

TELECONFERENCE AGENDA

FRIDAY, JANUARY 27, 2012

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. December 2, 2011, Board meeting minutes.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the matter of the Notice of Violations of the Montana Water Quality Act by North Star Aviation, Inc. at Ravalli County Airport, Ravalli County, BER 2009-10 WQ.** A hearing was held September 21, 2011. On October 19, the Board received *Unopposed Motion for Extension of Deadline to File [post-hearing] Briefs*, and on October 20, Hearing Examiner Katherine Orr granted the extension giving the parties until October 21, 2011. On October 21, the Board received *North Star's Post-Hearing Brief* and *DEQ's Post-Hearing Brief*. The Hearing Examiner issued *Proposed Findings of Fact, Conclusions of Law, and Order* on January 13, 2012. Exceptions, if any, are due in January and February, 2012.
 - b. **In the matter of violations of the Opencut Mining Act by Deer Lodge Asphalt, Inc., at the Olsen Pit, Powell County, Montana, BER 2011-02 OC.** A contested case hearing was held September 19, 2011. On October 11, the Board received *Deer Lodge Asphalt's Post-Hearing Brief* and *The Department's Post-Hearing Brief*. On October 13, 2011, the Board received *The Department's Post-Hearing Response Brief*. A *Proposed Findings of Fact and Conclusions of Law* order was issued by Hearing Examiner Katherine Orr on January 4, 2012. Exceptions, if any, are due in January and February, 2012. On January 11, 2012, the Board received *The Department's Clarification of Testimony and Exception Regarding Notice*.
 - c. **In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.** On October 17, 2011, Hearing Examiner Katherine Orr issued *Third Order Granting Extension of*

Time, giving the parties through January 5, 2012, to reach settlement or file a proposed hearing schedule.

- d. **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.** An *Order on Motion for Protective Order* was issued on December 6, 2011. A hearing is scheduled for April 18, 2012.
 - e. **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 December 12, 2011, attorney for DEQ, in consultation with counsel for the appellant, filed a *Request to Stay Proceedings*. On December 15, the Hearing Examiner issued *Order Granting Request for Stay of Proceedings*.
 - f. **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.** On December 7, 2011, the attorney for DEQ filed *Agreed Proposed Schedule* suggesting a hearing during the week of July 9, 2012.
 - g. **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.** A hearing is scheduled for March 27, 2012.
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. An *Order Requesting Status Report* was issued on January 13, 2012.
 - 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.** Roseburg Forest Products filed *Motion for Summary Judgment and Memorandum* on November 12, 2011. On December 2, 2011, the Board received *DEQ Brief in Response to Roseburg Forest Products Co. Motion for Summary Judgment*. Hearing Examiner Orr issued *Order Granting Extension of Time to File Summary Judgment Briefs* on December 5, 2011, and *Order Vacating & Resetting Prehearing Conference & Hearing Dates* on December 9. On December 15, 2011, the Board received *Roseburg Forest Products Co. Reply Memorandum to DEQ in Response to Roseburg Forest Product Co. Motion for Summary Judgment*.
 - c. **In the matter of the appeal and request for hearing by Maurer Farms, Inc.; Somerfeld & Sons Land & Livestock, LLC; Jerry McRae; and Katrina Martin regarding the DEQ's final decision to amend the MATL's certificate of compliance, BER 2010-16 MFS.** A contested case hearing was held October 19 and November 9, 2011. Following are the recent documents filed in this matter.
 - Nov. 18 – *Order Establishing Date for Filing of Post-Hearing Briefs* issued by Hearing Examiner Katherine Orr
 - Dec. 22 – *DEQ's Proposed Findings of Fact and Conclusions of Law* was filed by the DEQ attorney

- Dec. 23 – *Landowners statement of Facts & Findings of Law* was filed by the Appellants attorney; *Intervenor MATL's Proposed Findings of Fact & Conclusions of Law* was filed by the attorney for MATL
- d. **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 December 9, 2011, the Hearing Examiner issued *First Scheduling Order* setting a hearing date of May 10, 2012, and January 16, 2012, as the deadline for disclosure of individuals with discoverable information. On December 15, 2011, the Hearing Examiner issued *Amended Scheduling Order* changing the January 16 deadline to January 17, since January 16 is a State holiday. On December 16, 2011, the Board received *City of Helena's Motion for Joinder* requesting an order to join the Environmental Protection Agency Region 8 and Stephen Tuber as necessary parties.
- e. **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; 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; 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; and 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.** An *Order on Motion to Dismiss, Order Regarding the Alternative Motion for Summary Judgment, and Order on Prehearing and Hearing Schedule* was issued on December 13, 2011. The Hearing Examiner consolidated the following three cases into this case (BER 2011-15 OC) because of identity of allegations. On December 16, 2011, a *First Scheduling Order* was issued. A contested case hearing is set for April 16, 2011.
- In the matter of the Request for Hearing by John Hutton, BER 2011-17 OC,
 - In the matter of the Request of Hearing by Patricia Warrington, BER 2011-13 OC and
 - In the matter of the Request for Hearing by Marshall Warrington, BER 2011-12-OC.
- f. **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; and 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.** An *Order on Motion to Dismiss and Regarding the Alternative Motion for Summary Judgment; Order Consolidating Cases, and Order Addressing Hearing Schedule* was issued on December 13, 2011. The Hearing Examiner consolidated the case, Robert W. Gambill BER 2011-18 OC because of identity of allegations. A *First Scheduling Order* was issued on December 16, 2011. The contested Case in this matter is set for April 19, 2012.

- g. **In the matter of the request for hearing by Glenn Miller, Rick Sant, Ralph & Edna Neils, Berneiece 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, LP, for the Dorr Skeels site in Lincoln County, BER 2011-16 OC.** An *Order on Motion to Dismiss and Regarding the Alternative Motion for Summary Judgment and Order Addressing Hearing Schedule* was issued on December 13, 2011. A *First Scheduling Order* was issued on December 16, 2011. The contested case hearing in this matter is set for April 17, 2012. An *Order to Dismiss Certain Parties* was filed by the department on January 11, 2012.
- h. **In the matter of the request for hearing by Frank Gruber, Broadwater Estates, regarding the DEQ's denial of permit modifications to Groundwater Permit No. MTX000157, BER 2011-22 WQ.** On December 15, 2011, the Hearing Examiner issued *Order Granting Extension of Time* giving the parties through December 28, 2011, to file a proposed hearing schedule.
- 3. Other Contested Case Briefings
 - a. **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, Valley County, BER 2010-08 UST.** The Board signed an order granting the DEQ's *Motion for Summary Judgment* on September 28, 2011. On October 26, 2011, Hlavka filed a petition in state district court in Valley County for judicial review of the Board's decision. On November 30, 2011, the Board transmitted a certified copy of the record to the district court.

III. ACTION ITEMS

A. INITIATION OF RULEMAKING

The department will propose that the Board initiate rulemaking to:

- 1. Amend Title 17, Chapter 38, Sub-Chapter 3, Cross Connections In Drinking Water Supplies, to update the adoption by reference to the newest addition, to update the current language to use industry standard language, and for clarification. In addition, the Department proposes to amend 17.38.208 to remove duplicative language, 17.38.225 to clarify the disinfectant residual monitoring requirements, and 17.38.234 to clarify Water Hauler record keeping requirements.

B. FINAL ACTION ON CONTESTED CASES

- 1. **In the matter of the request for hearing by Plum Creek regarding the DEQ's final decision on the amendment of their Groundwater Permit No. MTX000092, BER**

2011-21 WQ. On December 12, 2011, the Board received *Notice of Dismissal and Stipulation to Dismiss Without Prejudice*, signed by counsel for both parties. An order dismissing the case will be presented for signature by the Chair.

C. NEW CONTESTED CASES

1. **In the matter of violations of the Opencut Mining Act by the City of Ronan at Ronan, Lake County, BER 2011-23 OC.** The Board received the request for hearing on November 28, 2011. Interim Hearing Examiner Katherine Orr issued a First Prehearing Order on December 6, 2011. The Board may appoint a permanent hearing examiner or decide to hear the matter.
2. **In the matter of violation of the Metal Mine Reclamation Act by Noble Excavating, Inc. at Nickleback Rock Quarry, Lincoln County, BER 2011-24 MM.** The Board received the appeal on December 14, 2011. The Board may appoint a permanent hearing examiner or decide to hear the matter.
3. **In the matter of violations of the Opencut Mining Act by Emerald Hills Development Company at the Emerald Hills Pit, Yellowstone County, BER 2011-25 OC.** The Board received the appeal on December 23, 2011. The Board may appoint a permanent hearing examiner or decide to hear the matter.
4. **In the matter of violations of the Opencut Mining Act by Brad Blakeman at the Camas Prairie Gravel Pit, Sanders County, BER 2012-01 OC.** The Board received the appeal on January 11, 2012. The Board may appoint a permanent hearing examiner or decide to hear the matter.

IV. GENERAL PUBLIC COMMENT

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

V. ADJOURNMENT

MINUTES
DECEMBER 2, 2011

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:00 a.m., on Friday, December 2, 2011, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

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

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); Richard Oppen (Director); John North, Claudia Massman, Jim Madden, and Norman Mullen – Legal; Judy Hanson – Permitting & Compliance Division; Jon Dilliard, Barb Kingery, and Steve Kilbreath – Public Water Supply & Subdivisions Bureau; David Klemp, Charles Homer, Debra Wolfe, and Stephen Coe – Air Resources Management Bureau; Chris Yde, Bob Smith, Eric Urban, Chris Cronin, Kris Brewer, and Ed Coleman – Industrial & Energy Minerals Bureau; Rick Thompson – Waste & Underground Tank Management Bureau; Bob Bukantis, Mark Bostrom, Randy Apfelbeck, and Rod McNeil – Water Quality Planning Bureau; Todd Teegarden – Technical & Financial Assistance Bureau; John Arrigo – Enforcement Division; John Koerth – Mine Waste Cleanup Bureau

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Mary Beth Marks – USDA Forest Service; Allan Kirk – Tetra Tech; Anne Hedges – Montana Environmental Information Center; Mark Lambrecht – Western Environmental Trade Association

- I.A.1 | Review and approve September 23, 2011, Board meeting minutes.
- Mr. Mires questioned some language in III.C.1 on page 6, where Chairman Russell called for a motion to appoint Ms. Orr and then called for the vote, without the motion and second.
- Chairman Russell called for a motion to approve the minutes with the correction noted. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.
- Note: Upon review of the September 23, 2011, transcript of proceedings it appears no motion was made on item III.C.1. Therefore, no corrections were warranted and the minutes stand as presented.*
- I.A.2 | Review and approve November 3, 2011, Board meeting minutes.
- Chairman Russell called for a motion to approve the November 3, 2011, minutes. Ms. Kaiser so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.B. | Set 2012 BER Meeting Schedule
- Mr. Livers said the dates were proposed to accommodate rulemaking. The dates proposed were January 27, March 23, May 18, July 27, September 18, and either November 30 or December 7.
- Chairman Russell asked that the November/December dates be left open for discussion at a later date. The Board agreed on the remaining dates.
- II.A.1.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.
- Ms. Orr said this matter went to hearing in October, that post hearing briefs were submitted, and she will issue the proposed findings of fact and conclusions of law.
- II.A.1.b | 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.
- Ms. Orr said this matter went to hearing in September, that it has been deemed submitted, and that a decision would be issued in the next few weeks.
- II.A.1.c | 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.d | In the matter of violations of the Montana Septage Disposal and Licensure Laws by

James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL.

Ms. Orr said she had ruled on the motion for a protective order both denying and granting it. She said the case has been reset for hearing on April 16.

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

II.A.1.f 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.

Ms. Orr said that Ell Dirt Works had just obtained counsel and that she was expecting a status report.

II.A.1.g 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. (*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.

Mr. Miller questioned the January 2010 date. Ms. Orr noted that the date was correct – the case has been around for quite a while – and that it may be time to move it along.

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.

Ms. Orr said a motion for summary judgment was filed by the appellant and that DEQ has asked for an extension on that. She also noted that the parties had asked to vacate and reset the dates of the prehearing conference and the hearing, which would be done.

II.A.2.c In the matter of the appeal and request for hearing by Maurer Farms, Inc.; Somerfeld & Sons Land & Livestock, LLC; 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 a contested case hearing was held on both October 19 and November 9, and that post-hearing briefs are due on December 22.

- II.A.2.d | 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 said the parties had submitted a proposed scheduling order on November 17.
- II.A.2.e | 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.
- II.A.2.f | 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.
- II.A.2.g | 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.
- II.A.2.h | 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.
- II.A.2.i | 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 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, LP, for the Dorr Skeels site in Lincoln County, BER 2011-16 OC.
- II.A.2.j | 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.

- II.A.2.k | 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.
- Regarding items e through k above, Ms. Orr said there is a pending motion to dismiss, and in the alternative for summary judgment, and that she has a draft order prepared. She noted that the parties are not represented by counsel and that the relief sought is a public hearing.
- II.A.3.a | 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, Valley County, BER 2010-08 UST.
- Ms. Orr said this case went to district court with a petition for judicial review.
- III.A.1 | In the matter of the amendment of ARM 17.30.617 to designate the mainstem Gallatin River from the Yellowstone National Park boundary to the confluence of Spanish Creek as an Outstanding Resource Water (ORW) and the amendment of ARM 17.30.638.
- Mr. Livers said the department is recommending another extension.
- Mr. Bukantis provided a brief overview of the rulemaking, saying it was brought to the Board by American Wildlands in December 2001 and had been handed over to the Greater Yellowstone Coalition, but that currently American Rivers is the active environmental group. He said the department had brought the rulemaking to the Board in October 2006, and that the ORW designation would offer the highest protection provided for waters under state law. Mr. Bukantis explained that the environmental groups and the development community have been conversing to try to craft a local solution to provide the same or better protection, and that the intent of the extensions is to encourage and support those conversations.
- In response to questions from the Board, Mr. Teegarden said there is snowmaking taking place in Vermont, Arizona, Colorado, and Idaho. He explained that the group has not actively met recently, that they have been waiting for the snowmaking pilot this winter.
- After further discussion, Chairman Russell called for a motion to “accept the department’s recommendation and move forward with an extension of rulemaking for the Gallatin ORW.” Mr. Miller so MOVED. Mr. Mires SECONDED the motion.
- A brief discussion took place regarding the survivability of the EIS, the Chairman Russell called for public comment regarding the rulemaking. There was no response.
- Chairman Russell called for a vote and the motion CARRIED.

III.A.2

In the matter of the amendment of Circular DEQ 4.

Mr. Kilbreath said DEQ 4 is the design standards that all the counties adopt and that the department uses for onsite wastewater treatment systems in the state. He described the process used for this revision, which involved consultants, county staff, and department staff drafting the document; a blog to take public comment; and public meetings in Polson, Helena, and Billings to take further comment. He said the draft before them had been heard and approved by the Water Pollution Control Advisory Council, that the department is requesting the Board move forward with the rulemaking, and the department would like a longer public comment period rather than the typical 30 days. Mr. Kilbreath also said some new chapters had been added.

Ms. Kingery described the major changes in the document, and both she and Mr. Kilbreath responded to questions and comments from the Board.

The Board suggested that instead of starting rulemaking, department staff continue work on the verbiage and complete the chapters that are in progress and put it back out for comment, then come back to the Board with a more up-to-date version.

Mr. Livers concurred that there is value in not initiating at this time and confirmed that there was no tight deadline on it.

Chairman Russell called for public comment. There was no response.

The Board did not take action on this item.

III.A.3

In the matter of the amendment of ARM Title 17, chapter 24, subchapters 3, 4, 5, 6, 7, 9, 10, 11, and 12, implementing the Montana Strip and Underground Mine Reclamation Act.

Mr. Urban described the changes being proposed. He said the department had held a stakeholders meeting, which included representatives from the coal industry, property owners, and private interest organizations, and that the comments received were addressed in the rule package. He responded to questions from the Board.

Ms. Kaiser recused herself from this rulemaking item.

Chairman Russell called for public comment.

Ms. Hedges said she thought the rule package was different than what was out for public comment last May, but that the Montana Environmental Information Center supports moving forward with the rulemaking.

Chairman Russell called for a motion to “move forward with this rulemaking, and adopt the MAR, and get it published.” Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a 6-0 vote.

III.B

In the matter of the three-year review of temporary water quality standards for the New World Mining District.

Mr. Bukantis provided background on this saying that in 1999 the Forest Service requested the Board adopt temporary water quality standards for the purpose of providing protection from liability for standards exceedences while they cleaned up legacy mine waste on federal property. He said the Forest Service has worked closely with the department and has reported back to the Board on progress every three years since then. He said the standards are set to expire in 2014. He said the department recommends the Board take no action at this time, so that the standards continue.

Chairman Russell announced the public hearing.

Ms. Marks provided details of the progress made at the site through 2011. She said the adoption of the temporary water quality standards has allowed cleanup actions on an established schedule that resulted in significant water quality improvement in the district. She said the Forest Service recommends there be no adjustments to the temporary standards at this time.

Chairman Russell asked if anyone else wanted to speak to the matter. There was no response. He called the hearing to close.

Ms. Marks and Mr. Bukantis responded to Board member questions.

The Board took no action on this matter.

III.C.1

In the matter of violations of the Opencut Mining Act by Concrete Materials of Montana, LLC, at the Mauritzson Site, Yellowstone County, BER 2011-04 OC.

Ms. Orr provided background on the matter and said the AOC was included in their packet, and that they have before them a stipulation to dismiss under rule 41(a) and an order.

Chairman Russell called for a motion to “authorize the Board Chair to sign [the dismissal order].” Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.2

In the matter of the appeal and request for hearing by Meat Production Inc., a.k.a. Stampede Packing Co., regarding the DEQ’s notice of final decision for Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000100, BER 2010-18 WQ.

Ms. Orr provided a brief overview of the case and said the parties had reached agreement. She said the Board had before it a motion to dismiss under rule 41(a)(1) and an order.

- Chairman Russell called for a motion to “authorize the Board Chair to sign [the dismissal order].” Mr. Mires so MOVED. Mr. Whalen SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.C.3 In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Carbon County Holdings, LLC, at Carbon County Holdings, Carbon County, BER 2011-01 SM.
- Ms. Orr provided background on the matter and said the AOC was included in their packet, and that they had before them a stipulation to dismiss and an order.
- Chairman Russell called for a motion to “authorize the Board Chair to sign [the dismissal order].” Ms. Kaiser recused herself from this matter. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.C.4 In the matter of the appeal 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.
- Ms. Orr explained the details of this case and said the Intervenor and Applicant filed a notice to have the case removed to District Court, that she issued an order recommending dismissal, and that the Board had before it an order adopting by reference the order recommending dismissal with prejudice.
- Chairman Russell called for a motion to “authorize the Board Chair to sign the order of dismissal for Case No. BER 2011-19 MFS.” Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.D.1 In the matter of the request for hearing by Plum Creek regarding the DEQ’s final decision on the amendment of their Groundwater Permit No. MTX000092, BER 2011-21 WQ.
- Ms. Orr provided information regarding the appeal.
- Chairman Russell called for a motion to “appoint Katherine the permanent hearings examiner on this matter.” Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.
- III.D.2 In the matter of the request for hearing by Frank Gruber, Broadwater Estates, regarding the DEQ’s denial of permit modifications to Groundwater Permit No. MTX000157, BER 2011-22 WQ.
- Ms. Orr provided information regarding the appeal.

Chairman Russell called for a motion to “appoint Katherine the permanent hearings examiner on this matter.” Ms. Shropshire so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

IV. General Public Comment

Chairman Russell asked if there was anyone in the audience that would like to speak to the Board on matters within the Board’s jurisdiction. There was no response.

V. Adjournment

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

The meeting adjourned at 12:47 p.m.

Board of Environmental Review December 2, 2011, minutes approved:

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

DATE

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

AGENDA # III.A.1.

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

1. Amend existing public water supply cross-connection rules to update documents adopted by reference, update existing rule language to incorporate current industry standard language, and for clarification;
2. Amend existing public water supply rules to remove duplicative language;
3. Amend existing disinfectant residual monitoring requirements for clarification; and
4. Amend existing recordkeeping rules to include water hauler records;

LIST OF AFFECTED RULES - ARM 17.38.208, 225, 234, 301, 302, 305, 310, and 312

AFFECTED PARTIES SUMMARY - Owners of regulated public water supply systems.

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

BACKGROUND - The Department is proposing to update the cross-connection rules by updating the adoption by reference of the “Manual for Cross-Connection Control” to the 10th edition, incorporating industry standard language into the rules, eliminating the adoption by reference of the “List of Approved Backflow Prevention Assemblies,” and by clarifying those agencies that can certify backflow device testers.

The remaining proposed changes are housekeeping in nature. The proposed amendment to ARM 17.38.208 is intended to remove language that is no longer required. Previously, the Board adopted, by reference, federal language regulating the control of lead and copper but modified it to include changes described in the Federal Register. When the Board last updated the adoption by reference to the 2009 edition of the Code of Federal Regulations, that language was included. The proposed change is necessary to remove duplicative language.

The Department is proposing to amend ARM 17.38.234 to clarify that the Department may waive the disinfectant residual monitoring requirements for consecutive systems. In some cases, the benefits of collecting and reporting this information do not offset the associated costs.

The Department is also proposing to clarify the requirement for water haulers to collect, record, and maintain disinfectant residual monitoring records by adding ARM 17.38.513 to the list of rules required to produce records under 17.38.234.

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

BOARD OPTIONS - The Board may:

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

DEQ RECOMMENDATION - The Department recommends initiation of rulemaking and appointment of a hearing officer for a public hearing.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.38.208, 17.38.225, 17.38.234,)	PROPOSED AMENDMENT
17.38.301, 17.38.302, 17.38.305,)	
17.38.310, and 17.38.312 pertaining to)	(PUBLIC WATER AND SEWAGE
treatment requirements, control tests,)	SYSTEM REQUIREMENTS)
testing and sampling records and)	
reporting requirements, definitions,)	
incorporation by reference, cross-)	
connections: regulatory requirements,)	
voluntary cross-connection control)	
programs: application requirements,)	
and standards and requirements for)	
cross-connection control)	

TO: All Concerned Persons

1. On _____, 2012, at __:__.m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., _____, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.38.208 TREATMENT REQUIREMENTS (1) through (3) remain the same.
(4) The board adopts and incorporates by reference the following:
(a) through (g) remain the same.
(h) 40 CFR 141.81, ~~as modified by 72 Fed. Reg. 57,782 (Oct. 10, 2007)~~,
which sets forth the applicability of lead and copper corrosion control treatment steps
to small, medium, and large water systems;
(i) remains the same.
(j) 40 CFR 141.83, ~~as modified by 72 Fed. Reg. 57,782 (Oct. 10, 2007)~~,
which sets forth lead and copper source water treatment requirements;
(k) 40 CFR 141.84, ~~as modified by 72 Fed. Reg. 57,782 (Oct. 10, 2007)~~,
which sets forth lead service line replacement requirements;
(l) through (w) remain the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.208 clarify the adoption by reference of federal requirements. The proposed amendments are necessary to remove confusing language in the rules. When the department adopted the 2007 edition of 40 CFR, there were additional requirements that had been published in the Federal Register that were not included in the 2007 edition. To avoid adopting multiple editions of the CFR, the board adopted the 2007 edition as modified by the language in the Federal Register. The language in the Federal Register is now present in the 2009 edition, which the board has adopted by reference.

17.38.225 CONTROL TESTS (1) remains the same.

(2) Disinfectant residual tests must be conducted daily by:

(a) remains the same.

(b) ground water systems in accordance with 40 CFR Part 141, subpart S.

Disinfectant residual tests must be conducted daily at each entry point to the distribution system to prove compliance with the 4 four-log virus inactivation or removal requirement; and

(c) ground water systems required by the department under ARM 17.38.229 to maintain a residual, and by consecutive systems connected to those systems, at each entry point to the distribution system and, if required to maintain a residual in the distribution system, one in the distribution system. For consecutive systems, the entry point is the point at which the purchased water enters the distribution system of the consecutive system.

(3) The department may waive, on a case-by-case basis, the requirement entry point sampling, distribution sampling, or both for ground water and consecutive systems that are referenced in ARM 17.38.225(2)(c):

~~(i) entry point sampling; and~~

~~(ii) entry point sampling and distribution system sampling, if the consecutive system produces treated water for vending or bottling where the treatment is designed to produce a product free of chlorine.~~

(3) through (7) remain the same, but are renumbered (4) through (8).

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.225 clarify that the department may waive any or all of the disinfectant residual monitoring requirements on a case-by-case basis for systems identified in ARM 17.38.225(2)(c). The proposed clarifications are necessary to allow a regulated system to avoid regulatory requirements where the department has determined that the public health is protected through other means.

17.38.234 TESTING AND SAMPLING RECORDS AND REPORTING REQUIREMENTS (1) and (2) remain the same.

(3) Recordkeeping requirements for water haulers are set forth in ARM

17.38.513.

(3) through (9) remain the same, but are renumbered (4) through (10).

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendment would provide information on where the recordkeeping requirements for water haulers can be found. This proposed amendment is necessary so that confusion will not exist as to whether the recordkeeping requirements in ARM 17.38.234 are applicable to water haulers and so that the water haulers' recordkeeping requirements can be cross-referenced with the recordkeeping requirements of ARM 17.38.234.

17.38.301 DEFINITIONS For the purposes of this subchapter, unless the context requires otherwise, the following definitions, in addition to those in 75-6-102, MCA, apply:

(1) through (6) remain the same.

(7) "Certified backflow prevention assembly tester" means a person who holds a current certificate issued by a certification program of any state authorizing the person to test backflow prevention assemblies or who holds a current certificate from the American ~~s~~Society of ~~s~~Sanitary ~~e~~Engineers, or the American bBackflow ~~p~~Prevention ~~a~~Association, ~~foundation for cross-connection control and hydraulic research, or American water works association.~~

(8) remains the same.

(9) "Degree of hazard" means the level of risk created by either a pollutant (non-health hazard) or a contaminant (health hazard), as derived from an assessment of the materials that may come in contact with the distribution system through a cross-connection.

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

~~(10)~~ (11) "Water pollution Non-health hazard" means a condition that causes or creates a potential for water quality degradation but does not constitute a health hazard.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.301(7) clarify which agencies can certify cross-connection control assembly testers. The proposed amendments are necessary to correct current language that indicates that the Foundation for Cross-Connection Control and Hydraulic Research and the American Water Works Association are certifying agencies. Both of these agencies offer training and testing, but certification is through the organizations now listed in the proposed amendment to the rule.

The proposed addition of the new definition in (9) would clarify the term "degree of health hazard." The proposed definition is necessary to ensure that the term, which is common in the cross-connection control industry, is properly understood by the regulated community.

The proposed amendments to the definition of "water pollution hazard" would make the rule language consistent with standard industry terminology adopted by reference in the "Manual of Cross-Connection Control." The proposed amendment is necessary to remove language that may confuse the regulated public. The remaining amendments are necessary for renumbering purposes.

17.38.302 INCORPORATION BY REFERENCE (1) The board hereby adopts and incorporates by reference the following:

~~(a) "List of Approved Backflow Prevention Assemblies" published by the Foundation for Cross-Connection Control and Hydraulic Research, University of Southern California (1998 edition);~~

~~(b) "Manual of Cross-Connection Control" (910th edition), published by the Foundation for Cross-Connection Control and Hydraulic Research, University of Southern California (December 1993 October 2009).~~

~~(2) These the publications sets forth approved backflow prevention assemblies or devices and standards for cross-connections to public water supply systems. Copies of the this publications listed above are available at may be obtained by contacting the Department of Environmental Quality, 1520 E. 6th Ave., PO Box 200901, Helena, MT 59620-0901 Foundation for Cross-Connection Control and Hydraulic Research, University of Southern California, Kaperielian Hall 200, Los Angeles, CA 90089-2531 or at <http://www.usc.edu/dept/fccchr/>.~~

~~(3) Backflow prevention assemblies or devices not identified in the publications listed above may be approved by the department if the person demonstrates to the satisfaction of the department that strict adherence to this rule is not necessary to protect public health and the quality of state waters.~~

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.302(1) would remove the adoption by reference of the "List of Approved Backflow Prevention Assemblies" and update the adoption by reference of the "Manual of Cross-Connection Control" to the 10th edition. The proposed deletion of the "List of Approved Backflow Prevention Assemblies" is necessary because Montana law does not allow for the adoption by reference of new editions without going through the rulemaking process. By keeping this adoption by reference in the rule, systems are unable to use new tools that are listed until that edition has been adopted. By removing the list and referring only to assemblies approved by the department, as is being proposed in ARM 17.38.305(3), the department may then still use the list and refer to the most recent edition. The proposed amendment to adopt the 10th edition of the "Manual of Cross-Connection Control" would update the adoption by reference to the most current edition. The proposed amendment is necessary to ensure that certified testers are testing the cross-connection control assemblies in accordance with current industry standards. The significant changes to the testing standards will: (1) ensure that a cross-connection is not created during testing; (2) protect the tester from pressure releases; and (3) provide a required minimum value, or improve the accuracy of the test, by detailing the procedure more fully.

MAR Notice No. 17-____

The proposed amendments to (2) would clarify how copies of the document adopted by reference may be obtained. The proposed amendments are necessary to reflect proposed amendments in (1) and to clarify that the department does not have copies available. The "Manual of Cross-Connection Control" is offered for sale by the publisher. Previously, because the department is a member of the association and can purchase the manual at a reduced rate, the department offered this document for sale at its cost. The department has determined that it should not be selling the manual to non-members at the member price, nor should the department charge more than its cost. The department will now only give requestors the publisher's contact information and requestors can make arrangements to receive a copy of the manual.

The reason for the proposed deletion of (3) is the same as that given for the proposed amendments to ARM 17.38.305.

17.38.305 CROSS-CONNECTIONS: REGULATORY REQUIREMENTS

(1) A cross-connection on a public water supply system must be eliminated by the disconnection of the cross-connection whenever reasonably practicable. Whenever elimination of a cross-connection is not reasonably practicable and the cross-connection creates a health or ~~water contamination~~ non-health hazard, the hazard must be eliminated by the insertion into the piping of an approved backflow prevention assembly or device in accordance with (2) ~~of this rule~~.

(2) For the cross-connections identified below, the following types of approved backflow prevention assemblies or devices must be used:

(a) A health hazard created by a cross-connection that may be subject to back pressure must be eliminated by an approved reduced pressure zone principle backflow prevention assembly (RP) or an air-gap.

(b) A health hazard created by a cross-connection that may be subject to back siphonage, but not subject to back pressure, must be eliminated by an approved air-gap, pressure vacuum breaker assembly (PVB), spill-resistant pressure vacuum breaker assembly (SVB), atmospheric vacuum breaker (AVB), or a reduced pressure zone principle backflow prevention assembly (RP).

(c) A ~~water pollution~~ non-health hazard created by a cross-connection that may be subject to back pressure and back siphonage must be eliminated, at a minimum, by an approved double check valve assembly (DC). ~~The This~~ cross-connection condition ~~described in this subsection~~ may also be eliminated by an air-gap or by an approved reduced pressure zone principle backflow prevention assembly (RP).

(d) A ~~water pollution~~ non-health hazard created by a cross-connection that may be subject to back siphonage, but is not subject to back pressure, must be eliminated, at a minimum, by an approved double check valve assembly (DC), pressure vacuum breaker assembly (PVB), spill-resistant pressure vacuum breaker assembly (SVB), or an atmospheric vacuum breaker (AVB) ~~device~~. This cross-connection condition ~~described in this subsection~~ may also be eliminated by an air-gap or by an approved reduced pressure zone principle backflow prevention assembly (RP).

(3) Backflow prevention assemblies and devices must be approved by the department.

(3) through (5) remain the same, but are renumbered (4) through (6).

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.305 incorporate changes proposed under ARM 17.38.301, update the list of available treatment devices, and incorporate changes in industry naming. The proposed amendments are necessary to allow the regulated public the use of all available treatment options to achieve compliance with the requirements and to incorporate standard industry naming language.

17.38.310 VOLUNTARY CROSS-CONNECTION CONTROL PROGRAMS:
APPLICATION REQUIREMENTS (1) remains the same.

(2) The application must be accompanied by a copy of the local ordinances or plan of operations that describes the methods for implementing the cross-connection control program. The local ordinances or plan of operations must include the following:

(a) and (b) remain the same.

(c) a requirement to eliminate cross-connections and hazards in compliance with ARM 17.38.305 on a priority basis beginning with those identified as having the highest degree of hazard. A health hazard must be assigned a higher degree of risk than all ~~water contamination~~ non-health hazards;

(d) remains the same.

(e) the method for identifying the appropriate backflow prevention assembly or device for a specific degree of hazard. The methodology must be in accordance with the "Manual of Cross-Connection Control" incorporated by reference in ARM 17.38.302, or as described in ARM 17.38.305(2);

(f) through (h) remain the same.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.310 incorporate changes proposed under ARM 17.38.301 and clarify existing language. The proposed amendments are necessary to incorporate standard industry definitions and language and to clarify the backflow valve requirement without having to access the Manual of Cross-Connection Control.

17.38.312 VOLUNTARY CROSS-CONNECTION CONTROL PROGRAMS:
STANDARDS AND REQUIREMENTS FOR CROSS-CONNECTION CONTROL

(1) The department shall approve a voluntary program for cross-connection control if:

(a) remains the same.

(b) the program provides for elimination of cross-connections, health hazards, and ~~water pollution~~ non-health hazards, and for installation and maintenance of backflow ~~protection~~ prevention assemblies or devices in accordance

with ARM 17.38.305;
(c) through (2)(c) remain the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.312 incorporate changes proposed under ARM 17.38.301. The proposed amendments are necessary to incorporate standard industry definitions and language for clarification.

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., _____ 2012. 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; openpit mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

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

Certified to the Secretary of State, _____, 2012.

Dale R. Cockrell
CHRISTENSEN, MOORE, COCKRELL,
CUMMINGS & AXELBERG, P.C.
P.O. Box 7370
Kalispell, MT 59904-0370
Telephone: (406) 751-6000
Facsimile: (406) 756-6522

Attorneys for Plum Creek Manufacturing, Inc.

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 12th day of December, 2011
at _____ o'clock _____ m.
By: [Signature]

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

IN THE MATTER OF:)	CASE NO. BER. 2011-21 WQ
THE REQUEST FOR HEARING BY)	
PLUM CREEK REGARDING THE)	NOTICE OF DISMISSAL AND
DEQ'S FINAL DECISION ON THE)	STIPULATION TO DISMISS
AMENDMENT OF THEIR)	WITHOUT PREJUDICE
GROUNDWATER PERMIT NO.)	
MTX000092.)	
)	

Pursuant to M.R.Civ.P. Rule 41(a), Plum Creek Manufacturing, Inc. and the Montana Department of Environmental Quality hereby provide this Notice of Dismissal and Stipulation to Dismiss without prejudice the above-captioned matter. A proposed Order Dismissing Appeal is attached.

DATED this 9th day of December, 2011.

CHRISTENSEN, MOORE, COCKRELL,
CUMMINGS & AXELBERG, P.C.

[Signature]
Dale R. Cockrell
P.O. Box 7370
Kalispell, MT 59904-0370

Attorneys for Plum Creek Manufacturing, Inc.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL
QUALITY

A handwritten signature in black ink, appearing to read 'Claudia Massman', is written over a horizontal line.

Claudia L. Massman
Special Assistant Attorney General
P.O. Box 200901
Helena, MT 59602-0901
Attorney for Montana Department of
Environmental Quality

CERTIFICATE OF SERVICE

I, Stacia McAdams, one of the staff of the law firm of CHRISTENSEN, MOORE, COCKRELL, CUMMINGS & AXELBERG, P.C., do hereby certify that I served a copy of the foregoing document in the above matter by mailing a copy thereof, first class postage prepaid, this date to:

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

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

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

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



Stacia McAdams

Date: ~~November~~ 9, 2011
~~December~~

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

IN THE MATTER OF:)	CASE NO. BER 2011-21 WQ
THE APPEAL AND REQUEST FOR)	
HEARING BY PLUM CREEK)	ORDER DISMISSING
REGARDING THE DEQ'S)	APPEAL
FINAL DECISION ON THE)	
AMENDMENT OF THEIR)	
GROUND WATER PERMIT NO.)	
MTX000092)	

Pursuant to Plum Creek Manufacturing, Inc.'s and the Montana Department of Environmental Quality's Notice of Dismissal and Stipulation to Dismiss Without Prejudice, dated December 9, 2011;

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

Dated this _____ day of _____, 2012.

BY: _____
Joseph W. Russell, M.P.H., Chairman
Montana Board of Environmental Review

cc: Claudia Massman, DEQ attorney
Dale Cockrell, attorney for Plum Creek Manufacturing, Inc.



MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: November 29, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-23 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF
THE OPENCUT MINING ACT BY CITY OF
RONAN AT RONAN, LAKE COUNTY,
MONTANA. (OPENCUT PERMIT NO. 43,
FID 2100; DOCKET NO. OC-11-06)

Case No. BER 2011-23 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2100, Docket No. OC-11-06).

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

BER-2011-23 OC

JAMES RAYMOND
Raymond Law Office, PLLC
406.883.5588 406.883.5582 FAX

Attorney and Counselor at Law
407 First Street West, Polson, Montana 59860
jamesraymond@centurytel.net

Friday, November 25, 2011

Filed with the

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 28th day of November 2011

at _____ o'clock _____ m.

By: M. J. [Signature]

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

RE: Notice of Violation and Administrative Compliance and Penalty Order,
Docket No. OC-11-06

Sir:

This office is City Attorney to the City of Ronan, and write in reply of your letter dated October 28 last past.


The City of Ronan takes no objection to the corrective action required of it in regards to submittal of the annual report, which will be transmitted under separate cover by its Director of Public Works.

The City does, however, take exception to a fine of \$480 in connection with this matter. Please consider this the City's written request for a hearing before the Board of Environmental Review on the subject.

The City is content to appear telephonically at such hearing, and please consider this its request for such appearance.

Thank you for your time and attention.

v/r/s


James Raymond
Raymond Law Office, PLLC

Encl.

Cc: Mayor, DPW



Brian Schweitzer, Governor
Richard H. Opper, Director

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

October 28, 2011

K. Templer, Director of Public Works
City of Ronan
207 Main Street SW, Suite A
Ronan, MT 59864

CERTIFIED MAIL #7009 2820 0000 7019 1097
Return Receipt Requested

RE: Notice of Violation and Administrative Compliance and Penalty Order, Docket No. OC-11-06, for violations of the Opencut Mining Act. [Permit No. 4, FID #2100]

Dear Mr. Templer:

Enclosed is a Notice of Violation and Administrative Compliance and Penalty Order (Order) for the above-referenced enforcement action. The Order alleges that City of Ronan (Ronan) violated the Montana Opencut Mining Act by failing to submit the 2010 annual progress report and severance fees. Please refer to Section III of the Order for a description of the violation, required corrective action and an explanation of the penalty.

Pursuant to Section 82-4-441, MCA, Ronan is entitled to a hearing before the Board of Environmental Review if a written request is submitted to the Board within 30 days of the date the Order is served. Service of the Order by mail is complete three business days after mailing. Any written request must be sent to:

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

If Ronan does not request a hearing and submit testimony at the hearing, Ronan will forfeit its right to seek judicial review of the Department's violation and penalty determination. If you have questions related to this matter, please contact me at either dkenney@mt.gov or the telephone number listed below.

Sincerely,

Daniel R. Kenney
Environmental Enforcement Specialist
DEQ Enforcement Division
406-444-1453; Fax 406-444-1923
E-mail: dkenney@mt.gov

Enclosures

cc w/enc.: Jane Amdahl, DEQ Legal Unit, via email
Chris Cronin, DEQ Industrial and Energy Minerals Bureau, via email
Lake County Environmental Health, via email
Julie DalSoglio, EPA-Montana, via email

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF
THE OPENCUT MINING ACT BY CITY
OF RONAN AT RONAN, LAKE
COUNTY, MONTANA.
(OPENCUT PERMIT NO. 43, FID 2100)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE AND
PENALTY ORDER

Docket No. OC-11-06

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 City of Ronan (Ronan) 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.

II. FINDING 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 Ronan to address the alleged violations of the Act, the administrative rules implementing the Act, and provisions of the reclamation permit issued under the Act, and to obtain corrective action and assess penalties for the alleged violation.
4. ARM 17.24.225(1) provides that "An operator shall comply with the provisions of its permit, this subchapter, and the Act."

5. Ronan is a "person" as defined in Section 82-4-403(10), MCA.

6. The Department issued Ronan a permit to operate an opencut mine in Section 32, Township 21 North, Range 19 West, Lake County, Montana. Ronan operates or has operated the opencut mine, Ronan pit (Site), under Permit No. 43 (Permit). Ronan, therefore, is an "operator" within the meaning of Section 82-4-403(8), MCA, and subject to the requirements of the Act and the rules adopted thereunder.

7. On or before March 1 of each year, an operator who possesses one or more permits shall submit to the Department an annual progress report for the previous calendar year on a form furnished by the Department. *See* Section 82-4-437(1), MCA, and ARM 17.24.214.

8. Section 82-4-437(2), MCA, requires each permitted operation, except for those that mine, extract or produce bentonite, to submit with the annual progress report a fee of 2.5 cents per cubic yard of material mined (severance fees) during the period covered by the annual progress report.

9. A review of the Department's opencut mining permit file establishes that Ronan has not submitted an annual progress report or severance fees for calendar year 2010.

10. On April 29, 2011, the Department sent Ronan a Violation Letter, via certified mail, for its failure to submit an annual progress report and severance fees for calendar year 2010. The Department's Violation Letter requested that Ronan submit the delinquent annual progress report and required severance fees within 30 days of receipt of the letter. Ronan accepted delivery of the Violation Letter on May 2, 2011.

11. Ronan failed to submit the annual progress report and severance fees for calendar year 2010 within 30 days of receiving the Department's Violation Letter.

12. Ronan violated ARM 17.24.214(1) one time by failing to submit the annual progress report and severance fees for calendar year 2010 by March 1, 2011.

III. ADMINISTRATIVE ORDER

This Order is issued to Ronan pursuant to the authority vested in the State of Montana, acting by and through the Department under the Act and administrative rules adopted thereunder, ARM Title 17, chapter 24, sub-chapter 2. Based on the foregoing Findings of Fact and Conclusions of Law and the authority cited above, the Department hereby ORDERS Ronan to do the following:

13. Within 45 days of service of this Order, Ronan shall:

- a. Submit to the Department the annual progress report for 2010 for the Permit listed in Paragraph 6 of this Order. The 2010 annual progress report must be submitted on the *Annual Progress Report* form that is attached to this Order and is incorporated herein as Attachment A; and
- b. Pay to the Department in full the severance fees, if any, that are due and owing for the period covered by the 2010 annual progress report. Severance fees must be paid by check or money order, made payable to the "Department of Environmental Quality," and sent to:

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

14. The Department has calculated a penalty of \$480 for the failure to submit the annual progress report for 2010.

15. No later than 60 days after service of this Order, Ronan shall pay to the Department the administrative penalty in the amount of \$480 for the violation specified above. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality" and sent to:

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

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

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

11 IV. NOTICE OF APPEAL RIGHTS

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

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

18 19. Hearings are conducted as provided in the Montana Administrative Procedure Act,
19 Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court
20 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to
21 the hearing may include formal discovery procedures, including interrogatories, requests for
22 production of documents, and depositions. Because Ronan is not an individual, Ronan must be
23 represented by an attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-
24 61-201, MCA.

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

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

IT IS SO ORDERED:

DATED this 28th day of October, 2011.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY


JOHN L. ARRIGO, Administrator
Enforcement Division

ANNUAL PROGRESS REPORT AND FEE CALCULATION**INSTRUCTIONS:**

1. Verify the address shown below.
2. Indicate the current phone number and email address for the operator.
3. For each permit and short form site listed below, print or type the information requested for the 2010 calendar year.
4. Complete the fee calculation and certification sections at the end of the report.
5. This form is not available online once submitted, therefore operators should retain a copy of the completed form for their records.

NOTE: In accordance with the Opencut Mining Act (MCA 82-4-437) each operator must submit this annual report and fee payment to the Opencut Mining Program by March 1, 2011

CITY OF RONAN

Phone : _____

207 MAIN ST SW STE A
RONAN, MT. 59864

Email : _____

Permit Number	Site Name	County	Year Site Was Last Mined:	Number of Cubic Yards Mined in 2010
43	RONAN	LAKE		
ANNUAL FEE CALCULATION NOTE: If no material was mined during 2010, the fee due is \$0.			Total Cubic Yards Mined :	
			x \$0.025	
			Total Annual Fee Due : \$	

** Indicates Short Form Mine Site

SIGN AND DATE BELOW AND ATTACH PAYMENT OF TOTAL ANNUAL FEES DUE.

I CERTIFY THIS REPORT AND FEE CALCULATION ARE COMPLETE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

Name: _____

Title : _____

Operator Name: CITY OF RONAN

Date : _____

Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet

Responsible Party Name:	City of Ronan (Ronan)
FID:	2100 Permit No. 43
Statute:	Opencut Mining Act (Act)
Date:	10/27/2011
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	\$1,000.00

Violation #1
Description of Violation:
Ronan violated Section 82-4-437, MCA, ARM 17.24.214(1) and ARM 17.24.225(1) by not submitting an annual progress report for calendar year 2010 to the Department on or before March 1 of the following year (2011).

I. BASE PENALTY

Nature

Explanation:
The Department relies on operators to self-report on the progress of their mining operations. The Department uses the information to determine whether the operator is in compliance with its reclamation permit. The annual report also provides the Department with a method to update ownership and contact information. The failure to submit an annual progress report impacts administration of the Act because it impairs the Department's ability to identify and promptly deal with violations.
Potential to Harm Human Health or the Environment
Potential to Impact Administration
X

Gravity and Extent

Gravity Explanation:
ARM 17.4.303(5)(b)(ii) provides that the gravity for the violation, "a failure to monitor, report, or make records," is moderate.
Extent Explanation:
Not applicable.

Harm to Human Health or the Environment

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

Impact to Administration

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

BASE PENALTY (Maximum Penalty Authority x Gravity Factor): **\$400.00**

II. ADJUSTED BASE PENALTY

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

Explanation:

Ronan had control over the circumstances surrounding the violation and did not file the annual progress reports when it was due. In addition, Ronan has a reclamation permit issued by the Department and should be knowledgeable of the opencut regulations. Furthermore, Ronan failed to submit the report after the Department notified Ronan in writing of the violation and what it needed to do to return to compliance. Therefore, the Department is adding 20% to the base penalty to reflect a moderate degree of culpability.

Circumstances Percent: 0.20

Circumstances Adjustment (Base Penalty x Circumstances Percent) \$80.00

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

Explanation:

The Department is not aware of any actions completed to correct the violation.

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 to complete the annual report. Therefore, no decrease to the Base Penalty is calculated for Amounts Voluntarily Expended.

AVE Percent: 0.00

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$400.00
Circumstances	\$80.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$480.00

III. DAYS OF VIOLATION

Explanation:

Ronan violated Section 82-4-437, MCA, ARM 17.24.225 and ARM 17.24.214(1) one time by failing to submit the annual progress report for calendar year 2010 by March 1, 2011. Therefore, the Department is calculating one day of violation.

Number of Days: 1

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$480.00

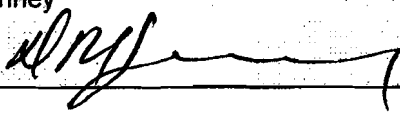
IV. ECONOMIC BENEFIT

Explanation:

The Department has determined that Ronan did not gain a significant economic benefit by delaying submittal of the annual progress report and that the failure to pay the associated 2.5 cent fee is a delayed cost and would not create a significant economic benefit. The Department estimates it would take less than two hours to complete and mail the annual progress report to the Department. The savings Ronan gained by delaying compliance is not significant.

ECONOMIC BENEFIT REALIZED: \$0.00

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

Responsible Party Name:	City of Ronan (Ronan)	
FID:	2100	Permit No. 43
Statute:	Opencut Mining Act (Act)	
Date:	10/27/11	
Signature of Employee Calculating Penalty:	Daniel R. Kenney 	

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

	Violation #1
Maximum Penalty Authority:	\$1,000.00
Percent Harm - Gravity and Extent:	0.00
Percent Impact - Gravity:	0.40
Base Penalty:	\$400.00

II. Adjusted Base Penalty

Base Penalty:	\$400.00
Circumstances:	\$80.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$480.00

Totals
\$400.00
\$80.00
\$0.00
\$0.00
\$480.00

**Days of Violation or
Number of Occurrences** 1

III. Total Adjusted Penalty \$480.00

IV. Economic Benefit \$0.00

V. History*

TOTAL PENALTY

\$480.00
\$0.00
\$0.00
\$480.00

*Ronan 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 CITY OF RONAN AT**
6 **RONAN, LAKE COUNTY, MONTANA.**
7 **(OPENCUT PERMIT NO. 43, FID 2100;**
8 **DOCKET NO. OC-11-06)**

CASE NO. BER 2011-23 OC

7 **FIRST PREHEARING ORDER**

9 On November 25, 2011, Mr. James Raymond, Counsel for the City of Ronan,
10 (hereafter, Appellant) filed a Request for Hearing to appeal the Notice of Violation
11 and Administrative Compliance and Penalty Order, Docket No. OC-11-06,
12 pertaining to the violation of legal requirements and imposition of penalties under
13 the Opencut Mining Act, Montana Code Ann. Title 82, Chapter 4, Part 4 and
14 administrative rules adopted under the Act in Title 17, Chapter 24, Subchapter 2,
15 Administrative Rules of Montana (ARM). Accordingly, the following guidelines
16 and rules are provided 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 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

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

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

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

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

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

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

- (a) for joinder/intervention of additional parties;
- (b) for disclosure by each party to the other parties of: (1) the name and address of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses; and, (2) a copy of, or a description by 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);

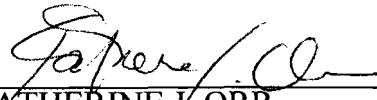
6 (d) for exchange of lists of witnesses and copies of documents that
7 each party intends to offer at the hearing;

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 6th day of December, 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. John Arrigo
17 Administrator, Enforcement Division
18 Department of Environmental Quality
19 P.O. Box 200901
20 Helena, MT 59620-0901

21 Mr. James Raymond
22 Ronan City Attorney
23 Raymond Law Office, P.L.L.C.
24 407 First Street West,
25 Polson, MT 59860

26 DATED: Dec 6, 2011 



MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: December 19, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-24 MM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATION OF THE METAL MINE
RECLAMATION ACT BY NOBLE
EXCAVATING, INC. AT NICKLEBACK
ROCK QUARRY, LINCOLN COUNTY,
MONTANA. (SMES NO. 56-079; FID
#2090; DOCKET NO. MM-11-01)

Case No. BER 2011-24 MM

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2090, Docket No. MM-11-01).

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

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

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

Attachments

BER 2011-24 mm

LAW OFFICES OF
JOHNSON, BERG, MCEVOY & BOSTOCK, PLLP

221 First Avenue East
P. O. Box 3038
Kalispell, Montana 59903-3038
ESTABLISHED 1891

EMAIL ADDRESS: jbm@centurytel.net
TELEPHONE (406) 755-5535 TELEFAX (406) 756-9436

JAMES W. JOHNSON
KENT P. SAXBY
PAUL A. SANDRY
THANE JOHNSON
COLLEEN DONOHOE
KAI GROENKE
SARAH D. SIMKINS
DAVID W. RANDALL

Of Counsel:

THOMAS R. BOSTOCK
STEPHEN C. BERG
BRUCE MCEVOY

December 13, 2011

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

Filed with the

131346.3

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 14th day of December, 2011

at _____ o'clock _____ m.

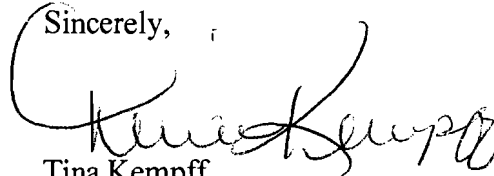
By: Mary Galt

Re: In the Matter of: Violation of the Metal Mine Reclamation Act by Noble
Excavating, Inc. at Nickelback Rock Quarry, Lincoln County, Montana (SMES
No. 56-079; FID #2090); Docket No. MM-11-01

Dear Board Secretary:

Enclosed for filing in the above referenced matter, please find an original and top copy
sheet of Noble Excavating, Inc.'s Notice of Appeal and Request for Hearing. Please file the
original, conform the copy and return same in the enclosed envelope. Please contact me should
you have any questions. Thank you for your assistance.

Sincerely,



Tina Kempff

Legal Assistant to Sarah D. Simkins

/tmk
Enclosures

1 Sarah D. Simkins
2 Johnson, Berg, McEvoy & Bostock, PLLP
3 221 First Avenue East
4 P.O. Box 3038
5 Kalispell, MT 59903-3038
6 Telephone: (406) 755-5535

7
8 Attorneys for Noble Excavating, Inc.

9
10 **BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY**
11 **OF THE STATE OF MONTANA**

12 **IN THE MATTER OF:**
13 **VIOLATION OF THE METAL MINE**
14 **RECLAMATION ACT BY NOBLE**
15 **EXCAVATING, INC. AT NICKELBACK**
16 **ROCK QUARRY, LINCOLN COUNTY,**
17 **MONTANA (SMES NO. 56-079; FID**
18 **#2090),**

Docket No. MM-11-01

NOTICE OF APPEAL
AND REQUEST FOR HEARING

19 **COMES NOW** Noble Excavating, Inc. (hereinafter "Noble") and files its *Notice of Appeal*
20 *and Request for Hearing* pursuant to Mont.Code.Ann. §82-4-361(6)(b) as follows:

21 **BACKGROUND**

22 In or around May 2011 Noble contracted with the Environmental Protection Agency
23 (hereinafter "EPA") to use Nickelback Rock Quarry (hereinafter "Nickelback") to make and haul
24 common fill materials for the local Libby Superfund Project (hereinafter "Superfund Project"). The
25 Superfund Project employed approximately sixty-four (64) EPA employees, seventeen (17) Noble
26 Employees and nine (9) Remp Sand and Gravel employees. The Superfund Project was intended
27 to operate within the parameters of the Small Miners Exclusion Statement (hereinafter "SMES").

28 In or around June 2011 the Department of Environmental Quality of the State of Montana
(hereinafter "Department") contacted Noble informing Noble that it would be required to apply for

1 an operating permit for Nickelback, as the disturbance exceeded the SMES. At the time of its
2 correspondence, the Department did not instruct Noble to shut down Nickelback or otherwise halt
3 work at the site. The Department simply informed Noble that its permit application should be
4 submitted to the Department by July 8, 2011. That deadline was subsequently extended to August
5 10, 2011. At the time of the Department's letter and subsequent communications, Noble understood
6 that the Department was not seeking an injunction to halt its work.
7

8 On August 23, 2011 the Department notified Noble that it was prohibited from conducting
9 any further disturbance at Nickelback until a permit was submitted and approved and that all mining
10 on the site should cease. However, after further discussion with the Department, on August 26,
11 2011, Noble was advised that "operation on *more than five acres* without an operating permit...[is]
12 in violation of the law". Noble was, at that point, of the understanding that it could continue to
13 operate on the five acres permitted under SMES. In September, and after further clarification from
14 the Department, and the Department's consideration to the number or individuals employed and
15 benefitting from the operation of Nickelback, Noble was instructed that it could continue to operate
16 out of the stockpiles on site but it could not disturb any additional areas until its application was
17 submitted and approved.
18

19 Noble, having never completed an application to the Department for an operating permit
20 under hard rock mining and struggling to complete the application with its limited knowledge,
21 sought assistance from Steve Welch, a former DEQ employee. Noble contacted Mr. Welch, at which
22 time it was informed that Mr. Welch would not be able to assist Noble in completing its application.
23 Noble then sought advise from the Department regarding a third party that could assist in applying
24 for the permit. The Department provided Noble with the name Dick Juntunen as a person that could
25 assist in the application process. Noble was ultimately able to contact Mr. Juntunen and successfully
26 retain Mr. Juntunen to assist Noble with its application. Since Mr. Juntunen was retained by Noble,
27
28

1 Noble was advised that it should prepare an application for a 5 year permit, a 20 year conceptual
2 permit and a 100 year conceptual permit.. As such, Noble understood that to submit the application
3 it was required to obtain satellite images of the site, which was a challenging task given the
4 complications involved with the weather patterns and rotation of the satellite. Noble has now
5 successfully obtained the necessary images and is working diligently with Mr. Juntunen to complete
6 its permit application. It is Noble's understanding that the satellite images will be helpful and
7 necessary for both the Department and Noble because the images will enable the parties to obtain
8 a clear picture as to the current site conditions and plans for the site in the future.
9

10 From the time Noble was notified of its violation it has been in frequent communication with
11 the Department. Noble did its best to understand its obligations and its limitations with regard to
12 operations on site after it received notification of the violation. Noble contacted and retained an
13 expert to assist it in completing its applications and has kept the Department informed of its progress
14 in that regard. It was always Noble's understanding, in its communications with the Department, that
15 Noble would be able to work within the perimeters of the Department's requests and sort through any
16 application and permitting issues at the close of mining season.
17

18 In or around the first week of November, 2011, Noble spoke with Daniel Kenney regarding
19 the status of its application. Mr. Kenney informed Noble that it would take the Department between
20 45 and 60 days to issue an enforcement letter because of the workload of the Department. Noble was
21 hopeful that during that period of time it would be able to submit its applications in accordance with
22 the Department's request and potentially circumvent any necessity for an Order from the Department.
23 On or about November 28, 2011 Noble received a Notice and Order relative to its violation.
24

25 Noble has always attempted to comply with the Department's requests, sought clarification
26 when it was unclear, and abided the Department's instructions relative to the continuation of work.
27
28

LEGAL ANALYSIS

The purpose of issuing a penalty pursuant to the Montana Mining Reclamation Act (hereinafter "Act") is to provide a deterrent against future violations and to ensure that any penalty assessed is "commensurate with the severity of the violation..." Mont.Admin.R. 17.4.301. The calculation for a violation of Mont.Code.Ann. §82-4-361(2), is assessed as follows: the Department may assess an administrative penalty of not less than \$100.00 or more than \$1,000.00 for each violation of the MMRA, administrative rule adopted under the MMRA, or term or condition of a permit issued under the MMRA. The Department may assess an additional administrative penalty of not less than \$100.00 or more than \$1,000.00 for each day during which the violation continues. Using the factors set forth in Mont.Code.Ann. §82-4-1001, and Mont.Admin.R.17.4.301 through 17.4.308, the Department may calculate an administrative penalty to resolve the violations of the Act.

Mont.Code.Ann. §82-4-1001 identifies the factors the Department must consider when determining the appropriate penalty for a violation of the Act, including: (a) the nature, extent, and gravity of the violation; (b) the circumstances of the violation; (c) the violator's prior history of the violation...; (d) the economic benefit or savings resulting from the violator's action; (e) the violator's good faith and cooperation; (f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or any facts of the violation; and (g) other matters that justice may require." Mont.Code.Ann. §82-4-1001.

I. Noble does not have a prior history of violations.

Mont. Admin. R. 17.4.302 indicates that a prior history of violations include "...a violation of a requirement under the authority of the same chapter and part of the violation for which the penalty is being assessed;...must be documented in an administrative order or a judicial order or judgment issued within three years prior to the date of the occurrence of the violation for which the

1 penalty is being assessed; and...may not, at the time that the penalty is being assessed, be undergoing
2 or subject to administrative appeal or judicial review." Mont. Admin. R. 17.4.302 (2011).

3 Noble does not have a prior history of violations. Noble has worked diligently in its past, and
4 continues to work, to abide by the obligations, limitations, rules and regulations placed upon it by
5 the Department. Noble understands and appreciates the purpose the Department serves and respects
6 its authority relative to enforcement of violations.
7

8 Noble's clean prior history should be considered when considering the penalty assessed.

9 **II. Good Faith and Cooperation.**

10 Pursuant to Mont.Admin.R.17.4.303, "[g]ood faith and cooperation...may be used to decrease
11 the base penalty." Mont.Admin.R. 17.4.04. When considering whether to decrease the base penalty
12 for a violator's good faith and cooperation, the Department must consider the following factors: "(a)
13 the violator's promptness in reporting and correcting the violation, and in mitigating the impact of
14 the violation; (b) the extent of the violator's voluntary and full disclosure of the facts related to the
15 violation; and (c) the extent of the violator's assistance in the department's investigation and analysis
16 of the violation." *Id.*
17

18 **a. Promptness in reporting and correction the violation and mitigating the impact of** 19 **of the violation.**

20 Upon notice from the Department regarding Noble's violation of the SMES, Noble took
21 action to satisfy the remedy requested by the Department, the application of an operating permit.
22 However, Noble encountered difficulty in completing the application itself and sought out Mr.
23 Welch to assist in completing the application. When Mr. Welch was unable to assist, Noble sought
24 advise from the Department regarding a third-party that could potentially assist it in the application
25 process. Noble was provided Mr. Juntunen's name and was ultimately able to contact Mr. Juntunen
26 and retain his services to assist in the preparation of the application. Since that time Noble has been
27
28

1 working diligently with Mr. Juntunen to complete the application, while at all times keeping the
2 Department advised of the progress and seeking clarification relative to any additional actions the
3 Department desired Noble to take. Noble made all efforts to understand and comply with any
4 requirements placed on it by the Department.

5 Noble's good faith efforts should be considered in assessing the penalty.

6
7 **b. Voluntary and full disclosure of the facts related to the violation.**

8 Noble has always been open and honest with the Department regarding the fact that it
9 inadvertently went beyond the acreage allowed by the SMES. Noble has never been evasive and has
10 always been up front regarding its difficulties in completing its permit application. Noble has kept
11 in frequent communication with the Department regarding its progress in submitting its application
12 for a permit. Noble has also been open and honest with the Department regarding the difficulty in
13 shutting down Nickelback because of the impact any shutdown would have on the Superfund
14 Project, Noble, Remp and the EPA.

15
16 Noble has also worked to understand the Department's position relative to Noble's ability to
17 continue some work on the site and abided by each of the Department's directives in that regard.
18 Noble's good faith efforts should be considered in assessing the penalty

19
20 **c. Assisting the Department in its investigation.**

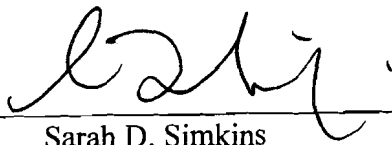
21 Noble has kept the Department informed of its progress in submitting its permit application
22 and kept it apprised of Noble's desire to continue performing work on the site. Noble has never acted
23 to infringe on the Department's investigation, provided it updates when requested, and volunteered
24 information relative to the site conditions and its struggle with the application. Noble has always
25 been forthcoming and cooperative as it related to any violations it may have committed. Noble's
26 good faith efforts should be considered in assessing the penalty.
27
28

CONCLUSION

Noble respectfully requests a hearing relative to the Order issued.

DATED this 13th day of December, 2011.

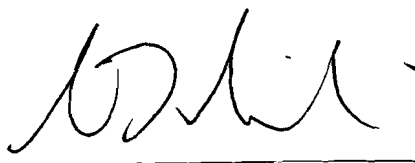
JOHNSON, BERG, McEVOY & BOSTOCK, PLLP

By: 
Sarah D. Simkins
Attorneys for Noble Excavating, Inc.
PO Box 3038
Kalispell, MT 59903-3038

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13th day of December, 2011, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, either by mailing, hand delivery, or otherwise, as indicated below.

Board Secretary	<input checked="" type="checkbox"/> U.S. Mail (first class postage)
Board of Environmental Review	<input type="checkbox"/> Hand Delivery
1520 East Sixth Avenue	<input type="checkbox"/> Other
P.O. Box 200901	
Helena, MT 59620-0901	


Sarah D. Simkins

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATION OF THE METAL MINE
RECLAMATION ACT BY NOBLE
EXCAVATING, INC. AT NICKLEBACK
ROCK QUARRY, LINCOLN COUNTY,
MONTANA. (SMES NO. 56-079; FID
#2090)

NOTICE OF VIOLATION
AND ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. MM-11-01

I. NOTICE OF VIOLATION

Pursuant to the authority of Section 82-4-361(6), Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Noble Excavating, Inc. (Noble) of the following Findings of Fact and Conclusions of Law and Administrative Compliance and Penalty Order with respect to a violation of the Metal Mine Reclamation Act (MMRA) (Title 82, chapter 4, part 3, MCA).

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 the State of Montana, created and existing under the authority of Section 2-15-3501, MCA. The Department administers the MMRA.
2. Noble is a "person" as defined in Section 82-4-303(12), MCA, and is subject to the requirements of the MMRA and its rules.
3. Section 82-4-335(1), MCA, states that a person may not engage in mining, ore processing, or reprocessing of tailings or waste material, construct or operate a hard-rock mill, use cyanide ore-processing reagents or other metal leaching solvents or reagents, or disturb land in anticipation of those activities in the state without first obtaining an operating permit from the Department.

1 4. Pursuant to Section 82-4-305(1), MCA, the permitting requirements of the
2 MMRA generally do not apply to a small miner if the small miner annually agrees in writing: (a)
3 that the small miner will not pollute or contaminate any stream; (b) that the small miner will
4 provide protection for human and animal life through the installation of bulkheads installed over
5 safety collars and the installation of doors on tunnel portals; (c) that the small miner will provide
6 a map location of the miner's mining operations. This written agreement, known as a Small
7 Miner Exclusion Statement (SMES), also includes the signatory's legal confirmation that the
8 signatory meets the definition of "small miner" as defined by Section 82-4-303(17), MCA.

9 5. Section 82-4-303(17), MCA, defines a small miner, in pertinent part, as a person,
10 firm, or corporation that engages in mining activity and that conducts: (i) an operation that
11 results in not more than five acres of the earth's surface being disturbed and unreclaimed.
12 Pursuant to Section 82-4-303(17)(b)(i), MCA, the Department is required to include access roads
13 in calculating the area disturbed by a small miner unless the small miner has submitted a
14 reclamation bond to ensure reclamation of the access road.

15 6. Noble operates the Nickleback Rock Quarry (Site) located in Township 31 North,
16 Range 31 West, Section 30 in Lincoln County, Montana.

17 7. On May 3, 2010, Noble submitted a SMES (SMES No. 56-079) to the
18 Department.

19 8. On May 12, 2010, the Department sent Noble a letter approving the SMES and
20 indicating that Noble should consider obtaining an operating permit since the map Noble
21 submitted with the SMES showed the mine site to be 4.99 acres without including the stockpiles,
22 screening facilities, and other disturbances associated with the facility area that would also be
23 counted towards the five-acre limit.

24 //

1 9. On June 15, 2011, the Department conducted an inspection of the Site and
2 determined the area of disturbance was in excess of seven acres. This determination did not
3 include the disturbance related to widening the access road.

4 10. On June 20, 2011, the Department sent a letter informing Noble of the results of
5 the June 2011 Inspection. The Department indicated that Noble would need to apply for an
6 operating permit since it appeared that Noble would be unable to reduce the amount of the
7 disturbance to below the five-acre limit. The Department requested Noble to submit the permit
8 application by July 8, 2011 to avoid penalties. DEQ subsequently extended the deadline to July
9 22, 2011, July 29, 2011, and finally to August 10, 2011.

10 11. On August 23, 2011, the Department sent a violation letter (August 2011 Violation
11 Letter) notifying Noble that it was in violation of the MMRA by disturbing more than the five acres
12 allowed by its SMES. The Department requested Noble to submit a permit application and filing
13 fee no later than August 31, 2011. The Department informed Noble that no further disturbance
14 should occur until the operating permit is approved.

15 12. On October 26, 2011, the Department conducted another inspection of the Site
16 and determined that Noble had disturbed approximately 14 acres. The Department is not certain
17 whether the additional acreage represents disturbance that occurred after the June inspection or is
18 disturbance that had occurred by that date but was not included in the Department's previous
19 disturbance calculation. A map showing the area of disturbance as determined by the June and
20 October inspections is attached hereto and incorporated by reference.

21 13. As of November 17, 2011, Noble has not submitted a permit application to the
22 Department.

23 14. By disturbing more than five acres at the Site, Noble does not qualify for an
24 exemption from the permitting requirements of the MMRA under the small miner exclusion

1 provisions. Therefore, Noble violated Section 82-4-335(1), MCA, by engaging in mining
2 activity without first obtaining an operating permit from the Department.

3 ***Administrative penalty***

4 15. Pursuant to Section 82-4-361(2), MCA, the Department may assess an
5 administrative penalty of not less than \$100 or more than \$1,000 for each violation of the
6 MMRA, administrative rule adopted under the MMRA, or term or condition of a permit issued
7 under the MMRA. The Department may assess an additional administrative penalty of not less
8 than \$100 or more than \$1,000 for each day during which the violation continues. Using the
9 factors set forth in Section 82-4-1001, MCA, and ARM 17.4.301 through 17.4.308, the
10 Department has calculated an administrative penalty in the amount of \$10,000 to resolve the
11 violation cited herein. The enclosed Penalty Calculation Worksheet is incorporated by reference
12 herein.

13 16. The Department reserves the right to increase the penalty based on additional days
14 of violation if Noble conducts mining activity and/or causes additional areas of disturbance
15 subsequent to receipt of this Order.

16 **III. ADMINISTRATIVE COMPLIANCE AND PENALTY ORDER**

17 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is
18 issued to Noble pursuant to the authority vested in the State of Montana, acting by and through
19 the Department under the MMRA and administrative rules adopted thereunder. Based on the
20 foregoing Findings of Fact and Conclusions of Law and the authority cited above, the
21 Department hereby ORDERS Noble to do the following:

22 17. Within 30 days from service of this Order, Noble shall submit to the Department a
23 complete permit application, including any required permit review fees, and reclamation plan.
24 Documents and fees required under this paragraph shall be sent to the address listed in Paragraph 18.

1 18. Within 60 days of service of this Order, Noble shall pay to the Department an
2 administrative penalty in the amount of \$10,000. The penalty must be paid by check or money
3 order, made payable to the "Montana Department of Environmental Quality," and must be sent to:

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

8 19. Failure to comply with this Order by the specified deadlines may result in the
9 Department seeking additional penalties and injunctive relief in district court, pursuant to Section
10 82-4-361(3) and (5), MCA.

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

13 IV. NOTICE OF APPEAL RIGHTS

14 21. This Order becomes final if Noble does not submit a written request for a hearing
15 within 30 days of service of this Order pursuant to Section 82-4-361(6)(b), MCA. Service of this
16 Order by mail is complete three business days after mailing. Any request for a hearing shall state
17 the reason for the request and must be sent to:

18 Board Secretary
19 Board of Environmental Review
20 1520 East Sixth Avenue
21 P.O. Box 200901
22 Helena, MT 59620-0901

21 22. Hearings are conducted as provided in the Montana Administrative Procedure Act,
22 Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court
23 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to
24 the hearing may include formal discovery procedures, including interrogatories, requests for

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

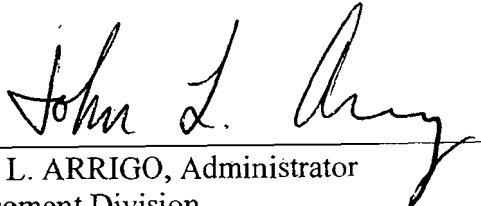
4 23. If a hearing is not requested within 30 days after service of this Order, the
5 opportunity for a contested case hearing is waived.

6 24. This Order becomes effective upon signature of the Director of the Department or
7 his designee.

8 IT IS SO ORDERED:

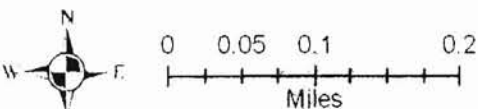
9 DATED this 28th day of November, 2011.

10 STATE OF MONTANA
11 DEPARTMENT OF ENVIRONMENTAL QUALITY

12 
13 _____
14 JOHN L. ARRIGO, Administrator
15 Enforcement Division
16
17
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24



SMES # 56-079
Noble Excavating Inc



L:\PCD\EMB\Data\OPIOP_GIS\Maps\Nobles.mxd OR jpg

Legend

- Access Road up to Site
- Disturbance of approx. 14 acres
as mapped by Craig Jones on 10/26/2011
- ▨ Disturbance of approx. 7 acres
as mapped by Cheryl LaRoque on 6/15/2011

Department of Environmental Quality - Enforcement Division
Settlement Penalty Calculation Worksheet

Responsible Party Name:	Noble Excavating, Inc. (Respondent)
FID:	2090
Statute:	Metal Mine Reclamation Act (Act)
Date:	11/23/2011
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	\$1,000.00

Penalty Calculation #1

Description of Violation:
Respondent violated Section 82-4-335, MCA, by mining without first obtaining an operating permit from the Department. During the June and October 2011 inspections, the Department observed that Respondent had mined and/or disturbed land outside the five-acre limit of its Small Miners Exclusion Statement (SMES) No. 56-079. During the October 2011 inspection, the Department determined that Respondent had disturbed approximately 9 acres above the SMES limit of five acres.

I. BASE PENALTY

Nature

Explanation:	
Conducting a mining operation and disturbing land without first obtaining an operating permit creates the potential to harm human health or the environment. Unless the Department has reviewed a permit application and issued a permit, there is no assurance that a mine operation will be conducted in compliance with state laws and designed to avoid or minimize environmental impact. In addition, the submission of a reclamation bond is a prerequisite to the issuance of an operating permit. Therefore, there is no assurance that the disturbance will be reclaimed if mining activity takes place without first obtaining an operating permit.	
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:
Disturbing approximately nine acres over the five-acre limit that can be disturbed under a SMES 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 who submitted and operated under a SMES, Respondent was knowledgeable about the regulations governing hard rock mining operating permits. The Department informed Respondent on several occasions that it needed to submit an operating permit application. Respondent failed to do so. Respondent had control over the circumstances surrounding the violation and should have foreseen that mining activities resulting in the disturbance of more than five acres without first obtaining an operating permit would result in a violation. Therefore, an upward adjustment of 30% for circumstances is calculated.

Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$255.00

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	\$255.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$1,105.00
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 is attributing two (2) days of violation for the first acre of non-permitted disturbance and an additional day of violation for each additional acre of non-permitted disturbance. Therefore, the Department has calculated a penalty for ten (10) days of violation for conducting non-permitted mining and/or disturbing land on nine (9) non-permitted acres. The Department believes this is a conservative estimate for determining the days of violation.

Number of Days:	10
-----------------	----

ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$10,000.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

IV. ECONOMIC BENEFIT

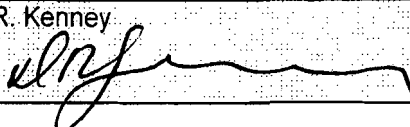
Explanation:

The Department requires a \$500 fee with a permit application. In addition, the Department estimates it would cost less than \$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:

\$0.00

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

Responsible Party Name:	Noble Excavating, Inc. (Respondent)
FID:	2090 SMES No.56-079
Statute:	Metal Mine Reclamation Act (Act)
Date:	11/23/11
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:	\$255.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$1,105.00
Maximum Statutory Penalty	\$1,000.00

Totals
\$850.00
\$255.00
\$0.00
\$0.00
\$1,105.00
\$1,000.00

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

10

Adjusted Base Penalty Total \$10,000.00

\$10,000.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit

\$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$10,000.00

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



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: December 28, 2011

SUBJECT: Board of Environmental Review case, Case No. BER 2011-25 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING ACT
BY EMERALD HILLS DEVELOPMENT COMPANY
AT THE EMERALD HILLS PIT, YELLOWSTONE
COUNTY, MONTANA [OPENCUT PERMIT NO.
21; FID NO. 2084, DOCKET NO. OC-11-09]

Case No. BER 2011-25 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2084, Docket No. OC-11-09).

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

BER 2011-25 OC

Filed with the

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 23rd day of December, 2011

at _____ o'clock _____ m.

By: Misty Cook

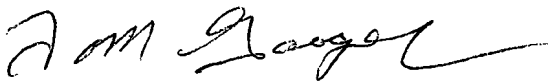
December 21, 2011

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

Board Secretary,

Please accept this letter to be my request for a hearing before the Montana Board of Environmental Review concerning Docket No. OC-11-09, for violations of the Opencut Mining Act (Permit no. 21; FID #2084).

Respectfully yours,



Tom Gauger
Secretary/Vice President
Emerald Hills Development Company

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY EMERALD HILLS DEVELOPMENT
COMPANY AT THE EMERALD HILLS PIT,
YELLOWSTONE COUNTY, MONTANA
(OPENCUT PERMIT NO. 21; FID NO. 2084)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. OC-11-09

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 Emerald Hills Development Company (Emerald Hills) 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, subchapter 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 Emerald Hills 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(1) requires an operator to comply with the provisions of its permit, which includes an approved plan of operation, and the Act.

1 5. Emerald Hills is a "person" as defined in Section 82-4-403(10), MCA.

2 6. Emerald Hills engaged in or controlled an opencut operation at the Emerald Hills
3 Pit (Site) and, therefore, is an "operator" within the meaning of Section 82-4-403(8), MCA.

4 Accordingly, Emerald Hills is subject to the requirements of the Act and the rules adopted
5 thereunder.

6 7. Since 1976, Emerald Hills has been authorized to mine the Site under an opencut
7 mining permit issued by the Department, which is currently designated Permit No. 21 (Permit).
8 The Permit also includes an approved Plan of Operation (Plan).

9 8. The Permit, as amended, authorizes Emerald Hills to conduct opencut mining
10 operations on 24.5 acres at the Site located in Township 1 North, Range 27 East, Sections 26 and
11 27 in Yellowstone County, Montana.

12 9. On June 8, 2011, Emerald Hills submitted to the Department an application to
13 amend the Permit (Amendment 2), proposing a change in the hours of operation and adding
14 additional stockpile locations.

15 10. On July 8, 2011, the Department conducted a routine inspection at the Site (July
16 2011 Inspection). The Department observed that:

- 17 a. Mining activities occurred on approximately 0.2 acres outside of the
18 permitted boundary;
- 19 b. There was no 10-foot buffer between the highwalls and unstripped soil;
- 20 c. Soil was being lost into drainages on the Site;
- 21 d. Stockpiled soils were not protected;
- 22 e. Asphalt was being stored on site without Emerald Hills submitting an Asphalt
23 and Concrete Recycling form or updating the bond; and
- 24 f. Emerald Hills was not following the approved Plan.

1 11. On July 22, 2011, the Department sent Emerald Hills a violation letter (July 2011
2 Violation Letter) for violations of the Act, as described in Paragraph 10. The Department
3 provided Emerald Hills with a copy of the July 2011 Inspection report.

4 12. On July 25, 2011, the Department sent Emerald Hills a letter (July 2011
5 Deficiency Letter), which identified numerous deficiencies in the Amendment 2 application
6 materials and informed Emerald Hills that the deficiencies must be corrected before the
7 Department could approve Amendment 2.

8 13. As of December 6, 2011, Emerald Hills has not responded to the Department's
9 July 2011 Deficiency Letter. The Department has not approved Amendment 2.

10 ***Conducting opencut operations in a non-permitted area***

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

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

23 16. Section 82-4-432(5), MCA, states that an operator may amend a permit by
24 submitting an amendment application to the Department.

1 17. ARM 17.24.212(5) states that "A permit does not become operative until issued
2 by the Department, and an applicant may not begin opencut operations until a permit is issued."

3 18. During the July 2011 Inspection, the Department observed that Emerald Hills had
4 conducted opencut operations on approximately 0.2 acres outside the permitted area.

5 19. Emerald Hills violated Section 82-4-431(1), MCA, and ARM 17.24.212(5) by
6 conducting opencut operations on 0.2 unpermitted acres without a valid permit.

7 ***Failure to protect stockpiled soils***

8 20. ARM 17.24.219(1)(b)(i) requires that stockpiled soils be protected from erosion,
9 contamination, compaction, and unnecessary disturbance.

10 21. ARM 17.24.225(1) requires an operator to comply with the provisions of the
11 Permit, which includes the approved Plan.

12 22. Section II-F 2 of the Plan states the operator will handle soil and overburden
13 separately and minimize the mixing of these materials.

14 23. During the July 2011 Inspection, the Department observed that the soils stockpile
15 located in the northwest corner of the site had been covered with gravel, thereby mixing gravel
16 into the soil and contaminating it.

17 24. Emerald Hills violated ARM 17.24.219(1)(b)(i) and ARM 17.24.225(1) by failing
18 to protect the soils stockpile from becoming contaminated with gravel.

19 ***Failure to maintain required 10-foot buffer***

20 25. ARM 17.24.219(1)(b)(i) requires that an operator maintain at least a 10-foot
21 buffer stripped of soil and needed overburden along the edges of highwalls.

22 26. ARM 17.24.225(1) requires an operator to comply with the provisions of the
23 Permit, which includes the approved Plan.

24 //

1 27. Section II-F 5 of the Plan states the operator will maintain a minimum 10-foot
2 buffer stripped of soil and needed overburden along the edges of the highwalls.

3 28. The Department's July 2011 Inspection revealed that Emerald Hills did not
4 maintain a 10-foot buffer between the highwalls and unstripped soil.

5 29. Emerald Hills violated ARM 17.24.219(1)(b)(i) and ARM 17.24.225(1) by not
6 maintaining at least a 10-foot buffer stripped of soil and overburden along the edges of the
7 highwalls.

8 ***Failure to mark permit boundary and unapproved storage of asphalt***

9 30. ARM 17.24.218 requires that the Plan must include certain site preparation,
10 mining and processing plan commitments and information, including the placement and
11 maintenance of permit boundary markers, waste disposal requirements, and how soil piles will
12 be stored.

13 31. ARM 17.24.219(2) requires compliance with the commitments set forth in that
14 rule, including those found in the Plan.

15 32. ARM 17.24.225(1) requires an operator to comply with the provisions of the
16 permit, which includes the approved Plan.

17 33. Section II-A of the Plan requires Emerald Hills to clearly mark the permit area
18 boundary.

19 34. Section II-G 1.(a) of the Plan requires Emerald Hills to keep mine material
20 stockpiles out of drainages.

21 35. The Plan did not include a proposal for stockpiling or recycling asphalt. Emerald
22 Hills did not submit an *Application for Concrete and Asphalt Recycling* form as required by
23 Section II-H 4b. of the Plan.

24 //

1 36. The Department's July 2011 Inspection noted that the permit boundary was not
2 clearly marked, soil was being lost to onsite drainages, and asphalt was stored on site.

3 37. Emerald Hills failed to follow the requirement of Sections II-A, II-G 1.(a) and II-
4 H 4b. of the Plan.

5 38. Emerald Hills violated ARM 17.24.219(2) and ARM 17.24.225(1) by failing to
6 comply with the referenced portions of the Permit's Plan.

7 ***Administrative penalty***

8 39. Section 82-4-441, MCA, provides that the Department may assess an
9 administrative penalty of not less than \$100 or more than \$1,000 for the violation and an
10 additional administrative penalty of not less than \$100 or more than \$1,000 for each day during
11 which the violation continues. Using the factors set forth in Section 82-4-1001, MCA, and ARM
12 17.4.301 through 17.4.308, the Department has calculated an administrative penalty in the
13 amount of \$6,300 to resolve the violations cited herein. The enclosed Penalty Calculation
14 Worksheet is incorporated by reference herein.

15 **III. ADMINISTRATIVE ORDER**

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

20 40. Immediately upon receipt of this Order, Emerald Hills shall comply with the
21 provisions of the Permit, as amended, and the Plan.

22 41. Within 30 days of service of this Order, Emerald Hills shall submit to the
23 Department revised application materials that correct the deficiencies identified in the July 2011
24 Deficiency Letter, including remitting an adequate bond for the permitted area, and complete the

1 corrective actions identified in the July 2011 Deficiency Letter. A copy of the July 2011
2 Deficiency Letter is attached and incorporated by reference herein.

3 42. All documents required by this Order shall be sent to the address listed in
4 Paragraph 43.

5 43. No later than 60 days after service of this Order, Emerald Hills shall pay to the
6 Department the administrative penalty in the amount of \$6,300 for the violations specified
7 above. The penalty must be paid by check or money order, made payable to the "Montana
8 Department of Environmental Quality," and sent to:

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

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

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

18 46. Pursuant to Section 82-4-441(6), MCA, the Department reserves its option to seek
19 injunctive relief from the district court if Emerald Hills fails to satisfactorily remedy the
20 violations cited herein.

21 IV. NOTICE OF APPEAL RIGHTS

22 47. Emerald Hills may appeal this Order under Section 82-4-441, MCA, by filing a
23 written request for a hearing before the Montana Board of Environmental Review no later than

24 //

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

48. 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 Emerald Hills is not an individual, Emerald Hills must be represented by an attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-61-201, MCA.

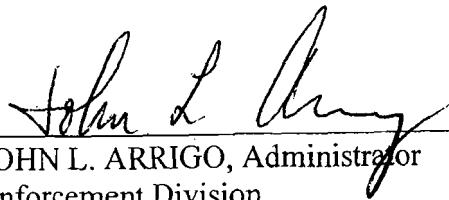
49. If a hearing is not requested within 30 days after service of this Order, the opportunity for a contested case appeal is waived.

50. This Order becomes effective on the date of service.

IT IS SO ORDERED:

DATED this 6th day of December, 2011.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY



JOHN L. ARRIGO, Administrator
Enforcement Division



Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P. O. Box 200901

Helena, MT 59620-0901

(406) 444-2544

Website: www.deq.mt.gov

July 25, 2011

Sent via email to gthom7@aol.com & mgcbiz10@hotmail.com
Hard copy sent via US Mail

Emerald Hills Development Company
Attn: Tom Gauger
5440 River Road
Laurel, MT 59044

RE: Deficiency Notice
Application for Opencut Mining Amendment #2
Emerald Hills Site Permit #21
Yellowstone County

Dear Mr. Gauger:

The Department of Environmental Quality reviewed the above-referenced application in accordance with requirements of the Opencut Mining Act (MCA Title 82, chapter 4, part 4) and the associated rules (ARM Title 17, chapter 24, subchapter 2). This letter identifies deficiencies in your application materials that you must respond to before the Department can perform any further processing of the application.

Please submit revised application materials that address all the deficiencies to the Opencut program in Helena as one package. The contents of an application constitute legal documents and become part of the permit; therefore all required certifications and approvals must be signed and dated.

Upon receipt of all required materials, the Department will review your revised application and notify you whether it is acceptable or if deficiencies remain. In accordance with Sections 82-4-432(10)(b), MCA, the Department will notify you of this determination within a maximum of 10 working days from the date all your revised materials are received.

Based on review of the application materials received to date, the Department has identified the deficiencies listed below. Please provide the revised documents the Department is requesting in type-written form. Creating electronic versions now will make it easier for you to update the documents in the future. Electronic versions of Opencut program forms are available on the internet at <http://www.deq.mt.gov/opencut/opencutPermitForms.mcp.x>.

NOTE: Submit only those documents that you make revisions to – Do not resubmit the entire application packet.

Accompanying Forms

1. **Landowner Consultation Form:** As opencut activities have occurred outside the permitted boundary and acreage must be added to the permit; a new Landowner Consultation form(s) will be required. Provide the Department with a new Landowner Consultation form using the Department's current form.
2. **Zoning Compliance Form:** As opencut activities have occurred outside the permitted boundary and acreage must be added to the permit; a new Zoning Compliance form will be required. Provide the Department with a new Zoning Compliance form using the Department's current form.

Opencut Mining Plan of Operation and Application: Please submit an updated form that includes detailed responses to the deficiencies below. The most current form can be obtained at the following web link <http://www.deq.mt.gov/opencut/opencutPermitForms.mcp.x>.

1. **A1-1:** The July 8, 2011 inspection report identified an unpermitted area approximately 0.2 acres in size located just west of your existing permit. Update this section to state that you are adding acreage to encompass the unpermitted disturbance.
2. **A1-7 & 8:** The acreages shown are not consistent with the current permitted acreages. There is 0.8 acres of non-bonded area that needs to be accounted for. As it has not been mined, it would likely need to go under the Mine-Level area column. In addition, you must add acreage to your existing permit to account for the unpermitted disturbance located on the west end of your site (refer to the July 8, 2011 inspection report). Revise and resubmit.
3. **C2-1:** Provide the required soil information in this section as required.
4. **C2-2:** Provide the required soil information in this section as required (i.e. 11 inches of growth media to be replaced on all but the 6.6 acres of American Tower Corporation Property).
5. **C4-1:** The following general statement that you made "*We commit to typical hours of operation of 7 a.m. to 7 p.m. Monday through Saturday, no operations on Sunday, and no operations on the ten Federal holidays (New Year's Day, King's Birthday, Washington's Birthday aka Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day), with the exception that certain activities may need to take place for certain operations for short periods around the clock, on Sundays, or on a holiday. We will notify the DEQ of the details of such exceptions before they occur.*" is not acceptable for this site. You must be more specific. For example, when asphalt operations are occurring, we will run a whisper lite generator 24 hours a day to keep the batch plant warm, etc.,. Provide the Department with specific uses and equipment that may be used other than the 7:00 am to 7:00 pm hours of operation time. Revise as appropriate.
6. **C5-5:** A boundary coordinate table is required for this site, due to the fact you will be required to add the acreage to this permit where unpermitted activities occurred. Provide an updated boundary coordinate table using the Department's form.

7. **C6-1:** The site will have to be restaked to encompass the unpermitted disturbance. Verify that the markers have been placed.
8. **C7-Additional Information:** The July 8, 2011 site inspection performed by the Department resulted in violations of the Opencut Act. Serious soil violations were included in the violation letter and enforcement report. The Department will require that you have at a minimum, 11 inches of growth media available for reclamation, except the 6.6 acres of American Tower Corporation land that is designated as *commercial/industrial* for a postmining land use. Therefore the Department will require the following:
 - a. Survey the quantity of soil available at this site and provide the cubic yards of soil currently available for reclamation at this site.
 - b. Describe how the contaminated and buried soils described in the inspection report will be recovered, or if they can be recovered.
 - c. Immediately strip and remove all soils from the highwalls and pit floors and stockpile in the current permitted location(s) as required by your current permit.
 - d. Provide more detailed information on how the soil stockpile areas will be protected in the future to keep contamination/mixing and soil loss from occurring.
 - e. Provide an adequate bond for importation of any soils as may be required to meet your soil reclamation volume requirements.
9. **D1-4:** You have stated in this section, that you will apply BMP's as needed. However, (this has not been done and as stated in the July 8 2011 inspection report), erosion control is needed in the drainages located on the south and west sides of the site. Therefore, the following must be completed before this amendment can be approved:
 - a. Describe how you will retrieve the soils, overburden, garbage and other sediments that have entered the drainages.
 - b. Install proper erosion control at this site to keep sediment out of the drainages. Explain in this section the type of erosion control used and show its location on the map.
10. **D2-1:** Dust control must be marked in this section as well. Active dust control was occurring during the July 8, 2011 inspection and is required under law.
11. **D3-4:** Currently, you are at and beyond your permit limits on the west end of the site. Provide a more up to date explanation of how this site will be mined and its phases.
12. **D5-1:** During the July 8, 2011 site inspection, stockpiles of asphalt were identified onsite. If any stockpile of asphalt is to remain onsite it must be appropriately permitted and bonded. The site is not permitted for the asphalt stockpiles identified onsite during the July 8, 2011 inspection. Therefore, if asphalt stockpiles are still onsite or will be onsite for future operations you must fill out this section and bond appropriately.
13. **D9:** Refer to the requirements of #9 and #10 above and revise this section appropriately. In addition, your commitment made in this section and section II-F, #8 of the existing permit to manage soil more appropriately has not happened to date. Ensure that you adequately address the questions in #8, above and in the future are more aware of Opencut operations that occur at your site.

14. **E4-3:** Provide a detailed description for this site that adequately addresses the question.
15. **E6-6:** In this section you have marked that you will use the *native grazing/pasture* mix. However, you are currently permitted to use a different seed mix. If you intend on using the new *native grazing/pasture* mix then add that as a "purpose" for your amendment in section A1-1. If not, then uncheck the seed mix *native grazing/pasture* and type the existing permitted seed mix into the table provided in this section.
16. **F-1-Reclamation Bond Calculation:** Due to acreage changes (for mining outside permit boundary), potential soil importation, and other factors, provide an updated reclamation bond spreadsheet that adequately bonds this site for reclamation.
17. **F-4-Reclamation Bond Calculation:** It is likely that changes are required to the reclamation bond spreadsheet. Therefore, revise this section appropriately.

Maps

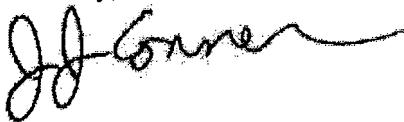
18. Provide a revised map that identifies all pertinent issues described in the above deficiencies.
19. Show the locations of the soil and overburden stockpile areas as separate stockpiles on the site map. Is there overburden? It appears to the Department that the onsite stockpiles were all growth media/soil. Revise here and throughout the plan appropriately.

Reclamation Bond Spreadsheet & Bond: If the acreage, dollar amount, or other bond parameters change from the original bond submittal, you must submit a rider or revised bond.

20. Provide a revised reclamation bond spreadsheet and bond to accurately portray the updates required at this site.

If you have any questions on the above, please contact the program at (406) 444-4970.

Sincerely,



JJ Conner
Environmental Science Specialist
Opencut Mining Program
Department of Environmental Quality
P.O.Box 200901, Helena, MT 59620-0901
Phone: (406) 444-4979; Fax: (406) 444-4988
jconner@mt.gov

Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet

Responsible Party Name:	Emerald Hills Development Company (Emerald Hills)
FID:	2084 Permit No. 21
Statute:	Opencut Mining Act (Act)
Date:	12/2/2011
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	\$1,000.00

Penalty Calculation #1

Description of Violation:

Emerald Hills violated Section 82-4-431(1), MCA, by conducting opencut operations in a non-permitted area at the Site without a permit amendment. In its July 8, 2011 site inspection, the Department observed that Emerald Hills had conducted mining operations on 0.2 acres outside the permit boundary.

I. BASE PENALTY

Nature

Explanation:

Conducting an opencut operation prior to obtaining a 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 affected land.

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 or permit amendment has a major gravity.

Extent Explanation:

The Department's expectation is that an opencut operator will not conduct opencut operations outside the permit boundary without having obtained a permit amendment. The Department has determined that the fact that Emerald Hills conducted opencut operations on 0.2 acres without a permit amendment constitutes a minor 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:
				0.55

Impact to Administration

Gravity

Major	Moderate	Minor	
.50	.40	.30	
			Gravity Factor:
			0.00

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

\$550.00

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, Emerald Hills should have been knowledgeable about the regulations governing opencut activities. Further, Emerald Hills submitted applications to amend its permit in January and June 2011 and, therefore, knew of the requirements. Emerald Hills had control over the circumstances surrounding the violation and should have foreseen that conducting opencut operations before a permit amendment 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)	\$110.00

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

Explanation:

Emerald Hills 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 Emerald Hills 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	\$550.00
Circumstances	\$110.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$660.00

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 0.2 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 or portion thereof of unpermitted opencut activities conducted by Emerald Hills.

Number of Days:	5
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ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$3,300.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

IV. ECONOMIC BENEFIT

Explanation:

The Department has determined that Emerald Hills did not gain a significant economic benefit by failing to comply with a permit requirement for the 5 days of violation. Therefore, the Department is not seeking economic benefit for the violation.

ECONOMIC BENEFIT REALIZED:	\$0.00
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Responsible Party Name:	Emerald Hills Development Company (Emerald Hills)
FID:	2084 Permit No. 21
Statute:	Opencut Mining Act (Act)
Date:	12/2/2011
Maximum Penalty Authority:	\$1,000.00

Penalty Calculation #2

Description of Violation:

Emerald Hills violated the Permit and Plan by failing to protect stockpiled soils from erosion, contamination, compaction, and unnecessary disturbance and failing to keep material stockpiles out of drainages. Section II-F, 2 and Section II-G1.(a) of the Plan of Operation (Plan) as approved by the Permit, states the operator will handle soil and overburden separately and minimize the mixing of these materials, and keep mined material stockpiles out of drainages, respectively. During the July 2011 Inspection, the Department observed that the soils stockpile located in the northwest corner of the site had been covered with gravel; and is therefore considered by the Department to be contaminated. Further, the Department observed materials stockpiled in drainages.

I. BASE PENALTY

Nature

Explanation:

Stockpiling gravel on soil and storing material in the drainage creates the potential for harm to the environment in that product may become comingled with the soil and the soil may no longer be suitable for reclamation purposes or the material may be lost. The lack of sufficient soil may prevent successful reclamation or, in the worst case scenario, another area of the earth's surface may need to be denuded to obtain replacement soil.

Potential to Harm Human Health or the Environment

X

Potential to Impact Administration

Gravity and Extent

Gravity Explanation:

Pursuant to ARM 17.4.303(5)(b), the failure to construct or operate in accordance with a permit or approval has a moderate gravity.

Extent Explanation:

The extent of deviation for this violation is moderate. The expectation is that the operator will protect salvaged soils from contamination to make them available for reuse and not store mined material in the drainage. Emerald Hills failed to prevent the stockpiled soils from becoming covered and mixed with gravel and failed to keep mined materials out of the drainages. The extent of deviation for this violation is moderate.

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

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

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

\$550.00

II. ADJUSTED BASE PENALTY

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

Explanation:

Emerald Hills had control over the circumstances surrounding the violation and should have foreseen that by not following the Plan by failing to protect the stockpiled soils from contamination and failing to keep mined materials out of the drainages would result in a violation. As a permitted entity, Emerald Hills should be knowledgeable about the requirements of the Act, its Permit and the Plan. Therefore, an upward adjustment of 20% for circumstances is appropriate.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$110.00

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

Explanation:

Emerald Hills 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 Emerald Hills to mitigate the violation or its impact beyond what was required 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	\$550.00
Circumstances	\$110.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$660.00

III. DAYS OF VIOLATION

Explanation:

The Department has determined that Emerald Hills violated ARM 17.24.219(1)(b)(i) and ARM 17.24.225(1) for at least two days, the day before and the day of the Department's July 2011 inspection, by failing to comply with its Permit and Plan by not protecting the stockpiled soils and failing to keep mined materials out of the drainages. Therefore, the Department is calculating a penalty based on two days of violation.

Number of Days:	2
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ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$1,320.00

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 has determined that Emerald Hills did not gain a significant economic benefit by failing to comply with a permit requirement and the Plan of Operation for the two days of violation. Therefore, the Department is not seeking economic benefit for the violation.

ECONOMIC BENEFIT REALIZED:	\$0.00
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Responsible Party Name:	Emerald Hills Development Company (Emerald Hills)	
FID:	2084	Permit No. 21
Statute:	Opencut Mining Act (Act)	
Date:	12/2/2011	
Maximum Penalty Authority:		\$1,000.00

Penalty Calculation #3

Description of Violation:

Emerald Hills violated the Permit and Plan by failing to maintain a 10-foot buffer stripped of soil and overburden along the edges of the highwalls in violation of ARM 17.24.219(1)(b)(i) and Section II-F, 5 of the Plan. During the July 2011 Inspection, the Department observed that Emerald Hills did not maintain a 10-foot buffer between the highwalls and unstripped soil.

I. BASE PENALTY

Nature

Explanation:

The failure to comply with permit requirements (including the Plan) poses the potential to harm the environment because by failing to provide a 10-foot buffer stripped of soil and overburden along the edges of the highwall, Emerald Hills risked losing topsoil and overburden as the highwall is mined or eroded.

Potential to Harm Human Health or the Environment

X

Potential to Impact Administration

Gravity and Extent

Gravity Explanation:

Pursuant to ARM 17.4.303(5)(b), the failure to construct or operate in accordance with a permit or approval has a moderate gravity.

Extent Explanation:

Pursuant to ARM 17.303(4)(a), a violation has a major extent if it constitutes a major deviation from the applicable requirements. Emerald Hills' failure to maintain a 10-foot buffer zone from the highwalls, as outlined in the Plan, is a major deviation from permit requirements.

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):

\$700.00

II. ADJUSTED BASE PENALTY

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

Explanation:

Emerald Hills had control over the circumstances surrounding the violation and should have foreseen that failing to comply with a permit requirement and the Plan would result in a violation. As a permitted entity, Emerald Hills should be knowledgeable about the requirements of the Act. Therefore, an upward adjustment of 20% for circumstances is appropriate.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$140.00

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

Explanation:

Emerald Hills 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 Emerald Hills to mitigate the violation or its impact beyond what was required 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	\$700.00
Circumstances	\$140.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$840.00

III. DAYS OF VIOLATION

Explanation:

The Department has determined that Emerald Hills violated ARM 17.24.225(1) for at least two days, the day before and the day of the Department's July 2011 inspection, by failing to comply with a permit requirement and the Plan. Therefore, the Department is calculating a penalty based on two days of violation.

Number of Days:	2
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ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$1,680.00

Other Matters as Justice May Require Explanation:

Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$0.00

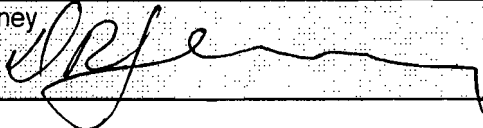
IV. ECONOMIC BENEFIT

Explanation:

The Department has determined that Emerald Hills did not gain a significant economic benefit by failing to comply with a permit requirement and the Plan for the two days of violation. Therefore, the Department is not seeking economic benefit for the violation.

ECONOMIC BENEFIT REALIZED: \$0.00

Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary

Responsible Party Name:	Emerald Hills Development Company (Emerald Hills)
FID:	2084 Permit No. 21
Statute:	Opencut Mining Act (Act)
Date:	12/5/11
Signature of Employee Calculating Penalty:	Daniel R. Kenney 

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

	Penalty #1	Penalty #2	Penalty #3
Maximum Penalty Authority:	\$1,000.00	\$1,000.00	\$1,000.00
Percent Harm - Gravity and Extent:	0.55	0.55	0.70
Percent Impact - Gravity:	0.00	0.00	0.00
Base Penalty:	\$550.00	\$550.00	\$700.00

II. Adjusted Base Penalty

Base Penalty:	\$550.00	\$550.00	\$700.00
Circumstances:	\$110.00	\$110.00	\$140.00
Good Faith and Cooperation:	\$0.00	\$0.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00	\$0.00
Adjusted Base Penalty:	\$660.00	\$660.00	\$840.00

Totals
\$1,800.00
\$360.00
\$0.00
\$0.00
\$2,160.00

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

5 2 2

Adjusted Base Penalty Total \$3,300.00 \$1,320.00 \$1,680.00

\$6,300.00

**Other Matters as Justice May
Require Total**

\$0.00 \$0.00 \$0.00

\$0.00

IV. Economic Benefit

\$0.00 \$0.00 \$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$6,300.00

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



Montana Department of
ENVIRONMENTAL QUALITY

MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: January 12, 2012

SUBJECT: Board of Environmental Review case, Case No. BER 2012-01 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY BRAD BLAKEMAN AT THE CAMAS
PRAIRIE GRAVEL PIT, SANDERS
COUNTY, MONTANA. [PENDING PERMIT
NO. 2057; FID #2106, DOCKET NO.
OC-11-10]

Case No. BER 2012-01 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2106, Docket No. OC-11-10).

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

BER 2012-01 DC

January 10, 2012

Brad Blakeman
P.O. Box 310
Hot Springs, MT 59845

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

I Brad Blakeman Respondent of Docket No. OC-11-10 do hereby request a hearing before the Montana Board of Environmental Review under Section 82-4-441, MCA.

Brad Blakeman



Filed with the

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 11th day of January 2012
at _____ o'clock 7 .m.

By: M. Sy Galt

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE OPENCUT MINING
ACT BY BRAD BLAKEMAN AT THE
CAMAS PRAIRIE GRAVEL PIT, SANDERS
COUNTY, MONTANA (PENDING PERMIT
NO. 2057, FID NO. 2106)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. OC-11-10

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 Brad Blakeman (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 violation of the Act and the administrative rules implementing the Act, and to obtain corrective action for the alleged violation.
4. Respondent is a "person" within the meaning of Section 82-4-403(10), MCA.
5. Respondent engaged in or controlled an opencut operation at the Camas Prairie Gravel Pit (Site) and, therefore, is an "operator" within the meaning of Section 82-4-403(8),

1 MCA. Accordingly, Respondent is subject to the requirements of the Act and the rules adopted
2 thereunder.

3 6. Section 82-4-431(1), MCA, requires that an operator may not conduct opencut
4 mining operations that result in the removal of 10,000 cubic yards or more of material and
5 overburden until the Department has issued a permit to the operator. An operator may not,
6 without a permit, remove materials or overburden from a site from which a total of 10,000 cubic
7 yards or more of materials and overburden in the aggregate has been removed.

8 7. In March 1990, the Department authorized Sanders County (Sanders) to conduct
9 opencut mining operations at the Site under an opencut mining permit (Permit No. 382) issued
10 by the Department.

11 8. In April 2010, Sanders informed the Department that it had not operated at the
12 Site since 2000 and that Respondent was now conducting opencut operations at the Site and was
13 doing so without Sanders' permission.

14 9. On June 3, 2010, the Department sent a letter informing Respondent that he was
15 not permitted to conduct opencut operations at the Site. The Department requested Respondent
16 to submit an opencut permit application within 30 days.

17 10. On July 15, 2010, the Department sent Respondent a violation letter (July 2010
18 Violation Letter) for conducting opencut operations without a permit at the Site and requested
19 Respondent to submit a complete permit application within 15 working days.

20 11. On August 2, 2010, Respondent, via email, requested that the deadline to submit
21 the permit application be extended until September 10, 2010. The Department responded via
22 email and granted Respondent's request for the extension.

23 12. On March 21, 2011, the Department conducted an inspection (March 2011
24 Inspection) at the Site.

1 13. On June 1, 2011, Respondent submitted a request for a pre-application meeting
2 to the Department.

3 14. On September 19, 2011, the Department sent Respondent a violation letter
4 (September 2011 Violation Letter) for conducting opencut operations without a permit at the
5 Site. The Department provided Respondent with a copy of the March 2011 Inspection report.

6 ***Failure to obtain an opencut permit***

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

16 16. During the March 2011 Inspection, the Department observed that Respondent
17 had conducted opencut operations on approximately 0.7 acre outside Sanders' permitted
18 boundary at the Site.

19 17. As of the date of this Order, Respondent has not submitted a complete opencut
20 permit application and the Department has not issued Respondent a permit for the Site.

21 18. Respondent violated Section 82-4-431, MCA, by conducting opencut mining
22 operations on 0.7 acre without a valid permit.

23 //

24 //

III. ADMINISTRATIVE ORDER

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

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

20. Within 45 days of service of this Order, Respondent shall submit to the Department a complete opencut permit application, including an adequate bond for reclaiming the 0.7 acre at the Site. The permit application and bond must be submitted to the address listed in Paragraph 23.

21. Within 60 days from receipt of an opencut permit, Respondent shall reclaim the 0.7 acre at the Site through contouring, replacing overburden and topsoil, and reseedling.

22. The Department has calculated a penalty of \$3,600 for conducting opencut operations without a permit.

23. No later than 60 days after service of this Order, Respondent shall pay to the Department the administrative penalty in the amount of \$3,600 for the violation specified above. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and sent to:

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

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

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

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

10 IV. NOTICE OF APPEAL RIGHTS

11 27. Respondent may appeal this Order under Section 82-4-441, MCA, by filing a
12 written request for a hearing before the Montana Board of Environmental Review no later than
13 30 days after service of this Order. Service of this Order is complete three business days after
14 mailing. Any request for a hearing must be in writing and sent to:

15 Board Secretary
16 Board of Environmental Review
17 1520 East Sixth Avenue
18 P.O. Box 200901
19 Helena, MT 59620-0901

20 28. Hearings are conducted as provided in the Montana Administrative Procedure
21 Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to
22 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings
23 prior to the hearing may include formal discovery procedures, including interrogatories, requests
24 for production of documents, and depositions. Respondent has the right to be represented by an
attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-61-201, MCA.

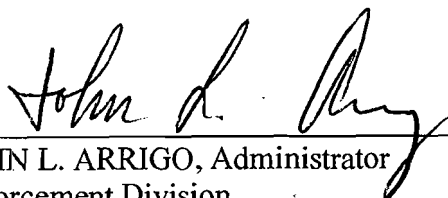
1 29. If a hearing is not requested within 30 days after service of this Order, the
2 opportunity for a contested case appeal is waived.

3 30. This Order becomes effective on the date of service.

4 IT IS SO ORDERED:

5 DATED this 21st day of December, 2011.

6 STATE OF MONTANA
7 DEPARTMENT OF ENVIRONMENTAL QUALITY

8 
9 _____
10 JOHN L. ARRIGO, Administrator
11 Enforcement Division

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

Responsible Party Name:	Brad Blakeman (Respondent)	
FID:	2106	Pending Permit 2057
Statute:	Opencut Mining Act (Act)	
Date:	12/12/2011	
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 a March 2011 inspection, the Department observed that Respondent had conducted opencut operations without a Department-issued permit at the Camas Prairie Gravel Pit (Site).

I. BASE PENALTY

Nature

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

Gravity and Extent

Gravity Explanation:
Pursuant to ARM 17.4.303(5)(a), operating without a required permit has a major gravity.
Extent Explanation:
The Department's expectation is that an opencut operator will not conduct opencut operations without having obtained a permit. The Department has determined that the fact that Respondent conducted opencut operations on 0.7 acre without a permit constitutes a minor 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: 0.55

Impact to Administration

Gravity

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

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

\$550.00

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 a request for a pre-application meeting, therefore, he 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
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Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$110.00
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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	\$550.00
Circumstances	\$110.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$660.00

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 0.7 acre. Using its discretion, the Department is choosing to use five (5) days of violation to calculate the administrative penalty assessed for the first acre where non-permitted opencut operations occurred. The Department has calculated a penalty for 5 days of violation for Respondent's conducting non-permitted opencut operations on 0.7 acre.

Number of Days:	5
-----------------	---

ADJUSTED BASE PENALTY x NUMBER OF DAYS:	\$3,300.00
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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

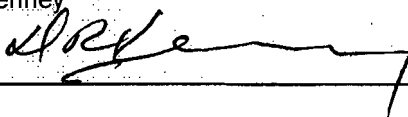
Explanation:

If Respondent had obtained a permit to cover the 0.7 acres, Respondent would have been required to post an estimated bond in the amount of \$15,000. The Department calculates that at the market rate of 2% per year, such a bond would have cost Respondent \$300 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 \$300. Accordingly, the Department calculates that by failing to obtain a permit and post the necessary bond for the past year, Respondent enjoyed a delayed economic benefit of \$300. 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:

\$300.00

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

Responsible Party Name:	Brad Blakeman (Respondent)
FID:	FID #2106
Statute:	Opencut Mining Act (Act)
Date:	12/21/11
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:	0.55
Percent Impact - Gravity:	0.00
Base Penalty:	\$550.00

II. Adjusted Base Penalty

Base Penalty:	\$550.00
Circumstances:	\$110.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
Adjusted Base Penalty:	\$660.00

Totals
\$550.00
\$110.00
\$0.00
\$0.00
\$660.00

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

5

Adjusted Base Penalty Total \$3,300.00

\$3,300.00

**Other Matters as Justice May
Require Total**

\$0.00

\$0.00

IV. Economic Benefit

\$300.00

\$300.00

V. History*

\$0.00

TOTAL PENALTY

\$3,600.00

*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.