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Special Board of Environmental Review Meeting Amendment and Adoption of MAR 17-405 (Subdivisions)

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BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, JANUARY 24, 2020
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: It is expected that most available Board members will be participating telephonically. The Board attorney and secretary will be present at the location stated above. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for Board members is available on the Board's Website (<http://deq.mt.gov/DEQAdmin/ber/board>) or from the Board Secretary (406-444-5270). 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 snelsen@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. ACTION ITEMS

In the Matter of the amendment of ARM 17.36.802 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule I pertaining to certification under 76-4-127, MCA (MAR 17-405). The board will review the proposed Notice of Amendment and Adoption.

II. 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.

III. ADJOURNMENT

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

Agenda # _____

Agenda Item Summary: Adoption of rule amendments to increase the Department's fees for public water and wastewater engineering review.

List of Affected Rules: ARM 17.38.106.

Affected Parties Summary: All public water supply and public wastewater systems require Department review and approval before they can be used or modified. These fee increases would apply to all applicants seeking such review and approval.

Scope of Proposed Proceeding: The Board is considering final action on adoption of amendments to the above-referenced rules as proposed in MAR Notice No. 17-405.

Background: On August 9, 2019, the Board initiated rulemaking to amend ARM 17.38.106 to increase fees for Department review of plans and specifications for public water and wastewater systems. In the same notice of proposed rulemaking, the Department proposed, under the Department's rulemaking authority, to amend ARM 17.36.802 to increase fees for Department review of subdivision applications. The Department also proposed, under the Department's rulemaking authority, to adopt New Rule 1, which would establish criteria for which municipalities and county water and/or sewer districts would be able to act as certifying authorities for the subdivision exemption in §§ 76-4-125(d) and -127, MCA.

The rule amendments initiated by the Board proposed increasing Department fees by 40 percent to address immediate budgetary shortfalls and to cover projected costs until 2027. Following public comments that the fees should be phased in over time, the Department has provided draft language to ARM 17.38.106 that would increase Department fees by 25 percent. The Board is now considering whether to adopt the proposed amendments to ARM 17.38.106 with the modified fee amounts.

The Department prepared a memorandum considering the stringency analysis under §§ 75-6-116 and 76-4-135, MCA, and a takings analysis under § 2-10-105, MCA, which is enclosed. The Department also prepared a small business impact analysis under § 2-4-111, MCA, and a supplemental memo in light of the modified fee amounts, both of which are enclosed.

Hearing Information: Sarah Clerget conducted a public hearing on September 16, 2019. The Department testified in favor of adoption as proposed, and no other person testified. Several written comments were submitted during the public comment period. These written comments have been summarized and responded to in the proposed Notice of Amendment and Adoption. Most significant among these comments was a request to phase in the proposed fee increases to ease the burden on the regulated community. In response to these comments, the Department has drafted modified language that would decrease the fee increases from 40 percent to 25 percent.

Board Options: The Board may:

1. Adopt the amendments as modified, the stringency and takings analysis, and the small business impact analysis and supplemental small business memorandum.
2. Adopt the proposed amendments with revisions that the Board finds are appropriate and that are consistent with the scope of the Notice of Public Hearing on Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the amendments.

DEQ Recommendation: The Department recommends that the Board adopt the rule amendments to ARM 17.38.106 as modified in the draft notice of amendment (i.e., with the 25 percent fee increase in response to comments); the stringency and takings analysis; and the small business impact analysis and supplemental memorandum.

Enclosures:

1. Draft Notice of Amendment and Adoption
2. Draft Administrative Order
3. Stringency and Takings Analysis
4. Supplemental Memorandum to Small Business Impact Analysis
5. Small Business Impact Analysis
6. Notice of Public Hearing on Proposed Amendment and Adoption

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 AMENDMENT AND
17.36.802 and 17.38.106 pertaining to) ADOPTION
subdivision and public water and)
wastewater review fees, and New Rule) (SUBDIVISIONS)
I pertaining to certification under 76-4-) (PUBLIC WATER AND SEWAGE
127, MCA) SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On August 23, 2019, the Board of Environmental Review (board) and Department of Environmental Quality (department) published MAR Notice No. 17-405, pertaining to the proposed amendment and adoption of the above-stated rules at page 1228 of the 2019 Montana Administrative Register, Issue No. 16.

2. The board has amended ARM 17.38.106 as proposed but with the following changes from the original proposal, stricken matter interlined and new matter underlined:

17.38.106 FEES (1) remains as proposed.

(2) Department review will not be initiated until fees calculated under (2)(a) through (f) and (5) have been received by the department. If applicable, the final approval will not be issued until the calculated fees under (3) and (4) have been paid in full. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or subparts listed in these subsections:

(a) The fee schedule for designs requiring review for compliance with Department Circular DEQ-1 is set forth in Schedule I, as follows:

SCHEDULE I

Policies	
ultra violet disinfection	\$ 1,000 <u>875</u>
point-of-use/point-of-entry treatment	\$ 1,000 <u>875</u>
Section 1.0 Engineering Report	\$ 400 <u>350</u>
Section 3.1 Surface water	
quality and quantity	\$ 1,000 <u>875</u>
structures	\$ 1,000 <u>875</u>
Section 3.2 Ground water	\$ 1,200 <u>1,050</u>
Section 4.1 Microscreening	\$ 400 <u>350</u>
Section 4.2 Clarification	
standard clarification	\$ 1,000 <u>875</u>
solid contact units	\$ 2,000 <u>1,750</u>
Section 4.3 Filtration	
rapid rate	\$ 2,500 <u>2,190</u>

pressure filtration	\$ 2,000 <u>1,750</u>
diatomaceous earth	\$ 2,000 <u>1,750</u>
slow sand	\$ 2,000 <u>1,750</u>
direct filtration	\$ 2,000 <u>1,750</u>
biologically active filtration	\$ 2,000 <u>1,750</u>
membrane filtration	\$ 2,000 <u>1,750</u>
micro and ultra filtration	\$ 2,000 <u>1,750</u>
bag and cartridge filtration	\$ 600 <u>520</u>
Section 4.4 Disinfection	\$ 1,000 <u>875</u>
Section 4.5 Softening	\$ 1,000 <u>875</u>
Section 4.6 Ion Exchange	\$ 1,000 <u>875</u>
Section 4.7 Aeration	
natural draft	\$ 400 <u>350</u>
forced draft	\$ 400 <u>350</u>
spray/pressure	\$ 400 <u>350</u>
packed tower	\$ 1,000 <u>875</u>
Section 4.8 Iron and manganese	\$ 1,000 <u>875</u>
Section 4.9 Fluoridation	\$ 1,000 <u>875</u>
Section 4.10 Stabilization	\$ 600 <u>520</u>
Section 4.11 Taste and odor control	\$ 800 <u>700</u>
Section 4.12 Adsorptive media	\$ 1,000 <u>875</u>
Chapter 5 Chemical application	\$ 1,400 <u>1,220</u>
Chapter 6 Pumping facilities	\$ 1,400 <u>1,220</u>
Section 7.1 Plant storage	\$ 1,400 <u>1,220</u>
Section 7.2 Hydropneumatic tanks	\$ 600 <u>520</u>
Section 7.3 Distribution storage	\$ 1,400 <u>1,220</u>
Chapter 8 Distribution system	
per lot fee	\$ 400 <u>90</u>
non-standard specifications	\$ 600 <u>520</u>
transmission distribution (per lineal foot)	\$ 0.35 <u>0.30</u>
rural distribution system (per lineal foot)	\$ 0.04
sliplining existing mains (per lineal foot)	\$ 0.20
Chapter 9 Waste disposal	\$ 1,000 <u>875</u>
Appendix A	
new systems	\$ 400 <u>350</u>
modifications	\$ 200 <u>175</u>

(b) The fee schedule for designs requiring review for compliance with Department Circular DEQ-2 is set forth in Schedule II, as follows:

SCHEDULE II

Chapter 10 Engineering reports and facility plans	
engineering reports (minor)	\$ 400 <u>350</u>
comprehensive facility plan (major)	\$ 2,000 <u>1,750</u>
Chapter 30 Design of sewers	
per lot fee	\$ 400 <u>90</u>

non-standard specifications	\$ 600 <u>520</u>
collection system (per lineal foot)	\$ 0.35 <u>0.30</u>
sliplining existing mains (per lineal foot)	\$ 0.20
Chapter 40 Sewage pumping station	
force mains (per lineal foot)	\$ 0.35 <u>0.30</u>
1000 gpm or less	\$ 1,000 <u>875</u>
greater than 1000 gpm	\$ 2,000 <u>1,750</u>
Chapter 60 Screening grit removal	
screening devices and comminutors	\$ 600 <u>520</u>
grit removal	\$ 600 <u>520</u>
flow equalization	\$ 1,000 <u>875</u>
Chapter 70 Settling	\$ 1,500 <u>1,400</u>
Chapter 80 Sludge handling	\$ 3,000 <u>2,800</u>
Chapter 90 Biological treatment	\$ 4,700 <u>4,200</u>
nonaerated treatment ponds	\$ 1,500 <u>1,400</u>
aerated treatment ponds	\$ 2,800 <u>2,450</u>
Chapter 100 Disinfection	\$ 1,200 <u>1,120</u>
Chapter 120 Irrigation and Rapid Infiltration Systems	\$ 1,400 <u>1,220</u>
Appendices A and C (per design)	\$ 1,400 <u>1,220</u>

(c) The fee schedule for designs requiring review for compliance with Department Circular DEQ-3 is set forth in Schedule III, as follows:

SCHEDULE III

Section 3.2 Ground water	\$ 1,200 <u>1,050</u>
Chapter 6 Pump facilities	\$ 600 <u>520</u>
Chapter 7 Finished storage/hydropneumatic tanks	\$ 600 <u>520</u>
Chapter 8 Distribution system	\$ 600 <u>520</u>

(d) The fee schedule for designs requiring review for compliance with Department Circular DEQ-4 is set forth in Schedule IV, as follows:

SCHEDULE IV

Chapter 4 Pressure Dosing	\$ 400 <u>350</u>
Chapter 5 Septic Tanks	\$ 400 <u>350</u>
Chapter 6 Soil Absorption Systems	\$ 400 <u>350</u>
Chapter 6, Subchapter 6.8 ETA and ET Systems	\$ 1,000 <u>875</u>
Chapter 7, Subchapters 7.1, 7.2, and 7.3 Filters	\$ 400 <u>350</u>
Chapter 7, Subchapter 7.4 Aerobic Treatment	\$ 1,000 <u>875</u>
Chapter 7, Subchapter 7.5 Chemical Nutrient-Reduction Systems	\$ 1,000 <u>875</u>
Chapter 7, Subchapter 7.6 Alternate Advanced Treatment Systems	\$ 1,000 <u>875</u>
Chapter 8 Holding Tanks, Pit Privy, Seepage Pits, Waste Segregation, Experimental Systems	\$ 400 <u>350</u>

Appendix D	\$ 400 <u>350</u>
Non-degradation Review	\$ 600 <u>520</u>

(e) The fee schedule for designs requiring review for compliance with Department Circular DEQ-10 is set forth in Schedule V as follows:

SCHEDULE V

Spring box and collection lateral	\$ 500 <u>440</u>
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(f) The fee schedule for designs requiring review for compliance with Department Circular DEQ-16 is set forth in Schedule VI, as follows:

SCHEDULE VI

Cisterns	\$ 600 <u>520</u>
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(3) through (7) remain as proposed.

3. The department has amended ARM 17.36.802 and adopted New Rule I (ARM 17.36.610) as proposed but with the following changes from the original proposal, stricken matter interlined and new matter underlined:

17.36.802 FEE SCHEDULES (1) An applicant for approval under this subchapter shall pay the following fees:

(a) type of lots:	
(i) subdivision lot or parcel or townhouse	\$ 175 <u>160</u>
(ii) condominium/trailer court/recreational camping vehicle campground unit or space	\$ 70 <u>60</u>
(iii) resubmittal fee - previously approved lot, boundaries are not changed per lot or parcel	\$ 400 <u>90</u>
(b) type of water system:	
(i) individual or shared water supply system (existing and proposed) per unit	\$ 120 <u>110</u>
(ii) multiple-user system (non-public):	
(A) - each new system	\$ 440 <u>400</u> (plus \$ 150 <u>130</u> / hour for review in excess of four hours)
(B) - new distribution system design per lineal foot	\$ 0.50 <u>0.30</u>
(C) - connection to distribution system per lot or unit	\$ 400 <u>90</u>
(iii) public water system:	
(A) new system per component	per ARM 17.38.106 fee schedule
(c) type of wastewater disposal:	
(i) existing systems per unit	\$ 405 <u>90</u>
(ii) new gravity fed system per drainfield	\$ 130 <u>120</u>

- (iii) new dosed system, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems:
- (A) per design \$ ~~250~~ 240
(plus \$ ~~450~~ 130 / hour for review in excess of two hours)
 - (B) per drainfield \$ ~~70~~ 60
- (iv) gray water reuse systems, holding tanks, sealed pit privies, unsealed pit privies, seepage pits, waste segregation, experimental systems \$ ~~430~~ 120
(plus \$ ~~450~~ 130 / hour in excess of two hours)
- (v) multiple-user wastewater system (non-public):
- (A) - new collection system design per lineal foot \$ ~~0.35~~ 0.30
 - (B) - connection to collection system per lot or unit \$ ~~400~~ 90
 - (vi) new public wastewater system per component per ARM 17.38.106 fee schedule
- (d) other:
- (i) deviation from circular per request or design \$ ~~300~~ 250
(plus \$ ~~450~~ 130 / hour for review in excess of two hours)
 - (ii) waiver from rule per request \$ ~~300~~ 250
(plus \$ ~~450~~ 130 / hour for review in excess of two hours)
 - (iii) reissuance of original approval statement per request \$ ~~90~~ 70
 - (iv) review of revised lot layout document per request \$ ~~475~~ 160
 - (v) municipal facilities exemption checklist (former master plan exemption) per application \$ ~~450~~ 120
 - (vi) nonsignificance determinations/categorical exemption reviews:
 - (A) - individual/shared systems per drainfield \$ ~~90~~ 70
(plus \$ ~~450~~ 130 / hour for review in excess of two hours)
 - (B) - multiple-user non-public systems per lot or structure \$ ~~45~~ 40
(plus \$ ~~450~~ 130 / hour for review in excess of two hours)
 - (C) - source specific mixing zone per drainfield \$ ~~275~~ 250

(D) - public systems per drainfield	per ARM 17.38.106 fee schedule
(vii) storm drainage plan review:	
(A) - Circular DEQ-8 simple plan review per project	\$ 450 <u>130</u>
(B) - Circular DEQ-8 standard plan review:	
(I) per project	\$ 250 <u>220</u>
(II) plus per lot	\$ 60 <u>50</u> (plus \$ 450 <u>130</u> / hour for review in excess of 30 minutes per lot)
(viii) preparation of environmental assessments/environmental impact statements:	actual cost
(ix) review for compliance with ARM 17.30.718	\$ 900 (plus \$ 450 <u>130</u> / hour for review in excess of 6 hours).

NEW RULE I (17.36.610) CERTIFYING AUTHORITY UNDER 76-4-127, MCA (1) through (1)(b) remain as proposed.
~~(c) is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA;~~
 (d) through (2) remains as proposed.

4. The following comments were received and appear with the board and department's response:

COMMENT NO. 1: One commenter stated it supports the department's proposal to raise subdivision review fees in ARM 17.36.802. The commenter explained that it is a county contract subdivision reviewer and recognized that the current fees do not cover the cost of review.

RESPONSE: The department appreciates the comment.

COMMENT NO. 2: One commenter requested that the department eliminate the subdivision hourly rate fees in ARM 17.36.802 instead of increasing the fees as proposed. The commenter stated that the fee schedule already accounted for the complexity of subdivisions and that the hourly rate disincentivizes efficiencies within the department and unjustly places an undefinable and potentially unlimited cost on applicants. The commenter noted that ARM 17.36.805 already allows the department to assess fees if there are any changes to an application due to comments of deficiency or changes in project scope.

RESPONSE: The purpose of the hourly rate is for the department to recover review costs when extremely complex or poorly prepared submittals are received. This hourly fee is assessed very rarely. In FY19, the department charged the hourly rate for two out of approximately 500 files reviewed by the department. The department can assess fees under ARM 17.36.805 only if there are changes to the

reviewed facilities. In some cases, the proposed facilities do not change, so this fee cannot be assessed for every file.

COMMENT NO. 3: One commenter noted that the proposed fees for new water distribution systems differed between ARM 17.36.802 and 17.38.106. The commenter suggested that the department correct this discrepancy and change the fee in ARM 17.36.802 to 35 cents per lineal foot, rather than the proposed 50 cents.

RESPONSE: The department agrees with this comment and has changed the subdivision distribution fee in ARM 17.36.802 to 35 cents per linear foot.

COMMENT NO. 4: Two commenters stated the proposed fee increase must be accompanied with a commitment from the department to improve service. One commenter stated that it is unfair for the department to ask the regulated community for a 40 percent fee increase and in return provide no more than the current level of service. The other commenter stated that the proposed fee increases should include a guarantee of timely and accurate review, not just the same level of service with at an increased price.

RESPONSE: The department is committed to improving customer service irrespective of the fee increase. For instance, the department is undertaking a comprehensive rule update to clarify and consolidate rules and standards. As described in the statement of reasonable necessity, the operating costs of the department's public water and subdivision review section have exceeded current revenue, and it is necessary to increase fees to maintain program solvency. The department and board are adopting an approximate 25 percent fee increase in response to comments, as described in the response to comment No. 5. This lower fee increase does not allow for the hiring of additional staff, but is sufficient to address immediate budget shortfalls to maintain adequate staff to conduct timely and accurate reviews.

COMMENT NO. 5: Two commenters suggested that the increased fees be phased in over time, rather than being adopted all at once. One of these commenters stated that the proposed fee increase would have an unavoidable impact on housing costs. The commenter also noted that the fees should be implemented gradually over a period of years because the increases are meant to cover the department's increased costs over time. The other commenter also stated that the proposed fee increase would contribute to growing unaffordability for home buyers. The commenter suggested that the fees be incrementally phased in, stating that incremental fee increases are more affordable for the regulated community and consumers to bear than an immediate 40 percent increase.

RESPONSE: The department and board agree that a phased-in approach would create less of a burden on the regulated community and consumers. To implement the phased-in approach suggested by the commenters, the department and board are adopting an approximate 25 percent fee increase to address immediate budget shortfalls, with the anticipation of proposing additional fee increases, as necessary, to cover future costs. The cumulative impact of the modified fee increase would be approximately 15 percent less than the impacts of the 40 percent increase that was originally proposed.

COMMENT NO. 6: One commenter stated they understand the rationale for charging the subdivision per lot fee for townhomes but will closely scrutinize any future rule proposals to conflate townhomes with subdivision lots.

RESPONSE: The department appreciates the comment.

COMMENT NO. 7: One commenter stated that individual permittees should not bear the entire cost of subdivision review because subdivision review benefits the public in general. The commenter noted that this is a policy decision outside the scope of this rulemaking.

RESPONSE: The commenter's suggestion is outside the scope of this rulemaking, but the department appreciates the comment.

COMMENT NO. 8: One commenter objected to the statement in the statement of reasonable necessity that the department had consulted with a broad representation of stakeholders and had received no negative feedback. The commenter stated that it had expressed hesitation at the fee increases and had repeatedly stated that the organization and its members would like to review the actual proposal in detail rather than give a blanket approval to concepts introduced at informal meetings. The commenter stated that informal meetings are not a substitute for the formal process of rulemaking and that statements of the regulated community's opinion of proposed rules is an attempt to circumvent the rulemaking process and short-circuit public input.

RESPONSE: The department thanks the commenter for the comment. The department consulted with stakeholders to vet general concepts and build consensus before publishing the rule notice for the proposed rules. The statement to which the commenter objected is the department's impression of those discussions and was included to explain the particular approach taken in the rule notice. As discussed in response to Comment No. 5, the department and board have modified the proposed rules in response to the regulated community's comments.

COMMENT NO. 9: One commenter requested that the department remove the proposed requirement in New Rule I that a certifying authority be required to be within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA. The commenter noted that some county water and sewer districts are not covered by county growth policies and that county water and sewer districts are not bound by growth policies, which are advisory in nature.

RESPONSE: The department agrees with this comment and has eliminated this requirement from New Rule I. Necessary planning will be accomplished by the utility master plan requirement. The department has renumbered the rule to account for this change.

COMMENT NO. 10: One commenter requested that the department remove storm water from the county water and sewer district certification requirements proposed in New Rule I. The commenter stated that the ability to provide adequate water and wastewater treatment is separate from reviewing and overseeing

construction plans and verifying that storm water is properly addressed. The commenter stated that the storm water requirement made it very unlikely that a county water and sewer district would become a certifying authority, and the legislative change to allow county and water sewer districts to act as certifying authorities would be of no use.

RESPONSE: The department has not modified the proposed rule in response to this comment. The requirement to review storm water facilities is necessary to comply with Sections 76-4-127(1) and (2)(i), MCA, both of which require the certifying authority to review and approve plans to ensure adequate storm water drainage. The statutory provision would have to be amended before the commenter's proposed change could be made.

4. The effective date for the proposed rulemaking was January 1, 2020. Because the board and department did not adopt the notice of proposed rulemaking by that date, the board and department are extending the effective date to March 1, 2020, to provide additional notice to the regulated community.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/
EDWARD HAYES
Rule Reviewer

BY: /s/
CHRISTINE DEVENY
Chair

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/
SHAUN McGRATH
Director

Certified to the Secretary of State, _____, 2020.

STATE OF MONTANA
BOARD OF ENVIRONMENTAL REVIEW
and the
DEPARTMENT OF ENVIRONMENTAL QUALITY

(1) I, Christine Deveny, Chair of the Board of Environmental Review of the State of Montana, by virtue of and pursuant to the authority vested in me by Sections 75-6-108, 76-4-105, MCA, do promulgate and adopt the annexed rules to-wit:

AMD:	17.36.802	Fee Schedules
	17.38.106	Fees

as permanent rules of this board.

(2) I, Shaun McGrath, Director of the Department of Environmental Quality of the State of Montana, by virtue of and pursuant to the authority vested in me by Section 76-4-104, MCA, do promulgate and adopt the annexed rules to-wit:

NEW: I	17.36.610	Certifying Authority Under 76-4-127, MCA
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as a permanent rule of this department.

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

APPROVED AND ADOPTED _____, 2020

CERTIFIED TO THE
SECRETARY OF STATE _____, 2020

BOARD OF ENVIRONMENTAL REVIEW

BY: /s/ _____
CHRISTINE DEVENY, CHAIR

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: /s/ _____
SHAUN McGRATH, DIRECTOR

To: Board of Environmental Quality

Shaun McGrath, Director, DEQ

From: Aaron Pettis, Attorney, DEQ 

RE: Stringency and Takings Analysis, MAR Notice No. 17-405

In the matter of the amendment of ARM 17.36.802 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule 1 pertaining to certification under 76-4-127, MCA

Date: September 16, 2019

Stringency Review

MAR Notice No. 17-405 is a joint rulemaking proposed by the Department of Environmental Quality (“Department”) and the Board of Environmental Review (“Board”). In this rulemaking, the Department proposes to amend ARM 17.36.802 to increase fees for Department review of subdivision applications, and the Board proposes to amend ARM 17.38.106 to increase fees for Department review of plans and specifications for public water and wastewater systems. The Department also proposes to adopt New Rule 1, which would establish criteria for which municipalities and which county water and/or sewer districts would be able to act as certifying authorities for the subdivision exemption in §§ 76-4-125(d) and -127, MCA.

The rules proposed to be adopted by the Department are New Rule 1 and the amendments to ARM 17.36.802. The authority for the Department to adopt these rules is found in §§ 76-4-104 and 76-4-105, MCA. The rules proposed to be adopted by the Board are the amendments to ARM 17.38.106. The authority for the Board to adopt these amendments is found in § 75-6-108, MCA.

Under §§ 75-6-116 and 76-4-135, MCA, neither the Department nor the Board may adopt rules that are more stringent than comparable federal regulations or guidelines that address the same circumstances, unless the Department or Board, as appropriate, makes a written finding after a public hearing and public comment that the proposed state standard or requirement protects public health or the environment of the state and that the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

The proposed amendments to ARM 17.36.802 and 17.38.106 are, respectively, fee increases for Department review of subdivision applications and Department engineering review of public water and wastewater systems. There are no comparable federal regulations or guidelines that address the fee requirements for review of such applications. Proposed New Rule 1 would create criteria for which municipalities and county water and/or sewer districts could act as certifying authorities for the statutory subdivision exemption in §§ 76-4-125(d) and -127, MCA, of Montana's Sanitation in Subdivisions Act. There are no comparable federal regulations or guidelines for subdivision review or exemptions. Therefore, none of the proposed rules would render any Department or Board rule or regulation more stringent than corresponding federal regulations or guidelines, and no written findings are required.

Private Property Assessment Act Analysis

Under § 2-10-105, MCA, an agency must complete a takings impact assessment before taking an action with taking or damaging implications. Such an action is defined as "a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution." § 2-10-103(1), MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. A completed Attorney General checklist for the proposed rules is attached to this memo. Based on the guidelines provided by the Attorney General, the proposed rule amendments do not constitute an "action with taking or damaging implications" in violation of the United States or Montana constitution.

MAR Notice No. 17-405

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

YES	NO		
<input checked="" type="checkbox"/>	<input type="checkbox"/>	1.	Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	2.	Does the action result in either a permanent or indefinite physical occupation of private property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	3.	Does the action deprive the owner of all economically viable uses of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	4.	Does the action deny a fundamental attribute of ownership?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	5.	Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a. and 5b. and continue with question 6.]
<input type="checkbox"/>	<input type="checkbox"/>	5a.	Is there a reasonable, specific connection between the government requirement and legitimate state interests?
<input type="checkbox"/>	<input type="checkbox"/>	5b.	Is the government requirement roughly proportional to the impact of the proposed use of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	6.	Does the action have a severe impact on the value of the property?
<input type="checkbox"/>	<input checked="" type="checkbox"/>	7.	Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO, do not answer questions 7a. – 7c.]
<input type="checkbox"/>	<input type="checkbox"/>	7a.	Is the impact of government action direct, peculiar, and significant?
<input type="checkbox"/>	<input type="checkbox"/>	7b.	Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
<input type="checkbox"/>	<input type="checkbox"/>	7c.	Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implications exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, 7c; or if NO is checked in response to questions 5a or 5b.

If taking or damaging implications exist, the agency must comply with § 5 of the Private Property assessment Act, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

To: Board of Environmental Quality
Shaun McGrath, Director, Department of Environmental Quality

From: Kevin Smith, Bureau Chief, Engineering Bureau, Department of Environmental Quality *KS*

Re: Supplemental Memorandum for Small Business Impact Analysis, MAR 17-405, dated September 16, 2019

In the matter of the amendment of ARM 17.36.802 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule 1 pertaining to certification under 76-4-127, MCA

Date: January 17, 2020

MAR Notice No. 17-405 is a joint rulemaking proposed by the Department of Environmental Quality (“Department”) and the Board of Environmental Review (“Board”). This memorandum supplements the September 16, 2019 Small Business Impact Analysis, MAR 17-405, previously submitted. That analysis considered a proposed 40% increase in subdivision and public water and wastewater review fees, as well as the proposed adoption of New Rule 1 pertaining to certification under § 76-4-127, MCA. This memorandum supplements the original analysis in light of changes that have been made to the rules in response to comments received.

During the public comment period, some commenters stated that the proposed 40% fee increase in ARM 17.36.802 and 17.36.106 should be phased in over time, rather than implementing them all at once to lower costs to the regulated community. In response to those comments, the Department now proposes that both it and the Board adopt a 25% fee increase to address immediate budget shortfalls.

The Small Business Impact Analysis, as discussed in the September 16, 2019 Memorandum, remains essentially the same with the following exceptions: Increased costs to small businesses that are involved with subdivision development and / or public water and waste water systems would be reduced from 40% to 25%, and the anticipated solvency of the Department’s programs that are funded by these fees would be reduced from 2027 to 2023.

The Department, should ongoing work demand increase as anticipated in the September 16, 2019 Memorandum, will request to adjust fees through the administrative rule process to ensure fiscal solvency of the programs. Said future adjustments will reflect actual work demand, staffing levels, and desired performance.

To: Board of Environmental Quality
Shaun McGrath, Director, Department of Environmental Quality

From: Kevin Smith, Bureau Chief, Engineering Bureau, Department of Environmental Quality *KSL*

Re: Small Business Impact Analysis, MAR 17-405
In the matter of the amendment of ARM 17.36.802 and 17.38.106 pertaining to subdivision and public water and wastewater review fees, and New Rule 1 pertaining to certification under 76-4-127, MCA

Date: September 16, 2019

Before adopting a rule, the agency that has proposed the rule must determine if the rule will have a significant and direct impact on small businesses. If so, the agency must prepare a small business impact statement that, at a minimum, does the following: (a) identify by class or group the small businesses probably affected by the proposed rule, (b) include a statement of the probable significant and direct effects of the proposed rule on the small businesses identified in subsection (a), and (c) include a description of any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule, while still achieving the purpose of the proposed rule. § 2-4-111(1), MCA. A small business is a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees. § 2-4-102(13), MCA.

MAR Notice No. 17-405 is a joint rulemaking proposed by the Department of Environmental Quality (“Department”) and the Board of Environmental Review (“Board”). In this rulemaking, the Department proposes to amend ARM 17.36.802 to increase fees for Department review of subdivision applications, and the Board proposes to amend ARM 17.38.106 to increase fees for Department review of plans and specifications for public water and wastewater systems. The Department also proposes to adopt New Rule 1, which would establish criteria for which municipalities and which county water and/or sewer districts would be able to act as certifying authorities for the subdivision exemption in §§ 76-4-125(d) and -127, MCA.

(a) Identify by class or group the small businesses probably affected by the proposed rule.

The proposed amendments to ARM 17.36.802 would increase fees for Department review of subdivision applications. Although the Department does not maintain records regarding the size or type of businesses that submit subdivision applications, the proposed fee increases could apply to any type of small business that own property subject to the Sanitation in Subdivisions Act. Under § 76-4-102(22), MCA, a “subdivision” is

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 and includes any resubdivision, any condominium, townhome or townhouse, or any area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes.

Under this definition, some small businesses probably affected by the proposed fee increases would be campgrounds, mobile home parks, and developers of condominiums, townhomes, or townhouses. Additionally, because the Act includes divisions of less than 20 acres and any resubdivisions, the Act (and thus fees associated with approval under the Act) could apply to any type of small business that owns such property. For the same reasons, proposed New Rule 1 likewise could apply to any type of small business.

The proposed amendments to ARM 17.38.106 would increase fees for Department engineering review of public water supply systems and public wastewater systems. The Department has previously estimated that approximately 49% of Montana’s 2,000+ public water supply systems are owned by small businesses. These small businesses are mainly day care centers, hotels and motels, mobile home parks, restaurants and bars, recreation areas, service stations, and wholesalers of water.

(b) Include a statement of the probable significant and direct effects of the proposed rule on the small businesses identified in subsection (a).

The proposed amendments to ARM 17.36.802 would increase fees for Department review of subdivision applications by an average 40 percent per component, to the next five or ten cent or dollar increment. These review fees would apply for first-time subdivision applications and for applications to change the original conditions of approval under ARM 17.36.112. The proposed fee increases concern engineering review fees only and would not impose any ongoing fees.

The proposed amendments to ARM 17.38.106 would increase fees for Department engineering review of public water supply systems and public wastewater systems. The proposed fee increases used an average 40 percent per component, to the next five or ten cent or dollar increment. These review fees would apply for engineering approval of public water and wastewater systems and to modifications of approved systems. The proposed fee increases concern engineering review fees only and would not impose any ongoing fees.

Proposed New Rule 1 would create criteria for which municipalities and county water and/or sewer districts are eligible to act as certifying authorities for the subdivision exemption in §§ 76-4-125(d) and -127, MCA. Before 2019, this exemption was available to a subdivider only if the governing body of certain municipalities certified that the subdivision would be served by adequate municipal facilities. In 2019, the Legislature enacted House Bill 55, which, among other things, expanded the exemption to include county water and/or sewer districts and removed the statutory eligibility requirements for municipalities. HB 55 directed the Department to adopt eligibility requirements for municipalities and county water and/or sewer districts to qualify as such certifying authorities. Proposed New Rule 1, which implements changes from House Bill 55, would therefore allow some subdividers, including small businesses, to use the exemption when it was previously unavailable. Because the exemption could apply to any type of small businesses, and because the Department maintains no records on the types or sizes of businesses that were eligible for the previous, narrower iteration of the exemption, it is impossible to determine which or how many small businesses would be affected by the proposed New Rule 1. However, small businesses that would be able to use the exemption after adoption of New Rule 1 would be exempt from Department subdivision review, which likely would lower costs to the small businesses for both Department review fees and for subdivision designs fees from a hired consultant or engineer. On the other hand, some small business consultants or engineers might lose some business because their services would not be needed for subdividers that could take advantage of the expanded exemption.

(c) Include a description of any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule, while still achieving the purpose of the proposed rule.

Because the purpose of the proposed fee increases is to cover the costs of the Department's review of subdivision applications and of plans and specifications for public water and wastewater systems, there are no other reasonable alternative methods to minimize or eliminate any potential adverse effects that could be reasonably implemented. Over the past three fiscal years, both sections have not collected fees commensurate with the cost to the Department for performing those reviewing services. The Department can cover its costs only by adopting a fee increase. The largest share of the Department's expenses by far are staff salaries. Reducing salaries can only be done by reducing staff. A single reviewer can reasonably be expected to review approximately 100 files per year. The two sections currently have 9.5 FTE. In fiscal year 19, the Department received 925 files. Eliminating even a single position would likely result in not meeting the

Department's statutory or rule review deadlines. And, as discussed in the statement of reasonable necessity for MAR 17-405, the Department projects that the proposed fee increases would cover Department costs through 2027. A smaller increase over shorter period would not allow the Department or contracted counties to adequately plan for the future and would not provide stability to the regulated community.

The expanded use of the statutory subdivision exemption in §§ 76-4-125(d) and -127, MCA, would lower costs for those subdividers who would now be able to be exempt from subdivision review by connecting to eligible county water and sewer districts. The Department does not foresee any adverse impacts to such small businesses if the proposed eligibility requirements are adopted. To the extent that there would be any adverse impacts to small businesses that provide consulting or engineering services, such adverse impacts likely would be insignificant, as the exemption would be available only to those county water and sewer districts eligible under the proposed rule. As mentioned above, New Rule 1 is being proposed because the Legislature expanded the use of the exemption to include county water and sewer districts and directed the Department to adopt rules concerning eligibility requirements. The Department must, therefore, adopt eligibility requirements. In determining which districts would be eligible, the Department considered adopting a minimum population threshold as the basis for determining county water and/or sewer district eligibility. The Department rejected this approach because a population threshold would eliminate some smaller districts that have adequately planned for future utility service while allowing other districts that may not have done so. Accordingly, the Department does not believe that there are any other reasonable alternative methods to minimize or eliminate any potential adverse effects that could be reasonably implemented.

Data sources

DEQ PWS Database

Small Business Impact Statement, MAR 17-386 (containing information from Matthew Betcher, Montana Department of Labor and Industry, concerning the public water systems that are likely to be categorized as small businesses)

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 17.36.802 and 17.38.106)	ON PROPOSED AMENDMENT
pertaining to subdivision and public)	AND ADOPTION
water and wastewater review fees,)	
and New Rule I pertaining to)	(SUBDIVISIONS)
certification under 76-4-127, MCA)	(PUBLIC WATER AND SEWAGE
)	SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On September 16, 2019, at 10:00 a.m., 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 and adoption 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., September 9, 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:

17.36.802 FEE SCHEDULES (1) An applicant for approval under this subchapter shall pay the following fees:

- (a) type of lots:
 - (i) subdivision lot or parcel or townhouse \$ ~~125.00~~ 175.00
 - (ii) condominium/~~townhouse~~/trailer court/recreational camping vehicle
campground unit or space \$ ~~50.00~~ 70.00
 - (iii) resubmittal fee - previously approved lot, boundaries are not changed per
lot or parcel \$ ~~75.00~~ 100.00
- (b) type of water system:
 - (i) individual or shared water supply system (existing and proposed) per
unit \$ ~~85.00~~ 120.00
 - (ii) multiple-user system (non-public):
 - (A) - each new system \$ ~~315.00~~ 440.00
(plus \$ ~~105.00~~ 150.00 / hour for
review in excess

	of four hours)
(B) - new distribution system design per lineal foot	\$ 0.25 <u>0.50</u>
(C) - connection to distribution system per lot or unit	\$ 70.00 <u>100.00</u>
(iii) public water system:	
(A) new system per component	per ARM 17.38.106 fee schedule
(B) new distribution system design per lineal foot	\$ 0.25
(C) connection to distribution system per lot or structure	\$ 70.00
(c) type of wastewater disposal:	
(i) existing systems per unit	\$ 75.00 <u>105.00</u>
(ii) new gravity fed system per drainfield	\$ 95.00 <u>130.00</u>
(iii) new dosed system, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems:	
(A) per design	\$ 190.00 <u>250.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(B) per drainfield	\$ 50.00 <u>70.00</u>
(iv) gray water reuse systems, holding tanks, sealed pit privies, unsealed pit privies, seepage pits, waste segregation, experimental systems	\$ 95.00 <u>130.00</u> (plus \$ 405.00 <u>150.00</u> / hour in excess of two hours)
(v) multiple-user wastewater system (non-public):	
(A) - new collection system design per lineal foot	\$ 0.25 <u>0.35</u>
(B) - connection to collection system per lot or unit	\$ 70.00 <u>100.00</u>
(vi) new public wastewater system per component	per ARM 17.38.106 fee schedule
(A) new collection system design per lineal foot	\$ 0.25
(B) connection to collection system per lot or structure	\$ 70.00
(d) other:	
(i) deviation from circular per request or design	\$ 200.00 <u>300.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(ii) waiver from rule per request	\$ 200.00 <u>300.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(iii) reissuance of original approval statement per request	\$ 60.00 <u>90.00</u>

(iv) review of revised lot layout document per request	\$ 425.00 <u>175.00</u>
(v) municipal facilities exemption checklist (former master plan exemption) per application	\$ 400.00 <u>150.00</u>
(vi) nonsignificance determinations/categorical exemption reviews:	
(A) - individual/shared systems per drainfield	\$ 60.00 <u>90.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(B) - multiple-user non-public systems per lot or structure	\$ 30.00 <u>45.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of two hours)
(C) - source specific mixing zone per drainfield	\$ 200.00 <u>275.00</u>
(D) - public systems per drainfield	per ARM 17.38.106 fee schedule
(vii) storm drainage plan review:	
(A) - plans exempt from Circular DEQ-8 <u>simple plan review</u> per lot project	\$ 40.00 <u>150.00</u>
(B) - plans subject to Circular DEQ-8 <u>standard plan</u> review:	
(I) per design project	\$ 180.00 <u>250.00</u>
(II) <u>plus</u> per lot	\$ 40.00 <u>60.00</u> (plus \$ 405.00 <u>150.00</u> / hour for review in excess of 30 minutes per lot)
(viii) preparation of environmental assessments/environmental impact statements:	actual cost-
<u>(ix) review for compliance with ARM 17.30.718</u>	<u>\$900.00 (plus \$150 / hour for review in excess of 6 hours).</u>

AUTH: 76-4-105, MCA
IMP: 76-4-105, MCA

REASON: The department is proposing to increase subdivision fees to cover actual costs for reviewing plats and subdivisions, conducting inspections, and conducting enforcement activities. The last major change to the subdivision fees was in 2013. Previous fiscal year expenses and revenue were the following:

FY 17 Revenue \$ 826,213.53	Expenses \$ 921,385.02	Difference \$ -95,171.49
FY 18 Revenue \$ 955,232.33	Expenses \$ 971,050.56	Difference \$ -15,818.23

Average expenses exceeded average revenue by approximately 7 percent over the past two fiscal years. Expenses to the department grew by over 5 percent between FY 17 and FY 18. Assuming a conservative average increase in expenses of 2 percent per year, the department projects that fees will need to be increased by 40 percent to cover the department's actual costs through 2027. The department has projected expenses through this date to allow the department and contracted counties to budget and plan for future needs and to provide long-term predictability for the regulated community. The proposed fee increase used an average 40 percent increase per component, to the next five or ten cent or dollar increment. Approximately 800 subdivision files per year will be impacted by this fee increase, resulting in an approximate cumulative increase of \$382,093 per year. The department consulted with a broad representation of stakeholders, including developers, consultants, engineers, and others in the regulated community, and has received no negative feedback regarding these proposed fee increases.

In addition to this general increase in fees, the department is proposing to make the following other amendments to ARM 17.36.802.

The department is proposing to amend (1)(a)(i) and (ii) so that townhouse applications will be subject to the same fees as subdivision lots. Townhouses create new lots that take as much time to review as other subdivision lots, and the fees should reflect the time incurred in reviewing them. Together with the general fee increase discussed above, this change will result in an increased fee of \$125 for each townhouse. The department does not maintain separate data for townhouse applications, and each application contains a different number of townhouses. Nevertheless, the department estimates that it receives approximately twenty townhouse applications per year, with each project generally containing ten to twenty townhouses.

The department is proposing to delete (1)(b)(iii)(B) and (C) and (1)(c)(vi)(A) and (B), which are duplicative of (1)(b)(iii)(A) and (1)(c)(vi). This amendment will have no impact on fees; it will merely delete the duplicative rule sections.

The department is proposing to update the terminology in (1)(d)(vii)(A) and (B) to refer to "simple" and "standard" storm water plans instead of "exempt" and "non-exempt" plans. This is necessary to conform the rule language with the 2018 edition of Department Circular DEQ-8. Instead of applying the general 40 percent fee increase discussed above, the department is proposing to increase fees for simple plans from \$40 to \$150, but on a per-project basis instead of a per-lot basis. This is necessary because simple plans take a minimum of one hour of review time. Approximately 1/3 of all subdivision applications include simple storm water plans, or approximately 266 files per year. This will result in a cumulative increase of approximately \$29,620 per year. The department is proposing to amend (1)(d)(vii)(B)(I) to refer to the "project" instead of the "design" and to amend (1)(d)(vii)(B)(II) to say "plus per lot," both which are necessary to clarify the language in the fee.

The department is proposing that applicants pay to cover the costs of the department's review to classify a subsurface wastewater treatment system as level 1a, level 1b, or level 2 under ARM 17.30.718. This review takes approximately six hours of staff time. This new fee is necessary to cover the costs of this review because currently applicants pay no fee for this review. The department receives

approximately three of these applications per year.

17.38.106 FEES (1) remains the same.

(2) Department review will not be initiated until fees calculated under (2)(a) through (f) and (5) have been received by the department. If applicable, the final approval will not be issued until the calculated fees under (3) and (4) have been paid in full. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or subparts listed in these subsections:

(a) The fee schedule for designs requiring review for compliance with Department Circular DEQ-1 is set forth in Schedule I, as follows:

SCHEDULE I

Policies	
ultra violet disinfection	\$ 700 <u>1,000</u>
point-of-use/point-of-entry treatment	\$ 700 <u>1,000</u>
Section 1.0 Engineering Report	\$ 280 <u>400</u>
Section 3.1 Surface water	
quality and quantity	\$ 700 <u>1,000</u>
structures	\$ 700 <u>1,000</u>
Section 3.2 Ground water	\$ 840 <u>1,200</u>
Section 4.1 Microscreening	\$ 280 <u>400</u>
Section 4.2 Clarification	
standard clarification	\$ 700 <u>1,000</u>
solid contact units	\$ 1,400 <u>2,000</u>
Section 4.3 Filtration	
rapid rate	\$ 1,750 <u>2,500</u>
pressure filtration	\$ 1,400 <u>2,000</u>
diatomaceous earth	\$ 1,400 <u>2,000</u>
slow sand	\$ 1,400 <u>2,000</u>
direct filtration	\$ 1,400 <u>2,000</u>
biologically active filtration	\$ 1,400 <u>2,000</u>
membrane filtration	\$ 1,400 <u>2,000</u>
micro and ultra filtration	\$ 1,400 <u>2,000</u>
bag and cartridge filtration	\$ 420 <u>600</u>
Section 4.4 Disinfection	\$ 700 <u>1,000</u>
Section 4.5 Softening	\$ 700 <u>1,000</u>
Section 4.6 Ion Exchange	\$ 700 <u>1,000</u>
Section 4.7 Aeration	
natural draft	\$ 280 <u>400</u>
forced draft	\$ 280 <u>400</u>
spray/pressure	\$ 280 <u>400</u>
packed tower	\$ 700 <u>1,000</u>
Section 4.8 Iron and manganese	\$ 700 <u>1,000</u>
Section 4.9 Fluoridation	\$ 700 <u>1,000</u>
Section 4.10 Stabilization	\$ 420 <u>600</u>
Section 4.11 Taste and odor control	\$ 560 <u>800</u>
Section 4.12 Adsorptive media	\$ 700 <u>1,000</u>

Chapter 5 Chemical application	\$ 980 <u>1,400</u>
Chapter 6 Pumping facilities	\$ 980 <u>1,400</u>
Section 7.1 Plant storage	\$ 980 <u>1,400</u>
Section 7.2 Hydropneumatic tanks	\$ 420 <u>600</u>
Section 7.3 Distribution storage	\$ 980 <u>1,400</u>
Chapter 8 Distribution system	
per lot fee	\$ 70 <u>100</u>
non-standard specifications	\$ 420 <u>600</u>
transmission distribution (per lineal foot)	\$ 0.25 <u>0.35</u>
rural distribution system (per lineal foot)	\$ 0.03 <u>0.04</u>
sliplining existing mains (per lineal foot)	\$ 0.15 <u>0.20</u>
Chapter 9 Waste disposal	\$ 700 <u>1,000</u>
Appendix A	
new systems	\$ 280 <u>400</u>
modifications	\$ 140 <u>200</u>

(b) The fee schedule for designs requiring review for compliance with Department Circular DEQ-2 is set forth in Schedule II, as follows:

SCHEDULE II

Chapter 10 Engineering reports and facility plans	
engineering reports (minor)	\$ 280 <u>400</u>
comprehensive facility plan (major)	\$ 1,400 <u>2,000</u>
Chapter 30 Design of sewers	
per lot fee	\$ 70 <u>100</u>
non-standard specifications	\$ 420 <u>600</u>
collection system (per lineal foot)	\$ 0.25 <u>0.35</u>
sliplining existing mains (per lineal foot)	\$ 0.15 <u>0.20</u>
Chapter 40 Sewage pumping station	
force mains (per lineal foot)	\$ 0.25 <u>0.35</u>
1000 gpm or less	\$ 700 <u>1,000</u>
greater than 1000 gpm	\$ 1,400 <u>2,000</u>
Chapter 60 Screening grit removal	
screening devices and comminutors	\$ 420 <u>600</u>
grit removal	\$ 420 <u>600</u>
flow equalization	\$ 700 <u>1,000</u>
Chapter 70 Settling	\$ 1,120 <u>1,500</u>
Chapter 80 Sludge handling	\$ 2,240 <u>3,000</u>
Chapter 90 Biological treatment	\$ 3,360 <u>4,700</u>
nonaerated treatment ponds	\$ 1,120 <u>1,500</u>
aerated treatment ponds	\$ 1,960 <u>2,800</u>
Chapter 100 Disinfection	\$ 900 <u>1,200</u>
Chapter 120 Irrigation and Rapid Infiltration Systems	\$ 980 <u>1,400</u>
Appendices A and C (per design)	\$ 980 <u>1,400</u>

(c) The fee schedule for designs requiring review for compliance with

Department Circular DEQ-3 is set forth in Schedule III, as follows:

SCHEDULE III

Section 3.2 Ground water	\$ 840 <u>1,200</u>
Chapter 6 Pump facilities	\$ 420 <u>600</u>
Chapter 7 Finished storage/hydropneumatic tanks	\$ 420 <u>600</u>
Chapter 8 Distribution system	\$ 420 <u>600</u>

(d) The fee schedule for designs requiring review for compliance with Department Circular DEQ-4 is set forth in Schedule IV, as follows:

SCHEDULE IV

Chapter 4 Pressure Dosing	\$ 280 <u>400</u>
Chapter 5 Septic Tanks	\$ 280 <u>400</u>
Chapter 6 Soil Absorption Systems	\$ 280 <u>400</u>
Chapter 6, Subchapter 6.8 ETA and ET Systems	\$ 700 <u>1,000</u>
Chapter 7, Subchapters 7.1, 7.2, and 7.3 Filters	\$ 280 <u>400</u>
Chapter 7, Subchapter 7.4 Aerobic Treatment	\$ 700 <u>1,000</u>
Chapter 7, Subchapter 7.5 Chemical Nutrient-Reduction Systems	\$ 700 <u>1,000</u>
Chapter 7, Subchapter 7.6 Alternate Advanced Treatment Systems	\$ 700 <u>1,000</u>
Chapter 8 Holding Tanks, Pit Privy, Seepage Pits, Waste Segregation, Experimental Systems	\$ 280 <u>400</u>
Appendix D	\$ 280 <u>400</u>
Non-degradation Review	\$ 420 <u>600</u>

(e) The fee schedule for designs requiring review for compliance with Department Circular DEQ-10 is set forth in Schedule V as follows:

SCHEDULE V

Spring box and collection lateral	\$ 350 <u>500</u>
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(f) The fee schedule for designs requiring review for compliance with Department Circular DEQ-16 is set forth in Schedule VI, as follows:

SCHEDULE VI

Cisterns	\$ 420 <u>600</u>
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(3) Fees for review of plans and specifications not covered under (2) are established by the department based on a charge of \$~~405~~ 150 per hour multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications will be determined by the review engineer and documented with time sheets.

(4) The fee for review of plans and specifications previously denied, for staff

time over two hours, is \$~~405~~ 150 per hour, assessed in half-hour increments, multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications must be determined by the review engineer and documented with time sheets.

(5) The fee for review of deviations is \$~~200~~ 300 per deviation.

(6) and (7) remain the same.

AUTH: 75-6-108, MCA

IMP: 75-6-108, MCA

REASON: The board is proposing to amend ARM 17.38.106 to increase fees for department review of plans and specifications of public water supply and public wastewater systems. Such increases are necessary to cover department costs in conducting such reviews. The last major change to these fees was in 2010. Previous fiscal year expenses and revenue were the following:

FY 17 Revenue \$ 470,097.73	Expenses \$ 498,450.95	Difference \$ -28,353.22
FY 18 Revenue \$ 606,894.58	Expenses \$ 659,109.63	Difference \$ -52,215.05

Average expenses exceeded average revenue by approximately 7 percent over the past two fiscal years. Assuming a conservative average increase in expenses of 2 percent per year, the Public Water and Wastewater Engineering Review program projects that fees will need to be increased by 40 percent to cover the department's actual costs through 2027. Using this time frame allows the department to budget and plan for future needs and provides long-term predictability for the regulated community. The proposed fee increase used an average 40 percent increase per component, to the next five or ten cent or dollar increment. Approximately 400 public water and wastewater applications per year will be affected by these fee increases, resulting in a cumulative increase of approximately \$242,758 per year. The department consulted with a broad representation of stakeholders, including developers, consultants, engineers, and others in the regulated community, and has received no negative feedback regarding these proposed fee increases.

4. The proposed new rule provides as follows:

NEW RULE I CERTIFYING AUTHORITY UNDER 76-4-127, MCA (1) A county water and/or sewer district is eligible to be a certifying authority under 76-4-127, MCA, if the district:

(a) is incorporated under Title 7, chapter 13, MCA;

(b) is in compliance with Title 75, chapters 5 and 6, MCA;

(c) is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA;

(d) has an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities; and

(e) has a utility master plan approved by the department within the past 10 years that addresses capacity of the water and wastewater systems to serve

additional development in compliance with department design circulars.

(2) A municipality is eligible to be a certifying authority under 76-4-127, MCA, if the municipality:

- (a) is in compliance with Title 75, chapters 5 and 6, MCA;
- (b) is a first or second class municipality or is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA; and
- (c) has an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities.

AUTH: 76-4-104, MCA

IMP: 76-4-104, 76-4-125, 76-4-127, MCA

REASON: Under 76-4-125 and 76-4-127, MCA, a subdivision may be exempt from department review if a certifying authority certifies that the subdivision will have adequate storm water drainage and that the subdivision will be served by adequate water and wastewater facilities. Before 2019, this exemption was available to a subdivider only if the governing body of certain municipalities certified that the subdivision would be served by adequate municipal facilities. In 2019, the Legislature enacted HB 55, which, among other things, expanded the exemption to include county water and/or sewer districts and removed the statutory eligibility criteria for municipalities. HB 55 directed the department to adopt eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under 76-4-127, MCA.

The department proposes New Rule I to comply with HB 55. Section (1) of New Rule I provides the eligibility requirements for county water and/or sewer districts, while (2) provides the eligibility requirements for municipalities.

Sections (1)(a) and (1)(b) require county water and/or sewer districts to be incorporated under Title 7, chapter 13, MCA, and to be in compliance with Title 75, chapters 5 and 6, MCA. These requirements are necessary to be consistent with the statutory definition of "adequate county water and/or sewer district facilities" in 76-4-102, MCA.

Section (1)(c) requires the county water and/or sewer district to be within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA. This requirement ensures that county water and sewer districts have planned for future development and have already evaluated their water, wastewater, and storm water needs, making additional oversight by the department unnecessary.

Section (1)(d) requires the county water and/or sewer district to have an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities. Because the exemption will allow a subdivision to avoid department subdivision review, professional engineering certification is necessary to ensure that the county water and/or sewer district is familiar with department minimum design standards for those facilities.

Section (1)(e) requires the county water and/or sewer district to have a utility master plan approved by the department within the past ten years that addresses capacity of the water and wastewater system to serve additional development in compliance with department design circulars. A utility master plan is a planning and engineering tool that provides a road map to ensure that water and wastewater

facilities can reliably and efficiently serve the current and future needs of the county water and/or sewer district. The plan must include current demands on the facilities, proposed future demands, and an evaluation of the facilities' capacity to serve future additional demands when using this exemption.

The department considered adopting a minimum population threshold as the basis for determining county water and/or sewer district eligibility. The department rejected this approach because a population threshold would eliminate some smaller districts that have adequately planned for future utility service while allowing other districts that may not have done so.

Section (2)(a) requires municipalities to be in compliance with Title 75, chapters 5 and 6, MCA. This requirement is necessary to be consistent with the statutory definition of "adequate municipal facilities" in 76-4-102, MCA.

Section (2)(b) requires municipalities to be a first or second class municipality or to be within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA, in order to be a certifying authority. First and second class municipalities generally have adequately planned for future development, making additional department oversight unnecessary. Municipalities with a growth policy also have planned for future development, including their water, wastewater, and storm water facility needs, making additional oversight by the department unnecessary.

Section (2)(c) requires a municipality to have an on-staff or retained professional engineer to certify compliance with department design standards for water, wastewater, and storm water facilities. Because the exemption will allow a subdivision to avoid department subdivision review, professional engineering certification is reasonably necessary to ensure that the municipality is familiar with department minimum design standards regarding water, wastewater, and storm water facilities.

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. September 20, 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 board or 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, does apply. The sponsor was notified via regular mail on May 29, 2019.

9. With regard to the requirements of 2-4-111, MCA, the board and the department have determined that the amendment and adoption of the above-referenced rules will significantly and directly impact small businesses.

10. These rules will become effective January 1, 2020.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: /s/ Christine Deveny
CHRISTINE DEVENY
Chair

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/ Shaun McGrath
SHAUN McGRATH
Director

Certified to the Secretary of State, August 13, 2019.