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BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, DECEMBER 7, 2018
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at Lindsay.Ford@mt.gov no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the October 5, 2018, meeting minutes.

Public Comment.

B. REVIEW AND APPROVE 2019 SCHEDULE

1. The Board will establish the 2019 meeting schedule.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.** On April 12, 2018 hearing examiner Clerget issued a Scheduling Order in this case. On July 20, 2018 the parties requested a stay in the proceeding due to settlement negotiations. On July 23, 2018, Ms. Clerget issued an Order granting the stay and requiring the parties to file joint status reports every 30 days until the case is settled. On October 24, 2018, the parties filed a joint status report stating that the technical experts in this case have met and DEQ is in the process of reviewing CMG's scope of work in regard to remediation. The parties further stated once the technical details associated with the remediation plan are completed, their agreement will be reduced to an Administrative Order on Consent and CMG will file a Notice of Dismissal. On November 23, 2018, the parties filed a similar status report.
 - b. **In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.** On July 20, 2018 the parties filed a Joint Stipulation to Stay the Scheduling Order requesting until September 14th to file a joint status

report. On July 24, 2018, Ms. Clerget granted the stay. On September 14, 2018, the parties filed a Joint Status Report and Motion to Continue Stay. The parties stated in their Status Report that they have come to an agreement in principle and are working toward finalizing the terms of their agreement. The parties requested a further stay until October 19, 2018 and Ms. Clerget partially granted the motion on September 20, 2018. On October 4th the parties submitted a Joint Status Report indicating a further stay was necessary in order to incorporate additional settlement terms, update the settlement agreement and distribute it for signatures.

- c. **In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.** On August 9, 2018, the parties submitted a Joint Motion for Stay of Proceedings Pending Settlement Execution. That same day Ms. Clerget issued an Order granting the stay. The Order directed parties to file a status update every 30 days. On November 9, 2018, the parties submitted a Status Report. The parties requested a continuation of the current stay until December 8, 2018. The parties indicated they have exchanged a proposed administrative Order on Consent and DEQ is holding in escrow the agreed-upon settlement pending execution of the final AOC.
- d. **In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.** On April 6, 2018, hearing examiner Clerget assumed jurisdiction of this matter. She issued a scheduling order on May 31, 2018, and the parties are proceeding accordingly.

2. Non-enforcement cases assigned to the Hearings Examiner

- a. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On February 21, 2018, the parties filed a Joint Status Report indicating the District Court case MEIC and Sierra Club v. DEQ and Western Energy has been appealed to the Montana Supreme Court. The parties requested a stay pending the issuance of a decision in that case. On March 28, 2018, hearing examiner Clerget issued an order granting the stay, and directed parties to file a status report within 30 days of the Supreme Court's decision, which has not yet occurred.
- b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On March 1, 2018, a Scheduling Order was issued. On April 18, 2018, a Motion to Quash subpoena was filed by MEIC regarding two deposition notices and subpoenas. The motion was fully briefed by May 9, 2018. Oral Argument on this issue was held on May 23, 2018. On June 4, 2018, the Board was served as a named Defendant in Case No. DV-18-0869 in Montana Thirteenth Judicial District Court as the parties are seeking resolution from the District Court on the subpoena issue. Hearing Examiner Clerget issued an Order on June 5, 2018 extending all pretrial motion deadlines pending resolution of the District Court case. The District Court has

ruled on the subpoena issue but the issue of attorneys fees remains pending before the District Court.

- c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** Ms. Clerget conducted a four-day hearing in this matter that concluded on March 22, 2018. After several extensions, the parties submitted their post-hearing filings on September 27, 2018. On October 23, 2018, Western Energy filed a notice of bankruptcy. On November 16, 2018, the parties held a status conference and agreed that the bankruptcy filing does not stay this proceeding. Ms. Clerget will review the filings and issue a Proposed Order to the Board as soon as possible.
- d. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.** On August 13, 2018, Ms. Clerget issued an Order granting in part and denying in part DEQ's motion for partial summary judgment. Ms. Clerget conducted a two-day hearing on this matter on December 3-4, 2018.
- e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 15, 2018, the parties filed a Joint Status Report and Motion for Continued Stay. The parties indicated settlement is a possibility in this matter. On March 14, 2018, Ms. Clerget issued an Order granting the stay until August 24, 2018. A status conference was held on September 6, 2018. The parties and the hearing examiner discussed the necessity of another six month stay. The parties stated at the conference that this appeal began with six distinct issues and only one remains. The remaining issue is tied to a rule regarding permit modifications that DEQ currently has out for public comment, and there is a pending permit modification that may affect the continuation of this case. The parties indicated there would be no additional delay if this matter were stayed for an additional six months, as the appealed portion of the permit would not take effect until at the earliest November of 2019. On September 13, 2018, the hearing examiner granted a six month stay until February 25, 2019.
- f. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.** On July 2, 2018, and July 5, 2018 the Board received a request for hearing. On August 10, 2018, the Board voted to consolidate these two matters and appointed Sarah Clerget as the hearing examiner. On August 14, 2018 Ms. Clerget issued a Prehearing Order. On August 23, 2018, the Wagner's submitted a motion to dismiss, which was granted on August 24, 2018, leaving only Mr. Weyer's appeal to continue. Counsel for Mr. Weyer submitted a notice of appearance on August 24, 2018. On September 17, 2018, the parties submitted a Stipulated Scheduling Order and Ms. Clerget issued the

Scheduling Order on September 20, 2018. The parties are proceeding accordingly.

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 Order Granting the Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings. This matter was stayed while action proceeded. On March 14, 2016, the Judge issued Order on Summary Judgment invalidating the permit modification and remanding the matter for consideration consistent with the opinion. On January 25, 2018, the Department of Environmental Quality entered a Stipulated Judgement resolving the issue of attorney's fees. The Department of Environmental Quality and Western Energy have appealed the District Court's Order on Summary Judgment to the Montana Supreme Court and the matter is currently being briefed. On October 19, 2018, the Montana Supreme Court granted Western Energy's unopposed motion for extension of the due date for Reply Briefs, making Western Energy and DEQ Reply Briefs due on January 11, 2019.

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. The Department will propose that the Board initiate rulemaking to add six human health ground water criteria into department Circular DEQ-7: diallate; dioxane, 1,4-; iron; manganese; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA).

Public Comment.

2. The Department will propose that the Board initiate rulemaking to establish an air quality registration program for portable sources of emissions by amending and adopting the following air quality rules in ARM Title 17, Chapter 8:
 - a. Amend ARM 17.8.744 to provide a general exclusion from the requirement to obtain a Montana air quality permit for facilities that register with the department in accordance with the proposed new rules.
 - b. Adopt New Rules I-IX to establish a registration process, applicability criteria, and rules of operation for certain portable sources of emissions.

Public Comment.

3. The Department will propose that the Board adopt amendments to Administrative Rules of Montana (ARM) 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding 401 Certification.

Public Comment.

4. The Department will propose that the Board initiate rulemaking for proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334,

17.38.101 and Department Circulars DEQ-1, DEQ-2, and DEQ-3. The amendments include adding or updating a citation to New Rule I. The 2017 Legislature required the Department to initiate rulemaking to implement HB 368 - establishing the minimum setback distance between a well and a lagoon. New Rule I implements HB 368 and establishes the minimum setback through Department rulemaking. New Rule I will be initiated concurrently with the Board rulemaking.

Public Comment.

B. ACTION ON CONTESTED CASES

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 and 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 July 16, 2018, Ms. Clerget issued her Proposed Findings of Fact Conclusions of Law and a separate order on exceptions. Copper Ridge and Reflections at Copper Ridge submitted their exceptions to the Proposed Order on September 17, 2018. DEQ filed its response on October 31, 2018. Copper Ridge has filed a motion to strike portions of DEQ's response brief as untimely. This matter is fully briefed and before the Board for oral argument and decision.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. 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.

VI. ADJOURNMENT

BOARD OF ENVIRONMENTAL REVIEW MINUTES

October 5, 2018

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, October 5, 2018, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chairperson Christine Deveny, John DeArment, Dexter Busby, Hillary Hanson, John Felton

Board Members Present by Phone: Chris Tweeten

Board Members Absent: Tim Warner

Board Attorney Present: Sarah Clerget, Attorney General's Office (AGO)

Board Liaison Present: George Mathieus

Board Secretary Present: Meranda Bass,

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Ed Hayes, Kirsten Bowers, mark Lucas, Aaron Pettis, Sandy Moisey-Scherer, Kurt Moser, Sarah Christopherson, Jonathan Morgan – LEGAL; Myla Kelly, Rainie Devaney, Tim Davis, Jon Kenning, Mindy McCarthy, Christine Weaver, Derek Fleming, Haley Sir, Joanna McLaughlin, Jason Garber, Eric Sivers, Eric Urban – WQD; Dick Sloan, Carolina Balliew – WMRD; Dave Klemp, Deb Grimm, Julie Merkel, Liz Ulrich, Rebecca Harbage, Shawn Juers, Ed Warner, Ed Coleman – AEMD; Chad Anderson – ENF

Interested & Other Persons Present: John Meyer – Cottonwood Environmental Law Center; Peggy Trenk – Treasure State Resources Association; Alan Olson – Montana Petroleum Association

Roll was called: five Board members were present in person and one Board members was present via teleconference, providing a quorum.

I.A. Administrative Items – Review and Approve Minutes

I.A.1. August 10, 2018 Meeting Minutes

Mr. Busby MOVED to approve the meeting minutes. Mr. Felton SECONDED. The motion PASSED unanimously.

II.A.1. Briefing Items – Enforcement Cases assigned to the Hearing Examiner

II.A.1.a. In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.

The parties have requested a stay of proceeding due to settlement negotiations and are providing updates every thirty days.

II.A.1.b. 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 and 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.

Ms. Clerget stated exceptions have been received and she is waiting on the responses to the exceptions. This should be on the December agenda for a final Board decision.

II.A.1.c. In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.

Ms. Clerget granted a stay and the parties filed a joint status report asking for a continuance of the stay. Ms. Clerget gave them until October 4 to submit a joint status report indicating the necessity of a continued stay.

II.A.1.d. In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC

Ms. Clerget said the parties indicated they need a stay because they're close to settling. The stay was issued and the parties continue to update Ms. Clerget.

II.A.1.e. In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.

Ms. Clerget stated there's a scheduling order in place and the parties have filed a stipulated extension for deadlines, which was granted.

II.A.2. Briefing Items – Non-Enforcement Cases Assigned to a Hearing Examiner

- II.A.2.a. **In the matter of Westmoreland Resources, Inc.’s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.**
- Mr. Hayes stated the matter is before the Montana Supreme Court, is undergoing briefing, and will be heard in due course.
- II.A.2.b. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC’s Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**
- Ms. Clerget said she issued a scheduling order. The underlying case before the Board is stayed while an ongoing proceeding regarding a motion to quash a subpoena is being litigated in District Court.
- II.A.2.c. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.**
- Ms. Clerget held a hearing and the parties have submitted their exceptions and responses.
- II.A.2.d. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.**
- Ms. Clerget stated she issued an order granting partial summary judgement, held a scheduling conference, and put a scheduling order in place for the remainder of the case. A two-day hearing is scheduling on December 3rd and 4th to hear this matter.
- II.A.2.e. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.**
- Ms. Clerget held a scheduling conference regarding the additional stay. The stay is not changing anything substantive for this permit.
- II.A.2.f. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.**
- Ms. Clerget stated one of the parties moved for dismissal leaving only Mr. Weyer’s appeal to continue. Mr. Weyer has obtained counsel and there’s a scheduling order in place.

I.A.3. Briefing Items – Contested Cases Not Assigned to a Hearing Examiner

- 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.**

Ms. Bowers said parties are still in the briefing phase of that case. The reply briefs are due October 25, after that the case will be fully briefed.

III.A. Action Items – APPEAL, AMEND, OR ADOPT FINAL RULES:

- III.A.1. | **In the matter of final adoption of the proposed amendments to ARM 17.8.505 Air Quality Operation Fees, to increase air quality operation fees to allow the department to collect sufficient revenue to support the appropriate implementation of the air quality program, as noticed in MAR 17-397 with modifications.**

Ms. Ulrich said the department is requesting the Board adopt the proposed amendments to the air quality operating fees.

Ms. Ulrich briefed the Board and answered questions.

Ms. Hanson MOVED to adopt the amendments and the air quality operation fees as proposed. Mr. DeArment SECONDED. The motion PASSED unanimously.

III.B. Other Briefing Items

- III.B.1. | **The Department's Air Quality Bureau has been working with stakeholders on a rule package that would transition the regulation of portable sources of emissions from case-by-case permitting to a more efficient and effective registration program. The Air Quality Bureau would like to brief the Board prior to requesting initiation of this rulemaking at the December 7, 2018, meeting.**

Ms. Harbage briefed the Board and answered questions.

III.C. Petition for Rulemaking

- III.C.1. | **On January 31, 2018 the Board received a petition from Cottonwood Environmental Law Center and The Gallatin Wildlife Association. Pursuant to MCA 75-5-316(3)(1), the petition requests that the Board classify the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek in Gallatin Canyon as an Outstanding Resource Water.**

Mr. Meyer expressed his reasons and concerns on behalf of Cottonwood Environmental Law Center and urged the Board to move forward in support of the petition.

Mr. Meyer, Ms. Clerget, and Ms. Bowers discussed with and answered questions from the Board.

Mr. Busby MOVED that the Board decline the petition and support the Hearing Examiner's final written decision. Mr. Felton SECONDED. The motion PASSED on a 5-1 vote.

III.D. Action on Contested Cases

III.D.1. **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, Montana, BER 2014-06 WQ.**

The Board heard oral arguments from the parties.

Based on discussions with the parties, Ms. Clerget withdrew her Proposed Findings of Fact and Conclusions of law and resubmitted it with an addendum (Exhibit A) of changes to it. The parties did not object to the re-submitted proposed findings of fact, with addendum. The Board adopted the proposed findings of fact.

The Board discussed the conclusions of law and asked questions of the parties. Two motions were made to amend the proposed conclusions of law and both motions failed to pass.

Based on discussions off the record, the parties reached a settlement and requested a stay from the Board on their decision on the proposed order until February 2019.

Ms. Clerget recommended the Board stay their decision based on the parties' settlement.

Mr. Busby MOVED to stay the decision until February 2019. Mr. Felton SECONDED. The motion PASSED unanimously.

IV. Board Counsel Update

Ms. Clerget had no updates.

V. General Public Comment

None were offered.

VI. Adjournment

Ms. Hanson MOVED to adjourn. Mr. Felton SECONDED. Chairperson Deveny adjourned the meeting at 3:00 p.m.

Board of Environmental Review October 5, 2018, minutes approved:

Date: _____
CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR SETTING OF THE 2018 MEETING SCHEDULE

AGENDA # I.B.1.

AGENDA ITEM SUMMARY - Setting of 2019 Meeting Schedule

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

BACKGROUND - Establishment of a 2019 Board meeting schedule at this meeting will enable Board members, the Department, and the public to plan and schedule matters that involve the Board and other activities far enough in advance to minimize scheduling conflicts and the need for emergency meetings.

HEARING INFORMATION - No hearing is necessary.

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

Considering the factors listed above and recent input from Board members regarding their 2019 schedules, the Department has developed a tentative meeting schedule for the Board's consideration. It is:

February 8
April 12
May 31
August 9
October 4
December 13

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

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED NEW RULE**

Agenda Item # III.A.1.

Agenda Item Summary – The Department requests that the Board initiate rulemaking for proposed amendments to Administrative Rules of Montana (ARM) 17.24.645, 17.24.646, 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.109, 17.56.507, and 17.56.608, pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.

List of Affected Board Rules –The proposed amendments will affect Board rules adopted under authority of § 82-4-204, Montana Code Annotated (MCA), at ARM Title 17, chapter 24, subchapter 6, specifically ARM 17.24.645 and ARM 17.24.646; § 75-5-301, MCA, at ARM Title 17, chapter 30, subchapter 5, specifically ARM 17.30.502; §§ 75-5-201 & 75-5-301, MCA, at ARM Title 17, chapter 30, part 6, specifically ARM 17.30.619; §§ 75-5-301 & 75-5-303, at ARM Title 17, chapter 30, subchapter 7, specifically ARM 17.30.702; §§ 75-5-201 & 75-5-401, MCA, at ARM Title 17, chapter 30, subchapter 10, pertaining to the incorporation of ground water standards by reference into Department Circular DEQ-7.

List of Affected Department Rules – The proposed amendments will affect Department rules adopted under the authority of § 76-4-104, MCA, at ARM Title 17, chapter 36, subchapter 3, specifically ARM 17.36.345; §§ 75-10-702 & 75-10-704, MCA, at ARM Title 17, chapter 55, subchapter 1, specifically ARM 17.55.109; §§ 75-11-319 & 75-11-505, MCA, at ARM Title 17, chapter 56, subchapters 5 and 6, specifically ARM 17.56.507 & ARM 17.56.608, pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.

Affected Parties Summary – The proposed amendments will add six human health ground water criteria into Department Circular DEQ-7, the failure to incorporate these criteria may be significant as explained below.

Background – The proposed Department Circular DEQ-7 can be viewed on the department's website at <http://deg.mt.gov/water/drinkingwater/standards>. Modifications to the circular and the reasons for the modifications are as follows:

Addition of new human health criteria: The board and the department propose adding six human health ground water criteria into department Circular DEQ-7: diallate; dioxane, 1,4-; iron; manganese; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA).

The diallate criterion will provide the department's Hazardous Materials Program of the Waste Management and Remediation Division a clean-up standard for hazardous waste permitted facilities. Dioxane, 1,4-, PFOS, PFOA, and iron are also considered important criteria to the Waste Management and Remediation Division as cleanup endpoints for remedial activities they are working on. Further, Dioxane, 1,4-, PFOS, and PFOA are included in EPA Office of Water Health Advisories.

Scientific research has demonstrated that excessive manganese levels can have neurobehavioral and neurocognitive impacts on infants (0-6 months) and the new proposed criterion was derived for this

most-sensitive population. Manganese is considered an important criterion to the Waste Management and Remediation Division as a cleanup endpoint.

The criteria were derived using U.S. Environmental Protection Agency (EPA) equations for human health criteria (EPA, 2000) and there are different equations for toxins and carcinogens. The criteria were derived assuming that exposure is through drinking water only (no accounting for exposure through consumption of fish is made). For example:

Toxic Criterion ($\mu\text{g/L}$) = $\{[\text{RfD (mg/kg-day)} \times \text{RSC} \times \text{average body weight (kg)}]/\text{drinking water intake (L/day)}\} \times 1000 \mu\text{g/mg}$

where the RfD is a value derived from the no effects or lowest observable effects concentration (NOAEL or LOAEL, respectively), and RSC is the relative source contribution to account for potential exposure from other environmental media. EPA generally recommends an RSC of 0.2 (i.e., 20 percent of a person's exposure is from drinking water). The default drinking water intake rate for adults is 2.4 L/day and the default body weight is 80 kg, both of which are in DEQ-7 (see page 5). For some criteria, sensitive sub-populations required different body weight and drinking assumptions than the defaults, and these are detailed below where appropriate.

The department derived the diallate criterion using a cancer slope factor of 0.061 mg/kg-day from the EPA Health Effects Assessment Summary Table (HEAST) database (<https://epa-heast.ornl.gov/heast.php>), default adult weight and drinking water intake rates, and Montana's cancer risk factor of 1×10^{-5} (per 75-5-301, MCA). Dioxane, 1,4- was derived using the IRIS 2013 cancer slope factor (0.1 mg/kg-day), default adult weight and drinking water intake rates, and Montana's cancer risk factor of 1×10^{-5} . PFOS and PFOA criteria are from EPA (2016a; 2016b; 2018) and were derived for the most sensitive population, lactating women. For them, the 90th percentile for drinking water intake was 3.6 L/day and they have a lower assumed body weight (67 kg) than the overall population. The iron criterion was calculated using a RfD (0.592 mg/kg-day) derived from EPA (2006) and the default adult weight and drinking water intake rates.

For manganese (a toxin), the department used a RfD of 0.025 mg/kg-day. The RfD was derived using literature toxicology studies (Kern *et al.*, 2010; Kern *et al.*, 2011; Beaudin *et al.*, 2013) and a 1000-fold uncertainty factor ($\text{UF}_A = 10$, $\text{UF}_H = 10$, $\text{UF}_L = 10$), where UF_A is uncertainty due to interspecies variability to account for extrapolating from laboratory animals to humans, UF_H is for intraspecies variability to account for variability in the responses within the human population because of intrinsic and extrinsic factors, and UF_L is applied because a LOAEL and not a NOAEL was used in the derivation (EPA, 1993). The average body weight of infants zero to <6 months old was used (6.47 kg; Table 8-1, EPA, 2011) and the 90th percentile drinking water ingestion for infants zero to <6 months was 0.966 L/day (Table 3-15, EPA, 2011). The RSC was calculated by subtracting the manganese infants receive from formula (21 CFR 107.100) from the LOAEL to give a RSC of 0.833 (rounded to 0.8 per EPA guidance). Accounting for significant figures (1 in this case), the department derived a water quality standard of 100 $\mu\text{g/L}$.

Criteria Stringency Compared to Federal Guidelines: Five proposed criteria (diallate; dioxane, 1,4-; iron; PFOS; and PFOA) are equivalent to comparable federally recommended guidelines (EPA, 2006; HEAST;

EPA, 2018). In contrast, the proposed manganese criterion is more stringent than comparable federal guidelines. EPA recommends a criterion of 300 µg/L (EPA, 2004; EPA, 2018) based on studies of dietary intake of manganese. But more recent peer-reviewed scientific studies (Kern *et al.*, 2010; Kern *et al.*, 2011; Beaudin *et al.*, 2013), based on dose-response effects on new-born and adult rats, indicate that the criterion should be 100 µg/L (the value proposed by the board). Rat studies were reviewed in EPA (2004) but the quality of those studies was not considered adequate to derive a criterion, whereas the more recent scientific works are considered high quality according to EPA Region VIII's drinking water toxicologist (Bob Benson, personal communication, 11/8/2018). As addressed above, the proposed manganese criterion is necessary to mitigate harm to the public health, specifically zero to <6 months old infants. Further, is it achievable under current technology. At the municipal scale, dissolved manganese can be removed by several technologies (e.g., oxidation/physical separation) which can achieve concentrations of 40 µ/L.

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

Board Options – The Board may:

1. Initiate rulemaking for the affected Board rules and issue the attached notice of public hearing on the proposed amendment of rule;
2. Determine that the amendments of the affected Board rules are not appropriate and decline to initiate rulemaking; or
3. Modify the notice and initiate rulemaking.

DEQ Recommendation – The Department recommends that the Board initiate rulemaking for the affected Board rules, as proposed in the attached notice of public hearing, and appoint a hearings officer.

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed Amendment of Administrative Rules of Montana 17.24.645, 17.24.646, 17.30.502, 17.30.619, 17.30.702, 17.30.1001, 17.36.345, 17.55.109, 17.56.507, and 17.56.608.

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

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING
ARM 17.24.645, 17.24.646,	)	ON PROPOSED AMENDMENT
17.30.502, 17.30.619, 17.30.702,)	
17.30.1001, 17.36.345, 17.55.109,	)	(RECLAMATION)
17.56.507, and 17.56.608, pertaining	)	(WATER QUALITY)
to ground water standards	)	(SUBDIVISIONS)
incorporated by reference into	)	(CECRA)
Department Circular DEQ-7	)	(UNDERGROUND STORAGE
	)	TANKS)

TO: All Concerned Persons

1. On _____, 2019, the Board of Environmental Review and the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board and department 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 Sandy Scherer, Legal Secretary, no later than 5:00 p.m., _____, 2019, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

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

17.24.645 GROUND WATER MONITORING (1) through (5) remain the same.

(6) Methods of sample collection, preservation, and sample analysis must be conducted in accordance with 40 CFR Part 136 titled "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (July 2015) and the department's document titled "Department Circular DEQ-7, Montana Numeric Water Quality Standards," ~~May 2017~~ [effective month and year of this rule amendment] edition. Copies of Department Circular DEQ-7 are available at the Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901. Sampling and analyses must include a quality assurance program acceptable to the department.

(7) and (8) remain the same.

AUTH: 82-4-204, MCA

MAR Notice No. 17-XXX

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

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.24.646 SURFACE WATER MONITORING (1) through (5) remain the same.

(6) Methods of sample collection, preservation, and sample analysis must be conducted in accordance with 40 CFR Part 136 titled "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (July 2015) and Part 434 titled "Coal Mining Point Source Category BPT, BAT, BCT Limitations and New Source Performance Standards" (January 2002), and the ~~May 2017~~ [effective month and year of this rule amendment] edition of the department's document titled "Department Circular DEQ-7, Montana Numeric Water Quality Standards." Copies of 40 CFR Part 136, 40 CFR 434, and Department Circular DEQ-7 are available at the Department of Environmental Quality, 1520 E. 6th Ave., P.O. Box 200901, Helena, MT 59620-0901. Sampling and analyses must include a quality assurance program acceptable to the department.

(7) remains the same.

AUTH: 82-4-204, MCA

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

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.502 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, and ARM Title 17, chapter 30, subchapters 6 and 7, apply throughout this subchapter:

(1) through (13) remain the same.

(14) The board adopts and incorporates by reference Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters. Copies of Department Circular DEQ-7 are available from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-301, MCA

IMP: 75-5-301, MCA

REASON: The board and the department are proposing to revise Circular

DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.619 INCORPORATIONS BY REFERENCE (1) The board adopts and incorporates by reference the following state and federal requirements and procedures as part of Montana's surface water quality standards:

(a) Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality criteria for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters and also establishes human health-based water quality criteria for the following specific nutrients with toxic effects:

- (i) through (f) remain the same.
- (2) and (3) remain the same.

AUTH: 75-5-201, 75-5-301, MCA
IMP: 75-5-301, 75-5-313, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.702 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter (Note: 75-5-103, MCA, includes definitions for "base numeric nutrient standards," "degradation," "existing uses," "high quality waters," "mixing zone," and "parameter"):

- (1) through (26) remain the same.
- (27) The board adopts and incorporates by reference:

(a) Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters and also establishes human health-based water quality standards for the following specific nutrients with toxic effects:

- (i) through (e) remain the same.

AUTH: 75-5-301, 75-5-303, MCA
IMP: 75-5-303, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.30.1001 DEFINITIONS The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) remains the same.

(2) "DEQ-7" means Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, radioactive, bioconcentrating, nutrient, and harmful parameters.

(a) The board adopts and incorporates by reference Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, nutrient, radioactive, and harmful parameters.

(3) through (17) remain the same.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-301, 75-5-401, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.36.345 ADOPTION BY REFERENCE (1) For purposes of this chapter, the department adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) through (d) remain the same.

(e) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(f) through (2) remain the same.

AUTH: 76-4-104, MCA

IMP: 76-4-104, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.55.109 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular DEQ-7, "Montana Numeric Water Quality" (~~May 2017~~ [effective month and year of this rule amendment] edition);

(b) through (5) remain the same.

AUTH: 75-10-702, 75-10-704, MCA
IMP: 75-10-702, 75-10-704, 75-10-711, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.56.507 ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department adopts and incorporates by reference:
(a) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);
(b) through (3) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The board and the department are proposing to revise Circular DEQ-7 to provide additional human health criteria as discussed in the statement of reason for the proposed amendment to ARM 17.56.608 set forth below. In the event that the revised circular is adopted, it is necessary to update the edition of Circular DEQ-7 being cited elsewhere in the rules.

17.56.608 ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department adopts and incorporates by reference:
(a) Department Circular DEQ-7, "Montana Numeric Water Quality Standards" (~~May 2017~~ [effective month and year of this rule amendment] edition);
(b) through (3) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The proposed revised Department Circular DEQ-7 can be viewed on the department's website at <http://deq.mt.gov/water/drinkingwater/standards>. A copy of the proposed revised circular also may be obtained by contacting Mike Suplee at (406) 444- 0831. Modifications to the circular and the reasons for the modifications are as follows:

Addition of new human health criteria: The board and the department are proposing to revise department Circular DEQ-7 to provide human health groundwater criteria for the following: diallate; dioxane, 1,4-; iron; manganese; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA). The proposed criteria concentrations are as follows: diallate, 5.5 µg/L; dioxane, 1,4-, 3 µg/L; iron, 4,000 µg/L; manganese, 100 µg/L; PFOS, 0.07 µg/L, PFOA, 0.07 µg/L.

The diallate criterion will provide the department's Hazardous Materials Program of

the Waste Management and Remediation Division a clean-up standard for hazardous waste permitted facilities. Standards for dioxane, 1,4-, PFOS, PFOA, and iron are also considered important criteria to the Waste Management and Remediation Division as cleanup endpoints for remedial activities carried out by that division. Further, standards for Dioxane, 1,4-, PFOS, and PFOA are included in EPA Office of Water Health Advisories.

Scientific research has demonstrated that excessive manganese levels can have neurobehavioral and neurocognitive impacts on infants (0-6 months). The new proposed criterion was derived for this most-sensitive population. Manganese is considered an important criterion to the Waste Management and Remediation Division as a cleanup endpoint.

The human health groundwater criteria were derived using U.S. Environmental Protection Agency (EPA) equations for human health criteria (EPA, 2000) and there are different equations for toxins and carcinogens. The criteria were derived assuming that exposure is through drinking water only (no accounting for exposure through consumption of fish is made). For example:

$$\text{Toxic Criterion } (\mu\text{g/L}) = \{[\text{RfD (mg/kg-day)} \times \text{RSC} \times \text{average body weight (kg)}] / \text{drinking water intake (L/day)}\} \times 1000 \mu\text{g/mg}$$

where the RfD is a value derived from the no effects or lowest observable effects concentration (NOAEL or LOAEL, respectively), and RSC is the relative source contribution to account for potential exposure from other environmental media. EPA generally recommends an RSC of 0.2 (i.e., 20 percent of a person's exposure is from drinking water). The default drinking water intake rate for adults is 2.4 L/day and the default body weight is 80 kg, both of which are in DEQ-7 (see page 5). For some criteria, sensitive sub-populations required different body weight and drinking assumptions than the defaults, and these are detailed below where appropriate.

Citations to several technical documents are made below; the list of these documents may be found at the end of this section.

The department derived the diallate criterion using a cancer slope factor of 0.061 mg/kg-day from the EPA Health Effects Assessment Summary Table (HEAST) database (<https://epa-heast.ornl.gov/heast.php>), default adult weight and drinking water intake rates, and Montana's cancer risk factor of 1×10^{-5} (per 75-5-301, MCA). Dioxane, 1,4- was derived using the IRIS 2013 cancer slope factor (0.1 mg/kg-day), default adult weight and drinking water intake rates, and Montana's cancer risk factor of 1×10^{-5} . PFOS and PFOA criteria are from EPA (2016a; 2016b; 2018) and were derived for the most sensitive population, lactating women. For them, the 90th percentile for drinking water intake was 3.6 L/day and they have a lower assumed body weight (67 kg) than the overall population. The iron criterion was calculated using a RfD (0.592 mg/kg-day) derived from EPA (2006) and the default adult weight and drinking water intake rates.

For manganese (a toxin), the department used a RfD of 0.025 mg/kg-day. The RfD was derived using literature toxicology studies (Kern *et al.*, 2010; Kern *et al.*, 2011; Beaudin *et al.*, 2013) and a 1000-fold uncertainty factor ($UF_A = 10$, $UF_H = 10$, $UF_L = 10$), where UF_A is uncertainty due to interspecies variability to account for extrapolating from laboratory animals to humans, UF_H is for intraspecies variability to account for variability in the responses within the human population because of intrinsic and extrinsic factors, and UF_L is applied because a LOAEL and not a NOAEL was used in the derivation (EPA, 1993). The average body weight of infants zero to <6 months old was used (6.47 kg; Table 8-1, EPA, 2011) and the 90th percentile drinking water ingestion for infants zero to <6 months was 0.966 L/day (Table 3-15, EPA, 2011). The RSC was calculated by subtracting the manganese infants receive from formula (21 CFR 107.100) from the LOAEL to give a RSC of 0.833 (rounded to 0.8 per EPA guidance). Accounting for significant figures (1 in this case), the department derived a water quality standard of 100 µg/L.

Criteria Stringency Compared to Federal Guidelines: Five of the proposed criteria (diallate; dioxane, 1,4-; iron; PFOS; and PFOA) are equivalent to comparable federally recommended guidelines (EPA, 2006; HEAST; EPA, 2018). The proposed manganese criterion is more stringent than comparable federal guidelines. EPA recommends a criterion of 300 µg/L (EPA, 2004; EPA, 2018) based on studies of dietary intake of manganese. But more recent peer-reviewed scientific studies (Kern *et al.*, 2010; Kern *et al.*, 2011; Beaudin *et al.*, 2013), based on dose-response effects on new-born and adult rats, indicate that the criterion should be 100 µg/L (the value proposed by the board). Rat studies were reviewed in EPA (2004) but the quality of those studies was not considered adequate to derive a criterion. The more recent scientific works are considered high quality according to EPA Region VIII's drinking water toxicologist (Bob Benson, personal communication, 11/8/2018). As addressed above, the proposed manganese criterion is necessary to mitigate harm to the public health, specifically zero to <6 months old infants. Further, is it achievable under current technology. At the municipal scale, dissolved manganese can be removed by several technologies (e.g., oxidation/physical separation) which can achieve concentrations of 40 µg/L.

Footnote (40): The board proposes the addition of footnote (40) to DEQ-7, which references the Montana Administrative Record (MAR) chapter, pages, and date for instances where the derivation of a DEQ-7 human-health criterion is documented in the MAR notice. Human health standards are normally flagged in DEQ-7 to indicate which information source they were derived from; for example, many are flagged "HA," meaning they were derived from nationally-recommended EPA Health Advisory documents. However, the iron and manganese criteria discussed above were derived by the department. If the proposed iron and manganese criteria are adopted as human health standards in DEQ-7, then footnote (40) would reference this MAR notice.

Footnote (41): The board proposes new footnote (41), which clarifies that the sum of PFOA and PFOS shall not exceed the individual standards for each.

Reference Cited: Technical documents cited above are provided here:

- EPA. 1993. Reference Dose (RfD): Description and Use in Health Risk Assessments. Background Document 1A. <https://www.epa.gov/iris/reference-dose-rfd-description-and-use-health-risk-assessments>.
- EPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. Technical Support Document. Volume 1: Risk Assessment. Office of Water, Office of Science and Technology. EPA-822-B-00-005.
- EPA. 2006. Provisional Peer Reviewed Toxicity Values and Iron and Compounds (CASRN 7439-89-6), Derivation of Subchronic and Chronic Oral RfDs. Superfund Health Risk Technical Support Center, National Center for Environmental Assessment, Office of Research and Development, U.S. Environmental Protection Agency, Cincinnati, OH 45268.
- EPA. 2011. Exposure Factors Handbook: 2011 Edition. Office of Research and Development. EPA/600/R-090/052F.
- EPA. 2016a. Drinking Water Health Advisory for Perfluorooctane Sulfonate (PFOS). Office of Water. EPA 822-R-16-004.
- EPA. 2016b. Health Effects Support Document for Perfluorooctanoic Acid (PFOA). Office of Water. EPA 822-R-16-003.
- EPA. 2018. 2018 Edition of the Drinking Water Standards and Health Advisories Tables. Office of Water. EPA 822-F-18-001.
- Kern, C., G. Stanwood and D.R. Smith. 2010. Pre-weaning Manganese Exposure Causes Hyperactivity, Disinhibition, and Spatial Learning and Memory Deficits Associated with Altered Dopamine Receptor and Transporter Levels. *Synapse* 64: 363-378.
- Kern, C. and D.R. Smith. 2011. Pre-weaning Mn Exposure Leads to Prolonged Astrocyte Activation and Lasting Effects on the Dopaminergic System in Adult Male Rats. *Synapse* 65: 532-544.
- Beaudin, S. A., S. Nisam and D.R. Smith. 2013. Early Life Versus Lifelong Oral Manganese Exposure Differently Impairs Skilled Forelimb Performance in Adult Rats. *Neurotoxicology and Teratology* 38: 36-45.

5. 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 Sandy Scherer, Legal Secretary, 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 sscherer@mt@gov, no later than 5:00 p.m. _____, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. The board and department maintain 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; wind energy, 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 Sandy Scherer, Legal Secretary, 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 Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

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

8. The 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 and the department have determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/

EDWARD HAYES
Rule Reviewer

BY: /s/

CHRISTINE DEVENY
Chairman

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/

GEORGE MATHIEUS
Acting Director

MAR Notice No. 17-XXX

Certified to the Secretary of State, _____, 2018.



CIRCULAR DEQ-7

MONTANA NUMERIC WATER QUALITY STANDARDS

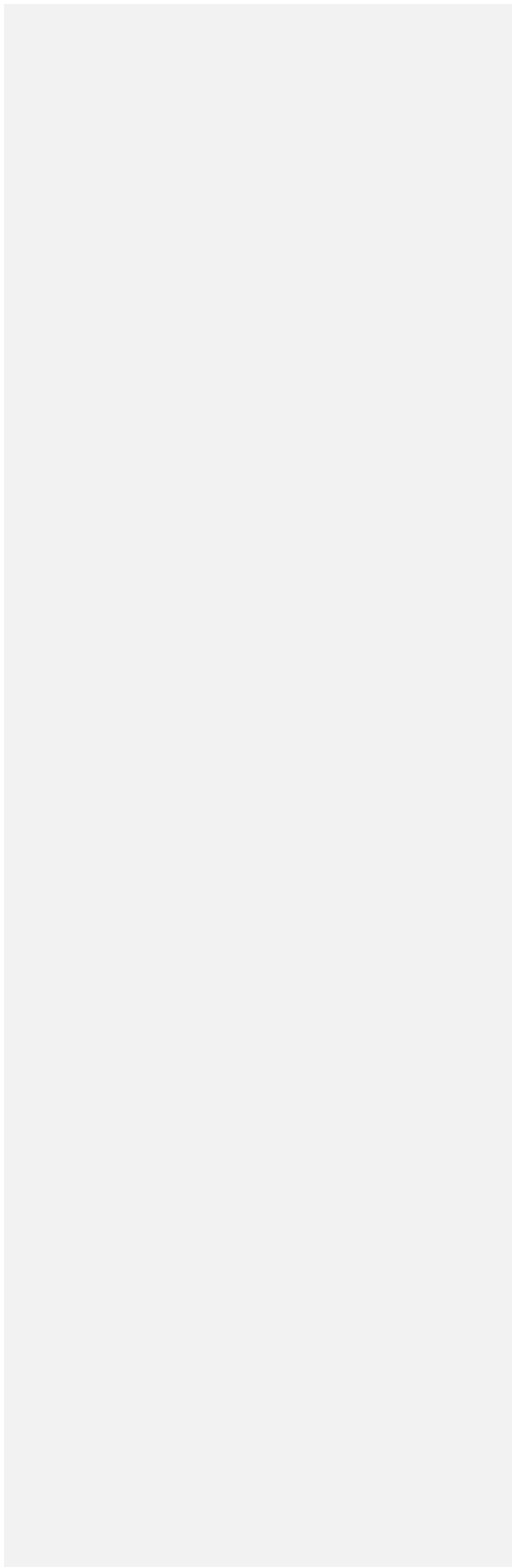


~~May 2017~~ September ~~November~~ 2018

Prepared by:

Montana Department of Environmental Quality
Water Quality Planning Bureau
Water Quality Standards and Modeling Section
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901





Suggested citation: Montana DEQ, Water Quality Division, Water Quality Planning Bureau, Water Quality Standards and Modeling Section. ~~2017~~2018. DEQ-7 Montana Numeric Water Quality Standards. Helena, MT: Montana Dept. of Environmental Quality.

INTRODUCTION

The Department of Environmental Quality (Department) Circular DEQ-7 (DEQ-7) contains numeric water quality standards for Montana's surface and ground waters. The standards were developed in compliance with Section 75-5-301, Montana Code Annotated (MCA) of the Montana Water Quality Act, Section 80-15-201, MCA (the Montana Agricultural Chemical Groundwater Protection Act), and Section 303(c) of the Federal Clean Water Act (CWA). Together, these provisions of state and federal law require the adoption of narrative and numeric standards that will protect the designated beneficial uses of state waters, such as growth and propagation of fishes and associated wildlife, waterfowl and furbearers, drinking water, culinary and food processing purposes, recreation, agriculture, and industry and other commercial purposes.

DEQ-7 contains a great deal of information about Montana's numeric standards in a compact form. In addition to providing the numeric water quality standards for each parameter, DEQ-7 also contains the following:

- The primary synonyms of each parameter. This section also includes any identification numbers used by the U.S. Environmental Protection Agency (EPA), such as the Resource Conservation and Recovery Act (RCRA) waste number, if available, as the last entry in the synonyms section;
- the Chemical Abstracts Service Registry Number (CASRN) for each chemical, as well as the National Institute for Occupational Safety and Health (NIOSH);
- the categorization of each parameter according to the type of pollutant;
- the bioconcentration factor, if known;
- trigger values used to determine "non-significant changes in water quality" under Montana's nondegradation policy (ARM 17.30.701-718); and
- required reporting values (RRV). See footnote 19 for a further explanation of RRV usage.

The numeric water quality standards in DEQ-7 have been established for parameters (i.e., "pollutants") in five categories: toxic, carcinogenic, radioactive, nutrients and harmful. An explanation of each of these categories is given below under "Explanation of Terms".

Parameters are listed in alphabetical order. In order to facilitate listing by alphabetical order, parameters that are normally written with the numbers first are listed with the numbers last. For example, 2,4-Dinitrophenol is listed as Dinitrophenol, 2,4-.

There are many explanatory notes following the table portion of DEQ-7. Footnotes referencing the explanatory notes are found in both the table headings and in individual line items. The notes following the table explain various aspects of the standards. For example, the standards for some metals, ammonia, and dissolved oxygen cover a range of values that are computed by using tables or formulas, using such parameters as pH, hardness, or temperature.

The Department will provide hard copies of this document upon request or the document may be retrieved from the Department website at, <http://deq.mt.gov/Portals/112/Water/WQPB/Standards/PDF/DEQ7/FinalApprovedDEQ7.pdf>. Use of an electronic copy will enable the reader to search for synonyms or CASRN. Such searches will make this document easier to use. Please note that when searching for a chemical with a hyphenated name, a dash must be used in the name as hyphens are not recognized in the pdf search function.

Standards Development

Montana's numeric water quality standards were developed using guidance from the EPA which includes:

- National Recommended Water Quality Criteria (NRWQC)¹ for the protection of human health and aquatic life, developed under Section 304(a) of the CWA. These include criteria for priority pollutants (PP), non-priority Pollutants (NPP), and organoleptic pollutants (OL); and
- Drinking Water Health Advisories (HA) and Maximum Contaminant Levels (MCLs) developed under the Safe Drinking Water Act.²

The 2016 versions of NRWQC and the “2012 and 2018 Edition editions of the EPA’s Drinking Water Standards and Health Advisories” were used to develop the standards in this version of DEQ-7.

Aquatic life criteria take into consideration the magnitude (how much of a pollutant is allowable), duration of exposure to the pollutant (averaging period), and frequency (how often criteria can be exceeded). Acute criteria are based on a one hour exposure event and can only be exceeded once, on average, in a three year period. Chronic criteria are based on a 96 hour exposure and can only be exceeded, on average, once in a three year period. For more information, see EPA’s *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*.³ The techniques used for determining aquatic life numeric standards are complex and take a great deal of time to develop. They require a detailed accumulation of scientific evidence from multiple studies, reviewed by experts in their field that may take years to complete. Aquatic life standards are added to DEQ-7 as they become available.

Nutrients in the aquatic environment are essential substances (organic or inorganic) which are used by living organisms such as algae or bacteria for cellular metabolism or construction. Examples include nitrogen (typically as ammonia, nitrate, or nitrite) and phosphorus. If present in excessive amounts (which depends on the ecosystem involved), nutrients can produce excessive algal and plant growth, which can lead to undesirable deterioration of beneficial uses of state waters. Numeric nutrient standards for aquatic life and recreation are not included in DEQ-7, but are addressed in [Department Circular DEQ Circular 12A](#). The human health standards for nitrogenous compounds are found in DEQ-7 and are listed as toxic compounds.

Human health criteria also have a magnitude, duration and frequency component. The standard assumption in calculating the magnitude of the pollutant for groundwater exposure is that an 80 kg person will consume 2.4 liters a day for 70 years. Water consumption is assumed to be the only route of exposure in that time frame. For surface water criteria, two routes of exposure are considered, water consumption and fish consumption. EPA and the Department use a fish consumption rate of 22 grams of fish per day. [In some instances, the Department has developed human health criteria using assumptions different from the standard ones, and/or used guidance/data other than those listed above. In these instances, the criteria are cross-referenced via footnote in this circular to the Montana Administrative Record \(MAR\) chapter, pages, and date where the details of the Department’s methods are documented.](#)

Other publications used by the Department in the development of standards include: the *1986 Quality Criteria for Water*, EPA 440/5/86-001 (the "Gold Book") and numerous updates; *Toxics Criteria for those States not Complying with Clean Water Act 303(c)(2)(B)*; *The National Toxics Rule* [NTR], which was published in the Code of Federal Regulations, 40 CFR 131.36 (1992); and *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California*, 62 F.R. 42159 [1997].

¹ See <http://www.epa.gov/waterscience/criteria/wqctable/>

² See <https://www.epa.gov/dwstandardsregulations/drinking-water-contaminant-human-health-effects-information#dw-standards>

³ Available at: <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/>

EXPLANATION OF TERMS

Toxics: A toxin is any chemical which has an immediate, deleterious effect on the metabolism of a living organism. The surface water quality standards for human health toxins are the more restrictive of either the MCL or the NRWQC. The ground water standards for human health toxins are the drinking water MCL or, if an MCL is not available, the NRWQC criteria. If neither an MCL nor an NRWQC criteria is available, an HA will be developed by the Department with the aid of the regional EPA toxicologist.

Carcinogens: The Montana Water Quality Act requires that human health standards for carcinogens be the more restrictive of either of the following: (1) the risk-based level of one in one hundred thousand [1×10^{-5}] for all carcinogens except arsenic, which is based upon one in one thousand [1×10^{-3}]; or, (2) the MCL. For surface water, the risk-based levels in EPA's NRWQC criteria or the MCL was used, or if not available HA information was used. In cases where a risk based level was not available, the most recent oral reference dose (RfD) or cancer potency factor (q_1^*) in the Integrated Risk Information System (IRIS) was used to compute the standard. In cases where no risk-based levels were available for known carcinogens, the standards in DEQ-7 are based on toxic effects. Ground water standards are based on EPA Drinking Water MCLs or HAs, NRWQC criteria, or IRIS information.

Pesticides: The Montana Agricultural Chemical Ground Water Protection Act requires that federal water quality criteria be adopted as ground water standards for pesticides if they are available. Pesticides are not a separate category in DEQ-7, but are included in either the toxic or carcinogenic categories. The criteria derivation would follow the process described above for those categories. If no MCLs or other federal criteria are available, standards must be developed using available data on health effects RfD and standard assumptions. The standard assumptions are that 2.4 liters of water are consumed per day and that adults weighing 80 kilograms are exposed for 70 years (life-long exposure) to a single source of water. When information was available, a relative source contribution (RSC) factor was also applied. The RSC is the percentage of a parameter's intake through drinking water versus other dietary sources. A RSC of 0.2 was used in most cases to develop ground water standards for pesticides. In some cases, no data was available to develop a water quality standard for a pesticide in surface water. In these cases, the ground water standard (developed for a pesticide according to the risk-based analysis provided above) was also adopted as a surface water standard. Other federal data sources were used when the EPA's most recent drinking water regulations and health advisories did not include data for a pesticide.

Bioconcentration: Bioconcentration factors (BCF) are not a separate category in DEQ-7, but are included with each pollutant for which there is a known bioconcentration effect. Bioconcentration is a biological amplification process which results in a higher concentration of a pollutant in a living organism than in the environment to which the organism is exposed. Pollutants such as mercury can be hundreds of times more concentrated in fish tissues than in the water the fish lives in. The calculation of a BCF is complex and is dependent on the age of the organism and the chemistry of its environment. A detailed discussion of bioconcentration can be found in EPA 823-B-94-004 *Guidance for Assessing Chemical Contaminant Data for use in Fish Advisories*.

The human health standards for carcinogens and other parameters that exhibit bioconcentration were developed using the assumption that there are two routes of human exposure: through consumption of water and fish. EPA's water quality criteria are derived using an average fish consumption rate of 22 grams/day and water consumption of 2.4 liters per day. The Department follows the EPA guidance for fish consumption rates.

Radioactive: All elements that emit alpha, beta, or gamma radiation are regulated in ground water by the EPA. As all forms of radiation are carcinogenic, the calculation of a numeric standard is derived either from MCLs set by the EPA or calculated from the Oral Cancer Slope Factor (OCSF) provided by the EPA Region VIII toxicologist,

the use of a risk based level of one in one hundred thousand (1×10^{-5}) and the consumption of 2.4 liters of water daily for 70 years for an adult weighing 80 kilograms. Unlike pesticides, a relative source correction (RSC) is not applied to the calculation of numeric standards for radioactive substances as discussed in EPA 402-R-11-001, *EPA Radiogenic Cancer Risk Models and Projections*.

Harmful: Pollutants typically classified as harmful include substances or measures which are controlled by numeric standards. Examples of harmful numeric standards are iron and *Escherichia coli*.

Required Reporting Value: Each pollutant's required reporting value (RRV) is the Department's selection of a laboratory reporting limit that can be met by the majority of local laboratories. In most cases, the RRV is sufficiently sensitive to meet the most stringent numeric water quality standard. The Department's RRV calculation is modified from EPA Guidance 821-B-04-005, "Revised Assessment of Detection and Quantitation Approaches," and uses method detection limits (MDLs) provided by laboratories. An MDL, as defined in 40 CFR 136 Appendix B, is "the minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte." EPA's guidance is based on MDL studies conducted at individual labs and recommends multiplying the MDL by 3.18 to calculate the RRV. Since the Department calculates RRVs based on an inter-laboratory study, the guidance has been modified to use the 75th percentile of the MDLs from the labs multiplied by 3.18.

Because DEQ-7 contains numeric standards for pollutants regulated under 40 CFR 136, EPA's Safe Drinking Water Act (SDWA), and EPA's Office of Pesticides, MDLs used to calculate RRVs in DEQ-7 include those from methods in 40 CFR 136 Appendix A, EPA's SDWA methods, and select methods approved by EPA for the analysis of pesticides. It is the responsibility of the sampling entity to ensure that appropriate methods and reporting limits are requested from the laboratory to meet analytical and reporting limit needs. For pollutants with low standards and RRVs, the Department realizes that the RRVs may be below the laboratory's lowest calibration standards. In these cases, laboratories are encouraged to report values down to the RRV when possible, and to qualify data reported below their lowest calibration standard.

RULES CONTAINING MONTANA'S WATER QUALITY STANDARDS

The Administrative Rules of Montana (ARM), 17.30.620 through 17.30.670, contain numeric surface water quality standards that vary with each stream classification. Additionally, both Montana's surface water and ground water rules contain narrative standards (ARM 17.30.620 through 17.30.670 and ARM 17.30.1001 through 17.30.1045). The narrative standards cover a number of parameters, such as alkalinity, chloride, hardness, sediment, sulfate, and total dissolved solids for which sufficient information does not yet exist to develop specific numeric standards. These narrative standards are directly translated to protect beneficial uses from adverse effects, supplementing the existing numeric standards.

CIRCULAR DEQ-7, MONTANA NUMERIC WATER QUALITY STANDARDS ⁽⁹⁾

No number indicates that a standard has not been adopted or information is currently unavailable. A '()' indicates that a detailed footnote of explanation is provided.

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Acenaphthene §§ § 3Acenaphthalene § Naphthyleneethylene § 1,8-Ethylenenaphthalene § § 1,8-Ethylene Naphthalene § 1,2- Dihydroacenphthylene § Acenphthylene, 1,2- Dihydro-	83-32-9 AB 1255500	Toxic			242	70	70		10
Acetochlor (30) §§ § Acenit § Azetochlor § C10925 § Erunit § Harness § MG 02 § MON 097 § Nevirex	34256-82-1	Toxic				100	100		0.4
Acifluorfen §§ Blazer § Tackle § Scepter § as sodium salt	62476-59-9	Carcinogen				9.4	9.4	N/A	0.5
Acrolein §§ Aqualine § Biocide § Crolean § Aqualin § Propenal § SHA 00701 § 2-propenal § Acraldehyde § Acrylaldehyde § Acrylic Aldehyde § Ethylene Aldehyde	107-02-8 AS 1050000	Toxic	3	3	215	3	3	N/A	3
Acrylamide §§ 2-Propenamide § Propenamide§ Acrylic Amide § Ethylencarboxamide § RCRA Waste Number U007	79-06-1 AS 3325000	Carcinogen				0.7	0.7	N/A	0.008

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Acrylonitrile §§ Fumigrain § Ventox § ENT 54 § TL 314 § Carbaryl § Cyanoethylene § Vinyl cyanide § Propenenitrile § 2-Propenenitrile § Acrylonitrile monomer § RCRA Waste Number U009	107-13-1 AT 5250000	Carcinogen			30	0.61 PP	0.61 PP	N/A	3
Alachlor (includes metabolites Alachlor ESA and Alachlor OA) (31) §§ Lasso § Lazo § Alator § Alanex § Alochlor § Pillarzo § Metachlor § Chimiclor § SHA 090501 § Methachlor § 2-Chloro-N-(2,6- Diethyl)Phenyl-N- Methoxymethylacetamide § 2-Chloro-2',6'-Diethyl-N- (Methoxymethyl) Acetanilide	15972-60-8 AE 1225000	Toxic				2 MCL	2 MCL		0.3
Aldicarb (37) §§ Temik § Temic § Ambush § OMS 771 § Temik G 10 § Aldecarb § Carbamyl § SHA 098301 § Carbanolate § Sulfone Aldoxycarb § Union Carbide 21149 § § Propanal, 2-Methyl-2- (Methylthio)-, O- [(Methylamino)Carbonyl] Oxime RCRA Waste Number P070	116-06-3 UE 2275000	Toxic				3 MCL	3 MCL	1	0.4

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Aldicarb Sulfone (37) §§ Aldoxycarb § Standak § UC 21865 § Sulfocarb § SHA 110801 § Propionaldehyde, 2- Methyl-2- (Methylsulfonyl)-, O- (Methylcarbomoyl)Oxime § 2-Methyl-2- (Methylsulfonyl) Propanal O- [(Methylamino)Carbonyl] Oxime	1646-88-4 UE 2080000	Toxic				2 MCL	2 MCL	2	0.5
Aldicarb Sulfoxide (37) §§	1646-87-3	Toxic				4 MCL	4 MCL	2	0.4
Aldrin §§ § HHDN § Alttox § Drinox § Aldrex § Aldrite § Seedrin § Octalene § SHA 045101 § Hexachlorohexahydro- endo-exo- Dimethanonaphthalene § 1,2,3,4,10,10-Hexachloro- 1,4,4a,5,8, 8a-Hexahydro- 1,4,5,8- Dimethanonaphthalene § 1,4:5,8- Dimethanonaphthalene, 1,2,3,4,10,10-Hexachloro- 1,4,4a,5,8,8a-Hexahydro- endo,exo- § 1,2,3,4,10,10- Hexachloro-1,4,4a,5,8,8a- Hexa-Hydro-1,4:5,8- Endo,Exo- Dimethanonaphthalene § RCRA Waste Number P004	309-00-2 IO 2100000	Carcinogen	1.5		4,670	7.7x10 ⁻⁶	0.02	N/A	0.1
Alpha Emitters (11) §§ § Gross Alpha § Adjusted Gross Alpha § Gross Alpha Emitters	Multiple	Carcinogen / Radioactiv e				15 picoC/ liter MCL	15 picoC/ liter MCL	N/A	

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
alpha-Chlordane §§ -Chlordane § cis-Chlordan § cis- Chlordane § c (cis)- Chlordane § Chlordane, cis-Isomer	5103-71-9 PB 9705000	Carcinogen			14,100	0.008 HA	1 HA	N/A	0.006
alpha- Hexachlorocyclohexane §§ § a-BHC § alpha-BHC § HCH-alpha § alpha-HCH § alpha-Lindane § a Hexachlorocyclohexane § alpha- Benzenhexachloride § alpha- Hexachlorocyclohexane § Benzene Hexachloride- alpha-isomer § alpha- 1,2,3,4,5,6- Hexachlorocyclohexane § Cyclohexane, alpha- 1,2,3,4,5,6-Hexachloro- § 1-alpha,2-alpha,3-beta,4- alpha,5-beta,6-beta- Hexachlorocyclohexane § Cyclohexane, alpha- 1,2,3,4,5,6-Hexachloro-, (1-alpha, 2-alpha, 3-beta, 4-alpha, 5-beta, 6-beta)-	319-84-6 GV 3500000	Carcinogen			130	0.0036 PP	0.0036 PP	N/A	0.03
Aluminum, dissolved, pH 6.5 to 9.0 only §§ Al	7429-90-5 BD 0330000	Toxic	750 NPP	87 NPP				30	9
Ametryn §§ Ametrex	834-12-8	Toxic				60 HA	60 HA		6
Aminomethylphosphonic Acid (AMPA) § Glyphosate metabolite §§		Toxic				2,000 HA	2,000 HA		200
Aminopyralid § 4-amino-3,6- dichloropyridine- 2carboxilic acid, § 4 amino-3,6 dichlro-2-	150114-71-9	Toxic				3,000 HA	3,000 HA		0.2

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
pyridinecarboxilic acid § Milestone									
Ammonia [total ammonia nitrogen (NH3-N plus NH4-N)] as ug/L N §§ § Ammonia Anhydrous § Anhydrous Ammonia § Spirit of Hartshorn	7664-41-7 BO 0875000	Toxic	(7)(8) NPP	(7)(8) NPP				10	70
Ammonium Sulfamate §§	7773-06-0	Toxic				1,000 HA	1,000 HA		200
Anthracene (PAH) §§ Paranaphthalene § Green Oil § Anthracin § Tetra Olive N2G	120-12-7 CA 9350000	Toxic			30	300 PP	2,100 HA	0.04	10
Antimony §§ Sb § Antimony Black § Antimony Regulus § C.I. 77050 § Stibium	7440-36-0 CC 4025000	Toxic			1	5.6 PP	6 MCL	0.4	0.5
Arsenic (36) §§ As § Arsenicals § Arsenic-75 § Arsenic Black § Colloidal Arsenic § Grey Arsenic § Metallic Arsenic	7440-38-2 CG 0525000	Carcinogen	340 PP	150 PP	44	10 MCL	10 MCL	N/A	1
Asbestos, fibers longer than 10 microns in length §§ § Amianthus § Amosite (Obs.) § Amphibole § Asbestos Fiber § Fibrous Grunerite § NCI C08991 § Serpentine, includes Chrysotile, Actinolite, Aurosite, Anthophyllite, Crocidolite, and Tremolite	Multiple	Carcinogen				7x10 ⁶ fibers /liter MCL	7x10 ⁶ fibers/ liter MCL	N/A	

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ Basagran						HA	HA		
Benzene §§ § Phene § Benzol § Benzolene § Pyrobenzol § Carbon Oil § SHA 109301 § Coal Naphtha § Motor Benzol § Phenyl hydride § Cyclohexatriene C § Caswell Number 077 § EPA Pesticide Chemical Code 008801 § NCI C55276 § RCRA Waste Number U019	71-43-2 CY 1400000	Carcinogen			5.2	5	5	N/A	0.6
Benzidine §§ § p,p'-Bianiline § 4,4'- Bianiline § 4,4'- Biphenyldiamine § p,p'- Diaminobiphenyl § 4,4'- Diaminodiphenyl § 4,4'- Biphenylenediamine § 4,4'-Diphenylenediamine § Biphenyl, 4,4'-Diamino- § 4,4'-Diamino-1,1'- Biphenyl § (1,1'-Biphenyl)- 4,4'-Diamine § NCI C03361 § RCRA Waste Number U021	92-87-5 DC 9625000	Carcinogen			87.5	0.0014	0.0014	N/A	5
Benzo(g,h,i)perylene (PAH) §§ § 1,12-Benzoperylene § 1,12-Benzperylene § Benzo(ghi)Perylene	191-24-2 DI 6200500	Toxic			30			0.076	10
Benzo[a]Pyrene (PAH) §§ § BaP § 3,4-BP § Benz(a)Pyrene § Benzo-a- Pyrene § 3,4-Benzpyrene § 6,7-Benzopyrene § 3,4- Benzopyrene § 3,4- Benz(a)Pyrene § Benzo(d,e,f)Chrysene	50-32-8 DJ 3675000	Carcinogen			30	0.0012	0.05	N/A	0.06

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Benzo[b]Fluoranthene (PAH) §§ § B(b)F § Benzo(b)Fluoranthene § Benzo(e)Fluoranthene § 2,3-Benzfluoranthene § 3,4-Benzfluoranthene § 3,4-Benzofluoranthene § 2,3-Benzofluoranthene § 2,3-Benzofluoranthrene § Benz(e)Acephanthrylen e § 3,4- Benz(e)Acephanthrylen e	205-99-2 CU 1400000	Carcinogen			30	0.012 PP	0.5 (29) HA	N/A	5
Benzo[k]fluoranthene (PAH) §§ § Benzo(k)Fluoranthene § 8,9-Benzofluoranthene § Dibenzo(b,jk)Fluorene § 2,3,1'8'-Binaphthylene § 11,12-Benzofluoranthene § 11,12- Benzo(k)Fluoranthene	207-08-9 DF 6350000	Carcinogen			30	0.12 PP	5 (29) HA	N/A	0.1
Benzo[a]anthracene (PAH) §§ § Tetraphene § Benanthracene § Benzoanthracene § Naphthanthracene § 1,2- Benanthrene § Benz(a)Anthracene § Benzo(a)Anthracene § 1,2- Benanthracene § Benzo(b)Phenanthrene § 1,2-Benzoanthracene § Benanthracene, 1,2- § 1,2-Benz(a)Anthracene § 2,3-Benzophenanthrene § RCRA Waste Number U018	56-55-3 CV 9275000	Carcinogen			30	0.012 PP	0.5 (29) HA	N/A	0.1
Beryllium §§ Be	7440-41-7 DS 1750000	Carcinogen			19	4	4	N/A	0.8

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ Beryllium-9 § Glucinum § RCRA Waste Number P015						MCL	MCL		
Beta Emitters (11) §§ § Gross Beta	Multiple	Carcinogen / Radioactiv e				4 mrem /yr MCL	4 mrem /yr MCL	N/A	
Beta-Chloronaphthalene §§ 2-Chloronaphthalene § β-Chloronaphthalene § Naphthalene, 2-Chloro- § 2 Chlornaftalen § A13- 01537 § CCRIS 5995 § HSDB 4014 § Halowax § EINECS 202-079-9 § RCRA waste number U047	91-58-7 QJ 2275000	Toxic			202	800 PP	800 PP	0.94	10
beta- Hexachlorocyclohexane §§ § β-BHC § beta-BHC § HCH-beta § beta-HCH § β- Lindane § beta-Lindane § Hexachlorocyclohexane, beta- § trans-alpha- Benzenhexachloride § Cyclohexane, 1,2,3,4,5,6- Hexachloro-, beta- § 1- alpha,2-beta,3-alpha,4- beta,5-alpha,6-beta- Hexachlorocyclohexane § Cyclohexane, 1,2,3,4,5,6- Hexachloro-, (1-alpha, 2- beta, 3-alpha, 4-beta, 5- alpha, 6-beta)- § Benzenhexachloride, trans-alpha- § beta- 1,2,3,4,5,6- Hexachlorocyclohexane	319-85-7 GV 4375000	Carcinogen			130	0.08 PP	0.08 PP	N/A	0.02

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Bis(2-Chloroisopropyl) Ether §§ § DCIP § NCI C50044 § Dichlorodiisopropyl Ether § 2,2'-Oxybis(1- Chloropropane) § Bis (2- Chloroisopropyl) ether § Propane, 2,2'-Oxybis(2- Chloro- § Propane, 2,2'- Oxybis[1-Chloro- § 2',2'- Dichlorodiisopropyl Ether § Dichlorodiisopropyl Ether (DOT) § Bis(2- Chloro-1-Methylethyl) Ether § RCRA Waste Number U027 Reregistration decision CAS-RN	108-60-1 KN 1750000 39638-32-9	Toxic			2.47	200	200	0.8	10
Bis(2- Chloroethoxy)Methane §§ § Bis(ß- Chloroethyl)Formal	111-91-1 PA 3675000	Toxic			0.64			0.5	10
Bis(Chloroethyl)Ether §§ § BCEE § DCEE § Clorex § Chlorex § Chloroethyl Ether § Dichloroethyl Ether § Dichloroethyl Oxide § Bis(Chloroethyl) Ether § Di(2-Chloroethyl) Ether § Bis (Chloroethyl) Ether § Bis(2-Chloroethyl) Ether § Bis(ß-Chloroethyl) Ether § ß,ß'-Dichloroethyl Ether § 2,2'-Dichloroethyl Ether § Bis (2-Chloroethyl) Ether § 1,1'-Oxybis(2- Chloro)Ethane § Ethane, 1,1'-Oxybis[2-Chloro- § beta,beta'-Dichloroethyl Ether § 1-Chloro-2-(beta- Chloroethoxy)Ethane § RCRA Waste Number U025	111-44-4 KN 0875000	Carcinogen			6.9	0.3	0.3	N/A	5

DEQ-7 Montana Numeric Water Quality Standards

Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Bis(Chloromethyl)ether §§ § BCME § bis-CME § Chloromethyl Ether § Oxybis(Chloromethane) § Bis (Chloromethyl) Ether § sym-Dichlorodimethyl Ether § 1,1'- Dichlorodimethyl Ether § Dimethyl-1,1'- Dichloroether § Chloro(Chloromethoxy) Methane § RCRA Waste Number P016	542-88-1 KN 1575000	Carcinogen			63	0.0015 NPP	0.0015 NPP	N/A	1x10 ⁻⁴
Bromacil §§ Hyvar §	314-40-9	Carcinogen				700 HA	700 HA	N/A	0.03
Bromate	7789-38-0	Carcinogen				10 MCL	10 MCL	N/A	1
Bromodichloromethane (HM) §§ Dichlorobromomethane § BDCM § NCI C55243 § Methane, bromodichloro- § Dichloromonobromometh ane § Monobromodichlorometh ane	75-27-4 PA 5310000	Carcinogen			3.75	9.5 PP	10 HA	N/A	0.6
Bromoform (HM) §§ Tribromomethane § NCI C55130 § Methane, Tribromo- § Methenyl Tribromide § RCRA Waste Number U225	75-25-2 PB 5600000	Carcinogen			3.75	70 PP	80 HA	N/A	5
Bromoxynil §§	1689-84-5	Carcinogen				3.2 HA	3.2 HA	N/A	0.3

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Butyl Benzyl Phthalate §§ § BBP § Sicol 160 § Unimoll BB § Palatinol BB § Santicizer 160 § Butylbenzylphthalate § Butylbenzyl Phthalate § Benzyl Butyl Phthalate § n-Benzyl Butyl Phthalate § Benzyl n-Butyl Phthalate § Phthalic Acid, Benzyl Butyl Ester § Butyl Phenylmethyl 1,2- Benzenedicarboxylate § 1,2-Benzenedicarboxylic Acid, Butyl Phenylmethyl Ester § NCI C54375	85-68-7 TH 9990000	Carcinogen			414	1	1	N/A	10
Butylate §§ Sutan §	2008-41-5	Toxic				300 HA	300 HA		0.02
Cadmium §§ Cd § C.I. 77180 § Colloidal Cadmium	7440-43-9 EU 9800000	Toxic	0.49 @25 mg/L hardness (12) PP	0.25 @25 mg/L hardness (12) PP	64	5 MCL	5 MCL	0.1	0.03
Carbaryl §§ Sevin §	63-25-2	Toxic	2.1 NP	2.1 NP		70 HA	70 HA	2	1
Carbofuran §§ § Yaltox § Euradan § Furadan § Curaterr § Furacarb § SHA 090601 § Niagra 10242 § 2,2- Dimethyl-7-Coumaranyl N-Methylcarbamate § 2,2- Dimethyl-2,3-Dihydro-7- Benzofuranyl N- Methylcarbamate § Carbamic Acid, Methyl-, 2,3-Dihydro-2,2-Dimethyl- 7-Benzofuranyl Ester	1563-66-2 FB 9450000	Toxic				40 MCL	40 MCL	1	1

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Carbon Tetrachloride §§ Freon 10 § R 10 § Univerm § Tetrasol § Fasciolin § Flukoids § Necatorina § Necatorine § Halon 104 § Tetraform § Carbon Tet Benzinoform § Carbon Chloride § Perchloromethane § Tetrachloromethane § Methane Tetrachloroide § RCRA Waste Number U211	56-23-5 FG 4900000	Carcinogen			18.75	4 PP	3 HA	N/A	0.6
Carboxin §§ Vitavax §	5234-68-4	Toxic				700 HA	700 HA	1	70
Chloramben §§ Vegiben §	133-90-4	Toxic				100 HA	100 HA		0.5
Chlordane §§ Termex § Belt § Niran § Dowchlor § Chlortox § Chlordan § Clordano § Chlor Kil § Toxichlor § Octa-Klor § Ortho-Klor § SHA 058201 § Gold Crest C-100 § Chlordane, Technical § Octachloro-4, 7- Methanohydroindane § Octachlorodihydrodicyclo pentadiene § Octachloro- 4,7- Methanotetrahydroindan e-4,7-Methylene Indane § 4,7-Methanoindan, 1,2,4,5,6,7,8,8- Octachloro-3a,4,7,7a- tetrahydro- § 4,7- Methano-1H-Indene § RCRA Waste Number U036	57-74-9 PB 9800000	Carcinogen	1.2	0.0043	14,100	0.0031	1	N/A	0.1
Chlorimuron Ethyl §§ Classic §	90982-32-4	Toxic				600 HA	600 HA	0.1	0.1

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Chlorine, total residual §§ Cl § Bertholite § Chlorine, molecular § Molecular Chlorine	7782-50-5 FO 2100000	Toxic	19 NPP	11 NPP		4,000 MCL	4,000 MCL		100
Chlorite	7758-19-2	Toxic				1,000 MCL	1,000 MCL		100
Chlorobenzene §§ Monochlorobenzene § MCB § Chlorobenzol § Chlorbenzene § Phenyl Chloride § Benzene Chloride § Benzene, Chloro- § Monochlorobenzene § NCI C54886 § RCRA Waste Number U037	108-90-7 CZ 0175000	Toxic			10.3	100 PP	100 MCL	0.5	0.8
Chlorodibromomethane §§ Monochlorodibromometh ane § CDBM § NCI C55254 § Methane, Dibromochloro- § Dibromochloromethane (THM)	124-48-1 PA 6360000	Carcinogen			3.75	8 PP	8 PP	N/A	0.6
Chloroethane §§ Ethyl Chloride § Aethylis § Aethylis Chloridum § Anodynnon § Chelen § Chlorethyl § Chloridum § Chloryl § Chloryl Anesthetic § Ether Chloratus § Ether Hydrochloric § Ether Muriatic § Hydrochloric Ether § Kelene § Monochlorethane § Muriatic Ether § Narcotile § NCI C06224	75-00-3 KH 7525000	Toxic						0.52	

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Chloroform (THM) §§ Trichloromethane § TCM § Freon 20 § Trichloroform § R-20 Refrigerant § Methenyl Chloride § Formyl Trichloride § Methyl Trichloride § Methane Trichloride § Methane, Trichloro- § Methenyl Trichloride § NCI CO2686§ RCRA Waste Number U044	67-66-3 FS 9100000	Carcinogen			3.75	60 PP	70 HA	N/A	0.9
Chlorophenol, 2- §§ Phenol, 2-Chloro § o-Chlorophenol § 2- Chlorophenol § Phenol, o- Chloro- § RCRA Waste Number U048	95-57-8 SK 2625000	Toxic			134	30 PP	30 PP	0.3	10
Chlorophenyl Phenyl Ether, 4- §§ § 4- Chlorophenyl Phenyl Ether	7005-72-3	Toxic with BCF >300			1,200				10
Chlorsulfuron §§ Glean §§ Telar	64902-72-3	Toxic				100 HA	100 HA		0.02
Chlorothalonil §§ Bravo §	1897-45-6	Carcinogen				14 HA	14 HA	N/A	0.05
Chlorpyrifos §§ Dursban § Ethion § Brodan § Eradex § Lorsban § Pyrinex § NA 2783 § Piridane § DowCo 179 § SHA 059101 § Ethion, dry § Chlorothalonil § Chlorpyrifos-Ethyl § O,O- Diethyl O-3,5,6-Trichloro- 2-Pyridyl Phosphorothioate § Phosphorothioic Acid, O,O-Diethyl O-(3,5,6- Trichloro-2-Pyridyl) Ester	2921-88-2 TF 6300000	Toxic	0.083	0.041		2 HA	2 HA	0.25	0.1
Chromium, all forms	7440-47-3	Toxic				100	100	1	10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§§ Cr § Chrome	GB 4200000					MCL	MCL		
Chromium, hexavalent §§ Chromium (VI) §	18540-29-9	Toxic	16 PP	11 PP	16				2
Chromium, trivalent §§ Chromium (III) §	16065-83-1	Toxic	579 @ 25mg/L hardness (12) PP	27.7 @ 25 mg/L hardness (12) PP	16			1	3
Chrysene (PAH) §§ § Benz(a)Phenanthrene § Benzo(a)Phenanthrene § 1,2-Benzphenanthrene § 1,2-Benzophenanthrene § 1,2,5,6- Dibenzonaphthalene § RCRA Waste Number U050	218-01-9 GC0700000	Carcinogen			30	1.2 PP	50 (29) HA	N/A	0.1
cis-1,2-Dichloroethylene §§ § 1,2-Dichloroethylene § cis-Dichloroethylene § cis- 1,2-Dichloroethene § 1,2,cis-Dichloroethylene § ethylene, 1,2-Dichloro-, (z)-	156-59-2 KV 9420000	Toxic				70 MCL	70 MCL	0.002	0.9
cis-1,3-Dichloropropene §§ Telone II § 1,3-Dichloropropene § 1,3-Dichloropropylene § (Z)-1,3-Dichloropropene § cis-1,3-Dichloropropylene § 1-Propene, 1,3-Dichloro- , (Z)-	10061-01-5 UC 8325000	Carcinogen			1.91	3.4 HA	4 HA	N/A	0.6
Clothianidin	210880-92-5	Toxic				650 HA	650 HA		
Clopyralid §§ Stinger §	1702-17-6	Toxic				1,000 HA	1,000 HA	1	0.3

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Copper §§ Cu § Allbri Natural Copper § ANAC 110 § Arwood Copper § Bronze Powder § CDA 101 § CDA 102 § CDA 110 § CDA 122 § C.I. 77400 § C.I. Pigment Metal 2 § Copper Bronze § 1721 Gold § Gold Bronze § Kafar Copper § M1 (Copper) § M2 (Copper) § OFHC Cu § Raney Copper	7440-50-8 GL 5325000	Toxic	3.79@ 25mg/L hardness (12) PP	2.85@ 25 mg/L hardness (12) PP	36	1,300 PP	1,300 PP	0.5	2
Cyanazine §§ Bladex	21725-46-2	Toxic				10 HA	10 HA		0.02
Cyanide, total §§ § Cyanide § Isocyanide § Cyanides, includes soluble salts and complexes § RCRA Waste Number P030	57-12-5 GS 7175000	Toxic	22 PP	5.2 PP	1	4 PP	200 MCL		3
Dacthal §§ DCPA §	1861-32-1	Toxic				70 HA	70 HA	0.025	1
Dalapon §§ Revenge § Dalpon § Unipon § Dowpon § Radapon § Basinex § Ded-Weed § Dalacide § Gramevin § Crisapon § Dalpon Sodium § 2,2-Dichloropropionic Acid § SHA 28902, for sodium salt § SHA 28901, for dalapon only Propionic Acid, 2,2-Dichloro- § Sodium 2,2- Dichloropropionate § a- Dichloropropionic Acid § a,a-Dichloropropionic Acid § alpha-alpha- Dichloropropionic Acid	75-99-0 UF 0690000	Toxic				200 MCL	200 MCL	1.3	3

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Dalapon, sodium salt §§ Dalpon § Unipon § Dowpon § Radapon § Revenge § Basinex § Ded-Weed § Dalacide § Gramevin § Crisapon § Dalpon Sodium § Sodium Dalapon § 2,2- Dichloropropionic Acid § SHA 28902, for sodium salt § SHA 28901, for dalapon only § Propionic Acid, 2,2-Dichloro- § Sodium 2,2- Dichloropropionate § alpha-alpha- Dichloropropionic Acid	127-20-8 UF 1225000	Toxic				200	200	1.3	3
Demeton §§ Systox § Bay 10756 § Bayer 8169 § Demox § Diethoxy Thiophosphoric Acid Ester of 2- Ethylmercaptoethanol § O,O-Diethyl 2- Ethylmercaptoethyl Thiophosphate § O,O- Diethyl O(and S)-2-(Ethyl- Thio)Ethyl Phosphorothioate Mixture § E 1059 § ENT 17,295 § Mercaptophos § Systemox § Systox § ULV § Demeton-O + Demeton-S	8065-48-3 TF 3150000	Toxic		0.1 NPP		0.3	0.3	0.25	0.01

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Di(2-Ethylhexyl)Phthalate (PAE) §§ Bis(2- Ethylhexyl)Phthalate § BEHP § DEHP § Octoil § Fleximel § Flexol DOP § Kodaflex DOP§ Ethylhexyl Phthalate § Diethylhexyl Phthalate § 2-Ethylhexyl Phthalate § Di(Ethylhexyl)phthalate § Di(2-Ethylhexyl)phthalate § Bis (2-Ethylhexyl) Phthalate § Bis(2- Ethylhexyl)-1,2-Benzene- Dicarboxylate § 1,2- Benzenedicarboxylic Acid, Bis(2-Ethylhexyl)Ester	117-81-7 TI 0350000	Carcinogen			130	3.2 PP	6 MCL	N/A	2
Di(2-Ethylhexyl)Adipate §§ Hexanedioic Acid § DEHA § BEHA § Bisoflex DOA § Effemoll DOA § Ergoplast AdDO § Flexol A 26 § PX-238 § Reomol DOA § Vestinol OA § Wickenol 158 § Kodaflex DOA § Monoplex DOA § NCI C54386 § Octyl Adipate § Dioctyl Adipate § Di-2-Ethylhexyl Adipate § Di (2-Ethylhexyl) Adipate § Bis(2-Ethylhexyl) Adipate § Adipic Acid, Bis(2- Ethylhexyl) Ester § Hexanedioic Acid, Bis(2- Ethylhexyl) Ester	103-23-1 AU 9700000	Carcinogen				280 HA	280 HA	N/A	6
<u>Diallate</u> §§	<u>2303-16-4</u>	<u>Carcinogen</u>					<u>5.5</u> <u>HA (40)</u>		
Diazinon §§	333-41-5	Toxic	0.17 NPP	0.17 NPP		1 HA	1 HA	0.25	0.03

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Dibenz[a,h]Anthracene (PAH) §§ § DBA § DB(a,h)A § Dibenz(a,h)Anthracene § Dibenzo(a,h)anthracene § 1,2:5,6-Benzanthracene § Dibenzo (a,h) Anthracene § 1,2,5,6- Dibenzanthracene § 1,2:5,6- Dibenz(a)Anthracene § RCRA Waste Number U063	53-70-3 HN 2625000	Carcinogen			30	0.0012 PP	0.05 HA (29)	N/A	0.1
Dibromoethane, 1,2- §§ Ethylene Dibromide § DBE § EDB § Nephis § Kopfume § Celmid § E-D- Bee § Soilfume§ Bromofume § Dowfume 40 § SHA 042002 § Pestmaster § Soilbrom- 40§ Dibromoethane § Ethylene Bromide § Glycol Dibromide § 1,2- Dibromoethane § 1,2- Ethylene Dibromide § RCRA Waste Number U067	106-93-4 KH 9275000	Carcinogen				0.017 HA	0.017 HA	N/A	0.01

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Dibutyl Phthalate §§ § DPB § Celluflex DPB § Elaol § Hexaplas M/B § Palatinol C§ Polycizer DBP § PX 104 § Staflex DBP § Witcizer § SHA 028001 § Butylphthalate § N- Butylphthalate § Di-n- Butylphthalate § Di-n- Butylphthalate § Dibutyl- o-Phthalate § Di-n-Butyl Phthalate § RCRA Waste Number U069 § Phthalic Acid Dibutyl Ester § Dibutyl 1,2-Benzene Dicarboxylate § 1,2- Benzenedicarboxylic Acid Dibutyl Ester § 1,2- Benzenedicarboxylic Acid, Dibutyl Ester § Benzene-o- Dicarboxylic Acid Di-n- Butyl Ester	84-74-2 TI 0875000	Toxic			89	20	20	0.25	10
Dicamba §§ Banvel §	1918-00-9	Toxic				200 HA	200 HA	0.28	0.7
Dichlorobenzene, 1,2- §§ DCB § ODB § ODCB § Dizene § Cloroben § Chloroben § Chloroden § Termitkil § Dilatin DB § Dowtherm E § Dilantin DB § o- Dichlorobenzene § Orthodichlorobenzene § ortho-Dichlorobenzene § Special Termite Fluid § Benzene, 1,2-Dichloro- § RCRA Waste Number U070	95-50-1 CZ 4500000	Toxic			55.6	600 MCL	600 MCL	0.02	10
Dichlorobenzene, 1,3- §§ Benzene, 1,3-Dichloro § M-Dichlorobenzene § m- Dichlorobenzene § meta- Dichlorobenzene § 1,3- Dichlorobenzene-	541-73-1 CZ 4499000	Toxic			55.6	7 PP	600 HA	0.006	5

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
RCRA Waste Number U078									
Dichlorophenol, 2,4- §§ Phenol, 2,4-Dichloro § DCP § 2,4-DCP § NCI C55345 § 2,4- Dichlorophenol § RCRA Waste Number U081	120-83-2 SK 8575000	Toxic			40.7	10 PP	10 PP	10	10
Dichlorophenoxyacetic Acid, 2,4- §§ Dichlorophenoxyacetic Acid § Chlorophenoxy herbicide § 2,4-D § Salvo § Phenox § Farmco § Amidox § Miracle § Agrotect § Weedtrol § Herbidal § Ded-Weed § Lawn-Keep § Fernimine § Crop Rider § Dichlorophenoxyacetic Acid, 2,4- § Acetic Acid, (2,4-Dichlorophenoxy)- § 2,4- Dichlorophenoxyacetic Acid, salts and esters	94-75-7 AG 6825000	Toxic				70 MCL	70 MCL	0.02	1
Dichloropropane, 1,2- §§ Propylene Chloride § 1,2-Dichloropropane § NCI C55141 § Propylene Dichloride § Caswell Number 324 § Propane, 1,2-Dichloro- § α,β- Propylene Dichloride § α,β- Dichloropropane § EPA Pesticide Chemical Code 029002 § RCRA Waste Number U083	78-87-5 TX 9625000	Carcinogen			4.11	5 MCL	5 MCL		0.7

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Dichloropropene, 1,3- §§ Telone II § Telone § NCI C03985 § Vidden D § Dichloropropene § a- Chloroallyl Chloride § g- Chloroallyl Chloride § 1,3- Dichloropropene § 1,3- Dichloropropylene § 1,3- Dichloro-2-Propene § Propene, 1,3-Dichloro- § Telone II Soil Fumigant § 3-Chloropropenyl Chloride § alpha,gamma- Dichloropropylene	542-75-6 UC 8310000	Carcinogen			1.91	2.7	2.7	N/A	0.3
Dichlorprop §§ § Canapur DP § Basagran DP § Cornox RX § Hedonil DP § Kildip § Mayclene § Polyclene § Weedone DP § Polytox	120-36-5	Toxic				300 HA	300 HA		1
Dieldrin §§ § Alvit § Quintox § Octalox § Illoxol § Dieldrex § NCI C00124 § Dieldrite § Hexachloroepoxyoctahydr o-endo,exo- Dimethanonaphthalene § 3,4,5,6,9,9-Hexachloro- 1a,2,2a,3,6,6a,7,7a- Octahydro-2,7:3,6- Dimethanonaphth(2,3- b)Oxirene § 2,7:3,6- Dimethanonaphth(2,3- b)Oxirene, 3,4,5,6,9,9- Hexachloro- 1a,2,2a,3,6,6a,7,7a- Octahydro- § SHA 045001 § 1,4:5,8- Dimethanonaphthalene § RCRA Waste Number P037	60-57-1 IO 1750000	Carcinogen	0.24	0.056	4,670	1.2x10 ⁻⁵	0.02	N/A	0.02

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Diethyl Phthalate §§ § Anozol § Neantine § Solvanol § NCI C60048 § Placidole E § Ethyl Phthalate § Diethylphthalate § Diethyl-o-Phthalate § 1,2- Benzenedicarboxylic Acid, Diethyl Ester § RCRA Waste Number U088	84-66-2 TI 1050000	Toxic			73	600 PP	600 PP		10
Difenoconazole §§ § 1-[2-[2-chloro-4-(4- chlorophenoxy)phenyl]- 4-methyl-1,3-dioxolan- 2-ylmethyl]-1H-1,2,4- triazole § CGA169374 § Dividend § Dragon § Plover § Score § Score EC250	119446-68-3	Toxic				70 HA	70 HA	N/A	0.06
Dimethenamid and degrade demethenamid OA § 2-Chloro-N-(2,4- dimethyl-3-thienyl)-N-(2- methoxy-1- methylethyl)acetamide § San 682H § Frontier herbicide § EPA pesticide Code 129051	87674-68-8	Carcinogen				300 HA	300 HA	N/A	0.03
Dimethoate §§	60-51-5	Toxic				15 HA	15 HA		6
Dimethrin §§	70-38-2	Toxic				2,000 HA	2,000 HA		200

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Dimethyl Phthalate §§ § DMP § NTM § ENT 262 § Mipax § Avolin § Fermine § Solvanom § Solvarone § Palatinol M § Methyl Phthalate § Dimethylphthalate § Phthalic Acid, Dimethyl Ester § Dimethyl Benzene- o-Dicarboxylate § Dimethyl 1,2- Benzenedicarboxylate § 1,2-Benzenedicarboxylic Acid, Dimethyl Ester	131-11-3 TI 1575000	Toxic			36	2,000 PP	2,000 PP	0.04	10
Dimethylphenol, 2,4- §§ Phenol, 2,4-Dimethyl- § m-Xylenol § 2,4-Xylenol § 4,6-Dimethylphenol § Caswell Number 907A § 2,4-Dimethyl Phenol § 1- Hydroxy-2,4- Dimethylbenzene § 4- Hydroxy-1,3- Dimethylbenzene § EPA Pesticide Chemical Code 086804 § RCRA Waste Number U101	105-67-9 ZE 5600000	Toxic			93.8	100 PP	100 PP	10	10
Dinitro-o-Cresol, 4,6- §§ Dinitrocresol § Detal § Sinox § DNOC § Arborol § Capsine § Dinitrol § Trifocide § Antinonin § Winterwash § Dinitro-o-Cresol § 2,4- Dinitro-o-Cresol § 4,6- Dinitro-o-Cresol § o- Cresol, 4,6-dinitro- § 2- Methyl-4,6-Dinitrophenol § 4,6-Dinitro-2- Methylphenol § 2,4- Dinitro-6-Methylphenol § 3,5-Dinitro-2- Hydroxytoluene § Phenol, 2-Methyl-4,6-Dinitro- §	534-52-1 GO 9625000	Toxic			5.5	2 PP	2 PP		10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Caswell Number 390 § RCRA Waste Number P047									
Dinitrophenol, 2,4- §§ Phenol, 2,4-Dinitro § Nitro § Kleenup § Aldifen § 2,4- Dinitrophenol § 2,4-DNP § Chemox PE § Maroxol-50 § Solfo Black B § alpha- Dinitrophenol § Dinitrophenol, 2,4- § Tertrosulphur Black PB § 1-Hydroxy-2,4- Dinitrobenzene § RCRA Waste Number P048	51-28-5 SL 2800000	Toxic			1.5	10 PP	10 PP	13	60
Dinitrophenols	2555-05-87	Toxic				10 NPP	10 NPP		
Dinitrotoluene, 2,4- §§ Toluene, 2,4-Dinitro § 2,4-DNT § NCI C01865 § 2,4-Dinitrotoluol - § Benzene, 1-Methyl-2,4- Dinitro- § RCRA Waste Number U105	121-14-2 XT 1575000	Carcinogen			3.8	0.49 PP	0.49 PP	N/A	0.2
Dinitrotoluene, 2,6- §§ Toluene-dinitro § 2,4-DNT § Methyl-1,3- Dinitrobenzene § RCRA Waste Number U106	606-20-2 XT 1925000	Carcinogen				0.5 HA	0.5 HA	N/A	0.2
Dinoseb §§ § DNBP § DBNF § Aretit § Basanite § Caldon § Sparic § Kiloseb § Spurge § Premerge § Dinitro § Hel-	88-85-7 SJ 9800000	Toxic				7 MCL	7 MCL	0.19	1

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards ($\mu\text{g/L}$ except where indicated) Acute (3) Chronic (4)	Bio-concentration Factor (BCF) ($\mu\text{g/L}$) (5)	Human Health Standards ($\mu\text{g/L}$ except where indicated) (17) (16) Surface Water Ground Water	Trigger Value ($\mu\text{g/L}$) (22)	Required Reporting Value ($\mu\text{g/L}$ except where indicated) (19)
Fire § SHA 037505 § Dow General § Sinox General § Dow General Weed Killer § Vertac General Weed Killer § 2-sec-Butyl-4,6-Dinitrophenol § Dinitro-Ortho-Sec-Butyl Phenol § 2-(1-Methylpropyl)-4,6-Dinitrophenol § 4,6-Dinitro-2-(1-Methyl-n-Propyl)Phenol§ Phenol, 2-(1-Methylpropyl)-4,6-Dinitro- § RCRA Waste Number P020							
Dioxane, 1,4- §§ Dioxane § P-Dioxane § 1,4-Diethylene dioxide § Diethylene ether § Dioxan § 1,4-Dioxacyclohexane § Dioxanne § Di(ethylene oxide) § Tetrahydro-p-dioxin § Tetrahydro-1,4-dioxin § Diethylene dioxide § Glycol ethylene ether § 1,4-Dioxan § p-Dioxan § Dioxan-1,4 § Dioxyethylene ether § Diokan § Dioksans § para-Dioxane	2663-46-5123-91-1	Carcinogen				3 HA	

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DEQ-7 Montana Numeric Water Quality Standards

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Dioxin Chlorinated Dibenzo-p-dioxins and Chlorinated Dibenzofurans Calculation of an equivalent concentration of 2,3,7,8-TCDD is to be based on congeners of CDDs/CDFs and the toxicity equivalency factors (TEF) in van den Berg, M: et al. (2006) The 2005 World Health Organization Re- evaluation of Human and Mammalian Toxic Equivalency Factors for Dioxins and Dioxin-like Compounds. Toxicological Sciences 93(2):223-241.	1746-01-6	Carcinogen			5,000	5x10 ⁻⁸ (10) PP	2x10 ⁻⁶ (10) HA	N/A	footnote (10)
Diphenamid §§	957-51-7	Carcinogen				200 HA	200 HA	N/A	20
Diphenylhydrazine, 1,2- §§ Hydrazine, 1,2- Diphenyl- § Hydrazobenzene § NCI C01854 § N,N'-Bianiline § Benzene, Hydrazodi- § (sym)-Diphenylhydrazine § 1,2-Diphenylhydrazine § RCRA Waste Number U109	122-66-7 MW 2625000	Carcinogen			24.9	0.3 PP	0.3 PP	N/A	0.04
Diquat §§ § Actor § Feglox § Deiquat § Reglone § Aquacide § Dextrone § Paraquat § Preeglove § SHA 032201 § Weedtrine-D § Diquat Dibromide § Ethylene Dipyridylum Dibromide § 1,1-Ethylene 2,2- Dipyridylum Dibromide § 5,6-Dihydro- Dipyrido(1,2a,1c)Pyraziniu m Dibromide § 9,10- Dihydro-8a,10a-	2764-72-9 JM 5690000	Toxic				20 MCL	20 MCL	0.44	2

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Diazoniaphenanthrene(1,1'-Ethylene-2,2'-Bipyridylum)Dibromide									
Disulfoton §§ § Disyston	298-04-4	Toxic				0.3 HA	0.3 HA	0.07	0.09
Diuron §§ § Karmex	330-54-1	Toxic				10 HA	10 HA	1	0.5
Endosulfan §§ § NCI C00566 § Malixv § Ensure § Beosit § Endocel § Thiodan § Cyclodan § Crisulfan § Benzoepin § Thiosulfan § SHA 079401 § Chlorthiepin § Endosulfan (mixed isomers) § Hexachlorohexahydromet hano 2,4,3- Benzodioxathiepin-3- Oxide § 1,4,5,6,7,7- Hexachloro-5- Norbornene-2,3- Dimethanol Cyclic Sulfite § 5-Norbornene-2, 3- Dimethanol, 1,4,5,6,7,7- Hexachloro Cyclic Sulfite § RCRA Waste Number P050	115-29-7 RB 9275000	Toxic	0.11 (39)	0.056 (39)	270	20 PP	20 PP	0.014	see Cis and trans isomers
Endosulfan, I (the cis isomer of Endosulfan) §§ § Thiodan I § Endosulfan-I § Alpha-Endosulfan § alpha-Endosulfan	959-98-8	Toxic	0.11 (39) PP	0.056 (39) PP	270	20 PP	20 PP		0.02
Endosulfan, II (the trans isomer of endosulfan)	33213-65-9	Toxic	0.11	0.056	270	20	20	0.004	0.02

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§§ § Thiodan II § Endosulfan- II § Beta-Endosulfan § beta-Endosulfan			(39) PP	(39) PP		PP	PP		
Endosulfan Sulfate §§ § 6,9-Methano-2,3,4- Benzodioxathiepin, 6,7	1031-07-8	Toxic			270	20 PP	20 PP	0.05	0.05
Endothall §§ § Hydout § Hydrothal-47 § Aquathol § SHA 038901 § Accelerate § Tri-Endothal § Endothal Hydout § 3,6- Endooxohexahydrophthali c Acid § Phthalic Acid, Hexahydro-3,6-endo-Oxy- § 7- Oxabicyclo(2,2,1)Heptane- 2,3-Dicarboxylic Acid § 1,2- Cyclohexanedicarboxylic Acid, 3,6-endo-Epoxy- § RCRA Waste Number P088	145-73-3 RN 7875000	Toxic				100 MCL	100 MCL	1	2
Endrin §§ § NCI C00157 § Endrex § Mendrin § Nendrin § Hexadrin § SHA 041601 § Compound 269 § 1,2,3,4,10,10-Hexachloro- 6,7-Epoxy- 1,4,4(a)5,6,7,8,8a- Octahydro-endo § 3,4,5,6,9,9-Hexachloro- 1a,2,2a,3,6,6a,7,7a- Octahydro-2, 7:3,6- Dimethanonaphth[2,3- b]oxirene § 1,4:5,8- Dimethanonaphthalene, 1,2,3,4,10,10-Hexachloro- 6,7-Epoxy- 1,4,4a,5,6,7,8,8a- Octahydro-Endo,Endo- § RCRA Waste Number P051	72-20-8 IO 1575000	Toxic with BCF >300	0.086 PP	0.036 PP	3,970	0.03 PP	2 MCL		0.006
Endrin Aldehyde	7421-93-4	Toxic with			3,970	1	1		0.03

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§§ Epichlorohydrin §§ § ECH § Epoxy Propane § - Epichlorohydrin § Chloromethyloxirane § RCRA Waste Number U041 § γ- Chloropropyleneoxide § 2- Chloropropylene Oxide § Glycerol Epichlorohydrin § 2,3-Epoxypropyl Chloride § 1-Chlor-2,3- Epoxypropane § 3-Chlor- 1,2-Epoxypropane	106-89-8 TX 4900000	BCF >300 Carcinogen				PP 10	PP 10	N/A	3
§§ Epichlorohydrin §§ § ECH § Epoxy Propane § - Epichlorohydrin § Chloromethyloxirane § RCRA Waste Number U041 § γ- Chloropropyleneoxide § 2- Chloropropylene Oxide § Glycerol Epichlorohydrin § 2,3-Epoxypropyl Chloride § 1-Chlor-2,3- Epoxypropane § 3-Chlor- 1,2-Epoxypropane						HA	HA		
<i>Escherichia coli</i> (Bacteria)	N/A	Harmful				(13)	Less than 1 (6)	N/A	1 per 100ml
Ethion §§ Phosphorodithioic acid, S,S'-methylene O,O',O'- tetraethyl ester § Diethion § Embathion § Ethanox § Ethiol 100 § Ethodan § Ethopaz § ethyl methylene phosphorodithioate § FMC-1240 § Fosfatox E § Fosfono P § HSDB 399 § Hylemox § KWIT § NIA 1240 § Niagara 1240 § Nialate § Phosphotox E § RP 8167 § Rhodocide § Rodocid § Vegfru fomisate	563-12-2	Toxic				3	3		0.3
Ethofumesate §§ 2-Ethoxy-2,3-dihydro- 3,3-dimethyl-5- benzofuranyl methanesulfonate § BRN 5759730 § CR 14658 § Caswell #427BB § HSDB 7451 § Nortron § Progress § Tramet	26225-79-6	Toxic				2,000	2,000		0.08
Ethofumesate §§ 2-Ethoxy-2,3-dihydro- 3,3-dimethyl-5- benzofuranyl methanesulfonate § BRN 5759730 § CR 14658 § Caswell #427BB § HSDB 7451 § Nortron § Progress § Tramet						HA	HA		
Ethylbenzene §§ § EB § NCI C56393 § Ethylbenzol §	100-41-4 DA 0700000	Toxic			37.5	68	700	0.002	1
Ethylbenzene §§ § EB § NCI C56393 § Ethylbenzol §						PP	MCL		

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Phenylethane § Ethyl Benzene § Benzene, Ethyl									
Fenamiphos §§ § Namacur	22224-92-6	Toxic				1.7 HA	1.7 HA		0.2
Fenbuconazole §§ 1H-1,2,4-Triazole-1- propanenitrile,alp-ha-(2- (4-chlorophenyl)ethyl)- alpha-phenyl- § 4-(4-chlorophenyl)-2- (1H-1,2,4-triazol-1- ylmethyl)butyronitrile	114369-43-6	Carcinogen				93 HA	93 HA	N/A	0.02
Fipronil §§ §HSDB 7051 §MB 46030 §RM1601 §Regent §UNII- QGH063955F	120068-37-3	Carcinogen				1 HA	1 HA	N/A	0.004
Flucarbazonone §§ Flucarbazonone § 1H-1,2,4-Triazole- 1carboxamide, 4,5- dihydro-3-methoxy-4- methyl-5-oxo-N((2- (trifluoromethoxy) phenyl)sulfonyl)-	145026-88-6	Toxic				3,000 HA	3,000 HA		300
Flucarbazonone sulfonamide §§ §	37526-59-3	Toxic				3,000 HA	3,000 HA		300
Fluometuron §§ § Flo-Met	2164-17-2	Carcinogen				83 HA	83 HA	N/A	0.5
Fluoranthene §§ § Idryl § Benzo(jk)Fluorene § Benzo(j,k)Fluorene § 1,2- Benzacenaphthene § 1,2- (1,8- Naphthylene)Benzene § Benzene, 1,2-(1,8- Naphthalenediyl)- § RCRA Waste Number U120	206-44-0 LL 4025000	Toxic BCF >300			1,150	20 PP	20 PP		10
Fluorene (PAH) §§	86-73-7	Toxic			30	50	50	0.25	5

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ 9H-Fluorene § Diphenylenemethane § o- Biphenylenemethane § 2,2'-Methylenebiphenyl						PP	PP		
Fluoride §§ Flourine § Fluoride § Fluoride(1-) § Perfluoride § Fluoride Ion § Fluorine, Ion § Soluable§ Fluoride § Hydrofluoric Acid, on(1-) § RCRA Waste Number P056	16984-48-8 LM 6290000	Toxic				4,000 MCL	4,000 MCL	5	200
Fluroxypyr	69377-81-7	Toxic				7,000 HA	7,000 HA		0.1
Fonofos §§ § Dyfonate	944-22-9	Toxic				10 HA	10 HA		1
Gamma Emitters (11) §§ Photon activity with Beta particles	Multiple	Carcinogen / Radioactiv e				4 mrem /yr MCL	4 mrem /yr MCL	N/A	
gamma-Chlordane §§ § Chlordane, beta-Isomer	5566-34-7	Carcinogen			14,100	0.008 HA	1 HA	N/A	0.006
gamma- hexachlorocyclohexane §§ Lindane § BHC § -BHC § Gamene § Lintox § Lintox § Hexcide § Aparsin § Agrocide § Afcide § BHC-gamma § gamma-BHC § HCH- gamma § gamma-HCH § Hexachlorocyclohexane § gamma- Hexachlorobenzene § gamma- Benzenhexachloride § gamma-Benzene Hexachloride § Hexachlorocyclohexane- gamma § Hexachlorocyclohexane (gamma)	58-89-9 GV 4900000	Toxic	0.95		130	0.2 MCL	0.2 MCL		0.02

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ HCB § Amatin § Smut-Go § Sanocide § Anticarie § Bunt-Cure § Bunt-No- More § Perchlorobenzene § Phenyl Perchloryl § No Bunt Liquid § Julin's Carbon Chloride § Co-op Hexa § Hexa C.B. § Benzene, Hexachloro-						PP	HA		
Hexachlorobutadiene §§ § 1,3- Hexachlorobutadiene § 1,3-Butadiene, Hexachloro- § 1,1,2,3,4,4- Hexachloro-1,3-Butadiene § 1,3-Butadiene, 1,1,2,3,4,4-Hexachloro- § HCBD § Dolan-Pur § Perchlorobutadiene § RCRA Waste Number U128	87-68-3 EJ 0700000	Carcinogen			2.78	0.1	5	N/A	0.5
Hexachlorocyclohexane §§	608-73-1	Carcinogen				0.066 NPP	0.066 NPP	N/A	0.01
Hexachlorocyclopentadiene §§ § HEX § HCP § PCL § C-56 § HCCPD § NCI C55607 § Hexachloropentadiene § Perchlorocyclopentadiene § 1,3-Cyclopentadiene, 1,2,3,4,5,5-Hexachloro- § RCRA Waste Number U130	77-47-4 GY 1225000	Toxic			4.34	4	50	1	5
Hexachloroethane §§ § Avlotane § Distokal § Distopan § Distopin § Egitol § Falkitol § Fasciolin § NCI C04604 § Phenohep § Mottenhexe § Perchloroethane § Hexachloroethylene § Ethane, Hexachloro- § Carbon Hexachloride §	67-72-1 KI 4025000	Carcinogen			86.9	1	30	N/A	1
						PP	HA		

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Ethane Hexachloride § Ethylene Hexachloride § 1,1,1,2,2,2- Hexachloroethane § RCRA Waste Number U131									
Hexazinone §§	51235-04-2	Toxic				300 HA	300 HA	1	0.02
Hydrogen Sulfide §§ § Stink Damp § Sulfur Hydride § Hydrogen Sulphide § Dihydrogen Sulfide § Dihydrogen Monosulfide § Hydrogen Sulfuric Acid § Hydrosulfuric Acid § Sulfurated Hydrogen § RCRA Waste Number U135	7783-06-4 MX 1225000	Toxic		2 NPP					20
Hydroxyatrazine §§ § Hydroxydechloroatrazine	2163-68-0	Toxic				70 HA	70 HA		7
Imazalil (Parent name Enilconazole) §§ 1-(2-(2,4- dichlorophenyl)-2-(2- propenyloxy)ethyl)-1H- imidazole § Enilconazole § BRN 054683 § Caswell #497AB § Chloramizol § Deccozil § Secozil S 75 § Fungaflor § HSDB 6672 § R 23979 § EPA Pesticide Code 111901	35554-44-0	Carcinogen				5.5 HA	5.5 HA	N/A	0.6
Imazamethabenz-methyl ester (includes the metabolite imazamethabenz methyl acid) (33) §§ Assert §	81405-85-8	Toxic				1,700 HA	1,700 HA		40
Imazamox §§	114311-32-9	Toxic				2x10 ⁴	2x10 ⁴		0.04

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ Ammonium salt of imazamox						HA	HA		
Imazapic §§ Imazapic § AC263222, Cadre, Imazameth, Imazamethapyr, Imazmethapyr	104098-48-8	Toxic				3,000	3,000		0.01
Imazapyr §§ Arsenal §	81334-34-1	Toxic				1.7x10 ⁴	1.7x10 ⁴		0.01
Imazethapyr §§ 3-pyridinecarboxylic acid, 2-(4,5-dihydro-4- methyl-4-(1-methylethyl)- 5oxo-1H-imidazol-2-yl)-5- ethyl- § AC 263,499 § CL263499 § HSDB 6678 § Pivot § Pursuit § EPA Pesticide Code# 128922	81335-77-5	Toxic				1.7x10 ⁴	1.7x10 ⁴		0.03
Imidacloprid §§	105827-78-9 138261-41-3	Toxic				380 HA	380 HA		0.07
Indeno(1,2,3-cd)pyrene (PAH) §§ § o-Phenylene pyrene § 2,3-Phenylene pyrene § 2,3-o-Phenylene pyrene § Indeno (1,2,3-cd) Pyrene § 1,10-(o- Phenylene)Pyrene § 1,10- (1,2-Phenylene)Pyrene § RCRA Waste Number U137	193-39-5 NK 9300000	Carcinogen			30	0.012	0.5 (29)	N/A	0.08
Iron §§ Fe § Ancor EN 80/150+A622 § Armco Iron	7439-89-6 NO 4565500	Harmful (aquatic life) Toxic (human health)		1,000 NPP			4000 HA (40)	N/A	20*
Isophorone §§ § Isoforon § NCI C55618 § Isoacetophorone § alpha-	78-59-1 GW 7700000	Carcinogen			4.38	340 PP	400 HA	N/A	10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Isophorone § 1,1,3- Trimethyl-3-Cyclohexene- 5-One § 3,5,5-Trimethyl-2- Cyclohexene-1-One § 3,5,5-Trimethyl-2- Cyclohexone									
Lead §§ Pb § C.I. 77575 § C.I. Pigment Metal 4 § Glover § Lead Flake § Lead 22 § Omaha § Omaha & Grant § SI § SO	7439-92-1 OF 7525000	Toxic	13.98 @ 25 mg/L hardness (12) PP	0.545 @ 25 mg/L hardness (12) PP	49	15 MCL	15 MCL	0.1	0.3
m-Xylene §§ § m-Xylol § 1,3-Xylene § meta-Xylene § m- Dimethylbenzene § m- Methyltolulene § 1,3- Dimethylbenzene § 1,3 Dimethyl Benzene	108-38-3 ZE 2275000	Toxic			1.17	1x10 ⁴ MCL	1x10 ⁴ MCL	0.5	2
Malathion §§ § Formal § Sumitox § Emmatoes § Celthion § Forthion § Malacide § Kop-Thion § Calmathion § Carbethoxy § NCI C00215 § Carbethoxy Malathion § SHA 057701 § Phosphothion § S-1,2- Bis(Ethoxycarbonyl)Ethyl- O,O-Dimethyl Thiophosphate § O, O- Dimethyl-S-(1,2- Dicarbethoxyethyl) Dithiophosphate § O,O- Dimethyl S-1,2- Di(Ethoxycarbonyl)Ethyl Phosphorodithioate § Succinic Acid, mercapto-, diethyl ester, S-Ester with O,O-Dimethyl Phosphorodithioate	121-75-5 WM 8400000	Toxic		0.1 NPP		470 HA	470 HA		0.09

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Manganese §§ Mn § Mangan & Colloidal manganese § Cutaval § Magnacat § Tronamang § Manganese, elemental § Manganese metal alloy § Manganese fume	7439-96-5	Toxic					100		5
MCPA §§ 4-chloro-2 methylphenoxy acetic acid	94-74-6	Toxic				3 HA	3 HA		0.008
MCPP §§ 2-(4-chloro-2- methylphenoxy)propionic acid § Mecoprop § 2M 4KhP § 2M-4CP § Anicon B § Anicon P § CMPP § Caswell #559 § Celatox CMPP § iso-Cornox § Isocarnox § Kilprop § Liranox § Mechlorprop § Mecomec § Mecopar § Mecopeop § Mecoper § Mecopex § Mecoprop § Mecoturf § Mecprop § Mepro § Methoxone § Morogal § Okultin § Proponex-pluse § RD 4593 § Rankotex § Runcatex § SYS 67 Mecmin § U 46 KV fluid § Vi-Par § Vi-Pex § EPA pesticide Code #031501	7085-19-0 93-65-2	Toxic				300 HA	300 HA		0.007
Mercury §§ Hg § Colloidal Mercury § Mercury, Metallic § NCI C60399 § Quick Silver § RCRA Waste Number U151	7439-97-6 OV 4550000	Toxic with BCF >300	1.7	0.91	5,500	0.05	2		0.005
Metalaxyl § Ridomil §	57837-19-1	Toxic							
Methamidophos §§ Monitor	10265-92-6	Toxic							

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ R 30 § DCM § Freon 30 § Aerotherene MM § NCI C50102 § Solmethine § Methane Dichloride § Methane, Dichloro- § 1,1- Dichloromethane § Methylene Bichloride § Methylene Dichloride						MCL	MCL		
Metolachlor (includes the metabolites metolachlor ESA and metolachlor OA (34) §§ Dual §	51218-45-2	Carcinogen				1,000	1,000	N/A	0.2
Metribuzin §§ Sencor §	21087-64-9	Toxic				170	170	10	0.1
Mirex §§ § NCI C06428 § Dechlorane § Bichlorendo § Ferriamicide § Perchloropentacyclodecan e § Dodecachloropentacyclod ecane § Hexachlorocyclopentadien e Dimer § Cyclopentadiene, Hexachloro-, Dimer § Perchloropentacyclo(5.2.1 .0[sup 2,6].0[sup 3,9].0[sup 5,8])Decane § Dodecachlorooctahydro- 1,3,4-Metheno-2H- Cyclobuta (c,d)Pentalene § 1,3,4-Metheno-1H- Cyclobuta[cd]Pentalene, 1,1a,2,2,3,3a,4,5,5,5a,5b,6 ,-Dodecachlorooctahydro-	2385-85-5 PC 8225000	Carcinogen		0.001		1	1	N/A	0.01
MTBE §§ Methyl Tertiary-Butyl Ether	1634-04-4	Harmful				30 (21)	30 (21)	N/A	1
Myclobutanil §§	88671-89-0	Toxic				170 HA	170 HA		0.03

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ EPA PCC 128857 § Nova § Rally § Systhane § Systhane 12E § Systhane 6 Flo									
N-Nitrosodimethylamine §§ Dimethylnitrosamine A707 § DMN § NDMA § DMNA § Nitrosodimethylamine § Dimethylnitrosoamine § N-Nitrosodimethylamine § N,N-Dimethylnitrosamine § Methylamine, N- Nitrosodi- § Dimethylamine, N- Nitroso- § N-Methyl-N- Nitrosomethanamine § Methamine, N-Methyl-N- Nitroso- § Methanamine, N-Methyl-N-Nitroso- § RCRA Waste Number P082	62-75-9 IQ 0525000	Carcinogen			0.026	0.0069	0.0069	N/A	5
N-Nitrosodiphenylamine §§ § NDPA § NDPhA § Vultrol § Curetard A § NCI C02880 § Redax § TJP § Retarder J § Vulcalent A § Vulcatard § Vultrol § Nitrosodiphenylamine § Diphenylnitrosamine § N,N-Diphenylnitrosamine § N-Nitroso-N- Phenylaniline § Diphenylamine, N- Nitroso- § Benzenamine, N-Nitroso-N-Phenyl-	86-30-6 JJ 9800000	Carcinogen			136	33	33	N/A	10
n-Dioctyl Phthalate §§ § DNOP § PX-138 § Vinicizer 85 § Dinopol NOP § n-Octyl Phthalate § Octyl Phthalate § Dioctyl Phthalate § Di-n-Octyl Phthalate § Di-sec-Octyl Phthalate § 1,2- Benzenedicarboxylic Acid,	117-84-0 TI 1925000	Carcinogen						N/A	10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Diocetyl Ester § RCRA Waste Number U107									
N-Nitrosodi-N- Propylamine §§ § DPN § DPNA § NDPA § DipropylNitrosamine § N- Nitrosodipropylamine § Di-n-PropylNitrosamine § Dipropylamine, N-Nitroso- § N-Nitrosodi-n- propylamine § N-Nitroso- di-n-propylamine § 1- Propanamine, N-Nitroso- n-Propyl- § RCRA Waste Number U111	621-64-7 JL 9700000	Carcinogen			1.13	0.05 PP	0.05 PP	N/A	5
N-Nitrosopyrrolidine §§ § NPYR § NO-pyr § N-N- pyr § 1-Nitrosopyrrolidene § Pyrrolidine, 1-Nitroso- § Tetrahydro-N- Nitrosopyrrole § Pyrrole, Tetrahydro-N-Nitroso- § RCRA Waste Number U180	930-55-2 UY 1575000	Carcinogen			0.055	0.16 NPP	0.16 NPP	N/A	0.02
Naphthalene §§ Moth Balls § Mighty 150 § NCI C52904 § Naphthene § White Tar§ Naphthalin § Tar Camphor § Caswell Number 587 § EPA Pesticide Chemical Code 055801 § RCRA Waste Number U165	91-20-3 QJ 0525000	Carcinogen			10.5	100 HA	100 HA	N/A	10
Nickel §§ Ni § C.I. 77775 § Ni 270 § Nickel 270 § Ni 0901-S § Ni 4303T § NP 2 § Raney Alloy § Raney Nickel	7440-02-0 QR 5950000	Toxic	145@ 25mg/L hardness (12) PP	16.1 @ 25 mg/L hardness (12) PP	47	100 HA	100 HA	0.5	2
Nicosulfuron §§ Accent	111991-09-4	Toxic				8,500	8,500	0.01	0.03

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§						HA	HA		
Nitrate (as Nitrogen[N])	14797-55-8	Toxic	(8)	(8)		1x10 ⁴	1x10 ⁴	surface water= 10, ground water= 5,000, see ARM 17.30.7 15	20
§§ NO3						NPP	NPP		
Nitrate plus nitrite (as Nitrogen[N])	See nitrate and nitrite	Toxic	(8)	(8)		1x10 ⁴	1x10 ⁴	surface water= 10, ground water= 5,000, see ARM 17.30.7 15	20
§§ NO3 + NO2						MCL	MCL		
Nitrite (as Nitrogen[N])	14797-65-0	Toxic	(8)	(8)		1,000 MCL	1,000 MCL	4	10
§§ NO2									
Nitrobenzene §§ § NCI C60082 § Mirbane Oil § Nitrobenzol § Oil of Mirbane § Benzene, Nitro- § Essence of Myrbane § RCRA Waste Number U169	98-95-3 DA 6475000	Carcinogen			2.89	10	10	N/A	10
						PP	PP		
Nitrogen, total inorganic (as Nitrogen[N])	See ammonia, nitrate and nitrite	Nutrient	(8)	(8)				10	10
§§ the sum of ammonia, nitrite, and nitrate									
Nitrophenol, 4- §§p-Nitropheno (DOT)I § 4-Hydroxynitrobenzene § NCI C55992) § RCRA Waste Number U170	100-02-7 SM 2275000	Toxic			3.31	50	50	2.4	60
						HA	HA		
o-Nitrophenol §§	88-75-5 SM 2100000	Toxic			2.33			0.45	10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ 2-Nitrophenol oxynitrobenzene									
Nitrosamines §§ -Nitrosamide § -NSC223080	35576-91-1	Carcinogen				0.008 NPP	0.008 NPP	N/A	8x10 ⁻⁴
Nitrosodibutylamine, N §§ Dibutyl nitrosamine § -1-Butanamine § BRN 1760378 § CCRIS 217 § EINECS 213-101-1 § HSDB 5107 § N-butyl-N-nitroso- 1-butamine § NDBA § NSC 6830 § RCRA waste number U172	924-16-3	Carcinogen				0.063 NPP	0.063 NPP	N/A	3
Nitrosodiethylamine, N §§ Diethylnitrosamine § -BRN 1744991 § CCRIS 239 § DEN § EINECS 200- 226-1 § Ethanamine, N- ethyl-N-nitroso § HSDB 4001 § NDEA § NSC 132 § RCRA waste number U174	55-18-5	Carcinogen				0.008 NPP	0.008 NPP	N/A	8x10 ⁻⁴
Nonylphenol §§ § 2,6-Dimethyl-4- heptylphenol § Hydroxyl No. 253	25154-52-3	Toxic	28 NPP	6.6 NPP					0.7
o-Xylene §§ § o-Xylol § 1,2-Xylene § ortho-Xylene § o- Methyltoluene § o- Dimethylbenzene § 1,2- Dimethylbenzene § 1,2- Dimethyl Benzene	95-47-6 ZE 2450000	Toxic			1.17	1x10 ⁴ MCL	1x10 ⁴ MCL	0.5	1

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Oxamyl §§ § D-1410 § DPX 1410 § Insecticide-Nematicide 1410 § Vydate § Thioxamyl § Methyl 2- (Dimethylamino)-N- § Vydate L, Insecticide/Nematicide § ({[Methylamino]Carbonyl} Oxy)-2- Oxoethanimidothioate § 2-Dimethylamino-1- (Methylthio)Glyoxal O- Methylcarbamoylmonozi me § Methyl N',N'- Dimethyl-N- ({Methylcarbamoyl}Oxy)- 1-Thiooxamimidate § N',N'-Dimethyl-N- [({Methylcarbamoyl}oxy)- 1-Methylthiooxamimidic Acid	23135-22-0 RP 2300000	Toxic				200	200	1	1
Oxydemeton Methyl §§ Metasystox R §	301-12-2	Toxic				0.7 HA	0.7 HA	1.4	0.07
Oxygen, dissolved (20) §§ O2 § Oxygen, Compressed § Oxygen, Refrigerated Liquid	7782-44-7 RS 2060000	Toxic	(15)	(15)					0.3 mg/L

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
p,p'- Dichlorodiphenyldichloroe thylene §§ DDE § DDE § p,p'-DDE § 4,4'- DDE § NCI C00555 § Dichlorodiphenyldichloroe thylene § Dichlorodiphenyldichloroe thylene, p,p'- § 2,2'-bis(4- Chlorophenyl)-1,1- Dichloroethylene § 1,1'- (Dichloroethenylidene)bis(4-Chlorobenzene) § 2,2'- bis(p-Chlorophenyl)-1,1- Dichloroethylene § Benzene, 1,1'- (Dichloroethenylidene)Bis[4-Chloro-	72-55-9 KV 9450000	Carcinogen			53,600	1.8x10 ⁻⁴ PP	1.8x10 ⁻⁴ PP	N/A	0.02
p,p'- Dichlorodiphenyldichloroe thane §§ DDD § TDE § Dilene § NCI C00475 § Rothane § Rhothane § 4,4'-DDD § p,p'-DDD § p,p'-TDE § 4',4'-D-DDD § RCRA Waste Number U060 § Tetrachlorodiphenylethan e § Dichlorodiphenyldichloroe thane § Dichlorodiphenyl Dichloroethane § 2,2-bis (4-Chlorophenyl)-1,1- Dichloroethane § 1,1- Dichloro-2,2-bis(p- Chlorophenyl) Ethane § 1,1-bis(4-Chlorophenyl)- 2,2-Dichloroethane § 2,2- bis(p-Chlorophenyl)-1,1- Dichloroethane § Benzene, 1,1'(2,2- Dichloroethylidene)Bis[4- Chloro-	72-54-8 KI 0700000	Carcinogen			53,600	0.0012 PP	0.0012 PP	N/A	0.02

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
p,p'- Dichlorodiphenyltrichloro ethane §§ DDT § DDT § 4,4'-DDT § Agritan § Anoflex § Arkotine § Azotox § Bosan Supra § Bovidermol § Chlorophenothan § Chlorophenothane § Chlorophenotoxum § Citox § Clofenotane § Dedelo § § Chlorophenothane § Diphenyltrichloroethane § Dichlorodiphenyltrichloro ethane § 4,4'- Dichlorodiphenyltrichloro ethane § 1,1,1-Trichloro- 2,2,-bis(p-Chlorophenyl) Ethane § 1,1,1-Trichloro- 2,2,-bis(p- Chlorophenyl)Ethane	50-29-3 KJ 3325000	Carcinogen	0.5	0.001	53,600	3x10 ⁻⁴	3x10 ⁻⁴	N/A	0.02
p-Bromodiphenyl Ether §§ Benzene, 1-Bromo-4- Phenoxy- § p-Bromodiphenyl Ether § 4- Bromophenoxybenzene § 4-Bromodiphenyl Ether § 1-Bromo-4- Phenoxybenzene § p- Bromophenylphenyl Ether § 4-Bromophenyl Phenyl Ether	101-55-3	Toxic with BCF >300			1,640				10
p-Chloro-m-Cresol §§3-methyl-4- chlorophenol	59-50-7 GO 7100000	Toxic				500	500	N/A	10

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ PCMC § Parol § Aptal § Baktol § Baktolan § Ottafact § Raschit § Rasen-Anicon § Parmetol § Candasetpic § Chlorocresol § Preventol CMK § Parachlorometra Cresol § 4-Chloro-3- methylphenol § 2-Chloro- Hydroxytoluene § Phenol, 4-Chloro-3-methyl- § Chlorophenol, 4-, methyl, 3- § RCRA Waste Number U039						PP	PP		
p-Xylene §§ § p-Xylol § Chromar § Scintillar § 1,4-Xylene § para-Xylene § p- Methyltoluene § p- Dimethylbenzene § 1,4- Dimethylbenzene § 1,4- Dimethyl Benzene	106-42-3 ZE 2625000	Toxic			1.17	1x10 ⁴	1x10 ⁴	0.5	2
Paraquat Dichloride §§	1910-42-5	Toxic				30 HA	30 HA	0.8	3
Parathion §§ § DNTP § Niran § Phoskil § Paradust § Stathion § Strathion § Pestox Plus § Nitrostigmine § Parathion Ethyl § Parathion-ethyl § Ethyl Parathion § Diethylparathion § Diethyl para-Nitrophenol Thiophosphate § Diethyl- p-Nitrophenyl Monothiophosphate § O,O-Diethyl O-4- Nitrophenyl Thiophosphate § Phosphorothioic Acid, O,O-Diethyl O-(4- Nitrophenyl) Ester § Caswell Number 637 § EPA Pesticide Chemical	56-38-2 TF 4920000,dry- liquid PAC250,dry	Carcinogen	0.065	0.013				N/A	0.2

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Code 057501 § RCRA Waste Number P089									

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Pentachlorobenzene §§ Benzene, Pentachloro- § QCB- § RCRA Waste Number U183	608-93-5 DA 6640000	Toxic with BCF >300			2,125	0.1 NPP	0.1 NPP		5
Pentachlorophenol §§ Penta § PCP § Durotox § Weedone § Chem-Tol § Lauxtol A § NCI C54933 § NCI C55378 § NCI C56655 § Permite § Dowcide 7 § Permacide § Penta-Kil§ Permagard § Penchlorol § Chlorophen § Pentachlorophenol § Pentachlorofenolo § Thompson's Wood Fix § Phenol, Pentachloro- § 2,3,4,5,6- Pentachlorophenol § 1- Hydroxy- 2,3,4,5,6- Pentachlorobenzene	87-86-5 SM 6300000	Carcinogen	5.3 @ pH of 6.5 (14) PP	4 @ pH of 6.5 (14) PP	11	0.3 PP	1 MCL	N/A	0.1
<u>Perfluorooctane Sulfonate (PFOS)</u> §§ § Perfluorooctane sulfonic acid § heptadecafluoro-1- octane sulfonic acid § PFOS acid	<u>1763-23-1</u>	<u>Toxic</u>					<u>.07</u> <u>(40)</u>		
<u>Perfluorooctanoic Acid (PFOA)</u> §§ § pentadecafluorooctanoic acid § Pentadecafluoro-1- octanoic acid § Pentadecafluoro-n- octanoic acid § Octanoic acid, pentadecafluoro- § Perfluorocaprylic acid § Pentadecafluorooctanoic acid; Perfluoroheptanecarboxyli c acid	<u>335-67-1</u>	<u>Toxic</u>					<u>.07</u> <u>(40)</u> HA (41)		

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Phenanthrene (PAH) §§ § Phenantrin	85-01-8 SF 7175000	Toxic			30			0.01	0.2
Phenol §§ § Baker's P and S Liquid and Ointment § NCI C50124 § Benzenol § Monophenol § Oxybenzene § Phenic Acid § Carboic Acid § Phenylic Acid § Hydroxybenzene § Hydroxybenzene § Phenyl Alcohol § Phenyl Hydrate § Phenylic Alcohol § Phenyl Hydroxide § Benzene, Hydroxy- § Monohydroxybenzene § RCRA Waste Number U188	108-95-2 SI 3325000	Toxic			1.4	4,000 PP	4,000 PP	100	10
Phosphorus, inorganic (20) §§ § Ortho-phosphorus § phosphorus, Ortho- § reactive phosphorus	14265-44-2 7723-14-0	Nutrient	(8)	(8)				1	1
Picloram §§ Tordon § ATCP § K-Pin § Borolin § Amdon Grazon § NCI C00237 § Tordon 10K § Tordon 22K § Tordon 101 Mixture § 3,5,6-Trichloro- 4-Aminopicolinic Acid § 4- Amino-3,5,6- Trichloropicolinic Acid	1918-02-1 TJ 7525000	Toxic				500 MCL	500 MCL	0.14	1
Pinoxaden (NOA 407855) (includes metabolites Pinoxaden NOA 407854 and pinoxaden NOA 447204) (35) §§	N/A	Toxic				2,000 HA	2,000 HA		200
Polychlorinated Biphenyls, (sum of all homolog, all isomer, all congener or all Aroclor analyses)	Multiple	Carcinogen		0.014	31,200	6.4x10 ⁻⁴	0.5	N/A	0.08

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
DBCP § EPA Pesticide Chemical Code 011301 § RCRA Waste Number U066									
Propazine §§	139-40-2	Carcinogen				100 HA	100 HA	N/A	0.03
Propam §§	122-42-9	Toxic				100 HA	100 HA	0.13	0.5
Propioconazole §§ 1-((2-(2,4- dichlorophenyl)-4propyl- 1,3-dioxolan-2-yl)methyl)- 1H-1,2,4-triazole § Banner § CGA-64250 § Caswell#323EE § Desmel § HSDB 6731 § Orbit § Radar § Tilt § EPA Pesticide # 122101	60207-90-1	Carcinogen				700 HA	700 HA	N/A	70
Propoxur §§ Baygon §	114-26-1	Carcinogen				24 HA	24 HA	N/A	0.4
Prosulfuron §§ Benzenesulfonamide, N(((4-methoxy-6-methyl- 1,3,5-triazin-2- yl)amino)carbonyl)-2- (3,3,3-trifluoropropyl)-	94125-34-5	Toxic				350 HA	350 HA		0.02
Pyrasulfotole §§ pyrasulfotole §	365400-11-9	Toxic				70 HA	70 HA		0.07
Pyrene (PAH) §§ § β-Pyrine § beta-Pyrene § Benzo(def)Phenanthrene § Benzo[def]Phenanthrene	129-00-0 UR 2450000	Toxic			30	20 PP	20 PP	0.25	10
Pyroxsulam	422556-08-9	Toxic				7,000 HA	7,000 HA		0.09
Radium 226 §§	13982-63-6	Carcinogen / Radioactiv e				5 picoC/ liter Note: The sum of Radium	5 picoC/ liter Note: The sum of Radium	N/A	

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
						226 and 228. MCL	226 and 228. MCL		
Radium 228 §§	15262-20-1	Carcinogen / Radioactiv e				5 picoC/ liter Note: The sum of Radium 226 and 228. MCL	5 picoC/ liter Note: The sum of Radium 226 and 228. MCL	N/A	
Radon 222 §§	14859-67-7	Carcinogen / Radioactiv e				300 picoC/ liter HA	300 picoC/ liter HA	N/A	
Saflufenacil	372137-35-4	Toxic				310 HA	310 HA		
Selenium §§ Se § C.I. 77805 § Colloidal Selenium § Elemental Selenium § Selenium Alloy § Selenium Base § Selenium Dust § Selenium Elemental § Selenium Homopolymer § Selenium Metal Powder, Non- Pyrophoric § Vandex	7782-49-2 VS 7700000 and VS 8310000, colloidal	Toxic	20	5	4.8	50	50	0.6	1
Silver §§ Ag § Argentum § C.I. 77820 § Shell Silver § Silver Atom	7440-22-4 NIOSH: VW 3500000	Toxic	0.374 @ 25 mg/L hardness (12) PP		0.5	100 HA	100 HA	0.2	0.2
Simazine §§ § CDT § Herbex § Framed § Bitamol § Radokor § A	122-34-9 XY 5250000	Carcinogen				4 MCL	4 MCL	N/A	0.5

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Pollutant Element / Chemical Compound or Condition §§ - Primary Synonym § - Other Names	CASRN numbers, NIOSH number (25) (26)	Category (1) (2)	Aquatic Life Standards (µg/L except where indicated)		Bio- concentratio n Factor (BCF) (µg/L) (5)	Human Health Standards (µg/L except where indicated) (17) (16)		Trigger Value (µg/L) (22)	Required Reporting Value (µg/L except where indicated) (19)
			Acute (3)	Chronic (4)		Surface Water	Ground Water		
2079 § Batazina § Cat (Herbicide) § CET § G 27692 § Geigy 27,692 § Gesaran § Gesatop 50 § Simazine 80W § Symazine § Taphazine § W 6658 § Zeapur § Princep § Aquazine § Herbazin § Tafazine § 2,4- bis(Ethylamino)-6-Chloro- s-Triazine § 1-Chloro, 3,5- Bisethylamino-2,4,6- Triazine § 2-Chloro-4,6- Bis(Ethylamino)-1,3,5- Triazine § 6-Chloro-N,N'- Diethyl-1,3,5-Triazine-2,4- Diylidiamine									
Strontium §§	7447-24-6	Toxic				4,000 HA	4,000 HA	100	20
Styrene §§ § Styrol § Cinnamol § Cinnamene § Cinnamenol § NCI C02200 § Styrole § Strolene § Styron § Stropor § Vinylbenzol § Phenethylene § Phenylethene § Vinylbenzene § Ethenylbenzene § Phenylethylene § Benzene, Vinyl- § Stryene, Monomer	100-42-5 WL 3675000	Carcinogen				100	100	N/A	0.9
Sulfentrazone	122836-35-5	Toxic				700 HA	700 HA		
Sulfometuron Methyl §§ Oust §	74222-97-2	Toxic				1,800 HA	1,800 HA	0.01	0.02
Sulfosulfuron §§ imidazo(1,2-a)pyridine- 3-sulfonamide,N-(((4,6- dimethoxy-2-	141776-32-1	Toxic				1,600	1,600		30

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
pyrimidinyl)amino)cabonyl)- 2-(ethylsulfonyl)- § Sulfosulfuron (ISO)						HA	HA		
Tebuconazole §§ 1H-1,2,4-Triazole-1- ethanol, alpha-(2-(4- chlorophenyl)ethyl)-apha- (1,1-dimethylethyl)- § BAY-HWG 1608 § Elite § Ethyltrianol § Etiltrianol § Fenetrazole § Folicur § LYNX § Preventol A 8 § Raxil § Terbucanazole § Terbutrazole § HWG 1608 § HSDB 7448	107534-96-3	Carcinogen				190	190	N/A	0.04
Tebuthiuron §§ TebuconazoleSpike	34014-18-1	Toxic				500	500	2	0.002
Terbacil §§ Sinbar §	5902-51-1	Toxic				83	83	2.2	0.02
Terbufos §§ Counter §	13071-79-9	Toxic				0.83	0.83	0.5	0.07
Tetrachlorobenzene, 1,2,4,5- §§ Benzene, 1,2,4,5- Tetrachloro- § RCRA Waste Number U207 § 1,2,4,5- Tetrachlorobenzene	95-94-3 DB 9450000	Toxic with BCF >300			1,125	0.03	0.03		5
Tetrachloroethane, 1,1,2,2- §§ Tetrachloroethane § TCE § Cellon § Westron § Bonoform § sym- Tetrachloroethane § Acetylene Tetrachloride § 1,1,2,2-Tetrachloroethane § Ethane, 1,1,2,2- Tetrachloro- § 1,1- Dichloro-2,2- Dichloroethane § RCRA Waste Number U209	79-34-5 NIOSH: KI 8575000	Carcinogen			5	2	2.0	N/A	0.5
Tetrachloroethylene	127-18-4	Carcinogen			30.6	5	5	N/A	0.7

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§§ Perchlorethylene § NCI C04580 § PCE § Perk § PERC § ENMA § Dow-Per § Perchlor § Perclene § Perklone § Didakene § Tetra Cap § Percosolve § Perchloroethylene § Tetrachloroethene § Carbon Bichloride § Carbon Dichloride § Ethylene Tetrachloride § Ethylene, Tetrachloro- § 1,1,2,2- Tetrachloroethylene § RCRA Waste Number U210	KX 3850000					MCL	MCL		
Thallium §§ TI § Ramor	7440-28-0 XG 3425000	Toxic			119	0.24 PP	2 MCL	0.3	0.2
Thiamethoxam	153719-23-4	Toxic				80 HA	80 HA		
Thifensulfuron Methyl §§ Harmony § Pinnacle	79277-27-3	Toxic				290 HA	290 HA	1	90
Toluene §§ § Antisal 1a § NCI C07272 § Toluol § Tolu-Sol § Methacide § Methylbenzol § Methylbenzene § Phenylmethane § Phenyl- Methane § Methyl- Benzene § Benzene, Methyl § RCRA Waste Number U220	108-88-3 XS 5250000	Toxic			10.7	57 PP	1,000 MCL	0.01	1
Toxaphene §§ § Attac 4-2 § Alltox § Alltex § Attac 6 § Toxakil § Agricide § Chem-Phene § Clor Chem T-590 § Compound 3956 § Crestoxo § Estonox § Geniphene § Gy-Phene § Hercules 3956 § Melipax §	8001-35-2 XW 5250000	Carcinogen	0.73 PP	0.0002 PP	13,100	0.007 PP	0.3 HA	N/A	1

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Motox § PCC § Phenacide § Toxaphene mixture § Chlorinated-Camphene § Camphene, Octachloro- § RCRA Waste Number P123									
Tralkoxydim (28) §§ Achieve	87820-88-0	Carcinogen	3,750			30 HA	30 HA	N/A	2
trans-1,2- Dichloroethylene §§ § trans-Dichloroethylene § RCRA Waste Number U079 § trans-1,2- Dichloroethane § trans- 1,2-Dichloroethene § Dichloroethylene, trans-§ trans-Acetylene Dichloride § 1,2-trans- Dichloroethylene § Ethene, 1,2-Dichloro-, €- § 1,2-Dichloroethylene, trans-	156-60-5 KV 9400000	Toxic			1.58	100	100	0.05	0.6
trans-1,3-Dichloropropene §§ § 1,3-Dichloropropene § 1,3-Dichloropropylene § (E)-1,3-Dichloropropene § trans-1,3- Dichloropropylene § 1- Propene, 1,3-Dichloro-, (E)-	10061-02-6 UC 8320000	Carcinogen			1.91	2	2	N/A	0.3
trans-Nonachlor (Chlordane component) §§ § Chlordane, trans-Isomer	39765-80-5	Carcinogen			14,100	0.008	1	N/A	0.1
Triallate §§ § Avadex BW § BRN 1875853 § Dipthal § Far- Go § Triamyl	2303-17-5	Carcinogen				4.6	4.6	N/A	5
Triasulfuron §§ Amber	82097-50-5	Toxic				70 HA	70 HA	1	0.03
Tribenuron Methyl §§ Express	101200-48-0	Carcinogen				50 HA	50 HA	N/A	6
Tributyltin (TBT)	56573-85-4	Toxic	0.46	0.072					0.007

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§§ Tin-San § Tributyltin chloride complex § EPA Pesticide Chemical #083108			NPP	NPP					
Trichlorobenzene, 1,2,4- §§ Benzene, 1,2,4- Trichloro- § unsym-Trichlorobenzene § 1,2,4-Trichlorobenzene	120-82-1 DC 2100000	Toxic			114	0.071 PP	70 MCL	0.02	10
Trichloroethane, 1,1,2- §§ Vinyl Trichloride § 1,1,2-Trichloroethane § β-T § Ethane Trichloride § beta-Trichloroethane § NCI C04579 § Ethane, 1,1,2-Trichloro- § Caswell Number 875A [NLM] § EPA Pesticide Chemical Code 081203 [NLM]§ 1,2,2-Trichloroethane § RCRA Waste Number U227	79-00-5 KJ 3150000	Carcinogen			4.5	5 MCL	3 HA	N/A	0.7
Trichloroethane, 1,1,1- §§ Methyl Chloroform § -T § Strobane § Inhibisol § 1,1,1-TCE § Tri-Ethane § Solvent 111 § Aerothene TT § Chloroethene § Chlorten § NCI C04626 § Methylchloroform § Chloroform, Methyl- § 1,1,1-Trichloroethene § alpha-Trichloroethane § Methyltrichloromethane § 1,1,1-Trichloroethane § Ethane, 1,1,1-Trichloro-§ RCRA Waste Number U226	71-55-6 KJ 2975000	Toxic			5.6	200 MCL	200 MCL	0.5	0.7
Trichloroethylene §§	79-01-6 KX 4550000	Carcinogen			10.6	5	5	N/A	0.5

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
§ TCE § Triad § Vitran § Algylen § Dow-Tri § Lanadin § Vestrol § Anamenth § Benzinol § Tri-Plus § Tri-Clene § Trichlorethene § Trichloroethene § Trichloroethane § Trichlorethylene § Ethene, Trichloro- § Ethylene Trichloride § Ethylene, Trichloro- § Acetylene Trichloride § 1,1,2- Trichloroethylene § 1,2,2- Trichloroethylene § 1- Chloro-2,2- Dichloroethylene § 1, 1- Dichloro-2-Chloroethylene						MCL	MCL		
Trichlorofluoromethane (HM) §§ Freon 11 § F 11 § FC 11 § Arcton 9 § Eskimon 11 § Halocarbon 11 § Algofrene Type 1 § Fluorocarbon Number 11 § NCI C04637 § Isotron 11 § Fluorotrichloromethane § Isceon 131 § Monofluorotrichlorometh ane § Ucon Refrigerant 11 § Trichloromonofluorometh ane § RCRA Waste Number U121	75-69-4 PB 6125000	Toxic			3.75	2,000	2,000	0.07	0.8
Trichlorophenol, 2,4,5- §§ Dowcide B § 2,4,5-Trichlorophenol § Nurelle § Dowcide 2 § Collunosol § Preventol 1 § NCI C61187 § RCRA Waste Number U230	95-95-4 SN 1400000	Toxic			110	300	300	10	60
Trichlorophenol, 2,4,6- §§ Phenachlor § Omal § Phenol, 2,4,6- trichloro- § NCI C02904 § 2,4,6-Trichlorophenol §	88-06-2 SN 1575000	Carcinogen			150	15	30	N/A	10
						PP	HA		

[illegible][illegible]

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Uranium, natural §§ U § Uranium Metal, Pyrophoric	7440-61-1 YR 3490000	Carcinogen / Radioactiv e				30 MCL	30 MCL	N/A	0.2
Vinyl 2-Chloroethyl Ether §§ Vinyl β-Chloroethyl Ether- § 2-Chloroethyl Vinyl Ether § (2- Chloroethoxy)Ethene § RCRA Waste Number U042	110-75-8 KN 6300000	Carcinogen			0.557			N/A	2
Vinyl Chloride §§ § VC § VCM § Chlorethene § Chloroethene § Chlorethylene § Chloroethylene § Ethylene, Chloro- § Monochloroethylene § Ethylene Monochloride § Vinyl Chloride Monomer § Vinyl C Monomer § Trovidur § RCRA Waste Number U043	75-01-4 KU 9625000	Carcinogen			1.17	0.22 PP	0.2 HA	N/A	0.4
Xylenes, total §§ § Xylol § Violet 3 § Mixed Xylenes § Methyl Toluene § Dimethylbenzene § NCI C55232 § Total equals the sum of meta, ortho, and para. § RCRA Waste Number U239	1330-20-7 ZE 2100000	Toxic			1.17	1x10 ⁴ MCL	1x10 ⁴ MCL	0.5	3

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			Acute (3)	Chronic (4)		Surface Water	Ground Water		
Zinc §§ Zn § Blue Powder § C.I. 77945 § C.I. Pigment Black 16 § C.I. Pigment Metal 6 § Emanay Zinc Dust § Granular Zinc § Jasad § Merrillite § Pasco § Zinc, Powder or Dust, non- Pyrophoric § Zinc, Powder or Dust, Pyrophoric	7440-66-6 ZG 8600000	Toxic	37 @ 25 mg/L hardness (12)	37 @ 25 mg/L hardnes s (12)	47	7,400	2,000	5	8
			PP	PP		PP	HA		

FOOTNOTES

- (1) Categories include toxic, carcinogen, and harmful. Parameters categorized as toxic and carcinogenic are based on EPA's Integrated Risk Information System (IRIS). Parameters categorized by the Department as harmful include biological agents (such as E. coli), parameters that cause taste and/or odor effects (such as MTBE), and parameters that generate physical effects (such as iron).
- (2) Chemicals classified by EPA as carcinogens for an oral route of exposure in the drinking water regulations and health advisories (EPA 822-B-96-002 and EPA 820-R-11-002) and those listed as carcinogens in the EPA priority pollutants list. In 2005, the EPA added a new scale to describe carcinogens and both the 1986 and 2005 scales are now in simultaneous use. The classifications considered carcinogenic in the 1986 scale are as follows: A (human carcinogen); B1 or B2 (probable human carcinogens); and C (possible human carcinogen). In the 2005 scale, the following categories are considered carcinogens: H (human carcinogen); L (likely carcinogen); L/N (likely to be carcinogenic above a specified dose) and S (suggestive evidence of carcinogenic potential).
- (3) The one-hour average concentration of these parameters in surface waters may not exceed these values more than once in any three year period, on average, with the exception of silver, which, at present, is interpreted as a "not to exceed" value.
- (4) The 96 hour average concentration of these parameters in surface waters may not exceed these values more than once in any three year period, on average.
- (5) All bioconcentration factors (BCFs) were developed by the EPA as part of the Standards development as mandated by Section 304(a) of the federal Clean Water Act. National Recommended Water Quality Criteria: 2002 Human Health Criteria Calculation Matrix (EPA-822-R-02-012).
- (6) The 24 hour geometric mean value must not exceed these values.
- (7) Freshwater Aquatic Life Standards for total ammonia nitrogen (mg/L $\text{NH}_3\text{-N}$ plus $\text{NH}_4\text{-N}$).

Because these formulas are non-linear in pH and temperature, the Standard is the average of separate evaluations of the formulas reflective of the fluctuations of pH and temperature within the averaging period; it is not appropriate to apply the formula to average pH and temperature.

1. The one-hour average concentration of total ammonia nitrogen (in mg/L) does not exceed the CMC (acute criterion) calculated using the following equations.

Where salmonid fish are present:

$$\text{CMC} = \frac{0.275}{1 + 10^{7.204 - \text{pH}}} + \frac{39.0}{1 + 10^{\text{pH} - 7.204}}$$

Or where salmonid fish are not present:

$$\text{CMC} = \frac{0.411}{1 + 10^{7.204 - \text{pH}}} + \frac{58.4}{1 + 10^{\text{pH} - 7.204}}$$

2. The thirty-day average concentration of total ammonia nitrogen (in mg/L) does not exceed the CCC (chronic criterion) calculated using the following equations.

When fish early life stages¹ are present:

$$CCC = \left(\frac{0.0577}{1 + 10^{7.688 - pH}} + \frac{2.487}{1 + 10^{pH - 7.688}} \right) \times \text{MIN} (2.85, 1.45 \times 10^{0.028 \times (25 - T)})$$

When fish early life stages¹ are absent:

$$CCC = \left(\frac{0.0577}{1 + 10^{7.688 - pH}} + \frac{2.487}{1 + 10^{pH - 7.688}} \right) \times 1.45 \times 10^{0.028 \times (25 - \text{MAX}(T, 7))}$$

¹Includes all embryonic and larval stages and all juvenile forms of fish to 30-days following hatching.

3. In addition, the highest four-day average within the 30-day period should not exceed 2.5 times the CCC.

Table 1. pH-Dependent Values of the CMC (Acute Criterion) for Ammonia.

CMC, total ammonia nitrogen (µg/L NH ₃ -N plus NH ₄ -N)		
pH	Salmonids Present	Salmonids Absent
6.5	32600	48800
6.6	31300	46800
6.7	29800	44600
6.8	28100	42000
6.9	26200	39100
7.0	24100	36100
7.1	22000	32800
7.2	19700	29500
7.3	17500	26200
7.4	15400	23000
7.5	13300	19900
7.6	11400	17000
7.7	9650	14400
7.8	8110	12100
7.9	6770	10100
8.0	5620	8400
8.1	4640	6950
8.2	3830	5720
8.3	3150	4710
8.4	2590	3880
8.5	2140	3200
8.6	1770	2650
8.7	1470	2200
8.8	1230	1840
8.9	1040	1560
9.0	885	1320

Table 2. Temperature and pH-Dependent Values of the CCC (Chronic Criterion) for Fish Early Life Stages Present and for Fish Early Life Stages Absent.

CCC for Fish Early Life Stages Present, total ammonia nitrogen ($\mu\text{g/L NH}_3\text{-N plus NH}_4\text{-N}$)										
pH	Temperature, °C									
	0	14	16	18	20	22	24	26	28	30
6.5	6670	6670	6060	5333	4680	4120	3620	3180	2800	2460
6.6	6570	6570	5970	5250	4610	4050	3560	3130	2750	2420
6.7	6440	6440	5860	5150	4520	3980	3500	3070	2700	2370
6.8	6290	6290	5720	5030	4420	3890	3420	3000	2640	2320
6.9	6120	6120	5560	4890	4300	3780	3320	2920	2570	2250
7.0	5910	5910	5370	4720	4150	3650	3210	2820	2480	2180
7.1	5670	5670	5150	4530	3980	3500	3080	2700	2380	2090
7.2	5390	5390	4900	4310	3780	3330	2920	2570	2260	1990
7.3	5080	5080	4610	4060	3570	3130	2760	2420	2130	1870
7.4	4730	4730	4300	3780	3320	2920	2570	2260	1980	1740
7.5	4360	4360	3970	3490	3060	2690	2370	2080	1830	1610
7.6	3980	3980	3610	3180	2790	2450	2160	1900	1670	1470
7.7	3580	3580	3250	2860	2510	2210	1940	1710	1500	1320
7.8	3180	3180	2890	2540	2230	1960	1730	1530	1330	1170
7.9	2800	2800	2540	2240	1960	1730	1520	1330	1170	1030
8.0	2430	2430	2210	1940	1710	1500	1320	1160	1020	897
8.1	2101	2101	1910	1680	1470	1290	1140	1000	879	773
8.2	1790	1790	1630	1430	1260	1110	973	855	752	661
8.3	1520	1520	1390	1220	1070	941	827	727	639	562
8.4	1290	1290	1170	1030	906	796	700	615	541	475
8.5	1090	1090	990	870	765	672	591	520	457	401
8.6	920	920	836	735	646	568	499	439	386	339
8.7	788	788	707	622	547	480	422	371	326	287
8.8	661	661	601	528	464	408	359	315	277	244
8.9	565	565	513	451	397	349	306	269	237	208
9.0	486	486	442	389	342	300	264	232	204	179

*At 15 C and above, the criterion for fish *ELS absent* is the same as the criterion for fish *ELS present*

- (8) A plant nutrient, excessive amounts of which may cause violations of Administrative Rules of Montana (ARM) 17.30.637 (1)(e).
- (9) Approved methods of sample preservation, collection, and analysis for determining compliance with the standards set forth in DEQ-7 are found in the surface water quality standards (ARM17.30.601, et seq.) and the ground water rules (ARM 17.30.1001, et seq.).

Standards for metals (except aluminum) in surface water are based upon the analysis of samples following a "total recoverable" digestion procedure (EPA Method 200.2, Supplement I, Rev. 2.8, May, 1994).

Standards for alpha emitters, beta emitters and gamma emitters in surface waters are based upon the analysis of unfiltered samples and appropriate EPA approved analysis methods.

Standards for metals in ground water are based upon the dissolved portion of the sample (after filtration through a 0.45 µm membrane filter, as specified in "Methods for Analysis of Water and Wastes" 1983, Environmental Monitoring and Support Laboratory, U.S. Environmental Protection Agency, EPA-600/4-79-020, or equivalent). Standards for alpha emitters, beta emitters and gamma emitters in ground water are based upon the analysis of unfiltered samples and appropriate EPA approved analysis methods.

Standard for organic parameters in surface water and ground water are based on unfiltered samples.

- (10) Calculation of an equivalent concentration of 2,3,7,8-TCDD is to be based on congeners of CDDs/CDFs and the toxicity equivalency factors (TEF) in van den Berg, M: et al. (2006) The 2005 World Health Organization Re-evaluation of Human and Mammalian Toxic Equivalency Factors for Dioxins and Dioxin-like Compounds. Toxicological Sciences 93(2):223-241. The analysis method to be used is EPA Method 1613, Revision B, Tetra- through Octa-Chlorinated Dioxins and Furans by Isotope Dilution HRGC/HRMS), EPA Method 8290, or other method approved by the department on case by case basis. The Required Reporting Value(s) (RRV) for Dioxin and congeners are to be the lowest detection level for the analysis method approved by the Department.
- (11) Radionuclides consisting of alpha emitters, beta emitters and gamma emitters are classified as carcinogens. "Alpha emitters" means the total radioactivity due to alpha particle emission. "Beta emitters" means the total radioactivity due to beta particle emission. "Gamma emitters" means the total radioactivity due to gamma particle emission. The emitters covered under this Standard include but are not limited to: Cesium, radioactive Iodine, radioactive Strontium-89 and -90, radioactive Tritium Gamma photon emitters.
- (12) Freshwater aquatic life standards for these metals are expressed as a function of total hardness (mg/L, CaCO₃). The values displayed in the chart correspond to a total hardness of 25 mg/L. The hardness relationships are:

	Acute = $\exp.\{ma[\ln(\text{hardness})]+ba\}$			Chronic = $\exp.\{mc[\ln(\text{hardness})]+bc\}$	
	ma	ba		mc	Bc
Cadmium	0.9789	-3.866		0.7977	-3.909
Copper	0.9422	-1.700		0.8545	-1.702
Chromium (III)	0.819	3.7256		0.819	0.6848
Lead	1.273	-1.46		1.273	-4.705
Nickel	0.846	2.255		0.846	0.0584
Silver	1.72	-6.52			
Zinc	0.8473	0.884		0.8473	0.884

Note: If the hardness is <25mg/L as CaCO₃, the number 25 must be used in the calculation. If the hardness is greater than or equal to 400 mg/L as CaCO₃, 400 mg/L must be used in the calculation.

- (13) The surface water E. coli human health standards were adopted to protect recreational uses of surface waters in Montana and vary based on the water-use classification. See Administrative Rules of Montana (ARM), title 17, Chapter 30 - Water Quality, Sub-Chapter 6 - Surface Water Quality Standards.

- (14) Freshwater aquatic life standard for pentachlorophenol is dependent on pH. Values displayed in the chart correspond to a pH of 6.5 and are calculated as follows:

$$\text{Acute} = \exp[1.005(\text{pH}) - 4.869] \quad \text{Chronic} = \exp[1.005(\text{pH}) - 5.134]$$

- (15) Freshwater aquatic life standards for dissolved oxygen in milligrams per liter are as follows:

	Standards for Waters Classified		Standards for Waters Classified	
	A-1, B-1, B-2, C-1, and C-2		B-3, C-3, and I	
	Early Life Stages ^{1,2}	Other Life Stages	Early Life Stages ²	Other Life Stages
30 Day Mean	N/A ³	6.5	N/A ³	5.5
7 Day Mean	9.5 (6.5)	N/A ³	6.0	N/A ³
7 Day Mean	N/A ³	5.0	N/A ³	4.0
Minimum				
1 Day Minimum ⁴	8.0 (5.0)	4.0	5.0	3.0

¹ These are water column concentrations recommended to achieve the required inter-gravel dissolved oxygen concentrations shown in parentheses. For species that have early life stages exposed directly to the water column, the figures in parentheses apply.

² Includes all embryonic and larval stages and all juvenile forms of fish to 30 days following hatching.

³ N/A (Not Applicable).

⁴ All minima should be considered as instantaneous concentrations to be achieved at all times.

- (16) Surface or groundwater concentrations may not exceed these values.

- (17) Source of the criteria used to derive the standard:

PP = priority pollutant criteria

NPP = non-priority pollutant criteria

OL= organoleptic pollutant criteria

MCL = Maximum contaminant level from the drinking water regulations

HA = health advisory developed from EPA's "Drinking Water Standards and Health Advisories" (October 1996) guidance, using recent scientific evidence and verified by EPA Region VIII toxicologist

- (18) Reserved

- (19) The required reporting value (RRV) is the Department's selection of a laboratory reporting limit that can be met by the majority of local laboratories. In most cases, the RRV is sufficiently sensitive to meet the most stringent numeric water quality standard. The RRV shall be used when reporting surface water or ground water monitoring or compliance data to the Department unless otherwise specified by the Department in a permit, approval or authorization issued by the Department.

Montana Pollutant Discharge Elimination System (MPDES) applicants and permittees must use EPA-approved analytical methods that are capable of detecting and measuring the pollutants at, or below, the applicable water quality standards or permit limits ("sufficiently sensitive methods"). If an RRV included in this document is not lower than the applicable water quality standard or permit

limit but an EPA-approved analytical method is capable of detecting and measuring the pollutant at, or below, the applicable water quality standard, then the minimum level for the sufficiently sensitive method supersedes the RRV.

It is the responsibility of the sampling entity to ensure that appropriate methods and reporting limits are requested from the laboratory to meet analytical and reporting limit needs.

- (20) Applicable to surface waters only.
- (21) Based on taste and odor thresholds given in EPA 822-f-97-008 December 1997.
- (22) Trigger Values are used to determine if a given increase in the concentration of toxic parameters is significant or non-significant as per the nondegradation rules ARM 17.30.701 et seq. The acronym "N/A" means "not applicable".
- (23) Reserved
- (24) Reserved
- (25) CASRN is an acronym for the American Chemical Society's Chemical Abstracts Service Registry Number.
- (26) The NIOSH RTECS number is a unique number used for identification in the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances.
- (27) Reserved
- (28) The sum of the concentrations of tralkoxydim and its breakdown products shall not exceed the standards listed. For a list of known breakdown products, see EPA memorandum "EFED's Section 3 Review for Tralkoxydim (Chemical #121000; Case # 060780; DP Barcodes 0234682, 0234752, 0238697, 0235723 & 0239519)," and the associated "Environmental Fate Assessment for Tralkoxydim."
- (29) Ground water human health standard is based on the relative potency for selected PAH compounds listed in Table 8 of the EPA "Provisional Guidance for Quantitative Risk Assessment of Polycyclic Aromatic Hydrocarbons" July 1993, EPA/600/R-93/089.
- (30) The sum of the concentrations of acetochlor and the breakdown products, acetochlor ESA and acetochlor OA, shall not exceed the standards listed.
- (31) The sum of the concentrations of alachlor and the breakdown products, alachlor ESA and alachlor OA, shall not exceed the standards listed.
- (32) The sum of the concentrations of atrazine and the breakdown products, deethyl atrazine, deisopropyl atrazine, and deethyl deisopropyl atrazine, shall not exceed the standards listed.
- (33) The sum of the concentrations of imazamethabenz-methyl ester and the breakdown product, imazamethabenz-methyl acid, shall not exceed the standards listed.

- (34) The sum of the concentrations of metolachlor and the breakdown products, metolachlor ESA and metolachlor OA, shall not exceed the standards listed.
- (35) The sum of the concentrations of pinoxaden (NOA 407855) and the breakdown products, pinoxaden NOA 407854 and pinoxaden NOA 447204, shall not exceed the standards listed.
- (36) The human health criterion for arsenic is the more restrictive of the risk based level of 1 in 1,000 [1×10^{-3}] or the MCL.
- (37) The quantitative combination of two or more of aldicarb, aldicarb sulfone and aldicarb sulfoxide shall not exceed 7 µg/L because each has a similar mode of action.
- (38) The quantitative sum of all listed haloacetic acids is used in determining the total haloacetic acid concentration.

(39) The sum of the concentrations of endosulfan and its isomers endosulfan I and endosulfan II shall not exceed the standards listed.

(40) The following human health standards were developed by the Department using non-standard assumptions and/or using data or guidance not listed at the start of this circular. The details of the Department's methods for deriving these criteria are found in the Montana Administrative Record (MAR) chapter, pages, and date associated with the specified standards. Refer to the most recent MAR date for standards which have been changed repeatedly. (A) ground-water diallate, iron, manganese: XX Mont. Admin. Register XXXX, XXXX to XXXX (XXX XX, XXXX).

~~(39)~~(41) The sum of the concentrations of PFOA and PFOS ([PFOA] + [PFOS]) shall not exceed the individual standards listed (0.07 µg/L).

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**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE INITIATION

Agenda # III.A.2.

Agenda Item Summary: The department requests that the board initiate rulemaking to amend an existing air quality rule and adopt new rules to establish a new registration program for portable sources of emissions, including crushing and screening plants, concrete batch plants, asphalt plants, and associated engines. The registration program would require eligible sources to register with the department in lieu of obtaining or maintaining a Montana air quality permit.

List of Affected Rules: This rulemaking would amend Administrative Rules of Montana (ARM) 17.8.744 and adopt New Rules I-IX.

Affected Parties Summary: The proposed new rules and rule amendment would affect approximately 156 entities that currently hold Montana air quality permits for facilities that would be eligible to register. It would also affect an unknown number of additional owners or operators of facilities that are currently below the permitting threshold but that would be required to register under the proposed new program.

Scope of Proposed Proceeding: The department requests that the board initiate rulemaking and designate a hearing officer to hold a public hearing to consider the proposed amendment and adoption of the above-stated rules.

Background: Currently, with specified exemptions, the administrative rules adopted under the Clean Air Act of Montana require the owner or operator of sources of air pollution to obtain a permit prior to construction or operation. The department has been permitting sources of air pollution for decades by conducting a case-by-case analysis of potential emissions and environmental impacts that would result from operation of the equipment at the proposed source. The department has identified potential efficiency gains by replacing the permitting process with a registration program where appropriate, such as for oil and gas well facilities and for the facilities proposed to be included in this rulemaking.

Section 75-2-234, MCA, allows the board to adopt a registration system that would streamline the process by which the department applies air quality requirements to certain types of sources. The registration system would take the place of the existing case-by-case permitting process for these sources. For example, the board adopted a registration system for oil and gas well facilities in 2006, which allowed the department to effectively deal with hundreds of nearly identical permit applications in an administratively efficient manner without compromising air quality protections. The department is requesting the board to amend a rule and adopt new rules to implement a

new registration system for portable facilities, many of which currently require a Montana air quality permit.

The facilities proposed to be included in the new registration system include nonmetallic mineral processing plants, commonly known as crushing and screening operations, asphalt plants, concrete batch plants, and the engines that are often associated with these facilities. These facilities are considered portable based on their ability to move from one location to another location.

The proposed new rules would provide a system for the owner or operator of a portable facility to register with the department in lieu of submitting a permit application and obtaining a permit. The owner or operator of a registered portable facility still would be required to supply information that is consistent with the type of information currently required in a permit application. Registered facilities would still be required to follow rules of operation that are similar to current permit conditions. These rules of operation would include emission limitations, air pollution control equipment installation and operation requirements, and requirements for testing, monitoring, and reporting. The registered facilities also would still be subject to other applicable local, state, and federal requirements.

Registration in lieu of permitting is appropriate for source categories in which there are a large number of similar sources subject to identical requirements and for which there is no substantial benefit from individual permitting. For these homogeneous facilities, the permit conditions and environmental impacts vary little from facility to facility. The facilities proposed to be included in this registration system fit into this category of sources. Implementing a registration system would allow the department to use air program staff more efficiently and refocus on major source permitting issues and compliance assistance in the field.

The proposed amendment to ARM 17.8.749 would provide an exemption from the requirement to obtain a Montana air quality permit for facilities that register with the department in accordance with the proposed new rules. The proposed new registration system consists of nine new administrative rules that address program definitions, applicability, requirements associated with the registration process, emission limitations and control requirements, notification of physical locations of operation, recordkeeping and reporting, and the deregistration process. The proposed new and amended administrative rules, together with existing administrative rules that remain applicable, comprise a program of air quality protection that is at least equivalent to the current permitting system.

The department prepared a programmatic Environmental Assessment to analyze the potential impacts of implementing the proposed new registration program. This document is currently available for review on the department's website at <http://deq.mt.gov/Air/PublicEngagement/CAAAC>. Should the board initiate rulemaking, the document will be published for public comment with the proposed rules at <http://deq.mt.gov/Public/publiccomment>, as indicated in the attached notice.

Hearing Information: The department recommends that the board appoint a hearing officer and conduct a public hearing to take comment on the proposed new rules and rule amendment.

Board Options: The board may:

1. Initiate rulemaking and issue the attached Notice of Public Hearing on Proposed Amendment;
2. Modify the Notice and initiate rulemaking; or
3. Determine that the amendment 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 and appoint a hearing officer to conduct a public hearing, as described in the attached proposed MAR notice.

Enclosures:

1. Draft Notice of Public Hearing on Proposed Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF PUBLIC HEARING
17.8.744 and adoption of New Rules I	)	ON PROPOSED ADOPTION AND
through IX implementing a registration	)	AMENDMENT
system for certain facilities that currently)	
require a Montana air quality permit	)	(AIR QUALITY)

TO: All Concerned Persons

1. On January 23, 2019, at 2:00 p.m., the Board of Environmental Review will hold a public hearing in Room 45 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Board of Environmental Review (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 Sandy Scherer, Legal Secretary, no later than 5:00 p.m., January 16, 2019, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

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

17.8.744 MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS

(1) A Montana air quality permit is not required under ARM 17.8.743 for the following:

(a) through (l) remain the same.

(m) any facility that has been registered with the department in accordance with ARM Title 17, chapter 8, subchapter 17 or 18.

AUTH: 75-2-111, 75-2-204, 75-2-234, MCA

IMP: 75-2-211, 75-2-234, MCA

REASON: The board is proposing to amend existing rules and adopt new rules to implement a registration system for certain facilities that currently require a Montana air quality permit. The facilities proposed to be included in the new registration system include nonmetallic mineral processing plants (commonly known as crushing and screening operations), asphalt plants, and concrete batch plants. These sources are often considered portable based on their ability to move locations and will be referred to as "portable sources." Currently, with specified exemptions, the administrative rules adopted under the Clean Air Act of Montana require the owner or operator of a source of air pollution that meets certain criteria to obtain a

permit prior to construction or operation. Section 75-2-234, MCA, authorizes the board to adopt a registration system in lieu of permitting.

The proposed new rules would provide a system for the owner or operator of a portable source facility to register with the department in lieu of submitting a permit application and obtaining a permit. The owner or operator of a registered facility still would be required to supply information that is consistent with the type and amount of information currently required in a permit application. Registered facilities would still be required to follow rules of operation that are similar to current permit conditions. These rules of operation would include emission limitations, air pollution control equipment installation and operation requirements, and requirements for testing, monitoring, and reporting. The proposed rules of operation are consistent with what is required at facilities across the state and, as such, are considered reasonable. Should more stringent, cost-effective technologies become widely available, the board could consider initiating a process to update the rules. The owner or operator of a registered facility still would be required to comply with any other applicable requirements.

Registration in lieu of permitting is appropriate for source categories in which there are a large number of homogeneous sources subject to identical requirements and for which there is no substantial benefit from individual permitting. For these homogeneous facilities, the permit conditions and environmental impacts vary little from facility to facility. The facilities proposed to be included in this registration system fit into this category of sources. Implementing a registration system would allow the department to use air program staff more efficiently and focus on major source permitting issues and compliance assistance in the field.

The proposed new rules provide as follows:

[NEW RULE I] DEFINITIONS For the purposes of this subchapter, the following definitions apply:

(1) "Asphalt plant" means a facility used to manufacture asphalt by heating and drying aggregate and mixing it with asphalt cement.

(2) "Concrete batch plant" means a facility that combines various ingredients, such as sand, water, aggregate, fly ash, potash, cement, and cement additives, to form concrete.

(3) "Deregister" means to revoke a registration.

(4) "Drop point" means a location at which air emissions are generated from the transfer of materials, such as loading raw materials into a hopper or transferring materials between conveyers.

(5) "Dust suppression control" means the use of water, water spray bars, chemical dust suppression, wind fences, enclosures, or other dust control techniques.

(6) "Facility" means any real or personal property that is either portable or stationary and is located on one or more contiguous or adjacent properties under the control of the same owner or operator and that emits or has the potential to emit any air pollutant subject to regulation under the Clean Air Act of Montana or the Federal Clean Air Act and that has the same two-digit standard industrial classification code. A facility may consist of one or more emitting units.

(7) "Nonmetallic mineral" has the meaning given in 40 CFR Part 60, subpart OOO.

(8) "Nonmetallic mineral processing plant" means a facility consisting of equipment that is used to crush, grind, or screen nonmetallic minerals and associated material-handling equipment and transfer points. The term does not include facilities in underground mines or at other stationary sources subject to Montana air quality permitting.

(9) "Permanent location" means a physical location at which a registered facility may remain or does remain for more than 12 months.

(10) "Registration" means the submission to the department of the completed registration notification under [NEW RULE III].

(11) "Registered facility" means a facility that has been registered in accordance with this subchapter.

(12) "Temporary location" means a physical location at which a registered facility remains for no more than 12 months.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule I is necessary to define terms that are used by the new rules and not defined elsewhere in ARM Title 17, chapter 8.

Subsection (3) defines "deregister" to provide that the process to remove authorization to operate as a registered facility is the same process used elsewhere to remove authorization to operate under an air quality permit. "Revoke" is used in statute to describe this process for permitted facilities and, for the purposes of this subchapter, "deregister" is defined as having the same meaning.

In subsection (5), the term "dust suppression control" is defined to include a range of possible dust control methods, including the use of water applied by a spray bar or other application method, or chemical dust suppression if application of water is not feasible.

Subsection (6) carries forward the definition of "facility" that currently exists in ARM Title 17, chapter 8, subchapter 7. Because these new rules would replace the permitting requirements in subchapter 7 for specific sources of air pollution, it is reasonable to use the same word to describe the regulated unit, a "facility," as that is used in the rules for the existing permitting program.

Subsection (8) defines "nonmetallic mineral processing plant" to exclude from regulation under this subchapter facilities located at underground mines or other stationary sources subject to Montana air quality permitting. Those types of facilities are included in the permits for the stationary sources with which they are associated and should not be eligible for registration as separate sources.

Subsections (9) and (12) define the terms "permanent location" and "temporary location" to distinguish between two types of locations at which a facility may operate. This is important for the specific types of facilities subject to these new rules because of their tendency to be portable and move around the state, as well as out of the state, from job site to job site. The key difference between a permanent and temporary location, as defined, is whether the facility remains, meaning equipment is present but not necessarily operating, at the location for more than 12

months. The reason the definition of "permanent location" is permissive is to allow an owner or operator to identify a location as being permanent, and comply with the requirements applicable at permanent locations, before the facility has actually remained at the location for more than 12 months. No facility may remain at a temporary location for longer than 12 months.

In subsection (10), the term "registration" is defined to include the submission of required information to the department.

[NEW RULE II] APPLICABILITY (1) This subchapter applies to the following facilities:

(a) Nonmetallic mineral processing plants with annual production of less than 8,000,000 tons as a rolling 12-month total.

(b) Concrete batch plants with annual production of less than 1,000,000 cubic yards as a rolling 12-month total.

(c) Asphalt plants that:

(i) combust natural gas, propane, distillate fuel, waste oil, diesel, or biodiesel; and

(ii) have annual production of less than:

(A) 996,000 tons as a rolling 12-month total for drum mix plants; or

(B) 324,000 tons as a rolling 12-month total for batch mix plants.

(d) Engines, such as power generators and other internal combustion engines, associated with any facility described in (a) through (c).

(2) An owner or operator of a facility that is not listed in (1) shall comply with the applicable application and permitting requirements of this chapter.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule II is necessary to describe the facilities that are eligible for registration. The eligibility of the facilities described in (1)(a) through (c) is based on annual production levels. The annual production levels were calculated as surrogates for emission limits using federal emission factors for the specific types of processes included in each source category. The emission factors come from the U.S. Environmental Protection Agency's Compilation of Air Pollutant Emission Factors (AP-42). Using the appropriate emission factors, the production limits were set at levels that ensure that no major stationary source, as defined in ARM Title 17, chapter 8, subchapters 8, 9, or 10, would be eligible to register under this subchapter. For each type of facility, the production levels equate to maximum mass emissions below major source thresholds. The reason for limiting registration-eligible facilities to below major source thresholds is that the simplified analysis associated with registration is not appropriate for major sources, which may have emissions and environmental impacts that differ from facility to facility and which therefore require case-specific impact analysis.

For nonmetallic mineral processing plants, particulate matter with an aerodynamic diameter of 10 microns or less (PM-10) is the primary pollutant of concern. The annual production limit of 8,000,000 tons as a rolling 12-month total results in maximum mass emissions of PM-10 of less than 63 tons per year from any

single facility. A facility emitting 100 tons per year of PM-10 would trigger additional permitting requirements as a major stationary source.

For concrete batch plants, PM-10 is also the primary pollutant of concern. The annual production limit of 1,000,000 cubic yards as a rolling 12-month total results in maximum mass emissions of less than 12 tons of PM-10 per year from any single facility.

For asphalt plants, carbon monoxide (CO) is the primary pollutant of concern because the majority of emissions from this source category results from fuel combustion. CO emissions differ depending on the type of fuel that is burned. The annual production limits account for a variety of the most common fuel types, which are listed in (1)(c)(i). The asphalt plants using fuel types not listed in this rule would require case-by-case permitting and would not be eligible for registration. In Montana, most of the permitted asphalt plants are drum mix plants. However, because the CO emission factors differ greatly between drum mix plants and batch mix plants, it is necessary to include two production limits. Each annual production limit results in maximum mass emissions of about 66 tons of CO per year from any single facility. A facility emitting 100 tons per year of CO would trigger additional permitting requirements as a major stationary source. This limit is low enough to allow for additional combustion emissions from associated generator engines, which often locate with portable equipment, and still result in a facility not exceeding major source limits.

A generator engine or other nonroad internal combustion engine used in association with one of the other three eligible source categories would also be eligible for registration. The facilities subject to this subchapter often operate at locations without line power and must therefore sometimes be powered using generator engines or other similar engines that are designed to be moved from one location to another. The engines to which the new rules apply are those associated with a listed type of registration-eligible facility, and not engines used as part of any facility not covered by this subchapter. Engine operating limits are discussed in New Rule V.

Subsection (2) is necessary to emphasize that a facility exceeding the annual production described in subsection (1) is not eligible for registration and would be required to follow the existing permitting process in ARM Title 17, chapter 8 for a Montana air quality permit. The additional scrutiny provided by existing case-by-case permitting is more appropriate than registration for major sources of emissions.

Preparation of an environmental assessment for registration of a facility is not necessary as long as the facility meets the applicability criteria. Facilities meeting the applicability criteria will not have a significant environmental impact. The department has made this determination through preparation of a programmatic environmental assessment. See paragraph 4 immediately following the state of reasonable necessity for proposed New Rule IX.

[NEW RULE III] REGISTRATION PROCESS AND INFORMATION

(1) Except as provided in (3), the owner or operator of a facility that meets the applicability criteria of [NEW RULE II] and that commences operation after [the effective date of this rule] shall:

(a) register the facility with the department prior to beginning initial operations; or

(b) register the facility with the department and request revocation of the associated Montana air quality permit (MAQP), if the owner or operator holds a valid MAQP for the facility.

(2) Except as provided in (3), the owner or operator of a facility that meets the applicability criteria of [NEW RULE II] and that commenced operation prior to [the effective date of this rule] shall:

(a) register the facility with the department no later than December 31, 2019; and

(b) request revocation of the associated MAQP, if the owner or operator holds a valid MAQP for the facility.

(3) An engine that meets the applicability criteria of [NEW RULE II] is exempt from the registration requirement if the engine will be located at temporary locations only.

(4) To register, the owner or operator shall submit a complete registration notification to the department on the form provided by the department. The notification information must include the following:

(a) Company name and mailing address;

(b) Owner or operator's name, mailing address, telephone number, and email address;

(c) Contact person's name, mailing address, telephone number, and email address;

(d) Physical location(s) of known permanent location(s), initial temporary location(s) if no permanent location is proposed, or business location if no in-state location of operation has been identified (legal description to the nearest 1/4 section);

(e) Physical location(s) of each permanent or temporary location not included in (d) of an existing facility for which the owner or operator holds a valid MAQP;

(f) Equipment-specific information, as applicable, including:

(i) Unit type;

(ii) Manufacturer's name;

(iii) Date of manufacture; and

(iv) Horsepower.

(g) Acknowledgement of the owner or operator's duty to comply with this subchapter;

(h) Other information required by the department.

(5) A facility is considered registered upon the department's receipt of the notification required in (4).

(6) Within 15 calendar days after registration, the department shall publish acknowledgment of the registration on the department's website at <http://deq.mt.gov/Air/PublicEngagement>.

(7) An owner or operator of a registered facility may not operate for the first 15 calendar days following the date of registration, unless the owner or operator holds a valid MAQP for the facility at the time of registration. Registration does not supersede any other local, state, or federal requirements associated with the operation of registered facilities.

(8) An owner or operator of a registered facility shall provide notification to the department, in a manner prescribed by the department, of any change(s) to the equipment-specific information required in (4)(f) by March 15th of each calendar year.

(9) If the owner or operator of a registered facility changes, the new owner or operator shall, prior to operating the facility, register with the department by submitting the notification required in (4).

(10) An owner or operator of a registered facility shall update the registration information by submitting notification to the department, in a manner prescribed by the department, to identify a location as a permanent location in advance of remaining at the location for longer than 12 months.

(11) Registration under this subchapter is valid provided the registered facility continues to meet the applicability criteria in [NEW RULE II].

AUTH: 75-2-111, 75-2-234, MCA
IMP: 75-2-234, MCA

REASON: Proposed New Rule III is necessary to describe when and how an owner or operator must register with the department. Subsection (1) applies to any registration-eligible facility that begins operation after these rules become effective. Any registration-eligible facility that is not already permitted by the department must be registered prior to beginning initial operations. If the owner or operator has already obtained a Montana air quality permit for the facility and the facility is eligible to register under New Rule II, the owner or operator must register the facility and request revocation of the permit at the time of registration. The purpose of this provision is to ensure that all facilities meeting the applicability criteria in New Rule II register in lieu of permitting. Registration of eligible facilities is mandatory. Only facilities that are not registration-eligible would be allowed to obtain a Montana air quality permit. This is reasonably necessary to allow the department to appropriately streamline the registration of homogeneous types of facilities.

Subsection (2) establishes a deadline of December 31, 2019, for registration of facilities in operation prior to the effective date of these rules. It may not be feasible for the owners and operators of existing facilities to immediately register upon adoption of these rules. Existing facilities with valid Montana air quality permits that are registration-eligible must also request revocation of the permit by the same deadline. The reason is the same as for subsection (1).

Subsection (3) provides an exception to the registration requirement for engines that are otherwise eligible for registration but that will not be located at a permanent location. Power generators and the other nonroad engines at facilities regulated under this subchapter are sources of emissions that are generally considered to be mobile because they can be transported from one location to another. Mobile emitting units, including the nonroad engines listed in New Rule II, are generally excluded from the permitting requirements of this chapter. See 17.8.744(1)(b). Therefore, it is reasonable to exclude such engines from the requirement to register. However, under Title 40, C.F.R. 89.2, internal combustion engines that would otherwise be considered nonroad engines are no longer considered mobile when they remain at a location for longer than 12 consecutive

months. Therefore, these engines would no longer qualify for the mobile emitting unit exclusion from permitting requirements if they remain at a location for longer than 12 months. Similarly, it is reasonable to require that they be registered under the proposed new rules if they remain at a location for longer than 12 months. Owners and operators of engines eligible for registration are required to request revocation of any existing MAQPs. The reason is the same as for subsection (1).

Subsection (4) is necessary to list the information an owner or operator is required to provide to register a facility. A registration notification that is missing any of the listed information would be considered incomplete.

Subsections (5), (6), and (7) prohibit operation of a registered facility for 15 days following the date of registration. The purpose of this delay is to allow time for the department to publish notification of the registration on the department's website and to determine if the registration notification submitted by the owner or operator contains complete information.

Subsection (8) requires the owner or operator of a registered to submit any changes to the required equipment-specific registration information no later than March 15 of each calendar year. Possible changes to the equipment-specific information include the addition or removal of emitting units from the list of registered equipment. Although changes must be submitted at least once per year, there is no limit on the number of times an owner or operator may submit changes to the registration. The purpose of requiring submission of the changes is to keep equipment-specific registration information current.

Subsection (9) is necessary to keep information identifying the entity that owns or operates registered facilities current.

Subsection (10) is reasonably necessary to provide a process by which an owner or operator may add or remove permanent locations included in the registration information.

Subsection (11) is reasonably necessary because registered facilities might change production levels or equipment in such a manner that the facility would no longer be eligible to operate as a registered facility under this subchapter.

[NEW RULE IV] GENERAL OPERATING REQUIREMENTS (1) Registration of a facility under this subchapter does not relieve an owner or operator of the responsibility to comply with:

- (a) applicable federal, state, or local statutes, rules, or orders; and
- (b) control strategies contained in the Montana State Implementation Plan.

(2) The department may require an owner or operator to conduct a test, emission or ambient, under ARM 17.8.105. Emission source testing must comply with ARM 17.8.106.

(3) An owner or operator of a facility required to be registered under this subchapter:

- (a) shall install, operate, and maintain all equipment to provide the maximum air pollution control for which it was designed;

- (b) shall employ dust suppression control that is installed, maintained, and operated to ensure that the facility complies with this chapter. Dust suppression control for crushing, screening, and/or conveyor transfer points consisting of water spray bars and/or chemical dust suppression must be operating if any visible

emissions equal to or greater than 10 percent opacity averaged over six consecutive minutes are present;

(c) shall allow the department's representatives access to the operations at any facility at all reasonable times to inspect or conduct surveys, collect samples, obtain data, audit any monitoring equipment or observe any monitoring or testing, and otherwise conduct all necessary functions related to the administration of this chapter; and

(d) may not operate an engine that is subject to the requirements of this subchapter at any permanent location when the combined horsepower hours of those sources exceed the following limits:

- (i) 6,000,000 horsepower-hours per rolling 12-month period; or
- (ii) 3,500,000 horsepower-hours per rolling 12-month period, if an asphalt plant is also located at the permanent location.

AUTH: 75-2-111, 75-2-234, MCA
IMP: 75-2-234, MCA

REASON: Proposed New Rule IV is necessary to provide general requirements for facilities that are eligible to be registered under this subchapter. Other federal, state, or local regulations and provisions of the Montana State Implementation Plan may be applicable to the registration-eligible facility. For example, subchapter 3 of this chapter contains opacity limitations and incorporates federal New Source Performance Standards, both of which will continue to apply to registration-eligible facilities. Subsection (1) is necessary to inform an owner or operator that registration of a facility under this subchapter does not affect the duty of that entity to comply with these other applicable requirements.

Subsection (2) is necessary to inform an owner or operator that facilities eligible to be registered under this subchapter are still subject to the testing requirements in ARM 17.8.105. The required testing may include source tests specifically required under a Federal New Source Performance Standard. Because some of the facilities that would be subject to this subchapter are required to conduct specific testing, the board believes it appropriate to include this reference even though ARM 17.8.105 and 17.8.106 apply to such sources regardless of whether those rules are incorporated here.

Subsection (3)(a) is necessary to ensure that the owner or operator installs, operates, and maintains all equipment to achieve the maximum pollution control for which the equipment was designed. The purpose of this rule is to require good operating and maintenance practices, which will result in decreased emissions.

Subsection (3)(b) is necessary to establish the required level of dust suppression for facilities required to register under this subchapter. Because different types of facilities are subject to different opacity limits, this rule requires that the owner or operator use a dust suppression technique that is sufficient to comply with the limits applicable to that facility.

For crushing, screening, and conveyor transfer points, subsection (3)(b) requires the use of water spray bars and/or chemical dust suppression if visible emissions have an opacity of greater than 10 percent. It is necessary that owners and operators of these types of facilities not only have available but operate such

dust suppression to ensure that the facility complies with applicable opacity limits. Depending on the applicable limit, the facility may be allowed to have emissions with opacity greater than 10 percent, but the controls must be operating whenever opacity exceeds 10 percent.

Subsection (3)(c) requires that the owner or operator provide department representatives access to the plant site at reasonable times so the department can conduct necessary site inspections, monitoring, observations, and/or data collection. This will allow the department to perform its functions and subject an owner or operator that did not allow access to compliance or enforcement actions.

Subsection (3)(d) establishes limits on the operation of registration-eligible engines at permanent locations. These operating limits are necessary to limit the emissions from such engines at locations where they would be considered stationary sources. No limits would apply at temporary locations, where these sources would be considered mobile, because mobile sources are not subject to the permitting requirements of this chapter. The horsepower-hour limits ensure that the additional emissions produced by engines do not create a major source, as defined in ARM Title 17, chapter 8, subchapters 8, 9, or 10, when added to the emissions from other associated emitting units at the facility. The reason for this requirement is the same as for New Rules II and III(1).

[NEW RULE VI] NOTICE OF LOCATION (1) Unless the owner or operator of a facility required to be registered under this subchapter has previously submitted the location of a facility under [NEW RULE III](4), the owner or operator shall submit to the department a notice of location for each facility, on a form provided by the department. The owner or operator shall submit the form at least 15 calendar days before commencing operation of the facility.

(2) If there is more than one type of facility listed in [NEW RULE II] at the same location, the owner or operator shall submit a notice of location for each facility type.

(3) Upon receipt of a complete notice of location, the department shall publish notification on the department's website at <http://deq.mt.gov/Air/PublicEngagement>.

(4) The owner or operator shall confirm the location, in a manner prescribed by the department, within 10 calendar days after commencing operation at the location.

(5) The owner or operator shall notify the department, in a manner prescribed by the department, within 10 calendar days after removing all equipment of a single type from the location. Following such notification, the owner or operator shall comply with (1) through (4) prior to operating equipment of that type at the location again.

(6) An owner or operator may transfer equipment between any locations that have been identified under (1) and (2), unless the owner or operator has notified the department under (5) that all equipment of the same type has been removed from the location.

(7) A registered facility may not remain at a temporary location for more than twelve months. Before twelve months have elapsed, the owner or operator of the registered facility shall either:

- (a) remove all equipment from the temporary location, according to the applicable requirements in this rule; or
- (b) register the location as a permanent location.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule V is necessary to describe the process an owner or operator or a registered facility must follow to provide notice of all locations of operation. This process is necessary because the facilities that are eligible to register under this subchapter are portable and may be relocated. It is the board's intent that the public and the department be informed, in advance, of all locations at which registered facilities may operate.

Subsection (1) requires that the owner or operator submit a notice of location to the department for each registered facility at least 15 days prior to operating that facility. This is necessary to ensure that the department has advance notice of each potential location of operation. The advance notice allows the department to notify interested parties and the public and raise any concerns that may exist regarding a specific location. Advance notice would be considered to have been given for locations the owner or operator provided to the department with the registration notification under New Rule III(4). Therefore, additional notice for such locations would not be required under this subsection.

Subsection (2) requires that the owner or operator of a registered facility notify the department of the locations where each type of registered facility may operate. This is necessary because the different types of registered facilities have different emission profiles and different operating requirements. The department must be able to keep accurate records of the locations of different types of emissions to ensure areas continue to meet the emission standards in the federal Clean Air Act and the Clean Air Act of Montana and implementing rules.

Subsection (3) requires the department to publish notification on its website of all complete notices of location. This is necessary to notify interested parties and the public of the possibility that sources of emissions may locate at a particular site. The website publication would also confirm to the owner or operator that the department had received the appropriate location notice.

Subsection (4) requires that the owner or operator of a registered facility provide confirmation of a location within ten days after beginning to operate at that location. This is necessary because the owners and operators of the facilities eligible to register under this subchapter may submit multiple potential locations to the department in advance of deciding where the equipment will actually be located. Subsection (5) requires the owner or operator to notify the department within ten days after removing all equipment of a single type from the location. The notices in (4) and (5) are necessary to ensure the department maintains an accurate record of the locations at which each type of registered facility is operating. Such a record is reasonably necessary for the department to efficiently perform required site visits and compliance checks, appropriately respond to complaints, and ensure compliance with emission standards.

Subsection (6) provides that an owner or operator may move equipment between locations if the owner or operator has identified the locations under (1) and (2). This clarification is necessary because the process in this subchapter differs from the process required under ARM Title 17, chapter 8, subchapter 7. For facilities registered under this subchapter, the owner or operator is not required to submit additional notification to move equipment between previously identified locations.

Subsection (7) prohibits a registered facility from remaining at a temporary location for longer than twelve months and establishes the options for an owner or operator if equipment has been at a temporary location for twelve months. It is necessary for the owner or operator to either remove equipment from a temporary location or identify the location as a permanent location before twelve months have elapsed because the requirements for registration-eligible engines differ depending on whether the engine is located at a permanent or temporary location.

[NEW RULE VI] DEREGISTRATION (1) The department may deregister a facility:

- (a) on written request of the owner or operator, or
- (b) for a violation of this chapter.

(2) To deregister a facility under (1)(b), the department shall notify the owner or operator in writing of its intent to deregister by certified mail, return receipt requested, to the owner or operator's last known address. The department shall advise the owner or operator of the right to request a hearing before the board under 75-2-211, MCA.

(3) If the department does not receive a return receipt for the notice of intent to deregister in (2), the department may give notice to the owner or operator by publishing the notice of intent to deregister. The publication must occur once each week for three consecutive weeks in a newspaper published in the county where the owner or operator's mailing address set forth in the registration is located. If no newspaper is published in that county, then the notice may be published in a newspaper having a general circulation in that county.

(4) When the department has published notice under (3), the owner or operator is deemed to have received the notice on the date the last notice was published.

(5) A hearing request must be in writing and must be filed with the board within 15 days after receipt of the department's notice of intent to deregister. Filing a hearing request postpones the effective date of the department's decision until issuance of a final decision by the board.

(6) If no hearing request is filed, the department's decision to deregister a facility is final when 15 days have elapsed from the date the owner or operator received notice.

(7) A hearing under this subchapter is governed by the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

AUTH: 75-2-111, 75-2-234, MCA
IMP: 75-2-234, MCA

REASON: Proposed New Rule VI is necessary to provide the department the authority to deregister a facility, either at the request of the registered entity or by the department based on an owner or operator's violation of the air quality rules in the operation of a registered facility. The new rule also necessarily provides for an appeal of the deregistration of a facility by the owner or operator to satisfy due process requirements. These provisions are nearly identical to those in ARM 17.8.763 for the revocation of a Montana air quality permit.

[NEW RULE VII] RECORDKEEPING AND REPORTING (1) An owner or operator of a facility required to be registered under this subchapter shall make records that include:

- (a) the location at which the facility was operated;
- (b) daily production rates and rolling 12-month total production in the units used in New Rule II(1);
- (c) daily pressure drop readings, including daily water input rate or pressure, if applicable;
- (d) daily horsepower hours of engines and rolling 12-month total horsepower hours, if applicable; and
- (e) a log of required facility inspections, repairs, and maintenance.

(2) The owner or operator shall maintain the records in (1) for at least five years following the date the record was created.

(3) The owner or operator shall maintain the records in (1) at the facility location or at another convenient location. The owner or operator shall make the records available to the department for inspection and submit the records to the department upon request.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule VII is necessary to provide the general recordkeeping and reporting requirements for facilities registered under this subchapter. Facilities would be required to maintain records of information necessary for the department to verify compliance with the requirements of this chapter. An owner or operator would be required to maintain these records for at least five years and must make them available for inspection upon request of the department. The recordkeeping and reporting requirements would be substantially the same under the registration process as under traditional permitting.

[NEW RULE VIII] REQUIREMENTS FOR CONCRETE BATCH PLANTS

(1) Except as provided in (2), an owner or operator of a concrete batch plant required to be registered under this subchapter shall control particulate emissions from the facility at all times during operation using:

- (a) a fabric filter dust collector or equivalent on each cement silo, cement storage silo, or similarly enclosed storage bin or weigh hopper; and
- (b) a particulate containment boot or equivalent on every product loadout opening.

(2) If a concrete batch plant required to register under this subchapter that commenced operation prior to [the effective date of this rule] does not have the control equipment in (1) installed at the time of registration, the owner or operator of the facility shall install the equipment no later than twelve months after registration.

(3) In addition to the general requirements in [NEW RULE VII], the owner or operator shall conduct a monthly inspection of each operating facility for fugitive dust. If visible emissions from the fabric filter are present, the inspection must include an inspection of the fabric filter for evidence of leaking, damaged, or missing filters. The owner or operator shall take appropriate corrective actions to restore the filter system to proper operation before resuming normal operations.

AUTH: 75-2-111, 75-2-234, MCA

IMP: 75-2-234, MCA

REASON: Proposed New Rule VIII is necessary to provide performance standards for registration-eligible concrete batch plants. These source-specific air pollution control requirements are consistent with existing permit conditions and constitute Best Available Control Technology for this source category. Subsection (2) would provide a period of twelve months after registration for the owner or operator of an existing facility to install any required control equipment not present at the time of registration. This is necessary because it may not be feasible for an owner or operator to install the equipment immediately upon registration. The reason for the monthly inspection required in subsection (3) is to determine whether the required control equipment is operating correctly and is achieving the expected level of emission control. If it is not, subsection (3) requires the owner or operator to correct the issue, which is necessary to ensure appropriate emission control.

[NEW RULE IX] REQUIREMENTS FOR ASPHALT PLANTS (1) An owner or operator of an asphalt plant required to register under this subchapter:

- (a) shall limit particulate matter emissions to no more than:
 - (i) 0.04 grains per dry standard cubic foot; or
 - (ii) 0.10 grains per dry standard cubic foot, for a facility that holds a valid MAQP containing this limit at the time of registration;
- (b) shall control emissions from each dryer or mixer at all times during operation using control equipment capable of achieving the applicable emission limit;
- (c) shall shut down an emitting unit using a baghouse control device needing a bag replacement until the replacement bag is installed;
- (d) shall install and maintain a device to measure the pressure drop on the control device, such as a magnehelic gauge or manometer. The pressure drop must be measured in inches of water and recorded daily; and
- (e) shall install and maintain temperature indicators at the control device inlet and outlet.
- (f) may not allow the asphalt production rate to exceed the average production rate during the last source test demonstrating compliance. The owner or operator may retest at a higher production rate at any time.

(2) Records made and maintained under [NEW RULE VII] must include daily pressure drop readings from the control device and the daily water input rate or the water input pressure, if applicable.

AUTH: 75-2-111, 75-2-234, MCA
IMP: 75-2-234, MCA

REASON: Proposed New Rule IX is necessary to provide performance standards for registration-eligible asphalt plants. These source-specific air pollution control requirements are consistent with existing permit conditions and constitute Best Available Control Technology for this source category.

Under subsection (1)(a), an existing facility that holds a valid MAQP would be allowed to continue to operate with the same particulate matter emission limit that is in the permit. This is because the limit included in the permit was determined to be appropriate based on a case-specific review that included consideration of the age of the facility. As of the effective date of this rule, any registration-eligible facility that does not hold a valid MAQP containing a different particulate matter limit would be required to meet the limit in subsection (1)(a)(i). This is because the lower limit is representative of the standard achievable using available pollution control technology for new facilities.

4. Concerned persons may submit their data, views, or arguments in writing to Sandy Scherer, Legal Secretary, 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 sscherer@mt.gov, no later than 5:00 p.m., January 16, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date. In addition, the department has prepared an environmental assessment demonstrating that the facilities eligible to register under proposed New Rule II do not have significant environmental impacts. That environmental assessment may be viewed on the department's web site at <http://deq.mt.gov/public/publiccomment>. An electronic or hard copy of that document may also be obtained from Sandy Scherer at the addresses listed above. Oral or written comments on the environmental assessment may also be submitted in the same manner as for the proposed rule amendments.

5. Sarah Clerget, 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 department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; openpit mine

reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, 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 Sandy Scherer, Legal Secretary, 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 Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

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 board has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ _____
EDWARD HAYES
Rule Reviewer

BY: /s/ _____
CHRISTINE DEVENY
Chairman

Certified to the Secretary of State, December 11, 2018.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED NEW RULE**

Agenda Item # III.A.3.

Agenda Item Summary – The Department requests that the Board initiate rulemaking for proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334, 17.38.101, Department Circulars DEQ-1, DEQ-2, DEQ-3, and the New Community and Non-Community Water Supply Well Expedited Review Checklists. The amendments include adding or updating a citation to New Rule I.

The 2017 Legislature required the Department to initiate rulemaking to implement HB 368 - establishing the minimum setback distance between a well and a lagoon. New Rule I implements HB 368 and establishes the minimum setback through Department rulemaking. New Rule I will be initiated concurrently with the Board rulemaking.

List of Affected Board Rules – The proposed amendments will affect Board rules adopted under the authority of Section 75-5-201 and -401, MCA, at ARM Title 17, chapter 30, subchapter 10, specifically 17.30.1001; Section 75-5-401 and -802, MCA, at ARM Title 17, chapter 30, subchapter 13, specifically 17.30.1334; and Section 75-6-103, MCA, at ARM Title 17, chapter 38, subchapter 1, specifically 17.38.101.

List of Affected Department Rules – The proposed amendments will affect current Department rules adopted under the authority of Section 76-4-104, MCA, at 17.36.103 and .345; and Section 75-10-1202, MCA, at ARM Title 17, chapter 50, subchapter 8, specifically at 17.50.819.

Affected Parties Summary – The parties affected by these rules would be anyone subject to DEQ rules seeking to site a water well near a sewage lagoon (and vice versa), including concentrated animal feeding operations, public water supply systems and public wastewater systems, and subdivision applications.

Background – Before 2017, Section 75-5-605(1)(c) prohibited any person from siting and constructing a sewage lagoon within 500 feet of an existing water well. In 2017, the Legislature passed House Bill 368 (HB 368), which removed the 500-foot setback and directed the Department of Environmental Quality to adopt rules establishing setback requirements between sewage lagoons and water wells to prevent water well contamination. The Department is now proposing to adopt New Rule I, which implements HB 368 by establishing setbacks between sewage lagoons and water wells to protect water wells from bacterial and viral pathogens that come from sewage lagoons.

The Department administers multiple programs that will be affected by New Rule I, including the programs related to concentrated animal feeding operations, public water supply engineering requirements, and subdivision review. The authority to adopt rules for those programs is shared by the Department and the Board of Environmental Review. To ensure that New Rule I is applied consistently and predictably across those programs, the Department is proposing to amend the subdivision rules in

ARM 17.36.103 and 17.36.345, and the solid waste rules of 17.50.819. To extend the protections in New Rule I to other programs administered by the Department, the Department is asking the Board to initiate rulemaking to amend the water quality rules in ARM 17.30.1001 and 17.30.1334; the public water engineering rules in 17.38.101; Circulars DEQ-1, DEQ-2, and DEQ-3; and the New Community and Non-Community Water Supply Well Expedited Checklists.

Hearing Information – The Department recommends the Board appoint a hearing officer and conduct a public hearing to take public comment on the adoption and amendment of these rules.

Board Options – The Board may:

1. Initiate rulemaking and issue the attached notice of public hearing on the proposed amendment of rule;
2. Determine that the amendment of rule is not appropriate and decline to initiate rulemaking; or
3. Modify the notice and initiate rulemaking.

DEQ Recommendation – The Department recommends that the Board initiate rulemaking, as proposed in the attached notice of public hearing, and appoint a hearings officer.

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed Amendment of Administrative Rules of Montana 17.30.1001, 17.30.1334, 17.36.103, 17.36.345, 17.38.101, and 17.50.819, adoption of New Rule I pertaining to definitions, and the amendment of Department Circulars DEQ-1, DEQ-2, and DEQ-3 regarding setbacks between water wells and sewage lagoons.

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

In the matter of the amendment of ARM	)	NOTICE OF PUBLIC HEARING
17.30.1001, 17.30.1334, 17.36.103,	)	ON PROPOSED ADOPTION
17.36.345, 17.38.101, and 17.50.819,	)	AND AMENDMENT
adoption of New Rule I pertaining to)	
definitions, and the amendment of	)	(SUBDIVISIONS)
Department Circulars DEQ-1, DEQ-2, DEQ-	)	(PUBLIC WATER ENGINEERING)
3 regarding setbacks between water wells	)	(WATER QUALITY)
and sewage lagoons	)	(SOLID WASTE)

TO: All Concerned Persons

1. On _____, 2019 at __:00 a.m., the Board of Environmental Review, the Department of Environmental Quality will hold a public hearing in Room ____ of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The board and department will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., _____, 2019, to advise of the nature of the accommodation that you need. Please contact Sandy Scherer, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. GENERAL REASON STATEMENT: Before 2017, Section 75-5-605(1)(c) prohibited any person from siting and constructing a sewage lagoon within 500 feet of an existing water well. In 2017, the Legislature passed House Bill 368 (HB 368), which removed the 500-foot setback and directed the Department of Environmental Quality to adopt rules establishing setback requirements between sewage lagoons and water wells to prevent water well contamination. The department now proposes to adopt New Rule I, which implements HB 368 by establishing setbacks between sewage lagoons and water wells to protect water wells from bacterial and viral pathogens that come from sewage lagoons.

The department administers multiple programs that will be affected by New Rule I, including the programs related to concentrated animal feeding operations, solid waste, public water supply engineering requirements, and subdivision review. The authority to adopt rules for those programs is shared by the department and the board of environmental review. To ensure that New Rule I is applied consistently and predictably across those programs, the department proposes to amend the subdivision rules in ARM 17.36.103 and 17.36.345, and the solid waste rules of 17.50.819. The board proposes to amend the water quality rules in ARM 17.30.1001 and 17.30.1334; the public water engineering rules in 17.38.101; and

Circulars DEQ-1, DEQ-2, and DEQ-3. The specifics of each of these proposed amendments is discussed in more detail below.

The amendments to ARM 17.30.1001, 17.36.345, 17.38.101, and 17.50.819 would adopt and incorporate by reference the 2018 revisions to Circulars DEQ-1, DEQ-2 and DEQ-3, which are contained in this notice. Additionally, the amendments to 17.38.101 would adopt and incorporate by reference the 2018 revisions to the New Community Water Supply Well Expedited Review Checklist and the New Non-Community Water Supply Well Expedited Review Checklist, which are contained in this notice. Under 2-4-307(2), an agency proposing to adopt material by reference is required to state where a copy of the omitted material may be obtained. In addition, the material must be available to the public for comment, through either publication in the register or publication in an electronic format on the agency's web page during the time that the rule adopting the material is itself subject to public comment. In this instance, the revisions to Circulars DEQ-1, DEQ-2, and DEQ-3, and the New Community and New Non-Community Water Supply Well Expedited Review Checklists that are being adopted by reference are set forth below. Thus, a statement of where a copy may be obtained and the publishing of the proposed rule on the department's website is not necessary.

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

17.30.1001 DEFINITIONS (1) The following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) through (16) remain the same.

(17) "Unrestricted reclaimed wastewater" means wastewater that is treated to the standards for Class A-1 or Class B-1 reclaimed wastewater, as set forth in Appendix B of Department Circular DEQ-2, entitled "Montana Department of Environmental Quality Design Standards for Public Sewage Systems" (~~2016~~ 2018 edition).

(a) The board adopts and incorporates by reference Department Circular DEQ-2, entitled "Department of Environmental Quality Design Standards for Public Sewage Systems" (~~2016~~ 2018 edition). Copies are available from the Department of Environmental Quality, ~~Technical and Financial Assistance~~ Engineering Bureau, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-201, 75-5-401, MCA

IMP: 75-5-301, 75-5-401, MCA

REASON: As discussed in Section 6 of this Notice, the board is proposing to make changes to Circular DEQ-2 to make that circular consistent with the requirements of New Rule I. The board proposes to amend ARM 17.30.1001 to update the reference to this new edition of the circular to ensure that programs across the department are using the same and most recent edition of the circular. The board also proposes to make a housekeeping change to update the name of the engineering bureau to reflect current department organization.

17.30.1334 TECHNICAL STANDARDS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (1) through (12) remain the same.

(13) CAFO sewage lagoons must meet the setbacks established in [NEW RULE I].

AUTH: 75-5-401, 75-5-802, MCA

IMP: 75-5-401, 75-5-802, MCA

REASON: The board is proposing to include New Rule I into the requirements for concentrated animal feeding operations (CAFOs) because the sewage contained in those lagoons can have similar or higher concentrations of pathogens than a sewage lagoon with human-derived sewage. Therefore, water wells near CAFO sewage lagoons need protection similar to water wells near sewage lagoons containing human-derived sewage.

17.36.103 APPLICATION--CONTENTS (1) In addition to the completed application form required by ARM 17.36.102, the following information must be submitted to the reviewing authority as part of a subdivision application:

(a) through (f) remain the same.

(g) if ground water is proposed as a water source, the applicant shall submit the following information:

(i) the location of the proposed ground water source, which must be shown on the lot layout, indicating distances to any potential sources of contamination within 500 feet, ~~and any known mixing zone as defined in ARM 17.30.502~~ within 500 feet, and any sewage lagoon within 1,000 feet. If the reviewing authority identifies a potential problem, it may require that all potential sources of contamination be shown in accordance with Department Circular PWS-6; and

(g)(ii) through (u) remain the same.

(v) the information required in [NEW RULE I] regarding setbacks between sewage lagoons and wells.

~~(v)~~(w) all additional information that is required under this chapter or that the reviewing authority determines is reasonably necessary for the review of the proposed subdivision.

AUTH: 76-4-104, MCA

IMP: 76-4-104, 76-4-125, MCA

REASON: The department is proposing to amend ARM 17.36.103 to require subdivision applications to identify any sewage lagoon within 1,000 feet of a proposed ground water source and to include in the application any information required by New Rule I. This is reasonably necessary to ensure that subdivision applications are reviewed and approved in accordance with New Rule I. This extends the protections of wells in New Rule I to subdivisions and provides consistency across programs administered by the department. The proposed changes also would clarify that applicants need only identify those known mixing zones that are within 500 feet of a proposed ground water source, which eliminates any existing confusion about what the rule requires.

17.36.345 ADOPTION BY REFERENCE (1) For purposes of this chapter, the department adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) Department Circular DEQ-1, "Standards for Water Works," ~~2014~~ 2018 edition;

(b) Department Circular DEQ-2, "Design Standards for Public Sewage Systems," ~~2016~~ 2018 edition;

(c) Department Circular DEQ-3, "Standards for Small Water Systems," ~~2014~~ 2018 edition;

(d) through (m) remain the same.

(n) [NEW RULE I] regarding setbacks between sewage lagoons and wells.

(2) remains the same.

AUTH: 76-4-104, MCA

IMP: 76-4-104, MCA

REASON: As discussed in Section 6 of this notice, the board is proposing to make changes to department Circulars DEQ-1, DEQ-2, and DEQ-3 to make those circulars consistent with the requirements of New Rule I. All of these circulars are adopted by reference by the department in the subdivision rules. The department is proposing to amend ARM 17.36.345 to adopt those most recent versions of each circular and to adopt by reference New Rule I. Because New Rule I is designed to protect water wells from contamination from sewage lagoons, the protections in New Rule I should apply to subdivision applications that are reviewed by the department. This change is also reasonably necessary to promote consistency across programs administered by the department.

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR PUBLIC SEWAGE SYSTEM (1) through (19) remain the same.

(20) For purposes of this chapter, the board adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) Department Circular DEQ-1, ~~2014~~ 2018 edition, which sets forth the requirements for the design and preparation of plans and specifications for public water supply systems;

(b) Department of Environmental Quality Circular DEQ-2, ~~2016~~ 2018 edition, which sets forth the requirements for the design and preparation of plans and specifications for sewage works;

(c) Department Circular DEQ-3, ~~2014~~ 2018 edition, which sets forth minimum design standards for small water systems;

(d) through (f) remain the same.

(g) Department Community Water Supply Well Expedited Review Checklist, ~~2014~~ 2018 edition, which sets forth minimum criteria and design standards for new community water supply wells;

- (h) Department Noncommunity Water Supply Well Expedited Review Checklist, ~~2014~~ 2018 edition, which sets forth minimum criteria and design standards for new non-community water supply wells;
- (i) through (21) remain the same.

AUTH: 75-6-103, MCA

IMP: 75-6-103, 75-6-112, 75-6-121, MCA

REASON: The board is proposing to amend ARM 17.38.101 to adopt the most recent version of Circulars DEQ-1, DEQ-2, DEQ-3, the Department Community Water Supply Well Expedited Review Checklist and the Department Noncommunity Water Supply Well Expedited Review Checklist. Doing so will incorporate New Rule I into the rules providing the engineering requirements for public water supply and public sewage systems.

These changes are reasonably necessary to ensure that new public water supply wells are not contaminated by sewage lagoons and that public sewage lagoons do not contaminate public or nonpublic water wells. These changes are also necessary to provide consistency across the programs administered by the department that deal with sewage lagoons and wells, or that adopt by reference the department circulars.

17.50.819 INCORPORATION BY REFERENCE AND AVAILABILITY OF REFERENCED DOCUMENTS (1) The department adopts and incorporates by reference:

- (a) Department Circular DEQ-2, Design Standards for Public Sewage Systems (~~2016~~ 2018 edition), which sets forth design standards for public sewage systems;
- (b) through (3) remain the same.

AUTH: 75-10-1202, MCA

IMP: 75-10-1202, MCA

REASON: The department proposes to amend ARM 17.50.819 to adopt the most recent version of Circular DEQ-2 so that all programs that adopt the circular use the same version, thus providing consistency and predictability across the programs administered by the department.

5. The proposed new rule for a subchapter provides as follows:

NEW RULE I SETBACKS BETWEEN SEWAGE LAGOONS AND WATER WELLS (1) For purposes of this section, the following definitions apply:

- (a) "Lagoon area" means the surface area of the lagoon within the design of the high-water mark.
- (b) "Maximum day well demand" means the highest volume of water discharged from a water well on any day in a year.
- (c) "Sewage lagoon" means any holding or detention pond that is used for treatment or storage of water-carried waste products from residences, public

buildings, institutions, or other buildings, including discharge from human beings or animals, together with ground water infiltration and surface water present. For purposes of this section, the term includes concentrated animal feeding operations but does not include storm water facilities or subsurface wastewater treatment systems.

(d) "Water well" has the same meaning as 75-5-103, MCA.

(2) All new water wells and new sewage lagoons must meet the setbacks in (3), unless the applicant demonstrates that a shorter setback is allowed under (4) or (6). Water wells and sewage lagoons that existed or were approved by the department before the effective date of this rule must meet the setbacks under either of the following circumstances:

(a) if the lagoon area is proposed to be increased; or

(b) if the maximum daily pumping rate of a water well is proposed to be increased.

(3) The following setbacks apply, unless the applicant demonstrates that a lesser setback is allowed under (4) or (6):

(a) 1,000 feet between a water well and the design high-water mark of a sewage lagoon;

(b) 200 feet between a well for a public water supply system with continuous disinfection that meets the 4-log virus inactivation and the design high-water mark of a sewage lagoon;

(c) 200 feet between a water well and the design high-water mark of a sewage lagoon if the geometric mean number of *E. coli* bacteria in the influent flow to the sewage lagoon does not exceed 126 colony forming units per 100 milliliters and 10 percent of the total samples do not exceed 252 colony forming units per 100 milliliters during any 30-day period; and

(d) 100 feet between a water well and the design high-water mark of a sewage lagoon if the applicant demonstrates there is no hydraulic connection between the sewage lagoon and the water well as demonstrated by groundwater gradients under the maximum day pumping rate or by confined conditions that prevent lagoon discharges from impacting the water well.

(4) A setback less than the setbacks in (3)(a) through (c) may be used if the applicant demonstrates that the distance needed to achieve 4-log pathogen reduction of effluent migration from the sewage lagoon to the water well is less than the setback distance in (3)(a) through (c). In no instance, however, may the setback be less than 100 feet.

(5) To make the demonstration in (4), the pathogen reduction between the sewage lagoon and the water well must be calculated according to one of the following methods:

(a) METHOD 1 – Travel Time Method - The vertical travel time in the vadose zone for the wastewater to reach groundwater is calculated using the following equation:

$$t_1 = (d) * (\theta) \div (\alpha) \div 365$$

Where:

t_1 = vertical travel time (days)

α is total effluent recharge – the maximum allowable leakage rate or actual measured leakage rate if the measured rate is available (in/yr)

θ is volumetric soil moisture (percent)

d is the depth to groundwater (in)

The horizontal travel time in the saturated zone for the wastewater to reach the water well is calculated using the following equations:

$$t_2 = (x) \div [(K) \cdot (i) \div (n_e)]$$

Where:

t_2 = horizontal travel time (days)

K is hydraulic conductivity of the saturated aquifer (feet/day)

i is hydraulic gradient (feet/feet)

n_e is effective porosity (dimensionless)

x is the horizontal distance from the sewage lagoon to the water well (feet)

The total log pathogen reduction from the bottom of the sewage lagoon to the water well is calculated using the following equation:

$$P_t = (t_1 + t_2) \cdot 0.02$$

Where:

P_t = Log reduction of pathogens during vertical and horizontal travel

0.02 = log 10 pathogen removal/day

(b) METHOD 2 – Travel time and VIRULO - The horizontal travel time (t_2) is calculated the same as for Method 1. The horizontal log reduction is calculated using the following equation:

$$P_h = (t_2) \cdot 0.02$$

Where:

P_h = Log reduction of pathogens during horizontal travel

The pathogen reduction during vertical movement in the vadose zone is calculated using VIRULO. The value of P_h is added to VIRULO results to provide the total pathogen reduction from the bottom of the sewage lagoon to the water well.

(c) Other methods approved by the department.

(6) In calculating 4-log pathogen reduction under (4), the following requirements apply:

(a) Hydraulic conductivity must be based on the aquifer material most likely to transmit lagoon discharges to the water well and be determined by one of the following methods:

(i) The maximum hydraulic conductivity value of the aquifer material shown in Table 1. The hydraulic conductivity for aquifer materials not included in Table 1 may be calculated by the applicant using other methods acceptable to the department. The aquifer material must be the most permeable soil layer that is at least six inches thick and is below the bottom of the of the sewage lagoon infiltrative surface, as identified in any test pit or borehole. This method may only be used for facilities that are not requesting a source-specific ground-water mixing zone, as defined in ARM 17.30.518.

TABLE 1	
<u>MATERIAL</u>	<u>HYDRAULIC CONDUCTIVITY (ft/d)</u>
Basalt (permeable/vesicular)	5,100
Clay	0.025
Clay (unweathered, marine)	0.00054
Coarse sand	94,500
Fine sand	51
Glacial Till	0.72
Glacial Till (fractured)	29.5
Gravel	201,600
Gravelly sand	1,020
Igneous/metamorphic rock (fractured)	76.5
Igneous/metamorphic rock (unfractured)	0.000054
Karst limestone	18,000
Limestone	1.5
Limestone (unjointed, crystalline)	0.30
Loess	0.27
Medium sand	569
Sandstone	1.5
Sandstone (friable)	3.0
Sandstone (well cemented, unfractured)	0.0036
Sandy clay loam	1.4
Sandy silt	0.27
Shale	0.00054
Silt	0.27
Siltstone	0.0036
Silty clay	0.013
Silty sand	45
Tuff	7.2

Very fine sand

21.4

(ii) A pumping test at least 8 hours long, representative of the hydraulic conductivity of the aquifer material, and conducted on a well(s) with complete lithology and construction details. Results for pumping tests must be submitted electronically on DNRC Form 633. Pumping tests must be conducted in accordance with the requirements in ARM 36.12.121(2)(a) through (f), (3)(a), (3)(c), (3)(g), (3)(i), (3)(j), and (3)(k).

(b) Hydraulic gradient must be based on the aquifer material most likely to transmit lagoon discharges to the water well and must be determined by one of the following methods:

(i) The regional topographic slope in an area that includes the water well and the sewage lagoon. The minimum hydraulic gradient that may be used with this method is 0.005 feet/foot, and the maximum gradient that may be used is 0.05 feet/foot. This method may not be used for facilities requesting a source-specific ground-water mixing zone as defined in ARM 17.30.518.

(ii) Groundwater potentiometric maps of the aquifer that accurately represent the local hydraulic gradient in the area of the water well and sewage lagoon.

(iii) Surveyed static water elevations in at least three wells that draw water from the aquifer, accurately represent the local hydraulic gradient in the area of the water well and sewage lagoon, and are measured on the same date to the nearest 0.01 foot.

(c) Soil type must be determined by test pits or boreholes. The following requirements apply:

(i) Test pits or boreholes must be completed to a minimum depth of 10 feet below the bottom of the sewage lagoon infiltrative surface or until an impervious layer, as defined in Circular DEQ-4, is encountered.

(ii) A minimum of two test pits or boreholes must be completed for the first 0.5 acre of lagoon area that is within 1,000 feet of a water well. A maximum of one additional test pit or borehole for each additional acre of lagoon area within 1,000 feet of a water well may be required if the department determines that additional test pits or boreholes are necessary to adequately characterize the soils between the sewage lagoon and the water well. The test pits or boreholes must be located to provide representative information on the soils beneath the sewage lagoon that affect the vertical and horizontal migration of pathogens from the sewage lagoon to the effected water well.

(iii) If the test pit or borehole locations are not within 50 feet of the toe of the sewage lagoon embankment, then the locations must be approved by the department before they are completed. The borehole method must provide a continuous soil sample that is representative of the soil and lithology profile.

(iv) Soils must be described according to the Unified Soil Classification System. The soil description must include information regarding the presence or absence of seasonal saturated conditions. If there is no evidence of saturated conditions from the test pit, borehole, or other evidence, then the depth to groundwater must be estimated as the bottom of the test pit or borehole.

(d) Soils with greater than 35 percent retained on the No. 10 sieve and geologic materials with fractures do not receive credit for virus reduction in the vadose zone.

(e) The well discharge rate used in calculations must be based on the maximum day well demand, which must be determined by using historic discharge rate records or other methods as approved by the department.

(7) The department may determine the setback calculated in accordance with this rule should be decreased—but in no instance shorter than 100 feet—if the applicant demonstrates equivalent protection of the water source that supplies the water well.

AUTH: 75-5-411, MCA

IMP: 75-5-411, MCA

REASON: The department proposes to adopt New Rule I, which establishes setbacks between sewage lagoons and water wells to protect water wells from bacterial and viral pathogens that come from sewage lagoons. Unlike the previous setback of 500 feet that was removed by the Legislature in HB 368, New Rule I uses scientifically based methods to calculate setbacks based on the distance needed between the lagoon and well to provide 4-log pathogen reduction, meaning a 99.99 percent reduction of those bacteria and viruses that may impact water wells.

In developing this rule, the department considered using a matrix of different setbacks for different types of water wells (e.g., domestic, stock, irrigation, incorrect construction) and different types of sewage lagoons (e.g., municipal wastewater, concentrated animal feeding operations, animal feeding operations). The department rejected this approach for three reasons:

(1) water wells often have their use changed over time (water well construction rules are the same for domestic, stock and irrigation uses) without any regulatory requirement to report that change;

(2) there are insufficient scientific studies regarding the virulence of different types of stock or human wastewater sources; and

(3) a 4-log reduction criterion is consistent with existing regulations that define adequate disinfection to protect water wells from pathogens. Those regulations include, for example, Circular DEQ-1 and EPA's *Ground Water Source Assessment Guidance Manual*, EPA 815-R-07-023.

New Rule I provides two methods for determining the appropriate setback between a sewage lagoon and a water well. The first is in Section (3), which provides four default setbacks, depending on whether the water well or sewage is disinfected and whether the water well and sewage lagoon are hydraulically connected. The second is in Section (4), which provides applicants a process to use a lesser setback if the applicant can demonstrate that the lesser setback is sufficient to provide 4-log pathogen reduction. Applicants therefore have the choice to use the easy-to-apply default distances or use a lesser setback if they can demonstrate that the lesser distance will not contaminate the water well. The specifics of each section for the rule are discussed below.

Section (1) defines words used in the rule, which is necessary to provide clarity, consistency, and predictability in the interpretation and administration of the

rule.

Section (1)(a) defines the phrase "lagoon area" as the maximum area of the lagoon designed to contain wastewater. This definition was chosen to provide a meaningful distance between water wells and lagoons in the rule with respect to susceptibility of pathogen migration. The department considered but rejected defining lagoon area in relation to the area occupied by the embankment toe. That definition would be dependent on the depth of the lagoon and land slope and would therefore not be a good metric for determining distances and risks to water wells.

Section (1)(b) defines the phrase "maximum day well demand." This definition is designed to provide the most applicable discharge rate from a water well to use in assessing the potential for pathogens discharged from a sewage lagoon to reach the water well.

Section (1)(c) defines the phrase "sewage lagoon." The definition is designed to specifically eliminate sewage lagoon sources and other lagoon facilities that do not provide a significant source of pathogens to water wells (e.g. storm water lagoons) or have existing setback requirements in other regulations (e.g. septic systems and rapid infiltration systems). The definition does specifically include concentrated animal feeding operations sewage lagoons to eliminate any potential uncertainty for those systems.

Section (1)(d) defines the phrase "water well" as currently defined in the Water Quality Act (75-5-103, MCA) which is inclusive of all wells used to measure or produce groundwater.

Section (2)(a) requires existing sewage lagoons that are increasing the design high water mark area to comply with the rule. The rationale for this section is that sewage lagoons that expand the area occupied by wastewater have the potential to decrease the distance to nearby wells and therefore increase the risk of pathogen impacts to water wells. Increasing the lagoon size is typically also associated with increasing the amount of sewage stored in the lagoon, which creates more potential pathogen impacts to water wells.

Section (2)(b) requires existing water wells that are expanding their rate of water withdrawal to comply with the rule. The rationale for this section is that water wells that increase their withdrawal rates have an increased potential to draw wastewater from sewage lagoon discharges and therefore increase the risk of pathogen impacts to the water well.

Section (3) establishes four setback distances based on pathogen treatment and hydraulic separation between sewage lagoons and water wells. This section provides applicants with default distances instead of the potentially more difficult process of determining the distance needed to achieve 4-log pathogen reduction that is provided in Section (5).

The first default distance is provided in Section (3)(a), which establishes a distance of 1,000 feet between nondisinfected wells and lagoons. This 1,000-foot distance was chosen as the general default setback based on an analysis of common hydrogeological conditions and parameters (hydraulic conductivity, hydraulic gradient, and effective porosity) that showed that 4-log pathogen reduction is generally achieved by a 1,000-foot separation between a sewage lagoon and water well. A review of several other western and mid-western states showed a variety of setbacks, but 1,000 feet is not out of the ordinary, with Nebraska and

Indiana both using a 1,000-foot setback under specific conditions.

Section (3)(b) reduces the 1,000-foot setback to 200 feet between a public water supply well with continuous disinfection that meets 4-log pathogen inactivation and the design high-water mark of a sewage lagoon. The setback is reduced to 200 feet because 4-log pathogen reduction is achieved by treatment of the water. Even though the well is continuously disinfected, the setback is set at 200 feet (instead of 100 feet) to provide additional protection to the well, which is reasonably necessary due to the typically higher pumping rates from public wells (which create a shorter travel time for water between the sewage lagoon and water well), and the potential for an inadequate or failing disinfection system that would only need to be faulty for a short time to allow distribution of contaminated water to multiple persons. Non-public water supply wells are excluded from this section because there is no reliable mechanism to ensure proper installation, operation and monitoring of a disinfection system.

Section (3)(c) reduces the 1,000-foot setback to 200 feet between a water well and the design high-water mark of a sewage lagoon that has been disinfected to levels required for surface water. The setback is reduced to 200 feet because the sewage entering the lagoon has the number of *E. coli* bacteria reduced via disinfection to the lowest number required in surface water classified as B-1 (ARM 17.30.623(2)(i)). The typical minimum setback between non-public water wells and surface water is 100 feet (ARM 17.36.323). Although the sewage lagoon *E. coli* numbers are reduced to surface water limits, the setback for this rule is increased to 200 feet to provide additional protection to the well, which is reasonably necessary due to the potential for an inadequate or failing disinfection system in the lagoon, the lack of monitoring in non-public wells, and the risk of natural bacterial sources such as wildlife waste that could increase the number of *E. coli* in the sewage lagoon.

Section (3)(d) proposes a setback distance of 100 feet between a water well and the design high-water mark of a sewage lagoon if there is no hydraulic connection between the sewage lagoon and the water well, meaning the wastewater leakage from the sewage lagoon cannot migrate into the water well either because of the direction of groundwater flow under maximum day pumping rates, or because an impervious geologic layer (e.g., thick clay or till layer) prevents wastewater leakage from entering the aquifer supplying water to the water well. In such cases, the lack of hydraulic connection means that the wastewater cannot physically enter the water well and provides adequate protection to reduce the setback to the minimum distance of 100 feet.

Section (4) allows applicants to use a lesser setback than those established in Section (3) if the applicant demonstrates that a shorter setback can provide 4-log pathogen reduction. This section provides a science-based method for siting lagoons and wells that protects public health and safety while giving applicants the flexibility to site wells or lagoons in locations that otherwise would not be allowed under the default setback distances in Section (3). This section requires a minimum setback of 100 feet under all circumstances, which is an accepted and longstanding standard both in and outside of Montana and is consistent with numerous state rules and circulars that use 100 feet as a minimum separation between various wastewater sources and water wells (e.g., ARM 17.36.323, ARM 36.21.638, and Circular DEQ-1 section 3.2.3.1). Additionally, it is a prudent public protection policy

to maintain a minimum setback between water wells and sources of contamination to guard against unforeseen circumstances and emergencies.

Section (5) provides two methods to determine the amount of pathogen reduction: the travel time method and the VIRULO method. This is reasonably necessary to provide applicants with accepted methods of calculating 4-log reduction, which provides consistency and predictability in the application of the rule. These two methods were chosen because they are common and accepted methods within the department and the engineering community. The first method is based on travel time calculations in both the unsaturated zone (where the wastewater moves vertically) and groundwater (where wastewater moves primarily horizontally) using common equations that are provided in this section. The travel time formulas in this section are based on Appendix B to 020-011-23 of the Code of Wyoming Rules, available at

<http://wwcb.state.wy.us/PDF/RulesAndRegulations/DEQ%20Chapter%2023.pdf>.

The calculated travel time is then combined with a default pathogen reduction rate of 0.02 log₁₀ removal/day (as described in Appendix C of the EPA *Ground Water Rule Source Assessment Guidance Manual*, available at

<https://www.epa.gov/dwreginfo/ground-water-rule-compliance-help-primacy-agencies>) to provide the log removal of pathogens.

Regarding Section (5)(b), the second method combines the travel time method in the groundwater and a model, VIRULO, for the unsaturated zone. VIRULO is an EPA-supported model that is commonly used in the department and the engineering community. Information about the model is available from the EPA at <https://www.epa.gov/water-research/virus-fate-and-transport-virulo-model>. Finally, the rule allows other methods to be used if approved by the department. This is reasonably necessary because the two listed methods, while common, are not the only methods that can be used to calculate 4-log pathogen reduction, and the rule gives applicants the flexibility to use those other methods.

Section (6) provides acceptable methods and technical requirements for determining hydraulic conductivity, hydraulic gradient, and soil types, which are site-specific parameters needed to demonstrate the 4-log pathogen reduction in Section (5). Specifically, those three parameters are needed for calculating travel time of the wastewater in the unsaturated zone and the groundwater. Travel time is needed for calculating the amount of pathogen reduction as the wastewater migrates towards the water well. Specific methods for determining those parameters are provided to promote consistency in applying the rule and to provide applicants with the expected level of detail.

Section (6)(a) provides methods and requirements for calculating hydraulic conductivity, which are necessary because hydraulic conductivity is one of the parameters needed to calculate travel time in groundwater. This section provides two different methods to calculate hydraulic conductivity. First, hydraulic conductivity may be calculated using the values in Table 1. This is a simple and inexpensive method to estimate hydraulic conductivity that requires only information from the test pits or boreholes required in Section (6)(c) and the corresponding value in Table 1. Table 1 is proposed as part of this section to promote consistency in applying the rule and to provide applicants with a simple and quick method to determine hydraulic conductivity. The values in Table 1 were derived from reviewing

existing published values of hydraulic conductivity and using 90 percent of the highest published value for each of the soil and rock types listed in Table 1. This higher value was used because it provides a faster travel time calculation and is thus more protective of water wells to account for uncertainty in estimating the true hydraulic conductivity of the aquifer materials. The sources considered in developing Table 1 were Patrick A. Domenico and Franklin W. Schwartz, *Physical and Chemical Hydrogeology* (1990); R. Allan Freeze and John A. Cherry, *Groundwater* (1979); Fletcher G. Driscoll, *Groundwater and Wells* (2d ed. 1987); C.W. Fetter, *Applied Hydrogeology* (1994); Mary P. Anderson and William W. Woessner, *Applied Groundwater Modeling* (1992); and Geotechdata.info, *Soil void ratio*, <http://geotechdata.info/parameter/permeability.html> (October 7, 2013). Finally, because Table 1 does not include all types of aquifer materials, New Rule I allows applicants to calculate the hydraulic conductivity for aquifer materials not included in the table by methods found acceptable to the department.

While the values in Table 1 are reasonably necessary to provide applicants with an easy and inexpensive method of calculating hydraulic conductivity, the resulting values are inherently conservative because the table used the larger values of the range of published values for hydraulic conductivity. Because of that, Section (6)(a)(ii) provides a more accurate but more expensive method to calculate hydraulic conductivity by allowing a pumping test in the aquifer that is most likely transmitting wastewater to the water well. The rule provides requirements on the methods and data needed to conduct an acceptable pumping test to promote consistency in applying the rule and to provide applicants with the expected level of detail.

Section (6)(b) provides requirements for calculating hydraulic gradient, which is necessary because hydraulic gradient is one of the parameters needed to calculate travel time in groundwater. This section provides three different methods for calculating hydraulic gradient, which vary from inexpensive but conservative to more expensive but more precise. These methods are necessary to provide consistency in applying the rule while giving applicants the flexibility to tailor calculations to their needs.

The first method is provided in Section (6)(b)(i), which provides a simple and inexpensive method to estimate hydraulic gradient using the topographic slope of the regional land surface that can be measured on a United States Geological Survey (USGS) topographic map or other topographic map. Using topography to estimate hydraulic gradient is conservative because it estimates a relatively larger hydraulic gradient; a larger hydraulic gradient value results in a faster travel time to the water well, less pathogen reduction, and a larger setback distance.

The second method is provided in Section (6)(b)(ii), which allows hydraulic gradient to be determined by using a groundwater potentiometric map that is representative of the hydraulic gradient of the aquifer that is most likely to transmit water between the water well and sewage lagoon. This method is simple and inexpensive but is more precise than the topographical maps allowed in section (6)(b)(i). Section (6)(b)(iii) provides the third and typically the most accurate and expensive method, which is to measure the local hydraulic gradient in the aquifer supplying water to the water well using water elevation measurements in at least three nearby wells.

Section (6)(c) provides location, number, and depth requirements for installing

test pits or boreholes, as well as requirements for collection and description of the soils. This section is reasonably necessary because soil type is one of the parameters needed to calculate wastewater travel time in the unsaturated zone and the groundwater. This section allows both test pits and boreholes because each has advantages and disadvantages for evaluating soils. A test pit is typically dug with a backhoe and allows a large area of the soil column to be viewed, but test pits are limited in depth by the size of the backhoe and the wall strength. A borehole is typically dug with well drilling rig and provides only one narrow cross section of the soils, but the depth of the borehole is typically not limited.

Section (6)(c)(i) defines the minimum depth for the test pit or borehole as 10 feet below the bottom of the lagoon. This depth is necessary to determine the type of soil or rock that the wastewater will flow through after discharging from the lagoon and is consistent with requirements by the Natural Resources Conservation Service (NRCS) and accepted practices in the engineering community. If there is an impervious layer such as unfractured bedrock or a thick clay layer encountered before the 10-foot depth, the boring or test pit can be ended at that depth because the wastewater will not migrate below the impervious layer; the soil information above the impervious layer will be used for the pathogen reduction calculations.

Section (6)(c)(ii) provides the requirements for the number of test pits or boreholes based on the lagoon area. Two test pits or boreholes are required for lagoons with an area of less than 0.5 acres that is within 1,000 feet of a water well. Two boreholes are adequate to characterize the soils near a small lagoon, and the requirement is consistent with NRCS requirements for animal feeding operation lagoons. As the lagoon size increases, additional test pits or boreholes may be required to provide adequate information to characterize the soils near the sewage lagoon.

Section (6)(c)(iii) requires department approval for test pits and boreholes that are not within 50 feet of the lagoon embankment. Test pits and boreholes should be as close to the lagoon as possible to provide the best available information on the soils and rock beneath the lagoon. In some cases, however, an alternative location must be chosen, such as when an applicant does not have access to the land near the sewage lagoon. In those cases, the department needs to be involved with selecting the locations so that representative locations are chosen. This section also requires collection of a continuous soil sample if a borehole is used instead of test pit. A continuous sample is important to define the correct soil/lithology to use in calculating the travel times in the unsaturated zone and groundwater. Boreholes are required to have continuous and representative samples because some borehole drilling methods do not provide detailed soil layer information that is needed for determining the correct soil properties. The rule allows the applicant to use any borehole method if it provides a representative and continuous soil sample.

Section (6)(c)(iv) requires that the commonly used Unified Soil Classification System (USCS) be used in describing soils. A common classification system was chosen to minimize confusion and interpretation errors when using New Rule I. This section also requires that the portions of the test pit or borehole that are not below the water table be examined for indications of past saturated conditions. Current or past levels of saturated conditions are important in determining the appropriate vertical and horizontal travel times of wastewater leakage from a sewage lagoon.

When there is no evidence of existing or past saturated conditions or impervious layers, using the bottom of the test pit as the level of groundwater is a conservative estimate for use in determining pathogen removal. The 10-foot minimum depth allows the applicant flexibility in ending the borehole or test pit at 10 feet if that depth is sufficient for determining an acceptable setback.

Section (6)(d) provides a maximum amount of coarse material allowed in a soil type to be eligible for virus reduction as it moves vertically in the unsaturated zone. The No. 10 sieve is sized to retain coarse sand and larger sized grains. According to the EPA VIRULO documentation, soils with 35 percent or more of coarse sand or larger grains do not provide any pathogen treatment because the wastewater migration is too rapid. Geologic materials with fractures (including but not limited to sandstone, limestone, shale, basalt and granite) also do not provide any pathogen treatment for the same reason. This restriction only applies to the unsaturated portion of the travel time calculations; coarse soils and fractured materials do receive credit for pathogen reduction during the horizontal movement of wastewater in the saturated groundwater aquifer.

Section (6)(e) provides requirements for the maximum day well demand to determine wastewater travel time and hydraulic separation between sewage lagoons and water wells. The maximum day well demand is the most applicable well discharge rate to determine travel rates in groundwater and be protective of water wells; other rates such as instantaneous maximum or pump capacity are too high to provide a reasonable value for the travel time calculations, while lower rates such as annual average are too low for this purpose. Because the maximum day well demand is a new metric that has not been defined for water wells in the past, this section provides applicants the flexibility to show maximum day well demand by using historic discharge rate records, or by using other methods as approved by the department when measured discharge rates for the water well are not available or are insufficient to accurately determine the maximum day well demand.

Section (7) provides the applicant flexibility to use other means to determine a setback that is shorter (but no shorter than 100 feet) than what is calculated using the requirements in Sections (3) through (6). This section is included because this rule does not address all potential valid methods and data requirements for determining pathogen reduction, and allows for other methods to be used when appropriate.

6. The proposed changes in Circulars are as follows:

Circular DEQ-1:

1.2.2 Detailed plans, including, where pertinent:

- a. through f. remain the same.
- g. location of all existing and potential sources of pollution, including all sewage lagoons with the design high-water mark within 1,000 feet of the well site and all easements, including easements, which may affect the water source or underground treated water storage facilities;
- h. through q. remain the same.

REASON: The board is proposing to amend Standard 1.2.2, which address the minimum requirements of what must be shown on the plans for a new public water supply well. The amendment would require that the location of any sewage lagoon within 1,000 feet of the well site must be identified in the plans, which is necessary so that the department can determine early in the review process if further evaluation is needed to ensure all water wells comply with New Rule I, and so that applicants are aware of its requirements early in the process and accordingly have a better basis for their decision making.

3.2.3.1 Well location

MDEQ must be consulted prior to design and construction regarding a proposed well location as it relates to required separation between existing and potential sources of contamination and ground water development. Wells must be located at least 100 feet from sewer lines, septic tanks, holding tanks, and any structure used to convey or retain industrial, storm, or sanitary waste; and from state or federal highway rights-of-way. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I]. Well location(s) must be based on a source water delineation and assessment conducted in accordance with Section 1.1.7.2 of this circular.

REASON: The board is proposing to amend Standard 3.2.3.1, which provides siting requirements for proposed public water supply well locations to ensure that they are constructed at the correct distances from potential sources of contaminants, to require that wells must meet the setback distances in New Rule I. Because New Rule I is designed to protect water wells from contamination from sewage lagoons, the protections in New Rule I should apply to public wells reviewed under the public water supply laws and DEQ-1. This change is also reasonably necessary to promote consistency across programs administered by the department.

Circular DEQ-2:

11.29 Detailed Alternative Evaluation

The following must be included for the alternatives to be evaluated in detail.

a. through c.7. remain the same.

8. Protection of groundwater including public and private wells is of utmost importance. Demonstration that protection will be provided must be included. The Department must be contacted for required separation. Protection for water wells within 1,000 feet of the design high water mark of any sewage ponds must be in accordance with [New Rule I].

9. through 18. remain the same.

REASON: The board is proposing to amend Standard 11.29, which contains the site evaluation requirements for plans submitted under DEQ-2. The amendment would include a reference to New Rule I to alert applicants to its requirements, thus

enabling the department to better assess and understand early in the project if a well will be impacted by the project and providing the applicant with a better basis for design and better information for decision making.

20.42 General Layout

Layouts of the proposed wastewater treatment plant must be submitted, showing:

a. through f. remain the same.

g. All wells located within 1,000 feet of the design high water mark of the sewage pond(s). Wells must meet the setback distance to sewage ponds as established in [New Rule I].

REASON: The board is proposing to amend Standard 20.42, which contains requirements for what must be shown on the plans for a new wastewater treatment facility. The board is proposing to amend this section to require that the location of any water well(s) in relation to sewage ponds comply with New Rule I. This amendment is necessary so that the department can determine if a further evaluation is needed to ensure all water wells are in compliance with New Rule I.

89.22 Location

Sludge ponds must be located as far as practicable from inhabited areas or areas likely to be inhabited during the lifetime of the structures. The distance between the design high water mark of the sludge pond and any water well must meet the setback distance as established in [New Rule I]. ~~Siting of sludge ponds must comply with the requirements of the Department. In accordance with MCA 75-5-605, a minimum separation of 500 feet (152.4 m) between the outer toe of the sewage pond embankments and any existing water well must be maintained.~~

REASON: The board is proposing to amend Standard 89.22, which currently cites 75-5-605, MCA to establish a 500-foot setback for sludge ponds (the terms "pond" and "lagoon" are used interchangeably in DEQ-2) and existing water wells. It is necessary to delete this reference in the circular after the Legislature deleted the 500-foot requirement in HB 368 and required the department to adopt new setbacks, which the department is doing in this Notice. Sludge ponds are typically used as part of the solids holding process in mechanical wastewater treatment plants and pose the same risks of well contamination that sewage lagoons do, so it is necessary that the requirements of New Rule I apply to protect water wells near sludge ponds.

93.26 Water Well Separation

~~In accordance with MCA 75-5-605, a minimum separation of 500 feet (152.4 m) between the outer toe of the sewage pond embankments and any existing water well must be maintained.~~

~~Separation requirements for storage ponds are discussed in Section 121.115 (Storage Analysis) and Section B.6 (Setbacks, Separation and Buffer Distances for Reclaimed Wastewater Use). The distance between the design high water mark of the sewage pond (including those used for the storage of effluent) and any water well must meet the setback distance as established in [New Rule I].~~

REASON: The board is proposing to amend Standard 93.26, which currently cites 75-5-605, MCA to establish a 500-foot setback for sewage ponds and existing water wells. It is necessary to delete this reference in the circular after the Legislature deleted the 500-foot requirement in HB 368 and required the department to adopt new setbacks, which the department is doing in this Notice. In place of the previous 500-foot setback, the board is proposing to adopt New Rule I, thus protecting wells from contamination from sewage lagoons reviewed under DEQ-2. The board is also proposing to delete the cross-reference to Standards 121.115 and Appendix B.6, which provide separation requirements for storage ponds. As discussed in the statement of reasonable necessity for those standards, the board is proposing to remove those requirements to consolidate all the requirements in New Rule I.

121.115 Storage Analysis

Adequate storage during inoperable periods must be provided. Justification and calculations associated with storage volume requirements must be provided including a month by month water balance based on maximum design conditions.

Design precipitation must be based on a 10-year precipitation return period as described in Section 121.103.11 b (Precipitation). Storage requirements for wastewater treatment ponds are located in Section 93.36 (Pond Design Criteria, Tables 93-1 and 93-2).

Evaporation (E) rates must be based on estimated lake evaporation in the local area, if available. Where monthly evaporation data is unavailable, average annual evaporation may be distributed based on the ratio of average monthly ETc to average annual ETc.

Average annual evaporation and monthly precipitation values for Montana communities can be found at the Western Regional Climate Center website.

~~Storage ponds are exempt from the requirements of Section 93.26 (Water Well Separation) provided the content has been treated to the levels established in Table 121-1 (Reclaimed Wastewater Classifications and Associated Treatment Requirements) and has been adequately disinfected. Wastewater is considered adequately disinfected if the geometric mean number of *E. coli* in the influent flow to the storage pond does not exceed 630 colony forming units per 100 milliliters and 10 percent of the total samples does not exceed 1,260 colony forming units per 100 milliliters during any 30-day period.~~

APPENDIX B.6 Setbacks, Separation and Buffer Distances for Reclaimed Wastewater Use

The required distance of the approved use area from surface water and any well will be determined by the Department case-by-case based on the quality of effluent and the level of disinfection. In no case can reclaimed wastewater be discharged or applied directly to surface water unless an MPDES discharge permit is obtained from the Department.

~~Storage ponds are exempt from the requirements of Section 93.26 (Water Well Separation) provided the content has been treated to the levels established in Table B-1 (Reclaimed Wastewater Classifications and Associated Treatment Requirements) and has been adequately disinfected. Wastewater is considered adequately disinfected if the geometric mean number of *E. coli* in the influent flow to the storage pond does not exceed 630 colony forming units per 100 milliliters and 10 percent of the total samples does not exceed 1,260 colony forming units per 100 milliliters during any 30-day period.~~

The Department will establish buffer zones on a case by case basis as necessary to protect public health.

REASON: The board is proposing to amend Standards 121.115 and Appendix B.6, both of which provide exemptions from the setback requirements in Standard 93.26 for storage ponds that meet certain disinfection standards. Because the board is proposing to amend Standard 93.26 to include the requirements of New Rule I, the board is also proposing to remove the exemptions in Standards 121.115 and Appendix B.6 to consolidate the requirements in a single place, New Rule I, thus making it easier to understand and apply the setback requirements. In doing so, the board is also proposing to modify the existing requirements in these standards. The first change included in New Rule I is to not exempt storage ponds with adequate disinfection from a setback but rather reduce the setback from 1,000 feet to 200 feet. The second modification is to increase the required amount of disinfection that meets the following requirements: the geometric mean number of *E. coli* bacteria in the influent flow to the sewage lagoon does not exceed 126 colony forming units per 100 milliliters and 10 percent of the total samples do not exceed 252 colony forming units per 100 milliliters during any 30-day period. The rationale for those changes are provided in the statement of reasonable necessity for section (3)(c) of New Rule I.

Circular DEQ-3:

1.2.2 Detailed plans, including:

- a. and b. remain the same.
- c. location of all existing and potential sources of pollution, ~~which that~~ may affect the water source or underground treated water storage facilities, including all sewage lagoons with the design high-water mark within 1,000 feet of the well site;

d. through h. remain the same.

REASON: The board is proposing to amend Standard 1.2.2, which address the minimum requirements of what must be shown on the plans for new water wells serving small water systems. The amendment would require that the location of any sewage lagoon within 1,000 feet of the well site must be identified in the plans, which is necessary so that the department can determine early in the review process if further evaluation is needed to ensure all water wells reviewed under DEQ-3 comply with New Rule I, and so that applicants are aware of its requirements early in the process and accordingly have a better basis for their decision making.

3.2.3.1 Well location

Regarding a proposed well location, MDEQ must be consulted prior to design and construction as the location relates to required separation between existing and potential sources of contamination and ground water development. Wells must be located at least 100 feet from sewer lines, septic tanks, holding tanks, and any other structures used to convey or retain industrial, storm, or sanitary waste and state or federal highway rights-of-way. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I]. Well location(s) must be based on a source water delineation and assessment conducted in accordance with Section 1.1.6 of this circular.

REASON: The board is proposing to amend Standard 3.2.3.1, which provides siting requirements for proposed small water system well locations to ensure they are constructed at the correct distances from potential sources of contaminants, to require that wells must meet the setback distances in New Rule I. Because New Rule I is designed to protect water wells from contamination from sewage lagoons, the protections in New Rule I should apply to small water system wells reviewed under Circular DEQ-3. This change is also reasonably necessary to promote consistency across programs administered by the department.

New Community Water Supply Well Expedited Review Checklist

ENGINEERING REPORT:

3.2.3.1 Well location

Wells must be located at least 100 feet from sewer lines, septic tanks, holding tanks, and any structure used to convey or retain industrial, storm or sanitary waste, and state or federal highway rights-of-way. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I].

PLANS:

1.2.2. Detailed plans, including where pertinent:
c. through f. remain the same.

- g. location of all existing and potential sources of pollution, including easements, which may affect the water source or underground treated water storage facilities, including all sewage lagoons with the design high-water mark within 1,000 feet of the well site;
- i. remains the same.

3.2.3.1 and 3.2.3.2. Well location and continued protection zone.

Plans must identify the well isolation zone and all sewer lines, septic tanks, holding tanks, groundwater mixing zones and any structure used to convey or retain industrial, storm or sanitary waste and state or federal highway rights-of-way located within 100 feet of the proposed well. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I].

REASON: The board is proposing to amend the New Community Water Supply Expedited Review Checklist, which contains the same requirements as in Circular DEQ-1, to require that wells must meet the setback distances in New Rule I and that all sewage lagoons within 1,000 feet of the well site be identified in the plans. These changes are necessary to ensure that the checklist matches the revisions in DEQ-1, to provide the protection of New Rule I to those wells, and to allow the department to determine early in the review process if further evaluation is needed.

New Non-Community Water Supply Well Expedited Review Checklist

ENGINEERING REPORT:

3.2.3.1 Well location

Wells must be located at least 100 feet from sewer lines, septic tanks, holding tanks, and any structure used to convey or retain industrial, storm or sanitary waste, and state or federal highway rights-of-way. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I].

PLANS:

1.2.2. Detailed plans, including where pertinent:

- a. and b. remain the same.
- c. location of all existing and potential sources of pollution, including all sewage lagoons with the design high-water mark within 1,000 feet of the well site, which may affect the water source or underground treated water storage facilities;
- d. remains the same.

3.2.3.1 and 3.2.3.2. Well location and continued protection zone

Plans must identify the well isolation zone and all sewer lines, septic tanks, holding tanks, groundwater mixing zones and any structure used to convey or retain

industrial, storm or sanitary waste and state or federal highway rights-of-way located within 100 feet of the proposed well. Wells must meet the setback distance to sewage lagoons established in [NEW RULE I].

REASON: The board is proposing to amend the New Non-Community Water Well Supply Expedited Review Checklist, which contains the same requirements as Circular DEQ-3, to require that wells must meet the setback distances in New Rule I and that all sewage lagoons within 1,000 feet of the well site be identified in the plans. These changes are necessary to ensure that the checklist matches the revisions in DEQ-3, to provide the protection of New Rule 1 to those wells, and to allow the department to determine early in the review process if further evaluation is needed.

7. 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 Sandy Scherer, Legal Secretary, 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 sscherer@mt.gov, no later than 5:00 p.m., _____, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

8. The board and department maintain 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 Sandy Scherer, Legal Secretary, 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 Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

9. Sarah Clerget, attorney for the board, has been designated to preside over and conduct the hearing.

10. The bill sponsor contact requirements of 2-4-302, MCA, do apply. The department notified the bill sponsor at his telephone number on February 15, 2018.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/
EDWARD HAYES
Rule Reviewer

BY: /s/
CHRISTINE DEVENY
Chairman

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/
GEORGE MATHIEUS
Acting Director

Certified to the Secretary of State, _____, 2018.

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR ACTION ON RULE AMENDMENT**

Agenda # III.A.4.

Agenda Item Summary – The Department requests that the Board adopt amendments to Administrative Rules of Montana (ARM) 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding 401 Certification as proposed in the attached Notice of Amendment. No comments were received from the public on the proposed amendments.

List of Affected Board Rules –The proposed amendments will affect Board rules adopted under authority of § 75-5-401, Montana Code Annotated (MCA) at ARM Title 17, chapter 30, subchapter 1 establishing policies and procedures for state water quality certification of activities requiring federal permits under section 401 of the federal Clean Water Act, 33 USC § 1341.

List of Affected Department Rules – The proposed amendments will not affect any current department rules.

Affected Parties Summary – The proposed amendments will clarify and update the § 401 certification process and will affect parties applying for § 401 Water Quality Certifications, but the impact should not be significant.

Background – Under Section 401 of the federal Clean Water Act, states and tribes can review and approve, condition, or deny all Federal permits or licenses that might result in a discharge to State or Tribal waters, including wetlands. The major Federal licenses and permits subject to Section 401 are Section 402 and 404 permits (in non-delegated states), Federal Energy Regulatory Commission hydropower licenses, and Rivers and Harbors Act Section 9 and 10 permits. States and tribes may choose to waive their Section 401 certification authority.

States and Tribes make their decisions to deny, certify, or condition permits or licenses primarily by ensuring the activity will comply with state water quality standards. In addition, states and tribes look at whether the activity will violate effluent limitations, new source performance standards, toxic pollutants, and other water resource requirements of state/tribal law or regulation. The Section 401 review allows for better consideration of state-specific concerns.

The proposed amendments are summarized as follows:

- 1.) ARM 17.30.103 is amended to clarify that the application is not deemed complete until all information needed for the review is received by the Department, including the appropriate fee. The automatic trigger deeming an application complete after 30 days of receipt is removed since this provision impedes coordination with the federal permitting agency, a process required for the 401 review to continue;
- 2.) ARM 17.30.106 is amended to eliminate the automatic waiver of certification if the applicant is not notified within 30 days of the Department's tentative determination. Automatically waiving 401 certification impedes review of federal permits authorizing discharges to Waters of the State and does not coincide with the federal permit review process;
- 3.) ARM 17.30.108 is amended to clarify how public notice of the department's tentative

- certification decision is distributed and published. Language is added to clarify that the Department may meet its public notice requirements through joint public notice with the U.S. Army Corps of Engineers when the Department has received a complete application and the federal agency's notice references the department's certification responsibility; and
- 4.) ARM 17.30.109 is amended to clarify that a pending 401 certification is suspended rather than denied upon appeal to the Board.

Hearing Information - A hearing was held September 18, 2018. The department testified in support of the proposed amendments at the hearing. No written comments or oral testimony from the public was received.

The Board's Options: 1.) Adopt the amendments to the above-stated rules as proposed in Montana Administrative Register (MAR) Notice No. 17-399, published on August 24, 2018; or 2.) Take no action.

Enclosures –

Draft Notice of Amendment of Administrative Rules of Montana 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding § 401 Certification;

Notice of Public Hearing on Proposed Amendment of Administrative Rules of Montana 17.30.103, 17.30.106, 17.30.108 and 17.30.109 regarding § 401 Certification; and House Bill 521/311 analyses and Takings Checklist

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
17.30.103, 17.30.106, 17.30.108 and)	
17.30.109 regarding 401 Certification)	(WATER QUALITY)
)	

TO: All Concerned Persons

1. On August 24, 2018, the Board of Environmental Review published MAR Notice No. 17-399, pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1645 of the 2018 Montana Administrative Register, Issue No. 16.

2. The board has amended the rules exactly as proposed.

3. No comments were received from the public, in writing or orally at the hearing. The department submitted testimony in support of the proposed amendments at the hearing.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ _____	BY: /s/ _____
EDWARD HAYES	CHRISTINE DEVENY
Rule Reviewer	Chairman

Certified to the Secretary of State, _____, 2018.

STATE OF MONTANA
BOARD OF ENVIRONMENTAL REVIEW

(1) I, Christine Deveny, Chairman of the Board of Environmental Review of the State of Montana, by virtue of and pursuant to the authority vested in me by Sections 75-5-401, MCA, do amend the following rules:

AMD: 17.30.103	Application for Certification
17.30.106	Tentative Determination by the Department
17.30.108	Public Notice and Final Determination by the Department
17.30.109	Appeal to the Board

as permanent rules of this department.

(2) This order, after first being recorded in the order register of this department, shall be forwarded to the Secretary of State for filing.

APPROVED AND ADOPTED _____, 2018

CERTIFIED TO THE
SECRETARY OF STATE _____, 2018

BOARD OF ENVIRONMENTAL REVIEW

BY: /s/ _____
CHRISTINE DEVENY, CHAIRMAN

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Tim Fox
Attorney General



1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: The Montana Board of Environmental Review

FROM: Sarah Clerget, Board Attorney

RE: 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, Montana (MTR105376)[FID 2288, Docket No. WQ-15-07] and in the matter of violations of the Water Quality Act by Copper Ridge, Development Corporation at Copper Ridge subdivision, Billings, Yellowstone County, Montana. (MTR105377)[FID 2289, Docket No. WQ-15-08]

DATE: November 30, 2018

The purpose of this memo is to assist BER when reviewing a hearing examiner's proposed decision in a contested case proceeding.

The record before the Board consists of a written record and an opportunity for the parties to make oral arguments to the Board. Pursuant to the contested cases provisions of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. § 2-4-601 *et. seq.*, as the hearing examiner in this case, I issued *Proposed Findings of Fact, Conclusions of Law and Order* (Proposed Order) on July 16, 2018. I also issued an Order on Exceptions that same day.

My Proposed Order depends on prior decisions made by the previous hearing examiner, Andres Haladay, based on Summary Judgement motions before him. Mr. Haladay issued his Summary Judgment order on August 1, 2017. Copper Ridge has taken exceptions to both my Proposed Order and Mr. Haladay's Summary Judgment order. The Board's materials for the December 7th meeting therefore include not only my Proposed Order, but also Mr. Haladay's Order on Summary Judgment, Copper Ridge's Exceptions Brief, and DEQ's Response Brief. Additionally, on November 26, 2018 (after DEQ filed its response), Copper Ridge filed an additional Motion to Strike portions of DEQ's response brief as untimely. That Motion is currently pending before the Board, and it is therefore also included in the Board materials.

In addition to the written materials, the parties can make oral arguments to the Board at the December 7th meeting.

Based on the written record and the oral arguments before the Board, it must decide, by seconded motion, what to do with my Proposed Order. MAPA provides BER with the following options:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

Mont. Code Ann. § 2-4-621(3).

In other words, BER has three options regarding what action to take upon review of a hearing examiner's proposed order:

- (1) Accept the Order on Summary Judgment and Proposed Order in their entirety and adopt them as the Board's final order;
- (2) Accept the findings of fact in the Order on Summary judgment and Proposed Order, but modify the conclusions of law or interpretations of administrative rules in either; or
- (3) Reject the Order on Summary judgment and/or the Proposed Order, review the entire record that was before the hearing examiner, find that the Proposed Order is not supported by substantial evidence, and modify the findings of fact and conclusions of law in the proposed order accordingly. This could mean a modified order on summary judgment, an order denying summary judgment and ordering a hearing, or some combination of the two.

When choosing among these three options, the Board should keep certain legal standards in mind. Regarding options (2) and (3), the agency may "correct a hearing examiner's incorrect conclusions of law" in a final order, without having to review the entire factual record. *Mont. Dept. Transp. v. Mont. Dept. Labor and Indus.*, 2016 MT 282, ¶ 23 (herein, *MDOT*); Mont. Code Ann. § 2-4-621(3). However, the agency is more

constrained with regard to modifying findings of fact. The agency cannot discard a hearing examiner's factual findings. *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶¶ 7, 27-29. "Under MAPA, an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 25 ((internal quotations marks omitted; citing *Moran v. Shotgun Willies*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995), Mont. Code Ann. § 2-4-621(3)). "In reviewing findings of fact, the question is not whether there is evidence to support *different* findings, but whether competent substantial evidence supports the findings actually made." *Mayer*, ¶ 27 (citing *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21 (emphasis supplied in *Knowles*)).

"An agency abuses its discretion if it modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence." *Stricker*, ¶ 25. "[A]n agency's rejection or modification of a hearing officer's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence."¹ *Id.* (internal citations omitted). With regard to whether substantial credible evidence supports the factual findings, *Stricker* explained:

Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance. The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence.

Stricker, ¶ 26 (internal citations and quotations omitted); *see also Mayer*, ¶ 27 (quoting Black's Law Dictionary 635, 636, 639, 640 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009)).

Members of the Board may therefore look at any portions of the underlying record in order to decide whether or not findings of facts are supported by "competent substantial evidence," but once the Board determines that factual findings are not so supported, the Board must review the entire record before modifying any fact found by the Hearing Examiner.

Once a decision is made, BER may utilize the Board Secretary or Board Attorney to assist in drafting the final order memorializing the Board's substantive decision, for the

¹ This standard should not be confused with the legal determination of whether the facts, as found, meet a party's burden of proof by a preponderance of the evidence. *See Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2005 MT 96, P17-26.

signature of the Board Chair. If the decision is dispositive (ending the case), then the aggrieved party may appeal to state District Court for review. If the Board's decision is not dispositive, the Board can decide to retain jurisdiction of this matter or assign it to a hearings examiner for further proceedings.

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE WATER**
5 **QUALITY ACT BY COPPER RIDGE,**
6 **DEVELOPMENT CORPORATION AT**
7 **COPPER RIDGE SUBDIVISION,**
8 **BILLINGS, YELLOWSTONE COUNTY,**
9 **MONTANA. (MTR105377) [FID 2289,**
10 **DOCKET NO. WQ-15-08]**

CASE NO. BER 2015-02 WO

Electronically Filed with the Montana Board of
Environmental Review

This 1 day of August, 2017
at 9:27 o'clock am

By: Meranda Sikes

ORDER ON SUMMARY JUDGMENT

9 The Parties have filed cross motions for summary judgment and have had the
10 opportunity for oral argument. Both Motions for Summary Judgment are granted in
11 part and denied in part. A hearing is still necessitated in this matter, and a
12 Scheduling Order is issued in conjunction with this Order, setting forth the process
13 going forward.

14 **FACTS**

15 1. On September 9, 2013, DEQ conducted a compliance evaluation
16 inspection at the Reflections at Copper Ridge (Reflections) and Copper Ridge
17 Subdivisions.

18 2. DEQ documented areas with construction activity that it believed were
19 not authorized under General Permit MTR 100000. DEQ observed clearing,
20 grading, excavation, soil stockpiles, concrete washout areas, and sediment tracking
21 on streets. DEQ documented that the subdivisions did not have Best Management
22 Practices (BMPs) in place to control or mitigate the discharge of pollutants
23 associated with storm water runoff from construction at the subdivisions.

24 3. On September 23, 2013, DEQ sent a Violation Letter to Gary Oakland
25 of the Copper Ridge Development Corporation.

26
27 4. The letter stated "The Montana Department of Environmental Quality

(DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action.”

5. The letter documented conditions observed at Copper Ridge and Reflections, on September 9, 2013.

6. DEQ conducted a CEI of construction disturbance observed within the respective subdivisions and the impact on storm water discharge into Cove Ditch.

7. DEQ concluded:

Based on the facility site inspection and the documentation reviewed, the DEQ has determined that Copper Ridge Development Corporation is in violation of the following provisions of the Montana Water Quality Act:

- Unauthorized discharge of wastes to state waters without a valid permit is a violation of 75-5-605(2)(c) of the Montana Code Annotated (MCA).
- Causing pollution of state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters is a violation of 75-5-605(1)(1) [sic] MCA.

8. DEQ explained it was “initiating a formal enforcement action,” and requested Copper Ridge Development Corporation complete corrective actions by October 18, 2013. DEQ further explained:

this letter of violation is intended to inform Copper Ridge Development of the formal enforcement action and require corrective actions to demonstrate compliance with the Montana Water Quality Act. If Copper Ridge Development Corporation believes the facts stated in this letter are inaccurate or the necessary corrective actions are not achievable by the required dates please contact me upon receipt of this letter. DEQ will take into consideration any documentation that indicates the violations did not occur, or that they occurred differently than described above.

9. On December 17, 2013, DEQ received a Notice of Intent (NOI) and Storm Water Pollution Prevention Plan (SWPPP) from both Copper Ridge and Reflections.

10. Section C of the NOI and SWPPP forms provides for the

1 “Owner/Operator” to provide information.

2 11. On both the NOI and SWPPP, Reflections identified itself as the
3 “Owner/Operator.”

4 12. On the NOI, Reflections described the construction activity as
5 “construction of new single-family homes and the necessary landscaping to
6 complete the third and fourth filing of the Copper Ridge subdivision. A material
7 stockpiling area (containing the proposed concrete washout area) in the area of the
8 Fifth filing as well as five lots in the first filing that have not yet achieved final
9 stabilization have also been included in this SWPPP area.”

10 13. On both the NOI and SWPPP, Copper Ridge identified itself as the
11 “Owner/Operator.”

12 14. On the NOI, Copper Ridge described its construction activity as
13 “construction of new single-family homes and the necessary landscaping to
14 complete the first, second and third filing of the Reflection at Copper Ridge
15 subdivision.”

16 15. On the SWPPP, Copper Ridge described the project as “construction
17 of single-family homes and establishment of vegetation.

18 16. On October 21, 2014, DEQ conducted a phase I storm water CEI
19 inspection for Copper Ridge and Reflections at Copper Ridge.

20 17. On December 9, 2014, DEQ sent Violation Letters to Copper Ridge
21 and Reflections at Copper Ridge, by certified mail.

22 18. The Violation Letters noted a violation for “[f]ailure to conduct
23 inspections at required intervals in violation of § 75-5-605(1)(b), MCA,
24 Administrative Rules of Montana (ARM) 17.30.1342(a), and Part 2.3 of the General
25 Permit for Storm Water Discharges Associated with Construction Activity.”

26
27 19. The Violation Letters also noted a violation for “[f]ailure to retain and

1 make available records listed in 2.5 of Permit No. MTR100000, including the
2 complete signed NOI and the latest signed SWPPP in violation of Section 75-5-
3 605(1)(b), MCA, ARM 17.30.1342(a), and Part 2.5 of Permit No. MTR100000.”

4 20. The Violation Letters also noted a violation for “[f]ailure to maintain a
5 SWPPP that describes the intended sequence of construction activity; that provides
6 an implementation schedule; and that clearly describes the relationship between
7 each phase of construction and the best management practices (BMPs) to be
8 employed in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and
9 Part 3 of Permit No. MTR100000.”

10 21. Finally the Violation Letters noted a violation for “[f]ailure to
11 properly design, install and maintain effective BMPs in violation of § 75-5-
12 605(1)(b), MCA, ARM 17.30.1342(1), and Parts 2.1, 3.1 and 3.7 of Permit No.
13 MTR 100000.”

14 22. The Violation Letters concluded:

15 The purpose of this letter is to provide you with notice that you are in
16 violation of the Montana Water Quality Act, rules adopted under that
17 act, and permit requirements, all of which require your compliance.
18 If you fail to respond to this letter by addressing the above-listed
19 violations in a timely manner, you may be subject to administrative
20 or civil enforcement actions to compel compliance and seek
21 penalties.

22 23. On March 27, 2015, DEQ served Reflections at Copper Ridge and
23 Copper Ridge with respective Administrative Compliance and Penalty Orders.

24 24. The respective Penalty Orders identified four violations by Copper
25 Ridge and Reflections at Copper Ridge.

26 25. First, DEQ stated the subdivisions “violated ARM 17.30.1105 from
27 2006 until December 23, 2013, by conducting construction activities that discharged
storm water to state waters prior to submitting an NOI.”

26 26. Second, DEQ stated the subdivisions “violated 75-5-605(2)(c), MCA,

1 from at least 2006 to December 23, 2013 by illicitly discharging water associated
2 with construction activities to state water without a permit.”

3 27. Third, DEQ stated the subdivisions “violated Section 75-5-605(1)(a),
4 MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at
5 least October 21, 2014, by placing waste where it will cause pollution and by
6 contributing sediments and other pollutants that will increase the concentration of
7 sediment, oils, settleable solids, and other debris above levels that are naturally
8 occurring in the state surface waters.”

9 28. Fourth, DEQ stated the subdivisions violated “75-5-605(1)(b), MCA,”
10 for violating conditions of the General Permit.

11 29. Additional facts are interposed, as necessary, throughout resolution of
12 the individual arguments.

13 ANALYSIS

14 The parties have filed cross-motions for summary judgment. Copper Ridge
15 and Reflections moved for summary judgment on the following bases:

- 16 1. All alleged violations should be dismissed because neither Copper
17 Ridge nor Reflections constitute an owner or operator.
- 18 2. All alleged violations should be dismissed because Copper Ridge and
Reflections did not discharge to state waters without a permit.
- 19 3. The third alleged violation should be dismissed because Copper Ridge
and Reflections did not place waste where it would cause pollution.
- 20 4. All alleged violations should be dismissed because DEQ did not
comply with mandatory notice provisions.
- 21 5. DEQ cannot assess administrative penalties because it did not comply
with mandatory notice provisions.

22 DEQ has moved for partial summary judgment to establish liability for all four
23 alleged violations. DEQ has not moved for summary judgment regarding
24 appropriate corrective action and penalty amounts.

25 **I. DEQ MET ITS NOTICE REQUIREMENTS WITH REGARD TO THE**

1 **SECOND, THIRD AND FOURTH ALLEGED VIOLATIONS**
2 **AGAINST COPPER RIDGE AND REFLECTIONS.**

3 Copper Ridge and Reflections have argued DEQ did not comply with Mont.
4 Code Ann. §§ 75-5-617, 75-5-611 and ARM 17.30.2003 (now repealed). The
5 analysis will begin with these three statutes because, if Copper Ridge's Motion is
6 granted no further substantive analysis will be required for the respective alleged
7 violation.

8 **A. The September 23, 2013 and December 9, 2014 Letters Satisfied**
9 **the Requirements of Mont. Code Ann. § 75-5-617(2).**

10 Reflections and Copper Ridge argue DEQ did not issue a letter notifying
11 them of alleged violations as required by Mont. Code Ann. § 75-5-617(2). Montana
12 Code Ann. § 75-5-617(1) provides that whenever DEQ finds a person in violation of
13 Title 75, Chapter Five, "a rule adopted under this chapter, or a condition or
14 limitation in a permit, authorization, or order issued under this chapter, the
15 department shall initiate an enforcement response." An enforcement response
16 includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611.
17 Mont. Code Ann. § 75-5-617(1)(d). Mont. Code Ann. § 75-5-617(2) places a notice
18 limitation on enforcement responses: "Unless an alleged violation represents an
19 imminent threat to human health, safety, or welfare or to the environment, the
20 department shall first issue a letter notifying the person of the violation and
21 requiring compliance. If the person fails to respond to the conditions in the
22 department's letter, then the department shall take further action as provided in
23 subsection (1)." Based on the plain language of this statute, DEQ may not bring an
24 administrative proceeding for penalties unless the notice requirements are met.

25 On September 23, 2013, DEQ notified Copper Ridge and Reflections at
26 Copper Ridge of three of the four alleged violations that form the basis for
27 administrative penalties in this matter: (1) conducting construction activities that
28 discharged storm water into state waters prior to submitting an NOI, discharging

1 water associated with construction activities to state water without a permit, and (3)
2 placing waste where it will cause pollution. The September 23, 2013 letter notified
3 Copper Ridge and Reflections at Copper Ridge that part of the corrective action was
4 to “implement and maintain the SWPPP in accordance with the general permit for
5 Storm Water Discharges Associated with Construction Activity.” Furthermore,
6 Copper Ridge and Reflections at Copper Ridge were to “[c]omply with the
7 provision of the general permit for Storm Water Discharges Associated with
8 Construction Activity.” In addition, Reflections and Copper Ridge were instructed
9 to implement BMPs to control pollutants associated with construction activity,

10 On December 9, 2014, DEQ notified Copper Ridge and Reflections at
11 Copper Ridge of observed non-compliance with the General Permit for Storm Water
12 Discharges Associated with Construction Activity. DEQ also notified Copper
13 Ridge and Reflections at Copper Ridge that they had failed to design, install and
14 maintain effective BMPs. Despite DEQ’s finding of non-compliance with the
15 corrective actions requested in the September 23, 2013 Letter, DEQ gave Copper
16 Ridge and Reflections further time to correct these alleged violations.

17 Based on the foregoing, DEQ complied with Mont. Code Ann. § 75-5-
18 617(2). On two occasions, DEQ provided Reflections and Copper Ridge with
19 notices of violation and conditions of compliance. DEQ’s violation letters notified
20 Copper Ridge and Reflections the Department considered them out of compliance
21 with their storm water discharge permit obligations, notified them of the salient
22 statutes, permit provisions and administrative rules, and informed them of the
23 necessary corrective action. DEQ complied with Mont. Code Ann. § 75-5-617(2)
24 and was permitted to undertake an enforcement response as provided in Mont. Code
25 Ann. § 75-5-617(1).

26
27 **B. Compliance with Mont. Code Ann. § 75-5-611.**

1 Reflections and Copper Ridge next argue DEQ did not comply with the
2 procedural provisions of Mont. Code Ann. § 75-5-611 and cannot pursue
3 administrative penalties. Mont. Code Ann. § 75-5-611(1) provides:

4 When the department has reason to believe that a violation of this
5 chapter, a rule adopted under this chapter, or a condition of a permit
6 or authorization required by a rule adopted under this chapter has
occurred, it may have a written notice letter served personally or by
certified mail on the alleged violator or the violator's agent.

7 The written notice letter must state specific information. Mont. Code Ann. § 75-5-
8 611(1)(a-e). DEQ may not assess an administrative penalty until the specific
9 provisions of Mont. Code Ann. § 75-5-611(1)(a-e) have been satisfied. Mont. Code
10 Ann. § 75-5-611(1)(e). It is undisputed DEQ did not provide a written notice letter
11 to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice
12 of Violation.

13 However, Mont. Code Ann. § 75-5-611(2) provides an exception to the
14 above notice rule. Mont. Code Ann. § 75-5-611(2)(a)(ii) provides, “[t]he
15 department may issue an administrative notice and order in lieu of the notice letter
16 provided under subsection (1) if the department’s action... seeks an administrative
17 penalty only for an activity that it believes and alleges has violated or is violating
18 75-5-605.” Therefore, if the alleged violations in DEQ’s Administrative
19 Compliance and Penalty Order only seek penalties for activities DEQ believes and
20 alleges violate Mont. Code Ann. § 75-5-605, DEQ will have complied with the
21 procedural provisions of Mont. Code Ann § 75-5-611. The Department has alleged
22 four violations against Copper Ridge and Reflections respectively. Three of the
23 alleged violations satisfy Mont. Code Ann. § 75-5-611(2)(a)(ii) on their face: the
24 second, third and fourth.

25
26
27 **C. The Second, Third and Fourth Violations Alleged Violations of**

Mont. Code Ann. § 75-5-605.

DEQ's second alleged violation states Copper Ridge and Reflections "violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit." This is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's fourth alleged violation states that Copper Ridge and Reflections, "violated 75-5-605(1)(b), MCA, by violating provisions of the general permit. Like the second violation, discussed above, this is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's third alleged violation states Copper Ridge and Reflections "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters." Regardless the references to administrative rules, this alleges a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

D. The First Alleged Violation Did Not Allege a Violation of Mont. Code Ann. § 75-5-605.

DEQ's first alleged violation states Copper Ridge and Reflections "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

1 DEQ asserts “ARM 17.30.1105 provides storm water permit requirements and
2 violation of ARM 17.30.1105 is a violation of § 75-5-605.” DEQ asserts,
3 “[v]iolation of ARM 17.30.1105, discharge without a permit, is the act prohibited by
4 § 75-5-605(2), MCA.”

5 A violation of ARM 17.30.1105 is not a violation of § 75-5-605. When
6 ARM 17.30.1105 was promulgated, the only statutes cited as authority were Mont.
7 Code Ann. §§ 75-5-201 and 75-5-401. More importantly, the only implementing
8 statute cited was 75-5-401. Had DEQ or the BER intended violations of ARM
9 17.30.1105 to constitute violations of Mont. Code Ann. § 75-5-605, it could have
10 been explicitly stated. In the absence of a reference to Mont. Code Ann. § 75-5-
11 605, it does not appear a violation of ARM 17.30.1105 constitutes a violation of
12 § 75-5-605.

13 Furthermore, Mont. Code Ann. § 75-5-611(1) provides “when the department
14 has reason to believe that a violation of this chapter, *a rule adopted* under this
15 chapter or...” (emphasis added). There is no question that ARM 17.30.1105 was
16 adopted pursuant to Mont. Code Ann. §§ 75-5-201 and 75-5-401. ARM 17.30.1105
17 was not adopted pursuant to Mont. Code Ann. § 75-5-605. This makes alleged
18 violations of ARM 17.30.1105 subject to the general notice requirement under 75-5-
19 611(1), *prior* to seeking an administrative penalty.

20 Moreover, DEQ’s argument is basically that a violation of Mont. Code Ann.
21 § 75-5-605(2)(c) is identical to a violation of ARM 17.30.1105(1)(a). A cursory
22 reading of the two provisions demonstrates they are not identical. Moreover, if
23 DEQ’s argument was accepted, it would essentially permit duplicative violations,
24 allowing DEQ to bring a violation of Mont. Code Ann. § 75-5-605 twice: once for a
25 violation of Mont. Code Ann. § 75-5-605(2)(c) and once for violation of ARM
26 17.30.1105(1)(a). This would be superfluous or redundant charge stacking, does not
27 make sense, and would attempt to work-around any statutory caps on maximum

1 damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

2 Based on the foregoing, DEQ was required to comply with Mont. Code Ann.
3 § 75-5-611(1)(a-e) to provide Copper Ridge and Reflections notice of the alleged
4 violations of ARM 17.30.1105. The exception under Mont. Code Ann. § 75-5-
5 611(2)(a)(ii) did not apply because a violation of 17.30.1105 is not a violation of
6 Mont. Code Ann. § 75-5-605. As a result “an administrative penalty may not be
7 assessed until the provision of [Mont. Code Ann. § 75-5-611(1)] have been
8 complied with.” DEQ may not seek an administrative penalty for violation of ARM
9 17.30.1105.

10 **E. DEQ’s Second, Third and Fourth Alleged Violations, all Allege**
11 **Violations of Major Extent and Gravity, Class I Violations, or**
Both.

12 Copper Ridge and Reflections moved for Summary Judgment based on
13 DEQ’s failure to comply with notice requirements contained in ARM 17.30.2003.
14 DEQ served the Notices of Violation and Administrative penalty in March of 2015.
15 At that time ARM 17.30.2003 was in effect. ARM 17.30.2003 was repealed on
16 March 19, 2016. The procedures set forth in ARM 17.30.2003 applied to initiation
17 of an administrative proceeding against Copper Ridge and Reflections.

18 ARM 17.30.2003 imposed greater requirements on DEQ than Mont. Code
19 Ann. § 75-5-611. Instead of merely parroting the exception contained in Mont.
20 Code Ann. § 75-5-611(2)(a)(ii), this administrative rule imposed additional
21 requirements before DEQ could seek an administrative penalty for violations of
22 Mont. Code Ann. § 75-5-605. Subsection 7 provided:

23 In lieu of the notice letter under (2), the department may issue an
24 administrative notice together with an administrative order if the
25 department’s action:

26 (a) does not involve assessment of an administrative penalty; or

27 (b) seeks an administrative penalty only for an activity that the

department believes and alleges was or is a violation of 75-5-605, MCA, and the violation was or is:

- (i) a class I violation as described in ARM 17.30.2001(1); or
- (ii) a violation of major extent and gravity as described in ARM 17.4.303.

ARM 17.30.2003(7). Even for alleged violations of Mont. Code Ann. § 75-5-605, DEQ was required to provide prior notice unless DEQ alleged (1) a class I violation, or (2) a violation of major extent and gravity.

DEQ's second alleged violation alleged a violation of major extent and gravity, and a Class I violation. DEQ's third alleged violation alleged a violation of major extent and gravity. The fourth alleged a Class I violation. The first alleged violation will not be addressed because it did not allege a violation of Mont. Code Ann. § 75-5-605.

F. Violation 2 Alleged a Violation of Major Extent and Gravity and a Class I Violation.

DEQ alleged a violation of Mont. Code Ann. § 75-5-605(2)(c) for "discharging storm water into the state waters without a permit." DEQ explained the basis for its Extent and Gravity analysis. It determined the Extent and Gravity factor was .85, which constitutes a violation of major gravity and extent.

Furthermore, at the time this proceeding was filed, it was a Class I violation to discharge waste into state waters without a permit. ARM 17.30.2001(1)(b) (now repealed). DEQ's second alleged violation alleged both a Class I violation and a violation of major extent and gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

G. Violation 3 Alleged a Violation of Major Extent and Gravity

DEQ's Notice of Violation and Administrative Penalty alleged a violation of Mont. Code Ann. § 75-5-605(1)(a) for placing waste where it will cause pollution. DEQ explained the basis for its Gravity and Extent analysis. It determined the

1 Extent and Gravity factor was .85, which constitutes a violation of major Extent and
2 Gravity. Therefore, DEQ's second alleged violation alleged a violation of major
3 Extent and Gravity. As a result, ARM 17.30.2003(7) did not impose any additional
4 notice requirements before issuing the Administrative Compliance and Penalty
5 Orders.

6 **H. Violation 4 Alleged a Class I Violation.**

7 The Administrative Compliance and Penalty Orders asserted a violation of
8 Mont. Code Ann. § 75-5-605(1)(b) for a host of sections in the general permit. At
9 the time DEQ issued the Administrative Compliance and Penalty Orders it was a
10 Class I violation to "violate a permit compliance plan or schedule." ARM
11 17.30.2001(1)(d) (Repealed March 19, 2016). All of the alleged violations of the
12 permit are violations of a permit compliance plan or schedule. This is an alleged
13 violation of a Class I violation. As a result, ARM 17.30.2003(7) did not impose any
14 additional notice requirements before issuing the Administrative Compliance and
15 Penalty Orders.

16 **II. COPPER RIDGE AND REFLECTIONS ARE OWNERS OR**
17 **OPERATORS.**

18 "Any person who discharges or proposes to discharge storm water from a
19 point source must obtain coverage under an MPDES general permit or another
20 MPDES permit for discharges...associated with construction activity." ARM
21 17.30.1105(1)(a). "A person who discharges or proposes to discharge storm water
22 associated with construction activity shall submit to the department a notice of
23 intent (NOI) as provided in this rule." ARM 17.30.1115(1). The NOI must be
24 signed by either the owner or operator, or both. ARM 17.30.1115(1)(a). The
25 phrase, "storm water discharge associated with construction activity" is defined as:

26
27 a discharge of storm water from construction activities including

1 clearing, grading, and excavation that result in the disturbance of
2 equal to or greater than one acre of total land area. For purposes of
3 these rules, construction activities include clearing, grading,
4 excavation, stockpiling earth materials, and other placement or
5 removal of earth material performed during construction projects.
Construction activity includes the disturbance of less than one acre
of total land area that is a part of a larger common plan of
development or sale if the larger common plan will ultimately disturb
one acre or more.

6 ARM 17.30.1102(28). "Owner or operator," is defined as "a person who owns,
7 leases, operates, controls or supervises a point source." Mont. Code Ann. § 75-5-
8 103(26). The parties disagree regarding whether Copper Ridge or Reflections is an
9 owner or operator.

10 Reflections and Copper Ridge propose too narrow a definition of Owner and
11 operator, generally limiting their arguments to ownership, lease and operations.
12 Mont. Code Ann. § 75-5-103(26) also defines a owner or operator as someone who
13 "controls or supervises a point source." Furthermore, Copper Ridge and Reflections
14 focus too heavily on construction of homes, rather than the more expansive statutory
15 definition of "storm water discharge associated with construction activity."

16 Reflections and Copper Ridge were the original owners and developers of all
17 land in their respective subdivisions. Construction activities, including clearing,
18 grading, excavation, stockpiling earth materials, and other placement or removal of
19 earth material performed during construction projects, resulted in disturbance equal
20 to or greater than one acre of total land area at the respective subdivisions. These
21 construction activities were initiated in 2006, in the respective subdivisions. These
22 construction activities were undertaken with the eventual goal of the sale of
23 individual lots for residential home construction.

24 Copper Ridge and Reflections admit that they entered into at least one
25 contract that required "all excess material from pipe and bedding displacement shall
26 be left on site." Therefore, not only did Copper Ridge and Reflections have
27 supervision and control over the actions of third parties, they acted on their ability to

1 instruct others how to engage in stockpiling of materials, an act expressly contained
2 in the definition of “construction activities.” This put Copper Ridge and Reflections
3 in a position of either control or supervision with regard to the terms of sale of any
4 individual lot for construction of residential homes. Any argument to the contrary
5 ignores the common sense and practical reality of development of a residential
6 subdivision. The mere fact that neither Copper Ridge nor Reflections exercised
7 supervision or control over the contractual terms of the sale of land, does not change
8 the fact that they had the power to supervise or control land with regard to storm
9 water discharges. In addition, on September 9, 2013, DEQ observed “clearing,
10 grading, excavation, soil stockpiles, concrete washout areas, and tracking on
11 streets.”

12 Moreover, Reflections and Copper Ridge conceded their owner or operator
13 status when they filed their December 23, 2013, SWPPs and NOIs, respectively.
14 Both Reflections and Copper Ridge expressly acknowledged they were the owner or
15 operator for construction activities. The affidavit produced by Landy Leep does not
16 create a material dispute of fact. Leep attempts to characterize the intent behind his
17 signature on the SWPPs and the NOIs. However, the documents themselves are
18 undisputed for the purposes of summary judgment and the admissions made by
19 Copper Ridge and Reflections that they were the owners or operators. Based on the
20 foregoing, Reflections and Copper Ridge were owners or operators with regard to
21 construction activities at their respective subdivisions.

22 **III. DEQ HAS ESTABLISHED COPPER RIDGE AND REFLECTIONS**
23 **DISCHARGED STORM WATER TO STATE WATERS WITHOUT A**
24 **PERMIT.**

25 It is “unlawful to carry on any of the following activities without a current
26 permit from the department...discharge sewage, industrial wastes or other wastes
27 into any state waters.” Mont. Code Ann. § 75-5-605(2)(c). DEQ has alleged
Copper Ridge and Reflections violated this statute by “discharging storm water

1 associated with construction activities to state water without a permit” from at least
2 2006 to December 23, 2013. The parties dispute whether storm water detention
3 ponds are treated as State waters and whether overflows from the detention ponds, to
4 state waters, constitutes a discharge into state waters.

5 This is all beside the point. DEQ has provided an affidavit of Dan Freeland
6 who conducted the September 9, 2013 CEIs at Reflections and Copper Ridge.
7 Freeland stated that he “documented and observed discharges of storm water from
8 Reflections at Copper Ridge and from Copper Ridge subdivisions through *direct*
9 *overland flow* and through swales, storm drains and drainage ditches into Cove
10 Ditch, which is state water.” (emphasis added). Freeland’s personal observations
11 have not been disputed on summary judgment.

12 Regardless the Parties’ disputes over state waters and the effect of the
13 overfilling of the detention ponds, there is no dispute that Freeland documented and
14 observed discharges of storm water that traveled over land, into Cove Ditch, a state
15 water. As a result, DEQ has established Reflections and Copper Ridge discharged
16 storm water into state waters, without a permit, a violation of Mont. Code Ann.
17 § 75-5-605(2)(c). DEQ is entitled to summary judgment on its second alleged
18 violation.

19 **IV. THERE IS A DISPUTE OF MATERIAL FACT REGARDING THE**
20 **ALLEGED VIOLATION OF MONT. CODE ANN. § 75-5-605(1)(a).**

21 “It is unlawful to...cause pollution, as defined in 75-5-103, of any state
22 waters or to place or cause to be placed any wastes where they will cause pollution
23 of any state waters...” Mont. Code Ann. § 75-5-605(1)(a). DEQ alleged both
24 Reflections and Copper Ridge violated this statute, from at least May 2012, to at
25 least October 21, 2014, by placing waste where it will cause pollution and by
26 contributing sediments and other pollutants that will increase the concentration of
27 sediment, oils, settleable solids and other debris above levels that are naturally

1 occurring in state surface waters. Copper Ridge and Reflections argue that there is
2 no evidence that Copper Ridge or Reflections placed waste within the subdivisions
3 and DEQ lacks an expert to testify that the waste could cause pollution.

4 There is sufficient evidence that Reflections and Copper Ridge placed or
5 caused to be placed wastes. On September 9, 2013, Dan Freeland observed
6 stockpiling of materials, concrete washout, sediment waste tracked onto impervious
7 surfaces, sediment and debris on the bank of Cove Ditch, accumulated sediment on
8 the sidewalk and grass area of the city park areas, and sediments on the streets and
9 storm drains throughout Reflections and Copper Ridge. All of this meets the
10 definition of “other wastes” contained in Mont. Code Ann. § 75-5-103(24).

11 In addition, DEQ does not necessarily require expert testimony to establish
12 the placement of wastes could cause pollution. In pertinent part, “pollution” is
13 defined as:

- 14 (i) contamination or other alteration of the physical, chemical, or
15 biological properties of state waters that exceeds that permitted by
16 Montana water quality standards, including but not limited to
17 standards relating to change in temperature, taste, color, turbidity, or
18 odor; or
19 (ii) the discharge, seepage, drainage, infiltration, or flow of liquid,
20 gaseous, solid, radioactive, or other substance into state water that
21 will or is likely to create a nuisance or render the waters harmful,
22 detrimental, or injurious to public health, recreation, safety, or
23 welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

24 Mont. Code Ann. § 75-5-103(30).

25 Expert testimony is often required when the subject matter is outside of the
26 common experience of the trier of fact and the expert testimony will assist the trier
27 of fact in determining the issue or understanding the evidence. *Dubiel v. Mont.*
DOT, 2012 MT 35, 364 Mont. 175, 272 P.3d 66. However, in a MAPA contested
case proceeding, “[n]otice may be taken of judicially cognizable facts. In addition,
notice may be taken of generally recognized technical or scientific facts within the
agency’s specialized knowledge.” Mont. Code Ann. § 2-4-612(6). In addition, the

1 “agency’s experience, technical competence, and specialized knowledge may be
2 utilized in the evaluation of evidence.” Mont. Code Ann. § 2-4-612(7).

3 Based on the definition of “pollution” and Mont. Code Ann. § 2-4-612(6)
4 and (7), there is no per se requirement that DEQ identify an expert. DEQ’s exhibits
5 and the testimony of its personnel, with their specialized knowledge, appears to be
6 sufficient to provide evidence of alleged pollution, as defined by statute. DEQ is
7 not required to present expert testimony in order to establish Reflections or Copper
8 Ridge placed, or caused to be placed, waste in a manner that could cause pollution
9 of state waters.

10 That said, DEQ has not met its burden to establish it is entitled to judgment
11 as a matter of law. The first prong of “pollution” requires DEQ to establish some
12 form of alteration of state waters “that exceeds that permitted by Montana water
13 quality standards.” Mont. Code Ann. § 75-5-103(30)(i). DEQ has not provided any
14 evidence of permitted water quality standards at this time. As a result, DEQ has not
15 established pollution under the first prong of the definition.

16 The second prong of “pollution” requires DEQ to establish that a substance
17 has entered state water that will either create a nuisance or “render the waters
18 harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to
19 livestock, or to wild animals, birds, fish, or other wildlife.” Mont. Code Ann. § 75-
20 5-103(30)(ii). While DEQ has established the placement of waste, DEQ has not
21 identified the facts to establish or explain how this waste will create a nuisance or
22 otherwise cause the harm required in the definition of “pollution.” As a result, DEQ
23 is not entitled to summary judgment on this alleged violation.

1 **V. DEQ IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS**
2 **CLAIM THAT COPPER RIDGE AND REFLECTIONS VIOLATED**
3 **THE CONDITIONS OF THE GENERAL PERMIT.**

4 DEQ's fourth alleged violation is that Reflections and Copper Ridge violated
5 Mont. Code Ann. § 75-5-605(1)(b), for violating provisions contained within the
6 General Permit. As a threshold matter, Reflections and Copper Ridge cannot rely
7 on their defense that they are not an owner or operator. Reflections and Copper
8 Ridge provided their respective SWPPPs and NOIs in December of 2013.
9 Resolution of this alleged violation is separate and distinct from the alleged
10 violations in the absence of a permit. Although Reflections and Copper Ridge
11 constituted owners or operators, that legal determination is not necessary for the
12 resolution of this fourth alleged violation.

13 As of December 17, 2013, Reflections and Copper Ridge agreed to follow
14 the terms and conditions of the General Permit. It is undisputed they entered the
15 NOIs and SWPPPs and undertook the obligations contained in the general permit.
16 Therefore, even if one accepted Reflections and Copper Ridge's argument as true –
17 that they are not owners or operators – this alleged violation could still proceed
18 because they agreed to abide by the provisions of the general permit. Their alleged
19 violations of any specific provisions are divorced from their status as an owner or
20 operator.

21 DEQ provided undisputed testimony that on October 21, 2014, Dan Freeland
22 and Chris Romankiewicz conducted a CEI as Reflections and Copper Ridge.
23 Freeland and Romankiewicz observed:

- 24 (1) the SWPPP administrator failed to conduct site inspection
25 every seven days in accordance with the inspection schedule
26 in the SWPPP, a violation of Section 2.3 of the general
27 permit.
- 28 (2) The SWPPP had not been developed in accordance with good
29 engineering practices and had not been updated to reflect
30 current onsite conditions, a violation of Sections 3.1.1 and
31 3.1.3 of the general permit.

- (3) The SWPPP administrator had failed to maintain records at the site where they could be made available to the DEQ Inspectors upon request, a violation of Section 2.5 of the general permit.
- (4) Best management practices were not implemented to control and mitigate discharges of sediment and other pollutants from construction related activities, violations of Sections 2.1.1 and 2.1.4 of the general permit.

Freeland and Romankiewicz's observations were memorialized in (1) a December 9, 2014 letter to Reflections and Copper Ridge, (2) an MPDES Compliance Inspection report for each subdivision, and (3) a Storm Water Construction Inspection Report for each subdivision.

Copper Ridge and Reflections have not disputed Freeland and Romankiewicz's observations and factual allegations. DEQ has met its burden to establish violations of provisions of the General Permit, a violation of Mont. Code Ann. § 75-5-605(1)(b). DEQ is entitled to partial summary judgment on the fourth alleged violation in the Administrative Compliance and Penalty Order.

CONCLUSION

Both parties' cross Motions for Summary Judgment are granted in part and denied in part:

- (1) Copper Ridge and Reflections' Motions are GRANTED with regard to its argument that DEQ cannot seek administrative penalties for a violation of ARM 17.30.1105.
- (2) Copper Ridge and Reflections' Motions for summary judgment are DENIED in all other aspects.
- (3) DEQ's Motion for Partial Summary Judgment is GRANTED with regard to the violations of Mont. Code Ann. § 75-5-605(2)(c), discharge of waste into state waters and 75-5-605(1)(b), violation of provisions set forth in a permit.
- (4) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of ARM 17.30.1105.

1 (5) DEQ's Motion for Partial Summary Judgment is DENIED with regard
2 to alleged violation of 75-5-605(1)(a).

3 DATED this 1st day of August, 2017.

4 /s/ Andres Haladay
5 ANDRES HALADAY
6 Hearing Examiner
7 Agency Legal Services Bureau
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CERTIFICATE OF SERVICE

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

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DATED: August 1, 2017 /s/ Andres Haladay

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

**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,
MONTANA. (MTR105376) [FID 2288,
DOCKET NO. WQ-15-07]**

**CASE NO. BER 2015-01
WQ**

**IN THE MATTER OF:
VIOLATIONS OF THE WATER QUALITY
ACT BY COPPER RIDGE,
DEVELOPMENT CORPORTATION AT
COPPER RIDGE SUBDIVISION,
BILLINGS, YELLOWSTONE COUNTY,
MONTANA. (MTR105377) [FID 2289,
DOCKET NO. WQ-15-08]**

**CASE NO. BER 2015-02
WQ**

**HEARING EXAMINER'S PROPOSED FINDINGS OF FACT &
CONCLUSIONS OF LAW TO THE BER**

On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC (CR/REF) filed a Notice of Appeal and Request for Hearing based on the Administrative Compliance and Penalty Orders (AOs) issued by Department of Environmental Quality (DEQ). A three-day hearing was held February 26-28, 2018. This matter is fully briefed and ready for disposition.

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INTRODUCTION

This case has been frustrating for many reasons. First, the factual record provided by both parties—even after summary judgment briefing and a three-day hearing—often left the undersigned struggling to answer questions vital to the case. Second, neither party came to this proceeding with clean enough hands to justify either awarding or avoiding a penalty. DEQ’s performance—including its inspections, record-keeping, notices, communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at the hearing—were difficult to understand and in some instances inadequate. CR/REF, however, were not much better, often seeming to at least passively use DEQ’s inaction as an excuse to shirk their responsibility and care for the environment, without proactively ensuring they had the requisite coverage (or clearance) from DEQ for their operations. For these reasons, the undersigned has struggled to find any satisfactory resolution to this case that might deter such conduct in the future by both sides.

FINDINGS OF FACT

1. Copper Ridge, and Reflections at Copper Ridge, are two subdivisions located in the City of Billings, Yellowstone County, Montana (collectively, Copper Ridge Subdivisions or CR/REF). Joint Stipulated Facts (JSF) ¶ 1.

2. The City of Billings is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the Montana Pollutant Discharge Elimination System ("MPDES") General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General Permit No. MTR040000). The City MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems. The City MS4 ultimately discharges storm water to the Yellowstone River, a state water. JSF ¶ 2.

3. The Department of Environmental Quality (DEQ or Department) issues the MPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit No. MTR100000). Unless administratively extended, General Permit No. MTR 100000 is issued for five-year periods. Relevant to this matter, General Permit No. MTR100000 was effective January 1, 2013, through December 31, 2017. JSF ¶ 3.

4. On March 26, 2013, the City contacted DEQ to request assistance in addressing noncompliance with storm water requirements at Copper Ridge. DEQ informed the City that construction activities at Copper Ridge were not covered by General Permit No. MTR100000. JSF ¶ 4.

5. The construction activities permitted under previous MPDES permit authorizations at CR/REF included construction of water, sanitary sewer, and

storm drainage utilities, and street and sidewalk improvements and the Storm Water Pollution Prevention Plans (SWPPP) associated with these permits did not include controls for construction activity on residential lots. Ex. A at 3; Ex. B at 3; Ex. C at 4; Hearing Transcript (Tr.) Vol. II (February 27, 2018), 62:4, 102:8 – 21; DEQ Proposed Findings of Fact (DEQ) ¶ 12; CR/REF Response to DEQ's Finding of Fact (CR Resp.) ¶ 1.

6. DEQ terminated the previous permit for construction activity in the Copper Ridge Subdivisions (MTR104590) in December 2012 without first notifying Copper Ridge. JSF ¶ 5.

7. Ground disturbance at the Copper Ridge Subdivisions each involve greater than one acre including all areas that are part of a "larger common plan of development or sale," as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). JSF ¶ 8.

8. On September 7, 2013, there was a significant storm event in and around Billings, MT. Ex. 14.

9. The following day, the Billings Gazette published a story about the effects of the storm that included some discussion of the conditions in the Copper Ridge Subdivisions during and after the storm. Ex. 14; Tr. Vol. I (February 26, 2018) 50:25-53:03.

10. Based on the Gazette's report, DEQ compliance inspector Dan Freeland decided to visit CR/REF and conduct an inspection. Tr. Vol. I 50:25-53:03.

11. Two days after the storm event Freeland conducted an inspection of the Copper Ridge Subdivisions. JSF ¶ 6.

12. During the September 9, 2013 inspection, DEQ observed and documented sediment tacking on the streets and concrete waste washed on to the ground. Tr. Vol. I, 54:21-56:4, 73:10-19, 74:1-6, 74:14-20, 74:24-75:8, 173:16-20; Ex. 15; CR/REF Proposed Findings of Fact (CR) ¶ 16; DEQ ¶ 16.

13. DEQ also observed and documented (with photographs provided a the hearing) stockpiled waste soil and areas of ground disturbance uncontrolled by Best Management Practices (BMPs) to mitigate contact with storm water; evidence that sediment and construction debris had been washed with storm water from the subdivisions toward Cove Ditch; evidence that concrete waste had been washed on to the ground with no containment; sediment in the storm drains, in the streets and on the sidewalks as a result of uncontrolled storm water discharges. Ex. 2 at DEQ 000039 – 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Tr. Vol. I, 71:2 – 77:18; DEQ ¶ 19; CR Resp. ¶ 1.

14. On September 23, 2013, DEQ sent CR, through Gary Oakland, a letter. JSF ¶ 7; Ex. 2.

15. The letter stated, “The Montana Department of Environmental Quality (DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action.” Tr. Vol. I, 65:24–66:8; Ex. 2 at DEQ 000038 – DEQ 000040; DEQ ¶ 18; CR Resp ¶ 1.

16. In a September 27, 2013 letter, CR/REF provided clarification to DEQ regarding ownership information and sought to distinguish the violations based on the separate subdivisions, CR and REF. Ex. 12; Tr. Vol. I, 79:21-80:15, 83:8-83:16; CR ¶ 2; DEQ ¶¶ 20, 22.

17. In an October 8, 2013 letter responding to CR/REF’s September 27, 2013 correspondence, Mr. Freeland explained that, based on his September 9, 2013 inspection, DEQ determined that the Copper Ridge Subdivisions were part of a greater common plan of development and one violation letter was adequate to address the violations at both subdivisions. Tr. Vol. I, 80:19-81:24; Ex. O; DEQ ¶ 21; CR Resp. ¶ 1.

18. CR/REF responded with letter on October 29, 2013 regarding ownership and again sought to distinguish the violations based on the separate subdivisions. Ex. 15; CR ¶ 2; DEQ ¶¶ 20, 22.

19. On November 8, 2013, DEQ issued another letter, which stated that violations at the CR were distinguishable from violations at REF. JSF ¶ 9

20. Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the September 23, 2013 and November 8, 2013 letters from DEQ. JSF ¶ 10

21. On December 23, 2013, DEQ received Notice of Intent and SWPPPs from CR/REF (collectively, NOI package). DEQ Exs. 3-6; JSF ¶ 8; Tr. Vol. II, 59:9-21, 60:11-18.

22. On January 8, 2014, DEQ sent confirmation letters to REF issuing Permit No. MTR105376 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at REF, and to CR issuing Permit No. MTR105377 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at CR. JSF ¶ 11.

23. Permit No. MTR105376 and Permit No. MTR105377 were effective from the date DEQ received the NOI Package on December 23, 2013. Ex. 3; Ex. 4; Tr. Vol. I 95:23-96:10.

24. On March 7, 2014, Inspector Freeland sent an email to inspection and enforcement employees of DEQ stating, “I did not get to a lot of the new construction at [CR]. But I did document and photograph a few lots under construction and in one case there was a berm around the site and sand bags. There was also a house under construction which had straw bales on the perimeter. Appears to be an effort to control runoff from the individual lots I observed.” Ex. V.

25. On October 21, 2014, DEQ conducted a scheduled inspection of CR/REF. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I, 105:24-106:3; Ex. 8 at DEQ 000125.

26. On December 9, 2014, DEQ sent CR/REF letters that notified CR/REF of the alleged MPDES Permit violations observed and documented by DEQ Inspectors during the October 21, 2014 inspection and requested corrective action to address the violations. JSF ¶¶ 13, 14; Ex. 7; Ex. 8.

27. In December 2014, Copper Ridge and Reflections at Copper Ridge requested an extension from DEQ in order to respond to DEQ’s December 9, 2014 letter of violation and inspection report; DEQ granted the extension by letter dated December 23, 2014. Ex. X.

28. On January 8, 2015, the Copper Ridge Subdivisions submitted a letter with corrective action and updates to their SWPPP to DEQ. Ex. Y.

29. Within a timeframe acceptable to DEQ, CR/REF each took the corrective action identified in the December 9, 2014 letters from DEQ and submitted an updated SWPPP to DEQ. JSF ¶15.

30. DEQ acknowledged the responses by CR/REF to the violations at the subdivisions noted during the October 21, 2014 inspection and identified in the December 9, 2014 letters. Tr. Vol. I, 112:7-120:8; Ex. 18; Ex.19; DEQ ¶ 30; CR Resp. ¶ 1.

31. CR/REF did not propose “corrective action plans” to address violations of the Montana Water Quality Act. Tr. Vol. III (February 28, 2018), 119:11; DEQ ¶ 31, CR Resp. ¶ 1.

32. On February 6, 2015, DEQ sent CR an acknowledgment letter indicating receipt of CR’s response letter of January 8, 2015. DEQ indicated that there was further compliance assistance needed and outlined three specific areas for improvement. Ex. 18; Tr. Vol. I, 65:24 – 66; Ex. 2 at DEQ 000038 – DEQ 000040.

33. On February 9, 2015, DEQ sent REF an acknowledgment letter indicating receipt of REF’s response letter dated January 8, 2015. DEQ indicated that there was further compliance assistance needed, mainly paperwork errors to be corrected. Ex. 19.

34. DEQ seeks penalties for the violations noted in the December 9, 2014 letter. Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.

35. DEQ issued AOs on March 27, 2015, identifying the following alleged violations of the Montana Water Quality Act at CR/REF:

- (1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;
- (2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;
- (3) Violation of § 75-5-605(1)(a), MCA, ARM 17.30.624(2Xf), and ARM 17.30.629(2)(f) by placing waste where it will cause pollution; and
- (4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

JSF ¶ 16; AO.

36. Each of the AOs assesses a penalty and has a penalty calculation worksheet attached. Tr. Vol. I, 215:19 – 216:5; Ex. 9 at DEQ 000154 – 000155, DEQ 000157; Ex. 10 at DEQ 000184 – 000185, DEQ 000187; DEQ ¶ 34; CR Resp. ¶ 1.

37. At the hearing, DEQ agreed that the number of days of violation for Violation 2 could be adjusted down to 19 days based on the precipitation events noted in the most current National Oceanic and Atmospheric Administration

(NOAA) weather service data. Ex. 20; Tr. Vol. III, 8:8-21, 17:6-10, 33:21-35:2; CR ¶ 32; DEQ ¶ 55.

38. The NOAA data shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches. Ex. 20.

DISCUSSION

A. Summary Judgment Findings (including Owner/Operator)

The prior hearing examiner made a number of findings based on the briefing and evidence presented at summary judgment. For brevity's sake, those findings and conclusions, with the underlying reasoning, are not reproduced in their entirety here; instead, the *Order on Summary Judgment* (Aug. 1, 2017) is attached to this decision and incorporated herein by reference. The main legal conclusions were as follows:

- i. CR/REF were “owners or operators” for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments. (Section II.)
- ii. (Violation 1) DEQ did not provide adequate notice regarding a violation of ARM 17.30.1105 – and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation. (Section I(D).)
- iii. (Violation 2) DEQ has established that CR/REF Discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). (Section III.)

- iv. (Violation 4) DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b). (Section V.)

Or. S.J. Despite a motion to reconsider, the undersigned did not disturb the previous hearing examiner's rulings. *Order on Motions in Limine*, at 6-8 (Feb. 22, 2018).

Based on those prior orders, the remaining issues to be decided by the undersigned at the hearing were:

- i. The burden and standard of proof.
- ii. (Violation 2) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.
- iii. (Violation 3) An issue of fact regarding whether CR/REF placed any wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a). If such a violation occurred, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules. (*See Or. S.J.*, Section IV.)
- iv. (Violation 4) The appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and associated administrative rules.

Or. S.J., at 11-14.

The findings and conclusions contained herein necessarily depend upon the findings and conclusions of the prior hearing examiner set out in that order.

B. Burden and Standard of Proof

At the hearing, there was some disagreement among the parties and the undersigned about the burden and standard of proof applicable to this proceeding and the parties were accordingly requested to brief the issue as part of their post-hearing filings. The parties have agreed that the applicable standard of proof is the preponderance standard. DEQ ¶ 68; CR ¶ 7. The parties disagree, however, about who has the burden of proof, each pointing to the other. For the reasons set forth below, the undersigned concludes that CR/REF have the burden of proof.

CR and REF have brought (through the Notice of Appeal (NOA)) this “appeal” of DEQ’s AO, “pursuant to Mont. Code Ann. § 75-5-611(4).” NOA at 1. CR and REF are therefore, by their own admission, analogous to an appellant and DEQ the appellee. Using as a guide the burden analysis set forth in *MEIC v. DEQ*, 2005 MT 96,¹ in this case CR/REF are in the same position as MEIC was in. Here, “[t]he claim [CR/REF] assert[s] before the Board [is] that the Department's decision ... violated Montana law.” *Id.* at ¶16. Therefore, CR/REF, like MEIC,

¹ BER’s statutory authority varies widely between different subject matter areas. The *MEIC* decision concerned an air quality permitting case brought pursuant to Mont. Code Ann. § 75-2-211, and the holding of that case is not directly precedential to, for example, a Water Quality Act enforcement action brought pursuant to Mont. Code Ann. § 75-5-611(4). In other words, the *MEIC* decision does not mean that DEQ will never bear the burden of proof in a case before the BER. The position of the parties and BER must be determined from the specific statutory authority at issue in each case.

are “the party asserting the claim at issue[,]” and have “challenged the Department's decision ... by requesting a contested case hearing before the Board.” *Id.* at ¶15. DEQ is the same position here as it was in *MEIC* of responding to the challenge; so too, is BER in the same position of deciding the merits of the challenge. *Id.* at ¶¶ 6-8, 10-16.

In the present case, Mont. Code Ann. § 75-5-611(4) states that if DEQ “does not require an alleged violator to appear before [BER] for a public hearing, the alleged violator may request the board to conduct the hearing ... within a reasonable time” after a timely request. The statute requires that, after the hearing, BER “shall make findings and conclusions that explain its decision” (*id.*, at (6)(a)), and “explain how it determined the amount of the administrative penalty,” if any (*id.*, at (6)(d)). The statute also requires that “[i]f the board determines that a violation has not occurred, it shall declare the department's notice void.” *Id.*, at (6)(e).

DEQ’s AO stated that “this Order becomes effective upon signature of the Department.” AO at ¶108. Therefore, the AO in this case is effective from its issuance unless CR/REF provides BER with a reason to “declare [it] void.” Although the statute is silent on the burden and standard of proof, its plain meaning indicates that the BER is reviewing an action taken by DEQ (similar to an appellee) and challenged by CR/REF (similar to an appellant). Most importantly

to the *MEIC* analysis, absent CR/REF's appeal or challenge, and were CR/REF to present no evidence at the hearing, BER would have no reason to "declare the department's notice void" and DEQ's AO would remain final.

BER's authority and the position of the parties in this instance is therefore sufficiently similar to reach the same conclusion as in the *MEIC* case: "[i]f no challenge had been made" to DEQ's AO (*i.e.*, by CR/REF's NOA) or if "no evidence were presented at the contested case hearing establishing that [DEQ's action] violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid." *MEIC*, at ¶16. CR/REF is "the party asserting a claim for relief" before BER and, pursuant to Mont. Code Ann. §§ 26-1-401 and -402, "bears the burden of producing evidence in support of that claim." *Id.* at ¶14. Based on the reasoning set out in *MEIC*, therefore, "as the party asserting the claim at issue, [CR/REF] ha[s] the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *Id.* at ¶16.

CR/REF argue that this case is distinguishable from *MEIC* because of language contained in subsection (3) of Mont. Code Ann. § 75-5-611, which states:

In a notice and order given under subsection (1), the department may require the alleged violator to appear before the board for a public hearing and to answer the charges. The hearing must be held no sooner than 15 days after service of the notice and order, except that the board may set an earlier date for hearing if it is requested to do so by the

alleged violator. The board may set a later date for hearing at the request of the alleged violator if the alleged violator shows good cause for delay.

CR/REF argue that “[T]he hearing’ provided in subsection 4 refers to the same hearing in subsection 3 – the hearing where the alleged violator will answer the charges” and “[a]n alleged violator appearing before this Board to ‘answer the charges’ cannot bear the burden of proof because he will not know what to answer until the Department presents the charges.” CR ¶¶ 1-2.

This argument is legally and factually unpersuasive for a number of reasons. First, by its own admission (in the NOA), CR/REF have requested this hearing pursuant to subsection (4) and not subsection (3) of the statute. Second, by its plain language subsection (3) contemplates a separate hearing from that described in subsection (4), and a hearing that is different in kind—namely an extremely expedited one. CR/REF did not request such a hearing in their NOA, and instead specifically requested a hearing “within a reasonable time after completion of discovery and resolution of any pre-hearing motion” (NOA at 1), this is not the hearing (or type of expedited hearing) contemplated by subsection (3).² Finally,

² It also appears that subsection (3) is referring a notice letter “given under subsection (1)” rather than to an AO (issued under subsection (2)) and there is no dispute that in this case the department issued an AO pursuant to subsection (2). As there was no argument on this point, however, and subsection (3) also refers to a “notice and order,” perhaps contemplating subsection (1) and (2), the undersigned has not based the conclusion on this point.

even if “the hearing” referred to in subsection (4) were the same as a hearing conducted pursuant to subsection (3), nothing in the statute’s requirement that CR/REF “answer the charges” changes the position of the parties or the analysis of the burden based on the *MEIC* case, as set forth above.

Contrary to CR/REF’s assertion, the AO contains “the charges” presented by the department and to which CR/REF must respond. The parties agree that the AO in this case was issued and was in effect on the date it was signed. Therefore, CR/REF received notice of “the charges” with the AO and, absent any “answer” on CR/REF’s part at the hearing, those “charges” would remain in effect. The statutory requirement (were it applicable) that CR/REF “answer the charges” therefore does not shift the burden to DEQ for the purpose of this hearing and CR/REF’s argument to the contrary is unconvincing.

For all these reasons, CR/REF bear the burden of establishing by a preponderance of the evidence that “a violation has not occurred” and that BER must “declare the department's notice void” (Mont. Code Ann. § 75-5-611(6)(e)) or “the facts essential to a determination that the Department's decision violated the law” (*MEIC* at ¶16).

C. Notice

CR/REF have argued that DEQ cannot assess administrative penalties on any of the alleged violations because DEQ did not provide CR/REF adequate

notice before issuing the AOs, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-617 and ARM 17.30.2003 (repealed 2016). These laws (each and together) require DEQ to issue notice letters that meet certain requirements prior to issuing AOs, unless the violations alleged by the AO meet certain thresholds of seriousness.³ Mont. Code Ann. §§ 75-5-611(2), -617(2); ARM 17.30.2003(7). If the AO's contain sufficiently serious allegations, however, then DEQ may proceed directly to an AO without sending a notice letter. Mont. Code Ann. §§ 75-5-611(1)(e), -617(2); ARM 17.30.2003(7).

The prior hearing examiner found that “[i]t is undisputed DEQ did not provide a written notice letter to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice of Violation.” *Or. S.J.*, at 8:10-12. For this reason, Violation 1 was dismissed, but Violations 2, 3, and 4 were allowed to remain because the three remaining allegations are serious enough to allow DEQ to proceed directly to an AO, pursuant to Mont. Code Ann. § 75-5-611(2)(a)(ii). *Id.*

In prehearing briefing and at the hearing, CR/REF made a slightly nuanced argument along these same lines, based on ARM 17.30.2003(5) (repealed 2016). ARM 17.30.2003(5) (repealed 2016) states that

³ *E.g.*, violations of Mont. Code Ann. § 75-5-605, violations that present “imminent threat to human health, safety, or welfare or to the environment” or violations of “Class I” or “major extent and gravity”.

the department may not assess a penalty for a violation cited in the notice letter if the violator submits to the department in writing within the time specified in the notice letter: (a) a response signed by the violator certifying that its activity was, or is now, in compliance with all requirements cited in the notice letter; or [a corrective action plan].

CR/REF argued that because they (by DEQ's own admission, JSF ¶¶ 10, 15) adequately responded to all of DEQ's letters, within the timeframe allowed by DEQ, that subsection (5) prevented the assessment of any of the penalties contained in the AO. The record was not clear whether this argument was squarely before the previous hearing examiner and so the undersigned allowed limited argument and evidence on it at the hearing. *See Or. MIL*, at [cite].

It is true that CR/REF responded to all of DEQ's letters within DEQ's specified timeframe, and that by DEQ's own admission the responses were adequate. JSF, ¶¶ 10, 15. Specifically, CR/REF ultimately responded to DEQ's December 9, 2014 (and September 23, 2013, and November 8, 2013), letters on January 8, 2015 (Ex. Y) and then DEQ responded to CR/REF on February 6 and 8, 2015 (Ex. 18 and 19) and issued the AO on March 27, 2015. Tr. Vol I, 214:16-19; 215:6-11. However, it has already been determined that none of these correspondences from DEQ constituted "notice letters" because none of them contained all the requisite parts pursuant to Mont. Code Ann. § 75-5-611(1)(a)-(e). *Or. S.J.*, at 8:10-12. Because none of DEQ's correspondence constituted a notice letter, it follows as a matter of law that none of CR/REF's responses can constitute

the “response [to] ... the notice letter” contemplated by ARM 17.30.2003(5).

CR/REF’s arguments regarding ARM 17.30.2003(5) are therefore unavailing. The only applicable section of ARM 17.30.2003 is subsection (7), which allows DEQ to proceed directly to an AO on violations, like the three remaining here, which meet the threshold level of seriousness.⁴

⁴ This conclusion does not ease all of the discomfort regarding DEQ’s correspondence and ARM 17.30.2003. DEQ’s argument is that any correspondence beyond an AO on cases that meet the seriousness thresholds are, essentially, a bonus or courtesy unrequired by law. While perhaps technically true, the undersigned is sympathetic to CR/REF’s position that DEQ’s correspondence created substantial, justifiable confusion.

Although these correspondence failed to meet the technical requirements of a “notice letter” (which seems inadvertent on DEQ’s part, given that it originally charged Violation 1); any recipient could have construed the letters as intended to be “notice letters” within the meaning of subsection (2). There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5). CR/REF’s frustration is understandable—it responded to and complied with all of DEQ’s demands in the correspondence, only to receive an AO three months later. Had DEQ been more precise in its correspondence (as it should have been), subsection (5) would have acted to prevent any penalty absent some additional evidence from DEQ. It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a “notice letter.”

That said, CR/REF have also benefited (by a dismissal of Violation 1) from the conclusion that none of the correspondence constituted a “notice letter.” CR/REF go beyond arguing in the alternative when trying to assert both that *none* of DEQ’s correspondence constituted a “notice letter” (and thus the dismissal of Violation 1 was justified) and that CR/REF adequately responded to *all* the “notice letters” (attempting to justify, now, dismissal of the remaining violations). Either DEQ’s correspondence constituted “notice letters” within the meaning of Mont. Code Ann. § 75-5-611(1)(a)-(e), or it did not.

As it has already been decided that the correspondence did not so-constitute (and the benefit of that conclusion already conferred), the undersigned must be satisfied. And as the ARM has now been repealed, a contrary conclusion would have little or no deterrent effect on DEQ’s future correspondence pursuant to that ARM.

D. Method for Calculating Penalties

Each of the Administrative Orders assesses a penalty and has a penalty calculation worksheet attached tracking the Administrative Rules on penalties. ARMs 17.4.301-308; *see also* Tr. Vol. I, 215:19 – 216:5; Ex. 9, DEQ 000154 - 000155; DEQ 000157; Ex. 10, DEQ 000184 – 000185, DEQ 000187. The method used to calculate any penalty for a violation is identical, pursuant to the steps set out in ARM 17.4.303.

Several of those steps, however, are inapplicable to this situation. First, a base penalty may be decreased by up to 10% based on the “amounts voluntarily expended” (AVE). ARM 17.4.304(4). But here there was no evidence of amounts CR/REF expended beyond what was required to come into compliance and therefore this factor is not relevant here. *See also* Tr. Vol. I, 219:7 – 219:12.

Second, the total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years or if the violator enjoyed an economic benefit through noncompliance. ARM 17.4.306; ARM 17.4.307. However, DEQ has not alleged any prior history for CR/REF and did not assess any economic benefit for violations 2-4, so neither of these penalty factors should be considered. Ex. 9, 157-166; Ex. 10, 187-196.

E. Violation Two

The previous hearing examiner concluded CR/REF were owner/operators requiring permit coverage. In other words, all discharges of storm water that occurred before CR/REF had permit coverage (prior to December 23, 2013) were necessarily in violation of Mont. Code Ann. § 75-5-605(2)(c).

Discharges of storm water are determined to occur whenever there is a storm event that results in of 0.25 inches or greater precipitation (“precipitation events”). Tr. Vol. II, 32:15-25, 33:1-12. Therefore, every day on which there was a precipitation event *and* on which CR/REF did not have a permit, CR/REF discharged storm water without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c). Tr. Vol III 104:10-16; 108:7-16 DEQ is only allowed, however, to “look back” for two years from the date of the AO (March 27, 2015) when counting the number of days that storm water was discharged. Tr. Vol. I, 225:14-25.

DEQ originally counted the number of days when there was a precipitation event between March 27, 2013 and December 23, 2013, to reach a total number of 21 days of storm water discharges without a permit. Tr. Vol. I, 225:14-226:3. However, DEQ apparently counted days based on precipitation data posted on the NOAA website, which was not as accurate as the certified NOAA data that they produced on the third day of the hearing. Tr. Vol. III, 33:10-36:20. When faced

with this data DEQ adjusted downward the number of days to a total of 19 days, instead of 21. Tr. Vol. III, 33:21-35:2.

However, CR/REF continues to dispute knowing they were (or could be determined to be by this proceeding) owner/operators required to have permit coverage. From the debate on this issue during summary judgment, it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair in this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage. DEQ told CR/REF on September 23, 2013, that they needed permit coverage;⁵ but, it then took until December 23, 2013, for CR/REF to comply. CR/REF can therefore only reasonably be penalized for the discharges of storm water (precipitation events) that occurred between September 23, 2013 and December 23, 2013. According to the certified NOAA data, there were eight precipitation events between those dates. Ex. 20. This calculation eliminates 11 days with precipitation events which occurred before DEQ's September 23, 2013 letter.

⁵ As discussed *supra*, while this correspondence may not have been a "notice letter" within the meaning of the applicable laws and rules, it certainly informed CR/REF that DEQ believed permit coverage was required.

The nature of Violation 3 must be classified “as one that harms or has the potential to harm human health or the environment....” ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 2 must be found to have a “major gravity” because it harmed or has the “potential for harm to human health or the environment...” and because “construction or operation without a required permit or approval” is a given example of a major gravity pursuant to ARM 17.4.303(5)(a).

There was no evidence presented at the hearing on the “volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit,” which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 17.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the “duration of the violation.” *Id.* DEQ alleged that 19 days constituted a “major deviation from the applicable requirements” necessitating a major extent finding. This argument is strained. However, eight days of discharge between the time DEQ told CR/REF that they needed permit coverage and the time they obtained it is closer to a “minor deviation from the applicable requirements.” *Id.* Adjusting the days of violation therefore also causes a downward adjustment of the extent finding to a “minor extent”, which changes the base penalty from \$8,500 per day, per entity, to \$5,500 per day, per entity.

DEQ also premises their 30% upward adjustment for “circumstances” on the fact that, “As a large and experienced developer, [CR/REF] was aware that storm water discharges without a permit are prohibited by law” and therefore they should have known to get permit coverage. Ex. 9; Ex. 10; Tr. Vol. I, 222:18-223:6; Vol. III, 96:22-97:3. As noted above, there is at least a (continuing) debate between the parties about whether or not CR/REF was an owner/operator requiring permit coverage and those arguments are not frivolous. CR/REF got permit coverage (under protest) once DEQ told them it was needed. Ex. 3; Ex. 4. These circumstances do not warrant a 30% increase in the base penalty for CR/REF. They also, however, do not warrant a 10% decrease in the base penalty for good faith and cooperation, because if CR/REF had been proactive as contemplated by ARM 75.4.304(3), they could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage and done more to get the permit faster after learning DEQ felt it was needed.

For all these reasons, a base penalty, with no adjustments, of \$5,500 per day is an appropriate penalty. The per day penalty multiplied by eight days of violation (for eight precipitation events between September 23, 2013 and December 23, 2013), comes to a total penalty of \$44,000 per entity, or a total of \$88,000 for both CR and REF for Violation 2.

F. Violation Three

The prior hearing examiner concluded “[t]here is sufficient evidence that Reflections and Copper Ridge placed or caused to be placed wastes” within the meaning of Mont. Code Ann. §§ 75-5-605(1)(a) and 75-5-103(24) (defining “other wastes”). *Or. S.J.*, at 17:4-5. This was based on the evidence presented by DEQ’s inspector, Dan Freeland, regarding his observations at an unscheduled inspection of CR/REF on September 9, 2013. *Id.* at 17:5-10. However, at summary judgment DEQ failed to show that the waste CR/REF placed would cause “pollution” as defined by Mont. Code Ann. § 75-5-103(30), thus, leaving the issue for resolution at the hearing.

At the hearing, DEQ convincingly argued that because of the definition of pollution, any *unpermitted* discharge to state waters of storm water that includes “other wastes” (as defined by Mont. Code Ann. § 75-5-103(24)) constitutes pollution. *Tr.* Vol I 29:16-30:22, Vol. III, 110:1-113:09. Specifically, “‘Pollution’ means: (i) contamination or other alteration of the physical, chemical, or biological properties of state waters *that exceeds that permitted* by Montana water quality standards.” Mont. Code Ann. § 75-5-103(30). When an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily “exceeding that permitted.” DEQ contends that permits themselves, and the BMPs they require, are what regulate the amount of waste that

is discharged in storm water. Tr. Vol. I, 29:16-30:22; Vol. III, 110:1-113:9. The assumption is that, if the BMPs are in place and working as they should, then the amount of waste (if any) that ends up in state waters through storm water discharges is permitted (*i.e.*, is of an amount that DEQ has determined is not going to harm human health or the environment or alter any applicable water quality standards). For this reason, numeric standards for the amount of waste are essentially irrelevant—either an entity is controlling waste through its permit and BMPs, or it is not. However, not all unpermitted storm water discharges are necessarily a violation of Mont. Code Ann. § 75-5-605(1)(a), because there must be the additional fact proven of an entity “plac[ing] or caus[ing] to be placed any wastes where they will” combine with storm water to cause unpermitted discharges and therefore “pollution.”⁶ Mont. Code Ann. § 75-5-103(30).

As stated above and in the *Order on Summary Judgment*, it has been established that CR/REF placed waste where it could cause pollution and that there were eight days of precipitation that could have caused storm water discharges between the time CR/REF had notice of the need for permit coverage and when it

⁶ If this were not the case, having an unpermitted storm water discharge would simultaneously violate two sections of Mont. Code Ann. § 75-5-605 and would result in superfluous or redundant charge stacking, and would offer a work-around any statutory caps on maximum damages. See Mont. Code Ann. § 75-5-611(9)(d).

was obtained. Or. SJ at 17:4-5; Ex. 20. DEQ also offered additional evidence at the hearing (namely the observations and documentation of Inspector Freedland from September 9, 2013) that discharges of storm water from CR/REF containing waste flowed from CR/REF into Cove Ditch, a tributary to the Yellowstone River, and a state water. Ex. 16; Tr. Vol. I, 143:16-21; Vol. III, 97:16-20. CR/REF did not meet their burden to show that “no violation occurred,” *i.e.*, that no waste was placed by CR/REF and no (or fewer) discharges of storm water occurred than alleged by DEQ. DEQ’s assumption therefore stands. After CR/REF was found to be placing waste (on September 9, 2013) and before they had permit coverage⁷ (on December 23, 2013), all of the storm water discharges were unpermitted and therefore placed waste into state waters in an amount “*that exceeds that permitted[.]*” Per Mont. Code Ann. § 75-5-103(30). Or. SJ at 17:4-5; Ex. 20; Ex. 16; Tr. Vol. I 29:16-30:22

As previously determined, there were eight days where precipitation occurred that might cause storm water discharges between September 23, 2013,

⁷ As discussed further below, it is unclear from the record (with the exception of one day on which DEQ actually inspected) whether BMPs were in place after CR/REF had permit coverage. As this essentially constructive definition of “pollution” depends only on *unpermitted* discharges (rather than discharges made in violation of a permit) any time period after CR/REF were permitted would require additional, affirmative evidence of the amounts of waste that exceeded those contemplated by the permits.

and December 23, 2013. Therefore, CR/REF is found to have placed waste where it would cause pollution via unpermitted storm water discharges for eight days.

Similar to the previous violation, the nature of Violation 3 is classified “as one that harms or has the potential to harm human health or the environment...” ARM 17.4.303(1), (5); ARM 17.4.302(6); Mont. Code Ann. § 75-5-605(2)(c). Violation 3 must also be found to have a “major gravity” because the “release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment” and “exceedance of a maximum containment level or water quality standard” are given examples of a major gravity pursuant to ARM 17.4.303(5)(a).

As in the prior violation, the only evidence presented at the hearing regarding the extent of Violation 3 concerned the “duration of the violation.” ARM 75.4.303(4). DEQ alleged that 730 days of violation (representing every day in the maximum two-year statute of limitation) constituted a “major deviation from the applicable requirements” necessitating a major extent finding. However, an adjustment to eight days of violation constitutes a “minor deviation from the applicable requirements.” *Id.* This adjustment of the days of violation also adjusts downward the extent finding to a “minor extent”. Per the matrix, this makes the base penalty 0.55, or \$5,500 per entity, per violation. As with the prior violation, no adjustments to the base or total penalty are appropriate for these circumstances,

good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. The total penalty is therefore \$44,000 per entity, or a total of \$88,000 for both CR and REF for Violation 3.

G. Violation Four

The prior hearing examiner concluded based on observations by DEQ during the October 21, 2014 inspection (and the documentation memorializing it) that CR/REF violated the terms and conditions of their general permit in four ways: (1) the SWPPP administrator failed to conduct site inspection every seven days (Permit Section 2.3); (2) the SWPPP had not been or updated appropriately (Permit Sections 3.1.1 and 3.1.3); (3) the SWPPP administrator had failed to maintain records at the site (Permit Section 2.5); and (4) BMPs were not implemented to control and mitigate discharges of sediment and other pollutants (Permit Sections 2.1.1 and 2.1.4). *Or. S.J.*, 19-20. These findings were consistent with evidence presented at the hearing. JSF ¶ 12; Tr. Vol. I, 100:11-100:20; Ex. 7 at DEQ 000113; Tr. Vol. I. 105:24-106:3; Ex. 8 at DEQ 000125.

CR/REF correctly characterized all but the fourth violation of the permit as paperwork violations. Tr. Vol. III 43:6-53:12. While these violations are certainly important (particularly, for example, regular inspections),⁸ they probably do not

⁸ Hopefully it is not lost on CR/REF that (as discussed further below) had they done and documented regular inspections as required by the permit, and had those inspections

meet the threshold of seriousness contemplated by ARM 17.30.2003(7) (repealed 2016). As discussed above and in the *Order on Summary Judgment*, Violation 4 has only survived to this stage is because it (at least at the time) met the threshold level of seriousness to overcome DEQ's failure to provide a "notice letter." *See supra*, Section C. It is therefore appropriate to focus on the fourth violation involving BMPs for the purpose of assessing a penalty, as this was the only violation that had the potential to harm human health and the environment. *See* Mont. Code Ann. § 75-5-605(1)(b); ARM 17.30.2003(7) (repealed 2016).

DEQ presented adequate evidence at the hearing to establish that when DEQ performed its scheduled inspection on October 21, 2014, CR/REF did not have BMPs in place and thus was not in compliance with the permit. Tr. Vol. I, 100:11-102:21 The specific BMPs were those intended to control storm water discharges: "Filtrexx Sediment Control, earthen berms, stabilized construction entrance, and preserving existing vegetation." Ex. 7 at DEQ000119; Tr. Vol. I, 125:5-13.

Based on that October inspection DEQ charged CR/REF with a violation for every day between the time CR/REF received permit coverage (December 23, 2013) and the date of the inspection (October 21, 2014), which resulted in 303

showed that BMPs were appropriately in place, supplying those inspection records at the hearing (or at summary judgment) would have easily met their burden to show that "a violation has not occurred." Mont. Code Ann. § 75-5-611(6)(e).

days of violation. Ex. 9; Ex. 10; Tr. Vol. I, 229:12-23. Even when pointedly asked by the undersigned, however, DEQ could point to *no evidence* in the record that BMPs were *not* in place for the ten months between December 2013 and October 2014. Tr. Vol III 112:6-23. DEQ argued instead that because BMPs were not in place in October, it was appropriate to *assume* that they were never put in place. This assumption, however, was contradicted by DEQ's own inspector, Dan Freeland, who stated in an email to other DEQ employees on March 7, 2014, that while driving through CR/REF there were at least some of BMPs (straw bales and a berm) in place and that there "[a]ppear[ed] to be an effort to control runoff from the individual lots I observed." Ex. V.

For its part, CR/REF also provided no evidence that all of the BMPs required by the permit (including the four discussed by DEQ) *were* in place for those ten months. CR/REF had Marshall Phil, their SWPPP administrator on the stand at the hearing, and there was some testimony that there were more SWPP inspections than were documented. Tr. Vol. III, 50:15-51:14. However, CR/REF never provided for that period any inspection reports, photographs, testimony, or any other evidence that affirmatively demonstrated that the BMPs DEQ alleged were not in place were in fact in use. Marshall Phil, the SWPPP administrator for CR/REF, during his testimony could only state that a "good majority" of BMPs were onsite and installed correctly, without providing any further detail. Tr. Vol.

III 53:13-15. CR/REF alluded to (and DEQ even admitted that) perhaps a storm event could have wiped out BMPs just prior to the October inspection (Tr. Vol. III, 111:25-112:5); and provided vague evidence that sometimes children removed stakes from the Filtrexx controls to have sword fights. Tr. Vol III., 52:18-53:6 This evidence is insufficient to meet CR/REF’s burden to show that “a violation has not occurred” (Mont. Code Ann. § 75-5-611(6)(e)) or that DEQ’s penalty assessment of 303 days “violated the law” (*MEIC* at ¶16).

CR/REF did provide evidence, however (consistent with their position that they are not owner/operators) that they did not own (at least some of) the lots on which DEQ noted a lack of BMPs. Ex. Y. In their January 8, 2015 letter⁹ CR/REF stated that its SWPPP administrator, Marshall Phil for Blue Line Engineering, “makes certain statements” in the attached corrective actions to the effect of,

concerning BMPs to be repaired or installed on subdivision lots not owned by [CR/REF]. We will communicate your observations to these other property owners. Again, we do not own these lots and have no right to enter these properties.

Ex. Y at 1. The attached corrective actions from Mr. Phil then confusingly state both that BMPs are being put in place currently—*e.g.*, “[t]he site is currently in and the process of implementing the Filtrexx Sediment Control BMP...” (Ex. Y at 5)—

⁹ CR/REF’s January 8, 2015 letter responded to DEQ’s December 9, 2014 letter notifying them of violations, which were based (in part) on DEQ’s October 2014 inspection. JSF ¶¶ 12-15.

and that “[i]n installation of additional BMPs and modification of existing BMPs ... have yet to be performed. Weather has not permitted any installation or modification to BMPs. All BMP installation and modification will commence in the spring” (*id.*, at 2).

From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF’s ownership access.

DEQ, however, apparently believed that CR/REF’s January 2015 communication was satisfactory regarding BMPs (and everything else) because it stipulated prior to hearing that “[w]ithin a timeframe acceptable to the Department, the Copper Ridge Subdivisions each took the corrective action identified in the December 9, 2014 Notices of Violation....” JSF ¶15. In seeming conflict with this stipulation, however, DEQ responded to CR/REF’s letter in February 2015¹⁰ by stating

[i]n your response, you state the installation and modification of [BMPs] has not been completed and will not be completed until spring 2015. This delay is unacceptable, [BMPs] must be installed and maintained immediately to control the discharge of pollutants per Parts 2.1, 2.3.5, and 3.7 of the Permit.^[11]

¹⁰ To CR on February 6 and to REF on February 9, 2015. Ex 18; Ex. 19.

¹¹ This response is only contained in DEQ’s response to CR, not the response to REF. Compare Ex. 18 with Ex. 19.

Ex. 18 at 1-2. There was no further communication between the parties until DEQ issued the March 27, 2015 AO. In other words, CR/REF never responded (in almost two months) to DEQ's statement that BMPs must be put in place immediately; CR/REF gave no further argument about the weather or ownership preventing them from doing so. DEQ also apparently was not concerned enough (based on CR/REF's January communication or any of their other conduct) to do another site inspection after October of 2014 to check whether any BMPs were actually in place.

Yet, curiously, DEQ only charged CR/REF with penalty days of violations for the 303 days between December 2013 and October 2014, and not for any time after October 21, 2014. Ex. 9 at 9 (DEQ 000165); Ex. 10 at 9 (DEQ000195). It therefore appears DEQ believed (or was comfortable assuming) that after the October 2014 inspection, CR/REF had BMPs in place, despite CR/REF's communication in January of 2015 indicating BMPs were *not* in place and may never be in place in some areas. Ex. Y. The undersigned is thus unclear whether DEQ either understood or was really concerned about the status of the BMPs at CR/REF after the October 21, 2014 inspection.

For all these reasons, the undersigned has struggled to determine the number of penalty days to be assessed for CR/REF's failure to implement the provisions of

the permit.¹² Ultimately, the only thing that is clear from the evidence (or lack thereof) presented at the hearing is that on at least October 21, 2014, when DEQ put “eyes on” CR/REF, four BMPs required by the permit (which CR/REF had agreed to abide by) were not in place. The only penalty day that should clearly be assessed for a violation of the permit is therefore October 21, 2014.

Similar to the previous violations, there was no evidence presented at the hearing on the “volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit,” which are the other factors to consider when determining the extent of a violation for the purpose of calculating a penalty. ARM 75.4.303(4). Therefore, the only remaining consideration for the extent of the violation is the duration. *Id.* DEQ alleged that ten months (between December 2013 and October 2014) constituted a “major deviation from the applicable requirements” necessitating a major extent finding. However, an adjustment to only one day of violating the permit constitutes a “minor deviation from the applicable requirements.” *Id.* This adjustment of the days of violation, therefore also adjusts downward the extent finding to a “minor extent”. A “failure to construct or operate in accordance with a permit or

¹² Whatever the penalty calculation, a final resolution of the owner/operator question by the Board seems the thing most likely to confer a meaningful penalty (or lack thereof) and future deterrent for both DEQ and CR/REF for these myriad failures.

approval” is by definition a “moderate gravity” finding. ARM 17.4.303(5)(b).¹³ Per the matrix, this makes the base penalty 0.40, or \$4,000 per entity, per violation. As with the prior violations, no adjustments to the base or total penalty are appropriate for circumstances, good faith, AVE, or economic benefit. ARMs 75.4.304, 306, 307. This makes the final penalty \$4,000 per entity or \$8,000 total for both CR/REF.

CONCLUSIONS OF LAW

1. BER has jurisdiction to hear this matter pursuant to its authority under Mont. Code Ann. § 75-5-611(4)-(9), and the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6 (MAPA).
2. DEQ is authorized under Mont. Code Ann. § 75-5-211 to administer the provisions of the Montana Water Quality Act, Title 75, Chapter 5, Mont. Code Ann. (“WQA”). The permit program administered by DEQ is implemented through rules adopted by the BER. Mont. Code Ann. §§ 75-5-401 and 75-5-402.
3. DEQ’s AO, issued March 27, 2015, meets the requirements of Mont. Code Ann. § 75-5-611(1)-(2).
4. Pursuant to the reasoning stated in the *Order on Summary Judgment* at Section II (Aug. 1, 2017), CR/REF were “owners or operators” for the purpose

¹³ DEQ’s citation on their penalty calculation forms (Exs. 9 and 10) incorrectly cites ARM 17.4.304(5)(b)(ii) instead of ARM 17.4.303(5)(b)(ii).

of obtaining permit coverage for the discharge of storm water at their respective developments.

5. DEQ provided legally sufficient notice of violations under the Montana Water Quality Act, Mont. Code Ann. §§ 75-5-611(2)(a)(ii), and 75-5-617, and under ARM 17.30.2003 (repealed 2016).

6. At the hearing, CR and REF had the burden of proving, by a preponderance of the evidence, that “a violation has not occurred” and the BER must “declare the department's notice void” (Mont. Code Ann. § 75-5-611(6)(e)) or that “the facts essential to a determination that the Department's decision violated the law” (*MEIC* at ¶16).

Findings Relating to All Penalties

7. The total penalty may be adjusted if the violator has been issued an Order for violations of the Water Quality Act within the past three years, however DEQ has not alleged any prior history for CR/REF so this factor is not relevant. ARM 17.4.306; *see also* Tr. Vol. I, 218:4 – 218:11; Ex. 9, DEQ 000166; Ex. 10, DEQ 000196.

8. The total penalty may be increased if the violator enjoyed an economic benefit through noncompliance, however DEQ has not assessed any economic benefit for violations 2-4, and therefore this factor is not relevant. ARM 17.4.307; *see also* Tr. Vol. I, 218:12 – 218:20; Ex. 9; Ex. 10.

9. DEQ treated CR and REF as separate violators under Mont. Code Ann. § 75-5-611 and initiated two separate enforcement actions in the above-captioned matters after considering evidence that each company is a separate legal entity, and each conducted separate development activities. Additionally, CR and REF obtained separate permit authorizations and submitted separate SWPPPs covering development activities at their respective subdivisions. Based on the evidence presented at the hearing and summary judgment, CR and REF are separate legal entities and therefore subject to separate penalties. [cites]

10. Based on Mont. Code Ann. § 75-5-611(9)(a) the penalty for each violator is limited to “not more than \$10,000 for each day of each violation” and “the maximum penalty may not exceed \$100,000 for any related series of violations.” As separate cases and entities (though considered together at the hearing and herein) therefore, CR/REF together may not be subject to more than \$20,000 per day or \$200,000 total in penalties. *Id.*

Violation One

11. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section I(D), DEQ did not provide adequate notice regarding its first alleged violation against CR/REF—a violation of ARM 17.30.1105—and therefore no violation of that ARM can be shown and DEQ cannot seek administrative penalties based on such a violation.

Violation Two

12. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section III, DEQ has established that CR/REF discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c).

13. Based on the evidence presented at the hearing, and as set forth above, the requisite penalty calculation (set forth below), and pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, the appropriate assessment of penalties for Violation 2 is \$44,000 per entity, or \$88,000 total for CR/REF.

14. The nature of this violation is classified as harming or having “the potential to harm human health or the environment...” ARMs 17.4.302(6), 17.4.303(1).

15. The gravity of the violation is major because it harmed or has the “potential for harm to human health or the environment...” and because “construction or operation without a required permit or approval” is a specific example of a major gravity pursuant to ARM 17.4.303(5)(a).

16. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely “the duration of the violation.” ARM 17.4.303(4). As the duration of the violation is eight days, “it constitutes a minor deviation from the applicable requirements.” *Id.*, at (4)(c).

17. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or \$5,500, per violation.

18. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

19. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation “results in a penalty that is higher than ... necessary to provide an adequate deterrent” and the Board “may reduce the number of days of violation.” ARM 17.4.305(2). It is also reasonably adjusted “as justice may require.” ARM 17.4.308.

Violation Three

20. Based on the evidence presented at the hearing, and as set forth above, CR/REF placed wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a).

21. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611,

75-5-1001, and ARMs 17.4.301-308, is \$44,000 per entity, or \$88,000 total for CR/REF.

22. The nature of this violation is classified as harming or having “the potential to harm human health or the environment...” ARMs 17.4.302(6), 17.4.303(1).

23. The gravity of this violation is major because the “release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment” and “exceedance of a maximum containment level or water quality standard” are specified examples of a major gravity pursuant to ARM 17.4.303(5)(a).

24. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely “the duration of the violation.” ARM 17.4.303(4). As the duration of the violation is eight days, “it constitutes a minor deviation from the applicable requirements.” *Id.* at (4)(c).

25. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.55 or \$5,500, per violation.

26. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

27. The number of days of the violation is eight because that is the number of days between when CR/REF had notice that DEQ required permit

coverage (September 23, 2013) and before they got permit coverage (December 23, 2013), and on which there was a precipitation event of 0.25 inches or greater as shown by the NOAA data. This number of days is also reasonable because the multiplication of days for the continuing violation “results in a penalty that is higher than ... necessary to provide an adequate deterrent” and the Board “may reduce the number of days of violation.” ARM 17.4.305(2). It is also reasonably adjusted “as justice may require.” ARM 17.4.308.

Violation Four

28. Pursuant to the reasoning stated in the *Order on Summary Judgment*, Section V, DEQ has established that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b).

29. Based on the evidence presented at the hearing, and as set forth above, the appropriate assessment of penalties, pursuant to Mont. Code Ann. §§ 75-5-611, 75-5-1001, and ARMs 17.4.301-308, is \$4,000 per entity, or \$8,000 total for CR and REF.

30. The nature of this violation is classified as harming or having “the potential to harm human health or the environment....” ARMs 17.4.302(6), 17.4.303(1).

31. The extent of the violation in this case is determined by the only factor on which there was any evidence presented, namely “the duration of the violation....” ARM 17.4.303(4). As the duration of the violation is one day, “it constitutes a minor deviation from the applicable requirements.” ARM 17.4.303(4)(c).

32. The gravity of the violation is moderate because it includes a “failure to construct or operate in accordance with a permit or approval.” ARM 17.4.303(5)(b).

33. Pursuant to the matrix in ARM 17.4.303(2), therefore, the base penalty, per entity, is 0.4 or \$4,000, per entity, per violation.

34. The base penalty should not be adjusted based on the circumstances of the violation, good faith and cooperation, or the AVE. ARM 17.4.304(1)-(4).

35. The number of days of the violation is one because that is the number of days on which there is any evidence that four BMPs were not in place in violation of the requirements of the permit. This number of days is also reasonable because the multiplication of days for the continuing violation “results in a penalty that is higher than ... necessary to provide an adequate deterrent” and the Board “may reduce the number of days of violation.” ARM 17.4.305(2). It is also reasonably adjusted “as justice may require.” ARM 17.4.308.

Total Penalties

36. The combined total of penalties for Violations 2, 3, and 4 is \$92,000 per entity, or \$184,000 total for CR and REF.

DATED this 16th day of July, 2018.

/s/Sarah Clerget

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Post-Hearing Submissions to be mailed to:

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DATED: 7/16/18

/s/ Aleisha Solem
Paralegal

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE WATER**
5 **QUALITY ACT BY REFLECTIONS AT**
6 **COPPER RIDGE, LLC AT**
7 **REFLECTIONS AT COPPER RIDGE**
8 **SUBDIVISION, BILLINGS,**
9 **YELLOWSTONE COUNTY, MONTANA.**
10 **(MTR105376) [FID 2288, DOCKET NO.**
11 **WQ-15-07]**

CASE NO. BER 2015-01 WQ

Electronically Filed with the Montana Board of
Environmental Review

This 1 day of August, 2017
at 9:27 o'clock am

By: Meranda Sikess

12 **ORDER ON SUMMARY JUDGMENT**

13 The Parties have filed cross motions for summary judgment and have had the
14 opportunity for oral argument. Both Motions for Summary Judgment are granted in
15 part and denied in part. A hearing is still necessitated in this matter, and a
16 Scheduling Order is issued in conjunction with this Order, setting forth the process
17 going forward.

18 **FACTS**

19 1. On September 9, 2013, DEQ conducted a compliance evaluation
20 inspection at the Reflections at Copper Ridge (Reflections) and Copper Ridge
21 Subdivisions.

22 2. DEQ documented areas with construction activity that it believed were
23 not authorized under General Permit MTR 100000. DEQ observed clearing,
24 grading, excavation, soil stockpiles, concrete washout areas, and sediment tracking
25 on streets. DEQ documented that the subdivisions did not have Best Management
26 Practices (BMPs) in place to control or mitigate the discharge of pollutants
27 associated with storm water runoff from construction at the subdivisions.

 3. On September 23, 2013, DEQ sent a Violation Letter to Gary Oakland
 of the Copper Ridge Development Corporation.

1 4. The letter stated “The Montana Department of Environmental Quality
2 (DEQ) has determined Copper Ridge Development Corporation is in violation of
3 the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and
4 Reflections at Copper Ridge Subdivision located in Billings, Montana and is
5 notifying Copper Ridge Development Corporation of a formal enforcement action.”

6 5. The letter documented conditions observed at Copper Ridge and
7 Reflections, on September 9, 2013.

8 6. DEQ conducted a CEI of construction disturbance observed within the
9 respective subdivisions and the impact on storm water discharge into Cove Ditch.

10 7. DEQ concluded:

11 Based on the facility site inspection and the documentation reviewed,
12 the DEQ has determined that Copper Ridge Development
13 Corporation is in violation of the following provisions of the
14 Montana Water Quality Act:

- 14 • Unauthorized discharge of wastes to state waters without a
15 valid permit is a violation of 75-5-605(2)(c) of the Montana
16 Code Annotated (MCA).
- 16 • Causing pollution of state waters or to place or cause to be
17 placed any wastes where they will cause pollution of any state
18 waters is a violation of 75-5-605(1)(1) [sic] MCA.

17 8. DEQ explained it was “initiating a formal enforcement action,” and
18 requested Copper Ridge Development Corporation complete corrective actions by
19 October 18, 2013. DEQ further explained:

20 this letter of violation is intended to inform Copper Ridge
21 Development of the formal enforcement action and require
22 corrective actions to demonstrate compliance with the Montana
23 Water Quality Act. If Copper Ridge Development Corporation
24 believes the facts stated in this letter are inaccurate or the necessary
25 corrective actions are not achievable by the required dates please
26 contact me upon receipt of this letter. DEQ will take into
27 consideration any documentation that indicates the violations did not
occur, or that they occurred differently than described above.

25 9. On December 17, 2013, DEQ received a Notice of Intent (NOI) and
26 Storm Water Pollution Prevention Plan (SWPPP) from both Copper Ridge and
27 Reflections.

1 10. Section C of the NOI and SWPPP forms provides for the
2 “Owner/Operator” to provide information.

3 11. On both the NOI and SWPPP, Reflections identified itself as the
4 “Owner/Operator.”

5 12. On the NOI, Reflections described the construction activity as
6 “construction of new single-family homes and the necessary landscaping to
7 complete the third and fourth filing of the Copper Ridge subdivision. A material
8 stockpiling area (containing the proposed concrete washout area) in the area of the
9 Fifth filing as well as five lots in the first filing that have not yet achieved final
10 stabilization have also been included in this SWPPP area.”

11 13. On both the NOI and SWPPP, Copper Ridge identified itself as the
12 “Owner/Operator.”

13 14. On the NOI, Copper Ridge described its construction activity as
14 “construction of new single-family homes and the necessary landscaping to
15 complete the first, second and third filing of the Reflection at Copper Ridge
16 subdivision.”

17 15. On the SWPPP, Copper Ridge described the project as “construction
18 of single-family homes and establishment of vegetation.

19 16. On October 21, 2014, DEQ conducted a phase I storm water CEI
20 inspection for Copper Ridge and Reflections at Copper Ridge.

21 17. On December 9, 2014, DEQ sent Violation Letters to Copper Ridge
22 and Reflections at Copper Ridge, by certified mail.

23 18. The Violation Letters noted a violation for “[f]ailure to conduct
24 inspections at required intervals in violation of § 75-5-605(1)(b), MCA,
25 Administrative Rules of Montana (ARM) 17.30.1342(a), and Part 2.3 of the General
26 Permit for Storm Water Discharges Associated with Construction Activity.”
27

1 19. The Violation Letters also noted a violation for “[f]ailure to retain and
2 make available records listed in 2.5 of Permit No. MTR100000, including the
3 complete signed NOI and the latest signed SWPPP in violation of Section 75-5-
4 605(1)(b), MCA, ARM 17.30.1342(a), and Part 2.5 of Permit No. MTR100000.”

5 20. The Violation Letters also noted a violation for “[f]ailure to maintain a
6 SWPPP that describes the intended sequence of construction activity; that provides
7 an implementation schedule; and that clearly describes the relationship between
8 each phase of construction and the best management practices (BMPs) to be
9 employed in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and
10 Part 3 of Permit No. MTR100000.”

11 21. Finally the Violation Letters noted a violation for “[f]ailure to
12 properly design, install and maintain effective BMPs in violation of § 75-5-
13 605(1)(b), MCA, ARM 17.30.1342(1), and Parts 2.1, 3.1 and 3.7 of Permit No.
14 MTR 100000.”

15 22. The Violation Letters concluded:

16 The purpose of this letter is to provide you with notice that you are in
17 violation of the Montana Water Quality Act, rules adopted under that
18 act, and permit requirements, all of which require your compliance.
19 If you fail to respond to this letter by addressing the above-listed
 violations in a timely manner, you may be subject to administrative
 or civil enforcement actions to compel compliance and seek
 penalties.

20 23. On March 27, 2015, DEQ served Reflections at Copper Ridge and
21 Copper Ridge with respective Administrative Compliance and Penalty Orders.

22 24. The respective Penalty Orders identified four violations by Copper
23 Ridge and Reflections at Copper Ridge.

24 25. First, DEQ stated the subdivisions “violated ARM 17.30.1105 from
25 2006 until December 23, 2013, by conducting construction activities that discharged
26 storm water to state waters prior to submitting an NOI.”
27

26. Second, DEQ stated the subdivisions “violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit.”

27. Third, DEQ stated the subdivisions “violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters.”

28. Fourth, DEQ stated the subdivisions violated “75-5-605(1)(b), MCA,” for violating conditions of the General Permit.

29. Additional facts are interposed, as necessary, throughout resolution of the individual arguments.

ANALYSIS

The parties have filed cross-motions for summary judgment. Copper Ridge and Reflections moved for summary judgment on the following bases:

1. All alleged violations should be dismissed because neither Copper Ridge nor Reflections constitute an owner or operator.
2. All alleged violations should be dismissed because Copper Ridge and Reflections did not discharge to state waters without a permit.
3. The third alleged violation should be dismissed because Copper Ridge and Reflections did not place waste where it would cause pollution.
4. All alleged violations should be dismissed because DEQ did not comply with mandatory notice provisions.
5. DEQ cannot assess administrative penalties because it did not comply with mandatory notice provisions.

DEQ has moved for partial summary judgment to establish liability for all four alleged violations. DEQ has not moved for summary judgment regarding appropriate corrective action and penalty amounts.

1 **I. DEQ MET ITS NOTICE REQUIREMENTS WITH REGARD TO THE**
2 **SECOND, THIRD AND FOURTH ALLEGED VIOLATIONS**
3 **AGAINST COPPER RIDGE AND REFLECTIONS.**

4 Copper Ridge and Reflections have argued DEQ did not comply with Mont.
5 Code Ann. §§ 75-5-617, 75-5-611 and ARM 17.30.2003 (now repealed). The
6 analysis will begin with these three statutes because, if Copper Ridge's Motion is
7 granted no further substantive analysis will be required for the respective alleged
8 violation.

9 **A. The September 23, 2013 and December 9, 2014 Letters Satisfied**
10 **the Requirements of Mont. Code Ann. § 75-5-617(2).**

11 Reflections and Copper Ridge argue DEQ did not issue a letter notifying
12 them of alleged violations as required by Mont. Code Ann. § 75-5-617(2). Montana
13 Code Ann. § 75-5-617(1) provides that whenever DEQ finds a person in violation of
14 Title 75, Chapter Five, "a rule adopted under this chapter, or a condition or
15 limitation in a permit, authorization, or order issued under this chapter, the
16 department shall initiate an enforcement response." An enforcement response
17 includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611.
18 Mont. Code Ann. § 75-5-617(1)(d). Mont. Code Ann. § 75-5-617(2) places a notice
19 limitation on enforcement responses: "Unless an alleged violation represents an
20 imminent threat to human health, safety, or welfare or to the environment, the
21 department shall first issue a letter notifying the person of the violation and
22 requiring compliance. If the person fails to respond to the conditions in the
23 department's letter, then the department shall take further action as provided in
24 subsection (1)." Based on the plain language of this statute, DEQ may not bring an
25 administrative proceeding for penalties unless the notice requirements are met.

26 On September 23, 2013, DEQ notified Copper Ridge and Reflections at
27 Copper Ridge of three of the four alleged violations that form the basis for
administrative penalties in this matter: (1) conducting construction activities that

1 discharged storm water into state waters prior to submitting an NOI, discharging
2 water associated with construction activities to state water without a permit, and (3)
3 placing waste where it will cause pollution. The September 23, 2013 letter notified
4 Copper Ridge and Reflections at Copper Ridge that part of the corrective action was
5 to “implement and maintain the SWPPP in accordance with the general permit for
6 Storm Water Discharges Associated with Construction Activity.” Furthermore,
7 Copper Ridge and Reflections at Copper Ridge were to “[c]omply with the
8 provision of the general permit for Storm Water Discharges Associated with
9 Construction Activity.” In addition, Reflections and Copper Ridge were instructed
10 to implement BMPs to control pollutants associated with construction activity,

11 On December 9, 2014, DEQ notified Copper Ridge and Reflections at
12 Copper Ridge of observed non-compliance with the General Permit for Storm Water
13 Discharges Associated with Construction Activity. DEQ also notified Copper
14 Ridge and Reflections at Copper Ridge that they had failed to design, install and
15 maintain effective BMPs. Despite DEQ’s finding of non-compliance with the
16 corrective actions requested in the September 23, 2013 Letter, DEQ gave Copper
17 Ridge and Reflections further time to correct these alleged violations.

18 Based on the foregoing, DEQ complied with Mont. Code Ann. § 75-5-
19 617(2). On two occasions, DEQ provided Reflections and Copper Ridge with
20 notices of violation and conditions of compliance. DEQ’s violation letters notified
21 Copper Ridge and Reflections the Department considered them out of compliance
22 with their storm water discharge permit obligations, notified them of the salient
23 statutes, permit provisions and administrative rules, and informed them of the
24 necessary corrective action. DEQ complied with Mont. Code Ann. § 75-5-617(2)
25 and was permitted to undertake an enforcement response as provided in Mont. Code
26 Ann. § 75-5-617(1).

1 **B. Compliance with Mont. Code Ann. § 75-5-611.**

2 Reflections and Copper Ridge next argue DEQ did not comply with the
3 procedural provisions of Mont. Code Ann. § 75-5-611 and cannot pursue
4 administrative penalties. Mont. Code Ann. § 75-5-611(1) provides:

5 When the department has reason to believe that a violation of this
6 chapter, a rule adopted under this chapter, or a condition of a permit
7 or authorization required by a rule adopted under this chapter has
occurred, it may have a written notice letter served personally or by
certified mail on the alleged violator or the violator's agent.

8 The written notice letter must state specific information. Mont. Code Ann. § 75-5-
9 611(1)(a-e). DEQ may not assess an administrative penalty until the specific
10 provisions of Mont. Code Ann. § 75-5-611(1)(a-e) have been satisfied. Mont. Code
11 Ann. § 75-5-611(1)(e). It is undisputed DEQ did not provide a written notice letter
12 to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice
13 of Violation.

14 However, Mont. Code Ann. § 75-5-611(2) provides an exception to the
15 above notice rule. Mont. Code Ann. § 75-5-611(2)(a)(ii) provides, “[t]he
16 department may issue an administrative notice and order in lieu of the notice letter
17 provided under subsection (1) if the department’s action... seeks an administrative
18 penalty only for an activity that it believes and alleges has violated or is violating
19 75-5-605.” Therefore, if the alleged violations in DEQ’s Administrative
20 Compliance and Penalty Order only seek penalties for activities DEQ believes and
21 alleges violate Mont. Code Ann. § 75-5-605, DEQ will have complied with the
22 procedural provisions of Mont. Code Ann § 75-5-611. The Department has alleged
23 four violations against Copper Ridge and Reflections respectively. Three of the
24 alleged violations satisfy Mont. Code Ann. § 75-5-611(2)(a)(ii) on their face: the
25 second, third and fourth.

1 **C. The Second, Third and Fourth Violations Alleged Violations of**
2 **Mont. Code Ann. § 75-5-605.**

3 DEQ's second alleged violation states Copper Ridge and Reflections
4 "violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly
5 discharging water associated with construction activities to state water without a
6 permit." This is a facial allegation of a violation of Mont. Code Ann. § 75-5-605.
7 Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu
8 of a letter with regard to this alleged violation.

9 DEQ's fourth alleged violation states that Copper Ridge and Reflections,
10 "violated 75-5-605(1)(b), MCA, by violating provisions of the general permit. Like
11 the second violation, discussed above, this is a facial allegation of a violation of
12 Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the
13 Administrative Order and Notice in lieu of a letter with regard to this alleged
14 violation.

15 DEQ's third alleged violation states Copper Ridge and Reflections "violated
16 Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f)
17 from at least May 2012 to at least October 21, 2014, by placing waste where it will
18 cause pollution and by contributing sediments and other pollutants that will increase
19 the concentration of sediment, oils, settleable solids, and other debris above levels
20 that are naturally occurring in the state surface waters." Regardless the references to
21 administrative rules, this alleges a violation of Mont. Code Ann. § 75-5-605.
22 Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu
23 of a letter with regard to this alleged violation.

24 **D. The First Alleged Violation Did Not Allege a Violation of Mont.**
25 **Code Ann. § 75-5-605.**

26 DEQ's first alleged violation states Copper Ridge and Reflections "violated
27 ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction

1 activities that discharged storm water to state waters prior to submitting an NOI.”
2 DEQ asserts “ARM 17.30.1105 provides storm water permit requirements and
3 violation of ARM 17.30.1105 is a violation of § 75-5-605.” DEQ asserts,
4 “[v]iolation of ARM 17.30.1105, discharge without a permit, is the act prohibited by
5 § 75-5-605(2), MCA.”

6 A violation of ARM 17.30.1105 is not a violation of § 75-5-605. When
7 ARM 17.30.1105 was promulgated, the only statutes cited as authority were Mont.
8 Code Ann. §§ 75-5-201 and 75-5-401. More importantly, the only implementing
9 statute cited was 75-5-401. Had DEQ or the BER intended violations of ARM
10 17.30.1105 to constitute violations of Mont. Code Ann. § 75-5-605, it could have
11 been explicitly stated. In the absence of a reference to Mont. Code Ann. § 75-5-
12 605, it does not appear a violation of ARM 17.30.1105 constitutes a violation of
13 § 75-5-605.

14 Furthermore, Mont. Code Ann. § 75-5-611(1) provides “when the department
15 has reason to believe that a violation of this chapter, *a rule adopted* under this
16 chapter or...” (emphasis added). There is no question that ARM 17.30.1105 was
17 adopted pursuant to Mont. Code Ann. §§ 75-5-201 and 75-5-401. ARM 17.30.1105
18 was not adopted pursuant to Mont. Code Ann. § 75-5-605. This makes alleged
19 violations of ARM 17.30.1105 subject to the general notice requirement under 75-5-
20 611(1), *prior* to seeking an administrative penalty.

21 Moreover, DEQ’s argument is basically that a violation of Mont. Code Ann.
22 § 75-5-605(2)(c) is identical to a violation of ARM 17.30.1105(1)(a). A cursory
23 reading of the two provisions demonstrates they are not identical. Moreover, if
24 DEQ’s argument was accepted, it would essentially permit duplicative violations,
25 allowing DEQ to bring a violation of Mont. Code Ann. § 75-5-605 twice: once for a
26 violation of Mont. Code Ann. § 75-5-605(2)(c) and once for violation of ARM
27 17.30.1105(1)(a). This would be superfluous or redundant charge stacking, does not

1 make sense, and would attempt to work-around any statutory caps on maximum
2 damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

3 Based on the foregoing, DEQ was required to comply with Mont. Code Ann.
4 § 75-5-611(1)(a-e) to provide Copper Ridge and Reflections notice of the alleged
5 violations of ARM 17.30.1105. The exception under Mont. Code Ann. § 75-5-
6 611(2)(a)(ii) did not apply because a violation of 17.30.1105 is not a violation of
7 Mont. Code Ann. § 75-5-605. As a result “an administrative penalty may not be
8 assessed until the provision of [Mont. Code Ann. § 75-5-611(1)] have been
9 complied with.” DEQ may not seek an administrative penalty for violation of ARM
10 17.30.1105.

11 **E. DEQ’s Second, Third and Fourth Alleged Violations, all Allege**
12 **Violations of Major Extent and Gravity, Class I Violations, or**
Both.

13 Copper Ridge and Reflections moved for Summary Judgment based on
14 DEQ’s failure to comply with notice requirements contained in ARM 17.30.2003.
15 DEQ served the Notices of Violation and Administrative penalty in March of 2015.
16 At that time ARM 17.30.2003 was in effect. ARM 17.30.2003 was repealed on
17 March 19, 2016. The procedures set forth in ARM 17.30.2003 applied to initiation
18 of an administrative proceeding against Copper Ridge and Reflections.

19 ARM 17.30.2003 imposed greater requirements on DEQ than Mont. Code
20 Ann. § 75-5-611. Instead of merely parroting the exception contained in Mont.
21 Code Ann. § 75-5-611(2)(a)(ii), this administrative rule imposed additional
22 requirements before DEQ could seek an administrative penalty for violations of
23 Mont. Code Ann. § 75-5-605. Subsection 7 provided:

24 In lieu of the notice letter under (2), the department may issue an
25 administrative notice together with an administrative order if the
26 department’s action:

27 (a) does not involve assessment of an administrative penalty; or

1 (b) seeks an administrative penalty only for an activity that the
2 department believes and alleges was or is a violation of 75-5-605,
MCA, and the violation was or is:
3 (i) a class I violation as described in ARM 17.30.2001(1); or
4 (ii) a violation of major extent and gravity as described in ARM
17.4.303.

5 ARM 17.30.2003(7). Even for alleged violations of Mont. Code Ann. § 75-5-605,
6 DEQ was required to provide prior notice unless DEQ alleged (1) a class I violation,
7 or (2) a violation of major extent and gravity.

8 DEQ's second alleged violation alleged a violation of major extent and
9 gravity, and a Class I violation. DEQ's third alleged violation alleged a violation of
10 major extent and gravity. The fourth alleged a Class I violation. The first alleged
11 violation will not be addressed because it did not allege a violation of Mont. Code
12 Ann. § 75-5-605.

13 **F. Violation 2 Alleged a Violation of Major Extent and Gravity and a**
14 **Class I Violation.**

15 DEQ alleged a violation of Mont. Code Ann. § 75-5-605(2)(c) for
16 "discharging storm water into the state waters without a permit." DEQ explained
17 the basis for its Extent and Gravity analysis. It determined the Extent and Gravity
18 factor was .85, which constitutes a violation of major gravity and extent.

19 Furthermore, at the time this proceeding was filed, it was a Class I violation
20 to discharge waste into state waters without a permit. ARM 17.30.2001(1)(b) (now
21 repealed). DEQ's second alleged violation alleged both a Class I violation and a
22 violation of major extent and gravity. As a result, ARM 17.30.2003(7) did not
23 impose any additional notice requirements before issuing the Administrative
24 Compliance and Penalty Orders.

25 **G. Violation 3 Alleged a Violation of Major Extent and Gravity**

26 DEQ's Notice of Violation and Administrative Penalty alleged a violation of
27 Mont. Code Ann. § 75-5-605(1)(a) for placing waste where it will cause pollution.

1 DEQ explained the basis for its Gravity and Extent analysis. It determined the
2 Extent and Gravity factor was .85, which constitutes a violation of major Extent and
3 Gravity. Therefore, DEQ's second alleged violation alleged a violation of major
4 Extent and Gravity. As a result, ARM 17.30.2003(7) did not impose any additional
5 notice requirements before issuing the Administrative Compliance and Penalty
6 Orders.

7 **H. Violation 4 Alleged a Class I Violation.**

8 The Administrative Compliance and Penalty Orders asserted a violation of
9 Mont. Code Ann. § 75-5-605(1)(b) for a host of sections in the general permit. At
10 the time DEQ issued the Administrative Compliance and Penalty Orders it was a
11 Class I violation to "violate a permit compliance plan or schedule." ARM
12 17.30.2001(1)(d) (Repealed March 19, 2016). All of the alleged violations of the
13 permit are violations of a permit compliance plan or schedule. This is an alleged
14 violation of a Class I violation. As a result, ARM 17.30.2003(7) did not impose any
15 additional notice requirements before issuing the Administrative Compliance and
16 Penalty Orders.

17 **II. COPPER RIDGE AND REFLECTIONS ARE OWNERS OR**
18 **OPERATORS.**

19 "Any person who discharges or proposes to discharge storm water from a
20 point source must obtain coverage under an MPDES general permit or another
21 MPDES permit for discharges...associated with construction activity." ARM
22 17.30.1105(1)(a). "A person who discharges or proposes to discharge storm water
23 associated with construction activity shall submit to the department a notice of
24 intent (NOI) as provided in this rule." ARM 17.30.1115(1). The NOI must be
25 signed by either the owner or operator, or both. ARM 17.30.1115(1)(a). The
26 phrase, "storm water discharge associated with construction activity" is defined as:
27

1 a discharge of storm water from construction activities including
2 clearing, grading, and excavation that result in the disturbance of
3 equal to or greater than one acre of total land area. For purposes of
4 these rules, construction activities include clearing, grading,
5 excavation, stockpiling earth materials, and other placement or
6 removal of earth material performed during construction projects.
Construction activity includes the disturbance of less than one acre
of total land area that is a part of a larger common plan of
development or sale if the larger common plan will ultimately disturb
one acre or more.

7 ARM 17.30.1102(28). "Owner or operator," is defined as "a person who owns,
8 leases, operates, controls or supervises a point source." Mont. Code Ann. § 75-5-
9 103(26). The parties disagree regarding whether Copper Ridge or Reflections is an
10 owner or operator.

11 Reflections and Copper Ridge propose too narrow a definition of Owner and
12 operator, generally limiting their arguments to ownership, lease and operations.
13 Mont. Code Ann. § 75-5-103(26) also defines a owner or operator as someone who
14 "controls or supervises a point source." Furthermore, Copper Ridge and Reflections
15 focus too heavily on construction of homes, rather than the more expansive statutory
16 definition of "storm water discharge associated with construction activity."

17 Reflections and Copper Ridge were the original owners and developers of all
18 land in their respective subdivisions. Construction activities, including clearing,
19 grading, excavation, stockpiling earth materials, and other placement or removal of
20 earth material performed during construction projects, resulted in disturbance equal
21 to or greater than one acre of total land area at the respective subdivisions. These
22 construction activities were initiated in 2006, in the respective subdivisions. These
23 construction activities were undertaken with the eventual goal of the sale of
24 individual lots for residential home construction.

25 Copper Ridge and Reflections admit that they entered into at least one
26 contract that required "all excess material from pipe and bedding displacement shall
27 be left on site." Therefore, not only did Copper Ridge and Reflections have

1 supervision and control over the actions of third parties, they acted on their ability to
2 instruct others how to engage in stockpiling of materials, an act expressly contained
3 in the definition of “construction activities.” This put Copper Ridge and Reflections
4 in a position of either control or supervision with regard to the terms of sale of any
5 individual lot for construction of residential homes. Any argument to the contrary
6 ignores the common sense and practical reality of development of a residential
7 subdivision. The mere fact that neither Copper Ridge nor Reflections exercised
8 supervision or control over the contractual terms of the sale of land, does not change
9 the fact that they had the power to supervise or control land with regard to storm
10 water discharges. In addition, on September 9, 2013, DEQ observed “clearing,
11 grading, excavation, soil stockpiles, concrete washout areas, and tracking on
12 streets.”

13 Moreover, Reflections and Copper Ridge conceded their owner or operator
14 status when they filed their December 23, 2013, SWPPs and NOIs, respectively.
15 Both Reflections and Copper Ridge expressly acknowledged they were the owner or
16 operator for construction activities. The affidavit produced by Landy Leep does not
17 create a material dispute of fact. Leep attempts to characterize the intent behind his
18 signature on the SWPPs and the NOIs. However, the documents themselves are
19 undisputed for the purposes of summary judgment and the admissions made by
20 Copper Ridge and Reflections that they were the owners or operators. Based on the
21 foregoing, Reflections and Copper Ridge were owners or operators with regard to
22 construction activities at their respective subdivisions.

23 **III. DEQ HAS ESTABLISHED COPPER RIDGE AND REFLECTIONS**
24 **DISCHARGED STORM WATER TO STATE WATERS WITHOUT A**
PERMIT.

25 It is “unlawful to carry on any of the following activities without a current
26 permit from the department...discharge sewage, industrial wastes or other wastes
27 into any state waters.” Mont. Code Ann. § 75-5-605(2)(c). DEQ has alleged

1 Copper Ridge and Reflections violated this statute by “discharging storm water
2 associated with construction activities to state water without a permit” from at least
3 2006 to December 23, 2013. The parties dispute whether storm water detention
4 ponds are treated as State waters and whether overflows from the detention ponds, to
5 state waters, constitutes a discharge into state waters.

6 This is all beside the point. DEQ has provided an affidavit of Dan Freeland
7 who conducted the September 9, 2013 CEIs at Reflections and Copper Ridge.
8 Freeland stated that he “documented and observed discharges of storm water from
9 Reflections at Copper Ridge and from Copper Ridge subdivisions through *direct*
10 *overland flow* and through swales, storm drains and drainage ditches into Cove
11 Ditch, which is state water.” (emphasis added). Freeland’s personal observations
12 have not been disputed on summary judgment.

13 Regardless the Parties’ disputes over state waters and the effect of the
14 overfilling of the detention ponds, there is no dispute that Freeland documented and
15 observed discharges of storm water that traveled over land, into Cove Ditch, a state
16 water. As a result, DEQ has established Reflections and Copper Ridge discharged
17 storm water into state waters, without a permit, a violation of Mont. Code Ann.
18 § 75-5-605(2)(c). DEQ is entitled to summary judgment on its second alleged
19 violation.

20 **IV. THERE IS A DISPUTE OF MATERIAL FACT REGARDING THE**
21 **ALLEGED VIOLATION OF MONT. CODE ANN. § 75-5-605(1)(a).**

22 “It is unlawful to...cause pollution, as defined in 75-5-103, of any state
23 waters or to place or cause to be placed any wastes where they will cause pollution
24 of any state waters...” Mont. Code Ann. § 75-5-605(1)(a). DEQ alleged both
25 Reflections and Copper Ridge violated this statute, from at least May 2012, to at
26 least October 21, 2014, by placing waste where it will cause pollution and by
27 contributing sediments and other pollutants that will increase the concentration of

1 sediment, oils, settleable solids and other debris above levels that are naturally
2 occurring in state surface waters. Copper Ridge and Reflections argue that there is
3 no evidence that Copper Ridge or Reflections placed waste within the subdivisions
4 and DEQ lacks an expert to testify that the waste could cause pollution.

5 There is sufficient evidence that Reflections and Copper Ridge placed or
6 caused to be placed wastes. On September 9, 2013, Dan Freeland observed
7 stockpiling of materials, concrete washout, sediment waste tracked onto impervious
8 surfaces, sediment and debris on the bank of Cove Ditch, accumulated sediment on
9 the sidewalk and grass area of the city park areas, and sediments on the streets and
10 storm drains throughout Reflections and Copper Ridge. All of this meets the
11 definition of “other wastes” contained in Mont. Code Ann. § 75-5-103(24).

12 In addition, DEQ does not necessarily require expert testimony to establish
13 the placement of wastes could cause pollution. In pertinent part, “pollution” is
14 defined as:

- 15 (i) contamination or other alteration of the physical, chemical, or
16 biological properties of state waters that exceeds that permitted by
17 Montana water quality standards, including but not limited to
18 standards relating to change in temperature, taste, color, turbidity, or
19 odor; or
20 (ii) the discharge, seepage, drainage, infiltration, or flow of liquid,
21 gaseous, solid, radioactive, or other substance into state water that
22 will or is likely to create a nuisance or render the waters harmful,
23 detrimental, or injurious to public health, recreation, safety, or
24 welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

25 Mont. Code Ann. § 75-5-103(30).

26 Expert testimony is often required when the subject matter is outside of the
27 common experience of the trier of fact and the expert testimony will assist the trier
of fact in determining the issue or understanding the evidence. *Dubiel v. Mont.*
DOT, 2012 MT 35, 364 Mont. 175, 272 P.3d 66. However, in a MAPA contested
case proceeding, “[n]otice may be taken of judicially cognizable facts. In addition,
notice may be taken of generally recognized technical or scientific facts within the

1 agency's specialized knowledge." Mont. Code Ann. § 2-4-612(6). In addition, the
2 "agency's experience, technical competence, and specialized knowledge may be
3 utilized in the evaluation of evidence." Mont. Code Ann. § 2-4-612(7).

4 Based on the definition of "pollution" and Mont. Code Ann. § 2-4-612(6)
5 and (7), there is no per se requirement that DEQ identify an expert. DEQ's exhibits
6 and the testimony of its personnel, with their specialized knowledge, appears to be
7 sufficient to provide evidence of alleged pollution, as defined by statute. DEQ is
8 not required to present expert testimony in order to establish Reflections or Copper
9 Ridge placed, or caused to be placed, waste in a manner that could cause pollution
10 of state waters.

11 That said, DEQ has not met its burden to establish it is entitled to judgment
12 as a matter of law. The first prong of "pollution" requires DEQ to establish some
13 form of alteration of state waters "that exceeds that permitted by Montana water
14 quality standards." Mont. Code Ann. § 75-5-103(30)(i). DEQ has not provided any
15 evidence of permitted water quality standards at this time. As a result, DEQ has not
16 established pollution under the first prong of the definition.

17 The second prong of "pollution" requires DEQ to establish that a substance
18 has entered state water that will either create a nuisance or "render the waters
19 harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to
20 livestock, or to wild animals, birds, fish, or other wildlife." Mont. Code Ann. § 75-
21 5-103(30)(ii). While DEQ has established the placement of waste, DEQ has not
22 identified the facts to establish or explain how this waste will create a nuisance or
23 otherwise cause the harm required in the definition of "pollution." As a result, DEQ
24 is not entitled to summary judgment on this alleged violation.

1 **V. DEQ IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS**
2 **CLAIM THAT COPPER RIDGE AND REFLECTIONS VIOLATED**
3 **THE CONDITIONS OF THE GENERAL PERMIT.**

4 DEQ's fourth alleged violation is that Reflections and Copper Ridge violated
5 Mont. Code Ann. § 75-5-605(1)(b), for violating provisions contained within the
6 General Permit. As a threshold matter, Reflections and Copper Ridge cannot rely
7 on their defense that they are not an owner or operator. Reflections and Copper
8 Ridge provided their respective SWPPPs and NOIs in December of 2013.
9 Resolution of this alleged violation is separate and distinct from the alleged
10 violations in the absence of a permit. Although Reflections and Copper Ridge
11 constituted owners or operators, that legal determination is not necessary for the
12 resolution of this fourth alleged violation.

13 As of December 17, 2013, Reflections and Copper Ridge agreed to follow
14 the terms and conditions of the General Permit. It is undisputed they entered the
15 NOIs and SWPPPs and undertook the obligations contained in the general permit.
16 Therefore, even if one accepted Reflections and Copper Ridge's argument as true –
17 that they are not owners or operators – this alleged violation could still proceed
18 because they agreed to abide by the provisions of the general permit. Their alleged
19 violations of any specific provisions are divorced from their status as an owner or
20 operator.

21 DEQ provided undisputed testimony that on October 21, 2014, Dan Freeland
22 and Chris Romankiewicz conducted a CEI as Reflections and Copper Ridge.
23 Freeland and Romankiewicz observed:

- 24 (1) the SWPPP administrator failed to conduct site inspection
25 every seven days in accordance with the inspection schedule
26 in the SWPPP, a violation of Section 2.3 of the general
27 permit.
- 28 (2) The SWPPP had not been developed in accordance with good
29 engineering practices and had not been updated to reflect
30 current onsite conditions, a violation of Sections 3.1.1 and
31 3.1.3 of the general permit.

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

3 **IN THE MATTER OF:**
4 **VIOLATIONS OF THE WATER**
5 **QUALITY ACT BY COPPER RIDGE,**
6 **DEVELOPMENT CORPORATION AT**
7 **COPPER RIDGE SUBDIVISION,**
8 **BILLINGS, YELLOWSTONE COUNTY,**
9 **MONTANA. (MTR105377) [FID 2289,**
10 **DOCKET NO. WQ-15-08]**

CASE NO. BER 2015-02 WO

Electronically Filed with the Montana Board of
Environmental Review

This 1 day of August, 2017
at 9:27 o'clock am

By: Meranda Sikes

ORDER ON SUMMARY JUDGMENT

9 The Parties have filed cross motions for summary judgment and have had the
10 opportunity for oral argument. Both Motions for Summary Judgment are granted in
11 part and denied in part. A hearing is still necessitated in this matter, and a
12 Scheduling Order is issued in conjunction with this Order, setting forth the process
13 going forward.

14 **FACTS**

15 1. On September 9, 2013, DEQ conducted a compliance evaluation
16 inspection at the Reflections at Copper Ridge (Reflections) and Copper Ridge
17 Subdivisions.

18 2. DEQ documented areas with construction activity that it believed were
19 not authorized under General Permit MTR 100000. DEQ observed clearing,
20 grading, excavation, soil stockpiles, concrete washout areas, and sediment tracking
21 on streets. DEQ documented that the subdivisions did not have Best Management
22 Practices (BMPs) in place to control or mitigate the discharge of pollutants
23 associated with storm water runoff from construction at the subdivisions.

24 3. On September 23, 2013, DEQ sent a Violation Letter to Gary Oakland
25 of the Copper Ridge Development Corporation.

26
27 4. The letter stated "The Montana Department of Environmental Quality

(DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action.”

5. The letter documented conditions observed at Copper Ridge and Reflections, on September 9, 2013.

6. DEQ conducted a CEI of construction disturbance observed within the respective subdivisions and the impact on storm water discharge into Cove Ditch.

7. DEQ concluded:

Based on the facility site inspection and the documentation reviewed, the DEQ has determined that Copper Ridge Development Corporation is in violation of the following provisions of the Montana Water Quality Act:

- Unauthorized discharge of wastes to state waters without a valid permit is a violation of 75-5-605(2)(c) of the Montana Code Annotated (MCA).
- Causing pollution of state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters is a violation of 75-5-605(1)(1) [sic] MCA.

8. DEQ explained it was “initiating a formal enforcement action,” and requested Copper Ridge Development Corporation complete corrective actions by October 18, 2013. DEQ further explained:

this letter of violation is intended to inform Copper Ridge Development of the formal enforcement action and require corrective actions to demonstrate compliance with the Montana Water Quality Act. If Copper Ridge Development Corporation believes the facts stated in this letter are inaccurate or the necessary corrective actions are not achievable by the required dates please contact me upon receipt of this letter. DEQ will take into consideration any documentation that indicates the violations did not occur, or that they occurred differently than described above.

9. On December 17, 2013, DEQ received a Notice of Intent (NOI) and Storm Water Pollution Prevention Plan (SWPPP) from both Copper Ridge and Reflections.

10. Section C of the NOI and SWPPP forms provides for the

1 “Owner/Operator” to provide information.

2 11. On both the NOI and SWPPP, Reflections identified itself as the
3 “Owner/Operator.”

4 12. On the NOI, Reflections described the construction activity as
5 “construction of new single-family homes and the necessary landscaping to
6 complete the third and fourth filing of the Copper Ridge subdivision. A material
7 stockpiling area (containing the proposed concrete washout area) in the area of the
8 Fifth filing as well as five lots in the first filing that have not yet achieved final
9 stabilization have also been included in this SWPPP area.”

10 13. On both the NOI and SWPPP, Copper Ridge identified itself as the
11 “Owner/Operator.”

12 14. On the NOI, Copper Ridge described its construction activity as
13 “construction of new single-family homes and the necessary landscaping to
14 complete the first, second and third filing of the Reflection at Copper Ridge
15 subdivision.”

16 15. On the SWPPP, Copper Ridge described the project as “construction
17 of single-family homes and establishment of vegetation.

18 16. On October 21, 2014, DEQ conducted a phase I storm water CEI
19 inspection for Copper Ridge and Reflections at Copper Ridge.

20 17. On December 9, 2014, DEQ sent Violation Letters to Copper Ridge
21 and Reflections at Copper Ridge, by certified mail.

22 18. The Violation Letters noted a violation for “[f]ailure to conduct
23 inspections at required intervals in violation of § 75-5-605(1)(b), MCA,
24 Administrative Rules of Montana (ARM) 17.30.1342(a), and Part 2.3 of the General
25 Permit for Storm Water Discharges Associated with Construction Activity.”

26
27 19. The Violation Letters also noted a violation for “[f]ailure to retain and

1 make available records listed in 2.5 of Permit No. MTR100000, including the
2 complete signed NOI and the latest signed SWPPP in violation of Section 75-5-
3 605(1)(b), MCA, ARM 17.30.1342(a), and Part 2.5 of Permit No. MTR100000.”

4 20. The Violation Letters also noted a violation for “[f]ailure to maintain a
5 SWPPP that describes the intended sequence of construction activity; that provides
6 an implementation schedule; and that clearly describes the relationship between
7 each phase of construction and the best management practices (BMPs) to be
8 employed in violation of Section 75-5-605(1)(b), MCA, ARM 17.30.1342(a), and
9 Part 3 of Permit No. MTR100000.”

10 21. Finally the Violation Letters noted a violation for “[f]ailure to
11 properly design, install and maintain effective BMPs in violation of § 75-5-
12 605(1)(b), MCA, ARM 17.30.1342(1), and Parts 2.1, 3.1 and 3.7 of Permit No.
13 MTR 100000.”

14 22. The Violation Letters concluded:

15 The purpose of this letter is to provide you with notice that you are in
16 violation of the Montana Water Quality Act, rules adopted under that
17 act, and permit requirements, all of which require your compliance.
18 If you fail to respond to this letter by addressing the above-listed
19 violations in a timely manner, you may be subject to administrative
20 or civil enforcement actions to compel compliance and seek
21 penalties.

22 23. On March 27, 2015, DEQ served Reflections at Copper Ridge and
23 Copper Ridge with respective Administrative Compliance and Penalty Orders.

24 24. The respective Penalty Orders identified four violations by Copper
25 Ridge and Reflections at Copper Ridge.

26 25. First, DEQ stated the subdivisions “violated ARM 17.30.1105 from
27 2006 until December 23, 2013, by conducting construction activities that discharged
storm water to state waters prior to submitting an NOI.”

26 26. Second, DEQ stated the subdivisions “violated 75-5-605(2)(c), MCA,

1 from at least 2006 to December 23, 2013 by illicitly discharging water associated
2 with construction activities to state water without a permit.”

3 27. Third, DEQ stated the subdivisions “violated Section 75-5-605(1)(a),
4 MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at
5 least October 21, 2014, by placing waste where it will cause pollution and by
6 contributing sediments and other pollutants that will increase the concentration of
7 sediment, oils, settleable solids, and other debris above levels that are naturally
8 occurring in the state surface waters.”

9 28. Fourth, DEQ stated the subdivisions violated “75-5-605(1)(b), MCA,”
10 for violating conditions of the General Permit.

11 29. Additional facts are interposed, as necessary, throughout resolution of
12 the individual arguments.

13 ANALYSIS

14 The parties have filed cross-motions for summary judgment. Copper Ridge
15 and Reflections moved for summary judgment on the following bases:

- 16 1. All alleged violations should be dismissed because neither Copper
17 Ridge nor Reflections constitute an owner or operator.
- 18 2. All alleged violations should be dismissed because Copper Ridge and
19 Reflections did not discharge to state waters without a permit.
- 20 3. The third alleged violation should be dismissed because Copper Ridge
21 and Reflections did not place waste where it would cause pollution.
- 22 4. All alleged violations should be dismissed because DEQ did not
23 comply with mandatory notice provisions.
- 24 5. DEQ cannot assess administrative penalties because it did not comply
25 with mandatory notice provisions.

26 DEQ has moved for partial summary judgment to establish liability for all four
27 alleged violations. DEQ has not moved for summary judgment regarding
appropriate corrective action and penalty amounts.

I. DEQ MET ITS NOTICE REQUIREMENTS WITH REGARD TO THE

1 **SECOND, THIRD AND FOURTH ALLEGED VIOLATIONS**
2 **AGAINST COPPER RIDGE AND REFLECTIONS.**

3 Copper Ridge and Reflections have argued DEQ did not comply with Mont.
4 Code Ann. §§ 75-5-617, 75-5-611 and ARM 17.30.2003 (now repealed). The
5 analysis will begin with these three statutes because, if Copper Ridge's Motion is
6 granted no further substantive analysis will be required for the respective alleged
7 violation.

8 **A. The September 23, 2013 and December 9, 2014 Letters Satisfied**
9 **the Requirements of Mont. Code Ann. § 75-5-617(2).**

10 Reflections and Copper Ridge argue DEQ did not issue a letter notifying
11 them of alleged violations as required by Mont. Code Ann. § 75-5-617(2). Montana
12 Code Ann. § 75-5-617(1) provides that whenever DEQ finds a person in violation of
13 Title 75, Chapter Five, "a rule adopted under this chapter, or a condition or
14 limitation in a permit, authorization, or order issued under this chapter, the
15 department shall initiate an enforcement response." An enforcement response
16 includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611.
17 Mont. Code Ann. § 75-5-617(1)(d). Mont. Code Ann. § 75-5-617(2) places a notice
18 limitation on enforcement responses: "Unless an alleged violation represents an
19 imminent threat to human health, safety, or welfare or to the environment, the
20 department shall first issue a letter notifying the person of the violation and
21 requiring compliance. If the person fails to respond to the conditions in the
22 department's letter, then the department shall take further action as provided in
23 subsection (1)." Based on the plain language of this statute, DEQ may not bring an
24 administrative proceeding for penalties unless the notice requirements are met.

25 On September 23, 2013, DEQ notified Copper Ridge and Reflections at
26 Copper Ridge of three of the four alleged violations that form the basis for
27 administrative penalties in this matter: (1) conducting construction activities that
28 discharged storm water into state waters prior to submitting an NOI, discharging

1 water associated with construction activities to state water without a permit, and (3)
2 placing waste where it will cause pollution. The September 23, 2013 letter notified
3 Copper Ridge and Reflections at Copper Ridge that part of the corrective action was
4 to “implement and maintain the SWPPP in accordance with the general permit for
5 Storm Water Discharges Associated with Construction Activity.” Furthermore,
6 Copper Ridge and Reflections at Copper Ridge were to “[c]omply with the
7 provision of the general permit for Storm Water Discharges Associated with
8 Construction Activity.” In addition, Reflections and Copper Ridge were instructed
9 to implement BMPs to control pollutants associated with construction activity,

10 On December 9, 2014, DEQ notified Copper Ridge and Reflections at
11 Copper Ridge of observed non-compliance with the General Permit for Storm Water
12 Discharges Associated with Construction Activity. DEQ also notified Copper
13 Ridge and Reflections at Copper Ridge that they had failed to design, install and
14 maintain effective BMPs. Despite DEQ’s finding of non-compliance with the
15 corrective actions requested in the September 23, 2013 Letter, DEQ gave Copper
16 Ridge and Reflections further time to correct these alleged violations.

17 Based on the foregoing, DEQ complied with Mont. Code Ann. § 75-5-
18 617(2). On two occasions, DEQ provided Reflections and Copper Ridge with
19 notices of violation and conditions of compliance. DEQ’s violation letters notified
20 Copper Ridge and Reflections the Department considered them out of compliance
21 with their storm water discharge permit obligations, notified them of the salient
22 statutes, permit provisions and administrative rules, and informed them of the
23 necessary corrective action. DEQ complied with Mont. Code Ann. § 75-5-617(2)
24 and was permitted to undertake an enforcement response as provided in Mont. Code
25 Ann. § 75-5-617(1).

26
27 **B. Compliance with Mont. Code Ann. § 75-5-611.**

1 Reflections and Copper Ridge next argue DEQ did not comply with the
2 procedural provisions of Mont. Code Ann. § 75-5-611 and cannot pursue
3 administrative penalties. Mont. Code Ann. § 75-5-611(1) provides:

4 When the department has reason to believe that a violation of this
5 chapter, a rule adopted under this chapter, or a condition of a permit
6 or authorization required by a rule adopted under this chapter has
occurred, it may have a written notice letter served personally or by
certified mail on the alleged violator or the violator's agent.

7 The written notice letter must state specific information. Mont. Code Ann. § 75-5-
8 611(1)(a-e). DEQ may not assess an administrative penalty until the specific
9 provisions of Mont. Code Ann. § 75-5-611(1)(a-e) have been satisfied. Mont. Code
10 Ann. § 75-5-611(1)(e). It is undisputed DEQ did not provide a written notice letter
11 to Reflections or Copper Ridge prior to issuing the Administrative Order and Notice
12 of Violation.

13 However, Mont. Code Ann. § 75-5-611(2) provides an exception to the
14 above notice rule. Mont. Code Ann. § 75-5-611(2)(a)(ii) provides, “[t]he
15 department may issue an administrative notice and order in lieu of the notice letter
16 provided under subsection (1) if the department’s action... seeks an administrative
17 penalty only for an activity that it believes and alleges has violated or is violating
18 75-5-605.” Therefore, if the alleged violations in DEQ’s Administrative
19 Compliance and Penalty Order only seek penalties for activities DEQ believes and
20 alleges violate Mont. Code Ann. § 75-5-605, DEQ will have complied with the
21 procedural provisions of Mont. Code Ann § 75-5-611. The Department has alleged
22 four violations against Copper Ridge and Reflections respectively. Three of the
23 alleged violations satisfy Mont. Code Ann. § 75-5-611(2)(a)(ii) on their face: the
24 second, third and fourth.

25
26
27 **C. The Second, Third and Fourth Violations Alleged Violations of**

Mont. Code Ann. § 75-5-605.

DEQ's second alleged violation states Copper Ridge and Reflections "violated 75-5-605(2)(c), MCA, from at least 2006 to December 23, 2013 by illicitly discharging water associated with construction activities to state water without a permit." This is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's fourth alleged violation states that Copper Ridge and Reflections, "violated 75-5-605(1)(b), MCA, by violating provisions of the general permit. Like the second violation, discussed above, this is a facial allegation of a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

DEQ's third alleged violation states Copper Ridge and Reflections "violated Section 75-5-605(1)(a), MCA, ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f) from at least May 2012 to at least October 21, 2014, by placing waste where it will cause pollution and by contributing sediments and other pollutants that will increase the concentration of sediment, oils, settleable solids, and other debris above levels that are naturally occurring in the state surface waters." Regardless the references to administrative rules, this alleges a violation of Mont. Code Ann. § 75-5-605. Therefore, DEQ was permitted to issue the Administrative Order and Notice in lieu of a letter with regard to this alleged violation.

D. The First Alleged Violation Did Not Allege a Violation of Mont. Code Ann. § 75-5-605.

DEQ's first alleged violation states Copper Ridge and Reflections "violated ARM 17.30.1105 from 2006 until December 23, 2013, by conducting construction activities that discharged storm water to state waters prior to submitting an NOI."

1 DEQ asserts “ARM 17.30.1105 provides storm water permit requirements and
2 violation of ARM 17.30.1105 is a violation of § 75-5-605.” DEQ asserts,
3 “[v]iolation of ARM 17.30.1105, discharge without a permit, is the act prohibited by
4 § 75-5-605(2), MCA.”

5 A violation of ARM 17.30.1105 is not a violation of § 75-5-605. When
6 ARM 17.30.1105 was promulgated, the only statutes cited as authority were Mont.
7 Code Ann. §§ 75-5-201 and 75-5-401. More importantly, the only implementing
8 statute cited was 75-5-401. Had DEQ or the BER intended violations of ARM
9 17.30.1105 to constitute violations of Mont. Code Ann. § 75-5-605, it could have
10 been explicitly stated. In the absence of a reference to Mont. Code Ann. § 75-5-
11 605, it does not appear a violation of ARM 17.30.1105 constitutes a violation of
12 § 75-5-605.

13 Furthermore, Mont. Code Ann. § 75-5-611(1) provides “when the department
14 has reason to believe that a violation of this chapter, *a rule adopted* under this
15 chapter or...” (emphasis added). There is no question that ARM 17.30.1105 was
16 adopted pursuant to Mont. Code Ann. §§ 75-5-201 and 75-5-401. ARM 17.30.1105
17 was not adopted pursuant to Mont. Code Ann. § 75-5-605. This makes alleged
18 violations of ARM 17.30.1105 subject to the general notice requirement under 75-5-
19 611(1), *prior* to seeking an administrative penalty.

20 Moreover, DEQ’s argument is basically that a violation of Mont. Code Ann.
21 § 75-5-605(2)(c) is identical to a violation of ARM 17.30.1105(1)(a). A cursory
22 reading of the two provisions demonstrates they are not identical. Moreover, if
23 DEQ’s argument was accepted, it would essentially permit duplicative violations,
24 allowing DEQ to bring a violation of Mont. Code Ann. § 75-5-605 twice: once for a
25 violation of Mont. Code Ann. § 75-5-605(2)(c) and once for violation of ARM
26 17.30.1105(1)(a). This would be superfluous or redundant charge stacking, does not
27 make sense, and would attempt to work-around any statutory caps on maximum

1 damages. *See* Mont. Code Ann. § 75-5-611(9)(d).

2 Based on the foregoing, DEQ was required to comply with Mont. Code Ann.
3 § 75-5-611(1)(a-e) to provide Copper Ridge and Reflections notice of the alleged
4 violations of ARM 17.30.1105. The exception under Mont. Code Ann. § 75-5-
5 611(2)(a)(ii) did not apply because a violation of 17.30.1105 is not a violation of
6 Mont. Code Ann. § 75-5-605. As a result “an administrative penalty may not be
7 assessed until the provision of [Mont. Code Ann. § 75-5-611(1)] have been
8 complied with.” DEQ may not seek an administrative penalty for violation of ARM
9 17.30.1105.

10 **E. DEQ’s Second, Third and Fourth Alleged Violations, all Allege**
11 **Violations of Major Extent and Gravity, Class I Violations, or**
Both.

12 Copper Ridge and Reflections moved for Summary Judgment based on
13 DEQ’s failure to comply with notice requirements contained in ARM 17.30.2003.
14 DEQ served the Notices of Violation and Administrative penalty in March of 2015.
15 At that time ARM 17.30.2003 was in effect. ARM 17.30.2003 was repealed on
16 March 19, 2016. The procedures set forth in ARM 17.30.2003 applied to initiation
17 of an administrative proceeding against Copper Ridge and Reflections.

18 ARM 17.30.2003 imposed greater requirements on DEQ than Mont. Code
19 Ann. § 75-5-611. Instead of merely parroting the exception contained in Mont.
20 Code Ann. § 75-5-611(2)(a)(ii), this administrative rule imposed additional
21 requirements before DEQ could seek an administrative penalty for violations of
22 Mont. Code Ann. § 75-5-605. Subsection 7 provided:

23 In lieu of the notice letter under (2), the department may issue an
24 administrative notice together with an administrative order if the
25 department’s action:

26 (a) does not involve assessment of an administrative penalty; or

27 (b) seeks an administrative penalty only for an activity that the

department believes and alleges was or is a violation of 75-5-605, MCA, and the violation was or is:

- (i) a class I violation as described in ARM 17.30.2001(1); or
- (ii) a violation of major extent and gravity as described in ARM 17.4.303.

ARM 17.30.2003(7). Even for alleged violations of Mont. Code Ann. § 75-5-605, DEQ was required to provide prior notice unless DEQ alleged (1) a class I violation, or (2) a violation of major extent and gravity.

DEQ's second alleged violation alleged a violation of major extent and gravity, and a Class I violation. DEQ's third alleged violation alleged a violation of major extent and gravity. The fourth alleged a Class I violation. The first alleged violation will not be addressed because it did not allege a violation of Mont. Code Ann. § 75-5-605.

F. Violation 2 Alleged a Violation of Major Extent and Gravity and a Class I Violation.

DEQ alleged a violation of Mont. Code Ann. § 75-5-605(2)(c) for "discharging storm water into the state waters without a permit." DEQ explained the basis for its Extent and Gravity analysis. It determined the Extent and Gravity factor was .85, which constitutes a violation of major gravity and extent.

Furthermore, at the time this proceeding was filed, it was a Class I violation to discharge waste into state waters without a permit. ARM 17.30.2001(1)(b) (now repealed). DEQ's second alleged violation alleged both a Class I violation and a violation of major extent and gravity. As a result, ARM 17.30.2003(7) did not impose any additional notice requirements before issuing the Administrative Compliance and Penalty Orders.

G. Violation 3 Alleged a Violation of Major Extent and Gravity

DEQ's Notice of Violation and Administrative Penalty alleged a violation of Mont. Code Ann. § 75-5-605(1)(a) for placing waste where it will cause pollution. DEQ explained the basis for its Gravity and Extent analysis. It determined the

1 Extent and Gravity factor was .85, which constitutes a violation of major Extent and
2 Gravity. Therefore, DEQ's second alleged violation alleged a violation of major
3 Extent and Gravity. As a result, ARM 17.30.2003(7) did not impose any additional
4 notice requirements before issuing the Administrative Compliance and Penalty
5 Orders.

6 **H. Violation 4 Alleged a Class I Violation.**

7 The Administrative Compliance and Penalty Orders asserted a violation of
8 Mont. Code Ann. § 75-5-605(1)(b) for a host of sections in the general permit. At
9 the time DEQ issued the Administrative Compliance and Penalty Orders it was a
10 Class I violation to "violate a permit compliance plan or schedule." ARM
11 17.30.2001(1)(d) (Repealed March 19, 2016). All of the alleged violations of the
12 permit are violations of a permit compliance plan or schedule. This is an alleged
13 violation of a Class I violation. As a result, ARM 17.30.2003(7) did not impose any
14 additional notice requirements before issuing the Administrative Compliance and
15 Penalty Orders.

16 **II. COPPER RIDGE AND REFLECTIONS ARE OWNERS OR**
17 **OPERATORS.**

18 "Any person who discharges or proposes to discharge storm water from a
19 point source must obtain coverage under an MPDES general permit or another
20 MPDES permit for discharges...associated with construction activity." ARM
21 17.30.1105(1)(a). "A person who discharges or proposes to discharge storm water
22 associated with construction activity shall submit to the department a notice of
23 intent (NOI) as provided in this rule." ARM 17.30.1115(1). The NOI must be
24 signed by either the owner or operator, or both. ARM 17.30.1115(1)(a). The
25 phrase, "storm water discharge associated with construction activity" is defined as:

26
27 a discharge of storm water from construction activities including

1 clearing, grading, and excavation that result in the disturbance of
2 equal to or greater than one acre of total land area. For purposes of
3 these rules, construction activities include clearing, grading,
4 excavation, stockpiling earth materials, and other placement or
5 removal of earth material performed during construction projects.
Construction activity includes the disturbance of less than one acre
of total land area that is a part of a larger common plan of
development or sale if the larger common plan will ultimately disturb
one acre or more.

6 ARM 17.30.1102(28). "Owner or operator," is defined as "a person who owns,
7 leases, operates, controls or supervises a point source." Mont. Code Ann. § 75-5-
8 103(26). The parties disagree regarding whether Copper Ridge or Reflections is an
9 owner or operator.

10 Reflections and Copper Ridge propose too narrow a definition of Owner and
11 operator, generally limiting their arguments to ownership, lease and operations.
12 Mont. Code Ann. § 75-5-103(26) also defines a owner or operator as someone who
13 "controls or supervises a point source." Furthermore, Copper Ridge and Reflections
14 focus too heavily on construction of homes, rather than the more expansive statutory
15 definition of "storm water discharge associated with construction activity."

16 Reflections and Copper Ridge were the original owners and developers of all
17 land in their respective subdivisions. Construction activities, including clearing,
18 grading, excavation, stockpiling earth materials, and other placement or removal of
19 earth material performed during construction projects, resulted in disturbance equal
20 to or greater than one acre of total land area at the respective subdivisions. These
21 construction activities were initiated in 2006, in the respective subdivisions. These
22 construction activities were undertaken with the eventual goal of the sale of
23 individual lots for residential home construction.

24 Copper Ridge and Reflections admit that they entered into at least one
25 contract that required "all excess material from pipe and bedding displacement shall
26 be left on site." Therefore, not only did Copper Ridge and Reflections have
27 supervision and control over the actions of third parties, they acted on their ability to

1 instruct others how to engage in stockpiling of materials, an act expressly contained
2 in the definition of “construction activities.” This put Copper Ridge and Reflections
3 in a position of either control or supervision with regard to the terms of sale of any
4 individual lot for construction of residential homes. Any argument to the contrary
5 ignores the common sense and practical reality of development of a residential
6 subdivision. The mere fact that neither Copper Ridge nor Reflections exercised
7 supervision or control over the contractual terms of the sale of land, does not change
8 the fact that they had the power to supervise or control land with regard to storm
9 water discharges. In addition, on September 9, 2013, DEQ observed “clearing,
10 grading, excavation, soil stockpiles, concrete washout areas, and tracking on
11 streets.”

12 Moreover, Reflections and Copper Ridge conceded their owner or operator
13 status when they filed their December 23, 2013, SWPPs and NOIs, respectively.
14 Both Reflections and Copper Ridge expressly acknowledged they were the owner or
15 operator for construction activities. The affidavit produced by Landy Leep does not
16 create a material dispute of fact. Leep attempts to characterize the intent behind his
17 signature on the SWPPs and the NOIs. However, the documents themselves are
18 undisputed for the purposes of summary judgment and the admissions made by
19 Copper Ridge and Reflections that they were the owners or operators. Based on the
20 foregoing, Reflections and Copper Ridge were owners or operators with regard to
21 construction activities at their respective subdivisions.

22 **III. DEQ HAS ESTABLISHED COPPER RIDGE AND REFLECTIONS**
23 **DISCHARGED STORM WATER TO STATE WATERS WITHOUT A**
24 **PERMIT.**

25 It is “unlawful to carry on any of the following activities without a current
26 permit from the department...discharge sewage, industrial wastes or other wastes
27 into any state waters.” Mont. Code Ann. § 75-5-605(2)(c). DEQ has alleged
Copper Ridge and Reflections violated this statute by “discharging storm water

1 associated with construction activities to state water without a permit” from at least
2 2006 to December 23, 2013. The parties dispute whether storm water detention
3 ponds are treated as State waters and whether overflows from the detention ponds, to
4 state waters, constitutes a discharge into state waters.

5 This is all beside the point. DEQ has provided an affidavit of Dan Freeland
6 who conducted the September 9, 2013 CEIs at Reflections and Copper Ridge.
7 Freeland stated that he “documented and observed discharges of storm water from
8 Reflections at Copper Ridge and from Copper Ridge subdivisions through *direct*
9 *overland flow* and through swales, storm drains and drainage ditches into Cove
10 Ditch, which is state water.” (emphasis added). Freeland’s personal observations
11 have not been disputed on summary judgment.

12 Regardless the Parties’ disputes over state waters and the effect of the
13 overfilling of the detention ponds, there is no dispute that Freeland documented and
14 observed discharges of storm water that traveled over land, into Cove Ditch, a state
15 water. As a result, DEQ has established Reflections and Copper Ridge discharged
16 storm water into state waters, without a permit, a violation of Mont. Code Ann.
17 § 75-5-605(2)(c). DEQ is entitled to summary judgment on its second alleged
18 violation.

19 **IV. THERE IS A DISPUTE OF MATERIAL FACT REGARDING THE**
20 **ALLEGED VIOLATION OF MONT. CODE ANN. § 75-5-605(1)(a).**

21 “It is unlawful to...cause pollution, as defined in 75-5-103, of any state
22 waters or to place or cause to be placed any wastes where they will cause pollution
23 of any state waters...” Mont. Code Ann. § 75-5-605(1)(a). DEQ alleged both
24 Reflections and Copper Ridge violated this statute, from at least May 2012, to at
25 least October 21, 2014, by placing waste where it will cause pollution and by
26 contributing sediments and other pollutants that will increase the concentration of
27 sediment, oils, settleable solids and other debris above levels that are naturally

1 occurring in state surface waters. Copper Ridge and Reflections argue that there is
2 no evidence that Copper Ridge or Reflections placed waste within the subdivisions
3 and DEQ lacks an expert to testify that the waste could cause pollution.

4 There is sufficient evidence that Reflections and Copper Ridge placed or
5 caused to be placed wastes. On September 9, 2013, Dan Freeland observed
6 stockpiling of materials, concrete washout, sediment waste tracked onto impervious
7 surfaces, sediment and debris on the bank of Cove Ditch, accumulated sediment on
8 the sidewalk and grass area of the city park areas, and sediments on the streets and
9 storm drains throughout Reflections and Copper Ridge. All of this meets the
10 definition of “other wastes” contained in Mont. Code Ann. § 75-5-103(24).

11 In addition, DEQ does not necessarily require expert testimony to establish
12 the placement of wastes could cause pollution. In pertinent part, “pollution” is
13 defined as:

- 14 (i) contamination or other alteration of the physical, chemical, or
15 biological properties of state waters that exceeds that permitted by
16 Montana water quality standards, including but not limited to
17 standards relating to change in temperature, taste, color, turbidity, or
18 odor; or
19 (ii) the discharge, seepage, drainage, infiltration, or flow of liquid,
20 gaseous, solid, radioactive, or other substance into state water that
21 will or is likely to create a nuisance or render the waters harmful,
22 detrimental, or injurious to public health, recreation, safety, or
23 welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

24 Mont. Code Ann. § 75-5-103(30).

25 Expert testimony is often required when the subject matter is outside of the
26 common experience of the trier of fact and the expert testimony will assist the trier
27 of fact in determining the issue or understanding the evidence. *Dubiel v. Mont.*
DOT, 2012 MT 35, 364 Mont. 175, 272 P.3d 66. However, in a MAPA contested
case proceeding, “[n]otice may be taken of judicially cognizable facts. In addition,
notice may be taken of generally recognized technical or scientific facts within the
agency’s specialized knowledge.” Mont. Code Ann. § 2-4-612(6). In addition, the

1 “agency’s experience, technical competence, and specialized knowledge may be
2 utilized in the evaluation of evidence.” Mont. Code Ann. § 2-4-612(7).

3 Based on the definition of “pollution” and Mont. Code Ann. § 2-4-612(6)
4 and (7), there is no per se requirement that DEQ identify an expert. DEQ’s exhibits
5 and the testimony of its personnel, with their specialized knowledge, appears to be
6 sufficient to provide evidence of alleged pollution, as defined by statute. DEQ is
7 not required to present expert testimony in order to establish Reflections or Copper
8 Ridge placed, or caused to be placed, waste in a manner that could cause pollution
9 of state waters.

10 That said, DEQ has not met its burden to establish it is entitled to judgment
11 as a matter of law. The first prong of “pollution” requires DEQ to establish some
12 form of alteration of state waters “that exceeds that permitted by Montana water
13 quality standards.” Mont. Code Ann. § 75-5-103(30)(i). DEQ has not provided any
14 evidence of permitted water quality standards at this time. As a result, DEQ has not
15 established pollution under the first prong of the definition.

16 The second prong of “pollution” requires DEQ to establish that a substance
17 has entered state water that will either create a nuisance or “render the waters
18 harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to
19 livestock, or to wild animals, birds, fish, or other wildlife.” Mont. Code Ann. § 75-
20 5-103(30)(ii). While DEQ has established the placement of waste, DEQ has not
21 identified the facts to establish or explain how this waste will create a nuisance or
22 otherwise cause the harm required in the definition of “pollution.” As a result, DEQ
23 is not entitled to summary judgment on this alleged violation.

1 **V. DEQ IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS**
2 **CLAIM THAT COPPER RIDGE AND REFLECTIONS VIOLATED**
3 **THE CONDITIONS OF THE GENERAL PERMIT.**

4 DEQ's fourth alleged violation is that Reflections and Copper Ridge violated
5 Mont. Code Ann. § 75-5-605(1)(b), for violating provisions contained within the
6 General Permit. As a threshold matter, Reflections and Copper Ridge cannot rely
7 on their defense that they are not an owner or operator. Reflections and Copper
8 Ridge provided their respective SWPPPs and NOIs in December of 2013.
9 Resolution of this alleged violation is separate and distinct from the alleged
10 violations in the absence of a permit. Although Reflections and Copper Ridge
11 constituted owners or operators, that legal determination is not necessary for the
12 resolution of this fourth alleged violation.

13 As of December 17, 2013, Reflections and Copper Ridge agreed to follow
14 the terms and conditions of the General Permit. It is undisputed they entered the
15 NOIs and SWPPPs and undertook the obligations contained in the general permit.
16 Therefore, even if one accepted Reflections and Copper Ridge's argument as true –
17 that they are not owners or operators – this alleged violation could still proceed
18 because they agreed to abide by the provisions of the general permit. Their alleged
19 violations of any specific provisions are divorced from their status as an owner or
20 operator.

21 DEQ provided undisputed testimony that on October 21, 2014, Dan Freeland
22 and Chris Romankiewicz conducted a CEI as Reflections and Copper Ridge.
23 Freeland and Romankiewicz observed:

- 24 (1) the SWPPP administrator failed to conduct site inspection
25 every seven days in accordance with the inspection schedule
26 in the SWPPP, a violation of Section 2.3 of the general
27 permit.
- 28 (2) The SWPPP had not been developed in accordance with good
29 engineering practices and had not been updated to reflect
30 current onsite conditions, a violation of Sections 3.1.1 and
31 3.1.3 of the general permit.

- (3) The SWPPP administrator had failed to maintain records at the site where they could be made available to the DEQ Inspectors upon request, a violation of Section 2.5 of the general permit.
- (4) Best management practices were not implemented to control and mitigate discharges of sediment and other pollutants from construction related activities, violations of Sections 2.1.1 and 2.1.4 of the general permit.

Freeland and Romankiewicz's observations were memorialized in (1) a December 9, 2014 letter to Reflections and Copper Ridge, (2) an MPDES Compliance Inspection report for each subdivision, and (3) a Storm Water Construction Inspection Report for each subdivision.

Copper Ridge and Reflections have not disputed Freeland and Romankiewicz's observations and factual allegations. DEQ has met its burden to establish violations of provisions of the General Permit, a violation of Mont. Code Ann. § 75-5-605(1)(b). DEQ is entitled to partial summary judgment on the fourth alleged violation in the Administrative Compliance and Penalty Order.

CONCLUSION

Both parties' cross Motions for Summary Judgment are granted in part and denied in part:

- (1) Copper Ridge and Reflections' Motions are GRANTED with regard to its argument that DEQ cannot seek administrative penalties for a violation of ARM 17.30.1105.
- (2) Copper Ridge and Reflections' Motions for summary judgment are DENIED in all other aspects.
- (3) DEQ's Motion for Partial Summary Judgment is GRANTED with regard to the violations of Mont. Code Ann. § 75-5-605(2)(c), discharge of waste into state waters and 75-5-605(1)(b), violation of provisions set forth in a permit.
- (4) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of ARM 17.30.1105.

1 (5) DEQ's Motion for Partial Summary Judgment is DENIED with regard
2 to alleged violation of 75-5-605(1)(a).

3 DATED this 1st day of August, 2017.

4 /s/ Andres Haladay
5 ANDRES HALADAY
6 Hearing Examiner
7 Agency Legal Services Bureau
8 1712 Ninth Avenue
9 P.O. Box 201440
10 Helena, MT 59620-1440
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CERTIFICATE OF SERVICE

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

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

Ms. Kirsten Bowers
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DATED: August 1, 2017 /s/ Andres Haladay

- (3) The SWPPP administrator had failed to maintain records at the site where they could be made available to the DEQ Inspectors upon request, a violation of Section 2.5 of the general permit.
- (4) Best management practices were not implemented to control and mitigate discharges of sediment and other pollutants from construction related activities, violations of Sections 2.1.1 and 2.1.4 of the general permit.

Freeland and Romankiewicz's observations were memorialized in (1) a December 9, 2014 letter to Reflections and Copper Ridge, (2) an MPDES Compliance Inspection report for each subdivision, and (3) a Storm Water Construction Inspection Report for each subdivision.

Copper Ridge and Reflections have not disputed Freeland and Romankiewicz's observations and factual allegations. DEQ has met its burden to establish violations of provisions of the General Permit, a violation of Mont. Code Ann. § 75-5-605(1)(b). DEQ is entitled to partial summary judgment on the fourth alleged violation in the Administrative Compliance and Penalty Order.

CONCLUSION

Both parties' cross Motions for Summary Judgment are granted in part and denied in part:

- (1) Copper Ridge and Reflections' Motions are GRANTED with regard to its argument that DEQ cannot seek administrative penalties for a violation of ARM 17.30.1105.
- (2) Copper Ridge and Reflections' Motions for summary judgment are DENIED in all other aspects.
- (3) DEQ's Motion for Partial Summary Judgment is GRANTED with regard to the violations of Mont. Code Ann. § 75-5-605(2)(c), discharge of waste into state waters and 75-5-605(1)(b), violation of provisions set forth in a permit.
- (4) DEQ's Motion for Partial Summary Judgment is DENIED with regard to alleged violation of ARM 17.30.1105.

1 (5) DEQ's Motion for Partial Summary Judgment is DENIED with regard
2 to alleged violation of 75-5-605(1)(a).

3 DATED this 1st day of August, 2017.

4 /s/ Andres Haladay
5 ANDRES HALADAY
6 Hearing Examiner
7 Agency Legal Services Bureau
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9 P.O. Box 201440
10 Helena, MT 59620-1440
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CERTIFICATE OF SERVICE

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

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
 OF THE STATE OF MONTANA

IN THE MATTER OF:)	Case No. BER 2015-01-WQ
VIOLATIONS OF THE WATER)	
QUALITY ACT BY REFLECTIONS AT)	
COPPER RIDGE, LLC AT)	
REFLECTIONS AT COPPER RIDGE)	
SUBDIVISION, BILLINGS,)	
YELLOWSTONE COUNTY, MONTANA)	
(MTR105376) [FID 2288, DOCKET NO.)	
WQ-15-07])	
)	
IN THE MATTER OF:	)	Case No. BER 2015-02-WQ
VIOLATIONS OF THE WATER)	
QUALITY ACT BY COPPER RIDGE)	
DEVELOPMENT CORPORATION AT)	
COPPER RIDGE SUBDIVISION,)	
BILLINGS, YELLOWSTONE COUNTY,)	
MONTANA (MTR105377) [FID 2289,)	
DOCKET NO. WQ-15-08])	

**EXCEPTIONS TO HEARING EXAMINER'S
 ORDER ON SUMMARY JUDGMENT AND
 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Copper Ridge Development Corporation (Copper Ridge) and Reflections at Copper Ridge, LLC (Reflections) respectfully submit these Exceptions for the Board of Environmental Review (Board) to consider when determining the most appropriate final Order in this enforcement case.

I. INTRODUCTION

The Proposed Findings of Fact and Conclusions of Law (Proposed FOFCOL) submitted to this Board on July 16, 2018 relies on an incorrect burden of proof. For this reason alone, the Board may find that “the proceedings on which the findings were based did not comply with essential requirements of law.” § 2-4-621(3), MCA. This case should therefore be remanded back to the Hearing Examiner for consideration using the correct burden of proof.

However, even if the Board accepts the Findings of Fact in the Proposed FOFCOL and the Order on Summary Judgment, it should modify the proposed conclusions and void the Department of Environmental Quality’s (DEQ’s) Administrative Compliance and Penalty Order because DEQ has not and cannot meet its burden of proving that Copper Ridge and Reflections committed the alleged violations. § 75-5-611(6)(e), MCA.

Even if this Board finds that Copper Ridge and Reflections committed the alleged violations, the proposed findings of fact do not support the assessed penalty

amounts. Therefore, justice demands that the penalty amounts be adjusted to zero, which this Board may do without a full record review. § 2-4-621(3), MCA.

Finally, a review of the complete record will reveal facts that contradict and add more accurate context to the proposed findings, proving that the proposed findings are not based upon “competent substantial evidence” and should therefore be modified. § 2-4-621(3), MCA.

For perspective, the total penalty proposed in this case (\$184,000) is greater than the *annual* amount of penalties deposited in the General Fund and Special Revenue Accounts for Water Quality Act cases for all but one of the last six fiscal years - 2011 (\$23, 255), 2012 (\$333,350), 2013 (\$72,495), 2014 (\$58,578), 2015 (\$119,891) and 2016 (\$123,505).¹ In this case, Copper Ridge and Reflections did nothing wrong. In fact, the proposed findings of fact demonstrate their repeated compliance with all of DEQ’s requests. Yet, DEQ persists in this enforcement action, forcing these two corporations to continue, at great expense, this legal battle.

II. BACKGROUND

Copper Ridge and Reflections are developers who appropriately planned and developed two subdivisions on the west end of Billings – all in accordance with the

¹ Department of Environmental Quality, Annual Amounts of Penalties Deposited in General Fund and Special Revenue Accounts FY 2011 through FY 2016, available at http://deq.mt.gov/portals/112/deqadmin/enf/documents/Reports/FY16/Penalties_collected-2011-2016.pdf (accessed September 13, 2018).

Montana Subdivision and Platting Act and all other legal requirements, including the Montana Water Quality Act. It is undisputed that Copper Ridge and Reflections had appropriate stormwater permit coverage for their construction activities as the developers of the subdivisions. It is also undisputed that DEQ terminated that permit coverage – effectively telling Copper Ridge and Reflections that they no longer needed permit coverage.

More than a year later, in September 2013, the Billings area experienced an unprecedented significant storm that pummeled the area with 2.10 inches of rain in just 45 minutes. Not surprisingly, the storm triggered flash flooding that literally turned streets into rivers. Along with the rain came wind gusts of up to 73 mph – strong enough to break trees and power poles and leave thousands of Billings residents without power.

That was just the storm that DEQ had been waiting for because, despite the City of Billings' request to address stormwater concerns on the west end of Billings *six months earlier*, DEQ waited for a storm that would create conditions for a stronger case – one that would be sure to create violations and compel compliance. But Copper Ridge and Reflections, with a proven track record of compliance, did not need such compulsion. Nor did they need or deserve the resulting \$200,000 penalty first assessed against them. As any prudent corporation would do, Copper Ridge and Reflections challenged the DEQ enforcement action,

questioning how DEQ found them liable for such violations. DEQ has never responded with facts that specifically tie any of the violations to any property owned or operated by Copper Ridge and Reflections. Nor has DEQ explained its purported authority to hold Copper Ridge and Reflections responsible for violations that, in all likelihood, originated on residential lots owned by others.

DEQ has failed at every step of this enforcement action. First, they failed to take proactive enforcement action in response to concerns raised by the City of Billings six month prior to the alleged violations - action that could have prevented the alleged discharges. Then DEQ failed to realize the magnitude and disastrous force of the storm, which overwhelmed nearly every stormwater system in the area. Instead, DEQ used the disastrous storm to initiate an unwarranted enforcement action against a compliant developer. DEQ failed to document exactly where the violations originated and failed to document the exact property and property owners responsible for the discharges and placement of wastes. Instead, DEQ looked only to the biggest target in the neighborhood – the developer who simply drew the boundaries, developed the infrastructure (all in accordance with all legal requirements), and sold the individual lots for residential homes to be built. DEQ also failed to document any pollution or harm that may have resulted from the disastrous storm's impact to Cove Ditch, an irrigation canal on the Billings west end. Further, DEQ failed to provide the statutorily and regulatory

notices for this enforcement action and assessed inappropriate and unsupportable penalties that simply ignore the facts of this case.

This Board should not reward DEQ's failures with an inappropriate Administrative Compliance and Penalty Order in this case. The regulated public, as well as Copper Ridge and Reflections, deserve better. The law demands better.

Of all the enforcement actions pending or needing to be pursued throughout this state, this one is an abomination. This enforcement action inappropriately penalizes the wrong party – the compliant subdivision developer – for a natural disaster. DEQ's action cannot withstand this Board's scrutiny. There is no proof that Copper Ridge and Reflections committed the alleged violations. Even if this Board determines or has any question whether Copper Ridge and Reflections did commit the alleged violations, penalties cannot be assessed for those violations because DEQ failed to follow the proper notice requirements and failed to assess the penalty amounts in compliance with its regulatory requirements. As illustrated by key facts provided herein, which contradict and provide more accurate context for the proposed findings, a review of the full record will reveal that the proposed findings are “not based upon competent substantial evidence” because no “reasonable mind” can accept them as adequate to support either the alleged violations or the substantial penalty assessment. The proposed finding should therefore be rejected or modified. § 2-4-621(3), MCA.

III. STANDARD OF REVIEW

When faced with an Administrative Compliance and Penalty Order, the alleged violator may request a hearing before the Board. “After a hearing, the board shall make findings and conclusions that explain its decision. ... If the board determines that a violation has not occurred, it shall declare the department's notice void.” § 75-5-611(6)(a) and (e). In a contested case hearing such as this, where the full Board has chosen not to hear the case and has assigned it to a Hearing Examiner, the Hearing Examiner proposes findings and conclusions to the Board, then the Board decides whether to adopt, modify or reject the findings and/or conclusions:

The agency [Board] may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

§ 2-4-621(3), MCA. While rejecting or modifying the findings of fact calls “for an explanation as required by § 2-4-621(3), MCA;” rejecting and modifying the proposed conclusions of law does not. *Key West, Inc. v. Winkler*, 2004 MT 186, ¶ 21, 322 Mont. 184, 95 P.3d 666. The substantial evidence required to reject or

modify the proposed findings “is evidence that a reasonable mind might accept as adequate to support a conclusion.” *State Pers. Div., Dep't of Admin. v. Child Support Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citation omitted).

IV. ARGUMENT

This action should be remanded for consideration under the correct burden of proof. Alternatively, the Board should modify the proposed conclusions and void DEQ’s Administrative Compliance and Penalty Order in its entirety because none of DEQ’s alleged violations or assessed penalties are supported by the proposed facts. Finally, if this Board has further doubt, it can consider the entire record before it, easily determine that key facts are missing and reject or modify the proposed findings of fact because no “reasonable mind” can accept them as adequate to support either the alleged violations or the assessed penalties.

A. DEQ Must Bear the Burden of Proof in an Enforcement Case.

Copper Ridge and Reflections disagree with the holding that Copper Ridge and Reflections have the burden of proving their compliance with the Montana Water Quality Act. Proposed FOFCOL, pp. 14-18. As the innocent party being charged as guilty of violating the Water Quality Act, Copper Ridge and Reflections should have the right, under the United States Constitution’s due process clause, to be considered innocent until proven guilty. *See In Re Winship*, 397 U.S. 358, 363,

90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) (“the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’”). Although this is not a criminal case, this contested case is similar because it is an enforcement action under the Water Quality Act, specifically §§ 75-5-611 and 75-5-617, MCA, which allow DEQ to initiate an enforcement response when it “has reason to believe that a violation” of the law has occurred. Indeed, DEQ’s enforcement action alleges that Copper Ridge and Reflections acted in violation of the Water Quality Act and DEQ therefore requests relief, or punishment, in the form of an Administrative Compliance and Penalty Order. Under the due process clause, it is only fair that Copper Ridge and Reflections be presumed innocent of the alleged violation until DEQ proves their guilt. The due process requirements of the United States Constitution demand that the government bear the burden of proof in enforcement actions such as this case.

Additionally, DEQ is in exactly the same position as the plaintiff in *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, upon which the Proposed FOFCOL relies – “MEIC filed a petition and affidavit with the Board alleging that the Department approved the permit *in violation of Montana statutes and administrative regulations*, and requesting the following relief...” MEIC, ¶ 15. In that case, the Board first required evidence from MEIC “necessary to establish the

facts essential to a determination that the Department's decision *violated the law*." *MEIC*, ¶ 16 (emphasis added).

Here, DEQ is, just like the plaintiff in *MEIC* - the one claiming that there has been a violation of the law. Copper Ridge and Reflections are not, as the Proposed FOFCOL stated, the ones asserting that DEQ's decision "violated Montana law." Proposed FOFCOL, p. 14. Rather, Copper Ridge and Reflections are defending themselves against the allegations and answering "the charges" levied against them by DEQ. § 75-5-611(3) (the alleged violator may be required to appear "before the board for a public hearing to answer charges.").

Federal statutes, rules and administrative case law specific to the federal Clean Water Act all agree that in an enforcement action such as this, it is the government who bears the burden of proving a violation of law has occurred and that the relief sought is appropriate. The federal Administrative Procedure Act requires that the "proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Here, DEQ claims authority to issue a "notice and order" under § 75-5-611, MCA; however, that order is not final, as evidenced by the alleged violator's ability to request a hearing and have the Board "determine[] that a violation has occurred," "issue an appropriate order" or "determine that a violation has not occurred," and "declare the department's notice void." §§ 75-5-611(6)(b) and (e),

MCA.² DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action. Once the alleged violator requests a hearing, the order is taken off the automatic track to become final and is instead placed before the Board to issue the final order. Here, DEQ is the "proponent" of an order and as such, has the "burden of proof." 5 U.S.C. § 556(d).

The administrative procedures for federal enforcement of these same types of violations under the Clean Water Act requires:

- (a) The **complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.** Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
- (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24 (emphasis added). Cases heard by the EPA's Environmental Appeals Board (EAB), which is analogous to this Board, have resoundingly held

²Indeed, the statute, when read in total, contemplates that any violations alleged by the Department are not final until either 1) a hearing is not required by the Department and the alleged violator fails to request one or 2) the alleged violator requests a hearing and the Board issues findings and conclusions. Until one of those points is reached, the violations are merely alleged and the order is not final. §§ 75-5-611(3) – 75-5-611(6), MCA.

that when the government alleges a violation, the government must prove every element of that violation. *In re Henry Stevenson and Parkwood Land Co.*, 16 E.A.D. 151, 158 (EAB 2013) (“the Region [EPA] bears the burden of demonstrating that the alleged violation occurred” and “the Region [EPA] must show, by a preponderance of the evidence, that the factual prerequisites exist for finding a violation of the applicable regulatory requirements.” (citing *In re Bricks, Inc.*, 11 E.A.D. 224, 233 (EAB 2003) (rejecting an administrative law judge’s findings of fact because the Region had failed to demonstrate that the facts were supported by a preponderance of the evidence); *In re Julie’s Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 (EAB 2004) (explaining preponderance of the evidence standard); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (same)).

Here, DEQ is the “complainant” who must prove that the violations occurred as set forth in their notice and order, and Copper Ridge and Reflections are the “respondents” who then have the burden of presenting defenses to the allegations.

The Proposed FOFCOL mistakenly views Copper Ridge and Reflections as “the party asserting a claim for relief” and concludes that §§ 26-1-401 and -402, MCA require Copper Ridge and Reflections to bear the burden of proof. That is wrong because clearly DEQ is the party asserting a claim for relief via its Administrative Compliance and Penalty Order.

Having DEQ bear the burden of proof in an enforcement proceeding complies with § 26-1-401, MCA because, prior to the order being final (either by lapse of the alleged violator's opportunity to request a hearing or by action of the Board), DEQ is only alleging violations that it has "reason to believe" occurred. § 75-5-611(1), MCA. Therefore, "if no evidence were given on either side," DEQ's allegations go unsupported, the Board has no evidence upon which to "determine[] that a violation has occurred" and therefore cannot "issue an appropriate order." §§ 26-1-401; 75-5-611(6)(b), MCA. Since DEQ's claim that a violation has occurred would be defeated in the absence of any evidence from either side, the plain reading of § 26-1-401 illustrates that DEQ bears the burden of producing evidence as to each particular fact that proves the alleged violation.

Having DEQ bear the burden of producing evidence also comports with the traditional notions of justice and fairness by placing the burden on the party bringing the claim and requesting relief. Here, it is DEQ who brings the claim that Copper Ridge and Reflections have violated the law and it is DEQ who requests relief in the form of a penalty payment. Copper Ridge and Reflections are not raising a claim, they are defending against DEQ's claims. Requiring the alleged violator to prove his innocence, or compliance, before any proof of the alleged violations is formally presented at a hearing before the Board, essentially requires the alleged violator to prove a negative – that no violation occurred. This is unfair

and would impose an undue burden on the regulated public because DEQ would “solely possess the relevant information pertaining to the activities.” *Travelers Cas. & Sur. Co. v. Ribic Immunochem Research, Inc.*, 2005 MT 50, ¶ 32, 326 Mont. 174, 108 P.3d 469. Until the case has gone through discovery and has been presented as the case in chief before the Board, the alleged violator cannot know for certain the extent or scope of evidence that DEQ will bring to bear against him. To require Copper Ridge and Reflections to prove that no violation occurred, without first having DEQ present its proof of the alleged violations, prejudices Copper Ridge and Reflections and requires the impossible – to prove a negative and to defend against allegations not yet articulated or proven.

The United States Constitution, Montana case law and statutes, as well as federal statutes, regulations and case law all emphasize that it is the government who bears the burden of proving a violation of law. Therefore, it is necessary that DEQ bear the burden of proof in this enforcement action. The notions of justice and fairness to the regulated public also require that when DEQ alleges a violation of the law, it must bear the burden of proving “each fact the existence or nonexistence of which is essential to the claim for relief.” § 26-1-402, MCA. Here, it is DEQ who alleges a violation of law, just as the plaintiff did in *MEIC v. DEQ*; therefore, it is DEQ who must prove, by a preponderance of the evidence, every element of each violation and every element of the requested penalty.

Because the Proposed FOFCOL relied on the wrong burden of proof, this Board should reject the proposed findings and conclusions, in their entirety, because “the proceeding on which the findings were based did not comply with essential requirements of law.” § 2-4-621(3), MCA. The entire case should be remanded back to the Hearing Examiner for review and consideration using the correct burden of proof.

B. The Facts Do Not Support the Violations Alleged.

Alternatively, this Board may examine the proposed findings of fact and reach different conclusions of law, without remanding this case back to the Hearing Examiner and without examining the complete record. § 2-4-621(3), MCA. Both the law and logic require that the Board modify the conclusions, even if it chooses not to reject or modify the proposed findings.

Neither the proposed findings nor the facts presented in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections discharged wastes to state waters without a permit, that Copper Ridge and Reflections placed or caused to be placed wastes where they will cause pollution, or that Copper Ridge and Reflections committed either of those violations over multiple days. Therefore, this Board may accept the proposed findings but modify the proposed conclusions to exonerate Copper Ridge and Reflections of DEQ’s unproven allegations.

1. DEQ has Failed to, and Indeed Cannot, Prove that Copper Ridge and Reflections Own or Operate the Source of the Discharge, are Persons who Discharged Stormwater, or that Copper Ridge and Reflections Placed or Caused to be Placed Any Wastes.

The Hearing Examiner relies on the previous Order on Summary Judgment for the conclusion that “CR/REF were ‘owners or operators’ for the purpose of obtaining permit coverage for the discharge of storm water at their respective developments.” Proposed FOFCOL, pp. 38-39, ¶ 4. The Order on Summary Judgment concluded that Copper Ridge and Reflections were owners or operators who “discharge[d] or propose[d] to discharge storm water associated with construction activity” Order on SJ, p. 13 (*citing* ARM 17.30.1115(1)). Pages 14 through 15 of the Order describe the operative facts relied upon:

- 1) Copper Ridge and Reflections were the original owners and developers of the subdivisions. *Id.*, p. 14.
- 2) Copper Ridge and Reflections’ construction activities within the subdivision that would be subject to permitting requirements began with the initial development in 2006 and “were undertaken with the eventual goal of the sale of individual lots for residential home construction.” *Id.*
- 3) Copper Ridge and Reflections entered into one contract that instructed that excavated materials should remain on site. *Id.*
- 4) Copper Ridge and Reflections “conceded their owner or operator status when they filed their December 23, 2013 SWPPs and NOIs.” *Id.*, p. 15.

Even if all of those facts are taken as true, they do not support liability for what can be charged as a \$10,000 per day violation of the Water Quality Act.

A subdivision “means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.” § 76-4-102(17), MCA. Such is the case here – both the statutes and the Order affirm that Copper Ridge and Reflections, as the developers, intended to sell the individual lots for subsequent construction of residential homes *by someone other than Copper Ridge and Reflections*.

DEQ administers the Montana Subdivision and Platting Act, which contains specific requirements for stormwater systems:

The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:

- (a) size of lots;
- (b) contour of land;
- (c) porosity of soil;
- (d) ground water level;
- (e) distance from lakes, streams, and wells;
- (f) type and construction of private water and sewage facilities; and
- (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

§ 76-4-104(2), MCA. The “rules must further provide for: ... standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways.” § 76-4-104(6)(e), MCA.

DEQ has authority to enforce the subdivision provisions, including those dealing with stormwater, but DEQ has not pursued any enforcement action against Copper Ridge and Reflections, as the developers, for any violation of the Montana Subdivision and Platting Act, including the requirements for stormwater. Indeed, no one has even alleged that Copper Ridge and Reflections failed to meet the Montana Subdivision and Platting Act’s statutory or regulatory requirements for stormwater. In fact, DEQ admits that Copper Ridge and Reflections had valid stormwater permit coverage for their development of the subdivisions. Proposed FOFCOL, pp. 4-5, ¶ 5. DEQ went so far as to terminate that coverage without noting *any* violations. *Id.*, p. 5, ¶ 6; p. 22 (noting that “DEQ has not alleged any prior history” of Water Quality Act violations for Copper Ridge and Reflections). Thus, all of the evidence (or lack thereof) indicates that Copper Ridge and Reflections, as the subdivision developers, did *everything* that they were supposed to do in terms of stormwater.

Of course, those permits for the development of the subdivisions did not include “controls for construction activity on residential lots” because those lots were “sold, rented, leased or otherwise conveyed” *out of* Copper Ridge and

Reflections' ownership and control – just as the subdivision statutes envision and in-line with the noted “eventual goal of the sale of individual lots for residential home construction.” *Id.*, p. 5, ¶ 5; Order on SJ, p. 14; § 76-4-102(17), MCA. The record is clear that Copper Ridge and Reflections were not involved in, nor intended to be involved in, construction activities on the individual lots.

This enforcement action kicked off with an inspection in September of 2013 – seven years after the development of the subdivisions and one year after DEQ was apparently so satisfied with Copper Ridge and Reflections' compliance with stormwater permit requirements during the developers' construction activities that they terminated the permit coverage – essentially telling Copper Ridge and Reflections that stormwater coverage for the subdivision developer was no longer necessary. Again, no violations of either the Water Quality Act or the Montana Subdivision and Platting Act were alleged against Copper Ridge and Reflections, the subdivision developers.

Neither the Proposed FOFCOL nor the Order on Summary Judgment articulated where, within the subdivisions, the discharges originated. The origin of the discharge is critical to the violation cited here because, for stormwater discharges associated with construction activity, it is the disturbance caused by the construction that is the regulated point source. ARM 17.30.1102(28).

DEQ has not described, with specificity, the location of the “disturbance” where the discharges originated. However, it is more likely than not, given the following facts, that the disturbances were on individual lots:

- Development began in 2006, but the discharges were not observed until 2013. Order on SJ, p. 14; p. 1, Facts ¶¶ 1 and 2.
- “[T]he eventual goal” of the subdivisions was “the sale of individual lots for residential home construction.” Order on SJ, p. 14.
- DEQ terminated Copper Ridge’s and Reflections’ permit coverage of the developers’ construction activities, outside of the individual lots, which did not include “controls for construction activity on residential lots.” Proposed FOFCOL, pp. 4-5, Findings of Fact ¶¶ 5-6.
- After the violations were alleged, DEQ required Copper Ridge and Reflections to file corrective SWPPPs and NOIs for “construction of new single-family homes.” Order on SJ, p. 3, Facts ¶ 14.

It is unlikely that DEQ would terminate Copper Ridge’s and Reflections’ permit coverage if it believed that the disturbances were still occurring due to the developer’s permitted construction activities outside of the individual lots. It is also unlikely that a developer would delay completing development of its substantial investment and delay its “eventual goal” of selling individual lots for seven years (the time between initiation of the development and the DEQ

inspection). Further, it is expected that DEQ would require permit coverage for the specific construction activity that caused the violation – the “construction of new single-family homes” – for which Copper Ridge and Reflections applied in response to the requirements in DEQ’s violation letters. Therefore, it is more likely than not that the sources of the discharges at issue in this enforcement action were *disturbances on individual lots*. DEQ’s observed “tracking on streets” does nothing to change this conclusion because it is not clear what “tracking” is or how it qualifies as a “construction activity” specifically tied to a Copper Ridge or Reflections construction project. ARM 17.30.1104(28) (“For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects.”).

If the discharges originated from construction projects on the individual lots, as is more likely than not in the case here, then Copper Ridge and Reflections cannot be held liable for those discharges because they are neither the owner nor the operator of the individual lots, nor were they responsible for any construction projects on the individual lots. The Order on Summary Judgment also relied on one contract that is obviously related to the developer’s construction activities in accordance with their responsibilities as developers under the Montana Subdivision and Platting Act. Order on SJ, p. 14. Any degree of “supervision and control” that

may be portrayed in that contract is limited to the developer's construction activities outside of the individual lots pursuant to the approved Subdivision Certificate only, and does not apply to homebuilding construction activities on individual lots.

Further, the Hearing Examiner stated that the same contract "put Copper Ridge and Reflections in a position of either control or supervision with regard to the terms of the sale of any individual lot for construction of residential homes," and that Copper Ridge and Reflections "had the power to supervise or control land with regard to storm water discharges" and should have "exercised supervision or control over the contractual terms of the sale of land." Order on SJ, p. 15. No authority is cited for this position and in fact, none can be found.

The Subdivision laws govern the developer's responsibilities with regard to subsequent purchasers and only require that:

The developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities. Each subsequent seller of property within the subdivision shall include within the instruments of transfer a reference to the conditions of the certificate of subdivision approval. A written verification of notice that is signed by both the seller and the purchaser and is recorded with the county clerk and recorder constitutes conclusive evidence of compliance with this section for that transaction.

§ 76-4-113, MCA. The idea that the developer must somehow “supervise and control” the use of land after it is purchased by someone else defies logic and is inconsistent with the very terms of property ownership. In fact, after the developer sells the lots and provides the information required by § 76-4-113, MCA, the lot owner becomes subject to the requirements of the Subdivision Certificate, including any covenants, conditions or restrictions imposed through the Subdivision Certificate. *See generally, Eastgate Village Water and Sewer Assoc. v. Davis*, 2008 MT 141, 343 Mont. 108, 183 P.3d 873. The previous owner of the lot, the developer in this case, no longer has authority over that land.

Nor would it be appropriate for the previous owner (even if the previous owner is the developer) to retain authority over that land for purposes of Water Quality Act or Montana Subdivision and Platting Act requirements. The Legislature specifically vested authority to administer the Water Quality Act in DEQ, not any previous landowner. § 75-5-211, MCA (“Except as otherwise provided, the department [of environmental quality] is responsible for administration of this chapter.”). Nothing in the Water Quality Act vests authority in a previous landowner or developer to enforce any Water Quality Act requirements, including stormwater discharge requirements. Further, nothing in the Montana Subdivision and Platting Act gives the developer enforcement authority. § 76-4-108, MCA (“If the reviewing authority has reason to believe that

a violation of this part or a rule adopted or an order issued under this part has occurred, the reviewing authority may have written notice and an order served personally or by certified mail on the alleged violator or the alleged violator's agent.”). Copper Ridge and Reflections retained no authority over stormwater discharges from the individual lots.

After complying with the Montana Subdivision and Platting Act, being granted a Subdivision Certificate and relaying the required information to the subsequent landowner, Copper Ridge and Reflections, as the developers, had done everything required of them under the law. Copper Ridge and Reflections, as the developers, have no authority to go beyond those requirements to control stormwater discharges associated with construction activities taking place on land they no longer own. Indeed, to do so would likely constitute trespass and subject Copper Ridge and Reflections to civil liability. *Davis v. Westphal*, 2017 MT. 276, ¶ 15, 389 Mont. 251, 405 P.3d 73 (“Because the legal harm is the interference with another’s right to *exclusive possession of property*, an unauthorized tangible presence on the property of another constitutes a trespass regardless of whether the intrusion caused any other harm.”) (emphasis added). Although not included as a proposed finding, the Proposed FOFCOL acknowledges testimony presented on this very issue:

From the above quoted letter and the testimony at the hearing, it is entirely unclear to the undersigned whether or not BMPs [Best

Management Practices for stormwater control] were in place as of January 2015, were going to be put in place in the spring of 2015, or ever could be put in place based on CR/REF's ownership access.

Proposed FOFCOL, p. 35. Trespass and liability concerns prevent Copper Ridge and Reflections from enforcing any stormwater requirements on land they no longer own.

The Order on Summary Judgment also relies on the fact that Copper Ridge and Reflections signed SWPPPs and NOIs, as *required* by DEQ, *after* the violations were alleged, as proof that Copper Ridge and Reflections were owners or operators. Order on SJ, pp. 2 – 3, ¶¶ 8 – 15. However, Copper Ridge and Reflections submitted (and still maintain) those SWPPPs and NOIs *under protest*. Proposed FOFCOL, p. 26. Surely DEQ cannot mean that documents it requires for compliance, and which are submitted under protest, somehow prove liability for the very violation that is the subject of the enforcement action. Not only is the timing wrong (using a later completed document to prove liability for an earlier violation), but the end result is absurd. If this Board approves this as an acceptable enforcement strategy, then DEQ can merely cite violations as it pleases, *without proof of liability*, in hopes of garnering some documented signature later that would prove liability. The law demands more. *In re Henry Stevenson*, 16 E.A.D. at 158.

None of the facts relied upon in the Order on Summary Judgment support a conclusion that Copper Ridge and Reflections are owners or operators of any individual lots. The preponderance of the evidence cannot, therefore, support any conclusion that Copper Ridge and Reflections discharged stormwater without a permit. At most, DEQ has proven that discharges originated somewhere in the subdivision or in an adjacent upgradient subdivision. Given that the violation at issue here demands that the discharge be tied to some construction activity's "disturbance," and given that there are multiple property owners within and adjacent to each subdivision, DEQ cannot just summarily assign the violation to Copper Ridge and Reflections without affirmatively demonstrating that Copper Ridge and Reflections own the disturbed land where the discharge originated. ARM 17.30.1102(28); § 26-1-402, MCA.

Therefore, given the facts as provided in the Order on Summary Judgment and in the Proposed FOFCOL, the preponderance of the evidence only leads to a conclusion that discharges occurred from construction projects somewhere in the subdivision or in an adjacent upgradient subdivision. There is no evidence, and indeed it is unlikely, that the discharges originated from any of Copper Ridge and Reflections' property. Therefore, Copper Ridge and Reflections cannot be held liable for the discharges.

Similarly, DEQ has failed to prove that Copper Ridge and Reflections “*place[d] or cause[d] to be placed* any wastes where they will cause pollution of any state waters” § 75-5-605(1)(a) (emphasis added). Although the Order on Summary Judgment found that all of the materials observed by DEQ on September 9, 2013 meet “the definition of ‘other wastes’ contained in Mont. Code Ann. § 75-5-103(24),” what’s missing is any proof that Copper Ridge and Reflections “placed or caused” those wastes to be placed. Order, p. 17. The fact that wastes are present in a subdivision is no different than the fact that wastes are present in a municipality, in a parking lot, alongside a county road, on a river bank, or in any other public space. DEQ must do more than identify the developer who established the boundaries of the subdivision in which it finds wastes. The facts presented to this Board are devoid of any proof that Copper Ridge and Reflections handled any wastes, moved any wastes, created any wastes, placed any wastes, or caused any wastes to be placed. To the extent that DEQ seeks to hold Copper Ridge and Reflections responsible for wastes placed by others in conjunction with construction projects on individual lots (which, as explained above is the most likely interpretation of the facts provided), Copper Ridge and Reflections cannot be held responsible for the actions of private landowners over whom they have no control, also as explained above.

If any doubt remains about Copper Ridge's and Reflections' innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.
2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.
3. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.
4. Although DEQ provided evidence of "sediment [on] the sidewalk," "concrete waste washed [...] on to the ground," DEQ provided no evidence or

testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

5. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

7. DEQ acknowledges that sediment has other sources and there is “no way [...] to know where the sediment would have come from.” Hearing Transcript, Vol. 1, 158:1 – 14.

8. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are “not based upon substantial competent evidence” and that no “reasonable mind” could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed

FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 2. § 2-4-621(3), MCA.

2. DEQ Failed to Prove that any Wastes Will Cause Pollution.

Violation 3 was alleged against Copper Ridge and Reflections as a violation of § 75-5-601(1), MCA, which makes it unlawful to:

(a) cause pollution, as defined in 75-5-103, of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters.

§ 75-5-601(1)(a), MCA.

DEQ must prove every element of the violation, including “pollution” which is defined as:

(i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or

(ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

§ 75-5-103(30), MCA.

As noted in the Order on Summary Judgment, DEQ failed to meet its burden:

... to establish “some form of alteration of state waters ‘that exceeds that permitted by Montana water quality standards.’” DEQ has not

provided any evidence of permitted water quality standards at this time. As a result, DEQ has not established pollution under the first prong of the definition.

Order on SJ, p. 18 (*citing* § 75-5-103(30)(i)). DEQ also failed to meet the second prong of the definition of pollution:

While DEQ has established the placement of waste, DEQ has not identified the facts to establish or explain how this waste will create a nuisance or otherwise cause the harm required in the definition of ‘pollution.’

Order on SJ, p. 18.

Nothing has changed. The Proposed FOFCOL includes no proposed findings or conclusions regarding any “alteration of state waters” let alone any alteration that “exceeds that permitted by Montana water quality standards.” § 75-5-103(30)(i), MCA. Nor are there any proposed findings or conclusions regarding a nuisance or harm that meets the definition of pollution.

The Proposed FOFCOL tries to rationalize around the requirement by stating “[w]hen an entity has no permit to discharge storm water, all storm water discharges to a state water that contain waste are necessarily ‘exceeding that permitted.’ ” Proposed FOFCOL, p. 27. But this language omits the operative phrase “... exceeding that permitted by Montana water quality standards” and fails to recognize that a stormwater general permit is not a water quality standard that

has been promulgated by the Board.³ The Proposed FOFCOL's logic seems to be that because there was no permit, there must have been a discharge that exceeded that permitted by Montana water quality standards. But that is the analysis for whether there was a discharge without a permit, which is the completely separate Violation 2 cited by DEQ. *See* § 75-5-605(2)(c), MCA ("it is unlawful to carry on any of the following activities without a current permit from the department ... discharge ... other wastes into any state waters.").

Here, the operative analysis is not whether there was a discharge without a permit, but whether the discharge caused an alteration "that exceeds that permitted by Montana Water Quality Standards." § 75-5-103(30), MCA. "Pollution" is an element that must be proven by a preponderance of the evidence in order for DEQ to meet its burden of proving Violation 3. § 26-1-402, MCA.

The Proposed FOFCOL imputes the analysis for a violation of discharge without a permit into the analysis for a violation of placement of wastes. The two are not the same and, contrary to the Proposed FOFCOL's assertion that "numeric standards for the amount of waste are essentially irrelevant," Montana's water quality standards do matter and must guide any analysis of whether or not

³ The Board is tasked by the Legislature to "formulate and adopt standards of water quality" and has promulgated "[s]pecific surface water quality standards, along with general provisions ... [that] protect the beneficial water uses." (§ 75-5-301(2), MCA.) ARM 17.30.620. None of the proposed findings or conclusions identify which water quality standard is alleged to have been exceeded such that the placement of wastes actually caused or would have caused pollution.

“pollution” was or would be caused by the placement of waste. §§ 75-5-605(1)(a); 75-5-103(30), MCA. The statute requires, as noted in the Order on Summary Judgment, that DEQ prove that the placement of wastes would cause “pollution.” Without such proof, DEQ fails to meet its burden of proving the violation. Because there is no finding of fact that any placement of waste caused any “alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards,” DEQ has not met the burden of proving that the first prong of pollution was met.

Regarding the second prong of pollution, which “requires DEQ to establish that a substance has entered state water that will either create a nuisance or ‘render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife,’ ” again, there are no findings or conclusions in the Proposed FOFCOL establishing that a nuisance was or could have been created or that the waters were or could have been rendered harmful, detrimental or injurious to any use. Order on SJ, p. 18.

In fact, the Proposed FOFCOL notes that there was no evidence on the “volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit.” Proposed FOFCOL, p. 25. That evidentiary void means that DEQ has failed to meet its burden of proving “pollution;” therefore, Copper Ridge and Reflections cannot be found to have

“place[d] or cause[d] to be placed wastes where they would cause pollution.”

§ 75-5-605(1)(a). Violation 3 cannot stand.

The analysis provided to the Board simply equates a violation for discharging without a permit to a violation of placement of wastes where they will cause pollution. Practically speaking, if that rationale stands, then every unpermitted discharge could be charged as both an unpermitted discharge under § 75-5-605(2)(c) and as a placement of wastes where they will cause pollution under § 75-5-605(1)(a). Not only does that prejudice the regulated public by alleviating DEQ of the burden of proving an element of the violation (pollution), it also leads to an unjust result because it exposes the regulated public to duplicative, costly violations.

If any doubt remains about Copper Ridge’s and Reflections’ innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are “not based on competent substantial evidence” and that no “reasonable mind” can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

2. DEQ acknowledges that sediment has other sources and there is “no way [...] to know where the sediment would have come from.” Hearing Transcript, Vol. 1, 158:1 – 14.

3. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

4. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water’s turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are “not based upon substantial competent evidence” and that no “reasonable mind” could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged Violation 3. § 2-4-621(3), MCA.

3. DEQ has Failed to Prove Any Subsequent Days of Violation.

The sole basis for concluding that there were eight days of violation for both Violation 2 and Violation 3 is “NOAA data [that] shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches.” Proposed FOFCOL, p. 12, ¶ 38; p. 24; p. 42, ¶ 19; pp. 43-44, ¶ 27. Nothing in the statute allows DEQ to allege violations based on precipitation events. For Violation 2, the statute is clear – it is “unlawful to ...discharge ... wastes into any state waters.” § 75-5-605(2)(c), MCA. The statute affirmatively requires that a discharge occur in order for there to be a violation. Charging days of violations based on precipitation events rather than actual discharges is unlawful.

For the same reasons, the daily penalties for Violation 3 are wrong. The statute at issue in Violation 3 requires that the placement of wastes “will cause pollution of any state waters.” § 75-5-605(1)(a), MCA. Nothing in the precipitation records demonstrates that pollution will be caused. In fact, the precipitation records do not consider the terrain, the proximity to state waters, the exact location of the precipitation, or the duration and intensity of the precipitation. All of those factors, and more, need to be considered before any logical conclusion can be reached as to when a placement of wastes “*will* cause pollution of state waters.”

If DEQ is allowed to penalize the regulated public based on weather data, how can the regulated public be expected to comply with the law? The regulated public (and likely no one) can accurately forecast the weather. Weather cannot be an element of a violation. In fact, the elements of the violations are clearly spelled out in statute and do not include weather. They include affirmative “discharges” and placement of wastes that “will cause pollution” – neither of which can be proven by looking at a precipitation record. DEQ cannot ignore the statutory elements of the violations, cannot insert different elements into the statutes, and cannot “conform [the statute] to what may be a prevailing practice actually at odds with what the [statutes] clearly and unambiguously require.” *Busch v. Atkinson*, 278 Mont. 478, 483, 925 P.2d 874, 877 (1996); § 1-2-101, MCA.

There is no evidence of a discharge or a placement of wastes that will cause pollution on any of the eight days cited for either Violation 2 or Violation 3. As a matter of law, the daily penalties for these violations cannot stand. Because DEQ has relied on an unlawful method of alleging violations, the Proposed Conclusions of Law No. 19 and No. 27 must be modified to reflect, at most, one day of violation.

Further, because the time period in which those eight days occur (September 23, 2013 and December 23, 2013) is the “timeframe acceptable to DEQ” in which Copper Ridge and Reflections were allowed to complete the

required compliance tasks, DEQ cannot now seek penalties for noncompliance during that timeframe. Proposed FOFCOL, p. 8, ¶¶ 20, 21; § 75-5-617(2), MCA (“*If the person fails to respond to the conditions in the department’s letter, then the department shall take further action.*”). Here, all parties agree that Copper Ridge and Reflections responded appropriately “to the conditions in the departments letters;” therefore, no further enforcement action, including assessment of penalties, may be taken and certainly no penalties may be assessed during the timeframe DEQ provided Copper Ridge and Reflections to complete the compliance tasks.

If any doubt remains about Copper Ridge’s and Reflection’s innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are “not based on competent substantial evidence” and that no “reasonable mind” can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. Although DEQ provided evidence of “sediment in the streets that led to the storm drains,” DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

2. Although DEQ provided evidence of “sediment [on] the sidewalk,” “concrete waste washed [...] on to the ground,” DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

3. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

4. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

5. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

6. DEQ acknowledges that sediment has other sources and there is “no way [...] to know where the sediment would have come from.” Hearing Transcript, Vol. 1, 158:1 – 14.

7. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are “not based upon substantial competent evidence” and that no “reasonable mind” could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged daily violations. § 2-4-621(3), MCA.

4. DEQ Failed to Prove that Violations 2 and 3 Occurred at Each Subdivision.

DEQ maintains that Copper Ridge and Reflections are two separate subdivisions. Proposed FOFCOL, p. 3, ¶ 1. It is physically and legally impossible for the subdivisions to overlap each other. They occupy separate and distinct portions of land and are owned by separate and distinct corporations. Therefore, each violation must be separately established for each subdivision. But DEQ conducted one site inspection and documented alleged violations of stormwater discharging from one combined “construction activity.” Without distinguishing

between the two subdivisions, DEQ issued one violation letter, based on the fact that the subdivisions were “part of a larger common plan of development” (i.e.: one construction activity) such that “one violation letter was adequate to address the violations.” Proposed FOFCOL, p. 7, ¶ 17; p. 5, ¶ 7 (*citing* ARM 17.30.1102(28)).

The phrase “part of a larger common plan of development” is not defined in the rules; rather, it is used to define the term “construction activity” as used in the basis for the alleged violations - “storm water discharge associated with construction activity.” DEQ’s initial citation alleged that the “construction activity” in this case is the “larger common plan of development,” or both subdivisions together. ARM 17.30.1102(28) (“Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.”). It is the “storm water discharge associated with [the larger common plan of development – i.e.: both subdivisions combined as one construction activity]” that DEQ alleged constituted the violation. Because DEQ cited the violations as occurring due to one combined construction activity, at most only one penalty may be assessed.

Nothing in the proposed findings distinguishes the violations as between the two separate subdivisions. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26.

After the initial Violation Letter, DEQ provided only a statement, with no supporting facts or analysis, that the violations were distinguishable. Proposed FOFCOL, p. 8, ¶ 19. Indeed, the facts alleged to constitute the violations were never separated or identified by subdivision. *See* Proposed FOFCOL, p. 6, ¶¶ 12, 13; p. 9, ¶ 26. For the penalty calculations, each of the three violations is analyzed without regard for, and even without reference to, the separate subdivisions. But then the assessment is just summarily multiplied by two and charged against both subdivisions. Proposed FOFCOL, pp. 22-38; p. 41, ¶ 13; pp. 42-43, ¶ 21; p. 44; ¶ 29.

DEQ cannot have it both ways. They cannot investigate, document, and send a notice letter for just one set of violations when it is convenient for them and then, without explanation and without separating the facts and tying each fact to a specific allegation against a specific subdivision, just double everything, including the penalties. Because DEQ initiated this action with one set of facts alleging violations against one “common plan of development” and because DEQ has never distinguished the facts as they apply to each subdivision, DEQ may not simply double every penalty for every violation. If any penalty is assessed, it should only be a single penalty amount of each violation. The Proposed Conclusions of Law Nos. 13, 21, 29, and 36 must be revised to reflect, at most, a singular penalty.

If any doubt remains about Copper Ridge's and Reflection's innocence, this Board should review the complete record of this contested case. Such a review will reveal that the proposed findings are "not based on competent substantial evidence" and that no "reasonable mind" can accept them as adequate to support either the alleged violations or the assessed penalties. The following findings, which were proposed by Copper Ridge and Reflections, contradict the proposed findings before this Board and provide important context, proving that DEQ has failed to, and indeed cannot, prove that Copper Ridge and Reflections violated the law:

1. On November 8, 2013, DEQ issued a "617 Letter of Violation – Clarification" to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties' Joint Stipulated Facts, ¶ 9.

2. Although DEQ provided evidence of "sediment in the streets that led to the storm drains," DEQ provided no evidence or testimony of an *observed*

discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

3. Although DEQ provided evidence of “sediment [on] the sidewalk,” “concrete waste washed [...] on to the ground,” DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

4. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are “not based upon substantial competent evidence” and that no “reasonable mind” could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections of the alleged violations. § 2-4-621(3), MCA.

C. Even if the Violations Stand, the Penalty Assessments are Wrong.

The notice requirements and statutorily-required penalty factors dictate that, based on the findings and conclusions in the Proposed FOFCOL, no penalties can be assessed for any of the violations.

1. Section 75-5-617(2) and ARM 17.30.2003(5) Preclude Assessment of Penalties in this Case.

As described in the Proposed FOFCOL, there is “discomfort regarding DEQ’s correspondence and ARM 17.30.2003” which “created substantial, justifiable confusion.” Proposed FOFCOL, p. 21, fn 4.

[A]ny recipient could have construed the letters as intended to be “notice letters” within the meaning of subsection (2) [of ARM 17.30.2003]. There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence, as contemplated by subsection (5) [of ARM 17.30.2003]. CR/REF’s frustration is understandable – it responded to and complied with all of DEQ’s demands in the correspondence, only to receive an AO three months later. ... It does not seem fair that DEQ should, in effect, be rewarded for its own failures to write (what it intended to be) a “notice letter.”

Id.

It is clear that, had the Proposed FOFCOL concluded that ARM 17.30.2003(5) applied, it would preclude DEQ from seeking penalties for the remaining violations. Both § 75-5-617 and ARM 17.30.2003(5) **do** apply to this case and preclude DEQ from seeking penalties for the remaining violations.

There are two types of notices – notice under § 75-5-611 and notice under § 75-5-617. As explained in the Order on Summary Judgment, § 75-5-617 “provides that whenever DEQ finds a person in violation ... the department shall initiate an enforcement response” and that “enforcement response includes administrative or judicial penalties under Mont. Code Ann. § 75-5-611,” which has

separate, additional notice provisions. Order on SJ, p. 6 (*citing* § 75-5-617(1)(d), MCA). In effect, § 75-5-617 authorizes an enforcement response and § 75-5-611 explains that enforcement response. Compliance with § 75-5-611 does not absolve DEQ of the requirements of § 75-5-617. In fact, DEQ must comply with § 75-5-617 before proceeding to § 75-5-611.

Also as correctly noted in the Order on Summary Judgment, § 75-5-617 requires that DEQ may only proceed to one of the allowable enforcement responses if it satisfies specific notice requirements **and** “[i]f the person fails to respond to the conditions in the department’s letter.” Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA); *see also* ARM 17.30.2003(5).

“There is also no dispute (and DEQ admitted) that CR/REF adequately and timely responded to all of this correspondence.” Copper Ridge and Reflections did “respond to the conditions in the department’s letter;” therefore, “DEQ may not bring an administrative proceeding for penalties.” Proposed FOFCOL, p. 8, ¶ 20; p. 10, ¶ 29; Order on SJ, p. 6 (*citing* § 75-5-617(2), MCA).

The Proposed FOFCOL alleges that Copper Ridge and Reflections cannot “assert both that *none* of DEQ’s correspondence constituted a ‘notice letter’ ... and that CR/REF adequately responded to *all* the ‘notice letters.’ ” Proposed FOFCOL, p. 21, fn. 4 (emphasis in original). But keep in mind that there are two statutes governing different types of notice - §§ 75-5-611 and 75-5-617. Copper

Ridge and Reflections proposed that “[b]oth the September 23, 2013 and the November 8, 2013 letters were issued pursuant to § 75-5-617 and the rules promulgated pursuant to that statute.” Copper Ridge and Reflections’ Proposed FOFCOL, p. 4, FOF ¶ 4; p. 13, COL ¶ 1. Copper Ridge and Reflections do not argue that none of the notice provisions were met, only that, as agreed in the Order on Summary Judgment, the notice provisions of § 75-5-611 were not met.

DEQ’s notices constituted notice letters under § 75-5-617 and ARM 17.30.2003(1), and Copper Ridge and Reflections adequately responded to those notice letters. Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶29. Therefore, § 75-5-617(2) and ARM 17-30-2003(5) prohibit DEQ from seeking administrative penalties for those violations. Section 75-5-611 was never invoked in this case and DEQ had no authority to issue any Administrative Compliance and Penalty Order.

Because the previous Hearing Examiner concluded that the provisions of § 75-5-617(2) apply and because all parties agree that “Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the [notice letters],” no administrative penalties may be sought in this case. § 75-5-617(2), MCA; ARM 17.30.2003(5). Proposed Conclusions of Law Nos. 13, 21, 29, and 36 are void and the remaining Proposed Conclusion of Law regarding penalties, including Nos. 7 through 10, 14 through 19, 22 through 27, and 30 through 35, are unnecessary.

2. Additionally, ARM 17.30.2003(7) Precludes Assessment of Penalties for Violations 3 and 4.

DEQ is only allowed to pursue an administrative penalty for violations that are either “(i) a class I violation as described in ARM 17.30.2001(1); or (ii) a violation of major extent and gravity as described in ARM 17.4.303.” Order on SJ, pp. 11-12 (*citing* ARM 17.30.2003(7)).

The previous Order on Summary Judgment did not rule that Violation 3 was a Class I violation. Order on SJ, pp. 12-13. Indeed, it cannot be a Class I violation because ARM 17.30.2001(2)(c) which clearly classes “placement of wastes in a location that will cause pollution of state waters” as a *Class II* violation. Further, because the current Proposed FOFCOL concludes that a proper analysis of Violation 3 reveals that it is only of “minor extent,” Violation 3 does not meet the 17.30.2003(7) criteria for assessing a penalty without proper notice under § 75-5-611. Proposed FOFCOL, p. 30. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 3 no longer meets the criteria of ARM 17.30.2003(7), a penalty may not be assessed. This is another reason why the Proposed Conclusion of Law No. 21 is void and Proposed Conclusion of Law Nos. 22 through 27 are unnecessary.

Violation 4 was characterized in the Order on Summary Judgment as a “viola[tion] [of] a permit compliance plan or schedule” which meets the criteria for a Class I violation. Order on SJ, p. 13; Admin. R. Mont. 17.30.2001(1)(d). However, as testimony from DEQ revealed, Violation 4 never alleged a violation of a permit compliance plan or schedule. Proposed FOFCOL, p. 10, ¶ 31. Therefore, the sole basis for asserting that Violation 4 was a Class I violation was erroneous.

Because violation 4 is no longer a Class I violation and because the Proposed FOFCOL finds that it is not of major extent and gravity, it no longer meets the criteria in ARM 17.30.2003(7) for assessment of a penalty without the proper notice under § 75-5-611. The Order on Summary Judgment held, and the Proposed FOFCOL has not disturbed the holding, that there was no adequate notice under § 75-5-611. Because there was insufficient notice under § 75-5-611 and because Violation 4 no longer meets the criteria of ARM 17.30.2003(7) a penalty may not be assessed.

3. Other Matters as Justice May Require Dictate that the Penalties for Violations 2 and 3 be Reduced to Zero.

When determining an appropriate penalty amount, DEQ “*shall* take into account ... other matters that justice may require.” § 75-1-1001(1)(g) (emphasis added). However, the Proposed FOFCOL only mentions this required penalty factor in terms of calculating the number of days of violation, which is a separate

penalty consideration pursuant to ARM 17.4.305. Proposed FOFCOL, pp. 42, 44, ¶¶ 19, 27. Because the Proposed FOFCOL fails to consider “other matters that justice may require,” as it must under the statute, “the proceeding on which the findings were based did not comply with the essential requirements of law.” § 2-4-621(3).

The Proposed FOFCOL fails to make any findings with respect to “other matters that justice may require.” The Proposed FOFCOL doesn’t even offer a finding that there are *no* “other matters that justice may require.” Even if it had, that finding would not be supported by “competent substantial evidence” in light of the following evidence to the contrary:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.
2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.
3. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to “catch” Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ

prefers enforcement during a storm event when a discharge is likely and will provide a “stronger case.” Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

4. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

5. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

6. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. “The burst of rain happened so quickly”. Within 45 minutes “an unofficial total of 2.10 inches fell just west of [Billings]” causing flash flooding. “Saturday’s total was five times the total month-to-date rainfall average.” Ex. 14, pp. 2-3.

7. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

In light of the above findings, this Board should review the entire record, determine that the proposed findings are “not based upon substantial competent evidence” and that no “reasonable mind” could accept them as adequate to support either the alleged violations or assessed penalties. Therefore, the Proposed FOFCOL should be rejected or modified to exonerate Copper Ridge and Reflections. § 2-3-261(3), MCA.

Even using the proposed findings as presented, the penalties cannot stand. Even though the City of Billings specifically requested that DEQ address storm water compliance issues at Copper Ridge and even though DEQ told the City of Billings that Copper Ridge did not have permit coverage for the storm water discharges, DEQ delayed for nearly six months, and purposely waited until after a “significant storm event” had resulted in alleged discharges to complete an inspection. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 8-11. DEQ also knew that Copper Ridge had previously obtained storm water permit coverage. *Id.*, pp. 4-5, ¶

5. In fact, DEQ had terminated that coverage without noting any violations. *Id.*, p. 5, ¶ 6; p. 22. So DEQ had no reason to think that Copper Ridge and Reflections were unwilling or unable to obtain permit coverage if they had been asked to do so prior to the September 2013 storm. It is not fair to penalize Copper Ridge and Reflections for discharges that could have been avoided if DEQ had responded appropriately and timely to the City's concerns.

It also is not fair for DEQ to wait for six months, until a "significant storm event" that was sure to cause problems occurred before conducting the inspection and requesting that Copper Ridge and Reflections obtain permit coverage. DEQ could have easily contacted Copper Ridge and Reflections immediately after the City first asked them to do so in March 2013 but chose not to. There is no reason to believe that, had DEQ notified Copper Ridge and Reflections of the need for a permit in March of 2013, as first requested by the City of Billings, that Copper Ridge and Reflections would not have had appropriate permit coverage in place six months later when the "significant storm event" occurred. Copper Ridge and Reflections' previous successful permit coverage and their timely permit submission in response to DEQ's requests suggests that it is more likely than not that Copper Ridge and Reflections would have promptly responded to DEQ's request for a permit application, had such a request been timely made.

Instead, DEQ waited until a discharge was certain, and then inspected the subdivision. For all its posturing about the importance of protecting state waters, DEQ itself failed to protect state waters by failing to timely respond to the City's call for an inspection and by specifically waiting until *after* a "significant storm event" to inform the regulated public of the need for a permit. As the Proposed FOFCOL acknowledges:

CR/REF at least had a non-frivolous, good faith legal basis to believe that they were not owner/operators requiring permit coverage. Based on the circumstances here, it is not fair [i]n this instance to charge CR/REF with violations for discharges without a permit before DEQ told them affirmatively that they needed to have permit coverage.

Proposed FOFCOL, p. 24.

Those circumstances are significant enough to be documented in the Proposed FOFCOL, yet they were not considered in terms of the penalty calculation. Proposed FOFCOL, p. 4, ¶ 4; pp. 5-6, ¶¶ 6-11; p. 22. The Proposed FOFCOL notes, at its very opening:

DEQ's performance – including its inspections, record-keeping, notices communication, enforcement decisions, follow up, and the evidence, testimony, and explanations provided at hearing – were difficult to understand and in some instances inadequate.

Proposed FOFCOL, p. 3. Those documented issues are "other matters as justice may require" and demand that the penalty for Violations 2 and 3 be reduced down to zero. The regulated public should not pay the price for DEQ's delay and

inaction in the face of a potential discharge to state waters. The Proposed Conclusions of Law ¶¶ 13 and 21 must be modified to reflect zero penalty.

4. All of the Penalties Should be Reduced for Good Faith and Cooperation.

The Proposed FOFCOL asserts that Copper Ridge and Reflections “could have sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage [i.e.: before the September 9, 2013 inspection that noted a violation] and done more to get the permit faster after learning DEQ felt it was needed.” Apparently, those are reasons why no decrease of the base penalty is warranted for good faith and cooperation pursuant to Admin. R. Mont. 17.4.304(3). But the Proposed FOFCOL refers to none of the good faith and cooperation criteria that must be included in DEQ’s consideration of this penalty factor:

- (a) the violator’s promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;
- (b) the extent of the violator’s voluntary and full disclosure of the facts related to the violation; and
- (c) the extent of the violator’s assistance in the department’s investigation and analysis of the violation.

ARM 17.4.304(3).

All of those criteria are forward looking, *after* the violation has occurred. Therefore, it is improper to discount the good faith and cooperation of Copper Ridge and Reflections based on what they did or did not do *before* the violation was issued. Indeed, the assertion that Copper Ridge and Reflections “could have

sought guidance from DEQ sooner on whether they needed (or DEQ thought they needed) permit coverage” contradicts an earlier statement that “it is clear that CR/REF at least had a non-frivolous, good faith legal basis to believe that that they were not owner/operators requiring permit coverage” at least until “DEQ told CR/REF on September 23, 2013 that they needed permit coverage.” Proposed FOCOL, p. 24. Because the rule requires consideration of actions that occur *after* the violation has been alleged, not before, and because the Proposed FOFCOL acknowledges that prior to DEQ alleging a violation against Copper Ridge and Reflections, that Copper Ridge and Reflections had good reason to believe that they did not require permit coverage, the assertion that no discount should be given for good faith and cooperation should be voided.

Further, there is no evidence anywhere in the record that Copper Ridge and Reflections “could have sought guidance from DEQ sooner” or that they could have done anything “more to get the permit faster,” as asserted in the Proposed FOFCOL. These phrases, which are relied upon for the mistaken premise that Copper Ridge and Reflections did not act in good faith and did not cooperate, are not actual proposed findings; therefore, the Board cannot be certain that they are based on “competent substantial evidence” and cannot rely upon them for any conclusion.

DEQ “*shall* take into account ...the [alleged] violator’s good faith and cooperation.” § 75-1-1001, MCA. From the Findings of Fact that are proposed, it is clear that:

- Copper Ridge and Reflections had appropriate permit coverage for all of *their* work, as the developers of the subdivision, including “construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements.” Proposed FOFCOL, pp. 4 – 5, ¶ 5.
- DEQ terminated that coverage without notifying Copper Ridge and Reflections. Proposed FOFCOL, p. 5, ¶ 6.
- “Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective actions” required in each of the violation letters received from DEQ. Proposed FOFCOL, pp. 8, 10, ¶¶ 20, 29.

In fact, the permitting process included *legitimate* (as acknowledged in the Proposed FOFCOL, p. 24) confusion and necessary clarification regarding ownership and permitting needs. Also, the permitting process took place in the winter, when discharges were unlikely and installation of BMPs was hampered by weather. Even so, Copper Ridge and Reflections were able to come into compliance by December 23, 2013 – just three months after DEQ’s violation letter

was sent to them. Nothing in the evidence indicates that this timeframe was unreasonable or that Copper Ridge and Reflections could have done anything “more to get the permit faster.” The blatant failure to consider any good faith and cooperation proves that the base penalty was not properly adjusted.

Indeed, the record shows a consistent on-going dialogue between the parties, with Copper Ridge and Reflections taking the appropriate corrective actions “[w]ithin a timeframe acceptable to DEQ.” Proposed FOCOL, p. 8, ¶ 20; p. 10, ¶ 29. Further, the record shows that Copper Ridge and Reflections had made “an effort to control runoff” including installation of “a berm around the site and sand bags” as well as “straw bales on the perimeter.” Proposed FOCOL, p. 9, ¶ 24. Because the conclusion that no adjustment was warranted for “good faith and cooperation” was not based on any facts and is contradicted even within the Proposed FOFCOL, the proposed conclusions regarding the penalties should be modified to include a 10-percent reduction, in consideration of Copper Ridge and Reflections’ good faith and cooperation.

5. All of the Penalties Should be Reduced in Consideration of Amounts Voluntarily Expended.

The Proposed FOFCOL asserts that “there was no evidence of amounts CR/REF expended beyond what was required to come into compliance.” Proposed FOFCOL, p. 22. This was not, but likely should have been, a proposed finding because without such a finding, this Board cannot appropriately determine, as they

must, whether there was an “amount voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation.” § 75-1-1001, MCA (requiring that DEQ “shall take into account the following factors...”).

Considering the Proposed FOFCOL’s statement above (“no evidence of amounts CR/REF expended beyond what was required to come into compliance”) as a proposed finding, this Board can easily determine that it is not supported by “competent substantial evidence.” § 2-4-621(3), MCA. The only citation provided in the Proposed FOFCOL is to DEQ’s recitation of the penalty factors, not to any relevant facts of this case. The record is clear:

When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least \$18,000 for “storm water management erosion control.”

Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

What the agency failed to acknowledge is that Copper Ridge and Reflections did not have to hire a professional consultant, they could have done the work internally. They could have had someone less qualified, and less expensive, do the work. Instead, they hired a professional consultant to ensure that the work was done correctly and completely. Hiring an independent third-party professional

gives the agency some assurances and confidence that the regulated entity will come into compliance. Therefore, it is wholly appropriate for DEQ to acknowledge this extra effort and expense. There is no requirement that exact amounts be expended in order to qualify for consideration of the 10-percent decrease in the base penalty allowed by Admin. R. Mont. 17.4.304(4).

Here, the agency didn't even consider the evidence in front of them – that Copper Ridge and Reflections hired a professional consultant to prepare the permit package and ensure compliance. The Proposed FOFCOL fails to acknowledge that the NOIs and SWPPPs were submitted by Mr. Marshall Phil, P.E., Senior Engineer with Blue Line Engineering. Proposed FOFCOL, p. 21. Nothing in the rules or statutes requires Copper Ridge and Reflections to hire a professional consultant. The fact that Copper Ridge and Reflections hired Blue Line Engineering, qualifies as “amounts voluntarily expended” to be considered under the rule.

Because the Proposed FOFCOL's conclusion regarding a required penalty factor is not based on any fact that is supported by competent substantial evidence, the conclusion regarding the penalty must be modified. § 2-4-621(3), MCA.

D. The Findings Presented to the Board are not Based on “Competent Substantial Evidence.”

The proposed findings are missing several key facts that illustrate the egregiousness of DEQ's behavior in this case and are essential to reaching the proper decision. Although this problem is alluded to in the Introduction to the

Proposed FOFCOL, the following facts are not, but should be, included in any Order issued by this Board:

1. Copper Ridge and Reflections do not construct homes in the Subdivisions. Hearing Transcript, Vol. 2, 59:22 – 60:7, 61:4 – 7, 66:17 – 20.
2. At the time of the alleged violations, Copper Ridge and Reflections did not own the stormwater retention ponds, streets or utilities in the Subdivisions. Hearing Transcript, Vol. 2 65:20 – 66:6.
3. On November 8, 2013, DEQ issued a “617 Letter of Violation – Clarification” to Copper Ridge Development Corporation. Although the letter indicated that DEQ intended to pursue separate formal enforcement actions against each subdivision, neither that letter nor the September 23, 2013 letter was addressed to REF, the owner of the Reflections at Copper Ridge subdivision. The November 8, 2013 letter provided the same information, cited the same violations, and required the same compliance and corrective actions as did the September 23, 2013 letter, but moved the compliance deadline to December 15, 2013. Ex. 17; The Parties’ Joint Stipulated Facts, ¶ 9.
4. Although DEQ provided evidence of “sediment in the streets that led to the storm drains,” DEQ provided no evidence or testimony of an *observed* discharge from the Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 91:25 – 92:17.

5. Although DEQ provided evidence of “sediment [on] the sidewalk,” “concrete waste washed [...] on to the ground,” DEQ provided no evidence or testimony of an *observed* discharge from the Reflections at Copper Ridge subdivision into state waters. Hearing Transcript, Vol. 1, 73:10 – 19; 74:1 – 6; 74:14 – 20; 74:24 – 75:8; 173:16 – 20.

6. DEQ observed Copper Ridge and Reflections controlling sediment and did not observe placement of waste or discharges on any day after or before September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

7. Although DEQ was aware of potential issues at the Subdivisions and other subdivisions in that area as early as March 2013, an inspection was not performed until September 2013, after a sudden and disastrous storm, in order to “catch” Copper Ridge and Reflections. Enforcement of unpermitted construction activity, without a potential discharge to state waters, is not a priority and DEQ prefers enforcement during a storm event when a discharge is likely and will provide a “stronger case.” Hearing Transcript, Vol. 1, 50:25 – 51:6; 191:4 – 193:17; 200:25 – 201:15; 142:24 – 143:6; 49:16 – 50:6; Ex. 14.

8. When calculating the penalties, DEQ did not consider that the alleged discharge occurred only during a significant storm event that also overwhelmed developed areas outside the Subdivisions with sediment, or that the alleged discharges were to an irrigation ditch that naturally carries high levels of sediment.

Exs. 9, 10, 14; Hearing Transcript, Vol. 1, 143:19 – 23, 146:14 – 147:2, 242:12 – 243:6; Vol. 2, 92:5 – 11.

9. There are no allegations of harm or threats of harm to human health or that the discharge killed any fish, birds or other animals. Hearing Transcript, Vol. 1, 241:17 – 242:11.

10. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not know and did not consider the lack of control that Copper Ridge and Reflections had over the homebuilding construction activities within the Subdivisions or the lack of control that Copper Ridge and Reflections had over the private property owners in the Subdivisions. Hearing Transcript, Vol. 1, 251:17 – 252:12; Vol. 2, 73:12 – 20, 80:3 – 81:18; Vol. 2, 90:1 – 15, 110:1 – 12.

11. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider that the occurrence and magnitude of the September 2013 storm was not foreseeable. Exs. 9, 10. “The burst of rain happened so quickly”. Within 45 minutes “an unofficial total of 2.10 inches fell just west of [Billings]” causing flash flooding. “Saturday’s total was five times the total month-to-date rainfall average.” Ex. 14, pp. 2-3.

12. When considering the circumstances of the alleged violations as they apply to the penalty calculation, DEQ did not consider the stormwater design of

the Subdivisions, or that Copper Ridge and Reflections had hired professional outside consultants to ensure compliance and had required contractors to obtain discharge permits and employ BMPs. Hearing Transcript, Vol. 1, 253:5 -22; Vol. 2, 8 – 16, 103:23 – 104:23; Exs. 9, 10, G.

13. When calculating the penalties, DEQ did not consider amounts voluntarily expended by Copper Ridge and Reflections to hire professional outside consultants for permit compliance and administration. Landy Leep testified that Copper Ridge and Reflections hired a professional consultant and have paid at least \$18,000 for “storm water management erosion control.” Hearing Transcript, Vol. 1, 258:11 –16; Vol. 2, 8 – 16; Vol. 2, 72:8 – 16; 113:18 – 114:4; Exs. 9, 10, G.

14. When calculating the penalties, DEQ calculated the number days based only on weather data collected in 24-hour increments. Any 24-hour period when a quarter-inch or more of rain was measured by the weather station was considered a day of violation regardless of whether or not a discharge actually occurred. Hearing Transcript, Vol. 1, 224:13 – 25, 256:23 – 257:25.

15. When calculating the penalties, DEQ calculated the number days without considering that no placement of waste or discharges were observed on any day before or after September 9, 2013. Hearing Transcript, Vol. 1, 167:12 – 15; 168:15 – 169:20.

16. DEQ acknowledges that sediment has other sources and there is “no way [...] to know where the sediment would have come from.” Hearing Transcript, Vol. 1, 158:1 – 14.

17. DEQ has not observed and has no evidence of anyone placing, or causing to be placed, waste anywhere in the Subdivisions. Hearing Transcript, Vol. 1, 159:6 – 11; 162:25 – 163:7; 164:3 – 10, 261:16 – 19.

18. DEQ did not observe or take water quality measurements of Cove Ditch and has no evidence of alterations of the water’s turbidity, taste or color. Nor does DEQ have any evidence of floating debris. Hearing Transcript, Vol. 1, 175:3 – 176:4; 200:21 – 24.

19. After submitting the required NOIs and SWPPPs and completing the required corrective action, Copper Ridge and Reflections asked for verification that they were no longer in violation. DEQ responded that it did not know. DEQ asserted only that violations would be assessed at a future compliance evaluation inspection. Hearing Transcript, Vol. 1, 186:8 – 187:12; Ex. U.

20. DEQ then found and cited violations for deficiencies in the NOIs and SWPPPs, including documentation failures that could have been spotted and addressed if DEQ had provided the assistance Copper Ridge and Reflections requested earlier. The deficiencies included failure to document inspections, failure to have signed SWPPPs available, and failure to maintain SWPPPs that

describe the construction activity, implementation schedule, and relationship between phases of construction and BMPs. Hearing Transcript, Vol. 1, 100:11 – 104:11; Ex. 7.

21. DEQ acknowledged that SWPPPs for each of the Subdivisions were “signed and certified by Landy Leep” and were received at the Department on December 23, 2013. Nonetheless, DEQ cited Copper Ridge and Reflections for “[f]ailure to retain and make available [...]” the latest signed SWPPPs and have assessed penalties for that alleged violation. Hearing Transcript, Vol. 1, 94:1 – 9, 95:9 – 15, 97:21 – 98:2; Vol. 2, 43:6 – 25; Exs. 3, 4, 5, 9, 10.


22. None of the permit violations alleged in Violation 4 posed a threat to human health or to the environment and the majority of issues noted are “paperwork issue[s].” Yet, DEQ characterized the nature of the violations as having the potential to harm human health and the environment. Hearing Transcript, Vol. 1, 264:20 – 22, 266:3 – 17; Exs. 9, 10.

A review of the record will reveal that the above findings contradict and provide important context for this contested case. Without the above facts, the Proposed FOFCOL cannot be said to be “based on competent substantial evidence.” Therefore, the Proposed FOFCOL should be modified to include the above findings.

V. CONCLUSION

DEQ has failed to carry its burden of proof in this enforcement action. The proposed findings do not support the alleged violations or the assessed penalties. There simply is no proof that Copper Ridge and Reflections discharged anything, that they placed wastes or that even if they did place wastes, that those wastes caused or would cause pollution. DEQ must prove every element of every violation in accordance with the Water Quality Act. They have failed to prove that Copper Ridge and Reflections did anything wrong, have failed to prove that discharges occurred, that any pollution occurred or was even possible, and that any of the multiple days of violation alleged actually occurred. Further, DEQ failed to comply with statutory notice provisions and failed to consider statutorily required penalty factors. Therefore, this Board should modify the Proposed FOFCOL and void DEQ's Administrative Compliance and Penalty Order in its entirety.

DATED this 17th day of September, 2018.

A handwritten signature in black ink, reading "Victoria A. Marquis", is written over a horizontal line.

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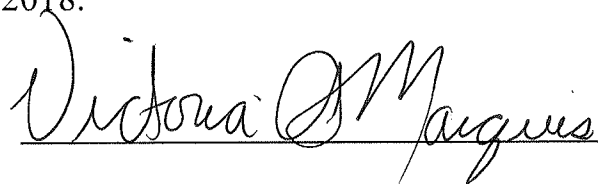
ATTORNEYS FOR REFLECTIONS AT
COPPER RIDGE, LLC AND COPPER
RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

Lindsay Ford (Original) Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue PO Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov	<input checked="" type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Sarah Clerget Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue PO Box 201440 Helena, MT 59620-1440 sclerget@mt.gov	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner ASolem@mt.gov	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue PO Box 200901 Helena, Montana 59601-0901 kbowers@mt.gov	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery

DATED this 17th day of September, 2018.



10/31/18 at 6:02 PM

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
 OF THE STATE OF MONTANA

)	Case Nos. BER 2015-01 WQ
IN THE MATTER OF:)	
VIOLATIONS OF THE)	
MONTANA WATER QUALITY)	
ACT BY REFLECTIONS AT)	
COPPER RIDGE, LLC AT)	
REFLECTIONS AT COPPER)	
RIDGE SUBDIVISION,)	
BILLINGS, YELLOWSTONE)	
COUNTY, MONTANA; AND)	
)	
BY COPPER RIDGE	)	BER 2015-02 WQ
DEVELOPMENT)	
CORPORATION AT COPPER)	
RIDGE SUBDIVISION,)	
BILLINGS, YELLOWSTONE)	
COUNTY, MONTANA)	
(MTR105376 AND MTR105377))	
(FID 2288 AND 2289) [DOCKET)	
NO. WQ-15-07 AND WQ-15-08].)	
)	

**DEQ'S RESPONSE TO EXCEPTIONS TO HEARING EXAMINER'S
 ORDER ON SUMMARY JUDGMENT AND PROPOSED FINDINGS
 OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY
 COPPER RIDGE DEVELOPMENT CORPORATION AND
 REFLECTIONS AT COPPER RIDGE, LLC**

The Montana Department of Environmental Quality (“DEQ”), by and through undersigned counsel, hereby responds to Reflections at Copper Ridge, LLC (“REF”) and Copper Ridge Development Corporation (“CR”) Exceptions to Hearing Examiner’s Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law in case numbers BER 2015-01 WQ and BER 2015-02 WQ (“CR and REF Exceptions”).

I. Introduction

Pursuant to § 75-5-611(4), Montana Code Annotated (MCA), REF and CR appealed the Administrative Compliance and Penalty Orders (Administrative Orders) issued by DEQ on March 27, 2015, for violations of the Montana Water Quality Act (WQA), § 75-5-101, MCA *et seq* at Reflections at Copper Ridge subdivision (BER 2015-01 WQ) and at Copper Ridge subdivision (BER 2015-02 WQ). The Administrative Orders alleged four violations under the Montana Water Quality Act and administrative rules adopted thereunder and assessed administrative penalties pursuant to the § 75-1-1001, MCA, Administrative Rules of Montana (ARM) Title 17, Chapter 4, subchapter 3; and §§ 75-5-601 through 75-5-641, MCA.

Pursuant to the parties’ cross motions for summary judgment, the Hearing Examiner issued Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ on August 1, 2017 (Orders on Summary Judgment), concluding:

- a. CR and REF motions for summary judgment are granted regarding their argument that DEQ cannot seek penalties for conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions (Violation 1) and DEQ's motions for summary judgment are denied regarding Violation 1. The Hearing Examiner found that DEQ did not meet the notice requirements § 75-5-611(1)(a) – (e) to provide CR and REF notice of violation of Violation 1 and, as a result, DEQ may not seek an administrative penalty for alleged violation of ARM 17.30.1105;
- b. The hearing examiner determined that CR and REF violated § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit (Violation 2). DEQ's motions for summary judgment are granted regarding Violation 2;
- c. The hearing examiner determined that CR and REF violated § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR100000 (Violation 4). DEQ's motions for summary judgment are granted regarding Violation 4; and
- d. The Hearing Examiner found there are material facts in dispute as to whether CR and REF placed waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA (Violation 3). DEQ's motions for summary judgment are denied regarding Violation 3.

The Orders on Summary Judgment are attached to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law (FOFCOL) submitted to the Board of Environmental Review (BER) on July 16, 2018. The Orders on Summary Judgment also determined that CR and REF are owners or operators based, in part, on findings that CR and REF were the original owners and developers of all land in the subdivisions and initiated construction activities

that included clearing, grading, excavation, stockpiling earthen materials, and placement of and removal of earthen materials resulting in land disturbances at each subdivision of equal to or greater than one acre. *See* Order on Summary Judgment entered in BER 2015-01 WQ on page 14; and Order on Summary Judgment entered in BER 2015-02 WQ on page 14.

February 26 through February 28, 2018, a consolidated case hearing to determine the remaining issues, after the Orders on Summary Judgment, in BER 2015-01 WQ and BER 2015-02 WQ was held before the BER's Hearing Examiner. The two remaining issues after the Orders on Summary Judgment are: 1) the liability of CR and REF for Violation 3 (placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA; and 2) the appropriate corrective actions and administrative penalties for Violation 2, 3, and 4 set forth in the Administrative Orders. CR and REF, through counsel, have filed exceptions to the Hearing Examiner's Proposed FOFCOL for BER's consideration in determining its final Order in Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ. CR and REF's Exceptions fall into the following categories:

1. The Hearing Examiner incorrectly placed the burden of proof on CR and REF to present evidence demonstrating by a preponderance of

evidence that DEQ's Administrative Orders issued against CR and REF violated the law.

2. The Hearing Examiner should have determined that DEQ has not proven, by a preponderance of evidence, the occurrence of Violations 2, 3, and 4 alleged in DEQ's Administrative Orders issued against CR and REF.

3. The Hearing Examiner should have adjusted the administrative penalties assessed in the Administrative Orders to assess zero dollars against CR and REF.

DEQ submits the following responses to CR and REF's Exceptions and requests that BER reject the Exceptions and arguments raised by CR and REF and adopt the Hearing Examiner's proposed FOFCOL.

II. The Hearing Examiner Applied the Correct Burden and Standard of Proof (Proposed FOFCOL pages 14 - 18. CR and REF Exceptions to Proposed FOFCOL pages: 1, 7 – 14).

The Hearing Examiner appropriately relied on the Montana Supreme Court's holding in *MEIC v. DEQ*, applied statutory rules of evidence to this contested case hearing, and determined "the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side; in addition a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." *MEIC v. DEQ*, 2005 MT

96, ¶¶ 13 – 14; 326 Mont. 502, 506-507; 112 P.3d 964, 966-967. CR and REF misinterpret the Montana Supreme Court’s holding in *MEIC v. DEQ*, which involved MEIC’s request for a contested case hearing in its challenge of an air quality permit issued by DEQ to a developer proposing to build a coal-fired power plant in a Class I Area. Class I Areas are designated for special protections under the federal Clean Air Act. 42 USC § 7491. In the MEIC case, as in CR and REF’s appeal of DEQ’s Administrative Orders, if no challenge had been made, DEQ’s administrative decision would stand. MEIC, as the party seeking relief through overturning DEQ’s permitting decision, had the burden of presenting evidence that DEQ’s issuance of the air quality permit violated the law. In the case now before the Board, CR and REF have the burden to present evidence that DEQ’s issuance of AOs against CR and REF are legally insufficient and should be void. *MEIC v. DEQ*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967 (interpreting §§ 26-1-401 and 402, MCA). *MEIC v. DEQ* stands for the proposition that the party requesting relief from an agency decision bears the burden of producing evidence in support of its claims. *Id.*

CR and REF argue the Montana Supreme Court’s holding in *MEIC v. DEQ* requires the claimant in an administrative case, alleging a violation of law, to bear the burden of proof. CR and REF argue MEIC bore the burden

of proof in its challenge of DEQ's air quality permit because it was alleging DEQ violated the law in issuing permit. In the case presently before the BER, CR and REF argue, because DEQ is alleging that CR and REF violated the WQA by failing to conduct construction-related activities in accordance with storm water requirements, DEQ bears the burden of proof. CR and REF's argument is contrary to standard civil process in which the party asserting a claim bears the burden of proof. Here, CR and REF claim to be adversely affected by DEQ's administrative enforcement decision and request relief from the Administrative Orders. CR and REF bear the burden of proof to demonstrate by a preponderance of evidence that they are entitled to the requested relief, the alleged violations did not occur, and the Administrative Orders should be declared void. § 75-5-611(5)(e), MCA.

Absent the request for contested case appeal by CR and REF, the Administrative Orders issued to CR and REF are DEQ's final agency decision. CR and REF's state "DEQ's administrative notice and order is a request for the Board to issue an order against the alleged violator. Unless the alleged violator fails to request a hearing, the notice and order does not become final without further agency action." CR and REF Exceptions, page 10. CR and REF's exception is counter to the clear language in § 75-5-611(5)(e), MCA, which states "if the board determines that a violation has not

occurred, it shall declare the department's notice void." Without such declaration by the Board, DEQ's Administrative Orders stand. CR and REF are appealing DEQ's Administrative Orders before the BER and have the burden to show the alleged violations did not occur and the Board should act to modify or void the Administrative Orders.

CR and REF further state "without placing the burden of proof on DEQ, the alleged violator cannot know the extent or scope of evidence that DEQ will bring to bear against him." CR and REF Exceptions, page 12. However, the Hearing Examiner correctly determined that the Administrative Orders "contain "the charges" presented by the department and to which CR/REF must respond." Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner also correctly held the contested case hearing was held pursuant to CR and REF's request for hearing under § 75-5-611(4), MCA and not under § 75-5-611(3), MCA to "answer the charges" in a notice given under § 75-5-611(1), MCA. Hearing Examiner's Proposed FOFCOL, pages 16 - 17.

DEQ set forth its case against CR and REF in the Administrative Orders issued under § 75-5-611(2), MCA. DEQ's evidence in support of the Administrative Orders is detailed in the September 23, 2013 Notice of Violation, which notified CR and REF that DEQ was initiating formal enforcement action for violations of the Montana Water Quality Act observed

by DEQ Inspector Dan Freeland during his September 9, 2013 compliance inspection. The September 23, 2013 Notice of Violation included evidence of unpermitted discharges from the subdivisions to state surface water and no best management practices (BMPs) in place to control storm water discharges from the subdivisions. Hearing Transcript Vol. I, 65:24 – 66:8, Exhibit 2, DEQ 000038 – DEQ 000040. On November 8, 2013, in response to written requests from CR and REF, DEQ issued a second notice of violation that distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Joint Stipulated Facts*, Fact No. 9; Hearing Transcript, Vol. I, 85:2 – 92:18; Exhibit 17, Exhibit 2, DEQ00046 (Photo 6), DEQ00050 (Photos 16, 17, and 18). DEQ provided CR and REF with sufficient notice of the substantial, credible evidence upon which the Administrative Orders are based; evidence which CR and REF failed to meet its burden to refute in the contested case hearing.

While admitting this is a civil and not a criminal case, CR and REF argue, since this case involves enforcement for violations of the Montana Water Quality Act, application of due process restrictions that apply in criminal cases are reasonable in this case. CR and REF Exceptions, pages 7 - 8. CR and REF argue, under the due process clause, they are entitled to “be presumed innocent of the alleged violation until DEQ proves their guilt.” CR

and REF Exceptions, page 8. However, there are no life, liberty, or property interests at stake that give rise to the same level of due process protection expected by an alleged violator in a criminal case.

Here, CR and REF requested a hearing under § 75-5-611(4), MCA and that statutory provision allows an alleged violator to submit a written request for hearing within thirty days after service of a notice and order under § 75-5-611(2), MCA. The hearing contemplated by § 75-5-611(4), MCA is a contested case appeal to BER and is held under MAPA contested case provisions found at Title 2, chapter 4, part 6, MCA. See § 75-5-611(4), MCA. CR and REF further argue BER should consider provisions under the federal Administrative Procedure Act (APA), which assign the burden of proof to the “proponent of a rule or order.” 5 U.S.C. § 556(d). The hearing required by law in this case was a contested case appeal under § 75-5-611(4), MCA. See for example *Johansen v. State*, 1998 MT 51, ¶ 22; 288, Mont. 39; 955 P.2d 653, 658 (the agency’s enabling/authorizing statute dictates the type of hearing required). CR and REF had a full and fair opportunity to present their case in a trial-type hearing before the Hearing Examiner held pursuant to § 75-5-611(4), MCA. Under § 75-5-611(6)(b), MCA, upon a determination that the alleged violations occurred, the BER shall issue an appropriate order for

the prevention, abatement, or control of pollution, the assessment of administrative penalties, or both.

The Hearing Examiner conducted a contested case hearing under § 75-5-611(4), MCA, properly received evidence, entered findings based on the preponderance of the evidence presented, and then entered conclusions of law based on those findings. The Hearing Examiner correctly found that the Administrative Orders issued to CR and REF set forth the allegations to which CR and REF must respond. Hearing Examiner's Proposed FOFCOL, page 18. The Hearing Examiner correctly held that the party seeking to overturn the administrative decision of the agency bears the burden of proof. *See Myers v. Mont. Dept. of Transportation*, 2010 Mont. Dist. LEXIS 366, ¶10 (citing § 26-1-401, MCA). The initial burden of producing evidence is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence. *Id.* CR and REF are the parties that would be defeated if no evidence were given on either side because DEQ's decision contained in the Administrative Orders would stand. CR and REF seek to overturn those decisions. In the contested case hearing held before the Board's Hearing Examiner, DEQ and CR and REF each called witnesses and presented evidence in the form of testimony and exhibits. The

Hearing Examiner correctly found CR and REF bear the burden of presenting evidence necessary to establish that the violations alleged in the Administrative Orders did not occur; or that the violations occurred, but the Administrative Orders violated the law; or the administrative penalties and corrective actions assessed against CR and REF are inappropriate. Hearing Examiner's Proposed FOFCOL, page 18; § 75-5-611(6)(e), MCA; *MEIC*, 2005 MT at ¶ 16; 326 Mont. at 507; 112 P.3d at 967. Regardless of who had the burden of proof in this case, the preponderance of evidence demonstrates that CR and REF violated the WQA at the subdivisions. *Myers*, 2010 Mont. Dist. LEXIS at ¶13 (when the evidence is overwhelming and conclusive, it does not matter who has the burden of proof).

III. DEQ ESTABLISHED THE OCCURRENCE OF VIOLATIONS 2, 3, AND 4 ALLEGED IN THE ADMINISTRATIVE COMPLIANCE AND PENALTY ORDERS ISSUED AGAINST CR AND REF BY A PREPONDERANCE OF EVIDENCE.

A. The Orders on Summary Judgment are the Law of This Case and Establish That REF is the Owner and Operator of Reflections at Copper Ridge Subdivision and CR is the Owner and Operator of Copper Ridge Subdivision.

An owner or operator under the WQA is “a person who owns, leases, operates, controls, or supervises a point source.” § 75-5-103(26), MCA. The Hearing Examiner correctly determined, based on the undisputed material facts in the record and as a matter of law, CR and REF were the “owners or operators”

of point source discharges from the subdivisions. See Hearing Examiners Proposed FOFCOL, page 38; Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 13 – 15; Cause No. BER 2015-02 WQ, pages 13 – 15. The Hearing Examiner’s determinations in the Orders on Motions for Summary Judgment were based on evidence that CR was the original owner, operator, developer, and subdivider of the Copper Ridge subdivision and REF was the original owner, operator, developer, and subdivider of the Reflections at Copper Ridge subdivision. Orders on Summary Judgment in BER 2015-01 WQ and BER 2015-02 WQ, page 14. This conclusion is further supported by evidence in the record of the contested case hearing that REF owned and controlled development on 100 percent of the property in the Reflections at Copper Ridge subdivision and CR owned and controlled development on 100 percent of the property in the Copper Ridge subdivision. Hearing Transcript, Vol. II, 66:21 – 67:17; 102:22 – 104:23.

CR and REF try to counter the evidence in the record with a discussion of their history of compliance with the Montana Subdivision and Platting Act. This discussion is outside the administrative record for Cause Nos. BER 2015-01 WQ and BER 2015-02 WQ and has no bearing on whether CR and REF are owners or operators of point source discharges of storm water from their

subdivisions for purposes of § 75-5-103 (26), MCA. CR and REF Exceptions, pages 16 - 29.

B. DEQ Established by a Preponderance of Evidence that CR and REF Discharged Storm Water from Reflections at Copper Ridge and Copper Ridge Subdivisions to State Surface Waters Through Overland Flow and Through the City of Billings Municipal Separate Storm Sewer System (MS4) Without an MPDES Permit in Violation of the Montana Water Quality Act § 75-5-605(2)(c), MCA (Violation 2).

Relying on the affidavit of DEQ's Inspector, Dan Freeland, who conducted compliance evaluation inspections (CEIs) at the subdivisions on September 9, 2013, documenting unpermitted discharges of storm water from Reflections at Copper Ridge and from Copper Ridge, the Hearing Examiner determined that CR and REF were responsible for unpermitted discharges of storm water from the subdivisions to state waters. *See* Orders on Summary Judgment Cause No. BER 2015-01 WQ, pages 15 - 16; Cause No. BER 2015-02 WQ, pages 15 - 16. The Hearing Examiner correctly determined that Dan Freeland's observations were undisputed by CR and REF on motions for summary judgment. *Id.*

CR and REF argue that the precise location of these observed discharges from the subdivisions were not described and the disturbances were likely from individual lots, which upon sale to individual homebuilders, CR and REF no longer own or operate. CR and REF Exceptions, pages 18 – 29. CR and REF

appear to base their argument that the discharges were from individual lots on the following facts: 1.) previous discharge permit authorizations were issued to construction contractors hired by CR and REF under General Permit No. MTR100000 for road and utility work; 2.) these previous permit authorizations covered storm water discharges associated with the development and construction of street improvements and construction and installation of utilities including water, sanitary sewer, and storm sewer in the subdivisions; and 3.) the previous permit authorizations would have reached final stabilization resulting in permit termination by 2013, and could not have been the source of discharges. *See* Hearing Transcript Vol. I, 133:23 – 139:25, Exhibit A (MPDES Permit No. MTR 102807 issued to JTL Group, Inc.), Exhibit B (MPDES Permit No. MTR 104590 issued to H.L. Ostermiller Construction), and Exhibit C (MPDES Permit No. MTR 104993 issued to CMG Construction, Inc.), CR and REF Exceptions, page 19. The road and utility permit authorizations, issued to construction contractors, for road and utility development being conducted within the boundaries of the subdivisions, were terminated by DEQ upon submission of notices of termination by the named owners or operators on those permits and certification that the permitted projects had reached final stabilization. Hearing Transcript Vol. I, 202:7 – 17. *Joint Stipulated Fact 5.* The

construction activities permitted under the road and utility construction MPDES permit authorizations at Copper Ridge and Reflections at Copper Ridge subdivisions included construction of water, sanitary sewer, and storm drainage utilities, and street and sidewalk improvements. The Storm Water Pollution Prevention Plans (SWPPPs) associated with these permit authorizations did not include best management practices (BMPs) or controls for construction activity on residential lots. Therefore, once the storm water discharge permit authorizations for road improvements and utility installation terminated, there was no permit coverage for homebuilding on the residential lots and no plan in place by the subdivision developers, CR and REF, to obtain such coverage. *See* Exhibit A, page 3; Exhibit B, page 3; and Exhibit C, page 4. *See* Hearing Transcript Vol. II, 62:4, 102:8 - 21. CR and REF do not take exception to the Hearing Examiner's proposed FOFCOL ¶¶ 12 and 13, which lists DEQ Inspector Freeland's observations during his September 9, 2013 CEI including sediment discharges onto streets, sidewalks, and other common areas; uncontained waste stockpiles; and evidence that sediment and construction debris had been "washed with storm water from the subdivisions to state surface waters." CR and REF seem to assert that these discharges are from the residential lots and are not their responsibility. Hearing Examiner's Proposed FOFCOL ¶¶ 12 and 13, page 6; CR and REF Exceptions, page 19.

CR and REF cannot defend their failure to obtain storm water discharge permit coverage for construction activities at the subdivisions by claiming, after they planned and developed the subdivision, upon the sale of individual residential lots within the subdivision, they are not an owner or operator associated with construction activities on those lots. See CR and REF Exceptions, pages 20 – 21. Storm water discharge associated with construction activity must be covered by a Montana Pollutant Discharge Elimination System (MPDES) Permit. ARM 17.30.1105. “Storm water discharge associated with construction activity” is defined as “a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more. ARM 17.30.1102(28). The plan in a common plan of development is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot.

Friends of Maha’Ulepu, Inc. v. Hawaii Dairy Farms, LLC, 224 F.Supp.3d 1094 (U.S. Dist. Court Dist. Hawaii 2016). In his testimony, DEQ Inspector Dan Freeland explained that he determined Copper Ridge subdivision and Reflections at Copper Ridge subdivision were a common plan of development or sale based on the signs identifying the subdivisions, the company website advertising the developments, and the company’s advertising brochures. Hearing Transcript Vol. I, 67:16 – 25.

A “larger common plan of development or sale” is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a distinct activity has been identified by the time the discharge permit application would be submitted, that distinct activity is included as part of a larger common plan. *Friends of Maha’Ulepu*, 224 F.Supp.3d at 1108. CR and REF admitted in hearing testimony that the common plan of development included improvements necessary to get the subdivision approved by the City of Billings, then subdivide and start selling residential lots. Hearing Transcript Vol. II, 66:21 - 67:17. CR and REF further admitted the use of the property prior to CR and REF’s initiation of development and construction activity was agricultural. Hearing Transcript Vol. II, 110:18 - 23. The common plan of development for the Copper Ridge and Reflections at Copper

Ridge subdivisions included grading, contouring, road building, utility installation, development of storm water retainage ponds, and other common areas, as well as the design and planning of residential lots for eventual sale to homebuilders. Hearing Transcript Vol. II, 105:15 – 111:6. CR and REF did not properly permit storm water discharges associated with construction activity at the subdivisions until December 23, 2013, when they each submitted a Notice of Intent requesting authorization to discharge storm water associated with construction activity under General Permit No. MTR100000. REF was issued Permit No. MTR105376 and CR was issued Permit No. MTR105377 authorizing each entity to discharge storm water associated with construction activity at their respective subdivisions. *Joint Stipulated Facts*, Fact No. 11; Hearing Transcript, Vol. I, 92:20 – 100:10; Exhibit 4, DEQ 00057; and Exhibit 5, DEQ 000083. CR and REF were obligated under the WQA to permit all construction activities that were part of the larger common plan of development or sale at Copper Ridge and Reflections at Copper Ridge subdivisions. § 75-5-401, MCA; ARM 17.30.1105.

Construction activity is the regulated point source that must be permitted when it meets the definition at ARM 17.30.1102(28). Ground disturbance at each of the above-named subdivisions involves more than one acre including all areas that are part of a “larger common plan of development

or sale,” as that phrase is used in General Permit No. MTR100000 and in ARM 17.30.1102(28). *Stipulated Facts*, Fact No. 8. It is not necessary, as CR and REF assert, for DEQ to show who placed, or who caused waste to be placed in the subdivisions. CR and REF Exceptions at 28. The Hearing Examiner correctly held that CR and REF violated the WQA by discharging storm water associated with construction activity without a permit (Violation 2). *See* Orders on Motions for Summary Judgment in Cause No. BER 2015-01 WQ, pages 15 – 16, and in Cause No. BER 2015-02, pages 15 – 16.

Any precipitation event of .25 inches or greater in a 24-hour period will cause an unpermitted discharge of pollutants including sediment, construction debris, and other waste materials from Copper Ridge and Reflections at Copper Ridge subdivision. Storm water runoff will enter Cove Ditch and public storm drainage systems. Additionally, surface runoff flows overland toward Cove Ditch and through storm drainage systems until it ultimately flows offsite to the Yellowstone River. Hearing Transcript Vol 1, 66:20; 148:11; Exhibit 2, DEQ 000038. Water quality may be impacted by sediment and construction debris during these precipitation events. Hearing Transcript Vol 1, 54:21 – 56:4; Exhibit 15. The Hearing Examiner’s determination that CR and REF should only be charged with precipitation events between September 23, 2013, the date CR and REF were put on notice that they needed

MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty. See Hearing Examiner's Proposed FOFCOL at page 24.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by discharging pollutants to state waters from a point source without MPDES permit authorization. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 2.

C. DEQ Established by a Preponderance of Evidence that CR and REF Placed Waste Where it Will Cause Pollution of State Waters in Violation of the Montana Water Quality Act at § 75-5-605(1)(a), MCA (Violation 3).

The Hearing Examiner correctly determined, based on the September 9, 2013 inspection conducted by DEQ Inspector Dan Freeland, that CR and REF placed or caused to be placed waste through unpermitted and uncontrolled discharges of storm water to state water. Dan Freeland documented, in writing and in photographs, substantial, credible evidence of stockpiled materials without protection to control contact with storm water, unmanaged concrete washout sites, sediment tracked onto impervious surfaces, sediment and debris on the banks of Cove Ditch, sediment on sidewalks and grassy common areas, and sediment in streets and built up in

and near the storm drains. Exhibit 2, DEQ 000038 – DEQ 000040, DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. The Hearing Examiner found uncontroverted evidence that CR and REF placed waste or caused waste to be placed where it may cause pollution. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 16 - 18, and in Cause No. BER 2015-02, pages 16 – 18.

After the contested case hearing, the Hearing Examiner correctly found that CR and REF placed waste where it will cause pollution of state waters, in violation of § 75-5-605(1)(a), MCA, by contributing sediment and other pollutants from unpermitted construction activities in the subdivisions, causing uncontrolled sediment, oil, solids, and other debris to be placed where it will impact state surface waters, including Cove Ditch. Hearing Examiner's Proposed FOFCOL, pages 27 – 31 supported by Exhibit 2, DEQ 000039 – 000040; DEQ 000045 (Photos 2 and 3), DEQ 000046 (Photos 4, 5, and 6), DEQ 000047 (Photo 9), DEQ 000048 (Photos 10, 11, and 12); DEQ 000050 (Photos 16, 17, and 18); Hearing Transcript Vol I, 71:2 – 77:18. In his testimony, Dan Freeland explained that he observed grass laid down

indicating the direction of storm water flow from the subdivisions toward Cove Ditch. Hearing Transcript Volume I, 72:15-22.

CR and REF disputes the Hearing Examiner's Proposed FOFCOL that unpermitted discharges are necessarily "exceeding that permitted by Montana water quality standards" and, therefore, causing "pollution" as that term is defined at § 75-5-103(30), MCA. CR and REF Exception, pages 29-34. CR and REF fail to acknowledge that not all water quality standards are numeric. DEQ Inspector Dan Freeland's documented evidence that sediment and other pollutants, contributed by CR and REF's unpermitted construction activities at the subdivisions, caused floating debris and other waste materials to be placed in and near Cover Ditch where it would impact state surface waters in violation of ARM 17.30.637(1). Because CR and REF conducted construction activity without a permit that required installation of BMPs and pollution prevention measures that meet engineering standards and specifications for control and mitigation of discharges of sediment and other pollutants from the construction activities at the subdivisions, waste, including sediment and construction debris, was placed where it will cause pollution of state waters in violation of ARM 17.30.637(5). Violation of the general prohibitions at ARM 17.30.637 are violations of Montana water quality standards.

DEQ has established by a preponderance of evidence that CR and REF violated the Montana Water Quality Act by placing waste where it will cause pollution in violation of § 75-5-605(1)(a), MCA. The BER should accept the Hearing Examiner's proposed FOFCOL supporting CR and REF's liability for Violation 3.

The Hearing Examiner's determination that CR and REF should only be charged with eight days of violation based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

D. DEQ Established by a Preponderance of Evidence that CR and REF Violated the Terms and Conditions of General Permit MTR100000 (Violation 4).

The Hearing Examiner properly determined that CR and REF violated terms and conditions of General Permit MTR100000 at the subdivisions, based on undisputed evidence documented in an inspection reported summarizing the findings of DEQ Inspectors Dan Freeland and Chris Romankiewicz after conducting inspections of the subdivisions on October 21, 2014. Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 19 -

20, and in Cause No. BER 2015-02, pages 19 – 20. CR and REF have not filed an exception to the Hearing Examiners' conclusions regarding Violation 4 and the BER should accept the Hearing Examiners' Orders on Summary Judgment and proposed FOFCOL supporting CR and REF's liability for Violation 4.

The Hearing Examiner's determination that CR and REF should only be charged with one day of violation based on the date DEQ observed the violations of the General Permit conditions is reasonable for purposes of calculating an administrative penalty for Violation 4. *See* Hearing Examiner's Proposed FOFCOL at pages 31 - 38.

IV. The Hearing Examiner's Proposed Administrative Penalties are Appropriate to Address CR and REF's Violations of the Montana Water Quality Act at Reflections at Copper Ridge and Copper Ridge Subdivisions.

The administrative penalties are assessed pursuant to the statutory penalty factors in § 75-1-1001, MCA; in ARM Title 17, chapter 4, subchapter 3; and subject to DEQ's authority under § 75-5-601 through § 75-5-641 MCA. The administrative penalties are assessed for the related series of violations, stemming from failure to obtain MPDES permit coverage, at each subdivision. Under §§ 75-5-611(9)(a), MCA the penalty is capped at \$100,000 for each related series of violations.

A. DEQ is not Prevented from Assessing Administrative Penalties Under §§ 75-5-611, 75-5-617, MCA, or ARM Title 17, chapter 30, subchapter 20 (repealed March 19, 2016).

CR and REF overstate their confusion with regard to DEQ's violation letters sent to CR and REF on September 23, 2013. CR and REF Exceptions, page 44. The violation letters satisfied § 75-5-617(2), MCA. *See* Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 6 - 7, and in Cause No. BER 2015-02, pages 6 – 7. Under § 75-5-617(2), MCA DEQ is not foreclosed from pursuing administrative penalties when the recipient of a letter issued under § 75-5-617(2), MCA responds as alleged by CR and REF. CR and REF Exceptions, page 46. Enforcement response actions under § 75-5-617, MCA include issuance of a letter; issuance of an order; judicial action; or an action seeking administrative or judicial penalties. In this case, DEQ initiated an enforcement response under § 75-5-611, MCA after providing CR and REF with notice under § 75-5-617, MCA.

Section 75-5-611(1), MCA requires written notice to an alleged violator before seeking administrative penalties. There is an exception for such notice when DEQ seeks administrative penalties only for activities it believes and alleges are violations of § 75-5-605, MCA. § 75-5-611(2)(a)(ii), MCA (emphasis added). Violations 2, 3, and 4 meet this notice exception. *See*

Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 8, and in Cause No. BER 2015-02, page 8.

ARM 17.30.2003 (repealed 2016) imposed additional notice requirements on DEQ. Under ARM 17.30.2003 prior notice of a violation was required unless DEQ was not seeking an administrative penalty, or was seeking an administrative penalty only for activities it believed and alleged were violations of § 75-5-605, MCA, and the violations were a class I violation as described in ARM 17.30.2001(1) or a violation of major extent and gravity under ARM 17.4.303. DEQ met the notice requirements in ARM 17.30.2003 for Violation 2 (violation of § 75-5-605, MCA; major extent and gravity; class I), for Violation 3 (violation of § 75-5-605, MCA; major extent and gravity), and for Violation 4 (violation of § 75-5-605, MCA; class I). *Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ pages 11-13, and in Cause No. BER 2015-02, pages 11-13.*

DEQ is not precluded from assessing administrative penalties for Violation 3 as asserted by CR and REF because DEQ believed and alleged Violation 3 was a violation of § 75-5-605, MCA and a violation of major extent and gravity under ARM 17.4.303, which satisfies ARM 17.30.2003(7). CR and REF Exceptions, page 47. The Hearing Examiner's Proposed Conclusion of Law is correct and not void based on CR and REF's misreading of ARM 17.30.2003.

DEQ is not precluded from assessing administrative penalties for Violation 4 as asserted by CR and REF because DEQ believed and alleged Violation 4 was a violation of § 75-5-605, MCA and the Hearing Examiner's determination that Violation 4 is a Class I violation is undisturbed. CR and

REF's Exceptions at 48; Orders on Motions for Summary Judgment in Cause No. BER 2015- 01 WQ page 13, and in Cause No. BER 2015-02, page 13. The Hearing Examiner determined that Violation 4 was a violation of a permit compliance plan or schedule. Some of the violations observed by DEQ's Inspectors during the October 2014 inspection of the subdivisions involved failure by CR and REF to conduct inspections in accordance with the schedules imposed under the permit. A Class I violation satisfies ARM 17.30.2003(7).

B. DEQ appropriately determined the days of violation for Violation 2 by considering NOAA precipitation data, for Violation 3 by considering evidence of ground disturbance and uncontrolled placement of waste, and for Violation 4 by considering lack of adequate permit implementation from the date CR and REF submitted NOIs.

It was reasonable for DEQ and the Hearing Examiner to consider the National Oceanic and Atmospheric Administration (NOAA) weather service data to determine the days of violation for Violation 2, discharging without a permit. Hearing Examiner's Proposed FOFCOL, page 23 – 26, CR and REF Exceptions at 23. Use of NOAA precipitation data is supported by the inspection schedule set forth in the General Permit requiring the SWPPP administrator to conduct routine inspections every fourteen days along with post-storm inspections within 24 hours of the end of a rainfall event of 0.25 inches or greater. DEQ Exhibit 1, DEQ000013. DEQ reasonably considered

a storm event resulting in .25 inches or more precipitation within 24 hours likely to result in discharges from the subdivisions and CR and REF presented no substantial evidence to counter this determination.

DEQ appropriately considered evidence of ground disturbance at the subdivisions, limited by the two-year statute of limitations for penalty actions, for days of violation for Violation 3. Hearing Transcript, Vol. I, 228:7 – 15. CR and REF presented no substantial evidence to counter these determinations. The Hearing Examiner has determined that CR and REF should only be charged with eight days of violation for Violation 3 based on precipitation events between September 23, 2013, the date they were put on notice that they needed MPDES permit coverage, and December 23, 2013, the date they obtained MPDES permit coverage. DEQ believes eight days of violation is reasonable for purposes of calculating an administrative penalty for Violation 3. *See* Hearing Examiner's Proposed FOFCOL at pages 29 - 30.

C. DEQ Provided Adequate Notice Under the WQA for Violations at Copper Ridge Subdivision and for Violations at Reflections at Copper Ridge Subdivision.

CR and REF allege DEQ failed to notify CR separately of each violation at Copper Ridge Subdivision and REF separately of each violation at Reflections at Copper Ridge Subdivision. CR and REF Exceptions 39 – 43. This assertion is not supported by evidence in the record and is contrary

to the parties' joint stipulated fact 7, which provides that the September 23, 2013 violation letter was sent to both CR and to REF and joint stipulated fact 9, which provides DEQ sent a separate violation letter dated November 8, 2013 that separated violations associated with the Copper Ridge subdivision. DEQ provided the November 8, 2013 letter to CR in response to a written request from Landy Leep in a letter to Dan Freeland, dated September 27, 2013, in which Mr. Leep explained that Copper Ridge subdivision and Reflections at Copper Ridge subdivision were separate real estate developments, owned and operated by separate legal entities. Mr. Leep requested two separate violation letters to "clarify which alleged violations pertain to Copper Ridge Development Corporation and which apply to Reflections at Copper Ridge, LLC." Hearing Transcript, Vol. I, 79:21 - 80:15; 83:18 – 86:3, Exhibit 12, DEQ 000202; Exhibit 17. Prior to sending the November 8, 2013 violation letter, DEQ Compliance Inspector Dan Freeland explained to Mr. Leep that DEQ considered Copper Ridge and Reflections at Copper Ridge subdivisions as part of one greater common plan of development and the September 23, 2013 violation letter was adequate to address the violations at both subdivisions. Hearing Transcript, Vol. I, 80:19 – 81:24; Exhibit O. Mr. Leep insisted the two subdivisions are separate and distinct, and that CR and REF should respond to DEQ's enforcement action

separately. Hearing Transcript, Vol. I. 83:8 – 83:16; Ex 13. In response to Mr. Leep's request, the November 8, 2013 letter distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Stipulated Facts*, Fact No. 9. The September 23, 2013 letter served as notice to REF of the violations at Reflections at Copper Ridge subdivision. DEQ Exhibit 2, DEQ 000038. The November 8, 2013 letter provided notice to CR of the violations at Copper Ridge Subdivision. CR and REF insisted on two separate enforcement actions, which resulted in two separate related series of violations, each with a maximum administrative penalty of \$100,000. § 75-5-611(9), MCA.

D. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the September 23, 2013, and November 8, 2013 violation letters by obtaining coverage under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

The parties stipulated that "Within a timeframe acceptable to the Department, CR and REF each took the corrective action identified in the September 23, 2013 and November 8, 2013 Notices of Violation." *Stipulated Facts*, Fact No. 10. DEQ agrees that, within an acceptable timeframe, CR and REF obtained coverage under the General Permit for construction activity at Copper Ridge and Reflections at Copper Ridge subdivisions. This fulfilled one of the corrective actions identified in the September 23, 2013, and

November 8, 2013 Notices of Violation. Hearing Transcript Vol. 1; 95:23 – 96:10, 100:3 – 100:10. CR and REF Exceptions, page 44; referencing Hearing Examiner Proposed FOFCOL, page 21, and footnote 4 (In footnote 4 the Hearing Examiner expressed some discomfort over the clarity of DEQ’s correspondence with CR and REF and the application of ARM 17.30.2003 (repealed 2016). Footnote 4 is not, however a proposed finding of fact).

E. DEQ was not foreclosed from taking further enforcement action after CR and REF addressed the violations in the December 9, 2014 violation letters by submitting an updated Storm Water Pollution Prevention Plan under the General Permit for discharges from the Copper Ridge and Reflections at Copper Ridge subdivisions.

On October 21, 2014, DEQ conducted a scheduled compliance inspection of the Copper Ridge and the Reflections at Copper Ridge subdivisions. *Stipulated Facts*, Fact No. 12; Hearing Transcript Vol. 1; 100:11 – 101:23; Exhibit 7, DEQ000113; Hearing Transcript Vol. 1; 105:24 – 106:3; Exhibit 8, DEQ000125. During the October 21, 2014 inspection, DEQ observed and documented several MPDES Permit violations at the subdivisions. On December 9, 2014, the Department sent CR and REF notices of violation and required corrective action to address the violations. *Stipulated Facts*, Nos. 13 and 14; Hearing Transcript, Vol 1, 103:25 - 105:21; Exhibit 7, DEQ000113; Hearing Transcript, Vol 1, 106:7 - 107:11; and Exhibit 8, DEQ000125. The parties stipulated that “Within a timeframe

acceptable to the Department, CR and REF each took the corrective action identified in the December 9, 2014 Notices of Violation and submitted an updated SWPPP to DEQ.” *Stipulated Facts*, Fact No. 15; Hearing Transcript, Vol 1, 108:19 - 110:3; Exhibit Y. Submission of the updated SWPPP by CR and REF did not correct all violations noted during the October 21, 2014 inspection, but DEQ determined the response was adequate. Hearing Transcript, Vol 1, 112:7 – 120:8; Exhibit 18 and Exhibit 19. At no time did CR and REF propose corrective action plans to address violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions. Hearing Transcript, Vol. III, 119:11. Because there had been significant violations of the Montana Water Quality Act at Copper Ridge and Reflections at Copper Ridge subdivisions, CR and REF were referred to DEQ’s Enforcement Division for further action. Hearing Transcript, Vol. I, 108:17, 120 :11, 121:13.

F. DEQ planned its compliance inspection to coincide with a storm event in order to observe discharges from the subdivisions.

CR and REF assert DEQ was aware of potential problems at the subdivisions as early as March 2013, but waited for a “disastrous and sudden” storm in September 2013 to “catch” CR and REF. CR and REF Exceptions, page 49. Dan Freeland explained in his testimony that after the City notified

him of noncompliance with MS4 storm permit requirements at the subdivisions, he checked an EPA database and discovered the subdivisions had no MPDES permit coverage for construction activities. Dan then determined to inspect the subdivisions during a storm event to better identify and document unpermitted discharges. This was designed to make a stronger case and convince the non-compliant owner/operator they needed permit coverage. Hearing Transcript Volume I, 48:21 – 50:19.

G. DEQ properly determined Violation 2 and Violation 3 are major extent and gravity based on the degree of deviation from requirements and the seriousness of the violations.

Discharging without a permit, Violation 2, and placing a waste where it will cause pollution, Violation 3, have the potential to harm human health or the environment. Hearing Testimony, Volume I, 217:7 – 10. In determining extent of a violation, DEQ may consider the duration of the violation. ARM 17.4.303(4). A violation has major gravity if it causes harm or poses serious potential to harm human health or the environment. ARM 17.4.303(4). DEQ properly determined Violation 2 and 3 are of major extent and gravity based on the duration and the seriousness of the violations. DEQ Exhibit 9, DEQ000160 – 163; DEQ Exhibit 10, DEQ000190 – 193. In addition, the Orders on Summary Judgment determined Violation 2 and 3 are major extent and gravity. Orders on Summary Judgment 11 – 13.

H. DEQ properly determined Violation 4 was of major extent and moderate gravity and the Hearing Examiner in Orders on Summary Judgment determined Violation 4 was a Class I Violation.

Violation 4, violating terms and conditions of General Permit No. MTR100000 is of moderate gravity. ARM 17.4.303(5)(b)(ii). DEQ considered the duration of the violation in its determination that the violation was of major extent. ARM 17.4.303(4); Hearing Testimony, Volume I, 222:7 – 14. The Orders on Summary Judgment determined Violation 4 is a Class I violation. Orders on Summary Judgment 13.

I. CR and REF provide no evidence of voluntary expenditures that are above and beyond what is necessary to comply with their WQA obligations.

CR and REF suggest they should be credited with voluntary expenditures made to “hire a professional outside consultant to complete permitting compliance and administration.” REF and CR Exceptions, page 58. However, these expenditures merely met CR and REF’s obligations to comply with the WQA and DEQ’s penalty rules allow a decrease of up to 10 percent for amounts voluntarily expended beyond what is required by law or by order. ARM 17.4.304(4); Hearing Testimony, Volume I, 219:7 – 12.

J. CR and REF provide no evidence that the penalties should be further reduced for good faith and cooperation.

CR and REF argue they should be credited with good faith and cooperation and suggest they are entitled to a ten percent reduction. REF and

CR Exceptions, page 54, 57. CR and REF provide no evidence of “promptness in reporting and correcting the violation, and in mitigating the impacts of the violation; the extent of . . . voluntary and full disclosure of the facts related to the violation; and the extent of . . . assistance in the department’s investigation and analysis of the violation.” ARM 17.4.304(a) – (c).

V. Conclusion

The Hearing Examiner’s findings of fact are supported by substantial evidence in the record and should be adopted by BER as its final order. § 2-4-621(3), MCA; Blaine County v. Stricker, 2017 MT 80, ¶25; 387 Mont 202, 211; 493 P.3d 159, 165. The proceedings on which the proposed finding of fact are based complied with essential requirements of law. The Hearing Examiner’s conclusions of law, which include the recommended administrative penalty of \$92,000 for the related series of WQA violations at each subdivision totaling \$184,000 for violations at both Copper Ridge and Reflections at Copper Ridge subdivisions, should be adopted by the BER as its final order. § 2-4-621(3), MCA; and § 75-5-611(9), MCA.

WHEREFORE, DEQ requests that the Board reject CR and REF’s Exceptions and adopt the Hearing Examiners’ Orders on Motions for Summary Judgment and Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted this 31st day of October, 2018.

A handwritten signature in blue ink, appearing to read "Kirsten Bowers", is written over a horizontal line.

KIRSTEN BOWERS

Department of Environmental Quality

Attorney for the Department


CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2018, I caused to be served a true and correct copy of the foregoing document and any attachments for BER 2015-01 WQ and BER 2015-02 WQ to all parties or their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
 OF THE STATE OF MONTANA

IN THE MATTER OF:) Case No. BER 2015-01-WQ
 VIOLATIONS OF THE WATER)
 QUALITY ACT BY REFLECTIONS AT)
 COPPER RIDGE, LLC AT)
 REFLECTIONS AT COPPER RIDGE)
 SUBDIVISION, BILLINGS,)
 YELLOWSTONE COUNTY, MONTANA)
 (MTR105376) [FID 2288, DOCKET NO.)
 WQ-15-07])

IN THE MATTER OF:) Case No. BER 2015-02-WQ
 VIOLATIONS OF THE WATER)
 QUALITY ACT BY COPPER RIDGE)
 DEVELOPMENT CORPORATION AT)
 COPPER RIDGE SUBDIVISION,)
 BILLINGS, YELLOWSTONE COUNTY,)
 MONTANA (MTR105377) [FID 2289,)
 DOCKET NO. WQ-15-08])

**MOTION TO STRIKE UNTIMELY EXCEPTIONS CONTAINED IN
 DEQ'S RESPONSE BRIEF**

Copper Ridge Development Corporation (Copper Ridge) and Reflections at Copper Ridge, LLC (Reflections) respectfully request that the Board of Environmental Review (Board) immediately strike the last paragraph of section IV.A., the entire section IV.G., and the entire Section IV.H from the Department of Environmental Quality's (DEQ's) Response Brief and prohibit DEQ from raising those arguments during the December 7th oral argument.

On July 16, 2018, the Hearing Examiner issued Proposed Findings of Fact and Conclusions of Law to the Board of Environmental Review. Although both sides of this controversy had an opportunity to file Exceptions to the Proposed Findings of Fact and Conclusions of Law, only Copper Ridge and Reflections did so. Now, long after the deadline for filing exceptions, DEQ argues for Findings and Conclusions contrary to those proposed by the Hearing Examiner. DEQ's untimely arguments prejudice Copper Ridge and Reflections and place the Board in the awkward position of reviewing arguments not fully or fairly fleshed out between the parties under the purview of the Hearing Examiner's ordered schedule. Copper Ridge and Reflections therefore ask the Board to immediately strike the inappropriate arguments from DEQ's Response Brief and prohibit DEQ from raising the untimely arguments during the oral argument.

DEQ's Response Brief raised three issues that contradict the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law:

1. The Proposed Findings of Fact and Conclusions of Law established that Violations 2 and 3 were each only a "minor deviation from the applicable requirements" and therefore of minor extent. Proposed FOFCOL, p. 41, ¶ 16; p. 43, ¶ 24. DEQ now asserts that "Violation 2 and 3 are major extent and gravity." DEQ Response, p. 34. But DEQ did not file any exceptions and therefore never objected to the proposed conclusions regarding the minor extent of Violations 2 and 3. Therefore, DEQ has waived any argument that either of those violations is of major extent and gravity. By failing to timely file an exception to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law, DEQ is now barred from raising any argument that Violations 2 and 3 are anything other than of minor extent.

2. The Proposed Findings of Fact and Conclusions of Law included a finding that "CR/REF did not propose 'corrective action plans' to address violations of the Montana Water Quality Act" and a conclusion pursuant to Section V of the Order on Summary Judgment, that "CR/REF violated provisions contained within its general permit." Proposed FOFCOL, p. 10, ¶31; p. 44, ¶28 (internal citations removed). There is no finding or conclusion that a compliance plan or schedule was violated. Indeed, a compliance plan has a specific meaning

in terms of discharge permits, provided in ARM 17.30.1350, which DEQ has never alleged that Copper Ridge or Reflections has violated.

Now, DEQ argues in its Response Brief that “the [previous] Hearing Examiner’s determination that Violation 4 is a Class I violation is undisturbed” and that the previous “Hearing Examiner determined that Violation 4 was a violation of a permit compliance plan or schedule” sufficient to support a Class I violation under ARM 17.30.2003(7) and ARM 17.30.2001(1)(d). DEQ Response, pp. 27-28. However, as established in the Proposed Findings of Fact and Conclusions of Law, there was no corrective action plan that could have been violated. Proposed FOFCOL, p. 10, ¶ 31. There is no evidence of, nor has DEQ ever alleged violation of, a permit compliance plan or schedule as that term is used in the discharge permitting rules at ARM 17.30.1350. Therefore, there can be no “violation of a permit compliance plan or schedule” in this case. DEQ failed to timely file an exception to the Proposed Findings of Fact and Conclusions of Law and is now barred from raising any argument that there was a corrective action plan or a compliance plan that would support interpreting Violation 4 as a Class I violation.

3. The Proposed Findings of Fact and Conclusions of Law assert that Violation 4 was only of minor extent. Proposed FOFCOL, p. 45, ¶ 31. DEQ never filed an exception to that proposed conclusion, yet DEQ now argues that Violation 4 “was of major extent.” DEQ Response, p. 35. DEQ failed to timely

file an exception to the Proposed Findings of Fact and Conclusions of Law and is now barred from raising any argument that the extent of Violation 4 is anything other than minor.

Because DEQ failed to object to any of the Proposed Findings of Fact and Conclusions of Law, DEQ has waived all arguments against the Proposed Findings of Fact and Conclusions of Law. DEQ raised the three arguments discussed above, which are all contrary to the Proposed Findings of Fact and Conclusions of Law, for the first time in its Response Brief. Allowing such untimely arguments to stand prejudices Copper Ridge and Reflections and deprives the Board of a full and fairly briefed matter to review prior to oral argument. Therefore, DEQ's untimely and inappropriately raised arguments must be stricken from their Response Brief and DEQ must be prohibited from further raising those arguments.

DATED this 26th day of November, 2018.



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ATTORNEYS FOR REFLECTIONS AT
COPPER RIDGE, LLC AND COPPER
RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following persons by e-mail and United States mail, postage prepaid on the date herein.

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DATED this 26th day of November, 2018.



A handwritten signature in blue ink, appearing to read "Victoria M. Higgins", is written over a horizontal line.