

**AGENDA**

FRIDAY, MAY 17, 2013

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

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**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](mailto: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. March 22, 2013, 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 Trailer Terrace Mobile Park, LLC, Dennis Deschamps and Dennis Rasmussen at the Trailer Terrace, PWSID No. MT0000025, Great Falls, Cascade County, BER 2012-11 PWS.** On December 11, 2012, the hearing examiner issued *Order Granting Extension* giving the parties through March 8, 2013, to settle the matter or file a proposed schedule. A *Second Order Granting Extension* was signed on March 28, 2013. The parties have until August 1, 2013, to settle the matter or file a joint proposed prehearing schedule.
2. Other Cases Assigned to a Hearing Examiner
  - a. **In the matter of the request for hearing by Hawthorne Springs Property Owners Association; H Lazy Heart, LLC; Patchy, Inc.; and other residents regarding Opencut Mining Permit No. 2258, issued to Farwest Rock Products, Missoula County, BER 2012-09 OC.** A contested case hearing is scheduled for May 20, 2013. *Motions to Dismiss* and a *Motion for Summary Judgment* have been filed and briefed and are pending. Oral argument on these motions will occur on May 20, 2012.
3. Contested Cases not assigned to a Hearing Examiner
  - a. **In the matter of the request for hearing by William E. Smith, on behalf of Mike Adkins, regarding Park County's denial to validate Adkins Class III Waste Tire Monofill License No. 517, BER 2012-05 SW.** At its July 27, 2012, meeting, the Board voted to hear all matters in this case. On September 11, 2012, the Board granted a motion to stay proceedings until disposition of the Petition for Judicial Review filed in the Sixth Judicial District. A written status report concerning the progress of the case in District Court was filed March 11, 2013.
  - b. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** On December 19, the Board received *Motion to Intervene* from counsel for Montana Environmental Information Center and Sierra Club. On

December 24, attorney for the Appellant filed *Agreed Motion for Extension to File Response Briefs and Reply Briefs Regarding Intervention and Agreed Motion to Vacate First Scheduling Order*. On January 2, 2013, the hearing examiner issued *Order Granting Extension to File Briefs on Motion to Intervene and Order Vacating First Scheduling Order*. On January 23, 2013, the Board received *Opposition Brief to Motion to Intervene* from the attorney for the Appellant, and on February 8 it received *Reply in Support of Motion to Intervene* from the proposed intervenor. A hearing on the *Motion to Intervene* is set for May 7, 2013.

- c. **In the matter of the request for hearing by Montana Environmental Information Center and Sierra Club regarding DEQ's issuance of Montana Air Quality Permit No. OP0513-08 for the Colstrip Steam Electric Station, Colstrip, BER 2013-01 AQ.** At its January 25 meeting, the Board chose to not appoint a hearings examiner for this matter. On February 7, the Board received *Joint Response to Hearing Examiner's Order Dated January 10, 2013*. A *First Scheduling Order* was issued on February 26, 2013. An *Order Setting Contested Case Hearing Date* was issued on March 26, 2013. The contested case hearing is set for December 6, 2013.
- d. **In the matter of the request for hearing by Montana Environmental Information Center and Sierra Club regarding DEQ's issuance of Montana Air Quality Permit No. OP2953-07 for the JE Corette Steam Electric Station, Billings, BER 2013-02 AQ.** At its January 25, 2013, meeting, the Board chose to not appoint a hearings examiner for this matter. On February 7, the Board received *Joint Response to Hearing Examiner's Order Dated January 10, 2013*. A *First Scheduling Order* was issued on February 26, 2013. An *Order Setting Contested Case Hearing Date* was issued March 26, 2013. The contested case hearing date is set for the regularly scheduled meeting in January or February of 2014.

### III. ACTION ITEMS

#### A. HEARINGS

- 1. American Chemet Corporation Lead (Pb) SIP Raw Materials Limits

American Chemet Corporation and the Montana Department of Environmental Quality are requesting the Board approve the elimination of limits on the amount of lead (Pb) allowed in raw materials used by American Chemet Corporation. The subject Pb limit is contained within and was established under a Board Order dated August 4, 1995. American Chemet's existing and enforceable Pb emission limits will remain in place and air modeling and air sampling have demonstrated continued compliance with the applicable ambient air quality standards for Pb. The Board will hold a public hearing and take action to approve or disapprove the proposed program revisions.

#### B. INITIATION OF RULEMAKING

DEQ will propose that the Board initiate rulemaking to:

- 1. Re-notice the proposed revisions to Circular DEQ-4, Montana Standards for Subsurface Wastewater Treatment Systems, to provide electronic links to standards that are adopted by reference. The proposed revisions to Circular DEQ-4 reorganize the format, add illustrations, and correct grammar and numbering errors. In response to emerging technology, new chapters and new design requirements have been added, including an appendix with design examples.

#### C. NEW CONTESTED CASES

- 1. **In the matter of violations of the sanitation in subdivisions act by Levi Britton at the 80<sup>th</sup> Street Estates Subdivision, Billings, Yellowstone County, BER 2013-03 SUB.** The Board received the request for hearing on March 15, 2013. A *First Prehearing Order* was issued on March 26, 2013. The Board may appoint a permanent hearings examiner or decide to hear the matter.

#### D. FINAL ACTION ON CONTESTED CASES

1. **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 November 26, 2012, the hearing examiner, having determined that the pending motion for summary judgment be resolved in the department's favor, issued *Order Vacating Hearing and Prehearing Conference Dates*, and *Recommended Order for Partial Summary Judgment* in January 2013. A hearing on penalties was set for April 9. A *Stipulation to Dismiss* was filed on April 2, 2013, with an Administrative Order on Consent. A proposed *Order of Dismissal* will be provided to the Board.
2. **In the matter of violations of the Montana Solid Waste Management Act by Valley County Refuse District #1 at the Valley County Landfill, Glasgow, BER 2012-06 SW.** On November 1, 2012, the Board received *DEQ Motion for Summary Judgment and Brief in Support of Motion*, and on December 17, 2012, it received *Valley County Refuse District #1's Brief in Opposition to DEQ's Motion for Summary Judgment*. On January 11, 2013, the hearing examiner issued *Order Vacating and Resetting Hearing Date* [for March 27] and *Setting Date for Telephonic Oral Argument* [for January 23]. On January 23, 2013, oral argument on the pending motion for summary judgment was presented. On March 6, the hearing examiner issued *Order on Motion for Summary Judgment*. The case was moved into the penalty phase. A telephonic hearing on penalties was held on March 25, 2013. The hearing examiner entered an order recommending imposition of penalties. A proposed order for the Board adopting the hearing examiner's *Order on Summary Judgment* and the Hearing Examiner's recommended penalties will be provided.
3. **In the matter of violations of the Montana Solid Waste Management Act by Asphalt Plus, LLC, a corporation, and Michael C. and Melinda M. Oedekoven, as individuals, at 425 Johnson Lane, Billings, Yellowstone County, BER 2012-13 SW.** On February 19, 2013, attorney for DEQ filed *Second Unopposed Motion for Extension of Time*. This motion was granted in a *Second Order Granting Extension of Time*, dated February 28, 2013. A *Stipulation to Dismiss* with an *Order on Consent* was filed May 1, 2013. An *Order of Dismissal* will be provided to the Board for signature.

#### IV. GENERAL PUBLIC COMMENT

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

#### V. ADJOURNMENT



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

**MINUTES**  
**March 22, 2013**

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, March 22, 2013, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

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

Board Members Present via Telephone: Joe Whalen

Board Members Absent: Larry Anderson

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

Board Secretary Present: Misty Gable

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director), Bonnie Lovelace, and Steve Kilbreath – Director's Office; John North, Carol Schmidt, David Dennis, Kirsten Bowers, Ed Hayes, and Norman Mullen – Legal; Judy Hanson – Permitting & Compliance Division; Paul Skubinna and Tom Reid – Water Protection Bureau; Eugene Pizzini – Public Water Supply & Subdivisions Bureau; David Klemp, Debra Wolfe, Whitney Walsh, Eric Merchant, Charles Homer, Julie Merkel, and Bob Habeck – Air Resources Management Bureau; John Arrigo and Daniel Kenney – Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Paul Riley – Butte-Silver Bow Environmental Health Department; Mark Schaffer – Copper Environmental

- I.A.1 | Review and approve January 25, 2013, Board meeting minutes.
- Mr. Mires MOVED to approve the January 25, 2013, Board meeting minutes. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.
- II.A.1.a | In the matter of violations of the Montana Septage Disposal and Licensure Laws by James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL. *(No discussion took place regarding this matter.)*
- II.A.1.b | In the matter of violations of the Montana Solid Waste Management Act by Valley County Refuse District #1 at the Valley County Landfill, Glasgow, BER 2012-06 SW. *(No discussion took place regarding this matter.)*
- II.A.1.c | In the matter of violations of the Public Water Supply Laws by Trailer Terrace Mobile Park, LLC, Dennis Deschamps and Dennis Rasmussen at the Trailer Terrace, PWSID No. MT0000025, Great Falls, Cascade County, BER 2012-11 PWS. *(No discussion took place regarding this matter.)*
- II.A.1.d | In the matter of violations of the Montana Solid Waste Management Act by Asphalt Plus, LLC, a corporation, and Michael C. and Melinda M. Oedekoven, as individuals, at 425 Johnson Lane, Billings, Yellowstone County, BER 2012-13 SW. *(No discussion took place regarding this matter.)*
- II.A.2.a | In the matter of the request for hearing by Hawthorne Springs Property Owners Association; H Lazy Heart, LLC; Patchy, Inc.; and other residents regarding Opencut Mining Permit No. 2258, issued to Farwest Rock Products, Missoula County, BER 2012-09 OC. *(No discussion took place regarding this matter.)*
- II.A.3.a | In the matter of the request for hearing by William E. Smith, on behalf of Mike Adkins, regarding Park County's denial to validate Adkins Class III Waste Tire Monofill License No. 517, BER 2012-05 SW.
- Ms. Orr said oral argument is scheduled for the petition for judicial review for April 10 or 11.
- II.A.3.b | In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ. *(No discussion took place regarding this matter.)*
- II.A.3.c | In the matter of the request for hearing by Montana Environmental Information Center and Sierra Club regarding DEQ's issuance of Montana Air Quality Permit No. OP0513-08 for the Colstrip Steam Electric Station, Colstrip, BER 2013-01 AQ.

- II.A.3.d | In the matter of the request for hearing by Montana Environmental Information Center and Sierra Club regarding DEQ's issuance of Montana Air Quality Permit No. OP2953-07 for the JE Corette Steam Electric Station, Billings, BER 2013-02 AQ.
- Ms. Orr said both II.A.3.c and II.A.3.d have been set for hearing before the Board: Colstrip at the Board's December 6 meeting and JE Corette at the meeting in January 2014.
- The Board discussed the date for the January meeting; Chairman Russell prefers January 17. Mr. Livers indicated staff would send a list of possible dates to Board members via email for their review.
- II.B.1 | Briefing on Eastern Montana Issues Related to Oil and Gas
- Mr. Kilbreath gave a Power Point presentation and discussed the impacts for oil development drilling predominantly in eastern Montana. Mr. Kilbreath answered questions from the Board.
- III.A.1 | In the matter of Butte-Silver Bow County Outdoor Air Quality Regulations
- Chairman Russell explained that the Board must hold a public hearing on the Butte-Silver Bow County outdoor air quality regulations. He took comment from proponents first.
- Mr. Riley said the regulations were passed by the Butte-Silver Bow County Commission on April 18, 2012, and that the Walkerville Town Council also moved to develop the air quality regulations. He said they followed the procedures outlined in 75-2-301, MCA, and said a public hearing took place on February 22, 2012. Mr. Riley provided some details of the revised regulations. He noted that the Health Department and the Council went to great lengths to ensure that all citizens' comments and concerns were addressed through the public comment process.
- There were no other proponents or opponents present, on the phone or in person, who chose to speak to the matter.
- Chairman Russell called the hearing closed. Mr. Riley answered questions from Board members.
- Chairman Russell called for a motion to authorize him to sign the order approving the regulations. Ms. Kaiser so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a 6-0 vote.

- III.B.1 In the matter of final adoption of the amendment of rules pertaining to concentrated animal feeding operations (CAFOs) and adoption of a new rule governing the application of manure, litter, and process wastewater at these facilities.
- Mr. Reid said the primary reason for the amendments is to update the state regulations in order to maintain consistency with the federal regulations. He said the Board initiated rulemaking on December 7, 2012, a hearing was held on January 11, 2013, and the public comment period closed on January 22, 2013. He also said five comments were received and gave a brief summary of the comments. Mr. Reid responded to questions from the Board.
- Chairman Russell asked if any members of the public wanted to comment on the matter. There was no response.
- Chairman Russell called for a motion to adopt the rule as amended, accept the Presiding Officer's report, the House Bill 521 and 311 Analyses, and DEQ's response to comments. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion and it CARRIED with a unanimous vote.
- III.C.1 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.
- Ms. Orr briefed the Board regarding the case. There was discussion regarding the penalty and language changes to the order.
- The Board agreed on specific language changes to add clarification to the order, and to extend the completion deadline to six months from the date the order is signed by the Board. Chairman Russell called for a motion to accept the changes. Mr. Miller so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED 5-1. Further discussion took place regarding the penalty.
- Discussion took place regarding the penalty. Chairman Russell called for a motion to reduce the penalty to \$1,800 if all requirements are complied with. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a 5-0 vote. *(note: The teleconference connection with Mr. Whalen was lost at this point.)*
- Chairman Russell called for a motion to authorize the Chair to sign the findings, conclusions of law, and order on completion by Ms. Orr. Mr. Mires so MOVED. Mr. Miller SECONDED the motion and it CARRIED with a 5-0 vote.
- III.C.2 In the matter of violations of the Public Water Supply laws by the city of Ronan Public Water Supply System, PWSID #MT0000318, Ronan, Lake County, BER 2012-04 PWS.
- Ms. Orr said she drafted a proposed order for the Board's signature adopting the recommended order on summary judgment. Mr. Livers confirmed the draft order was

included in the Board packets. Ms. Orr gave background on the case and recommended that the Board adopt the order.

Chairman Russell called for a motion for the Board to sign the order. Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a 5-0 vote.

Discussion took place regarding the new surface water treatment rule. Mr. Pizzini gave background and answered questions from members of the Board.

*(note: The connection with Mr. Whalen was restored.)*

IV. General Public Comment

Chairman Russell asked if any member of the public was present who wanted to address the Board on matters that pertain to the Board. There was no response.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. Chairman Russell thanked Mr. Miller for his time on the Board and his expertise (Mr. Miller is not seeking reappointment to the Board). The motion to adjourn CARRIED with a 6-0 vote.

The meeting adjourned at 12:09 p.m.

Board of Environmental Review March 22, 2013, minutes approved:

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

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DATE



**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY FOR  
PETITION TO REVISE EAST HELENA LEAD CONTROL PLAN**

**Agenda # III.A.1.**

**Agenda Item Summary:** American Chemet Corporation (“American Chemet”) requests the Board to modify a 1995 order to remove a lead-in-feed limit that is no longer necessary to control lead emissions in the East Helena area.

**Affected Parties Summary:** American Chemet and residents of the East Helena area.

**Scope of Proposed Proceeding:** American Chemet is requesting the Board to consider revising a 1995 Board Order to remove the limit on lead content in American Chemet’s feed material on a quarterly and annual average basis. This revision would not change American Chemet’s lead emission limits.

**Background:** The US Environmental Protection Agency (“EPA”) promulgates NAAQS intended to define levels of air quality determined by EPA to be necessary to protect public health and welfare.

In 1978, EPA promulgated a NAAQS for lead. EPA set the standard at 1.5 micrograms of lead per cubic meter of ambient air (“ $\mu\text{g}/\text{m}^3$ ”) averaged over a calendar quarter. Ambient air quality monitoring data collected by the Department between 1977 and 1981 demonstrated that there was an exceedance of the lead NAAQS occurring in the East Helena area. Montana developed a plan to control lead emissions in the East Helena area. In 1984, EPA published approval of Montana’s lead SIP (49 FR 27944).

In 1988, EPA notified the Governor of Montana that EPA determined Montana’s 1983 plan no longer was adequate to attain the lead NAAQS in the East Helena area. In 1991, EPA designated the East Helena area as a nonattainment area for lead. In 1993, EPA found that Montana had failed to submit a revised State Implementation Plan (SIP) for lead in the East Helena area.

In June 1995, the Department entered into stipulations with ASARCO and American Chemet concerning control strategies to reduce lead emissions in the East Helena area. On August 4, 1995, the Board adopted the proposed control strategies as a Board order. EPA approved the control strategies as revisions to the SIP.

**Additional Information:** Pursuant to the 1995 stipulations (“American Chemet Stipulation”), lead emissions from the American Chemet facility were limited to a total of 123.2 pounds per year. Actual emissions have averaged less than three pounds per year for the past 23 years. Also pursuant to the 1995 stipulation and 1995 Board order, American Chemet is required to limit the content of lead in its feed material to less than 0.15%, on a quarterly average basis, and less than 0.10%, on an annual average basis.

American Chemet utilizes approximately 50,000,000 pounds of recycled scrap copper for production annually. The recycled scrap copper market is very dynamic, with

foreign countries such as China having a dramatic influence on availability and quality. Also, world events such as the recent recession can create surplus and scarcity in the market. The varying uses for copper, from automotive, wiring, heat exchanger radiators, tubing, building facades, and many others, create copper scrap with varying levels of impurities that are added either intentionally or unintentionally. American Chemet is subject to, and not in control of, these scrap market fluctuations. While American Chemet has never violated the current SIP raw material lead limits, it has at times been very close to the limit.

The lead-in-feed limit is not reasonably related to, and does not affect emissions limits. American Chemet is required to comply with lead emission limits, regardless of the lead-in-feed limit. Removing the lead-in-feed limit would ensure American Chemet does not face a raw material constraint and would provide American Chemet the ability to obtain its raw material as needed while still complying with emission limits for lead.

In April 2001, ASARCO ceased operations at its East Helena lead smelter. ASARCO removed nearly all its equipment from that facility and razed the majority of the structures. The 62 tons per year of ASARCO lead emissions allowed under the 1995 Stipulations and Board Orders represented 99.9% of the permitted lead emissions in the East Helena area. Ambient air monitoring measurements in 2002 (following the closure of the ASARCO smelter) and air quality modeling performed in 2012 demonstrate that the NAAQS for lead will be maintained.

EPA sent a letter to the Department, dated December 18, 2009, stating a revision to the East Helena Lead Montana SIP to eliminate the lead-in-feed limit is acceptable if:

- (1) Air modeling was performed sufficient to demonstrate noninterference with the attainment and maintenance of the lead NAAQS, and
- (2) The revocation of ASARCO's operating permit is finalized.

In 2009, the Department revoked ASARCO's air quality permit (MAQP #2557) pursuant to ASARCO's request for such revocation. American Chemet performed air modeling to demonstrate noninterference with the attainment and maintenance of the lead NAAQS and submitted its modeling analysis to the Department. The Department found such modeling sufficient and the Department agrees with American Chemet that conditions have been met for the Montana Board of Environmental Review to grant American Chemet's request to revoke the provision limiting the lead content in American Chemet's feed material. All other provisions and stipulations regarding American Chemet's lead emission limits and operating permit requirements would remain unchanged, including the lead emission limit to which American Chemet is subject.

**Hearing Information:** Section 75-2-203(1), MCA, of the Clean Air Act of Montana ("the Act"), provides the Board with authority to "establish the limitations of the levels, concentrations, or quantities of emissions of various pollutants from any source necessary to prevent, abate, or control air pollution." Section 75-2-111(2), MCA, of the Act provides the Board with authority "to hold hearings related to any aspect of or matter in the administration of [the Act]..." Section 75-2-111(3), MCA, of the Act provides the Board with authority to "issue orders necessary to effectuate the purposes of [the Act]..."

American Chemet is requesting that the Board consider and revoke the limit on lead in feed material set forth in its 1995 Order adopting the stipulation between American Chemet and the Department regarding the lead control plan in the East Helena area.

**Board Options:** The Board may:

1. Grant American Chemet's request for an order as set forth above; or
2. Determine that it is not appropriate to approve American Chemet's request, and deny American Chemet's request for an order.

**DEQ Recommendation:** The Department recommends the Board grant American Chemet's request and approve and execute the proposed order.

**Enclosures:**

1. Draft 2013 Findings of Fact, Conclusions of Law, and Order
2. Revocation of Montana Air Quality Permit dated December 16, 2009
3. Letter from EPA to the Department dated December 18, 2009
4. Letter from the Department to American Chemet dated April 9, 2013
5. Monitoring data
6. American Chemet Annual Emissions and Lead-in-Feed
7. Modeling analysis submitted by American Chemet prepared by Bison Engineering, Inc.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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In the matter of the Petition of American Chemet Corporation (“American Chemet”) Findings of Fact, Conclusions of Law, and Order revoking the Lead-in-Feed limit applicable to American Chemet relating to the Control of Lead Emissions in the East Helena Lead Nonattainment Area, Affecting the Following Industries: American Chemet Corporation.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

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**Findings of Fact**

1. On October 5, 1978, the U.S. Environmental Protection Agency (“EPA”) promulgated both primary and secondary National Ambient Air Quality Standards (“NAAQS”) for lead pursuant to 42 U.S.C. §7409.
2. In 1992, pursuant to 42 U.S.C. §7407, EPA designated the East Helena, Montana area as a nonattainment area for the lead NAAQS.
3. In August 1993, EPA issued a finding that Montana had failed to timely submit a State Implementation Plan (SIP) element concerning lead for the East Helena lead nonattainment area.
4. On June 30, 1995, the Montana Department of Environmental Quality (“Department”) and American Chemet stipulated to a set of emission limitations and conditions, set forth as Exhibit A to the Stipulation of Department and American Chemet dated June 30,

1 1995. This is referred to as the “Stipulation” and is attached to this Memorandum and Order as  
2 Attachment 1).

3 5. On August 4, 1995, the Montana Board of Environmental Review (Board) issued  
4 an order requiring American Chemet to comply with the emission limitations and conditions set  
5 forth in the Stipulation and declared that the Department shall enforce the Stipulation. (This is  
6 referred to as the “BER Order” and is attached to this Memorandum and Order as Attachment 2).

7 6. The Stipulation contains a limit on the percent of lead in feed material entering  
8 American Chemet and used in its processes. This will be referred to as the “Lead-In-Feed Limit”.

9 7. The Lead-in-Feed Limit is not reasonably related to the attainment and  
10 maintenance of the lead NAAQS in East Helena, and removing it from the Stipulation will not  
11 increase lead emissions from American Chemet over the lead emissions limits already in effect.

12 8. Independent of the Lead-in-Feed Limit, the Stipulation contains a limit on  
13 American Chemet’s actual lead emissions. This will be referred to as “Actual Lead Limit”.

14 9. Ambient concentrations of lead in East Helena were dominated by emissions from  
15 the former ASARCO Smelter, which emitted an average of approximately 30,000 pounds per  
16 year over the last five years of operations. Compliance testing indicates that American  
17 Chemet’s actual lead emissions were approximately 3 pounds per year over the past five years.

18 9. The ASARCO Smelter no longer exists and, therefore, no longer emits any air  
19 pollutant, including lead.

20 10. Removing American Chemet’s Lead-in-Feed limit would ensure American  
21 Chemet does not face a raw material constraint and would provide American Chemet the ability  
22 to obtain its raw material as needed while still complying with its lead emission limits.

23 12. The Actual Lead Limit remains in effect.

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**Conclusions of Law**

1. The Board has authority to set emission levels pursuant to § 75-2-203, MCA.

2. The Department is responsible for preparing and developing a comprehensive plan for the prevention, abatement, and control of air pollution in the State of Montana pursuant to § 75-2-112(2)(c), MCA.

3. The Board is authorized to issue orders necessary to effectuate the purposes of the Montana Clean Air Act. § 75-2-111(3), MCA.

4. A Board order revising the Lead-in-Feed Limit is necessary to effectuate the purposes set forth in Conclusions of Law 10 and create an enforceable mechanism that may be submitted for inclusion into the Montana SIP.

5. All Findings of Fact are incorporated into these Conclusions of Law.

**Order**

Based on the Findings of Fact and Conclusions of Law, the Board orders:

1. The Lead-in-Feed Limit is revoked.

2. The Board may modify this Order if requested by the Department or American Chemet, or at the Board's initiative. Any Order for modification must be in writing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2013.

BOARD OF ENVIRONMENTAL REVIEW

By: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chair

December 16, 2009

**CERTIFIED MAIL: 7004 1350 0002 0840 7865**

Lewis T. Putman  
Milbank  
1850 K Street NW  
Washington, DC 20006

**Re: Revocation of Montana Air Quality Permit (MAQP) #2557**

Dear Mr. Putman:

The Department of Environmental Quality - Air Resources Management Bureau (Department) received the request to revoke MAQP #2557 from Ms. Aileen M. Hooks of Baker Botts on behalf of ASARCO LLC. The letter was dated December 8, 2009 and was delivered to the Department on December 9, 2009.

Proposed Action. The Department intends to revoke MAQP #2557 at the request of the above-named permittee. In accordance with ARM 17.8.763, the Department's revocation of ASARCO LLC's permit shall become final within 15 days of receipt of this letter.

Procedures for Appeal. ASARCO LLC may appeal the Department's decision by requesting a hearing before the Board of Environmental Review (Board) within 15 days of receipt of this letter. The filing of a request for a hearing postpones the effective date of revocation until the conclusion of the hearing and issuance of a final decision of the Board. **Requests for hearing must be sent in writing to: Chairman, Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901.**

Operation of a Facility once a Permit is Revoked. Once a permit is revoked, a permit application must be submitted and a new permit issued prior to any future operation of the equipment or facility.

If you have any questions, please contact me at (406) 444-9741.

Sincerely,



Vickie Walsh  
Air Permitting Program Supervisor  
Air Resources Management Bureau  
Email: [viwalsh@mt.gov](mailto:viwalsh@mt.gov)

cc: Montana Environmental Trust Group, LLC, c/o Greenfield Environmental Trust Group, Inc.,  
Cynthia Brooks, President; 44 Shattuck Road, Watertown, MA 02472  
Mary Capdeville, Assistant Attorney General, Montana Department of Justice  
Bill Kirley, Special Assistant Attorney General, Montana Department of Environmental Quality



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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

DEC 18 2009

Ref: 8P-AR

Mr. Dave Klemp, Bureau Chief  
Air and Waste Management Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

RE: American Chemet Modification Request

Dear Mr. Klemp:

This is in response to Montana Department of Environmental Quality's (DEQ) request for EPA guidance concerning a proposal from American Chemet Corporation regarding the modification of a stipulated condition in a 1995 Board Order contained in the East Helena lead SIP. This stipulation is also located in the facility's air quality permit (#1993-15). Specifically, American Chemet requested a change to the 1995 Board Order which would eliminate Exhibit A, Section C, Subsection B. This subsection reads: *"Feed Material into the plant shall have a quarterly average lead content of less than 0.15%, and an average annual lead content of less than 0.10%."*

The American Chemet facility is adjacent to the site of the former ASARCO lead smelter which shut down operations in April 2001. The "lead in feed" limitations for American Chemet were created as part of DEQ's efforts to respond to EPA's designation of East Helena as "nonattainment" for the National Ambient Air Quality Standard (NAAQS) for airborne lead under the Clean Air Act. In the 1990's, DEQ negotiated restrictions on lead emissions for the East Helena area to meet and maintain compliance with the NAAQS for lead. The principal target for curtailing lead emissions was ASARCO, which operated a lead smelter located immediately behind American Chemet's East Helena facility. In addition to shutting down its operations in 2001, ASARCO demolished its stacks in 2009. After the ASARCO facility shut down in 2001, ambient air monitoring during the following six months showed that East Helena was in compliance with the 1997 lead NAAQS of  $1.5 \text{ ug/m}^3$ . It is our understanding that ASARCO has now requested that its permit be revoked.

Considering these facts, our preliminary view is that we could allow a revision to the Montana State Implementation Plan (SIP) that would eliminate Exhibit A, Section C, Subsection B from the 1995 Board Order if the conditions listed below are met.

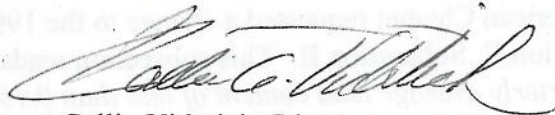


1. DEQ must perform modeling sufficient to demonstrate noninterference with the attainment and maintenance of the lead NAAQS (a demonstration for the new standard will suffice for the old standard). AERMOD is appropriate to use for this modeling. If DEQ meets condition 2 below, DEQ may assume in modeling that ASARCO's stack emissions are zero but will need to input appropriate values for any remaining lead emissions from ASARCO, such as fugitive emissions.

2. The State must finalize the revocation of ASARCO's permit and provide us with evidence of, and ASARCO's consent to, the revocation. In the alternative, the SIP revision must state that ASARCO has shut down permanently and that ASARCO would need to go through New Source Review permitting in order to resume operations. An opinion from the Montana Attorney General is not sufficient to satisfy this condition. This is because an Attorney General's opinion would not be subject to the State's public participation process for SIP revisions and could be disputed by ASARCO subsequent to EPA approval of a SIP revision allowing the American Chemet change.

We look forward to working with you and your staff regarding this issue. If you have any questions, please do not hesitate to contact me, or your air quality staff may contact Monica Morales at (303) 312-6936.

Sincerely,



Callie Videtich, Director  
Air Program





April 9, 2013

Dan Brimhall  
Vice President, Operations  
American Chemet Corporation  
Box 1160  
East Helena, MT 59635

Re: American Chemet Request to Amend Montana Board of Environmental Review Order  
Limiting Lead in Feed.

Mr. Brimhall,

The Montana Department of Environmental Quality (DEQ) has received and reviewed a request and Supporting Technical Documents from American Chemet Corporation (American Chemet). These documents summarize the facility's request for a Montana Board of Environmental Review (BER) action to change a July 24, 1995 Board Order and Stipulation to allow American Chemet to use feed materials with a higher percentage of lead content. Specifically, American Chemet is asking to remove Exhibit A, Section C, Subsection B from the before mentioned Board Order.

EPA, in a December 18, 2009, letter to Dave Klemp stated "...we could allow a revision to the Montana State Implementation Plan (SIP) that would eliminate Exhibit A, Section C, and Subsection B from the 1995 Board Order if the following Conditions are met."

1. ... Perform modeling sufficient to demonstrate attainment and maintenance of the lead NAAQS (a demonstration for the new standard will suffice for the old standard). AERMOD is appropriate to use for this modeling. If DEQ meets condition 2 below, DEQ may assume in modeling that ASARCO's stack emissions are zero but will need to input appropriate values for any remaining lead emission from ASARCO, such as fugitive emissions.
2. The State must finalize the revocation of ASARCO's permit and provide us with evidence of, and ASARCO's consent to, the revocation. In the alternative, the SIP revision must state that ASARCO has shut down permanently and that ASARCO would need to go through New Source Review permitting in order to resume operations...

American Chemet submitted to DEQ a complete modeling analysis on December 4, 2012. DEQ has reviewed the supplied analysis and agrees with the methodology and results. American Chemet has shown through modeling that operating the facility at the enforceable permit limits does not violate the lead NAAQS, including background ambient lead concentrations.

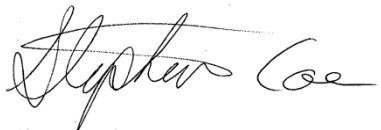
The ASARCO permits have either expired or been revoked by the DEQ. The ASARCO Title V permit expired on April 5, 2007, and DEQ did not receive a renewal application. The ASARCO Montana Air Quality Permit (MAQP) was revoked on December 16, 2009, at the request of Ms. Aileen M. Hooks of Baker Botts on behalf ASARCO. Should any party have wished to appeal the revocation of the permit a hearing would have been requested before the BER. Included with this letter are the request for revoking the permit, the Departments response and the agenda for the BER meeting in which a hearing would have been held if requested.

The buildings, equipment, and associated emissions points have been physically destroyed and the site only retains the slag piles, which have been shown to be inert. Any new industrial operations on the former ASARCO site would be required to go through New Source Review permitting for operation.

The two conditions outlined in the December 18, 2009, letter from EPA have been met by American Chemet and the DEQ. The DEQ supports American Chemet's request to change the 1995 Board order.

We appreciate your attention to this matter and look forward to helping you through this process. If you have any additional questions please contact Eric Merchant at 406-444-1457 or me at 406-782-2689 ext. 209.

Thank you,

A handwritten signature in cursive script, appearing to read "Stephen Coe". The signature is written in dark ink on a light background.

Stephen Coe P.E.

Enclosures (3)

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

BRIAN SCHWEITZER  
GOVERNOR



JOHN BOHLINGER  
LT. GOVERNOR

September 30, 2009

Carol Rushin  
Acting Regional Administrator  
United States Environmental Protection Agency  
Region VIII, 8P-AR  
1595 Wynkoop St.  
Denver, CO 80202-1129

Dear Ms. Rushin:

As you are aware, EPA finalized a revision to the National Ambient Air Quality Standard (NAAQS) for lead on November 12, 2008. Pursuant to 42 USC §7407, Congress directs governors to submit a list of areas designating as nonattainment, attainment, or unclassifiable with respect to a new or revised NAAQS. Such lists of designated areas ordinarily would be due no later than one year following the promulgation of a new or revised standard, or November 12, 2009. However, as a result of a court-ordered schedule pursuant to a lawsuit regarding the lead NAAQS, the due date for submission of these lists is October 15, 2009. 73 FR 66963 at 67031.

Montana designates all 56 counties in the state attainment or unclassifiable for the revised lead NAAQS. Based on the analysis in the enclosed technical memorandum and associated attachments, Montana's designation is appropriate for all counties. The memorandum also describes the significant change in circumstances regarding lead emissions and attainment status for East Helena, Lewis and Clark County, Montana, one of two existing nonattainment areas in the United States for the former 1978 NAAQS.

We anticipate working with you as we continue to meet the challenge of maintaining Montana's status with regard to the revised lead standard. If you have any questions regarding this action, please contact M. Eric Merchant, the Department's Air Quality Policy and Planning Supervisor, by telephone at (406) 444-1457 or by email at [emerchant@mt.gov](mailto:emerchant@mt.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Schweitzer", written over the printed name and title.

BRIAN SCHWEITZER  
Governor

Enclosure

c: Richard Oppen, Director, Department of Environmental Quality  
Dave Klemp, Chief, Air Resources Management Bureau  
M. Eric Merchant, Air Resources Management Bureau



# ATTACHMENT 1

## 1999-2001 Pb Review Quarterly Means

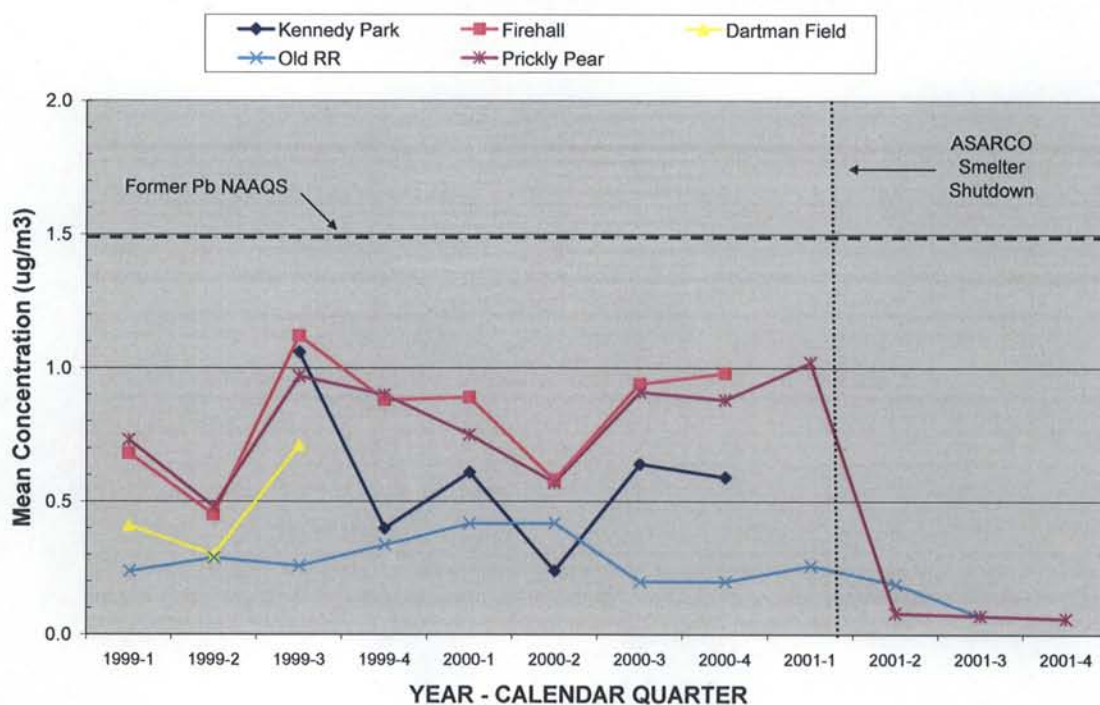


Figure 1

\*\*\*\*\*

## 2001 Pb Review Rolling 3-Month Averages

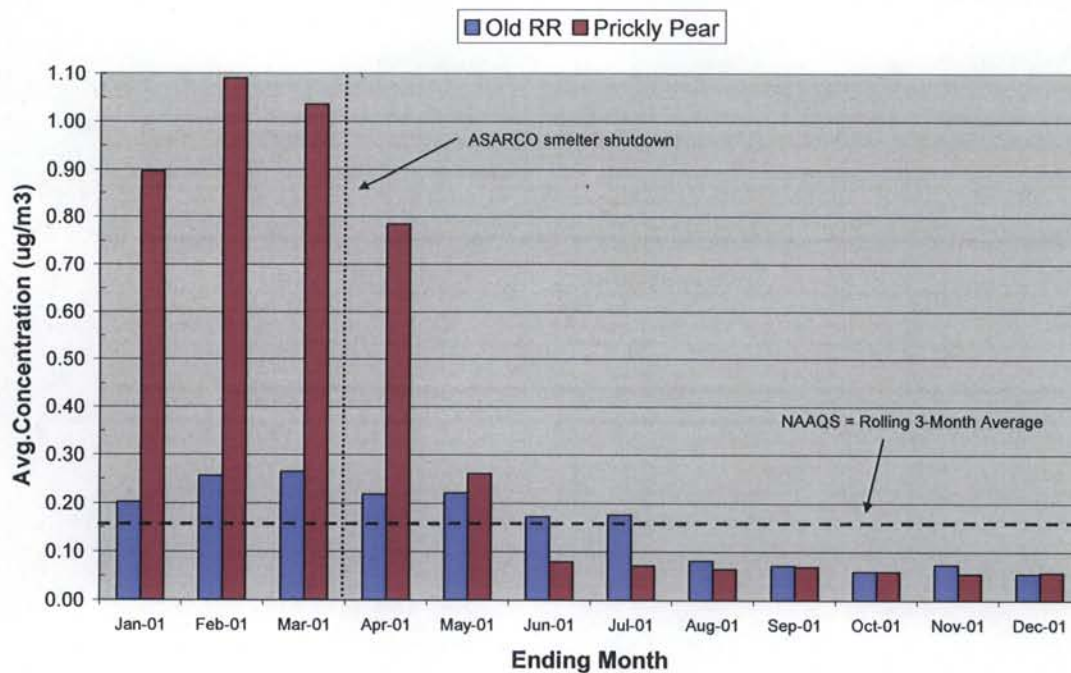


Figure 2

## ATTACHMENT 2

### Historical E.Helena Pb Review 1998-2001; Calendar Quarter Means

Year	Kennedy Park	Firehall	Dartman Field	Old RR	Prickly Pear
1999-1		0.68	0.41	0.24	0.73
1999-2		0.45	0.30	0.29	0.48
1999-3	1.06	1.12	0.71	0.26	0.97
1999-4	0.40	0.88		0.34	0.90
2000-1	0.61	0.89		0.42	0.75
2000-2	0.24	0.58		0.42	0.57
2000-3	0.64	0.94		0.20	0.91
2000-4	0.59	0.98		0.20	0.88
2001-1				0.26	1.02
2001-2				0.19	0.08
2001-3				0.07	0.07
2001-4				0.06	0.06

### Historical E.Helena Pb Review 2000-2001; Rolling 3-Month Means

Year	Old RR	Prickly Pear
Jan-01	0.202	0.897
Feb-01	0.256	1.09
Mar-01	0.265	1.036
Apr-01	0.218	0.785
May-01	0.221	0.261
Jun-01	0.172	0.079
Jul-01	0.176	0.071
Aug-01	0.081	0.064
Sep-01	0.071	0.069
Oct-01	0.059	0.059
Nov-01	0.073	0.054
Dec-01	0.054	0.057



**Technical Memorandum**  
**State of Montana – Lead Monitoring Data and Analysis**  
**Supporting attainment/unclassifiable designation**

**INTRODUCTION:**

On November 12, 2008, EPA revised the national ambient air quality standards (NAAQS) for lead, lowering the level of the primary (health-based) standard from 1.5 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) ("former NAAQS"), to 0.15  $\mu\text{g}/\text{m}^3$  averaged over a rolling 3-month period with a maximum (not-to-be-exceeded) form evaluated over a 3 year period ("new NAAQS"). Compliance with the former primary standard was evaluated on a calendar quarter average. The secondary lead standard has been revised to be identical to the primary standard. 73 FR 66963.

Montana is obliged, pursuant to 42 USC §7407, *et seq.*, to submit to EPA a list of geographic areas that attain the standard or that do not attain the standard or that are otherwise unclassifiable based on available information.

**BACKGROUND:**

Montana is a large state with relatively few large industrial sources of air pollution. Of the large industrial sources in Montana, no sources emit lead in excess of the 1 ton per year threshold referenced in EPA's promulgation of the lead NAAQS according to data submitted by the Department into the 2007 National Emissions Inventory. East Helena, Montana is a nonattainment area for the former NAAQS, because it was the site of the now-defunct ASARCO facility, a primary lead smelter. ASARCO ceased operations in 2001.

The ASARCO facility, including all production units and stacks, has since been razed and dismantled. The main stacks were felled on August 14, 2009 and the remaining small metal stack on September 15, 2009. ASARCO's emitting units and stacks neither emit any air pollutants nor have the potential to do so.

Sources in Montana are subject to permit requirements pursuant to Montana's New Source Review and Montana Air Quality Permit requirements. Montana law requires that any proposal modifying the ASARCO facility that has the potential to exceed an amount greater than 0.6 tons per year of lead emissions would be subject to the requirements of the Montana Air Quality Permit rules at ARM 17.8.740, *et seq.* ASARCO also would be prohibited from legally operating the lead smelter without first applying for and obtaining a major New Source Review permit under the provisions of ARM 17.8.801, *et seq.*

In addition to controls that may be required under the Montana Air Quality Permitting program and New Source Review, sources would also be required to comply with control, emission limitations, and monitoring requirements under applicable Maximum Achievable Control Technology (MACT) and New Source Performance Standards that may minimize any lead emissions. These rules, current operating practices, and control equipment make it unlikely that sources in Montana emit lead in amounts that would influence Montana's lead NAAQS designation status.



Further, EPA recognizes the ASARCO facility is no longer in operation and that the area has subsequently achieved compliance with the revised NAAQS by stating "EPA notes that the most recent three years of available monitoring data for East Helena, MT, one of two current nonattainment areas, showed no violations of the current standard, although the monitors were shut down in December 2001 following the shutdown of the large stationary source of lead emissions there". 73 FR 66963 at 67031.

Attachment 1 of this memo sets forth the dramatic decreases in lead in the East Helena area following the shutdown of the ASARCO facility. The graph in Figure 1 (reflecting data contained in Attachment 2) indicates the East Helena Area, even before the shutdown, had come into attainment with the former standard. Once ASARCO shut down entirely, the ambient lead levels decreased to such an extent that the graph represented in Figure 2, using the data contained in Attachment 2 calculated according to the methodology of the new standard, shows the area to be well in attainment with the new standard<sup>1</sup>. This remains true, even in a worst-case scenario: When ASARCO was still operating, historical monitoring data collected during first and fourth quarters of any year generally reflected high concentrations, due in large part to poor atmospheric dispersion. The last three rolling averages in Figure 2 show the data in an historically worse dispersion period to be in attainment with the new standard.

#### **PAST REGULATORY ACTIONS RELATING TO LEAD NAAQS:**

On September 29, 1983, Montana submitted to EPA the East Helena Lead Control Plan after ambient air monitoring indicated violations of the former 1978 lead NAAQS in East Helena. On July 9, 1984, EPA approved this submission. 49 FR 27944. However, following implementation of the lead control plan, East Helena continued violating the lead NAAQS. On December 2, 1988, EPA notified Montana that the East Helena lead control plan was inadequate and required revision. 53 FR 48642.

On November 6, 1991, EPA again designated East Helena as nonattainment for lead. 56 FR 56694. In 1993, EPA promulgated further requirements for lead control plans. Montana submitted to EPA a series of lead control plans from 1995 to 2000. On June 18, 2001, EPA partially approved and partially disapproved the East Helena lead control plan. 66 FR 32760. Montana was not required to revise the disapproved portions and EPA did not pursue sanctions and Federal implementation plan (FIP) actions pursuant to 42 USC §§7410 and 7509a.

In its discussion of implementation considerations, EPA notes, ". . . it may become necessary in some areas to also implement controls on . . . former industrial type sources." EPA will surely indicate circumstances that might, following some period of time, necessitate state evaluation of the reasonableness of imposing controls on former sources. 73 FR 66963 at 67030.

#### **EXISTING SOURCE IMPACT ANALYSIS:**

---

<sup>1</sup> The bars in Figure 2 result from (a) the residual effect of including previous data in the rolling 3-month averages, and (b) the gradual cessation of lead-emitting activities of ASARCO following its April 10, 2001 announcement of curtailment of activities.



Montana has no sources of lead that would be anticipated to cause or contribute to a violation of the ambient standard for lead. In its analysis of available monitoring data, EPA concludes that a large percentage of recent Pb ambient air concentrations in excess of 0.15  $\mu\text{g}/\text{m}^3$  have occurred in locations with active industrial sources of lead emissions.

Montana conducted a thorough analysis, considering topography, meteorology, and emission release characteristics of predicted and actual Pb impacts from industrial sources during the development of the control plan implemented to reduce emissions at the ASARCO facility and to demonstrate compliance with the former 1978 Pb NAAQS. Based on these analyses, Montana agrees with EPA's assumption that facilities emitting less than 1 ton a year of lead are not sources of concern for the new NAAQS. Montana's worst-case assumption for sources of this size is that they would consume no more than 50 percent of the new NAAQS and that it would take several sources of this size in the same airshed to produce concentrations of Pb in ambient samplers sufficient to cause concern<sup>2</sup>.

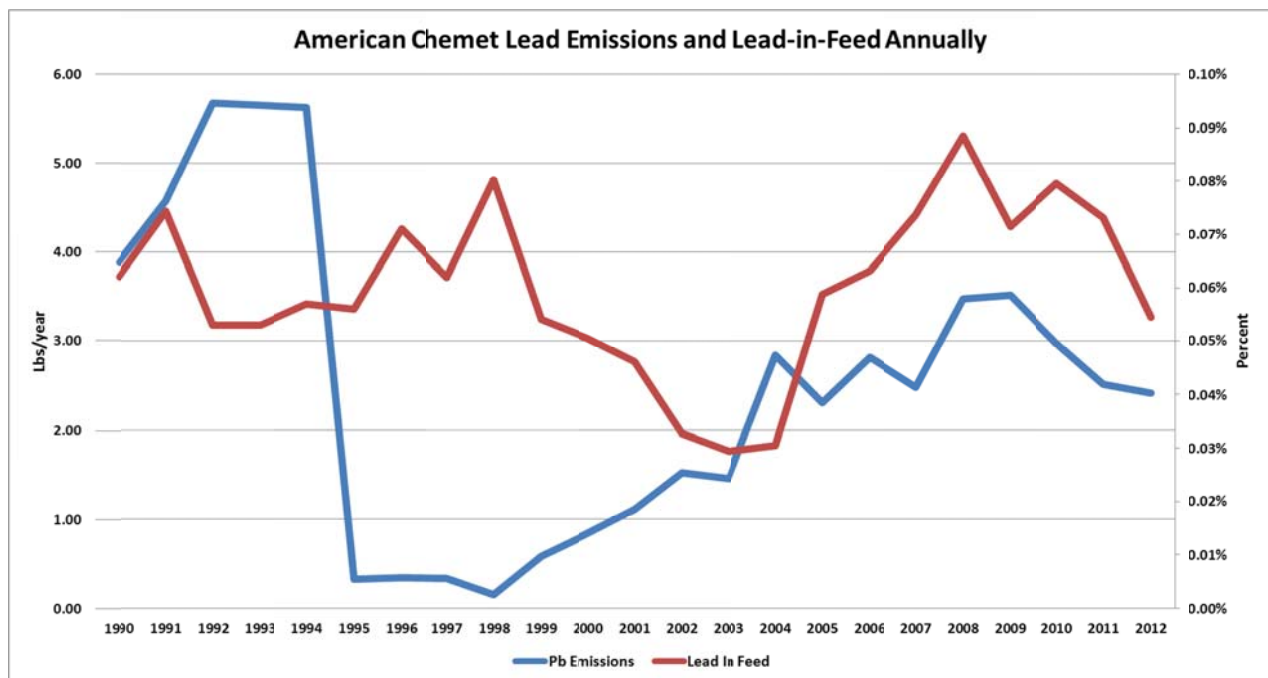
#### **CONCLUSION:**

Accordingly, all 56 Montana counties will attain the revised NAAQS as Montana law continues to require air pollution control measures on lead emitting industrial sources through implementation of the federally-enforceable Montana Air Quality Permitting program(s) and related regulations.

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<sup>2</sup> Demonstration of Attainment Modeling Report, Revised East Helena, Montana, Lead SIP, CPP Project 90-S-0264, Cermak, Peterka, Peterson, Inc., November 18, 1992.

American Chemet Historical Emissions and Lead-in-Feed Percentage				
Year	#1 and/or #41 Copper Furnace Hours of Operation	#1 and/or #41 Cu Furnace Total Lead Emissions (pounds)	Avg. Lead Content of Feed Materials (w/w%)	Total Feed Materials (pounds)
1990	4,654	3.88	0.06%	20,484,719
1991	5,493	4.58	0.07%	22,588,010
1992	6,815	5.68	0.05%	27,319,842
1993	6,789	5.66	0.05%	30,271,796
1994	6,756	5.63	0.06%	32,166,135
1995	8,010	0.3268	0.06%	33,849,729
1996	8,423	0.3437	0.07%	36,403,050
1997	8,137	0.3320	0.06%	37,537,356
1998	7,236	0.1505	0.08%	33,844,089
1999	9,934	0.5784	0.05%	39,876,364
2000	11,391	0.8376	0.05%	43,467,633
2001	12,328	1.1052	0.05%	42,654,239
2002	14,209	1.52	0.03%	50,591,525
2003	14,576	1.4557	0.03%	57,025,499
2004	14,194	2.84	0.03%	78,131,727
2005	11,568	2.3034	0.06%	69,211,438
2006	14,541	2.8222	0.06%	71,985,954
2007	12,185	2.4795	0.07%	64,540,446
2008	8,305	3.48	0.09%	64,873,199
2009	8,172	3.52	0.07%	53,638,641
2010	7,543	2.9758	0.08%	63,287,348
2011	6,630	2.51	0.07%	54,890,827
2012	6,446	2.41	0.05%	46,394,408
<b>Total</b>		<b>55.12</b>		<b>1,005,822,536</b>





# **BISON ENGINEERING, INC.**

1400 11<sup>TH</sup> AVENUE • HELENA, MT 59601 • 406-442-5768

FAX: 406-449-6653 • E-MAIL: [bison@bison-eng.com](mailto:bison@bison-eng.com) • [www.bison-eng.com](http://www.bison-eng.com)

## **RECEIVED**

April 5, 2012

AUG 24 2012

MT Dept. Environmental Quality  
Permitting & Compliance Division  
Air Resources Management Bureau

Kraig Keltz  
American Chemet Corporation  
P.O. Box 1160  
East Helena, MT 56635

Dear Kraig:

**Re: Lead Concentration Impacts Modeling Analysis**

As requested, Bison Engineering, Inc. has conducted a study of ambient air lead concentration impacts potentially resulting from the American Chemet facility's maximum allowable lead emissions. Enclosed are two copies of a report detailing analysis methods and results. Included with the reports are CD-ROMs containing electronic model input and output files for your reference.

Thank you for the opportunity to work with you on this project. Please contact me if you have any questions regarding this study or if you have need for further assistance.

Sincerely,  
BISON ENGINEERING, INC.

Kevin M. Mathews  
Project Engineer

Enclosures

**AERMOD  
MODELING ANALYSIS  
FOR  
American Chemet  
East Helena, MT**

*Submitted by:*  
**American Chemet**

*Prepared by:*  
**Bison Engineering, Inc.  
1400 11th Avenue  
Helena, Montana 59601**

**April 3, 2012**

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Appendix A:	Receptor Graphics
Appendix B:	Preparation of Meteorological Data
Appendix C:	CD-ROM Modeling Files

## **1.0 INTRODUCTION**

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American Chemet Corporation (ACC) is requesting to eliminate raw materials lead concentration limits in Montana Air Quality Permit #1993-14 held by its East Helena manufacturing facility. The Montana Department of Environmental Quality (Department) has requested that an air dispersion modeling analysis be performed for the lead emitting sources at the facility in support of this requested change. This modeling analysis report describes the detailed methods ACC used and the results of the requested analysis.

## 2.0 PURPOSE

---

The purpose of this air dispersion modeling analysis is to provide the Department with information about ambient air quality impacts potentially resulting from ACC's allowable lead emissions. To quantify these impacts, a dispersion modeling analysis was conducted following guidelines presented in the following references:

- State of Montana Modeling Guidance for Air Quality Permit Applications, November 2007 Draft (Montana Modeling Guideline)
- New Source Review Workshop Manual, October, 1990 Draft (NSR Manual)
- Appendix W, 40 CFR Part 51, Guideline on Air Quality Models (Revised), November 9, 2005 (Appendix W Guideline Document)

The following sections detail the modeling methodology and present analysis results.

## 3.0 MODELING PROCEDURES

### 3.1 Air Quality Standards Addressed

Model-predicted concentration impacts potentially resulting from ACC's allowable lead emissions were compared with Montana and National Ambient Air Quality Standards for lead. The standards, all of which are not to be exceeded, are as follows:

**Table 1: Lead Ambient Air Quality Standards**

Jurisdiction	Standard	Averaging Period	Type
National	0.15 $\mu\text{g}/\text{m}^3$ <sup>(a)</sup>	Rolling 3-Month	Primary and Secondary
Montana	1.5 $\mu\text{g}/\text{m}^3$	90-Day	N/A

(a) This standard was promulgated in 2008. A previous standard of 1.5  $\mu\text{g}/\text{m}^3$  based on a quarterly average was promulgated in 1978 and technically remains in effect until one year after an area is designated for the 2008 standard. Effective December 31, 2011, the entire state of Montana was designated as "Unclassifiable/Attainment" for the 2008 standard.

### 3.2 Modeling Methodology

Modeling demonstrations for air quality permit applications, as detailed in the guidelines referenced above, are typically conducted in two to four phases, depending upon initial model results. Briefly, these phases are as follows:

- Phase I: Define the significant impact area. Emissions from only the source or sources being permitted are modeled to determine the greatest distance that "significant" impacts result. Significant impact levels (SILs) are defined in the regulations. This information is then used to define the modeling receptor grid and to identify other nearby sources that should be included in the final impacts analyses.
- Phase II: Quantify ambient concentration impacts using a full receptor grid. Pollutant emissions from the proposed sources and applicable surrounding sources are modeled to identify peak ambient impacts for all pollutants and averaging times of interest.
- Phase III: Refine Phase II results using a small, closely spaced receptor grid. If initial results do not definitively demonstrate compliance, the model is rerun with a limited number of receptors surrounding the Phase II peak receptor or receptors. This ensures that the modeling analysis identifies the true peak impacts.
- Phase IV: If Phase II/III results identify one or more standard exceedances, a final analysis is required to determine whether the proposed sources cause or contribute significantly to the exceedance.



Modeling of impacts from ACC lead emissions did not require this full process. No SILs are defined for the lead standards. Even if applicable SILs did exist, it would not have been necessary to identify a significant impact area because no other recognized sources of lead emissions exist within the vicinity of the plant. The ASARCO smelter was the only other lead emissions source historically included in East Helena lead nonattainment analyses; this source no longer exists and no longer holds a valid air quality permit. Peak lead impacts resulting from ACC emissions are known to occur near the facility fenceline, so the initial receptor grid was restricted to that area. (Receptor grid definitions are described in detail below.) Because ACC is the only lead emitting source in the modeling domain, a Phase IV contributions analysis is not required.

### **3.3 Model Selection**

The analysis used the AERMOD modeling system to predict peak ambient concentrations potentially resulting from ACC lead emissions. AERMOD is an EPA- and Department-approved dispersion model for short-range (less than 50 km) regulatory dispersion modeling demonstrations. The modeling system is comprised of three primary algorithms:

**AERMET** processes hourly meteorological data, both surface and upper air, to generate meteorological values required by AERMOD. Version 06341 was used for this analysis.

**AERMAP** processes digital elevation data to assign base elevations and an additional elevation-related characteristic to receptors. Version 09040 was used for this analysis.

**AERMOD** uses hourly meteorological values provided by AERMET along with receptor, building, and emissions source values entered by the user to calculate hourly concentration values. Version 90292 was used for this analysis. AERMOD also incorporates an algorithm known as Building Profile Input Program for the Plume Rise Model Enhancements model (BPIPPRM) for modeling downwash effects from buildings and other structures. The current version of BPIPPRM, Version 04274, was used for the demonstration described in this report.

The analysis was conducted using a commercial modeling interface that facilitates model setup and execution and results analysis. The interface program, BEEST for Windows, is provided by Oris Solutions, LLC (formerly BEE-Line Software). The version used in this analysis is Version 9.82.

### **3.4 General Settings**

AERMOD was run using default regulatory settings for the control options pathway.

### **3.5 Meteorological Data**

To calculate ambient air pollutant concentrations, AERMOD uses hourly meteorological data processed by the AERMET program. AERMET produces the data using data files of observed surface and upper air meteorological parameters. Surface data proposed for use in this analysis were collected at a meteorological station near the ACC facility during an

18-month period from January 1, 1990 to June 30, 1991. These data were provided to ACC by the Department. Upper air data used in this analysis were collected by the National Weather Service at the Great Falls, Montana, International Airport (WBAN #24143).<sup>1</sup>

In addition to observed meteorological data, AERMET requires values for surface characteristics (surface roughness, albedo, and bowen ratio) surrounding the data collection site. These values were generated by the current version of AERSURFACE (version 08009) using land cover data for the area surrounding the ACC facility.

Appendix B included in this report details the processing of meteorological data for use with this analysis.

### 3.6 Source Parameters

This analysis evaluated ambient lead concentration impacts from the ACC facility's two sources of lead air emissions: Copper Furnaces #1 and #41. Emissions from Copper Furnace #41 were divided evenly between two stacks designated in the model as '41CUFRNC' and '41CU\_2.' These stacks exhaust from two identical baghouses, one that controls emissions from the furnace exhaust and one from the furnace feed point. Their modeled emission rates - 0.0035 lb/hr each - are equivalent to half the permit lead emission rate limit for the #41 furnace. The #1 furnace was modeled at its permit limit emission rate limit of 0.007 lb/hr. These lead emission rate limits are provided in permit condition II.A.4.b.

Stack parameters for these sources are listed in Table 2 below. Note that the actual stack heights are lower than GEP stack height and so were modeled without reduction in the analysis.

**Table 2: Model Source Physical Parameters**

Source	Source Description	X-UTM (m)	Y-UTM (m)	Stack Base Elevation (ft)	Stack Height (ft)	Stack Temp. (°F)	Stack Velocity (ft/sec)	Stack Diameter (ft)
CuFurn1	CU Furnace	429293.5	5159475	3898	35	230.0	51.3	1.5
41CUFRNC	CU Furnace	429300.3	5159477	3898	40.7	230.0	51.3	1.7
41CU_2	CU Furnace split	429345.3	5159460	3898	33.7	224.3	41.8	1.7

No other sources were included in the analysis. The ASARCO smelter is only other lead emissions source historically included in East Helena lead nonattainment analyses, but this facility no longer exists and no longer holds a valid air quality permit.

<sup>1</sup> Located at 47.473 degrees latitude, 111.382 degrees longitude.

### **3.7 Building Effects**

Building downwash effects from the facility buildings were considered in the modeling analysis. Building locations and property boundary locations are included in Appendix A of this report.

The EPA-developed program BPIPPRM, which is incorporated into AERMOD, was used to adjust for downwash effects from buildings.

### **3.8 Receptor Grid**

Modeled concentration impacts were evaluated using fenceline receptors spaced at no more than 50-meter intervals<sup>2</sup> and a surrounding receptor set with 50-meter spacing extending from the plant boundary to a distance of approximately 1.0 km. Appendix A contains a satellite image of the facility and the nearby vicinity with an overlay of the property boundary and proximate receptors. It also includes a graphical depiction of the entire receptor grid.

### **3.9 Elevation Data**

Base elevations of sources, buildings, and receptors were determined from USGS digital elevation model (DEM) data files processed through the AERMAP program. The reference projection upon which the terrain data were based is NAD27. DEM data files used for the modeling analysis are included with the final modeling analysis files in Appendix C (CD\_ROM).

### **3.10 Background Concentrations**

An East Helena ambient lead monitor administered by the Department recorded values of 0.08, 0.07, and 0.06 micrograms per cubic meter during the three quarters immediately after the ASARCO facility ceased operation in April of 2001. Lead monitoring in this area was discontinued after those measurements. Because no new sources of lead emissions have been permitted in the East Helena area since that time, it is reasonable to conclude that current East Helena ambient lead concentrations are similar to – and likely less than – those measured in the last three quarters of the monitoring program. For that reason, ACC added a background lead concentration of 0.08  $\mu\text{g}/\text{m}^3$  to peak modeled values. This is a conservatively high value given the downward trend observed after cessation of ASARCO smelter operations.

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<sup>2</sup> The fenceline receptors were generated automatically by the AERMOD interface program BEEST. The program places receptors along the fenceline at the requested interval—50 meters in this case—and at each fenceline vector node. The result can, and in this case does, produce receptors more closely spaced than the minimum assigned spacing.

### 3.11 Ambient Air Quality Standard Analyses Results

#### 3.11.1 Modeling Threshold Results

Emissions from the facility were compared to the modeling thresholds published in the Montana Modeling Guideline. The maximum lb/hr values were assumed to be emitted for a full day and were compared to the lb/day threshold values. The annual emission values were compared to the tons/year thresholds. Per the guidance, pollutants below the thresholds should not be included in the modeling analysis. As indicated in the table below, ACC's potential lead emissions are significantly below the modeling guideline thresholds. Nevertheless, a modeling analysis was performed because it was specifically requested by the Department to support ACC's request for a permit modification.

**Table 3: Modeling Applicability Policy Analysis**

Pollutant	Emissions (facility)		Thresholds		Modeling Triggered	
	Lbs/Day	Tons/yr	Lbs/day	Tons/yr	Lbs/day	Tons/yr
Pb	0.34	0.06	3.29	0.60	No	No

#### 3.11.2 NAAQS Analysis Results

Table 4 reports model results and compares maximum predicted impacts with the Montana and federal standards. Peak impacts for each meteorological year modeled are included in electronic files on the CD-ROM in Appendix C. No exceedances of any ambient standards were predicted.

**Table 4: Ambient Air Quality Standards Impact Analysis Results**

Pollutant	Avg. Period	Peak Met Period	Predicted Ambient Conc. <sup>(a)</sup> ( $\mu\text{g}/\text{m}^3$ )	NAAQS ( $\mu\text{g}/\text{m}^3$ )	Compliance Status (In/Out)	MAAQS ( $\mu\text{g}/\text{m}^3$ )	Compliance Status (In/Out)
Pb	90-Day	July-September 1990	0.14	N/A	N/A	1.5	In
	Rolling 3-Month	July-September 1990	0.14	0.15	In	N/A	N/A

(a) Includes estimated  $0.08 \mu\text{g}/\text{m}^3$  ambient background concentration.

NOTE: Predicted concentrations for lead ambient standard are high-first-high.

The results shown above were generated using a receptor grid with 50 meter receptor spacing.

Model input and output files are included on the CD-ROM attached to this submittal in Appendix C.

Table 5 lists and describes the modeling file names. Files are included for the SIA and ambient standards analysis. A summary of all of the AERMOD modeling results can be found in Appendix C.

**Table 5: Model File Names**

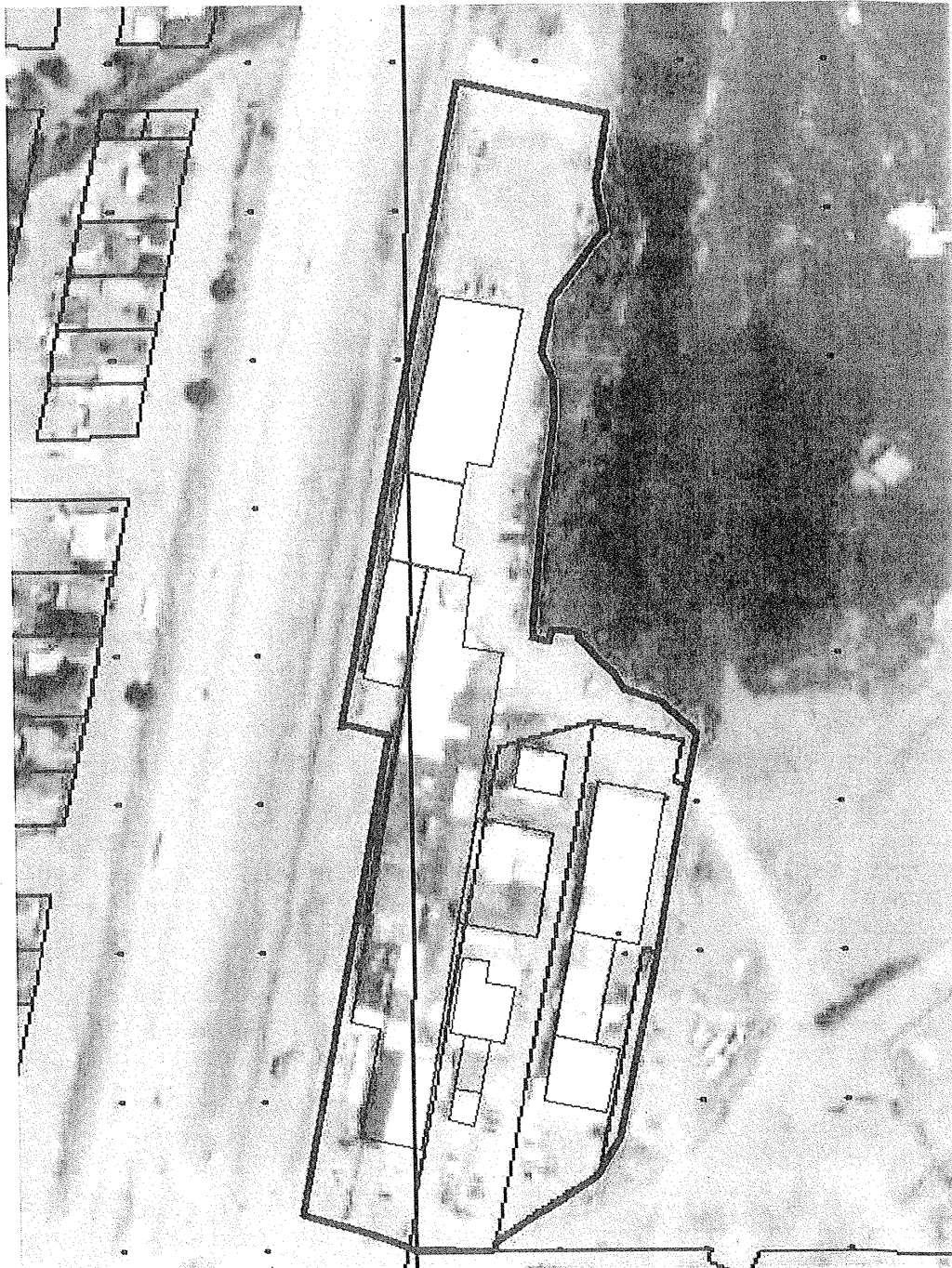
File Description	Filename
Significant Impact Analysis	Domain.txt 1_Km_Grid.MAP MAP File 1_Km_Grid.Rmp RMP File Mapdetail.out OUT File Mapparams.out OUT File 1_Km_Grid.Mot MOT File 1_Km_Grid.rcf RCF File Sept_14_2010.PIP Sept_14_2010.PRW Sept_14_2010.SO Sept_14_2010.SUM Sept_14_2010.TAB ACH_Apr_June90.BST ACH_Apr_June90.BND ACH_Apr_June90.DTA ACH_Apr_June90.GRF ACH_Apr_June90.LST ACH_Apr_June90.RUN ACH_Apr_June90.USF Note:*** ***** Month year
Meteorological Data Files	Also included in this folder are all processing files used to develop the meteorological data, as well as heat flux evaluation spreadsheets for the BTM airport data Hln9091.144 144 File Gtf9091.ua UA File Asarco.prn PRN File ACCOnSite.inp INP File Os.err ERR File Os.oqa OQA File Os.rpt RPT File ACCSfc.inp INP File Hlnsfc9091.err ERR File Hlnsfc9091.iqa IQA File Hlnsfc9091.oqa OQA File Hlnsfc9091.rpt RPT File ACCUa.inp INP File Gtfua.iqa IQA File Gtfua.oqa OQA File Gtfua9091.err ERR File Gtfua9091.rpt RPT File ACCMerge.inp INP File ACCmerge9091.err ERR File ACCmerge9091.out OUT File ACCmerge9091.rpt RPT File ACC.log Text Document ACC.out OUT File Aersurface.dat Surfer Worksh albedo_bowen_domain.txt Text Document roughness_domain.txt Text Document ACCStage3.inp INP File aemet.inp INP File ACC_os_hlnsfc_gtfua_9091.msg Outlook Item ACC_os_hlnsfc_gtfua_9091.pfl PFL File ACC_os_hlnsfc_gtfua_9091.rpt RPT File ACC_os_hlnsfc_gtfua_9091.sfc SFC File ACC_OS_HLNSFC_GTFUA_9091_SF Microsoft Excel
Digital Elevation Model Files	<div> <div>46111E8.dem</div> <div>46111F8.dem</div> <div>46112E1.dem</div> <div>46112F1.dem</div> </div>

Extensions have the following meanings:

*.DTA	- Input file
*.LST	- Standard data output
*.GRF	- Standard graphics output
*.SO	- Building dimensions used by ISC3
*.PIP	- BPIP input file
*.TAB	- BPIP tab file
*.SUM	- BPIP summary file
*.USF	- Modeling results summary
*.DEM	- USGS Digital Terrain File
*.BAT	- DOS Batch Run File
*.BST	- Beeline Software BEEST Modeling Suite File

## **APPENDIX A: RECEPTOR GRAPHICS**

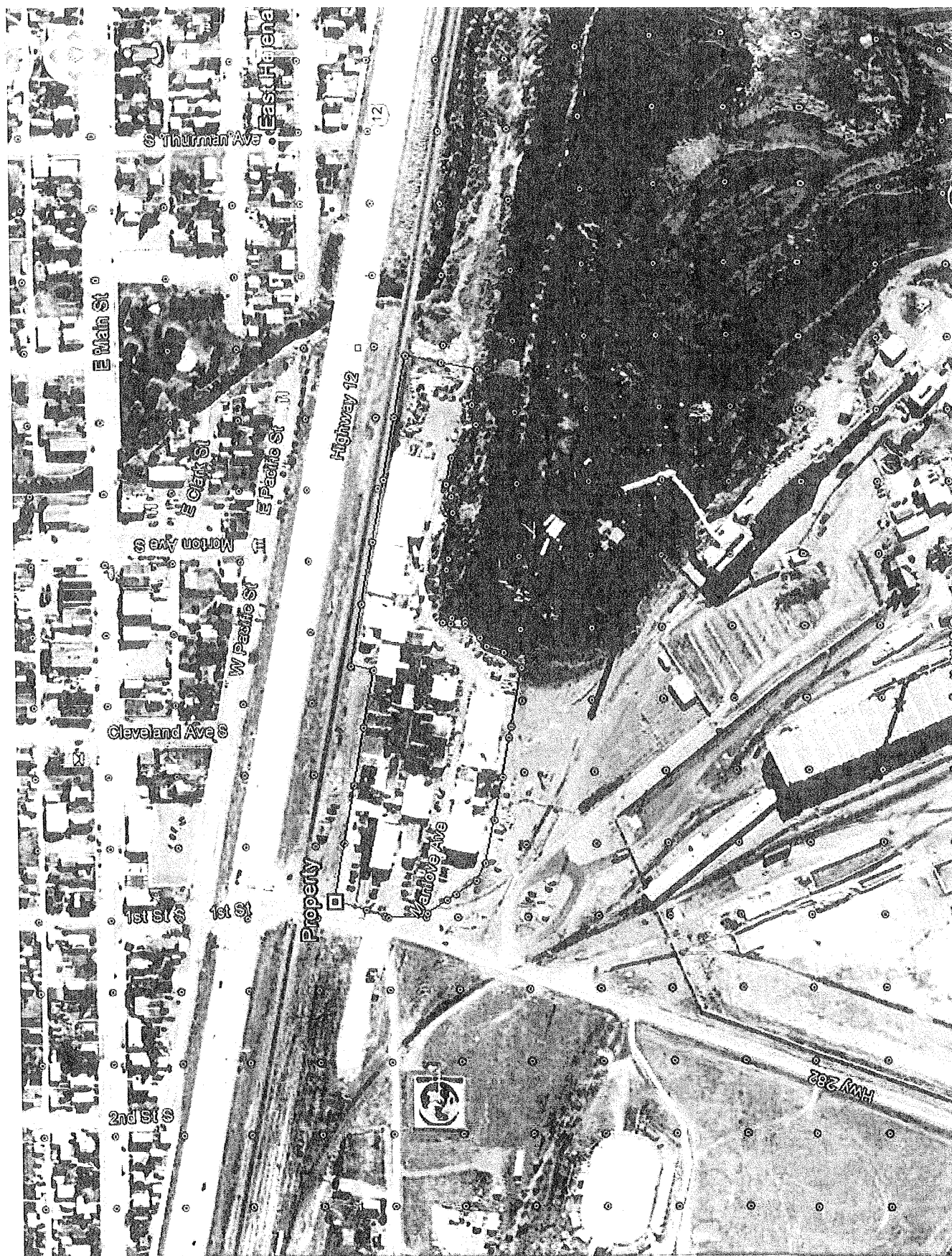
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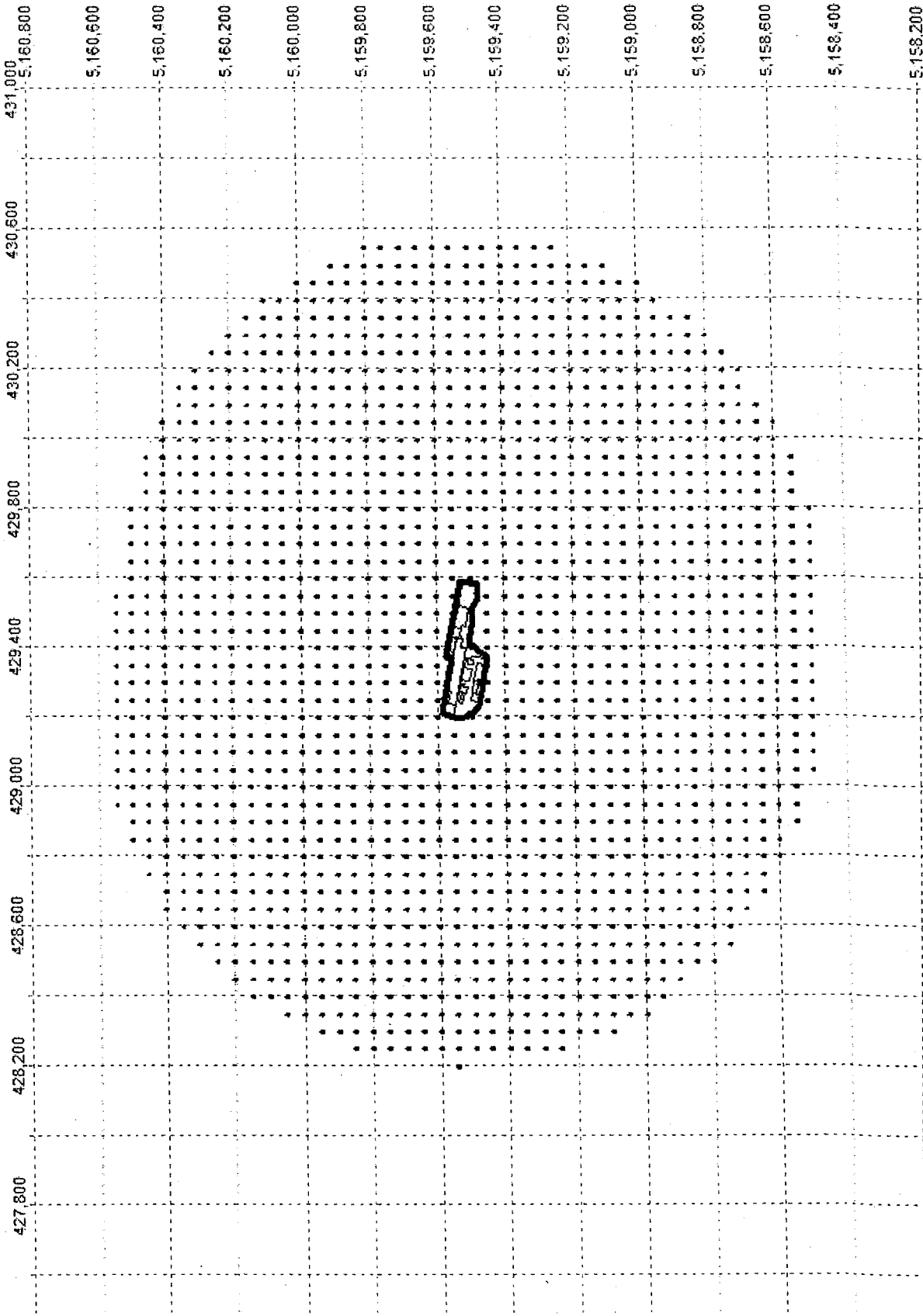
Scale: 1" = 50.0 Meters

American Chemet-Plant Modification





ACH Receptor Grid



Scale: 1" = 417.9 Meters

American Chemet-Plant Modification

## **APPENDIX B: PREPARATION OF METEOROLOGICAL DATA**

## Preparation of ASARCO met data for AERMET

The ASARCO meteorological data were provided by John Coefield of MDEQ. As received from MDEQ, the data consisted of a zip archive containing text files with the hourly data values in tabular form, with the 24 hourly values for each day contained on each line in the text file. The hourly values were organized into monthly tables. The text files contained hourly values for the following parameters:

- Old Railroad Monitoring Site: wind speed, wind direction, sigma-theta, peak wind gust, and temperature measured at 10-meters from December 1989 through June 1991.
- Kennedy Park Monitoring Site: wind speed, wind direction, sigma-theta, peak wind gust, and temperature measured at 10-meters from December 1989 through June 1991.
- Firehall Monitoring Site: wind speed, wind direction, sigma-theta, peak wind gust, and temperature measured at 10-meters from December 1989 through June 1991.
- Zinc Stack Monitoring Site: wind speed, wind direction, sigma-theta, peak wind gust, and temperature measured at 35-meters and 103-meters from December 1989 through June 1991.
- ASARCO Plant Site: temperature measured at 10-meters from June 1990 through June 1991.

These data had been further analyzed and processed by ASARCO for their dispersion modeling purposes in the early 1990s. In particular, they had produced a model-ready meteorological data set consisting of 10-meter data from the Kennedy Park Site and 35- and 103-meter data from the Zinc Stack Site. Missing data in the original data set had been substituted with data from the other monitoring sites and from Helena Airport surface and Great Falls upper air data. These model-ready data were presented in Appendix X-1 through Appendix X-3 in the data set provided by MDEQ, and these were the data that were reprocessed for input to AERMET.

The data contained in the Appendix X files were first consolidated using a text editor to remove extraneous data and to organize the data by parameter. The result of this consolidation was a set of data files, each of which contained data for one parameter, with 24 hourly values on each line in the file. A small utility program (ExtractASARCO.exe) was developed to read each of the parameter files for a given measurement location and height and to write the data into an output file in a format suitable for input to AERMET. Three such files were created: one for the 10-meter data at the Kennedy Park Site, one for the 35-meter data at the Zinc Stack Site, and one for the 103-meter data at the Zinc Stack Site. A second small utility program (CombineASARCO.exe) was developed to read these three data files and combine them into a final data file for input to AERMET. This final data file (Asarco.out) has data from each measurement level (10-, 35-, and 103-meters) in sequential order for each hour of data. As a final step, this output text file was imported into Microsoft Excel so that the temperature data could be converted to degrees Celsius as required by

AERMET. The Excel spreadsheet was exported to a fixed width text file (Asarco.prn) which was used in the AERMET processing.

The site characteristics data required for the AERMET stage 3 processing were calculated using the AERSURFACE utility program. AERSURFACE.exe (dated 08009) was obtained from the US EPA Support Center for Regulatory Atmospheric Modeling website. As described in the user's guide (EPA-454/B-08-001), the AERSURFACE application reads "land cover data from the U.S. Geological Survey (USGS) National Land Cover Data 1992 archives (NLCD92), which it uses to determine the land cover types for the user-specified location. AERSURFACE matches the NLCD92 land cover categories to seasonal values of albedo, Bowen ratio, and surface roughness. Values of surface characteristics are calculated based on the land cover data for the study area and output in a format for input into AERMET Stage 3." Land cover data used for the present analysis are available upon request or can be downloaded from <http://edcftp.cr.usgs.gov/pub/data/landcover/states/montana.nlcd.tif.gz> (download the zipped file montana.nlcd.tif.gz).

AERSURFACE was executed interactively, with the default options employed. The center location selected was the location of the meteorological data tower. Specifically, the following options were selected during execution:

- \*\* Center Latitude (decimal degrees): 46.590000
- \*\* Center Longitude (decimal degrees): -111.920000
- \*\* Datum: NAD27
- \*\* Study radius (km) for surface roughness: 1.0
- \*\* Airport? N, Continuous snow cover? Y
- \*\* Surface moisture? Average, Arid region? N

These selections resulted in the following assignments during AERSURFACE execution:

- \*\* Month/Season assignments? Default
- \*\* Late autumn after frost and harvest, or winter with no snow: 0
- \*\* Winter with continuous snow on the ground: 12 1 2
- \*\* Transitional spring (partial green coverage, short annuals): 3 4 5
- \*\* Midsummer with lush vegetation: 6 7 8
- \*\* Autumn with unharvested cropland: 9 10 11

The output from the AERSURFACE processing was a set of four seasonal site characteristics (albedo, Bowen ratio, and surface roughness length) for each of twelve 30-degree wind direction sectors. These values were incorporated into the stage 3 input control file for the final AERMET processing run.

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

**AGENDA # III.B.1.**

**AGENDA ITEM SUMMARY:** The Department requests that the Board approve the filing of the attached draft joint Board/Department Amended Notice of Proposed Amendment and Extension of Comment Period.

**LIST OF AFFECTED RULES:** ARM 17.30.702, 17.36.345, 17.36.914, and 17.38.101.

**AFFECTED PARTIES SUMMARY:** The proposed rule amendments will affect designers and owners of systems that discharge sewage to subsurface treatment systems, and local boards of health and health departments that have regulations for such systems.

**SCOPE OF PROPOSED PROCEEDING:** A comment was received requesting that the Board and the Department make available to the public those rules and other publications that are adopted by reference in Department Circular DEQ-4, Montana Standards for Subsurface Wastewater Treatment Systems (DEQ-4). In response, the Department is proposing to amend, and is requesting that the Board propose to amend, DEQ-4 by providing: (a) the specific version of each standard to be adopted; (b) a link to the web site of the source of each rule or publication proposed to be adopted by reference, as required by 2-4-307(3)(c), MCA; (c) the address of the department where the rule or publication may be viewed; and (d) language to clarify that these standards are adopted by reference. This information is contained in a new Appendix F to DEQ-4.

The Department, therefore, requests that the Board amend the notice and extend the comment period to allow the public more time to provide comment regarding the industry standards adopted by reference.

**BACKGROUND:** Department Circular DEQ-4 sets out requirements for the design and preparation of plans and specifications for subsurface sewage treatment systems. Circular DEQ-4 is incorporated by reference in Department rules for review of subdivisions, and in Board rules addressing water quality nondegradation, review of public sewer systems, and minimum standards for sewage regulation by local health agencies. In the proposed revisions to Department Circular DEQ-4, the numbering is corrected, language is added clarifying the adoption by reference of industry design standards, and a new Appendix F is added, which lists those industry design standards, provides electronic link information, and describes where a hard copy may be viewed.

**HEARING INFORMATION:** The Department recommends that the Board issue the Amended Notice of Proposed Amendment and Extension of Comment Period.

**BOARD OPTIONS:**

The Board may:

1. Issue the attached Amended Notice of Proposed Amendment and Extension of Comment Period;
2. Modify and issue the Notice; or
3. Determine that amendment of the rules is not appropriate and deny the Department's request to issue the Amended Notice, but continue with the

proposed amendments based on the original notice in this rulemaking. Should the Board decide not to issue this Amended Notice, this rulemaking will terminate because the amendments will not have been adopted within the six months required in 2-4-305(7), MCA.

**DEQ RECOMMENDATION:**

The Department recommends that the Board extend the comment period to accept further public comment.

**ENCLOSURES:**

1. Draft Amended Notice of Proposed Amendment and Extension of Comment Period
2. Table listing electronic source information in accordance with 2-4-307, MCA (Omissions from ARM or Register)

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	AMENDED NOTICE OF
17.30.702, 17.36.345, 17.36.914, and )	PROPOSED AMENDMENT AND
17.38.101 pertaining to Department )	EXTENSION OF COMMENT
Circular DEQ-4 )	PERIOD
)	
)	(WATER QUALITY)
)	(SUBDIVISIONS/ON-SITE
)	SUBSURFACE WASTEWATER
)	TREATMENT)
)	(PUBLIC WATER AND SEWAGE
)	SYSTEMS REQUIREMENTS)

TO: All Concerned Persons

1. On December 20, 2012, the Board of Environmental Review and the Department of Environmental Quality published MAR Notice No. 17-343 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2529, 2012 Montana Administrative Register, issue number 24. On January 31, 2013, the Board of Environmental Review and the Department of Environmental Quality published MAR Notice No. 17-343 extending the comment period because the original comment period spanned the Christmas and New Year holidays.

2. A comment was received requesting that the board and the department make available to the public those rules and other publications that are adopted by reference in Department Circular DEQ-4, Montana Standards for Subsurface Wastewater Treatment Systems (DEQ-4). In response, the board and the department are proposing to amend DEQ-4 by providing: (a) the specific version of each standard to be adopted; (b) a link to the web site of the source of each rule or publication proposed to be adopted by reference, as required by 2-4-307(3)(c), MCA; (c) the address of the department where the rule or publication may be viewed; and (d) language has been added to clarify that these standards are adopted by reference. This information may be viewed at <http://deq.mt.gov/wqinfo/sub/deq-4tables.mcp>. The board and department are adding a new Appendix F, which lists the design standards referenced in DEQ-4 and links to the web sites where the standards may be obtained. No further amendments to DEQ-4 are being proposed in this notice based on comments received during the initial Notice of Public Hearing or the Notice of Extension of Comment Period. Comments already received by the department will be addressed during the adoption process of this rulemaking and, therefore, resubmission of those comments is not necessary.

The board and the department are, therefore, amending the notice and extending the comment period to allow the public more time to provide comment regarding the industry standards adopted by reference.

MAR Notice No. 17-343B



3. Written data, views, or arguments may 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](mailto:ejohnson@mt.gov), no later than \_\_\_\_\_, 2013. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

4. The board and department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking action 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., \_\_\_\_\_, 2013, 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](mailto:ejohnson@mt.gov).

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

_____	BY:	_____
JOHN F. NORTH		JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer		Chairman

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

BY:	_____
	TRACY STONE-MANNING, Director

Certified to the Secretary of State, \_\_\_\_\_, 2013.

**Table 1**

<b>Adopted-by-Reference</b>	<b>Source Link</b> (for purchase or where available for free)
ASTM C117-13	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=21254E2A5D0A&amp;oshid=21254E2A580A&amp;shopping_cart_id=21254E2A560A&amp;rid=Z06&amp;input_doc_number=c117&amp;mid=5280&amp;input_doc_number=c117&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00014310&amp;item_key_date=950430&amp;input_doc_number=c117&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=21254E2A5D0A&amp;oshid=21254E2A580A&amp;shopping_cart_id=21254E2A560A&amp;rid=Z06&amp;input_doc_number=c117&amp;mid=5280&amp;input_doc_number=c117&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00014310&amp;item_key_date=950430&amp;input_doc_number=c117&amp;input_doc_title=</a>
ASTM D5093-08	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125482B290A&amp;oshid=2125482B260A&amp;shopping_cart_id=2125482B2C0A&amp;rid=Z06&amp;input_doc_number=c117&amp;mid=5280&amp;input_doc_number=c117&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00128525&amp;item_key_date=911231&amp;input_doc_number=d5093&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125482B290A&amp;oshid=2125482B260A&amp;shopping_cart_id=2125482B2C0A&amp;rid=Z06&amp;input_doc_number=c117&amp;mid=5280&amp;input_doc_number=c117&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00128525&amp;item_key_date=911231&amp;input_doc_number=d5093&amp;input_doc_title=</a>
ASTM D3034-08	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125432B3B0A&amp;oshid=2125432B370A&amp;shopping_cart_id=2125432B360A&amp;rid=Z06&amp;input_doc_number=d5093&amp;mid=5280&amp;input_doc_number=d5093&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00017192&amp;item_key_date=910530&amp;input_doc_number=d3034&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125432B3B0A&amp;oshid=2125432B370A&amp;shopping_cart_id=2125432B360A&amp;rid=Z06&amp;input_doc_number=d5093&amp;mid=5280&amp;input_doc_number=d5093&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00017192&amp;item_key_date=910530&amp;input_doc_number=d3034&amp;input_doc_title=</a>
ASTM D1785-12	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125492C550A&amp;oshid=2125492C5B0A&amp;shopping_cart_id=2125492C560A&amp;rid=Z06&amp;input_doc_number=d3034&amp;mid=5280&amp;input_doc_number=d3034&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00016048&amp;item_key_date=870830&amp;input_doc_number=d1785&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125492C550A&amp;oshid=2125492C5B0A&amp;shopping_cart_id=2125492C560A&amp;rid=Z06&amp;input_doc_number=d3034&amp;mid=5280&amp;input_doc_number=d3034&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00016048&amp;item_key_date=870830&amp;input_doc_number=d1785&amp;input_doc_title=</a>
ASTM D2321-11	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125432B390A&amp;oshid=2125432B3C0A&amp;shopping_cart_id=2125432B3C0A&amp;rid=Z06&amp;input_doc_number=d1785&amp;mid=5280&amp;input_doc_number=d1785&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00016509&amp;item_key_date=881030&amp;input_doc_number=d2321&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125432B390A&amp;oshid=2125432B3C0A&amp;shopping_cart_id=2125432B3C0A&amp;rid=Z06&amp;input_doc_number=d1785&amp;mid=5280&amp;input_doc_number=d1785&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00016509&amp;item_key_date=881030&amp;input_doc_number=d2321&amp;input_doc_title=</a>
ASTM D4318-10	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125412B5E0A&amp;oshid=2125412B5E0A&amp;shopping_cart_id=2125412B5C0A&amp;rid=Z06&amp;input_doc_number=d2321&amp;mid=5280&amp;input_doc_number=d2321&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00018514&amp;item_key_date=891116&amp;input_doc_number=d4318&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125412B5E0A&amp;oshid=2125412B5E0A&amp;shopping_cart_id=2125412B5C0A&amp;rid=Z06&amp;input_doc_number=d2321&amp;mid=5280&amp;input_doc_number=d2321&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00018514&amp;item_key_date=891116&amp;input_doc_number=d4318&amp;input_doc_title=</a>
ASTM D698-12	<a href="http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125442B4D0A&amp;oshid=2125442B480A&amp;shopping_cart_id=2125442B440A&amp;rid=Z06&amp;input_doc_number=d4318&amp;mid=5280&amp;input_doc_number=d4318&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00019131&amp;item_key_date=870730&amp;input_doc_number=d698&amp;input_doc_title=">http://global.ihs.com/doc_detail.cfm?currency_code=USD&amp;customer_id=2125442B4D0A&amp;oshid=2125442B480A&amp;shopping_cart_id=2125442B440A&amp;rid=Z06&amp;input_doc_number=d4318&amp;mid=5280&amp;input_doc_number=d4318&amp;country_code=US&amp;lang_code=ENGL&amp;item_s_key=00019131&amp;item_key_date=870730&amp;input_doc_number=d698&amp;input_doc_title=</a>
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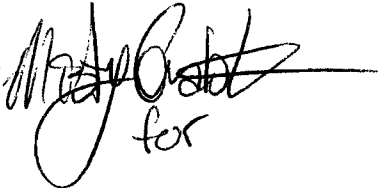
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IAMPO/ANS I Z1000-07	<a href="http://webstore.ansi.org/RecordDetail.aspx?sku=IAPMO%2fANSI+Z1000+-+2007">http://webstore.ansi.org/RecordDetail.aspx?sku=IAPMO%2fANSI+Z1000+-+2007</a>
IAPMO PS 63-2005	<a href="http://iapm-membership.org/index.php?page=shop.product_details&amp;flypage=flypage_iapmo.tpl&amp;product_id=238&amp;category_id=43&amp;option=com_virtuemart&amp;Itemid=3">http://iapm-membership.org/index.php?page=shop.product_details&amp;flypage=flypage_iapmo.tpl&amp;product_id=238&amp;category_id=43&amp;option=com_virtuemart&amp;Itemid=3</a>
UNI-B-6-13	<a href="http://www.uni-bell.org/resources.php?c=31">http://www.uni-bell.org/resources.php?c=31</a>
ACI 318-12	<a href="http://www.concrete.org/BookstoreNet/ProductDetail.aspx?itemid=31811">http://www.concrete.org/BookstoreNet/ProductDetail.aspx?itemid=31811</a>



**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

  
for

DATE: March 18, 2013

SUBJECT: Board of Environmental Review case, Case No. BER 2013-03 SUB

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE SANITATION IN  
SUBDIVISIONS ACT BY LEVI BRITTON  
AT THE 80<sup>TH</sup> STREET ESTATES  
SUBDIVISION, BILLINGS, YELLOWSTONE  
COUNTY, MONTANA. [FID 2241, DOCKET  
NO. SUB-13-05]

Case No. BER 2013-03 SUB

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID 2241, Docket No. SUB-13-03).

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

David Dennis  
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

# Yellowstone Contractors

BER 2013-03 SUB  
(Specializing in Land Development & Subdivision)

ENVIRONMENTAL REVIEW

Filed with the  
NTANA BOARD OF

This 15<sup>th</sup> day of March 2013  
Levi Britton

D.E.Q.

2013 MAR 15 A 9 33 AM

7625 N. Leopard Ave. • Billings, MT 59106  
Phone (406) 290-6633 • Fax (406) 652-5163

ATTN: Barbara Kingery, John L. Arrigo, James Kujawa  
Tom Boverton, Board Secretary

RE: Docket No. Sub-13-05 (Fid 2241) Dated March 1, 2013

I am responding, in writing, within 30 days of Said Notice.

In Response to #17: We are choosing option b. as this is the only option that will truly solve storm water issues for this property.

Chuck at E.E.C. engineering has been in contact w/ James Kujawa to submit a second application, addressing the items noted in the first application denial. We are fully expecting this resubmitted in the next few days. We will send submittal to Barbara Kingery as instructed.

\* Please confirm in writing our decision to #17.

In Response to #19: Any payments made will be sent to John L. Arrigo within 60 days of notice.

As per #23: I am requesting, in writing, to Board Secretary, a hearing before the Montana Board of Environmental Review. \* Please confirm, in writing, the acceptance of my request to #23 and copy all correspondence to:

Hendrickson Law Firm ATTN: Mark Noenig/Daniel Ball P.O. Box 2502 Billings, MT 59103.

I look forward to working with (not against) all parties at D.E.Q. with 2 main goals:

#1. To Bring 80<sup>th</sup> Street Estates phase 1 and 2 into Compliance.

#2. To design & create a Long Term, working solution to storm water issues in this Subdivision as what was prescribed and approved in the beginning was a Failure.

I ask and look for assistance from all parties to make both of our goals a reality.

Sincerely,



Planning, Designing and Customized Construction

Homes • Lodges • Entrances • Archways • Barns • Pole Buildings • Arenas • Roads • Fences

Levi Britton

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE SANITATION IN  
SUBDIVISIONS ACT BY LEVI BRITTON AT  
THE 80<sup>th</sup> STREET ESTATES SUBDIVISION,  
BILLINGS, YELLOWSTONE COUNTY,  
MONTANA. (FID #2241)

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE COMPLIANCE  
AND PENALTY ORDER

Docket No. SUB-13-05

**I. NOTICE OF VIOLATION**

Pursuant to the authority of Sections 76-4-108(1) and 75-6-109(1), Montana Code Annotated (MCA), the Department of Environmental Quality (Department) hereby gives notice to Levi Britton (Respondent) of the following Findings of Fact and Conclusions of Law with respect to violations of the Sanitation in Subdivisions Act (SSA) (Title 76, chapter 4, part 1, MCA) and the administrative rules implementing the SSA (Administrative Rules of Montana (ARM) Title 17, chapter 36, sub-chapters 1 through 6) adopted thereunder.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
2. The Department administers the SSA and the administrative rules adopted thereunder.
3. Respondent subdivided and developed 80<sup>th</sup> Street Estates Subdivision 1<sup>st</sup> Filing (Property One) and 2<sup>nd</sup> Filing (Property Two) located in Section 12, Township 1 South, Range 24 East, Yellowstone County, Montana.
4. The Department issued a certificate of subdivision plat approval (COSA) under the SSA for Property One on October 6, 2006 (EQ #06-3213) and Property Two on April 8, 2008 (EQ #08-1903).

1           5.       The COSAs for Property One and Property Two (the Properties) each have an  
2 approved storm water drainage plan (Plan) that states the storm water runoff within the subdivision  
3 will be contained in the street/avenue ditches (Borrow Pits) that are within the perimeter of the  
4 property and that there are to be no culverts to facilitate the movement of storm water for discharge  
5 off of the Properties.

6 **Operation of unapproved subdivision**

7           6.       Section 76-4-130, MCA, states that a person may not construct or use a facility  
8 that deviates from the COSA until the Department has approved the deviation.

9           7.       On October 20, 2011, the Department received a complaint concerning  
10 Respondent's deviation from the approved COSAs at the Properties because of the extensive use  
11 of culverts to route storm water throughout the Properties and discharge storm water off of the  
12 Properties.

13          8.       On May 8, 2012, the Department performed a field investigation of the Properties  
14 that documented 33 culverts underneath driveways connecting Borrow Pits on either side and  
15 eight culverts underneath roads. The investigation also determined that the majority of the  
16 Borrow Pits were not constructed as per the approved Plan because they lacked the approved  
17 depth and width. Photographs from the investigation also indicate the removal of the historic  
18 berm on the south side of the Properties would allow storm water discharges off of the  
19 Properties.

20          9.       On June 1, 2012, the Department notified Respondent in writing (Violation Letter)  
21 that the extensive use of culverts throughout the Properties and the Borrow Pits not constructed as  
22 per the approved Plan deviated from the COSAs and therefore the Properties are in violation of  
23 Section 76-4-130, MCA. The Violation Letter requested Respondent to return the Properties to  
24 compliance with the approved Plan by either constructing the Properties in accordance with the



1 Plan and supply as-built drawings or submit an application to the Department for a rewrite of the  
2 COSAs, get the rewrites approved, reconstruct the storm water drain system as per the approved  
3 rewrites, and supply as-built drawings after construction is complete. On June 14, 2012, the  
4 Department contacted the Respondent by telephone to describe the photographic evidence of the  
5 removal of the historic berm on the south side of the Properties and told Respondent that the berm  
6 needs to be restored to contribute to bringing the Properties back into compliance with the SSA.

7 10. On August 8, 2012, the Department received a single rewrite application  
8 (Application) for both COSAs and a \$1,560 payment for the review fee.

9 11. On October 22, 2012, the Department informed Respondent in writing that the  
10 Application was denied (Denial Letter One) and outlined the reason for denial. Denial Letter One  
11 also detailed that because there are two plats and two COSAs there must be two rewrite applications  
12 unless an amended plat was drawn up superseding both previous plats. The Application submitted  
13 was given EQ #13-1204 and all comments in Denial Letter One and \$660 were assigned to Property  
14 One. Property Two was given EQ #13-1356 to a tentative application that is required to be submitted  
15 to the Department to rewrite the COSA for Property Two which the Application also addressed in its  
16 content. The balance of the funds from Paragraph 10 was assigned to EQ #13-1356.

17 12. On October 23, 2012, the Department informed Respondent in writing that the  
18 application EQ #13-1356 was denied (Denial Letter Two) because of inadequate information.

19 13. The Department has not received a response to the denial letters in Paragraphs 11  
20 and 12 nor has Respondent performed the alternate method of compliance as spelled out in the  
21 Violation Letter referred to in Paragraph 9.

22 14. Respondent violated and continues to violate Section 76-4-130, MCA, by failing to  
23 construct the storm water drainage system in accordance with the Plan in the COSAs for Property  
24 One and Two.

1 **Administrative penalty**

2 15. Pursuant to Section 76-4-109(a), MCA, the Department may assess an  
3 administrative penalty not to exceed \$250 for each day of violation.

4 16. The Department has calculated an administrative penalty in the amount of \$15,120  
5 for the violation alleged in Paragraph 14. *See* Section 75-1-1001, MCA, and ARM 17.4.301 through  
6 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by reference herein.

7 **III. ADMINISTRATIVE ORDER**

8 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is  
9 issued to Respondent pursuant to the authority vested in the State of Montana, acting by and  
10 through the Department under the SSA, Section 76-4-101, *et seq.*, MCA, and the administrative  
11 rules adopted thereunder, ARM Title 17, chapter 36. Based on the foregoing Findings of Fact  
12 and Conclusions of Law and the authority cited above, the Department hereby ORDERS  
13 Respondent to take the following actions to comply with the SSA within the timeframes  
14 specified in this Order:

15 17. Within 30 days from receipt of this Order, Respondent shall notify the  
16 Department which of the following two options he will complete to return the Properties to  
17 compliance with the SSA:

18 a. Within 90 days from receipt of this Order, reconstruct the Properties as per  
19 the approved COSAs including, but not limited to: (i) remove all culverts; (ii) properly  
20 size the Borrow Pits; (iii) reconstruct the historic berm on the south side of the Properties  
21 to prevent discharge of storm water off of the Properties; and (iv) supply as-built  
22 drawings, produced by a professional engineer, of the completed work performed; or

23 b. Upon receipt of this Order, complete the COSA rewrite process for the  
24 Properties according to the following schedule: (i) within 30 days from receipt of this

1 Order, submit a complete and approvable response to Denial Letters One and Two  
2 (copies attached); (ii) respond to any further denial letters within 30 days; (iii) by  
3 September 1, 2013, construct the storm water drainage system as approved in the COSA  
4 rewrite; and (iv) by November 1, 2013, supply as-built drawings, produced by a  
5 professional engineer, of the work performed.

6 18. All documentation, and submittals required in Paragraph 17 shall be sent to:

7 Barbara Kingery, PE  
8 Subdivision Review Section  
9 Department of Environmental Quality  
10 1520 E. Sixth Avenue  
11 P.O. Box 200901  
12 Helena, MT 59620-0901

13 19. Respondent is assessed a penalty of \$15,120 for the violation described in this  
14 Order. Within 60 days from receipt of this Order, Respondent shall pay to the Department an  
15 administrative penalty in the amount of \$15,120. The penalty must be paid by check or money  
16 order, made payable to the "Montana Department of Environmental Quality," and shall be sent to:

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

23 20. Failure to take the required corrective actions and pay the assessed penalty by the  
24 specified deadlines, as ordered herein, constitutes a violation of Title 76, chapter 4, part 1,  
MCA, and may result in the Department seeking a court order assessing civil penalties of up to  
\$1,000 per day of violation pursuant to Section 76-4-109, MCA.

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

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

7 **IV. NOTICE OF APPEAL RIGHTS**

8 23. Respondent may appeal this Order under Section 76-4-108, MCA, by filing a  
9 written request for a hearing before the Montana Board of Environmental Review no later than  
10 30 days after service of this Order. Any request for a hearing must be in writing and sent to:

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

14 24. Hearings are conducted as provided in the Montana Administrative Procedure  
15 Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to  
16 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings  
17 prior to the hearing may include formal discovery procedures, including interrogatories, requests  
18 for production of documents, and depositions. You have the right to be represented by an  
19 attorney in all proceedings. *See* ARM 1.3.231(1).

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

22 //

23 //

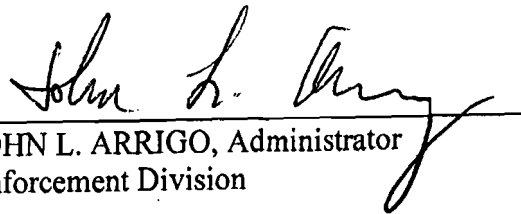
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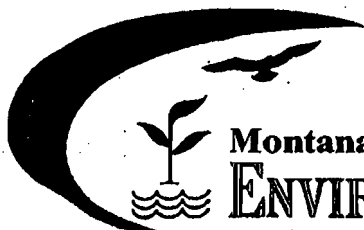
1        26.    This Order becomes effective on the date of service. Service by mail is complete  
2 on the date of receipt.

3 IT IS SO ORDERED:

4 DATED this 1<sup>st</sup> day of March, 2013.

5                                STATE OF MONTANA  
6                                DEPARTMENT OF ENVIRONMENTAL QUALITY

7                                  
8                                \_\_\_\_\_  
9                                JOHN L. ARRIGO, Administrator  
10                              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](http://www.deq.mt.gov)

October 22, 2012

Quentin Eggart PE  
Eggart Engineering Company  
6809 King Ave. West, Unit E  
Billings, MT 59106

Levi Britton  
7623 North Leopard Ave  
Billings, MT 59106

RE: 80<sup>th</sup> Street Estates Subdivision  
1<sup>st</sup> Filing  
Yellowstone County  
EQ #13-1204

Dear Applicant:

The application for the above referenced subdivision was received by this office and reviewed in accordance with ARM Title 17, Chapter 36. This is to inform you that the material submitted for the above referenced proposal is incomplete for our review purposes. The deficiencies are noted on the attached sheet.

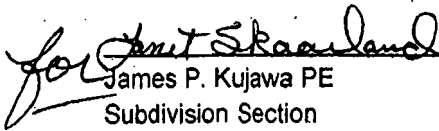
Because of the inadequate information, the Department hereby denies the proposed division. Until the information required by law and regulation is submitted to this office and found to be adequate, we cannot produce a statement that the subdivision is free of sanitary restriction. The time period for review, specified in ARM Section 17.36.106 (1) (b), will commence again upon your re-submittal of material which addresses the deficiencies.

If you wish to challenge the Department's denial of certification, you may request a hearing before the Board of Environmental Review or the Department, pursuant to Section 76-4-126, MCA and the Montana Administrative Procedures Act.

You may submit the necessary information for our review. If you do so, please use the submittal title noted above to assure that the information is placed with your particular proposal.

If you have any questions on the above, please feel free to call me at the Permitting and Compliance Division at 444-2825.

Sincerely,

  
James P. Kujawa PE  
Subdivision Section  
Water Protection Bureau

c: file  
Yellowstone County Sanitarian

RE: 80<sup>th</sup> Street Estates Subdivision  
1<sup>st</sup> Filing  
Yellowstone County  
EQ #13-1204

**ADDITIONAL INFORMATION**

**GENERAL REWRITE**

1. 76-4-130MCA states that a person may not construct or use a facility that deviates from the certificate of subdivision approval until the reviewing authority has approved the deviation.

The issues with the stormwater have created a situation where these subdivision(s) are out of compliance with their Certificates of Subdivision Approval (COSA).

An application and plat was submitted for the 80<sup>th</sup> Street Estates Subdivision, 1<sup>st</sup> filing and a COSA was issued, by county contract review, on October 6<sup>th</sup> 2006, under EQ#06-3213. An application and plat was submitted for the 80<sup>th</sup> Street Estates Subdivision, 2<sup>nd</sup> filing and a COSA was issued, by county contract review, on April 18<sup>th</sup> 2008, under EQ#08-1903.

Since there were originally two plats and two COSA's issued approving those separate plats, a single COSA cannot now be issued for a rewrite of both the 1<sup>st</sup> and 2<sup>nd</sup> filings, unless a single new amended plat was drawn up superseding both previous plats. Thus, there will have to be two separate rewrites required to bring these subdivision into compliance. All issues with regard to the 1<sup>st</sup> filing will be addressed in this letter under the number EQ#13-1204.

ARM 17.36.102(1)states that to initiate review of a subdivision under 76-4-125, MCA, a person must submit a complete application, signed by the owner of the subdivision or an authorized representative, to the department.

A new application will have to be submitted for the 2<sup>nd</sup> filing. The Department has assigned the number: EQ#13-1356 to this tentative application. A separate letter of comments for this rewrite will be forthcoming under this new number. Fees submitted so far will be divided accordingly based upon the lots in each subdivision.

2. The total fees received for the review of (both) submittals was \$1,530.00 on 8/28/12. The enclosed fee calculation sheet shows the required subdivision fees of \$660.00 for review of the 1<sup>st</sup> filing. The remaining review fees will be applied to the review of the 2<sup>nd</sup> filing.



3. ARM 17.36.104(1) states that the applicant shall provide four copies of the lot layout document for the proposed subdivision. The lot layout must be no larger than 11x17. ARM 17.36.104(2) states the following information must be provided on the layout document (a) the name of the subdivision, and the county, section, township and range (b) a north arrow and scale (c) the boundaries, dimensions and total area of each lot (d) identifier or number for each lot (e) location of existing and proposed easements (f) locations of existing and proposed roads (g) locations and sizes of existing and proposed storm water structures (culverts, ponds, dry wells, etc) (h) locations of drainage ways (i) name and affiliation of the person who prepared the lot layout (j) information in Table 1 for specific water supply and wastewater systems.

New Lot layouts were not received with this application. New lot layouts for the rewrite of the 1<sup>st</sup> filing (only), with drainfield locations, etc., will have to be submitted. In the case of the rewrite of the 1<sup>st</sup> filing, since there are no changes to the lot boundaries or drainfield locations, the same lot layouts can be used except that the previous Department approval stamps should be erased and/or white out and any reference to the EQ#06-3213 number should be removed or replaced with EQ#13-1204. Normally, the stormwater structures would also have to be shown on the lot layouts but the stormwater plans will be attached as succeeding pages to the lot layouts when the COSA is issued. Please review the requirements listed above and in Table 1 and submit new lot layouts.

4. ARM 17.36.110(1) Subject to the local certification requirements set out in (2), the reviewing authority shall issue a certificate of subdivision approval if: (a) an applicant has submitted all of the information required by this chapter.

When the original 2006 COSA was issued only Lot 1 had an existing house and drainfield. Obviously, since then, lots have been sold and houses and drainfields have been constructed. The new COSA, when it is issued, must be written differently to reference the other lots with existing structures as well as those lots that have not yet sold or been built upon. Please submit a listing of lots that now have existing houses and existing drainfields.

## STORMWATER

5. ARM17.36.310(1) the applicant shall submit a storm drainage plan to the reviewing authority. The plan must conform to the requirements of either (2) or (3).

ARM17.36.310(2) Except as provided in (3), a storm drainage plan must be designed in accordance with department Circular DEQ-8.(a) for lots proposed for uses other than as single-family dwellings, a storm drainage plan submitted under (2) must be prepared by a registered professional engineer.

The new stormwater plan, for both the 1<sup>st</sup> and 2<sup>nd</sup> filing was received with this application. Note that the plan will be reviewed as one overall plan for both subdivision and the COSA's for both subdivisions will reference the same plan when they are issued. Note also, that since this rewrite is being prompted by a complaint, that submittal of as-builts will be required in the COSA. The following are items to be addressed for the entire stormwater plan.

6. The Department has received complaints of stormwater from this subdivision entering the King Avenue Estates Subdivision, which I suspect is what prompted this rewrite. The plan shows that an 8-inch culvert at the south end of North Leopard Avenue is to be removed. This particular culvert would have received stormwater from Lots 1 and 2, and portions of North African Ave., South African Ave and North Leopard Ave. Where will this run-off go when the culvert is removed? If it's slated to enter the swale on the south end of Lots 12, 13 and 14, how will it get there; no crossing culvert is shown on the plan? The original stormwater plan for this subdivision was to capture the run-off in roadside ditches. Are there ditches on North Leopard adjacent to Lots 1 and 2 that are large enough to contain and hold the run-off?
7. ARM17.36.103(1) states that in addition to the completed application form required by ARM 17.36.102, the following information must be submitted to the reviewing authority as part of a subdivision application: (p) a copy of applicable supporting legal documents, including documents relating to easements, covenants, water rights, water user agreements, and establishment of homeowners' associations and local districts.

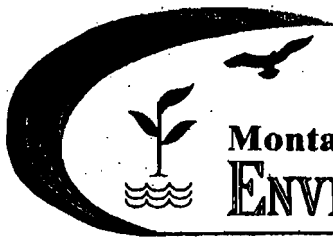
The landscape swale section will cross Lots 12, 13 and 14. The V-ditch will cross Lots 20, 21, 22 and 23. Since these conveyances and catchment will cross property that is either now or will be owned by a third party, are there easements on those lots? If not, easements are required. The Department has had situations where individual property owners have filled in stormwater conveyances because either the easement did not exist or they were unaware of the easement. Please submit evidence of the easements on the lots where the conveyances and catchments will be.

8. ARM17.36.103(1)(n) states that the following information shall be submitted to the Department: copies of applicable letters of approval or denial from local government officials. ARM 17.36.108(1) states that the applicant shall provide the Department with evidence, as set out in (2), as to whether facilities for the supply of water, disposal of sewage, and disposal of solid waste are in compliance with applicable laws and regulations of local government.

A conditional approval from the Yellowstone County Commissioners, dated August 17<sup>th</sup> 2006, was in the 1<sup>st</sup> filing file. Item #11 states that the final plat will comply with county subdivision regulations. The original stormwater plan was to capture and hold all run-off in roadside ditches. The installation of many small culverts is part of what detracted from the original plan. The new stormwater plan calls for the replacement of many of the 6-inch culverts with 8-inch culverts; however there are a few location where these 6-inch culverts will remain. The calculation submitted with this rewrite show that during the design storm these smaller culverts will be flowing full. Small culverts tend to clog easily. Many county public works or road departments have requirements for minimum culvert sizing; does Yellowstone County? Please submit verification that the 6-inch and other size PVC culverts are in compliance with Yellowstone County standards so that the requirements of the Commissioners approval are met.

Additional questions or comments may be required based upon the continued review of this file and the content of future submittals.

<b>Subdivision Review Fee Calculation Checklist</b>			
<b>SUBDIVISION NAME: 80th street estates - first filing</b>			<b>EQ#: 13-1204</b>
<b>Choose type of lots, water system, wastewater system, nondegradation, and other components as necessary</b>			
<b>TYPE OF LOTS</b>			
	Unit	Unit cost	Total (unit cost x no. of units)
Subdivision lot	lot/parcel	\$100	\$0
Condo unit - Trailer court - RV campground	unit/space	\$40	\$0
Resubmittal fee - previously approved lot/boundaries not changed	lot/parcel	\$60	\$0
<b>TYPE OF WATER SYSTEM</b>			
Individual or shared water supply system (existing/proposed)	unit	\$60	\$0
Multiple user water system	unit*	\$250	\$0
*plus \$75 per hour for review in excess of 4 hours	hour	\$75	\$0
connection to approved existing distribution system	lot/unit	\$20	\$0
extension to existing distribution system	lot/unit	\$50	\$0
new distribution system	lot/unit	\$50	\$0
Public water system, new system per DEQ-1	component	per 17.38.106	To be invoiced
connection to existing system	lot/structure	\$20	\$0
extension of existing system	lot/structure	\$40	\$0
new distribution system	lot/structure	\$40	\$0
<b>TYPE OF WASTEWATER SYSTEM</b>			
Existing systems	unit	\$60	\$0
New subsurface system	drainfield	\$75	\$0
New pressure-dosed, elevated sand mound, ET system,	design	\$150	\$0
intermittent sand filter, ETA system, recirculating sand filter,	drainfield	\$40	\$0
recirculating trickling filter, aerobic treatment unit,			
and nutrient removal			
*plus \$75 per hour for review in excess of 2 hours	hour	\$75	If Required To be invoiced
New multiple user wastewater system			
connection	lot/unit	\$20	\$0
extension	lot/unit	\$50	\$0
new collection system	lot/unit	\$50	\$0
New public wastewater system per DEQ-2	component	per 17.38.106	To be invoiced
new connection to existing public sewer system	lot/structure	\$20	\$0
new extension of existing public sewer system	lot/structure	\$50	\$0
new public wastewater collection system	lot/structure	\$50	\$0
<b>OTHER</b>			
Deviation from Circular	request/design*	\$150	\$0
*plus \$75 per hour for review in excess of two hours	hour	\$75	\$0
Waiver from Rules	request*	\$150	\$0
*plus \$75 per hour for review in excess of two hours	hour	\$75	\$0
Reissuance of original approval statement	request	\$50	\$0
Nondegradation review - nonsignificance determinations			
individual/shared	drainfield	\$50	\$0
multiple-user or public systems	lot/structure	\$25	\$0
Storm drainage plan review - plan exempt from DEQ-8	Lot	\$30	\$0
Storm drainage plan review - DEQ-8 review	Lot	\$30	22 \$660
*plus \$75 per hour for review in excess of 30 minutes per lot	hour	\$75	\$0
Preparation of environmental impact statements/EAs	actual	If Required	
Gray water reuse systems. This is a stand-alone fee and all gray water reuse systems will be reviewed at the unit cost	unit	\$75	\$0
*plus \$75 per hour in excess of two hours	hour	\$75	\$0
<b>Total Review Fee</b>			<b>\$660</b>



Montana Department of  
**ENVIRONMENTAL QUALITY**

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • [www.w.deq.mt.gov](http://www.w.deq.mt.gov)

October 23, 2012

Quentin Eggart PE  
Eggart Engineering Company  
6809 King Ave. West, Unit E  
Billings, MT 59106

Levi Britton  
7623 North Leopard Ave  
Billings, MT 59106

RE: 80<sup>th</sup> Street Estates Subdivision  
2<sup>nd</sup> Filing  
Yellowstone County  
EQ #13-1356

Dear Applicant:

The application for the above referenced subdivision was received by this office and reviewed in accordance with ARM Title 17, Chapter 36. This is to inform you that the material submitted for the above referenced proposal is incomplete for our review purposes. The deficiencies are noted on the attached sheet.

Because of the inadequate information, the Department hereby denies the proposed division. Until the information required by law and regulation is submitted to this office and found to be adequate, we cannot produce a statement that the subdivision is free of sanitary restriction. The time period for review, specified in ARM Section 17.36.106 (1) (b), will commence again upon your re-submittal of material which addresses the deficiencies.

If you wish to challenge the Department's denial of certification, you may request a hearing before the Board of Environmental Review or the Department, pursuant to Section 76-4-126, MCA and the Montana Administrative Procedures Act.

You may submit the necessary information for our review. If you do so, please use the submittal title noted above to assure that the information is placed with your particular proposal.

If you have any questions on the above, please feel free to call me at the Permitting and Compliance Division at 444-2825.

Sincerely,

James P. Kujawa PE  
Subdivision Section  
Water Protection Bureau

c: file  
Yellowstone County Sanitarian

RE: 80<sup>th</sup> Street Estates Subdivision  
2<sup>nd</sup> Filing  
Yellowstone County  
EQ #13-1356

**ADDITIONAL INFORMATION**

**GENERAL REWRITE**

1. ARM 17.36.102(1) states that to initiate review of a subdivision under 76-4-125, MCA, a person must submit a complete application, signed by the owner of the subdivision or an authorized representative, to the department.

A new application will have to be submitted for the 2<sup>nd</sup> filing. The Department has assigned the number: EQ#13-1356 to this tentative application.

2. The total fees received for the review of (both) submittals was \$1,530.00 on 8/28/12; \$660.00 of which was applied to the 1<sup>st</sup> filing review. This leaves a remainder of \$870.00. The enclosed fee calculation sheet shows the required subdivision fees of \$1,070.00 for review of the 2<sup>nd</sup> filing; that is: 29 lots for stormwater review plus the boundaries have changed for Lots 4A & 5A.

Please remit the remaining \$200.00 subdivision fees.

3. ARM 17.36.104(1) states that the applicant shall provide four copies of the lot layout document for the proposed subdivision. The lot layout must be no larger than 11x17. ARM 17.36.104(2) states the following information must be provided on the layout document (a) the name of the subdivision, and the county, section, township and range (b) a north arrow and scale (c) the boundaries, dimensions and total area of each lot (d) identifier or number for each lot (e) location of existing and proposed easements (f) locations of existing and proposed roads (g) locations and sizes of existing and proposed storm water structures (culverts, ponds, dry wells, etc) (h) locations of drainage ways (i) name and affiliation of the person who prepared the lot layout (j) information in Table 1 for specific water supply and wastewater systems.

New Lot layouts were not received with this application. New lot layouts for the rewrite of the 2<sup>nd</sup> filing (only), with drainfield locations, etc., will have to be submitted. The same lot layouts for the original 2<sup>nd</sup> filing cannot be used. There was a subsequent boundary line adjustment for Lots 2A, 3A, 4A and 5A that will have to be incorporated into the new lot layouts. Also, there was an error on the old 2<sup>nd</sup> filing lot layouts showing multi-user drainfields on Lots 4 and 5, but those drainfields were never approved by the Department or written into the original COSA. They cannot appear on the new lot layouts. Please review the requirements listed above and in Table 1 and submit new lot layouts.

4. ARM 17.36.110(1) Subject to the local certification requirements set out in (2), the reviewing authority shall issue a certificate of subdivision approval if: (a) an applicant has submitted all of the information required by this chapter.

When the original 2008 COSA was issued only Lot 1 had an existing house and drainfield. Obviously, since then, lots have been sold and houses and drainfields have been constructed. The new COSA, when it is issued, must be written differently to reference the other lots with existing structures as well as those lots that have not yet sold or been built upon. Please submit a listing of lots that now have existing houses and existing drainfields.

Additional questions or comments may be required based upon the continued review of this file and the content of future submittals.



<b>Subdivision Review Fee Calculation Checklist</b>			
<b>SUBDIVISION NAME: 80th street estates - 2nd filing</b>			<b>EQ#: 13-1356</b>
<b>Choose type of lots, water system, wastewater system, nondegradation, and other components as necessary</b>			
<b>TYPE OF LOTS</b>			
	Unit	Unit cost	Total (unit cost x no. of units)
Subdivision lot	lot/parcel	\$100	2 \$200
Condo unit - Trailer court - RV campground	unit/space	\$40	\$0
Resubmittal fee - previously approved lot/boundaries not changed	lot/parcel	\$60	\$0
<b>TYPE OF WATER SYSTEM</b>			
Individual or shared water supply system (existing/proposed)	unit	\$60	\$0
Multiple user water system	unit*	\$250	\$0
*plus \$75 per hour for review in excess of 4 hours	hour	\$75	\$0
connection to approved existing distribution system	lot/unit	\$20	\$0
extension to existing distribution system	lot/unit	\$50	\$0
new distribution system	lot/unit	\$50	\$0
Public water system, new system per DEQ-1	component		
connection to existing system	lot/structure	\$20	\$0
extension of existing system	lot/structure	\$40	\$0
new distribution system	lot/structure	\$40	\$0
<b>TYPE OF WASTEWATER SYSTEM</b>			
Existing systems	unit	\$60	\$0
New subsurface system	drainfield	\$75	\$0
New pressure-dosed, elevated sand mound, ET system,	design	\$150	\$0
intermittent sand filter, ETA system, recirculating sand filter,	drainfield	\$40	\$0
recirculating trickling filter, aerobic treatment unit,			
and nutrient removal			
*plus \$75 per hour for review in excess of 2 hours	hour	\$75	
New multiple user wastewater system			
connection	lot/unit	\$20	\$0
extension	lot/unit	\$50	\$0
new collection system	lot/unit	\$50	\$0
New public wastewater system per DEQ-2	component		
new connection to existing public sewer system	lot/structure	\$20	\$0
new extension of existing public sewer system	lot/structure	\$50	\$0
new public wastewater collection system	lot/structure	\$50	\$0
<b>OTHER</b>			
Deviation from Circular	request/design*	\$150	\$0
*plus \$75 per hour for review in excess of two hours	hour	\$75	\$0
Waiver from Rules	request*	\$150	\$0
*plus \$75 per hour for review in excess of two hours	hour	\$75	\$0
Reissuance of original approval statement	request	\$50	\$0
Nondegradation review - nonsignificance determinations			
individual/shared	drainfield	\$50	\$0
multiple-user or public systems	lot/structure	\$25	\$0
Storm drainage plan review - plan exempt from DEQ-8	Lot	\$30	\$0
Storm drainage plan review - DEQ-8 review	Lot	\$30	29 \$870
*plus \$75 per hour for review in excess of 30 minutes per lot	hour	\$75	\$0
Preparation of environmental impact statements/EAs			
Gray water reuse systems. This is a stand-alone fee and all gray water reuse systems will be reviewed at the unit cost	unit	\$75	\$0
*plus \$75 per hour in excess of two hours	hour	\$75	\$0
<b>Total Review Fee</b>			<b>\$1,070</b>

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

Responsible Party Name:	Levi Britton (Respondent) at 80th Street Estates Subdivision (Properties)	
FID:	2241	EQ #06-3213 (Property One) and EQ #08-1903 (Property Two)
Statute:	Sanitation in Subdivisions Act (SSA)	
Date:	2/27/2013	
Name of Employee Calculating Penalty:	Tom Bovington	
Maximum Penalty Authority:	\$250.00	

**Violation #1**

Description of Violation:
Respondent violated Section 76-4-130, MCA, by deviating from the certificate of subdivision approvals (COSAs) without Department review and approval. The COSAs authorized a storm water plan that stated all storm water will be retained on the Properties. Respondent installed culverts throughout the subdivision that discharge water off of the Properties.

**I. BASE PENALTY**

**Nature**

Explanation:	
A COSA is required for subdivisions in order to protect human health and the environment. This unapproved deviation has the potential to harm human health and the environment because an unapproved drainage system may cause pollution of state waters and/or negatively impact properties.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

**Gravity and Extent**

Gravity Explanation:
According to ARM 17.4.303(5)(a), the construction or operation without approval from the Department is a violation with moderate gravity because of the potential to harm human health and the environment. An unapproved deviation from the COSA could potentially harm human health and the environment since the deviations were not approved and could potentially harm water quality or properties.
Extent Explanation:
Subdivision review under the Act considers the storm water for proposed subdivisions. The installation of culverts, improperly sized borrow ditches, and the removal of the historic berm is a major deviation from the storm water plans and COSAs. Therefore, according to ARM 17.4.303(4)(a), this violation has a major extent.

**Harm to Human Health or the Environment**

**Gravity**

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

**Impact to Administration**

**Gravity**

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

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

**\$175.00**

## II. ADJUSTED BASE PENALTY

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

Explanation:

As the developer of 80th Street Estates Subdivision (Property One and Two), Respondent should be aware of the requirements of the COSAs. Additionally, the Department notified Respondent in writing of the violation and Respondent still failed to comply. Respondent is in control of the circumstances that caused the violation. The Department is adding 20% to the base penalty.

Circumstances Percent: 0.20

Circumstances Adjustment (Base Penalty x Circumstances Percent) \$35.00

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

Explanation:

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

Good Faith & Coop. Percent: 0.00

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

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

Explanation:

The Department is not aware of any amounts voluntarily expended by Respondent to mitigate the violation and/or its impact; therefore, no reduction is being allowed.

AVE Percent: 0.00

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

## ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$175.00
Circumstances	\$35.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$210.00</b>

## III. DAYS OF VIOLATION

Explanation:

Section 76-4-109(2)(a), MCA, provides that the Department may assess an administrative penalty for each day of violation. For the purpose of calculating this penalty, the Department is considering each day following the June 1, 2012 violation letter as one day of violation. Respondent has remained in violation for at least 272 days for Property One and 272 days for Property Two.

Number of Days: 544

**ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$114,240.00**

Other Matters as Justice May Require Explanation:

The Department, in exercising its enforcement discretion, will reduce the days of violation to 72 under Other Matters as Justice May Require to obtain a penalty that is more commensurate with the severity of the violation.

Number of Days: 72

**OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL: \$15,120.00**

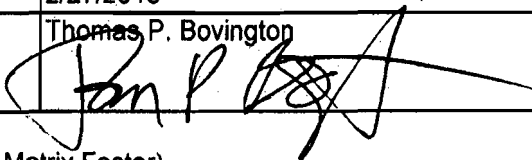
## IV. ECONOMIC BENEFIT

Explanation:

Given the uncertainties of the delay in expenditures by Respondent required to put the subdivision into compliance, there isn't enough information for the Department to perform a realistic economic benefit calculation.

**ECONOMIC BENEFIT REALIZED: \$0.00**

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

Responsible Party Name:	Levi Britton (Respondent) at 80th Street Estates Subdivision (Properties)
FID:	2241 EQ #06-3213 (Property One) and EQ #08-1903 (Property Two)
Statute:	Sanitation in Subdivisions Act (SSA)
Date:	2/27/2013
Signature of Employee Calculating Penalty:	Thomas P. Bovington 

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

	<b>Violation #1</b>
Maximum Penalty Authority:	\$250.00
Percent Harm - Gravity and Extent:	0.70
Percent Impact - Gravity:	0.00
<b>Base Penalty:</b>	<b>\$175.00</b>

**II. Adjusted Base Penalty**

Base Penalty:	\$175.00
Circumstances:	\$35.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$210.00</b>

<b>Totals</b>
\$175.00
\$35.00
\$0.00
\$0.00
<b>\$210.00</b>

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

544

**Adjusted Base Penalty Total** \$114,240.00

**\$114,240.00**

**Other Matters as Justice May  
Require**

\$15,120.00

**\$15,120.00**

**IV. Economic Benefit**

\$0.00

**\$0.00**

**V. History\***

**\$0.00**

**TOTAL PENALTY**

**\$15,120.00**

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

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

---

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF THE SANITATION IN**  
5 **SUBDIVISIONS ACT BY LEVI BRITTON**  
6 **AT THE 80<sup>TH</sup> STREET ESTATES**  
7 **SUBDIVISION, BILLINGS,**  
8 **YELLOWSTONE COUNTY, MONTANA**  
9 **[FID 2241, DOCKET NO. SUB-13-05]**

**CASE NO. BER 2013-03 SUB**

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8                   **FIRST PREHEARING ORDER**

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9           Mr. Levi Britton, on behalf of The 80<sup>th</sup> Street Estates Subdivision (hereafter,  
10 Appellant), has requested a hearing before the Board of Environmental Review  
11 (Board) to appeal the Department of Environmental Quality's (Department) Notice  
12 of Violation and Administrative Compliance and Penalty Order (FID 2241, Docket  
13 No. SUB-13-05) dated March 1, 2013 referencing violation of the Sanitation  
14 Subdivisions Act. The following guidelines and rules are provided to assist the  
15 parties in an orderly resolution of this contested case:

16           1.     REFERENCES: This matter is governed by the Montana  
17 Administrative Procedure Act, Mont. Code Ann. tit. 2, ch. 4, pt. 6; and Mont.  
18 Admin. R. 17.4.101, by which the Board has adopted the Attorney General's Model  
19 Rules for contested cases, Mont. Admin. R. 1.3.211 through 1.3.225; and Title 76,  
20 Chapter 4, Mont. Code Ann..

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

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

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

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

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

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

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

22 5. SCHEDULING: The parties are requested to consult with each other  
23 and submit to the Hearing Examiner a joint proposed prehearing and hearing  
24 schedule upon which they agree by April 8, 2013. The schedule should include the  
25 following dates:

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

1 description by category and location of, all documents and tangible things that are in  
2 the possession, custody, or control of the party and that the disclosing party may use  
3 to support its claims or defenses;

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

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


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

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

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

12 6. If the parties are unable to agree upon the date for any item set forth in  
13 the preceding paragraph, the undersigned may set a schedule upon consultation with  
14 the parties.

15 DATED this 26 day of March, 2013.

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



1 **CERTIFICATE OF SERVICE**

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

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

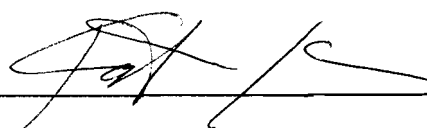
11 David Dennis  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

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

21 Levi Britton  
22 Yellowstone Contractors  
23 7623 N. Leopard Avenue  
24 Billings, MT 59106

25 DATED: \_\_\_\_\_

26 *March 26, 2013*

27 

Dana David  
Special Assistant Attorney General  
Department of Environmental Quality  
Legal Unit, Metcalf Building  
P.O. Box 200901  
Helena, Montana 59620-0901  
Telephone: (406) 444-2626  
email: ddavid@mt.gov  
*Attorney for DEQ*

Robert J. Long  
Long Law Office, PC  
311 2<sup>nd</sup> St. E  
Polson, MT 59860  
(406)883-1363  
*Attorney for James Vaughan*

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 2<sup>nd</sup> day of April, 2013  
at 11:03 o'clock A.m.  
By: [Signature]

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

<b>IN THE MATTER OF:</b>	)	
<b>VIOLATIONS OF THE MONTANA</b>	)	<b>CASE NO. BER 2011-06 SDL</b>
<b>SEPTAGE DISPOSAL AND LICENSURE</b>	)	
<b>LAWS BY JAMES VAUGHAN, D/B/A</b>	)	<b>STIPULATION TO DISMISS</b>
<b>ANY TIME SEPTIC &amp; PORTA POTTY,</b>	)	
<b>CHARLO, LAKE COUNTY, MONTANA</b>	)	
<b>[(FID 2002, DOCKET NO. SDL-11-01)]</b>	)	
	)	

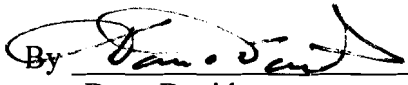
The Department of Environmental Quality (Department or DEQ) and James Vaughan, dba Any Time Septic & Porta Potty ("Vaughan"), through counsel have settled this contested case and hereby stipulate to dismiss it with prejudice. By this Stipulation, the parties inform the Board of Environmental Review of the settlement. A copy of the Administrative Order on Consent by which this matter was settled is attached as Attachment I.


Each party agrees to bear its own costs and attorney fees.

[signatures on following page]

Respectfully submitted this 2<sup>nd</sup> day of ~~March~~ <sup>April</sup> 2013.

STATE OF MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY

By   
Dana David  
Special Assistant Attorney General

By   
Robert J. Long  
Counsel to James Vaughan

**CERTIFICATE OF SERVICE**

The undersigned certifies that on ~~March~~ <sup>April</sup> 2, 2013, he caused a copy of the foregoing Stipulated Findings of Fact, Conclusions of Law and Agreement on Consent to be mailed to the following:

Robert J. Long  
Long Law Office PC  
311 2nd St. E  
Polson MT 59860-2327

Katherine Orr, Hearing Examiner (interagency mail)  
DOJ Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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

By: 

# ATTACHMENT I TO STIPULATION TO DISMISS

## BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
VIOLATIONS OF THE MONTANA	)	DEQ Docket No. SDL-11-01
SEPTAGE DISPOSAL AND LICENSURE	)	FID 2002
LAWS BY JAMES VAUGHAN, D/B/A	)	
ANY TIME SEPTIC & PORTA POTTY,	)	ADMINISTRATIVE ORDER ON
CHARLO, LAKE COUNTY, MONTANA	)	CONSENT
	)	

---

### I. INTRODUCTION

¶1. Pursuant to §75-10-1222, MCA, the Department of Environmental Quality (Department or DEQ) hereby notifies James Vaughan, d/b/a Any Time Septic & Porta Potty ("Vaughan"), of the following Findings of Fact, Conclusions of Law with respect to violations of the Montana Septic Disposal and Licensure Law, Title 75, chapter 10, part 12, of the Montana Code Annotated, and its implementing rules, ARM 17.50.801 through 17.50.820. Concurrently, upon execution of this Administrative Order on Consent, DEQ terminates the Notice of Violation and Penalty Order described in paragraph 5, below and replaces it with this Order.

### II. STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

¶2. 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.

¶3. The Department administers the Montana Septic Disposal and Licensure Law, Title 75, chapter 10, part 12, of the Montana Code Annotated, and its implementing rules, ARM 17.50.801 through 17.50.820.

¶4. James Vaughan had a septic cleaning and disposal license from the Department from 2005-2009.

¶5. DEQ issued its Notice of Violation and Administrative Compliance and Penalty Order (“NOV/AO”) in this matter in Docket No. SDL-11-01 on April 11, 2011 against James Vaughan, d/b/a Any Time Septic & Porta Potty (“Vaughan”). The NOV/AO notified Vaughan of violations of §§ 75-10-1210(1), 1211(2),(3),(4), MCA, and ARM 17.50.803(1)(d),(6) for disposal of septage on his land on ten instances without having obtained permission to do so. The Department ordered Vaughan to pay \$5,000.00 in penalties for the ten violations.

¶6. Vaughan, through counsel, requested a hearing before the Board of Environmental Review (“the Board” or “BER”) on April 22, 2011. This matter was docketed as BER Case No. 2011-06 SDL. The Board assigned the matter to Hearing Examiner, Katherine Orr.

¶7. In its Second Scheduling Order the Hearing Examiner authorized the parties to submit renewed briefing on motions for summary judgment.

¶8. DEQ filed its Renewed Motion for Summary Judgment and Supporting Brief on September 14, 2012. Vaughn filed his Answer to DEQ Renewed Motion for Summary Judgment. DEQ filed its Reply Brief Supporting Motion for Summary Judgment on October 4, 2012.

¶9. In its Renewed Motion for Summary Judgment DEQ argued that the Hearing Examiner find that Vaughan committed the ten violations described in the NOV/AO based on documentary evidence, a 2009 Septage Report, that Vaughan previously submitted to the Department.

¶10. In her Order on Renewed Motion for Summary Judgment entered January 12, 2013, the Hearing Examiner granted DEQ’s Renewed Motion for Summary Judgment.

¶11. Throughout this matter Vaughan did not admit the violations described in the NOV/AO and contends that the information contained in the 2009 Septage Report is untrue.

¶12. By granting DEQ's Renewed Motion for Summary Judgment the Hearing Examiner determined that the evidence in the record demonstrates that Vaughan disposed of septage on land on ten occasions on or after August 1, 2009, without having obtained approval of DEQ or the county health officer for disposal on any parcel of land in violation of §§ 75-10-1210(1), 1211(2),(3),(4), 1212(2)(c),(d), MCA, and ARM 17.50. 803(1)(d),(5)(n),(o),(6), 809(9), and 811(8).

### **III. STIPULATED ORDER**

¶13. Based on the foregoing, the Department and Vaughan stipulate as provided in paragraphs 14 through 26, below.

¶14. Vaughan paid an administrative penalty in the amount of \$2,500.00.

¶15. DEQ agrees to accept the payment of an administrative penalty in the amount of \$2,500.00 in satisfaction of all alleged violations of §§ 75-10-1210(1), 1211(2),(3),(4), 1212(2)(c),(d), MCA, and ARM 17.50. 803(1)(d),(5)(n),(o),(6), 809(9), and 811(8) before and during the pendency of this appeal.

¶16. Vaughan agrees that he will not, within a period of ten years from the later date of signature on this Stipulated Order: 1) apply for licensure as a septic pumper in the State of Montana; 2) acquire an interest in any business or equipment used in any business engaged in septage pumping in the State of Montana; or 3) work for any business engaged in septage pumping in the State of Montana.

¶17. Vaughan agrees to stipulate dismissal of BER Case No. 2011-06 SDL.

¶18. DEQ agrees to voluntarily dismiss with prejudice the Complaint filed in the Twentieth Judicial District Court, Lake County, Montana, Case No. DV-12-53.

¶19. DEQ further agrees to return to Vaughan all of Vaughan's personal property that is currently in the custody of DEQ.

¶20. Any stipulation by Vaughan herein shall not be deemed to be admission of any violation described in the NOV/AO or in any Complaint filed by DEQ against Vaughan.

¶21. Vaughan waives his right to administrative appeal or judicial review of this Stipulated Order and Consent Agreement and agrees that this Stipulated Order memorializes the final and binding resolution of the issues raised.

¶22. The terms of this Stipulated Order constitute the entire agreement between the Department and Vaughan with respect to the issues addressed herein notwithstanding any other oral or written agreements and understandings made and entered into between the Department and Vaughan prior to the date of this Stipulated Order.

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

¶24. None of the requirements in this Stipulated Order are intended to relieve Vaughan from its obligation to comply with all applicable state, federal, and local statutes, rules, ordinances, orders, and the conditions of any permit.

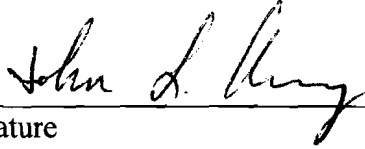
¶25. Each of the signatories to this Stipulated Order represents that he or she is authorized to enter into this Stipulated Order and to bind the parties represented by him or her to the terms of the Stipulated Order.

¶26. The parties agree that this Stipulated Order may be executed through counterparts.  
[signatures on following page]



STIPULATED AND ORDERED.

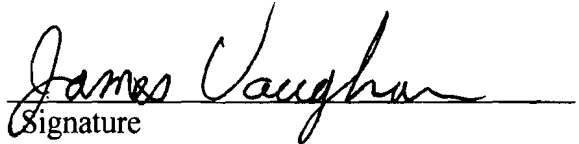
STATE OF MONTANA  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY



Signature  
JOHN L. ARRIGO  
Administrator, Enforcement Division

Date: 4/2/13

JAMES VAUGHAN d/b/a/ ANY TIME  
SEPTIC & PORTA POTTY



Signature  
JAMES VAUGHAN  
Appellant

Date: 3-29-13

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

**IN THE MATTER OF:** )  
**VIOLATIONS OF THE MONTANA** ) **CASE NO. BER 2011-06 SDL**  
**SEPTAGE DISPOSAL AND LICENSURE** )  
**LAWS BY JAMES VAUGHAN, D/B/A** )  
**ANY TIME SEPTIC & PORTA POTTY,** ) **ORDER OF DISMISSAL**  
**CHARLO, LAKE COUNTY, MONTANA** )  
**[(FID 2002, DOCKET NO. SDL-11-01)]** )

The parties have filed a Stipulation requesting that the Board issue an Order dismissing this matter with prejudice, with each party to bear its own costs. As provided in the parties' Administrative Order on Consent, 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 \_\_\_\_\_, 2013

BOARD OF ENVIRONMENTAL REVIEW

By: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

## MAILING LIST

Robert J. Long

Long Law Office PC

311 2nd St. E

Polson MT 59860-2327

Dana David (interagency mail)

Department of Environmental Quality

Legal Unit

P.O. Box 200901

Helena, MT 59620-0901

John L. Arrigo (interagency mail)

Administrator, Enforcement Division

Department of Environmental Quality

P.O. Box 200901

Helena, MT 59620-0901

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

---

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF THE MONTANA**  
5 **SOLID WASTE MANAGEMENT ACT BY**  
6 **VALLEY COUNTY REFUSE DISTRICT**  
7 **#1 AT THE VALLEY COUNTY**  
8 **LANDFILL, GLASGOW, VALLEY**  
9 **COUNTY, MONTANA [SOLID WASTE**  
10 **LICENSE NO. SW-295; FID #2138;**  
11 **DOCKET NO. SW-12-01]**

**CASE NO. BER 2012-06 SW**

---

8 **ORDER ON MOTION FOR SUMMARY JUDGMENT**

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10 This contested case has been submitted for decision upon the “DEQ Motion  
11 for Summary Judgment and Brief in Support of Motion” (Motion) initially  
12 submitted and briefed with five exhibits by the Department of Environmental  
13 Quality (Department) on November 1, 2012. Valley County Refuse, the Petitioner,  
14 filed “Valley County Refuse District #1’s Brief in Opposition to DEQ Motion For  
15 Summary Judgment” (Response Brief) with five exhibits attached, on December 14,  
16 2012. The Department filed “DEQ Reply Brief for Motion Summary Judgment”  
17 (Reply Brief) on December 28, 2012, together with one exhibit. On January 9,  
18 2013, the parties submitted an Agreed Statement of Findings of Fact and  
19 Conclusions of Law (Agreed Statement). Oral argument on the Motion occurred on  
20 January 23, 2013, in which the parties agreed that the Agreed Statement would be  
21 incorporated into the record for the purposes of disposition of the Motion. The  
22 Agreed Statement is hereby incorporated by reference.

23 **BACKGROUND**

24 The Department issued a Notice of Violation and Administrative Compliance  
25 and Penalty Order (NOV) on May 14, 2012. In the NOV the Department stated that  
26 the Petitioner is the Owner and operator of the Valley County Landfill, that Valley  
27 County has a license to operate a Class II solid waste landfill and as such, is subject

1 to the Admin. R. Mont. 17.50.1104(1) which requires owners or operators of a Class  
2 II landfill to cover disposed solid waste at the end of each operating day or at more  
3 frequent intervals if necessary to control disease vectors, fires, odors, blowing litter  
4 and scavenging. The NOV also states that the license issued to Valley County,  
5 License No. 295 states “[a]ll waste disposed of in the Class II disposal unit must be  
6 covered on a daily basis with a Department-approved cover material. The NOV  
7 states that on July 13, 2010, October 4, 2011, and December 6, 2011, upon  
8 inspection by the Department, it was observed that Valley County was not covering  
9 disposed solid waste at the Landfill with either soil or an alternate Department-  
10 approved cover material on a daily basis at the end of each operating day. Thus, it is  
11 concluded in the NOV that Valley County violated Admin. R. Mont. 17. 50. 1104 by  
12 failing to cover disposed solid waste at the Landfill on a daily basis. An  
13 administrative penalty of \$750.00 was calculated by the Department.

14 Administrative penalties are not a subject of this recommended order.

15       The Department argues that the minimum daily cover requirement applies to  
16 Valley County Landfill (or “Landfill”) and there are no exceptions or mitigating  
17 actions of the Landfill that remove the Landfill from responsibility to provide daily  
18 cover. The Petitioner, Landfill, admits that it was not its practice to apply daily  
19 cover, see Department’s Exhibit 5, Response to Interrogatory No. 1 answered by the  
20 Landfill, but that it should in essence be considered exempt from the daily cover  
21 requirement because of other refuse control measures it has implemented such as a  
22 “three-fence system.” Moreover, the Landfill argues that because it has met the  
23 objectives of Admin. R. Mont. 17.50.1104(1) by operating a very clean landfill that  
24 has controlled disease vectors, fires, odors, blowing litter and scavenging by  
25 applying its unique alternatives to the daily cover requirement, the Landfill has not  
26 created any harm to the environment and is essentially in compliance with the  
27 purpose of the daily cover rule.

## **STANDARD OF REVIEW**

Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56 (c). A party seeking summary judgment has the burden of showing an absence of genuine issue as to all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law. Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements to raise a genuine issue of material fact. Sherrod v. Prewett, 2001 MT 228, 36 P.3d 378. Summary judgment motions may be entertained in the administrative context. See In the Matter of Peila, 249 Mont. 272, 815 P.2d 139 (1991). The rationale for motions for summary judgment is that the parties are afforded the opportunity to present evidence and arguments in the summary judgment stage without the necessity for a full hearing through briefing and presentation of sworn evidence. If there are no genuine issues of material fact, there is no need for an evidentiary hearing and the case may be resolved as a matter of law.

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

1 **DISCUSSION**

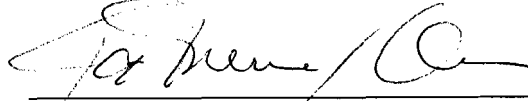
2 The moving party, the Department, has met its burden of demonstrating the  
3 absence of any genuine issues of material facts regarding liability under Mont.  
4 Admin. R. Mont. 17. 50.1104. The parties do not dispute that Valley County  
5 Landfill, on the three days of violation, July 13, 2010, October 4, 2011, and  
6 December 6, 2011, did fail to apply cover to the Landfill. See Department Exhibit  
7 5, Response to Interrogatory No. 1 and numbered paragraphs four through 18 in the  
8 Agreed Statement of Facts. This removes all disputes as to material facts as to the  
9 requirement to apply daily cover. The arguments the Landfill raises, no harm,  
10 compliance in other respects and the pending application for alternative daily cover  
11 do not exempt it from compliance or raise a genuine issue as to the material fact of  
12 failure to apply daily cover on the days of violation, namely, July 13, 2010,  
13 October 4, 2011, and December 6, 2011. As a matter of interpretation of the rule  
14 language and as a matter of law, there is no exemption from the daily cover  
15 requirement even if the Landfill is clean in other respects, or the listed objectives,  
16 control of disease vectors, fires, odors, blowing litter and scavenging have been met.  
17 Control of the adverse impacts are a stated purpose for the rule but are not the  
18 express prophylactic requirement the Landfill must follow. The factors that the  
19 Landfill mentions of no impact to the environment may appropriately be addressed  
20 in the phase of the proceeding that addresses a penalty calculation.

21 **ORDER**

22 As a matter of law and undisputed fact, Valley County Landfill has violated  
23 the daily cover requirement of Admin. R. Mont. 17.50.1104 and is liable for  
24  
25  
26  
27

1 penalties. This case shall proceed to the penalty phase of the case through the  
2 setting of a telephonic scheduling conference by the Hearing Examiner.

3 DATED this 6<sup>th</sup> day of March, 2013.

4 

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

11 **CERTIFICATE OF SERVICE**

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

14 Joyce Wittenberg  
15 Secretary, Board of Environmental Review  
16 Department of Environmental Quality  
17 1520 East Sixth Avenue  
18 P.O. Box 200901  
19 Helena, MT 59620-0901  
20 (original)

21 Dana David  
22 Legal Counsel  
23 Department of Environmental Quality  
24 P.O. Box 200901  
25 Helena, MT 59620-0901

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

Nickolas C. Murnion  
Valley County Attorney  
501 Court Square, #20  
Glasgow, MT 59230

28 DATED: March 6, 2013 



**IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA  
SOLID WASTE MANAGEMENT ACT BY  
VALLEY COUNTY REFUSE DISTRICT  
#1 AT THE VALLEY COUNTY  
LANDFILL, GLASGOW, VALLEY  
COUNTY, MONTANA [SOLID WASTE  
LICENSE NO. SW-295; FID #2138;  
DOCKET NO. SW-12-01]**

**ORDER RECOMMENDING PENALTIES**  
**PAGE 1**

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing Order

3 Recommending Penalties to be mailed to:

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

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

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

21 Nickolas C. Murnion  
22 Valley County Attorney  
23 501 Court Square, #20  
24 Glasgow, MT 59230

25 DATED: March 28, 2013 JS/C

Dana David  
Special Assistant Attorney General  
Department of Environmental Quality  
Legal Unit, Metcalf Building  
P.O. Box 200901  
Helena, Montana 59620-0901  
Telephone: (406) 444-2626  
email: ddavid@mt.gov  
*Attorney for DEQ*

Melinda M. Oedekoven  
Michael C. Oedekoven  
% Asphalt Plus, Inc.  
425 Johnson Ln.  
Billings, MT 59101  
*Pro se*

Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 13<sup>th</sup> day of May, 2013  
at 8:10 o'clock, A.m.  
By: Misty Galt

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

**IN THE MATTER OF:** )  
**VIOLATIONS OF THE MONTANA** )  
**SOLID WASTE MANAGEMENT ACT** )  
**BY ASPHALT PLUS, INC., A** )  
**CORPORATION, AND MICHAEL C.** )  
**AND MELINDA M. OEDEKOVEN, AS** )  
**INDIVIDUALS, AT 425 JOHNSON** )  
**LANE, BILLINGS, YELLOWSTONE** )  
**COUNTY, MONTANA. (FID #2199)** )

CASE NO. BER 2012-13 SW

**STIPULATION TO DISMISS**

The Department of Environmental Quality (Department or DEQ) through counsel and Melinda M. and Michael C. Oedekoven as individuals and principals of Asphalt Plus, Inc., (“Oedekovens”), pro se, have settled this contested case and hereby stipulate to dismiss it with prejudice. By this Stipulation, the parties inform the Board of Environmental Review of the settlement. A copy of the Administrative Order on Consent by which this matter was settled is attached as Attachment I.

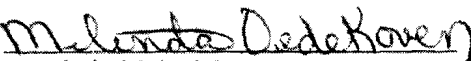
Each party agrees to bear its own costs and attorney fees.

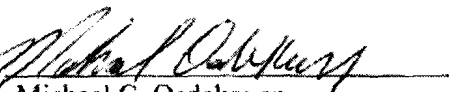
[signatures on following page]

Respectfully submitted this 1<sup>st</sup> day of May 2013.

STATE OF MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY

By   
Dana David  
Special Assistant Attorney General

By   
Melinda M Oedekoven  
Pro se

By   
Michael C. Oedekoven  
Pro se

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 1<sup>st</sup>, 2013, he caused a copy of the foregoing Stipulation to Dismiss including the attached Agreement on Consent to be mailed to the following:

Melinda M. Oedekoven  
Michael C. Oedekoven  
% Asphalt Plus, Inc.  
425 Johnson Ln.  
Billings, MT 59101

Katherine Orr, Hearing Examiner (interagency mail)  
DOJ Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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

By: 

# ATTACHMENT I TO STIPULATION TO DISMISS

## BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
VIOLATIONS OF THE MONTANA SOLID	)	DEQ Docket No. SW-12-02
WASTE MANAGEMENT ACT BY	)	FID 2199
ASPHALT PLUS, INC., A CORPORATION,	)	
AND MICHAEL C. AND MELINDA M.	)	<b>ADMINISTRATIVE ORDER ON</b>
OEDEKOVEN, AS INDIVIDUALS, AT 425	)	<b>CONSENT</b>
JOHNSON LANE, BILLINGS,	)	
YELLOWSTONE COUNTY, MONTANA.	)	
(FID #2199)	)	

### I. INTRODUCTION

1. Pursuant to §75-10-1222 , MCA, the Department of Environmental Quality (“the Department” or “DEQ”) Melinda M. and Michael C. Oedekoven as individuals and principals of Asphalt Plus, Inc., (“Oedekovens”), acknowledge and agree to this Administrative Order on Consent (“AOC”) including its constituent Findings of Fact, Conclusions of Law, and Stipulated Order with respect to violations of the Montana Solid Waste Management Act (“SWMA”), sections 75-10-201 through 250, of the Montana Code Annotated (“MCA”) and its implementing rules, Administrative Rules of Montana (“ARM”) subchapters 17.50.401 through 17.50.416 and 17.50.501 through 17.50.542. Concurrently, upon execution of this AOC, DEQ terminates the Notice of Violation and Penalty Order described in paragraph 5, below and replaces it with this Order.

### II. STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. 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.
3. The Department administers the SWMA.
4. The Oedekovens and Asphalt Plus, Inc. are “persons” within the meaning of § 75-11-503(4), MCA, and ARM 17.56.101(48).

5. On October 12, 2012, DEQ issued its Notice of Violation and Administrative Order (“NOV/AO”) in this matter in Docket No. SW-12-02. The NOV/AO notified the Oedekovens and Asphalt Plus, Inc. of violations of sections 75-10-221(1), MCA, relating to storage and disposal of waste asphalt on property owned by the Oedekovens. Except as specifically provided in these Stipulated Findings of Fact and Conclusions of Law, the Findings of Fact set forth in the NOV/AO are incorporated into this AOC by reference.

6. Oedekovens timely appealed the NOV/AO and the appeal was docketed as BER Case No. 2012-13 SW.

7. Oedekovens stipulate that Asphalt Plus, Inc. does not have an ownership interest of any kind in the real property located at 425 Johnson Lane, Yellowstone County (“the Property”) that is the subject of this AOC and that Asphalt Plus, Inc. played no part in bringing on to the Property, nor does Asphalt Plus, Inc. own the waste asphalt that is the subject of this AOC.

8. Throughout the proceedings that are the subject of this AOC, Oedekovens claim that they caused the asphalt to be brought on the Property and that they intended to use the waste asphalt on the Property.

9. Based on the foregoing, the Department agrees that this AOC binds the Oedekovens as individuals and as principals of Asphalt Plus, Inc., but does not bind Asphalt Plus, Inc. as a corporate entity. The Department further agrees, on the basis of the stipulations in this AOC, that Asphalt Plus, Inc., was not liable for any of the violations described in the NOV/AO.

10. In paragraph 25(c) of the NOV/AO, the Department gave the Oedekovens the option of applying for a Beneficial Use Determination (“BUD”) for approval of the use of waste asphalt on the Property.

11. In response to the NOV/AO, on [date], Oedekovens submitted a BUD request seeking permission to use waste asphalt stored and disposed on the Property for road construction material as part of a subdivision development.

12. In its letter dated February 27, 2013, DEQ Solid Waste Program approved the application for the BUD with the following conditions:

- a. waste asphalt may be used as compacted fill for road construction either as foundation material or base course;
- b. waste asphalt must be screened to a maximum 6-inch size before it is introduced into road fill;
- c. waste asphalt must be incorporated into compacted road fill in lifts no greater than 8-inches thick;
- d. waste asphalt incorporated into compacted road fill must be placed in a position above the highest seasonal water saturation level;
- e. all applicable storm water runoff controls must be incorporated into any road construction; and,
- f. the compacted road fill containing waste asphalt must be capped with asphalt or concrete to prevent migration of water through the asphalt product.

13. In addition, in the February 27, 2013 letter DEQ directed the Oedekovens to store asphalt waste prior to beneficial use in stockpiles placed in an environmentally sound location that is not subject to ponding of water and with berms as necessary to prevent runoff that will degrade surrounding waters or soils.

14. In an email message dated March 15, 2013, Melinda Oedekoven stated that she agreed to the conditions of the February 27, 2013 BUD approval. Ms. Oedekoven stated that all asphalt material placed in the bottom of fill along the sides of the coulee, had previously been

removed. Ms. Oedekoven stated that visible pieces of asphalt in fill along the coulee would be removed when the fill is seeded for grass.

### **III. STIPULATED ORDER**

15. Based on the foregoing, the Department and Oedekovens stipulate as provided in paragraphs 16 through 31, below.

16. Oedekovens agree to abide by all the conditions on beneficial use of waste asphalt set forth in paragraphs 12 and 13.

17. In addition, by no later than April 23, 2013, or as soon as reasonably possible if surface conditions require delay, Oedekovens agree to complete removal of all visible asphalt greater than 6-inches in maximum dimension from any fill on the Property and in the irrigation ditch—the removed asphalt must be placed in stockpiles in accordance with the requirements of paragraph 13.

18. Oedekovens further agree that on April 23, 2013, or on a mutually convenient later date if surface conditions require delay, DEQ staff may enter the Property and witness excavation of no more than two test pits at locations designated by DEQ. The purpose of the test pits is to determine that no asphalt pieces with a maximum size exceeding 6-inches are incorporated in the fill along the coulee. The costs of the equipment and the operator shall be on Oedekovens' account. Oedekovens further agree to allow DEQ staff entry on the Property on a later date as necessary to verify compliance with paragraphs 16 through 18.

19. In the event that the test pits described in paragraph 18 indicate that waste asphalt pieces with a maximum size greater than 6 inches were buried in the fill along the coulee, DEQ may direct Oedekovens to excavate additional test pits to verify the representations set forth in paragraph 14. In the event that DEQ determines that asphalt pieces with a maximum size greater than 6 inches are a common constituent of the fill along the coulee, Oedekoven's agree to take



corrective action necessary to bring the coulee fill in compliance with the requirements of this AOC. Corrective action shall be taken according to a schedule satisfactory to DEQ.

20. Oedekovens agree that by no later than October 31, 2014, they will complete one of the following alternatives:

- a. Removal and disposal at landfill licensed to accept waste asphalt of all waste asphalt from the Property, and within 15 days of disposal, submittal of copies of disposal receipts to DEQ;
- b. Completion of beneficial use the waste asphalt currently on the Property in accordance with the conditions described in this AOC, and within 15 days of completion of the use, submittal of photos to DEQ that document the use; or
- c. Submittal for review and approval by DEQ a beneficial use plan including specific schedules and detailed drawings describing how, when, and where the waste asphalt currently on the Property and any asphalt brought on to the property after October 31, 2014, will be used to construct roads appurtenant to residential development on the Property.

21. Oedekovens further agree that they will not bring any additional waste asphalt on to the Property prior to DEQ review and approval of a beneficial use plan that satisfies the requirements set forth in paragraph 20(c).

22. DEQ agrees that the stipulations and consent by Oedekovens memorialized in in this AOC satisfy all obligations described in the Administrative Order set forth on pages 4 through 6 of the NOV/AO.

23. DEQ further agrees that beneficial use of the waste asphalt in accordance with the terms of this AOC does not constitute storage, disposal, or recycling of waste that requires licensure under section 75-10-221, MCA.

24. Oedekovens agree to stipulate dismissal of the administrative appeal docketed as Case No. BER 2012-13.

25. Oedekovens waive their right to administrative appeal or judicial review of this AOC and agree that this AOC memorializes the final and binding resolution of the issues raised.

26. The terms of this AOC constitute the entire agreement between the Department and Oedekovens notwithstanding any other oral or written agreements and understandings made and entered into between the Department and the Oedekovens prior to the date of this AOC.

27. Oedekovens acknowledge that they have fully read and understand the stipulations, consent, and obligations contained this AOC and that they have had the opportunity but chose not to seek the advice of legal counsel regarding this matter.

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

29. None of the requirements in this AOC are intended to relieve the Oedekovens from any obligation to comply with all applicable state, federal, and local statutes, rules, ordinances, orders, and the conditions of any permit.

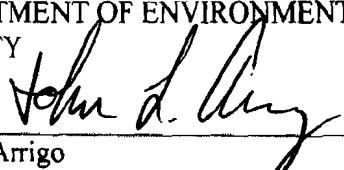
30. Each of the signatories to this AOC represents that he or she is authorized to execute into this AOC and bind the parties represented by him or her.

31. The parties agree that this AOC may be executed through counterparts.

[continued on following page]

STIPULATED AND ORDERED.

STATE OF MONTANA  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

  
\_\_\_\_\_  
John L. Arrigo  
Administrator, Enforcement Division

Date: 4/30/13

MELINDA M. and MICHAEL C.  
OEDEKOVEN, in their individual  
capacities

  
\_\_\_\_\_  
Melinda M. Oedekoven

  
\_\_\_\_\_  
Michael C. Oedekoven

Date: 4-30-13

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

8 **IN THE MATTER OF:** )  
9 **VIOLATIONS OF THE MONTANA** )  
10 **SOLID WASTE MANAGEMENT ACT** )  
11 **BY ASPHALT PLUS, INC., A** )  
12 **CORPORATION, AND MICHAEL C.** )  
13 **AND MELINDA M. OEDEKOVEN, AS** )  
14 **INDIVIDUALS, AT 425 JOHNSON** )  
15 **LANE, BILLINGS, YELLOWSTONE** )  
16 **COUNTY, MONTANA. (FID #2199)** )

**CASE NO. BER 2012-13 SW**

**ORDER OF DISMISSAL**

13 The parties have filed a Stipulation requesting that the Board issue an Order dismissing  
14 this matter with prejudice, with each party to bear its own costs. As provided in the parties'  
15 Administrative Order on Consent, and for good cause appearing:

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

18  
19 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

20 **BOARD OF ENVIRONMENTAL REVIEW**

21  
22 By:

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

## MAILING LIST

1  
2 Melinda M. Oedekoven  
Michael C. Oedekoven  
3 % Asphalt Plus, Inc.  
425 Johnson Ln.  
4 Billings, MT 59101  
5 Dana David (interagency mail)  
Department of Environmental Quality  
6 Legal Unit  
P.O. Box 200901  
7 Helena, MT 59620-0901  
8 John L. Arrigo (interagency mail)  
Administrator, Enforcement Division  
9 Department of Environmental Quality  
P.O. Box 200901  
10 Helena, MT 59620-0901

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