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Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 5 day of May, 2017  
at 9:15 o'clock A.m.  
By: [Signature]

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
CHS, INC.'s APPEAL OF FINAL MPDES  
PERMIT NO. MT0000264 ISSUED BY  
DEQ FOR THE LAUREL REFINERY IN  
LAUREL, YELLOWSTONE COUNTY,  
MONTANA

Case No. BER 2015-07 WQ

**STIPULATION FOR FINAL AGENCY  
DECISION**

COME NOW Appellant CHS, Inc. ("CHS") and the Montana Department of Environmental Quality ("DEQ"), collectively ("Parties"), and hereby stipulate and agree as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board has authority to hear contested case appeals of DEQ's Montana Pollutant Discharge Elimination System ("MPDES") permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. The Department has statutory authority to administer Montana's water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and ARM 17.30.1301.

3. CHS is an association registered to do business in Montana, located in Yellowstone County, Montana, and is the owner and operator of the MPDES permitted facility which has been issued MPDES Permit No. MT0000264.

4. On September 16, 2015, DEQ issued a renewal of an Authorization to Discharge under MPDES Permit No. MT0000264 for CHS's Laurel Refinery.

5. On October 14, 2015, CHS timely appealed certain provisions of Permit No. MT0000264 before the Board of Environmental Review ("Board"). See Notice of Appeal and Request for Hearing (October 14, 2015).

6. On January 26, 2017, the Parties filed a Joint Stipulation to Vacate Remaining Scheduling Order Dates whereby the Parties indicated their desire to resolve five of the six identified appeal issues through a Stipulation for Final Agency Decision.

7. On January 26, 2017, the Hearing Examiner Ordered the Parties to comply with the terms of the Joint Stipulation to Vacate Remaining Scheduling Order Dates and to, inter alia, file the contemplated Stipulation for Final Agency Decision for presentation at the Board's June 2017 meeting.

8. Five of the six issues identified in CHS's Notice of Appeal and Request for Hearing may be resolved under the terms of this Stipulation, should the Board adopt a

final agency decision as specified herein and as further set forth in the MPDES Permit attached hereto as Exhibit A and incorporated herein by this reference. Under the terms of this Stipulation, CHS's Appeal Issues Nos. 1, 3, 4, 5, and 6 would be resolved.

9. At this time, the Parties foresee no mutual resolution concerning CHS's Appeal Issue No. 2, i.e., the arsenic limits for Outfalls 001 and 002. Following the Board's decision on this Stipulation, the Parties therefore contemplate the continuation of contested case proceedings concerning Appeal Issue No. 2.

10. As pertinent to CHS's Appeal Issue No. 1, it is appropriate to modify the appealed MPDES Permit to remove Water Quality-Based Effluent Limitations ("WQBELs") for Hydrogen Sulfide and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of dissolved sulfide and pH. The Parties further agree that this monitoring information is necessary to determine whether WQBELs for Hydrogen Sulfide should be implemented during the next MPDES permitting cycle and that such determination will be based, in part, upon an analysis of effluent and Yellowstone River data. Through the use of Standard Methods (SM) 4500-S<sup>2</sup>, CHS will calculate and report Hydrogen Sulfide concentrations from its measurements of dissolved sulfide as a function of pH.

11. CHS withdraws Appeal Issue No. 3 in its entirety.

12. As pertinent to CHS's Appeal Issue No. 4, it is appropriate to modify the appealed MPDES Permit to remove WQBELs for Total Nitrogen and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of Total Kjeldahl Nitrogen (TKN) and Nitrate + Nitrite (NO<sub>3</sub> + NO<sub>2</sub>). The Parties further



agree that this monitoring information is necessary to determine whether WQBELs for Total Nitrogen should be implemented during the next MPDES permitting cycle and that such determination will be based, in part, upon an analysis of effluent and Yellowstone River data collected from August 1<sup>st</sup> – October 31<sup>st</sup>.

13. CHS withdraws Appeal Issue No. 5 in its entirety.

14. As pertinent to CHS's Appeal Issue No. 6, the Parties agree that the requirement to monitor and report NO<sub>3</sub> + NO<sub>2</sub>, Fluoride, Arsenic, and Selenium at Outfall 001 should be modified in the appealed MPDES Permit to a frequency of semi-annual until November 1, 2019.

15. The MPDES Permit attached hereto as Exhibit A appropriately incorporates modifications to the appealed MPDES Permit as contemplated in this Stipulation.

16. The Parties request the Board adopt, as the final agency decision, concerning Appeal issues Nos. 1, 3, 4, 5, and 6, the MPDES Permit attached hereto as Exhibit A, pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403 (2) and ARM 17.30.1370 (4).

17. The Parties shall each pay their own attorney fees and costs.

18. Each of the signatories to this Stipulation represents that he or she is authorized to enter into this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.



19. Exhibit B, a track changes/redline version of the modified MPDES Permit, has been attached to this Stipulation to better highlight the Parties' proposed changes to the MPDES Permit.

NOW THEREFORE IT IS HEREBY STIPULATED AND AGREED, by and between CHS and DEQ that CHS's Appeal Issues Nos. 1, 3, 4, 5, and 6 have been fully and finally compromised and settled by agreement of the Parties and the Parties herein respectfully request the Board and stipulate to the Board's entry of a final agency decision as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board has authority to hear contested case appeals of DEQ's Montana Pollutant Discharge Elimination System ("MPDES") permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. The Department has statutory authority to administer Montana's water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and ARM 17.30.1301.

3. CHS is an association registered to do business in Montana, located in Yellowstone County, Montana, and is the owner and operator of the MPDES permitted facility which has been issued MPDES Permit No. MT0000264.

4. On September 16, 2015, DEQ issued a renewal of an Authorization to Discharge under MPDES Permit No. MT0000264 for CHS's Laurel Refinery.

5. On October 14, 2015, CHS timely appealed certain provisions of Permit No. MT0000264 before the Board. See Notice of Appeal and Request for Hearing (October 14, 2015).

6. On January 26, 2017, the Parties filed a Joint Stipulation to Vacate Remaining Scheduling Order Dates whereby the Parties indicated their desire to resolve five of the six identified appeal issues through a Stipulation for Final Agency Decision.

7. On January 26, 2017, the Hearing Examiner Ordered the Parties to comply with the terms of the Joint Stipulation to Vacate Remaining Scheduling Order Dates and to, inter alia, file the contemplated Stipulation for Final Agency Decision for presentation at the Board's June 2017 meeting.

8. Five of the six issues identified in CHS's Notice of Appeal and Request for Hearing are resolved through the Board's adoption a final agency decision as specified herein and as further specified in the MPDES Permit attached hereto as Exhibit A and incorporated herein by this reference. The resolved issues are CHS's Appeal Issues Nos. 1, 3, 4, 5, and 6.

9. As pertinent to CHS's Appeal Issue No. 1, it is appropriate to modify the appealed MPDES Permit to remove Water Quality-Based Effluent Limitations ("WQBELs") for Hydrogen Sulfide and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of dissolved sulfide and pH. This monitoring information is necessary to determine whether WQBELs for Hydrogen Sulfide should be implemented during the next MPDES permitting cycle and such determination will be based, in part, upon an analysis of effluent and Yellowstone River

data. Through the use of Standard Methods (SM) 4500-S<sup>2</sup>, CHS will calculate and report Hydrogen Sulfide concentrations from its measurements of dissolved sulfide as a function of pH.

10. CHS has withdrawn Appeal Issue No. 3 in its entirety.

11. As pertinent to CHS's Appeal Issue No. 4, it is appropriate to modify the appealed MPDES Permit to remove WQBELs for Total Nitrogen and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of Total Kjeldahl Nitrogen (TKN) and Nitrate + Nitrite (NO<sub>3</sub> + NO<sub>2</sub>). This monitoring information is necessary to determine whether WQBELs for Total Nitrogen should be implemented during the next MPDES permitting cycle and such determination will be based, in part, upon an analysis of effluent and Yellowstone River data collected from August 1<sup>st</sup> – October 31<sup>st</sup>.

12. CHS has withdrawn Appeal Issue No. 5 in its entirety.

13. As pertinent to CHS's Appeal Issue No. 6, the requirement to monitor and report NO<sub>3</sub> + NO<sub>2</sub>, Fluoride, Arsenic, and Selenium at Outfall 001 is modified in the appealed MPDES Permit to a frequency of semi-annual until November 1, 2019.

14. The MPDES Permit attached hereto as Exhibit A appropriately incorporates modifications to the appealed MPDES Permit as contemplated in this Stipulation.

15. Pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403 (2) and ARM 17.30.1370 (4), the Board HEREBY ADOPTS AS THE FINAL AGENCY DECISION, the MPDES Permit attached



hereto as Exhibit A, specifically reserving the CHS's appeal rights through contested case proceedings concerning CHS's Appeal Issue No. 2 as listed in its Notice of Appeal and Request for Hearing, dated October 14, 2015.

16. All conditions the MPDES Permit, attached hereto as Exhibit A, are fully effective and enforceable, with the exception any stayed conditions resulting from CHS's remaining Appeal Issue No. 2.

17. The Parties shall each pay their own attorney fees and costs.

18. The Board's Decision as to Appeal issues Nos. 1, 3, 4, 5, and 6 shall represent the FINAL AGENCY DECISION for purposes of the Montana Administrative Procedure Act, Section 2-4-623, MCA.

19. On or before June 16, 2017, the Parties shall contact Lori O'Brien, Paralegal, at Agency Legal Services Bureau, to set a telephonic scheduling conference to reset the vacated dates of the Scheduling Order for purposes of hearing CHS's Appeal Issue No. 2.

DATED this 4<sup>th</sup> day of May, 2017.

  
KURT R. MOSER  
Department of Environmental Quality

DATED this 4<sup>th</sup> day of May, 2017.

  
W. JOHN TIETZ  
Browning, Kaleczyc, Berry & Hoven, P.C.

## CERTIFICATE OF SERVICE

I hereby certify that this \_\_\_\_ day May, 2017, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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## EXHIBIT A

Major Industrial  
Permit No.: MT0000264

### MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

#### AUTHORIZATION TO DISCHARGE UNDER THE MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251 *et seq.*,

**CHS, Inc.**

is authorized to discharge from its **Laurel Refinery**

located at **802 Highway 212 South, Laurel, MT,**

to receiving waters named, **Italian Drain and Yellowstone River**

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit.

This permit shall become effective: **November 1, 2015.**

This permit and the authorization to discharge shall expire at midnight, **October 31, 2020.**

Modified Pursuant to Board Order on: June 2, 2017



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I. EFFLUENT LIMITATIONS, MONITORING REQUIREMENTS & OTHER CONDITIONS

A. Description of Discharge Points and Mixing Zone

The authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MPDES permit is a violation of the Montana Water Quality Act and could subject the person(s) responsible for such discharge to penalties under the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under Section 75-5-632 of the Montana Water Quality Act.

<u>Outfall</u>	<u>Description</u>
001	<p><b>Location:</b> At the end of the pipe/ditch, discharging into the Italian Drain, located at 45°39'28" N latitude, 108°45'09" W longitude.</p> <p><b>Mixing Zone:</b> None</p> <p><b>Treatment Works:</b> Refinery wastewater treatment plant.</p>
002	<p><b>Location (Future):</b> At the end of a single port diffuser, discharging into the Yellowstone River, located at 45°39'23.4" N latitude, 108°45'07.2" W longitude.</p> <p><b>Mixing Zone:</b> The maximum extent of the <b>chronic/human health</b> mixing zone in the named receiving waters is as follows: 1,000 feet downstream for the following parameters: ammonia, nitrate+nitrite, nitrogen, phosphorus, fluoride, hydrogen sulfide, cyanide, lead, mercury, and selenium.</p> <p>The maximum extent of the <b>acute</b> mixing zone in the named receiving waters is as follows: 100 feet downstream for the following parameters: ammonia and selenium.</p> <p><b>Treatment Works:</b> Refinery wastewater treatment plant.</p>



B. Effluent Limitations

*Interim Effluent Limits – Outfall 001 Italian Ditch*

Beginning on the effective date of this permit and lasting through **October 31, 2019**, the quality of effluent discharged from Outfall 001 by the facility shall, at a minimum, meet the limitations as set forth below:

Outfall 001 - Interim Numeric Discharge Limitations <sup>(1)</sup>			
Parameter	Units	Maximum Daily	Average Monthly
5-Day Biochemical Oxygen Demand (BOD <sub>5</sub> )	lb/day	620	331
Net Total Suspended Solids (TSS)	lb/day	532	339
Chemical Oxygen Demand (COD)	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Chromium, Total Recoverable (TR)	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(2)</sup>	
Footnotes:			
(1) See Definitions section at end of permit for explanation of terms.			
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 002 at any time there is discharge from Outfall 001.

*Final Effluent Limits Outfall 001- Italian Ditch*

Beginning **November 1, 2019**, until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits at Outfall 001:



Outfall 001 - Final Numeric Discharge Limitations <sup>(1)</sup>			
Parameter	Units	Effluent Limits	
		Maximum Daily	Average Monthly
BOD <sub>5</sub>	lb/day	620	331
Net TSS	lb/day	532	339
COD	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	mg/L	3.8	1.2
	lb/day	418	191
Nitrate + Nitrite	mg/L	10	10
Fluoride	mg/L	4.0	4.0
Sulfide	lb/day	3.9	1.8
Arsenic, TR	µg/L	10	10
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
Selenium, TR	µg/L	8.2	4.1
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(2)</sup>	
Footnote:			
(1) See Definitions section at end of permit for explanation of terms.			
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 002 at any time there is discharge from Outfall 001.

#### *Outfall 002 – Yellowstone River*

Effective upon commencement of discharge through Outfall 002, until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits at Outfall 002:

Outfall 002 - Final Effluent Limits			
Parameter	Units	Effluent Limits	
		Maximum Daily	Average Monthly
BOD <sub>5</sub>	lb/day	620	331
Net TSS	lb/day	532	339
COD	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Arsenic, TR <sup>(1)</sup>	µg/L	11.3	11.3
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(2)</sup>	
Footnote:			
(1) Effective November 1, 2019.			
(2) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 001 at any time there is discharge from Outfall 002.

C. Monitoring Requirements

1. *Outfall 001 and Outfall 002*

As a minimum, upon the effective date of this permit, the following constituents shall be monitored at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge. If no discharge occurs during the entire monitoring period, it shall be stated on the Discharge Monitoring Report (DMR) Form (EPA No. 3320-1) that no discharge or overflow occurred.



Self-monitoring of effluent discharged from Outfall 001 or Outfall 002 shall be conducted at the Flow Meter & Sampling Building following final treatment, unless another location is requested and approved by the Department in writing. Samples will reflect the nature of the discharge. Samples shall be collected, preserved and analyzed in accordance with approved procedures listed in 40 CFR 136. The data submitted to the Department must meet the Required Reporting Value (RRV), which is the detection level that must be achieved as listed in Circular DEQ-7.

<b>Outfalls 001 and 002 - Effluent Monitoring Requirements<sup>(1)</sup></b>				
<b>Parameter</b>	<b>Units</b>	<b>Monitoring Frequency</b>	<b>Type</b>	<b>Reporting Requirement</b>
Flow	MGD	Continuous	Instantaneous <sup>(2)</sup>	Daily Max & Mo Avg
BOD <sub>5</sub>	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
TSS – Intake Water	mg/L	2/Week <sup>(3)</sup>	Composite	None
TSS – Effluent Gross	mg/L	2/Week <sup>(3)</sup>	Composite	None
TSS – Net <sup>(4)</sup>	lb/day	1/Month	Calculated	Daily Max & Mo Avg
COD	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Oil and Grease	mg/L	2/Week <sup>(3)</sup>	Grab	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Phenol	µg/L	1/Week	Grab	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Ammonia (as N)	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Sulfide, Total	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Sulfide, Dissolved	µg/L	1/Week	Composite	Daily Max & Mo Avg
Hydrogen Sulfide (H <sub>2</sub> S)	µg/L	1/Week	Calculated <sup>(5)</sup>	Daily Max & Mo Avg
Chromium, TR	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Chromium, Hexavalent	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
pH	s.u.	1/Day	Instantaneous	Daily Min & Daily Max
Fluoride	mg/L	2/Year <sup>(3,6)</sup> 1/Month	Composite	Daily Max & Mo Avg
Arsenic, TR	µg/L	2/Year <sup>(3,6)</sup> 1/Month	Composite	Daily Max & Mo Avg
Selenium, TR	µg/L	2/Year <sup>(3,6)</sup> 1/Month	Composite	Daily Max & Mo Avg
Cyanide	µg/L	2/Year <sup>(3)</sup>	Grab	Report
Lead, TR	µg/L	2/Year <sup>(3)</sup>	Composite	Report
Mercury, TR	µg/L	2/Year <sup>(3)</sup>	Composite	Report
Total Residual Chlorine	mg/L	1/Month	Grab	Report



Outfalls 001 and 002 - Effluent Monitoring Requirements <sup>(1)</sup>				
Parameter	Units	Monitoring Frequency	Type	Reporting Requirement
Nitrate + Nitrite (Nov 1 – July 31)	mg/L	2/Year <sup>(3,6)</sup> 1/Month	Composite	Daily Max & Mo Avg
Nitrate + Nitrite (Aug 1 – Oct 31)	mg/L	1/Week <sup>(7)</sup>	Composite	Daily Max & Mo Avg
Total Kjeldahl Nitrogen (TKN)	mg/L	1/Week <sup>(7)</sup>	Composite	Mo Avg
TN <sup>(8)</sup>	lb/day	1/Month <sup>(7)</sup>	Calculated	Mo Avg
TP	mg/L	1/Month <sup>(7)</sup>	Composite	Mo Avg
	lb/day	1/Month <sup>(7)</sup>	Calculated	Mo Avg
Temperature	degrees C	1/Week	Instantaneous	Daily Max & Mo Avg
Whole Effluent Toxicity, Acute <sup>(9)</sup>	% Effluent	1/Quarter	Grab	Pass/Fail
Footnotes: (1) The effluent monitoring location must be after all treatment has been completed ( <i>i.e.</i> , downstream from all treatment units, and prior to entry to the receiving waters). (2) Requires recording device or totalizer. (3) Samples required 2/week must be taken at least two days apart, and samples required 2/year must be taken at least four months apart. (4) Mass-based net TSS calculated by first determining mass-based net TSS discharge on a daily basis, then determining daily maximum and monthly average for the month. (5) Calculate H <sub>2</sub> S based on dissolved sulfide concentrations and pH in accordance with <i>Standard Methods</i> Method 4500-S <sup>2-</sup> , unless another method is proposed and accepted by DEQ. (6) Monitoring for four parameters (nitrate+nitrite, fluoride, arsenic, and selenium) required twice a year until October 31, 2019. Beginning November 1, 2019 these parameters will be monitored monthly. (7) Monitoring required only during the summer season of August 1 – October 31 <sup>st</sup> . (8) TN is the sum of Nitrate+Nitrite and TKN. (9) Two species conducted quarterly. At minimum, failure of any acute WET test requires that the permittee comply with the Permit's Special Conditions.				

Composite samples shall, as a minimum, be composed of two or more discrete aliquots (samples) of equal volume and time collected in a 24 hour period. The aliquots shall be combined in a single container for analysis (simple composite). The time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours.

## 2. Whole Effluent Toxicity Monitoring – Acute Toxicity

Starting immediately upon the effective date of this permit, the permittee shall, at least once each calendar quarter, conduct an acute static renewal toxicity test on a grab sample of the effluent. Testing will employ two species per quarter and will consist of 5 effluent concentrations (100, 50, 25, 12.5, 6.25 percent effluent) and a control. Dilution water and the control shall consist of the receiving water.

The toxicity tests shall be conducted in general accordance with the procedures set out in the latest revision of *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA-821-R-02-012 and the *Region VIII EPA NPDES Acute Test Conditions - Static Renewal Whole Effluent*



*Toxicity Test* testing protocols. The permittee shall conduct an acute 48-hour static renewal toxicity test using *Ceriodaphnia sp.* and an acute 96-hour static renewal toxicity test using fathead minnows (*Pimephales promelas*). The control of pH in the toxicity test utilizing CO<sub>2</sub> enriched atmospheres is allowed to prevent rising pH drift. The target pH selected must represent the pH value of the receiving water at the time of sample collection.

Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration. If more than 10 percent control mortality occurs, the test is considered invalid and shall be repeated until satisfactory control survival is achieved unless a specific individual exception is granted by the Department. This exception may be granted if less than 10 percent mortality was observed at the dilutions containing high effluent concentrations.

If acute toxicity occurs in a routine test, an additional test shall be conducted within 14 days of the date of the initial sample. Should acute toxicity occur in the second test, accelerated testing shall occur once a month for the affected species. If no acute toxicity occurs for six (6) consecutive months for the affected species, CHS shall notify DEQ and the WET testing will revert back to a frequency of once each calendar quarter. In all cases, the results of all toxicity tests must be submitted to the Department in accordance with Part II of this permit.

Failure to initiate, or conduct an adequate Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE), or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted to the permitting authority within 45 days after confirmation of the continuance of the effluent toxicity.

The quarterly results from the laboratory shall be reported along with the DMR form submitted for the end of the reporting calendar quarter (e.g., whole effluent results for the reporting quarter ending March 31 shall be reported with the March DMR due April 28th with the remaining quarterly reports submitted with the June, September, and December DMR's). The format for the laboratory report shall be consistent with the latest revision of the EPA form *Region VIII Guidance for Acute Whole Effluent Reporting*, and shall include all chemical and physical data as specified.

If the results for eight consecutive quarters of testing indicate no acute toxicity, the permittee may request a reduction to semi-annual acute toxicity testing on two species. The Department may approve or deny the request based on the results and other available information without an additional public notice. If the request is approved, the test procedures are to be the same as specified above for the test species.

### 3. *Upstream Monitoring*

As a minimum, the following constituents shall be monitored for the specified receiving waterbody at the frequency and with the type of measurement indicated.

Results must be provided on the DMRs. CHS must use a sufficiently sensitive method to detect the parameters at or above the RRV as specified in Circular DEQ-7 or DEQ-12A; if this is not possible for any of the samples an explanation must be provided. Upstream Monitoring Requirements as specified in this section shall be conducted through **October 30, 2020**.

Upstream Monitoring Requirements				
Parameter	Units	Monitoring Frequency	Type	Receiving Waterbody
Sulfide, Dissolved	µg/L	1/Quarter	Grab	Yellowstone River
Hydrogen Sulfide (H <sub>2</sub> S)	µg/L	1/Quarter	Calculated <sup>(1)</sup>	
pH	s.u.	1/Quarter	Instantaneous/ Grab	
Total Nitrogen <sup>(2)</sup>	µg/L	1/Month <sup>(3)</sup>	Grab or Calculated	Yellowstone River
Footnotes:				
(1) Calculate H <sub>2</sub> S based on dissolved sulfide concentrations and pH in accordance with <i>Standard Methods</i> Method 4500-S <sup>2-</sup> , unless another method is proposed and accepted by DEQ.				
(2) TN can be determined by either the persulfate method or the sum of Nitrate+Nitrite and TKN.				
(3) Monitoring required only during the summer season of August 1 – October 31 <sup>st</sup> .				

CHS shall submit a topo map or aerial photo indicating where the monitoring locations will be prior to taking the first sample. If the sample location is changed, CHS shall submit a revised monitoring location prior to taking the next sample.

#### D. Special Conditions

##### 1. *Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE)*

Should acute toxicity be detected in the required resample, a TIE-TRE shall be undertaken by the permittee to establish the cause of the toxicity, locate the source(s) of the toxicity, and develop control or treatment for the toxicity. Failure to initiate or conduct an adequate TIE-TRE, or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted to the Department within 45 days after confirmation of the continuance of effluent toxicity (resample).

##### 2. *Notification Regarding Outfalls 001 and 002*

CHS Laurel Refinery currently discharges under Outfall 001. Once CHS constructs Outfall 002, they are required to notify the Department in writing at least 30 days in advance before discharge commences at Outfall 002.

CHS will be authorized to discharge from either outfall, but not both simultaneously. As a result, DMR submittals and annual fees will apply to each outfall. For any reporting period that CHS discharges through both outfalls, CHS shall include a daily log that documents the amount of effluent discharged through each outfall as well as indicates the effluent monitoring that is conducted. This is necessary since Outfalls



001 and 002 have different effluent limits and CHS must comply with the applicable effluent limit for each outfall.

### 3. *Storm Water Management*

CHS Laurel Refinery has two outfalls for storm water which are currently covered under Montana storm water industrial general permit (GP) authorization MTR000099. The GP excludes storm water discharges subject to 40 CFR 419. Although CHS Laurel Refinery submitted a certified Notice of Intent (NOI) that the two storm water outfalls are 'non-process' areas that meet the GP requirement, review of the NOI description provides reasonable doubt that all of the area covered under the GP can be excluded from the definition of "contaminated runoff." If any of these non-process areas includes contaminated runoff, the storm water discharge from this area cannot be authorized by the storm water industrial GP and must be covered under an individual permit.

CHS Laurel Refinery is required to evaluate whether discharge from the two storm water outfalls that are currently authorized under the GP should be classified as "contaminated" and permitted under this individual MPDES permit or "uncontaminated" and eligible to remain authorized under the GP. By no later than **July 1, 2018**, CHS Laurel Refinery shall either:

- submit a report evaluating the storm water runoff, including providing TOC and oil & grease concentrations and sources of potential contamination, and explain why continued coverage under the GP is appropriate; or
- submit the appropriate permit application forms and relevant information to request modification of this individual permit to include these two storm water outfalls and terminate coverage under the GP.

### E. Compliance Schedule

1. By no later than **November 1, 2016**, CHS Laurel Refinery shall submit a plan for compliance with the Outfall 001 and Outfall 002 final effluent limits to the Department. The plan shall include, as appropriate:
  - An evaluation of each process contributing to parameters which have expected concentrations greater than the final effluent limits;
  - An evaluation of control methods and technology to reduce the pollutants from each contributing process; and
  - A projected schedule for ensuring compliance as of **November 1, 2019**.

Until the final compliance date of **November 1, 2019**, CHS Laurel Refinery must submit an annual report summarizing their progress towards meeting each of the effluent limits to the Department. The annual report must be post-marked no later than January 28<sup>th</sup> of each year, and include actions taken in the previous year and planned actions for the upcoming year.

2. By no later than **November 1, 2017**, CHS will submit the results of lab analyses to document the concentrations of TRC and, as necessary, magnesium oxide, in order to demonstrate whether TRC can be expected present and at what concentrations, as well as whether and to what extent magnesium oxide may cause interference with the lab tests.

Until the compliance date of **November 1, 2017**, CHS Laurel Refinery must submit an annual report summarizing their progress towards meeting these requirements to the Department. The annual report must be post-marked no later than January 28<sup>th</sup> of each year, and include actions taken in the previous year and planned actions for the upcoming year.



## II. MONITORING, RECORDING AND REPORTING REQUIREMENTS

### A. Representative Sampling

Samples taken in compliance with the monitoring requirements established under Part I of the permit shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

### B. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under Part 136, Title 40 of the Code of Federal Regulations, unless other test procedures have been specified in this permit. All flow-measuring and flow-recording devices used in obtaining data submitted in self-monitoring reports must indicate values within 10 percent of the actual flow being measured.

### C. Penalties for Tampering

The Montana Water Quality Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

### D. Reporting of Monitoring Results

Monitoring results must be reported on a Discharge Monitoring Report (DMR) EPA form 3320-1. Monitoring results must be submitted in either electronic or paper format and be postmarked no later than the 28th day of the month following the end of the monitoring period. Whole effluent toxicity (biomonitoring) results must be reported with copies of the laboratory analysis report on forms from the most recent version of EPA Region VIII's "Guidance for Whole Effluent Reporting."

If no discharge occurs during the reporting period, "no discharge" must be reported on the report form. Legible copies of these, and all other reports required herein, must be signed and certified in accordance with Part IV.G 'Signatory Requirements' of this permit and submitted to the Department at the following address:

Montana Department of Environmental Quality  
Water Protection Bureau  
PO Box 200901  
Helena, Montana 59620-0901  
Phone: (406) 444-3080

### E. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit must be submitted to the Department in either electronic or paper format and be postmarked no later than 14 days following each schedule date unless otherwise specified in the permit.



F. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using approved analytical methods as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

G. Records Contents

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

H. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Department at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this MPDES permit must be maintained on site during the duration of activity at the permitted location.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any serious incidents of noncompliance as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-3080 or the Office of Disaster and Emergency Services at (406) 324-4777. The following examples are considered serious incidents:
  - a. Any noncompliance which may seriously endanger health or the environment;
  - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities"); or

- c. Any upset which exceeds any effluent limitation in the permit (see Part III.H of this permit, "Upset Conditions").
2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
  - a. a description of the noncompliance and its cause;
  - b. the period of noncompliance, including exact dates and times;
  - c. the estimated time noncompliance is expected to continue if it has not been corrected; and
  - d. steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
3. The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, (406) 444-3080.
4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results".

J. Other Noncompliance Reporting

Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.D of this permit are submitted. The reports shall contain the information listed in Part II.I.2 of this permit.

K. Inspection and Entry

The permittee shall allow the head of the Department or the Director, or an authorized representative thereof, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.



### III. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the Department or the Regional Administrator advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

B. Penalties for Violations of Permit Conditions

The Montana Water Quality Act provides that any person who violates a permit condition of the Act is subject to civil or criminal penalties not to exceed \$10,000 per day of such violation. Any person who willfully or negligently violates permit conditions of the Act is subject to a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than 2 years, or both, for subsequent convictions. MCA 75-5-611(a) also provides for administrative penalties not to exceed \$10,000 for each day of violation and up to a maximum not to exceed \$100,000 for any related series of violations. Except as provided in permit conditions on Part III.G of this permit, "Bypass of Treatment Facilities" and Part III.H of this permit, "Upset Conditions", nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

C. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.



F. Removed Substances

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard.

G. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Parts III.G.2 and III.G.3 of this permit.
2. Notice:
  - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.
  - b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, "Twenty-four Hour Reporting".
3. Prohibition of bypass:
  - a. Bypass is prohibited and the Department may take enforcement action against a permittee for a bypass, unless:
    - 1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
    - 2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
    - 3) The permittee submitted notices as required under Part III.G.2 of this permit.
  - b. The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

H. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of Part III.H.2 of this permit are met. No determination made

during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations).

2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
  - a. An upset occurred and that the permittee can identify the cause(s) of the upset;
  - b. The permitted facility was at the time being properly operated;
  - c. The permittee submitted notice of the upset as required under Part II.I of this permit, "Twenty-four Hour Notice of Noncompliance Reporting"; and
  - d. The permittee complied with any remedial measures required under Part III.D of this permit, "Duty to Mitigate".
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

I. Toxic Pollutants

The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

J. Changes in Discharge of Toxic Substances

Notification shall be provided to the Department as soon as the permittee knows of, or has reason to believe:

1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
  - a. One hundred micrograms per liter (100 µg/L);
  - b. Two hundred micrograms per liter (200 µg/L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/L) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;
  - c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or

- d. The level established by the Department in accordance with 40 CFR 122.44(f).
2. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following “notification levels”:
- a. Five hundred micrograms per liter (500 µg/L);
  - b. One milligram per liter (1 mg/L) for antimony;
  - c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - d. The level established by the Department in accordance with 40 CFR 122.44(f).



#### IV. GENERAL REQUIREMENTS

- A. Planned Changes  
The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limitations in the permit.
- B. Anticipated Noncompliance  
The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.
- C. Permit Actions  
This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.
- D. Duty to Reapply  
If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of this permit.
- E. Duty to Provide Information  
The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for revoking, modifying and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.
- F. Other Information  
When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information with a narrative explanation of the circumstances of the omission or incorrect submittal and why they weren't supplied earlier.
- G. Signatory Requirements  
All applications, reports or information submitted to the Department or the EPA shall be signed and certified.
1. All permit applications shall be signed as follows:
    - a. For a corporation: by a responsible corporate officer;
    - b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;

- c. For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.
- 2. All reports required by the permit and other information requested by the Department shall be signed by a person described above or by a duly authorized representative of that person. A person is considered a duly authorized representative only if:
  - a. The authorization is made in writing by a person described above and submitted to the Department; and
  - b. The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or an individual occupying a named position.)
- 3. Changes to authorization. If an authorization under Part IV.G.2 of this permit is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part IV.G.2 of this permit must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.
- 4. Certification. Any person signing a document under this section shall make the following certification:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

H. Penalties for Falsification of Reports

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

I. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public



inspection at the offices of the Department. As required by the Clean Water Act, permit applications, permits and effluent data shall not be considered confidential.

J. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

K. Property or Water Rights

The issuance of this permit does not convey any property or water rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

L. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

M. Transfers

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the Department at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them;
3. The Department does not notify the existing permittee and the proposed new permittee of an intent to revoke or modify and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part IV.M.2 of this permit; and
4. Required annual and application fees have been paid.

N. Fees

The permittee is required to submit payment of an annual fee as set forth in ARM 17.30.201. If the permittee fails to pay the annual fee within 90 days after the due date for the payment, the Department may:

1. Impose an additional assessment computed at the rate established under ARM 17.30.201; and,
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. The Department may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under

this sub-section. Suspensions are limited to one year, after which the permit will be terminated.

O. Reopener Provisions

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. **Water Quality Standards:** The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. **Water Quality Standards are Exceeded:** If it is found that water quality standards or trigger values in the receiving stream are exceeded either for parameters included in the permit or others, the department may modify the effluent limits or water management plan.
3. **TMDL or Wasteload Allocation:** TMDL requirements or a wasteload allocation is developed and approved by the Department and/or EPA for incorporation in this permit.
4. **Water Quality Management Plan:** A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
5. **Toxic Pollutants:** A toxic standard or prohibition is established under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit.
6. **Toxicity Limitation:** Change in the whole effluent protocol, or any other conditions related to the control of toxicants have taken place, or if one or more of the following events have occurred:
  - a. Toxicity was detected late in the life of the permit near or past the deadline for compliance.
  - b. The TRE/TIE results indicated that compliance with the toxic limits will require an implementation schedule past the date for compliance.
  - c. The TRE/TIE results indicated that the toxicant(s) represent pollutant(s) that may be controlled with specific numerical limits.
  - d. Following the implementation of numerical controls on toxicants, a modified whole effluent protocol is needed to compensate for those toxicants that are controlled numerically.
  - e. The TRE/TIE revealed other unique conditions or characteristics which, in the opinion of the Department, justify the incorporation of unanticipated special conditions in the permit.



V. DEFINITIONS

1. **"Act"** means the Montana Water Quality Act, Title 75, chapter 5, MCA.
2. **"Administrator"** means the administrator of the United States Environmental Protection Agency.
3. **"Acute Toxicity"** occurs when 50 percent or more mortality is observed for either species (See Part I.C of this permit) at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.
4. **"Arithmetic Mean" or "Arithmetic Average"** for any set of related values means the summation of the individual values divided by the number of individual values.
5. **"Average Monthly Limitation"** means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.
6. **"Bypass"** means the intentional diversion of waste streams from any portion of a treatment facility.
7. **"Chronic Toxicity"** means when the survival, growth, or reproduction, as applicable, for either test species, at the effluent dilution(s) designated in this permit (see Part I.C.), is significantly less (at the 95 percent confidence level) than that observed for the control specimens.
8. **"Composite samples"** means a sample composed of two or more discrete aliquots (samples). The aggregate sample will reflect the average quality of the water or wastewater in the compositing or sample period. Composite sample may be composed of constant volume aliquots collected at regular intervals (simple composite) or flow proportioned.
9. **"Daily Discharge"** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
10. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. Expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day. Expressed as a concentration, it is the arithmetic average of all measurements taken that day.
11. **"Department"** means the Montana Department of Environmental Quality (DEQ). Established by 2-15-3501, MCA.

12. **"Director"** means the Director of the Montana Department of Environmental Quality.
13. **"Discharge"** means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.
14. **"EPA"** means the United States Environmental Protection Agency.
15. **"Federal Clean Water Act"** means the federal legislation at 33 USC 1251, *et seq.*
16. **"Grab Sample"** means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.
17. **"Instantaneous Maximum Limit"** means the maximum allowable concentration of a pollutant determined from the analysis of any discrete or composite sample collected, independent of the flow rate and the duration of the sampling event.
18. **"Instantaneous Measurement"**, for monitoring requirements, means a single reading, observation, or measurement.
19. **"Minimum Level"** (ML) of quantitation means the lowest level at which the entire analytical system gives a recognizable signal and acceptable calibration point for the analyte, as determined by the procedure set forth at 40 CFR 136. In most cases the ML is equivalent to the Required Reporting Value (RRV) unless other wise specified in the permit. (ARM 17.30.702(22))
19. **"Mixing zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.
20. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.
21. **"Regional Administrator"** means the administrator of Region VIII of EPA, which has jurisdiction over federal water pollution control activities in the state of Montana.
22. **"Severe property damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
23. **"TIE"** means a toxicity identification evaluation.



- 24. **"TMDL"** means the total maximum daily load limitation of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.
- 25. **"TRE"** means a toxicity reduction evaluation.
- 26. **"TSS"** means the pollutant parameter total suspended solids.
- 27. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

## EXHIBIT B

Major Industrial  
Permit No.: MT0000264

### MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

#### AUTHORIZATION TO DISCHARGE UNDER THE MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251 *et seq.*,

**CHS, Inc.**

is authorized to discharge from its **Laurel Refinery**

located at **802 Highway 212 South, Laurel, MT,**

to receiving waters named, **Italian Drain and Yellowstone River**

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit.

This permit shall become effective: **November 1, 2015.**

This permit and the authorization to discharge shall expire at midnight, **October 31, 2020.**

~~FOR THE MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY~~

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~~Jon Kenning, Chief  
Water Protection Bureau  
Permitting & Compliance Division~~

~~Issuance-Modified Pursuant to Board Order on Date: June 2, 2017~~



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I. EFFLUENT LIMITATIONS, MONITORING REQUIREMENTS & OTHER CONDITIONS

A. Description of Discharge Points and Mixing Zone

The authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MPDES permit is a violation of the Montana Water Quality Act and could subject the person(s) responsible for such discharge to penalties under the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under Section 75-5-632 of the Montana Water Quality Act.

<u>Outfall</u>	<u>Description</u>
001	<p><b>Location:</b> At the end of the pipe/ditch, discharging into the Italian Drain, located at 45°39'28" N latitude, 108°45'09" W longitude.</p> <p><b>Mixing Zone:</b> None</p> <p><b>Treatment Works:</b> Refinery wastewater treatment plant.</p>
002	<p><b>Location (Future):</b> At the end of a single port diffuser, discharging into the Yellowstone River, located at 45°39'23.4" N latitude, 108°45'07.2" W longitude.</p> <p><b>Mixing Zone:</b> The maximum extent of the <b>chronic/human health</b> mixing zone in the named receiving waters is as follows: 1,000 feet downstream for the following parameters: ammonia, nitrate+nitrite, nitrogen, phosphorus, fluoride, hydrogen sulfide, cyanide, lead, mercury, and selenium.</p> <p>The maximum extent of the <b>acute</b> mixing zone in the named receiving waters is as follows: 100 feet downstream for the following parameters: ammonia and selenium.</p> <p><b>Treatment Works:</b> Refinery wastewater treatment plant.</p>



B. Effluent Limitations

*Interim Effluent Limits – Outfall 001 Italian Ditch*

Beginning on the effective date of this permit and lasting through **October 31, 2019**, the quality of effluent discharged from Outfall 001 by the facility shall, at a minimum, meet the limitations as set forth below:

Outfall 001 - Interim Numeric Discharge Limitations <sup>(1)</sup>			
Parameter	Units	Maximum Daily	Average Monthly
5-Day Biochemical Oxygen Demand (BOD <sub>5</sub> )	lb/day	620	331
Net Total Suspended Solids (TSS)	lb/day	532	339
Chemical Oxygen Demand (COD)	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Chromium, Total Recoverable (TR)	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
Total Nitrogen (TN) <sup>(2)</sup>	lb/day	—	181
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(32)</sup>	
Footnotes:			
(1) See Definitions section at end of permit for explanation of terms.			
(2) TN limits applicable August 1 <sup>st</sup> — October 31 <sup>st</sup> .			
(32) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 002 at any time there is discharge from Outfall 001.

*Final Effluent Limits Outfall 001- Italian Ditch*

Beginning **November 1, 2019**, until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits at Outfall 001:

Outfall 001 - Final Numeric Discharge Limitations <sup>(1)</sup>			
Parameter	Units	Effluent Limits	
		Maximum Daily	Average Monthly
BOD <sub>5</sub>	lb/day	620	331
Net TSS	lb/day	532	339
COD	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	mg/L	3.8	1.2
	lb/day	418	191
Nitrate + Nitrite	mg/L	10	10
Fluoride	mg/L	4.0	4.0
Sulfide	lb/day	3.9	1.8
Hydrogen Sulfide (H <sub>2</sub> S) <sup>(4)</sup>	μg/L	3.2	1.7
Arsenic, TR	μg/L	10	10
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
Selenium, TR	μg/L	8.2	4.1
Total Nitrogen (TN) <sup>(2)</sup>	lb/day	—	181
pH	s.u.	Between 6.0 and 9.0, all times	
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(32)</sup>	
Footnote:			
(1) See Definitions section at end of permit for explanation of terms.			
(4) Any results that show “nondetect” at the RRV of 20 μg/L is considered compliance with the effluent limit.			
(2) Nutrient limits (TN) applicable August 1 <sup>st</sup> —October 31 <sup>st</sup> .			
(32) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 002 at any time there is discharge from Outfall 001.



*Outfall 002 – Yellowstone River*

Effective upon commencement of discharge through Outfall 002, until the end of the permit, CHS Laurel Refinery will be required to meet the following effluent limits at Outfall 002:

Outfall 002 - Final Effluent Limits			
Parameter	Units	Effluent Limits	
		Maximum Daily	Average Monthly
BOD <sub>5</sub>	lb/day	620	331
Net TSS	lb/day	532	339
COD	lb/day	4,425	2,288
Oil and Grease	mg/L	10	--
	lb/day	242	128
Phenol	lb/day	4.5	2.2
Ammonia, Total as N	lb/day	418	191
Sulfide	lb/day	3.9	1.8
Hydrogen Sulfide (H <sub>2</sub> S) <sup>(1,2)</sup>	µg/L	3.3	1.6
Arsenic, TR <sup>(21)</sup>	µg/L	11.3	11.3
Chromium, TR	lb/day	9.1	5.2
Hexavalent Chromium	lb/day	1.0	0.36
pH	s.u.	Between 6.0 and 9.0, all times	
Total Nitrogen (TN) <sup>(3)</sup>	lb/day	—	181
Whole Effluent Toxicity, Acute, LC <sub>50</sub>	% effluent	No acute toxicity <sup>(42)</sup>	
Footnote:			
<del>(1) Any results that show “nondetect” at the RRV of 20 µg/L is considered compliance with the effluent limit.</del>			
(12) Effective November 1, 2019.			
<del>(3) Nutrient limits (TN) applicable August 1<sup>st</sup> — October 31<sup>st</sup>.</del>			
(42) Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration.			

There shall be no discharge of floating solids or visible foam other than trace amounts.

There shall be no discharge that causes visible oil sheen in the receiving stream.

There shall be no discharge of wastewater which reacts or settles to form an objectionable sludge deposit or emulsion beneath the surface of the receiving stream or upon adjoining shorelines.

There shall be no discharge from Outfall 001 at any time there is discharge from Outfall 002.

C. Monitoring Requirements

1. *Outfall 001 and Outfall 002*

As a minimum, upon the effective date of this permit, the following constituents shall be monitored at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge. If no discharge occurs during the entire monitoring period, it shall be stated on the Discharge Monitoring Report (DMR) Form (EPA No. 3320-1) that no discharge or overflow occurred.

Self-monitoring of effluent discharged from Outfall 001 or Outfall 002 shall be conducted at the Flow Meter & Sampling Building following final treatment, unless another location is requested and approved by the Department in writing. Samples will reflect the nature of the discharge. Samples shall be collected, preserved and analyzed in accordance with approved procedures listed in 40 CFR 136. The data submitted to the Department must meet the Required Reporting Value (RRV), which is the detection level that must be achieved as listed in Circular DEQ-7.

<b>Outfalls 001 and 002 - Effluent Monitoring Requirements<sup>(1)</sup></b>				
<b>Parameter</b>	<b>Units</b>	<b>Monitoring Frequency</b>	<b>Type</b>	<b>Reporting Requirement</b>
Flow	MGD	Continuous	Instantaneous <sup>(2)</sup>	Daily Max & Mo Avg
BOD <sub>5</sub>	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
TSS – Intake Water	mg/L	2/Week <sup>(3)</sup>	Composite	None
TSS – Effluent Gross	mg/L	2/Week <sup>(3)</sup>	Composite	None
TSS – Net <sup>(4)</sup>	lb/day	1/Month	Calculated	Daily Max & Mo Avg
COD	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Oil and Grease	mg/L	2/Week <sup>(3)</sup>	Grab	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Phenol	µg/L	1/Week	Grab	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Ammonia (as N)	mg/L	2/Week <sup>(3)</sup>	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Sulfide, <u>Total</u>	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
<u>Sulfide, Dissolved</u>	<u>µg/L</u>	<u>1/Week</u>	<u>Composite</u>	<u>Daily Max &amp; Mo Avg</u>
Hydrogen Sulfide (H <sub>2</sub> S)	µg/L	1/Week	<u>Composite</u> <u>Calculated</u> <sup>(5)</sup>	Daily Max & Mo Avg
Chromium, TR	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg
Chromium, Hexavalent	µg/L	1/Week	Composite	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	Daily Max & Mo Avg



Outfalls 001 and 002 - Effluent Monitoring Requirements <sup>(1)</sup>				
Parameter	Units	Monitoring Frequency	Type	Reporting Requirement
pH	s.u.	1/Day	Instantaneous	Daily Min & Daily Max
Fluoride	mg/L	$\frac{2}{\text{Year}}^{(3,6)}$ 1/Month	Composite	Daily Max & Mo Avg
Arsenic, TR	µg/L	$\frac{2}{\text{Year}}^{(3,6)}$ 1/Month	Composite	Daily Max & Mo Avg
Selenium, TR	µg/L	$\frac{2}{\text{Year}}^{(3,6)}$ 1/Month	Composite	Daily Max & Mo Avg
Cyanide	µg/L	2/Year <sup>(3)</sup>	Grab	Report
Lead, TR	µg/L	2/Year <sup>(3)</sup>	Composite	Report
Mercury, TR	µg/L	2/Year <sup>(3)</sup>	Composite	Report
Total Residual Chlorine	mg/L	1/Month	Grab	Report
Nitrate + Nitrite (Nov 1 – July 31)	mg/L	$\frac{2}{\text{Year}}^{(3,6)}$ 1/Month	Composite	Daily Max & Mo Avg
Nitrate + Nitrite (Aug 1 – Oct 31)	mg/L	1/Week <sup>(5,2)</sup>	Composite	Daily Max & Mo Avg
Total Kjeldahl Nitrogen (TKN)	mg/L	1/Week <sup>(5,2)</sup>	Composite	Mo Avg
TN <sup>(6,8)</sup>	lb/day	1/Month <sup>(5,2)</sup>	Calculated	Mo Avg
TP	mg/L	1/Month <sup>(5,2)</sup>	Composite	Mo Avg
	lb/day	1/Month <sup>(5,2)</sup>	Calculated	Mo Avg
Temperature	degrees C	1/Week	Instantaneous	Daily Max & Mo Avg
Whole Effluent Toxicity, Acute <sup>(7,2)</sup>	% Effluent	1/Quarter	Grab	Pass/Fail
Footnotes: (1) The effluent monitoring location must be after all treatment has been completed ( <i>i.e.</i> , downstream from all treatment units, and prior to entry to the receiving waters). (2) Requires recording device or totalizer. (3) Samples required 2/week must be taken at least two days apart, and samples required 2/year must be taken at least four months apart. (4) Mass-based net TSS calculated by first determining mass-based net TSS discharge on a daily basis, then determining daily maximum and monthly average for the month. (5) Calculate H <sub>2</sub> S based on dissolved sulfide concentrations and pH in accordance with <i>Standard Methods Method 4500-S<sup>2-</sup></i> , unless another method is proposed and accepted by DEQ. (6) Monitoring for four parameters (nitrate+nitrite, fluoride, arsenic, and selenium) required twice a year until October 31, 2019. Beginning November 1, 2019 these parameters will be monitored monthly. (5)(7) Monitoring required only during the summer season of August 1 – October 31 <sup>st</sup> . (6)(8) TN is the sum of Nitrate+Nitrite and TKN. (7)(9) Two species conducted quarterly. At minimum, failure of any acute WET test requires that the permittee comply with the Permit's Special Conditions.				

Composite samples shall, as a minimum, be composed of two or more discrete aliquots (samples) of equal volume and time collected in a 24 hour period. The aliquots shall be combined in a single container for analysis (simple composite). The time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours.



2. *Whole Effluent Toxicity Monitoring – Acute Toxicity*

Starting immediately upon the effective date of this permit, the permittee shall, at least once each calendar quarter, conduct an acute static renewal toxicity test on a grab sample of the effluent. Testing will employ two species per quarter and will consist of 5 effluent concentrations (100, 50, 25, 12.5, 6.25 percent effluent) and a control. Dilution water and the control shall consist of the receiving water.

The toxicity tests shall be conducted in general accordance with the procedures set out in the latest revision of *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA-821-R-02-012 and the *Region VIII EPA NPDES Acute Test Conditions - Static Renewal Whole Effluent Toxicity Test* testing protocols. The permittee shall conduct an acute 48-hour static renewal toxicity test using *Ceriodaphnia sp.* and an acute 96-hour static renewal toxicity test using fathead minnows (*Pimephales promelas*). The control of pH in the toxicity test utilizing CO<sub>2</sub> enriched atmospheres is allowed to prevent rising pH drift. The target pH selected must represent the pH value of the receiving water at the time of sample collection.

Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration. If more than 10 percent control mortality occurs, the test is considered invalid and shall be repeated until satisfactory control survival is achieved unless a specific individual exception is granted by the Department. This exception may be granted if less than 10 percent mortality was observed at the dilutions containing high effluent concentrations.

If acute toxicity occurs in a routine test, an additional test shall be conducted within 14 days of the date of the initial sample. Should acute toxicity occur in the second test, accelerated testing shall occur once a month for the affected species. If no acute toxicity occurs for six (6) consecutive months for the affected species, CHS shall notify DEQ and the WET testing will revert back to a frequency of once each calendar quarter. In all cases, the results of all toxicity tests must be submitted to the Department in accordance with Part II of this permit.

Failure to initiate, or conduct an adequate Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE), or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted to the permitting authority within 45 days after confirmation of the continuance of the effluent toxicity.

The quarterly results from the laboratory shall be reported along with the DMR form submitted for the end of the reporting calendar quarter (e.g., whole effluent results for the reporting quarter ending March 31 shall be reported with the March DMR due April 28th with the remaining quarterly reports submitted with the June, September, and December DMR's). The format for the laboratory report shall be consistent with the latest revision of the EPA form *Region VIII Guidance for Acute Whole Effluent Reporting*, and shall include all chemical and physical data as specified.



If the results for eight consecutive quarters of testing indicate no acute toxicity, the permittee may request a reduction to semi-annual acute toxicity testing on two species. The Department may approve or deny the request based on the results and other available information without an additional public notice. If the request is approved, the test procedures are to be the same as specified above for the test species.

### 3. Upstream Monitoring

As a minimum, the following constituents shall be monitored for the specified receiving waterbody at the frequency and with the type of measurement indicated. Results must be provided on the DMRs. CHS must use a sufficiently sensitive method to detect the parameters at or above the RRV as specified in Circular DEQ-7 or DEQ-12A; if this is not possible for any of the samples an explanation must be provided. Upstream Monitoring Requirements as specified in this section shall be conducted through October 30, 2020.

<u>Upstream Monitoring Requirements</u>				
<u>Parameter</u>	<u>Units</u>	<u>Monitoring Frequency</u>	<u>Type</u>	<u>Receiving Waterbody</u>
<u>Sulfide, Dissolved</u>	<u>µg/L</u>	<u>1/Quarter</u>	<u>Grab</u>	<u>Yellowstone River</u>
<u>Hydrogen Sulfide (H<sub>2</sub>S)</u>	<u>µg/L</u>	<u>1/Quarter</u>	<u>Calculated <sup>(1)</sup></u>	
<u>pH</u>	<u>s.u.</u>	<u>1/Quarter</u>	<u>Instantaneous/ Grab</u>	
<u>Total Nitrogen <sup>(2)</sup></u>	<u>µg/L</u>	<u>1/Month <sup>(3)</sup></u>	<u>Grab or Calculated</u>	<u>Yellowstone River</u>
Footnotes:				
(1) Calculate H <sub>2</sub> S based on dissolved sulfide concentrations and pH in accordance with <i>Standard Methods Method 4500-S<sup>2-</sup></i> , unless another method is proposed and accepted by DEQ.				
(2) TN can be determined by either the persulfate method or the sum of Nitrate+Nitrite and TKN.				
(3) Monitoring required only during the summer season of August 1 – October 31 <sup>st</sup> .				

CHS shall submit a topo map or aerial photo indicating where the monitoring locations will be prior to taking the first sample. If the sample location is changed, CHS shall submit a revised monitoring location prior to taking the next sample.

### D. Special Conditions

#### 1. Toxicity Identification Evaluation / Toxicity Reduction Evaluation (TIE/TRE)

Should acute toxicity be detected in the required resample, a TIE-TRE shall be undertaken by the permittee to establish the cause of the toxicity, locate the source(s) of the toxicity, and develop control or treatment for the toxicity. Failure to initiate or conduct an adequate TIE-TRE, or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit. A TRE plan needs to be submitted to the Department within 45 days after confirmation of the continuance of effluent toxicity (resample).

2. *Notification Regarding Outfalls 001 and 002*

CHS Laurel Refinery currently discharges under Outfall 001. Once CHS constructs Outfall 002, they are required to notify the Department in writing at least 30 days in advance before discharge commences at Outfall 002.

CHS will be authorized to discharge from either outfall, but not both simultaneously. As a result, DMR submittals and annual fees will apply to each outfall. For any reporting period that CHS discharges through both outfalls, CHS shall include a daily log that documents the amount of effluent discharged through each outfall as well as indicates the effluent monitoring that is conducted. This is necessary since Outfalls 001 and 002 have different effluent limits and CHS must comply with the applicable effluent limit for each outfall.

3. *Storm Water Management*

CHS Laurel Refinery has two outfalls for storm water which are currently covered under Montana storm water industrial general permit (GP) authorization MTR000099. The GP excludes storm water discharges subject to 40 CFR 419. Although CHS Laurel Refinery submitted a certified Notice of Intent (NOI) that the two storm water outfalls are 'non-process' areas that meet the GP requirement, review of the NOI description provides reasonable doubt that all of the area covered under the GP can be excluded from the definition of "contaminated runoff." If any of these non-process areas includes contaminated runoff, the storm water discharge from this area cannot be authorized by the storm water industrial GP and must be covered under an individual permit.

CHS Laurel Refinery is required to evaluate whether discharge from the two storm water outfalls that are currently authorized under the GP should be classified as "contaminated" and permitted under this individual MPDES permit or "uncontaminated" and eligible to remain authorized under the GP. By no later than **July 1, 2018**, CHS Laurel Refinery shall either:

- submit a report evaluating the storm water runoff, including providing TOC and oil & grease concentrations and sources of potential contamination, and explain why continued coverage under the GP is appropriate; or
- submit the appropriate permit application forms and relevant information to request modification of this individual permit to include these two storm water outfalls and terminate coverage under the GP.

E. Compliance Schedule

1. By no later than **November 1, 2016**, CHS Laurel Refinery shall submit a plan for compliance with the Outfall 001 and Outfall 002 final effluent limits to the Department. The plan shall include, as appropriate:
  - An evaluation of each process contributing to parameters which have expected concentrations greater than the final effluent limits;



- An evaluation of control methods and technology to reduce the pollutants from each contributing process; and
- A projected schedule for ensuring compliance as of **November 1, 2019**.

Until the final compliance date of **November 1, 2019**, CHS Laurel Refinery must submit an annual report summarizing their progress towards meeting each of the effluent limits to the Department. The annual report must be post-marked no later than January 28<sup>th</sup> of each year, and include actions taken in the previous year and planned actions for the upcoming year.

2. By no later than **November 1, 2017**, CHS will submit the results of lab analyses to document the concentrations of TRC and, as necessary, magnesium oxide, in order to demonstrate whether TRC can be expected present and at what concentrations, as well as whether and to what extent magnesium oxide may cause interference with the lab tests.

Until the compliance date of **November 1, 2017**, CHS Laurel Refinery must submit an annual report summarizing their progress towards meeting these requirements to the Department. The annual report must be post-marked no later than January 28<sup>th</sup> of each year, and include actions taken in the previous year and planned actions for the upcoming year.

## II. MONITORING, RECORDING AND REPORTING REQUIREMENTS

### A. Representative Sampling

Samples taken in compliance with the monitoring requirements established under Part I of the permit shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

### B. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under Part 136, Title 40 of the Code of Federal Regulations, unless other test procedures have been specified in this permit. All flow-measuring and flow-recording devices used in obtaining data submitted in self-monitoring reports must indicate values within 10 percent of the actual flow being measured.

### C. Penalties for Tampering

The Montana Water Quality Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

### D. Reporting of Monitoring Results

Monitoring results must be reported on a Discharge Monitoring Report (DMR) EPA form 3320-1. Monitoring results must be submitted in either electronic or paper format and be postmarked no later than the 28th day of the month following the end of the monitoring period. Whole effluent toxicity (biomonitoring) results must be reported with copies of the laboratory analysis report on forms from the most recent version of EPA Region VIII's "Guidance for Whole Effluent Reporting."

If no discharge occurs during the reporting period, "no discharge" must be reported on the report form. Legible copies of these, and all other reports required herein, must be signed and certified in accordance with Part IV.G 'Signatory Requirements' of this permit and submitted to the Department at the following address:

Montana Department of Environmental Quality  
Water Protection Bureau  
PO Box 200901  
Helena, Montana 59620-0901  
Phone: (406) 444-3080

### E. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit must be submitted to the Department in either electronic or paper format and be postmarked no later than 14 days following each schedule date unless otherwise specified in the permit.



F. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using approved analytical methods as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

G. Records Contents

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

H. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Department at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this MPDES permit must be maintained on site during the duration of activity at the permitted location.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any serious incidents of noncompliance as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-3080 or the Office of Disaster and Emergency Services at (406) 324-4777. The following examples are considered serious incidents:
  - a. Any noncompliance which may seriously endanger health or the environment;
  - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities"); or

- c. Any upset which exceeds any effluent limitation in the permit (see Part III.H of this permit, "Upset Conditions").
  2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
    - a. a description of the noncompliance and its cause;
    - b. the period of noncompliance, including exact dates and times;
    - c. the estimated time noncompliance is expected to continue if it has not been corrected; and
    - d. steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
  3. The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, (406) 444-3080.
  4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results".
- J. Other Noncompliance Reporting  
Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.D of this permit are submitted. The reports shall contain the information listed in Part II.I.2 of this permit.
- K. Inspection and Entry  
The permittee shall allow the head of the Department or the Director, or an authorized representative thereof, upon the presentation of credentials and other documents as may be required by law, to:
  1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
  2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
  3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
  4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.



### III. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the Department or the Regional Administrator advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

B. Penalties for Violations of Permit Conditions

The Montana Water Quality Act provides that any person who violates a permit condition of the Act is subject to civil or criminal penalties not to exceed \$10,000 per day of such violation. Any person who willfully or negligently violates permit conditions of the Act is subject to a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than 2 years, or both, for subsequent convictions. MCA 75-5-611(a) also provides for administrative penalties not to exceed \$10,000 for each day of violation and up to a maximum not to exceed \$100,000 for any related series of violations. Except as provided in permit conditions on Part III.G of this permit, "Bypass of Treatment Facilities" and Part III.H of this permit, "Upset Conditions", nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

C. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

F. Removed Substances

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard.

G. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Parts III.G.2 and III.G.3 of this permit.
2. Notice:
  - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.
  - b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, "Twenty-four Hour Reporting".
3. Prohibition of bypass:
  - a. Bypass is prohibited and the Department may take enforcement action against a permittee for a bypass, unless:
    - 1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
    - 2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
    - 3) The permittee submitted notices as required under Part III.G.2 of this permit.
  - b. The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

H. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of Part III.H.2 of this permit are met. No determination made



during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations).

2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
  - a. An upset occurred and that the permittee can identify the cause(s) of the upset;
  - b. The permitted facility was at the time being properly operated;
  - c. The permittee submitted notice of the upset as required under Part II.I of this permit, "Twenty-four Hour Notice of Noncompliance Reporting"; and
  - d. The permittee complied with any remedial measures required under Part III.D of this permit, "Duty to Mitigate".
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

I. Toxic Pollutants

The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

J. Changes in Discharge of Toxic Substances

Notification shall be provided to the Department as soon as the permittee knows of, or has reason to believe:

1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
  - a. One hundred micrograms per liter (100 µg/L);
  - b. Two hundred micrograms per liter (200 µg/L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/L) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;
  - c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or

- d. The level established by the Department in accordance with 40 CFR 122.44(f).
2. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following “notification levels”:
- a. Five hundred micrograms per liter (500 µg/L);
  - b. One milligram per liter (1 mg/L) for antimony;
  - c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - d. The level established by the Department in accordance with 40 CFR 122.44(f).



#### IV. GENERAL REQUIREMENTS

- A. Planned Changes  
The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limitations in the permit.
- B. Anticipated Noncompliance  
The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.
- C. Permit Actions  
This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.
- D. Duty to Reapply  
If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of this permit.
- E. Duty to Provide Information  
The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for revoking, modifying and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.
- F. Other Information  
When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information with a narrative explanation of the circumstances of the omission or incorrect submittal and why they weren't supplied earlier.
- G. Signatory Requirements  
All applications, reports or information submitted to the Department or the EPA shall be signed and certified.
  - 1. All permit applications shall be signed as follows:
    - a. For a corporation: by a responsible corporate officer;
    - b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;

- c. For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by the Department shall be signed by a person described above or by a duly authorized representative of that person. A person is considered a duly authorized representative only if:
  - a. The authorization is made in writing by a person described above and submitted to the Department; and
  - b. The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or an individual occupying a named position.)
3. Changes to authorization. If an authorization under Part IV.G.2 of this permit is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part IV.G.2 of this permit must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this section shall make the following certification:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

H. Penalties for Falsification of Reports

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

I. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public



inspection at the offices of the Department. As required by the Clean Water Act, permit applications, permits and effluent data shall not be considered confidential.

J. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

K. Property or Water Rights

The issuance of this permit does not convey any property or water rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

L. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

M. Transfers

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the Department at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them;
3. The Department does not notify the existing permittee and the proposed new permittee of an intent to revoke or modify and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part IV.M.2 of this permit; and
4. Required annual and application fees have been paid.

N. Fees

The permittee is required to submit payment of an annual fee as set forth in ARM 17.30.201. If the permittee fails to pay the annual fee within 90 days after the due date for the payment, the Department may:

1. Impose an additional assessment computed at the rate established under ARM 17.30.201; and,
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. The Department may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under

this sub-section. Suspensions are limited to one year, after which the permit will be terminated.

O. Reopener Provisions

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Water Quality Standards are Exceeded: If it is found that water quality standards or trigger values in the receiving stream are exceeded either for parameters included in the permit or others, the department may modify the effluent limits or water management plan.
3. TMDL or Wasteload Allocation: TMDL requirements or a wasteload allocation is developed and approved by the Department and/or EPA for incorporation in this permit.
4. Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
5. Toxic Pollutants: A toxic standard or prohibition is established under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit.
6. Toxicity Limitation: Change in the whole effluent protocol, or any other conditions related to the control of toxicants have taken place, or if one or more of the following events have occurred:
  - a. Toxicity was detected late in the life of the permit near or past the deadline for compliance.
  - b. The TRE/TIE results indicated that compliance with the toxic limits will require an implementation schedule past the date for compliance.
  - c. The TRE/TIE results indicated that the toxicant(s) represent pollutant(s) that may be controlled with specific numerical limits.
  - d. Following the implementation of numerical controls on toxicants, a modified whole effluent protocol is needed to compensate for those toxicants that are controlled numerically.
  - e. The TRE/TIE revealed other unique conditions or characteristics which, in the opinion of the Department, justify the incorporation of unanticipated special conditions in the permit.



V. DEFINITIONS

1. **"Act"** means the Montana Water Quality Act, Title 75, chapter 5, MCA.
2. **"Administrator"** means the administrator of the United States Environmental Protection Agency.
3. **"Acute Toxicity"** occurs when 50 percent or more mortality is observed for either species (See Part I.C of this permit) at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.
4. **"Arithmetic Mean" or "Arithmetic Average"** for any set of related values means the summation of the individual values divided by the number of individual values.
5. **"Average Monthly Limitation"** means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.
6. **"Bypass"** means the intentional diversion of waste streams from any portion of a treatment facility.
7. **"Chronic Toxicity"** means when the survival, growth, or reproduction, as applicable, for either test species, at the effluent dilution(s) designated in this permit (see Part I.C.), is significantly less (at the 95 percent confidence level) than that observed for the control specimens.
8. **"Composite samples"** means a sample composed of two or more discrete aliquots (samples). The aggregate sample will reflect the average quality of the water or wastewater in the compositing or sample period. Composite sample may be composed of constant volume aliquots collected at regular intervals (simple composite) or flow proportioned.
9. **"Daily Discharge"** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
10. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. Expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day. Expressed as a concentration, it is the arithmetic average of all measurements taken that day.
11. **"Department"** means the Montana Department of Environmental Quality (DEQ). Established by 2-15-3501, MCA.

12. **"Director"** means the Director of the Montana Department of Environmental Quality.
13. **"Discharge"** means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.
14. **"EPA"** means the United States Environmental Protection Agency.
15. **"Federal Clean Water Act"** means the federal legislation at 33 USC 1251, *et seq.*
16. **"Grab Sample"** means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.
17. **"Instantaneous Maximum Limit"** means the maximum allowable concentration of a pollutant determined from the analysis of any discrete or composite sample collected, independent of the flow rate and the duration of the sampling event.
18. **"Instantaneous Measurement"**, for monitoring requirements, means a single reading, observation, or measurement.
19. **"Minimum Level"** (ML) of quantitation means the lowest level at which the entire analytical system gives a recognizable signal and acceptable calibration point for the analyte, as determined by the procedure set forth at 40 CFR 136. In most cases the ML is equivalent to the Required Reporting Value (RRV) unless other wise specified in the permit. (ARM 17.30.702(22))
19. **"Mixing zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.
20. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.
21. **"Regional Administrator"** means the administrator of Region VIII of EPA, which has jurisdiction over federal water pollution control activities in the state of Montana.
22. **"Severe property damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
23. **"TIE"** means a toxicity identification evaluation.



- 24. **"TMDL"** means the total maximum daily load limitation of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.
- 25. **"TRE"** means a toxicity reduction evaluation.
- 26. **"TSS"** means the pollutant parameter total suspended solids.
- 27. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 5 day of May, 2017  
at 9:15 o'clock a.m.  
By: John Butty

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
CHS, INC.'s APPEAL OF FINAL MPDES  
PERMIT NO. MT0000264 ISSUED BY  
DEQ FOR THE LAUREL REFINERY IN  
LAUREL, YELLOWSTONE COUNTY,  
MONTANA

Case No. BER 2015-07 WQ

**BOARD ORDER FOR  
FINAL AGENCY DECISION**

This matter is before the Board of Environmental Review ("Board") upon CHS, Inc.'s ("CHS") Notice of Appeal and Request for Hearing, dated October 14, 2015, and the Board has received a Stipulation for Entry of Final Agency Decision ("Stipulation") by and between CHS and the Department of Environmental Quality ("DEQ"), dated May 4, 2017. The Board has reviewed and considered the Stipulation and has been advised that CHS's Appeal Issues Nos. 1, 3, 4, 5, and 6 have been fully and finally compromised and settled upon the merits by agreement of the Parties and as further ORDERED herein. The Board finds good cause for entry of the Final Agency Decision as stipulated and requested by the Parties.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board has authority to hear contested case appeals of DEQ's Montana Pollutant Discharge Elimination System ("MPDES") permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.



2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. The Department has statutory authority to administer Montana's water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and ARM 17.30.1301.

3. CHS is an association registered to do business in Montana, located in Yellowstone County, Montana, and is the owner and operator of the MPDES permitted facility which has been issued MPDES Permit No. MT0000264.

4. On September 16, 2015, DEQ issued a renewal of an Authorization to Discharge under MPDES Permit No. MT0000264 for CHS's Laurel Refinery.

5. On October 14, 2015, CHS timely appealed certain provisions of Permit No. MT0000264 before the Board. See Notice of Appeal and Request for Hearing (October 14, 2015).

6. On January 26, 2017, the Parties filed a Joint Stipulation to Vacate Remaining Scheduling Order Dates whereby the Parties indicated their desire to resolve five of the six identified appeal issues through a Stipulation for Final Agency Decision.

7. On January 26, 2017, the Hearing Examiner Ordered the Parties to comply with the terms of the Joint Stipulation to Vacate Remaining Scheduling Order Dates and to, inter alia, file the contemplated Stipulation for Final Agency Decision for presentation at the Board's June 2017 meeting.

8. Five of the six issues identified in CHS's Notice of Appeal and Request for Hearing are resolved through the Board's adoption a final agency decision as specified

herein and as further specified in the MPDES Permit, attached hereto as Exhibit A and incorporated herein by this reference. The resolved issues are CHS's Appeal Issues Nos. 1, 3, 4, 5, and 6.

9. As pertinent to CHS's Appeal Issue No. 1, it is appropriate to modify the appealed MPDES Permit to remove Water Quality Based Effluent Limitations ("WQBELs") for Hydrogen Sulfide and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of dissolved sulfide and pH. This monitoring information is necessary to determine whether WQBELs for Hydrogen Sulfide should be implemented during the next MPDES permitting cycle and such determination will be based, in part, upon an analysis of effluent and Yellowstone River data. Through the use of Standard Methods (SM) 4500-S<sup>2</sup>, CHS will calculate and report Hydrogen Sulfide concentrations from its measurements of dissolved sulfide as a function of pH.

10. CHS has withdrawn Appeal Issue No. 3 in its entirety.

11. As pertinent to CHS's Appeal Issue No. 4, it is appropriate to modify the appealed MPDES Permit to remove WQBELs for Total Nitrogen and that; instead, the MPDES Permit should contain monitoring requirements to include the monitoring of Total Kjeldahl Nitrogen (TKN) and Nitrate + Nitrite (NO<sub>3</sub> + NO<sub>2</sub>). This monitoring information is necessary to determine whether WQBELs for Total Nitrogen should be implemented during the next MPDES permitting cycle and such determination will be based, in part, upon an analysis of effluent and Yellowstone River data collected from August 1<sup>st</sup> – October 31<sup>st</sup>.



12. CHS has withdrawn Appeal Issue No. 5 in its entirety.
13. As pertinent to CHS's Appeal Issue No. 6, the requirement to monitor and report  $\text{NO}_3 + \text{NO}_2$ , Fluoride, Arsenic, and Selenium at Outfall 001 is modified in the appealed MPDES Permit to a frequency of semi-annual until November 1, 2019.
14. The MPDES Permit attached hereto as Exhibit A appropriately incorporates modifications to the appealed MPDES Permit as contemplated in the Stipulation.
15. Pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403 (2) and ARM 17.30.1370 (4), the Board HEREBY ADOPTS AS THE FINAL AGENCY DECISION, the MPDES Permit attached hereto as Exhibit A, specifically reserving the CHS's appeal rights through contested case proceedings concerning CHS's Appeal Issue No. 2 as listed in its Notice of Appeal and Request for Hearing, dated October 14, 2015.
16. All conditions the MPDES Permit, attached hereto as Exhibit A, are fully effective and enforceable, with the exception any stayed conditions resulting from CHS's remaining Appeal Issue No. 2.
17. The Parties shall each pay their own attorney fees and costs.
18. The Board's Decision as to Appeal issues Nos. 1, 3, 4, 5, and 6 shall represent the FINAL AGENCY DECISION for purposes of the Montana Administrative Procedure Act, Section 2-4-623, MCA.
19. On or before June 16, 2017, the Parties shall contact Lori O'Brien, Paralegal, at Agency Legal Services Bureau, to set a telephonic scheduling conference

to reset the vacated dates of the Scheduling Order for purposes of hearing CHS's Appeal Issue No. 2.

DATED this \_\_\_\_ day of June, 2017.

By: \_\_\_\_\_  
Joan Miles  
Chair  
Board of Environmental Review

cc: Andres Haladay (Hearing Examiner)  
W. John Tietz  
Kurt R. Moser  
Jon Kenning (DEQ)  
Joyce Wittenberg (BER)





1 February 28, 2017, whether it has secured legal counsel in this proceeding. Failure  
2 to do so will result in dismissal of the contested case proceedings.”

3 7. No proposed scheduling order was filed by February 28. To-date no  
4 proposed scheduling order has been filed.

5 8. Vanak has not appeared through counsel.

6 9. On March 7, 2017, DEQ filed a Notice and Motion to Dismiss.

7 10. DEQ stated that it contacted Vanak to request Vanak locate local  
8 counsel by no later than February 21, 2017. DEQ stated it spoke with Vanak’s  
9 Operations Manager regarding Vanak obtaining local counsel. DEQ represented it  
10 subsequently attempted to contact Vanak again regarding local counsel.

11 11. DEQ explained the March 7 Notice was intended to notify the Board  
12 why the parties had not provided a proposed scheduling order.

13 12. DEQ moved to dismiss Vanak’s appeal “pursuant to the Examiner’s  
14 Second Prehearing Order and the Board’s inherent authority to manage the practice  
15 of law before it.

16 13. Vanak did not respond to DEQ’s Notice and Motion to Dismiss.

17 14. On April 4, 2017, an Order to Show cause was issued and served on  
18 the parties. Vanak was ordered to show cause “(1) why DEQ’s Motion to Dismiss  
19 should not be deemed well-taken; (2) why this matter should not be dismissed  
20 pursuant to M.R.Civ.P. 16; (3) why this matter should not be dismissed pursuant to  
21 M.R.Civ.P. 41(b); (4) why Vanak should not be defaulted and (5) why this matter  
22 should not be dismissed for Vanak’s failure to obtain legal counsel.”

23 15. Vanak was given until April 14, 2017 to file a response. Vanak did  
24 not respond.

### 25 **CONCLUSIONS OF LAW**

26 1. This matter is governed by the Montana Administrative Procedure  
27 Act, Contested Cases, Mont. Code Ann. Tit. 2, Ch. 4, pt. 6, and Mont. Admin. R.



1 17.4.101, by which the Board of Environmental Review (Board) has adopted the  
2 Attorney General’s Model Rules for contested cases, Mont. Admin. R. 1.3.211  
3 through 1.3.225, and by Mont. Code Ann. Tit. 75, Ch. 5, pts. 6.

4 2. “The Montana Rules of Civil Procedure do not apply to administrative  
5 hearings.” *Citizens Awareness Network v. Mont. Bd. of Env’tl. Review*, 2010 MT  
6 10, ¶ 20, 355 Mont. 60, 61, 227 P.3d 583, 588. However, “they may still serve as  
7 guidance for the agency and the parties.” *Id.*

8 3. Pursuant to the Montana Administrative Procedure Act (“MAPA”),  
9 “[i]n a contested case, all parties must be afforded an opportunity for hearing after  
10 reasonable notice.” Mont. Code Ann. § 2-4-601(1).

11 4. Vanak received notice of the dates contained in the First and Second  
12 Prehearing Orders, DEQ’s Motion to Dismiss, and the Show Cause Order. Vanak  
13 had reasonable notice and opportunity to be heard.

14 **A. DEQ’s Motion to Dismiss Is Well Taken.**

15 5. Montana Uniform District Court Rule 2(b), “Failure to File Briefs,”  
16 provides:

17 Failure to file briefs may subject the motion to summary ruling. The  
18 moving party’s failure to file a brief shall be deemed an admission  
19 that the motion is without merit. *Failure to file an answer brief by  
the opposing party within the time allowed shall be deemed an  
admission that the motion is well taken.*

20 (emphasis added.)

21 6. When a motion is deemed “well-taken” pursuant to Uniform District  
22 Court Rule 2(b), the Montana Supreme Court “will not hold a district court in error  
23 for failing to address an issue that the parties did not raise.” *McDunn v. Arnold*,  
24 2013 MT 138, ¶ 14, 370 Mont. 270, 303 P.3d 1279.

25 7. Pursuant to Uniform District Court Rule 2(b), Vanak’s failure to  
26 Respond to DEQ’s Motion to Dismiss constitutes an admission DEQ’s Motion is  
27 well-taken.

1           8.       Vanak has not raised any arguments in response to DEQ and the  
2 Board of Environmental Review cannot be held in error for failure to address issues  
3 Vanak did not raise.

4           9.       DEQ's Motion to Dismiss is deemed well taken.

5           10.      This matter is dismissed, with prejudice.

6 **B.     This Matter is Dismissed for Failure to Comply with the Scheduling**  
7 **Order.**

8           11.      A hearing examiner may set motion and briefing schedules, provide  
9 for the taking of discovery, and generally "regulate the course of hearings." Mont.  
10 Code Ann. § 2-4-611; Mont. Admin R. 1.3.218.

11          12.      "The purpose of a scheduling order is to instruct the parties to  
12 complete certain pretrial activities such as discovery and filing pretrial motions by a  
13 specific date. This scheduling order allows the district court to better control trial  
14 proceedings by resolving many issues during the pretrial phase of the case."  
15 *Stevenson v. Felco Indus.*, 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763.

16          13.      M.R.Civ.P. 16 provides guidance that a hearing examiner may impose  
17 "just orders" if a party or attorney fails to obey a scheduling order or other pretrial  
18 order. M.R.Civ.P. 16(f)(1)(C); *see also Kingsbury Ditch Co. v. Dep't of Nat. Res. &*  
19 *Conservation*, 223 Mont. 379, 381, 725 P.2d 1209, 1210 (1986) (considering,  
20 without deciding, hearing officer's decision to not employ sanctions for discovery  
21 abuse). A "just order" may include the sanction of dismissal of an action in whole  
22 or in part. *McKenzie v. Scheeler*, 285 Mont. 500, 511, 949 P.2d 1168, 1174 (1997).

23          14.      "Rule 16(f), M.R.Civ.P., which provides that a district court may  
24 impose sanctions for failure to obey a scheduling order, does not require that a party  
25 be given notice of failure to comply or that sanctions could be imposed." *Id.*

26          15.      Vanak was required to comply with two initial scheduling deadlines:  
27 (1) prepare a joint proposed scheduling order, and (2) obtain legal counsel.



1           16.     Vanak's non-compliance with these deadlines has prevented these  
2 proceedings from moving forward, interfered with the undersigned's ability to  
3 regulate the course of these proceedings, made DEQ unable to complete pre-trial  
4 activities in a timely and economical fashion and has resulted in an inability to  
5 resolve issues during the pretrial phase of the case.

6           17.     Vanak had notice of the First and Second Prehearing Orders, notice of  
7 DEQ's Notice and Motion to Dismiss, and notice of the Show Cause Order. Vanak  
8 was made aware on multiple occasions that its non-compliance and non-  
9 participation might result in dismissal. Vanak had multiple opportunities to be  
10 heard but did not respond.

11           18.     Vanak's non-compliance merits dismissal with prejudice.

12 **C.     This Matter is Dismissed Based on Vanak's Failure to Comply with**  
13 **Orders.**

14           19.     Montana R.Civ.P. 41(b) provides, "[i]f the plaintiff fails to prosecute  
15 or to comply with these rules or a court order, a defendant may move to dismiss the  
16 action or any claim against it."

17           20.     Montana's Rule 41(b) was amended in 2010 to "conform to the recent  
18 changes in the Federal Rules." M.R.Civ.P. 41, Committee Notes.

19           21.     Rule 41(b) has "long been interpreted to permit courts to dismiss  
20 actions sua sponte for a plaintiff's failure to prosecute or comply with the rules of  
21 civil procedure or court's orders." *Hells Canyon Pres. Council v. United States*  
22 *Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) (quoting *Olsen v. Mapes*, 333 F.3d  
23 1199, 1204 n.3 (10th Cir. 2003)).

24           22.     In several opinions the Montana Supreme Court has stated that a  
25 corporation must be represented in court by an attorney. *E.g., Audit Servs., Inc. v.*  
26 *Frontier-West, Inc.*, (1992), 252 Mont. 142, 148, 827 P.2d 1242, 1246; *Continental*  
27 *Realty, Inc. v. Gerry*, (1991), 251 Mont. 150, 152, 822 P.2d 1083, 1084.

1           23.     State Bar of Montana Ethics Opinion No. 000008 opined that a  
2 hearing examiner in a contested case under the MAPA “may not ethically permit a  
3 corporation to represent itself pro se through an unlicensed individual.”

4           24.     Where an attorney moved to preclude a nonlawyer from representing a  
5 corporation in a proceeding before a hearing examiner, and the hearing examiner  
6 granted the motion, the Court ruled that both the hearing examiner and lawyer had  
7 immunity from suit. *Steele v. McGregor*, 1998 MT 85, ¶ 31, 288 Mont. 238, 956  
8 P.2d 1364. The Court stated that the lawyer who made the motion was “an officer  
9 of the court who merely discharged his duty under the Montana Rules of  
10 Professional Conduct . . . .” *Id.*, ¶ 27. The Court cited M.R. Prof’l Conduct 5.5(b),  
11 which prohibits an attorney to “assist a person who is not a member of the bar in the  
12 performance of activity that constitutes the unauthorized practice of law.” *Id.*, ¶ 29.  
13 The Court stated that the attorney “was required by Rule 5.5(b) to refrain from  
14 assisting [the nonlawyer] in what [the attorney] perceived to be the unauthorized  
15 practice of law.” *Id.*, at ¶ 30.

16           25.     Vanak Transportation is a corporation, must be represented by legal  
17 counsel, and was ordered to obtain legal counsel.

18           26.     Montana analyzes four factors to determine whether a tribunal, in its  
19 discretion, may dismiss pursuant to 41(b):

- 20           (1) the plaintiff’s diligence in prosecuting his claims;  
21           (2) the prejudice to the defense caused by the plaintiff’s delay;  
22           (3) the availability of alternate sanctions; and  
23           (4) the existence of a warning to plaintiff that his case is in danger of  
dismissal.

24           *Watson v. West*, 2009 MT 342, ¶ 25, 353 Mont. 120, 218 P.3d 1227.

25           27.     The Board of Environmental Review is in the best position to  
26 “consider the circumstances of each case and decide questions of good faith in  
27 situations that may warrant sanctions.” *Id.* ¶ 31.



1           28.     Vanak has not exercised diligence in this case. Vanak requested a  
2 hearing before the Board of Environmental Review but did not provide a basis for  
3 the appeal. Vanak did not comply with the First Prehearing Order or Second  
4 Prehearing Order. Vanak did not respond to DEQ's motion to dismiss. Vanak did  
5 not respond to the Show Cause Order. Vanak's objective conduct establishes it has  
6 not been diligent.

7           29.     Vanak's lack of diligence has resulted in prejudice to DEQ. Waste of  
8 time and delay constitute sufficient prejudice when they arise from another party's  
9 lack of diligence and disregard for a tribunal's orders. *Watson*, ¶ 28.

10          30.     The undersigned has considered whether to impose something other  
11 than involuntary dismissal. *See* M.R.Civ.P. 37(b)(2)(A)(i)-(iv). Given that Vanak  
12 has been unresponsive to multiple orders, prevented the issuance of a scheduling  
13 order, has not responded to DEQ's Motion to Dismiss, ignored the Show Cause  
14 Order and has not demonstrated objective inclination to participate in these  
15 proceedings, anything less than dismissal would unnecessarily prolong these  
16 proceedings, frustrate judicial economy and be a waste of time.

17          31.     Vanak received three warnings that its case was in danger of  
18 dismissal. First, Vanak was told that if it did not obtain legal counsel it faced  
19 dismissal. Second, Vanak received DEQ's Motion to Dismiss. Third, the Show  
20 Cause Order warned Vanak this proceeding might be dismissed on multiple  
21 grounds, including Rule 41(b).

22          32.     Based on the foregoing, Vanak's appeal is dismissed with prejudice.

23 **D.     Default Is Entered Against Vanak.**

24          33.     The Attorney General's Model Rule 10(1) (Mont. Admin. R.  
25 1.3.214(1)) states:

26                 If a party does not appear to contest an intended agency action, the agency  
27                 may enter a default order. If a default is entered, the order must contain  
                  findings of fact and conclusions of law.

34. As set forth in the Findings of Fact, Vanak was afforded opportunity for hearing in this case. Vanak had notice of the dates by which it was supposed to propose a scheduling order and obtain counsel. Vanak had notice of the pending Motion to Dismiss. Vanak had notice of the Show Cause Order. Vanak did not comply with its obligations, did not brief this matter and did not respond to the Show Cause Order. Vanak has not appeared to contest the intended agency action by DEQ. Vanak will be defaulted.

35. The formal requirements for entering a final order of default are satisfied as this order is in writing and contains findings of fact and conclusions of law, pursuant to Mont. Code Ann. §§ 2-4-603(1)(a) and 2-4-623(1)(a), and Mont. Admin. R. 1.3.214(1) (Model Rule 10).

**PROPOSED ORDER**

It is hereby ORDERED:

1. DEQ's Motion to Dismiss is well taken and this matter is dismissed, with prejudice.

2. Pursuant to M.R.Civ.P. 16(f), Vanak's appeal is dismissed, with prejudice.

3. Pursuant to M.R.Civ.P. 41(b), Vanak's appeal is dismissed, with prejudice.

4. Default is entered against Vanak and this appeal is dismissed, with prejudice.

DATED this 21st day of April 2017.

/s/ Andres Haladay  
ANDRES HALADAY  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
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 Findings of Fact, Conclusions of Law and Proposed Order to be emailed to:

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

Brad Jones  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
Bjones4@mt.gov

John Arrigo  
Enforcement Division  
Division Administrator  
1520 E. 6th Ave  
Helena, MT 59601  
Jarrigo!mt.gov

Harvey Dennis  
Vanak Transportation  
Operations Manager  
100 Bass Pro Mills Drive, Unit 43  
Vaughan, ON L4K 5X1  
Vanaktransportation@gmail.com

DATED: 4/21/2017 /s/ Andres Haladay





5. Once this matter is submitted, it will be placed on the next-available Agenda of the Board of Environmental Review for final agency action. The Parties may request an alternative meeting date by stipulation.

DATED this 21st day of April 2017.

/s/ Andres Haladay  
ANDRES HALADAY  
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 Exceptions to be emailed to:

Joyce Wittenberg  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
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Operations Manager  
100 Bass Pro Mills Drive, Unit 43  
Vaughan, ON L4K 5X1  
Vanaktransportation@gmail.com

DATED: 4/21/17 /s/ Andres Haladay

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**CASE NO. BER 2017-01 SW**

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Notice  
on Submittal to be emailed to:

Joyce Wittenberg  
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Harvey Dennis  
Vanak Transportation  
Operations Manager  
100 Bass Pro Mills Drive, Unit 43  
Vaughan, ON L4K 5X1  
Vanaktransportation@gmail.com

DATED: 5/11/17 /s/ Andres Haladay

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

3 **IN THE MATTER OF: APPEAL THE**  
4 **CONDITIONS OF THE CERTIFICATE**  
5 **FOR TIMBRSHOR AT FINLEY POINT**  
6 **WASTEWATER SUBDIVISION**  
7 **REWRITE LAKE COUNTY E.Q. #15-**  
8 **1971, LAKE COUNTY, MONTANA**

CASE NO. BER 2016-10 SUB

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 3<sup>rd</sup> day of April, 2017

at 2:15 o'clock p.m.

9 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**  
10 **PROPOSED ORDER ON SUMMARY JUDGMENT**

11 **INTRODUCTION**

12 Adam and Anne Rys-Sikora challenged the conditions of the Certificate of  
13 Subdivision Plat Approval for the Timbrshor at Finley Point Wastewater  
14 Subdivision Rewrite Lake County E.Q. #15-1971 and requested a hearing before the  
15 Board of Environmental Review. On January 6, 2017, Intervenor Timbrshor  
16 Association, Inc. (Timbrshor) filed a Motion to Dismiss the Rys-Sikoras' challenge.  
17 On January 26, 2017, the Montana Department of Environmental Quality (DEQ)  
18 also moved to dismiss the Rys-Sikoras' challenge.

19 The respective Motions to Dismiss were converted into Motions for  
20 Summary Judgment. The Rys-Sikoras responded on February 28, 2017. On  
21 March 12, 2017, Timbrshor served its reply brief on March 14, 2017, the DEQ filed  
22 its reply brief. This matter is now fully briefed and ready for disposition.

23 **FINDINGS OF FACT**

- 24 1. Timbrshor at Finley Point is a subdivision in Lake County, Montana.
- 25 2. Timbrshor applied to DEQ to rewrite its existing Certificate of
- 26 Subdivision Approval.
- 27 3. On September 2, 2016, DEQ approved Timbrshor's application.
4. The Rys-Sikoras sent a letter to DEQ, dated October 17, 2016:

1 We wish to challenge the conditions of this Certificate of  
2 Subdivision Plat Approval, and request a hearing before the Board of  
3 Environmental Review or the Department, pursuant to Section 76-4-  
126, MCA and the Montana Administrative Procedures Act.

4 5. The Board of Environmental Review set this matter for a contested  
5 case haring and the undersigned was appointed Hearing Examiner.

6 6. On December 20, 2016, Timbrshor sought to intervene and filed a  
7 Motion to Dismiss. On January 6, 2017, Timbrshor was granted intervention and  
8 Timbrshor's Motion to Dismiss was deemed filed that day.

9 7. The Rys-Sikoras did not respond to Timbrshor's Motion to Dismiss  
10 within 14 days.

11 8. On January 26, DEQ filed a Motion to Dismiss.

12 9. Both Timbrshor and DEQ's respective Motions included materials  
13 outside of the pleadings. As a result, on January 27, 2017, both Motions to Dismiss  
14 were converted to Motions for Summary Judgment. The Rys-Sikoras were given  
15 21-days to respond.

16 10. On February 16, 2017, the Rys-Sikoras filed their "Grounds for  
17 Appeal," setting forth the reasons for challenging the Certificate of Subdivision Plat  
18 Approval for the Timbrshor at Finley Point Wastewater Subdivision Rewrite Lake  
19 County E.Q. #15-1971.

20 11. On February 23, 2017, the Rys-Sikoras requested additional time to  
21 respond to the Motions for Summary Judgment. They were granted an extension  
22 until March 1, 2017.

23 12. On February 28, 2017, the Rys-Sikora's filed their Response to the  
24 Converted Motions for Summary Judgment.

### 25 CONCLUSIONS OF LAW

26 1. This matter is governed by the Montana Administrative Procedure  
27 Act, Contested Cases, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont. Admin. R.



1 17.4.101, by which the Board of Environmental Review (Board) has adopted the  
2 Attorney General's Model Rules for contested cases, Mont. Admin. R. 1.3.211  
3 through 1.3.225, and by Mont. Code Ann. Tit. 75, Ch. 5, pts. 6.

4 2. "The Montana Rules of Civil Procedure do not apply to administrative  
5 hearings." *Citizens Awareness Network v. Mont. Bd. of Env't'l. Review*, 2010 MT  
6 10, ¶ 20, 355 Mont. 60, 61, 227 P.3d 583, 588. However, "they may still serve as  
7 guidance for the agency and the parties." *Id.*

8 3. Pursuant to the Montana Administrative Procedure Act ("MAPA"),  
9 "[i]n a contested case, all parties must be afforded an opportunity for hearing after  
10 reasonable notice." Mont. Code Ann. § 2-4-601(1).

11 4. However, under MAPA, an evidentiary hearing is not required when  
12 there are no material facts in dispute. *In re Peila*, 249 Mont. 272, 281, 815 P.2d  
13 139, 144-45 (1991). Where material facts are not in dispute, and a party has had  
14 reasonable opportunity to be heard, summary judgment is appropriate in a MAPA  
15 contested case. *Id.*

16 5. "Summary judgment is appropriate when the moving party  
17 demonstrates both the absence of any genuine issues of material fact and entitlement  
18 to judgment as a matter of law. M. R. Civ. P. 56(c)(3)." *Sullivan v. Cherewick*,  
19 2017 MT 38, ¶ 9. "Once the moving party has met its burden, the opposing party  
20 must present material and substantial evidence to raise a genuine issue of material  
21 fact." *Id.* A party opposing summary judgment is entitled to all reasonable  
22 inferences from the offered evidence, but cannot rely on conclusory statements,  
23 speculative assertions or mere denials. *Id.*

24 6. The Rys-Sikoras have received reasonable notice of Timbrshor and  
25 DEQ's dispositive arguments. The Rys-Sikora's have received an extension of time  
26 to respond, have not been denied any requested extension of time, and have had a  
27 reasonable opportunity to be heard.

1     **A.     The Rys-Sikoras Do Not Have Standing to Request a Hearing Under**  
2     **Mont. Code Ann. § 76-4-126.**

3             7.     An administrative agency only has those powers specifically conferred  
4     by the legislature. *Auto Parts of Bozeman v. Emp't Rels. Div. Uninsured*  
5     *Employers' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193. "An  
6     administrative agency may not assume jurisdiction without express delegation by the  
7     legislature." *Id.* "A litigant's standing before an administrative agency depends on  
8     the language of the statute and regulations which confer standing before that  
9     agency." *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71.

10            8.     When interpreting a statute, the goal is "simply to ascertain and  
11     declare what is in term or in substance contained therein, not to insert what has been  
12     omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. If the  
13     legislature's intent can be determined from the plain language of a statute, the plain  
14     language controls and no further analysis is required. *In re Estate of: M.D.*, 2017  
15     MT 22, ¶ 12.

16            9.     The Rys-Sikoras rely on Mont. Code Ann. § 76-4-126(1) as their legal  
17     authority to request a hearing. That statute provides:

18                    Upon a denial of approval of subdivision plans and specifications  
19                    relating to environmental health facilities, the person who is  
20                    aggrieved by the denial may request a hearing before the board. A  
21                    hearing request must be filed, in writing, within 30 days after receipt  
22                    of the notice of denial and must state the reason for the request.

23            10.    The plain language of Mont. Code Ann. § 76-4-126(1) limits hearing  
24     requests to those persons who are aggrieved by the "*denial of approval of*  
25     subdivision plans and specifications relating to environmental health facilities."  
26     (emphasis added.)

27            11.    It is undisputed the Rys-Sikoras seek to challenge DEQ's *Approval of*  
   the Timbrshor at Finley Point Wastewater Subdivision Rewrite Lake County E.Q.  
   #15-1971. Nothing in the plain language of Mont. Code Ann. § 76-4-126(1) permits



1 the Rys-Sikoras to request a hearing regarding DEQ's approval of the Timbrshor  
2 rewrite.

3 12. The Rys-Sikoras allege numerous substantive problems in the plat  
4 approval process, assign fault to DEQ for not considering their financial interests,  
5 and generally allege a lack of procedural and substantive due process. However,  
6 given that the Rys-Sikoras are not challenging the "*denial of approval of*  
7 subdivision plans and specifications relating to environmental health facilities"  
8 these allegations are beside the point. Mont. Code Ann. § 76-4-126(1). The Rys-  
9 Sikoras do not have standing to request a hearing.

10 13. DEQ and Timbrshor have met their burden to establish an absence of  
11 material fact and that they are entitled to judgment as a matter of law. Even with all  
12 reasonable inferences drawn in their favor, the Rys-Sikoras have not presented  
13 evidence to defeat summary judgment. Summary judgment is granted in favor of  
14 DEQ and Timbrshor.

15 **B. DEQ and Timbrshor's Other Arguments.**

16 14. DEQ and Timbrshor both raise additional arguments including that the  
17 Rys-Sikoras failed to state reasons for their hearing request and their request for  
18 hearing was untimely.

19 15. Given the above conclusion that summary judgment is appropriate  
20 based on the plain language in Mont. Code Ann. § 76-4-126, any analysis of these  
21 additional arguments would be functionally dicta.

22  
23  
24  
25  
26  
27 ///



1 **PROPOSED ORDER**

2 IT IS ORDERED:

- 3 1. The Rys-Sikoras' appeal in this matter is DISMISSED, with prejudice.

4 DATED this 3 day of April, 2017.

5  
6   
ANDRES HALADAY  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440  
9

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that I caused a true and accurate copy of the foregoing  
12 Findings of Fact, Conclusions of Law and Proposed Order on Summary Judgment to  
13 be mailed to:

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

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

26 John Dilliard, Bureau Chief  
27 Public Water Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Adam and Anne Rys-Sikora  
P.O. Box 2222  
Missoula, MT 59806

28 DATED: 4.3.17 

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL THE  
CONDITIONS OF THE CERTIFICATE  
FOR TIMBRSHOR AT FINLEY POINT  
WASTEWATER SUBDIVISION  
REWRITE LAKE COUNTY E.Q. #15-  
1971, LAKE COUNTY, MONTANA

CASE NO. BER 2016-10 SUB

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW

This 3<sup>rd</sup> day of April, 2017

ORDER ON EXCEPTIONS

at 2:15 o'clock p.m.

By: [Signature]

The undersigned has issued Findings of Fact, Conclusions of Law and a Proposed Order (Proposed Order). The Proposed Order has been served on the parties. Mont. Code Ann. § 2-4-621 affords "each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision." See Mont. Admin R. 1.3.223(1).

Mont. Code Ann. § 2-4-621(3) provides:

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.

It is ORDERED:

1. The Scheduling Order is **VACATED**.
2. Any party adversely affected by the Proposed Order will have until **April 17, 2017**, to file exceptions to the proposed order. If no party files exceptions this matter will be deemed submitted.
3. The parties will have until **May 1, 2017**, to file response briefs. If no party files a response brief, this matter will be submitted.







Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 17<sup>th</sup> day of April, 2017  
at 12:05 o'clock p.m.  
By: [Signature]

BEFOR THE BOARD OF ENVIROMENTAL REVIEW  
OF THE STATE OF MONTANA

---

IN THE MATTER OF: APPEAL THE )	CASE NO. BER 2016-10-SUB
CONDITIONS OF THE CERTIFICATE )	
FOR THE TIMBRSHOR AT FINLEY )	
POINT WASTEWATER SUBDIVISION )	
REWRITE LAKE COUNTY E.Q. #15- )	
1971, LAKE COUNTY MONTANA )	

---

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EXCEPTIONS TO THE PROPOSED ORDER

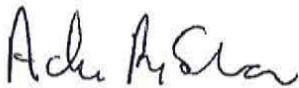
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Adam and Anne Rys-Sikora agree that the FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER ON SUMMARY JUDGEMENT denies the Rys-Sikora's an opportunity for hearing. The Rys-Sikora's have been adversely affected by the PROPOSED ORDER and beg the hearings examiner to continue the hearing process for the following reasons:

1. The Montana State Constitution, Article II, Section 29 states that "Private Property shall not be taken or damaged for public use without compensation to the full extent of the loss". The Rys-Sikora's have lost their investment in septic system development, access to property, denied the right to safety and imposed with Plat changes degrading property value. "Knight vs. the City of Billings" and "Tucker vs. Lake County" both substantiate that if a loss that has been seized without compensation then reimbursement for the loss is necessary.

2. The 2008 MCA Chapter 20, Rules for Civil Procedure, pages 451-452 states:  
“ The purpose of a complaint and subsequent amendments is to provide adequate notice to defendants of the nature of the actions they must defend against and remedy which is sought”. The case; Knight vs. The City of Billings, 260 MT 37, 860 P2d 140, P142; supports this argument that adequate notice is a right of the property owner.
3. There are others in the Timbershor subdivision who do not agree with the process as shown with exhibit A's “demand for payment”

Dated this day of April 17, 2017



Adam and Anne Rys-Sikora  
P.O. Box 2222  
Missoula, 59806

## CERTIFICATE OF SERVICE

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Siefert & Erickson, PLLC  
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Missoula, MT 59802  
erickson@montanalawyer.com



Exhibit A

Adam Rys-Sikora

---

**From:** Dan McCarthy <danmccarthy7777@aol.com>  
**Sent:** Tuesday, April 11, 2017 5:25 AM  
**To:** Amy Acher; tru2u.beth@gmail.com; Doug Ammons; rachel@ammonsscscientific.com; Liahna Armstrong; armstjim@gmail.com; wkdmystic02@yahoo.com; borchers1@charter.net; Nicole Michione; asbrooke@bresnan.net; tombrooke1229@gmail.com; Margaret Caraway; MecObb; James Cole; Thomas Cox; halvoter@comcast.net; markestvold@bresnan.net; gafetz@mso.umt.edu; evelyn fordahl; idellemanning@gmail.com; bisbell@montana.com; stephi@montana.com; davinaka@tctwest.net; Steve Karpstein; Nancy Lewis; manning.jack@dorsey.com; kmaxwell@montana.com; drmac@bresnan.net; silverlynxlane@yahoo.com; jillysnichols@hotmail.com; Daniel E Novinski; James Payson; Kristen Rose; frotondi@skyenergy.us; Irotondi@bresnan.net; Doug Rotondi; MaryAnnRotondi; bevtree@bresnan.net; tomandsue; Adam Rys-Sikora; rsand@montana.edu; Mike Sand; jock@schwanks.net; cswindlehurst@bresnan.net; mstillnghast@att.net; Burke Townsend; karentownsend@mac.com; Larry Walters; kathleen@montanarealtynetwork.com  
**Subject:** Re: Septic Payments

All-

Just wanted to clarify that septic payments need to be paid in full by April 30th.

Best.

Dan

Sent from my iPad

> On Apr 8, 2017, at 4:12 PM, Dan McCarthy <danmccarthy7777@aol.com> wrote:

>

>

> All-

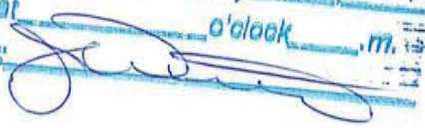
>

> This is just a quick note to thank all of you who have sent in your septic payments to date, particularly those who have already paid in full. I've been told that the contractor is on schedule, which means that within a relatively short period of time we'll need to be in a position to pay the full contract amount. While the Board will be setting a final payment date, I'd encourage all members to pay their full septic amount as soon as they can.

>

> The payments that we have received to date are as follows: Rose (Lodge and 201) half \$13,302; Acher 203 (notified that payment is en route); Swindlehurst (204) full \$13,302; R. Rotondi (205) (notified that payment is en route); Walters (206) none; Peterson (209) half \$6,651; Schwank (210) half \$6,651; Fordahl (211) more than half \$9,000; M. Rotondi (one of 216/217) half \$6,651; Michione (219) none; Karpstein (301) half \$6,651; Rountree (302) full \$13,302; Estvold (305) almost full \$11,000; Selvig/Nichols (306) half \$6,500; Payson (307) full \$13,302; Cole (308 and 309) half \$13,302; Tillinghast (311) none; Novinski (312) none; Brooke/Lewis (314) full \$13,302; Feierabend Partnership (315) full \$13,302; Aamons (316) none; McCarthy (317, 318, 320 and 414) half \$24,756.50; Johnson (401, 421, 422 and 424) half \$26,500; J. Manning (402) half \$6,651; Cobb (two of 403/404 and 418/419) half \$8,680; Armstrong (406) none; Caraway/Dasinger (408) more than half \$8,006; Roy (409) about half \$4,425; Sand (410) none; Mead full \$9,607; Cox full \$9,607; I. Manning (416, 417 and 429) full \$39,906; Borchers (426) half \$6,651; Maxwell full \$7,753; Rys-Sikora (428 and 430) none.

Robert Erickson  
**RHOADES SIEFERT & ERICKSON PLLC**  
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Telephone: (406) 721-9700  
Facsimile: (406) 721-5838  
[erickson@montanalawyer.com](mailto:erickson@montanalawyer.com)

Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 25<sup>th</sup> day of April, 2017  
at \_\_\_\_\_ o'clock \_\_\_\_\_ m.  
By: 

*Attorneys for Timbrshor Association, Inc.*

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

IN THE MATTER OF: APPEAL THE  
CONDITIONS OF THE CERTIFICATE  
FOR TIMBRSHOR AT FINLEY POINT  
WASTEWATER SUBDIVISION  
REWRITE LAKE COUNTY E.Q. #15-  
1971, LAKE COUNTY, MONTANA

Case No. BER 2016-10 SUB

**TIMBRSHOR ASSOCIATION,  
INC.'S RESPONSE BRIEF  
OPPOSING RYS-SIKORAS'  
EXCEPTIONS TO  
PROPOSED ORDER**

Timbrshor Association, Inc. ("Timbrshor") hereby respectfully opposes the Rys-Sikoras' Exceptions to the Proposed Order.

The Rys-Sikoras do not dispute the Hearing Examiner's finding of facts, conclusions of law or proposed order. Instead, the Rys-Sikoras reiterate portions of the same arguments that the Hearing Examiner has already rejected as irrelevant to the dispositive motions filed by both Timbrshor and DEQ.

The Rys-Sikoras' allegations regarding the DEQ's approval process and the Rys-Sikoras' financial considerations have no bearing on whether this proceeding must be dismissed as a matter of law. As noted by the Hearing Examiner, because the Rys-Sikoras are not challenging a "*denial of approval* of subdivision plans and specifications relating to environmental health facilities," *see* Mont. Code Ann. § 76-4-126(1), but rather are purportedly challenging the DEQ's *approval* of this facilities re-write, the



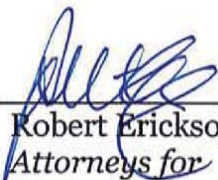
Rys-Sikoras lack standing to request a hearing before the Board of Environmental Review. "It is a basic rule of law that ... an administrative agency ... has only those powers specifically conferred upon it by the legislature." *Gwynn v. Town of Eureka*, 178 Mont. 191, 193, 582 P.2d 1262, 1263 (1978). An administrative agency, such as the Board of Environmental Review, may not assume jurisdiction without an express delegation. *See Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193. Since no authority exists to hear the Rys-Sikoras' challenge, it must be dismissed, as correctly concluded by the Hearing Examiner. *See id.*; *Gwynn*, 178 Mont. at 193, 582 P.2dc at 1263. The Rys-Sikoras' exceptions to the Hearing Examiner's proposed order does change this unavoidable conclusion, which is dispositive.

Under the circumstances, Timbrshor respectfully requests that the Hearing Examiner submit the Findings of Fact, Conclusion of Law and Proposed Order on Summary Judgment to the Board of Environmental Review without alteration and that the Board of Environmental Review adopt it in full, thereby dismissing this matter with prejudice.

DATED this 21<sup>st</sup> day of April 2017.

Respectfully Submitted,  
RHOADES SIEFERT & ERICKSON PLLC

By: \_\_\_\_\_

  
Robert Erickson  
*Attorneys for*  
Timbrshor Association, Inc.



## CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> day of April 2017, I served upon the following a true and correct copy of the foregoing by email and by depositing said copy in the U.S. mail, postage prepaid, and addressed as follows:

Andres Haladay  
Hearing Examiner  
Office of the Attorney General  
Agency Legal Services Bureau  
P.O. Box 201440  
Helena, MT 59620-1440

John Dillard Bureau Chief  
Public Water Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

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

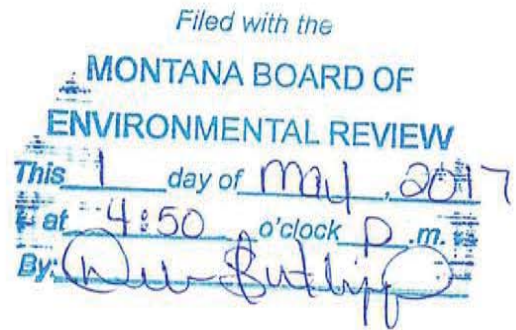
Adam and Anne Rys-Sikora  
P.O. Box 2222  
Missoula, MT 59806

In addition, the original of this document was mailed via U.S. mail, postage prepaid, and addressed as follows:

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

By:  \_\_\_\_\_  
Robert Erickson

Aaron Pettis  
Special Assistant Attorney General  
Department of Environmental Quality  
P.O. Box 200901  
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(406) 444-1422  
APettis@mt.gov  
*Attorney for the Department*



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

**IN THE MATTER OF:  
APPEAL THE CONDITIONS OF THE  
CERTIFICATE FOR TIMBRSHOR AT  
FINLEY POINT WASTEWATER  
SUBDIVISION REWRITE LAKE  
COUNTY E.Q. #15-1971, LAKE COUNTY,  
MONTANA**

**CASE NO. BER 2016-10 SUB**

**Department of Environmental Quality's Response Brief to  
the Rys-Sikoras' Exceptions to the Proposed Order**

Adam and Anne Rys-Sikora have filed exceptions to the Hearing Examiner's Findings of Fact, Conclusions of Law and Proposed Order on Summary Judgment ("Proposed Order"). Because the Rys-Sikoras fail to address the dispositive issue in this appeal—that they cannot appeal the approval of a subdivision application—the Board should adopt the Hearing Examiner's Proposed Order and dismiss this appeal with prejudice.

**BACKGROUND**

Timbrshor at Finley Point is a subdivision in Lake County, Montana. (Proposed Order ¶ 1). Intervenor Timbrshor Association, Inc., applied to the Department to rewrite their existing

certificate of subdivision approval, and the Department approved the application. (*Id.* ¶¶ 2–3). The Rys-Sikoras then appealed that approval to the Board of Environmental Review, citing Section 76-4-126, MCA, and the Montana Administrative Procedure Act as the basis for their appeal. (*Id.* ¶ 4). The Department and Timbrshor both moved for summary judgment, and, after briefing, the Hearing Examiner concluded that the appeal should be dismissed with prejudice because there was no statutory basis for the Rys-Sikoras to appeal the approval of a subdivision application. (*Id.* at 4–6).

#### STANDARD OF REVIEW

Although the Montana Rules of Civil Procedure do not apply to administrative hearings, “they may still serve as guidance for the agency and the parties.” *Citizens Awareness Network v. Mont. Bd. of Env’tl Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583. Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3).

The Board may adopt the Hearing Examiner’s proposal for decision as its final order. Section 2-4-621(3), MCA. The Board may reject or modify the Hearing Examiner’s conclusions of law but may not reject or modify the findings of fact unless the Board first determines from a review of the complete record and states with particularity in its final 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. *Id.*



## ARGUMENT

The threshold question in this appeal is whether Section 76-4-126(1), MCA, allows the Rys-Sikoras to appeal the Department's approval of the Timbrshor subdivision application. As the Hearing Examiner correctly concluded, the answer is plainly no.

The Board cannot assume jurisdiction without express delegation by the Legislature, *Auto Parts of Bozeman v. Emp't Relations Div. Uninsured Emp'rs' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193, and the Rys-Sikoras cannot appeal to the Board if the governing statute does not contemplate their participation in a contested case hearing, *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71. Here, the governing statute provides that only denials of subdivision applications can be appealed:

*Upon a denial of approval of subdivision plans and specifications relating to environmental health facilities, the person who is aggrieved by the denial may request a hearing before the board. A hearing request must be filed, in writing, within 30 days after receipt of the notice of denial and must state the reason for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.*

Section 76-4-126(1), MCA (emphasis added). The Montana Administrative Procedure Act does not provide an independent basis for a contested case hearing. *See Kadillak v. Anaconda Co.*, 184 Mont. 127, 140–41, 602 P.2d 147 (1979); *see also Johansen v. Dep't of Natural Res. & Conserv.*, 1998 MT 51, ¶¶ 20–24, 288 Mont. 39, 955 P.2d 653.

There is only one operative fact in this appeal: the Rys-Sikoras have appealed a subdivision approval. The plain language of Section 76-4-126(1), MCA, is clear that only subdivision denials can be appealed. As such, the Hearing Examiner correctly concluded that there are no questions of material fact and that the Department and Intervenor Timbrshor are entitled to summary judgment.

The Rys-Sikoras ignore this threshold issue and do not object to any of the Hearing Examiner's findings of fact or conclusions of law. Indeed, the Rys-Sikoras have never disputed that they are appealing an approval, or that approvals cannot be appealed. The Rys-Sikoras have, in effect, waived any future arguments about this issue. *Cf. WLF Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312, ¶ 20, 318 Mont. 333, 360 P.3d 1112 (explaining the general rule that arguments cannot be raised for the first time in a reply brief).

Instead, the Rys-Sikoras raise three exceptions to the Proposed Order: (1) they have been subject to an unconstitutional taking; (2) "adequate notice is a right of the property owner;"<sup>1</sup> and (3) "[t]here are others in the Timbershor [*sic*] subdivision who do not agree with the process . . . ."<sup>2</sup> (Rys-Sikoras' Exceptions ¶¶ 1–3). As the Hearing Examiner already concluded, however, the Rys-Sikoras' allegations are beside the point when there is no statutory basis for them to appeal in the first place. (Proposed Order ¶ 12).

The Rys-Sikoras also state, without elaboration, that the Hearing Examiner's Proposed Order denies them "an opportunity for hearing." (Rys-Sikoras' Exceptions at 1). This argument is meritless. The Rys-Sikoras are not entitled to a hearing before the Board if that opportunity is not granted by statute. *Williamson*, 2012 MT 32, ¶ 30. Further, an evidentiary hearing is not required when, as here, there are no disputed material facts. *Anaconda Pub. Schs. v. Whealon*, 2012 MT 13, ¶¶ 15–16, 363 Mont. 344, 268 P.3d 1258. Finally, the Rys-Sikoras have received

---

<sup>1</sup> This argument appears to be a re-assertion of the Rys-Sikoras' allegation that the Department's approval of the Timbrshor application denied them due process, but this allegation is irrelevant because Section 76-4-126(1), MCA, does not allow them to appeal a subdivision approval.

<sup>2</sup> It is not clear whether the "process" to which the Rys-Sikoras refer has to do with the Department's review and approval of the Timbrshor application, since the only support they provide for this argument is an attached e-mail ostensibly showing that some members of the subdivision have not yet made septic payments. Nevertheless, as with all of their arguments, this exception fails to address the fact that there is no statutory basis for the Rys-Sikoras to appeal.

notice of the Department's and Timbrshor's arguments and were given ample opportunity to respond. (Proposed Order ¶ 6).

In sum, the Rys-Sikoras cannot overcome the fact that they cannot appeal the approval of a subdivision application, and nothing in their exceptions addresses this issue. Accordingly, the Board should adopt the Hearing Examiner's Proposed Order and dismiss this appeal with prejudice.

Dated this 1st day of May, 2017.

/s/ Aaron Pettis  
Aaron Pettis  
Attorney for the Department



### CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Department of Environmental Quality's Response Brief to the Rys-Sikoras' Exceptions to the Proposed Order to be sent by electronic mail to the following parties:

Joyce Wittenberg  
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jwittenberg@mt.gov  
**(original hand-delivered)**

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Hearing Examiner  
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P.O. Box 201440  
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Adam and Anne Rys-Sikora  
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Robert Erickson  
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Dated this 1st day of May, 2017.

/s/ Aaron Pettis  
Aaron Pettis  
Attorney for the Department

This 16 day of MAY, 2017

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

at 1:32 o'clock P.m.

By: [Signature]

IN THE MATTER OF: APPEAL THE  
CONDITIONS OF THE CERTIFICATE  
FOR TIMBRSHOR AT FINLEY POINT  
WASTEWATER SUBDIVISION  
REWRITE LAKE COUNTY E.Q. #15-  
1971, LAKE COUNTY, MONTANA

CASE NO. BER 2016-10 SUB

NOTICE OF SUBMITTAL

Exceptions and responses to exceptions were submitted. **May 15, 2017** was the final day for replies to responses. As a result, this matter is deemed submitted. This matter will be placed on the agenda as an action item for the Montana Board of Environmental Review's next meeting, **June 2, 2017**.

DATED this 16th day of May, 2017.

/s/ Andres Haladay  
ANDRES HALADAY  
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 Notice of Submittal to be mailed to:

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

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DATED: 5/16/2017 /s/ Andres Haladay