

AGENDA

FRIDAY, JULY 31, 2015

METCALF BUILDING, ROOM 111

1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone (406-444-2544) or by e-mail (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

The Board will vote on adopting the May 29, 2015, meeting minutes.

B. OCTOBER MEETING DATE DISCUSSION

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner

- a. **In the matter of violations of the Opencut Mining Act by Bay Materials, LLC at Normont Farms Pit, Toole County, Montana, BER 2014-07 OC.** On May 19, 2015, the parties filed Second Joint Proposed Prehearing Schedule and Form of Order. On May 20, the hearing examiner issued Order Adopting Second Joint Proposed Prehearing Schedule and Setting Prehearing Conference and Hearing Dates, setting a hearing for September 14, 2015. On May 28, DEQ Counsel filed Unopposed Motion to Continue Hearing Date, requesting a hearing date of October 5, 2015. On June 1, the hearing examiner issued Order Continuing Hearing Date, setting the hearing for October 5, 2015. On June 16, Bay Materials filed Bay Materials, LLC's Response Brief in Opposition to DEQ's Motion for Summary Judgment.
- b. **In the matter of violation of the Opencut Mining Act by Somont Oil Company, Inc., at Somont Oil Company gravel pit, Toole County (Permit No. 2597, FID 2326, Docket No. OC-14-021), BER 2014-08 OC.** On May 19, 2015, the parties filed Second Joint Proposed Prehearing Schedule and Form of Order, requesting a hearing the week of October 5, 2015, or later. On May 20, the hearing examiner issued Order Adopting Second Joint Proposed Prehearing Order and Setting Prehearing Conference and Hearing Dates, setting a hearing for October 5, 2015. On May 28, DEQ Counsel filed Unopposed Motion to Continue Hearing Date, requesting the hearing be scheduled for October 19, 2015. On June 1, the hearing examiner issued Order Continuing Hearing Date, setting the hearing for October 19, 2015.

- c. **In the matter of violations of the Public Water Supply Laws by Rene Requa at Highlander Bar and Grill, PWISD MT0004764, Lewis and Clark County (FID 2299, Docket No. PWS-14-08), BER 2014-09 PWS.** On July 14, 2015, the hearing examiner issued a Scheduling Order with a hearing date at the end of January, 2016.
 - d. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ.** On May 26, 2015, the hearing examiner issued a Scheduling Order with a hearing date of July 19, 2016.
 - e. **In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On May 26, 2015, the hearing examiner issued a Scheduling Order with a hearing date of June 14, 2016.
2. Non-enforcement cases assigned to the Hearings Examiner
- a. **In the matter of the notice of appeal and request for hearing by Yellowstone Energy Limited Partnership (YELP) regarding issuance of MPDES Permit NO. MT0030180 for YELP's facility in Billings, MT, BER 2014-01 WQ.** On June 11, attorney for appellant filed Unopposed Motion to Extend Stay and Reporting Deadlines, requesting continuance of the Stay until February 1, 2016. On June 16, the hearing examiner issued Order Extending Stay / Reporting Deadlines, continuing the Stay until February 1, 2016.
 - b. **In the matter of Phillips 66 Company's appeal of Outfall 006 Arsenic Limits in Montana Pollution Discharge Elimination System Permit No. MT0000256, Billings, Yellowstone County, MT, BER 2014-05 WQ.** On March 11, 2015, the Board received Stipulation to Stay Appeal from the parties. On March 25, the hearing examiner issued Order approving the stipulation and ordered the parties to comply with the terms or the stipulation.
 - c. **In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, MT, BER 2014-06 WQ.** On March 25, 2015, the hearing examiner issued Scheduling Order scheduling a hearing for April 18, 2016.
3. 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 April 9, 2014, the hearings examiner issued an Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. On May 14, 2014, DEQ filed a Status Report regarding the matter stating that a modified permit would be made available for public comment on or before June 9, 2014.

B. LEGISLATION BRIEFING

III. ACTION ITEMS

A. NEW CONTESTED CASES

1. **In the matter of violations of the Water Quality Act by Buscher Construction and Development, Inc., at Poly Vista Estates, Trailhead, and Falcon Ridge II Subdivisions, Billings, Yellowstone County, BER 2015-03 WQ.** The Board received the appeal on June 8, 2015. The Board may assign a permanent hearing examiner or decide to hear the matter.

B. INITIATION OF RULEMAKING

DEQ will propose that the Board initiate rulemaking to:

1. Adopt site specific electrical conductivity (EC) and sodium adsorption ratio (SAR) criteria for Otter Creek, tributary to the Tongue River. The proposed criteria are based on the natural EC and SAR of Otter Creek.
2. Meet the requirements of Section 128 of the federal Clean Air Act (CAA) regarding State boards and "conflict of interest."

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.

11:00 a.m.

V. CONTESTED CASE HEARING

In the matter of the notice of appeal 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, BER 2013-07 SM. The Board will hold oral argument on Appellant MEIC's Motion for Summary Judgment, filed April 11, 2014, and on Signal Peak Energy's Cross Motion for Summary Judgment, filed May 30, 2014.

VI. ADJOURNMENT

MINUTES

May 29, 2015

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Madam Chair Shropshire at 9:01 a.m., on Friday, May 29, 2015, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Larry Mires

Board Members Present via Teleconference: Chairman Shropshire, Heidi Kaiser, Chris Tweeten, Marietta Canty

Board Members Absent: Joe Russell, Joan Miles

Board Attorney Present: Ben Reed, 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 – Director; John North, Dana David, Carol Schmidt, and Norm Mullen – Legal; Hoby Rash, Julie Merkel, Eric Merchant, Liz Ulrich, and Annette Williams – Air Resources Management Bureau; Jon Dilliard, Tammy Filiater, and Eugene Pizzini – Public Water Supply & Subdivisions Bureau; John Arrigo – Enforcement Division; Jon Kenning and Paul Skubinna – Water Protection Bureau; George Mathieus, Eric Urban, Erik Makus, Michael Pipp, Amy Steinmetz; Ed Coleman, Emily Hinz, and Melissa Sjolund – Industrial & Energy Minerals Bureau

Interested Persons Present: Ella Smith and Cameron Clevidence – Northern Plains Resource Council;

- I.A. Review and approve March 20, 2015, Board meeting minutes.
- Chairman Shropshire asked if any members of the Board had comments on the draft minutes. No one commented.
- Mr. Mires MOVED to approve the minutes as submitted. Mr. Tweeten SECONDED the motion. The motion CARRIED 5-0.
- II.A.1.a. In the matter of violations of the Opencut Mining Act by Bay Materials, LLC at Normont Farms Pit, Toole County, BER 2014-07 OC.
- Mr. Reed said this matter has been continued to October 5, 2015.
- II.A.1.b. In the matter of violation of the Opencut Mining Act by Somont Oil Company, Inc., at Somont Oil Company gravel pit, Toole County (Permit No. 2597, FID 2326, Docket No. OC-14-021), BER 2014-08 OC.
- Mr. Reed said the hearing in this matter has been continued to October 19, 2015.
- II.A.1.c. In the matter of violations of the Public Water Supply Laws by Rene Requa at Highlander Bar and Grill, PWSID MT0004764, Lewis and Clark County (FID 2299, Docket No. PWS-14-08), BER 2014-09 PWS.
- Mr. Reed said he is expecting the parties to jointly file a new scheduling order on June 30, 2015.
- II.A.2.a. In the matter of the notice of appeal and request for hearing by Yellowstone Energy Limited Partnership (YELP) regarding issuance of MPDES Permit No. MT0030180 for YELP's facility in Billings, MT, BER 2014-01 WQ.
- No discussion took place regarding this matter*
- II.A.2.b. In the matter of Phillips 66 Company's appeal of Outfall 006 Arsenic Limits in MPDES Permit No. MT0000256 Billings, Yellowstone County, BER 2014-05 WQ.
- No discussion took place regarding this matter.*
- II.A.2.c. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of MPDES Permit No. MT0030066, Columbia Falls, Flathead County, BER 2014-06 WQ.
- No discussion took place regarding this matter.*
- II.A.3.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.
- A brief discussion took place regarding procedure when no hearing examiner has been assigned to the case.

III.A.1. In the matter of final action regarding proposed amendments to ARM 17.8.102 and 17.8.103 to incorporate by reference updated federal and state statutes and regulations.

Ms. Ulrich said the department recommends the Board adopt the rules and reminded that the Board initiated the rulemaking in January 2015. She said a public hearing was conducted March 5, 2015, and no comments were received.

Chairman Shropshire called for a motion to adopt the proposed amendments set forth in the draft notice of amendment, and the attached House Bill 521 and 311 analyses, and the Presiding Officer's report. Mr. Tweeten so MOVED. Ms. Kaiser SECONDED the motion. Chairman Shropshire asked if there were any members of the public who wished to comment on the matter. There was no one. The motion CARRIED 5-0.

III.B.1. In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ.

Mr. Reed said the parties in this matter. He said the case is scheduled for hearing July 19, 2016.

Chairman Shropshire called for a motion to appoint Mr. Reed as the permanent Hearings Examiner for this matter. Mr. Mires so MOVED. Mr. Tweeten SECONDED the motion. The motion CARRIED 5-0.

III.B.2. In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.

Mr. Reed said this matter is scheduled for hearing June 14, 2016.

Chairman Shropshire called for a motion to appoint Mr. Reed as the permanent Hearings Examiner for this matter. Mr. Mires so MOVED. Mr. Tweeten SECONDED the motion. The motion CARRIED 5-0.

IV. General Public Comment

Chairman Shropshire asked if any member of the audience would like to speak to any matters before the Board. No one did.

Mr. Livers explained that the Board will have new members June 1. He thanked Ms. Shropshire for chairing the Board for the past two years. Tom thanked Larry Mires and Heidi Kaiser for their service on the Board, and thanked Joe Russell for his years of service to the Board and for serving as chairman for multiple terms.

Chairman Shropshire noted that Ms. Miles will be the new chair of the Board as of July 1.

V. Contested Case Hearing – POSTPONED (date to be determined)

Mr. North said a special meeting may be called to hold oral argument in this matter before the July 31 meeting, possibly in late June.

VI. Adjournment

The meeting adjourned at 9:19 a.m.

Board of Environmental Review May 29, 2015, minutes approved:

ROBIN SHROPSHIRE
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE



AN ACT REVISING THE BOARD OF ENVIRONMENTAL REVIEW PROCESS FOR ADOPTING WATER QUALITY REGULATIONS MORE STRINGENT THAN FEDERAL REGULATIONS; REVISING IMPLEMENTATION OF WATER QUALITY STANDARDS THAT ARE PURER THAN A NATURAL CONDITION OF A WATERCOURSE OR WATER SOURCE; REVISING THE PROCESS FOR RECLASSIFYING WATER QUALITY STANDARDS; REVISING THE PROCESS FOR ADOPTING SITE-SPECIFIC WATER QUALITY STANDARDS; PROVIDING A DEFINITION; AMENDING SECTION 75-5-203, MCA; AND REPEALING SECTION 75-5-309, MCA.

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

Section 1. State regulation for natural conditions. (1) The department may not apply a standard to a water body for water quality that is more stringent than the nonanthropogenic condition of the water body. For the parameters for which the applicable standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition of the parameter in the water body. The department shall implement the standard in a manner that provides for the water quality standards for downstream waters to be attained and maintained.

(2) (a) For water bodies where the standard is more stringent than the condition of the water body but subsection (1) is not applicable, the board shall adopt rules consistent with comparable federal rules and guidelines providing criteria and procedures for the department to issue variances from standards if:

- (i) the condition cannot reasonably be expected to be remediated during the permit term for which the application for variance has been received; and
- (ii) the discharge to which the variance applies would not materially contribute to the condition.

(b) A variance issued pursuant to subsection (2)(a) must be reviewed every 5 years and may be modified or terminated as a result of the review.

Section 2. Section 75-5-203, MCA, is amended to read:

"75-5-203. State regulations no more stringent than federal regulations or guidelines. (1) ~~After April 14, 1995, except~~ Except as provided in subsections (2) through (5) or unless required by state law, the board may not adopt a rule to implement ~~this chapter~~ 75-5-301, 75-5-302, 75-5-303, or 75-5-310 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines.

(2) The board may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the board makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed ~~can~~ can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference ~~information and~~ pertinent, ascertainable, and peer-reviewed scientific studies contained in the record that forms the basis for the board's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the board ~~adopted after January 1, 1990, and before April 14, 1995,~~ that that person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the board shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed ~~12~~ 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The board may charge a petition filing fee in an amount not to exceed \$250.

(b) A person may also petition the board for a rule review under subsection (4)(a) if the board adopts a rule ~~after January 1, 1990,~~ in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted board rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of

2-4-303(1)."

Section 3. Repealer. The following section of the Montana Code Annotated is repealed:

75-5-309. Standards more stringent than federal standards.

Section 4. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 75, chapter 5, and the provisions of Title 75, chapter 5, apply to [section 1].

- END -



Memo

TO: Benjamin Reed, Hearing Examiner
Board of Environmental Review
FROM: Joyce Wittenberg, Board Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901
DATE: June 18, 2015
SUBJECT: Board of Environmental Review case, Case No. BER 2015-03 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY ACT BY
BUSCHER CONSTRUCTION AND DEVELOPMENT,
INC. AT POLY VISTA ESTATES, TRAILSHEAD,
AND FALCON RIDGE II SUBDIVISIONS,
BILLINGS, YELLOWSTONE COUNTY, MONTANA.
MTR105162; MTR105277 AND MTR105130 FID
2285; FID 2309; AND FID 2361) [DOCKET
NO. WQ-15-09]

Case No. BER 2015-03 WQ

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FIDs 2285, 2309 and 2361; Docket No. WQ-15-09).

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

Kirsten Bowers
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

John G. Crist
CRIST, KROGH, BUTLER & NORD, LLC
The Securities Building
2708 First Avenue North, Suite 300
Billings, MT 59101
Telephone: (406) 255-0400
Facsimile: (406) 255-0697
Email: jcrist@crislaw.com

*Attorneys for Buscher Construction and
Development, Inc.*

Filed with the
**MONTANA BOARD OF
ENVIRONMENTAL REVIEW**
This 18 day of June, 2015
at 10 o'clock 00 A.M.
By: Hillary Howe

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY ACT
BY BUSCHER CONSTRUCTION AND
DEVELOPMENT, INC. AT POLY VISTA
ESTATES, TRAILSHEAD AND FALCON
RIDGE II SUBDIVISIONS, BILLINGS,
YELLOWSTONE COUNTY, MONTANA
(MTR105162; MTR 105277 AND MTR 105130
FID 2285; FID 2309 AND FID2361

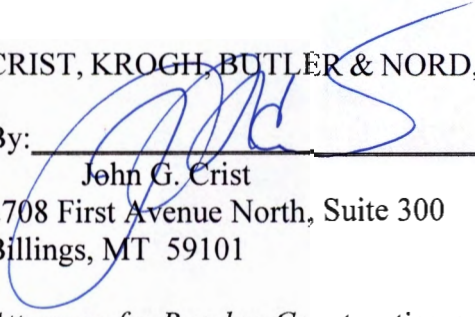
Docket No. WQ-15-09

REQUEST FOR HEARING

Buscher Construction and Development, Inc. herewith requests a Hearing before the Montana Board of Environmental Review in connection with all matters raised as to all properties referenced in the Administrative Compliance and Penalty Order, Docket No. WQ-15-09 dated May 21, 2015.

DATED this 15th day of June, 2015.

CRIST, KROGH, BUTLER & NORD, LLC

By: 

John G. Crist

2708 First Avenue North, Suite 300

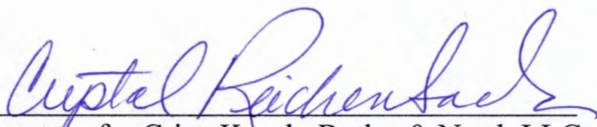
Billings, MT 59101

*Attorneys for Buscher Construction and
Development, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2015, a copy of the foregoing document was served by U.S. Mail, post prepaid on the following:

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


Secretary for Crist, Krogh, Butler & Nord, LLC

1 BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
2 OF THE STATE OF MONTANA

3 IN THE MATTER OF:
4 VIOLATIONS OF THE WATER QUALITY ACT
5 BY BUSCHER CONSTRUCTION AND
6 DEVELOPMENT, INC. AT POLY VISTA
7 ESTATES, TRAILSHEAD, AND FALCON
RIDGE II SUBDIVISIONS, BILLINGS,
YELLOWSTONE COUNTY, MONTANA.
(MTR105162; MTR105277 AND MTR105130
FID 2285; FID 2309; AND FID 2361)

ADMINISTRATIVE COMPLIANCE AND
PENALTY ORDER

Docket No. WQ-15-09

8 **I. NOTICE OF VIOLATION**

9 Pursuant to the authority of Sections 75-5-611 and 75-5-617, Montana Code Annotated
10 (MCA), the Department of Environmental Quality (Department) hereby issues this administrative
11 order to Buscher Construction and Development, Inc., hereinafter referred to as "Buscher," based
12 upon the allegations set forth below for violations of the Water Quality Act (WQA) (Title 75,
13 chapter 5, part 6, MCA) and the Administrative Rules of Montana (ARM) (Title 17, chapter 30)
14 adopted thereunder at Poly Vista Estates Subdivision (Poly Vista), Trailshead Subdivision
15 (Trailshead), and Falcon Ridge II Subdivision (Falcon Ridge) hereinafter referred to collectively
16 as "the Subdivisions." The Subdivisions are located in Billings, Yellowstone County, Montana.

17 **II. PARTIES**

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

20 2. The Department is charged with the administration and enforcement of the
21 Montana WQA, Title 75, chapter 5, parts 1 through 11, MCA, and the administrative rules
22 adopted under the WQA. The Department's principal office is located in Helena, Montana.

23 3. Buscher is an active corporation registered to do business in the State of Montana,
24 and is a "person" as defined in Section 75-5-103(28), MCA.

1 4. Buscher's principal office is located in Billings, Montana.

2 **III. GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

3 5. On May 30, 2012, Buscher entered an administrative order on consent with the
4 Department to resolve violations caused by conducting construction activities prior to
5 submitting a Notice of Intent (NOI) at Poly Vista (Department Docket No. WQ-12-10).

6 6. Buscher is the owner and/or operator and is developing three acres of land at Poly
7 Vista, three acres of land at Trailhead, and 42 acres of land at Falcon Ridge, each located west
8 of Billings, Yellowstone County, Montana.

9 7. It is a violation of the Montana WQA, Section 75-5-605(1)(a), MCA, to cause
10 pollution of state waters or to place or cause to be placed wastes where they will cause pollution of
11 state waters.

12 8. It is a violation of the Montana WQA, Section 75-5-605(1)(b), MCA, to "violate any
13 provision set forth in a permit or stipulation, including but not limited to limitations and conditions
14 contained in the permit."

15 9. It is a violation of the Montana WQA, Section 75-5-605(2), MCA, to construct or
16 use any outlet for the discharge of wastes to state waters, or to discharge any wastes to state waters
17 without a current permit.

18 10. Storm water runoff from sites disturbed by construction activity may impair water
19 quality by discharging sediment and other pollutants, such as pollutants from concrete, petroleum,
20 pesticides, and other wastes, to waters of the state.

21 11. Pursuant to Section 75-5-401, MCA, the Board of Environmental Review (BER)
22 adopted rules at Administrative Rules of Montana (ARM) Title 17, chapter 30, subchapters 11, 12,
23 and 13 governing application for and issuance of permits to discharge sewage, industrial wastes, or
24 other wastes to state waters.

1 12. ARM 17.30.1105(1)(a) requires any person who discharges or proposes to discharge
2 storm water from a point source to obtain coverage under an MPDES general permit or another
3 MPDES permit for discharges associated with construction activity.

4 13. ARM 17.30.1102(28) defines "storm water discharge associated with construction
5 activity" as "a discharge of storm water from construction activities including clearing, grading, and
6 excavation that result in the disturbance of equal to or greater than one acre of total land area. For
7 purposes of these rules, construction activities include clearing, grading, excavation, stockpiling
8 earth materials, and other placement or removal of earth material performed during construction
9 projects. Construction activity includes the disturbance of less than one acre of total land area that is
10 a part of a larger common plan of development or sale if the larger common plan will ultimately
11 disturb one acre or more."

12 14. ARM 17.30.1102(13) defines "municipal separate storm sewer system", as "a
13 conveyance or system of conveyances (including roads with drainage systems, municipal streets,
14 catch basins, curbs, gutters, ditches, man-made channels, or storm drains) that discharges to surface
15 waters..."

16 15. The City of Billings (City) municipal separate storm sewer system (MS4) (herein
17 "Billings MS4") is authorized by the Department to discharge storm water to state waters under the
18 MPDES General Permit for Storm Water Discharge Associated with Small Municipal Separate
19 Storm Sewer Systems. The Billings MS4 ultimately discharges to the Yellowstone River, a state
20 surface water.

21 16. A person who discharges or proposes to discharge storm water associated with
22 construction activity shall submit an NOI to the Department that meets the requirements set forth
23 under ARM 17.30.1115(1). Authorization to discharge under the General Permit for Storm Water
24 Discharges Associated with Construction Activity Permit No. MTR100000 (herein "the General

1 Permit”) is effective upon receipt by the Department of a complete NOI package, which includes
2 the NOI, Storm Water Pollution Prevention Plan (SWPPP), and the permit fee.

3 17. The General Permit defines "disturbance" related to construction activity to mean:
4 “areas that are subject to clearing, excavating, grading, stockpiling earth materials, and
5 placement/removal of earth material performed during construction projects.”

6 18. Section 1.1.1 of the General Permit states that “storm water which discharges into
7 a drain inlet and/or storm sewer system from the site is regulated as a discharge to state surface
8 waters if the inlet or system itself ultimately discharges into state surface water.”

9 19. ARM 17.30.1102(7) defines “illicit discharge” as “any discharge to a municipal
10 separate storm sewer that is not composed entirely of storm water except discharges pursuant to an
11 MPDES permit (other than the MPDES permit for discharges from the municipal separate storm
12 sewer) and discharges resulting from firefighting activities.”

13 20. Section 75-5-103(4), MCA, defines “contamination” as “impairment of the quality
14 of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.”

15 21. Section 75-5-103(24), MCA, defines “other wastes” as “garbage, municipal refuse,
16 decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat,
17 chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid
18 waste, and all other substances that may pollute state waters.”

19 22. Section 75-5-103(30)(a), MCA, defines “pollution” as “(i) contamination or other
20 alteration of the physical, chemical, or biological properties of state waters that exceeds that
21 permitted by Montana water quality standards, including but not limited to standards relating to
22 change in temperature, taste, color, turbidity or odor; or (ii) the discharge, seepage, drainage,
23 infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that
24 will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to

1 public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other
2 wildlife.”

3 23. Buscher, as the "owner or operator," pursuant to Section 75-5-103(25), MCA, of a
4 storm water discharge associated with construction activity is required to obtain and maintain
5 authorization to discharge storm water under the General Permit. The General Permit also refers to
6 the owner or operator as the “permittee.”

7 24. The permittee is required to install, and maintain effective erosion and sediment
8 control, including best management practices (BMPs) identified in the SWPPP, designed to
9 minimize discharge of pollutants from the construction site. *See* Part 2 of the General Permit.

10 25. The permittee must specify a Primary SWPPP Administrator, a Secondary SWPPP
11 Administrator (as applicable), and any other designated SWPPP Administrator(s) in the SWPPP.
12 A SWPPP Administrator is responsible for developing, implementing, maintaining, revising, and
13 updating the SWPPP. The SWPPP Administrator must have knowledge of the principles and
14 practices of erosion, sediment control, and pollution prevention. The SWPPP Administrator must
15 address all aspects of the SWPPP from initiation of construction activities until final site
16 stabilization is achieved and the permit authorization is terminated. *See* Part 3.2 of the General
17 Permit.

18 26. The General Permit requires control of storm water discharges from the
19 construction site to meet applicable water quality standards. *See* Part 2.2 of the General Permit.

20 27. The General Permit requires regular site inspections in accordance with a schedule
21 that is documented in the SWPPP until final stabilization of the construction site is achieved. *See*
22 Part 2.3 of the General Permit.

23 28. The General Permit requires that all BMPs identified in the SWPPP be maintained in
24 effective operating condition. *See* Part 2.3.5 of the General Permit.

1 29. The General Permit requires that if BMPs identified in the SWPPP must be
2 modified, if additional BMPs are necessary, if additional or corrective measures must be completed
3 before the next storm event, all changes must be documented in the SWPPP and summarized in a
4 SWPPP Revision/Update Log. *See* Part 2.4 and Part 3.12.2. of the General Permit.

5 30. The General Permit requires that certain records be retained and made available at
6 the construction site immediately upon request by the Department, EPA, or local officials, or their
7 representatives. *See* Part 2.5 of the General Permit.

8 31. The General Permit requires that the owner/operator or permittee notify the
9 Department in writing of any changes in the SWPPP Administrator. *See* Part 3.2.1 of the General
10 Permit.

11 32. The SWPPP must include a description of the intended sequence of construction
12 activity, and clearly describe the relationship between phases of construction activity and the
13 implementation and maintenance of BMPs. *See* Part 3.3 of the General Permit.

14 33. The SWPPP must contain a narrative description of the construction activity,
15 including, but not limited to: construction-related storm water discharges; total site area; area of the
16 site expected to undergo construction-related disturbance; site soil characteristics; nearby state
17 surface waters; outfall locations; and expected storm water flow. *See* Part 3.4 of the General Permit.

18 34. The SWPPP must identify potential sources of pollution. *See* Part 3.6 of the General
19 Permit.

20 35. Section 3.1.1 of the General Permit states the SWPPP must be developed and
21 implemented in accordance with good engineering, hydrologic, and pollution control practices,
22 and pursuant to Section 3.1.3 of the General Permit, the SWPPP must be implemented as stated in
23 the Primary SWPPP Administrator's up-to-date field copy.

24 //

1 36. Storm water from the Subdivisions ultimately discharge to state waters through catch
2 basin inlets, swales, pipes, detention ponds, and overland flow from Poly Vista to High Ditch,
3 Trailhead to High Ditch and the Billings MS4, and from Falcon Ridge to Cove Ditch.

4 37. Beginning in 1992, the Department issued the General Permit, which is effective for
5 five-year periods, or longer if administratively extended. The current General Permit, MTR100000,
6 is effective January 1, 2013, through December 31, 2017.

7 38. On October 25, 2012, the Department sent a renewal notice to Buscher for
8 MTR104186 at Poly Vista, stating that "If this stormwater discharge associated with construction
9 activity still exists, and your construction activity site has not achieved "final stabilization", then the
10 owner or operator must submit a new NOI Form, Storm Water Pollution Prevention Plan (SWPPP),
11 and an application fee for coverage under the reissued General Permit".

12 39. On May 23, 2013, a Department inspector (Inspector) was conducting inspections at
13 construction sites whose permits were not renewed as is required with the issuance of a new
14 General Permit by the State. The Inspector conducted an inspection (May 2013 Inspection) at Poly
15 Vista and Trailhead to determine if active construction was occurring. At the time of the May 2013
16 Inspection, Buscher had not submitted an NOI package to renew coverage under the General Permit
17 for the discharge of storm water associated with construction activities at Poly Vista; Buscher had
18 not submitted an NOI package to obtain coverage under the General Permit for the discharge of
19 storm water associated with construction activities at Trailhead; and Buscher was not authorized to
20 discharge storm water associated with construction activity at the Subdivisions under any other
21 MPDES permit.

22 40. During the May 2013 Inspection, the Inspector documented homes under
23 construction and areas disturbed by associated construction activity such as cleared and graded
24 areas, excavations, soil stockpiles, concrete washout areas, and sediment tracking in the streets.

1 The Inspector also noted that there were no BMPs installed at Poly Vista or Trailhead to control
2 and mitigate the introduction of pollutants associated with storm water runoff from these
3 construction activities. The Inspector also observed that storm water had discharged from Poly
4 Vista into High Ditch through storm water ponds, storm drains, swales and drainage ditches; and
5 stormwater had discharged from Trailhead into the Billings MS4.

6 41. On June 11, 2013, the Department sent a Violation Letter to notify Buscher that
7 it was in violation of the WQA for conducting construction activity at Poly Vista prior to
8 submitting an NOI package.

9 42. On June 12, 2013, the Department sent a Violation Letter to notify Buscher that it
10 was in violation of the WQA for conducting construction activity at Trailhead prior to submitting
11 an NOI package.

12 43. On June 26, 2013, Buscher called the Department to request an extension for
13 submittal of the NOI package for Trailhead. The Department approved an extension for
14 submittal of the NOI package for Trailhead to July 19, 2013.

15 44. On July 22, 2013, Buscher submitted a complete NOI package for Poly Vista to
16 the Department and requested an additional extension to the deadline for submittal of the NOI
17 package for Trailhead.

18 45. On July 24, 2013, the Department sent Buscher a confirmation letter authorizing
19 storm water discharges associated with construction activities under the General Permit, and
20 issued Buscher permit MTR105162 for Poly Vista.

21 46. On July 25, 2013, the Department sent Buscher a letter extending the deadline for
22 the NOI package for Trailhead to August 1, 2013.

23 47. On August 2, 2013, Buscher requested a third extension to the deadline for submitting an
24 NOI package for Trailhead. The Department extended the deadline to August 24, 2013.

1 48. On September 11, 2013, the Department received a citizen (Complainant)
2 complaint (September 2013 Complaint) regarding flooding at Poly Vista Estates. The
3 Complainant stated that BMPs installed in the catch basins restricted water flow causing water to
4 back up and flood the Complainant's property and basement.

5 49. On September 12, and 17, 2013, the Inspector conducted facility site review's
6 (FSR) of Falcon Ridge for permit MTR105130; held by CMG Construction, to determine if the
7 construction activities at the site were covered by the permit. The Inspector observed land
8 disturbance associated with street construction, utility installation, permanent storm drains, and a
9 detention pond. These activities were covered by MTR105130.

10 50. On September 17, 2013, in response to the September 2013 Complaint, the
11 Inspector conducted Compliance Evaluation Inspections (CEI) at Poly Vista and Trailhead
12 (September 2013 CEI). The Inspector observed active construction activities including: grading,
13 excavation, soil stockpiles, sediment tracking in the streets and concrete washout areas. BMPs
14 were not installed or maintained properly; and BMPs were not implemented in accordance with
15 the SWPPP.

16 51. On September 20, 2013, Buscher submitted a complete NOI package for
17 Trailhead.

18 52. On September 23, 2013, the Department sent Buscher a confirmation letter
19 authorizing storm water discharges associated with construction activities under the General
20 Permit, and issued Buscher permit MTR105277 for Trailhead.

21 53. On September 23, 2013, the Department sent a letter to Buscher summarizing the
22 findings of the FSR at Falcon Ridge and reminded Buscher that the current storm water permit
23 "...does not include clearing, excavation, stockpiling, or grading of lots in preparation for the
24 construction of single family homes, or the construction of single family homes. Any additional

1 construction activity at the site will require a modification to the current permit...or additional
2 permit coverage.”

3 54. On October 8, 2013, the Department received a citizen complaint (October 2013
4 Complaint) regarding improper stormwater mitigation in Trailhead causing mud to inundate their
5 property, reaching the wheel wells of their truck.

6 55. On October 10, 2013, the Department sent Violation Letters and the associated
7 September 2013 CEI reports for Poly Vista and Trailhead to Buscher. The Violation Letters
8 stated that Buscher was being recommended for a formal enforcement action.

9 56. On November 12, 2013, The Department received Buscher’s response to the
10 Violation Letter to Poly Vista. Photographs were enclosed that showed installation of BMPs.
11 However, the photographs showed the BMPs had not been installed in accordance with good
12 engineering practices or to proper specifications.

13 57. On November 12, 2013, the Department received Buscher’s response to the
14 Violation letter to Trailhead. Photographs were enclosed alleging that the violation was due to
15 water running onto the site from Rimrock Boulevard

16 58. On November 27, 2013, the Department acknowledged receipt of Buscher’s
17 response, and reminded Buscher that BMPs must be installed to the specifications indicated in the
18 SWPPP.

19 59. On March 6, 2014, the Inspector conducted a CEI at Falcon Ridge (March 2014
20 CEI). The Inspector observed active construction at the site, including clearing, grading,
21 excavation, soil stockpiles and single family homes under construction. The Inspector also
22 observed a discharge of sediment laden runoff entering Cove Ditch.

23 //

24 //

1 60. On March 11, 2014, the City conducted a construction site review and observed
2 sediment discharge from building sites within Falcon Ridge into unprotected City storm drains and
3 excessive tracking on the streets.

4 61. On March 19, 2014, the City sent Buscher a Notice of Violation (NOV) regarding
5 the observations on March 11, 2014.

6 62. On April 4, 2014, the City conducted a follow-up site review at Falcon Ridge. The
7 City observed sediment tracking from building sites and sediment in the streets.

8 63. On April 8, 2014, the Department sent Buscher a Violation Letter for conducting
9 construction activities at Falcon Ridge prior to submitting an NOI package; discharging stormwater
10 without a permit, and placing a waste where it will cause pollution.

11 64. On April 11, 2014, the City sent Buscher a second NOV for continued sediment
12 tracking in the streets at Falcon Ridge.

13 65. On April 11, 2014, the Department received a complete NOI package from Buscher
14 to transfer permit MTR105130 from CMG Construction to Buscher to cover construction activities
15 associated with home building at Falcon Ridge.

16 66. On April 15, 2014, the Department sent Buscher a confirmation letter authorizing
17 stormwater discharges associated with construction activities at Falcon Ridge and transferred
18 Permit MTR105130.

19 67. On September 4, 2014, the Department received a citizen complaint (September
20 2014 Complaint) regarding muddy discharge to the streets in Falcon Ridge.

21 68. On September 4, 2014, in response to the September 2014 Complaint, the Inspector
22 conducted a field investigation (September 2014 Investigation) at Falcon Ridge, and observed
23 excessive sediment build up in the curb line, sediment discharge to storm drains, BMPs that had not
24 been maintained, sediment tracking into the streets, and a concrete washout area that was not

1 maintained and did not have controls to prevent a discharge to storm water. At the time of the
2 September Investigation, the Inspector spoke with a representative of Buscher and the sediment was
3 cleaned up immediately.

4 69. On October 24, 2014, the Inspector conducted a CEI (October 2014 CEI) at Falcon
5 Ridge and found that the SWPPP had not been adequately developed to proper standards, the
6 SWPPP had not been implemented, BMPs had not been installed to specifications designated in the
7 SWPPP, BMPs had not been properly operated or maintained, concrete wash out areas had no
8 BMPs to control discharge to storm water, and other pollutants were discharged on site and no
9 controls were in place to prevent their introduction to state water.

10 70. On December 11, 2014, the Department received a citizen complaint (December
11 2014 Complaint) regarding excessive sediment and tracking in Falcon Ridge.

12 71. On December 11, 2014, in response to the December 2014 Complaint, the Inspector
13 conducted a Field Investigation (December 2014 Investigation) at Falcon Ridge. The Inspector
14 observed BMPs that were not properly installed or maintained to prevent sediment discharges to
15 storm water. Additionally, non-sediment sources of pollutants were observed at the Falcon Ridge
16 without BMPs to prevent the discharge of pollutants into storm water.

17 72. On January 5, 2015, the Department sent Buscher a Violation Letter for violations
18 observed during the October 2014 CEI.

19 73. On January 7, 2015, the Department sent Buscher a Violation Letter for violations
20 observed during the December 2014 Investigation. The Department also notified Buscher that
21 additional Enforcement Action would be pursued, including the assessment of penalties.

22 74. On January 30, 2015, the Department received a response from Buscher that included
23 photographs of clean-up of the site, and a letter that Buscher is sending to all contractors in Falcon
24 Ridge.

1 **IV. Violations**

2 **A. *Conducting construction activity without submittal of a NOI***

3 75. The Department incorporates and restates Paragraphs 1 through 75.

4 76. Construction activities, including clearing, grubbing, grading and excavation began
5 at Poly Vista in 2010.

6 77. Poly Vista's permit coverage, MTR104186, expired on December 31, 2012.

7 78. On July 22, 2013, Buscher submitted a complete NOI package for Poly Vista.

8 79. On July 23, 2013, the Department sent a confirmation letter to Buscher authorizing
9 storm water discharges associated with construction activities under the General Permit and issued
10 Buscher permit MTR105162 for Poly Vista.

11 80. Construction activities, including clearing, grubbing, grading, and excavation have
12 been occurring at Trailshead since at least 2007.

13 81. On September 20, 2013, Buscher submitted a complete NOI package for Trailshead.

14 82. On September 23, 2013, the Department sent a confirmation letter to Buscher
15 authorizing storm water discharges associated with construction activities under the General Permit
16 and issued Buscher permit MTR105277 for Trailshead.

17 83. Construction activities, including clearing, grubbing, grading and excavation have
18 been occurring at Falcon Ridge since at least July, 2013.

19 84. On April 11, 2014, Buscher submitted a complete NOI package for Falcon Ridge.

20 85. On April 15, 2014, the Department sent a confirmation letter to Buscher authorizing
21 storm water discharges associated with construction activities under the General Permit and issued
22 Buscher permit MTR105130 for Falcon Ridge.

23 86. Buscher violated ARM 17.30.1105 from January 1, 2013, to July 21, 2013, at Poly
24 Vista; from at least 2007, to September 20, 2013, at Trailshead; and from at least September 14,

1 2013, to April 11, 2014, at Falcon Ridge by conducting construction activities that discharged storm
2 water to state waters prior to submitting an NOI.

3 **B. *Discharging storm water without a permit***

4 87. The Department incorporates and restates Paragraphs 1 through 87.

5 88. A discharge of storm water associated with construction activity from the
6 Subdivisions will likely occur during and after a precipitation event of 0.25 inches or greater.

7 89. During the Department's September 2013 CEI at Poly Vista and Trailshead; and
8 during the March 2014 Inspection at Falcon Ridge, the Inspector observed and documented storm
9 water discharges to state water through catch basin inlets, overland flow, and overflow from on-
10 site retention ponds to High Ditch at Poly Vista; to High Ditch and the Billings MS4 at
11 Trailshead; and to Cove Ditch from Falcon Ridge.

12 90. Buscher violated Section 75-5-605(2)(c), MCA, from January 1, 2013, to July 22,
13 2013, at Poly Vista; from at least 2007, to September 20, 2013, at Trailshead; and from at least
14 September 14, 2013, to April 11, 2014, at Falcon Ridge by discharging storm water associated with
15 construction activities to state water without a permit.

16 **C. *Placing a waste where it will cause pollution***

17 91. The Department incorporates and restates Paragraphs 1 through 91.

18 92. ARM 17.30.611(1)(b) classifies the Yellowstone River drainage area from the
19 Laurel water supply intake to the Billings water supply intake as B-2. The specific water quality
20 standards for waters classified B-2 are set forth at ARM 17.30.624(2)(f), which provides: "No
21 person may violate the following specific water quality standards for waters classified B-2: . . . (f)
22 No increases are allowed above naturally occurring concentrations of sediment or suspended
23 sediment (except as permitted in Section 75-5-318, MCA), settleable solids, oils, or floating solids,
24

1 | which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious
2 | to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.”

3 | 93. Section 2.2.1 of the General Permit states that a storm water discharge associated
4 | with construction activity may not cause or contribute to an exceedance of applicable water quality
5 | standards.

6 | 94. Sediment is considered “other waste” pursuant to Section 75-5-103(24), MCA, and
7 | sediment can be harmful to plants and animals living in aquatic environments by decreasing
8 | oxygen, decreasing food availability and visibility, clogging gills of fish and aquatic insects, and
9 | increasing water temperature. Other pollutants such as oil, grease, and nutrients will be transported
10 | by storm water runoff from construction sites causing pollution of state waters.

11 | 95. During the May 2013 Inspections at Poly Vista and at Trailhead, the Inspector
12 | documented soil stockpiles, concrete washout areas, and sediment tracking in the streets, without
13 | BMPs installed to prevent the introduction of sediments and other pollutants from these potential
14 | sources into storm water discharges

15 | 96. During the March 2014 CEI at Falcon Ridge, the Inspector observed soil stockpiles
16 | and excavations without BMPs installed to prevent the discharge of sediments and other pollutants
17 | from these sources into storm water discharges.

18 | 97. Buscher violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and
19 | ARM 17.30.629(2)(f) from at least 2010, to at least November 8, 2013, at Poly Vista; from at
20 | least 2007, to November 12, 2013, at Trailhead; and from at least September 14, 2013, to
21 | January 30, 2015, by placing waste where it will cause pollution and by contributing sediments
22 | and other pollutants that will increase the concentration of sediment, oils, settleable solids, and
23 | other debris above levels that are naturally occurring in state surface waters.

24 | //

1 **D. *Violating provisions of the General Permit***

2 98. The Department incorporates and restates Paragraphs 1 through 98.

3 99. During the September 2013 CEI at Poly Vista, and the March 2014 CEI at Falcon
4 Ridge, the Inspector documented that the SWPPP had not been developed in accordance with good
5 engineering, hydrologic, and pollution control practices, the SWPPP had not been implemented as
6 stated in the Primary SWPPP Administrator's up- to-date field copy.

7 100. Buscher violated Section 75-5-605(1)(b), MCA, and Sections 3.1.1 and 3.1.3 of the
8 Permit at Poly Vista, and at Falcon Ridge by failing to develop an adequate SWPPP and failing to
9 implement the SWPPP as written.

10 101. Section 2.1.1 of the General Permit states permittees must design, install, and
11 maintain effective erosion and sediment controls to minimize the discharge of potential pollutants.
12 Section 2.1.4 of the General Permit states that permittees must design, install, implement, and
13 maintain effective pollution prevention measures to minimize the discharge of pollutants.

14 102. During the September 2013 CEI at Poly Vista, and the March 2014 CEI at Falcon
15 Ridge the Inspector documented improper installation of BMPs, improper maintenance of BMPs,
16 and absence of BMPs at Poly Vista and at Falcon Ridge that would result in the discharge of
17 sediments and other pollutants to storm water that discharges to state water.

18 103. Buscher violated Sections 2.1.1 and 2.1.4 of the General Permit by failing to install,
19 implement, and maintain BMPs at Poly Vista and Falcon Ridge.

20 104. Section 2.3 of the General Permit states that regular inspections must be performed
21 by a SWPPP Administrator. The initial SWPPP submitted with the NOI Package must specify
22 which inspection schedule will be utilized and this inspection schedule must be used until final
23 stabilization is achieved for all areas of the construction activity. The permittee cannot switch
24 between the inspection schedule options ... during the life of the permit authorization. Section

1 2.3.1 states that a SWPPP Administrator must, at a minimum, conduct a routine inspection at least
2 once every seven calendar days. Section 2.3.2 states that a SWPPP Administrator must, at a
3 minimum, conduct a routine inspection at least once every 14 calendar days, and a post-storm event
4 inspection must be conducted by a SWPPP Administrator within 24 hours of the end of a rainfall
5 event of 0.25 inches or greater, and within 24 hours of snowmelt due to thawing conditions which
6 cause visible surface erosion at the site.

7 105. During the September 2013 CEI at Poly Vista, and the March 2014 CEI at Falcon
8 Ridge, the Inspector documented that the SWPPP's for Poly Vista and Falcon Ridge called for
9 inspections to be conducted once every seven calendar days.

10 106. Inspection records were not maintained onsite at Poly Vista; accurate records were
11 not maintained onsite at Falcon Ridge; and Inspections at both sites were not conducted in
12 accordance with the schedule indicated in the SWPPP.

13 107. Buscher violated Section 75-5-605(1)(b), MCA, and Section 2.3 of the General
14 Permit at Poly Vista and Falcon Ridge by failing to conduct inspections as scheduled in the
15 SWPPP.

16 108. Section 2.5 of the General Permit states that the primary SWPPP Administrator
17 must retain certain records at the construction site including: a copy of the General Permit; a copy
18 of the completed and signed NOI form; a copy of the Department's Confirmation Letter for
19 receipt of the complete NOI Package; a copy of the latest up-to-date and signed SWPPP; BMP
20 installation and design standards for all BMPs installed and detailed in the SWPPP; and the
21 SWPPP Administrator(s) documentation requirements, including the SWPPP Administrator's
22 training records; the SWPPP Administrator Delegation Form; the SWPPP Revision/Update Log
23 as required under Part 3.12.2.; all inspection records required under Part 2.3. of this permit; and
24 all reports of noncompliance under Part 4 of this permit. These documents are to be made

1 available at the site immediately upon request from a Department representative, EPA official, or
2 local official.

3 109. During the October CEI at Falcon Ridge, the Inspectors requested that Buscher
4 provide documents required under the General Permit to be retained and made available at the
5 construction site immediately upon request by the Department. *See* Part 2.5 of the General Permit.
6 Buscher did not provide a signed copy of SWPPP to the Inspector for review upon request as
7 required by the General Permit.

8 110. Buscher violated Section 75-5-605(1)(b), MCA, and Section 2.5 of the General
9 Permit by failing to maintain and make available the required documents onsite.

10 111. Section 2.3.5 of the General Permit states all BMPs identified in the SWPPP must be
11 maintained in effective operating condition. Proper selection and installation of BMPs, and
12 implementation of comprehensive inspection and maintenance procedures, in accordance with the
13 SWPPP, is important to ensure permit compliance.

14 112. During the September 2013 CEI at Poly Vista, and the October 2014 CEI at Falcon
15 Ridge, the Inspector documented that BMPs were not properly installed, operated and maintained to
16 minimize the discharge of sediments. For example, the designated concrete washout was not
17 installed in accordance with accepted or known engineering practices; and straw wattles were not
18 installed with the proper staking pattern and were not trenched in at Poly Vista. At Falcon Ridge
19 the concrete wash out area was near capacity and washout was occurring outside of the designated
20 area; a silt fence had collapsed; and earthen berms were not installed to standard engineering
21 specifications.

22 113. Buscher violated Section 75-5-605(1)(b), MCA, and Section 2.3.5 of the general
23 permit by failing to implement, install and maintain BMPs in an effective operating condition at
24 Poly Vista and Falcon Ridge.

1
2
3
4
5
6
7
8 **V. ADMINISTRATIVE ORDER**

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

15 **A. Corrective Actions**

16 114. Within 60 days of the effective date of this order, Buscher shall identify a qualified
17 SWPPP Administrator(s) in accordance with Section 3.2 of Permit No. MTR100000. The SWPPP
18 Administrator identification and qualifying certification shall be sent to the address listed in
19 paragraph 119.

20 115. Dennis Buscher will attend each of the following classes offered by the Department,
21 or acceptable equivalents, no later than December 1, 2015: BMP 101,102, 201 and 202. Any
22 classes attended that are not provided by the Department shall be approved by the Department prior
23 to registration and attendance.

24 116. No later than December 31, 2015, the certificates of completion for each class listed
in Paragraph 115 shall be submitted to the Department at the address listed in Paragraph 119.

117. Within 60 days of receipt of this Order, Buscher shall install, replace and/or repair
all BMPs necessary at the Subdivisions in accordance with each Subdivisions' current SWPPP.

118. Within 90 days of receipt of this Order, Buscher shall submit an updated SWPPP
and a report describing the actions taken to install, replace and/or repair BMPs at the Subdivisions
and describe daily housekeeping procedures that will be used to prevent pollutants from entering
storm water, High Ditch, Cove Ditch, and the Billings MS4 from the Subdivisions. The report

1 shall include photographic documentation of the BMPs and clean up and be sent to the address in
2 Paragraph 119.

3 119. Buscher shall submit a summary report of activities conducted at the Subdivisions
4 under its current SWPPP; a SWPPP revision/update log; a revised site map; a BMP maintenance
5 log; and inspection reports for each Subdivision to the Department on a quarterly basis for two
6 years or until final stabilization has been achieved and a Notice of Termination has been submitted
7 and accepted by the Department. The aforementioned quarterly reports shall be due: July 10, 2015;
8 October 10, 2015; January 10, 2016; April 10, 2016; July 10, 2016; October 10, 2016; and January
9 10, 2017; April 10, 2017, and sent to:

10 Susan Bawden
11 Enforcement Division
12 Department of Environmental Quality
13 1520 East 6th Avenue
14 P.O. Box 200901
15 Helena, MT 59620-0901

14 **B. *Administrative Penalty***

15 120. Buscher is hereby assessed an administrative penalty in the amount of \$100,000 for
16 each subdivision: Poly Vista, Falcon Ridge and Trailhead, for the violations cited herein, for a total
17 of \$300,000.

18 121. Within 60 days of receipt of this Order, Buscher shall pay to the Department the
19 \$300,000 administrative penalty. The penalty must be paid by check or money order, made payable
20 to the "Montana Department of Environmental Quality," and sent to:

21 John L. Arrigo, Administrator
22 Enforcement Division
23 Department of Environmental Quality
24 1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

1 122. Failure to take the required corrective actions and pay the assessed penalty by the
2 specified deadlines, or in accordance with a timeframe agreed to by the Parties, and as ordered
3 herein, constitutes a violation of Title 75, chapter 5, part 6, MCA, and may result in the Department
4 seeking a court order assessing civil penalties of up to \$25,000 per day of violation pursuant to
5 Section 75-5-631, MCA.

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

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

12 VI. NOTICE OF APPEAL RIGHTS

13 125. Buscher may appeal this Order under Section 75-5-611(4), MCA, by having its
14 attorney file a written request for a hearing before the Montana Board of Environmental Review
15 no later than 30 days after service of this Order. Any request for a hearing must be sent to:

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

19 126. Hearings are conducted as provided in the Montana Administrative Procedure Act,
20 Title 2, chapter 4, and part 6, MCA. Hearings are normally conducted in a manner similar to court
21 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to the
22 hearing may include formal discovery procedures, including interrogatories, requests for production
23 of documents, and depositions. Because Buscher is not an individual, Buscher may not appear on
24 its own behalf or through an agent other than an attorney. See ARM 1.3.231(2) and Section 37-61-

1 201, MCA.

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

4 128. Service by mail is complete on the date of receipt.

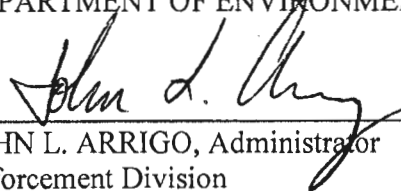
5 129. This Order becomes effective upon signature of the Department.

6 IT IS SO ORDERED:

7 DATED this 21st day of May, 2015.

8 STATE OF MONTANA
9 DEPARTMENT OF ENVIRONMENTAL QUALITY

10
11



JOHN L. ARRIGO, Administrator
Enforcement Division

12
13
14
15
16
17
18
19
20
21
22
23
24

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

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) Poly Vista	
FID:	2285	
Statute:	WQA	
Maximum Penalty Authority:	\$100,000.00	\$10,000.00
Date:	5/21/2015	
Name of Employee Calculating Penalty:	Susan Bawden	

Penalty Calculation #1

Description of Violation:
Buscher violated ARM 17.30.1105(1)(a) by conducting construction activities at Poly Vista without submittal of an NOI to obtain coverage under the General Permit for storm water discharges associated with construction activities.

I. BASE PENALTY

Nature

Explanation:	
Conducting construction activities prior to submitting an NOI poses the potential to harm human health and the environment because there is no assurance the required storm water pollution controls are implemented, therefore creating the potential for an uncontrolled storm water discharge to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Conducting construction activities prior to submitting an NOI to obtain coverage under the General Permit is considered to have major gravity per ARM 17.4.304(5)(a).	
Extent Explanation:	
Buscher conducted construction activities at Poly Vista prior to submitting an NOI from January 1, 2013 until July 22, 2013. Given the duration of the violation, the Extent is major per ARM 17.4.303(4)(a).	

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	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:
As a large and experienced developer, and having previously been under order for the same violation, Buscher was aware of the requirement to submit an NOI. The Department sent Buscher a renewal notice in October 2012 to notify Buscher that its permit for Poly Vista would expire December 31, 2012 and submittal of a new NOI package was required before that date. Buscher failed to take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).

Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.

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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:
Buscher actively conducted construction activities prior to submitting an NOI from January 1, 2013 to July 22, 2013 for 174 days. 174 days of violation results in a penalty that exceeds the statutory maximum.

Number of Days:	174
-----------------	-----

ADJUSTED BASE PENALTY x NUMBER OF DAYS:

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:
Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00
--	---------------

V. ECONOMIC BENEFIT

Explanation:

By not submitting an NOI to obtain permit coverage, Buscher has realized an economic benefit from delaying payment of application fees for preparing an NOI package, including a SWPPP. The new permit application fee for areas between 1 and 5 acres is \$900. Total delayed costs are \$900 for permit application fees. By industry estimates it costs \$48,826 to initially prepare and comply with the NOI and SWPPP requirements. Total delayed costs for the NOI submittal is \$48,826. The Department used EPA's economic benefit model (BEN) to calculate the economic benefit from delayed costs associated with the permit application fees at \$47 and from costs associated with NOI and SWPPP preparation and compliance at \$2,569. Total economic benefit realized by Buscher \$2,616.

ECONOMIC BENEFIT REALIZED: **\$2,616.00**

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)		
FID:	2285		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #2

Description of Violation:
Buscher violated Section 75-5-605(2)(c), MCA, by discharging storm water into state waters without a permit.

I. BASE PENALTY

Nature

Explanation:	
Discharging storm water into state waters without a permit has the potential to harm human health or the environment by allowing the uncontrolled discharge of sediments and other pollutants to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Discharging storm water associated with construction activities may result in the release of regulated substances (sediments, oils, grease, etc.) that have the potential to harm human health or the environment; therefore, Gravity is major per ARM 17.4.303(5)(a).	
Extent Explanation:	
Buscher discharged storm water associated with construction activity to state waters from January 1, 2013 until July 22, 2013, without a permit, therefore Extent is major per ARM 17.4.303(4)(a).	

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	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
As a large and experienced developer, Buscher was aware that storm water discharges without a permit are prohibited by law. Buscher failed take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:	
The Department believes that a rainfall event of 0.25 inches or greater or snowmelt which causes visible surface erosion, will cause a discharge to state waters. NOAA weather station Billings 7.1 W, NT US located on East Copper Ridge Loop, Billings, MT indicates there have been 9 storm or snowmelt events, 0.25 inches or greater, between January 1, 2013, and July 23, 2013. Therefore the Department calculates a penalty for 9 days of violation.	
Number of Days:	9
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	\$90,000.00

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department has determined the economic benefit Buscher realized for discharging without a permit is included in the economic benefit calculated in Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)		
FID:	2285		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #3

Description of Violation:
Buscher violated Section 75-5-605(1)(a), MCA, by placing a waste where it will cause pollution.

I. BASE PENALTY

Nature

Explanation:	
Placing a waste where it will cause pollution has the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Placing a waste where it will cause pollution of state waters poses a serious threat to water quality, therefore gravity is major per ARM 17.4.304(5)(a).
Extent Explanation:
Buscher has actively placed wastes where they will cause pollution since at least 2010 to present. Considering the long-term duration of this violation, extent is major per ARM 17.4.303(4)(a).

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	
	0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
Buscher has been developing Poly Vista since at least 2010, it should have been aware that controls were necessary to prevent waste materials from being introduced to state waters where it will cause pollution. Buscher did not take reasonable precautions to prevent the introduction of waste materials into storm water and should have known the impacts associated with waste materials entering storm water. Buscher showed a major amount of culpability, therefore the Department is adjusting the base penalty upward by 30% for circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
Good Faith & Coop. Percent:	
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$0.00

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

Explanation:	
The Department is unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:	
Buscher has been documented to be placing a waste where it will cause pollution since at least 2010. The statutory maximum of 730 days results in a calculation that exceeds the maximum allowable penalty of \$100,000.	
Number of Days:	730
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department has determined the economic benefit Buscher realized for placing a waste where it will cause pollution is included in the economic benefit calculated in Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)		
FID:	2285		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00		\$10,000.00

Penalty Calculation #4

Description of Violation:
 Buscher violated Section 75-5-605(1)(b), MCA, and sections 2.1.1; 2.1.4; 2.3; 2.3.5; 2.5; 3.1.1; 3.1.3 of the General Permit by failing to implement the provisions of the General Permit, failing to develop an adequate SWPPP, failing to implement an adequate SWPPP; failing to maintain records, conduct inspections, and install and maintain BMPs in operable condition.

I. BASE PENALTY

Nature

Explanation:	
Failure to implement the provisions of the General Permit poses the potential to harm human health and the environment by allowing uncontrolled pollutants to enter storm water which discharges to state water.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Failure to operate in accordance with the requirements of a permit has is moderate Gravity per ARM 17.4.304(5)(b)(ii).
Extent Explanation:
Buscher failed to implement provisions of the General Permit and failed to implement their SWPPP for at least 15 months from July 23, 2013 to October 21, 2014. In consideration of the number of items that were inadequate and the duration of the violations, the Extent is major per ARM 17.4.303(4)(a).

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

Gravity			Gravity Factor:
Major	Moderate	Minor	
0.50	0.40	0.30	

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$7,000.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
Buscher was aware of the requirement to properly implement the provisions of the General Permit and the SWPPP, had complete control of over the violation and did not take reasonable precautions to prevent the violation. Therefore Buscher exhibited a high degree of culpability and the base penalty is adjusted upward by 30% for Circumstances per ARM 17.4.305(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,100.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$7,000.00
Circumstances	\$2,100.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$9,100.00

III. DAYS OF VIOLATION

Explanation:	
Buscher failed to implement the provisions of the General Permit and failed to implement their SWPPP from September 17, 2013, to at least October 21, 2014, for 399 days. The calculation for 399 days exceeds the maximum allowable penalty of \$100,000.	
Number of Days:	399
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department believes the economic benefit for this violation has been captured in the economic benefit calculation for Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)
FID:	2285
Statute:	WQA

VI. HISTORY

Explanation:
Buscher and the Department signed a Consent Order on May 30, 2012 to address storm-water violations at Poly Vista. The Order identified a violation for the failure to apply for a permit, with a Nature of Administrative.

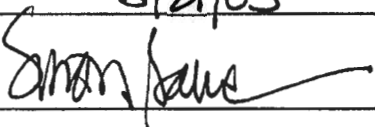
Historical Violation: Harm to Human Health or the Environment - 10%
Historical Violation: Impact to Administration - 5%

Historical Violation #1 Percent:	0.05
Historical Violation #2 Percent:	
Historical Violation #3 Percent:	
Historical Violation #4 Percent:	
Historical Violation #5 Percent:	
Historical Violation #6 Percent:	
Total History Percent (cannot exceed 30%):	0.05

Base Penalty #1	\$8,500.00
Base Penalty #2	\$8,500.00
Base Penalty #3	\$8,500.00
Base Penalty #4	\$7,000.00
Base Penalty #5	\$0.00
Total Base Penalties:	\$32,500.00

HISTORY ADJUSTMENT (Base Penalty x History Percent):	\$1,625.00
---	-------------------

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

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)		
FID:	2285		
Statute:	WQA		
Maximum Penalty Authority:		\$100,000.00	\$10,000.00
Date:		5/21/05	
Signature of Employee Calculating Penalty:	Susan Bawden		

Penalty #1 Penalty #2 Penalty #3 Penalty #4

I. Base Penalty (Maximum Penalty Authority x Matrix Factor)				
Maximum Penalty Authority:	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00
Percent Harm - Gravity and Extent:	0.85	0.85	0.85	0.70
Percent Impact - Gravity:	0.00	0.00	0.00	0.00
Base Penalty:	\$8,500.00	\$8,500.00	\$8,500.00	\$7,000.00
II. Adjusted Base Penalty				
Base Penalty:	\$8,500.00	\$8,500.00	\$8,500.00	\$7,000.00
Circumstances:	\$2,550.00	\$2,550.00	\$2,550.00	\$2,100.00
Good Faith and Cooperation:	\$0.00	\$0.00	\$0.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00	\$0.00	\$0.00
Adjusted Base Penalty:	\$11,050.00	\$11,050.00	\$11,050.00	\$9,100.00
Maximum Per Violation:	\$10,000.00	\$10,000.00	\$10,000.00	
III. Days of Violation or				
Number of Occurrences	174	9	730	399
Total Adjusted Penalty:		\$90,000.00		
Statutory Maximum Penalty	\$100,000.00		\$100,000.00	\$100,000.00
IV. Other Matters as Justice				
May Require	\$0.00	\$0.00	\$0.00	\$0.00
V. Economic Benefit				
	\$2,616.00	\$0.00	\$0.00	
VI. History				
Subtotal(s)	\$0.00	\$0.00	\$0.00	\$0.00 <u>1,625</u>
Total Penalty:				\$100,000.00

*Buscher has a prior history of violations of the Water Quality Act documented in either an administrative order, judicial order, or judgment within the last three years.

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

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Trailshead Subdivision (Trailshead)		
FID:	2309		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	
Date:	5/20/2015		
Name of Employee Calculating Penalty:	Susan Bawden		

Penalty Calculation #1	
Description of Violation:	
Buscher violated ARM 17.30.1105(1)(a) by conducting construction activities at Trailshead without submittal of an NOI to obtain coverage under the General Permit for storm water discharges associated with construction activities.	

I. BASE PENALTY

Nature

Explanation:	
Conducting construction activities prior to submitting a NOI poses the potential to harm human health and the environment because there is no assurance the required storm water pollution controls are implemented, therefore creating the potential for an uncontrolled storm water discharge to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Conducting construction activities prior to submitting an NOI to obtain coverage under the General Permit is considered to have major gravity per ARM 17.4.304(5)(a).	
Extent Explanation:	
Buscher conducted construction activities at Trailshead without submitting an NOI from at least 2007 until September 22, 2013. Given the duration of the violation, the Extent is major per ARM 17.4.303(4)(a).	

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	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
As a large and experienced developer, and having previously been under order for the same violation at Poly Vista, Buscher was aware of the requirement to submit an NOI. Buscher failed to take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:	
Buscher actively conducted construction activities prior to submitting an NOI from 2007 to September 20, 2013. In consideration of the 2-year statute of limitations, the maximum days of violation allowable is 730 which results in a penalty that exceeds the statutory maximum.	
Number of Days:	730

ADJUSTED BASE PENALTY x NUMBER OF DAYS:

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
--------------	--

By not submitting an NOI to obtain permit coverage, Buscher has realized an economic benefit from delaying payment of application fees and for delaying the preparation of an NOI package, including a SWPPP. The new permit application fee for areas between 1 and 5 acres is \$900. Total delayed costs are \$900 for permit application fees. By industry estimates it costs \$48,826 to initially prepare and comply with the NOI and SWPPP requirements. Total delayed costs for the NOI submittal is \$48,826. The Department used EPA's economic benefit model (BEN) to calculate the economic benefit from delayed costs associated with the permit application fees at \$62 and from costs associated with NOI and SWPPP preparation and compliance at \$3,377. Total economic benefit realized by Buscher \$3,439.

ECONOMIC BENEFIT REALIZED: **\$3,439.00**

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at		
FID:	2309		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #2

Description of Violation:
Buscher violated Section 75-5-605(2)(c), MCA, by discharging storm water into state waters without a permit.

I. BASE PENALTY

Nature

Explanation:	
Discharging storm water without a permit has the potential to harm human health or the environment by allowing the uncontrolled discharge of sediments and other pollutants to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Discharging storm water associated with construction activities may result in the release of regulated substances (sediments, oils, grease, etc.) that have the potential to harm human health or the environment; therefore, gravity is major per ARM 17.4.303(5)(a).	
Extent Explanation:	
Buscher discharged storm water associated with construction activity to state waters from 2007 until September 20, 2013, without a permit. Considering the duration of the violation, the extent is major per ARM 17.4.303(4)(a).	

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	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY**A. Circumstances (up to 30% added to Base Penalty)**

Explanation:	
As a large and experienced developer, Buscher was aware that storm water discharges without a permit are prohibited by law. Buscher failed take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:	
The Department believes that a rainfall event of 0.25 inches or greater or snowmelt which causes visible surface erosion will cause a discharge to state waters. NOAA weather station Billings 7.1 W, NT US located on East Copper Ridge Loop, indicates there have been 13 storm or snowmelt events between May 23, 2013, and September 20, 2013. The calculation for 13 days exceeds the statutory maximum penalty of \$100,000.	
Number of Days:	13

ADJUSTED BASE PENALTY x NUMBER OF DAYS:**IV. OTHER MATTERS AS JUSTICE MAY REQUIRE**

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department has determined the economic benefit Buscher realized for discharging without a permit is included in the economic benefit calculated in Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Trailshead Subdivision (Trailshead)		
FID:	2309		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #3

Description of Violation:
Buscher violated Section 75-5-605(1)(a), MCA, by placing a waste where it will cause pollution.

I. BASE PENALTY

Nature

Explanation:	
Placing a waste where it will cause pollution has the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Placing a waste where it will cause pollution of state waters poses a serious threat to water quality, therefore Gravity is major per ARM 17.4.304(5)(a).
Extent Explanation:
Buscher has actively placed wastes where they will cause pollution since at least 2007 to present. Considering the duration of this violation, Extent is major per ARM 17.4.303(4)(a).

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	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
Buscher has been developing Trailshead since at least 2007, it should have been aware that controls were necessary to prevent waste materials from being introduced to state waters where it will cause pollution. Buscher did not take reasonable precautions to prevent the introduction of waste materials into storm water and should have known the impacts associated with waste materials entering storm water. Buscher showed a major amount of culpability, therefore the Department is adjusting the base penalty upward by 30% for circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III. DAYS OF VIOLATION

Explanation:	
Buscher has been documented to be placing a waste where it will cause pollution since at least 2007. The statutory maximum of 730 days results in a calculation that exceeds the maximum allowable penalty of \$100,000.	
Number of Days:	730
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department has determined the economic benefit Buscher realized for placing a waste where it will cause pollution is included in the economic benefit calculated in Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc. (Buscher)
FID:	2309
Statute:	WQA

VI. HISTORY

Explanation:
Buscher and the Department signed a Consent Order on May 30, 2012 to address storm water violations at Poly Vista. The Order identified a violation for the failure to apply for a permit, with a Nature of Administrative.

Historical Violation: Harm to Human Health or the Environment - 10%

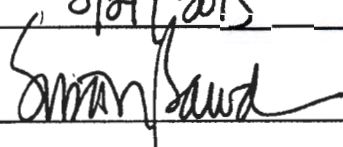
Historical Violation: Impact to Administration - 5%

Historical Violation #1 Percent:	0.05
Historical Violation #2 Percent:	
Historical Violation #3 Percent:	
Historical Violation #4 Percent:	
Historical Violation #5 Percent:	
Historical Violation #6 Percent:	
Total History Percent (cannot exceed 30%):	0.05

Base Penalty #1	\$8,500.00
Base Penalty #2	\$8,500.00
Base Penalty #3	\$8,500.00
Base Penalty #4	\$0.00
Base Penalty #5	\$0.00
Total Base Penalties:	\$25,500.00

HISTORY ADJUSTMENT (Base Penalty x History Percent):	\$1,275.00
---	-------------------

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

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Trailhead		
FID:	2309		
Statute:	WQA		
Maximum Penalty Authority:		\$100,000.00	\$10,000.00
Date:	8/21/2015		
Signature of Employee Calculating Penalty:	Susan Bawden		

Penalty #1 Penalty #2 Penalty #3

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

Maximum Penalty Authority:	\$10,000.00	\$10,000.00	\$10,000.00
Percent Harm - Gravity and Extent:	0.85	0.85	0.85
Percent Impact - Gravity:	0.00	0.00	0.00
Base Penalty:	\$8,500.00	\$8,500.00	\$8,500.00

II. Adjusted Base Penalty

Base Penalty:	\$8,500.00	\$8,500.00	\$8,500.00
Circumstances:	\$2,550.00	\$2,550.00	\$2,550.00
Good Faith and Cooperation:	\$0.00	\$0.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00	\$0.00
Adjusted Base Penalty:	\$11,050.00	\$11,050.00	\$11,050.00
Maximum Per Violation:	\$10,000.00	\$10,000.00	\$10,000.00

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

	730	13	730
Total Adjusted Penalty:			
Statutory Maximum Penalty	\$100,000.00	\$100,000.00	\$100,000.00

**IV. Other Matters as Justice
May Require**

	\$0.00	\$0.00	\$0.00
--	--------	--------	--------

V. Economic Benefit

	\$3,439.00	\$0.00	\$0.00
--	------------	--------	--------

VI. History

Subtotal(s)		\$0.00	\$0.00	\$1,275
-------------	--	--------	--------	---------

Total Penalty: \$100,000.00

*Buscher has a prior history of violations of the Water Quality Act documented in either an administrative order, judicial order, or judgment within the last three years.

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

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Falcon Ridge II Subdivision (Falcon Ridge)		
FID:	2361		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	
Date:	5/20/2015		
Name of Employee Calculating Penalty:	Susan Bawden		

Penalty Calculation #1	
Description of Violation:	
Buscher violated ARM 17.30.1105(1)(a) by conducting construction activities at Falcon Ridge without submittal of an NOI to obtain coverage under the General Permit for storm water discharges associated with construction activities.	

I. BASE PENALTY

Nature

Explanation:	
Conducting construction activities prior to submitting a NOI poses the potential to harm human health and the environment because there is no assurance the required storm water pollution controls are implemented, therefore creating the potential for an uncontrolled storm water discharge to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:	
Conducting construction activities prior to submitting an NOI to obtain coverage under the General Permit is considered to have major gravity per ARM 17.4.304(5)(a).	
Extent Explanation:	
Buscher conducted construction activities at Falcon Ridge without submitting an NOI from at least March 6, 2014 until April 8, 2014. Given the duration of the violation, the Extent is minor per ARM 17.4.303(4)(a).	

Harm to Human Health or the Environment

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

Impact to Administration

	Gravity			
Major	Moderate	Minor		
0.50	0.40	0.30	Gravity Factor:	

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$5,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:
As a large and experienced developer, and having previously been under order for the same violation at Poly Vista, Buscher was aware of the requirement to submit an NOI. The Department sent Buscher a reminder notice on September 3, 2013 to notify Buscher that the permit held by CMG would not cover single family home construction and that an NOI for a new permit or for modification and transfer of the permit held by CMG would be required for construction activities associated with single family home building yet Buscher failed to take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).

Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$1,650.00

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

Explanation:
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.

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

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

Explanation:
The Department is unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$5,500.00
Circumstances	\$1,650.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$7,150.00

III. DAYS OF VIOLATION

Explanation:
Buscher actively conducted construction activities prior to submitting an NOI from at least March 6, 2014 to April 8, 2014 for 33 days. The Calculation for 33 days of violation results in a penalty that exceeds the statutory maximum.

Number of Days:	33
-----------------	----

ADJUSTED BASE PENALTY x NUMBER OF DAYS:

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:
Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00
--	---------------

V. ECONOMIC BENEFIT

Explanation:

By not submitting an NOI to obtain permit coverage, Buscher has realized an economic benefit from delaying payment of application fees and from delaying the preparation of an NOI package, including a SWPPP. The new permit application fee for areas between 25 and 100 acres is \$2,000. Total delayed costs are \$2,000 for permit application fees. By industry estimates it costs \$48,826 to initially prepare and comply with the NOI and SWPPP requirements. Total delayed costs for the NOI submittal is \$48,826. The Department used EPA's economic benefit model (BEN) to calculate the economic benefit from delayed costs associated with the permit application fees at \$8 and from costs associated with NOI and SWPPP preparation and compliance at \$217. Total economic benefit realized by Buscher at Falcon Ridge is \$225.

ECONOMIC BENEFIT REALIZED: **\$225.00**

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Falcon Ridge II Subdivision (Falcon Ridge)		
FID:	2361		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #2

Description of Violation:
Buscher violated Section 75-5-605(2)(c), MCA, by discharging storm water into state waters without a permit.

I. BASE PENALTY

Nature

Explanation:	
Discharging storm water without a permit has the potential to harm human health or the environment by allowing the uncontrolled discharge of sediments and other pollutants to state waters.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Discharging storm water associated with construction activities may result in the release of regulated substances (sediments, oils, grease, etc.) that have the potential to harm human health or the environment; therefore, gravity is major per ARM 17.4.303(5)(a).
Extent Explanation:
Buscher discharged storm water associated with construction activity to state waters from at least March 6, 2014 until April 8, 2014 without a permit. Given the duration of the violation, the Extent is minor per ARM 17.4.303(4)(a).

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

Major	Moderate	Minor	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$5,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
As a large and experienced developer, Buscher was aware that storm water discharges without a permit are prohibited by law. Buscher failed take reasonable precautions to prevent the violation. Buscher exhibited a major degree of culpability in committing the violation, therefore the Department is adjusting the penalty upward by 30% for Circumstances per ARM 17.4.304(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$1,650.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$5,500.00
Circumstances	\$1,650.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$7,150.00

III. DAYS OF VIOLATION

Explanation:	
The Department believes that a rainfall event of 0.25 inches or greater or snowmelt which causes visible surface erosion will cause a discharge to state waters. NOAA weather station Billings 7.1 W, NT US located on East Copper Ridge Loop, and the Inspectors observation indicates there have been 3 storm or snowmelt events between March 6, 2014, and April 8, 2014.	
Number of Days:	3
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	\$21,450.00

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department has determined the economic benefit Buscher realized for discharging without a permit is included in the economic benefit calculated in Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at		
FID:	2361		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #3

Description of Violation:
 Buscher violated Section 75-5-605(1)(a), MCA, by placing a waste where it will cause pollution.

I. BASE PENALTY

Nature

Explanation:	
Placing a waste where it will cause pollution has the potential to harm human health or the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
 Placing a waste where it will cause pollution of state waters poses a serious threat to water quality, therefore Gravity is major per ARM 17.4.304(5)(a).

Extent Explanation:
 Buscher has actively placed wastes where they will cause pollution at Falcon Ridge since at least March 6, 2014 to present. Considering the long-term duration of this violation, Extent is major per ARM 17.4.303(4)(a).

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	
	0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$8,500.00**

II. ADJUSTED BASE PENALTY

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

Explanation:
Buscher has been developing Falcon Ridge since at least March 6, 2014 and should have been aware that controls were necessary to prevent waste materials from being introduced to state waters where it will cause pollution. Buscher did not take reasonable precautions to prevent the introduction of waste materials into storm water and should have known the impacts associated with waste materials entering storm water. Buscher showed a major amount of culpability, therefore the Department is adjusting the base penalty upward by 30% for circumstances per ARM 17.4.304(2).

Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,550.00

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

Explanation:
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.

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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.

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

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$8,500.00
Circumstances	\$2,550.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$11,050.00
Maximum penalty authority	\$10,000.00

III: DAYS OF VIOLATION

Explanation:
Buscher has been documented to be placing a waste where it will cause pollution since at least March 6, 2014 to at least December 11, 2014 for 280 days. 280 days results in a calculation that exceeds the maximum allowable penalty of \$100,000.

Number of Days:	391
-----------------	-----

ADJUSTED BASE PENALTY x NUMBER OF DAYS:

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:
Not applicable.

OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00
--	---------------

V. ECONOMIC BENEFIT

Explanation:
The Department has determined the economic benefit Buscher realized for placing a waste where it will cause pollution is included in the economic benefit calculated in Violation #1.

ECONOMIC BENEFIT REALIZED:	\$0.00
-----------------------------------	---------------

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher) at Falcon Ridge II Subdivision (Falcon Ridge)		
FID:	2361		
Statute:	WQA		
Maximum Penalty Authority:	\$100,000.00	\$10,000.00	

Penalty Calculation #4

Description of Violation:
Buscher violated Section 75-5-605(1)(b), MCA, and sections 2.1.1; 2.1.4; 2.3; 2.3.5; 2.5; 3.1.1; 3.1.3 of the general permit by failing to implement the provisions of the General Permit, failing to develop an adequate SWPPP, failing to implement an adequate SWPPP; failing to maintain records, conduct inspections, and install and maintain BMPs in operable conditions.

I. BASE PENALTY

Nature

Explanation:	
Failure to implement the provisions of the General Permit poses the potential to harm human health and the environment by allowing uncontrolled pollutants to enter storm water which discharges to state water.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

Gravity and Extent

Gravity Explanation:
Failure to operate in accordance with the requirements of a permit has is moderate Gravity per ARM 17.4.304(5)(b)(ii).
Extent Explanation:
Buscher failed to implement provisions of the General Permit and failed to implement its SWPPP for at least 9 months from April 8, 2014 to at least January 30, 2015. Considering the duration of the violation, the Extent is major per ARM 17.4.303(4)(a).

Harm to Human Health or the Environment

Gravity

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

Impact to Administration

Gravity

Major	Moderate	Minor	
0.50	0.40	0.30	Gravity Factor:

BASE PENALTY (Maximum Penalty Authority x Gravity and Extent Factor): **\$7,000.00**

II. ADJUSTED BASE PENALTY

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

Explanation:	
Buscher was aware of the requirement to properly implement the provisions of the General Permit and the SWPPP, had complete control of over the violation and did not take reasonable precautions to prevent the violation. Therefore Buscher exhibited a high degree of culpability and the base penalty is adjusted upward by 30% for Circumstances per ARM 17.4.305(2).	
Circumstances Percent:	0.30
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$2,100.00

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

Explanation:	
The Department is unaware of any Good Faith and Cooperation (GFC) by Buscher, therefore the Department is not adjusting the penalty for GFC.	
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 unaware of any AVE by Buscher above and beyond what is necessary to come into compliance with the permit, therefore the Department is not adjusting the penalty for AVE.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

ADJUSTED BASE PENALTY SUMMARY

Base Penalty	\$7,000.00
Circumstances	\$2,100.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
ADJUSTED BASE PENALTY	\$9,100.00

III. DAYS OF VIOLATION

Explanation:	
Buscher failed to implement the provisions of the General Permit and failed to implement their SWPPP from April 8, 2014, to at least January 30, 2015, for 288 days. The calculation for 288 days exceeds the maximum allowable penalty of \$100,000.	
Number of Days:	288
ADJUSTED BASE PENALTY x NUMBER OF DAYS:	

IV. OTHER MATTERS AS JUSTICE MAY REQUIRE

Explanation:	
Not applicable.	
OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:	\$0.00

V. ECONOMIC BENEFIT

Explanation:	
The Department believes the economic benefit for this violation has been captured in the economic benefit calculation for Violation #1.	
ECONOMIC BENEFIT REALIZED:	\$0.00

Responsible Party Name:	Buscher Construction and Development, Inc.(Buscher)
FID:	2361
Statute:	WQA

VI. HISTORY

Explanation:
Buscher and the Department signed a Consent Order on May 30, 2012 to address storm water violations at Poly Vista. The Order identified a violation for the failure to apply for a permit, with a Nature of Administrative.

Historical Violation: Harm to Human Health or the Environment - 10%

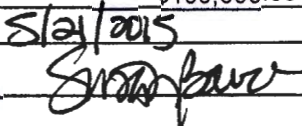
Historical Violation: Impact to Administration - 5%

Historical Violation #1 Percent:	0.05
Historical Violation #2 Percent:	
Historical Violation #3 Percent:	
Historical Violation #4 Percent:	
Historical Violation #5 Percent:	
Historical Violation #6 Percent:	
Total History Percent (cannot exceed 30%):	0.05

Base Penalty #1	\$5,500.00
Base Penalty #2	\$5,500.00
Base Penalty #3	\$8,500.00
Base Penalty #4	\$7,000.00
Base Penalty #5	\$0.00
Total Base Penalties:	\$26,500.00

HISTORY ADJUSTMENT (Base Penalty x History Percent): **\$1,325.00**

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

Responsible Party Name:	Buscher Construction and Development, Inc. (Buscher) at Falcon Ridge II Subdivision (Falcon Ridge)		
FID:	2361		
Statute:	WQA		
Maximum Penalty Authority:		\$100,000.00	\$10,000.00
Date:	5/21	5/21/2015	
Signature of Employee Calculating Penalty:	Susan Bawden		

Penalty #1 Penalty #2 Penalty #3 Penalty #4

I. Base Penalty (Maximum Penalty Authority x Matrix Factor)				
Maximum Penalty Authority:	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00
Percent Harm - Gravity and Extent:	0.55	0.55	0.85	0.70
Percent Impact - Gravity:	0.00	0.00	0.00	0.00
Base Penalty:	\$5,500.00	\$5,500.00	\$8,500.00	\$7,000.00

II. Adjusted Base Penalty				
Base Penalty:	\$5,500.00	\$5,500.00	\$8,500.00	\$7,000.00
Circumstances:	\$1,650.00	\$1,650.00	\$2,550.00	\$2,100.00
Good Faith and Cooperation:	\$0.00	\$0.00	\$0.00	\$0.00
Amount Voluntarily Expended:	\$0.00	\$0.00	\$0.00	\$0.00
Adjusted Base Penalty:	\$7,150.00	\$7,150.00	\$11,050.00	\$9,100.00
Maximum Per Violation:			\$10,000.00	

III. Days of Violation or Number of Occurrences				
	33	3	391	288
Total Adjusted Penalty:		\$21,450.00		
Statutory Maximum Penalty	\$100,000.00		\$100,000.00	\$100,000.00

IV. Other Matters as Justice May Require				
	\$0.00	\$0.00	\$0.00	\$0.00

V. Economic Benefit				
	\$0.00	\$0.00	\$0.00	

VI. History				
Subtotal(s)	0	\$21,450.00	\$0.00	\$0.00

Total Penalty: \$100,000.00

*Buscher has a prior history of violations of the Water Quality Act documented in either an administrative order, judicial order, or judgment within the last three years.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION

Agenda Item No. III.B.1.

Agenda Item Summary: The Department requests that the Board initiate rulemaking to add a new rule to water quality standards that would contain site-specific standards based on natural conditions. The new rule would include site-specific criteria based on natural conditions for electrical conductivity (EC) and sodium adsorption ratio (SAR) for Otter Creek, tributary to the Tongue River.

List of Affected Rules: This rulemaking would add a new rule to the Administrative Rules of Montana (ARM) Title 17, Chapter 30, Subchapter 6.

Affected Parties Summary: The proposed new rule would affect water quality beneficial use assessments conducted by the Department and subsequent load reductions for point and nonpoint sources that may result from total maximum daily load calculations. It would also affect new permits in the Otter Creek watershed.

Scope of Proposed Proceeding: The Department requests that the Board initiate rulemaking and conduct a public hearing to consider the proposed new rule in ARM Title 17, chapter 30, subchapter 6 as summarized below. Refer to the attached draft notice for additional detail.

Background: A new rule for site-specific criteria based on natural conditions is necessary because there are water bodies in Montana with parameter values that naturally exceed currently applicable numeric water quality criteria and that nevertheless meet their designated uses. Section 75-5-306, MCA, states that wastes do not need to be treated to a purer level than the natural condition of receiving water. Additionally, recently signed Senate Bill 325 requires that water quality standards more stringent than the natural condition of a water body may not be implemented in water quality beneficial use assessments or surface water discharge permits and that the natural condition becomes the standard when this is the case.

Hearing Information: The Department recommends the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed new rule.

Board Options: The Board may:

1. Initiate rulemaking and issue the attached draft Notice of Public Hearing on Proposed Adoption;
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 that the Board initiate rulemaking and appoint a hearing examiner to conduct a public hearing, as described in the attached Draft Notice of Public Hearing on Proposed Adoption.

Enclosures:

1. Draft Notice of Public Hearing on Proposed Adoption

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rule I pertaining to streams with site-)	PROPOSED ADOPTION
specific standards based upon natural)	
conditions)	(WATER QUALITY)

TO: All Concerned Persons

1. On _____, 2015, at __:__ __.m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed adoption of 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., _____, 2015, 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. STREAMS WITH SITE-SPECIFIC STANDARDS BASED UPON NATURAL CONDITIONS (1) These site-specific standards are based upon natural conditions and therefore protect the uses designated for the corresponding water bodies in ARM 17.30.607 through 17.30.613.

(2) In implementing the criteria in this rule the department shall set effluent limits in permits to provide for the water quality standards for downstream waters to be attained and maintained. The department shall ensure that increased loading of the parameters in (3), or their equivalents in mg/L, do not cause or contribute to violation of downstream water quality standards.

(3) The following water quality criteria for electrical conductivity (EC) and sodium adsorption ratio (SAR) supersede the corresponding numeric water quality criteria in ARM 17.30.670 for Otter Creek:

(a) The EC and SAR criteria for the Otter Creek drainage must be met in Otter Creek at latitude 45.5884, longitude -106.2551. In any permit for discharge above this compliance point, the department shall require that the discharger meet these criteria at this compliance point and, to the extent it may be determined, non-anthropogenic conditions for EC and SAR at the point of discharge.

(b) The EC criterion is 3,100 µS/cm. The 80th percentile of an annual dataset may not exceed this value more than once in a two-year period.

(c) The SAR criterion is 6.5. The 80th percentile of an annual dataset may not exceed this value more than once in a two-year period.

AUTH: 75-5-301, MCA

MAR Notice No. 17-__

IMP: 75-5-301, 75-5-306, MCA

REASON: The rulemaking is proposed to accomplish two purposes. First, (1) and (2) of the rule provide a framework for adoption of site-specific standards based on natural conditions in a water body. These sections would apply generally to any stream for which a site-specific standard is set at the natural condition of the water body. It is anticipated that as site-specific standards are developed for a water body based on natural conditions, additional sections will be added to this rule. A new rule for site-specific standards based on natural conditions is necessary because there are water bodies in Montana with parameter values that exceed currently applicable numeric water quality criteria because of non-anthropogenic conditions and that meet their designated uses. Section 75-5-306, MCA, states that wastes do not need to be treated to a purer level than the natural condition of receiving water.

The board recognizes that there is no assimilative capacity for a parameter with a criterion based on the non-anthropogenic condition of the water body. New Rule I(2) protects downstream water quality standards. Careful consideration must be given when the stream flows into a water body with higher water quality. In those cases, New Rule I(2) ensures that pollutant contributions to a tributary will not violate water quality standards in a mainstem stream, river, or other downstream water body.

Adopting site-specific standards based upon natural conditions will also allow the department to better address impaired water bodies. For purposes of implementing 75-5-702, MCA, which requires assessment and listing of impaired water bodies, data collected under the natural condition of the stream will not be assessed as impaired, except when anthropogenic conditions cause exceedances of the criteria.

Section (3) accomplishes the second purpose of this rulemaking. It provides site-specific criteria that supersede the established numeric criteria for EC and SAR in Otter Creek. The numeric criteria described below are to be met at latitude 45.5884, longitude -106.2551 in Otter Creek. However, water quality along Otter Creek and in its tributaries varies, and the standards are written to protect the non-anthropogenic (and therefore natural) condition of the entire Otter Creek watershed.

DEQ used a mathematical model to determine that anthropogenic sources of EC and SAR in the Otter Creek watershed are negligible and that the current condition of the stream is not different than the natural condition of the stream.

Thirteen years of monitoring data for EC at latitude 45.5884, longitude -106.2551 in Otter Creek are available from 1980 through 1985, 2004 through 2008, and 2013 and 2014. Two hundred sixty-two grab samples for SAR, calculated from sodium, calcium, and magnesium, are available near latitude 45.5884, longitude -106.2551 in Otter Creek from 1974 through 1985, 1987 through 1995, and 2003 through 2014. The proposed site-specific criteria in New Rule I(3) are set to the 80th percentile of this data. The 80th percentile is chosen for chronic criteria because it is protective of uses that have adapted to the natural condition of the water body. Additionally, criteria based on the 80th percentile will ensure that permit effluent limits for a stream will be set within the natural range of parameters. The 80th percentile of EC data is approximately 3,100 $\mu\text{S}/\text{cm}$ and the 80th percentile of SAR

data is approximately 6.5.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., _____, 2015. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

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

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

JOHN F. NORTH
Rule Reviewer

BY: _____
JOAN MILES
Chairman

Certified to the Secretary of State, _____, 2015.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION

Agenda # III.B.2.

Agenda Item Summary: The Department requests that the Board initiate rulemaking to amend the air quality rules to include provisions meeting the requirements of Section 128 of the federal Clean Air Act (CAA) regarding state Boards and conflict of interest.

List of Affected Rules: New Rules I through III

Affected Parties Summary: The proposed rule amendments would affect any Board of Environmental Review member who has a potential conflict of interest and/or derives a significant portion of his/her income from regulated persons. It also would affect persons involved in contested case proceedings before the Board if the Board cannot act because of the prohibition in Rule II.

Background: The federal Clean Air Act requires states to develop a state implementation plan (SIP) that outlines how the State will attain and maintain compliance with the national ambient air quality standards (NAAQS). The Montana SIP was originally submitted to the Environmental Protection Agency (EPA) in 1972. As a SIP-approved State, Montana must satisfy all of the applicable requirements of the federal CAA in order to maintain an EPA-approved air quality program, including the requirements of Section 128. In relevant part, Section 128 provides that SIPs contain requirements that any board that approves permits or enforcement orders have a majority of members that "represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders" and that those members shall disclose any potential conflicts of interest.

The proposed new rules include definitions, conflict of interest requirements for members of the Board of Environmental Review, and the process by which the Board members will report any possible conflicts of interest. Upon promulgation, the proposed rules would satisfy the requirements of Section 128 of the federal CAA.

Hearing Information: The Department recommends that the Board propose to adopt the rules without 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 adoption of the rules is not appropriate and deny the Department's request to initiate rulemaking.

DEQ Recommendation: The Department recommends that the Board initiate rulemaking as described in the proposed MAR notice.

Enclosures:

1. Proposed Notice of Public Hearing on Proposed Adoption (No Public Hearing Contemplated)
2. Section 128, Federal Clean Air Act

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PROPOSED
Rules I through III pertaining to the)	AMENDMENT
Clean Air Act)	
)	(AIR QUALITY)
)	
)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On _____, 2015, the Board of Environmental Review proposes to adopt the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process 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., _____, 2015, 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 rules provide as follows:

NEW RULE I DEFINITIONS For purposes of this subchapter, the following terms have the following meanings:

- (1) "Board" means the Board of Environmental Review provided for in 2-15-3502.
- (2) "Potential conflict of interest" means:
 - (a) any income from a regulated person; or
 - (b) any interest or relationship that would preclude the individual having the interest or relationship from being considered one who represents the public interest.
- (3) "Regulated person" means:
 - (a) a person, other than a department or agency of a state, local, or regional government, who is subject to a permit or an enforcement order that implements the federal Clean Air Act; or
 - (b) any trade or business association of which a person described in (3)(a) is a member.
- (4) "Represent the public interest" means ~~that the person does not:~~
 - (a) own a controlling interest in or have five percent or more of his or her capital invested in a regulated person;
 - (b) serve as attorney for, act as consultant for, or serve as an officer or director of a regulated person; or
 - (c) hold any other official or contractual relationship with a regulated person.
- (5) "Significant portion of income" means ten percent or more of gross

personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends, except that it shall mean 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement. For purposes of this section, income derived from mutual-fund payments, or from other diversified investments as to which the recipient does not know the identity of the primary sources of income, shall be considered part of the recipient's gross personal income but shall not be treated as income derived from persons subject to permits or enforcement orders under the Clean Air Act.

AUTH: 75-2-111, MCA

IMP: 75-2-111, MCA

NEW RULE II BOARD ACTION (1) The board may not take action on any contested case matter that arises under the Clean Air Act of Montana unless a majority the members of the board at the time of the action:

- (a) represent the public interest; and
- (b) do not derive a significant portion of income from a regulated person.

AUTH: 75-2-111, MCA

IMP: 75-2-111, MCA

NEW RULE III REPORTING (1) At the first meeting each calendar year and prior to the first meeting following a change in the board's membership, each board member who represents the public interest and does not derive a significant portion of income from regulated persons shall file with the board secretary a written certification of this status.

(2) If, subsequent to making a certification under (1), a board member no longer represents the public interest or has begun to derive a significant portion of income from regulated persons, the member shall file with the board a written withdrawal of certification.

(3) Whenever the board is prohibited by New Rule II from taking action, the chairman shall notify the Governor of this fact in writing and shall in the notice list the members of the board who do not represent the public interest or who derive a significant portion of income from regulated persons.

(4) Each board member who has a potential conflict of interest shall file with the board a written disclosure of the interest that creates the potential conflict.

AUTH: 75-2-111, MCA

IMP: 75-2-111, MCA

REASON: Section 110 of the federal Clean Air Act (CAA) (42 USC 7410) requires a state seeking primacy for the implementation and enforcement of the CAA to develop a state implementation plan (SIP) that outlines how the state will attain and maintain compliance with the National Ambient Air Quality Standards (NAAQS). Montana's SIP was initially submitted to the Environmental Protection Agency (EPA) in 1972. As a SIP-approved State, Montana must satisfy all of the applicable

requirements of the CAA in order to maintain an EPA-approved air quality program and retain program primacy.

In 2013, the EPA identified a problem with Montana's SIP specific to the requirements of Section 128 of the Clean Air Act (42 USC 7428). In relevant part, Section 128 provides that a SIP must contain the following requirements:

- "(1) any board or body which approves permits or enforcement orders under this Act shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Act; and
- (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be disclosed."

Because the Board of Environmental Review has such authority, compliance with Section 128 of the CAA is required.

The proposed new rules include definitions, conflict of interest requirements for members of the board, and the process by which the board members will report any possible conflicts of interest. These rules would impose on the board the substantive prohibition contained in section 128(1), the disclosure requirement contained in section 128(2), and definitions that provide for reasonable implementation of these requirements. The definitions are patterned after EPA's "Guidance to States Meeting Conflict of Interest Requirements of Section 128." The EPA has been consulted and has indicated that adoption of these rules into Montana's SIP would be sufficient for Montana to make that SIP compliant with section 128 and allow Montana to retain primacy under the CAA.

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 _____, 2015. 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 _____, 2015.

6. If the board receives requests for a public hearing on the proposed action from either 10 percent 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 180 based on the approximately 1800 permit holders.

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 department.

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

9. With regard to the requirements of 2-4-111, MCA, the board has determined that the proposed new rules will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

JOHN F. NORTH
Rule Reviewer

BY: _____
JOAN MILES, CHAIRMAN

Certified to the Secretary of State, _____, 2015.

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 85 - AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER I - PROGRAMS AND ACTIVITIES
Part A - Air Quality and Emission Limitations

§ 7428. State boards

(a) ¹ Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that—

(1) any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and

(2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraph (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

Footnotes

¹ So in original. Section enacted without a subsec. (b).

(July 14, 1955, ch. 360, title I, § 128, as added Pub. L. 95-95, title I, § 125, Aug. 7, 1977, 91 Stat. 725.)

Effective Date

Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.