

TELECONFERENCE AGENDA

FRIDAY, DECEMBER 6, 2013

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

NOTE: It is expected that most available Board members will be participating telephonically. The Board attorney and secretary, along with any Board members who so choose, will be present at the location stated above. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for Board members is available on the Board's Website (<http://www.deq.mt.gov/ber/index.asp>) or from the Board Secretary (406-444-2544). The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at jwittenberg@mt.gov no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the October 4, 2013, teleconference meeting minutes.
2. The Board will vote on adopting the October 29, 2013, teleconference meeting minutes.

B. OTHER ADMINISTRATIVE ITEMS

1. Set 2014 Meeting Schedule

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. A Third Order Granting Extension** was issued on August 8 giving the parties through December 1, 2013, to settle the matter or file a joint proposed prehearing schedule.
2. Contested Cases not assigned to a Hearing Examiner
 - a. **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 October 4, 2013, the hearing examiner issued a Second Scheduling Order setting a January 31, 2014, final deadline for completion of discovery, and an April 14, 2014, telephonic prehearing conference.

- b. **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 permanent hearings examiner for this matter. Oral argument on pending motions took place October 22, 2013. Appellants' Motion for Leave to Amend was granted on November 14, and the Motion for Leave to Supplement Briefs with Appellants' Discovery Requests of PPLM was granted on November 18. The contested case hearing is set for January 21, 2014.
- 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. 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 permanent hearings examiner for this matter. Oral argument on pending motions took place October 22, 2013. The contested case hearing date is set for January 2014.

III. ACTION ITEMS

A. NEW CONTESTED CASES

- 1. **In the matter of violations of the Sanitation in Subdivisions Act and Public Water Supply Laws by Roger Emery at the Sunrise Motel, Sidney, Richland County, BER 2013-06 SUB.** The Board received the appeal on October 25, 2013. Interim hearing examiner issued a First Prehearing Order on November 4, 2013. The Board may appoint a permanent hearings examiner or decide to hear the matter.
- 2. **In the matter of the notice of appeal for heating by Montana Environmental Information Center regarding DEQ's approval of coal mine permit No. C1993017 issued to Signal Peak Energy, LLC, for Bull Mountain Mine No. 1 in Roundup, MT, BER 2013-07 OC.** The Board received the appeal and request for hearing on November 18, 2013. The Board may appoint a permanent hearings examiner or decide to hear the matter.

B. FINAL ACTION ON CONTESTED CASES

- 1. **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.** On October 17, the hearing examiner issued *Recommended Order on Motion to Dismiss of Farwest Rock Products and on Motion*

to Dismiss or For Summary Judgment of the Department of Environmental Quality recommending that:

- The Farwest Motion to Dismiss be denied as to H Lazy Heart and granted as to the remaining requesting parties.
- The department's Motion to Dismiss be denied as to H Lazy Heart and granted as to the remaining requesting parties.
- All constitutional due process claims be dismissed for lack of subject matter jurisdiction.
- The department's Summary Judgment be granted as to H Lazy Heart.

Since the case is at a point of final disposition, the Board will consider whether to issue and order adopting the Recommended Order of the hearing examiner dismissing the claims of requesting parties and awarding the Department summary judgment. The requesting parties were invited to file exceptions to the Recommended Order of the hearing examiner, which they did. Respondents' Farwest and the Department filed responses to the requesting parties' exceptions, which may be considered by the Board in its deliberation of the Recommended Order. The Board will have before it a proposed order adopting the Recommended Order.

2. **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.** On July 16, 2013, the Court entered a decision in favor of Protecting Paradise and remanded the matter to DEQ with a directive that the Environmental Assessment be corrected and that an Environmental Impact Statement be performed. Counsel for DEQ submitted a written status report on September 4, 2013, stating that DEQ would not appeal the judgment issued by the Sixth Judicial District. Attorney for Appellants filed *Proposed Order Dismissing with Prejudice* on September 23, 2013, and *Unopposed Motion to Dismiss with Prejudice* on September 27, 2013. The Board has before it for approval an Order Dismissing Case with Prejudice.

C. INITIATION OF RULEMAKING

DEQ will propose that the Board initiate rulemaking to:

1. Amend the insitu coal operations rule as requested by the Office of Surface Mining (OSM). The change will only be removing the language stating that ARM 17.24.320 (Plans for Disposal of Excess Spoil) is not applicable to insitu coal operations. This was requested by OSM as it made the States rule less stringent then the Federal rule.
2. Adopt new rule I pertaining to the administrative requirements for limited opencut operations. The Department is proposing New Rule I in order to implement the provisions for limited opencut operations in Section 5 of Senate Bill 332 (2013).

IV. GENERAL PUBLIC COMMENT

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

V. ADJOURNMENT

MINUTES

October 4, 2013

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Shropshire at 9:00 a.m., on Friday, October 4, 2013, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Shropshire and Joan Miles

Board Members via Teleconference: Marietta Canty, Heidi Kaiser, Chris Tweeten, Larry Mires, and Joe Russell

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

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director); John North, Norman Mullen, and Carol Schmidt, and Paul Nicol – Legal; David Klemp, Eric Merchant, Charles Homer, Rebecca Harbage, and Hoby Rash – Air Resources Management Bureau; Jon Dilliard, Eugene Pizzini, Barb Kingery – Public Water Supply & Subdivisions Bureau;

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Bruce Brown, Integrated Water, Inc.; Debbie Skibicki, Bison Engineering; Anne Hedges and Derf Johnson, Montana Environmental Information Center

	At the request of Chairman Shropshire, Mr. Livers took roll call of Board members present.
I.A.1	<p>Review and approve July 26, 2013, Board meeting minutes.</p> <p>Chairman Shropshire asked if there were any comments on the minutes. Ms. Miles MOVED to approve the July 26, 2013, Board meeting minutes. Mr. Russell SECONDED the motion. The motion CARRIED with a unanimous vote.</p>
I.B.	<p>Rulemaking Update</p> <p>Mr. Livers explained to the Board that the DEQ-4 rulemaking was not on the agenda for adoption and that the Department would like to schedule an ad hoc teleconference for late October to early November for the purpose of asking the Board to approve DEQ-4. After some discussion, the Board settled on a teleconference meeting to take place October 29 at 1:00 p.m.</p>
II.A.1.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. <i>(No discussion took place regarding this matter.)</i>
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. <i>(No discussion took place regarding this matter.)</i>
II.A.3.a	<p>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.</p> <p>Ms. Orr said the appellant might file a motion to dismiss because the District Court invalidated the permit.</p>
II.A.3.b	<p>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.</p> <p>Ms. Orr said a prehearing conference is scheduled for April 14, 2014, and that a hearing date will not be set until the Board determines its schedule for 2014.</p>
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. OP2953-07 for the Colstrip Steam Electric Station, Colstrip, BER 2013-01 AQ. <i>(see II.A.3.d)</i>

- 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. OP0513-08 for the JE Corette Steam Electric Station, Billings, BER 2013-02 AQ.
- Ms. Orr informed the Board that there had been response motions and cross motions for summary judgment since the agenda was published. She said there would be a hearing all day on October 22 regarding the motions, and reminded the Board that a hearing is scheduled to begin on January 21, 2014.
- Ms. Canty explained that she might need to recuse herself from these matters.
- II.B.1 | Air Quality Permit Fees Briefing
- Mr. Homer explained that the rules require the Department to report to the Board annually regarding fees. He provided background information regarding the air fee rules and said the Department is not requesting changes this year; the Department will keep the existing fee structure through FY 2014. He said the Department may need to come to the Board next year to propose changes to the fee structure. Mr. Homer responded to questions from the Board.
- In response to questions from the Board, Mr. Livers said the Department made a policy decision to not increase the fees for a few years following the economic downturn of 2009.
- III.A.1 | In the matter of violations of the Sanitation in Subdivisions Act and Public Water Supply Laws by Steve R. and Shanna L. Lunderby at North Drive Mobile Home Court, Sidney, Richland County, BER 2013-05 SUB.
- Ms. Orr said the appeal was received on August 5 and that she, acting as the Interim Hearings Examiner, issued a prehearing order. She also informed the Board that the parties have already entered into and signed a stipulation for dismissal. She suggested that this matter be added to the October 29 teleconference agenda for the Board to vote on dismissal. The Board took no action on this item; it will be added to October 29 agenda.
- III.B.1 | In the matter of violations of the Sanitation in Subdivisions Act by Levi Britton at the 80th Street Estates Subdivision, Billings, Yellowstone County, BER 2013-03 SUB.
- Ms. Orr said this is a Rule 41(a) dismissal. Under Rule 41(a) of the Rules of Civil Procedure, the parties may settle and the adjudicating body, in this case the Board, does not have authority to approve or disapprove of the settlement.
- Mr. Russell MOVED to authorize the Board Chair to sign the order of dismissal. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous vote.

- III.B.2 | In the matter of the notice of appeal and request for hearing by City of Whitefish regarding DEQ's notice of final decision for its MPDES Permit No. MT0030414 issued for Whitefish Water Treatment Plant, BER 2013-04 WQ.
- Ms. Orr said the parties had worked things out and that this is a Rule 41(a) dismissal. Mr. Russell MOVED to authorize the Board Chair to sign the order of dismissal. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- IV. | General Public Comment
- Chairman Shropshire asked if there was anyone on the phone or in the room who wanted to address the Board. There was no response.
- Mr. Livers reminded the Board of the teleconference scheduled for October 29 and the Board meeting scheduled for December 6.
- Mr. Russell inquired as to the status of the Sanders County gravel pit case (Blakeman). Mr. Livers said he would find out and follow up on it.
- V. | Adjournment
- Chairman Shropshire called for a motion to adjourn. Ms. Miles so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- The meeting adjourned at 9:49 a.m.

Board of Environmental Review October 4, 2013, minutes approved:

ROBIN SHROPSHIRE
MADAM CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE

MINUTES

October 29, 2013

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Shropshire at 1:00 p.m., on Tuesday, October 29, 2013, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Shropshire, Joan Miles, and Marietta Canty

Board Members via Teleconference: Heidi Kaiser, Chris Tweeten, Larry Mires, and Joe Russell

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

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: John North and Paul Nicol – Legal; Barb Kingery – Public Water Supply & Subdivisions Bureau;

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*):

- Mr. North took roll call of Board members present.
- I.A. In the matter of the Department's proposed amendments to the Administrative Rules of Montana (ARM) 17.30.702, 17.36.345, 17.36.914, and 17.38.101 pertaining to Department Circular DEQ-4 that were initially published on December 20, 2012.
- Ms. Kingery provided a briefing on the current revision process of DEQ-4 and asked that the Board adopt it.
- Chairman Shropshire asked if there were any questions from Board members. Mr. Russell complimented the department on the work done on it and Chairman Shropshire concurred.
- Chairman Shropshire asked if any member of the public would like to comment on the rulemaking. There was no response.
- Chairman Shropshire called for a motion to adopt the proposed amendments pertaining to DEQ-4. Ms. Kaiser so MOVED. Ms. Canty SECONDED the motion. Mr. Russell made a friendly AMENDMENT to also adopt the 521 and 311 Analyses, the Presiding Officer's Report, and the Department's Responses to Comments. Mr. Mires so MOVED. Ms. Miles SECONDED. The motion CARRIED with a unanimous vote.
- I.B. In the matter of violations of the Sanitation in Subdivision Act and Public Water Supply Laws by Steve R. and Shanna L. Lunderby at North Drive Mobile Home Court, Sidney, Richland County, BER 2013-05 SUB.
- Ms. Orr explained that the parties have reached agreement and this is a Rule 41(a) Motion to Dismiss.
- Mr. Russell MOVED to authorize the Chair to sign the dismissal order for this matter. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous vote.
- Mr. North provided more information about the case at the request of Board members.
- II. General Public Comment
- Chairman Shropshire called for general public comment. There was no response.
- III. Adjournment
- Chairman Shropshire called for a motion to adjourn. Ms. Miles so MOVED. Ms. Canty SECONDED the motion. The motion CARRIED with a unanimous vote.

The meeting adjourned at 1:24 p.m.

Board of Environmental Review October 29, 2013, minutes approved:

ROBIN SHROPSHIRE
MADAM CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR SETTING OF THE 2014 MEETING SCHEDULE**

AGENDA # I.B.1

AGENDA ITEM SUMMARY - Setting of 2014 Meeting Schedule

AFFECTED PARTIES SUMMARY - Board members, Department personnel, and members of the public who appear before the Board will be affected.

BACKGROUND - Establishment of a 2014 Board meeting schedule at this meeting will enable Board members, the Department, and the public to plan and schedule matters that involve the Board and other activities far enough in advance to minimize scheduling conflicts and the need for emergency meetings.

HEARING INFORMATION - No hearing is necessary.

BOARD OPTIONS - The Board has authority to set whatever schedule it wishes to set. It is advisable for the Board to schedule meetings approximately two months apart. This allows the Board to adopt rules approximately four months after initiation of rule proceedings and provides adequate time for compilation of public comments and preparation of notices and hearing officer reports. In addition, should the Board at the 4-month meeting decide to ask for more information or major revisions, two-month intervals allow the Board to consider and take action on the matter at the next meeting without renoticing the matter in the Montana Administrative Register. Renoticing is required if notice of adoption is not published within 6 months of the notice of initiation.

Considering the factors listed above, the Department has developed a tentative meeting schedule for the Board's consideration. It is:

January 21
March 21
May 30
July 25
September 26
December 5

DEQ RECOMMENDATION - The Department recommends that the Board consider the matter and set an appropriate schedule.



MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: October 28, 2013

SUBJECT: Board of Environmental Review case, Case No. BER 2013-06 SUB

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE SANITATION IN
SUBDIVISIONS ACT AND PUBLIC WATER
SUPPLY LAWS BY ROGER EMERY AT THE
SUNRISE MOTEL, SIDNEY, RICHLAND
COUNTY, MONTANA. [FID 2214,
DOCKET NO. SUB-13-04]

Case No. BER 2013-06 SUB

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID 2214, Docket No. SUB-13-04).

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

Paul Nicol
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

October 24, 2013

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

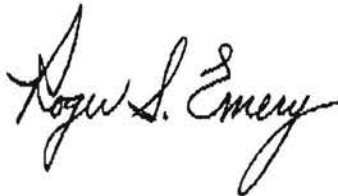
Re: Sunrise Motel
SUB-13-04 (FID 2214)
Richland County, Montana


To Whom It May Concern:

The following letter is to inform the Board of Environmental Review that I formally request a hearing before the Montana Board of Environmental Review to appeal the enforcement penalties issued in the Notice of Violation and Administrative Compliance and Penalty Order, Docket No. SUB-13-04. I understand that I have the right to request this appeal under Section 76-4-108, MCA.

Sincerely;

Roger Emery
Sunrise Motel



Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 25th day of October, 2013
at Billings o'clock PM
By: 

RECEIVED

OCT 28 2013

**DEQ DIRECTORS
OFFICE**

October 24, 2013

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

Re: Sunrise Motel
SUB-13-04 (FID 2214)
Richland County, Montana

RECEIVED BY DEQ
FINANCIAL SERVICES
2013 OCT 28 P 10:31

To Whom It May Concern:

The following letter is to inform the Board of Environmental Review that I formally request a hearing before the Montana Board of Environmental Review to appeal the enforcement penalties issued in the Notice of Violation and Administrative Compliance and Penalty Order, Docket No. SUB-13-04. I understand that I have the right to request this appeal under Section 76-4-108, MCA.

Sincerely,

 10/24/2013
Roger Emery
Sunrise Motel

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE SANITATION IN
SUBDIVISIONS ACT AND PUBLIC WATER
SUPPLY LAWS BY ROGER EMERY AT THE
SUNRISE MOTEL, SIDNEY, RICHLAND
COUNTY, MONTANA. (FID 2214)

NOTICE OF VIOLATION
AND
ADMINISTRATIVE COMPLIANCE
AND PENALTY ORDER

Docket No. SUB-13-04

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 Roger Emery (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, Montana Code Annotated (MCA)) and the administrative rules implementing the SSA (Administrative Rules of Montana (ARM) Title 17, chapter 36, sub-chapters 1 through 6), and the Public Water Supply Laws (PWSL) (Title 75, chapter 6, part 1, MCA) and ARM (Title 17, chapter 38) adopted thereunder.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
2. The Department administers the SSA and PWSL and the administrative rules adopted thereunder.
3. The Department issued certificate of subdivision approval (COSA) No. 42-78-S3-173 under the SSA on September 14, 1977 for Fischer Land Development Subdivision Amended located in Sidney, NW1/4, SE1/4 Section 5, Township 22 North, Range 59 East, Richland County, Montana (Property).

1 4. The COSA approved four lots on the Property for use as commercial developments
2 with a public water supply system (PWSS), supplied by one well, and a public wastewater treatment
3 system (WWTS), consisting of an aerated lagoon, designed to serve 100 people.

4 5. The Department issued certificate of trailer court approval (CTCA) No. 42-80-T1-
5 15 under the SSA for part of the Property on February 22, 1980. The CTCA approved 20 trailer
6 spaces on the Property. The CTCA was approved with the condition that water and sewer
7 services for the trailers would be provided by Fischer Land Development Subdivision Amended.

8 6. Respondent owns Lots 2B and 3B within the Property that include three of the
9 originally approved four lots, on which Respondent owns and operates the Sunrise Motel and a
10 trailer park. A third party owns the fourth lot and operates the Depot restaurant that is connected
11 to the PWSS and the WWTS.

12 7. Respondent owns and operates the PWSS, PWSID MT0001906, and the WWTS,
13 which serve the customers of the Sunrise Motel, the trailer park, and the Depot. The System
14 regularly serves water to at least 25 persons daily for any 60 or more days in a calendar year.
15 Respondent is therefore a "supplier of water" and subject to the requirements of the PWSL and
16 the rules adopted thereunder. *See* ARM 17.38.202 and 40 CFR 141.2 as incorporated therein.

17 8. The Department has classified the PWSS as a system that regularly serves water
18 to at least 25 persons daily, is not a community water system, and does not regularly serve water
19 to at least 25 of the same persons for at least six months per year. Therefore, the PWSS is
20 considered a "transient, non-community water system" within the meaning of Section 75-6-
21 102(20), MCA.

22 ***Operation of unapproved subdivision***

23 9. Section 76-4-130, MCA, states that a person may not construct or use a facility
24 that deviates from the COSA and CTCA until the Department has approved the deviation.

1 10. On October 20, 2011, the Department received a complaint concerning
2 Respondent's alleged deviation from the COSA and CTCA at the Property. The Department
3 performed a field investigation and the investigator observed a 48-unit motel, 28 mobile homes,
4 and 35 recreational vehicles (Units) on the Property. The investigator further observed that each
5 Unit was connected to the PWSS and WWTS.

6 11. On December 14, 2011, the Department notified Respondent in writing of the
7 following violations:

8 a. That the addition of eight mobile homes and 35 RVs without the
9 Department's review and approval is a violation of Section 76-4-130, MCA;

10 b. That the connection of eight mobile homes and 35 RVs raised the
11 population of the Property served by the PWSS and WWTS to 200 people, which is
12 double the population authorized by the COSA and in excess of the Units allowed by the
13 CTCA, and violates Section 76-4-130, MCA; and

14 c. That two public water supply wells had been constructed and connected to the
15 PWSS without the Department's approval in violation of Section 75-6-112, MCA.

16 12. The December 14, 2011 letter requested Respondent to return the Property to
17 compliance with the SSA and PWSL and to submit a detailed compliance plan and schedule to the
18 Department that describes how Respondent intends to return the Property to compliance with the
19 SSA and PWSL.

20 13. On August 14, 2012, the Department performed another field investigation that verified
21 the total number of Units in place and connected to the PWSS and WWTS as set forth in Paragraph 10.

22 14. Respondent violated and continues to violate Section 76-4-130, MCA, by
23 operating a subdivision with more Units than allowed and by providing water and sewer service
24 to a population larger than approved by the COSA and CTCA.

1 ***Construction and operation of unapproved public water supply system***

2 15. Section 75-6-112, MCA, states that a person may not commence or continue
3 construction, alteration, extension, or operation of a system of water supply or water distribution
4 that is intended to be used as a public water supply system or a system that is intended to be used as
5 a public sewage system before the person submits to the Department necessary maps, plans, and
6 specifications for its review and the Department approves those maps, plans, and specifications.

7 16. On February 9, 2011, the Department received information from the Richland
8 County Health Department that two new water supply wells are installed and operating at the
9 System without Department approval.

10 17. On May 25, 2011, the Department notified Respondent in writing that the new
11 wells were installed without Department approval in violation of the PWSL.

12 18. On August 5, 2011, Respondent provided the Department with information
13 regarding the unapproved wells.

14 19. On August 6, 2011, the Department notified Respondent that the information
15 provided on August 5, 2011 was not sufficient for Department review under ARM Title 17,
16 chapter 38.

17 20. On October 20, 2011, the Department performed a sanitary survey that verified
18 unapproved wells being used at the Property.

19 21. On November 15, 2011, the Department made recommendations to Respondent to
20 bring the site into compliance based on the sanitary survey performed on October 20, 2011.

21 22. On December 14, 2011, the Department notified Respondent a second time in writing
22 that the unapproved installation and operation of the new wells was in violation of the PWSL.

23 23. Respondent violated and continues to violate Section 75-6-112, MCA, of the
24 PWSL by operating the public water system without approval by the Department.

1 ***Administrative penalty***

2 24. Pursuant to Section 75-6-110(1)(d), MCA, the Department may assess an
3 administrative penalty not to exceed \$500 for each day of violation. Pursuant to Section 76-4-
4 109(2)(a), MCA, the Department may assess an administrative penalty not to exceed \$250 for
5 each day of violation.

6 25. The Department has calculated an administrative penalty in the amount of \$21,000
7 for the violation alleged in Paragraph 14 and an administrative penalty in the amount of \$10,500 for
8 the violation alleged in Paragraph 23. *See* Section 75-1-1001, MCA, and ARM 17.4.301 through
9 17.4.308. The enclosed Penalty Calculation Worksheet is incorporated by reference herein.

10 **III. ADMINISTRATIVE ORDER**

11 This Notice of Violation and Administrative Compliance and Penalty Order (Order) is
12 issued to Respondent pursuant to the authority vested in the State of Montana, acting by and
13 through the Department under the SSA, Section 76-4-101, *et seq.*, MCA, and the administrative
14 rules adopted thereunder, ARM Title 17, chapter 36, and under the PWSL, Section 75-6-101, *et*
15 *seq.*, MCA, and the administrative rules adopted thereunder, ARM Title 17, chapter 38. Based
16 on the foregoing Findings of Fact and Conclusions of Law and the authority cited above, the
17 Department hereby ORDERS Respondent to take the following actions to comply with the SSA
18 and PWSL within the timeframes specified in this Order:

19 ***Corrective actions***

20 26. Respondent shall bring the Property into compliance with the PWSL and SSA by
21 July 1, 2014, by completing a. or b. as follows:

- 22 a. Return the Property to compliance with the COSA and CTCA in
23 accordance with the following compliance plan and schedule:

24 //

1 i. Within 60 days of receipt of this Order, reduce the population served
2 by the PWSS and WWTS to 100, remove all but 20 Units as allowed by the
3 COSA and the CTCA and disconnect the unapproved wells from the PWSS;

4 ii. Within 75 days of receipt of this Order, submit written and
5 photographic documentation to the Department that the items required by
6 Paragraph 26.a.i. have been completed;

7 iii. Within 90 days of receipt of this Order, submit maps, plans and
8 specifications, in accordance with ARM 17.38.101 et seq. to demonstrate that the
9 PWSS and WWTS are constructed and operated in accordance with the applicable
10 Department design standards. Respondent must respond to any deficiency letters
11 within 30 days of receipt; and

12 iv. Construction of any approved modifications to the PWSS or WWTS
13 must be completed by July 1, 2014.

14 Or

15 b. Apply for an amendment to the COSA and CTCA to obtain approval for
16 the Sunrise Motel, trailer park, and Depot in accordance with the following compliance
17 plan and schedule:

18 i. Within 90 days of receipt of this Order, submit an application for an
19 amendment to the COSA and CTCA in accordance with ARM 17.36.101 et seq.; and

20 ii. By July 1, 2014, complete construction of modifications to the Property
21 and the PWSS and WWTS as approved by the amended COSA and CTCA.

22 27. All documentation, submittals, and notifications required in Paragraph 26 shall
23 be sent to:

24 //

Matthew Waite, PE
Subdivision Review Section
Montana Department of Environmental Quality
1371 Rimtop Drive
Billings, MT 59105-9702

Administrative penalty

28. Respondent is assessed a penalty of \$31,500 for the violations described in this Order.

29. Within 60 days from receipt of this Order, Respondent shall pay to the Department an administrative penalty in the amount of \$31,500. The penalty must be paid by check or money order, made payable to the "Montana Department of Environmental Quality," and shall be sent to:

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

30. Failure to take the required corrective actions and pay the assessed penalty by the specified deadlines, as ordered herein, constitutes a violation of Title 76, chapter 4, part 1, MCA, and Title 75, chapter 6 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, and \$10,000 per day of violation pursuant to Section 75-6-114, MCA.

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

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

//

1 **IV. NOTICE OF APPEAL RIGHTS**

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

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

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

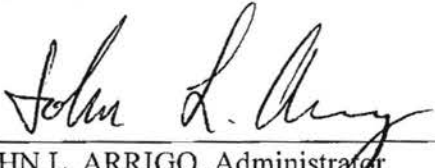
15 35. If a hearing is not requested within 30 days after service of this Order, the
16 opportunity for a contested case appeal is waived.

17 36. This Order becomes effective on the date of service. Service by mail is complete
18 on the date of receipt.

19 IT IS SO ORDERED:

20 DATED this 26th day of September, 2013.

21 STATE OF MONTANA
22 DEPARTMENT OF ENVIRONMENTAL QUALITY

23 
24 JOHN L. ARRIGO, Administrator
Enforcement Division

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

Responsible Party Name:	Roger Emery (Respondent) at The Sunrise Motel and adjacent properties (Property)		
FID:	2214	Certificate of Subdivision Approval No. 42-78-S3-173 (COSA), and Certificate of Trailer Court Approval No. 42-80-T1-15 (CTCA)	
Statute:	Sanitation in Subdivisions Act (SSA)		
Date:	9/25/2013		
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 approval (COSA) and certificate of trailer court approval (CTCA) without Department review and approval. The COSA authorized a population served of 100 and the CTCA authorized 20 mobile homes. Respondent has a 48-unit motel, 28 mobile homes and 35 RVs on the Property which serves approximately 200 people.

I. BASE PENALTY

Nature

Explanation:	
A COSA is required for subdivisions in order to protect human health and the environment. An unapproved deviation has the potential to harm human health and the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
The deviations were made without regard for or under the review of Montana's subdivision review standards. According to ARM 17.4.303(5)(a), the construction or operation without approval from the Department is a violation with major gravity. Therefore this violation has a major gravity.	
Extent Explanation:	
The use of unapproved water and wastewater systems for over 20 months is a major deviation from a COSA. Therefore this violation has a major extent.	

Harm to Human Health or the Environment

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

Impact to Administration

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

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

\$212.50

II. ADJUSTED BASE PENALTY

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

Explanation:

Respondent exhibited moderate culpability by deviating from the COSA. As the owner of the Property, Respondent should be aware of the requirements of the Certificates. 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 for Circumstances.

Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$42.50

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	\$212.50
Circumstances	\$42.50
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$255.00
MAXIMUM BASE PENALTY	\$250.00

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. Respondent has remained in violation from December 14, 2011 to September 25, 2013 for 639 days. For the purpose of calculating this penalty, the Department is considering each day as one day of violation.

Number of Days:	639
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	\$159,750.00

Other Matters as Justice May Require Explanation:

Considering that the calculation of a penalty for 639 violations results in a penalty that is exorbitantly high, the Department, in exercising its enforcement discretion, will reduce the days of violation to 84 as it is more commensurate with the severity of the violation.

Number of Days:	84
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$21,000.00

IV. ECONOMIC BENEFIT

Explanation:

Given the uncertainties of the delayed or avoided cost since the site was determined to be in violation, there isn't enough accurate information for the Department to perform an economic benefit calculation.

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

Responsible Party Name:	Roger Emery (Respondent) at The Sunrise Motel and adjacent properties (Property)
FID:	2214 PWSID MT0001906 (System)
Statute:	Public Water Supply Laws (PWSL)
Date:	9/25/2013
Name of Employee Calculating Penalty:	Tom Bovington
Maximum Penalty Authority:	\$500.00

Violation #2
Description of Violation: Respondent violated Section 75-6-112, MCA, by constructing, altering, extending, and operating a public water system on the property by drilling wells and adding and operating additional trailers before plans and specifications have been approved by the Department.

I. BASE PENALTY

Nature

Explanation: The approval of the design of public water systems by the Department is performed to protect human health and the environment. Any unapproved public water and wastewater system has the potential to harm human health and the environment.	
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 of a public water system without approval from the Department is a violation with major gravity. Therefore, this violation has a major gravity.	
Extent Explanation: The construction and use of unapproved water and wastewater systems for 20 months is a major deviation from public water system approval process. Therefore, 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:					0.85

Impact to Administration

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

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

\$425.00

II. ADJUSTED BASE PENALTY

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

Explanation:

Respondent exhibited moderate culpability by constructing and operating a public water system without approval. As the owner of The Sunrise Motel and adjacent properties, Respondent should be aware of the requirements of a public water and wastewater system. 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)		\$85.00

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	\$425.00
Circumstances	\$85.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$510.00
MAXIMUM BASE PENALTY	\$500.00

III. DAYS OF VIOLATION

Explanation:

Section 75-6-110(1)(d), MCA, provides that the Department may assess an administrative penalty for each day of violation. Respondent has remained in violation from December 14, 2011 to September 25, 2013 for 639 days. For the purpose of calculating this penalty, the Department is considering each day as one day of violation.

	Number of Days:	639
ADJUSTED BASE PENALTY x NUMBER OF DAYS:		\$319,500.00

Other Matters as Justice May Require Explanation:

Considering that the calculation of a penalty for 639 violations results in a penalty that is exorbitantly high, the Department, in exercising its enforcement discretion, will reduce the days of violation to 21 as it is more commensurate with the severity of the violation.

	Number of Days:	21
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:		\$10,500.00

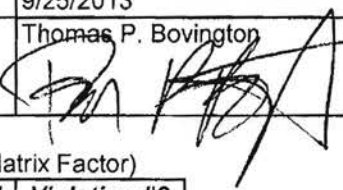
IV. ECONOMIC BENEFIT

Explanation:

Given the uncertainties of the delayed or avoided cost since the site was determined to be in violation there isn't enough information for the Department to perform an economic benefit calculation.

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

Responsible Party Name:	Roger Emery (Respondent) at The Sunrise Motel and adjacent properties (Property)	
FID:	2214	Certificate of Subdivision Approval No. 42-78-S3-173 (COSA), and Certificate of Trailer Court Approval No.42-80-T1-15 (CTCA) PWSID MT0001906 (System)
Statute:	Sanitation in Subdivisions Act (SSA) Public Water Supply Laws (PWSL)	
Date:	9/25/2013	
Signature of Employee Calculating Penalty:	 Thomas P. Bovington	

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

	Violation #1	Violation #2
Maximum Penalty Authority:	\$250.00	\$500.00
Percent Harm - Gravity and Extent:	0.85	0.85
Percent Impact - Gravity:	0.00	0.00
Base Penalty:	\$212.50	\$425.00

II. Adjusted Base Penalty

Base Penalty:	\$212.50	\$425.00
Circumstances:	\$42.50	\$85.00
Good Faith and Cooperation:	\$0.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00
Adjusted Base Penalty:	\$255.00	\$510.00
Maximum Base Penalty:	\$250.00	\$500.00

Totals
\$637.50
\$127.50
\$0.00
\$0.00
\$765.00
\$750.00

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

639 639

Adjusted Base Penalty Total \$159,750.00 \$319,500.00

\$479,250.00

**Other Matters as Justice May
Require**

\$21,000.00 \$10,500.00

\$31,500.00

IV. Economic Benefit

\$0.00 \$0.00

\$0.00

V. History*

\$0.00

TOTAL PENALTY

\$31,500.00

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

File

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE SANITATION IN
SUBDIVISIONS ACT AND PUBLIC
WATER SUPPLY LAWS BY ROGER
EMERY AT THE SUNRISE MOTEL,
SIDNEY, RICHLAND COUNTY,
MONTANA. [FID 2214, DOCKET NO.
SUB-13-04]

CASE NO. BER 2013-06 SUB

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 6 day of November, 2013
at 3:45 o'clock P.m.
By Karen Higgs

FIRST PREHEARING ORDER

Mr. Roger Emery has appealed, by letter dated October 24, 2013, the Notice of Violation and Administrative Compliance and Penalty Order issued by the Department of Environmental Quality ("Department") dated September 26, 2013. The following guidelines and rules are provided to assist the parties in an orderly resolution of this contested case:

1. REFERENCES: This matter is governed by the Montana Administrative Procedure Act, Contested Cases, Mont. Code Ann. Tit. 2, Ch. 4, pt. 6; and Mont. Admin. R. 17.4.101, by which the Board of Environmental Review (Board) has adopted the Attorney General's Model Rules for contested cases, Mont. Admin. R. 1.3.211 through 1.3.225; and Mont. Code Ann. §§ 76-4-126 and 75-6-109.

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

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

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

3 KATHERINE J. ORR
4 Interim 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 Interim Hearing Examiner, including correspondence, must be
14 served upon 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
20 communicating with the Interim Hearing Examiner even on purely procedural
21 matters such as the need for a continuance.

22 5. SCHEDULING: The parties shall consult with each other and
23 propose a schedule to the undersigned upon which they agree by **November 21,**
24 **2013.** The schedule should include the following dates:

25 (a) for joinder/intervention of additional parties;

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

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

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

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

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

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

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

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

13 DATED this 4th day of November, 2013.

14 

15 _____
16 KATHERINE J. ORR
17 Interim Hearing Examiner
18 Agency Legal Services Bureau
19 1712 Ninth Avenue
20 P.O. Box 201440
21 Helena, MT 59620-1440
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MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

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

DATE: November 20, 2013

SUBJECT: Board of Environmental Review Case No. BER 2013-07 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE NOTICE OF APPEAL AND REQUEST
FOR HEARING BY MONTANA
ENVIRONMENTAL INFORMATION CENTER
REGARDING DEQ'S APPROVAL OF COAL
MINE PERMIT NO. C1993017 ISSUED TO
SIGNAL PEAK ENERGY LLC FOR BULL
MOUNTAIN MINE NO. 1 IN ROUNDUP, MT.

Case No. BER 2013-07 OC

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

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

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

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

Attachments

c: Shiloh Hernandez, Western Environmental Law Center (for Appellant)



Northwest
1216 Lincoln Street
Eugene, Oregon 97401
(541) 485-2471

Rocky Mountains
103 Reeder's Alley
Helena, Montana 59601
(406) 443-3501

Southwest
208 Paseo del Pueblo Sur #602
Taos, New Mexico 87571
(575) 751-0351

Defending the West www.westernlaw.org

Western Environmental Law Center

November 18, 2013

Board of Environmental Review
Department of Environmental Quality
Metcalf Building
1520 East Sixth Avenue
PO Box 200901
Helena, Montana 59620-0901

RECEIVED
NOV 18 2013
DEQ DIRECTORS
OFFICE

RE: Bull Mountain Mine No. 1, Permit ID: C1993017

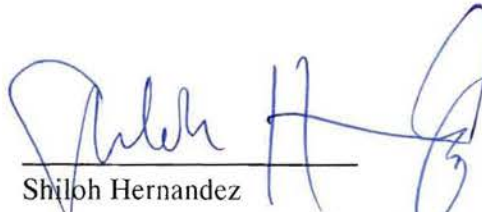
NOTICE OF APPEAL AND REQUEST FOR HEARING

The Montana Environmental Information Center (MEIC), pursuant to Montana Code Annotated § 82-4-206(1)-(2), and Montana Administrative Code 17.24.425(1), hereby files its notice of appeal and request for hearing regarding Montana Department of Environmental Quality (DEQ) approval of Bull Mountain Mine No. 1 Permit ID C1993017, on October 18, 2013. MEIC further requests that the Board of Environmental Review or its appointed hearing examiner hold a hearing on this appeal.

MEIC states that the grounds for this appeal include but are not limited to the following:

1. DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the assessment employed the incorrect legal standard.
2. DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the permit application did not affirmatively demonstrate and DEQ could not, therefore, rationally conclude that the proposed mine expansion was designed to prevent material damage to the hydrologic balance.

Respectfully submitted this 18th day of November, 2013,



Shiloh Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
406.204.4861
hernandez@westernlaw.org

*Counsel for Montana Environmental Information
Center*



**Montana Department of
ENVIRONMENTAL QUALITY**

Steve Bullock, Governor
Tracy Stone-Manning, Director

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

October 18, 2013

Mr. Dusty Weber
Signal Peak Energy LLC
Bull Mountain Coal Mine #1
100 Portal Drive
Roundup, MT 59072

Permit ID: C1993017
Revision Type: Amendment
Permitting Action: Approval
Subject: Approval; Amendment 03

Dear Dusty:

The Department of Environmental Quality (DEQ) has completed preparation of its Written Findings, including the Cumulative Hydrologic Impact Assessment, for Amendment Application 03. Based on the information in Amendment Application 03 and our Written Findings, DEQ has approved Amendment 03, Bull Mountain Mine No.1. Enclosed for your records is a copy of the updated mining permit (C1993017), which will expire on May 9, 2018. Also enclosed please find a copy of DEQ's Written Findings.

Upon receipt of this approval, Signal Peak Energy, LLC (SPE) must submit the necessary documents to the Office of Surface Mine to amend the Federal Mine Plan. The federal coal located in Sections 4, 8, 10, 14, and 22 Township 6N, Range 27E cannot be mined until the Federal Mine Plan has been amended. Additionally, the state coal located in Section 16, Township 6N, Range 27E cannot be mined until the Montana Board of Land Commissioner's has approved the mine operation and reclamation plan as required by the state lease.

A copy of these materials and the updated permit materials will be forwarded to the OSM offices in Casper and Denver.

Sincerely,

Chris A. Yde, Supervisor
Coal and Uranium Program
Industrial and Energy Minerals Bureau
Ph: 406 444.4967
Fax: 406 444.4988
E-mail: cyde@mt.gov

Cc: Jeff Fleischman, OSM Casper Office
Gene Hay, OSM Denver Office
Ed Coleman, IEMB Bureau Chief (via email)

Enclosures

FC: 620.903 (AM03)

SURFACE/UNDERGROUND MINING PERMIT

STATE OF MONTANA
Department of Environmental Quality
PO Box 200901
Helena, Montana 59620-0901
Phone (406) 444-4970

UNDERGROUND MINING PERMIT NO. C1993017
Pursuant to Title 82, Chapter 4, Part 2, MCA

Pursuant to Application for Coal Mine Permit Amendment No. 03 received by the Department on October 5, 2012, Coal Mine Permit No. C1993017 issued to Signal Peak Energy on May 9, 1993 is hereby amended as follows:

Legal Description of Amendment Area:	Change in Permitted Acres:	Amount of Change in Bond:
See Attached Table	7,161	\$762,357

THIS PERMIT, WHEN EXECUTED BY THE CHIEF, INDUSTRIAL AND ENERGY MINERALS BUREAU, DEPARTMENT OF ENVIRONMENTAL QUALITY, SHALL AUTHORIZE THE OPERATOR TO COMMENCE COAL MINING ACTIVITIES AS SPECIFIED HEREIN AND AS SHOWN ON MAPS, PLANS, SPECIFICATIONS AND APPLICATIONS SUBMITTED BY THE OPERATOR.

Name and Address of Operator:	Legal Description of Mine:
Signal Peak Energy LLC 100 Portal Drive Roundup MT 59072	See attached Table

Mineral to be Mined: Coal	County: Musselshell and Yellowstone
----------------------------------	--

Total Bond Level: \$11,700,000 (Total Bond Level did not change as the required bond after the adjustment is \$11,194,411.)	Total Permitted Acreage: 14,896 acres, more or less
---	--

Acreage Breakdown	Permit Acreage Mineral	Permit Acreage Surface
Federal:	2,675	941
Tribal:	0	0
State:	642	642
Private:	11,579	13,313
County:	0	0
Total:	14,896	14,896

THIS PERMIT AUTHORIZES THE PERMITTEE TO CONDUCT MINING ACTIVITIES AS SPECIFIED IN:

1. The mining and reclamation permit numbered C1993017 covering this mine or mine complex approved by the Commissioner, Department of State Lands, or Director, Department of Environmental Quality on October 15, 1993, and any approved amendments, revisions, and renewals.
2. The application for amendment Surface/Underground Coal Mine Permit numbered C1993017, received by the Department of Environmental Quality on October 5, 2012 and revised through August 19, 2013.

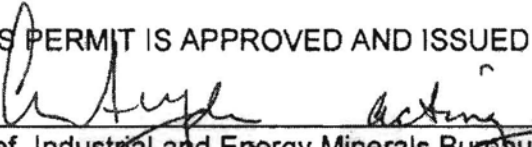
Stipulations: ARM 17.24.304(1)(b) requires "listing, location and description of all archaeological, historical, ethnological and cultural resources and values of the proposed mine plan and adjacent area." Amendment 03 is for extension of underground activities of an existing mine, and the only significant surface disturbance anticipated is the possibility of some surface failure in areas of steep slopes where few archeological/historical resources are expected. No additional archeological or historical sites have been discovered, and no impacts to known archeological or historical sites should occur. Protection of any incidentally discovered sites is stipulated in the approved surface mining permit.

ARM 17.24.303(1)(o) requires "copies of the documents upon which the applicant bases his or her legal right to enter and begin mining operations in the permit area." SPE must provide documents from the State of Montana Board of Land Commissioner's approval of mine operation and reclamation plan for coal located in Section 16, Township 6N, Range 27E.

ARM 17.24.303(1)(o) requires "copies of the documents upon which the applicant bases his or her legal right to enter and begin mining operations in the permit area." SPE must provide the amended Federal Mine Plan allowing mining in all or portions of Sections 4, 8, 10, 14, and 22 Township 6N, Range 27E to complete mining in these areas.

THIS PERMIT IS ISSUED PURSUANT TO AND SUBJECT TO THE PROVISIONS OF TITLE 82, CHAPTER 4, PART 2, MCA, AND RULES ADOPTED PURSUANT TO TITLE 82, CHAPTER 4, PART 2, MCA.

THIS PERMIT IS APPROVED AND ISSUED BY:



Chief, Industrial and Energy Minerals Bureau
Department of Environmental Quality

Effective Date: October 18, 2013

Expiration Date: May 9, 2018

This permit is valid for 5 years and is subject to renewal, suspension or revocation as deemed necessary by the Department.

Date: 10/18/2013

LEGAL DESCRIPTION FOR PERMIT NUMBER C1993017

AREA	LEGAL DESCRIPTION	ACRES
ORIGINAL PERMIT AREA (93017)		
	Township 6 North, Range 26 East	
Section 12	S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$; S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$; S $\frac{1}{2}$ Lot 2, Lots 3 and 4; W $\frac{1}{2}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$	384
Section 13	All (Lots 1,2,3,4; W $\frac{1}{2}$ E $\frac{1}{2}$; W $\frac{1}{2}$)	598
Section 14	All	640
	Subtotal:	1,622
	Township 6 North, Range 27 East	
Section 7	Lot 4; SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ NE $\frac{1}{4}$	276
Section 16	SW $\frac{1}{4}$ SW $\frac{1}{4}$	40
Section 17	W $\frac{1}{2}$; W $\frac{1}{2}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$	561
Section 18	All (Lots 1,2,3,4; E $\frac{1}{2}$; E $\frac{1}{2}$ W $\frac{1}{2}$)	634
Section 19	Lots 1,2,3; E $\frac{1}{2}$ W $\frac{1}{2}$; E $\frac{1}{2}$	604
Section 20	N $\frac{1}{2}$; W $\frac{1}{2}$ SW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$	444
Section 21	NW $\frac{1}{4}$ NW $\frac{1}{4}$	40
	Subtotal:	2,599
	TOTAL ORIGINAL PERMIT AREA ACREAGE*:	4,220
PERMIT AMENDMENT #1 AREA (0178)		
	Township 6 North, Range 27 East	
Section 20	SE $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$	202
Section 28	SW $\frac{1}{4}$; SW $\frac{1}{4}$ NW $\frac{1}{4}$	201
Section 29	All	645
Section 30	E $\frac{1}{2}$ NE $\frac{1}{4}$	81
Section 32	N $\frac{1}{2}$	322
Section 33	All	641
Section 34	W $\frac{1}{2}$ SW $\frac{1}{4}$	79
	TOTAL PERMIT AMENDMENT #1 AREA ACREAGE*:	2,172
PERMIT AMENDMENT #2 AREA (0187)		
	Township 6 North, Range 27 East	
Section 8	SW $\frac{1}{4}$ SW $\frac{1}{4}$; Portions of SE $\frac{1}{4}$ SW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$; SW $\frac{1}{4}$ NW $\frac{1}{4}$; SW $\frac{1}{4}$ SE $\frac{1}{4}$	140
Section 16	Portion of NW $\frac{1}{4}$ SW $\frac{1}{4}$	1
	Deleted Portion of SW $\frac{1}{4}$ SW $\frac{1}{4}$	-21
Section 17	Portion of SE $\frac{1}{4}$ NE $\frac{1}{4}$	7
	Deleted Portions of W $\frac{1}{2}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ SE $\frac{1}{4}$	-29
Section 21	SW $\frac{1}{4}$; Portions of SE $\frac{1}{4}$; S $\frac{1}{2}$ NW $\frac{1}{4}$; NE $\frac{1}{4}$ NW $\frac{1}{4}$; SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$	298
	Deleted Portion of NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$	-1
Section 27	SW $\frac{1}{4}$ SW $\frac{1}{4}$; Portion of SW $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ SW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$	121
Section 28	N $\frac{1}{2}$ NW $\frac{1}{4}$; SE $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ NE $\frac{1}{4}$; S $\frac{1}{2}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$	430
Section 34	NW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$; Portions of SW $\frac{1}{4}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ NE $\frac{1}{4}$	246
	NET PERMIT AMENDMENT #2 AREA ACREAGE*:	1,193

AREA	LEGAL DESCRIPTION	ACRES
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PERMIT AMENDMENT #3 AREA

	Township 6 North, Range 27 East	
Section 3	SW¼; SW¼SE¼; W½NW¼	285
Section 4	S½NE¼; NE¼NE¼; SE¼NW¼; S½	474
Section 5	S½SE¼	79
Section 8	NE¼; E½NW¼; Portion SW¼NW¼; Portion S½;	454
Section 9	ALL	637
Section 10		601
Section 11	S½; NW¼; W½NE¼; SE¼NE¼ S½SW¼; NW¼SW¼; SW¼NW¼	160
Section 14	S½; NW¼; SW¼NE¼	520
Section 15	ALL	641
Section 16	N½; SE¼; E½SW¼; Portion W½SW¼	622
Section 17	Portion E½	101
Section 21	Portion N½; Portion SE¼	306
Section 22	ALL	640
Section 23	N½; SW¼; NW¼SE¼	520
Section 26	W½; W½SE¼; NE¼SE¼; W½NE¼; SE¼NE¼	559
Section 27	E½; Portion W½	518
Section 28	Portion NE¼NE¼	12
Section 34	Portion W½NE¼	32
TOTAL AMENDMENT NO. 3 AREA ACREAGE*:		7,161

INCIDENTAL BOUNDARY CHANGES

MR 07-17-04	Township 6 North, Range 27 East	
Section 30	NW¼NE¼	40
MR 10-17-09	Township 6 North, Range 26 East	
Section 25	(Road Corridor)	19
	Township 6 North, Range 27 East	
Section 30	(Road Corridor)	18
MR 10-17-12	Township 5 North, Range 27 East	
Section 4	N½NE¼ (Select Tract)	26
MR 10-17-23	Township 4 North, Range 25 East	
Section 13	(Comanche Basin Loadout. This area was not contiguous to current mine and is not calculated in the acreage.)	-20
MR 135	Township 6 North, Range 26 East	
Section 25	(Soil Stockpile)	8
	Township 6 North, Range 27 East	
Section 30	(Soil Stockpile)	12
Section 31	E½NE¼ (Select Tract)(Road Corridor)	5
Section 32	(Road Corridor)(Soil Stockpile)	19
	Township 5 North, Range 27 East	
Section 4	(Road Corridor)NW¼	4
TOTAL INCIDENTAL BOUNDARY CHANGE ACREAGE*:		150

TOTAL LOM PERMIT ACREAGE:** 14,896

* Acreages calculated using AutoCAD MAP. Any minor acreage totaling differences can be attributed to decimal/fractional acreages in actual Microsoft Excel Spreadsheet.

** LOM PERMIT ACREAGE = ORIGINAL + AMENDMENTS 1, 2 & 3 +
INCIDENTAL BNDRY CHANGES

MONTANA BOARD OF
ENVIRONMENTAL REVIEW

This 29th day of March, 2013
at 1:30 o'clock P.m.
By: [Signature]

Kirsten H. Bowers
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901
(406) 444-5690
Attorney for the Department

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

**IN THE MATTER OF:
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.**

CASE NO. BER 2012-09 OC

**THE DEPARTMENT'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT**

The Department of Environmental Quality ("Department"), by counsel, moves the Board of Environmental Review to dismiss or, in the alternative, grant summary judgment in favor of the Department and against Petitioners in the above-captioned contested case on the ground that it fails to state a claim upon which relief may be granted. In the alternative, if the Board declines to dismiss this case, the Department moves the Board to grant summary judgment in favor of the Department and against Petitioners. The Department also requests that the Board dismiss any and all claims by the Petitioners who are identified only as "other residents" for failing to comply with the requirements of Mont.R.Civ.P. 10(a). In support of its Motion, the Department submits herewith and incorporates herein by reference its Brief in Support of the Department's Motion to

1 Dismiss or, in the Alternative, for Summary Judgment and the Affidavits of Kris Brewer and
2 Kenley Stone.

3 WHEREFORE, the Department requests that the Board dismiss Petitioner's claims pursuant
4 to Mont. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or in the
5 alternative, find there to be no disputed fact and enter summary judgment pursuant to Mont. R. Civ.
6 P. 56 in favor of the Department and against Petitioners on all claims, and grant such other and
7 further relief as is just and appropriate in the premises.

8 Respectfully submitted this 29th day of March, 2013.

9 DEPARTMENT OF ENVIRONMENTAL QUALITY

10
11 BY: Kirsten H. Bowers
12 Kirsten H. Bowers,
Staff Attorney

13
14 **Certificate of Service**

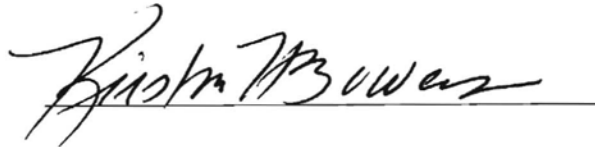
15 I hereby certify that on the 29th day of March, 2013, I mailed a true and correct copy of
16 the foregoing Department's Motion to Dismiss or, in the Alternative, for Summary Judgment:

17 Joseph D. Houston
18 CHRISTIAN, SAMSON & JONES, PLLC
310 West Spruce
Missoula, MT 59802

19 W. John Tietz
20 BROWNING, KALECZYC, BERRY & HOVEN, P.C.
800 North Last Chance Gulch
21 Helena, MT 59601
Attorney for Lunde Baston, d/b/a Farwest Rock Products
22
23
24

1 I further certify that on the same date I sent the same document by interdepartmental mail
2 to:

3 Katherine Orr, Hearing Officer
4 DOJ – ALS – 9th Avenue

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Alanah Griffith
Pape & Griffith, PLLC
1184 N. 15th, Ste. 4
Bozeman, MT 59715
(406) 522-0014
Fax: (406) 585-2633

alanah@papegriffithlaw.com

Attorney for Appellants

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 23 day of September, 2013
at 12:00 o'clock P.m.
By: Heather L. Griffith

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)	
THE REQUEST FOR HEARING BY)	
WILLIAM E. SMITH, ON BEHALF	)	CASE NO. BER-2012-05 SW
OF MIKE ADKINS, REGARDING PARK)	
COUNTY'S DENIAL TO VALIDATE	)	Proposed ORDER
ADKINS CLASS III WASTE TIRE	)	DISMISSING WITH
MONOFILL LICENSE NO. 517.	)	PREJUDICE
)	
)	
)	

The Montana Department of Environmental Quality and the Adkins have chosen not to appeal Judge Gilbert's decision in the district court case known as *Protecting Paradise, Inc. v. DEQ*, DV-12-123, Sixth Judicial District, Park County. Therefore, the Adkins appeal of Dr. Wadle's May 18, 2012 decision not to validate the License is moot as the DEQ is reevaluating the license pursuant to Judge Gilbert's decision. The Adkins moved that the Board dismiss the appeal of Dr. Wadle's May 18, 2012, decision with prejudice. This motion is unopposed by the other parties.

For good cause, this matter is **DISMISSED WITH PREJUDICE**

Dated this ____ day of September, 2013.

Submitted for consideration this 23rd day of September, 2013.


Alanah Griffith

I hereby certify that on this 23 day of September, 2012, a true and correct copy of the foregoing document was served upon the following individuals in the manner set forth below:

Shannan Piccolo Park County Attorney 414 E. Callendar St. Livingston, MT 59047	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email: civildeputy@parkcounty.org
Ms. Katherine J. Orr Hearing Examiner Agency Legal Services Bureau P.O. Box 201440 Helena, MT 59620-1440	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> Via email:
Ms. Joyce Wittenberg Secretary, Board of Env. Review Department of Env. Quality P.O. Box 200901 Helena, MT 59620-0901 (original)	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> Via email:
Mr. Dana David Legal Counsel Department of Env. Quality P.O. Box 200901 Helena, MT 59620-0901	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email: DDavid@mt.gov
Jim Goetz Zachary Strong Goetz, Gallik and Baldwin P.O. Box 6580 Bozeman, MT 59771-6580	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email:

By:


Alanah Griffith

Alanah Griffith
Pape & Griffith, PLLC
1184 N. 15th, Ste. 4
Bozeman, MT 59715
(406) 522-0014
Fax: (406) 585-2633

alanah@papegriffithlaw.com

Attorney for Appellants

Filed with the
MONTANA BOARD OF

ENVIRONMENTAL REVIEW

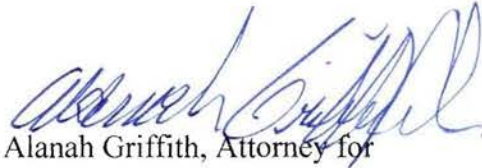
This 27th day of September 2013
at 11:00 o'clock A.m.
By: [Signature]

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)	
THE REQUEST FOR HEARING BY)	
WILLIAM E. SMITH, ON BEHALF	)	CASE NO. BER-2012-05 SW
OF MIKE ADKINS, REGARDING PARK)	
COUNTY'S DENIAL TO VALIDATE	)	<u>UNOPPOSED</u> MOTION TO
ADKINS CLASS III WASTE TIRE	)	DISMISS WITH
MONOFILL LICENSE NO. 517.	)	PREJUDICE
)	
)	
)	

As the Board is aware, the Montana Department of Environmental Quality and the Adkins have chosen not to appeal Judge Gilbert's decision in the district court case known as *Protecting Paradise, Inc. v. DEQ*, DV-12-123, Sixth Judicial District, Park County. Therefore, the Adkins appeal of Dr. Wadle's May 18, 2012 decision not to validate the License is moot as the DEQ is reevaluating the license pursuant to Judge Gilbert's decision. Therefore, the Adkins request that the Board dismiss the appeal of Dr. Wadle's May 18, 2012, decision with prejudice. This motion is unopposed by the other parties.

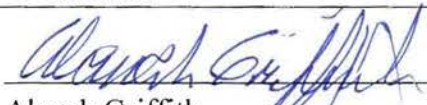
Dated this 23 day of September, 2013.


Alanah Griffith, Attorney for
Appellants

I hereby certify that on this 23 day of September, 2012 a true and correct copy of the foregoing document was served upon the following individuals in the manner set forth below:

Shannan Piccolo Park County Attorney 414 E. Callendar St. Livingston, MT 59047	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email: civildeputy@parkcounty.org
Ms. Katherine J. Orr Hearing Examiner Agency Legal Services Bureau P.O. Box 201440 Helena, MT 59620-1440	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> Via email:
Ms. Joyce Wittenberg Secretary, Board of Env. Review Department of Env. Quality P.O. Box 200901 Helena, MT 59620-0901 (original)	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> Via email:
Mr. Dana David Legal Counsel Department of Env. Quality P.O. Box 200901 Helena, MT 59620-0901	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email: DDavid@mt.gov
Jim Goetz Zachary Strong Goetz, Gallik and Baldwin P.O. Box 6580 Bozeman, MT 59771-6580	X First-class mail, postage prepaid <input type="checkbox"/> FedEx <input type="checkbox"/> Hand delivery <input type="checkbox"/> Via fax: X Via email:

By:


Alanah Griffith

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

AGENDA # III.C.1.

AGENDA ITEM SUMMARY - The Department requests approval of an amendment to a rule that implements the Montana Strip and Underground Mine Reclamation Act.

LIST OF AFFECTED RULES - ARM 17.24.905

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

SCOPE OF PROPOSED PROCEEDING - The Department is requesting initiation of rulemaking with no public hearing contemplated.

BACKGROUND - The Department requests approval of an amendment of a rule applicable to in situ coal processing operations to respond to a determination by the U.S. Department of the Interior, Office of Surface Mining ("OSM") that the current rule is less stringent than its federal counterpart. The rule being amended was adopted in response to SB 292, enacted as Section 1, Ch. 398, Montana Laws 2011, and codified as section 82-4-207, MCA, which directs the Board to adopt rules necessary to regulate underground coal mining by using in situ coal gasification operations by no later than October 1, 2011. Accordingly, the Board adopted ARM 17.24.905 which identified specific rules relating to underground coal mining that did not apply to in situ coal gasification, and amended ARM 17.24.902, providing application requirements for in situ coal processing operations, and ARM 17.24.903, providing general performance standards, accordingly. OSM which is authorized by the Surface Coal Mine Regulation and Control Act ("SMCRA") to approve rules adopted by a SMCRA primacy state such as Montana as being no less stringent than federal law, determined that ARM 17.24.905(1)(b) was less stringent than federal law. That provision excludes the requirement for providing plans for disposal of excess spoil described in ARM 17.24.320 from an application for a permit for in situ coal gasification. In response to OSM's determination, the proposed amendment deletes the exclusion of ARM 17.24.320 thereby reinstating the requirement to provide plans for disposal of excess spoil for an application for mining coal through in situ coal gasification.

OSM, in its review of the rule, recognized that in situ coal gasification generally does not contemplate disposal of excess spoil. However, OSM determined that because providing a plan for disposal of excess spoil remains a requirement of federal law, the ARM 17.24.905(1)(b) exclusion nevertheless renders state law less stringent than its federal counterpart.

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

BOARD OPTIONS - The Board may:

1. Initiate rulemaking and issue the attached Notice of Proposed Amendment (No Public Hearing Contemplated);
2. Modify the Notice and initiate rulemaking; or
3. Determine that the amendment of the rule is not appropriate and deny the Department's request to initiate rulemaking.

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

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

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PROPOSED
17.24.905 pertaining to rules not)	AMENDMENT
applicable to in situ coal operations)	
)	(RECLAMATION)
)	
)	(NO PUBLIC HEARING
)	CONTEMPLATED)

TO: All Concerned Persons

1. On _____, 2013, the Board of Environmental Review proposes to amend the above-stated rule.

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

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

17.24.905 RULES NOT APPLICABLE TO IN SITU COAL OPERATIONS

(1) The following rules are not applicable to in situ coal gasification:

(a) remains the same.

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

(c) and (d) remain the same, but are renumbered (b) and (c).

(2) remains the same.

AUTH: 82-4-207, MCA

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

REASON: It is necessary to amend this rule because the Office of Surface Mining has determined that, by eliminating the plans for disposal of excess spoil, our rule would be less stringent than the federal counterpart. In order for the department to continue to regulate coal mining, its rules must be as stringent as the Surface Mining Control and Reclamation Act and implement federal statute 30 U.S.C. 1253.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone

MAR Notice No. 17-____

(406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than _____, 2013. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than _____, 2013.

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

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

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

9. With regard to the requirements of Chapter 318, Section 1, Laws of 2013, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

_____	BY: _____
JOHN F. NORTH	ROBIN SHROPSHIRE
Rule Reviewer	Chairman

Certified to the Secretary of State, _____, 2013.

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

AGENDA ITEM # III.C.2.

AGENDA ITEM SUMMARY - The Department is requesting that the Board initiate rulemaking to adopt proposed New Rule I pertaining to the administrative requirements for limited opencut operations. Proposed new rule I would implement the provisions for limited opencut operations in Section 5 of Senate Bill 332 (2013).

LIST OF AFFECTED RULES - New Rule I

AFFECTED PARTIES SUMMARY - Owners or operators of permitted opencut operations wanting to conduct limited opencut operations that meet the criteria in Section 5 of Senate Bill 332 (2013) codified as 82-4-431(2), Montana Code Annotated (MCA).

SCOPE OF PROPOSED PROCEEDING - The Department is requesting initiation of rulemaking with no public hearing contemplated.

BACKGROUND – Proposed New Rule I would provide administrative requirements and procedures that are necessary to implement the provisions in Section 5 of Senate Bill 332 (2013) (now codified as 82-4-431(2), MCA) for limited opencut operations. An operator who holds an opencut permit under 82-4-431, MCA, may conduct a limited opencut operation without obtaining an additional permit or an amendment to an existing permit, if the limited opencut operation meets the criteria in 82-4-431(2), MCA. Section 82-4-431(2), MCA, requires the operator to submit appropriate site and operation information on a form provided by the department. Proposed new rule I would clarify the time limits for limited opencut site reclamation and for submittal of an application to continue or expand a limited opencut operation pursuant to Section 5 of Senate Bill 332 (the provisions for continuing and expanding limited opencut operations are codified as 82-4-431(4), MCA). Finally, new rule I would provide that the 10,000-cubic-yard limitation for a limited opencut operation does not include the volume of soil and overburden that is stripped and stockpiled on the limited opencut operation site for reclamation purposes. This clarification is necessary to uphold the intent of Senate Bill 332, which is to allow operators to complete smaller, short-term projects without having to undertake the full opencut permitting process.

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

BOARD OPTIONS - The Board may:

1. Initiate rulemaking and issue the attached Notice of Proposed Adoption (No Public Hearing Contemplated);
2. Modify the Notice and initiate rulemaking; or

3. Determine that the adoption of the rule is not appropriate and deny the Department's request to initiate rulemaking.

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

Enclosures:

1. Draft Notice of Proposed Adoption
2. SB 332 (2013)

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF PROPOSED
Rule I pertaining to administrative	)	ADOPTION
requirements for limited opencut)	
operations	)	(RECLAMATION)
)	
	)	(NO PUBLIC HEARING
	)	CONTEMPLATED)

TO: All Concerned Persons

1. On _____, 2013, the Board of Environmental Review proposes to adopt the above-stated rule.

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

3. The proposed new rule provides as follows:

NEW RULE I ADMINISTRATIVE REQUIREMENTS FOR LIMITED OPENCUT OPERATIONS (1) An operator holding an opencut permit may conduct a limited opencut operation that meets the criteria in 82-4-431(2), MCA, without first obtaining an additional permit or an amendment to an existing permit when, prior to commencing the limited opencut operation, the operator completes and submits to the department appropriate site and opencut operation information on a limited opencut operation form provided by the department.

(2) The operator must submit a completed limited opencut operation form and the following information to the department prior to commencing the opencut operation:

- (a) the operator's complete name and address;
- (b) the location, in the format required by the department, of the limited opencut operation site;
- (c) the locational coordinates of the approximate center of the limited opencut operation site;
- (d) the location, in a format acceptable to the department, of the operator's nearest limited opencut operation to the proposed limited opencut operation site;
- (e) plans to expand or continue the limited opencut operation in accordance with 82-4-431(4), MCA;
- (f) the landowner's name and address;
- (g) driving directions to access the site from the nearest public road;

(h) a description of the pre-mine condition of the limited opencut operation site and the pre-mine condition of any private access roads to the limited opencut operation site;

(i) an aerial or topographic map of the limited opencut operation site; and

(j) certification by the operator that the information provided to the department in the limited opencut operation form is complete and accurate.

(4) The department's receipt of a limited opencut operation form initiates the timeframes set forth in 82-4-431, MCA, for either:

(a) salvaging soil, removing materials, and reclaiming the limited opencut operation site; or

(b) applying for a permit to continue or expand the opencut operation.

(5) A person conducting a limited opencut operation, authorized under 82-4-431(2), MCA, may not remove more than 10,000 cubic yards of materials and overburden. This limitation does not include the volume of soil and overburden that is stripped and stockpiled on the limited opencut operation site for site reclamation.

AUTH: 82-4-422, MCA

IMP: 82-4-431, MCA

REASON: Proposed New Rule I provides administrative requirements that are necessary to implement the provisions in Section 5 of Senate Bill 332 (Chapter 198, Laws of 2013, codified as 82-4-431(2), MCA) for limited opencut operations. An operator who holds a permit under 82-4-431, MCA, may conduct a limited opencut operation without obtaining an additional permit or an amendment to an existing permit if the limited opencut operation meets the criteria in 82-4-431(2), MCA. To meet the criteria in 82-4-431(2), MCA, for a limited opencut operation, the operator must submit appropriate site and operation information on a form provided by the department. Proposed New Rule I is necessary to set forth administrative procedures for submitting appropriate limited opencut operation site and operation information to the department in accordance with Section 5 of Senate Bill 332. Proposed New Rule I will provide necessary clarification of the time limits for site reclamation and for submittal of an application to continue or expand a limited opencut operation pursuant to Section 5 of Senate Bill 332 (to be codified as 82-4-431(4), MCA). Finally, New Rule I provides that the 10,000-cubic-yard limitation for a limited opencut operation does not include the volume of soil and overburden that is stripped and stockpiled on the limited opencut operation site for reclamation purposes. This clarification is necessary to uphold the intent of Senate Bill 332, which is to allow operators a way to avoid the full permit process when necessary to complete smaller, short-term projects.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than _____, 2013. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

2013 Montana Legislature
[Additional Bill Links](#) [PDF version](#)



SENATE BILL NO. 332
INTRODUCED BY TUTVEDT, CONNELL

AN ACT GENERALLY REVISING OPENCUT MINING LAWS, REQUIRING NOTICE OF INSPECTIONS; REVISING NOTICE AND HEARING PROVISIONS, REQUIRING FEE FOR MATERIALS MINED ILLEGALLY; AND AMENDING SECTIONS 7-14-2124, 82-4-403, 82-4-425, 82-4-427, 82-4-431, 82-4-432, 82-4-433, AND 82-4-437, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 7-14-2124, MCA, is amended to read

"7-14-2124. Disposition of surplus crushed rock and gravel. (1) ~~Any crushed~~ Crushed rock or gravel not directly used or needed by the county in the construction, repair, or maintenance of its roads may be sold by the board of county commissioners at not less than actual cost of production to only a:

(a) any person, firm, or corporation desiring to use it upon any public street or highway in the county; or
(b) landowner for personal use in an area within 5 miles of the opencut operation where the materials were mined.

(2) The proceeds of any ~~such sale shall~~ must be paid into the county road fund "

Section 2. Section 82-4-403, MCA, is amended to read:

"82-4-403. Definitions. When used in this part, unless a different meaning clearly appears from the context, the following definitions apply

(1) "Affected land" means the area of land and land covered by water that is disturbed by opencut

~~operations, including the area from which overburden or materials are to be or have been removed and upon which the overburden is to be or has been deposited, existing private roads that are used and roads constructed to gain access to the materials, areas of processing facilities on or contiguous to the opencut mine, treatment and sedimentation ponds, soil and materials stockpile areas on or contiguous to the opencut mine, and any other surface or subsurface disturbance associated with opencut operations. For the purposes of this subsection, an existing~~ A private road may be included as affected land only with the landowner's consent.

(2) "Amendment" means a change to the approved permit.

(3) "Board" means the board of environmental review provided for in 2-15-3502

(4) "Department" means the department of environmental quality provided for in 2-15-3501

(5) "Landowner" means the holder of legal title to land subjected to an opencut operation

(6) "Materials" means bentonite, clay, scoria, peat, sand, soil, gravel, or mixtures of those substances.

(7) "Opencut operation" means ~~the following activities, if they are~~ conducted for the primary purpose of sale or utilization of materials, including.

(a) mine site preparation;

~~(b)~~ (i) removing the overburden and mining directly from the exposed natural deposits, or

(ii) mining directly from natural deposits of materials;

~~(b)~~ mine site preparation, including access;

(c) processing of materials ~~within the area that is to be mined or contiguous to the area that is to be mined or the access road~~ mined from the natural deposits, except that processing facilities located more than 300 feet from where materials were mined or are permitted to be mined are not part of the opencut operation.

~~(d)~~ transporting, depositing, staging, and stockpiling of overburden and materials unless the activity occurs more than 300 feet from where the materials were mined or are permitted to be mined;

~~(d)~~ transportation of materials on areas referred to in subsections (7)(a) through (7)(c);

(e) storing or stockpiling of materials ~~on areas referred to in subsections (7)(a) through (7)(c)~~ at processing facilities that are part of the opencut operation;

(f) reclamation of affected land; and

(g) ~~any other associated surface or subsurface activity conducted on areas referred to in subsections (7)(a) through (7)(c)~~ parking or staging of vehicles, equipment, or supplies unless.

~~(i)~~ the activity is separated from other opencut operations by at least 25 feet and is connected to the opencut operation by a single road that is no more than 25 feet wide, or

~~(ii)~~ the activity is inside the construction disturbance area shown on a construction project plan.

(8) "Operator" means a person ~~engaged in or controlling an opencut operation. When a permit has been~~

~~issued for an operation, a person who removes materials from the site under the control of the operator is not considered an operator who holds a permit issued pursuant to this part. For purposes of enforcing the provisions of this part, the term also includes any person conducting opencut operations on affected land that is not covered by a permit.~~

(9) "Overburden" means the earth that lies above a natural deposit of materials.

(10) "Person" means:

- (a) a natural person,
- (b) a firm, association, partnership, cooperative, or corporation;
- (c) a department, agency, or instrumentality of the state or any governmental subdivision, or
- (d) any other entity

(11) "Plan of operation" means a plan that:

- (a) meets the requirements of 82-4-434, and
- (b) contains a description of current land use, topographical data, hydrologic data, soils data, proposed mine areas, proposed mining and processing operations, proposed reclamation, and appropriate maps

(12) "Processing facilities" means

- (a) crushers, screens, and pug mills,
- (b) asphalt, wash, and concrete plants, ~~and~~
- (c) ~~other equipment used in processing opencut materials~~ treatment, sedimentation, or retention areas for processing facilities; and
- (d) areas receiving washout from vehicles and equipment using the processing facilities.

(13) "Reclamation" means the reconditioning of affected land to make the area suitable for productive use, including but not limited to forestry, agriculture, grazing, wildlife, recreation, or residential or industrial development.

(14) "Soil" means the dark or root-bearing surface matter that has been generated through time by the interaction of biological activity, climate, topography, and parent material and that is capable of sustaining plant growth and is recognized and identified as such by standard authorities and methods."

Section 3. Section 82-4-425, MCA, is amended to read:

"82-4-425. Inspection of opencut operations. The department or its accredited representatives may enter upon lands subjected to opencut operations at all reasonable times for the purpose of inspection to determine whether the provisions of this part have been complied with. The department shall attempt to provide reasonable notice to a permitted operator when practicable under the circumstances."

Section 4. Section 82-4-427, MCA, is amended to read

"82-4-427. Hearing -- appeal -- venue. (1) (a) ~~★ Subject to subsections (1)(b) and (1)(c), a person whose~~ interests are or may be adversely affected by a final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying material under this part is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision

(b) If an application was noticed publicly as required by this part, to be eligible to file for an appeal a person must have either submitted comments to the department on an application or submitted comments at a public meeting held under 82-4-432.

(c) Subsection (1)(b) does not apply to a person filing for an appeal of an application that was not required to be noticed publicly by this part.

(2) An operator may request a hearing before the board on:

(a) a final decision of the department director pursuant to 82-4-436(4) by submitting a request for a hearing within 15 days of receipt of notice of the director's decision, and

(b) an order of suspension or revocation issued under 82-4-442 by filing a request for hearing within 30 days of receipt of the decision

(3) The operator or the landowner may request a hearing before the board on a decision on a bond release application.

(4) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section

(5) A petition for judicial review of a board decision made pursuant to this section must be brought in the county in which the permitted activity is proposed to occur or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County. If an activity is proposed to occur in more than one county, the action may be brought in any of the counties in which the activity is proposed to occur

(6) The petition for judicial review must include the party to whom the permit was issued or the applicant unless otherwise agreed to by the permitholder or applicant. All judicial challenges of permits for projects with a project cost, as determined by the court, of more than \$1 million must have precedence over any civil cause of a different nature pending in that court. If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs incurred in defending the action "

Section 5. Section 82-4-431, MCA, is amended to read.

"82-4-431. Permit for mining, processing, and reclamation required. (1) ~~An operator may not conduct an opencut operation that results in the removal of a total of 10,000 cubic yards or more of materials and overburden until the department has issued a permit to the operator. An operator may not, without a permit, remove materials or overburden from a site from which a total of 10,000 cubic yards or more of materials and overburden in the aggregate has been removed. An operator conducting a number of opencut operations, each of which results in the removal of less than 10,000 cubic yards of materials and overburden but that result in the removal of 10,000 cubic yards or more of materials and overburden in the aggregate, is subject to the provisions of this part, except as provided in this section. A permit is required for an operator who:~~

(a) conducts an opencut operation that results in the removal of more than 10,000 cubic yards of materials and overburden;

(b) conducts more than one opencut operation where each of the operations results in the removal of less than 10,000 cubic yards of materials and overburden but the operations result in the removal of 10,000 cubic yards or more of materials and overburden in the aggregate; or

(c) removes materials or overburden at a previously mined site where the removal, combined with the amount of previously mined materials and overburden, exceeds 10,000 cubic yards.

(2) Except as provided in or conditioned under subsections ~~(3) and (4)~~ (5) and (6), an operator who holds a permit under this part may conduct ~~an~~ a limited opencut operation without first securing an additional permit or an amendment to an existing permit if the limited opencut operation meets the following criteria:

(a) the area to be disturbed by the limited opencut operation is located more than 1 mile from the operator's nearest existing limited opencut operation;

~~(a)(b)~~ (b) the total amount of materials and overburden removed ~~from the site~~ does not exceed ~~5,000~~ 10,000 cubic yards and the total area from which the materials and overburden are removed does not exceed 5 acres; and

~~(b)(c)~~ (c) the operator

(i) submits appropriate site and opencut operation information on a limited opencut operation form provided by the department; and

(ii) within 180 days of submitting the 1 year of the department's receipt of the limited opencut operation form, salvages all soil from the area to be disturbed, removes the materials, grades the affected land to 3:1 or flatter slopes, blends the graded land into the surrounding topography, replaces an appropriate amount of overburden and all soil, and reclaims to conditions present prior to mining all access roads used for the operation unless the landowner requests in writing that specific roads or portions of the roads remain open. Roads left open at the

landowner's request must be sized to support the use of the road after opencut operations.

(iii) at the first seasonal opportunity, seeds or plants all affected land with vegetative species that meet the requirements of 82-4-434.

(3) At the operator's request and with department approval, the operator may have up to 1 additional year to perform the reclamation required by subsection (2)(c), provided the operator does not apply to extend or continue the limited opencut operation pursuant to subsection (4).

(4) (a) An operator who commences a limited opencut operation pursuant to subsection (2) may apply for a permit to continue or expand that opencut operation pursuant to the provisions of this subsection (4).

(b) The permit application must be complete within 180 days of the department's receipt of the limited opencut operation form.

(c) If the complete permit application is acceptable within 1 year of the department's receipt of the limited opencut operation form, the provisions of subsections (2)(c)(ii) and (2)(c)(iii) do not apply and reclamation must be conducted as prescribed in the permit.

(d) If the complete permit application is not acceptable within 1 year of the department's receipt of the limited opencut operation form, the application is considered abandoned and void. Starting 3 days after the department notifies the applicant that the application is considered abandoned and void, the applicant has 180 days to complete the reclamation provided for in subsections (2)(c)(ii) and (2)(c)(iii).

(e) If the permit application is withdrawn by the applicant within 1 year of the department's receipt of the limited opencut operation form, the reclamation provided for in subsections (2)(c)(ii) and (2)(c)(iii) must be completed within 180 days of the date of the withdrawal.

~~(3)~~(5) The department may refuse to approve an application for issuance of a permit under subsection (1) or may prohibit the operator from conducting an opencut operation under subsection (2) if, at the time of notification by the operator to the department, the operator has a pattern of violations or is in current violation of this part, rules adopted under this part, or provisions of a permit.

~~(4)~~(6) The department may require an additional bond as a condition for the conduct of an opencut operation under subsection (2)

~~(5)~~(7) Opencut operations described in subsection (2) may not occur

(a) in ephemeral, intermittent, or perennial streams;

(b) in an area where the opencut operation will intercept surface water, ground water, or any slope that is steeper than 3:1; or

(c) in any area where mining would be restricted by other laws

~~(6)~~(8) Sand and gravel opencut operations must meet applicable local zoning regulations adopted under

Title 76, chapter 2."

Section 6. Section 82-4-432, MCA, is amended to read:

"82-4-432. Application for permit -- contents -- issuance -- amendment. (1) An application for a permit must be made using forms furnished by the department and must contain the following.

- (a) the name of the applicant and, if other than the owner of the land, the name and address of the owner;
- (b) the type of operation to be conducted;
- (c) the estimated volume of overburden and materials to be removed;
- (d) the location of the proposed opencut operation by legal description and county, accompanied by a map showing the location of the proposed operation sufficient to allow the public to locate the proposed site; and
- ~~— (e) the date when the opencut operation is proposed to commence; and~~

~~(f)~~(e) a statement that the applicant has the legal right to mine the designated materials in the lands described

(2) The application must be accompanied by:

- (a) a bond or security meeting the requirements as set out in this part;
- (b) a statement from the local governing body having jurisdiction over the area to be mined certifying that the proposed sand and gravel opencut operation complies with applicable local zoning regulations adopted under Title 76, chapter 2;

(c) a plan of operation that addresses the requirements of 82-4-434 and rules adopted pursuant to this part related to 82-4-434,

(d) written documentation that the landowner has been consulted about the proposed plan of operation; and

(e) a list of surface owners of land located within one-half mile of the boundary of the proposed opencut permit area using the ~~most current known~~ owners of record as shown no more than 60 days prior to the submission of an application in the paper or electronic records of the county clerk and recorder in for the county where the proposed opencut operation is located

(3) If, prior to applying for a permit, a person notifies the department of the intention to submit an application and requests that the department examine the area to be mined, the department shall examine the area and make recommendations to the person regarding the proposed opencut operation. The person may request a meeting with the department. The department shall hold a meeting if requested

(4) (a) (i) Except as provided in 75-1-208(4)(b), upon receipt of an application, the department shall, within 5 working days, review the application and notify the person as to whether or not the application is complete. An application is complete if it contains the items listed in subsections (1) and (2) If the department determines that

the application is not complete, the department shall notify the applicant in writing and include a detailed identification of information necessary to make the application complete

(ii) The time limit provided in subsection (4)(a)(i) applies to each submittal of the application until the department determines that the application is complete

(b) (i) A determination that an application is complete does not ensure that the application is acceptable and does not limit the department's ability to request additional information or inspect the site during the review process.

(ii) Upon determining that an application is complete, the department shall begin reviewing the application for acceptability pursuant to this section.

(iii) The department shall accept public comment throughout the review process

(c) The department may declare an application abandoned and void if

(i) the applicant fails to respond to the department's written request for more information within 1 year; and

(ii) the department notifies the applicant of its intent to abandon the application and the applicant fails to provide information within 30 days.

(d) The department shall notify the applicant when an application is complete and post the complete application on the department's website

(5) Within 15 days after the department sends notice of a complete application to the applicant, the applicant shall provide public notice, which must include:

(a) the name, address, and telephone number of the applicant;

(b) a description of the acreage, the estimated volume of overburden and materials to be removed, the type of materials to be removed, the facilities, the duration of activities, and the access points of the proposed opencut operation;

(c) a legal description of the proposed opencut operation and a map, or directions on how to access a map, showing the location of the proposed opencut operation and immediately surrounding property, and

(d) on a form provided by the department, notification that the application is complete and information on how to request a public meeting pursuant to this section

(6) To provide public notice, the applicant shall:

(a) publish notice at least twice in a newspaper of general circulation in the locality of the proposed opencut operation; A map is not required in the notice if, in addition to the legal description of the proposed opencut operation, the notice provides an address for the map posted on the department's website and instructions for obtaining a paper copy of the map from an applicant. If the notice does not include a map, the applicant shall promptly provide a paper copy to a requestor.

(b) mail the notice by first-class mail to the board of county commissioners of the county in which the proposed opencut operation is located and to surface owners of land located within one-half mile of the boundary of the proposed opencut permit area using the most current known owners of record as shown in the paper or electronic records of the county clerk and recorder ~~in~~ for the county where the proposed opencut operation is located,

(c) post the notice in at least two prominent locations at the site of the proposed opencut operation, including near a public road if possible; and

(d) provide the department with the names and addresses of those notified pursuant to subsection (6)(b).

(7) (a) Except as provided in subsection (7)(b), the department shall accept requests for a public meeting for 45 days after the department sends notice to the applicant of a complete application. Within this period, unless a public meeting is required pursuant to subsection (9), the department shall notify the applicant as to whether or not the application is acceptable pursuant to subsection (10).

(b) If the applicant and the department mutually agree or the applicant submits documentation ~~to~~ on a form provided by the department showing that a public meeting will not be required pursuant to subsection (9), the department shall inform the applicant within 30 days of the notice of a complete application as to whether or not the application is acceptable pursuant to subsection (10).

(8) If a public meeting is required pursuant to subsection (9), within 30 days from the closing date of the public meeting request period in subsection (7), the department shall

(a) hold a meeting, and

(b) notify the applicant as to whether or not the application is acceptable pursuant to subsection (10) or that the application requires an extended review pursuant to 82-4-439.

(9) (a) The department shall hold a public meeting in the area of the proposed opencut operation at the request of

(i) the applicant; or

(ii) at least 30% of the property owners or 10 property owners, whichever is greater, notified pursuant to this section. For the purposes of this subsection (9)(a)(ii), multiple property owners of the same parcel are to be counted as a single property owner.

(b) To provide notice for a public meeting, the department shall notify by first-class mail or electronically the property owners on the list provided by the applicant pursuant to this section and the board of county commissioners in the county where the proposed opencut operation is located

(10) (a) An application is acceptable if it complies with the requirements of subsections (1) and (2) and includes a plan of operation that satisfies the requirements of 82-4-434 and rules adopted pursuant to this part

related to 82-4-434. If the department determines that the application is not acceptable, the department shall notify the applicant in writing and include a detailed identification of all deficiencies.

(b) Within 10 working days of receipt of the applicant's response to the identified deficiencies, the department shall review the responses and notify the applicant as to whether or not the application is acceptable. If the application is unacceptable, the department shall notify the applicant in writing and include a detailed identification of the deficiencies.

(c) If the application is acceptable, the department shall issue a permit to the operator that entitles the operator to engage in the opencut operation on the land described in the application.

(11) (a) An operator may amend a permit by submitting an amendment application to the department. Upon receipt of the amendment application, the department shall review it in accordance with the requirements and procedures in this section. If the amendment application is acceptable, the department shall issue an amendment to the original permit.

(b) An application for an amendment is not subject to the public notice or public meeting requirements of this section or an extended review pursuant to 82-4-439 unless it proposes an increase in permitted acreage of 50% or more of the amount of permitted acreage in the ~~original~~ current permit.

(c) For amendment applications not subject to the public notice and public meeting requirements of this section, the department shall, within 45 days of notifying the applicant that the application is complete, notify the applicant as to whether or not the application is acceptable pursuant to subsection (10) ~~or that the application requires an extended review pursuant to 82-4-439.~~

(12) The department shall ~~publish~~ post a copy of an acceptable permit or amendment on its website."

Section 7. Section 82-4-433, MCA, is amended to read:

"82-4-433. Bond. (1) Before a permit or permit amendment may be issued, a surety bond made payable to the state of Montana and conditioned upon the operator's full compliance with all requirements of this part, the rules adopted under this part, and the permit must be submitted to and approved by the department. The bond must be signed by the applicant as principal and by a good and sufficient corporate surety licensed to do business in the state of Montana. The bond amount must be determined by the department at the cost of reclamation of the affected land by the department. The applicant shall submit a bond that is no less than the amount determined by the department.

(2) (a) For opencut operations on federal land within the state, the department may accept a bond payable to the state of Montana and the federal agency administering the land. The bond must provide at least the same amount of financial guarantee as required by this part.

(b) The bond must provide that the department may forfeit the bond without the concurrence of the federal land management agency. The bond may provide that the federal land management agency may forfeit the bond without the concurrence of the department. Upon forfeiture by either agency, the bond must be payable to the department and may also be payable to the federal land management agency. If the bond is payable to the department and the federal land management agency, the department, before accepting the bond, shall enter into an agreement or memorandum of understanding with the federal land management agency providing for administration of the bond funds in a manner that will allow the department to provide for compliance with the requirements of this part, the rules adopted under this part, and the permit.

(3) In lieu of submitting a surety bond pursuant to subsection (1), the operator may submit cash, ~~government securities~~ a certificate of deposit, a letter of credit in a form acceptable to the department, or a bond with property sureties in an amount equal to that of the required bond on conditions as prescribed in this part. In the discretion of the department, surety bond requirements may be fulfilled by the operator's posting a bond with land and improvements and facilities located on the land as security, in which event a surety may not be required but the department may require that the amount of the bond be adjusted to reimburse the department for foreclosure costs.

(4) The bond or other security must be increased or reduced as provided in this part.

(5) The bond or security remains in effect until the affected land has been reclaimed as provided under the permit and the department has approved the reclamation and released the bond or security. The bond or security may cover only actual affected land and must be increased or reduced to cover only unreclaimed acreages.

(6) If the license of a surety that has issued a bond filed with the department pursuant to this part is suspended or revoked, the operator, within 30 days after receiving notice of the suspension or revocation from the department, shall substitute a good and sufficient bond from another surety licensed to do business in the state or shall submit another type of security pursuant to subsection (3). Upon failure of the operator to make the bond substitution within the 30-day time period, the department shall suspend the permit of the operator to conduct opencut operations upon the land described in the permit until the substitution has been made. If the operator demonstrates in writing that the operator has been pursuing a replacement bond in good faith but additional time is necessary to complete the transaction, the department may grant up to an additional 60 days for the operator to submit a replacement bond before suspending the permit.

(7) Whenever an operator has completed all of the reclamation requirements under the provisions of this part as to any affected land, the operator shall notify the department of the completed requirements and may request bond release. If the department releases the operator from further obligation regarding any affected land, the bond must be reduced proportionately. The department shall notify the operator and the landowner in

writing of the decision on the bond release application "

Section 8. Section 82-4-437, MCA, is amended to read

"82-4-437. Annual report -- fee. (1) For each ~~permitted~~ opencut operation, the operator shall file an annual report on a form furnished by the department. The report must contain the information and be submitted at times provided in rules of the board

(2) (a) Except as provided in subsection (2)(b), each ~~permitted~~ opencut operation shall submit with the annual report a fee of 2.5 cents per cubic yard of ~~material~~ materials for all operations mined during the period covered by the report.

(b) ~~Permitted~~ Opencut operations that mine, extract, or produce bentonite are not subject to the fee in this section

(3) Pursuant to the provisions of 82-4-441, a person who mines materials without a permit in violation of this part shall submit a report and the fee required by subsection (2)(a)."

- END -

Latest Version of SB 332 (SB0332.ENR)

Processed for the Web on March 25, 2013 (11:50am)

New language in a bill appears underlined, deleted material appears stricken

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted

See the [status of this bill](#) for the bill's primary sponsor

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