budget under the Low Income Energy Assistance Program as administered by the Montana Department of Public Health and Human Services.
 - (a) The applicant shall attach proof of participation in one of the following programs:
 - (i) Low Income Energy Assistance Program (LIEAP)
 - (ii) Families Achieving Independence in Montana (FAIM)
 - (iii) Supplemental Security Income (SSI)
- (2) A person who has a heating system that is temporarily inoperable may apply for an exemption to burn on Poor air quality days.
 - (a) The applicant shall attach proof, from a licensed heating specialist, detailing why the heating system is inoperable and the estimated length of time that the system will be inoperable.
- (3) The application for an exemption shall contain the following information:
 - (a) The name and complete address of the applicant;

- (b) The reason for and estimated duration of the exemption; and
 - (c) The applicant's signature and date.
- (4) Solid fuel burning devices with average pm 2.5 particulate emission rates of less than 7.5 grams per hour as certified by EPA are exempt from these regulations, except in no case shall emissions from such stoves exceed 20% opacity during a Poor air quality episode.

Rule 5.102 - Variances

- (1) A person may operate a solid fuel burning device during a Poor air quality rating if the Health Board grants a variance from these regulations.
- (2) The Health Board may grant a person a variance or partial variance if it determines:
 - (a) Compliance with the requirements from which the variance is sought would produce hardship without equal or greater benefits to the public; and
 - (b) The emissions proposed to occur under a variance do not constitute an unreasonable danger to public health or safety.
- (3) Application for a variance shall be made on forms supplied by the Health Department.
- (4) The application for variance shall be submitted to the Environmental Services Administrator at least 14 working days prior to a regularly scheduled Health Board meeting.
- (5) After receiving a timely request under (4) above, the Environmental Services Division Administrator shall notify the Health Board Chair.
- (6) The Health Board Chair in consultation with the Health Officer and the Environmental Services Division Administrator will determine whether the variance request will be heard by the Health Board or by a hearing officer.
- (7) The Health Board Chair will instruct the Environmental Services Division Administrator to schedule the variance request for a public hearing.
- (8) If the variance request will be heard by a hearing officer, the Health Board Chair will appoint a hearing officer.

- (9) The hearing officer will conduct a public hearing and make a written recommendation to the Health Board
- (10) The recommendation of a hearing officer is subject to approval by a quorum of the Health Board at the next regularly scheduled Health Board meeting.
- (11) Any decision of the Health Board or a recommendation of a hearing officer must be supported by findings of fact.
- (12) The Health Board may not grant a variance authorizing any source to emit air pollutants in excess of standards set forth at §17.8.2 and 17.8.3, ARM.

ENFORCEMENT AND PENALTIES

Rule 6.101 - General Provisions

- (1) Action under this Rule is not a bar to enforcement of these regulations, or regulations or orders made pursuant thereto, by injunction or other appropriate remedy, as provided in §75-2-413, MCA. The Health Board or the Health Department may institute and maintain in the name of the county or the state any and all enforcement proceedings.
- (2) All fines collected under this chapter are deposited in the Outdoor Air Quality Fund 186.
- (3) It is the intention of the Health Board to impose absolute liability upon persons for conduct that violates any part, provision or order issued pursuant to these regulations. Unless otherwise specifically provided, a person may be guilty of an offense without having, with respect to each element of the offense, either knowledge, negligence, or specific intent.
- (4) It is the specific intention of the Health Board that these regulations impose liability upon persons for violations of a part, provision or order issued pursuant to these regulations.
- (5) A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself or that of another and he is legally accountable.
- (6) A person is legally accountable for the conduct of another under these regulations when he:
 - (a) causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; or

- (b) either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid such other person in the planning or commission of the offense.

Rule 6.102 - Criminal Penalties

Except as provided for in Rule 6.104, a person who violates a provision, regulation, or rule enforced under these regulations, or an order made pursuant to these regulations, is guilty of an offense and upon conviction subject to a fine not to exceed ten thousand dollars (\$10,000.00). Each day of the violation constitutes a separate offense.

Rule 6.103 - Civil Penalties

- (1) Except as provided in Rule 6.104, a person who violates a provision, rule or order under these regulations, after notice thereof has been given by the Health Department, is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) per violation. Each day a violation continues constitutes a separate violation.
- (2) Upon request of the Health Department the county attorney may petition the district court to impose, assess and recover the civil penalty. The civil penalty is in lieu of the criminal penalty provided in Rule 6.102.

Rule 6.104 - Penalties

- (1) Notwithstanding the provisions of Rule 6.102, a person who violates a provision of these regulations (Lewis and Clark Outdoor Air Quality Regulations) is guilty of a criminal offense and subject, upon conviction, to a fine not to exceed five hundred dollars (\$500.00). Each day a violation continues constitutes a separate offense.
- (2) Notwithstanding the provisions of Rule 6.103, any person who violates any of the provisions of these regulations is subject to a civil penalty not to exceed five hundred dollars (\$500.00). Each day a violation continues constitutes a separate violation. The civil penalty is in lieu of the criminal penalty provided for in Rule 6.102, and may be pursued in any court of competent jurisdiction.
- (3) The civil penalty or criminal fine for a violation of these regulations during the calendar year :

First violation - Warning

Second Violation – One Hundred Dollars (\$100)

Third Violation – Two Hundred Dollars (\$200)

Fourth Violation – Five Hundred Dollars (\$500)

Chapter 7
ADMINISTRATIVE PROCEDURES AND HEALTH BOARD HEARINGS

Rule 7.101 - Notice of Violation

- (1) Whenever the Health Department determines that there are reasonable grounds to believe that a violation of any provision of these regulations has occurred, the Health Department may issue a written notice to be served personally or by registered or certified mail on the alleged violator or his agent.
- (2) This notice must specify the provision of these regulations alleged to have been violated and the facts alleged to constitute the violation.
- (3) If the Health Department issues a Notice of Violation to a person for a first violation of any provision of these regulations, the Health Department shall provide such person with a summary of the regulations that affect solid fuel burning devices.

Rule 7.102 – Appearance Before the Health Board

The Health Department or Health Board may require alleged violators of these regulations to appear before the Health Board for a hearing at a time and place specified in the Notice of Violation.

Rule 7.103 – Other Remedies

Injunction under this Rule 8.101 does not bar enforcement of these regulations by injunction, seeking penalties or other appropriate remedy.

Rule 7.104 - Credible Evidence

For the purpose of establishing compliance with these regulations or establishing whether a person has violated or is in violation of any standard or limitation adopted pursuant to these regulations or Title 17, Chapter 8 of the Montana Code Annotated, nothing in these regulations precludes the use, including the exclusive use, of any relevant evidence.

Rule 7.105 - Administrative Review

- (1) A person subject to a Notice of Violation issued under the authority of these regulations may request an administrative review by the Health Officer or his or her designee (Hearing Officer).
- (2) A request for an administrative review must be received with fifteen (15) days of the issuance of a Notice of Violation.

- (3) A request for an administrative review does not suspend or delay the Health Department's notice, order or action, except as otherwise provided for in these regulations.
- (4) The Hearing Officer shall schedule a review within ten (10) days after receipt of the request. The review may be scheduled beyond ten days after receipt of the request by mutual consent of the Health Department and the party requesting the review.
- (5) The Hearing Officer shall provide written or verbal notice to the person requesting the review of the date, time and location of the scheduled hearing.
- (6) The Hearing Officer may continue the administrative review for a reasonable period following the hearing to obtain information necessary to make a decision.
- (7) The Hearing Officer shall affirm, modify, or revoke the Notice of Violation, Order to Take Corrective Action, or other action, in writing, following the completion of the administrative review. A copy of this decision must be sent by certified mail or hand delivered to the person who requested the review.

Rule 7.106 – Health Board Hearings

- (1) Any person subject to an Order to Take Corrective Action or an action taken by the department under the authority of these regulations may request a hearing before the Health Board following the conclusion of an administrative review.
- (2) The Health Board shall schedule a hearing within sixty (60) days after receipt of a written request and shall notify the applicant of that hearing.
- (3) The Health Board may and on application by a party shall compel the attendance of witnesses and the production of evidence on behalf of the parties.
- (4) Public hearings must proceed in the following order:
 - (a) first, the Health Department shall present a staff report, if any.
 - (b) second, the person who requested the hearing shall present relevant evidence to the Health Board; and
 - (c) third, the Health Board shall hear any person in support of or in opposition to the issue being heard and shall accept any related letters, documents or materials.
- (5) After a hearing regarding an Order to Take Corrective Action, the Health Board shall issue a final decision that affirms, modifies or rescinds the Health

Department's Order to Take Corrective Action. In addition, the Health Board may issue an appropriate order for the prevention, abatement or control of the emissions involved.

- (6) A person aggrieved by an order of the Health Board may apply for rehearing upon one or more of the following grounds and upon no other grounds:
 - (a) the Health Board acted without or in excess of its powers;
 - (b) the order was procured by fraud;
 - (c) the order is contrary to the evidence;
 - (d) the applicant has discovered new evidence, material to him which he could not with reasonable diligence have discovered and produced at the hearing; or
 - (e) competent evidence was excluded to the prejudice of the applicant.
- (7) The petition for a rehearing must be filed with the Health Board within thirty (30) days of the date of the Health Board's order.

Rule 7.107 - Judicial Review

- (1) Within thirty (30) days after the application for rehearing is denied, or if the application is granted, within thirty (30) days after the decision on the rehearing, a party aggrieved thereby may appeal to the District Court.
- (2) The appeal shall be taken by serving a written notice of appeal upon the chair of the Health Board, which service shall be made by the delivery of a copy of the notice to the chair and by filing the original with the Clerk of Court. Immediately after service upon the Health Board, the Health Board shall certify to the District Court the entire record and proceedings, including all testimony and evidence taken by the Health Board. Immediately upon receiving the certified record, the District Court shall fix a day for filing of briefs and hearing arguments on the cause and shall cause a notice of the same to be served upon the Health Board and the appellant.
- (3) The District Court shall hear and decide the cause upon the record of the Health Board. The District Court shall determine whether the Health Board regularly pursued its authority, whether the findings of the Health Board were supported by substantial competent evidence, and whether the Health Board made errors of law prejudicial to the appellant.
- (4) Either the Health Board or the person aggrieved may appeal from the decision of the District Court to the Supreme Court. The proceedings before the Supreme

Court are limited to a review of the record of the hearing before the Health Board and of the district court's review of the record

CHAPTER 8

REVIEW AND REVISIONS TO REGULATIONS

Rule 8.101 - Review

The Health Department shall periodically review the effectiveness of these regulations and shall make appropriate recommendations to the Lewis and Clark County Board of County Commissioners for revisions of these regulations. Such review shall include the levels of particulate matter measured as micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) contained in the ambient air within the Air Pollution Control District. Such review shall also take into account other air quality pollutants regulated by the EPA and DEQ, including but not limited to lead, carbon monoxide, sulfur dioxide and nitrous oxides.

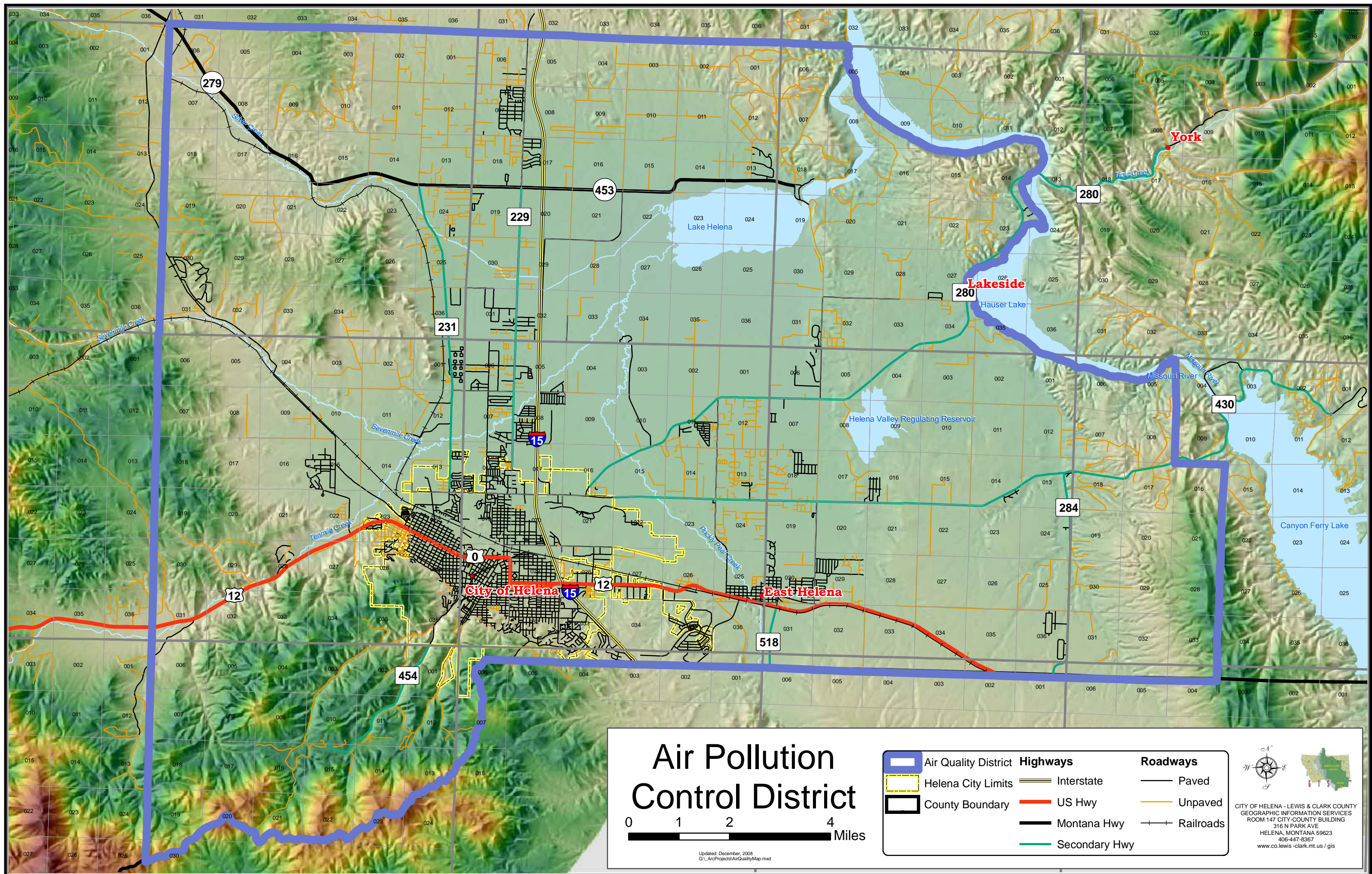
Rule 8.102 - Amendments and Revisions

- (1) The Board of County Commissioners may enact any amendments or revisions to these regulations that have been approved by the Montana Board of Environmental Review.
- (2) The Board of County Commissioners grants to the Health Board the authority to establish the policies and procedures that provide for the implementation of the Lewis and Clark County Outdoor Air Regulations.

Rule 8.103 – Repealer and Effective Date

- (1) All previous rules, regulations, resolutions and ordinances as adopted by the Board of County Commissioners governing outdoor air quality in the Air Pollution Control District are hereby repealed.
- (2) These regulations will be in full force and effect upon final approval by the Montana Board of Environmental Review.

Reviewed and approved by the Montana Board of Environmental Review, by memorandum and order dated November ____, 2011.



Air Pollution Control District



Updated: December, 2008
G:_ArcProjects\AirQualityMap.mxd

Air Quality District	Highways	Roadways
Helena City Limits	Interstate	Paved
County Boundary	US Hwy	Unpaved
	Montana Hwy	Railroads
	Secondary Hwy	



CITY OF HELENA - LEWIS & CLARK COUNTY
GEOGRAPHIC INFORMATION SERVICES
ROOM 147 CITY-COUNTY BUILDING
316 N PARK AVE
HELENA, MONTANA 59623
406-447-8367
www.co.lewis-clark.mt.us/gis

Written Notice of Intent to Revise the Lewis and Clark County Outdoor Air Quality Regulations July 19, 2011

The Lewis and Clark City-County Health Department and the Board of Health are recommending to the Lewis and Clark Board of County Commissioners that it make changes to the existing county Outdoor Air Quality Regulations. Members of the public are invited and encouraged to participate in this process by learning more about the proposed changes and offering their comments on the draft regulations.

Who is affected by this revision?

You may be affected by this revision to the regulations if you work or live within the Lewis and Clark County [Air Pollution Control District](#) and you operate diesel engines or solid-fuel-burning devices like wood stoves, outdoor wood-fired boilers, or incinerators.

Why revise the regulations?

Most of the changes to the existing regulations are needed to address pollution caused by fine particulate matter (PM_{2.5}), fine soot-like particles caused by burning solid fuels or operating cars or diesel engines. Recent studies indicate that PM_{2.5} in the air we breathe can impact health at lower concentrations than previously thought. The U.S. Environmental Protection Agency has lowered the acceptable 24-hour national standard for PM_{2.5} from 65 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to 35 $\mu\text{g}/\text{m}^3$. The draft three-year running average for 2008-2010 for PM_{2.5} in Helena is 34.4 $\mu\text{g}/\text{m}^3$. This comes very close to violating the EPA standard and indicates a possible increase in serious health effects for local citizens. It would also result in EPA imposing mandatory regulations in our local airshed.

When will we discuss the revisions?

The proposed revisions to the regulations have been reviewed by the Lewis and Clark City-County Board of Health and have been recommended to the Lewis and Clark Board of County Commissioners for public hearing and adoption. The following public meetings have been scheduled. Any additional meeting dates will be announced through the media and on the county website at <http://www.co.lewis-clark.mt.us>.

- **Aug. 2:** Presentation to the East Helena City Council, 7 p.m., East Helena City Hall
- **Aug. 4:** Presentation to the joint city and county commissions, 4 p.m., Room 326, City-County Building, 316 N. Park Ave., Helena
- **Aug. 11:** Public hearing before the county commission, 9 a.m., Room 330, City-County Building
- **Aug. 23:** Decision by county commission on whether to approve new regulations, 9 a.m., Room 330, City-County Building

How can members of the public participate?

Copies of the draft revised regulations are available on the county website, <http://www.co.lewis-clark.mt.us>, and on the health department website, <http://www.lewisandclarkhealth.org> . You can also request a copy of the proposed changes by calling the Environmental Services Division at 447-8351. Written comments can be submitted to: Air Quality Regulations, Environmental Services Division, City-County Building, Room 230, 316 North Park Avenue, Helena, MT, 59623. You may also contact us at outdooraq@co.lewis-clark.mt.us.

What changes are being proposed?

Here is a brief summary of what the proposed revisions are intended to accomplish:

- Set local air pollutions standards that match the standards required by the EPA for particulate matter.
- Redefine air-quality ratings for the public (“good”, “watch,” and “poor”) to reflect the new standards.
- Increase fines for violation of the outdoor air-quality regulations.

A more detailed explanation of the changes is available online or by calling 447-8351.



LEWIS & CLARK CITY-COUNTY Health Department

316 N. Park. Rm. 404
P.O. Box 1723
Helena, MT 59624
Ph: 406.447.8351
Fax: 406.447.8398

Applicability of 75-2-301 findings for proposed changes to the Lewis and Clark County Outdoor Clean Air Ordinance.

MCA 75-2-301(3)b requires the Lewis and Clark County Board of County Commissioners to fulfill the provisions of MCA 75-2-301(4) when adopting an ordinance or local law that is more stringent than the comparable state law.

MCA 75-2-301(4) allows the Board to adopt a rule more stringent than comparable state law if they make a written finding after a public hearing and public comment and based on evidence that the proposed local standard or requirement:

- (A) Protects public health or the environment of the area;
- (B) Can mitigate harm to the public health or the environment; and
- (C) Is achievable with current technology

The written finding must reference information and peer-reviewed scientific studies contained in the record that form the basis for the boards or local air pollution control programs conclusion. The written finding must also include information from the hearing record regarding the const to the regulated community that are directly attributable to the proposed local standard or requirement.

If there is no comparable state law, MCA 75-2-301(4) does not apply.

This document reviews the proposed Lewis and Clark County Outdoor Air Quality Regulations and determines if they are subject to 75-2-301(4).

Chapter 1- Authority and Administration

The State of Montana currently has no comparable regulation for residential solid fuel burning devices. 75-2-301(4) does not apply.

Chapter 2- Definitions

All definitions are either consistent with DEQ or have no comparable DEQ definition. 75-2-301(4) does not apply.

Chapter 3- Air Quality Action Stages

The State of Montana currently has no comparable regulation for residential solid fuel burning devices. 75-2-301(4) does not apply.

Chapter 4- Solid Fuel / Visible Emissions / Incineration

Rule 4.101(1)(b) prohibits the use of coal as a solid fuel. This is more restrictive than the current DEQ regulation. Therefore 75-2-301(4) applies.

Appendix A includes peer reviewed documents which indicate that the burning of coal contributes higher levels of sulfur dioxide and nitrogen oxide than the burning of wood. Sulfur dioxide and nitrogen oxide contribute to the formation of secondary particles.

The reduction of secondary particles achieved by prohibiting the use of coal will help to protect the health of the residents of the Helena Valley Air Shed and the environment.

The prohibition on the use of coal in solid fuel burning devices can mitigate harm to the public and the environment by reducing the formation of secondary particulate matter.

There is currently very little coal used in solid fuel burning devices in the air pollution control district. This regulation is achievable with current technology. Wood may be substituted for coal.

Rule 4.101(2) is consistent with the current DEQ regulation

Rule 4.102-visible emissions

The State of Montana currently has no comparable regulation for residential solid fuel burning devices.

Chapter 5- Exemptions and Variances

The State of Montana currently has no comparable regulation for residential solid fuel burning devices. 75-2-301(4) does not apply.

Chapter 6-Enforcement and Penalties

The State of Montana currently has no comparable regulation for residential solid fuel burning devices. 75-2-301(4) does not apply.

Chapter 7 Administrative Procedures and Board Hearings

The State of Montana currently has no comparable regulations for local regulation of residential solid fuel burning devices. 75-2-301(4) does not apply.

Chapter 8-Review and Revisions to Regulations

The State of Montana currently has no comparable regulation for residential solid fuel burning devices. 75-2-301(4) does not apply.

APPENDIX A

Peer reviewed scientific studies

US EPA AP 42 Volume I, Fifth Edition

Davies, John, Misiuk, David, Colgan, Ryan, Wiltse, Nathan. “Reducing PM 2.5 Emissions from Residential Heating Sources in the Fairbanks North Star Borough”

Houck, James E., Tiegs, Paul E., McCrillis, Robert C., Keithley, Carter, Crouch, John. “Air Emissions From Residential Heating: The Wood Heating Option Put Into Environmental Perspective”.

The full text of US EPA AP 42 may be viewed at <http://www.epa.gov/ttnchie1/ap42/>



City of Helena

RECEIVED

AUG 15 2011

Ronald J. Alles, City Manager
316 North Park Avenue
Helena, MT 59623
Telephone: 406/447-8401 Fax: 406/447-8434
E-mail: ralles@ci.helena.mt.us

**LEWIS & CLARK COUNTY
COMMISSIONER**

August 10, 2011

Lewis and Clark County Commission
316 North Park
Helena, MT 59623

R.e.: Letter of Support for Proposed Outdoor Air-Quality Regulations

Dear Commissioners,

On behalf of the City of Helena and City Commission I write this letter in support of the proposed changes to the Lewis and Clark County Outdoor Air Pollution Regulations.

The presentation by Kathy Moore at the Joint City-County Worksession on August 4, 2011 outlined the Environmental Protection Agency national standards and the City-County Health Department's proposed implementation measures. The presentation provided the information necessary to conclude modifications to the existing ordinance are necessary to achieve and maintain a level of air quality that will better protect human health and safety in Lewis and Clark County.

Therefore, the City recognizes the harmful effects outdoor particulate pollution PM2.5 has on public health and we endorse the proposed changes as presented by the City-County Health Department.

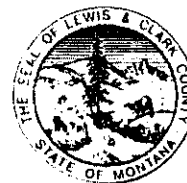
Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Alles", is written over the typed name and title.

Ronald J. Alles, City Manager
City of Helena



**JOINT WORK SESSION #260
CITY OF HELENA - LEWIS & CLARK COUNTY
August 4, 2011
4:00 p.m. - Room 326**



AGENDA

1. Call to order
2. Approval of meeting minutes – June 2, 2011
3. Proposed revisions to Lewis & Clark County Outdoor Air Quality Regulations
 - Presentation, Questions and Answers – Kathy Moore
4. LED outdoor lighting – Commissioner Brown
5. Historic Trolley
6. Agenda items for September 1, 2011 (Contact Carole Byrnes, Ext. 8305)
7. Adjournment

RESOLUTION #435

**RESOLUTION OF THE
EAST HELENA CITY COUNCIL
IN SUPPORT THE LEWIS AND CLARK COUNTY OUTDOOR AIR
POLLUTION REGULATIONS**

WHEREAS, outdoor air pollution known as particulate matter (PM) is recognized by the United States Environmental Protection Agency (EPA) to present an increased health risk to residents of Lewis and Clark County and its cities and towns; and,

WHEREAS, scientific studies have determined that breathing PM pollution 2.5 microns or smaller (PM_{2.5}) at concentrations higher than EPA health standards can cause acute respiratory symptoms such as coughing, aggravation of asthma, reduced lung function, shortness of breath, chronic bronchitis, cardiac arrhythmias, heart attacks, and increased mortality, and can result in increased rates of school absenteeism, emergency room visits and hospital admissions for respiratory and cardiovascular diseases; and,

WHEREAS, PM 2.5 air pollution contains combustion products, soot, nitrous oxides, sulfate sulfur dioxide, suspected carcinogens, irritants, systemic toxicants, aromatic hydrocarbons, heavy metals, EPA-listed hazardous air pollutants, cilia toxic agents, sub-micron- sized particulates; and,

WHEREAS, the Montana Asthma Control Program has determined that particulate pollution adversely affects persons with asthma by decreasing lung function and causing inflammation and the American Lung Association states that particle pollution can damage the body in ways similar to cigarette smoking ; and,

WHEREAS, at special risk from outdoor particulate pollution PM_{2.5} are infants, children, elderly people, individuals with cardiovascular disease and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and,

WHEREAS, the EPA has developed health-protective national standards of 15 micrograms per cubic meter of air (15 ug/m³) annual arithmetic mean averaged over 3 years, and a 24-hour, limit of 35 ug/m³; and,

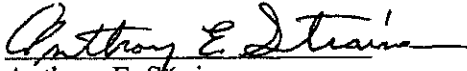
WHEREAS, the Montana Department of Environmental Quality (DEQ) enables the creation of local air pollution control programs to regulate residential wood burning and road dust (the primary sources of particulate air pollution in Montana), as well as smaller sources of air pollution; and ,

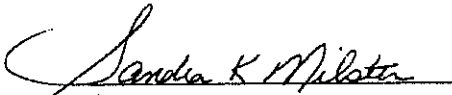
WHEREAS, the Lewis and Clark Board of County Commissioners is authorized by Title 75, Chapter 2, subchapter 3 Montana Code Annotated to adopt a local air pollution control program to achieve and maintain such levels of air quality as will protect human health and safety in Lewis and Clark County; and,

WHEREAS, reduction of outdoor air pollution has been demonstrated to improve public health; protect property and the environment from damage, and improve visibility;

NOW THEREFORE BE IT RESOLVED, the East Helena City Council supports the proposed revisions to the Lewis and Clark County Outdoor Air Quality Regulations and asks the Lewis and Clark Board of County Commissioners to vote to approve the revisions.

ADOPTED by the East Helena City Council on August 16, 2011.


Anthony E. Strainer,
Mayor


Attest:

City of East Helena
City Council Meeting
July 26, 2011

<u>NAME</u> (please print)	<u>ADDRESS/BUSINESS</u>	<u>PHONE#</u>
Mike Carsten	Pacific	227 7398
James Schell	Box 1610	227-7844
Amy Boylen	PO BOX 1413	465-6513
Waltello	P.O. Box 1231	451-8583
Robert Shydel	65 Homestead Cln	443-7157
Don Dahl	307 King	227-6876
Kenn Winegar	205 E. Groschell	227-7671
Ron Whitmore	Box 1280	227-7700
Richard Hargett	635 Tamarack Helena	443-7733