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

AGENDA

FRIDAY, MARCH 23, 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. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone at (406) 444-6701 or by e-mail at jwittenberg@mt.gov no later than 24 hours prior to the meeting to advise her of the nature of the accommodation you need.*

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. January 27, 2012, Board meeting minutes.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner

a. **In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.** On January 19, 2012, Hearing Examiner Katherine Orr issued *Fourth Order Granting Extension of Time*, giving the parties through March 15, 2012, to reach settlement or file a proposed hearing schedule.

b. **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.** On February 9, 2012, DEQ filed *Department's Motion to Vacate Contested Case Hearing & to Set Status Conference*. On February 15, 2012, counsel for the appellant filed *Answer to Motion to Vacate and Set Status Hearing* requesting the DEQ's motion be denied.

c. **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*, giving the parties through March 8, 2012, to settle or file a joint status.

d. **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.** Hearing Examiner Katherine Orr issued *First Scheduling Order* on January 13, 2012, setting a hearing date of July 11, 2012. On January 30, 2012, the Board received *Motion to Join Additional Parties* from the appellant's attorney.

e. **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.** On February 7, 2012, DEQ counsel filed *Request for Stay* to allow time for settlement discussions. On

February 16, Hearing Examiner Katherine Orr issued *Order Granting Request for Stay and Vacating First Scheduling Order* giving the parties through March 9, 2012, to settle or submit a joint agreed revised hearing schedule.

f. **In the matter of violations of the Opencut Mining Act by the City of Ronan at Ronan, Lake County, BER 2011-23 OC.** On February 24, 2012, DEQ counsel filed *The Department's Proposed Prehearing Schedule*. A *First Scheduling Order* was issued on March 1, 2012, setting a hearing for August 17, 2012.

g. **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.** On January 13, 2012, Hearing Examiner Katherine Orr issued *First Prehearing Order* giving the parties until February 3, 2012, to file a proposed schedule. On February 2, the Board received *Stipulation for Extension of Time to Submit Proposed Schedule* from the parties. On March 6, 2012, an *Order Granting Extension of Time* to reach settlement or file a proposed hearing schedule was issued.

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. DEQ counsel filed *Status Report* on January 26, 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*. On March 9, 2012, an *Order Vacating Prehearing Conference and Hearing Date and Setting Date for Oral Arguments* was issued. The oral arguments set for April 16, 2012, are on the pending *Motion for Summary Judgment*.

c. **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 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. On January 31, 2012, Hearing Examiner Katherine Orr issued *Order Setting Telephonic Conference* to discuss the Motion for Joinder. A telephonic conference was held on March 2, 2012, concerning the Motion for Joinder, which is pending. On March 5, 2012, the DEQ filed an *Unopposed Motion to Modify the First Scheduling Order*. This was granted on March 9, 2012, in a *Seconded Amended Scheduling Order*.

d. **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, Marshall Warrington, Jr., Patricia**

Warrington, John Hutton, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-15 OC, BER 2011-12 OC, BER 2011-13 OC, and 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. On February 3, 2012, DEQ counsel filed *Reply Brief in Support of the Department's Motion for Summary Judgment*. A contested case hearing is set for April 16, 2012.

e. **In the matter of the request for hearing by Steven K. Endicott, Ruth Ann Endicott, and Robert W. Gambill regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-14 OC and BER 2011-18 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. On February 3, 2012, DEQ counsel filed *Reply Brief in Support of the Department's Motion for Summary Judgment*. A contested case hearing is set for April 19, 2012.

f. **In the matter of the request for hearing by Glenn Miller, Rick Sant, Ralph & Edna Neils, Berneiee A. Zucker, Patricia Anderson, Tina K. Moore, Marc Zahner, Donald E. White, Jacki Bruemmer, Betty Longo, Tracy Nicely, Michael Dunn, Dennis Thayer, James Hopkins, Debbie Zahner, James P. Tomlin, Howard C.A. Hunter, George Stachecki, Marie Mabee, Harold Mabee, Patricia Warrington, Lily S. Parker, Linda S. Fisher, Steven E. Fisher, Connie Karns, John Ritchie, Grant Denton, Karen & Ben Pelzel, Richard L. Johnson, N.E.W. Boss, Jane O. Drayton, Leonard H. Drayton, Warren Robbe, Katherine G. Potter, Robert B. Potter, Bonnie Gannon, Kim F. Taylor, Linda Cochran, Helen R. Lockard, Marshall Warrington, Jr., Bruce Kinney, Devan Kinney, Jon Kinney, Joel Kinney, Karen Legue, Angeline R. Allen, Gary Allen, Bonnie Sonnenberg, Bud Biddle, Eunice Boeve, Ron Boeve, Kathleen Burbridge, Harold Lewis, Ken Mole, and Lois M. Mole, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, 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. DEQ counsel filed *Motion to Dismiss Certain Parties* on January 10, 2012, and *Reply Brief in Support of the Department's Motion for Summary Judgment* on February 3, 2012. The contested case hearing in this matter is set for April 17, 2012.

3. Contested Cases not assigned to a Hearing Examiner

   a. **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.** Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* on January 31, 2012. On February 17, 2012, the Board received *Agreed Proposed Schedule* from the parties, suggesting a hearing during the week of September 10, 2012.

4. 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.

B. OTHER BRIEFING ITEMS

1. DEQ's Role in Oil and Gas Development – The department will provide information about the agency and BER's role in regulations that apply to Oil and Gas Development, both in the production processes and the social impacts that are a by-product of the production.

2. Nutrient Reduction Strategy Briefing – The department will brief the Board on water quality items facing the BER in the coming months and explain how they all tie together: Numeric Nutrient Water Quality Standards; DEQ-2/Reuse; and Nutrient Trading Policy.

III. ACTION ITEMS

A. INITIATION OF RULEMAKING

The department will propose that the Board initiate rulemaking to:

1. In the matter of the amendment of ARM Title 17, Chapter 24, Subchapter 9, in order to regulate underground mining using in situ coal gasification. The proposed revision is required by the 62nd Legislature under SB 292.

B. REPEAL, AMENDMENT, OR ADOPTION OF FINAL RULES

1. 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 in order to maintain compliance with the federal Surface Mining Control and Reclamation Act. The proposed revisions fall into the following general categories: (1) implementing legislative changes; (2) adopting provisions of federal regulations that govern the applicant violator system, and ownership and control requirements; (3) addressing conditional approvals and disapprovals from the federal Office of Surface Mining; (4) making substantive modifications to existing rules recommended by the Department's Coal and Uranium Program; (5) correcting grammatical errors; and 6) correcting reference citations; and I will briefly address each of these categories.

C. FINAL ACTION ON CONTESTED CASES

1. **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. On January 31, 2012, an *Unopposed Motion for Extension to File Exceptions* was filed and an *Order Granting Extension of Time to File Exceptions* was issued providing a new deadline of February 29, 2012. The Board received *Appellant's Statement of Exceptions* on March 1, 2012, and *DEQ Response to Exceptions* on March 9, 2012. The Board will decide to accept, reject, or modify the proposed Findings of Fact and Conclusions of Law.

2. **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. Hearing Examiner Katherine Orr issued Proposed Findings of Facts, Conclusions of Law, and Order on January 20, 2012. No Exceptions were filed. The Board will be asked to adopt, modify, or reject the proposed Findings of Fact and Conclusions of Law as the final order in this matter.

3. **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, were due in January and February, 2012. No exceptions were filed. The department filed *The Department's Clarification of Testimony and Exception Regarding Notice* on January 9, 2012. The Board will decide to accept, reject, or modify the proposed Findings of Fact and Conclusions of Law, and whether to incorporate points made in the department's request for clarification.

4. **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 February 2, 2012, the Board received *Notice of Dismissal and Stipulation to Dismiss Without Prejudice* signed by the parties. An order to dismiss the matter will be presented for the Board's signature.

5. **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.** On January 13, 2012, Hearing Examiner Katherine Orr issued First Prehearing Order giving the parties until February 3 to file a proposed schedule. On February 1 the parties filed *Stipulation to Dismiss* requesting dismissal with prejudice under Rule 41(a). An order dismissing the case will be presented for the Board's signature.

D. NEW CONTESTED CASES

1. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc., at the Absaloka Mine, Big Horn County, BER 2012-02 SM.** The Board received the appeal on February 27, 2012. Interim Hearings Examiner Katherine Orr issued First Prehearing Order on March 6, 2012. The Board may appoint a permanent hearings 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

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

TELECONFERENCE MINUTES
JANUARY 27, 2012

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:02 a.m., on Friday, January 27, 2012, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

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

Board Attorney Present: None

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Susan Johnson

Department Personnel Present: Tom Livers (Deputy Director); John North, Jane Amdahl, James Madden, Carol Schmidt – Legal; Judy Hanson – Permitting & Compliance Division; Jon Dilliard, Eugene Pizzini – Public Water Supply & Subdivisions Bureau; Debra Wolfe and Whitney Walsh – Air Resources Management Bureau;

Interested Persons Present: *no members of the public were present in the room or on the phone*

I.A.1	Review and approve December 2, 2011, Board meeting minutes. Mr. Mires MOVED for the Board to adopt the December 2, 2011, meeting minutes. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.
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.
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.
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.
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.
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.
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.
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.
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.
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.
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.
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.
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; the request for hearing by Patricia Warrington, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-13 OC; the 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; and 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.f In the matter of the request for hearing by Steven K. Endicottt & 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 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.

II.A.2.g In the matter of the request for hearing by Glenn Miller, Rick Sant, Ralph & Edna Neils, Berneiee A. Zucker, Patricia Anderson, Tina K. Moore, Marc Zahner, Donald E. White, Jacki Bruemmer, Betty Longo, Tracy Nicely, Michael Dunn, Dennis Thayer, James Hopkins, Debbie Zahner, James P. Tomlin, Howard C.A. Hunter, George Stachecki, Marie Mabee, Harold Mabee, Patricia Warrington, Lily S. Parker, Linda S. Fisher, Steven E. Fisher, Connie Karns, John Ritchie, Grant Denton, Karen & Ben Pelzel, Richard L. Johnson, N.E.W. Boss, Jane O. Drayton, Leonard H. Drayton, Warren Robbe, Katherine G. Potter, Robert B. Potter, Bonnie Gannon, Kim F. Taylor, Linda Cochran, Helen R. Lockard, Marshall Warrington, Jr., Bruce Kinney, Devan Kinney, Jon Kinney, Joel Kinney, Karen Legue, Angeline R. Allen, Gary Allen, Bonnie Sonnenberg, Bud Biddle, Eunice Boeve, Ron Boeve, Kathleen Burbridge, Harold Lewis, Ken Mole, and Lois M. Mole, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-16 OC.

II.A.2.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.

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.

Chairman Russell informed the Board members that Katherine Orr was not present, but that information provided on the agenda regarding the contested cases was up to date.

Mr. Miller noted that in item II.A.2.e the date for the contested case hearing, reflected as April, 16, 2011, should be April 16, 2012.

III.A.1 In the matter of the amendment of ARM Title 17, Chapter 38, Sub-chapter 3, Cross Connections in Drinking Water Supplies, and the amendment of ARM 17.38.208, 17.38.225, and 17.38.234.

Mr. Pizzini said the department is proposing to update existing rules to remove duplicative, confusing, and outdated language, and to provide clarification. He requested two amendments to the notice and said the department is recommending

initiation of the rulemaking and appointment of a hearings officer. Mr. Pizzini responded to questions from the Board.

Chairman Russell called for public comment regarding the request for rulemaking. There was no response.

Chairman Russell called for a motion to move forward on rulemaking and appoint Katherine. Mr. Whalen so MOVED. Mr. miller SECONDED the motion. Board members clarified that the motion included the two requested amendments. The motion CARRIED with a unanimous vote.

III.B.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.

Chairman Russell called for a motion to authorize him to sign the order dismissing the case. Mr. Miller so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.1 In the matter of violations of the Opencut Mining Act by the City of Ronan at Ronan, Lake County, BER 2011-23 OC.

Chairman Russell called for a motion to appoint Katherine. Ms. Kaiser so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.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.

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

III.C.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.

Chairman Russell called for a motion to appoint Katherine. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.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.

Chairman Russell called for a motion to appoint Katherine as the permanent hearings examiner for this matter. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. Mr. Whalen commented that this is a common issue throughout state and that

perhaps the Board should hear the matter. Chairman Russell called for the vote and the motion FAILED unanimously.

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.

Mr. Livers reminded everyone that the next meeting is scheduled for March 23 and that it is expected to be an in-person meeting in Helena. He said there would be several briefing items including briefings on water reuse standards, nutrient issues, and changes in DEQ-2. He also noted that the department would be returning with DEQ-4.

Mr. Mires discussed the oil and gas development in North Dakota and Eastern Montana. He requested a briefing on the Board's roles and responsibilities.

Mr. Livers said the department can provide a high-level overview of the role the department has in oil and gas development.

V. Adjournment

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

The meeting adjourned at 9:45 a.m.

Board of Environmental Review January 27, 2012, 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 Montana Strip and Underground Mining Reclamation Act.

LIST OF AFFECTED RULES - Proposing one new rule to implement SB 292 of the 2011 Legislature (Chapter 398, Laws of 2011) and conforming amendments to ARM 17.24.902 and 903.

AFFECTED PARTIES SUMMARY - Affected and interested parties include, but are not limited to, the department's Industrial and Energy Minerals Bureau, coal mine and prospecting operators as represented by the Montana Coal Council, and the Northern Plains Resource Council.

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

BACKGROUND - SB 292, of the 2011Legislative session requires the board to adopt rules necessary to regulate underground mining using insitu coal gasification by October 1, 2011. The bill also states that the rule regulating insitu coal gasification may not be more stringent than the comparable federal regulations or guidelines. Prior to the passage of 82-4-207, MCA, the board adopted two rules specifically regulating insitu coal gasification. ARM 17.24.902 provides permit application requirements and ARM 17.24.903 provides performance standards for insitu coal gasification. Both of those rules provide that appropriate provisions of subchapters 3 through 8 and 10 through 13 are applicable to insitu coal permit applications and operations. ARM 17.24.902 and 17.24.903 are substantially similar to the comparable federal regulations, which are contained in 30 CFR 785.22 and 30 CFR Part 828. Following passage of 82-4-207, MCA, the Department reviewed subchapter 3 through 8 and 10 through 13 to identify which rules within those subchapters apply to insitu operations. The Department has determined that most rules would apply to those operations. Rather than adopting rules that duplicate existing rules, the Department is recommending that the Board adopt a rule that lists those rules that would never apply to insitu operations. By doing that, the Board would thereby also identify the rules that do apply.

HEARING INFORMATION - The Department recommends that the Board not schedule a hearing.

BOARD OPTIONS - The Board may:

1. Initiate rulemaking without or without a hearing;
2. Determine that the rule is not appropriate and decline to initiate

rulemaking; or
3. Modify the proposed rulemaking and proceed.

DEQ RECOMMENDATION - The Department recommends initiation of rulemaking without a hearing by authorizing publication of the attached Notice of Proposed Amendment and Adoption.

Enclosures – Draft Notice of Proposed Amendment and Adoption (No Public Hearing Contemplated)

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.902 and 17.24.903 pertaining to general performance standards and adoption of New Rule I pertaining to rules not applicable to insitu coal operations	)))))))	NOTICE OF PROPOSED AMENDMENT AND ADOPTION (RECLAMATION) (NO PUBLIC HEARING CONTEMPLATED)

TO: All Concerned Persons

1. On _____, 2012, the Board of Environmental Review proposes to amend and adopt 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:

17.24.902 APPLICATION REQUIREMENTS FOR IN SITU COAL PROCESSING OPERATIONS (1) Except as provided in [NEW RULE I], ~~A~~an application for a permit for in situ coal processing operations must be made according to all requirements of ARM 17.24.901. In addition, the mining and reclamation operations plan for operations involving in situ processing operations must contain information establishing how those operations will be conducted in compliance with the requirements of ARM 17.24.907, including:

(a) through (2) remain the same.

AUTH: 82-4-204, 82-4-205, 82-4-207, MCA
IMP: 82-4-222, MCA

17.24.903 GENERAL PERFORMANCE STANDARDS (1) In addition to all appropriate requirements of subchapters 4 through 8, and 10 through 13, except ARM 17.24.519 and as provided in [NEW RULE I], the following requirements apply to underground mining operations:

(a) through (2) remain the same.

AUTH: 82-4-204, 82-4-207, MCA;
IMP: 82-4-227, 82-4-231, 82-4-232, 82-4-233, 82-4-243, 82-4-253, MCA

3. The proposed new rule provides as follows:

I RULES NOT APPLICABLE TO INSITU COAL OPERATIONS (1) The following rules are not applicable to insitu coal gasification:

(a) ARM 17.24.311 (Air Pollution Control Plan);

(b) ARM 17.24.320 (Plans for Disposal of Excess Spoil);

(c) ARM 17.24.519 (Monitoring for Settlement); and

(d) ARM 17.24.831 through 837 (auger mining and remining rules).

(2) All other rules may apply on a mine-specific basis.

AUTH: 82-4-207, MCA

IMP: 82-4-221, 82-4-222, 82-4-223, 82-4-225, 82-4-227, 82-4-228, 82-4-231, 82-4-232, 82-4-233, 82-4-237, 82-4-238, 82-4-240, 82-4-243, MCA

REASON: Chapter 398, Laws of 2011, (SB 292) requires the board to adopt rules necessary to regulate underground mining using insitu coal gasification by October 1, 2012. That requirement is codified in 82-4-207, MCA. That statute also provides that those rules may not be more stringent than the comparable federal regulations or guidelines. Prior to the passage of 82-4-207, MCA, the board adopted two rules specifically regulating insitu coal gasification. ARM 17.24.902 provides permit application requirements and ARM 17.24.903 provides performance standards for insitu coal gasification. Both of those rules provide that appropriate provisions of subchapters 3 through 8 and 10 through 13 are applicable to insitu coal permit applications and operations. ARM 17.24.902 and 17.24.903 are substantially similar to the comparable federal regulations, which are contained in 30 CFR 785.22 and 30 CFR Part 828. Following passage of 82-4-207, MCA, the Department of Environmental Quality reviewed subchapter 3 through 8 and 10 through 13 to identify which rules within those subchapters apply to insitu operations. The department determined that most rules would apply to those operations. Rather than adopting rules that duplicate existing rules, the board is proposing to adopt a rule that lists those rules that would never apply to insitu operations. By adoption of New Rule I, the board would identify those rules that do not apply to insitu coal mining operations and thereby also identify the rules that do apply.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to 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, no later than _____, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to 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, no later than _____, 2012.

6. If the department receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 1 based on the fewer than 20 regulated mines in Montana.

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

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The sponsor was notified by letter sent by U.S. mail dated January 4, 2012.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

_____ BY: _____

JOHN F. NORTH
Rule Reviewer

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

Certified to the Secretary of State, _____, 2012.

BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR RULEMAKING

AGENDA ITEM # III.B.1.

AGENDA ITEM SUMMARY - The Board has proposed to amend, adopt, and repeal rules implementing the Montana Strip and Underground Mine Reclamation Act. The Board proposed the amendments, adoptions, and repeal in order to maintain compliance with the federal Surface Mining Control and Reclamation Act and the Montana Strip and Underground Mine Reclamation Act and for other reasons listed below.

LIST OF AFFECTED RULES - ARM Title 17, chapter 24, subchapters 3, 4, 5, 6, 7, 9, 10, 11, and 12.

AFFECTED PARTIES SUMMARY – Operators holding permits issued pursuant to the Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, MCA; persons or operators who wish to obtain a permit or file a notice of intent to prospect under the Act; and persons and landowners who hold an interest in strip and underground coal mining.

SCOPE OF PROPOSED PROCEEDING - The Board is considering final action on the amendment, adoption, and repeal of the above rules as proposed in the Montana Administrative Register.

BACKGROUND - The proposed revisions fall into the following general categories: (1) implementing legislative changes; (2) adopting provisions of federal regulations that govern the applicant violator system and ownership and control requirements; (3) addressing conditional approvals and disapprovals from the federal Office of Surface Mining; (4) correcting grammatical errors; (5) correcting reference citations; and (6) modifying existing rules proposed by the department's coal and uranium program.

HEARING INFORMATION – Kathryn Orr conducted a public hearing on January 18, 2012, on the proposed amendment, adoption, and repeal of the rules.

BOARD OPTIONS - The Board may:

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

DEQ RECOMMENDATION - The Department recommends that the Board adopt the amendments, adoptions, and repeal with some revisions as set out in the attached draft Notice of Amendment, Adoption, and Repeal.

ENCLOSURES -

1. Notice of Public Hearing on Proposed Amendment, Adoption, and Repeal
2. Presiding Officer's Report
3. HB 311 Analysis
4. Public Comment
5. Draft Notice of Amendment, Adoption, and Repeal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.301, 17.24.302, 17.24.303, 17.24.304, 17.24.308, 17.24.313, 17.24.314, 17.24.401, 17.24.403, 17.24.416, 17.24.418, 17.24.425, 17.24.501, 17.24.623, 17.24.639, 17.24.642, 17.24.645, 17.24.646, 17.24.702, 17.24.711, 17.24.718, 17.24.723, 17.24.725, 17.24.726, 17.24.901, 17.24.924, 17.24.926, 17.24.927, 17.24.1001, 17.24.1002, 17.24.1003, 17.24.1005, 17.24.1016, 17.24.1018, 17.24.1111, 17.24.1112, 17.24.1113, 17.24.1114, 17.24.1116, 17.24.1201 pertaining to definitions, format, data collection, and supplemental information, baseline information, operations plan, reclamation plan, plan for protection of the hydrologic balance, filing of application and notice, informal conference, permit renewal, transfer of permits, administrative review, general backfilling and grading requirements, blasting schedule, sedimentation ponds and other treatment facilities, permanent impoundments and flood control impoundments, ground water monitoring, surface water monitoring, redistribution and stockpiling of soil, establishment of vegetation, soil amendments, management techniques, and land use practices, monitoring, period of responsibility, vegetation measurements, general application and review requirements, disposal of underground development waste, permit requirement, renewal and transfer of permits, information and monthly reports, drill holes, bond requirements for drilling operations, notice of intent to prospect, bonding, frequency and methods of inspections; the adoption of New Rules I through V pertaining to the department's	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (STRIP AND UNDERGROUND MINE RECLAMATION ACT)

obligations regarding the applicant/ violator system, department eligibility review, questions about and challenges to ownership or control findings, information requirements for permittees, and permit requirement - short form; and the repeal of 17.24.763 pertaining to coal conservation

TO: All Concerned Persons

1. On January 18, 2012, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., January 9, 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:

17.24.301 DEFINITIONS The following definitions apply to all terms used in the Strip and Underground Mine Reclamation Act and subchapters 3 through 13 of this chapter:

(1) through (12) remain the same.

(13) "Applicant/violator system" or "AVS" means an automated information system of applicant, permittee, operator, violation, and related data that the Office of Surface Mining maintains to assist in implementing the Surface Mining Control and Reclamation Act of 1977.

~~(13)~~ (14) "Approximate original contour" is defined in 82-4-203, MCA., ~~as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles, and coal refuse piles eliminated, so that:~~

~~(a) the reclaimed terrain closely resembles the general surface configuration if it is comparable to the premine terrain. For example, if the area was basically level or gently rolling before mining, it should retain these features after mining, recognizing that rolls and dips need not be restored to their original locations and that level areas may be increased;~~

~~(b) the reclaimed area blends with and complements the drainage pattern of~~

~~the surrounding area so that water intercepted within or from the surrounding terrain flows through and from the reclaimed area in an unobstructed and controlled manner;~~

~~(c) postmining drainage basins may differ in size, location, configuration, orientation, and density of ephemeral drainageways compared to the premining topography if they are hydrologically stable, soil erosion is controlled to the extent appropriate for the postmining land use, and the hydrologic balance is protected as necessary to support postmining land uses within the area affected and the adjacent area; and~~

~~(d) the reclaimed surface configuration is appropriate for the postmining land use."~~

(14) through (53)(c) remain the same, but are renumbered (15) through (54)(c).

~~(54)~~ (55) "Hydrologic balance" is defined in 82-4-203, MCA.~~, as "the relationship between the quality and quantity of water inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir, and encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage as they relate to uses of land and water within the area affected by mining and the adjacent area."~~

(55) through (106)(b) remain the same, but are renumbered (56) through (107)(b).

~~(107)~~ (108) "Road" means a surface right-of-way for purposes of travel by land vehicles used in prospecting or strip or underground mining or reclamation operations. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side area, approaches, structures, ditches, surface, and such contiguous appendages as are necessary for the total structure. The term includes access, haul, and ramp roads constructed, used, reconstructed, improved, or maintained for use in prospecting or strip or underground mining operations, including use by coal-hauling vehicles leading to transfer, processing, or storage areas. Subcategories of roads are as follows:

(a) and (b) remain the same.

(c) "Public road" is defined in ARM 17.24.1132(1)~~(f)~~(g).

(d) remains the same.

(108) through (119) remain the same, but are renumbered (109) through (120).

~~(120)~~ (121) "Substantially disturb" means, for purposes of prospecting, to significantly impact land or water resources by:

(a) drilling of uranium prospecting holes or blasting. Drilling of coal prospecting holes and installation and use of associated disposal pits or installation of ground water monitoring wells does not constitute substantial disturbance;

(b) through (e) remain the same.

(121) through (129) remain the same, but are renumbered (122) through (130).

~~(130)~~ (131) "Transfer, assignment, or sale of permit rights" means a change in ownership or other effective control over the right to conduct strip or underground mining operations under a permit issued by the department. See ARM ~~17.24.412 and 17.24.413~~ 17.24.418.

(131) through (145)(b) remain the same, but are renumbered (132) through (146)(b).

AUTH: 82-4-204, MCA
IMP: 82-4-203, MCA

REASON: The term "applicant/violator system" or "AVS" appears in several proposed revisions and in New Rules I through IV, which are being adopted to comply with federal requirements in order for the Department of Environmental Quality to maintain primacy to regulate coal mining under the Surface Mining Control and Reclamation Act of 1977. The proposed amendment to ARM 17.24.301(13) defines that term to bring the rules into conformance with 30 CFR 701.5.

The proposed amendments to ARM 17.24.301(13) and (54) delete direct quotes from 82-4-233, MCA. Section 2-4-305(2), MCA, provides that rules may not unnecessarily repeat statutory language. The board has determined it is not necessary to repeat statutory language in the rule when a reference to the statute will suffice. This amendment would also avoid the necessity of amending the rule in the future, should the Legislature amend 82-4-233, MCA, again.

The proposed amendments to (107)(c) and (130) are necessary to correct internal reference cites. The amendment to (107) (proposed (108)) is necessary to conform to proper drafting practice. Because of the Secretary of State's style rules for the Administrative Rules of Montana, the three subsections in (107) cannot be consecutively earmarked as (a), (b), and (c), as would be required by the Legislative Services Division if (107) were being adopted into the Montana Code Annotated. To ensure that citations to (107) will include (a), (b) and (c), the introductory sentence is being added.

Senate Bill 286 (Chapter 407, Laws of 2011), passed by the 2011 Legislature, amended 82-4-226, MCA, and modified certain coal prospecting procedures. The bill provided for a streamlined permitting process for coal exploration using drilling that does not substantially disturb the land surface. The process is codified in 82-4-226(8), MCA. The change to the definition of "substantially disturb" would bring this definition into conformance with the Legislature's use of the term in Senate Bill 286.

17.24.302 FORMAT, DATA COLLECTION, AND SUPPLEMENTAL INFORMATION (1) Information set forth in the application must be accurate, current, presented clearly and concisely, submitted in a format acceptable to the department, and supported by appropriate references to technical and other written material available to the department.

(2) through (9) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-222, MCA

REASON: The proposed amendment to ARM 17.24.302 allows the department to have authority over the format in which the required information for an application is submitted. This proposed amendment remedies time-consuming efforts by the department caused by submission of data to the department in

improper formats. For example, large database information that requires statistical analyses, by the department should not be submitted in a paper format. Additionally, information that is submitted in an electronic format must be in a format that is usable with the department's current software technology. This amendment would provide the department with the authority to require a specific format, thus allowing for more efficient use of department resources.

17.24.303 LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION (1) through (1)(g)(v) remain the same.

(h) for any surface coal mining operations that the applicant or the applicant's operator owned or controlled within the five-year period preceding the date of the submission of the application, and for any surface coal mining operation the applicant or the applicant's operator owns or controls on that date, the applicant must provide the:

(i) permittee's and operator's name and address;

(ii) permittee's and operator's taxpayer identification numbers;

(iii) federal or state permit number and corresponding Mine Safety and Health Administration number;

(iv) regulatory authority with jurisdiction over the permit; and

(v) permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure;

(h) through (k) remain the same, but are renumbered (i) through (l).

~~(l)~~ (m) a certified statement of whether the applicant, operator, any subsidiary, affiliate, or persons controlled by or under common control with the applicant or operator, is in compliance with 82-4-251, MCA, and, if known, whether any officer, partner, director, or any individual owning of record or beneficially, alone or with associates, ~~10%~~ ten percent or more of any class of stock of the applicant is subject to any of the provisions of 82-4-251, MCA, and whether any of the foregoing parties or persons have ever had a strip mining or underground mining license or permit issued by any other state or federal agency revoked or have ever forfeited a strip mining or underground mining bond or a security deposited in lieu of a bond and, if so, a detailed explanation of the facts involved in each case must be attached including:

(i) identification number and date of issuance of the permit ~~or~~ and, when applicable, date and amount of bond or similar security;

(ii) through (v) remain the same.

(m) through (y) remain the same, but are renumbered (n) through (z).

AUTH: 82-4-204, MCA
IMP: 82-4-222, MCA

REASON: The department regulates coal mining under a delegation of authority by the federal Office of Surface Mining (OSM). That delegation is subject to the department adopting rules consistent with the federal regulations that govern surface and underground coal mining. The OSM maintains an automated information system of applicant, permittee, operator, violation, and related data to assist in implementing the Surface Mining Control and Reclamation Act of 1977.

That is known as the applicant/violator system, or AVS. Previously, the department's obligations to input data and utilize data from the AVS was regulated by a memorandum of understanding between the OSM and the department. However, in 2009, the OSM directed the department to adopt rules to govern the state's obligations related to the AVS. The amendment adding (1)(h) through (h)(v) is proposed to comply with the OSM's directive and 30 CFR 778.12. It is necessary to ensure that information related to ownership and control of coal mining operations is readily available to the department to ensure that rules relating to the issuance, suspension, and revocation of coal prospecting and operating permits due to current or historical violations are complied with.

The proposed amendment to (1)(m) is intended to comply with the directive from the OSM to adopt rules to implement the federal applicant/violator system referenced above by providing information required for input into the system. The amendment brings the rule into conformance with 30 CFR 778.14.

The amendment to (1)(m)(i) is proposed because the department only needs bond information for bonds that have been forfeited.

17.24.304 BASELINE INFORMATION: ENVIRONMENTAL RESOURCES

(1) The following environmental resources information must also be included as part of an application for a strip or underground mining permit:

(a) through (f)(iv) remain the same.

(g)~~(i)~~ a detailed description of all overburden and mineral materials (all materials other than soil) that will be handled during mining or backfilling operations. The description must include:

(A) through (C) remain the same, but are renumbered (i) through (iii).

~~(D)~~ (iv) a narrative addressing the suitability or unsuitability of the materials to be handled for reclamation purposes. This narrative must address or reference the data, characteristics of materials, and aspects of reclamation described in ~~(6)~~ (1)(f), and ~~(7)(a)(ii) and (iii)~~ (1)(g)(ii) and (iii), and ARM 17.24.322(2)(a)(iii); and

~~(E)~~ (v) additional studies or information determined by the department to be useful or necessary to evaluate the application~~;~~.

~~(ii) a~~All laboratory work ~~in this regard~~ conducted under (g) must be conducted in accordance with ARM 17.24.302(3);

(h) through (i)(ii) remain the same.

(j) a narrative of the results of a wildlife survey. The operator shall contact the department at least three months before planning the wildlife survey to allow the department to consult state and federal agencies with fish and wildlife responsibilities to determine the scope and level of detail of information required in the survey to help design a wildlife protection and enhancement plan. At a minimum, the wildlife survey must include:

(i) through (iii) remain the same.

(iv) a wildlife habitat map for the entire wildlife survey area including habitat types that are discussed in (c), and ARM 17.24.751(2)(f) ~~through (h)~~ and (g); and

(v) remains the same.

(k) through (l)(ii)(D) remain the same.

AUTH: 82-4-204, MCA

IMP: 82-4-222, MCA

REASON: The proposed amendment to ARM 17.24.304(1)(g) is necessary to comply with formatting requirements of the Secretary of State's office, which prohibits use of double earmarking practice, e.g. "(g)(i)."

The other proposed amendments to ARM 17.24.304 are necessary to correct internal reference cites.

17.24.308 OPERATIONS PLAN (1) Each application must contain a description of the operations proposed to be conducted during the life of the mine including, at a minimum, the following:

(a) remains the same.

(b) a narrative, with appropriate cross sections, design drawings, and other specifications sufficient to demonstrate compliance with ARM 17.24.609 and applicable rules of subchapter 10, explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facilities is necessary for postmining land use as specified in ARM 17.24.762):

(i) through (vi) remain the same.

(vii) facilities or sites and associated access routes for environmental monitoring and data gathering activities or for the gathering of subsurface data by trenching, drilling, geophysical or other techniques to determine the natures, depth, and thickness of all known strata, overburden, and coal seams; and

(viii) through (f) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-222, MCA

REASON: Currently, ARM 17.24.308(1)(b)(vii) requires a description for facilities associated with environmental monitoring and data gathering activities for the gathering of subsurface data. The word "or" was inadvertently left out of this rule in a previous rulemaking. As written, the language is nonsensical because environmental data and coal data are not the same things. Adding the word "or" as proposed, will require a description to be included for all facilities associated with environmental monitoring, data gathering, or gathering of subsurface data.

17.24.313 RECLAMATION PLAN (1) Each reclamation plan must contain a description of the reclamation operations proposed, including the following information:

(a) through (g)(iv) remain the same.

(h) a narrative of the method for revegetation including, but not limited to, a discussion of:

(i) through (ix) remain the same.

(x) measures to be used to determine the success of revegetation, including the use of reference areas and/or technical standards in relation to the revegetation types pursuant to ARM 17.24.724 and 17.24.726;

(xi) through (i) remain the same.

(j) a narrative explaining reclamation of facilities and sites identified under

ARM 17.24.308~~(2)~~(1)(b).

AUTH: 82-4-204, MCA
IMP: 82-4-222, 82-4-231, 82-4-232, 82-4-233, 82-4-234, MCA

REASON: The proposed amendment to ARM 17.24.313(1)(h)(x) provides internal references to the reference area requirements and technical standards referenced in the rule. This amendment is necessary to direct the reader's attention to those requirements and standards.

The proposed amendment to ARM 17.24.313(1)(j) is necessary to correct an erroneous internal reference cite.

17.24.314 PLAN FOR PROTECTION OF THE HYDROLOGIC BALANCE

(1) Each permit application must contain a detailed description, supported by appropriate maps, data, and other graphics, of the measures to be taken during and after the proposed mining activities to minimize disturbance of the hydrologic balance on and off the mine plan area and to prevent material damage to the hydrologic balance outside the permit area in accordance with subchapters 4 through 9. The measures must minimize disturbance of the hydrologic balance sufficiently to sustain the approved postmining land use and the performance standards of subchapters 5 through 12 and must provide protection of:

(a) and (b) remain the same.

(c) the quantity of surface and ground water within both the proposed mine plan area and adjacent areas from adverse effects of the proposed mining activities, or to provide alternative sources of water in accordance with ARM 17.24.304~~(5)~~(1)(e) and ~~(6)~~(f), and 17.24.648, where the protection of quantity cannot be ensured.

(2) The description must include:

(a) through (c) remain the same.

(d) plans for monitoring and semiannual reporting of ground and surface water quality and quantity data collected and analyzed in accordance with ARM 17.24.304~~(5)~~(1)(e) and ~~(6)~~(f), 17.24.645, and 17.24.646.

(3) through (5) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-222, MCA

REASON: The proposed amendments to ARM 17.24.314 are necessary to correct erroneous internal reference cites.

17.24.401 FILING OF APPLICATION AND NOTICE (1) and (2) remain the same.

(3) Upon receipt of notice of the department's determination of administrative completeness, the applicant shall place an advertisement in a newspaper of general circulation in the locality of the proposed activity at least once a week for four consecutive weeks. The advertisement must contain, at a minimum, the following information:

(a) remains the same.

(b) a map or description, which must:

(i) remains the same.

(ii) for all applications except major revision applications, clearly show or describe the exact location and boundaries of the proposed permit area and state the acreage of that area; and

~~(iii) state the names of the US geological survey 7.5- or 15-minute quadrangle maps that contain the area shown or described, if available; and~~

(iv) remains the same, but is renumbered (iii).

(c) through (6) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-222, 82-4-226, 82-4-231~~(4)~~, 82-4-232, 82-4-233, MCA

REASON: The proposed amendments to ARM 17.24.401(3)(b)(ii), (iii), and (iv) are necessary to remove an antiquated requirement in (iii). It is antiquated because the maps have been superseded by electronic mapping.

17.24.403 INFORMAL CONFERENCE (1) through (1)(c) remain the same.

(2) Except as provided in (3) of this rule, if an informal conference is requested in accordance with this rule, the department shall hold an informal conference within 30 days following the receipt of the request. The informal conference shall be conducted according to the following:

(a) and (b) remain the same.

(c) If requested, in writing, by a conference requestor in a reasonable time prior to the conference, the department may arrange with the applicant to grant parties to the conference access to the ~~mine plan~~ proposed mining area for the purpose of gathering information relevant to the conference.

(d) through (4) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-226, 82-4-231, MCA

REASON: The proposed amendment to (2)(c) reconciles the rule language to the statutory language in 82-4-231(6), MCA.

17.24.416 PERMIT RENEWAL (1) through (3) remain the same.

(4)~~(a)~~ The department shall, upon the basis of application for renewal and completion of all procedures required under this rule, issue a renewal of a permit, unless it is established and written findings by the department are made that:

(i) through (iv) remain the same, but are renumbered (a) through (d).

(A) and (B) remain the same, but are renumbered (i) and (ii).

~~(v)~~ (e) any additional revised or updated information required by the department that has not been provided by the applicant;

(vi) remains the same, but is renumbered (f).

~~(vii)~~ (g) the renewal is prohibited by the denial provisions of 82-4-227, 82-4-234, and 82-4-251, MCA; ~~or~~

~~(viii)~~ (h) the operation has been in a state of temporary cessation for six or more years; or

(i) the department determines, following an eligibility review and determination as described in [NEW RULE II], that the owner or operator is not eligible for a permit.

(b) through (d) remain the same, but are renumbered (5) through (7).

(5) remains the same, but is renumbered (8).

AUTH: 82-4-204, MCA
IMP: 82-4-221, 82-4-226, MCA

REASON: The proposed amendment to ARM 17.24.416(4)(a) is necessary to comply with the Secretary of State's prohibition on double earmarking and the proposed amendment to (4)(a)(v) is necessary to correct a grammatical error.

The proposed addition of (4)(i) conforms the rule to the requirements of proposed New Rule II. See the first paragraph of the reason given for the proposed amendment to ARM 17.24.303.

17.24.418 TRANSFER OF PERMITS (1) remains the same.

(2) The department may not approve any transfer or assignment of any permit unless the potential transferee or assignee:

(a) through (a)(iii) remain the same.

(b) provides the department with an application for approval of such proposed transfer, assignment, or sale, including:

(i) and (ii) remain the same.

(iii) the same information as is required in ~~subchapter 3~~ ARM 17.24.303 for applications for new permits.

(3)(a) through (6)(b) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-238, MCA

REASON: The proposed amendment to ARM 17.24.418 is necessary to make an internal reference cite more specific.

17.24.425 ADMINISTRATIVE REVIEW (1) remains the same.

(2) The ~~department~~ board shall commence the hearing within 30 days of such request. For the purposes of the hearing, the ~~department~~ board or its hearing officer may order a site inspection. The hearing is a contested case hearing and no person who presided at an informal conference shall either preside at this hearing or participate in the decision thereon.

(3) The ~~department~~ board may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate, pending final determination of the proceeding, if:

(a) through (5) remain the same.

(6) Within 20 days after the close of the record, the ~~department~~ board shall issue and furnish the applicant and each person who participated in the hearing with

the written findings of fact, conclusions of law, and order of the department with respect to the appeal.

(7) The burden of proof at such hearing is on the party seeking to reverse the decision of the ~~department~~ board.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-206, 82-4-221, 82-4-226, 82-4-231, 82-4-232, MCA

REASON: The proposed amendments to ARM 17.24.425 reflect the enactment of HB 370 (Chapter 127, Laws of 2005) by the 2005 Legislature transferring the responsibility for holding a hearing from the Department of Environmental Quality to the Board of Environmental Review. See 82-4-231(9), MCA.

17.24.501 GENERAL BACKFILLING AND GRADING REQUIREMENTS

(1) through (3)(b) remain the same.

(4) All final grading on the area of land affected must be to the approximate original contour of the land in accordance with 82-4-232(1), MCA.

(a) The operator shall transport, backfill, and compact to ensure compliance with (3)(b) and ARM 17.24.505, and grade all spoil material as necessary to achieve the approximate original contour. Highwalls must be reduced or backfilled in compliance with ARM 17.24.515(1), or reclaimed using approved highwall reduction alternatives in compliance with ARM 17.24.515(2).

(b) through (7) remain the same.

AUTH: 82-4-204, 82-4-231, MCA
IMP: 82-4-231, 82-4-232, MCA

REASON: The proposed amendment to ARM 17.24.501 is necessary to provide clarification that an alternative to reducing or backfilling is allowed. The methods for highwall reclamation may include reducing, backfilling, or reclaiming to a replacement bluff feature pursuant to ARM 17.24.515(2). As currently worded, the rule conflicts with ARM 17.24.515(2).

17.24.623 BLASTING SCHEDULE (1) through (5)(f) remain the same.

(6) Before blasting in areas or at times not in a previous schedule, the operator shall prepare and distribute a revised blasting schedule according to the procedures of (1) and (2). Whenever a schedule has previously been provided to the owner or residents under ~~(1)~~ (2) with information on requesting a preblasting survey, the notice of change need not include information regarding preblast surveys.

(7) remains the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, MCA

REASON: The proposed amendments to ARM 17.24.623 are necessary to

ensure that the modifications of the blasting schedule are not only prepared but are also distributed appropriately according to (2) and to correct an internal citation error. Distribution is necessary to protect public safety.

17.24.639 SEDIMENTATION PONDS AND OTHER TREATMENT FACILITIES (1) through (19) remain the same.

(20) If a sedimentation pond meets any of the criteria of 30 CFR 77.216(a), the following additional requirements must be met:

(a) an appropriate combination of principal and emergency spillways that will discharge safely the runoff resulting from a 100-year, ~~24~~ six-hour precipitation event, or a larger event specified by the department, assuming the impoundment is at full pool for spillway design, must be provided;

(b) through (28)(b) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, MCA

REASON: The proposed amendment to ARM 17.24.639 requires sedimentation ponds that meet any of the criteria of 30 CFR 77.216(a) to be designed to have an appropriate combination of principal and emergency spillways that will discharge safely the runoff resulting from a 100-year, six-hour storm. This amendment requires the specified sedimentation ponds to safely pass a generally smaller peakflow than the existing rule requiring the safe passage of a 100-year, 24-hour storm. This amendment will align the spillway design to the same requirements as the stream channel reclamation found in ARM 17.24.634. A 100-year, six-hour event still represents a large and rare runoff event, would comply with 30 CFR 816.49(a)(9)(ii)(B), and would provide adequate protection for the facility.

17.24.642 PERMANENT IMPOUNDMENTS AND FLOOD CONTROL IMPOUNDMENTS (1) Permanent impoundments are prohibited unless constructed in accordance with ARM 17.24.504 and 17.24.639~~,~~ and have open-channel spillways that will safely discharge runoff resulting from a 100-year, ~~24~~ six-hour precipitation event, assuming the impoundment is at full pool for spillway design or larger event specified by the department. The department may approve a permanent impoundment upon the basis of a demonstration that:

(a) through (7) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, MCA

REASON: The proposed amendment to ARM 17.24.642 requires permanent impoundments to be designed to have open channel spillways that will discharge safely the runoff resulting from a 100-year, six-hour storm. This amendment requires permanent impoundments to safely pass a generally smaller peakflow than the existing rule requiring the safe passage of a 100-year, 24-hour storm. A 100-year, six-hour event, however, still represents a large and rare runoff event and would make the rule consistent with federal regulations. See 30 CFR

816.49(a)(9)(ii)(B) pertaining to impoundments of this class. The current 100-year, 24-hour design results in inconsistencies between geomorphic stream channel reclamation designs (ARM 17.24.634) and spillway engineering designs. The proposed amendment will alleviate this inconsistency and provide for an uninterrupted peakflow stream channel design.

17.24.645 GROUND WATER MONITORING (1) Ground water levels, subsurface flow and storage characteristics, and the quality of ground water must be monitored based on information gathered pursuant to ARM 17.24.304 and the monitoring program submitted pursuant to ARM 17.24.314 and in a manner approved by the department to determine the effects of strip or underground mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems in the permit and adjacent areas. When operations may affect the ground water system, ground water levels and ground water quality must be periodically monitored using wells that can adequately reflect changes in ground water quantity and quality resulting from such operations. The information must be submitted to the department in a format approved by the department.

(2) through (8) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, 82-4-232, MCA

REASON: This amendment will allow the department to require the permittee to submit the ground water hydrology data in a format that will ensure the long-term usability of the data, increase review efficiency, and provide consistency for data comparison.

17.24.646 SURFACE WATER MONITORING (1) through (1)(b) remain the same.

(2) The operator shall submit semiannual reports including analytical results from each sample taken during the semester to the department. Sampling results must be submitted in a format approved by the department. In addition, all monitoring data must be maintained on a current basis for review at the minesite. Any sample results that indicate a permit violation must be reported immediately to the department. However, whenever the discharge for which water monitoring reports are required is also subject to regulation by a MPDES permit and that permit requires filing of the water monitoring reports within 90 days or less of sample collection, the operator shall submit to the department on the time schedule required by the MPDES permit or within 90 days following sample collection, whichever is earlier, a copy of the completed reporting form filed to meet MPDES permit requirements.

(3) through (7) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-231, 82-4-232, MCA

REASON: This amendment will allow the department to require the permittee to submit the surface water hydrology data in a format that will ensure the long-term usability of the data, increase review efficiency, and provide consistency for data comparison.

17.24.702 REDISTRIBUTION AND STOCKPILING OF SOIL (1) through (3)(b) remain the same.

(4) Prior to redistribution of soil or soil substitutes, regraded areas must be:

(a) sampled and analyzed to determine the physicochemical nature of the surficial spoil material in accordance with ARM 17.24.313(1)~~(g)~~(h)(xi);

(b) through (7) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-232, MCA

REASON: The proposed amendment to ARM 17.24.702 is necessary to correct an internal reference cite.

17.24.711 ESTABLISHMENT OF VEGETATION (1) Vegetation must be reestablished in accordance with 82-4-233~~(1), (2), (3), and (5)~~, MCA~~, as follows:~~. For purposes of that statute, "other constructed features" means discrete man-made features less than two acres in size that are incorporated into reclaimed areas, that have been constructed to an approved design, and that do not require revegetation to achieve the approved postmining land use or postmining slope stability.

~~(a) Sections 82-4-233(1), (2), and (3), MCA, state: "(1) The operator shall establish on regraded areas and on all other disturbed areas, except water areas, surface areas of roads, and other constructed features approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is:~~

~~"(a) diverse, effective, and permanent;~~

~~"(b) composed of species native to the area or of introduced species when desirable and necessary to achieve the postmining land use and when approved by the department;~~

~~"(c) at least equal in extent of cover to the natural vegetation of the area; and~~

~~"(d) capable of stabilizing the soil surface in order to control erosion to the extent appropriate for the approved postmining land use.~~

~~"(2) The reestablished plant species must:~~

~~"(a) be compatible with the approved postmining land use;~~

~~"(b) have the same seasonal growth characteristics as the original vegetation;~~

~~"(c) be capable of self-regeneration and plant succession;~~

~~"(d) be compatible with the plant and animal species of the area; and~~

~~"(e) meet the requirements of applicable seed, poisonous and noxious plant, and introduced species laws or regulations.~~

~~"(3) Reestablished vegetation must be appropriate to the postmining land use so that when the postmining land use is:~~

~~"(a) cropland, the requirements of subsections (1)(a), (1)(c), (2)(b), and (2)(c)~~

~~are not applicable;~~

~~"(b) pastureland or grazing land, reestablished vegetation must have use for grazing by domestic livestock at least comparable to premining conditions or enhanced when practicable;~~

~~"(c) fish and wildlife habitat, forestry, or recreation, trees and shrubs must be planted to achieve appropriate stocking rates."~~

~~(b) Section 82-4-233(5), MCA, states: "For land that was mined, disturbed, or redisturbed after May 2, 1978, and that was seeded prior to January 1, 1984, using a seed mix that was approved by the department and on which the reclaimed vegetation otherwise meets the requirements of subsections (1) and (2) and applicable state and federal seed and vegetation laws and rules, introduced species are considered desirable and necessary to achieve the postmining land use and may compose a major or dominant component of the reclaimed vegetation."~~

(2) through (3)(b) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-233, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.711 would delete a direct quotation of 82-4-233, MCA, which is no longer accurate, and would substitute a reference to that statute. The proposed amendment brings the rule into compliance with 2-4-305(2), MCA, which provides that rules may not unnecessarily repeat statutory language and would avoid the necessity of amending the rule in the future, should the Legislature amend 82-4-233, MCA, again. The board also proposes to amend (1) by adding a definition of "other constructed features" to address a concern raised by the Office of Surface Mining that all of reclamation could be considered "constructed" and so the exemption of establishing vegetation could broadly be applied to the whole affected area (see Volume 72 Federal Register 57826, October 10, 2007). To ensure that the entire reclaimed area cannot be considered to be a constructed feature, the board's proposed definition provides a limit on the size of the other constructed feature. Furthermore, the proposed definition requires that the constructed feature would not interfere with the achievement of the postmining land use or slope stability. This would ensure that the exemption from revegetation in 82-4-233, MCA, does not impair reclamation. Finally, the proposed definition requires the other constructed feature to be constructed to an approved design. By requiring an approved design, the department would have the opportunity to review the proposed feature to ensure the reclamation will not negatively affect the post mine land use or slope stability while not limiting the permit holder to specific reclamation features.

17.24.718 SOIL AMENDMENTS, MANAGEMENT TECHNIQUES, AND LAND USE PRACTICES (1) remains the same.

(2) ~~An operator may use only normal husbandry practices to ensure the establishment of vegetation consistent with the approved reclamation plan.~~ An operator may use husbandry practices, approved by the department, for management of vegetation consistent with the approved reclamation plan without affecting the minimum responsibility period. If husbandry practices other than those

specified for the approved land use are employed, the minimum responsibility period will start after the last such unapproved practice is used.

(3) remains the same.

AUTH: 82-4-204, MCA
IMP: 82-4-233, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.718 addresses a concern raised by the Office of Surface Mining in Volume 72 Federal Register No. 195, 57830 (2007). Currently ARM 17.24.718(2) requires that operators use normal husbandry practices as management techniques. The Office of Surface Mining is concerned that the current language could be construed to include any normal husbandry practice. The proposed amendment addresses this concern by requiring the operator to use only approved normal husbandry practices.

17.24.723 MONITORING (1) The operator shall conduct periodic vegetation, soils, and wildlife monitoring under plans submitted pursuant to ARM 17.24.312(1)(d) and 17.24.313(1)~~(f)(iv) and (1)(g)(ix)~~(g) and (h) and the approved postmining land use as approved by the department.

(2) through (4) remain the same

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-233, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.723 is necessary to correct an erroneous internal reference cite.

17.24.725 PERIOD OF RESPONSIBILITY (1) Except as provided in 82-4-235~~(3)~~(4), MCA, et seq., the minimum period of responsibility for reestablishing vegetation begins after the last seeding, planting, fertilizing, irrigating, or other activity related to phase III reclamation as determined by the department unless it can be demonstrated that such work is a normal husbandry practice that can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success.

(2) Except as provided in 82-4-235(3), MCA, an ~~A~~application for phase III bond release may not be submitted prior to the end of the tenth growing season.

AUTH: 82-4-204, MCA
IMP: 82-4-233, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.725(1) corrects an erroneous reference cite resulting from the enactment of HB 278 by the 2009 Legislature (Chapter 72, Laws of 2009) adding 82-4-235(3), MCA, and renumbering the formerly described 82-4-235(3) to (4).

The proposed amendment to (2) adds the reference citation for the statute that provides the exception to when a bond release application may be submitted.

This amendment is necessary to reflect the enactment of HB 278, in which exceptions to the ten-year responsibility period were adopted.

17.24.726 VEGETATION MEASUREMENTS (1) Standard, ~~and~~ consistent, and statistically valid field and laboratory methods must be used to obtain and evaluate vegetation data consistent with 82-4-233 and 82-4-235, MCA, and to compare revegetated area data with reference area data and/or with technical standards. Specific field and laboratory methods used and schedules of assessments must be ~~detailed in a plan of study and be~~ approved by the department for inclusion in the permit. ~~Sample adequacy must be demonstrated.~~ In addition to these and other requirements described in this rule, the department shall supply guidelines regarding ~~acceptable~~ representative field and laboratory methods.

(2) remains the same.

(3) ~~The revegetated a~~Areas to be developed for grazing land, pastureland, or cropland must meet or exceed the applicable performance standards in (1) and (2) ~~for at least two of the last four years~~ in any two years after year six of the phase III bond period of responsibility. Pursuant to ARM 17.24.1113, the department shall evaluate the vegetation at the time of the bond release inspection for phase III to confirm the findings of the quantitative data.

(4) Areas to be developed for fish and wildlife habitat, forestry, or recreation must meet or exceed the performance standards in (1) and (2), excluding production, and a minimum tree and shrub density following the requirements of (1). Tree and shrub density must be sampled during the last growing season of the phase III bond period of responsibility. Sampling must demonstrate the following conditions:

(a) all trees and shrubs must be healthy and have been in place for not less than two growing seasons;

(b) at least 80 percent of the trees and shrubs used to determine success shall have been in place for at least the last six years of the phase III bond period of responsibility; and

(c) volunteer and sucker trees and shrubs of the approved species may be included in the accounting for success.

(5) For areas to be developed for residential or industrial/commercial post-mine land use, the vegetative ground cover shall not be less than that required to control erosion within two years after regrading is completed.

(4) remains the same, but is renumbered (6).

AUTH: 82-4-204, MCA
IMP: 82-4-233, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.726(1) addresses a concern raised by the Office of Surface Mining in Volume 72 Federal Register 57830, October 10, 2007. Currently, (1) requires the permittee to submit a plan of study regarding vegetation measurements to be approved by the department. The Office of Surface Mining is concerned that the current language is less stringent than the federal regulations which require that each permit application contain measures proposed to be used to determine success of revegetation. See 30 CFR

780.18(b)(5). The proposed amendment addresses the concern of the Office of Surface Mining by requiring the methods and schedules of vegetation measurements to be included in the permit.

The proposed amendments to (3) are necessary to conform Montana's administrative rules with the corresponding federal requirements located at 30 CFR 816.116(c)(3). Currently, the rule reads that the vegetation standards must be met in any two of the last four years. The proposed amendment (any two years after year six) has the same meaning if the responsibility period is exactly ten years. The need for this rule amendment is evident when the operator chooses or the vegetation requires a period longer than ten years. As the rule currently exists, Montana's language has a different meaning than the CFR because vegetation data collected may "expire" if a longer responsibility period is taken. This would require additional expense in sampling that is unnecessary.

The proposed addition of (4) is necessary to conform Montana's rule with the corresponding federal requirements located at 30 CFR 816.116(b). Currently, the rule requires all revegetated areas to meet or exceed standards for production, cover, and density. However, the statute that the rule implements, 82-4-235(1)(c), MCA, does not require land reclaimed to fish and wildlife habitat, forestry, and recreation land uses to meet a production standard. The addition of (4) is proposed to further define what conditions must be present for acceptable sampling time frames for tree and shrub density and what constitutes a tree or shrub. These provisions are required by 30 CFR 816.116(b)(3).

The proposed addition of (5) is necessary to conform Montana's rule with the corresponding federal requirements located at 30 CFR 816.116(b)(4). The proposed language acknowledges that a vegetative standard for cover, production, and density are not appropriate for a land use of residential or industrial/commercial. Rather, the appropriate measurement is to require vegetative ground cover sufficient to control erosion.

17.24.901 GENERAL APPLICATION AND REVIEW REQUIREMENTS

(1) through (1)(h)(iv) remain the same.

(2) The requirements of (1)~~(f)~~(g) and ~~(g)~~(h) also apply to pneumatic backfilling operations, except where the operations are exempted by the department from requirements specifying hydrologic monitoring.

AUTH: 82-4-204, MCA
IMP: 82-4-222, MCA

REASON: The proposed amendments to ARM 17.24.901 are necessary to correct erroneous internal reference citations.

17.24.924 DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: GENERAL REQUIREMENTS (1) through (15) remain the same.

(16) Surface water runoff from the area above a structure must be diverted away from the structure and into stabilized diversion channels designed to pass safely the runoff from a 100-year, ~~24~~ six-hour precipitation event or larger event specified by the department. Surface runoff from the structure surface must be

diverted to stabilized channels off the fill that will safely pass the runoff from a 100-year, ~~24~~ six-hour precipitation event. Diversion design must comply with the requirements of ARM 17.24.637.

(17) through (20) remain the same.

AUTH: 82-4-204, 82-4-231, MCA
IMP: 82-4-227, 82-4-231, 82-4-232, 82-4-233, MCA

REASON: The proposed amendments to ARM 17.24.924 are necessary to eliminate a difference in the design criteria located in ARM 17.24.634, which is referenced in ARM 17.24.637, that requires the surface water drainage to be constructed to safely pass a 100-year, six-hour storm. These amendments require the surface water drainage to safely pass a generally smaller peakflow than the existing rule requiring the safe passage of a 100-year, 24-hour storm. A 100-year, six-hour event, however, still represents a large and rare runoff event. This amendment would make the rule consistent with federal regulations (30 CFR 817.83(a)(2)) and would provide adequate protection for the facility.

17.24.926 DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: HEAD-OF-HOLLOW FILL (1) remains the same.

(2) The drainage control system for the head-of-hollow fill must be capable of passing safely the runoff from a 100-year, ~~24~~ six-hour precipitation event, or larger event specified by the department.

AUTH: 82-4-204, 82-4-205, 82-4-231~~(10)(h)~~, MCA
IMP: 82-4-227, 82-4-231, 82-4-232, 82-4-233, MCA

REASON: The proposed amendment to ARM 17.24.926 requires drainage control systems to be designed to safely pass the runoff resulting from a 100-year six-hour storm. This amendment requires the drainage control system to safely pass a generally smaller peakflow than the existing rule requiring the safe passage of a 100-year, 24-hour storm. A 100-year, six-hour event, however, still represents a large and rare runoff event. This amendment would make the rule consistent with federal regulations pertaining to head-of-hollow drainage systems (30 CFR 817.72(a)(2)) and would provide adequate protection for the facility.

17.24.927 DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: DURABLE ROCK FILLS (1) through (3)(c) remain the same.

(4) Surface water runoff from the areas adjacent to and above the fill must not be allowed to flow into the fill and must be diverted into stabilized channels that are designed to pass safely the runoff from a 100-year, ~~24~~ six-hour precipitation event. Diversion design must comply with the requirements of ARM 17.24.637.

(5) remains the same.

(6) Surface runoff from the outslope of the fill must be diverted off the fill to properly designed channels that will pass safely a 100-year, ~~24~~ six-hour precipitation event. Diversion design must comply with the requirements of ARM 17.24.637.

(7) through (7)(c) remain the same.

AUTH: 82-4-204, 82-4-231, MCA
IMP: 82-4-227, 82-4-231, 82-4-232, 82-4-233, MCA

REASON: The proposed amendments to ARM 17.24.927 are necessary to eliminate an inconsistency in the design criteria located in ARM 17.24.634, which is referenced in ARM 17.24.637, that requires the surface water drainage to be constructed to safely pass a 100-year, six-hour storm. This amendment requires the surface water drainage to safely pass a generally smaller peakflow than the existing rule requiring the safe passage of a 100-year, 24-hour storm. A 100-year, six-hour event, however, still represents a large and rare runoff event. This amendment would make the rule consistent with federal regulations pertaining to disposal of excess spoil (30 CFR 817.73(f)) and would provide adequate protection for the facility.

17.24.1001 PERMIT REQUIREMENT (1) A person who intends to prospect for coal or uranium on land not included in a valid strip or underground mining permit must obtain a prospecting permit from the department if the prospecting will be:

(a) remains the same.

(b) conducted to determine the location, quality, or quantity of mineral using drilling operations; or

(b) remains the same, but is renumbered (c).

(2) An application for a prospecting permit must be made on forms provided by the department and, except for an application for a coal drilling operation that is subject to the application and review requirements of 82-4-226(8), must be accompanied by the following information:

(a) through (g) remain the same.

(h) a prospecting map that meets the following requirements:

(i) and (ii) remain the same.

(iii) each map must contain:

(A) through (E) remain the same.

(F) the location of habitat of species described in ~~(d)~~(e); and

(G) through (o) remain the same.

(p) the proposed post-disturbance land use; and

(q) the proposed public notice of the prospecting activities and proof of publication, in accordance with ARM 17.24.303~~(23)~~(1)(x). The procedures of ARM 17.24.401(3) and (5), 17.24.402, and 17.24.403 must be followed in the processing of a prospecting permit application.

(3) through (6)(d) remain the same.

(7) Prospecting-related activities or facilities that are conducted or created in accordance with this rule and ARM 17.24.1002 through 17.24.1014 and 17.24.1016 through ~~17.24.1018~~ [NEW RULE V] must be transferred to a valid strip or underground mining permit whenever such activities or facilities become part of mine operations in conjunction with ARM 17.24.308~~(2)~~(1)(b) or 17.24.609.

AUTH: 82-4-204, MCA
IMP: 82-4-226, MCA

REASON: The proposed amendments to ARM 17.24.1001 are necessary to correct erroneous internal reference cites and to correct a typographical error in (2)(p) by adding a hyphen to the word "post-disturbance."

Senate Bill 286, passed by the 2011 Legislature, amended 82-4-226, MCA, and modified certain coal prospecting procedures. The bill provided for a streamlined permitting process for coal exploration using drilling that does not substantially disturb the land surface. The process is codified in 82-4-226(8), MCA. The addition of (1)(b), the new language in (2), and the amendment to (7) would bring these provisions into conformance with 82-4-226, MCA, as amended by Senate Bill 286.

17.24.1002 INFORMATION AND MONTHLY REPORTS (1) through (2)(m) remain the same.

(3) Annual reports must be filed in accordance with 82-4-226~~(7)~~(6) and 82-4-237, MCA, and must include the information required under (2) for all activities conducted during the report year.

AUTH: 82-4-204, MCA
IMP: 82-4-226, MCA

REASON: The proposed amendment to ARM 17.24.1002(3) is necessitated by the changes to 82-4-226, MCA, made by HB 370 (Chapter 127, Laws of 2005) during the 2005 legislative session and to conform the citation to the current statute.

17.24.1003 RENEWAL AND TRANSFER OF PERMITS (1) An application for renewal of a prospecting permit must be submitted by the permittee on forms provided by the department. The application must be submitted at least ~~120~~ 15 ~~but not more than 150~~ days prior to the anniversary date of the permit and must include:

(a) through (4) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-226, MCA

REASON: Currently, an application to renew a prospecting permit must be submitted at least 120 days prior to the renewal date. The board believes that 15 days is sufficient time for review of the renewal application and will result in quicker department action on the application.

17.24.1005 DRILL HOLES (1) through (1)(b) remain the same.

(2) The prospector shall use appropriate techniques to:

(a) through (c) remain the same.

(d) reclaim all surface impacts and prevent ~~subsidence~~ settling that may result from prospecting-related activities.

(3) through (4) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-226, MCA

REASON: The proposed amendment to ARM 17.24.1005 is necessary to correct the improper use of the word "subsidence." Subsidence is defined in 82-4-204(49), MCA, as "... a vertically downward movement of overburden materials resulting from the actual mining of an underlying mineral deposit or associated underground excavations." The proposed amendment will replace the word "subsidence" with the word "settling," which is an appropriate word to be associated with prospecting-related activities.

17.24.1016 BOND REQUIREMENTS FOR DRILLING OPERATIONS

(1) and (2) remain the same.

(3) Each drill site is considered to be ~~0.~~1.0 acre unless otherwise approved by the department.

(4) remains the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-223, 82-4-226, MCA

REASON: The proposed amendment to ARM 17.24.1016 would increase the area associated with each drill site to 1.0 acre. This disturbance area would then be bonded at $200 per acre. The current area of 0.1 acre allows for set up of the drill rig and minimal disturbance around it. Increasing the size of the drill site will better allow for use of mud pits when needed, storage of drilling materials, and better blending of reclamation with adjacent native areas.

17.24.1018 NOTICE OF INTENT TO PROSPECT (1) This rule applies to a prospecting operation that is outside an area designated unsuitable for coal mining pursuant to 82-4-227 or 82-4-228, MCA, and that is:

(a) remains the same.

(b) conducted ~~for the purpose of determining the location, quality, or quantity of a natural mineral deposit but does not substantially disturb, as defined in ARM 17.24.301, the natural land surface~~ to determine drill hole locations and access routes prior to submittal of an application to prospect to determine the location, quality, and quantity of a mineral reserve.

(2) A person who conducts a prospecting operation as described in (1) must, before conducting the prospecting operations, file with the department a notice of intent to prospect that meets the requirements of (3) ~~or~~ and (4). A notice of intent to prospect is effective for one year after it is filed. If prospecting activities described in a notice are not conducted within the year, they may be incorporated by reference in a subsequent notice of intent to prospect.

(3) remains the same.

(4) The notice must document that the owners of the land affected have been notified and understand that the department shall make investigations and inspections necessary to ensure compliance with the Act, applicable rules, and ~~permit~~ notice of intent conditions. The notice must also include the current mailing address and phone number of each affected landowner.

(5) A notice of intent for prospecting activities that will not substantially disturb, as defined in ARM 17.24.301, the natural land surface must contain the

following:

(a) ~~information required in ARM 17.24.1001(2)(a) through (i), and (2)(l) through (n)~~ a map of sufficient size and scale to adequately show all areas to be prospected. Standard United States geological survey topographic quadrangle maps, or other similar map showing the same level of detail, must be used as base maps. The following must be clearly identified on the map~~;~~:

(i) topography (minimum of ten-foot contours), locations of streams, lakes, stockwater ponds, wells, and springs that are known or readily discoverable proximate to the prospecting operations;

(ii) surface ownership;

(iii) roads and access routes;

(iv) locations of proposed installations of monitoring facilities; and

(v) location of occupied dwellings and pipelines; and

(b) remains the same.

(6) A notice of intent to prospect for prospecting operations that will substantially disturb, as defined in ARM 17.24.301, the natural land surface, must contain the following to the extent that it is applicable to the proposed prospecting operation:

(a) through (c) remain the same.

(7) Within 30 days of receipt of a notice of intent to prospect ~~pursuant to (3) or (4)~~, the department shall notify the person who filed the notice whether the notice meets the requirements of ~~(3) or (4)~~ this rule.

(8) Each person who conducts prospecting ~~which substantially disturbs the natural land surface~~ under a notice of intent shall, while in the prospecting area, have available to the department for review upon request a copy of the notice of intent to prospect.

(9) All provisions of this subchapter, except ARM 17.24.1001~~(1), (2)(j), (k), and (q), (3), (4), and (5)~~, 17.24.1003, 17.24.1014, 17.24.1016, ~~and~~ 17.24.1017, and [NEW RULE V] apply to a ~~prospecting operation for which a permit is not required pursuant to ARM 17.24.1001~~ notice of intent to prospect.

AUTH: 82-4-226, MCA
IMP: 82-4-226, MCA

REASON: The amendment to (1)(b) and the first amendment to (2) are proposed to bring the rule into conformance with 82-4-226, MCA, as amended by SB 286 (Chapter 407, Laws of 2011), which does not allow prospecting to determine the location, quality, or quantity of a mineral deposit to be conducted under a notice of intent. The replacement of "or" with "and" in (2) is made because both (3) and (4) apply to each notice of intent. The amendments to (5)(a) eliminate information requirements that are not necessary for operations that do not create a substantial disturbance. The amendment to (6) is proposed because not all of the requirements referenced in (6)(a) through (c) apply to every prospecting operation. The amendments to (8) are necessary because, when a department employee on an inspection trip observes a prospecting operation, the employee must have access to the notice of intent to ensure that the operation has a notice of intent and that the operation is in compliance with it. The amendment to (9) is made because the

information requirements for notices of intent are specified in (5) and (6) of the rule.

17.24.1111 BONDING: BOND RELEASE APPLICATION CONTENTS

(1) and (2) remain the same.

(3) The application must include the permit number and date approved or renewed, a proposed public notice of the precise location of the land affected, the location and acreage for which bond release is sought, the amount of bond release sought, a description of the completed reclamation, including the dates of performance and how the results of the reclamation satisfy the requirements of the approved reclamation plan, and copies of letters sent to adjoining property owners, surface owners, local government bodies, planning agencies, and sewage and water treatment facilities or water companies in the locality of the permit area, notifying them of the permittee's intention to seek release of performance bond(s). These letters must be sent before the permittee files the application for release.

(4) remains the same.

(5) ~~Within 30 days after filing the application for release, the permittee shall submit proof of publication of the advertisement required by ARM 17.24.1112. Such proof of publication is considered part of the bond release application.~~ The department shall determine whether an application is administratively complete within 60 days of receipt and shall immediately notify the applicant in writing of its determination. If the department determines an application is not administratively complete, the notice must list the specific items not adequately addressed in the application. Any items not listed in the notice are presumed to be addressed.

(6) Within 45 days of the department's determination of administrative completeness, the applicant shall submit proof of publication of the advertisement required by ARM 17.24.1112.

(6) remains the same, but is renumbered (7).

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-223, 82-4-232, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.1111(3) is necessary to bring the rule into compliance with 82-4-232(6), MCA, as amended by HB 370 during the 2005 legislative session. (See Chapter 127, Laws of 2005.) The proposed language provides clear direction to the bond release application requirements found at 82-4-232(6), MCA.

The proposed amendment to (5) also is necessary to reflect changes in 82-4-232, MCA. The proposed amendment deletes the current requirement to submit proof of publication of the public notice for bond release within 30 days of submission of the application, and replaces it with a requirement in (6) that proof of publication be submitted to the department within 45 days after the application is determined to be administratively complete. This time frame will allow the company to run the public notice for four consecutive weeks after the date set by 82-4-232(6)(c), MCA, to begin publication and still have two weeks to submit the affidavit of publication. Section 82-4-232(6)(c), MCA, allows the department a maximum of 60 days to review a bond release application. The proposed language in (6) reflects that amendment and includes a starting time for when the 60 days begins.

17.24.1112 BONDING: ADVERTISEMENT OF RELEASE APPLICATIONS AND RECEIPT OF OBJECTIONS (1) ~~At the time of filing an application for bond release~~ Upon receipt of notice of the department's determination of administrative completeness, the ~~permittee~~ applicant shall advertise the ~~filing~~ approved public notice of the application in a newspaper of general circulation in the locality of the permit area. The advertisement must:

(a) through (2)(b)(ii) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-223, 82-4-232, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.1212 reflects changes in 82-4-232(6)(c) as amended by HB 370 during the 2005 Legislative session. (See Chapter 127, Laws of 2005.) The current language in (1) requires that the applicant advertise the public notice for the bond release at the time of the application. However, 82-4-232, MCA, was amended during that session to require the department to review a proposed public notice for form and content prior to advertisement, thus the proposed public notice is not available for circulation in the newspaper until the department approves it. The proposed amendment is requested to reconcile the timing of the advertisement with the timing required in 82-4-323(6)(c), MCA.

17.24.1113 BONDING: INSPECTION OF SITE AND PUBLIC HEARING OR INFORMAL CONFERENCE (1) Within 30 days~~, weather permitting,~~ of ~~receiving a complete bond release request~~ determining that a bond release application is administratively complete pursuant to 82-4-232(6)~~(a)~~(h), MCA, the department shall, weather permitting, inspect and evaluate the reclamation work. The surface owner, agent, or lessee shall be given notice of such inspection and may participate with the department in making the bond release inspection. Upon request of any person described in ARM 17.24.1112(2), the department may arrange with the permittee to allow that person access to the permit area for the purpose of gathering information relevant to the proceeding.

(2) The department shall ~~schedule~~ hold a public hearing if written objections are filed and a public hearing is requested within 30 days of the last publication of notice of application. The public hearing must be held in the locality of the permit area for which bond release is sought or in Helena, at the option of the objector.

(a) Notice of a public hearing must be published in the Montana Administrative Register at least two weeks before the date of hearing and in a newspaper of general circulation in the locality of the hearing ~~at least two weeks~~ for two consecutive weeks before the date of the hearing.

(b) The public hearing must be held within 30 days from the date of the ~~notice~~ hearing request.

(c) through (e) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-223, 82-4-232, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.1113(1) reflects changes in 82-4-232, MCA. In 2005, the Legislature amended what is now 82-4-232(6)(h), MCA, by changing the beginning of the 30-day period for the department to complete the bond release inspection from the date the application is received to the date the department determines the application is administratively complete, weather permitting. (See Chapter 127, Laws of 2005.) The proposed language reflects those changes to the statute.

The proposed amendments to (2) also reflect amendments to 82-4-232, MCA, by the 2005 Legislature in the same bill. The first proposed change in (2) clarifies, but does not change the meaning of, the rule. The second change in (2) allows the hearing to be held in Helena at the option of the objector, and brings the rule into compliance with 82-4-232(6)(d).

The proposed amendment to (2)(a) is necessary to provide clarification for the duration of the public notice of the hearing. The current language requires the notice to be published at least two weeks before the hearing, but it does not require two consecutive weeks as specified in 82-4-232(6)(d), MCA. The proposed language adds the "consecutive" clarification.

The proposed amendment to (2)(b) is necessary to correct the beginning point of the 30-day period during which the public hearing must be held. The current language begins the 30-day period from the date of the notice. ARM 17.24.1113 refers to two separate notices, which adds a level of confusion. Additionally, 82-4-232(6)(d), MCA, states that the public hearing must be held within 30 days of the request for hearing.

17.24.1114 BONDING: DEPARTMENTAL REVIEW AND DECISION ON BOND RELEASE APPLICATION (1) through (1)(c) remain the same.

(2) If no informal conference or public hearing has been held under ARM 17.24.1113, the department shall notify the permittee, the surety, or other persons with an interest in the bond collateral who have requested notification of actions pursuant to the bond at the time the collateral was offered, and persons who filed objections of its decision to release or not to release all or part of the performance bond or deposit. This decision must be submitted, in writing, within 60 days ~~of filing of the bond release application~~ from the date of the inspection.

(3) and (4) remain the same.

(5) The department may not release the bond until it has given the ~~town or city~~ municipality or county in which the permit area is located, at least 30 days notice of the release by certified mail. ~~If the permit area is not located in a town or city, notice must be sent to the county in which the permit area is located.~~

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-223, 82-4-232, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.1214(2) would bring (2) into compliance with 82-4-232(6), MCA, as amended by the 2005 Legislature. The 2005 Legislature changed the deadline for the department's decision from 60 days after the request for bond release was filed to 60 days after the date of the inspection. (See Chapter 127, Laws of 2005.)

The proposed amendment to (5) would bring (5) into compliance with 82-4-232(6), MCA, as well. The 2005 Legislature in that same bill amended 82-4-232(6)(m), MCA, by adding the phrase "or county" to the required parties to be notified by the department of the bond release application. The proposed amendment removes the phrase "town or city" and replaces it with the phrase "municipality or county" in order to be consistent with the corresponding statute. Additionally, the last sentence in (5) is proposed to be deleted as it becomes redundant to include the county if the proposed modification to include "or county" is approved.

17.24.1116 BONDING: CRITERIA AND SCHEDULE FOR RELEASE OF BOND (1) through (5) remain the same.

(6) For the purposes of these rules, reclamation phases are as follows:

(a) through (b)(vi) remain the same.

(c) reclamation phase III is deemed to have been completed when:

(i) through (iv) remain the same.

(v) the lands meet the special conditions provided in 82-4-235~~(3)~~(4)(a), MCA;

(d) through (8) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-223, 82-4-232, 82-4-235, MCA

REASON: The proposed amendment to ARM 17.24.1116 corrects a reference cite that reflects the enactment of HB 278 by the 2009 Legislature adding 82-4-235(3), MCA, and renumbering the formerly described 82-4-235(3) to (4).

17.24.1201 FREQUENCY AND METHODS OF INSPECTIONS (1) remains the same.

(2) A partial inspection is an on-site or aerial observation of the operator's compliance with some of the mining or prospecting permit conditions and requirements. Aerial inspections shall be conducted in a manner and at a time that reasonably ensure the identification and documentation of conditions at each operation in relation to permit conditions and requirements. Any potential violation observed during an aerial inspection shall be investigated on site within three days, provided that any indication of a violation, condition, or practice that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant and imminent environmental harm to land, air, or water resources shall be investigated on site immediately. On-site investigations of potential violations observed during an aerial inspection must not be considered to be an additional partial or complete inspection for the purposes of ARM 17.24.1201.

(3) and (4) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-205, 82-4-235, 82-4-237, 82-4-251, MCA

REASON: The proposed amendment to ARM 17.24.1201 is necessary for Montana's permanent program to remain as stringent as the corresponding federal

requirements located at 30 CFR 840.11(d)(2). The proposed addition of this language provides clear requirements for further on-site investigation, to be conducted by the department, upon identification of a potential violation. Without the addition of this language, Montana's program is less stringent than the federal program.

4. The proposed new rules provide as follows:

NEW RULE I THE DEPARTMENT'S OBLIGATIONS REGARDING THE APPLICANT/VIOLATOR SYSTEM (1) The department shall enter into the applicant/violator system (AVS) the following data:

(a) information that the applicant is required to submit under ARM 17.24.303(1)(f), (g), and (h);

(b) information submitted by the applicant pursuant to ARM 17.24.303(1)(l) and (m) [amended as (1)(m) and (n) above] pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired; and

(c) any additional information of the kind described in (1)(a) or (b) submitted or discovered during the department's permit application review, upon verification by the department of that additional information.

(2) If, at any time, the department discovers that any person owns or controls an operation with an unabated or uncorrected violation, the department shall take appropriate enforcement action. The department shall enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(3) The information provided to or obtained by the department must be entered into AVS pursuant to the following table:

The department shall enter into AVS all:	Within 30 days after:
1. permit records	the permit is issued or subsequent changes are made
2. unabated or uncorrected violations	the abatement or correction period for a violation expires
3. changes to information initially required to be provided by an applicant under ARM 17.24.303(1)(g)(i) through (iv) and (h)	receiving notice of a change
4. changes in violation status	abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal
5. additional information submitted or discovered during the department's permit application, permit renewal application, or permit amendment application review	verification by the department of the additional information

(4) If, at any time, the department identifies a person who owns or controls an entire coal mining operation or any relevant portion or aspect of a coal mining

operation, the department shall issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. The preliminary finding must be based on evidence sufficient to establish a prima facie case of ownership or control.

(5) A person subject to a preliminary finding under (4) has 30 days in which to submit to the department information tending to demonstrate that person's lack of ownership and control. If, after reviewing the submitted information, the department determines the person is not an owner or controller, the department shall serve written notice of that determination on that person. If, after reviewing the submitted information, the department determines the person is an owner or controller or if no information is submitted during the 30-day period, the department shall issue its finding in writing and shall enter that finding into AVS.

(6) A person identified as an owner or controller under (5) may challenge the finding using the provisions of [NEW RULE III].

(7) Whenever a court of competent jurisdiction enters a judgment against a person under 82-4-254(4) or convicts a person of under 82-4-254(6) or (7), MCA, the department shall update the AVS.

AUTH: 82-4-204, MCA
IMP: 82-4-227, MCA

REASON: The reason for adopting New Rule I is the same as that stated in the first paragraph for the proposed amendment to ARM 17.24.303.

NEW RULE II DEPARTMENT ELIGIBILITY REVIEW (1) In making a permit eligibility determination, the department shall rely upon the information supplied by the applicant pursuant to [NEW RULE I(1)], information from AVS, and any other available information to review. The department shall review:

(a) the organizational structure and ownership or control relationships of the applicant and the operator;

(b) the permit histories of applicant and the operator;

(c) the previous mining experience of the applicant and the operator; and

(d) the history of compliance with Surface Mining Control and Reclamation Act and the Montana Strip and Underground Mine Reclamation Act (the Act), implementing rules, any permits issued thereunder, and any other applicable air or water quality laws, by the applicant, the operator, operations the applicant owns or controls, and operations the operator owns or controls.

(2) If the applicant and the operator have no previous mining experience, the department may conduct an additional review to determine if someone else with mining experience controls the mining operation.

(3) Based on the reviews pursuant to (1) and (2), the department shall determine whether the applicant is eligible for a permit under (4).

(4) Except as provided in ARM 17.24.405(6)(h), the applicant is not eligible for a permit if approval is prohibited by 82-5-227(11) or (12), MCA.

(5) After approving a permit under ARM 17.24.405, the department may not issue the permit until:

(a) the applicant updates and certifies all information required by ARM

17.24.303(1)(g), (h), and (i) and [NEW RULE I(1)]; and

(b) the department obtains and reviews an updated compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect permit eligibility under (5) and (6). The department shall request this report no more than five business days before issuance under ARM 17.24.405.

(6) If the applicant is ineligible for a permit under this rule, the department shall send written notification of the decision to the applicant, stating the reason for the finding of ineligibility and giving notice of the applicant's right to challenge the decision under [NEW RULE III].

AUTH: 82-4-204, MCA
IMP: 82-4-227, MCA

REASON: The department regulates coal mining under a delegation of authority by the federal Office of Surface Mining (OSM). That delegation is subject to the department adopting rules consistent with the federal regulations that govern surface and underground coal mining. The OSM maintains an automated information system of applicant, permittee, operator, violation, and related data to assist in implementing the Surface Mining Control and Reclamation Act of 1977. That is known as the applicant/violator system, or AVS. Previously, the department's obligations to input data and utilize data from the AVS was regulated by a memorandum of understanding between the OSM and the department. However, in 2009, the OSM directed the department to adopt rules to govern the state's obligations related to the AVS. This proposed New Rule II is intended to comply with the OSM's directive. It is necessary to ensure the department submits to the AVS, has access to, and reviews, all information necessary to ensure that permits are not issued to persons or entities that are not entitled to obtain them.

NEW RULE III QUESTIONS ABOUT AND CHALLENGES TO OWNERSHIP OR CONTROL FINDINGS (1) At any time a person listed in AVS as an owner or controller of a surface coal mining operation in Montana may request an informal explanation from the department as to the reason that person is shown in AVS in an ownership or control capacity. Within 14 days of the request, the department shall provide a response describing why the person is listed in AVS.

(2) An applicant or permittee affected by an ownership or control listing or finding, a person listed in a permit application or AVS as an owner or controller of an entire surface coal mining operation or any portion or aspect thereof, or person found to be an owner or controller of an entire surface coal mining operation or any portion or aspect thereof, may challenge an ownership or control listing or finding to:

(a) the board if the challenge concerns a pending permit application; or

(b) the department if the challenge concerns the challenger's ownership or control of a surface coal mining operation, and the challenger is not currently seeking a permit.

(3) Challenges to an ownership or control listing or finding may be made as follows:

(a) when the challenge is made in connection with the approval or denial of a permit application, permit amendment application, or permit renewal application, by

submitting a request for a hearing to the board pursuant to 82-4-206, MCA; or

(b) when the challenge is not made in connection with the approval or denial of a permit application, permit amendment application, or permit renewal application, by submitting to the department a challenge, including written explanation of the basis for the challenge, along with evidence and explanatory materials.

(4) A person who challenges a finding of ownership or control under [NEW RULE I(5)] or a listing or finding of ownership or control bears the burden of proving by a preponderance of the evidence that the person either:

(a) does not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or

(b) did not own or control the entire surface coal mining operation or relevant portion or aspect thereof during the relevant time period.

(5) In meeting that burden of proof, the challenger must present reliable, credible, and substantial evidence and any explanatory materials to the board or department. The materials presented in connection with the challenge must become part of the permit file, an investigation file, or another public file. The challenger may request that information be kept confidential. The board or department shall determine whether the information may be kept confidential under Montana law. If the board or department determines that the information may not be kept confidential, the board or department shall notify the challenger and shall hold the documents confidential for ten days in order to allow the challenger to obtain a court order requiring the board or department to keep the documents confidential.

(6) Materials that may be submitted in response to the requirements of (8) include, but are not limited to:

(a) notarized affidavits containing specific facts concerning the specific duties the challenger performed for the relevant operation, the beginning and ending dates of the challenger's ownership or control of the operation, and the nature and details of any transaction creating or severing the challenger's ownership or control of the operation;

(b) certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(c) certified copies of documents filed with or issued by any state, municipal, or federal governmental agency; and

(d) an opinion of counsel, when supported by:

(i) evidentiary materials;

(ii) a statement by counsel that he or she is qualified to render the opinion; and

(iii) a statement that counsel has personally and diligently investigated the facts of the matter.

(7) When the department receives a written challenge to an ownership or control listing pursuant to (2)(b), the department shall review and investigate the evidence and explanatory materials submitted with the challenge and any other reasonably available information that has bearing on the challenge, and shall issue a written decision within 60 days of receipt of the challenge, stating whether the department finds that the person who submitted the challenge owns or controls the relevant surface coal mining operation, or owned or controlled the operation during the relevant time period. The department shall send its decision to the challenger by

certified mail or by any means consistent with the rules governing service of a summons and complaint under the Montana Rules of Civil Procedure. Service of the decision is complete upon delivery and is not incomplete if the challenger refuses to accept delivery.

(8) The department shall post all decisions made under this rule on AVS.

(9) Following the department's written decision or any decision by the board or a court, the department shall review the information in AVS to determine if it is consistent with the decision. If it is not, the department shall promptly revise the information in AVS to reflect the decision.

AUTH: 82-4-204, MCA
IMP: 82-4-227, MCA

REASON: The department regulates coal mining under a delegation of authority by the federal Office of Surface Mining (OSM). That delegation is subject to the department adopting rules consistent with the federal regulations that govern surface and underground coal mining. The OSM maintains an automated information system of applicant, permittee, operator, violation, and related data to assist in implementing the Surface Mining Control and Reclamation Act of 1977. That is known as the applicant/violator system, or AVS. Previously, the department's obligations to input data and utilize data from the AVS was regulated by a memorandum of understanding between the OSM and the department. However, in 2009, the OSM directed the department to adopt rules to govern the state's obligations related to the AVS. This proposed New Rule II is intended to comply with the OSM's directive. Due process requires that persons affected by department decisions have a process to challenge those decisions. New Rule III provides such a process.

NEW RULE IV INFORMATION REQUIREMENTS FOR PERMITTEES

(1) Except as provided in (2), within 30 days after the issuance of a cessation order under 82-4-251, MCA, the permittee of the operation subject to the cessation order shall provide or update the following information:

(a) a statement indicating whether the permittee and any operator are corporations, partnerships, associations, sole proprietorships, or other business entities;

(b) taxpayer identification numbers for the permittee and any operator;

(c) the name, address, and telephone number for:

(i) the permittee;

(ii) the permittee's resident agent who will accept service of process; and

(iii) any operator;

(d) each business entity in the applicant's and any operator's organizational structures, up to and including the ultimate parent entity of the applicant and any operator and, for every such business entity, the required information for every president, chief executive officer, and director (or persons in similar positions), and every person who owns, of record, ten percent or more of the entity;

(e) for the permittee and any operator, the information required by (f) of this section for every:

(i) officer;
(ii) partner;
(iii) member;
(iv) director;
(v) person performing a function similar to a director; and
(vi) person who owns, of record, ten percent or more of the permittee or operator; and

(f) the following information for each person listed in (e):
(i) the person's name, address, and telephone number;
(ii) the person's position title and relationship to the permittee or operator, including percentage of ownership and location in the organizational structure; and
(iii) the date the person began functioning in that position.

(2) The permittee is not required to submit the information required in (1) if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(3) Within 60 days of any addition, departure, or change in position of any person identified in (1)(e), the permittee must notify the department in writing of the addition, departure, or change. The notice must include:
(a) the information required in (1)(f); and
(b) the date of any departure.

AUTH: 82-4-204, MCA
IMP: 82-4-227, MCA

REASON: The department regulates coal mining under a delegation of authority by the federal Office of Surface Mining. That delegation is subject to the department adopting rules consistent with the federal regulations that govern surface and underground coal mining. New Rule IV provides requirements that are the equivalent of 30 CFR 774.12.

NEW RULE V PERMIT REQUIREMENT - SHORT FORM (1) This rule applies to a prospecting operation that is outside an area designated unsuitable and conducted to determine the location, quality, or quantity of a coal deposit pursuant to 82-4-226(7), MCA, that does not remove more than 250 tons of coal and that does not substantially disturb the natural land surface.

(2) A person who conducts a coal prospecting operation pursuant to (1) must, before conducting the prospecting operations, file with the department a prospecting permit application on a form provided by the department. Prospecting operations must not be conducted until the department has reviewed the application pursuant to 82-1-226(8), MCA, and issued a permit.

(3) All provisions of this subchapter, except ARM 17.24.1001, 17.24.1006(2), (3)(b) and (c), 17.24.1007, 17.24.1009, 17.24.1014, and 17.24.1018 apply to a prospecting operation permitted pursuant to 82-4-226(8), MCA.

AUTH: 82-4-226, MCA
IMP: 82-4-226, MCA

REASON: Senate Bill 286, passed by the 2011 Legislature, amended 82-4-226, MCA, and modified certain coal prospecting procedures. (See Chapter 407, Laws of 2011.) This rule is needed to ensure that the new coal prospecting permit provisions in 82-4-226(8), MCA, are reflected in the rules. In (3), ARM 17.24.1001 is listed because 82-4-226(8) MCA, contains the application requirements for these permits. ARM 17.24.1007, 17.24.1009, and portions of 17.24.1006 are listed because those provisions address substantial disturbance of the land surface, which is not allowed under this type of permit. ARM 17.24.1014 is listed because that rule applies to test pits, which cannot be permitted under 82-4-226(8), MCA. ARM 17.24.1018 is listed because it applies to statements of intent to prospect.

5. The rule proposed to be repealed is as follows:

17.24.763 COAL CONSERVATION (AUTH: 82-4-204, MCA; IMP: 82-4-231, MCA), located at page 17-2180, Administrative Rules of Montana. The proposed repeal of ARM 17.24.763 is necessary to remove a repetitive rule. ARM 17.24.523(2) contains nearly identical language as ARM 17.24.763. Repeal of this rule will provide a single location in the ARM that describes the requirements for coal conservation.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., January 23, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The sponsors were notified by letter sent by U.S. mail dated January 22, 2010.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North BY: */s/ Joseph W. Russell*
JOHN F. NORTH JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, December 12, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.301, 17.24.302, 17.24.303, 17.24.304, 17.24.308, 17.24.313, 17.24.314, 17.24.401, 17.24.403, 17.24.416, 17.24.418, 17.24.425, 17.24.501, 17.24.623, 17.24.639, 17.24.642, 17.24.645, 17.24.646, 17.24.702, 17.24.711, 17.24.718, 17.24.723, 17.24.725, 17.24.726, 17.24.901, 17.24.924, 17.24.926, 17.24.927, 17.24.1001, 17.24.1002, 17.24.1003, 17.24.1005, 17.24.1016, 17.24.1018, 17.24.1111, 17.24.1112, 17.24.1113, 17.24.1114, 17.24.1116, 17.24.1201 pertaining to definitions, supplemental information, baseline information, operations plan, reclamation plan, plan for protection of the hydrologic balance, filing of application and notice, informal conference, permit renewal, transfer of permits, administrative review, general backfilling and grading requirements, blasting schedule, sedimentation ponds and other treatment facilities, permanent impoundments and flood control impoundments, ground water monitoring, surface water monitoring, redistribution and stockpiling of soil, establishment of vegetation, soil amendments, management techniques, and land use practices, monitoring, period of responsibility, vegetation measurements, general application and review requirements, disposal of underground development waste, permit requirement, renewal and transfer of permits, information and monthly reports, drill holes, bond requirements for drilling operations, notice of intent to prospect, bonding, frequency and methods of inspections; the adoption of New Rules I through V pertaining to the department's obligations regarding the applicant/violator system, department eligibility review, questions about and challenges to ownership or control findings, information requirements for permittees, and permit requirement – short form; and the repeal of 17.24.763 pertaining to coal conservation	**PRESIDING OFFICER REPORT**

1. On January 18, 2012, at 1:30 p.m., the undersigned Presiding Officer conducted a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned

proposed amendments, adoption of new rules and repeal of a rule. The amendments, adoption of new rules and repeal of a rule are proposed to implement legislative changes; to adopt provisions of federal regulations that govern the applicant violator system and ownership and control requirements; to address conditional approvals and disapprovals from the Office of Surface Mining of the United States; to make substantive modifications to existing rules recommended by the Department of Environmental Quality's coal and uranium program; to correct grammatical errors and to correct reference citations.

2. Notice of the hearing was contained in the Montana Administrative Register (MAR), Notice No. 17-324, published on December 22, 2011, in Issue No. 24. A copy of the notice is attached to this report. (Attachments are provided in the same order as they are referenced in this report.)

3. The Court Reporter, Cheryl Romsa, of Helena, MT recorded the hearing.

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

SUMMARY OF HEARING

5. Mr. Eric Urban, the Technical Coordinator of the Coal and Uranium Program, of the Montana Department of Environmental Quality (Department), submitted a written statement supporting the amendments, adoption of new rules and repeal of a new rule and providing an oral summary at the hearing. (The written statement is attached.)

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

7. A written memorandum was submitted from Department Chief Legal Counsel, Mr. John North with a HB 311 Review and a Private Property Assessment

Checklist. (Mr. North's memorandum is attached to this report.)

8. No HB 521 analysis is necessary for this rulemaking because HB 521, Chapter 471, Laws of 1995 did not amend the Montana Strip and Underground Mine Reclamation Act and does not apply to a rulemaking under that act.

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

10. The period to submit comments ended at 5 p.m. on January 23, 2012.

WRITTEN COMMENTS

11. Westmorland Resources, Inc. submitted written comments on January 16, 2012. A copy of the comments is attached. The comments have been properly identified and addressed in the Notice of Amendment, Adoption and Repeal.

PRESIDING OFFICER COMMENTS

12. The Board of Environmental Review (Board) has jurisdiction to make the proposed amendments. See Mont. Code Ann. §§ 82-4-204, 82-4-205, 82-4-231 and 82-4-226.

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

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

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

16. Under Mont. Code Ann. § 2-4-305(7), for the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by June 22, 2012.

DATED this 19th day of March, 2012.

KATHERINE J. ORR
Presiding Officer

MEMORANDUM

To: Board of Environmental Review

From: John F. North
Chief Legal Counsel
Department of Environmental Quality

Re: HB 521 Analysis and Takings Checklist

MAR Notice No. 17-324

In the matter of the amendment of ARM 17.24.301, 17.24.302, 17.24.303, 17.24.304, 17.24.308, 17.24.313, 17.24.314, 17.24.401, 17.24.403, 17.24.416, 17.24.418, 17.24.425, 17.24.501, 17.24.623, 17.24.639, 17.24.642, 17.24.645, 17.24.646, 17.24.702, 17.24.711, 17.24.718, 17.24.723, 17.24.725, 17.24.726, 17.24.901, 17.24.924, 17.24.926, 17.24.927, 17.24.1001, 17.24.1002, 17.24.1003, 17.24.1005, 17.24.1016, 17.24.1018, 17.24.1111, 17.24.1112, 17.24.1113, 17.24.1114, 17.24.1116, 17.24.1201 pertaining to definitions, format, data collection, and supplemental information, baseline information, operations plan, reclamation plan, plan for protection of the hydrologic balance, filing of application and notice, informal conference, permit renewal, transfer of permits, administrative review, general backfilling and grading requirements, blasting schedule, sedimentation ponds and other treatment facilities, permanent impoundments and flood control impoundments, ground water monitoring, surface water monitoring, redistribution and stockpiling of soil, establishment of vegetation, soil amendments, management techniques, and land use practices, monitoring, period of responsibility, vegetation measurements, general application and review requirements, disposal of underground development waste, permit requirement, renewal and transfer of permits, information and monthly reports, drill holes, bond requirements for drilling operations, notice of intent to prospect, bonding, frequency and methods of inspections; the adoption of New Rules I through V pertaining to the department's obligations regarding the applicant/ violator system, department eligibility review, questions about and challenges to ownership or control findings, information requirements for permittees, and permit requirement - short form; and the repeal of 17.24.763 pertaining to coal conservation.

Date: March 12, 2012

HB 521 Review

No HB 521 analysis is necessary for this rulemaking. HB 521 (Chapter 471, Laws of 1995) did not amend the Montana Strip and Underground Mine Reclamation Act and there does not apply to rulemaking under that act.

HB 311 Review

HB 311 (Chapter 462, Laws of 1995), the Private Property Assessment Act, codified as Title 2, Chapter 10, part 1, MCA, requires that, prior to adopting a proposed rules that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. "Action with taking or damaging implications" means:

> [A] proposed state agency administrative rule, policy, or permit conditions or denial pertaining to land or water management or to some other environmental matter that is adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constutution.

§ 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. Jane Amdahl has completed an Attorney Generals "Private Property Assessment Act Checklist" pertaining to the Board's adoption of the new rule and rule amendments, which is attached to this memo. Based upon completion of the checklist, the proposed rule and rule amendments do not have taking or damaging implications. Therefore, no further HB311 assessment is required.

PROPOSED AMENDMENTS TO THE ADMINISTRATIVE RULES OF MONTANA, SET FORTH IN MAR NOTICE NUMBER 17-324, DECEMBER 22, 2011, WHICH ARE PROPOSED FOR ADOPTION UNDER THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT,

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

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

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

Jane B. Amdahl
Signature of Reviewer

1/13/12
Date

FC: 629.61 (2011)

WESTMORELAND RESOURCES, INC.

January 16, 2012

Board of Environmental Review of the State of Montana

Re: MAR Notice No. 17-324

Westmoreland Resources, Inc. (WRI) appreciates the opportunity to comment on the amendment, adoption and repeal of certain Administrative Rules of Montana as presented in the above referenced MAR Notice. Below, WRI offers alternative wording for several rules for consideration.

17.24.302 FORMAT, DATA COLLECTION, AND SUPPLEMENTAL INFORMATION (1) Information set forth in the application must be accurate, current, presented clearly and concisely, submitted in a format protected from unauthorized alteration, that is mutually acceptable to the department and applicant and, supported by appropriate references to technical and other written material available to the department.

Reason: Increasing use of electronic information clearly indicates the need to protect both an applicant and the department from both intentional and unintentional alteration of information. It is in the best interest of the program to maintain good communications between the department and applicants regarding submittal formats and retaining flexibility to address unforeseen circumstances.

17.24.313 RECLAMATION PLAN (1) Each reclamation plan must contain a description of the reclamation operations proposed, including the following information:

(h) a narrative of the method for revegetation including, but not limited to, a discussion of:

(x) measures to be used to determine the success of revegetation, including the use of reference areas and/or technical standards in relation to ~~revegetation types~~ post mine land uses pursuant to ARM 17.24.724 and 17.24.726.

REASON: The term "revegetation types" is undefined in the statute or administrative rules. The requirement should be stated to apply to the defined term "Land Use". Although not part of this proposed rule change, 17.24.313(1)(h)(i) also contains the undefined term "revegetation types". Both instances are likely overlooked for revision during the rule change effort to implement changes required by passage of HR 373 in 2003.

Absaloka Mine ■ P.O. Box 449 ■ 100 Sarpy Cr Rd ■ Hardin, MT 59034 ■ Phone 406-342-5241 ■ Fax 406-342-5401

17.24.645 GROUND WATER MONITORING (1) Ground water levels, subsurface flow and storage characteristics, and the quality of ground water must be monitored based on information gathered pursuant to ARM 17.24.314 ~~and in a manner approved by the department~~ to determine the effects of strip or underground mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems in the permit and adjacent areas. When operations may affect the ground water system, ground water levels and ground water quality must be periodically monitored using wells that can adequately reflect changes in ground water quantity and quality resulting from such operations. The information must be submitted in a format ~~approved by~~ mutually acceptable to the department and permittee.

REASON: In the publicly reviewed draft rule amendments, the department proposed deleting the word "manner" and replacing it with the word "format". Therefore, the now proposed change appears to be redundant. However, moving the format statement to the end of the paragraph improves readability. Additionally, the department should be required to communicate with permittees to arrive at a mutually acceptable format.

17.24.646 SURFACE WATER MONITORING (2) The ~~operator~~ permittee shall submit semiannual reports including analytical results from each sample taken during the semester to the department. Sampling results must be submitted in a format ~~approved by~~ mutually acceptable to the department and permittee. The balance of (2) remains unchanged.

REASON: The permittee is ultimately responsible for submittal of required data even if there is a separate operator. The department must maintain flexibility in data submittal format. One primary reason is that the department typically lags behind industry in acquiring software updates. Agreeing on a solution through open communication is preferable to mandating what may be an outdated format.

17.24.711 ESTABLISHMENT OF VEGETATION (1) Vegetation must be reestablished in accordance with 82-4-233, MCA. For purposes of that statute, "other constructed features" means discrete man-made features ~~less than two acres in size~~ sized appropriately for the intended use, that are incorporated into reclaimed areas, ~~that have been constructed to an approved design~~ to facilitate postming management, and that do not require revegetation to achieve the approved postmining land use or postmining slope stability.

REASON: The proposed language unnecessarily limits "constructed features" beyond what is required to respond to the OSM concerns. This increases unnecessary regulatory burden on permittees.

17.24.1016 BOND REQUIREMENTS FOR DRILLING OPERATIONS (3) Each drill site is considered to be ~~1.0~~ 0.25 acre unless otherwise approved by the department.

REASON: The proposed increase from 0.1 acre to 1.0 acre is excessive. The experience at WRI is that the existing assumption of 0.1 acre is valid. However, some drilling sites may require slightly more area. Therefore, we propose an increase to 0.25 acre. The department should be required to quantitatively justify a larger acreage.

17.24.1111 BONDING: BOND RELEASE APPLICATION CONTENTS (3) The application must include a completed bond release request form provided by the department and any other information required under 82-4-232(6)(a), MCA~~the permit number and date approved or renewed, a proposed public notice of the precise location of the land affected, the location and acreage for which bond release is sought, the amount of bond release sought, a description of the completed reclamation, including the dates of performance and how the results of the reclamation satisfy the requirements of the approved reclamation plan, and copies of letters sent to adjoining property owners, surface owners, local government bodies, planning agencies, and sewage and water treatment facilities or water companies in the locality of the permit area, notifying them of the permittee's intention to seek release of performance bond(s). These letters must be sent before the permittee files the application for release~~.

REASON: Both existing and proposed language is directly quoted from or duplicative of language in 82-4-232(6)(a), MCA. The department has stated in other reason sections of MAR Notice No. 17-324 that directly quoting from statute in rule is to be avoided. The department already provides a serviceable bond release request form that provides the majority of information required by statute. Additional required information is provided by the applicant in the application package. The requirement in 17.24.1111(3) to send notification letters prior to filing an application is not required by statute or by federal regulation. The proposed changes to (5) do not comport with 30 CFR 800.40(a)(2), as the existing language does.

17.24.1201 FREQUENCY AND METHODS OF INSPECTIONS (2) A partial inspection is an on-site or aerial observation of the ~~operator's~~ permittee's compliance with some of the mining or prospecting permit conditions and requirements. Aerial inspections shall be conducted in a manner and at a time that reasonably ensure the identification and documentation of conditions at each operation in relation to permit conditions and requirements. Any potential violation observed during an aerial inspection shall be investigated on site within three days, provided that any indication of a violation, condition, or practice constituting cause for the issuance of a cessation order under ARM 17.24.1206~~that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant and imminent environmental harm to land, air, or water resources~~ shall be investigated on site immediately. On-site investigations of potential violations observed during an aerial inspection ~~must~~ shall not be considered to be an additional partial or complete inspection for the purposes of ARM 17.24.1201.

REASON: If the department intends 17.24.1201 (2) to be no less effective than 30 CFR 840.11(d)(2) it is advisable to utilize similar language and format as proposed above.

With the exception of the alternatives proposed above, WRI supports the proposed rule change package.

Sincerely,

Darrel Myran

Vice President

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.301, 17.24.302, 17.24.303, 17.24.304, 17.24.308, 17.24.313, 17.24.314, 17.24.401, 17.24.403, 17.24.416, 17.24.418, 17.24.425, 17.24.501, 17.24.623, 17.24.639, 17.24.642, 17.24.645, 17.24.646, 17.24.702, 17.24.711, 17.24.718, 17.24.723, 17.24.725, 17.24.726, 17.24.901, 17.24.924, 17.24.926, 17.24.927, 17.24.1001, 17.24.1002, 17.24.1003, 17.24.1005, 17.24.1016, 17.24.1018, 17.24.1111, 17.24.1112, 17.24.1113, 17.24.1114, 17.24.1116, 17.24.1201 pertaining to definitions, format, data collection, and supplemental information, baseline information, operations plan, reclamation plan, plan for protection of the hydrologic balance, filing of application and notice, informal conference, permit renewal, transfer of permits, administrative review, general backfilling and grading requirements, blasting schedule, sedimentation ponds and other treatment facilities, permanent impoundments and flood control impoundments, ground water monitoring, surface water monitoring, redistribution and stockpiling of soil, establishment of vegetation, soil amendments, management techniques, and land use practices, monitoring, period of responsibility, vegetation measurements, general application and review requirements, disposal of underground development waste, permit requirement, renewal and transfer of permits, information and monthly reports, drill holes, bond requirements for drilling operations, notice of intent to prospect, bonding, frequency and methods of inspections; the adoption of New Rules I through V pertaining to the department's	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL (STRIP AND UNDERGROUND MINE RECLAMATION ACT)

obligations regarding the applicant/ violator system, department eligibility review, questions about and challenges to ownership or control findings, information requirements for permittees, and permit requirement - short form; and the repeal of 17.24.763 pertaining to coal conservation

TO: All Concerned Persons

1. On December 22, 2011, the Board of Environmental Review published MAR Notice No. 17-324 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 2726, 2011 Montana Administrative Register, issue number 24.

2. The board has amended ARM 17.24.301, 17.24.302, 17.24.303, 17.24.304, 17.24.308, 17.24.313, 17.24.314, 17.24.401, 17.24.403, 17.24.416, 17.24.418, 17.24.425, 17.24.501, 17.24.623, 17.24.639, 17.24.642, 17.24.645, 17.24.646, 17.24.702, 17.24.711, 17.24.718, 17.24.723, 17.24.725, 17.24.726, 17.24.901, 17.24.924, 17.24.926, 17.24.927, 17.24.1001, 17.24.1002, 17.24.1003, 17.24.1005, 17.24.1016, 17.24.1018, 17.24.1112, 17.24.1113, 17.24.1114, and 17.24.1116, adopted New Rules I (17.24.1264), III (17.24.1266), and IV (17.24.1267), and repealed ARM 17.24.763 exactly as proposed. The board has amended ARM 17.24.1111 and 17.24.1201 and adopted New Rules II (17.24.1265) and V (17.24.1019) as proposed, but with the following changes, new matter underlined, stricken matter interlined:

17.24.1111 BONDING: BOND RELEASE APPLICATION CONTENTS

(1) and (2) remain as proposed.

(3) The application must include ~~the permit number and date approved or renewed, a proposed public notice of the precise location of the land affected, the location and acreage for which bond release is sought, the amount of bond release sought, a description of the completed reclamation, including the dates of performance and how the results of the reclamation satisfy the requirements of the approved reclamation plan, and copies of letters sent to adjoining property owners, surface owners, local government bodies, planning agencies, and sewage and water treatment facilities or water companies in the locality of the permit area, notifying them of the permittee's intention to seek release of performance bond(s). These letters must be sent before the permittee files the application for release~~ the information required by 82-4-232(6)(a), MCA.

(4) through (7) remain as proposed.

17.24.1201 FREQUENCY AND METHODS OF INSPECTIONS (1) remains as proposed.

(2) A partial inspection is an on-site or aerial observation of the operator's compliance with some of the mining or prospecting permit conditions and

requirements. Aerial inspections shall be conducted in a manner and at a time that reasonably ensure the identification and documentation of conditions at each operation in relation to permit conditions and requirements. Any potential violation observed during an aerial inspection shall be investigated on site within three days, provided that any indication of a violation, condition, or practice that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant and imminent environmental harm to land, air, or water resources shall be investigated on site immediately. On-site investigations of potential violations observed during an aerial inspection ~~must~~ may not be considered to be an additional partial or complete inspection for the purposes of ARM 17.24.1201.

(3) and (4) remain as proposed.

NEW RULE II DEPARTMENT ELIGIBILITY REVIEW (1) through (3) remain as proposed.

(4) Except as provided in ARM 17.24.405(6)(h), the applicant is not eligible for a permit if approval is prohibited by ~~82-5-227~~ 82-4-227(11) or (12), MCA.

(5) through (6) remain as proposed.

NEW RULE V PERMIT REQUIREMENT - SHORT FORM (1) remains as proposed.

(2) A person who conducts a coal prospecting operation pursuant to (1) must, before conducting the prospecting operations, file with the department a prospecting permit application on a form provided by the department. Prospecting operations must not be conducted until the department has reviewed the application pursuant to ~~82-1-226~~ 82-4-226(8), MCA, and issued a permit.

(3) All provisions of this subchapter, except ARM 17.24.1001(1), (2), and (4) through (6), 17.24.1006(2)~~,~~ and (3)(b) and (c), 17.24.1007, 17.24.1009, 17.24.1014, and 17.24.1018 apply to a prospecting operation permitted pursuant to 82-4-226(8), MCA.

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

COMMENT NO. 1: Proposed changes to ARM 17.24.302 should be amended to limit information submittals to formats that are "protected from unauthorized alteration."

RESPONSE: The department currently has a guideline describing the formats for information submittals. The guideline requests that all required documents be submitted in PDF format. The guideline also requests that tabular and map data be submitted in the original format (.xlsx, .dwg, etc.) in addition to the PDF version. The intent of the proposed rule amendments is to provide the department with authority to require formats that allow the department to more easily analyze and incorporate the information into its databases. The PDF version of each document will remain unaltered and will be considered the "original" file document. Accordingly, the board declines to make the suggested change to ARM 17.24.302.

COMMENT NO. 2: Proposed changes to ARM 17.24.302, 17.24.645, and 17.24.646 should be amended to limit information submittals to only formats that are "mutually" agreed upon by the department and the applicant.

RESPONSE: If the proposed rule amendments were modified to include "mutual agreement," it would nullify the intent of the proposed amendments, which is to make it possible for the department to more easily incorporate information into its electronic databases. Also, the commentor's suggestion would potentially require the department to accept a different format from each applicant as all applicants may not agree on a single format. Therefore, the board declines to make the changes proposed in the comment.

COMMENT NO. 3: The phrase located in ARM 17.24.313(1)(h)(x) "revegetation types" should be replaced with the phrase "post-mine land use."

RESPONSE: The comment is outside the scope of the proposed amendments in ARM 17.24.313(1)(h)(x). The proposed amendment merely added a cross-reference, and the board cannot make a substantive amendment to the rule in this proceeding. A substantive amendment would require public notice and an opportunity to comment on the amendment.

COMMENT NO. 4: The term "operator" should be replaced with the term "permittee" in ARM 17.24.646 and 17.24.1201.

RESPONSE: The comment is outside the scope of the proposed rulemaking. Also, the operator is required to apply for a permit and is therefore also the permittee. Accordingly, the board declines to make the change proposed in the comment.

COMMENT NO. 5: The definition of the phrase "other constructed features," in ARM 17.24.711, should be amended to remove the specific size restriction and the design approval requirement. These specifics would then be replaced by generic language that provides a similar intent.

RESPONSE: The Office of Surface Mining required Montana to define "other constructed features" with limits on size, slope, stabilization against erosion, and other environmental factors that may affect stability. See 72 Fed. Reg. 57822, 57826 (October 10, 2007). It is difficult to predict all potential "other constructed features" that may benefit the post-mine land use. The board's proposed definition provides a specific limit on the size of features and requires that the department review a design to verify that the feature complies with slope, stabilization against erosion, and other environmental factors that may affect stability. The commentor's proposed language does not meet the Office of Surface Mining’s requirement. Accordingly, the board declines to make the change proposed in the comment.

COMMENT NO. 6: The proposed increase in bonding acres for each drill site in ARM 17.24.1016 from 0.1 acres to 1.0 acres is excessive and should only be increased to 0.25 acres.

RESPONSE: All drill sites have a level of disturbance associated with the activity and without a detailed disturbance plan in the permit application, an assumed area must be assigned. If the applicant chooses to provide a detailed plan

for disturbance, the department maintains the authority in ARM 17.24.1016(3) to approve a smaller disturbance area for each drill site. Accordingly, the board declines to make the change proposed in the comment.

COMMENT NO. 7: The board should consider citing 82-4-232(6)(a) instead of adding similar language to ARM 17.24.1111(3).

RESPONSE: The board agrees with the comment and has amended the rule as shown above.

COMMENT NO. 8: Neither the Montana Code Annotated nor the federal regulations support the requirement in ARM 17.24.1111(3) to send notification letters prior to filing an application.

RESPONSE: Section 82-4-232(6), MCA, requires the application to include ". . . copies of letters that the permittee has sent. . . .." Furthermore, 30 CFR 800.40(a)(2) requires the bond release application to include ". . . copies of letters which he or she has sent. . . .." The board does not agree with the comment. However, in addressing Comment No. 7, the board will delete the language in ARM 17.24.1111(3) and replace it with a citation to 82-4-232(6).

COMMENT NO. 9: Proposed amendments to ARM 17.24.1201 should be modified in order to be no less effective than 30 CFR 840.11(d)(2).

RESPONSE: The commentor did not specify in what manner that ARM 17.24.1201 is less effective than 30 CFR 840.11(d)(2) and the board has not identified an area to support this comment. The proposed language is almost verbatim with the federal language except that the federal language requires an immediate inspection when the violation would constitute grounds for a cessation order. The proposed state language instead uses a description of these grounds. Accordingly, the board declines to amend the language.

COMMENT NO. 10: It is recommended that the word "must" be replaced with the word "shall" in the proposed amendment to ARM 17.24.1201.

RESPONSE: The board agrees that the word choice should be modified, but has determined that it is grammatically accurate to replace the word "must" with the word "may" instead of the word "shall" as the commentor suggested.

COMMENT NO 11: There is a typographical error located in New Rule II(4). The cross reference to 82-5-226(11) should be to 82-4-226(11).

RESPONSE: The board agrees with the comment and the rule has been amended as shown above.

COMMENT NO. 12: There is a typographical error located in New Rule V(2). The cross reference to 82-1-226(8) should be to 82-4-226(8).

RESPONSE: The board agrees with the comment and has amended the rule as shown above.

COMMENT NO. 13: As proposed, New Rule V(3) provides an exemption for all short form prospecting permits from the requirements of ARM 17.24.1001. The

intention of SB 286 is to exempt short form prospecting permits from ARM 17.24.1001(2) and (4) through (6).

RESPONSE: The board agrees with the comment and the rule has been amended as shown above.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

_____ By: _____

JOHN F. NORTH
Rule Reviewer

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

Certified to the Secretary of State, _____, 2012.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY NORTH STAR AVIATION, INC. AT RAVALLI COUNTY AIRPORT, RAVALLI COUNTY MONTANA. [FID #1707, DOCKET NO. WQ-09-05]	**CASE NO. BER 2009-10 WQ**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

The contested case hearing in this matter was conducted on September 21, 2011. North Star Aviation, Inc. (North Star), the Appellant, appeared through Counsel, Mr. Steven R. Brown and the Department of Environmental Quality (Department) appeared through Counsel, Mr. James M. Madden. Appellant, North Star, called one witness, Mr. Steve Wolters, former President and owner of North Star and current owner of the liabilities of North Star. The Department called one witness, Mr. John L. Arrigo, Administrator of the Enforcement Division of the Department.

The Hearing exhibits were submitted by the Department as Exhibits DEQ 1 through DEQ 4. The parties submitted an Agreed Statement of Facts in the form of the Proposed Prehearing Order and which is designated DEQ Exhibit 2. These facts are listed under the section below entitled Uncontested Facts and are incorporated as findings of fact. DEQ Exhibits 1-4 were admitted. In addition, a Joint Statement of Uncontested Facts from a proceeding relating to Appellant's request for reimbursement before the Petroleum Tank Release Compensation Board administratively attached to the Department, was admitted as DEQ Exhibit 5. Facts from DEQ Exhibit 5 are incorporated as findings of fact but are not listed herein except for uncontested fact number 11 on pages 5 and 6 which is excerpted for

easier reference. A list itemizing each of DEQ Exhibits is attached as Attachment A. The Appellant did not introduce any exhibits.

An Unopposed Motion for an extension for the parties to file their briefs in this matter was filed on October 18, 2011, and was granted on October 20, 2012. North Star filed a Post Hearing Brief on October 20, 2011, and the Department filed a Post Hearing Brief on October 21, 2011.

UNCONTESTED FACTS

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the Authority of Mont. Code Ann. § 2-15-3501. The Department administers the Montana water quality laws at Title 75, chapter 5, MCA, and administrative rules adopted there under Title 17, chapter 30, ARM.

2. North Star is a corporation registered with the State of Montana, and is, therefore, a "person" as defined in Mont. Code Ann. § 75-5-103(23).

3. At the time of the alleged violation, North Star was in control of, or had responsibility for, the operation of an aboveground storage tank (AST) located at the Ravalli County Airport, 516 Airport Road, Ravalli County, Montana (Site).

4. Montana Code Ann. § 75-5-605(1)(a), states in part that it is unlawful "to cause pollution, as defined in Mont. Code Ann. § 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters."

5. Pursuant to Mont. Code Ann. § 75-5-103(29)(a), "'pollution' means: (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that

will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare to livestock, or to wild animals, birds, fish, or other wildlife."

6. Pursuant to Mont. Code Ann. § 75-5-103(33) (a), "state waters" means "a body of water, irrigation system, or drainage system, either surface or underground."

7. On July 1, 2008, the Department was notified that North Star had a release of approximately 1,000 gallons of Avgas and Jet A fuel (fuel) at the Site. The release occurred on June 30, 2008, when an airport refueler was overfilled while fuel was being transferred from a 20,000-gallon aboveground storage tank (AST) to the mobile tanker truck during a sudden, violent storm that hit the airport. [From DEQ Exhibit 5, page 4] "In addition to the release of jet fuel from the airport refueler as described, a smaller amount of aviation gas was also released from a second North Star airport refueler during the windstorm incident on June 30, 2008. While [Mr.] Wolters was engaged in pumping fuel from the jet fuel AST into the first airport refueler, he also had a second refueler connected by a hose to the other North Star AST, which contained aviation fuel. At the time the windstorm arose, the second refueler had already been filled and the pump on the aviation fuel AST had been turned off, but the hose between the aviation fuel refueler and the aviation fuel AST had not yet been disconnected. When Mr. Wolters returned to the North Star AST area after the storm had abated, he noticed that the second refueler was still attached by the hose to the aviation fuel AST. He therefore decoupled that hose from the aviation fuel AST and let it drop down which allowed aviation fuel to back flow out of the previously filled second refueler. About 500 gallons of aviation fuel was released in this manner on June 30, 2008... The parties stipulate that this second release on June 30, 2008 constituted a release ...and was part of Release No. 4668."]

8. In a panic caused by the storm, North Star's operator [Mr. Wolters] rushed to turn off the fuel pump on the jet fuel AST and hurried over to work on securing the airplanes to prevent them from being damaged by the storm. The storm caused [the] North Star [operator] to be away from the refueler for approximately forty minutes, twenty of which were spent waiting for the storm to pass inside North Star's building at the Airport.

9. When fuel is being loaded from the AST into the refueler tank, there is no off switch on the refueler; the off switch is on the AST, and it controls the AST pump. After the planes were secured and the storm abated, North Star's operator returned to the bulk storage area. He then discovered that when he tried to turn off the electric pump on the AST earlier to stop the flow of jet fuel from the AST, the switch had not engaged in the "off" position. As a consequence, jet fuel was pumped from the AST into the airport refueler tank unabated for approximately forty minutes. During that time the refueler tank had completely filled with the jet fuel, which had then overflowed from the refueler tank through the purge vent on the top of the tank, resulting in the release of approximately 4,000 gallons of jet fuel.

10. North Star immediately contracted PBS&J, an environmental consulting firm, to oversee the emergency response action and cleanup the Site. On July 3, 2008, PBS&J observed fuel in monitoring wells MW-1, MW-2, and MW-4, which had been previously installed at the Site.

11. On July 14, 2008, the Department sent North Star a Violation Letter stating that the June 30, 2008, fuel release, identified by the Department as Release ID No. 4668, constituted a violation of the Montana WQA [Water Quality Act] because the release polluted groundwater. The violation letter explained that the fuel had been observed in monitoring wells MW-1, MW-2 and MW-4, which were installed as part of the cleanup of a previous fuel release (Release ID No. 4414) at

the Site. Groundwater samples collected on October 26, 2006, from the aforementioned wells did not reveal volatile petroleum hydrocarbons above the analytical detection limit, indicating that the recent presence of fuel in the monitoring wells is a result of Release ID No. 4668. The Violation Letter required that North Star submit a Petroleum Release Section 30-day Release Report (30-Day Report) to the Department by August 15, 2008. DEQ Exhibit 1.

12. On July 18, 2008, the Department received a project status letter from PBS&J summarizing the emergency response work that had been completed from June 30, 2008, through July 15, 2008.

13. On July 23, 2008, the Department received the 30-Day Report for the Site. The 30-Day Report stated than an estimated 4,500 gallons of fuel was released onto asphalt and native soil. The 30-Day Report also provided the following site characteristics, which were documented during a cleanup excavation at the Site:

- Ground Water was present in the excavation at four feet below ground surface(bgs):
- The soil and ground water had a petroleum odor;
- Fuel was present in the soil; and
- A two to four-inch thick layer of fuel was present on the ground water.

14. On April 15, 2009, the Department issued to Respondent a Notice of Violation and Administrative Compliance and Penalty Order, Docket No. WQ 09-05 (Notice of Violation). The Administrative Order assessed a penalty of $8,500.00 and requires corrective action. By letter dated May 4, 2009, Steve Wolters, president of North Star Aviation, filed a request for a hearing before the Board of Environmental Review. The request was received by the Board on May 13, 2009.

15. North Star complied with all cleanup actions required by the Department.

SUMMARY OF PARTIES' CONTENTIONS

16. Appellant's contentions are as follows: (a) North Star was not the cause of the release. The release was caused by a sudden and violent storm during

which time North Star had no ability to safely know that fuel was continuing to flow into the airport refueler. (b) North Star did not violate Mont. Code Ann. § 75-5-605 by causing pollution to state waters. (c) North Star has complied with all remediation requirements at a substantial cost which caused severe hardship to North Star business and owners. North Star sought reimbursement from the Petroleum Release Compensation Board but was turned down. (d) The administrative penalty sought by the Department is excessive. The bases for determining the gravity and extent for the penalty calculation by the Department were incorrect because there was no demonstration of a serious threat to human health and no evidence to demonstrate toxicity of the released fuel or the presence of benzene. Further the Appellant contends that the Department is acting arbitrarily by seeking to impose a fine in this case in view of other similar cases where no fine was imposed.

17. Respondent's contentions are as follows: (a) North Star violated Mont. Code Ann. § 75-5-605(1)(a), by causing pollution of state water. (b) Pursuant to Mont. Code Ann. § 75-5-611, the Department may assess an administrative penalty not to exceed $10,000.00 for each day of each violation. The maximum penalty may not exceed $100,000.00 for any related series of violations. (c) The Department has properly calculated an administrative penalty in the amount of $8,500.00 for the violation, after considering the statutory penalty factors in Mont. Code Ann. § 75-1-1001 and Admin. R. Mont. 17.4.301 through 17.4.308. The Department's penalty calculation is documented in the Penalty Calculation Worksheet attached to the Department's Administrative Order, which is part of the record in this proceeding as DEQ Exhibit 4. (d) The Board of Environmental Review should affirm the Department's Notice of Violation and Administrative Compliance and Penalty Order (Notice of Violation) and order North Star to pay to the Department the $8,500.00 administrative penalty to resolve the violation cited

herein and to perform all required assessment or remedial actions requested by the Petroleum Technical Section.

FINDINGS OF FACT

1. This contested case arises from the Notice of Violation issued by the Department through Mr. John L. Arrigo, Administrator, Enforcement Division of the Department of Environmental Quality, on April 15, 2009. The Notice of Violation states that North Star violated Mont. Code Ann. § 75-5-605(1)(a) by polluting state water. As stated in the Notice of Violation, the Department calculated an administrative penalty in the amount of $8,500.00 based on Mont. Code Ann. § 75-1-1001 and Admin. R. Mont. 17.4.301 through 17.4.308. The Notice of Violation orders that North Star shall perform all required assessments and/or remedial actions in accordance with all plans and schedules required and approved by the Department's Petroleum Technical Section and to pay the administrative penalty of $8,500.00 to resolve the violation cited. All of the Findings of Fact 1 through 11 of the Notice of Violation are contained in the Uncontested Facts.

2. The factual questions to be resolved concern whether Mr. Wolters, as agent of North Star Aviation, DEQ Exhibit 5, page 2 caused pollution, and the appropriateness and bases for the calculation of the penalty. Most of the basic facts are not in dispute.

3. Mr. Steve Wolters, opened North Star Aviation, Inc. in 2002 and sold it in 2009. North Star is operated as a "service station" at the airport providing sales of gas and maintenance to airplanes. Testimony Wolters, Transcript, page 73, lines 9 through 20; page 80, line 18. Mr. Wolters assumed the liabilities of North Star when the company was sold. Testimony Wolters, Transcript, page 83, lines 4-7.

4. North Star stored Jet A and AvGas in two 20,000 gallon steel aboveground storage tanks (AST). DEQ Exhibit 3, page 5.

5. The fuel is transferred from the AST into refuel tanks on a mobile truck through a coupling hose. Testimony Wolters, Transcript, page 74, lines 2 through 14.

6. The Department was notified on July 1, 2008, that a petroleum release had occurred at North Star Aviation on June 30, 2008, Facility ID #99-95007, Release No. 4668. It was reported that an estimate of 1,000 gallons of Jet A fuel was released to the environment. DEQ Exhibit 1, page 1. Uncontested Facts, Number 7.

7. Mr. Wolters was conducting the daily activity of refueling the trucks, when a terrific windstorm estimated at "35 to 40" miles per hour and thunderstorm passed over the Ravalli County Airport area. Testimony Wolters, Transcript, page 75, lines 9 through 14. Airplanes had just taxied on to the airport ramp and were not tied down. Testimony Wolters, Transcript, page 75, lines 14 through 17. Mr. Wolters abandoned the refueling process, "shut it off" and ran to assist in tying down customer's airplanes before the airplanes could flip over. Testimony Wolters, Transcript, page 75, lines 15 through 19. The fuel shut off "button" is located on the AST. The "detent" button from one of the ASTs did not shut off the fuel flowing into the refueling tank. Testimony Wolters, Transcript, page 76, lines 1 through 9. Once the refuel tank was full, the fuel spilled out through the vents on the top of the tank. Testimony Wolters, Transcript, page 76, lines 12 through 23. See also Uncontested Facts, Numbers 8 and 9.

8. After the storm abated, Mr. Wolter returned to the refueling area, noticing fuel was spilling from the top of the tank. Mr. Wolter then "got it shut off". Testimony Wolters, Transcript, page 77, lines 17 through 24. See also Uncontested Facts, Number 7.

9. Mr. Wolter immediately notified the Airport Manager, who contacted the local environmental person. The clean-up of the spill began by digging out

contaminate surface dirt and piling it up on plastic on the asphalt. This continued through the night. Testimony Wolters, Transcript, page 77, lines 1 through 10. See Uncontested Facts, Number 10.

10. The 30-Day Release Report filed by Tyler Etzel, PBS&J, on July 22, 2008. Four hundred and fifty gallons of free product from the loading/unloading containment area was immediately recovered. Three hundred and fifty gallons of free product was captured by the vacuum truck in the excavated, storm water drainage swales. DEQ Exhibit 3, page 6.

11. A sheen and free product was visible on the water and soil in the excavation. The water and soil had a petroleum odor. Groundwater level at the site is four feet below the surface. DEQ Exhibit 3, page 2, lines 5 through 7. Free product was present in the excavation and on the water, two to four inches thick. DEQ Exhibit 3, page 2, line 8. Free product was observed in groundwater monitoring wells MW-1, MW-2 and MW-4 which were installed in an earlier petroleum release at the Facility, ID #4414. Laboratory analysis on October 26, 2006, did not identify volatile petroleum hydrocarbons constituents above the laboratory detection limits. DEQ Exhibit 1, page 1. See Uncontested Facts, Numbers 12 and 13.

12. Two groundwater wells are established for domestic drinking and commercial use in the site area. The airport maintenance building is 100 feet west of the site and the USDA Forest Service is 200 feet north-northwest of the site. The groundwater flow direction is north-northwest. DEQ Exhibit 3, page 2. Petroleum product did not contaminate the drinking water wells. Testimony Arrigo, Transcript page 20, lines 1 through 3. The Department did not present any evidence to suggest that the drinking water wells were influencing the movement of free product or that there were hydrocarbons in the drinking water wells caused by the spill event. Testimony Arrigo, Transcript page 52, lines 6-14; page 55, lines 6. With free

product on the water table this will or is likely to render the waters harmful to people to drink it and is "pollution" under the definition in Mont. Code Ann. § 75-5-103(30)(a)(ii). Testimony Arrigo, Transcript, page 59, lines 8-12. The threat to human health was not quantified. Testimony Arrigo, Transcript, page 60, line 22. There were no analytical results that have been produced in this record to suggest that benzene was in the groundwater or a constituent of Avgas or Jet A fuel. Testimony Arrigo, Transcript, page 61, lines 5-19. The fact that there was fuel on the water table caused actual harm to the groundwater resource so [the violation] was given major gravity designation. The designation didn't relate to threats or potential threats to anybody drinking the water or the wells nearby. Testimony Arrigo, Transcript, page 67, lines 1-9.

13. To prevent a future occurrence of a fuel tank transfer spill, Mr. Wolters voluntarily added an "optional deadman switch into the electrical circuit", during the remediation. The deadman switch is hand held. The total cost of the deadman switch was approximately $1,000.00. Testimony Wolters, Transcript, page 82, lines 1 through 24. This expenditure of $1,000.00 constitutes a voluntary expenditure warranting a 10% subtraction from the base penalty to determine the adjusted base penalty.

14. The site at the Ravalli County Airport has been remediated; monitoring wells have turned out clean. Mr. Wolters hoped the site would be closed. Testimony Wolters, Transcript, page 79, lines 3 through 16. North Star expended $250,000.00 to remediate the spill at Ravalli County Airport.

15. The Department calculated the administrative penalty following Mont. Code Ann. § 75-5-1001 and administrative rules Admin. R. Mont. 17.4.301 through 17.4.308. Pursuant to Mont. Code Ann. § 75-5-611(9)(a), an action initiated under this section may include an administrative penalty of not more than $10,000.00 for each day of each violation; however, the maximum penalty may not exceed

$100,000.00 for any related series of violations. Testimony Arrigo, Transcript, page 21, lines 9 through 19. The Department determined that there was one day of violation. DEQ Exhibit 4 Penalty Calculation Worksheet, page 1.

16. The Department rated the base penalty as constituting a harm to the environment and a potential harm to human health because 4500 gallons of fuel entered and polluted the groundwater at Ravalli County Airport and this contaminated groundwater had a potential to reach drinking water. In evaluating the extent of harm, the Department analyzed volume and toxicity (benzene content). The existence and concentration of benzene in the fuel that spilled was not proven. There was a high volume of free product on and in the groundwater and on the basis of volume the extent factor should be major. DEQ Exhibit 4, Penalty Calculation Worksheet, page 1 of 3. Testimony Arrigo, Transcript page 21, lines 25, page 22, lines 1-24, page 23, lines 7-22.

17. As to the circumstances concerning to the penalty calculation, the Department determined that Mr. Wolters had control of the circumstances that resulted in the violation and he failed to ensure that the emergency shutoff switch on the AST had been engaged. According to the Department, North Star should have foreseen that failing to turn off the AST would result in a release of fuel. Exhibit 4, Penalty Calculation Worksheet, page 2 of 3. Testimony Arrigo, Transcript, page 24, lines 16 through 25 and page 25, lines 1-5. The Appellant testified that he believed he had pushed the button that turns the switch off. Testimony Wolters, Transcript, page 76, line 5. Mr. Wolters did attempt to ensure that the emergency shutoff switch had been activated and could not have foreseen that the violation would occur. The violent storm and competing responsibilities did interfere with Mr. Wolters' attentiveness to the one AST. As to the other AST that Mr. Wolters addressed after the storm abated but from which 500 gallons were released, Mr. Wolters did have control over and knowledge presumably about the back flow out

of the hose connected to the previously filled second refueler. Mr. Wolters decoupled the hose from the aviation fuel AST and let it drop down which caused the back flow and release. See Uncontested Facts, Number 7. Because of the error handling the hose on the second aviation fuel AST, the Department's adjustment upward by $850.00 in the penalty is justified.

18. The Department recognized correctly that the prompt reporting, clean-up of the site and communication with the Department, was cause to decrease the base penalty by ten percent. DEQ Exhibit 4, Penalty Calculation Worksheet, page 2 of 3. Testimony Arrigo, Transcript, page 25, lines 9 through 18.

19. The Department determined the number of days for the violation to be one due to the fact that the release occurred on one day. DEQ Exhibit 4, Penalty Calculation Worksheet, page 2 of 3. The total penalty was calculated to be $8,500.00 Testimony Arrigo, Transcript page 26, lines 19 through 25.

20. Because the testimony at the hearing was that the Appellant expended $1,000.00 to install a switch to prevent another release in addition to the remediation costs, the base penalty should be adjusted downward by 10% of the base penalty to $7,650.00.

21. Because the Appellant disputes the process by which the Department determines to pursue fines for accidental spills, Mr. Arrigo was asked to testify about cases where the violator did receive a penalty and where the violator did not receive a penalty. It appears that the Department applies case by case reasoning in the determination to apply penalties. The Appellant argues that it appears that the North Star case falls into the category of cases-extreme weather events-where the Department's policy is not to issue fines as part of the enforcement action. Here it was not the storm that caused the release but it was human error during and after the storm that caused the cumulative release No. 4668.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Mont. Code Ann. § 75-5-611(4) and this proceeding was conducted pursuant to Mont. Code Ann. § 75-5-611 (4) through (6) and the Montana Administrative Procedure Act, Mont. Code Ann. Title 2, Chapter 4, Part 6 and Attorney General's Model Rules Admin. R Mont. 1.3.211 through 1.3.225.

2. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Mont Code Ann. § 2-15-3501. The Department is authorized under Mont. Code Ann. § 75-6-611(3) to issue a Notice of Violation and Administrative Compliance and Penalty Order to address violations of statute such as here, Mont. Code Ann. § 75-5-605(1). A Notice of Violation was issued on April 15, 2009. The Appellant timely filed its appeal on May 13, 2009.

3. A contested case hearing occurred on September 21, 2011, and the parties submitted post hearing briefs. This hearing complied with the Montana Administrative Procedure Act, Mont. Code Ann. Title 2, Chapter 4, Part 6.

4. Mont. Code Ann. § 75-5-605(1)(a) provides that it is unlawful to "(a) cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters..." Pollution is defined in Mont. Code Ann. § 75-5-103(30)(a)(ii) as "the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid ...into state water that will or is likely to create a nuisance of render the waters harmful, detrimental or injurious to public health recreation, safety or welfare, to livestock, or to wild animals, birds, fish or other wildlife." Pursuant to Mont. Code Ann. § 75-5-103(29)(a), "state waters" means a body of water, irrigation system or drainage system, either surface or underground.

5. Pollution as defined in Mont. Code Ann. § 75-5-103(30)(a)(ii), occurred since an estimated 4,500 gallons of fuel was released onto asphalt and the native soil, and also seeped and infiltrated into the groundwater. Specifically, the fuel from Release No. 4668 was present in the excavation at four feet below ground surface and there was a two to four inch thick layer of fuel present on the groundwater. Since, the fuel sitting on the groundwater and dissolving into it was likely to create a nuisance or to render the waters harmful, detrimental or injurious, pollution occurred.

6. The parties disagree on how liability under Mont. Code Ann. § 75-5-605 (1)(a) is established. The Appellant argues that the Department must show that a person "caused" pollution and that statute contains a causation element. The Appellant applies principles of negligence and argues that the Department must show a causal link between North Star and the pollution and the storm event was in essence, an intervening cause. Appellant argues that North Star's owner did not realize that the switch that normally would stop the flow of fuel had not engaged and the violent storm that came up was the causal element that triggered the chain of events that led to the release not Mr. Wolters' actions. North Star's Post Hearing Brief, pages 2-5. The Department argues that it was the action of Mr. Wolters that caused the release because he tried and failed to activate the fuel pump shutoff. This action, the Department argues, caused the release which in turn caused the pollution of groundwater. DEQ Post-hearing Brief pages 6-8.

7. Looking at the cause of the spill accident, the evidence is that Mr. Wolters did fail to activate the fuel pump shutoff on the AST, albeit in a severe storm, and his error caused the overflow. Notwithstanding causation, the Montana Water Quality Act, Mont. Code Ann. §§ 75-5-101 through 75-5-905, with roots in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, which imposes a strict liability standard for imposition of penalties, see e.g. San Francisco Baykeeper

v. West Bay Sanitary District, 2011 U.S. Dist. LEXIS 138093, (N.D. Cal. Jan. 11, 2011); United states v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1978) may be read to, at the least, impose liability strictly as a matter of statutory interpretation. There is no reference in Mont. Code Ann. § 75-5-605(1)(a), to any language that confers liability according to causation in a negligence sense , intentionality or foreseeability of acts when the pollution occurs. The wording in the statute refers to the fact that to cause pollution is unlawful no matter the circumstances. In this case, the Appellant caused pollution by mishandling the shut off valve from the AST which he owned. Factors that the Appellant argues are important to liability are taken into account in the calculation of the penalty amount. See Admin. R. Mont. 17.4.304 which considers circumstances of a violation and evaluates the violator's culpability. It allows for increase of the penalty amount taking into account factors such as control the violator had over the violation, the foreseeability of the violation, whether the violator took reasonable precautions to prevent the violation, the foreseeability of the impacts associated with the violation. There is no increase in the base penalties if these factors are not present which is what the Appellant argues as to liability. Good faith and cooperation after the fact may work to decrease a base penalty by up to 10%. Admin. R. Mont. 17.4.304 (1).

8. Pursuant to Mont. Code Ann. § 75-5-611(6), the Board may assess an administrative penalty not to exceed $10,000.00 for each day of each violation, however, the maximum penalty may not exceed $100,000.00 for any related series of violations.

9. The Department has calculated an administrative penalty in the amount of $8,500.00 for the violation of polluting state water, Mont. Code Ann. § 75-5-605(1)(a). The Penalty Calculation Worksheet, the attachment to DEQ Exhibit 4, incorporated the penalty calculation factors of Mont. Code Ann. § 75-1-1001 and Mont. Admin. R. 17.4.301 through 17.4.308. The key penalty factors in

this case are Gravity, Extent, Circumstances, Good Faith, Cooperation and Amounts Voluntarily Expended.

10. The gravity factor is addressed in Admin. R. Mont. 17.4.303. A violation has major gravity if it causes harm to human health or the environment, poses a serious potential to harm human health or the environment or has a serious adverse impact on the Department's administration of the statute or rules. The release of 4500 gallons of Avgas and Jet A Fuel that was observed on the groundwater to the extent of a two to four inch thick layer and as observed in the excavation harms the environment and poses a potential harm to human health. Here the polluted groundwater was upgradient to and a potential source to two drinking water wells. Therefore the violation has major gravity.

11. In determining the extent of a violation, the factors that the department may consider include, but are not limited to, the volume, concentration and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit and the duration of the violation. A violation occurs to a major extent if it constitutes a major deviation from the applicable requirements. Admin. R. Mont. 17.4.303 (4). A release of 4,500 gallons of fuel with 3-4 inches of free product observed on the groundwater is major in extent as far as volume. Data on the benzene content of the gasoline was too speculative to include in the determination of this factor. The violation was major in gravity and extent and the gravity and extent factor of 0.85 was correctly determined. The base penalty of $8,500.00 was correctly determined as well.

12. Pursuant to Admin. R. Mont. 17.4.304, the Department may consider circumstance, good faith and cooperation and amounts voluntarily expended to calculate and adjusted base penalty. To determine the penalty adjustment based upon circumstances, the Department shall evaluate a violator's culpability associated with the violation. In determining the amount of increase for

circumstances, the Department's consideration must include, but not be limited to, the following factors: how much control the violator had over the violation, the foreseeability of the violation, whether the violator took reasonable precautions to prevent the violation, whether the violator knew or should have known of the requirement that was violated.

13. The Department concluded North Star had control of the circumstances that resulted in the violation but failed to ensure that the emergency shutoff switch on the AST had been engaged. For this, the Department increased the base penalty by 10% or by $850.00. The Department subtracted $850.00 for North Star's demonstration of good faith and cooperation. The Hearing Examiner finds that Mr. Wolters testified that he didn't know as to the one AST from which releases occurred during the storm that he had failed to fully turn off the emergency shutoff switch. Therefore he could not have foreseen that the release would have been occurring as to that AST. As to the AST from which a release occurred after the hose was decoupled and aviation fuel back flowed out of the previously filled second refueler, Mr. Wolters had more control over the violation and should have foreseen the violation. The increase in the base penalty of $850.00 based upon circumstances was correct based on the handling of the decoupled hose.

14. The decrease by $850.00 for good faith and cooperation was correctly applied by the Department given the extensive remediation Mr. Wolters undertook. The Department acknowledges that Mr. Wolters' testimony that he spent $1,000.00 to install a "deadman" shutoff switch is an amount voluntarily expended and that Mr. Wolters should get a 10% adjustment downward in the penalty for this expenditure in the calculation of the adjusted base penalty. DEQ Post Hearing Brief, page 5. There was no economic benefit of noncompliance to factor in. There was one day of violation.

15. Based on the above facts and conclusions of law, the correct adjusted base penalty should be $7,650.00.

PROPOSED ORDER

For the above reasons, it is recommended that the Board in its final order require the Appellant, North Star Aviation, pay an administrative penalty of $7,650.00 to the Department within six months of the date of issuance of the order finding a violation of Mont. Code. Ann. § 75-5-605(1).

NOTICE AND OPPORTUNITY TO BE HEARD

Pursuant to Mont. Code Ann.§ 2-4-621, these Proposed Findings of Fact, Conclusions of Law and Proposed Order may be challenged by a party that deems these proposed Finding of Fact, Conclusions of Law and Proposed Order contrary to its interests. Any party adversely affected may file exceptions and present briefs and submit oral arguments to the Board prior to the Board meeting in which it issues its decision to affirm, correct or reject the Proposed Findings of Fact, Conclusions of Law and Proposed Order. The schedule for filing exceptions shall be as follows:

(1) The Appellant shall indicate by January 17, 2012, whether it intends to file exceptions.

(2) Exceptions may be filed by the Appellant by January 31, 2012.

(3) Exceptions may be filed by the Department by February 17, 2012.

Any exceptions and oral argument will be presented to the Board at its regularly scheduled March 23, 2012, Board meeting when the Board will consider adoption of the Proposed Findings of Fact, Conclusions of Law and Proposed Order.

The filing of exceptions may be a necessary step if judicial review is sought. See In the Matter of Change Application No. 41s-30013940 by T Lazy T Ranch,

Inc. v. Department of Natural Resources and Conservation, 2009 MT 306 N, 2009 Mont. LEXIS 456. (Sept. 15, 2099).

DATED this 13th day of January, 2012.

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Proposed Findings of Fact, Conclusions of Law and Proposed Order to be mailed to:

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

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

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

Mr. Steven R. Brown
Garlington, Lohn & Robinson
199 W. Pine
P.O. Box 7909
Missoula, MT 59807

DATED: January 13, 2012

ATTACHMENT A

NORTH STAR AVIATION
SEPTEMBER 21, 2011

Department Exhibits	Description	Date Admitted
1	Violation letter to Steve Wolters from Nicholas S. Sovner, Project Manger, Petroeum Technical Section, July 14, 2008	9/21/2011
2	Proposed Prehearing Order with Joint Statement of Uncontested Facts.	9/21/2011
3	Petroleum Release Section, 30-day Release Report, received July 23, 2008.	9/21/2011
4	Notice of Violation and Administrative Compliance and Penalty Order, April 15, 2009.	9/21/2011
5	Tank Release Compensation Board, Claim No. 2009-99-95007, North Star signed on January 25, 2010 and Petroleum Tank Release Fund signed on January 28, 2010.	9/21/2011

Stephen R. Brown
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595
srbrown@garlington.com

Attorneys for North Star Aviation, Inc.

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 1st day of March, 2012
at ____ o'clock ____.m.
By: [signature]

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY NORTH STAR AVIATION, INC. AT RAVALLI COUNTY AIRPORT, RAVALLI COUNTY, MONTANA [FID #1707, DOCKET NO. WQ-09-05]	Case No. BER 2009-10 WQ **APPELLANT'S STATEMENT OF EXCEPTIONS**

Pursuant to the Proposed Findings of Fact, Conclusions of Law and Proposed Order dated January 1, 2012, as modified by a grant of extension dated January 31, 2012, and pursuant to the contested case procedures set forth in the Montana Administrative Procedures Act, petitioner North Star Aviation, Inc. ("North Star") submits this Statement of Exceptions to the hearing examiner's proposed findings of fact and conclusions of law.

Pursuant to Mont. Code Ann. § 2-4-621, the proposed findings and conclusions should be rejected because they are not based on competent substantial evidence and the findings do not comply with essential requirements of law.

BACKGROUND

This case involves a very unusual fuel spill. The basic facts of the spill already are documented in the record before the Board. Those facts, however, must be viewed in the light of

the equities of what North Star has faced. Specifically, North Star has spent hundreds of thousands of dollars in responding to a spill that was caused by an act of God. North Star had preventative procedures in place and was in compliance with all laws. Although the Board has no jurisdiction over the Petroleum Compensation Board ("Petro Board"), it bears emphasizing that due to the vagaries in the Petro Board rules and the hard line position it took, North Star received no reimbursement. The Petro Board treated this as if it were an accident on a highway involving a trailer and a truck. It was not. Rather, North Star has special equipment designed for airport refueling that it owned and operated. Because the Petro Board rules did not contemplate such a thing, it denied all reimbursement after a protracted legal battle.

Notwithstanding the enormous financial burden caused by the lack of reimbursement, a burden that forced the former owner to have to sell his family's business in order to pay off the credit cards used to pay for the spill response, the Department of Environmental Quality ("MDEQ") still seeks a fine. MDEQ seeks this fine even though it admitted at the hearing that its normal practice for truck accidents on highways it to not seek a fine. Thus, North Star is in a situation where the Petro Board treats this as a highway accident so as to avoid paying reimbursement to North Star, yet MDEQ treats this as not being a highway accident to ensure that it can fine North Star without being arbitrary in its application of its unwritten enforcement policies. As a matter of equity, this is fundamentally unfair. Additionally, as discussed below, the legal and evidentiary basis for the hearing examiner's recommendations are contrary to Montana law.

EXCEPTIONS

North Star incorporates by reference its post-hearing brief dated October 20, 2011. The brief sets forth the basic legal positions following the hearing. In addition, North Star submits the following specific exceptions to the hearing examiner's proposed findings and conclusions

set forth below. In reviewing the record and these exceptions, the North Star respectfully requests that the Board be mindful that if this matter is appealed, there are a host of bases on which a decision adverse to North Star may be reversed, including: (i) a decision in violation of constitutional or statutory provisions; (ii) a decision in excess of the statutory authority of the agency; (iii) a decision made upon unlawful procedure; (iv) a decision affected by other error of law; (v) a decision clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) or a decision that is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Section 2–4–704(2), MCA. A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made. *Williamson v. Montona Pub. Serv. Comm'n*, 2012 MT 32.

1. No reliable, probative or substantial evidence exists as to Finding of Fact 11. Finding of Fact 11 states technical facts as to the depth to groundwater, and the amount of free product presence in groundwater. No evidence was submitted at the hearing to establish these facts. Montana Department of Environmental Quality ("MDEQ") offered no laboratory reports, well logs, photographs, eyewitness accounts or any other evidence to support this finding. The finding is the violation letter. This is not competent evidence to substantiate the technical factual findings set forth in Finding of Fact 11.

2. No reliable, probative or substantial evidence exists as exists as to Finding of Fact 12. Finding of Fact 12 makes reference to two groundwater wells "in the area." There are no well logs or water right records to support the allegation that the wells are used for domestic drinking water. The finding of fact states that free product on the water table "will or likely to render the water harmful to people to drink it." No expert witness or analytical report was

offered or entered to support this finding. The witness offered by MDEQ was offered as the program administrator, not an expert. Thus, no substantial evidence supports Finding of Fact 12.

3. A clear error of law exists as to Conclusion of Law 7. The Montana Water Quality Act has a clear causation requirement. Under basic rules of statutory construction, the definition of causation adopted by the Montana Legislature should be guided by principles of Montana law, not a federal statute. Causation is a familiar concept in Montana law and North Star provided authority. The hearings examiner ignored that authority and referenced federal law to construe a Montana statute. Neither the Water Quality Act, nor any Montana case supports this line of reasoning. When there is Montana authority to interpret a term, as here, and there is no provision in the statute to suggest that Montana law does not apply to a term contained in a Montana statute, the hearings examiner erred by ignoring Montana law.

4. The lack of substantial evidence eliminates the support for the Conclusion of Law 12.

For these reasons, North Star respectfully requests the Board decline to adopt the hearing examiner's proposed findings and enter an order accordingly.

DATED this 29th day of February, 2012.

Attorneys for North Star Aviation, Inc.:

GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595

By 
Stephen R. Brown

CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for North Star Aviation, Inc., hereby certify that on this 29th day of February, 2012, a copy of the foregoing document was served on the following persons by the following means:

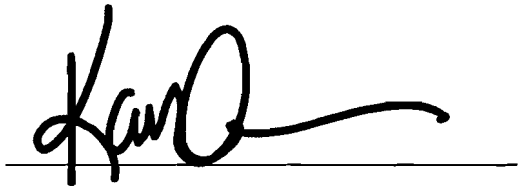
_____ Hand Delivery
__1-4__ Mail
_____ Overnight Delivery
_____ Fax
_____ E-mail

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

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

3. James Madden
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

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



James M. Madden
Special Assistant Attorney General
Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901
(406) 444-4009

Attorney for Department

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY NORTH STAR AVIATION, INC. AT RAVALLI COUNTY AIRPORT, RAVALLI COUNTY MONTANA. [FID #1707, DOCKET NO. WQ-09-05]	Case No. BER 2009-10- WQ **DEQ Response to Exceptions**

Summary

Appellant North Star Aviation Inc. has filed Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Proposed Order ("Proposed Order"). In the Exceptions Appellant argues that there is no factual basis for Findings of Fact #11 and #12, that Conclusion of Law #7 is legally erroneous and without factual basis, and that assessment of a penalty in this case is fundamentally unfair.

In response, DEQ maintains that the Proposed Order is correct and should be upheld. As set out in more detail below, Findings of Fact #11 and #12 are based on Exhibits that were admitted into evidence without objection. Conclusion of Law #7 is also based on the undisputed factual record and is legally sound. Assessment of a penalty in this case is consistent with DEQ penalty actions in similar cases and is not unfair.

DEQ Responses

1. Findings of Fact #11 and #12 are based on facts set out in uncontested Exhibits.

Findings of Fact #11 and #12 establish the factual basis for classifying this violation as having "major gravity" under the DEQ penalty rules. ARM 17.4.303. The "major gravity" designation was the result of 2-4 inches of fuel free product floating on the groundwater as a result of the release. Although there were no measured impacts to nearby drinking water wells, the "major gravity" designation was based upon harm to the resource. This was appropriate under the penalty rules, which define "major" gravity as the degree of harm or potential for harm to human health, the environment, or the DEQ ability to administer the law. ARM 17.4.302(4).

Finding of Fact #11. Finding of Fact #11 addresses the depth to groundwater and the amount of fuel free product present in the groundwater. Proposed Order at page 9. The facts in this Finding were taken directly from **DEQ Exhibit 1** and **DEQ Exhibit 3**, which were part of the record. See Attachment A to Proposed Order. These Exhibits were admitted without objection, and no contravening evidence was provided by Appellant.

DEQ Exhibit 3 was a technical report sent to DEQ 30 days after the release by Appellant's technical consultant. **DEQ Exhibit 3** is the basis for the findings in #11 that a sheen and free product was visible on the water and soil in the excavation at the spill site, that groundwater was four feet below ground surface, and that free product was two to four inches thick on the groundwater. **DEQ Exhibit 3**, page 2, lines 5-8.

DEQ Exhibit 1 is the basis for the findings in #11 that, after the release, free product was observed in three monitoring wells at the site whereas, prior to the release, no detectable product had been observed in the same wells. **DEQ Exhibit 1** was the Violation Letter that DEQ sent to Appellant regarding the release. The well sampling results summarized in **DEQ Exhibit 1** had been submitted to DEQ by the Appellant's consultant and were uncontested.

Finding of Fact #12. Finding of Fact #12 states that there were two drinking water wells downgradient of the release. One well was approximately 100 feet away, and the other approximately 200 feet. This information was taken directly from the Appellant's consultant report in **DEQ Exhibit 3** which, as noted above, was admitted without objection.

Finding of Fact #12 cites DEQ's testimony that the release polluted the groundwater and was likely to render it harmful to drink, but the Finding notes that DEQ presented no evidence that there was benzene in the groundwater or that drinking water wells had been contaminated by the release. This part of the Finding correctly reflects DEQ's testimony.

Finding of Fact #12 then states that the designation of the violation as "major" under the DEQ penalty rules was not based on potential threats to the drinking water wells, but rather on the fuel on the water table causing actual harm to the groundwater resource. This correctly reflects DEQ's testimony. **Transcript** at 67, lines 1-9. As stated above, the designation of "major" based on harm to the environment rather than direct harm to human health is supported by the DEQ penalty rules.

In summary, there is substantial uncontested evidence to support Findings of Fact #11 and #12, and the designation of the violation as "major gravity" was appropriate under the penalty rules.

2. Conclusion of Law #7 is legally correct and is supported by substantial evidence

Conclusion of Law #7 states that Appellant was liable for the violation because Appellant's employee's actions caused it. The Conclusion explains that because the Water Quality Act is a strict liability statute, liability is not affected by negligence, or the lack of it. The Conclusion notes that culpability factors are addressed elsewhere in the penalty calculations.

Appellant argues that Conclusion of Law #7 is legally erroneous because it fails to establish that Appellant "caused" the release. On the contrary, the Conclusion addresses causation in two places:

> Looking at the cause of the spill accident, the evidence is that Mr. Wolters did fail to activate the fuel pump shutoff on the AST [above ground storage tank], albeit in a severe storm, and his error caused the overflow.
> ...
> In this case, the Appellant caused pollution my mishandling the shut off valve from the AST which he owned.

Proposed Order, page 14, line 22; page 15, line7. These statements are supported by substantial evidence that Appellant's employee tried and failed to activate the shutoff switch on the fuel tank pump. See Statement of Uncontested Facts, **DEQ Exhibit #2**, paragraphs 8-9.

As noted by the Hearing Examiner, the Montana Water Quality Act is a strict liability statute. Under strict liability principles, no showing of negligence is required to establish liability for a violation. The DEQ penalty rules take negligence and other culpability factors into account under "Circumstances". ARM 17.4.304(2). In considering the circumstances in this case, DEQ found a minor degree of culpability for the Appellant's error in not ensuring that the shutoff switch was properly engaged. This resulted in a penalty increase of 10%. Finding of Fact #17. The Hearing Examiner upheld the 10% increase, citing Appellant's subsequent error of decoupling and dropping a fuel hose while it was full, which released another 500 gallons. Finding of Fact #17.

Good faith and cooperation after the fact can be considered to reduce a penalty. See ARM 17.4.304(3). DEQ reduced the penalty by 10% based on Appellant's prompt reporting, cleanup, and communications. Finding of Fact #18.

Amounts voluntarily expended beyond what is required is another factor that can be used to reduce a penalty. ARM 17.4.304(4). Based on evidence submitted at the hearing, the Hearing Examiner reduced the penalty by another 10% for Appellant's subsequent installation of a "deadman" shutoff switch on the AST. Finding of Fact #20.

In summary, Conclusion of Law #7 is supported by substantial evidence and properly establishes causation. Appellant's negligence, or lack of it, was given appropriate consideration under other factors considered in the calculation of the penalty amount.

3. Assessing a penalty in this case is not fundamentally unfair..

Appellant asserts that DEQ has an informal enforcement policy of not seeking penalties for spills from truck accidents, and argues that DEQ arbitrarily classified this case as not involving a truck spill so as to be able to assess penalties. Appellant argues that this is particularly unfair because this incident was considered a truck spill by the Petroleum Tank Release Compensation Board (Petro Board), which was the reason the Petro Board denied reimbursement for remediation costs. Exceptions at page 2.

DEQ does not have a policy of waiving penalties for truck spills. Generally, DEQ will assess penalties under the Water Quality Act for any spill, regardless of the source and regardless of whether it was accidental, where there is a significant release to state waters. **Transcript** at 30-35. In its testimony, DEQ discussed five other accidental spill cases in which penalties were assessed. DEQ then recounted two truck spill incidents in which DEQ did not seek penalties. In one case, the spill occurred on the Flathead Reservation where DEQ had no enforcement jurisdiction. In the other case, the truck spill occurred in a remote area where there were no significant impacts to state waters. **Transcript** at 37-41. DEQ's approach in this case is consistent with other cases in which DEQ has assessed penalties for accidental spills that significantly impact state waters. The purpose of a penalty in such cases is to deter future spills by encouraging operators to take all feasible precautions to prevent them. **Transcript** at 35.

For the foregoing reasons, the Proposed Order should be adopted as proposed.

DATED this 9th day of March, 2012

STATE OF MONTANA
Department of Environmental Quality

by: James M Madden
James M. Madden
Attorney for Department

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of March, 2012, a true and correct copy of the foregoing was served upon Appellant and Hearing Examiner by placing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Stephen R. Brown
Garlington, Lohn & Robinson
199 W. Pine
P.O. Box 7909
Missoula, MT 59807

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

James M Madden

FILE

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: THE APPEAL AND REQUEST FOR HEARING BY MAURER FARMS, INC.; SOMERFELD & SONS LAND & LIVESTOCK, LLC; JERRY MCRAE; AND KATRINA MARTIN REGARDING THE DEQ'S FINAL DECISION TO AMEND THE MATL'S CERTIFICATE OF COMPLAINCE.	**CASE NO. BER 2010-16 MFS**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The contested case hearing in this matter was conducted on October 19, 2011, and on November 9, 2011. The Appellants, Maurer Farms, Inc., Somerfeld & Sons Land & Livestock, LLC, Jerry McRae and Katarina Martin (Appellants) appeared through Counsel, Ms. Hertha Lund. The Department of Environmental Quality, (Department) appeared through Counsel, Mr. Edward Hayes and Intervenor and Respondent, Montana Alberta Tie, LTD and MATL, LLP (MATL) appeared through Counsel, Mr. David K.W. Wilson.

Appellants called Mr. Bruce Maurer, Mrs. Leona Somerfeld, Mr. Tom Ring, Mr. Craig Jones and Mr. Darryl James, from the Consultant, Gallatin Group. The Department called Mr. Ring and Mr. Jones. MATL called Mr. James. All witnesses were duly sworn.

Appellants' Exhibits 1, 3, 4, 5, 6, 10, 11, 13, 20, 22, 23, 24, 25 through 29 were admitted. The Department's Exhibits A, B, E, F, H were admitted. MATL's Exhibit 1 was admitted. A list itemizing each exhibit is attached as Attachment A. The parties filed an "Agreed Statement of Facts and Conclusions of Law" on October 19, 2011. This document is referred to below as "Agreed Statement of Facts."

PROPOSED FINDINGS OF FACT

A. Certificate of Compliance

1. In September of 2008, the Department and United States Department of Energy ("DOE") issued a Final Environmental Impact Statement regarding MATL's construction, operation and maintenance of an international 230-kV transmission line connecting an existing switchyard northwest of Great Falls, Montana, to a new substation to be constructed northeast of Lethbridge, Alberta. Agreed Statement of Facts.

2. On October 28, 2008, the Department issued a Certificate of Compliance (the Certificate) to Montana Alberta Tie Ltd. (MATL) under the Major Facility Siting Act (MFSA). The Certificate authorized MATL to construct and operate the Montana segment of the 230-kV transmission line (the Transmission Line). Agreed Statement of Facts.

3. The Certificate prohibited MATL from conducting construction within 50 feet of a stream or wetland. Certificate, Paragraph 3(G). Appellants' Post Hearing Brief, page 2, Paragraph No. 4. (The Department and MATL also agreed to this assertion in the document "MATL and DEQ's Proposed Agreed Statement of Facts and Conclusions of Law dated October 5, 2011.)

4. The Certificate indicated that construction and operation of the Transmission Line did not require any air or water quality decision or opinion. Certificate, Paragraph 12. Appellants' Post Hearing Brief, page 2, Paragraph No. 7. (The Department and MATL also agreed to this assertion in the document "MATL and DEQ's Proposed Agreed Statement of Facts and Conclusions of Law dated October 5, 2011.)

5. To reduce the amount of sediment entering streams, the Certificate required a strip of undisturbed ground or vegetation for 50 feet between areas of disturbance (such as road construction or tower construction) and wetlands, stream

courses, and around first order or larger streams that have a well-defined stream course or aquatic or riparian vegetation, unless otherwise required by the Landowner. Certificate, Attachment 2, Section 2.11.17 Agreed Statement of Facts.

6. The Certificate required MATL to delineate wetlands within 500 feet of the selected transmission line corridor and prohibited MATL from conducting construction activities within 50 feet of wetlands. Certificate, Attachment 2, Appendix A, Agreed Statement of Facts.

7. Under a definition used by the United States Army Corps of Engineers (USACE), a wetland is defined by the existence of the appropriate hydrology, soil type, and vegetative cover. (Testimony Darryl James, Transcript, pp. 162, lines 1-2; p 293, lines 15-24.)

8. Imposition of the 50 foot buffer around wetlands was included in the Certificate based on the following comment by the Environmental Protection Agency (EPA):

> The DEIS states that there could be alterations to wetland hydrology, wetland plant communities and inadvertent filling of wetlands or sedimentation of wetlands, although no direct filling of wetlands is intended. We recommend that there be a strict prohibition of placement of transmission line pole structures in wetlands, rather than just avoiding placement in wetlands "whenever possible," and that a wetland buffer zone be used to avoid even inadvertent construction impacts to wetlands (e.g., 50 foot wetland buffer zone). We also recommend that wetlands be flagged on the ground to facilitate contractor avoidance and inadvertent wetland impacts. If any wetlands are to be impacted the extent of impacts should be more clearly estimated and disclosed. The final EIS should also more clearly identify and disclose probable wetland impacts, as well as mitigation activities that would compensate for unavoidable impacts to wetlands.

Appellants' Exhibit 5, Section 1.1.

B. Application to Amend Certificate of Compliance

9. On August 11, 2010, MATL submitted an application to amend the Certificate to: "change language in the Certificate and attached Environmental Specifications as indicated by deleting existing language in the Certificate and

adding new language" regarding construction and maintenance activity within the 50 feet of a delineated stream or wetland. Section 2.0 of the Draft EA. Agreed Statement of Facts.

10. In its application to amend the Certificate, MATL requested that Paragraph 3(G) of the Certificate be amended to allow construction within 50 feet of a stream or wetland, although no permanent structures could be placed within a delineated stream or wetland. The requested amendment also required any construction activity occurring within a 50 foot buffer zone around a delineated stream or wetland to be conducted pursuant to the more environmentally protective of (i) DEQ Environmental Specifications 2.11 and 3.2; (ii) any applicable water quality permit, decision, or order; or (iii) MATL's Proposed Environmental Protection Measures that were set forth in Attachment 1 of the Certificate. Appellants' Exhibit 4.

11. In its application to amend the Certificate, MATL requested that Paragraph 12 of the Certificate be amended to require MATL to obtain all necessary water quality decisions, opinions or orders prior to starting construction of the transmission line. Agreed Statement of Facts.

12. In its application to amend the Certificate, MATL requested that Attachment 2, Section 2.11.17 of the Certificate be amended to not require the 50 foot buffer of undisturbed ground between areas of disturbance and wetlands and streams upon the authorization of the State Inspector and managing agency. The Certificate defines "State Inspector" to mean the "DEQ employee or DEQ designee with the responsibility for monitoring [MATL's] compliance with terms and conditions of the Certificate of Compliance issued for a project." Certificate, Attachment 2. Agreed Statement of Facts.

13. In its application to amend the Certificate, MATL requested that Attachment 2, Appendix A, be amended to allow construction activities within the

wetland or within 50 feet of a wetland, although placement of permanent structures would be prohibited within 50 feet of a wetland. Any construction activity within 50 feet of a wetland would have to be conducted pursuant to the more environmentally protective of: (i) DEQ Environmental Specifications 2.11 and 3.2; (ii) any applicable water quality permit, decision, or order; or (iii) MATL's Proposed Environmental Protection Measures that were set forth in Attachment 1 of the Certificate. Agreed Statement of Facts.

C. Draft and Final Environmental Assessments.

14. The Department issued a Draft Environmental Assessment (Draft EA) on August 24, 2010, in regard to MATL's application to amend the Certificate. Appellants' Exhibit 4.

15. DEQ considered three alternatives in the Draft EA in addition to MATL's Proposed Amendment. Appellants' Exhibit 4.

16. Alternative 1 was developed by the Department in an effort to provide for some additional mitigation above and beyond that which was requested by MATL in their application to amend. (Testimony Ring, Transcript p. 214, lines 5-8.)

17. Under Alternative 1, Paragraph 3(G) would prohibit only the placement of permanent poles in wetlands. Guy wires could be placed in wetlands if such placement avoided the placement of the guy wires in farmland. (Testimony Ring, Transcript p. 215, lines 3-8.)

18. Under Alternative 1, Paragraph 3(G), it would also allow MATL to conduct construction activities within a delineated wetland only upon the prior approval of the Department through the State Inspector. MATL would be required to make a monetary contribution to a recognized wetland mitigation bank or develop replacement wetlands themselves for disturbances within wetlands. MATL would delineate wetlands within 500 feet of the alignment of the selected location.

Following MATL's submission of wetland delineation maps and design drawings to the Department showing structure and preliminary access road locations, the State Inspector would review the information and determine where field inspections would be needed to determine whether reasonable alternatives exist that would avoid disturbance of a stream or wetland. If field reviews are necessary to verify reasonable alternatives, the State Inspector would invite MATL (or MATL's appointee) to attend the reviews. During the field reviews, the Department would determine whether there is a reasonable alternative to allowing ground disturbing activities or guy wires that would temporarily or permanently disrupt or cause the loss of wetlands. Consideration would be given to the amount of vegetation and wildlife habitat that would be affected as well as land use, cultural resources, transportation, recreation, and visual impacts. The Department would also consider the costs to avoid wetland impacts. After consideration of these factors, DEQ may identify alternative locations for access routes or guy wires, alternative sites for temporary construction disturbances, or alternative construction timing (e.g. winter construction when the ground is frozen). Consideration would be given for access for maintenance activities as well as construction activities. If environmental impacts at construction sites, access, or guy wires locations, or costs make wetland avoidance unreasonable as determined by DEQ, DEQ would require MATL to provide compensatory mitigation of the wetland acreage affected. Appellants' Exhibit 4.

Compensatory mitigation as a result of temporary construction activities would be calculated at a rate of 0.2 acres for each acre of temporary wetland disturbance while compensatory mitigation for wetland losses for the life of the project would be calculated at a rate of 1.5 acres of mitigation for each wetland acre lost during the life of the project. Such compensatory mitigation would not relieve

MATL of its responsibility to reclaim disturbed areas as required by Admin. R. Mont. 17.20.1902(10). Appellants' Exhibit 4.

The amount of wetland disturbance would be determined by the State Inspector during construction or in the year following construction. MATL would make a monetary contribution to a recognized statewide mitigation bank or develop the permanent wetland replacements within two years following the end of construction. Appellants' Exhibit 4.

19. Under Alternative 1, MATL would be required to obtain a 318 authorization from DEQ for any construction in intermittent streams or wetlands. Appellants' Exhibit 4.

20. Under Alternative 2, the same amendments to the Certificate would be made as under Alternative 1. In addition, the approved location of the transmission line (normally 250 feet on either side of a centerline) would be widened in three selected areas to allow further avoidance of additional wetlands or intermittent streams. One of the three areas involved the property of Bruce Maurer (Maurer). Appellants' Exhibit 4.

21. The Draft EA also considered a No Action Alternative under which the Certificate would not be amended. Appellants' Exhibit 4.

22. In the Draft EA, the Department tentatively concluded that the MATL's proposed amendment would result in a material increase in an environmental impact of the facility. The Certificate prohibits any construction with 50 feet of a wetland while the proposed amendment would allow temporary disturbance during construction if there were no practical means of avoiding the disturbance. Poles would not be located in delineated wetlands. Appellants' Exhibit 4.

23. In the Draft EA, the Department tentatively concluded that the proposed amendment as modified by Alternatives 1 and 2 would not materially alter

the findings. MATL would be required to provide compensatory payments to a wetland mitigation bank for the creation of permanent wetlands to offset its disturbances of wetlands and would be provided additional latitude to locate the transmission line in specified areas to avoid intermittent streams and wetlands. Poles would not be located in delineated wetlands. Appellants' Exhibit 4.

24. Maurer submitted comments on the Draft EA by letters dated August 17 and 29, 2010. Appellants' Exhibit 5.

25. Somerfeld & Sons Land & Livestock, LLC, submitted comments on the Draft EA by letter dated August 30, 2010. Appellants' Exhibit 5.

26. Jerry McRae submitted comments on the Draft EA by e-mail dated September 2, 2010. Appellants' Exhibit 5.

27. Katrina Martin received a copy of the Draft EA. Martin submitted comments on the Draft EA by e-mail dated September 3, 2010. Appellants' Exhibit 5.

28. MATL submitted comments on the Draft EA by letter dated September 3, 2010. In its comments, MATL stated as follows:

> In response to our amendment request, DEQ has prepared an EA including alternatives which would allow permanent impacts to wetlands and allow examination of additional alternatives outside the previously approved corridor. There was never any intent on MATL's part to expand the scope of the project or entertain changes in location or design. The allowance for permanent impacts and modifications to the route outside the approved corridor is unnecessary for our purposes, and we expressly confirm that there is no need for it in this amendment.
>
> MATL sees no nexus between the expanded study area proposed in the EA and MATL's Amendment request for clarification on the process for considering temporary wetland impacts. The proposal in the EA to expand the study area is inconsistent with the analysis conducted in both the MFSA process and MEPA/NEPA process, and MATL and its customers are unable to accept the risk of appeal and concomitant delays that this proposal could create at the state or federal level. Appellants' Exhibit 5.

29. In its comments, MATL also stated as follows:

> It is unclear to MATL how the process surrounding the EA arrived at a decision to allow alignment and study area revisions in only three locations while ignoring the countless requests made by other landowners for substantial alignment shifts that may ostensibly produce similar results in wetland avoidance or impact minimization. We are concerned that this appears arbitrary and could give rise to appeals. MATL did not seek this change, is unwilling to accept the liability this presents to the project, and feels it is a significant enough change to warrant call for much higher analysis and public engagement were it to be selected. We are concerned that this is an untenable solution to the amendment request due to procedural concerns, exposure to legal challenge, and implications on project schedule which would affect not only MATL's project financing, but the investment and financing arrangements of the wind farms relying on the completion of this project by a date certain before the Production Tax Credit eligibility expires. Appellants' Exhibit 5.

30. MATL attached to its comments a letter from the EPA dated September 2, 2010, clarifying EPA's position on impacts to wetlands. (DEQ-Exhibit E.) The EPA letter is dated September 8, 2010, and provides, in part, as follows:

> It has been a long standing requirement in the Section 404 permit program that no discharges to waters of the U.S., including wetlands, should be permitted if a practicable alternative exists that is less damaging to the environment. In order for a project to be permitted under Section 404, it must be demonstrated that all practicable steps have been taken to avoid and minimize impacts to aquatic resources, including wetlands, and then compensation should be committed to for aquatic impacts that cannot be avoided. The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. This is commonly referred to as the mitigation sequencing requirement of the Clean Water Act Section 404 regulatory program.

The EPA comments noted that MATL would have to comply with the Clean Water Act, including noting that MATL would have to determine that all "practicable" steps are taken to avoid and minimize impacts to wetlands; that there could be remaining unavoidable impacts to wetlands; and the company would then have to mitigate the remaining impacts through compensation in an effort to replace the functions and services lost in the unavoidable impacted wetlands. DEQ Exhibit E.

31. NaturEner submitted comments on the Draft EA by letter dated September 2, 2010, stating as follows:

> We are concerned that the adoption of the other alternatives as described in the draft Environmental Assessment could cause substantial delays to the construction of the MATL Line. We cannot emphasize enough the negative impact such delays in completion of the MATL Line could be (sic) have on the construction of NaturEner's wind generation project ("Project").
>
> NaturEner requires a construction period of approximately 12 to 18 months for the completion of the 3000 MW Project, and cannot begin construction of the Project until such time as there is certainty regarding the in-service date of the MATL Line. Production tax credits ("PTCs"), essential to the financial viability of wind generation projects, expire and are no longer available to wind generation projects that are not in commercial operation by December 31, 2012. If our project is not fully operational before that date, we cannot possibly finance and build the 309 MW wind farm contemplated to be interconnected to the MATL Line near Hay Lake, Montana.
>
> * * *
>
> As described in the draft Environmental Assessment, Alternatives 2 and 3 could cause substantial delay to MATL's construction, putting the construction of the wind farm, and thus the financial viability of the MATL Line in jeopardy, because NaturEner would not be able to construct a wind generation project to connect to it before the expiration of the availability of PTCs. Appellants' Exhibit 5.

32. The Department sent a copy of the Draft EA to affected landowners and made it available for public comment on the Department's website. (Testimony Ring, Transcript p. 219, lines 4-6.)

33. The Department issued a Final Environmental Assessment (Final EA) on September 22, 2010, in regard to MATL's application to amend the Certificate. (Appellants' Exhibit 5.)

34. The Final EA indicated that Alternative 1 would affect wetland soils during construction through compaction and disturbance and during placement and removal of timber matting. Revegatation may take more than five years in saline wetlands. Short and long-term impacts would be mitigated through development of

wetlands in other areas. (Appellants' Exhibit 5, Checklist – Geology and Soil Quality, Stability and Moisture.)

35. The Final EA indicated that under Alternative 1, construction in intermittent streams or wetlands with water present or nearby could increase the amount of sediment reaching state waters despite implementation of best management practices to control storm water runoff. A 318 authorization would be required. (Appellants' Exhibit 5, Checklist – Water Quality, Quantity and Distribution.)

36. The Final EA indicated that under Alternative 1, potential impacts to unique, endangered, fragile or limited environmental resources are described in the Final EIS. Only those species that rely on wetland habitat are potentially affected. Short and long-term impacts would be mitigated through development of wetlands in other areas. (Appellants' Exhibit 5, Checklist – Unique, Endangered, Fragile or Limited Environmental Resources.)

37. The Final EA indicated that under Alternative 1, construction in wetlands could affect recreation and aesthetics in and near the construction zone. The project is located in a rural area; wetlands are typically located in topographically low areas and these may be considered more natural-appearing in a landscape that has largely been cultivated. (Appellants' Exhibit 5, Checklist – Aesthetics.)

38. The Final EA indicated that under Alternative 1, allowing construction in wetlands could reduce the amount of fuel used to transport equipment around the wetland areas. Wetlands are limited in the area and this alternative would affect wetlands. (Appellants' Exhibit 5, Checklist – Demands on Environmental Resources of Land, Water, Air or Energy.)

39. There were changes made in Alternative 1 as it was described in the Final EA as compared to the Draft EA. In the Final EA, DEQ added the following conditions to Alterative 1:

A. Permanent guy wire and structure placement would be prohibited in wetlands.

B. MATL would be required to invite the landowners to any on-site field inspections identified by the Department to evaluate whether there is a reasonable alternative to temporary construction activity in a delineated wetland.

C. Upon completion of the field inspection, the Department's State Inspector, MATL and the landowner would each have 7 working days to make recommendations to the Department's director on whether there are any reasonable alternatives to temporary construction activity in a delineated wetland. The recommendations may consider but are not limited to the amount of vegetation and wildlife habitat that would be affected, land use, cultural resources, transportation, recreation, visual impacts, and the costs to avoid or otherwise mitigate wetland impacts. The director would make the final decision whether or not to allow temporary construction activity in a given wetland. Appellants' Exhibit 6.

40. The condition prohibiting the placement of both poles and guy wires in wetlands made Alternative 1 consistent with what MATL originally proposed in its application to amend the Certificate. (Testimony Ring, Transcript page 221. lines 12-14 and 18.) Inclusion of this condition on the proposed wetland amendment and alternatives as described in the Draft EA were not major changes and did not compromise the public's ability to comment.

41. The condition requiring landowners to be involved in the process of determining whether there is a reasonable alternative to temporary construction activity in a delineated wetland was added in response to public comment. (Testimony Ring, Transcript pp. 221-22, 224) Jerry McRae, one of the appellants in this appeal, was one member of the public that commented that landowners should be involved in the process. (Testimony Ring, Transcript p. 224, line 7-9.)

42. The condition providing that the Department's Director, rather than the State Inspector, determine whether there is a reasonable alternative to temporary construction activity in a delineated wetland was added in response to public comment. (Testimony Ring, pp. 221-22, 224.) Jerry McRae, one of the appellants in this appeal, was one member of the public that commented that the determination should be made by the Director of the Department. (Testimony Ring, p. 224, lines 7-9.)

43. The conditions requiring landowner involvement and providing for a determination by the Director of the Department are procedural and do not affect the substantive evaluation of potential impacts of the proposed amendment and alternatives set forth in the Draft EA. The provisions in the Final EA concerning the Director of the Department as opposed to an inspector do not represent a major change from the Draft EA and adoption of this provision did not compromise the Appellants' right to comment.

44. In addition to the three conditions previously discussed, there were other changes in Alternative 1 as it was described in the Final EA as compared to the Draft EA. (Testimony Ring, Transcript p. 154, line 25.) Most of these changes were either editorial, made in response to public comments, or were clean-up clarification language. (Testimony Ring, Transcript p. 244, lines 1-6) For example, the Draft EA stated that no construction disturbance would take place within a delineated wetland while the Final EA stated that no temporary construction activity would take place within a delineated wetland. The word "temporary" was added for clarity. (Testimony Ring, Transcript pp. 244-45) As another example, the Final EA provided specified periods of two and five years at which snapshots would be taken of affected wetlands to determine whether MATL should provide compensatory mitigation. This change provides clarity that was sought by a comment received from the EPA. (Testimony Ring, p. 246, lines 20-25.) As another example, the

Final EA proposes to amend two provisions of the Certificate that were not included in the Draft EA. Amendments of these two provisions concerning the total prohibition on any construction within 50 feet of a wetland, was inadvertently omitted in the Draft EA and without them, there would have been a discrepancy in the Amended Certificate. (Testimony Ring, p. 250, lines 10-13.) These additional changes did not represent major changes and did not compromise the public's ability to comment on the proposed wetland amendment and the alternatives described in the Draft EA.

45. On September 22, 2010, the Department issued a final decision regarding MATL's request to amend the Certificate.

46. In the final decision, the Department selected Alternative 1 with the following conditions:

A. Permanent guy wire and structure placement would be prohibited in wetlands;

B. MATL would be required to invite landowners to any on-site field inspections identified by DEQ to evaluate whether there is a reasonable alternative to temporary construction activity in a delineated wetland; and

C. Upon completion of the field inspection, DEQ's State Inspector, MATL and the landowner would each have 7 working days to make recommendations to the Department's director on whether there are any reasonable alternatives to temporary construction activity in a delineated wetland. The recommendations may consider but are not limited to the amount of vegetation and wildlife habitat that would be affected, land use, cultural resources, transportation, recreation, visual impacts, and the cost to avoid or otherwise mitigate wetland impacts. The director would make the final decision whether or not to allow temporary construction activity in a given wetland. Appellants' Exhibit 6.

47. In the final decision, the Department determined that while it could not determine definitively that there would or would not be a material increase in impacts to wetlands as a result of the Proposed Amendment, it determined there

would be no material or significant impact to wetlands applying Alternative 1 of the Final EA with the three conditions listed in Paragraph 46.

48. In the final decision, the Department concluded that Alternative 1, as conditioned by the Final EA, would not materially alter the findings that were the basis for granting the Amended Certificate. Temporary construction activity in wetlands would be avoided unless there is no reasonable alternative to such temporary construction activity. MATL has agreed to provide compensatory payments to a wetland bank for the creation of permanent wetlands to offset remaining impacts associated with its temporary construction activities conducted in wetlands. No transmission structures (poles or guy wires) would be located in delineated wetlands under any circumstance. Alternative 1 allows for a uniform approach to wetland impacts and mitigation and would be applicable to all landowners. Appellants' Exhibit 6.

49. In the final decision, the Department did not select Alternative 2. Additional environmental analysis would be needed due to increasing the width of the approved location in three areas. The delay associated with the additional environmental analysis could jeopardize funding of the transmission line and the development of a connecting wind farm. Appellants' Exhibit 6.

50. The Department determined that Alternative 1 is consistent with EPA's position. (Testimony Ring, Transcript p. 237, lines 11-25.)

51. The Department's final decision minimizes adverse impacts to wetlands, considering the state of available technology and the nature and economics of the various alternatives. (Testimony Ring, Transcript pp. 251 through 258.) Specifically, the adverse impacts (referenced in Appellants' Exhibit 6) are minimized as follows:

a. Permanent impacts to wetlands are avoided. No poles, guy wires or other permanent structures are allowed to be placed in wetlands. This provision directly reduces the impacts on landowners of property on which there are wetlands.

b. Temporary disturbance of wetlands is allowed only if there is no reasonable alternative. Reasonable alternatives to temporary disturbance of wetlands include "drive-arounds" under which small variations in the access routes needed for construction of the transmission line are made to avoid wetlands. (Ring, p. 133; James, pp. 296, 300) "Drive-arounds" may use the edge of a field, an existing road, a farm field road, or an existing two-track in rangeland. (Ring, p. 216, 253)

c. Reasonable alternatives to temporary disturbance of wetlands also include spanning the wetlands by the construction of bridges. (Ring, pp. 133; 217; James, pp. 297, 300) This provision directly reduces the impacts on the landowners of property on which there are wetlands.

d. The Department is required to involve the potentially affected landowner in determining whether there are reasonable alternatives to allowing temporary disturbance of wetlands. The Department is required to invite landowners to any field review conducted to evaluate whether there are reasonable alternatives to allowing temporary disturbance of wetlands. Landowners are allowed an opportunity to submit a recommendation to the Director of the Department who will ultimately decide whether there is a reasonable alternative to allowing the temporary disturbance of wetlands. (Testimony James, Transcript , p. 304, lines 19-25.) This provision directly reduces the impacts on the landowners of property on which there are wetlands.

e. If wetlands cannot be avoided, the wetlands may be "matted" with heavy timber mats to prevent excessive rutting in a wetland. (Testimony James, pp. 297, 300) A series of six, eight or ten-inch logs are attached to each to form a mat. The mat would be placed on saturated soils to form a temporary platform to support vehicles, avoiding the creation of ruts. (Testimony Ring, Transcript p. 217, lines5-14.)

f. The approved environmental protection measures attached to the Certificate as Attachment 1 remain in effect under the wetland amendment and are enforceable by the Department. (Testimony Ring, Transcript p. 197, line 19). Under the approved environmental protection measures, MATL prepared an erosion control plan to minimize erosion and sedimentation. MATL also submitted a Storm Water Pollution and Prevention Plan (SWPP) to the Department which contains measures such as the use of baffles and barriers to reduce and minimize the amount of sediment that would enter a stream or wetland. (Testimony James, Transcript p. 298, lines 2-8) The general purpose of a SWPP is to reduce or eliminate the amount of sediment eroding off construction sites and reaching waters of the State of Montana. (Testimony Ring, Transcript pp. 202, 254) The environmental protection measures directly reduce the impacts on the landowners of property on which there are wetlands.

g. The DEQ Environmental Protection Measures attached to the Certificate as Attachment 2 remain in effect under the wetland amendment and are enforceable by the Department. (Testimony Ring, Transcript, pp. 197-98) The Environmental Protection Measures include the following specifications.

(i) Specification 2.3.2. – In order to prevent rutting and excessive damage to vegetation, construction will not take place during periods of high soil moisture when construction vehicles will cause severe rutting.

(ii) Specification 2.7.8. – Any damage to existing private roads, including rutting, resulting from project construction or maintenance shall be repaired and restored to a condition as good or better than original as soon as possible unless otherwise specified by landowners during landowner negotiations. Repair and restoration of roads should be accomplished during and following construction as necessary to reduce erosion.

(iii) Specification 2.8.4. – Work crew foremen shall be qualified and experienced in the type of work being accomplished by the crew they are supervising. Earthmoving equipment shall be operated only by qualified, experienced personnel. Correction of environmental damage resulting from operation of equipment will be the responsibility of [MATL]. Repair of damage to a condition reasonably satisfactory to the LANDOWNER, managing agency, or if necessary, the Department, is required.

(iv) Specification 3.1.2. – Insofar as practical, all signs of temporary construction facilities such as haul roads, work areas, buildings foundations or temporary structures, soil stockpiles, excess or waste materials, or any other vestiges of construction shall be removed and the areas restored to as natural condition as practical, in consultation with the LANDOWNER.

(v) Specification 3.2.1. – Restoration, reclamation, and revegetation of the right-of-way, access roads, crane pads, splicing or stringing sites, borrow sites, gravel fill, stone, or aggregate excavation, or any other disturbance shall be in accordance with the reclamation and revegetation plan (Appendix K).

(vi) Specification 3.2.15. – All temporary roads shall be obliterated and reclaimed (with the concurrence of the LANDOWNER), as specified in Appendix M. All temporary roadways shall be graded and scarified as specified to permit the growth of vegetation and to discourage traffic. Permanent unsurfaced roadbeds not open to public use will be revegetated as soon after use as possible unless specified otherwise by the LANDOWNER.

(vii) Specification 3.3.2. – Failure of the OWNER to adequately reclaim all disturbed areas in accordance with Section 3.2 and ARM 17.20.1902(10) shall be cause for forfeiture of the reclamation BOND or penalties described in ARM 17.20.1902(10). Failure of the OWNER to achieve adequate revegetation of disturbed areas may be cause for forfeiture of the revegetation BOND or penalties described in Section 0.3.

Pursuant to Specification 3.3.2, MATL has submitted a reclamation and revegetation bond in the amount of $620,000 which may be used if MATL fails to satisfy its reclamation obligations. (Ring, p. 273; James, p. 325.)

These specifications minimize the impacts on landowners of property on which there are wetlands.

h. MATL is required to obtain a 318 authorization prior to conducting construction activity in intermittent streams and wetlands. (Testimony Ring, Transcript p. 138, lines 18-23.) A 318 authorization addresses turbidity of streams and wetlands and typically includes conditions that minimize impacts. (Testimony Ring, Transcript pp. 212, 252.)

i. Under the Department's final decision, MATL has agreed to provide compensatory mitigation for the wetland acreage affected by making a monetary contribution to a recognized wetland mitigation bank to offset impacts to wetlands. Compensatory mitigation as a result of temporary construction activity would be calculated at a rate of 0.2 acres for each acre of remaining wetland impact two years after construction. MATL has agreed to provide compensatory mitigation for wetland impacts remaining at the end of the five-year monitoring period of 1.5 acres of mitigation for each wetland acre impacted.

Through this wetland banking, wetlands would be developed generally in the area north of Great Falls, east of the Rocky Mountain Front, and west of Fort Benton. (Testimony Ring, Transcript p. 267, lines 18-22.) While minimizing wetlands impacts as a whole, although these provisions do not minimize the impacts on the landowners of property on which the affected wetlands are located, this is a common tool for reclamation supported by the U.S. Corp of Engineers. (Testimony James, Transcript, p. 300, lines 3-15.)

j. Under the Department's final decision, the mitigation that MATL has agreed to provide by making a monetary contribution to a recognized wetland bank does not relieve MATL of its reclamation and revegetation responsibility under Admin. R. Mont. 17.20.1902(10). (Testimony Ring, pp. 217-218.) Because the compensatory mitigation does not relieve MATL of its ultimate responsibility to reclaim all temporary disturbances of wetlands, a net gain in wetlands will probably be achieved. (Testimony James, Transcript p. 301, lines 16-17.) This provision minimized the impacts on landowners of property on which there are wetlands.

52. Appellants Maurer Farms, Somerfeld & Sons Land and Livestock, LLC and Jerry McRae each own land that is crossed by the approved MATL transmission line corridor. Katrina Martin does not own land crossed by the approved MATL transmission line corridor but owns land to its east. Mr. Maurer testified that his concern with the final decision on the EA was that pole placement for transmission line was bad because the ground is soft and muddy and you can make the ground a mess where you can get stuck and you can make big tracks that last a long time. Testimony Maurer, Transcript, page 38 Lines 5-7; lines 14-17; page 52, lines 12-21; page 55, lines 5-8. Mr. Maurer acknowledged that if there is a wetland, a pole may not be placed in it. Testimony Maurer, Transcript page 62, line 21. The prohibition on the placement of permanent guy wires and structures within wetlands addresses one of Mr. Maurer's concerns. Testimony Maurer, Transcript, page 71, line 3. Mr. Maurer expressed concern about the delineation of wetlands by MATL, whether land could be reclaimed within 5 years and whether land could be revegetated at all. Testimony Maurer, Transcript, pp. 337-339. Mr. Maurer did admit he did not hire a wetland specialist or an engineer and that there was he could not present any evidence that a pole could not be placed where proposed. Testimony Maurer, Transcript pp. 340-342. Mr. Maurer does not demonstrate by clear and convincing evidence that the Department's efforts to minimize impacts to the environment as referenced in Paragraph 51, were unreasonable.

53. As to the difference between what was presented to the public in the draft EA and what was finally approved, the draft EA did allow construction activities within a 50 foot buffer zone from wetlands under certain environmentally protective circumstances around a delineated stream and no placement of permanent structures within a delineated stream or wetland. Testimony Maurer, Transcript, page 67 lines 2-13, 19. The final EA addresses construction of permanent structure or guy wire placement by prohibiting them. In the Final EA, temporary construction activity in wetlands would be avoided unless there is no reasonable alternative to such construction activity.

54. Maurer Farms owns a number of parcels near Power, MT, across which the transmission line is to be constructed. (Appellants' Exhibit 1.)

55. Three delineated wetlands are on Maurer Farms property. Two of the wetlands are outside the construction corridor and would be avoided. The third wetland is a spring seep that would be crossed by the transmission line corridor. The wetland is somewhere between 20 and 40 feet in width and if it were matted, would result in 600 square feet of temporary impact. (Appellants' Exhibit 22, Testimony James, p. 306, lines 6-15.)

56. Pole 25/1 is located in an area that does not meet the definition of "wetland" used by MATL in its delineation of wetlands. (Testimony James, Transcript pp. 305-07, 314, 319, 321)

57. Pole 25/1 is located on the side of a hill approximately 20 feet higher than the bottom of a coulee. (Testimony James, Transcript pp. 329-331.)

58. Pole 25/1 is not located in an alkaline seep. Rather, Pole 25/1 is located in a field that has been cultivated within the last several years and

in an area that is frequently wet. (Appellants' Exhibit 22, Testimony James, p. 309, lines 12-14.)

59. The foundation for Pole 25/1 can be engineered so that the structure is stable in a wet condition. (Testimony James, Transcript p. 313, lines 20-22.)

60. The operation of heavy equipment across ground that is wet can cause rutting which Maurer has found to be difficult to reclaim. (Testimony Maurer, Transcript pp. 52, 59.)

61. In its construction of the transmission line in another area, a contractor for MATL operated equipment over wet ground adjacent to a delineated wetland. A crane became stuck in the wet ground and deep rutting resulted. (Testimony Ring, Transcript p. 150; Appellants' Exhibits 25 through 29.)

62. Creation of the deep ruts was a violation of the Certificate. (DEQ Exhibit F.) Enforcement of the Certificate is provided under Mont. Code Ann. § 75-20-408, which authorizes the Department to seek civil penalties for violations of the Certificate or the Amended Certificate.

63. MATL reclaimed the deep rutting within one week. (Testimony Jones, Transcript p. 279; DEQ Exhibit H.) The Department did not initiate an enforcement action against MATL based on MATL's adequate response when the violation was brought to its attention. (DEQ Exhibit F.) An enforcement action is available to the Appellants in the case that the Amended Certificate is violated.

64. Alternative 2 potentially could help to avoid wetlands on Maurer's property. (Testimony James, Transcript p. 160, lines 13-18.)

65. Ms. Leona Somerfeld testified that she is concerned about digging power lines on wetlands over wetlands. Testimony Somerfeld, Transcript page 89,

lines 9-11. She also is concerned about adherence to the construction prohibitions where pole placements are next to reservoirs or alkali flats. Id , page 90 lines 7-11; page 108, lines 23-24. A concern is that temporary construction activities would be allowed in a wetland and purchasing wetlands elsewhere wouldn't alleviate her concerns about her property. Id, page 91, lines 13-23; page 92, line 1. Ms. Somerfeld was not aware of the mitigation measures that the Department is requiring in order to avoid environmental impacts as it pertains to the wetland amendment (Amended Certificate) and therefore is not in a position to determine compliance with MFSA or to prove by clear and convincing evidence what is reasonable under Mont. Code Ann. § 75-20-219. Testimony Somerfeld, Transcript, page 107, line 18.

66. The Somerfelds operate a farm or ranch near Power, Montana. (Testimony Somerfeld, Transcript p. 78, line 18.) The Somerfelds own or lease a number of adjoining and disjointed parcels. (Appellants' Exhibit 3.) Between seven and eight miles of the transmission line is approved to cross the Somerfelds' property. (Testimony Somerfeld, Transcript p. 79, line 13.)

67. The approved transmission line corridor crosses some intermittent drainages on the Somerfeld property and poles are to be placed next to or near reservoirs, a stock well, springs, and alkali flats. (Testimony Somerfeld, Transcript pp. 83 through 90.)

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Mont. Code Ann. § 75-20-223(2). This section provides that a person aggrieved by the final decision of the Department on an application for an amendment of a certificate may within 15 days appeal the decision to the Board as provided by Mont. Code Ann. §§ 75-20-223(1)(b) and (1)(c).

2. The contested case hearing in this matter occurred on October 19, 2011 and November 9, 2011. The parties submitted post hearing findings of fact and conclusions of law on December 22, 2011. This hearing complied with the Montana Administrative Procedure Act, Mont. Code Ann. Title 2, chapter 4, Part 6 and the Attorney General's Model Rules Mont. Admin. R. 1.3.211 through 1.3.25.

3. Pursuant to Mont. Code Ann. § 75-20-219(3), the person requesting the hearing has the burden of showing by clear and convincing evidence that the Department's determination is not reasonable. "Reasonable" may be construed as whether the applicable statutory and rule requirements were followed when determining to allow amendment of the Certificate and when determining the conditions to be applied in the Amended Certificate.

4. Mont. Code. Ann. § 75-20-213 (1), requires that an application for an amendment to a certificate must be in the form and contain the information that the Department by rule or by order prescribes. Notice of an application to amend a certificate must be given as set forth in Mont. Code Ann. § 75-20-211(3) and (4). There was no issue raised by Appellants concerning this requirement.

5. Pursuant to Mont. Code Ann. § 75-20-223(1)(b), if the Department provided an opportunity for public comment on the application for the amendment, the request for hearing must be limited to those issues the party has raised during the comment period on the Draft EA [unless the issues are related to a material change in law made during the comment period, to a judicial decision issued after the comment period, or to a material change to the draft permit, which was submitted for public comment, made by the Department in the final permit decision and upon which the public did not have a meaningful opportunity to comment.] The bracketed language is not applicable here.

6. Mont. Code Ann. § 75-20-211(3), requires a copy of the notice of an application to amend a certificate to be attached to the application to amend a

certificate. Mont. Code Ann. § 75-20-211(4), requires an application to amend a certificate to be accompanied by proof that public notice of the application was given to persons residing in the county in which any portion of the proposed facility is located that would be affected by the proposed amendment. There was no issued raised by the Appellants concerning this requirement. The Board finds, based on the record, that all of the Appellants received notice of the amendment application and draft EA; submitted comments in response to the draft EA; and that the Department specifically responded to each Appellants' comments in the final EA Appellants' Exhibit 5. Accordingly, the public participation requirements of MFSA have been satisfied here.

7. To the extent that the Appellants argue that the MEPA public participation principles prohibit modifications in final agency decisions, they are incorrect. MEPA, like MFSA, expressly allows alternatives to be modified between a draft and a final. See for example, Admin. R. Mont. 17.4.610:

> ...
>
> (6) The agency shall consider the substantive comments received in response to an EA and proceed in accordance with one of the following steps, as appropriate:
>
> (a) determine that an EIS is necessary;
>
> (b) determine that the EA did not adequately reflect the issues raised by the proposed action and issue a revise d document; or
>
> (c) determine that an EIS is not necessary and make a final decision on the proposed action, **with appropriate modification resulting from the analysis in the EA and analysis of public comment**.

8. The Appellants argue that in its Final EA, the Department chose a modified version of Alternative 1 from the Draft EA that had not been sent out for public comment and that this modified version significantly changed the conditions. The conditions to Alternative 1 in the Final EA were minor changes from the

initially noticed provisions and are therefore acceptable. See Russell Country Sportsmen v. U. S. Forest Service, 2011 U.S. App. LEXIS 20666 (9th Cir. Mont. October 12, 2011).

9. Specifically, Maurer Farms, the Somerfelds, McRae and Martin submitted comments on the Draft EA for the wetland amendment, which was appropriately noticed to them thereby satisfying the opportunity for public comment contemplated under Mont. Code Ann. § 75-20-223(1)(b). The three conditions imposed by the Department in the Final EA and other changes made by the Department between the Draft and Final EA did not substantially change the nature of the proposed amendment or alternatives so as to negate the opportunity for submission of meaningful public comment. The Department incorporated public comment about landowner participation into the Final EA.

10. In considering the proposed amendment to the Certificate, the Department is required to determine whether the proposed change in the facility would result in a material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility as set forth in the Certificate. If the Department determines the proposed change would result in a material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility, the Department is required to grant, deny, or modify the amendment with conditions as it considers appropriate. Mont. Code Ann. § 75-20-219(1).

11. If the Department determines the proposed change in the facility would not result in a material increase in any environmental impact or would not be a substantial change in the location of all or a portion of the facility, the Department is required to automatically grant the amendment either as applied for or upon terms or conditions that the Department considers appropriate. Mont. Code Ann.§ 75-20-

219(2). This provision does not apply to this case and the Department did not automatically grant the amendment.

12. In order for the Department to determine that an amendment to a certificate should be granted or modified, it is required to determine that the amendment will not materially alter the findings required by the decision standards set forth in subchapter 16 of Title 17, chapter 20 of the Administrative Rules of Montana that were the basis for granting the certificate. In making this finding, the Department is required to limit itself to consideration of the effects that the proposed change or addition to the facility contained in the notice for the certificate amendment may produce. See Admin. R. Mont. 17.20.1804.

13. The findings required by the decision standards are set forth in Mont. Code Ann. § 75-20-301, which reads in pertinent part:

> (1) Within 30 days after issuance of the report pursuant to 75-20-216 for facilities defined in 75-20-104(8)(a) and (8)(b), the department shall approve a facility as proposed or as modified or an alternative to a proposed facility if the department finds and determines:
>
> (a) the basis of the need for the facility;
>
> (b) **the nature of the probable environmental impact;**
>
> (c) that the facility **minimizes adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives;**
>
> ....
>
> (3) Within 30 days after issuance of the report pursuant to 75-20-216 for a facility defined in 75-20-104(8)(c), the department shall approve a facility as proposed or as modified or an alternative to a proposed facility if the department finds and determines:
>
> **(a) that the facility or alternative incorporates all reasonable, cost-effective mitigation of significant environmental impacts; and**
>
> **(b) that unmitigated impacts, including those that cannot be reasonably quantified or valued in monetary terms, will not result in:**

(i) a violation of a law or standard that protects the environment; or

(ii) a violation of a law or standard that protects the public health and safety. (Emphasis supplied)

14. Therefore, Mont. Code Ann. § 75-20-301, like Mont. Code Ann. § 75-20-219, does not prohibit the fact that may be environmental impacts. Rather, it recognizes that there may be environmental impacts; that they should be minimized through mitigation; and that the resulting impact should not violate any law or standard designed to protect the environment or public health and safety.

15. The Department's approval of the wetland amendment (Amended Certificate) does not alter its finding in the Final EIS prepared in association with the decision to issue the original Certificate that construction and operation of the transmission line as authorized in the Certificate would minimize adverse environmental impacts. The provisions of the Certificate as amended by the wetland amendment (Amended Certificate) that minimize adverse impacts to wetlands are set forth in Paragraph 51. The record and testimony also show that the Department required extensive mitigation to minimize or eliminate environmental impacts, as part of the avoidance, minimization, and mitigation scheme. Measures intended to minimize or eliminate environmental impacts include: MATL's Environmental Protection Measures and the Department's Environmental Specifications, both attached to the 2008 Certificate (DEQ -A); compensatory mitigation with payments into a wetland bank for temporary wetland disturbance for the creation of a permanent wetland to offset disturbances of wetlands; (Testimony Ring, Transcript, p. 218, Appellant's Exhibit 4) and the reclamation and restoration measures for all lands disturbed, as set forth in the Department's regulations. (Testimony Ring, Transcript, pp. 206 and 218.) See also, Mont. Admin. R. 17.20.1902 pertaining to reclamation requirements.

16. The Department properly exercised its authority under Mont. Code Ann. § 75-20-219(1) and (2) to include conditions in its approval of an amendment application when it included the conditions: 1) prohibiting the placement of permanent guy wires and structures in wetlands, 2) requiring landowners to be invited to field inspections to determine whether there are any reasonable alternatives to temporary construction in wetlands; and 3) providing that the Director of the Department would determine whether there are any reasonable alternatives to temporary construction in wetlands based on recommendations of the State Inspector, MATL and the landowner.

17. The Appellants have not demonstrated by clear and convincing evidence that the Department's September 22, 2010, granting of the amendment to the Certificate was not reasonable. The evidence demonstrates that the Department followed all of the requirements of Mont. Code Ann. §§ 75-20-219; 75-20-223, 75-20-301 and Admin. R. Mont. 17.20.1804 and that its action are reasonable.

18. The Appellants assert that the Department could not have made the same finding in the Final EA associated with the Amended Certificate as the Final EIS associated with the Certificate because the Amended Certificate "would materially alter the underlying environmental analysis for the project." The wetlands amendment would not materially alter the findings, since in the Amended Certificate there was also a finding of sufficient mitigation measures (even though construction in wetlands was allowed) to minimize adverse environmental impacts considering the state of available technology and the nature and economics of the various alternatives. See Admin. R. Mont. 17.20.1804.

PROPOSED ORDER

For the above reasons, it is recommended that the Board find that the Department acted reasonably in issuing the Amended Certificate on September 22,

2010, and the Amended Certificate was correctly issued and is valid and enforceable.

NOTICE AND OPPORTUNITY TO BE HEARD

Pursuant to Mont. Code Ann. § 2-4-621, these Proposed Findings of Fact, Conclusions of Law and Proposed Order may be challenged by a party that deems these proposed Finding of Fact, Conclusions of Law and Proposed Order contrary to its interests. Any party adversely affected may file exceptions and present briefs and submit oral arguments to the Board prior to the Board meeting in which it issues its decision to affirm, correct or reject the Proposed Findings of Fact, Conclusions of Law and Proposed Order. The schedule for filing exceptions shall be as follows:

1. The Appellant shall indicate in writing by January 31, 2012, whether it intends to file exceptions.

2. Exceptions may be filed by the Appellant by February 14, 2012.

3. Exceptions may be filed by the Department and MATL by February 27, 2012. Any exceptions and oral argument will be presented to the Board at its regularly scheduled March 23, 2012, Board meeting when the Board will consider adoption of the Proposed Findings of Fact, Conclusions of Law and Proposed Order.

The filing of exceptions may be a necessary step if judicial review is sought. See In the Matter of Change Application No. 41s-30013940 by T Lazy T Ranch, Inc. v. Department of Natural Resources and Conservation, 2009 MT 306 N, 2009 Mont. LEXIS 456. (Sept. 15, 2099).

DATED this 30th day of January, 2012.

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Proposed Findings of Fact and Conclusions of Law and Order to be mailed to:

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

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

Ms. Hertha L. Lund
Lund Law, PLLC
502 South 19th, Ste. 102
Bozeman, MT 59718

Mr. David K.W. Wilson, Jr.
Morrison, Motl and Sherwood
401 North Last Chance Gulch
Helena, MT 59601

Mr. Alan L. Joscelyn
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, MT 59624-1715

DATED: January 20, 2012

ATTACHMENT A

Departme of Environmental Quality Appeal H ing
Maurer Farms, Inc.; Somerfeld Sons Land Livestock, LLC, Jerry McRae; and Katrina Martin

Appellant's		
Exhibit	**Description**	**Date Admitted**
1	GIS Base Map, Figure 10	10/19/2011
3	GIS Base Map, Figure 4,5,6,7	10/19/2011
4	Draft Environmental Assessment, August 24, 2010	10/19/2011
6	Final Decision on Amendment, September 22, 2010	10/19/2011
10	Comment letter from Bruce Maurer, August 17, 2010	10/19/2011
11	Comment letter from Bruce Maurer, August 29, 2010	10/19/2011
13	Comment letter from David and Leona Somerfield, August 30, 2010	10/19/2011
20	Wetlands and Floodplains, Final Environmental Impact Study on Wetlands, Chapter 3, with maps attached	10/19/2011
22	Map, wetland Delineation Detail, located near 25/1-26/2	10/19/2011
23	Map, wetland Delineation Detail, located near 33/4-33/5	10/19/2011
24	3 Maps, Wetland Delineation Detail, located near 10/4-10/5, 12/4-12/6 and 13/3-13/4	10/19/2011
25	Photograph of Crane	10/19/2011
26	Photograph of Crane	10/19/2011
27	Photograph of Crane	10/19/2011
28	Photograph of Crane	10/19/2011
29	Photograph of Crane	10/19/2011
Appellant's		
5	Environmental assessment, September 22, 2010	10/19/2011
Department of Environmental Quality		
A	Findings Necessary for Certification and Certification Determination, October 22, 2008	11/9/2011
E	Application to Amend Certificate of Compliance, Received August 11, 2010	11/9/2011
F	Letter to J.C. van't Hof from Richard Opper, November 22, 2010	11/9/2011
H	Memorandum, October 22, 2010, Re MATL Field Inspection, October 21, 2010	11/9/2011
MATL		
1	Drawing, 230 kv Transmission Line, Great Falls Sub to Marias Sub 24/4-25/4	11/9/2011

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **THE APPEAL AND REQUEST FOR HEARING BY MAURER FARMS, INC.; SOMERFELD & SONS LAND & LIVESTOCK, LLC; LARRY SALOIS, POA; JERRY MCRAE; AND KATRINA MARTIN REGARDING THE DEQ'S FINAL DECISION TO AMEND THE MATL'S CERTIFICATE OF COMPLIANCE.**	**CASE NO. BER 2010-16 MFS**

ADOPTION OF PROPOSED DECISION AS FINAL ORDER

A contested case hearing in this matter was conducted before Hearing Examiner Katherine J. Orr on October 19, 2011 and on November 9, 2011. The Appellants, Maurer Farms, Inc., Somerfeld & SonsLand & Livestock, LLC, Jerry McRae and Katrina Martin (Appellants) appeared through Counsel, Ms. Hertha Lund. The Department of Environmental Quality (Department) appeared through Counsel, Mr. Edward Hayes, and Intervenor and Respondent, Montana Alberta Tie, LTD and MATL, LLP (MATL) appeared through Counsel, Mr. David K.W. Wilson.

After considering the evidence and exhibits introduced at the contested case hearing, Hearing Examiner Orr issued a proposed decision on January 20, 2012, captioned "Proposed Findings of Fact, Conclusions of Law and Order." Hearing Examiner Orr determined that the Department acted reasonably in issuing the Amended Certificate on September 22, 2010, and that the Amended Certificate was correctly issued and is valid and enforceable. The proposed decision contained a notice that any party

adversely affected by the proposed decision could file exceptions and present briefs and submit oral arguments to the Board of Environmental Review (Board) prior to the Board meeting in which it issues its decision to affirm, correct or rejected the proposed decision. The notice required the Appellants to file exceptions by February 14, 2012, and the Department and MATL to file exceptions by February 27, 2012. Finally, the notice indicated that the filing of exceptions may be a necessary step if judicial review is sought. Exceptions to the proposed decision were not filed by any party.

Pursuant to ARM 1.3.223, adopted an incorporated by the Department and the Board in ARM 17.4.101, the Board adopts the proposed decision as the Board's final order. The Proposed Findings of Fact, Conclusions of Law and Order are hereby incorporated by reference as if fully set forth in this final order.

Dated this ____ day of March, 2012.

JOSEPH W. RUSSELL
Chairman
Board of Environmental Review

Notice: You may be entitled to judicial review of this Order in accordance with Section 2-4-702, MCA. Judicial review may be obtained by filing a petition in district court within thirty days after the service of this Order.

CERTIFICATE OF SERVICE

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

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

Ms. Hertha Lund
Lund Law, PLLC
502 South 19th, Ste. 102
Bozeman, MT 59718

Mr. David K.W. Wilson, Jr.
Morrison, Motl and Sherwood
401 North Last Chance Gulch
Helena, MT 59601

Mr. Alan L. Joscelyn
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, MT 59624-1715

DATED: _____ _____

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE OPENCUT MINING ACT BY DEER LODGE ASPHALT, INC. AT THE OLSEN PIT, POWELL COUNTY, MONTANA [FID #1998, DOCKET NO. OC-11-02]	**CASE NO. BER 2011-02 OC**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The contested case hearing in this matter was conducted on September 19, 2011. Deer Lodge Asphalt, the Appellant, appeared through Counsel, Mr. Karl Knuchel, and the Department of Environmental Quality (Department) appeared through Counsel, Ms. Jane B. Amdahl. Appellant, Deer Lodge Asphalt, called one witness; Mr. Bruce Anderson, owner of Deer Lodge Asphalt. The Department called Mr. Frank Gessaman, Bureau Chief for Case Management of the Department's Enforcement Division.

The Department's Exhibits DEQ-B through DEQ-H; Exhibits DEQ-K through DEQ-N and DEQ-P were offered by the Department and they were admitted by the Hearing Examiner. DEQ Exhibit A, the Notice of Violation and Administrative Compliance and Penalty Order (Notice of Violation) is deemed a part of the record and is called DEQ-A. A list itemizing each Department Exhibit is attached as Attachment A. The Appellant did not offer any exhibits. An Agreed Statement of Facts and Conclusions of Law (Agreed Statement) was filed by the Parties on August 15, 2011. The portion of the Agreed Statement containing "Facts Which are Not in Dispute" is incorporated into this proposed Order in the section below entitled, "Uncontested Facts."

After the hearing on September 19, 2011, the parties filed post-hearing briefs on October 6, 2011 (Appellant), the Department (October 11, 2011) and on October 13, 2011 (the Department).

UNCONTESTED FACTS

1. The Department of Environmental Quality (Department) is an agency of the executive branch of government of the State of Montana, and is authorized to administer the Opencut Mining Act, Title 82, chapter 4, part 4, MCA, and its implementing rules found at ARM title 17, chapter 24, subchapter 2.

2. Deer Lodge Asphalt, Inc. ("Deer Lodge Asphalt") is a corporation registered to do business in the State of Montana.

3. Mr. Bruce Anderson is, and at all times has been, a principal of Deer Lodge Asphalt and its predecessor in interest, Deer Lodge Aggregate.

4. On May 6, 1993, the Department received from Deer Lodge Asphalt an application to obtain a permit (known at the time as a "contract") to mine gravel on property located in Township 8 North, Range 9 West, Section 27 in Powell County, Montana, now referred to as the Olsen Pit.

5. DEQ Exhibit B is a true and correct copy of the Application for Mined Land Reclamation Contract form that Deer Lodge Asphalt (which was called Deer Lodge Aggregate at the time) submitted to the Department on May 6, 1993.

6. In 1993 Deer Lodge Asphalt was already conducting an opencut operation and removing gravel from the Olsen Pit.

7. On May 12, 1993, the Department responded to Deer Lodge Asphalt's permit application with a letter stating that the application was not acceptable as submitted, and stating that Deer Lodge Asphalt needed to submit a different map. It also stated that the reclamation costs would be higher than Deer Lodge Asphalt's prior calculation, and directed Deer Lodge Asphalt to sign the enclosed Plan of Operation that the Department had prepared for Deer Lodge Asphalt, and submit

additional bond (the amount not stated in that letter) and a map before the Department would be able to issue a contract (permit) to Deer Lodge Asphalt.

8. DEQ Exhibit C is a true and correct copy of the letter sent by the Department to Deer Lodge Asphalt on May 12, 1993.

9. The Department did not issue a permit to Deer Lodge Asphalt for the Olsen Pit at that time.

10. In or about 1995, Deer Lodge Asphalt submitted to the Department a new signed Plan of Operation for the Olsen Pit, listing Deer Lodge Aggregate (Deer Lodge Asphalt's predecessor in interest) as operator.

11. DEQ Exhibit D is a true and correct copy of the Plan of Operation submitted in or about 1995.

12. On or about November 7, 1996, Deer Lodge Asphalt submitted to the Department a hand-drawn map of the Olsen Pit opencut operation.

13. DEQ Exhibit E is a true and correct copy of the hand-drawn map submitted to the Department in or about November 7, 1996.

14. On or about December 17, 1996, the Department sent a letter to Deer Lodge Asphalt with an enclosed map drafted from the hand-drawn map (Exhibit E) and a revised Plan of Operation for the Olsen Pit, along with instructions to sign one of the copies of the Plan and return it to the Department, and a note that "As soon as we [the Department] receive the signed plan we should be able to issue the contract."

15. DEQ Exhibit F is a true and correct copy of the December 17, 1996, letter sent by the Department to Deer Lodge Asphalt.

16. The Department does not have a signed copy of a permit application submitted in response to the December 17, 1996, letter.

17. The Department did not issue a permit to Deer Lodge Asphalt for the Olsen Pit at that time.

18. On March 22, 2005, Department reclamation Specialist Jo Stephen inspected the Olsen Pit.

19. DEQ Exhibit P is a true and correct copy of Ms. Stephen's Opencut Mining Field Report, memorializing what she noted during her inspection of the Olsen Pit on March 22, 2005.

20. In the Spring of 2008, at the request of Department Reclamation Specialist Jo Stephen, a Montana Tech class in Butte prepared a permit application for Deer Lodge Asphalt's Olsen Pit as a class project.

21. Deer Lodge Asphalt did not sign and submit the permit application prepared by the Montana Tech class to the Department.

22. On February 24, 2009, Department Reclamation Specialist James "JJ" Conner inspected the Olsen Pit.

23. DEQ Exhibit K is a true and correct copy of Mr. Conner's Opencut Mining Field Report, which summarizes what Mr. Conner observed at the Olsen Pit and what he told Mr. Bruce Anderson of Deer Lodge Asphalt on February 24, 2009.

24. DEQ Exhibits K-2 through K-5 are true and accurate photographs of the various portions of the Olsen Pit opencut operation on February 24, 2009, that they purport to depict.

25. On February 24, 2009, Deer Lodge Asphalt had an asphalt plant located at the Olsen Pit.

26. On February 24, 2009, other heavy equipment, including a truck and a backhoe were present at the Olsen Pit.

27. On February 24, 2009, Mr. Anderson stated to Mr. Conner that he planned to rip the site and reseed, but would leave the highwall along the east side of the pond open for future use.

28. On July 2, 2009, Deer Lodge Asphalt submitted a signed permit application to the Department for the Olsen Pit, listing itself as the operator.

29. DEQ Exhibit G is a true and correct copy of the Application for Opencut Mining Permit form that Deer Lodge Asphalt submitted to the Department on July 2, 2009, with its other application materials, except for the slash mark drawn across the page and the note stating "Revised Received 2/24/11," which were added later by the Department.

30. On August 10, 2009, Mr. Conner again inspected the Olsen Pit.

31. DEQ Exhibit L is a true and correct copy of Mr. Conner's Opencut Mining Field Report, which summarizes what Mr. Conner observed at the Olsen Pit and what he told Mr. Bruce Anderson of Deer Lodge Asphalt on August 10, 2009.

32. DEQ Exhibits L-1 through L-8 are true and accurate photographs of the various portions of the Olsen Pit opencut operation on August 10, 2009, that they purport to depict.

33. On August 10, 2009, at least one truck was present at the Olsen Pit.

34. On August 10, 2009, an asphalt plant was present at the Olsen Pit.

35. On August 10, 2009, evidence that a petroleum product had been spilled onto a gravel surface near the asphalt plant was present at the Olsen Pit.

36. On August 10, 2009, stockpiles of soils and materials were present at the Olsen Pit.

37. On November 16, 2009, the Department sent Deer Lodge Asphalt a Deficiency Letter listing 16 deficiencies with the July 2, 2009, application.

38. DEQ Exhibit M is a true and correct copy of that November 16, 2009, Deficiency Letter.

39. On August 18, 2010, the Department sent a Violation Letter by Certified Mail, return receipt, to Deer Lodge Asphalt.

40. The August 18, 2010, Violation Letter was received by Deer Lodge Asphalt and signed for by Mr. Bruce Anderson on August 25, 2010.

41. DEQ Exhibit N is a true and correct copy of the August 25, 2010, Violation Letter and certified mail "green card" receipt.

42. On February 23, 2011, the Department received corrected documents from Deer Lodge Asphalt to correct the deficiencies in its permit application identified in the November 16, 2009, Deficiency Letter.

43. DEQ Exhibit H is a true and correct copy of the corrected documents that Deer Lodge Asphalt submitted to the Department on February 23, 2011.

44. The asphalt hot plant at the Olsen Pit was being operated "a few weeks of the year" as of February 23, 2011.

45. On February 23, 2011, gravel stockpiles for Powell County and Deer Lodge Asphalt were located within the proposed permit area of the Olsen Pit.

46. On February 23, 2011, an asphalt plant and weigh scale were located within the proposed permit boundary at the Olsen Pit.

47. Deer Lodge Asphalt does not expect to finally reclaim the Olsen Pit until August 2031.

48. The Department issued an opencut mining permit to Deer Lodge Asphalt on March 30, 2011.

49. Between August 2009 and October 2009, Deer Lodge Asphalt processed between 40 and 50 yards of contaminated soil through its asphalt plant as part of an operation to clean up spilled petroleum product by its asphalt plant.

50. After removing the 40 to 50 yards of contaminated soil from the area around the asphalt plant, Deer Lodge Asphalt transported crushed gravel that had been mined from the Olsen Pit to fill the area where the contaminated soil had been.

51. A total of more than 10,000 cubic yards of material and overburden had been removed from the Olsen Pit prior to February 9, 2009.

52. A total bond of $21,238 was required for the Olsen Pit, $2,000 of which Deer Lodge Asphalt submitted to the Department in 1993, and the remainder of which Deer Lodge Asphalt submitted to the Department in July 2009.

53. The Department erred in calculating an economic benefit based on the delayed cost for a $215,000 bond.

54. If any economic benefit is to be considered in a penalty calculation, it should be based on a savings to Deer Lodge Asphalt by delaying the cost of submitting the $19,238 portion of the bond until it was submitted on July 2, 2009.

55. Deer Lodge Asphalt maintained an asphalt plant and weigh scale at the Olsen Pit for the entire time between February 9, 2009, and the present.

56. Deer Lodge Asphalt has stored at least one stockpile of its own material at the Olsen Pit from a date prior to February 9, 2009, until the present.

57. Deer Lodge Asphalt mixed asphalt for the City of Deer Lodge and Powell County on at least eight days between after February 9, 2009, and March 30, 2011.

58. Deer Lodge Asphalt, or its predecessor in interest, Deer Lodge Aggregate, has been the operator of the Olsen Pit since the spring of 1990.

59. Deer Lodge Asphalt has allowed the Powell County Road Department to store on site from a date before February 9, 2009, to the present, one or more stockpiles of materials that had been mined from the Olsen Pit.

60. Deer Lodge Asphalt has conducted reclamation activities between February 9, 2009, and March 30, 2011.

SUMMARY OF PARTIES' CONTENTIONS

1. The Department's contentions are contained in part in the Notice of Violation issued on February 9, 2011. The Notice of Violation states that Deer Lodge Asphalt violated Mont. Code Ann. § 82-4-431 by conducting an opencut

mining operation on 14.7 acres without a valid permit. The Department contends that Deer Lodge Asphalt is an operator within the meaning of Mont. Code Ann. § 82-4-403, that it never did obtain an opencut permit from 1993 to March 20, 2011, and 10,000 cubic yards or more of materials and overburden were removed from the site prior to February 9, 2009, thereby triggering the permit requirement in Mont. Code Ann. § 82-4-431. The opencut operations Deer Lodge Asphalt engaged in included operating an asphalt plant at the Olsen Pit, storing or stockpiling materials at the Olsen Pit, transporting materials from a stockpile on site to a location at the mine site for processing materials and reclamation. Finally, the Department contends the $19,000 penalty is appropriate under the penalty calculation conducted by the Department.

2. The Appellant contends that the penalty assessed by the Department against the Appellant of $1,000.00 per day for 19 days is unwarranted and excessive because the Department failed to show which days the non-permitted opencut mining operations occurred during the time period of February 9, 2009, to March 30, 2011, or that the primary purpose of the opencut mining operations was for utilization or sale of the materials by the Appellant. Deer Lodge Asphalt further argues that Deer Lodge Asphalt did not stockpile or store the mined materials, rather it put the materials in a pile but did not use the materials and therefore there was no opencut operation from the time the materials were put in a pile. Additionally, the Appellant contends he was confused as to whether he had an opencut mining permit by the Department's activities. There was very little activity post 2009 according to the Appellant.

FINDINGS OF FACT

1. This contested case arises from the issuance of a Notice of Violation issued by the Department through Mr. John L. Arrigo, Administrator, Enforcement Division of the Department of Environmental Quality, on February 9, 2011. The

Notice of Violation contends Deer Lodge Asphalt conducted opencut operations at the Olson Pit without a permit and it seeks penalties pursuant to Mont. Code Ann. § 82-4-441.

2. The factual questions to be resolved as to liability for violations conducted under the Opencut Mining Act are whether Deer Lodge Asphalt conducted opencut mining operations defined in Mont. Code Ann. § 82-4-403(7) during the critical time frame from February 9, 2009, to February 9, 2011, without a permit. Since there is a two-year statute of limitations prior to the issuance of the Notice of Violation which was issued on February 9, 2011, the look back period for assessing penalties and evaluating violations to February 9, 2009.

3. The parties have agreed in # 51 of the Agreed Statement that a total of more than 10,000 cubic yards of material and overburden were removed from the Olsen Pit at the Deer Lodge Asphalt property prior to February 9, 2009. The parties also agree that no permit was issued for the Olsen Pit until March 30, 2011. Agreed Statement # 48.

4. Mr. Anderson, the owner of Deer Lodge Asphalt, testified that he had some confusion about whether he ever was issued a permit from the Department for the opencut mining activities at Deer Lodge Asphalt. Testimony Anderson, Transcript p. 54, line 14, page 55 line 6. Despite the long period in which the Department did not communicate with Mr. Anderson about not having a permit, Testimony, Anderson, Transcript, page 69, lines 10-23, he testified that he knew by 1996 that he didn't have a permit, and that then again in 2005 and/or 2006 that he did not have a permit. Testimony Anderson, Transcript, page 68, lines 22-25. Mr. Anderson never signed a permit application prior to 2009. Agreed Statement # 16, # 21. Mr. Anderson understood he had to reapply for an opencut mining permit as of 2006 when Ms. Jo Stephen, a reclamation specialist with the Department informed Mr. Anderson that the Department did not have record of a permit and the

process of getting a permit should start over. Testimony, Anderson, Transcript p. 70, lines 15-18. Mr. Anderson testified that he has no memory of having received a permit. Testimony Anderson, Transcript, p. 71, line 3. Mr. Anderson applied for and received a permit on March 30, 2011. Agreed Statement # 48. The Department did not have a permit in its files. Mr. Anderson knew this from 2006 on. He reapplied for a permit and posted the correct bond of $21,096 in July 2009. Mr. Anderson received a deficiency letter regarding the permit application on November 16, 2009. Agreed Statement # 28. See DEQ Exhibit M. From these facts, it may be inferred that Mr. Anderson never had a valid permit for opencut mining operations at the Olsen Pit with the correctly posted bond entitling him to a permit until March 20, 2011, after the critical time in question. Despite some confusion about how and whether a permit was being issued, there was no basis for confusion from 2006 on. It was Mr. Anderson's sole responsibility to apply for and operate with a permit.

5. Deer Lodge Asphalt has engaged in or controlled an opencut operation Olsen Pit from the early 1990's to the present and is therefore an operator pursuant to Mont. Code Ann. § 82-4-403. Agreed Statement #'s 3, 6, 58.

6. The opencut operations that occurred between February 9, 2009, and February 9, 2011, were operation of an asphalt plant located at the Olsen Pit Agreed Statement # 25, # 34, # 44, # 57, storing or stockpiling of materials at the Olsen Pit, Agreed Statement # 36, # 45, # 56; processing of materials, Agreed Statement # 49, # 50, processing of contaminated soil through the asphalt plant as part of an operation to clean up spilled petroleum between August 2009 and October 2009, Agreed Statement # 49, transporting crushed gravel that had been mined from the Olsen Pit to fill the area where the contaminated soil had been after the contaminated soil was removed, Agreed Statement # 50, # 60. There was reclamation of the pond area and the use of gravel for processing of the asphalt. See

also, Testimony Anderson, Transcript pages 49 (stockpiling gravel), 50 (running an asphalt plant), 53 (running a crushing operation), 64-66 (reclaiming the pond and increasing the slopes 3 to 1 and topsoiling the site), 67 (using the materials from the stockpile to run the asphalt plant) and 68 (using the stockpiled materials for use or sale). These activities were by description of the activity and the testimony conducted for "use" by Deer Lodge Asphalt in the mining or reclamation or for "sale" of materials.

7. An inspection of the Olsen Pit was conducted on August 10, 2009, by Mr. J. J. Conner of the Department. See Exhibit DEQ-L, with attached photographs that demonstrate the asphalt plant and a stockpile of were in existence.

8. Mr. J. J. Conner, issued a Violation Letter on August 18, 2010, for Mining without a permit. Exhibit DEQ-N.

9. The Department issued an opencut mining permit to Deer Lodge Asphalt on March 30, 2011. Agreed Statement # 48.

10. From testimony put on the record by Mr. Anderson, Deer Lodge Asphalt, during the critical period, processed asphalt for eight days, transported stockpiled gravel for less than a day in a remediation effort, reclaimed land at the pond for two and one-half days, used materials from the stockpile for eight days while processing the asphalt, for a violation total of 19.5 days during the time frame of February 9, 2009, through February 9, 2011. Moreover, according to Agreed Statement # 44, the asphalt plant was run "a few weeks of the year" prior to February 23, 2011. The total number of days of opencut mining operations in the critical time period, not even counting the continuous stockpiling of mined materials for use or sale is at least 19.5 days. Testimony Anderson, Transcript, pages 66, lines 18-25, 67 lines 1-25, 68, lines 2-5. See also, Agreed Statement # 56 in which it is stated that Deer Lodge Asphalt stored at least one stockpile of its own at the Olsen Pit from February 9, 2009, to the present. The stored stockpile was for use or sale

by Deer Lodge asphalt up to the present according to Mr. Anderson. Testimony Anderson, Transcript 68, line 5.

11. Mr. Gessaman testified and was not cross-examined as to the opencut operations that occurred during the time in question. These were, according to him, site preparation, including surveying, setting of markers, stripping of topsoil, the preparation of roads to haul material in and out, removal of material, mining of material for the ground and the transportation of material to and from stockpiles and away, the stockpiling of material and reclamation of the Olsen Pit. Testimony Gessaman, Transcript, page 41, lines 5-14 and page 42, lines 20-21. These facts are in large part confirmed by Mr. Anderson.

12. As far as the penalties sought by the Department in the Notice of Violation and the attached worksheet containing a calculation of penalties, the Department put on testimony of Mr. Frank Gessaman, the Bureau Chief for Case Management within the Enforcement Division of the Department. He testified that Mont. Code Ann. § 82-4-1001 contains the factors for determining penalties and Mont. Admin. R. 17.4.301 through 17.4.308 govern the assessment of penalties for violations of the Opencut Mining Act. An administrative penalty may be assessed for violations of Mont. Code Ann. § 82-4-431, amounting to $100 to $1,000 for each day that a violation occurs. See Mont. Code Ann. § 82-4-441(2).

13. The base penalty was determined by first classifying the nature of the violation, specifically whether it either is a violation that causes potential or actual harm to the environment or human health or constitutes an impairment of the ability of the Department to do its job. The Department determined that there was a potential for harm to the environment or to human health because the without a permit it was unknown whether opencut mining would be conducted in compliance with state law, whether impacts to the environment or human health would be mitigated. Also mining without a permit would result in a potential elimination of

public input and if there were not an adequate bond posted, resources may not be available to reclaim the disturbance. Gessaman Testimony, Transcript, page 22, lines 2-12. See Worksheet attached to the Notice of Violation, page 1. The gravity of the violation was designated as major because operating without a permit is deemed "major gravity" pursuant to Mont. Admin. R. 17.4.305(5)(a). The base penalty is deemed to be $850.00. Gessaman Testimony, Transcript, page 22, lines 15-25, page 23.

14. The base penalty adjusted by circumstances, good faith and amounts voluntarily expended was calculated to be $1,020.00, but the maximum penalty is $1,000.00. Deer Lodge Asphalt did not expend any more money to return to compliance than what was required so it was not deemed to have "voluntarily expended" any amount. Deer Lodge Asphalt did not get any adjustment downward of the penalty due to good faith and cooperation because it did not self-report its violations.

15. The Department calculates violation days based on "guidance" employed by the Department when its not always possible to determine the actual number of days that the violation has occurred. The "guidance" correlates amount of disturbance in acreage to number of days of violation. Thus according to the Department guidance, there would be five days of violations associated with the first acre of disturbance and 14 days for the remaining 13.7 acres for a total of $19,000. Testimony Franklin Gessaman, Transcript, Page 28, lines 6 through 17. It was Mr. Gessaman's testimony that Deer Lodge Asphalt operated for a full two years or 730 days without a permit, to collect a penalty for 730 days would be very large and the Department has instead determined to collect a penalty based on 19 days of violation based upon acres or disturbed land, Testimony Gessaman, Transcript, page 28, lines 6-17.

16. The Appellant objects to the characterization that Deer Lodge Asphalt conducted opencut operations during the entire time of 730 days. Appellant Post Hearing Brief, page 3. It is true that the Department could not testify as to how many acres of land were disturbed during the period not barred by the statute of limitation, February 9, 2009, to February 9, 2011. Testimony Gessaman, Transcript, page 37, lines 16-17. Notwithstanding this, from the factual record, see Finding of Fact Numbered 10, there are at least 19 days of actual opencut operation without a permit.

17. Since the guidance the Department is relying on to determine days of violation has not been promulgated as a rule, and the guidance meets the definition of a rule under Mont. Code Ann. § 2-4-102(11)(a), the guidance may not be applied to the calculation of penalties. The statute, Mont. Code Ann. § 82-4-441(2)(b) directs that a penalty be based on days upon which a violation occurs not disturbed land.

18. There were no facts to give rise to application of the "other matters as justice may require" referenced in Mont. Code Ann. § 82-4-1001(1)(g) and Mont. Admin. R. 17.4.308. Testimony Gessaman, page 31, lines 19 -24.

19. The economic benefit is the category where the Department captures any economic gain that the violator may have realized from not complying with the law. In this case there is no economic benefit and the $8,600.00 of economic benefit that would have increased the penalty to $26,700.00 that was contained in the penalty calculation sheet attached to the Notice of Violation does not apply. The total penalty the Department is seeking is $19,000.00. Testimony Gessaman, pages 32 and 33. This amount is appropriate given the facts and application of the penalty factors.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 82-4-422(2)(c) and 82-4-441(5)(b).

2. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Mont. Code Ann. § 2-15-3501. The Department is authorized under Mont. Code Ann. § 82-4-441 to issue a Notice of Violation and Administrative Compliance Penalty Order to address violations of the Opencut Mining Act, Mont. Code Ann. §§ 82-4-401 through 82-4-446, (the Act), and of applicable rules promulgated under the Act such as Mont. Admin. R. 17.24.201, 17.24.202 and 17.24.225.

3. Mont. Code Ann. § 82-4-431 (1) provides that an operator may not conduct an opencut operation that results in the removal of a total of 10,000 cubic yards or more of materials and overburden until the Department has issued a permit to the operator. Mont. Admin. R. 17.24.225 (1) requires that "[a]n operator shall comply with the provisions of its permit, this subchapter and the Act." Mont. Admin. R. 17.24.225 (3) states that "a person who conducts opencut operations at a non-permitted site and who was obligated to obtain a permit is in violation of Mont. Code Ann. § 82-4-431..." The Appellant had not been issued a permit from the Department before or during the critical time in question, for the purposes of this contested case, of February 9, 2009, to February 9, 2011. In sum, Mr. Anderson and Deer Lodge Asphalt conducted opencut operations on an unpermitted site, the Olsen Pit, during the time in question.

4. Deer Lodge Asphalt is a corporation and therefore is a "person" within the meaning of Mont. Code Ann. § 82-4-403(1)). An operator under Mont. Code. Ann. § 82-4-403(8) means a person engaged in or controlling an opencut operation. As the Findings of Fact indicate, from February 9, 2009, to

February 9, 2011, Deer Lodge Asphalt, engaged in or controlled an opencut operation at the Olson Pit and therefore is an "operator" within the meaning of Mont. Code Ann. § 82-4-403(8).

5. The definition of an "opencut operation" is contained in Mont. Code Ann. § 82-4-403 and Admin. R. Mont. 17.24.202 with a similar definition to the statutory definition. An opencut operation means the following activities if they are conducted for the primary purpose of sale or utilization of materials:

> (a) ...
> (c) processing of materials within the area that is to be minded or contiguous to the area that is to be mined or the access road.
> (d) transportation of materials on areas [where the mining, mining site preparation or processing of materials takes place].
> (e) the storing or stockpiling of materials on areas referred to [where the mining, mining site preparation or processing of materials takes place].
> (f) reclamation of affected land; and
> (g) any other associated surface or subsurface activity conducted on areas referred to [where the mining, mining site preparation or processing of materials takes place]. Mont. Code Ann. § 82-4-403(7).

Findings of Fact numbered 4 through 11 establish that the Appellant engaged in the opencut operations during the critical time in question for the purposes of use or sale of processing materials, transporting of materials, and storing or stockpiling materials for the use or sale of Deer Lodge Asphalt. The definition of opencut operations as it pertains to storage or stockpiling of materials may be interpreted to refer to the placement of materials in a pile if placed in a pile for use or sale.

6. The statute of limitations on assessing penalties for violations committed by the Appellant under the Opencut Mining Act is two years. Mont. Code Ann. §§ 27-2-211(1)(a) and 27-2-103. Violations occurring between February 9, 2009, and February 9, 2011, are the only violations that may be considered for the purposes of assessment of penalties in this case. The Findings of Fact numbered 4 through 11 indicate that opencut operations were conducted for 19.5 days between February 9, 2009, to February 9, 2011, on an unpermitted site and therefore were violations of the Act. While proof of the exact days of opencut

violations is definitive as to when the opencut operations occurred, if the testimony of the owner and operator is that the opencut violations occurred over a total number of 19 days, this is sufficient to prove days of violation pursuant to Mont. Code Ann. § 82-4-441.

7. Mont. Code Ann. §§ 82-4-441 and 82-4-1001 and Mont. Admin. R. 17.4.301 through 17.4.308 govern the assessment of penalties for violations of the Opencut Mining Act. Pursuant to Mont. Code Ann. § 82-4-441(2), the Department may assess an administrative penalty of not less than $100.00 nor more than $1,000.00 for each violation of the Opencut Mining Act and an additional penalty for each day during which a violation occurs. The Department's "guidance" was not noticed or promulgated by rule and is not enforceable against the Appellant. Mont. Code Ann. §§ 2-4-102(11) and 2-4-302. See Northwest Airlines, Inc. v. State Tax Appeal Board, 221Mont. 441, 720 P.2d 676 (1986).

8. The Department's assessment of $19,000.00 of penalties is correct because the testimony shows there were 19 actual days of violations during the critical time in question.

PROPOSED ORDER

For the above reasons it is recommended that the Board in its final order require that Deer Lodge Asphalt pay an administrative penalty of $19,000.00 to the Department within six months of the date of issuance of the order for violation of Mont. Code. Ann. § 82-4-431(1).

NOTICE OF OPPORTUNITY TO BE HEARD

Pursuant to Mont. Code. Ann. § 2-4-621, these Findings of Fact and Conclusions of Law and Proposed Order ("Order") may be challenged by a party that deems the Order contrary to its interests. Any party adversely affected may file exceptions and present briefs and submit oral arguments to the Board prior to the

Board's issuing its decision to affirm, correct or reject the Order. The schedule for filing exceptions shall be as follows:

(1) The Appellant shall indicate by January 9, 2012, whether it intends to file exceptions

(2) Exceptions may be filed by the Appellant by January 25, 2012.

(3) A response may be filed by the Department by February 13, 2012.

Any exceptions and oral argument will be presented to the Board at its regularly scheduled March 23, 2012, Board meeting when the Board will consider adoption of the Proposed Findings of Fact and Conclusions of Law.

DATED this 4th day of January, 2012.

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Proposed Findings of Fact and Conclusions of Law to be mailed to:

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

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

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

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

DATED: January 4, 2012

ATTACHMENT A

DEER LODGE ASPHALT
SEPTEMBER 19, 2011

Department Exhibits	Description	Agreed Statement of Facts and Conclusions of Law	Date Admitted
A	Notice of Violation and Penalties, February 9, 2011		9/19/2011 Page 18 # 5 Part of the Pleading
B	Application for Mined Land Reclamation Contract, May 1, 1993	# 5	9/19/2011
C	Letter to: Mr. Bruce Anderson, from Jerry Burke, Reclamation Specialist, Re: Pending Opencut Reclamation Contract, May 12, 1993	# 8	9/19/2011
D	Plan of Operation Including the Mining and Reclamation Plan, Deer Lodge Aggregate-Olsen Site, signed by Bruce Anderson, January 6, 1995	# 11	9/19/2011
E	Hand drawn map sent to the Department by Deer Lodge Asphalt on November 7, 1996	# 13	9/19/2011
F	Letter to: Mr. Bruce Anderson, from Jerry Burke, Reclamation Specialist, Re: Pending Opencut Reclamation Application-Olsen Site, December 17, 1996	# 15	9/19/2011
G	Application for Opencut Mining Permit, Bruce Anderson, June 30, 2009	# 29	9/19/2011
H	Letter: To DEQ Opencut Mining Program, Application packet for the Olsen Pit Site, Chris Laity, Great West Engineering, February 23, 2011	# 43	9/19/2011
K	Opencut Mining Field Report, Deer Lodge Aggregate, Olsen Pit, J. J. Conner, February 24, 2009	# 23, 24	9/19/2011
L	Opencut Mining Field Report, Deer Lodge Asphalt, Olsen Pit, J. J. Conner, August 10, 2009	# 31, 32	9/19/2011

DEER LODGE ASPHALT
SEPTEMBER 19, 2011

Department Exhibits	Description	Agreed Statement of Facts and Conclusions of Law	Date Admitted
M	Letter: To Deer Lodge Asphalt, Inc., from JJ Conner, Re: Deficiency Notice, Application for Opencut Mining, Olsen Pit, Powell County, November 16, 2009	# 38	9/19/2011
N	Letter: To Deer Lodge Asphalt, Inc., from JJ Conner, Re: Violation(s) of Opencut Mining Act, Olsen Site, Permit # 1874, Powell County, Montana, Section 27, Township 8N, Range 9W, August 18, 2010	# 41	9/19/2011
P	Opencut Mining Field Report, Deer Lodge Aggregate, Olson Site, Jo Stephens, March 22, 2005	# 19	9/19/2011

Jane B. Amdahl
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901
(406) 444-5690

Attorney for the Department

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF VIOLATIONS OF THE OPENCUT MINING ACT BY DEER LODGE ASPHALT, INC. AT THE OLSEN PIT, POWELL COUNTY, MONTANA [FID #1998, DOCKET NO. OC-11-02]	Case No. 2011-02 OC **THE DEPARTMENT'S CLARIFICATION OF TESTIMONY AND EXCEPTION REGARDING NOTICE**

The Montana Department of Environmental Quality ("Department"), by counsel, respectfully would like to clarify the testimony of Franklin Gessaman, as referred to in Finding of Fact No. 11 on page 12 of the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law, and also to provide notice of the consequences of not filing exceptions.

a. Clarification of the Testimony of Franklin Gessaman.

In Finding of Fact No. 11 on page 12 of the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law, the Hearing Examiner stated:

> Mr. Gessaman testified . . . as to the opencut operations that occurred during the time in question. There were, according to him, site preparation, including surveying, setting of markers, stripping of topsoil, the preparation of roads to haul material in and out, removal of material, mining of material for the ground and the transportation of material to and from stockpiles and away, the stockpiling of material and reclamation of the Olsen Pit.

The Hearing Examiner correctly noted that Mr. Gessaman was not cross-examined about this testimony. However, it appears that Mr. Gessaman's testimony, as laid out in the transcript,

appears to state something that was not intended. The Department wishes to clarify that, although ultimately it makes no difference in the final outcome of the case.

Specifically, the Department does NOT allege that that Deer lodge Asphalt, Inc. conducted every one of the activities described in the quoted language during the two years (730 days) prior to the date the Department issued the administrative order at issue in this case. A review of the transcript reveals that Mr. Gessaman was describing the sort of activities that "would" occur in an opencut operation in the two-year statute of limitations period. (Transcript, p. 42, lines 12-14.) Counsel for the Department attempted to clarify in her statements from page 41, line 17 through page 42, line 12 of the Transcript that, of the activities that Mr. Gessaman stated "would" constitute an opencut operation that would be subject to penalties if conducted during the 730-day statute of limitations, it was the storing of materials on site for Deer Lodge Asphalt's own subsequent use or sale that the Department alleged Deer Lodge Asphalt carried out during that full 730 days prior to the date of the Order.

In other words, the Department does not claim that Deer Lodge Asphalt conducted every one of the referenced activities during the 730 days, or that Deer Lodge Asphalt conducted any of the activities listed under the definition of "opencut operation" (except storing materials) on every day of the 730. There were various days when some of those activities were carried out (e.g., transporting materials across the Site; operating the asphalt plant; working on reclamation), but the only activity that constitutes "opencut operations" in MCA 82-4-403(7) that took place over all 730 days was storing materials for Deer Lodge Asphalt's own later utilization or sale. But one activity is enough to incur liability for all of the 730 days it continued.

b. Exception Regarding Notice.

Pursuant to the opinion of the Supreme Court of Montana set forth in *In the Matter of Change Application No. 41s-30013940 by T Lazy T Ranch, Inc. v. Department of Natural*

Resources and Conservation, 2009 MT 306N[1], 2009 Mont. LEXIS 456, the Department takes exception to the fact that, although the Hearing Examiner's document entitled "Proposed Findings of Fact and Conclusions of Law" appropriately gives the parties notice of the right to file exceptions, that document does not advise the parties that filing exceptions is a necessary step before a party may seek judicial review in the District Court of an adverse Final Order. A copy of the *T Lazy T* opinion is attached hereto as Exhibit A. To avoid potential problems later, the Petitioner is hereby given notice that filing exceptions to the Proposed Findings of Fact and Conclusions of Law is necessary if Petitioner intends to challenge any adverse ruling in District Court.

CONCLUSION

WHEREFORE, the Department requests that in any Final Order, Finding of Fact No. 11 be clarified as described above. The Department also hereby gives notice to the Petitioner that filing exceptions is a necessary step before it may seek judicial review of the Final Order in this case.

Respectfully submitted this 9th day of January, 2012.

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: Jane B. Amdahl
Jane B. Amdahl
Attorney for the Department

[1] Although this opinion was not designated for publication, it potentially could have implications for any ruling that a hearing examiner recommends to the Board of Environmental Review. Accordingly, and in an abundance of caution, the Department believes it appropriate to raise this issue as soon as possible to avoid problems in the event the Petitioner seeks to appeal the ruling.

Certificate of Service

I hereby certify that on the 9th day of January, 2012, I mailed a true and correct copy of the foregoing Department's Clarification of Testimony and Exception Regarding Notice, postage prepaid, to the following:

Karl Knuchel
P.O. Box 953
Livingston, MT 59047

I further certify that on the same date I sent a copy of the same document, by Interdepartmental Mail Service to:

Katherine Orr
DOJ – ALC – Ninth Ave.

Jane B. Amdahl

*2009 MT 306N, *; 2009 Mont. LEXIS 456, **

IN THE MATTER OF CHANGE APPLICATION NO. 41S-30013940 BY T LAZY T RANCH, INC., Petitioner and Appellee, v. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Respondent and Appellant.

DA 09-0009

SUPREME COURT OF MONTANA

2009 MT 306N; 2009 Mont. LEXIS 456

July 8, 2009, Submitted on Briefs
September 15, 2009, Decided

NOTICE: PURSUANT TO THE APPLICABLE MONTANA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

SUBSEQUENT HISTORY: Reported at Change Application v. DNRC, 2009 Mont. LEXIS 604 (Mont., Sept. 15, 2009)

PRIOR HISTORY: [1]**
APPEAL FROM: District Court of the Tenth Judicial District, In and For the County of Judith Basin, Cause No. DV 08-12. Honorable Wm. Nels Swandal, Presiding Judge.

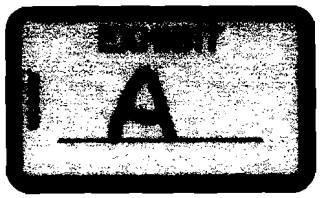
CORE TERMS: judicial review, final order, administrative remedies, notice, notice provision, misleading, non-moving, remanding, equitable, permissive, exhaust

COUNSEL: For Appellant: Kevin R. Peterson and Candace F. West, Department of Natural Resources & Conservation, Helena, Montana.

For Appellee: John R. Christensen, Ragain, Christensen, Fulton & Filz, Billings, Montana.

JUDGES: JOHN WARNER. We Concur: JAMES C. NELSON, PATRICIA O. COTTER, W. WILLIAM LEAPHART, BRIAN MORRIS. Justice John Warner delivered the Opinion of the Court.

OPINION BY: John Warner



OPINION

Justice John Warner - delivered the Opinion of the Court.

[*P2] The Montana Department of Natural Resources and Conservation (DNRC) appeals from an order of the Tenth Judicial District Court, Judith Basin County, denying its motion to dismiss the petition for judicial review of T Lazy T Ranch, Inc. (T Lazy T).

[*P3] T Lazy T applied to DNRC for a change in its existing water rights pursuant to § 85-2-402, MCA. After consideration, DNRC issued a Proposal for Decision, pursuant to § 2-4-621, MCA, which recommended denial of T Lazy T's application. T Lazy T did not file exceptions to the Proposal for Decision. Thus, DNRC entered a Final Order in which it fully adopted its Proposal **[**2]** for Decision, resulting in denial of the application.

[*P4] The Proposal for Decision advised T Lazy T that, "Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument." DNRC's Final Order stated:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act . . . . A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order (Mont. Code Ann. § 2-4-702).

[*P5] T Lazy T petitioned the District Court for review of the Final Order of DNRC. DNRC moved the District Court to dismiss the petition for lack of subject matter jurisdiction, arguing that because T Lazy T did not file exceptions to the Proposal for Decision it did not exhaust its **administrative** remedies, and therefore the District Court did not have jurisdiction to hear the matter.

[*P6] In response to the **motion to dismiss,** T Lazy T conceded that it did not file exceptions to the Proposal for Decision, and argued **[**3]** that it would be inequitable to deny judicial review of DNRC's Final Order because the notices did not clearly state that filing exceptions to the Proposal for Decision was required in order to seek judicial review of the Final Order.

[*P7] The District Court concluded after a hearing that the notice provision concerning the availability of judicial review was misleading because it did not clearly inform T Lazy T that filing exceptions is a requirement to judicial review. The District Court's reasoning hinged on the fact that the permissive "may" is used in the notice contained in the Proposal for Decision.

[*P8] The District Court denied DNRC's **motion to dismiss,** and remanded to DNRC with the instruction to reopen the case giving T Lazy T 30 days to file any exceptions to the Proposal for Decision.

[*P9] On appeal, DNRC claims the District Court erred in concluding that the notice provision in the Final Order was misleading and in remanding the case back to the agency. According to DNRC, the necessity of exhausting **administrative** remedies is a major underpinning of **administrative** law and T Lazy T should have known it had to file exceptions to the Proposal for Decision. DNRC further contends that remanding **[**4]** the matter to the DNRC and allowing T Lazy T to file exceptions to the Proposal for Decision is "nonexistent discretionary equitable relief." In addition, DNRC asserts that the District Court erred in not dismissing T Lazy T's petition because it was insufficient under § 2-4-702(2)(b), MCA.

[*P10] The question of whether a district court properly granted a **motion to dismiss** is a

conclusion of law which we review to determine if the court's interpretation and application of the law is correct. A **motion to dismiss** should be construed in a light most favorable to the non-moving party and should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief. *Public Lands Access Ass'n, Inc. v. Jones*, 2008 MT 12, P 9, 341 Mont. 111, 176 P.3d 1005.

[*P11] Leaving aside the question whether the failure to exhaust **administrative** remedies deprives a district court of "jurisdiction," that is, authority to rule on the matter before it, we agree with the District Court that neither the permissive language in the Proposal for Decision's notice concerning filing exceptions, nor the language in the Final Order regarding **[**5]** judicial review, clearly informed T Lazy T that filing exceptions to the Proposal for Decision is a necessary step before seeking judicial review.

[*P12] We further agree with the District Court that an expeditious and equitable remedy is to remand to the DNRC with instructions to allow T Lazy T to file exceptions to the Proposal for Decision.

[*P13] No further action is required on the present petition for judicial review. We need not discuss DNRC's contention that T Lazy T's petition does not meet the requirements of § 2-4-702 (2)(b), MCA.

[*P14] Affirmed.

/s/ JOHN WARNER

We Concur:

/s/ JAMES C. NELSON

/s/ PATRICIA O. COTTER

/s/ W. WILLIAM LEAPHART

/s/ BRIAN MORRIS

Source: **Montana > Find Cases > MT State Cases, Combined**
Terms: **administrative w/100 "motion to dismiss"** (Suggest Terms for My Search | Feedback on Your Search)
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* Signal Legend:
- Warning: Negative treatment is indicated
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- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

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Claudia L. Massman
Special Assistant Attorney General
Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901
(406) 444-4222

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	**CASE NO. BER 2011-22 WQ**
THE REQUEST FOR HEARING	)	
BY FRANK GRUBER, BROADWATER	)	
ESTATES, REGARDING DEQ'S	)	**NOTICE OF DISMISSAL AND**
DENIAL OF PERMIT	)	**STIPULATION TO DISMISS**
MODIFICATIONS TO THEIR	)	**WITHOUT PREJUDICE**
GROUNDWATER PERMIT	)	
NO. MTX000157	)	

Pursuant to M.R.Civ.P. Rule 41(a), Broadwater Estates Subdivision 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 the Appeal is attached.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: Claudia Massman Date: 1/31/12

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

BROADWATER DEVELOPMENT, LLC

BY: Frank Gruber Date: 1/30/12

FRANK GRUBER, Owner
3049 Old Broadwater Lane
Helena, Montana 59604
(406) 443-0518

CERTIFICATE OF SERVICE

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

Mr. Frank Gruber, Owner
3049 Old Broadwater Lane
Helena, MT 59604

Ms. Katherine Orr, Hearing Examiner (via state deadhead mail)
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

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

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

Ms. Jenny Chambers, Bureau Chief
Water Protection Bureau
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

DATED: Feb. 2, 2012

Misty Gable

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	**CASE NO. BER 2011-22 WQ**
THE REQUEST FOR HEARING	)	
BY FRANK GRUBER, BROADWATER	)	
ESTATES, REGARDING DEQ'S	)	**ORDER DISMISSING**
DENIAL OF PERMIT	)	**APPEAL**
MODIFICATIONS TO THEIR	)	
GROUNDWATER PERMIT	)	
NO. MTX000157	)	

Pursuant to Broadwater Estates Subdivision and the Montana Department of Environmental Quality's Notice of Dismissal and Stipulation to Dismiss Without Prejudice, filed with the Board of Environmental Review on February 2, 2012;

IT IS HEREBY ORDERED that the above captioned appeal is hereby dismissed without prejudice.

DATED this ____ day of_____, 2012.

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

cc: Claudia L. Massman, DEQ Attorney
Frank Gruber, Owner of Broadwater Estates

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

Thomas P. Gauger
Emerald Hills Development Company
5440 River Rd.
Laurel, MT 59044
(406) 652-8988
Petitioner

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 #2084; DOCKET NO. OC-11-09)	STIPULATION TO DISMISS Case No. BER 2011-25 OC

Petitioner Emerald Hills Development Company and the Department of Environmental Quality, by counsel, hereby inform the Board of Environmental Review that the parties have resolved their differences and hereby stipulate to dismiss the above-captioned contested case with prejudice pursuant to Montana Rule of Civil Procedure 41(a). A copy of the Administrative Order on Consent by which this matter was settled is attached hereto as Exhibit A. Each party to bear its own costs, including attorney fees.

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IT IS SO STIPULATED:

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: Jane E. Amdahl Date: 2/1/12
Jane B. Amdahl, Attorney for the Department

EMERALD HILLS DEVELOPMENT COMPANY

By: Thomas P Gauger Date: 1-31-12
Thomas P. Gauger, Director

Certificate of Service

I hereby certify that on the 1st day of February, 2012, I sent a true and correct copy of the above Stipulation to Dismiss to Katherine Orr, Hearing Examiner, through inter-departmental mail.

Jane B. Amdahl

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 (PERMIT NO. 21; FID NO. 2084)	ADMINISTRATIVE ORDER ON CONSENT 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 violation of the Opencut Mining Act (the Act), Title 82, chapter 4, part 4, MCA, and the Administrative Rules of Montana (ARM) adopted thereunder. This Administrative Order on Consent (Consent Order) hereby replaces the December 6, 2011 Notice of Violation and Administrative Compliance and Penalty Order.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department hereby makes the following Finding 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, Title 82, chapter 4, part 4, MCA.

3. The Department is authorized under Section 82-4-441, MCA, to issue this Consent Order to Emerald Hills to address 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/or assess penalties for the alleged violations.

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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.

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

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

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

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

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

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

a. Mining activities occurred on approximately 0.2 acres outside of the permitted boundary;

b. There was no 10-foot buffer between the highwalls and unstripped soil;

c. Soil was being lost into drainages on the Site;

d. Stockpiled soils were not protected;

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e. Asphalt was being stored on site without Emerald Hills submitting an Asphalt and Concrete Recycling form or updating the bond; and

f. Emerald Hills was not following the approved Plan.

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

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

13. As of January 10, 2012, the Department has not approved Amendment 2.

Conducting opencut operations in a non-permitted area

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

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

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

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

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

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

Failure to protect stockpiled soils

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

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

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

23. 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, thereby mixing gravel into the soil and contaminating it.

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

Failure to maintain required 10-foot buffer

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

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

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

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

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

Failure to mark permit boundary, failure to keep materials out of drainages, and unapproved storage of asphalt

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

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

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

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

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

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

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

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

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

III. ADMINISTRATIVE ORDER ON CONSENT

This Consent Order is issued to Emerald Hills 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 ORDERS and Emerald Hills AGREES to take the following actions:

39. Emerald Hills shall comply with the provisions of the Permit, as amended, and the Plan.

40. Emerald Hills shall sign a Stipulation to Dismiss Case No. BER 2011-25 OC, which is currently pending before the Board of Environmental Review.

41. Within 90 days from the effective date of this Consent Order, Emerald Hills shall submit to the Department revised application materials that correct the deficiencies identified in the July 2011 Deficiency Letter, including remitting an adequate bond for the permitted area, and complete the corrective actions identified in the July 2011 Deficiency Letter. A copy of the July 2011 Deficiency Letter is attached and incorporated by reference herein.

42. All documents required by this Consent Oder shall be sent to the address listed in Paragraph 44.

43. Emerald Hills is hereby assessed an administrative penalty in the amount of $4,210 for the violations cited herein.

44. Within 60 days from the effective date of this Consent Order, Emerald Hills shall pay to the Department an administrative penalty in the amount of $4,210 to resolve the violations cited herein. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and shall be sent to:

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

IV. CONSENT TO ADMINISTRATIVE ORDER

45. Emerald Hills waives its right to administrative appeal or judicial review of the Findings of Fact and Conclusions of Law and Administrative Order on Consent set forth herein and agrees that this Consent Order is the final and binding resolution of the issues raised.

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

47. The terms of this Consent Order constitute the entire agreement between the Department and Emerald Hills with respect to the issues addressed herein notwithstanding any other oral or written agreements and understandings made and entered into between the Department and Emerald Hills prior to the effective date of this Consent Order.

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

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

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

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

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

IT IS SO ORDERED:

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

JOHN L. ARRIGO, Administrator
Enforcement Division

2/1/12
Date

IT IS SO AGREED:

EMERALD HILLS
DEVELOPMENT COMPANY

Thomas P. Gauger, Director

1-31-12
Date

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.mcpx.

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.mcpx.

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

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 #2084; DOCKET NO. OC-11-09)	Case No. BER 2011-25 OC **DISMISSAL ORDER**

The parties have filed a Stipulation pursuant to Rule 41(a), M.R.Civ.P., stating that the parties have settled their differences and agree that this matter should be dismissed with prejudice. As provided in the parties' Stipulation and for good cause appearing:

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

DATED this _____ day of _____, 2012.

BOARD OF ENVIRONMENTAL REVIEW

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

Jane B. Amdahl
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901

Thomas P. Gauger
Emerald Hills Development Company
5440 river road
Laurel, MT 59044

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: February 28, 2012

SUBJECT: Board of Environmental Review case, Case No. BER 2012-02 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT BY WESTMORELAND RESOURCES, INC. AT THE ABSALOKA MINE, BIG HORN COUNTY, MONTANA. [FID #2115, DOCKET NO. SM-12-01]	Case No. BER 2012-02 SM

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2115, Docket No. SM-12-01).

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 2012-02 SM

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 27th day of February 2012
at ____ o'clock ____ .m.
By: Mary Cobb

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT BY WESTMORELAND RESOURCES, INC. AT THE ABSALOKA MINE, BIG HORN COUNTY, MONTANA. (FID #2115)	REQUEST FOR HEARING PURSUANT TO MONT. CODE ANN. § 82-4-254(3) Docket No. SM-12-01

Westmoreland Resources, Inc. ("Westmoreland") respectfully requests a hearing pursuant to Mont. Code Ann. § 82-4-254(3) regarding the Notice of Violation and Administrative Penalty ("Order") issued by the State of Montana Department of Environmental Quality ("DEQ") dated January 30, 2012. Westmoreland received the Order by mail after it was mailed January 30, 2012. This Request is being filed within 30 days of service of the Order.

Westmoreland requests a hearing for the following reasons:

1. Westmoreland conducted all well monitoring activities according to the revised monitoring schedule in the 2009-2010 Annual Hydrology Report that was submitted to DEQ;
2. When Westmoreland informed DEQ that the revised monitoring schedule had been implemented and was told to discontinue use of the revised monitoring schedule, it did so immediately;
3. The single incident of failure to monitor wells is insignificant considering the wealth of past data collected regarding the wells at issue;
4. Westmoreland submitted a Letter of Mitigating Circumstances that corrected factual errors contained in the NON and provided additional information. A true and correct copy of the Letter of Mitigating Circumstances is attached as Exhibit A; and
5. Since the NOV does not reflect the information provided in the Letter of Mitigating Circumstances, the administrative penalty assessed is improper.

DATED this 24th day of February, 2012.

MOULTON BELLINGHAM PC

By: _____

W. ANDERSON FORSYTHE
BRANDON JT HOSKINS
Suite 1900 Crowne Plaza
PO Box 2559
Billings, MT 59103-2559

4834-6627-3550, v. 1

WESTMORELAND RESOURCES, INC.

Post Office Box 449, Hardin, Montana 59034 (406) 342-5241 Fax (406) 342-5401

12/12/2011 **Certified No. 91 7108 2133 3936 9597 4675**

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

Permit ID: C1985005
Revision Type: **N/A**
Permitting Action: Response
Subject: **Noncompliance No: 11-05-01 – Order of Abatement**

Dear Mr. Coleman,

This letter is in response to paragraph (7) of the Notice of Noncompliance and Order of Abatement (NON 11-05-01) sent by the Department on November 21, 2011.

On May 29, 2007, Westmoreland Resources, Inc. (WRI) submitted to the Department a Minor Revision (MR 07-05-04) to Surface Mine Permit C1985005. MR 07-05-04 requested, among other things, that the monitoring schedule be removed from the permit and thereafter include the monitoring schedule in the Annual Hydrology Report.

The purpose of moving the monitoring schedule from the Surface Mine Permit to the Annual Hydrology Report was so that a minor revision is not necessary for each deletion, addition, or modification to each and every monitoring site. In discussion with WRI, it was clear that MDEQ was in an agreement with this idea and the Department approved MR 07-05-04 on October 12, 2007.

Since the monitoring schedule has been moved to the Annual Hydrology Report, approximately 35 wells have been added, removed or had monitoring frequencies changed without a minor revision between 2006 and 2010 (Please see Table 1). These changes have been accepted without question by the Department.

On December 13, 2010, WRI submitted another revised monitoring schedule in the 2009-2010 Annual Hydrology Report. The revised monitoring schedule changed the water level measurement frequency of 38 groundwater wells from quarterly water levels to annual water levels. During the first quarter of the 2011 water year, in December 2010, WRI followed the revised monitoring schedule. Table 2, lists the 38 wells that were not monitored in December of 2010. The Notice of Noncompliance and Order of Abatement (NON) lists 39 wells that were not monitored during the first quarter of 2011 water year. Two wells, B12R2 and B16R2, are not in the approved monitoring schedule. These two wells were added by WRI for continued monitoring for a possible mine expansion. Well B24R2 is in the approved monitoring schedule and was inadvertently excluded from the well list included in the NON.

WRI received a letter from the Department on January 11, 2011 stating that the proposed changes to the monitoring plan must not be implemented until approved by MDEQ. WRI contacted Mr. Chris Yde, Section Supervisor of the Coal and Uranium Section of the Industrial and Energy Minerals Bureau, and informed him that WRI had implemented the revised monitoring schedule found in the 2009-2010 Annual Hydrology Report. Mr. Yde advised WRI to discontinue following the revised monitoring schedule and revert back to the previous monitoring schedule. WRI reverted back to the previous monitoring schedule during the second quarter of 2011 water year (March 2011). Mr. Yde also advised WRI to send in a Minor Revision for approval of the revised monitoring schedule. WRI submitted a Minor Revision (MR 255) on February 14, 2011.

On May 13, 2011, WRI submitted to the Department the required semi-annual hydrology report containing groundwater and surface water data for first and second quarters of 2011 water year (October through March). Included in the report was the static water level information from the revised monitoring schedule.

The Department makes the claim that any annual report is part of a surface mine permit and therefore a minor revision must be submitted to change information contained in the annual report. An annual report is a stand alone document containing comprehensive information on activities required by permit commitments from the proceeding year and to give a foreword looking view of activities for the coming year. The Annual Hydrology Report is comprised of factual information during a given snap shot in time which includes a current monitoring schedule for the water year. The 2009-2010 report also included a proposed monitoring schedule for the coming year.

Due to the time elapsed before the Department issued the violation, it is evident that failing to monitor the 38 monitoring wells in question is of little importance. WRI agrees that failing to collect one water level is not significant. Table 2 shows that of the 38 wells, 3 wells have 35 plus years of reported water levels, 12 wells have 30 plus years of reported water levels, 14 wells have 25 plus years of reported water levels, 3 wells have 15 plus years of reported water levels and 10 wells have 10 plus years of reported water levels. In light of the foregoing facts, WRI requests that the Department vacate NON 11-05-01.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

David Kuzara
Permit Coordinator
Westmoreland Resources, Inc.
Absaloka Coal Mine
Ph: (406) 342-4509
Fax: (406) 342-5480
E-mail: dkuzara@westmoreland.com

Enclosure: Table 1, Table 2

c: Mr. Jeffrey Fleischman, OSM, Casper

TABLE 1
Sites Changed without a Minor Revision

Well/Spring Number	Annual Report Date	Reason for Change	Frequency
29R1	06-07	Mined Out	-----
B15I	06-07	Mined Out	-----
B15-0	06-07	Mined Out	-----
B15R1	06-07	Mined Out	-----
B15R2	06-07	Mined Out	-----
B15SR	06-07	Mined Out	-----
B42-O	06-07	Mined Out	-----
B42R1	06-07	Mined Out	-----
A-49	07-08	Added	Monthly
A-50	07-08	Added	Monthly
51SR	07-08	Added	Monthly
B7R2	07-08	Reactivated	Monthly
B7SR	07-08	Reactivated	Monthly
B12R2	07-08	Reactivated	Monthly
B12R2A	07-08	Reactivated	Monthly
B12SR	07-08	Reactivated	Monthly
B13R2	07-08	Frequency Change	Monthly
B13SR	07-08	Frequency Change	Monthly
B16SR	07-08	Frequency Change	Monthly
B16R2	07-08	Reactivated	Monthly
25R2	07-08	Frequency Change	Monthly
B5-O	07-08	Mined Out	-----
B5R1	07-08	Mined Out	-----
B5R2	07-08	Mined Out	-----
B26R1	08-09	Mined Out	-----
B26R2	08-09	Mined Out	-----
A-49	09-10	Frequency Change	Quarterly
A-50	09-10	Frequency Change	Quarterly
51SR	09-10	Frequency Change	Quarterly
B7R2	09-10	Frequency Change	Quarterly
B7SR	09-10	Frequency Change	Quarterly
B12R2	09-10	Frequency Change	Quarterly
B12R2A	09-10	Frequency Change	Quarterly
B12SR	09-10	Frequency Change	Quarterly
B13R2	09-10	Frequency Change	Quarterly
B13SR	09-10	Frequency Change	Quarterly
B16SR	09-10	Frequency Change	Quarterly
B16R2	09-10	Frequency Change	Quarterly

TABLE 2

Monitoring Wells Not Monitored in December 2010

Well Number	Date Drilled (Mo-Yr)	Frequency for Water Levels	Years Water Levels Measured	Years of Levels
A-5	6-77	QTRLY	77-82, (continuous 83-06), 07-10	33
A-6	7-77	QTRLY	77-80, (continuous 81-06), 07-10	33
A-7	6-78	QTRLY	77-82, (continuous 83-06), 07-10	33
A-8	6-77	QTRLY	77-10	33
A-12	11-80	QTRLY	81-10	29
A-13	11-80	QTRLY	81-10	29
A-14	11-80	QTRLY	81-10	29
AC-18	6-79	QTRLY	80-81, (continuous 82-06), 07-10	30
AC-20	11-80	QTRLY	81-83, 91-07-10	29
AC-21	11-80	QTRLY	81-83, (continuous 83-06), 07-10	29
AC-22	11-80	QTRLY	81-83, 91-07-10	29
AC-23	11-80	QTRLY	81-83, 91-07-10	29
AC-24	11-80	QTRLY	81-83, 91-07-10	29
AC-25	11-80	QTRLY	81-83, 91-07-10	29
AC-27	11-80	QTRLY	81, (continuous 82-06), 07-10	29
AC-29	11-80	QTRLY	80-83, 91-10	30
AC-30	11-80	QTRLY	80-83, 91-10	30
AC-31	11-80	QTRLY	80-83, 91-10	30
AC-32	11-80	QTRLY	80-83, 91-10	30
AC-33	7-91	QTRLY	91-92, (continuous 93-06), 07-10	19
AC-34	7-91	QTRLY	91-10	19
2M	7-91	QTRLY	91-10	19
B1R2	8-73	QTRLY	73-10	37
B23R2	1-81	QTRLY	80-84, 91-10	30
B24R2	11-80	QTRLY	81-84, 91-10	36
B1SR	8-73	QTRLY	74-10	36
B16SR	6-79	QTRLY	79-10	31
B24SR	1-81	QTRLY	81-84, 91-10	29
SP2R2	2-78	QTRLY	79-10	31
SP3R2	1-81	QTRLY	82-10	28
SP4R2	1-81	QTRLY	81-10	29
SP6R1	9-83	QTRLY	83-10	27
SP7R2	5-99	QTRLY	99-10	11
SP8R2	5-99	QTRLY	99-10	11
SP9R1	6-99	QTRLY	99-10	11
SP10R1	6-99	QTRLY	99-10	11
SP11R1	6-99	QTRLY	99-10	11
SP12R1	6-99	QTRLY	99-10	11

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT BY WESTMORELAND RESOURCES, INC. AT THE ABSALOKA MINE, BIG HORN COUNTY, MONTANA. (FID #2115)	NOTICE OF VIOLATION AND ADMINISTRATIVE PENALTY ORDER Docket No. SM-12-01

I. NOTICE OF VIOLATION

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The Department administers the Act.

3. Westmoreland is a "person" within the meaning of Section 82-4-203(39), MCA.

4. Westmoreland operates a surface coal mine, known as the Absaloka Mine, under Permit No. C1985005 (Permit) located near Hardin, Montana. The Permit was issued by the Department under the Act.

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

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

Failure to monitor water levels

7. Pursuant to ARM 17.24.314(2), the permit application description must include plans for monitoring and semi-annual reporting of ground and surface water quality and quantity data collected and analyzed in accordance with ARM 17.24.304, 17.24.645 and 17.24.646.

8. Pursuant to ARM 17.24.645(1), ground water levels, subsurface flow and storage characteristics, and the quality of ground water must be monitored based on information gathered pursuant to ARM 17.24.304 and the monitoring program submitted pursuant to ARM 17.24.314 and in a manner approved by the Department to determine the effects of strip or underground mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems in the permit and adjacent areas.

9. During a September 6, 2011 review of Westmoreland's 2011 semi-annual hydrology report, the Department identified that Westmoreland failed to monitor water levels in 39 monitoring wells during the first quarter of the 2011 water year as required by the approved monitoring program.

10. On November 21, 2011, the Department issued Notice of Noncompliance and Order of Abatement 11-05-01 (NON 11-05-01) to Westmoreland alleging violations of ARM 17.24.645(1). NON 11-05-01 required Westmoreland to abate the alleged violation. NON 11-05-01, attached and incorporated by reference herein, listed the 39 monitoring wells that Westmoreland failed to monitor water levels during the first quarter of the 2011 water year. NON 11-05-01 ordered Westmoreland to abate the violation on or before January 6, 2012.

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11. Westmoreland violated ARM 17.24.645(1) by failing to monitor the water levels in 39 monitoring wells during the first quarter of the 2011 water year.

Administrative penalties

12. Pursuant to Section 82-4-1001, MCA, and ARM 17.4.301, *et seq.*, the Department has calculated an administrative penalty of $2,600 for NON 11-05-01. The Penalty Calculation Worksheet is enclosed with this Order and is hereby incorporated by reference.

III. ADMINISTRATIVE PENALTY ORDER

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

13. Westmoreland is hereby assessed an administrative penalty in the amount of $2,600 for the violation cited in this Order.

14. Within 60 days of service of this Order, Westmoreland shall pay to the Department administrative penalties totaling $2,600 to resolve the violation cited herein. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and shall be sent to:

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

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IV. NOTICE OF APPEAL RIGHTS

15. As provided in Section 82-4-254(3), MCA, Westmoreland is entitled to a hearing before the Board of Environmental Review. A written request must be submitted to the Board within 30 days of service of this Order. Service by mail is complete three business days after mailing. Westmoreland's request for a hearing should state its reasons for objecting to the Department's determination of the violation or penalty amount and be directed to:

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

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

17. If Westmoreland does not request a hearing, or if it does not submit testimony at such hearing, Westmoreland forfeits its right to judicial review of the Department's determination of the violation or penalty.

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

IT IS SO ORDERED:

DATED this 30th day of January, 2012.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

JOHN L. ARRIGO, Administrator
Enforcement Division

Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor
Richard H. Opper, Director

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

Certified No. 7008 1140 0004 3035 1326
Return Receipt Requested

NOTICE OF NONCOMPLIANCE AND ORDER OF ABATEMENT

Date: November 21, 2011

To: Westmoreland Resources, Inc., hereinafter "Permittee"

Noncompliance No: 11-05-01

Permit No: C1985005

(1) On September 6, 2011 the following practice or condition was observed:

Department review of the semi-annual hydrology report identified that the Permittee failed to monitor water levels in the following 39 monitoring wells during the first quarter of the 2011 water year, as required by the currently approved monitoring program: A-5, A-6, A-7, A-8, A-12, A-13, A-14, AC-18, AC-20, AC-21, AC-22, AC-23, AC-24, AC-25, AC-27, AC-29, AC-30, AC-31, AC-32, AC-33, AC-34, 2M, B1R2, B12R2, B16R2, B23R2, B1SR, B16SR, B24SR, SP2R2, SP3R2, SP4R2, SP6R1, SP7R2, SP8R2, SP9R1, SP10R1, SP11R1, SP12R1.

(2) This practice or condition is located at: Absaloka Coal Mine; T1N38ES30 (permit center)

(3) This practice or condition is hereby deemed to be a violation of the following provisions of the Montana Strip and Underground Mine Reclamation Act (the Act), administrative rules adopted pursuant thereto, and the permit:

ARM 17.24.645(1): "Groundwater levels...must be monitored based on information gathered pursuant to ARM.17.304 and the monitoring program submitted pursuant to ARM 17.24.314 and in a manner approved by the department to determine the effects of the strip or underground mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems in the permit and adjacent areas..."

(4) Pursuant to the authority granted to me as an authorized agent of the Director, Department of Environmental Quality, pursuant to 82-4-251(2) MCA, PERMITTEE IS HEREBY ORDERED TO ABATE THE ABOVE REFERENCED VIOLATION on or before January 6, 2012 by:

- submitting a written response that addresses the department's deficiency comments for minor revision MR 255 (revision to Water Resources Monitoring Plan).

(5) Upon application by the Permittee, the department may extend the period for abatement. The period for abatement, however, may not be extended beyond 90 days unless one of the

conditions set forth in ARM 17.24.1206(5) exist. The department's decision on an application for extension beyond 90 days is subject to a hearing if a hearing is requested in writing by a person with an interest that is or may be adversely affected.

(6) This Notice of Noncompliance may be modified, vacated, or terminated at any time.

(7) The Permittee may submit a letter of mitigating circumstances to the department providing information about the violation. The department will consider any information submitted in determining the facts surrounding the violation and the amount of penalty.

The letter of mitigating circumstances must be sent to the Chief, Industrial and Energy Minerals Bureau, Department of Environmental Quality, PO Box 200901, Helena, Montana 59620-0901, on or before December 15, 2011. Failure to timely submit a letter of mitigating circumstances will result in the issuance of the Notice of Violation and Administrative Penalty Order without input from the Permittee. The failure to raise an issue in the letter of mitigating circumstances will not preclude the Permittee from raising the issue at a contested case hearing as set forth in Paragraph 9.

(8) Pursuant to Section 82-4-251(6), MCA, a Permittee who has been issued a notice or order of cessation or a person who has an interest that is or may be adversely affected by an order of cessation or by modification, vacation, or termination of that order may request a hearing before the Board of Environmental Review on that order within 30 days of its issuance or within 30 days of its modification, vacation, or termination. The filing of an application for review does not operate as a stay of any order or notice.

(9) Pursuant to Section 82-4-254(1), MCA, a Permittee who violates the Act, rules adopted or orders issued under the Act, or term or condition of a permit, shall pay an administrative penalty of not less than $100 and not more than $5,000 and an additional administrative penalty within the same limits for every day during which the violation continues. In order to institute the penalty assessment process, the department will serve the Permittee a Notice of Violation and Administrative Penalty Order within 90 days after issuing the Notice of Noncompliance, unless the penalty is waived pursuant to Section 82-4-254(2), MCA. The department will determine the penalty based on the factors and penalty calculation procedures found in Section 82-4-1001, MCA, and ARM 17.4.301-308.

(10) Pursuant to 82-4-254(3), MCA, the Notice of Violation and Administrative Penalty Order will provide the Permittee an opportunity for a contested case hearing before the Board of Environmental Review on the issues of whether the alleged violation has occurred and whether the penalty is proper.

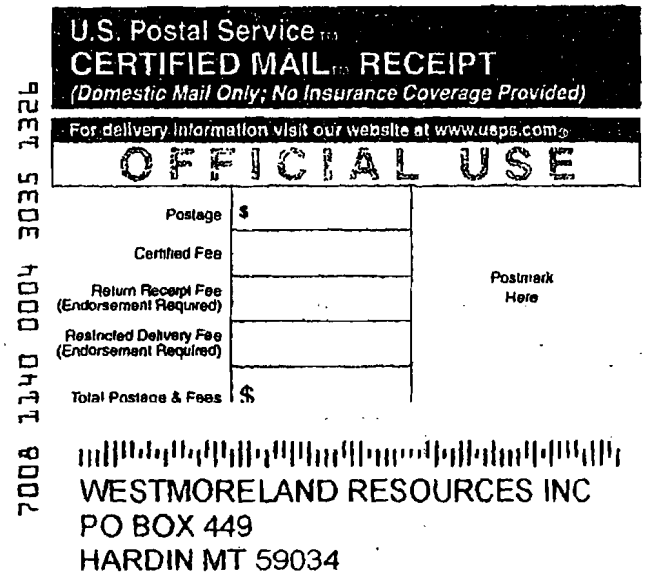
11-21-11

Authorized Representative of the Department of Environmental Quality

c: Mr. Jeffrey Fleischman, OSM, Casper
Mr. Eric Urban, MDEQ Coal Program
Mr. Dan Kenney, MDEQ Enforcement Division
Ms. Ashley Eichhorn, MDEQ Coal Program
MDEQ Legal

Revised 3/09

FC: 620.33 (NON 11-05-01)



Department of Environmental Quality - Enforcement Division
Penalty Calculation Worksheet

Responsible Party Name:	Westmoreland Resources, Inc. (Westmoreland)
FID:	2115 Permit No. C1985005
Statute:	Strip and Underground Mine Reclamation Act (Act)
Date:	1/10/2012
Name of Employee Calculating Penalty:	Daniel R. Kenney
Maximum Penalty Authority:	$5,000.00

Penalty Calculation #1
Description of Violation:
ARM 17.24.645(1), requires that ground water levels be monitored based on information gathered pursuant to ARM 17.24.304 and the monitoring program submitted pursuant to ARM 17.24.314. Westmoreland failed to monitor the water levels in 39 monitoring wells during the first quarter of the 2011 water year.

I. BASE PENALTY

Nature

Explanation:	
Westmoreland's failure to monitor and report the results, as required by the approved monitoring plan, impaired the Department's ability to ensure that a complete and timely record of water quality would be available for examination by the Department or the public. Therefore, the violation is administrative in nature.	
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) specifies that a failure to monitor and/or report is a violation that has moderate gravity.
Extent Explanation:
Not applicable.

Harm to Human Health or the Environment

Extent \ Gravity	Major	Moderate	Minor
Major	0.85	0.70	0.55
Moderate	0.70	0.55	0.40
Minor	0.55	0.40	0.25

Gravity and Extent Factor:

Impact to Administration

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

BASE PENALTY (Maximum Penalty Authority x Gravity Factor): **$2,000.00**

II. ADJUSTED BASE PENALTY

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

Explanation:
As a regulated entity, Westmoreland is expected to have knowledge of its permit and the requirements of the Act. Westmoreland should have foreseen the actions would result in a violation but it did not take precautions to prevent the violation. Therefore, the Department is increasing the Base Penalty by a moderate degree or by 20% for Circumstances.

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

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

Explanation:
Westmoreland did not promptly report or disclose the facts of the violation. Therefore, no decrease in the Base Penalty is calculated for Good Faith and Cooperation.

Good Faith & Coop. Percent:	
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 Westmoreland to mitigate the violation and/or the impacts above and beyond what was required to return to compliance. Therefore, no reduction in the base penalty is calculated for Amounts Voluntarily Expended.

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	$2,000.00
Circumstances	$400.00
Good Faith & Cooperation	$0.00
Amt. Voluntarily Expended	$0.00
ADJUSTED BASE PENALTY	**$2,400.00**

III. DAYS OF VIOLATION

Explanation:
The Department identified the violation during its September 6, 2011 review of Westmoreland's semi-annual hydrology report for water year 2011. Therefore, the Department is calculating one day of violation.

Number of Days:	1

ADJUSTED BASE PENALTY x NUMBER OF DAYS: $2,400.00

Other Matters as Justice May Require Explanation:
Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	**$0.00**

IV. ECONOMIC BENEFIT

Explanation:
The Department has determined that the economic gain through the avoided costs to monitor the water levels in the 39 ground water monitoring wells to be insignificant as Westmoreland has the ability to perform these actions utilizing in-house resources. Therefore, the Department is not adding economic benefit to the penalty.

ECONOMIC BENEFIT REALIZED:	$0.00

V. HISTORY

Explanation:
Westmoreland has incurred one other violation within the past three years: NON 09-05-01 (FID 1880) - Failure to backfill and regrade within required two-year timeframe. Nature = Harm

Historical Violation: Harm to Human Health or the Environment - 10%
Historical Violation: Impact to Administration - 5%

Historical Violation #1 Percent:	0.10
Total History Percent **(cannot exceed 30%)**:	0.10

Base Penalty #1	$2,000.00
Total Base Penalties:	$2,000.00

HISTORY ADJUSTMENT (Base Penalty x History Percent)	**$200.00**

Department of Environmental Quality - Enforcement Division
Penalty Calculation Summary

Responsible Party Name:	Westmoreland Resources, Inc. (Westmoreland)
FID:	2115 Permit No. C1985005
Statute:	Strip and Underground Mine Reclamation Act (Act)
Date:	1/30/12
Signature of Employee Calculating Penalty:	

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

	Penalty #1
Maximum Penalty Authority:	$5,000.00
Percent Harm - Gravity and Extent:	0.00
Percent Impact - Gravity:	0.40
Base Penalty:	$2,000.00

II. Adjusted Base Penalty

		Totals
Base Penalty:	$2,000.00	$2,000.00
Circumstances:	$400.00	$400.00
Good Faith and Cooperation:	$0.00	$0.00
Amount Voluntarily Expended:	$0.00	$0.00
Adjusted Base Penalty:	$2,400.00	$2,400.00

III. Days of Violation or Number of Occurrences	1	
Adjusted Base Penalty Total	$2,400.00	$2,400.00
Other Matters as Justice May Require Total	$0.00	$0.00
IV. Economic Benefit	$0.00	$0.00
V. History	$200	$200.00
	TOTAL PENALTY	$2,600.00

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT BY WESTMORELAND RESOURCES, INC. AT THE ABSALOKA MINE, BIG HORN COUNTY, MONTANA [FID #2115, DOCKET NO. SM-12-01]	**CASE NO. BER 2012-02 SM**

FIRST PREHEARING ORDER

Mr. Anderson Forsyth and Mr. Brandon JT Hoskins, Counsel for Westmoreland Resources, Inc. (hereafter, Appellant), have appealed the Notice of Violation and Administrative Penalty Order, Docket No. SM-12-01, dated January 30, 2012, pertaining to violations of the Montana Strip and Underground Mine Reclamation Act (the Act) and imposition of penalties codified at Mont. Code Ann. Title 82, Chapter 4, Part 2, and violations of administrative rules adopted under the Admin. R. Mont. Title 17, Chapter 24 and/or the provisions of Westmoreland Resources, Inc./Absaloka Mine's operating permits.

The following guidelines and rules are provided to assist the parties in an orderly resolution of this contested case.

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Contested Cases, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont. Admin. R. 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, Mont. Admin. R. 1.3.211 through 1.3.225, and by Mont. Code Ann. Tit. 82, ch. 4, pt. 2.

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

JOYCE WITTENBERG
Secretary, Board of Environmental Review
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 be sent to the Hearing Examiner, addressed as follows:

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

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

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

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

5. SCHEDULING: The undersigned requests the parties to consult with each other and propose a schedule to the undersigned upon which they agree by **March 23, 2012**. 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 are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses;

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

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

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

(f) for a Prehearing Conference to hear argument on any motions and resolve other prehearing matters; and,

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

DATED this 6th day of March, 2012.

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

CERTIFICATE OF SERVICE

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

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

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

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

Mr. W. Anderson Forsythe
Mr. Brandon JT Hoskins
Suite 1900 Crowne Plaza
P.O. Box 2559
Billings, MT 59103-2559

DATED: March 6, 2012