

**AGENDA**

FRIDAY, JULY 27, 2012

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

\*\*\*\*\*

**NOTE:** Individual agenda items are not assigned specific times. For public notice purposes, the meeting will begin no earlier than the time specified; however, the Board might not address the specific agenda items in the order they are scheduled. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone at (406) 444-6701 or by e-mail at [jwittenberg@mt.gov](mailto:jwittenberg@mt.gov) no later than 24 hours prior to the meeting to advise her of the nature of the accommodation you need.

**9:00 A.M.**

**I. RULE HEARING**

The Board will hold a public hearing regarding the proposed revision of Circular DEQ-2, design standards for municipal wastewater collection and treatment. Included in the revisions to DEQ-2 are treatment standards, classifications, and allowable uses for reclaimed wastewater. Associated with these reuse standards are proposed rule changes under the Water Quality Act and the Public Water Supply Act.

**II. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. May 18, 2012, Board meeting minutes.

**B. SET NOVEMBER / DECEMBER MEETING DATE**

**III. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATE**

1. Enforcement cases assigned to the Hearing Examiner
  - a. **In the matter of violations of the Montana Septage Disposal and Licensure Laws by James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL.** A *Second Order Vacating Hearings and Imposing Stay of Proceedings* was issued on April 17, 2012. The stay is in effect until July 18, 2012.
  - b. **In the matter of violations of the Public Water Supply Laws by Olson's Lolo Hot Springs, Inc. at Lolo Hot Springs, PWSID #MT0000805, Missoula County, BER 2011-09 PWS.** The hearing examiner issued an *Order Granting Request to Stay Proceedings* on December 15, 2011. A *Status Report* was filed on March 19, 2012. On July 2, 2012, the hearing examiner issued *Order Setting Telephonic Status Conference*, setting it for July 10, 2012.
  - c. **In the matter of violations of the Opencut Mining Act by Ell Dirt Works, LLC, at the Gene Foss Pit 1, Richland County, BER 2011-11 OC.** An *Order Vacating and Resetting Prehearing and Hearing Dates* was issued on June 25, 2012. A hearing is set for August 31, 2012.
  - d. **In the matter of violations of the Water Quality Act by SK Construction, Inc. on US Highway 2 near Bainville, Roosevelt County, BER 2011-20 WQ.** On April 11, 2012, the hearing examiner issued *Order Granting Extension of Stay*, giving the parties through May 4, 2012, to reach settlement or submit a joint agreed revised hearing schedule. A *Second Scheduling Order* was issued on May 11, 2012. A hearing is scheduled for September 19, 2012.

- e. **In the matter of violations of the Opencut Mining Act by the City of Ronan at Ronan, Lake County, BER 2011-23 OC.** A hearing is scheduled for August 17, 2012.
- 2. Other cases assigned to the Hearing Examiner
  - a. **In the matter of the appeal and request for hearing by Roseburg Forest Products Co. of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System Permit No. MTX000099, BER 2010-09 WQ.** A telephonic conference was held on June 19, 2012, in which the parties indicated they were discussing settlement. A subsequent telephonic conference is scheduled for July 24, 2012.
- 3. Contested Cases not assigned to a Hearing Examiner
  - a. **In the matter of violations of the Opencut Mining Act by Brad Blakeman at the Camas Prairie Gravel Pit, Sanders County, BER 2012-01 OC.** Interim Hearing Examiner Katherine Orr issued *First Scheduling Order* setting a hearing before the Board on September 28, 2012.
- 4. Other Contested Case Briefings
  - a. **In the matter of violations of the Montana Underground Storage Tank Act by Jeanny Hlavka, individually and d/b/a J.R. Enterprise, LLC, at the Fort Peck Station, Valley County, BER 2010-08 UST.** On March 9, 2012, the District Court remanded the case back to the Board. A *Second Scheduling Order* was issued on June 25, 2012. On July 9, 2012, attorney for DEQ filed *The Department's Second Motion for Summary Judgment and Affidavit of Jane B. Amdahl*. A hearing is set for October 25, 2012.

#### IV. ACTION ITEMS

##### A. INITIATION OF RULEMAKING

DEQ will propose that the Board initiate rulemaking to:

- 1. Amend rules governing the Montana Pollutant Discharge Elimination System (MPDES) permit program in ARM Title 17, Chapter 30, subchapter 13. The Department is requesting these amendments in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program.
- 2. Add a new rule in ARM Title 17, Chapter 30, subchapter 17 adopting DEQ's new Nutrient Trading Policy. DEQ is in the final stages of developing numeric standards for nitrogen and phosphorus in surface waters. Nutrient trading is a market based approach to improve water quality and is supported by EPA as a tool to meet TMDL load allocations. DEQ's draft trading policy allows for voluntary nutrient trading in a watershed between point sources and point sources, or point sources and nonpoint sources.
- 3. Amend ARM 17.8.102 to amend the air quality rules to adopt the 2010 edition of the Code of Federal Regulations and current updates to state statutes and regulations that are incorporated by reference in the rules.

##### B. REPEAL, AMENDMENT, OR ADOPTION OF FINAL RULES

- 1. In the matter of final adoption of amendments of ARM Title 17, Chapter 24, Subchapter 9, in order to regulate underground mining using in situ coal gasification. The proposed revision is required by the 62<sup>nd</sup> Legislature under SB 292.

##### C. FINAL ACTION ON CONTESTED CASES

- 1. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.** A *Stipulation for Dismissal* was received on July 11, 2012, and a proposed order of dismissal will be presented to the Board.

2. **In the matter of the appeal and request for hearing by the City of Helena regarding the DEQ's Notice of Final Decision for Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0022641, BER 2011-08 WQ.** A *Notice of Dismissal and Stipulation to Dismiss Without Prejudice* was filed on June 11, 2012. A proposed order of dismissal will be presented to the Board.
3. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc., at the Absaloka Mine, Big Horn County, BER 2012-02 SM.** The hearing examiner issued *First Scheduling Order* on April 12, 2012. A *Stipulation to Dismiss* was filed on June 7, 2012. A proposed order of dismissal will be presented to the Board.
4. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc., at the Absaloka Mine, Big Horn County, BER 2012-03 SM.** Interim Hearing Examiner Katherine Orr issued *First Prehearing Order* on April 11, 2012. A *Stipulation to Dismiss* was filed on June 7, 2012. A proposed order of dismissal will be presented to the Board.

#### D. NEW CONTESTED CASES

1. **In the matter of violations of the Public Water Supply laws by the city of Ronan Public Water Supply System, PWSID #MT0000318, Ronan, Lake County, BER 2012-04 PWS.** The Board received the appeal on May 21, 2012. Interim Hearing Examiner Katherine Orr issued the *First Prehearing Order* on May 31, 2012. A *Motion for Extension to Submit a Proposed Schedule* was filed by the DEQ on June 12, 2012, and *Order Granting Extension* was issued by the hearing examiner on July 2, 2012. The Board may appoint a permanent hearing examiner or decide to hear the matter.
2. **In the matter of the request for hearing by William E. Smith, on behalf of Mike Adkins, regarding Park County's denial to validate Adkins Class III Waste Tire Monofill License No. 517, BER 2012-05 SW.** The Board received the appeal on May 23, 2012. A *First Prehearing Order* was issued on June 4, 2012. On June 29, the Board received *Unopposed Motion to Enter Proposed Scheduling Order* with attached *Proposed Scheduling Order*. On July 11, 2012, the Board received *Amended Appeal Brief and Petition for Declaratory Ruling* from the attorney for appellants. The hearing examiner issued the *First Scheduling Order* on July 6, 2011. The Board may appoint a permanent hearing examiner or decide to hear the matter.
3. **In the matter of violations of the Montana solid Waste Management Act by Valley County Refuse District #1 at the Valley County Landfill, Glasgow, BER 2012-06 SW.** The Board received the appeal on June 8, 2012. A *First Prehearing Order* was issued on June 25, 2012. On July 9, 2012, the parties filed *Joint Proposed Hearing Schedule* requesting a hearing the week of January 21, 2013, or later. The Board may appoint a permanent hearing examiner or decide to hear the matter.
4. **In the matter of violations of the Opencut Mining Act by Russell Olsen at PaveCo Pit, Flathead County, BER 2012-07 OC.** The Board received the request for hearing on July 11, 2012. The Board may appoint a permanent hearing examiner or decide to hear the matter.

#### V. GENERAL PUBLIC COMMENT

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

#### VI. ADJOURNMENT



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: [www.deq.state.mt.us](http://www.deq.state.mt.us)

**MINUTES  
MAY 18, 2012**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:02 a.m., on Friday, May 18, 2012, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Marvin Miller, Larry Anderson, Robin Shropshire, and Joe Whalen

Board Members Absent: Larry Mires and Heidi Kaiser

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

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director); John North, Norman Mullen, Claudia Massman, David Dennis, and Jane Amdahl – Legal; Jenny Chambers – Water Protection Bureau; Jon Dilliard, Eugene Pizzini, and Shelley Nolan – Public Water Supply & Subdivisions Bureau; Debra Wolfe, Vickie Walsh, Charles Homer, Whitney Walsh, and Stephen Coe – Air Resources Management Bureau; Ed Coleman and Eric Urban – Industrial & Energy Minerals Bureau; Mark Bostrom, Amy Steinmetz, and Rod McNeil – Water Quality Planning Bureau; Todd Teegarden, Paul LaVigne, and Terry Campbell – Technical & Financial Assistance Bureau; John Arrigo – Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): None

- I.A Review and approve March 23, 2012, meeting minutes.
- Chairman Russell called for a motion to approve the March 23, 2012, minutes. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous vote.
- II.A.1.a In the matter of violations of the Montana Septage Disposal and Licensure Laws by James Vaughn, d/b/a Any Time Septic & Porta-Potty, Lake County, BER 2011-06 SDL.
- Ms. Orr said there is a Stay in effect for this matter until July 18, 2012.
- II.A.1.b In the matter of violations of the Public Water Supply Laws by Olson's Lolo Hot Springs, Inc. at Lolo Hot Springs, PWSID #MT0000805, Missoula County, BER 2011-09 PWS.
- Ms. Orr said the parties in this matter anticipate settlement on July 1, 2012.
- II.A.1.c In the matter of violations of the Opencut Mining Act by Ell Dirt Works, LLC, at the Gene Foss Pit 1, Richland County, BER 2011-11 OC. *(No discussion took place regarding this matter.)*
- II.A.1.d In the matter of violations of the Water Quality Act by SK Construction, Inc. on US Highway 2 near Bainville, Roosevelt County, BER 2011-20 WQ.
- Ms. Orr said a scheduling order was issued on May 11, 2012, and that a hearing is set for September 19, 2012.
- II.A.1.e In the matter of violations of the Opencut Mining Act by the City of Ronan at Ronan, Lake County, BER 2011-23 OC. *(No discussion took place regarding this matter.)*
- II.A.1.f In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc., at the Absaloka Mine, Big Horn County, BER 2012-02 SM.
- Ms. Orr said a hearing is scheduled for August 29, 2012.
- II.A.2.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.
- Ms. Orr said a status report was filed in this matter on May 3, 2012, and that a stipulation for dismissal will be submitted in the near future.
- II.A.2.b In the matter of the appeal and request for hearing by Roseburg Forest Products Co. of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System Permit No. MTX000099, BER 2010-09 WQ.
- Ms. Orr said a telephonic status conference for this matter is scheduled for June 19, 2012.
- II.A.2.c In the matter of the appeal and request for hearing by the City of Helena regarding the DEQ's Notice of Final Decision for Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0022641, BER 2011-08 WQ.
- Ms. Orr said an unopposed motion to modify the second scheduling order was filed on May 16, 2012, and that her ruling on the motion will be forthcoming.

II.A.3.a In the matter of violations of the Opencut Mining Act by Brad Blakeman at the Camas Prairie Gravel Pit, Sanders County, BER 2012-01 OC.

Ms. Orr said a hearing for this matter is scheduled for September 28, 2012, before the Board. She also noted that there had been a notice and consent to withdrawal of counsel.

II.A.4.a In the matter of violations of the Montana Underground Storage Tank Act by Jeanny Hlavka, individually and d/b/a J.R. Enterprise, LLC, at the Fort Peck Station, Valley County, BER 2010-08 UST. (*No discussion took place regarding this matter.*)

III.A.1 In the matter of DEQ's request to initiate rulemaking to amend ARM 17.30.617 to designate a portion of the Gallatin River as an Outstanding Resource Water (ORW).

Mr. Livers explained that this is a request for an extension on the rulemaking and that at least one more extension will be requested before final adoption is requested. He said the snow effluent disposal pilot project is underway and runoff data is expected in June and should be the last data collection needed to evaluate the pilot project. He said DEQ and most of the parties involved believe that it will be feasible and that the increased sewage capacity will be an option.

Discussion took place regarding the legislative directive to conduct the EIS and the EIS process itself.

Chairman Russell called for a motion to extend the rulemaking and public comment period to November 2, 2012. Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. Chairman Russell called for public comment on the matter. No one responded. The motion CARRIED with a unanimous vote.

III.A.2 In the matter of DEQ's request to initiate rulemaking to amend ARM 17.8.801 and 17.8.818 for major source permitting.

Ms. Wolfe said DEQ is requesting initiation of rulemaking to update requirements for ozone for sources subject to major source permitting rules. She provided information regarding ozone and the National Ambient Air Quality Standards for it.

Ms. Vicki Walsh responded to questions from the Board.

Chairman Russell called for public comment on the proposed rulemaking. No one responded.

Chairman Russell called for a motion to initiate the rulemaking and appoint Ms. Orr as the presiding officer. Mr. Miller so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

III.A.3 In the matter of DEQ's request to initiate rulemaking to revise Circular DEQ-2, design standards for municipal wastewater collection and treatment.

Mr. LaVigne said DEQ is requesting rule initiation for changes in Circular DEQ-2, design standards for larger municipal systems, which includes collection system information and various treatment technologies. He said the circular is a tool box of sorts, based on the *Ten*

*States Standards*, for consulting engineers and DEQ review engineers to provide consistency in the reviews. He said the proposed changes include: a lot of cleanup; significant modifications regarding land application; new sections on membranes and other treatment technologies; and the addition of reuse standards, classifications, and allowable uses.

Further discussion covered the National Environmental Policy Act, the Montana Environmental Policy Act, the Water Quality Act, and the Public Water Supply Act. Mr. LaVigne, Mr. Campbell, and Ms. Massman responded to questions from the Board.

Mr. Whalen expressed interest in the Board holding the hearing for this rulemaking.

Chairman Russell called for a motion to initiate the rulemaking and have the Board conduct the hearing. Mr. Whalen so MOVED. Ms. Shropshire SECONDED the motion. Chairman Russell called for public comment on the proposed rulemaking. No one responded. The motion CARRIED with a unanimous VOTE.

III.A.4 In the matter of DEQ's request to initiate rulemaking to establish new and revised water quality standards in Circular DEQ-7.

Mr. McNeil said this update of DEQ-7 is to clean up some issues that were missed in the triennial review and includes a major undertaking to add required reporting values to a large number of the constituents in DEQ-7. He said the document has been out for informal public comment twice this round and to WPCAC three times to discuss changes.

Mr. McNeil said the Department of Agriculture detected five new pesticides in groundwater supplies during 2010 and 2011, for which staff worked with an EPA toxicologist to develop standards. He said staff had also reviewed all the pesticide standards in DEQ-7 and modified 12 of them. Mr. McNeil said two new aquatic life standards were adopted and that there are nine new or revised human health standards. He described other changes in the document, including a change in Footnote 8, which indicates development of a draft numeric standard to be included under a separate circular, DEQ-12.

Mr. McNeil pointed out several corrections and modifications to Subchapter (6). Ms. Steinmetz, Ms. Chambers, and Mr. McNeil responded to questions from the Board.

Chairman Russell called for public comment on the proposed rulemaking. No one responded. He called for a motion to commence the rulemaking process and appoint it to Ms. Orr. Mr. Miller so MOVED. Mr. Whalen SECONDED the motion. The motion CARRIED with a unanimous vote.

III.B.1 In the matter of final action regarding DEQ's proposal to adopt the amendments to Title 17, Chapter 38, Sub-Chapter 3, Cross Connections in Drinking Water Supplies.

Mr. Pizzini said the Board initiated the rulemaking process on January 27 and that a public hearing was held before Ms. Orr on March 2. He said that comments were received from one municipal system and that DEQ believes the proposed responses adequately address the comments. He recommended the Board adopt the rule amendments as set forth in the notice.

Chairman Russell called for a motion to amend the rule 17.38 Subchapter (3) and to accept the Presiding Officer's report, the 311 and 521 analyses, and the department's responses to comments. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion

CARRIED with a unanimous vote.

A brief discussion took place regarding the omitted call for public comment. However, since no members of the public were present, the issue was deemed moot.

III.C.1 In the matter of violations of the Public Water Supply Laws by Jore Corporation at Jore Corporation, Lake County, BER 2011-05 PWS.

Ms. Orr said the parties reached agreement in this matter and that a Rule 41(a) dismissal is requested.

Chairman Russell called for a motion to authorize him to sign the order of dismissal. Mr. Anderson so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.2 In the matter of the request for hearing by Nancy Scott, Dale Whitton, Kimberly Mole, Jess Hodge, Katherine G. Potter, Sharon B. Johnson, Clinton C. Johnson, James, D. Ward, Korrie L. Ward, Marshall Warrington, Jr., Patricia Warrington, and John Hutton, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-15 OC, BER 2011-12 OC, BER 2011-13 OC, and BER 2011-17 OC.

Ms. Orr explained that she had issued an order granting motion for summary judgment and that a proposed order to adopt that order is before the Board for approval. She provided further information about this appeal and the related appeals, items III.C.3 and III.C.4.

Chairman Russell called for a motion to authorize him to sign the order adopting the proposed order granting summary judgment. Mr. Miller so MOVED. Mr. Anderson SECONDED the motion. After further discussion, the motion CARRIED with a unanimous vote.

III.C.4 In the matter of the request for hearing by Glenn Miller, Rick Sant, Ralph & Edna Neils, Berneice A. Zucker, Patricia Anderson, Tina K. Moore, Marc Zahner, Donald E. White, Jacki Bruemmer, Betty Longo, Tracy Nicely, Michael Dunn, Dennis Thayer, James Hopkins, Debbie Zahner, James P. Tomlin, Howard C.A. Hunter, George Stachecki, Marie Mabee, Harold Mabee, Patricia Warrington, Lily S. Parker, Linda S. Fisher, Steven E. Fisher, Connie Karns, John Ritchie, Grant Denton, Karen & Ben Pelzel, Richard L. Johnson, N.E.W. Boss, Jane O. Drayton, Leonard H. Drayton, Warren Robbe, Katherine G. Potter, Robert B. Potter, Bonnie Gannon, Kim F. Taylor, Linda Cochran, Helen R. Lockard, Marshall Warrington, Jr., Bruce Kinney, Devan Kinney, Jon Kinney, Joel Kinney, Karen Legue, Angeline R. Allen, Gary Allen, Bonnie Sonnenberg, Bud Biddle, Eunice Boeve, Ron Boeve, Kathleen Burbridge, Harold Lewis, Ken Mole, and Lois M. Mole, regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for the Dorr Skeels site in Lincoln County, BER 2011-16 OC.

Chairman Russell called for a motion to authorize him to sign the order adopting the proposed order granting summary judgment for Case No. BER 2011-16 OC. Ms. Shropshire so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.3 In the matter of the request for hearing by Steven K. Endicott, Ruth Ann Endicott, and Robert W. Gambill regarding Opencut Permit No. 487, issued to Plum Creek Timberlands, LP, for



the Dorr Skeels site in Lincoln County, BER 2011-14 OC and BER 2011-18 OC.

Chairman Russell called for a motion to authorize him to sign the order adopting the proposed order granting summary judgment for Case No. BER 2011-14 OC and BER 2011-18 OC. Mr. Whalen so MOVED. Mr. Anderson SECONDED the motion. The motion CARRIED with a unanimous vote.

III.C.5 In the matter of violation of the Metal Mine Reclamation Act by Noble Excavating, Inc. at Nickleback Rock Quarry, Lincoln County, BER 2011-24 MM.

Ms. Orr provided details of the matter and said that the Board has before it a stipulation for dismissal under Rule 41(a).

Chairman Russell called for a motion to authorize him to sign the order of dismissal for this matter. Mr. Anderson so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.

III.D.1 In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc., at the Absaloka Mine, Big Horn County, BER 2012-03 SM.

Ms. Orr provided details of the appeal and the Board discussed Mr. Whalen's interest in hearing this matter. The Board took no action on this matter.

IV. General Public Comment

Mr. North announced Ms. Massman's upcoming retirement and her recently-hired replacement, Mr. Dennis.

Mr. Livers reminded the Board members that the next meeting is scheduled for July 27 and could possibly require a start on July 26 due to the rule hearing. He also announced that the July meeting would be in-person.

V. Adjournment

Chairman Russell called for a motion to adjourn. Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous vote.

The meeting adjourned at 11:18 a.m.

Board of Environmental Review May 18, 2012, minutes approved:

\_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
DATE

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

**AGENDA ITEM # IV.A.1.**

**AGENDA ITEM SUMMARY** - The Department requests that the Board initiate rulemaking to amend rules governing the Montana Pollutant Discharge Elimination System (MPDES) permit program in ARM Title 17, Chapter 30, subchapter 13. The Department is requesting these amendments in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program.

**LIST OF AFFECTED RULES** - This rulemaking would amend ARM 17.30.1304, 17.30.1310, and 17.30.1322 and repeal ARM 17.30.1303.

**AFFECTED PARTIES SUMMARY** - Persons or operators of facilities holding discharge permits issued pursuant to the Montana Water Quality Act, Title 75, chapter 5, MCA, and persons or facilities who wish to obtain a permit under the Act.

**SCOPE OF PROPOSED PROCEEDING** - The Department requests that the Board initiate rulemaking, appoint a hearing officer, and conduct a public hearing to take comment on the proposed amendments and repeal.

**BACKGROUND** - The proposed amendments are intended to update rules establishing permit application requirements, permit exclusions, and definitions used in Subchapter 13. ARM 17.30.1303, a rule which includes miscellaneous incorporations of federal rules and statutes by reference is proposed to be repealed. The rulemaking is necessary to maintain compliance with federal regulations governing states that are delegated to implement the federal Clean Water Act's permitting program in accordance 40 CFR 123.25. That regulation requires delegated states to adopt permit application requirements found at 40 CFR 122.21. Permit exclusions found at ARM 17.30.1310 are not a required component of a state program under 40 CFR 123.25 however the proposed amendment will maintain consistency with the federal program.

ARM 17.30.1303 incorporates 49 different federal rules and statutes including many that are not required by 40 CFR 123.25 for delegated state programs. Incorporations by reference that are necessary are all included elsewhere in Title 17, chapter 30, subchapters 11, 12 or 13. Repeal of ARM 17.30.1303 will eliminate duplication and confusion regarding these requirements.

The proposed amendments are necessary to: (1) incorporate changes in federal permit application requirements between 1990 and 2008; (2) clarify that water transfers are not subject to discharge permit requirement adopted under this chapter; (3) update definitions used in this subchapter; (4) update incorporations by reference of federal rules that are too cumbersome to publish into state rules; (5) repealing existing incorporations by reference that are either duplicative or inapplicable to state permit programs; and (6) clarifying existing language.

**Hearing Information** - The Department recommends the Board appoint a presiding officer and conduct a public hearing to take comment on the proposed amendments and repeal.

**Board Options** - The Board may:

1. Initiate rulemaking and issue the attached Notice of Public Hearing on Proposed Amendment and Repeal;
2. Modify the Notice and initiate rulemaking; or
3. Determine that amendment of the rules is not appropriate and deny the Department's request to initiate rulemaking.

**DEQ Recommendation** - The Department recommends that the Board initiate rulemaking and appoint a presiding officer to conduct a public hearing, as described in the enclosed proposed Montana Administrative Register notice.

**Enclosures:**

1. Notice of Public Hearing on Proposed Amendment and Repeal.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
17.30.1304, 17.30.1310, and 17.30.1322 )  
pertaining to Montana pollutant )  
discharge elimination system permits, )  
permit exclusions, and application )  
requirements and repeal of ARM )  
17.30.1303 pertaining to incorporations )  
by reference )

NOTICE OF PUBLIC HEARING ON  
PROPOSED AMENDMENT AND  
REPEAL

(WATER QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2012, at \_\_\_:\_\_\_ .m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.30.1304 DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in 75-5-103, MCA.

(1) through (4) remain the same.

(5) "Application" means the department's standard form for applying for a permit including any additions, revisions, or modifications to the forms.

(5) through (11) remain the same, but are renumbered (6) through (12).

(13) "Concentrated animal feeding operation" (CAFO) is defined in 75-5-801, MCA.

(12) remains the same, but is renumbered (14).

(15) "Conventional pollutant" is defined in ARM 17.30.1202.

(16) "Cooling water" is defined in ARM 17.30.1202.

(17) "Cooling water intake structure" is defined in ARM 17.30.1202.

(13) through (15) remain the same, but are renumbered (18) through (20).

(21) "Discharge," when used without qualification, means the discharge of a pollutant.

(16) through (18) remain the same, but are renumbered (22) through (24).

(25) "Effluent limitation" is defined in ARM 17.30.1202.

(19) remains the same, but is renumbered (26).

~~(20)~~ (27) "Effluent standards" means any restriction or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into state waters is defined in 75-5-103, MCA, and is synonymous with the term "effluent limitation," as defined in ARM 17.30.1202, with the exception that it does not include a schedule of compliance.

(28) "Entrainment" means the incorporation of all life stages of fish and shellfish with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.

(21) through (26) remain the same, but are renumbered (29) through (34).

~~(27)~~ (35) "Hazardous substance" means any substance element or compound designated by EPA under 40 CFR Part 116 pursuant to section 311(b)(2)(a) of the federal Clean Water Act and listed in 40 CFR 116.4.

(36) "Impingement" means the entrapment of all life stages of fish and shellfish on the outer part of an intake structure or against a screening device during periods of intake water withdrawal.

(28) through (36) remain the same, but are renumbered (37) through (45).

(46) "New facility" is defined in ARM 17.30.1202.

(37) through (58) remain the same, but are renumbered (47) through (68).

(69) "Source water" means the state water body (state surface waters) from which the cooling water is drawn.

(59) remains the same, but is renumbered (70).

(71) "Storm water" is defined in ARM 17.30.1102.

(72) "Storm water discharge associated with an industrial activity" is defined in 40 CFR 122.26(b)(14).

(73) "Storm water discharge associated with small construction activity" is defined in 40 CFR 122.26(b)(15).

(60) remains the same, but is renumbered (74).

~~(61)~~ (75) "Toxic pollutant" means any pollutant listed as toxic pursuant to section 1317(a)(1) designated by EPA under section 307(a)(1) of the federal Clean Water Act and set forth listed in 40 CFR 429 401.15.

(62) and (63) remain the same, but are renumbered (76) and (77).

(78) "Variance" is defined in ARM 17.30.1202.

(79) "Whole effluent toxicity" means the aggregate toxic effect of an effluent measured by a toxicity test.

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

IMP: 75-5-401, MCA

REASON: The board is proposing to amend the definitions in ARM 17.30.1304 in order to add definitions explaining technical terms that are used in the application requirements also being proposed for adoption in this rulemaking. In addition, the board is proposing to amend some of the current definitions in ARM 17.30.1304 to correct errors, ensure consistency with statutory definitions, and provide consistency among the definitions appearing in ARM 17.30.1202, 17.30.1102, and 17.30.1304.

MAR Notice No. 17-\_\_\_\_

17.30.1310 EXCLUSIONS (1) The following discharges do not require MPDES permits:

~~(1) (a) Discharges of dredged or fill material into waters of the United States which that are regulated under section 404 of the federal Clean Water Act;~~

~~(2) (b) The introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to state waters are eliminated (see also ARM 17.30.1350(2)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other party not leading to treatment works;~~

~~(3) (c) Any discharge in compliance with the instructions of an on-scene coordinator pursuant to 40 CFR Part 300 et seq. (The National Oil and Hazardous Substances Pollution Plan) or 33 CFR Parts 153-157 (Pollution by Oil and Hazardous Substances);~~

~~(4) (d) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in ARM 17.30.1304(3)(15), discharges from concentrated aquatic animal production facilities as defined in ARM 17.30.1304(6) 1331(1), discharges to aquaculture projects as defined in ARM 17.30.1304(5), and discharges from silvicultural point sources as defined in ARM 17.30.1304(56)(65);~~

~~(5) (e) Return flows from irrigated agriculture;~~

~~(6) (f) Discharges into a privately owned treatment works, except as the department may otherwise require under ARM 17.30.1344; and~~

~~(7) (g) The board hereby adopts and incorporates herein by reference 40 CFR Part 300 and 33 CFR 153.101 which are federal agency rules setting forth requirements concerning releases of hazardous wastes or petroleum products. See ARM 17.30.1303 for complete information about all materials incorporated by reference. discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the state without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.~~

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

IMP: 75-5-401, MCA

REASON: The board is proposing to amend ARM 17.30.1310(4) (renumbered (d)) in order to correct the citations to the various definitions referenced in that provision. The board is further proposing to eliminate the incorporation of federal rules in ARM 17.30.1310(7) (renumbered (g)), since the department does not implement these federal rules under the Montana Pollutant Discharge Elimination System (MPDES) permit program. Although the existing permit exclusion in ARM 17.30.1310(3) (renumbered (c)) requires a discharge to be in compliance with 40 CFR Part 300 and 33 CFR 153.01 in order to qualify for the exclusion, incorporating

MAR Notice No. 17-\_\_\_\_

these rules by reference is not necessary to determine whether the discharge is in compliance with the federal rules.

Finally, the board is amending ARM 17.30.1310(7) (renumbered (g)) to add a new discharge to the current list of discharges that are not required to obtain an MPDES permit. The proposed amendment specifies that a discharge from a water transfer that conveys or connects waters of the state does not need an MPDES permit. The proposed amendment further specifies that the exclusion does not apply if pollutants are added to the transferred water or if the transferred water is used for other purposes prior to being discharged. The board is proposing this amendment to be consistent with the U.S. Environmental Protection Agency's (EPA's) recent promulgation of a rule clarifying that water transfers, as defined in the board's proposed amendment, are not subject to NPDES permits. This amendment is necessary in order to maintain consistency between the state and federal permit program and to avoid being more stringent than applicable federal regulations.

17.30.1322 APPLICATION FOR A PERMIT (1) Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under ARM 17.30.1341, excluded under ARM 17.30.1310, or a user of a privately owned treatment works unless the department requires otherwise under ARM 17.30.1344, shall submit a complete application ~~(which must include a BMP program if necessary under 40 CFR 125.102)~~ to the department in accordance with this rule and ARM 17.30.1364 and 17.30.1365, 17.30.1370 through 17.30.1379, and 17.30.1383.

(a) All applicants for MPDES permits shall submit applications on department permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the Water Protection Bureau at (406) 444-3080; Department of Environmental Quality, Water Protection Bureau, 1520 East Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901; or on the department's website at <http://deq.mt.gov/default.mcp>.

(b) All applicants, other than publicly owned treatment works (POTWs), shall submit Form 1.

(c) Applicants for new and existing POTWs shall submit the information required in (12) using Form 2A.

(d) Applicants for concentrated animal feeding operations or concentrated aquatic animal production facilities shall submit Form 2B.

(e) Applicants for existing industrial facilities, including manufacturing facilities, commercial facilities, mining activities, and silvicultural activities, shall submit Form 2C.

(f) Applicants for new industrial facilities that discharge process wastewater shall submit Form 2D.

(g) Applicants for new and existing industrial facilities that discharge only non-process wastewater shall submit Form 2E.

(h) Applicants for new and existing facilities, whose discharge is composed entirely of storm water associated with industrial activity, shall submit Form 2F, unless exempted by (11)(b) through (d). If the discharge is composed of storm water and non-storm water, the applicant shall also submit Forms 2C, 2D, and/or 2E.

as appropriate, in addition to Form 2F.

(i) Applicants for new cooling water intake structures shall submit the information required in (17) in addition to any forms required in (e) through (g).

(2) remains the same.

(3) Any person proposing a new discharge shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the department. Persons proposing a new discharge are encouraged to submit their applications well in advance of the 180-day requirement to avoid delay. See also ~~(14)~~ (13) through (15) requiring time frames where a variance may be available.

~~(4)(a)~~ Any POTW permittee with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the department. ~~{The department may not grant permission for applications to be submitted later than the expiration date of the existing permit.}~~

~~(b) All other permittees with currently effective permits shall submit a new application 180 days before the existing permit expires except that:~~

~~(i) the department may grant permission to submit an application later than the deadline for submission otherwise applicable, but no later than the permit expiration date.~~

(5) remains the same.

(6) All applicants for MPDES permits, other than POTWs, shall provide the following information to the department, using the department's application form Form 1 provided by the department. ~~(a) Additional information required of applicants is set forth in (7) through (14 17):~~

~~(a) through (f) remain the same.~~

~~(g) a topographic map, (or other map if a topographic map is unavailable), extending one mile beyond the property boundaries of the source, depicting:~~

~~(i) the facility and each of its intake and discharge structures;~~

~~(ii) each of its hazardous waste treatment, storage, or disposal facilities;~~

~~(iii) each well where fluids from the facility are injected underground; and~~

~~(iv) those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area; and~~

~~(h) a brief description of the nature of the business; and~~

~~(i) the following POTWs shall provide the results of valid whole effluent biological toxicity testing to the department:~~

~~(i) all POTWs with design influent flows equal to or greater than one million gallons per day;~~

~~(ii) all POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program;~~

~~(j) In addition to the POTWs listed in (6)(i), the department may require other POTWs to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:~~

~~(i) the variability of the pollutants or pollutant parameters in the POTW effluent (based on chemical-specific information, the type of treatment facility, and types of industrial contributors);~~

~~(ii) the dilution of the effluent in the receiving water (ratio of effluent flow to~~



receiving stream flow);

~~(iii) existing controls on point or nonpoint sources, including total maximum daily load calculations for the waterbody segment and the relative contribution of the POTW;~~

~~(iv) receiving stream characteristics, including possible or known water quality impairment, and whether the POTW discharges to a water designated as an outstanding natural resource; and~~

~~(v) other considerations (including but not limited to the history of toxic impact and compliance problems at the POTW) which the department determines could cause or contribute to adverse water quality impacts.~~

[p2924]

~~(k) for POTWs required under (6)(i) or (j) to conduct toxicity testing, POTWs shall use EPA's methods or other established protocols which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity. This testing must have been conducted since the last MPDES permit reissuance or per modification under ARM 17.30.1361, whichever occurred later;~~

~~(l) all POTWs with approved pretreatment programs shall provide to the department a written technical evaluation of the need to revise local limits, as described in 40 CFR 403.5(c)(1).~~

(7) Existing manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits, except for those facilities subject to the requirements of (8), shall provide the following information to the department, using application forms provided by the department:

(a) the latitude and longitude of the outfall to the nearest 15 seconds, and the name of the receiving water;

(b) remains the same.

(c) a narrative identification of each type of process, operation, or production area ~~which~~ that contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and storm water runoff; the average flow ~~which~~ that each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations, or production areas may be described in general terms (for example, "dye-making reactor," "distillation tower"). For a privately owned treatment works, this information must include the identity of each user of the treatment works; The average flow of point sources composed of storm water may be estimated. The basis for the rainfall event and the method of estimation must be indicated;

(d) through (f) remain the same.

(g) information on the discharge effluent characteristics of pollutants specified in this subsection, except information on storm water discharges that is specified in (11)(b), must be provided according to the following:

(i) when "quantitative data" for a pollutant are required, the applicant ~~must~~ shall collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136, unless use of another method is required for the pollutant under 40 CFR subchapter N. When no analytical method is approved under Part 136 or required under subchapter N, the applicant may use any suitable method, ~~but must~~ shall provide a description of the method.

When an applicant has two or more outfalls with substantially identical effluents, the department may allow the applicant to test only one outfall and report that the quantitative data also apply to the substantially identical outfalls. The requirements in (iii)(A), (B), and (iv) (vi), (vii), and (viii), ~~below that state that an applicant must shall~~ provide quantitative data for certain pollutants known or believed to be present, do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant ~~must shall~~ report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform, including Escherichia coli (E-coli). For all other pollutants, a 24-hour composite samples, using a minimum of four grab samples, must be used, unless specified otherwise at 40 CFR Part 136. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours, ~~and a minimum of one to four grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab sample must be taken in the first hour (or less) of discharge with one additional grab sample taken in each succeeding hour of discharge up to a minimum of four grab samples for discharges lasting four or more hours. In addition, for discharges other than storm water discharges,~~ the department may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four grab samples will be a representative sample of the effluent being discharged. Results of analyses of individual grab samples for any parameter may be averaged to obtain the daily average. Grab samples that are not required to be analyzed immediately (see Table II at 40 CFR 136.3(e)) may be composited in the laboratory, provided that container, preservation, and holding time requirements are met (see Table II at 40 CFR 136.3 (e)) and that sample integrity is not compromised by compositing; An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(ii) for storm water discharges, all samples must be collected from the discharge resulting from a storm event that is greater than 0.1 inch and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area. For all applicants, a flow-weighted composite must be taken for either the entire discharge or for the first three hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes. However, a minimum of one grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than 24 hours. For a flow-weighted composite sample, only one analysis of the composite of aliquots is required. For storm water discharge samples taken from discharges associated with industrial activities, quantitative data must be reported for the grab

sample taken during the first thirty minutes, or as soon thereafter as practicable, of the discharge for all pollutants specified in (11)(e). For all storm water permit applicants taking flow-weighted composites, quantitative data must be reported for all pollutants specified in (11)(e) except pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. The department may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall), protocols for collecting samples under 40 CFR Part 136, and additional time for submitting data on a case-by-case basis. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility;

~~(i)(A)~~ (iii) ~~Every applicant must~~ shall report quantitative data for every outfall for the following pollutants:

- (A) biochemical oxygen demand (~~BOD<sub>5</sub>~~);
- (B) chemical oxygen demand;
- (C) total organic carbon;
- (D) total suspended solids;
- (E) ammonia (as N);
- (F) temperature (both winter and summer); and
- (G) pH;

~~(B)~~ (iv) ~~The department may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in the above subsection if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements;~~

~~(ii)~~ (v) ~~Each applicant with processes in one or more primary industry category (see Appendix A of 40 CFR Part 122) contributing to a discharge must~~ shall report quantitative data for the following pollutants in each outfall containing process wastewater:

- (A) remains the same.
- (B) the pollutants listed in Table III of Appendix D of 40 CFR Part 122 (the toxic metals, cyanide, and total phenols);

~~(iii)(A)~~ (vi) ~~Each applicant must~~ shall indicate whether it knows or has reason to believe that any of the pollutants in Table IV of Appendix D of 40 CFR Part 122 (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant ~~must~~ shall report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant ~~must~~ shall either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged;

~~(B)~~(vii) ~~Each applicant must~~ shall indicate whether it knows or has reason to

believe that any of the pollutants listed in Table II or Table III of Appendix D of 40 CFR Part 122 (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under (7)(g)(ii)(v), is discharged from each outfall. For every pollutant expected to be discharged in concentrations of ~~40~~ ten ppb or greater, the applicant ~~must~~ shall report quantitative data. For acrolein, acrylonitrile, 2,4-dinitrophenol, and 2-methyl 4,6-dinitrophenol, where any of these four pollutants are expected to be discharged in concentrations of 100 ppb or greater, the applicant ~~must~~ shall report quantitative data. For every pollutant expected to be discharged in concentrations less than ~~40~~ ten ppb, or in the case of acrolein, acrylonitrile, 2,4-dinitrophenol, and 2-methyl 4,6-dinitrophenol, in concentrations less than 100 ppb, the applicant ~~must~~ shall either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under (7)(h) is not required to analyze for pollutants listed in Table II of Appendix D of 40 CFR Part 122 (the organic toxic pollutants)-;

~~(iv)~~ (viii) ~~E~~each applicant ~~must~~ shall indicate whether it knows or has reason to believe that any of the pollutants in Table V of Appendix D of 40 CFR Part 122 (certain hazardous substances and asbestos) are discharged from each outfall. For every pollutant expected to be discharged, the applicant ~~must~~ shall briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant-;

~~(v)~~ (ix) ~~E~~each applicant ~~must~~ shall report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A) remains the same.

(B) knows or has reason to believe that TCDD is or may be present in an effluent-;

(h) an applicant which qualifies as a small business under one of the following criteria is exempt from the requirements in (7)(g)(ii)(v)(A) or ~~(iii)(vi)(A)~~ to submit quantitative data for the pollutants listed in Table II of Appendix D of 40 CFR Part 122 (the organic toxic pollutants):

(i) remains the same.

(ii) for all other applicants, gross total annual sales averaging less than \$100,000 per year (in second quarter 1980 dollars)-;

(i) a listing of any toxic pollutant which the applicant currently uses or manufactures as an intermediate or final product or byproduct. The department may waive or modify this requirement for any applicant if the applicant demonstrates that it would be unduly burdensome to identify each toxic pollutant and the department has adequate information to issue the permit-;

(j) an identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last three years on any of the applicant's discharges or on a receiving water in relation to a discharge-;

(k) if a contract laboratory or consulting firm performed any of the analyses required by (7)(g), the identity of each laboratory or firm and the analyses performed-;

(l) remains the same.

(8) Except for storm water discharges, all manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits ~~which that~~

discharge only non-process wastewater not regulated by an effluent limitations guideline or new source performance standard shall provide the following information to the department, using application forms provided by the department:

(a) through (c) remain the same.

(d)(i) Quantitative data for the pollutants or parameters listed below, unless testing is waived by the department. The quantitative data may be data collected over the past 365 days, if they remain representative of current operations, and must include maximum daily value, average daily value, and number of measurements taken. The applicant ~~must~~ shall collect and analyze samples in accordance with 40 CFR Part 136. Grab samples must be used for pH, temperature, oil and grease, total residual chlorine, and fecal coliform, including E-coli. For all other pollutants, a 24-hour composite samples, using a minimum of four grab samples, must be used, unless specified otherwise at 40 CFR Part 136. For a composite sample, only one analysis of the composite aliquots is required. New dischargers ~~must~~ shall include estimates for the pollutants or parameters listed below, instead of actual sampling data, along with the source of each estimate. All levels must be reported or estimated as concentration and as total mass, except for flow, pH, and temperature.

(i) The requirements of this subsection (d) apply to:

(A) through (I) remain the same.

(J) pH; and

(K) temperature (winter and summer); and

(L) any pollutant not listed above, if the pollutant is present in the effluent and regulated by a state-adopted water quality standard;

(ii) The department may waive the testing and reporting requirements for any of the pollutants or flow listed in (i) if the applicant submits a request for such a waiver before or with ~~his~~ the application ~~which~~ that demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

(iii) If the applicant is a new discharger, ~~he must~~ the applicant shall complete forms provided by the department by providing quantitative data in accordance with (d) no later than two years after commencement of discharge. However, the applicant need not complete those portions of the forms requiring tests ~~which he~~ that the applicant has already performed and reported under the discharge monitoring requirements of ~~his~~ the MPDES permit.

(iv) The requirements of ~~(i)~~ (d) and (d)(iii), that an applicant ~~must~~ shall provide quantitative data or estimates of certain pollutants, do not apply to pollutants present in a discharge solely as a result of their presence in intake water. However, an applicant ~~must~~ shall report such pollutants as present. Net credit may be provided for the presence of pollutants in intake water if the requirements of ARM 17.30.1345(9) are met;

(e) remains the same.

(f) a brief description of any treatment system used or to be used;

(g) and (h) remain the same.

(9) New and existing concentrated animal feeding operations (CAFOs), defined in ARM 17.30.1330 1304, and concentrated aquatic animal production facilities, defined in ARM 17.30.1304 ~~(6)~~ 1331(1), shall provide the following information to the department, using ~~the~~ the application ~~f~~Form 2B ~~provided by the~~

department:

(a) for CAFOs; ~~the information specified in ARM 17.30.1322(6)(a) through (f) and 40 CFR 122.21(i)(1), including a topographic map; and~~

(i) the name of the owner or operator;

(ii) the facility location and mailing addresses;

(iii) latitude and longitude of the production area (entrance to production area);

(iv) a topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of (6)(g);

(v) specific information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(vi) the type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage (tons/gallons);

(vii) the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;

(viii) estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(ix) estimated amounts of manure, litter, and process wastewater transferred to other persons per year (tons/gallons); and

(x) a nutrient management plan that at a minimum satisfies the requirements specified in ARM 17.30.1343(1)(c), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of 40 CFR 412.4(c), as applicable; and

(b) through (b)(v) remain the same.

(10) New manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits (except for new discharges of facilities subject to the requirements of (8) or new discharges of storm water runoff or facilities associated with industrial activity that are subject to the requirements of (10) (11)) shall provide the following information to the department, using application forms provided by the department:

(a) and (b) remain the same.

(c)(i) a description of the treatment that the wastewater will receive, along with all operations contributing wastewater to the effluent, average flow contributed by each operation, and the ultimate disposal of any solid or liquid wastes not discharged;

(ii) (i) a line drawing of the water flow through the facility with a water balance as described in ARM 17.30.1322(9) (7)(b);

(iii) remains the same, but is renumbered (ii).

(d) remains the same.

(e) the requirements in (8)(d)(i), (ii), and (iii), that an applicant ~~must~~ shall provide estimates of certain pollutants expected to be present, do not apply to pollutants present in a discharge solely as a result of their presence in intake water;

however, an applicant ~~must~~ shall report such pollutants as present. Net credits may be provided for the presence of pollutants in intake water if the requirements of ARM 17.30.1345(9) are met. All levels (except for discharge flow, temperature, and pH) must be estimated as concentration and as total mass;

(i) Each applicant ~~must~~ shall report estimated daily maximum, daily average, and source of information for each outfall for the ~~following~~ pollutants or parameters in (ii). The department may waive the reporting requirements for any of these pollutants and parameters if the applicant submits a request for such a waiver before or with his application ~~which~~ that demonstrates that information adequate to support issuance of the permit can be obtained through less stringent reporting requirements.

(ii) The requirements of (e)(i) apply to:

(A) through (F) remain the same.

(G) temperature (winter and summer); ~~and~~

(H) pH; and

(I) any pollutant not listed above, if the pollutant is present in the effluent and regulated by a state-adopted water quality standard.

~~(ii)~~ (iii) Each applicant ~~must~~ shall report estimated daily maximum, daily average, and source of information for each outfall for the following pollutants, if the applicant knows or has reason to believe they will be present or if they are limited by an effluent limitation guideline or new source performance standard either directly or indirectly through limitations on an indicator pollutant: all pollutants in Table IV of Appendix D of 40 CFR Part 122 (certain conventional and nonconventional pollutants).

~~(iii)~~ (iv) Each applicant ~~must~~ shall report estimated daily maximum, daily average and source of information for the following pollutants if he knows or has reason to believe that they will be present in the discharges from any outfall:

(A) and (B) remain the same.

(iv) through (iv)(f) remain the same, but are renumbered (v) through (v)(f).

~~(v)~~ (vi) Each applicant ~~must~~ shall report any pollutants listed in Table V of Appendix D of 40 CFR Part 122 (certain hazardous substances) if ~~he~~ the applicant believes they will be present in any outfall (no quantitative estimates are required unless they are already available).

~~(vi)~~ (vii) No later than two years after the commencement of discharge from the proposed facility, the applicant is required to complete and submit forms prescribed by the department. However, the applicant need not complete those portions of the forms requiring tests which he has already performed and reported under the discharge monitoring requirements of his MPDES permit;

(f) each applicant ~~must~~ shall report the existence of any technical evaluation concerning his wastewater treatment, along with the name and location of similar plants of which he has knowledge;

(g) and (h) remain the same.

~~(11) Dischargers of storm water from facilities or activities that are listed in ARM 17.30.1105(1)(a) through (f), must apply for an individual permit, or seek coverage under a storm water general permit as provided for in subchapter 11. Individual permits for small municipal separate storm sewer systems are subject to the provisions stated in ARM 17.30.1111(1) through (18) associated with industrial~~

activity or with small construction activity that are required to obtain an individual permit or any other discharge of storm water that the department is evaluating for designation under ARM 17.30.1105(1)(f) and is not a municipal storm sewer, shall submit an MPDES permit application in accordance with the requirements of (6)(a) through (h), as modified and supplemented by the provisions of this section.

(a) Except as provided in (b) through (d), the operator of a storm water discharge associated with industrial activity that is required to obtain an individual permit shall provide:

(i) a site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including:

(A) each of its drainage and discharge structures;

(B) the drainage area of each storm water outfall;

(C) paved areas and buildings within the drainage area of each storm water outfall;

(D) each past or present area used for outdoor storage or disposal of significant materials;

(E) each existing structural control measure to reduce pollutants in storm water runoff;

(F) materials loading and access areas;

(G) areas where pesticides, herbicides, soil conditioners, and fertilizers are applied;

(H) each of its hazardous waste treatment, storage, or disposal facilities (including each area not required to have a RCRA permit that is used for accumulating hazardous waste under 40 CFR 262.34);

(I) each well where fluids from the facility are injected underground; and

(J) springs and other surface water bodies that receive storm water discharges from the facility;

(ii) an estimate of the area of impervious surfaces (including paved areas and building roofs), the total area drained by each outfall (within a mile radius of the facility), and a narrative description of the following:

(A) significant materials that in the three years prior to the submittal of this application have been treated, stored, or disposed in a manner to allow exposure to storm water;

(B) method of treatment, storage, or disposal of such materials;

(C) materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff;

(D) materials loading and access areas;

(E) the location, manner, and frequency in which pesticides, herbicides, soil conditioners, and fertilizers are applied;

(F) the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and

(G) a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(iii) a certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of



non-storm water discharges that are not covered by an MPDES permit. Tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification must include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(iv) existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(v) quantitative data based on samples collected during storm events and collected in accordance with ARM 17.30.1322(7)(g)(ii) from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(A) any pollutant limited in an effluent guideline to which the facility is subject;

(B) any pollutant listed in the facility's MPDES permit for its process wastewater, if the facility is operating under an existing MPDES permit;

(C) oil and grease, pH, biochemical oxygen demand, chemical oxygen demand, total suspended solids, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(D) any information on the discharge required under ARM 17.30.1322(7)(g)(vi) through (viii);

(E) flow measurements or estimates of the flow rate, the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(F) the date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) that generated the sampled runoff, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(vi) operators of a discharge that is composed entirely of storm water are exempt from the requirements of ARM 17.30.1322(7)(b), (c), (d), and (e), and (g)(iii), (iv), (v), and (ix);

(vii) operators of new sources or new discharges, as defined in ARM 17.30.1304, that are composed in part or entirely of storm water shall include estimates for the pollutants or parameters listed in (v) instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water shall provide quantitative data for the parameters listed in (v) within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the MPDES permit for the discharge. Operators of a new source or new discharge that is composed entirely of storm water are exempt from the requirements of ARM 17.30.1322(10)(c)(i) and (ii) and (e).

(b) An operator of an existing or new storm water discharge associated with industrial activity solely under the definition in 40 CFR 122.26(b)(14)(x) or associated with small construction activity solely under the definition in ARM 17.30.1304, is exempt from the requirements of (7) and (11)(a). Such operator shall provide a narrative description of:

(i) the location, including a map, and the nature of the construction activity;

(ii) the total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(iii) proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable state and local erosion and sediment control requirements;

(iv) proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable state or local erosion and sediment control requirements;

(v) an estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(vi) the name of the receiving water.

(c) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with (a), unless the facility:

(i) has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987;

(ii) has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(iii) contributes to a violation of a water quality standard.

(d) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.

(e) Applicants shall provide such other information the department may reasonably require under (7)(l) to determine whether to issue a permit and may require any facility subject to (11)(b) to comply with (11)(a).

(12) Dischargers of storm water associated with industrial, mining, oil and gas, and construction activity, shall apply for an individual permit as stated in 40 CFR 122.26(c)(1) if their discharge is not covered under a general permit provided for in ARM 17.30.1110 or another MPDES permit. Dischargers of storm water associated with construction activity are exempt from the application requirements of (7) and 40 CFR 122.26(c)(1)(i). Unless otherwise indicated, all new and existing publicly owned treatment works (POTWs) and other dischargers designated by the department, shall provide, at a minimum, the information in (a) through (h) to the department, using Form 2A. Permit applicants shall submit all information available at the time of permit application. The information may be provided by referencing information previously submitted to the department. The department may waive any requirement of (a) through (h), if the department has access to substantially identical information. The department may also waive any requirement of (a) through (h) that is not of material concern for a specific permit, if approved by EPA. The waiver request to the EPA must include the department's justification for the waiver. The EPA's disapproval of the proposed waiver does not constitute final agency action, but does provide notice to the department and permit applicant that EPA may object

to any MPDES permit issued in the absence of the required information.

(a) All applicants shall provide the following basic information:

(i) name, mailing address, and location of the facility for which the application is submitted;

(ii) name, mailing address, and telephone number of the applicant and indication as to whether the applicant is the facility's owner, operator, or both;

(iii) identification of all environmental permits or construction approvals received or applied for, including dates, under any of the following programs:

(A) hazardous waste management program under the Resource Conservation and Recovery Act (RCRA), Subpart C;

(B) underground injection control program under the Safe Drinking Water Act (SDWA);

(C) MPDES program under the Clean Water Act (CWA);

(D) dredge or fill permits under section 404 of the CWA; and

(E) other relevant environmental permits, including state permits;

(iv) the name and population of each municipal entity served by the facility, including unincorporated connector districts. Applicant shall indicate whether each municipal entity owns or maintains the collection system and whether the collection system is separate sanitary or combined storm and sanitary, if known;

(v) information concerning whether the facility is located in Indian country and whether the facility discharges to a receiving stream that flows through Indian country;

(vi) the facility's design flow rate (the wastewater flow rate the plant was built to handle), annual average daily flow rate, and maximum daily flow rate for each of the previous three years;

(vii) identification of type(s) of collection system(s) used by the treatment works (i.e., separate sanitary sewers or combined storm and sanitary sewers) and an estimate of the percent of sewer line that each type comprises;

(viii) the following information for outfalls that discharge to state surface water and other discharge or disposal methods:

(A) for effluent discharges to state surface waters, the total number and types of outfalls (e.g. treated effluent, combined sewer overflows, bypasses, constructed emergency overflows);

(B) for wastewater discharged to surface impoundments:

(I) the location of each surface impoundment;

(II) the average daily volume discharged to each surface impoundment; and

(III) whether the discharge is continuous or intermittent;

(C) for wastewater applied to the land:

(I) the location of each land application site;

(II) the size of each land application site, in acres;

(III) the average daily volume applied to each land application site, in gallons per day; and

(IV) whether land application is continuous or intermittent;

(D) for effluent sent to another facility for treatment prior to discharge:

(I) the means by which the effluent is transported;

(II) the name, mailing address, contact person, and phone number of the organization transporting the discharge, if the transport is provided by a party other

than the applicant;

(III) the name, mailing address, contact person, phone number, and MPDES permit number (if any) of the receiving facility; and

(IV) the average daily flow rate from this facility into the receiving facility, in millions of gallons per day; and

(E) for wastewater disposed of in a manner not included in (a)(viii)(A) through (D) (e.g., underground percolation, underground injection):

(I) a description of the disposal method, including the location and size of each disposal site, if applicable;

(II) the annual average daily volume disposed of by this method, in gallons per day; and

(III) whether disposal through this method is continuous or intermittent.

(b) All applicants with a design flow greater than or equal to 0.1 million gallons per day shall provide the following additional information:

(i) the current average daily volume of inflow and infiltration, in gallons per day, and steps the facility is taking to minimize inflow and infiltration;

(ii) a topographic map (or other map if a topographic map is unavailable) extending at least one mile beyond property boundaries of the treatment plant, including all unit processes, and showing:

(A) the treatment plant area and unit processes;

(B) the major pipes or other structures through which wastewater enters the treatment plant and the pipes or other structures through which treated wastewater is discharged from the treatment plant. Outfalls from bypass piping must be included, if applicable;

(C) each well where fluids from the treatment plant are injected underground;

(D) wells, springs, and other surface water bodies listed in public records or otherwise known to the applicant within 1/4 mile of the treatment works' property boundaries;

(E) sewage sludge management facilities (including on-site treatment, storage, and disposal sites); and

(F) the location at which waste classified as hazardous under RCRA enters the treatment plant by truck, rail, or dedicated pipe;

(iii) a process flow diagram or schematic, which includes:

(A) a diagram showing the processes of the treatment plant, including all bypass piping and all backup power sources or redundancy in the system. This includes a water balance showing all treatment units, including disinfection, daily average flow rates at influent and discharge points, and approximate daily flow rates between treatment units; and

(B) a narrative description of the diagram; and

(iv) information regarding scheduled improvements and the schedule of implementation, which includes the following:

(A) the outfall number of each outfall affected;

(B) a narrative description of each required improvement;

(C) scheduled or actual dates of completion for the following:

(I) commencement of construction;

(II) completion of construction;

(III) commencement of discharge; and

(IV) attainment of operational level; and

(D) a description of permits and clearances concerning other state or federal requirements.

(c) Each applicant shall provide the following information for each outfall, including bypass points, through which effluent is discharged, as applicable:

(i) a description of each outfall that includes the following information:

(A) outfall number;

(B) county, city, or town in which outfall is located;

(C) latitude and longitude, to the nearest second;

(D) distance from shore and depth below surface;

(E) average daily flow rate, in million gallons per day;

(F) the following information for each outfall with a seasonal or periodic discharge:

(I) number of times per year the discharge occurs;

(II) duration of each discharge;

(III) flow of each discharge; and

(IV) months in which discharge occurs; and

(G) whether the outfall is equipped with a diffuser and the type (e.g., high-rate) of diffuser used;

(ii) a description of receiving waters that includes the following information, if known for each outfall through which effluent is discharged to state surface waters:

(A) name of receiving water;

(B) name of United States Geological Survey 8-digit hydrologic unit code and state water body identification code; and

(C) critical flow of receiving stream and total hardness of receiving stream at critical low flow (if applicable); and

(iii) a description of treatment system, including the following information describing the treatment provided for discharges from each outfall to state water:

(A) the highest level of treatment (e.g., primary, equivalent to secondary, secondary, advanced, other) that is provided for the discharge for each outfall and:

(I) design biochemical oxygen demand or carbonaceous oxygen demand removal (percent);

(II) design suspended solids removal (percent); and, where applicable,

(III) design phosphorus removal (percent);

(IV) design nitrogen removal (percent); and

(V) any other removals that an advanced treatment system is designed to achieve; and

(B) a description of the type of disinfection used and whether the treatment plant dechlorinates (if disinfection is accomplished through chlorination).

(d) As specified in (i) through (ix), all applicants shall submit to the department effluent monitoring information for samples taken from each outfall through which effluent is discharged to state surface waters. The department may allow applicants to submit sampling data for only one outfall, on a case-by-case basis, where the applicant has two or more outfalls with substantially identical effluent. The department may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone.

(i) All applicants shall sample and analyze for the following pollutants:

- (A) biochemical oxygen demand or carbonaceous oxygen demand;
- (B) fecal coliform;
- (C) design flow rate;
- (D) pH;
- (E) temperature (winter and summer); and
- (F) total suspended solids.

(ii) All applicants with a design flow greater than or equal to 0.1 million gallons per day shall sample and analyze for the pollutants listed below. Facilities that do not use chlorine for disinfection, do not use chlorine elsewhere in the treatment process, and have no reasonable potential to discharge chlorine in their effluent are not required to analyze for chlorine:

- (A) ammonia (as N);
- (B) chlorine (total residual, TRC);
- (C) nitrate/nitrite;
- (D) Kjeldahl nitrogen;
- (E) oil and grease;
- (F) phosphorus; and
- (G) total dissolved solids.

(iii) The following applicants shall sample and analyze for the pollutants listed in Appendix J, Table 2 of 40 CFR Part 122, and for any other pollutants for which the board has established water quality standards applicable to the receiving waters:

(A) all POTWs with a design flow rate equal to or greater than one million gallons per day;

(B) all POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program; and

(C) other POTWs, as required by the department.

(iv) The department may require sampling for additional pollutants, as appropriate, on a case-by-case basis.

(v) Applicants shall provide data from a minimum of three samples taken within four and one-half years prior to the date of the permit application. Samples must be representative of the seasonal variation in the discharge from each outfall. Existing data may be used, if available, in lieu of sampling done solely for the purpose of this application. The department may require additional samples, as appropriate, on a case-by-case basis.

(vi) All existing data for pollutants specified in (i) through (iv) that is collected within four and one-half years of the application must be included in the pollutant data summary submitted by the applicant. If, however, the applicant samples for a specific pollutant on a monthly or more frequent basis, it is only necessary, for such pollutant, to summarize all data collected within one year of the application.

(vii) Applicants shall collect samples of effluent and analyze such samples for pollutants in accordance with analytical methods approved under 40 CFR Part 136 unless an alternative is specified in the existing MPDES permit. When analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform (including E. coli), or volatile organics is required by (i) through (iii), grab samples must be collected for those pollutants. For all other pollutants, 24-hour composite samples must be used. For a composite sample, only one analysis of the composite of aliquots is required.

(viii) The effluent monitoring data provided must include at least the following information for each parameter:

(A) maximum daily discharge expressed as concentration or mass, based upon actual sample values;

(B) average daily discharge for all samples, expressed as concentration or mass, and the number of samples used to obtain this value;

(C) the analytical method used; and

(D) the minimum detection limit (MDL) or minimum level (ML) for the analytical method used.

(ix) Unless otherwise required by the department, metals must be reported as total recoverable.

(e) All applicants shall provide an identification of any whole effluent toxicity tests conducted during the four and one-half years prior to the date of the application on any of the applicant's discharges or on any receiving water near the discharge.

(i) As specified in (ii) through (viii), the following applicants shall submit to the department the results of valid whole effluent toxicity tests for acute or chronic toxicity for samples taken from each outfall through which effluent is discharged to surface waters, except for combined sewer overflows:

(A) all POTWs with design flow rates greater than or equal to one million gallons per day;

(B) all POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program; and

(C) other POTWs, as required by the department, based on consideration of the following factors:

(I) the variability of the pollutants or pollutant parameters in the POTW effluent (based on chemical-specific information, the type of treatment plant, and types of industrial contributors);

(II) the ratio of effluent flow to receiving stream flow;

(III) existing controls on point or non-point sources, including total maximum daily load calculations for the receiving stream segment and the relative contribution of the POTW;

(IV) receiving stream characteristics, including possible or known water quality impairment, a water designated as an outstanding natural resource water; and

(V) other considerations (including, but not limited to, the history of toxic impacts and compliance problems at the POTW) that the department determines could cause or contribute to adverse water quality impacts.

(ii) Where the POTW has two or more outfalls with substantially identical effluent discharging to the same receiving stream segment, the department may allow applicants to submit whole effluent toxicity data for only one outfall on a case-by-case basis. The department may also allow applicants to composite samples from one or more outfalls that discharge into the same mixing zone.

(iii) Each applicant required to perform whole effluent toxicity testing pursuant to (i) shall provide:

(A) results of a minimum of four quarterly tests for a year, from the year preceding the permit application; or

(B) results from four tests performed at least annually in the 4 1/2-year period

prior to the application, provided the results show no appreciable toxicity using a safety factor determined by the department.

(iv) Applicants shall conduct tests with multiple species (no less than two species, e.g., fish, invertebrate, plant) and test for acute or chronic toxicity, depending on the range of receiving water dilution. Applicants shall conduct acute or chronic testing based on the following dilutions:

(A) acute toxicity testing if the dilution of the effluent is greater than 100:1 at the edge of the mixing zone;

(B) acute or chronic toxicity testing if the dilution of the effluent is between 10:1 and 100:1 at the edge of the mixing zone; and

(C) chronic testing if the dilution of the effluent is less than 10:1 at the edge of the mixing zone.

(v) Each applicant required to perform whole effluent toxicity testing pursuant to (i) shall provide the number of chronic or acute whole effluent toxicity tests that have been conducted since the last permit reissuance.

(vi) Applicants shall provide the results using the form provided by the department, or test summaries if available and comprehensive, for each whole effluent toxicity test conducted pursuant to (i) for which such information has not been reported previously to the department.

(vii) Whole effluent toxicity testing conducted pursuant to (i) must be conducted using methods approved under 40 CFR Part 136.

(viii) For whole effluent toxicity data submitted to the department within four and one-half years prior to the date of the application, applicants shall provide the dates on which the data were submitted and a summary of the results.

(ix) Each POTW required to perform whole effluent toxicity testing pursuant to (i) shall provide any information on the cause of toxicity and written details of any toxicity reduction evaluation conducted, if any whole effluent toxicity test conducted within the past four and one-half years revealed toxicity.

(f) Applicants shall submit the following information about industrial discharges to the POTW:

(i) number of significant industrial users (SIUs) and categorical industrial users (CIUs) discharging to the POTW; and

(ii) POTWs with one or more SIUs shall provide the following information for each SIU, as defined at ARM 17.30.1402, that discharges to the POTW:

(A) name and mailing address;

(B) description of all industrial processes that affect or contribute to the SIU's discharge;

(C) principal products and raw materials of the SIU that affect or contribute to the SIU's discharge;

(D) average daily volume of wastewater discharged, indicating the amount attributable to process flow and non-process flow;

(E) whether the SIU is subject to local limits;

(F) whether the SIU is subject to categorical standards, and if so, under which category(ies) and subcategory(ies); and

(G) whether any problems at the POTW (e.g., upsets, pass through, interference) have been attributed to the SIU in the past four and one-half years.

(iii) The information required in (i) and (ii) may be waived by the department



for POTWs with pretreatment programs if the applicant has submitted either of the following that contain information substantially identical to that required in (i) and (ii):

(A) an annual report submitted within one year of the application; or

(B) a pretreatment program.

(g) POTWs receiving Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or RCRA corrective action wastes or wastes generated at another type of cleanup or remediation site shall provide the following information:

(i) if the POTW receives, or has been notified that it will receive, by truck, rail, or dedicated pipe any wastes that are regulated as RCRA hazardous wastes pursuant to 40 CFR Part 261, the applicant shall report the following:

(A) the method by which the waste is received (i.e., whether by truck, rail, or dedicated pipe); and

(B) the hazardous waste number and amount received annually of each hazardous waste;

(ii) if the POTW receives, or has been notified that it will receive, wastewaters that originate from remedial activities, including those undertaken pursuant to CERCLA and sections 3004(u) or 3008(h) of RCRA, the applicant shall report the following:

(A) the identity and description of the site(s) or facility(ies) at which the wastewater originates;

(B) the identities of the wastewater's hazardous constituents, as listed in Appendix VIII of 40 CFR Part 261, if known; and

(C) the extent of treatment, if any, the wastewater receives or will receive before entering the POTW; and

(iii) applicants are exempt from the requirements of (ii) if they receive no more than 15 kilograms per month of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and 261.33(e).

(h) Each applicant with combined sewer systems shall provide the following information:

(i) a map indicating the location of the following:

(A) all combined sewer overflow (CSO) discharge points;

(B) sensitive use areas potentially affected by CSOs (e.g., beaches, drinking water supplies, shellfish beds, sensitive aquatic ecosystems, and outstanding national resource waters); and

(C) waters supporting threatened and endangered species potentially affected by CSOs;

(ii) a diagram of the combined sewer collection system that includes the following information:

(A) the location of major sewer trunk lines, both combined and separate sanitary;

(B) the locations of points where separate sanitary sewers feed into the combined sewer system;

(C) in-line and off-line storage structures;

(D) the locations of flow-regulating devices; and

(E) the locations of pump stations;

(iii) the following information for each CSO discharge point (outfall) covered

by the permit application:

(A) outfall number;

(B) county, city, or town in which each outfall is located;

(C) latitude and longitude, to the nearest second;

(D) distance from shore and depth below surface;

(E) whether the applicant monitored any of the following in the past year for

this CSO:

(I) rainfall;

(II) CSO flow volume;

(III) CSO pollutant concentrations;

(IV) receiving water quality; or

(V) CSO frequency; and

(F) the number of storm events monitored in the past year;

(iv) the following information about CSO overflows from each outfall:

(A) the number of events in the past year;

(B) the average duration per event, if available;

(C) the average volume per CSO event, if available; and

(D) the minimum rainfall that caused a CSO event, if available, in the last

year;

(v) the following information about receiving waters:

(A) name of receiving water;

(B) name of watershed/stream system and the United States Soil

Conservation Service watershed (14-digit) code, if known; and

(C) name of the United States Geological Survey hydrologic cataloging unit (8-digit) code and the state water body identification code, if known; and

(vi) a description of any known water quality impacts on the receiving water caused by the CSO (e.g., permanent or intermittent beach closings, permanent or intermittent shellfish bed closings, fish kills, fish advisories, other recreational loss, or exceedance of any applicable water quality standard).

(i) All applicants shall provide the name, mailing address, telephone number, and responsibilities of all contractors responsible for any operational or maintenance aspects of the facility.

(j) All applications shall be signed by a certifying official in compliance with ARM 17.30.1323

(13) A discharger that is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified below:

(a) through (a)(ii) remain the same.

(b) A request for a variance from the best available technology (BAT) requirements for federal Clean Water Act section 301(b)(2)(F) pollutants (commonly called "nonconventional" pollutants) pursuant to section 301(c) of the federal Clean Water Act because of the economic capability of the owner or operator, or pursuant to section 301(g) of the federal Clean Water Act because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

(i) through (i)(B) remain the same.

(ii) submitting a completed request no later than the close of the public

comment period under ARM 17.30.1372 demonstrating that the requirements of ARM 17.30.1375 and the applicable requirements of 40 CFR Part 125 have been met. Notwithstanding this provision, the complete application for a request under section 301(g) of the federal Clean Water Act shall must be filed before the department must make a decision;

(iii) remains the same.

~~(c) An extension under federal Clean Water Act section 301(i)(2) of the statutory deadlines in section 301(b)(1)(A) or (b)(1)(C) of the federal Clean Water Act based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978, or 180 days after the relevant POTW requested an extension under (14)(b), whichever is later, but in no event may this date have been later than January 30, 1988. The request must explain how the requirements of 40 CFR Part 125, subpart J, have been met.~~

~~(d) An extension under federal Clean Water Act section 301(k) from the statutory deadline of 301(b)(2)(A) for best available technology or 301(b)(2)(E) for best conventional pollutant control technology based on the use of innovative technology, may be requested no later than the close of the public comment period under ARM 17.30.1372 for the discharger's initial permit requiring compliance with section 301(b)(2)(A) or (b)(2)(E), as applicable. The request must demonstrate that the requirements of ARM 17.30.1375 and 40 CFR Part 125, subpart C, have been met.~~

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

(14) A discharger ~~which~~ that is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under ~~either of the following statutory provisions as specified below:~~

~~(a) an extension under federal Clean Water Act section 301(i)(1) of the statutory deadlines in federal Clean Water Act section 301(b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before August 3, 1987; or~~

~~(b) a modification under federal Clean Water Act section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations must be requested no later than the close of the public comment period under ARM 17.30.1372 on the permit from which the modification is sought.~~

(15) Notwithstanding the time requirements in (13) and (14):

(a) the department may notify a permit applicant before a draft permit is issued under ARM 17.30.1370 that the draft permit will likely contain limitations eligibility for variances. In the notice the department may require that the applicant, as a condition of consideration of any variance request, submit an explanation of how the requirements of ~~40 CFR Part 125~~ ARM 17.30.1203(4) applicable to the variance have been met. The department may require submission of the explanation within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations that may become effective upon final grant of the variance; and specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations that may become effective upon final grant of the variance; and

(b) remains the same.

(16) remains the same.

(17) ~~The board hereby adopts and incorporates herein by reference (see ARM 17.30.1303 for complete information about all materials incorporated by reference):~~

~~(a) 40 CFR 125.102, which is a federal agency rule setting forth requirements for best management practices for dischargers who use, manufacture, store, handle, or discharge any hazardous or toxic pollutant;~~

~~(b) 40 CFR Part 136, which is a series of federal agency rules setting forth guidelines establishing test procedures for the analysis of pollutants;~~

~~(c) Appendix A to 40 CFR Part 122, which is an appendix to a series of federal agency rules and sets forth a list of primary industrial categories;~~

~~(d) Tables I, II, and III of Appendix D to 40 CFR Part 122, which are part of appendices of federal agency rules and list, respectively, testing requirements for organic toxic pollutants by industry category for existing dischargers, organic toxic pollutants in each of four fractions in analysis by gas chromatography/mass spectroscopy (GC/MS), and other toxic pollutants (metals and cyanide) and total phenols;~~

~~(e) Tables IV and V of Appendix D to 40 CFR Part 122, which are lists appended to a federal agency rule setting forth, respectively, conventional and nonconventional pollutants, and toxic pollutants and hazardous substances required to be identified by existing dischargers if expected to be present;~~

~~(f) 40 CFR Part 125, which is a series of federal agency rules setting forth criteria and standards for the national pollutant discharge elimination system (NPDES), specifically including criteria for extending compliance dates for facilities installing innovative technology (Subpart C), criteria for determining the availability of a variance based on fundamentally different factors (FDF) (Subpart D), and criteria for extending compliance dates for achieving effluent limitations;~~

~~(g) 40 CFR 403.5(c)(i) (July 1, 1991), which requires POTWs to develop and enforce specific limits to prevent certain discharges; and~~

~~(h) 40 CFR 122.26(c)(1), which states requirements for individual permit applications for storm water discharges.~~

~~(i) Copies of the above listed materials are available from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. New facilities with new or modified cooling water intake structures, as defined in ARM 17.30.1202, shall submit to the department for review the information required in this section as part of their application. Requests for alternative requirements under ARM 17.30.1213 must be submitted with the facility's permit application required by ARM 17.30.1322. All applicants shall provide the following information:~~

~~(a) source water physical data, which includes:~~

~~(i) a narrative description and scaled drawings showing the physical configuration of all source water bodies used by the facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports a determination of the water body type where each cooling water intake structure is located;~~

~~(ii) identification and characterization of the source water body's hydrological and geomorphological features, as well as the methods used to conduct any~~

physical studies to determine the intake's area of influence within the water body and the results of such studies; and

(iii) locational maps;

(b) cooling water intake structure data, which includes:

(i) a narrative description of the configuration of each of the facility's cooling water intake structures and where they are located in the water body and in the water column;

(ii) latitude and longitude in degrees, minutes, and seconds for each of the cooling water intake structures;

(iii) a narrative description of the operation of each of the facility's cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation and seasonal changes, if applicable;

(iv) a flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and

(v) engineering drawings of the cooling water intake structures; and

(c) a source water baseline biological characterization including information required to characterize the biological community in the vicinity of the cooling water intake structures and to characterize the operation of the cooling water intake structures. The department may also use this information in subsequent permit renewal proceedings to determine if the facility's design and construction technology plan, as required in ARM 17.30.1213, should be revised. This supporting information must include existing data (if they are available). However, supplemental data using newly conducted field studies may also be submitted at the discretion of the applicant. The following information must be submitted:

(i) a list of the data in (ii) through (vi) that are not available and efforts made to identify sources of the data;

(ii) a list of species (or relevant taxa) for all life stages and their relative abundance in the vicinity of the cooling water intake structures;

(iii) identification of the species and life stages that would be most susceptible to impingement and entrainment. Species evaluated should include the forage base as well as those most important in terms of significance to commercial and recreational fisheries;

(iv) identification and evaluation of the primary period of reproduction, larval recruitment, and period of peak abundance for relevant taxa;

(v) data representative of the seasonal and daily activities (e.g., feeding and water column migration) of biological organisms in the vicinity of the cooling water intake structures;

(vi) identification of all threatened, endangered, and other protected species that might be susceptible to impingement and entrainment at the cooling water intake structures;

(vii) documentation of any public participation or consultation with federal or state agencies undertaken in development of the plan; and

(viii) if information is submitted to supplement the information requested in (i) with data collected using field studies, supporting documentation for the source water baseline biological characterization must include a description of all methods and quality assurance procedures for sampling, and data analysis including a description of the study area, taxonomic identification of sampled and evaluated

biological assemblages (including all life stages of fish and shellfish), and sampling and data analysis methods. The sampling and/or data analysis methods used must be appropriate for a quantitative survey and based on consideration of methods used in other biological studies performed within the same source water body. The study area should include, at a minimum, the area of influence of the cooling water intake structure.

(18) The board adopts and incorporates by reference the following federal regulations as part of the Montana pollutant discharge elimination system. Copies of these federal regulations may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

(a) 40 CFR Part 136 (July 1, 2011), which sets forth guidelines establishing test procedures for the analysis of pollutants;

(b) Appendix A to 40 CFR Part 122 (July 1, 2011), which sets forth a list of primary industrial categories;

(c) Appendix D to 40 CFR Part 122 (July 1, 2011), which sets forth NPDES permit application testing requirements;

(d) Appendix J to 40 CFR Part 122 (July 1, 2011), which sets forth NPDES permit testing requirements for publicly owned treatment works;

(e) 40 CFR Part 125 (July 1, 2011), which sets forth criteria for extending compliance dates and for determining the availability of a variance;

(f) 40 CFR Part 412 (July 1, 2011), which sets forth effluent guidelines and standards for concentrated animal feeding operations.

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

IMP: 75-5-401, MCA

REASON: The board is proposing to amend the application requirements in ARM 17.30.1322 in order to make them consistent with the equivalent federal requirements set forth in 40 CFR 122.21 and 122.26(c). In general, the proposed amendments add informational requirements for certain discharges, delete requirements that no longer apply, clarify which application forms and information must be submitted by various categories of discharges, add portions of the text of 40 CFR 122.21 and 122.26 into the existing text of ARM 17.30.1322, and update incorporations by reference of applicable federal rules. The board is proposing to adopt these federal application requirements because they are required elements of a delegated state's permit program. See 40 CFR 123.25. The board's specific reasons for adopting these federal requirements into various sections of ARM 17.30.1322 follow. The proposed amendments also make minor changes to wording and punctuation to conform to standard practices for rule formatting.

The board is proposing to amend (1) to clarify which application forms must be submitted for various categories of discharges that require an individual MPDES permit, as specified in 40 CFR 122.21(a). Given that the department currently provides these same federal application forms to MPDES applicants according to their type of discharge, no change or additional requirements are anticipated as a result of the proposed amendment. The board finds that adopting the proposed amendment is necessary to provide clear authority for the department to require the submission of information required by the various forms. In addition, the board is

proposing to delete language in (1) that requires the submittal of a best management program (BMP), because this language is no longer included in 40 CFR 122.21.

The board is proposing to amend (4) to eliminate the current language that establishes separate but identical application deadlines of 180-days that apply to publicly owned treatment works (POTWs) under (4)(a) and to "all other permittees" under (4)(b). Since 40 CFR 122.21(c) imposes on all permittees the obligation to submit an application 180 days prior to the expiration of an existing permit, the board is deleting language that provides separate application deadlines for POTWs and "all other permittees." To clarify that all permittees are subject to the same timeframe, the board is proposing to eliminate the deadline applicable to "all other permittees" in existing (4)(b) and amend (4)(a) to impose the 180-day time frame on "all permittees."

The board is proposing to amend (6) to clarify that POTWs, unlike all other permittees, do not have to submit Form 1 when applying for an individual MPDES permit. Since POTWs have different application requirements that must be submitted on a different form, the board is proposing to remove the existing application requirements for POTWs from (6) and combine those requirements with all of the other POTW application requirements being proposed for adoption in (12). This proposed amendment is necessary to provide clarity concerning the appropriate application forms and to consolidate all of the application requirements for POTWs under one section of the rule.

The board is proposing to amend (7), which sets forth the application requirements for existing manufacturing, commercial, mining, and silvicultural discharges in order to make Montana's requirements consistent with the federal requirements for these same facilities. In order to ensure consistency with the federal rule, the board is proposing to adopt all portions of the text from 40 CFR 122.21(g) that apply to delegated-states' permit programs, but are absent from the existing text of subsection (7). The portions of 40 CFR 122.21(g) being proposed for adoption under (7) consist of the following: (1) language clarifying that the application requirements do not apply to facilities that discharge only non-process wastewater; (2) sampling and analytical requirements for storm water discharges from these facilities; and (3) sampling requirements that are necessary to characterize the effluent discharged by these facilities. These amendments are necessary to maintain consistency with federal application requirements.

The board is proposing to amend (8), which sets forth the application requirements for all manufacturing, commercial, mining, and silvicultural discharges applying for MPDES permits that discharge only non-process wastewater. The proposed amendments to (8)(d) reformats the structure of the subsection by removing the list of pollutants currently in (8)(d)(i)(A) through (K) and including that list into the last sentence of (8)(d). Other amendments to (8)(d)(i) through (iii) are to proposed make the language gender neutral. The board is also proposing to add language clarifying the number of samples that must be used for a 24-hour composite sample. Finally, the board is proposing to add a new requirement for the submission of data relating to pollutants that are present in the discharge, if those pollutants are regulated by water quality standards. This new language is necessary to ensure that water quality standards are adequately considered and addressed during the application process.

The board is proposing to amend (9), which currently incorporates by reference the application requirements for concentrated animal feeding operations (CAFO) that apply for an individual permit. The proposed amendment will accomplish two objectives. First, it will correct citations to definitions that are incorrectly cited in the current text of (9). Second, it will eliminate the incorporation by reference of 40 CFR 122.21(i)(1) and replace that reference with the actual text of the federal rule. These proposed amendments are necessary to correct errors in internal citations and make more readily available to the public the specific application requirements that apply to CAFOs that are required to apply for an individual permit.

The board is proposing to amend (10), which specifies application requirements for new sources and new discharges, to make the language describing exceptions to those requirements consistent with the federal requirements in 40 CFR 122.21(k). The board is also proposing an amendment that will reformat (10)(e)(i). This amendment will not impose any new requirements, but will remove the list of pollutants in (10)(e)(i)(A) through (H) and move that list into the last sentence of (10)(e)(i). Finally, the board is proposing to add a new requirement for the submission of data relating to pollutants that are present in the discharge, if those pollutants are regulated by water quality standards. This new language is necessary to ensure that water quality standards are adequately considered and addressed during the application process.

The board is proposing to amend (11), which currently requires dischargers of storm water from certain facilities to apply for an individual permit or a general permit under subchapter 11. The current text also explains that individual permits for small municipal separate storm sewer systems (MS4s) are subject to the permit requirements in ARM 17.30.1111(1) through (18). Since general permit requirements for storm water and MS4s are addressed separately in subchapter 11, the reference to those requirements in ARM 17.30.1322, which is solely concerned with individual permit applications, is not necessary. Consequently, the board is proposing to delete the existing language in (11) and replace it with individual permit application requirements for storm water discharges, as required in 40 CFR 122.26(c). The proposed amendment to (11)(a) applies to dischargers of storm water associated with industrial activity that are required to obtain an individual permit and any other discharge that the department is evaluating for designation under subchapter 11, unless otherwise exempt under the proposed language in (11)(b), (c) or (d). The individual application requirements for storm water dischargers, provided in 40 CFR 122.26(c), including the exceptions to those requirements, are a required element of a delegated state's permit program, as specified in 40 CFR 123.25(a)(9).

The board is proposing to delete the current language in (12), which requires dischargers of storm water from certain industrial facilities to obtain coverage under a general permit or apply for an individual permit, pursuant to 40 CFR 122.26(c). Since general permit requirements for storm water dischargers are addressed separately in subchapter 11, and since the board is proposing to adopt the individual permit requirements required by 40 CFR 122.26(c) into (11), there is no need to retain these requirements in (12). Instead, the board is proposing to replace the current text of (12) with the application requirements for POTWs. Specifically, the



board is proposing to remove the application requirements for POTWs currently included under (6) and consolidate those requirements with all of the application requirements for POTWs that are required by 40 CFR 122.21(j), but currently absent from ARM 17.30.1322. This amendment is necessary to make more readily available to the public the entire list of specific application requirements that apply to POTWs.

The board is proposing to delete the current text in (13)(c) and (d) and (14)(a), which require dischargers intending to request a variance from certain effluent limitations do so by a certain date. The time periods for submitting a request under subsections (13)(c) and (d) and (14)(a) are taken from the federal Clean Water Act, which required such requests be submitted by, for (13)(c), January 30, 1988; for (13)(d), March 31, 1991; and for (14)(a), August 7, 1987. Since the timelines imposed by the federal Clean Water Act expired decades ago, the requirement to meet these deadlines serves no purpose. Given that EPA removed these particular timeframes from federal rules on June 29, 1995 (60 FR 33926), the board is proposing to remove them from Montana's rules as well.

The board is proposing to move the incorporations by reference of federal rules currently in (17) and place them in new (18). The board is then proposing to adopt the text of 40 CFR 122.21(r) into (17). The text of the federal rule being proposed for adoption in (17) applies to new cooling water intake structures and includes all of the information and application requirements that apply to these facilities. This amendment is necessary in order to be consistent with EPA's requirements for delegated states' permit programs, pursuant to 40 CFR 123.25(a)(4).

The board is proposing to incorporate and update all applicable federal rules necessary to support the provisions of ARM 17.30.1322 that were formerly in (17) and are now proposed for adoption in new (18). Some of the federal rules that are currently incorporated by reference are being eliminated, because they are no longer necessary to support the provisions of ARM 17.30.1322. The federal rules that are being omitted are the following: (1) 40 CFR 125.102, which sets forth requirements for BMP programs, is no longer necessary due to the proposed elimination of references to BMP programs from (1); (2) 40 CFR 403.5(c)(i), which establishes requirements for pretreatment programs, is not necessary because the department does not administer the federal pretreatment program; and (3) 40 CFR 122.26(c)(1), which sets forth individual permit application requirements for storm water dischargers, is no longer necessary due to the proposed adoption of those requirements into (11). The board is further proposing to add 40 CFR 412.4(c) to the list of federal rules proposed for incorporation by reference in (18), because that rule is necessary to support the CAFO application requirements in (9).

4. The rule proposed for repeal is as follows:

17.30.1303 INCORPORATIONS BY REFERENCE (75-5-304, MCA; IMP, 75-5-304, 75-5-401, MCA), located at page 17-2895, Administrative Rules of Montana. The board is proposing to repeal ARM 17.30.1303, which incorporates by reference 46 different federal rules or statutes that are included in the MPDES rules. Many of these rules and statutes are not implemented by the department under the MPDES

program because they are not a required element of a delegated state's permit program. The incorporations by reference in ARM 17.30.1303 that are a necessary component of a delegated state's permit program are already incorporated by reference into the specific MPDES rule that relies upon the federal rule. Repeal of ARM 17.30.1303 will eliminate duplication between this rule and the other MPDES rules in Title 17, chapter 30, subchapters 11 through 13.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., \_\_\_\_\_, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

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

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JAMES M. MADDEN  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2012.

MAR Notice No. 17-\_\_\_\_

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM  
EXECUTIVE SUMMARY  
FOR  
REQUEST TO INITIATE RULEMAKING**

**AGENDA # IV.A.2.**

**AGENDA ITEM SUMMARY:** The Department requests that the Board initiate rulemaking to adopt Montana's Policy for Nutrient Trading.

**LIST OF AFFECTED RULES:** No existing rules would be amended. A new water quality rule would be adopted and incorporate the policy by reference.

**AFFECTED PARTIES SUMMARY:** The proposed rule amendments could affect any wastewater facility or other facility that may want to include nutrient trading as a part of the MPDES permit application and/or renewal.

**SCOPE OF PROPOSED PROCEEDING:** The Department requests that the Board initiate rulemaking and schedule a public hearing to take comment on the proposed rule.

**BACKGROUND:** Nutrient trading is a market-based approach to reduce nutrient loads and improve water quality in a watershed. Trading programs allow dischargers facing higher pollution control costs to meet their regulatory obligations by purchasing environmentally equivalent or superior pollution reductions from another source at lower costs, thus achieving the same water quality improvements at lower overall cost. EPA encourages and support nutrient trading for nitrogen and phosphorus.

The Nutrient Trading Policy was developed using other state policies and programs as examples. The policy is intended to provide a voluntary tool for dischargers to comply with TMDL load limits, offset new or increased discharge of nutrients, or comply with water quality-based effluent limits for nutrients. The Department presented the policy to the Nutrient Workgroup numerous times and, at its recommendation, organized a Nutrient Trading Subgroup to assist with development of the policy. Numerous meetings and conference calls were held in 2010 and 2011 to solicit input, comment, and respond to comments. A two-day Nutrient Trading Workshop was held in Helena in April 2010. The Nutrient Trading Policy was presented to the Water Pollution Control Advisory Council (WPCAC) twice. At its June 2012 meeting, WPCAC recommended that DEQ proceed to the BER for rulemaking and was very complimentary of the policy.

**HEARING INFORMATION:** The Department recommends that the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed amendments.

**BOARD OPTIONS:**

The Board may:

1. Initiate rulemaking and issue the attached Notice of Public Hearing;
2. Modify the Notice and initiate rulemaking; or
3. Determine that rulemaking is not appropriate and deny the Department's request to initiate rulemaking.

**DEQ RECOMMENDATION:**

The Department recommends that the Board initiate rulemaking and appoint a hearings officer.

**ENCLOSURES:**

1. Notice of Public Hearing
2. Nutrient Trading Policy

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to nutrient trading )  
 )  
 )  
 ) NOTICE OF PUBLIC HEARING ON  
 PROPOSED ADOPTION  
 (WATER QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2012, at \_\_:\_\_ \_\_.m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed adoption of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I NUTRIENT TRADING (1) The board adopts and incorporates by reference Montana's Policy for Nutrient Trading ([month and year of adoption] edition).

(2) The department shall approve a nutrient trade that is consistent with the requirements and guidelines established in Montana's Policy for Nutrient Trading.

(3) An owner or operator of a point source discharge may submit an application for nutrient trading to the department prior to or concurrent with an application for a new or renewed MPDES permit. The application must include the information specified in Montana's Policy for Nutrient Trading and be consistent with the guidelines and requirements contained in that policy.

(4) An application to trade may be submitted for any of the following purposes:

(a) to comply with an approved total maximum daily load (TMDL) for nutrients;

(b) to offset a new or increased discharge of nutrients into a nutrient-impaired water;

(c) to comply with Montana's base numeric nutrient criteria or a variance from those criteria;

(d) to offset a new or increased discharge of nutrients into waters that are high quality for nutrients; or

(e) to comply with the nonsignificance criteria for nutrients in ARM 17.30.715.

(5) A trade proposed pursuant to (3) must be described in the draft permit and is subject to public comment. If approved, the trade must be described in the

final permit and is not effective until the final permit is issued. The final permit must contain permit conditions that ensure that the terms of the trade are enforceable.

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

REASON: The board proposes adoption of New Rule I to establish clear guidelines and requirements for evaluating nutrient trading proposals. Rather than integrating the numerous and detailed trading requirements into the rule, New Rule I incorporates by reference Montana's Policy for Nutrient Trading (Trading Policy, [month and year of adoption] edition). The Trading Policy sets out a framework for evaluating prospective nutrient trades.

Although the current water quality standards for nutrients (nitrogen and phosphorus) are narrative rather than numeric, the department sometimes establishes numeric nutrient limits on a case-by-case basis in individual permits. In addition, the board may soon propose adoption of numeric water quality standards for nutrients in Montana surface waters. These numeric limits are designed to protect the beneficial uses of such surface waters. However, because of the limitations of available treatment technology and the potential economic harm resulting from immediate enforcement of the numeric standards, point source dischargers will be granted a temporary general variance from the base numeric limits. The department may employ general variances and subsequent variances to provide interim goals and a timeframe for point sources to begin reducing nutrient loading. The long-term goal is to reduce nutrient loading by an amount necessary to achieve compliance with the nutrient limits.

Nutrient trading is a tool to assist point source dischargers to meet their interim and long-term nutrient discharge limits. A point source discharger may buy "credits," in the form of an additional allocation of nutrient discharge, from another point source discharger that is discharging to the same water body and is discharging below its nutrient limit. A point source discharger may also obtain "credits" by entering into agreements with nonpoint source dischargers to employ nutrient management practices that reduce the nonpoint source's discharge of nutrients to a common water body.

The intent of the Trading Policy is to encourage cooperation between point and nonpoint sources as a means to reduce nutrient loading into surface waters. Given that nutrient discharges from nonpoint dischargers presently are not regulated, the best potential for reduction of nutrient discharges to a water body lies in cooperation between point source and nonpoint source dischargers. The Trading Policy would allow point source to point source trading and point source to nonpoint source trading. In addition, it would provide guidance that could be used for nonpoint source to nonpoint source trading, although the department has no regulatory authority over these trades.

The Trading Policy provides flexibility, yet also establishes firm criteria that must be met by either a point or a nonpoint source before credits can be generated and sold for use in a trade. The Trading Policy establishes baseline requirements from which trading credits will be calculated. Other requirements in the Trading Policy include a limit on the duration of credits, restrictions on the boundaries of a

trade, limitations on banking credits, and a requirement that all trades will be enforced through an applicable MPDES permit. The boundary restrictions for trades are necessary to ensure that the transfer of nutrient discharge occurs between dischargers in the same watershed. The credit duration and banking restrictions will ensure that the decrease in nutrient discharge from the source selling the credit and the increase in nutrient discharge from the source purchasing the credit occur contemporaneously. Enforcement of trades through the MPDES permit system will allow the department to monitor nutrient trades and ensure compliance with this policy.

In addition, the Trading Policy provides for adjustments in the trading credits received by a discharger, referred to as trading ratios, designed to: (1) account for the reduction of the nutrient load from a nonpoint source that would have occurred naturally prior to discharge to the applicable water body (delivery ratio); (2) provide for reduction of the overall nutrient load for a water body (water quality ratio); and (3) provide a margin of error (uncertainty ratio). Together, these requirements ensure that trading will not adversely affect water quality in the short term and will improve water quality in the long term.

For the reasons given above, the board finds it reasonable and necessary to adopt the Trading Policy.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., \_\_\_\_\_, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2012.



# MONTANA'S POLICY FOR NUTRIENT TRADING

## I. INTRODUCTION

Montana may soon adopt numeric criteria for nutrients (nitrogen and phosphorous) that will protect the beneficial uses of state surface waters.<sup>1</sup>

Implementation of the criteria is supported by legislation that allows for the adoption of an individual variance or the approval of a general variance<sup>2</sup> from the base numeric nutrient standards for a specific point source discharge due to: (1) substantial and widespread economic harm or (2) the limits of technology, or both.<sup>3</sup>

Obtaining a variance will allow a point source to commence or continue discharging in compliance with the terms of the variance for a defined period of time without significant and costly upgrades. Although a variance will provide interim goals and a time frame for point sources to begin reducing nutrient loading, the State's long-term goal is that each point source will reduce nutrient loading in the amount necessary to achieve compliance with the State's nutrient criteria as soon as feasible. This policy provides the framework for allowing point source discharges to use trading as a cost-effective method of achieving the State's numeric criteria for nutrients without delay and avoid the need for a variance. Trading under this policy is intended to provide a flexible and voluntary alternative to meeting the numeric nutrient criteria or, when applicable, a variance from those criteria. Although the policy does not provide for Department of Environmental Quality (DEQ) review and approval of nonpoint to nonpoint source trading, DEQ may consider such trades when needed.

Trading under this policy may take place under a variety of conditions that may arise after or before the adoption of numeric criteria for nutrients, including circumstances where trading is used to: (1) comply with an approved total maximum daily load (TMDL) for nutrients; (2) offset a new or increased discharge of nutrients; (3) comply with water quality-based effluent limits for nutrients; or (4) offset a new or increased discharge of nutrients into "high quality" waters. This policy allows point source to point source trading, point source to nonpoint source trading, and nonpoint to nonpoint source trading. All trades that involve point source discharges will be monitored and enforced under a Montana Pollutant Discharge Elimination System (MPDES) permit, except those that involve only nonpoint source trading partners. DEQ will not allow the use of credits or trades that would cause an impairment of existing or designated uses, adversely affect water quality at an intake for drinking water supply, or that would exceed a cap<sup>4</sup> established under a TMDL.

---

<sup>1</sup> The terms "numeric criteria for nutrients" and "numeric nutrient criteria" are used interchangeably and have the same meaning as "base numeric nutrient standards" as defined in § 75-5-103(2), MCA.

<sup>2</sup> A variance, if adopted or approved by DEQ for a specific point source, provides a defined period of time in which a specific point source is not required to comply with the base numeric nutrient standards. A variance may not exceed 20 years.

<sup>3</sup> The term "limits of technology" will be defined in rulemaking.

<sup>4</sup> The cap that cannot be exceeded refers to a particular watershed's total load of nutrients established by a TMDL. Consequently, the prohibition against allowing trades that exceed a cap established by a TMDL

## 1. Purpose

The purpose of this policy is to facilitate trading among watershed stakeholders interested in participating in nutrient trading opportunities. Consistent with *EPA Water Quality Trading Policy*, DEQ encourages water quality trading when it does not result in adverse ecological consequences and supports one or more of the following objectives:

\*To provide a cost-effective method for achieving compliance with Montana's base numeric nutrient standards or for achieving compliance with a nutrient standards variance approved or adopted by DEQ.

\* To offset new or increased discharges resulting from growth in order to *maintain and improve* levels of water quality that support all designated uses.

\* To establish economic incentives for *reductions* from all sources within a watershed.

\* To reduce the cost of implementing nutrient TMDLs or water quality-based effluent limits for nutrients through greater efficiency and flexible approaches.

\* To achieve greater environmental benefits than through the existing regulatory framework. For example, DEQ supports the creation of water quality trading credits that achieve ancillary environmental benefits beyond the required reductions of pollutant loads, such as the creation and restoration of wetlands and riparian habitat.

## II. DEFINITIONS

1. **Baseline:** The baseline for generating pollution reduction credits must be consistent with applicable water quality standards. The term pollution reduction credits ("credits"), as used in this policy, means pollutant reductions greater than those required by a regulatory requirement for nonpoint sources or established under a TMDL waste load allocation or water quality-based effluent limit for point sources. For purposes of determining baseline, the term "water quality-based effluent limit" means an effluent limit that ensures compliance with the base numeric nutrient criteria. Examples of "baseline" for impaired waters where a TMDL has been approved or established and for waters where no TMDL has been established, including "high quality" waters,<sup>5</sup> are as follows:

### (a) **Impaired waters where a TMDL has been approved or established**

---

does not prohibit trades that may result in an exceedance of an individual waste load allocation, as long as the cap for the total load is not exceeded.

<sup>5</sup> As used in this policy, "high quality" water is a water body with water quality that is better than the base numeric nutrient standards adopted by the Board of Environmental Review.

Where a TMDL has been established or approved, the applicable point source waste load allocation would establish the point source's baseline for generating credits. In distinction, the baseline for nonpoint sources is the level of pollutant load associated with existing land uses and management practices that comply with applicable state, local, or tribal regulations. See §75-5-317(2)(a) and (b), MCA. A nonpoint source may generate credits by achieving greater nutrient load reductions than required by any statute or rule governing its nonpoint source activity. A nonpoint source may not, however, terminate an existing Best Management Practice (BMP) to reduce the baseline requirement in order to generate credits for future trading purposes.

**(b) Waters where no TMDL has been established**

For trades that occur where the quality of water is better than the numeric nutrient standards (i.e., "high quality" waters), or in impaired waters prior to a TMDL being established, the baseline for point sources would be established by a water quality-based effluent limitation. In this instance, like the previous instance, the baseline for nonpoint sources is the level of pollutant load associated with existing land uses and management practices that comply with applicable state, local, or tribal regulations. A nonpoint source may generate credits by achieving greater nutrient load reductions than required by any statute or rule governing its nonpoint source activity. A nonpoint source may not, however, terminate an existing BMP to reduce the baseline requirement in order to generate credits for future trading purposes.

**2. Credit:** In general, a credit is a reduction in nutrient loads beyond baseline conditions. More specifically, it is a measured or estimated unit of pollutant reduction per unit of time adjusted to account for applicable trading ratios. A seller generates excess load reductions by controlling its discharge beyond what is needed to meet its baseline through controlling its flow and/or its discharge concentrations. A buyer compensates a seller for creating the excess load reductions that are then converted into credits by using trading ratios. Where appropriate, the buyer can use the credits to meet a regulatory obligation. Credits are expressed as pounds of nitrogen or phosphorous per applicable period of time that is delivered to surface waters in the watershed. Credits will need to be measured or estimated, verified, and accounted for according to that time period. Credits cannot be banked for a future time period, unless it can be demonstrated that an off-season reduction provides a water quality benefit within the applicable period of the standards.

**(a) Point source credits**

A point source may generate credits by achieving measured nutrient reductions greater than the waste load allocation established for the point source under a TMDL or greater than a water quality-based effluent limitation for its discharge derived from the State's numeric nutrient criteria. A credit may not be generated by achieving nutrient reductions greater than required by a variance approved or adopted by DEQ for the point source.

**(b) Nonpoint source credits**

A nonpoint source may generate credits by achieving nutrient reductions greater than required by a regulatory requirement applicable to that source. Nonpoint source credits will be based upon a measured or estimated reduction of nutrients adjusted to account for

applicable trading ratios. For example, such loads may be calculated by using watershed model delivery ratios that will be applied to edge-of-fields loads or may be calculated by a model used in a Department-approved TMDL. (See Appendix A)

**3. Nonpoint Source:** A "nonpoint source" is any source of diffuse runoff or discharge that is not a "point source," as defined in Montana's water quality laws, § 75-5-103, MCA. Examples of nonpoint sources include, but are not limited to, farming activities, cattle grazing, timber harvesting, unpaved roads, septic systems, and eroding stream banks.

**4. Nutrient Trading:** Trading is a market-based approach to achieving water quality standards in which a point source purchases pollutant reduction credits from another point source or a nonpoint source in the applicable trading region that are then used to meet the source's pollutant discharge obligations. To be creditable to the source purchaser, the credits must reflect an actual, pollutant load differential below the credit seller's baseline. Under certain circumstances, a point source buyer may have to purchase more than one pound of pollutant reduction to equal a pound discharged at its outfall.

**5. Nutrient Reduction:** The difference in nutrient (total nitrogen or total phosphorus) discharges to surface waters achieved by activities such as best management practices or technical upgrades, compared to the applicable baseline after meeting eligibility requirements.

**6. Total Maximum Daily Loads (TMDL):** A TMDL is "...the sum of the individual waste load allocations for point sources and load allocations for both nonpoint sources and natural background sources established at a level necessary to achieve compliance with applicable water quality standards." § 75-5-103(37), MCA. In other words, a TMDL establishes the maximum amount of pollutant load that a waterbody can receive and still meet applicable water quality standards. A TMDL includes an allocation of pollutant loadings to point sources (waste load allocations **WLAs**), an allocation on pollutant loadings to nonpoint sources or natural sources (load allocations **LAs**), and a margin of safety.

**7. Trading Ratio:** Discount factors applied to pollutant reductions to account for delivery or uncertainty. The following are examples of trading ratios:

**(a) Delivery Ratios**

Delivery ratios apply discount factors to compensate for a pollutant's travel over land or in water (or both) and may be applied to point, as well as, nonpoint sources. Delivery ratios generally account for attenuation (i.e., the rate at which nutrients are reduced through natural processes, such as hydrolysis, oxidation, and biodegradation, on their way to the mainstem of the waterbody). The ratio may vary depending on the location of the source. Generally, the greater the distance the pollutant has to travel, the greater the pollutant loss will be. This ratio would work to equalize a trade between a source in the headwaters and one near the mainstem. This ratio is often referred to as the "location ratio." Delivery ratios will be based upon information from applicable and accepted data sources as reviewed and approved by DEQ. Delivery ratios may

incorporate time-variable credits to account for delays between implementation of a load reduction (e.g. connecting a Wastewater Soil Disposal System (WSDS) to a permitted wastewater treatment plant) and the time that load reduction is actually realized in the receiving water.

**(b) Uncertainty Ratios**

Uncertainty ratios are intended to account for variation in the expected reliability and efficiency of the source or type of reduction being applied toward credit for another. They are calibrated to create a margin of safety or otherwise attempt to ensure that the credited practice provides a minimum level of reductions to ensure water quality is improved as a result of the trade, even if actual reduction efficiencies and units removed are on the low end of an expected range. In some instances uncertainty ratios will not be employed because they are already accounted for in quantification methods used in delivery ratios.

Once a trading ratio has been established for a specific BMP DEQ cannot change the ratio unless the BMP is not maintained as originally proposed.

**8. Load Allocation (LA):** The portion of the receiving water's loading capacity that is allocated to one of its existing or future nonpoint sources of pollution or natural background sources.

**9. Waste Load Allocation (WLA):** The portion of receiving water's loading capacity that is allocated to one or more of its existing or future point sources of pollution. WLAs implemented in discharge permits constitute a type of water-quality based effluent limit.

**10. Wastewater Soil Disposal System (WSDS):** Any system that disposes of sewage effluent on top or beneath the soil surface such that the wastewater migrates downward below the soil surface.

**III. KEY PRINCIPLES**

**1. All new or expanded point source nutrient loads must be fully offset on streams that are impaired by nutrients.**

To participate in trading, new point source dischargers with no allocation in the watershed or point source discharges requesting an increase in a waste load allocation in the watershed must fully offset any increased point source loading.

**2. Trading in an impaired waterbody for which a TMDL has been approved or established must be consistent with the assumptions in the TMDL's WLA or any interim WLA.**

Nutrient trades must not exceed the total load imposed by the TMDL, except when a variance has been granted. There are two phased TMDLs currently existing (Lake

Helena and Flathead Lake.), which provide interim goals that establish interim waste load allocations. For these phased TMDLs, trading must comply with the interim waste load allocations or a variance from the interim waste load allocation approved by DEQ.

**3. All nutrient trades involving point sources will be implemented and enforced via MPDES permits.**

When trading involves a point source, the permit limits of the point source discharge will incorporate the nutrient trade. The permit will also provide the vehicle for enforcement of the trade condition. In the event of default by another source generating credits for a MPDES permittee, the MPDES permittee using those credits is responsible for complying with the effluent limitations that would have applied if no trade had occurred. The use of the discharge permit program will ensure that credits are accountable, reliable, and enforceable. The public will have an opportunity to comment on any permit conditions that allow trading during the public comment period on the draft permit. These conditions will be subject to the normal comment process and period for comment, along with all other conditions of the permit.

**4. What may be traded.**

DEQ supports the concept of trading and through this Policy seeks to specifically facilitate the trading of nutrient (total phosphorous and total nitrogen) credits. Such trades must involve comparable credits (e.g., total nitrogen traded for total nitrogen).

**5. Duration of Credits**

A point source discharger submitting a trading proposal must demonstrate that it has secured credits for at least the permit cycle (i.e., 5 years).

Other safeguards should be considered by the permittee and by the non-point source that is generating credits to ensure that the appropriate amount of credits are generated during the entire 5-year permit cycle. They may include such things as backup plans and alternative options to address failures by nonpoint sources to provide the contracted credits.

**IV. FUNDAMENTALS**

**1. Credit Funding Sources**

Credits may be generated from point or nonpoint source discharges funded through a variety of sources such as the State Revolving Fund, local funds, or private funds. The cost of credits are determined by the market.

## **2. Who May Participate in Trading**

- (a) Point sources (e.g., sources required by law to obtain a Montana Pollutant Elimination Discharge (MPDES) discharge permit)
- (b) Nonpoint sources (e.g., any source that is not required to obtain an MPDES permit, such as logging activities, agricultural activities, or septic systems)
- (c) Third parties (e.g., county governments, nonprofits, aggregators, private brokers, etc.)
- (d) Any combination of the above

## **3. Examples of Obtaining Nutrient Credits**

Credits may be obtained by: a) implementing any of the options listed below: b) implementing a BMP described or referenced (see references to BMPs in other states) in Appendix A: or c) implementing other options that may be proposed on a case-by-case basis through the MPDES public participation process.

A person proposing to implement a BMP may calculate load credits using an applicable method described in Appendix A as guidance. Alternatively, a person may calculate load credits using any other method applicable to the site where a BMP will be implemented. DEQ will review each proposed load calculation during the application process prior to approving its use in a MPDES permit.

### **Potential Sources of Nutrient Reduction Credits**

1. Retiring an existing WSDS with a demonstrated hydrologic connection to surface water by connecting to a permitted wastewater treatment facility. Where existing WSDS's are connected to DEQ permitted wastewater systems as part of a trading plan, the following elements, as a minimum, must be included:
  - (i) GIS mapping of septic system locations;
  - (ii) Annual nutrient loading at the edge of the WSDS discharge (including septic type if it is a significant factor in loading values); and
  - (iii) Nutrient delivery ratio and uncertainty ratio based on site-specific conditions.
2. Land application of wastewater with any applicable treatment and nutrient management controls;
3. Optimizing treatment operations;
4. Animal waste management (i.e., ponds, lagoons, holding tanks);
5. Conservation tillage (e.g., no-till, low-till);
6. Cover crops;
7. Retirement of highly erodible land;
8. Installation of new runoff or erosion control;
9. Installation of new stream protection;
10. Installation of new forest conservation or harvesting practices;
11. Enhanced storm water management;
12. Forested or grass buffers;

13. Other protection practices as approved by DEQ.

#### **4. Where Trading May Occur (Boundaries)**

Geographical boundaries for trading will be based on watershed boundaries. Other boundary conditions may exist in certain instances, such as when the stream passes through a reservoir, lake, or large wetland complex. Generally credits should be generated upstream in the watershed.

Certain site specific conditions may allow for downstream credit generation for downstream trading. Downstream trades will be structured to minimize increased loading to any portion of an impaired water body or to prevent exceedences of water quality standards on a non-impaired waterbody. DEQ may include increased trading ratios when approving a downstream trade to meet those objectives.

#### **5. Effect of Policy**

The policy and procedures outlined in this document are intended to supplement existing requirements established under Montana's Water Quality Act and rules implementing that Act. Nothing in the policy or procedures reduces or replaces these existing regulatory requirements.

DEQ's authority to allow MPDES permits to use trading is provided for under Montana's Water Quality Act, and rules implementing the State's MPDES program. This document establishes the framework for DEQ to exercise its administrative discretion when allowing nutrient trading in MPDES permits. Neither the load allocations established for both point and nonpoint sources under TMDLs nor the credits generated or purchased under this policy are a property right. For point sources, waste load allocations and trading baselines will be implemented through MPDES permits.

### **V. IMPLEMENTATION**

This section describes the requirements and process for obtaining DEQ approval of nutrient trades in MPDES permits. DEQ will provide a pre-application process to work with any point source interested in trading to assist in determining the appropriate information needed to incorporate the trade in an MPDES permit and inform the permittee of any new permit conditions that will be required to implement the trade.

#### **1. Identifying Trading Partners**

Sources seeking to acquire or sell credits are responsible for finding trading partners. For example, trading partners may be identified by contacting individual sources that have been identified as contributors of nutrient loading in an approved TMDL or by contacting third-party stakeholder groups.



## **2. Application Process and Documentation Procedures**

Point sources planning to enter into a trading agreement shall submit an application for approval of the trade. The application shall be composed of three parts: (1) specific details of the trade; (2) credit buyer documentation; and (3) credit seller documentation. The point source trading partner will be responsible for including the trade application information in any permit application or permit modification request.

## **3. The Trading Application - Specific Details of the Trade**

The applicant proposing the trade shall provide specific information about the proposed trading arrangement. Depending on the details of the specific trade, the following information may be required:

- \* time period for the trading arrangement;
- \* the number of credits to be exchanged each year during this period;
- \* how the number of credits was determined;
- \* source of the credits;
- \* the general contractual arrangements;
- \* timeline for credit generation and use;
- \* need for the trade, including the waste load allocation status, flow and load projections;
- \* the consistency of the trade with any approved TMDL;
- \* the eligibility of the facility to trade;
- \* the location of the facilities and any applicable watershed delivery factor;
- \* the credit acquisition plan;
- \* how the discharge credits will be generated;
- \* inspection and verification requirements; and
- \* any other relevant information requested by DEQ.

DEQ will review the application to trade and evaluate it based upon the requirements described in this policy. DEQ may approve the application, approve it with conditions, or deny the application. The approved trade will be included in a draft MPDES permit and public comment on the trade will be accepted during the formal public comment period required for all MPDES permits. DEQ approval is not final until the MPDES permit is issued incorporating the trade.

# APPENDIX A

---

## 1. SUMMARY OF TRADE CREDIT CALCULATIONS FOR NON-POINT BMPs USED BY OTHER STATES

### IDAHO

**Summary:** Have a list of 12 specific BMPs for phosphorus reduction with a pre-determined “Effectiveness” percentage and a pre-determined “Uncertainty” percentage. Prior to using those tables, applicant must determine the site-specific reduction in soil loss from the proposed BMP by using an NRCS program called Surface Irrigation Soil Loss (SISL) tool.

[http://www.deq.idaho.gov/media/488798-water\\_quality\\_pollutant\\_trading\\_guidance\\_0710.pdf](http://www.deq.idaho.gov/media/488798-water_quality_pollutant_trading_guidance_0710.pdf)

#### **Notes:**

- BMP list only applies to the Lower Boise Watershed. BMP effectiveness and uncertainty for other Idaho watersheds have not been determined yet.
- The SISL tool is designed for irrigated croplands.
- Pre-determined BMPs do not include effectiveness or uncertainty for nitrogen.
- BMPs not on the pre-determined list must go through a detailed monitoring program to determine the appropriate effectiveness percentages.

### OREGON

**Summary:** Provides simple calculations for determining nitrogen and phosphorus reductions for 3 BMPs (grassy swales, vegetative buffers, and livestock fencing). Applicant only needs to provide annual precipitation value and land use area affected. Also includes trading ratios for the three BMP (ratios vary between 2.5 and 2.8)

<http://www.deq.state.or.us/wq/pubs/imds/wqtrading.pdf> (see Appendix D).

#### **Notes:**

- Calculations apply over the entire state.
- Does not address how to determine credits for any other BMPs.

### USEPA

**Summary:** Uses the Spreadsheet Tool for Estimating Pollutant Loads (STEPL) model and the Region 5 model. Includes and describes 62 BMPs that can be used in the “BMP Efficiency Calculator for STEPL”. The BMP efficiency calculator requires the user to enter the state, county and nearest weather station (from a list provided) and the local soil hydrologic group (A, B, C or D).

# APPENDIX A

---

<http://it.tetrattech-ffx.com/steplweb/>

**Notes:**

- Includes a list of simple, mid-range, and complex models that can be used to estimate sediment and nutrient loads before and after BMPs. STEPL and Region 5 models are considered “simple” models in this list.
- Region 5 model includes a detailed manual.

**OHIO**

**Summary:** Uses the Region 5 model described in the USEPA section. Also suggests use of the NRCS Revised Universal Soil Loss Equation (RUSLE), Version 1.

<http://www.dnr.state.oh.us/tabid/8856/Default.aspx>

**NRCS**

**Summary:** Has developed the Revised Universal Soil Loss Equation, Version 2 (RUSLE2) that includes more user friendly interface.

[http://fargo.nserl.purdue.edu/rusle2\\_dataweb/RUSLE2\\_Index.htm](http://fargo.nserl.purdue.edu/rusle2_dataweb/RUSLE2_Index.htm)

## APPENDIX A

# MONTANA'S SEPTIC TRADING METHOD

Table 1

## NITROGEN ATTENUATION FACTORS FOR SEPTIC SYSTEM DISCHARGES TO GROUND WATER

<b>Percent Nitrogen Load Reduction<sup>(1)</sup></b>	<b>Soil Type @ Drainfield<sup>(2)</sup></b>	<b>Soil Type within 100' of surface water<sup>(2)</sup></b>	<b>Distance to surface water (ft)</b>
<b>0</b>	A	A	0 – 100
<b>10</b>	B		101 – 500
<b>20</b>	C	B	501 – 5,000
<b>30</b>	D	C	5,001 – 20,000
<b>50</b>		D	20,001+
<b>Data Source</b>	NRCS Web Site / GIS STATSGO or SSURGO		GIS – County Records / State Cadastral

Notes:

## APPENDIX A

---

(1) The total nitrogen reduction is the sum of the individual reductions for each column of the table. For example a drainfield that is in a type C soil (20%) that drains to a surface water with type B soil (20%) and is 200 feet from the surface water (10%) would reduce their nitrogen load to the surface water by 50% from what is discharged from the drainfield.

(2) Soil descriptions are available via the NRCS web soil survey at:

<http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx> . Once the Area Of Interest (AOI) has been defined information is accessed by clicking on following links: “Soil Data Explorer” – “Soil Properties and Qualities” – “Soil Qualities and Features” – “Drainage Class”. The NRCS soil survey has seven soil drainage classes that are correlated to the A, B, C and D designation in the table as follows:

A = excessively drained or somewhat excessively drained

B = well drained or moderately well drained

C = somewhat poorly drained

D = poorly drained or very poorly drained

Within the defined area of interest, the soil survey application provides the percent of soil types with these attributes. That feature provides a quick way to determine the percent of each soil type and therefore the percent reduction for each area of interest defined.

## APPENDIX A

**Table 2**  
**PHOSPHORUS ATTENUATION FACTORS FOR SEPTIC SYSTEM**  
**DISCHARGES TO GROUND WATER**

Percent Phosphorus Load Reduction <sup>(1)</sup>	Soil Type @ Drainfield <sup>(2,3)</sup> (CaCO <sub>3</sub> ≤ 1%)	Soil Type @ Drainfield <sup>(2,3)</sup> (CaCO <sub>3</sub> >1% and <15%)	Soil Type @ Drainfield <sup>(2,3)</sup> (CaCO <sub>3</sub> ≥15%)	Distance to surface water (ft)
0	A	A	A	0 – 100
10			B	
20		B	C	
30	B		D	101 - 500
40		C		
60	C	D		501 - 5,000
90	D			
100				5,001 +
<b>Data Source</b>	NRCS Web Site / GIS STATSGO or SSURGO			GIS – County Records / State Cadastral

## APPENDIX A

---

### Notes:

(1) The total phosphorus reduction is the sum of the individual reductions for the soil type (only use one of the three soil columns) and the distance to surface water. For example a drainfield that is in a type B soil with less than 1% CaCO<sub>3</sub> (30%) and is 200 feet from the surface water (40%) would reduce their nitrogen load to the surface water by 70% from what is discharged from the drainfield.

(2) Soil descriptions are available via the NRCS web soil survey at:

<http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx> . Once the Area Of Interest (AOI) has been defined information is accessed by clicking on following links: “Soil Data Explorer” – “Soil Properties and Qualities” – “Soil Qualities and Features” – “Drainage Class”. The NRCS soil survey has seven soil drainage classes that are correlated to the A, B, C and D designation in the table as follows:

A = excessively drained or somewhat excessively drained

B = well drained or moderately well drained

C = somewhat poorly drained

D = poorly drained or very poorly drained

Within the defined area of interest, the soil survey application provides the percent of soil types with these attributes. That feature provides a quick way to determine the percent of each soil type and therefore the percent reduction for each area of interest defined.

(3) CaCO<sub>3</sub> percent is available via the NRCS web soil survey at:

<http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx> . Once the area of interest has been defined information is accessed by clicking on following links: “Soil Data Explorer” – “Soil Properties and Qualities” -- “Soil Chemical Properties” – “Calcium Carbonate (CaCO<sub>3</sub>)”. Within the defined area of interest, the soil survey application provides the percent of land with the percent of CaCO<sub>3</sub>. That feature provides a quick way to determine the percent of area of different CaCO<sub>3</sub> percentages and therefore the percent reduction for each area of interest defined.

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

**Agenda # IV.A.3**

**Agenda Item Summary:** The Department requests the Board initiate rulemaking to amend the air quality incorporation by reference (IBR) rules to adopt the current editions of federal statutes and regulations with certain limited exceptions and to further revise the state administrative rules.

**List of Affected Rules:** This rulemaking would amend ARM 17.8.102.

**Affected Parties Summary:** The proposed rule amendments would affect sources of air pollution subject to regulation under the air quality rules in ARM Title 17, Chapter 8, that are subject to revisions in the July 1, 2010 edition of the Code of Federal Regulations (CFR), revisions in the 2006 edition of United States Code (USC) Supplement IV (2010), and revisions to the 2010 edition of Administrative Rules of Montana (ARM).

**Scope of Proposed Proceeding:** The Department requests the Board initiate rulemaking and conduct a public hearing to consider the proposed amendments to the above-stated rules.

**Background:** Annually, the Department requests the Board update the rules incorporating by reference federal statutes and regulations and state administrative rules. The IBR updating is accomplished by amending the dates of the editions of the CFR, U.S. Code, and ARM set forth in ARM 17.8.102(1). The failure to adopt the most recent edition of the CFR may result in the loss of state primacy for administering the air program.

**Hearing Information:** The Department recommends the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed amendments. Section 75-2-205, MCA, states that no rule, rule amendment, or rule repeal under the Clean Air Act of Montana may take effect except after public hearing on due notice.

**Board Options:** The Board may:

1. Authorize the Department to initiate rulemaking and issue the attached Notice of Public Hearing on Proposed Amendment of Rules;
2. Modify the Notice and initiate rulemaking; or
3. Determine that the amendment of the rules is not appropriate and deny the Department's request to initiate rulemaking.



**DEQ Recommendation:** The Department recommends that the Board initiate rulemaking and appoint a presiding officer to conduct a public hearing, as described in the proposed MAR notice.

**Enclosures:**

1. Draft Notice of Public Hearing on Proposed Amendment

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
17.8.102 pertaining to incorporation by )  
reference of current federal regulations )  
and other materials into air quality rules )

NOTICE OF PUBLIC HEARING ON  
PROPOSED AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On \_\_\_\_\_, 2012, at \_\_:\_\_.m., the Board of Environmental Review will hold a public hearing [in/at address], Montana, to consider the proposed amendment of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., \_\_\_\_\_, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES

(1) In this chapter where the board has:

(a) adopted a federal regulation by reference, the reference is to the July 1, ~~2009~~ 2010, edition of the Code of Federal Regulations (CFR);

(b) adopted a section of the United States Code (USC) by reference, the reference is to the 2006 edition of the USC and Supplement # IV (~~2009~~ 2010);

(c) adopted another rule of the department or of another agency of the state of Montana by reference, the reference is to the December 31, ~~2009~~ 2010, edition of the Administrative Rules of Montana (ARM).

(2) through (3)(c) remain the same.

AUTH: 75-2-111, MCA

IMP: Title 75, chapter 2, MCA

REASON: The board is proposing to amend the air quality rules to adopt the current editions of federal and state statutes and regulations that are incorporated by reference in the rules. The board is proposing to amend ARM 17.8.102(1) to adopt revisions which were published in the July 1, 2010, edition of the Code of Federal Regulations (CFR), the 2006 edition of the United States Code (USC) Supplement IV (2010), and the 2010 edition of the Administrative Rules of Montana (ARM). The board adopts and incorporates by reference federal regulation to ensure that Montana's air quality rules are at least as stringent as federal air quality regulations,

MAR Notice No. 17-\_\_\_\_

to maintain primacy, to maintain federal delegation of Montana's air quality program, and to implement federal emission standards pursuant to a federal program of emissions control.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., \_\_\_\_\_, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

BY: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2012.

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

**AGENDA # IV.B.1.**

**AGENDA ITEM SUMMARY** - The Department requests adoption of a new rule and amendments to two existing rules implementing the Montana Strip and Underground Mine Reclamation Act.

**LIST OF AFFECTED RULES** - ARM 17.24.902 and 903 and New Rule I.

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

**SCOPE OF PROPOSED PROCEEDING** - The Board is considering final action on the amendment and adoption of the above rules as proposed in the Montana Administrative Register.

**BACKGROUND** - SB 292, of the 2011 Legislative session requires the board to adopt rules necessary to regulate underground mining using insitu coal gasification by October 1, 2011. The bill also states that the rule regulating insitu coal gasification may not be more stringent than the comparable federal regulations or guidelines. Prior to the passage of 82-4-207, MCA, the board adopted two rules specifically regulating insitu coal gasification. ARM 17.24.902 provides permit application requirements and ARM 17.24.903 provides performance standards for insitu coal gasification. Both of those rules provide that appropriate provisions of subchapters 3 through 8 and 10 through 13 are applicable to insitu coal permit applications and operations. ARM 17.24.902 and 17.24.903 are substantially similar to the comparable federal regulations, which are contained in 30 CFR 785.22 and 30 CFR Part 828. Following passage of 82-4-207, MCA, the Department reviewed subchapters 3 through 8 and 10 through 13 to identify which rules within those subchapters apply to insitu operations. The Department has determined that most rules would apply to those operations. Rather than adopting rules that duplicate existing rules, the Department is recommending that the Board adopt a rule that lists those rules that would never apply to insitu operations. By doing that, the Board would thereby also identify the rules that do apply.

**HEARING INFORMATION** – No hearing was held and no public comments were received.

**BOARD OPTIONS** - The Board may:

1. Adopt the proposed amendments and adoption as set forth in the attached Notice of Proposed Amendment and Adoption (No Public Hearing Contemplated);

2. Adopt the proposed amendments and adoption with revisions that the Board finds are appropriate and that are consistent with the scope of the Notice of Proposed Amendment and Adoption (No Public Hearing Contemplated) and the record in this proceeding; or
3. Decide not to adopt the proposed amendments and adoptions.

**DEQ RECOMMENDATION** - The Department recommends adoption of the new rule and rule amendments as proposed.

**Enclosures –**

1. Notice of Proposed Amendment and Adoption (No Public Hearing Contemplated)
2. Draft Notice of Amendment and Adoption

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF PROPOSED
17.24.902 and 17.24.903 pertaining to )	AMENDMENT AND ADOPTION
general performance standards and )	
adoption of New Rule I pertaining to )	(RECLAMATION)
rules not applicable to in situ coal )	
operations )	(NO PUBLIC HEARING
)	CONTEMPLATED)

TO: All Concerned Persons

1. On June 25, 2012, the Board of Environmental Review proposes to amend and adopt the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., June 11, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.24.902 APPLICATION REQUIREMENTS FOR IN SITU COAL PROCESSING OPERATIONS (1) Except as provided in [NEW RULE I], An application for a permit for in situ coal processing operations must be made according to all requirements of ARM 17.24.901. In addition, the mining and reclamation operations plan for operations involving in situ processing operations must contain information establishing how those operations will be conducted in compliance with the requirements of ARM 17.24.907, including:

(a) through (2) remain the same.

AUTH: 82-4-204, 82-4-205, 82-4-207, MCA

IMP: 82-4-222, MCA

17.24.903 GENERAL PERFORMANCE STANDARDS (1) In addition to all appropriate requirements of subchapters 4 through 8, and 10 through 13, except ARM 17.24.519 and as provided in [NEW RULE I], the following requirements apply to underground mining operations:

(a) through (2) remain the same.

AUTH: 82-4-204, 82-4-207, MCA

IMP: 82-4-227, 82-4-231, 82-4-232, 82-4-233, 82-4-243, 82-4-253, MCA

4. The proposed new rule provides as follows:

NEW RULE I RULES NOT APPLICABLE TO IN SITU COAL OPERATIONS

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

- (a) ARM 17.24.311 (Air Pollution Control Plan);
  - (b) ARM 17.24.320 (Plans for Disposal of Excess Spoil);
  - (c) ARM 17.24.519 (Monitoring for Settlement); and
  - (d) ARM 17.24.831 through 17.24.837 (auger mining and remining rules).
- (2) All other rules may apply on a mine-specific basis.

AUTH: 82-4-207, MCA

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

REASON: Chapter 398, Laws of 2011, (SB 292) requires the board to adopt rules necessary to regulate underground mining using in situ coal gasification by October 1, 2012. That requirement is codified in 82-4-207, MCA. That statute also provides that those rules may not be more stringent than the comparable federal regulations or guidelines. Prior to the passage of 82-4-207, MCA, the board adopted two rules specifically regulating in situ coal gasification. ARM 17.24.902 provides permit application requirements and ARM 17.24.903 provides performance standards for in situ coal gasification. Both of those rules provide that appropriate provisions of subchapters 3 through 8 and 10 through 13 are applicable to in situ coal permit applications and operations. ARM 17.24.902 and 17.24.903 are substantially similar to the comparable federal regulations, which are contained in 30 CFR 785.22 and 30 CFR Part 828. Following passage of 82-4-207, MCA, the Department of Environmental Quality reviewed subchapter 3 through 8 and 10 through 13 to identify which rules within those subchapters apply to in situ operations. The department determined that most rules would apply to those operations. Rather than adopting rules that duplicate existing rules, the board is proposing to adopt a rule that lists those rules that would never apply to in situ operations. By adoption of New Rule I, the board would identify those rules that do not apply to in situ coal mining operations and thereby also identify the rules that do apply.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than June 21, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Elois Johnson at Department of Environmental Quality, P.O.

Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than June 21, 2012.

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

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

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The sponsor was notified by letter sent by U.S. mail dated January 4, 2012.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North  
JOHN F. NORTH  
Rule Reviewer

BY: /s/ Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, May 14, 2012.



BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT AND
17.24.902 and 17.24.903 pertaining to )	ADOPTION
general performance standards and )	
adoption of New Rule I pertaining to )	(RECLAMATION)
rules not applicable to in situ coal )	
operations )	

TO: All Concerned Persons

1. On May 24, 2012, the Board of Environmental Review published MAR Notice No. 17-333 regarding a notice of proposed amendment and adoption of the above-stated rules (no public hearing contemplated) at page 1027, 2012 Montana Administrative Register, issue number 10.

2. The board has amended ARM 17.24.902 and 17.24.903 and adopted New Rule I (17.24.905) exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

By: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2012.

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

3 **IN THE MATTER OF:** ) **Case No. 2002-09 MM**  
4 )  
4 **The request for hearing of C.R. Kendall** )  
5 **Corporation under Mont. Code Ann. 82-4-** ) **STIPULATION FOR DISMISSAL**  
5 **353 (2) re: denial of application for** )  
6 **amendment of Operating Permit 00122** )  
6 )  
7 \_\_\_\_\_ )

8 COME NOW the parties and stipulate, pursuant to Rule 41(a), M.R.Civ.P., to the  
9 dismissal of this appeal. The parties have reached a resolution of the matters at issue and  
10 Petitioner hereby withdraws its appeal and request for hearing. The parties request that the  
11 Board issue an Order dismissing this matter with prejudice, with each party to bear its own costs.

12 DATED this 11<sup>TH</sup> day of July, 2012.

13  
14 C.R. KENDALL CORPORATION

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

15  
16 By: Alan L. Joscelyn  
17 Alan L. Joscelyn  
18 Attorney for C.R. Kendall Corporation

16 By: John F. North  
17 John F. North  
18 Special Assistant Attorney General  
19 Attorney for Department

20 Filed with the  
21 MONTANA BOARD OF  
22 ENVIRONMENTAL REVIEW

22 This 11<sup>th</sup> day of July, 2012  
23 at 3:30 o'clock P.m.  
24 By: Misty Galt

1  
2  
3  
4 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
5 **OF THE STATE OF MONTANA**

6 \_\_\_\_\_ )  
7 **IN THE MATTER OF THE REQUEST FOR ) CASE NO. BER 2002-09 MM**  
8 **HEARING OF C. R. KENDALL )**  
9 **CORPORATION UNDER MONT.CODE ANN. )**  
10 **82-4-353 (2) RE: DENIAL OF APPLICATION )**  
11 **FOR AMENDMENT OF OPERATING )**  
12 **PERMIT 00122 )**

13 \_\_\_\_\_  
14 **ORDER TO DISMISS**  
15 \_\_\_\_\_

16 The parties have filed a Stipulation for Dismissal pursuant to Rule 41(a)(1), M.R.Civ.P.,  
17 stating that the Appellant has withdrawn its appeal and request for hearing,

18 As requested in the Stipulation for Dismissal, IT IS HEREBY ORDERED that the above-  
19 entitled matter is dismissed with each party to bear its own costs.

20 DATED this \_\_\_\_\_ day of July, 2012.

21 \_\_\_\_\_  
22 **JOSEPH W. RUSSELL, M.P.H.**  
23 **Chairman, Board of Environmental Review**  
24

Thomas J. Jodoin  
Deputy City Attorney  
316 North Park Avenue  
Helena, MT 59623  
tjodoin@ci.helena.mt.us

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW <sup>MC-1</sup>  
This 19<sup>th</sup> day of June, 2012  
at 4:49 o'clock P.m.  
By: Thomas J. Jodoin

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	CASE NO. BER 2011-08 WQ
THE APPEAL AND REQUEST FOR	)	
HEARING BY THE CITY OF HELENA	)	<b>NOTICE OF DISMISSAL AND</b>
REGARDING THE DEQ'S NOTICE OF	)	<b>STIPULATION TO DISMISS</b>
FINAL DECISION FOR MONTANA	)	<b>WITHOUT PREJUDICE</b>
POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM (MPDES)	)	
PERMIT NO. MT0022641	)	

---

Pursuant to M.R.Civ.P. Rule 41(a), the City of Helena and the Montana Department of Environmental Quality hereby provide this Notice of Dismissal and Stipulation To Dismiss Without Prejudice in the above-captioned matter. A proposed Order Dismissing Appeal is attached.

DATED this 11<sup>th</sup> day of June, 2012.

Thomas J. Jodoin  
Thomas J. Jodoin, Atty. for Appellant  
Deputy City Attorney  
316 North Park Avenue  
Helena, MT 59623

David Dennis  
David Dennis, Atty. for Appellee  
Montana Dept. Envir. Quality  
Metcalf Building  
P.O. Box 200901  
Helena, MT 59620-0901

I

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	CASE NO. BER 2011-08 WQ
THE APPEAL AND REQUEST FOR	)	
HEARING BY THE CITY OF HELENA	)	<b>ORDER DISMISSING APPEAL</b>
REGARDING THE DEQ'S NOTICE OF	)	
FINAL DECISION FOR MONTANA	)	
POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM (MPDES)	)	
PERMIT NO. MT0022641	)	

---

The parties have filed a Notice of Dismissal And Stipulation To Dismiss Without Prejudice pursuant to Montana rule of Civil Procedure 41(a). As provided in the parties Stipulation for Dismissal:

IT IS HEREBY ORDERED that this appeal is dismissed without prejudice. Each party shall bear its own costs and expenses.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2012.

---

Joseph W. Russell, MPH  
Chairman  
Montana Board of Environmental Review

1 Jane B. Amdahl  
Department of Environmental Quality  
2 P.O. Box 200901  
1520 E. Sixth Avenue  
3 Helena, MT 59620-0901  
(406) 444-5690  
4  
5 Attorney for the Department  
W. Anderson Forsythe  
6 Brandon JT Hoskins  
Suite 1900 Crowne Plaza  
7 P.O. Box 2559  
Billings, MT 59103-2559  
8 (406) 248-7731

9 Attorneys for the Petitioner

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

Filed with the

MONTANA BOARD OF  
ENVIRONMENTAL REVIEW

This 7<sup>th</sup> day of June 2012  
at 8:22 o'clock A.m.  
By: M. J. Galt

12 **IN THE MATTER OF: VIOLATIONS OF**  
13 **THE MONTANA STRIP AND**  
14 **UNDERGROUND MINE RECLAMATION**  
15 **ACT BY WESTMORELAND**  
**RESOURCES, INC. AT THE ABSALOKA**  
**MINE, BIG HORN COUNTY, MONTANA**  
**[FID #2115, DOCKET NO. SM-12-01]**

CASE NO. BER 2012-02-SM

**STIPULATION TO DISMISS**

16  
17 The Department of Environmental Quality and Westmoreland Resources, Inc., by their  
18 respective counsel, hereby inform the Board of Environmental Review that they have resolved  
19 their differences and hereby stipulate to dismiss the above-captioned contested case with  
20 prejudice pursuant to Montana Rule of Civil Procedure 41(a). A copy of the Administrative  
21 Order on Consent by which this matter was settled is attached hereto as Exhibit A. Each party to  
22 bear its own costs, including attorney fees.

23 IT IS SO STIPULATED.  
24

1 DEPARTMENT OF ENVIRONMENTAL QUALITY

2  
3 BY: Jane B. Amdahl  
4 Jane B. Amdahl  
5 Attorney for the Department

6 WESTMORELAND RESOURCES, INC.

7 BY: W. Anderson Forsythe  
8 W. Anderson Forsythe  
9 Attorney for Petitioner

10 Certificate of Service

11  
12 I hereby certify that on the 7<sup>th</sup> day of June, 2012, I sent a true and  
13 correct copy of the foregoing Stipulation to Dismiss by the State of Montana's Interdepartmental  
Delivery System to the following:

14 Katherine Orr  
15 Hearing Examiner  
16 Department of Justice  
17 Agency Legal Services

18  
19  
20  
21  
22  
23  
24 Jane B. Amdahl

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA STRIP AND  
UNDERGROUND MINE RECLAMATION ACT  
BY WESTMORELAND RESOURCES, INC. AT  
THE ABSALOKA MINE, BIG HORN COUNTY,  
MONTANA. (FID #2115)

ADMINISTRATIVE ORDER  
ON CONSENT

Docket No. SM-12-01

This Administrative Order on Consent (Consent Order) is issued to resolve the enforcement action (FID 2115) that the Department of Environmental Quality (Department) initiated against Westmoreland Resources, Inc. (Westmoreland) with respect to a violation of the Montana Strip and Underground Mine Reclamation Act (the Act) codified at Title 82, chapter 4, part 2, MCA; the administrative rules implementing the Act set forth in Title 17, chapter 24, Administrative Rules of Montana (ARM); and/or the provisions of Westmoreland's operating permits issued under the Act. Concurrent with the issuance of this Administrative Order on Consent (Consent Order), the Department is terminating its January 30, 2012 Notice of Violation and Administrative Penalty Order (Order) that was issued in this matter, and is replacing it with this Consent Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
  2. The Department administers the Act pursuant to Section 82-4-205, MCA.
  3. Pursuant to Section 82-4-254, MCA, the Department is authorized to institute and maintain administrative enforcement proceedings under the Act. The Act also authorizes the Department to seek administrative penalties from persons who violate requirements of the Act.
- See Section 82-4-254(1), MCA.





1 4. Westmoreland is a "person" within the meaning of Section 82-4-203(40), MCA.

2 5. Westmoreland operates a surface coal mine, known as the Absaloka Mine, under  
3 Permit No. C1985005 (Permit) located near Hardin, Montana. The Permit was issued by the  
4 Department under the Act.

5 6. Westmoreland, therefore, is an "operator" as defined by Section 82-4-203(36), MCA.

6 7. As an operator, Westmoreland is subject to the requirements of the Act, the  
7 administrative rules adopted under the Act, and the provisions of the Permit.

8 8. Pursuant to ARM 17.24.314(2), the permit application description must include  
9 plans for monitoring and semi-annual reporting of ground and surface water quality and quantity  
10 data collected and analyzed in accordance with ARM 17.24.304, 17.24.645 and 17.24.646.

11 9. Pursuant to ARM 17.24.645(1), ground water levels, subsurface flow and storage  
12 characteristics, and the quality of ground water must be monitored based on information gathered  
13 pursuant to ARM 17.24.304 and the monitoring program submitted pursuant to ARM 17.24.314  
14 and in a manner approved by the Department to determine the effects of strip or underground  
15 mining operations on the recharge capacity of reclaimed lands and on the quantity and quality of  
16 water in ground water systems in the permit and adjacent areas.

17 10. During a September 6, 2011 review of Westmoreland's 2011 semi-annual  
18 hydrology report, the Department identified that Westmoreland failed to monitor water levels in  
19 39 monitoring wells during the first quarter of the 2011 water year as required by the approved  
20 monitoring program.

21 11. On November 21, 2011, the Department issued Notice of Noncompliance and  
22 Order of Abatement 11-05-01 (NON 11-05-01) to Westmoreland alleging a violation of ARM  
23 17.24.645(1). The NON 11-05-01 ordered Westmoreland to abate the violation on or before  
24 January 6, 2012.



1 18. Westmoreland shall execute a Stipulation to Dismiss their appeal, Case No. BER  
2 2012-02 SM, which is currently pending before the BER.

3 19. Westmoreland is hereby assessed an administrative penalty in the amount of \$2,500.

4 20. Within 60 days from the effective date of this Consent Order, Westmoreland shall  
5 pay to the Department the administrative penalty of \$2,500 to resolve the violation cited herein.  
6 The penalty must be paid by check or money order, made payable to the "Montana Department  
7 of Environmental Quality," and shall be sent to:

8 John L. Arrigo, Administrator  
9 DEQ Enforcement Division  
10 1520 East Sixth Ave.  
11 P.O. Box 200901  
12 Helena, MT 59620-0901

#### 11 **CONSENT TO ADMINISTRATIVE ORDER**

12 21. Westmoreland waives its right to administrative appeal or judicial review of the  
13 Findings of Fact and Conclusions of Law and Administrative Order on Consent set forth herein  
14 and agrees that this Consent Order is the final and binding resolution of the issues raised.

15 22. None of the requirements in this Consent Order are intended to relieve  
16 Westmoreland from complying with all applicable state, federal, and local statutes, rules,  
17 ordinances, orders, and permit conditions.

18 23. The terms of this Consent Order constitute the entire agreement between the  
19 Department and Westmoreland with respect to the issues addressed herein notwithstanding any  
20 other oral or written agreements and understandings made and entered into between the  
21 Department and Westmoreland prior to the effective date of this Consent Order.

22 24. Except as herein provided, no amendment, alteration, or addition to this Consent  
23 Order shall be binding unless reduced to writing and signed by both parties.

24 25. Each party shall bear its own costs incurred in this action, including attorney fees.

1 26. Each of the signatories to this Consent Order represents that he or she is  
2 authorized to enter into this Consent Order and to bind the parties represented by him or her to  
3 the terms of this Consent Order.

4 27. Full payment of the penalty assessed herein shall constitute full and complete  
5 satisfaction of the terms of this Consent Order.

6 28. This Consent Order becomes effective upon signature of the Director of the  
7 Department or his designee.

8 IT IS SO ORDERED:

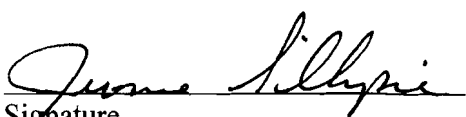
9 STATE OF MONTANA  
10 DEPARTMENT OF ENVIRONMENTAL QUALITY

11   
12 JOHN L. ARRIGO, Administrator  
13 Enforcement Division

14 6/6/12  
15 Date

IT IS SO AGREED:

WESTMORELAND RESOURCES, INC.

16   
17 Signature

18 Jerome G. HESPIG  
19 Printed Name

20 Pres + GM  
21 Title

22 6/4/12  
23 Date

1  
2  
3  
4  
5 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
6 **OF THE STATE OF MONTANA**

7 **IN THE MATTER OF: VIOLATIONS OF**  
8 **THE MONTANA STRIP AND**  
9 **UNDERGROUND MINE RECLAMATION**  
10 **ACT BY WESTMORELAND**  
11 **RESOURCES, INC. AT THE ABSALOKA**  
12 **MINE, BIG HORN COUNTY, MONTANA**  
13 **[FID #2115, DOCKET NO. SM-12-01]**

**CASE NO. BER 2012-02-SM**  
  
**DISMISSAL ORDER**

14 The parties have filed a Stipulation pursuant to Rule 41(a), M.R.Civ.P., stating that the  
15 parties have settled their differences and agree that this matter should be dismissed with  
16 prejudice. As provided in the parties' Stipulation and for good cause appearing:

17 IT IS HEREBY ORDERED THAT this appeal is dismissed with prejudice. Each party  
18 shall bear its own costs.

19 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

20 BOARD OF ENVIRONMENTAL REVIEW

21  
22 By: \_\_\_\_\_  
23 JOSEPH W. RUSSELL, M.P.H.  
24 Chairman

1 | Jane B. Amdahl  
Department of Environmental Quality  
2 | P.O. Box 200901  
1520 E. Sixth Avenue  
3 | Helena, MT 59620-0901

4 | W. Anderson Forsythe  
Brandon JT Hoskins  
5 | Suite 1900 Crowne Plaza  
P.O. Box 2559  
6 | Billings, MT 59103-2559

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 Jane B. Amdahl  
Department of Environmental Quality  
2 P.O. Box 200901  
1520 E. Sixth Avenue  
3 Helena, MT 59620-0901  
(406) 444-5690  
4  
5 Attorney for the Department  
6 W. Anderson Forsythe  
Brandon JT Hoskins  
Suite 1900 Crowne Plaza  
7 P.O. Box 2559  
Billings, MT 59103-2559  
8 (406) 248-7731

9 Attorneys for the Petitioner

Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 7<sup>th</sup> day of June, 2012  
at 8:23 o'clock A.m.  
By: Alicy Cook

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

12 <b>IN THE MATTER OF: VIOLATIONS OF</b> 13 <b>THE MONTANA STRIP AND</b> 14 <b>UNDERGROUND MINE RECLAMATION</b> 15 <b>ACT BY WESTMORELAND</b> <b>RESOURCES, INC. AT THE ABSALOKA</b> <b>MINE, BIG HORN COUNTY, MONTANA</b> <b>[FID #2133, DOCKET NO. SM-12-02]</b>	CASE NO. BER 2012-03-SM  STIPULATION TO DISMISS
---	---

16  
17 The Department of Environmental Quality and Westmoreland Resources, Inc., by their  
18 respective counsel, hereby inform the Board of Environmental Review that they have resolved  
19 their differences and hereby stipulate to dismiss the above-captioned contested case with  
20 prejudice pursuant to Montana Rule of Civil Procedure 41(a). A copy of the Administrative  
21 Order on Consent by which this matter was settled is attached hereto as Exhibit A. Each party to  
22 bear its own costs, including attorney fees.

23 IT IS SO STIPULATED.  
24

1 DEPARTMENT OF ENVIRONMENTAL QUALITY

2  
3 BY: Jane B. Amdahl  
4 Jane B. Amdahl  
5 Attorney for the Department

6 WESTMORELAND RESOURCES, INC.

7 BY: W. Anderson Forsythe  
8 W. Anderson Forsythe  
9 Attorney for Petitioner

10 Certificate of Service

11  
12 I hereby certify that on the 7<sup>th</sup> day of June, 2012, I sent a true and  
13 correct copy of the foregoing Stipulation to Dismiss by the State of Montana's Interdepartmental  
Delivery System to the following:

14 Katherine Orr  
15 Hearing Examiner  
16 Department of Justice  
17 Agency Legal Services

18  
19  
20  
21  
22  
23  
24 Jane B. Amdahl



JUN - 5 2012

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA STRIP AND  
UNDERGROUND MINE RECLAMATION ACT  
BY WESTMORELAND RESOURCES, INC. AT  
THE ABSALOKA MINE, BIG HORN COUNTY,  
MONTANA. (FID #2133)

ADMINISTRATIVE ORDER  
ON CONSENT

Docket No. SM-12-02

This Administrative Order on Consent (Consent Order) is issued to resolve the enforcement action (FID 2133) that the Department of Environmental Quality (Department) initiated against Westmoreland Resources, Inc. (Westmoreland) with respect to a violation of the Montana Strip and Underground Mine Reclamation Act (the Act) codified at Title 82, chapter 4, part 2, MCA; the administrative rules implementing the Act set forth in Title 17, chapter 24, Administrative Rules of Montana (ARM); and/or the provisions of Westmoreland's operating permits issued under the Act. Concurrent with the issuance of this Administrative Order on Consent (Consent Order), the Department is terminating its February 16, 2012 Notice of Violation and Administrative Penalty Order (Order) that was issued in this matter, and is replacing it with this Consent Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

1. The Department is an agency of the executive branch of government of the State of Montana, created and existing under the authority of Section 2-15-3501, MCA.
2. The Department administers the Act pursuant to Section 82-4-205, MCA.
3. Pursuant to Section 82-4-254, MCA, the Department is authorized to institute and maintain administrative enforcement proceedings under the Act. The Act also authorizes the Department to seek administrative penalties from persons who violate requirements of the Act. See Section 82-4-254(1), MCA.

1 4. Westmoreland is a "person" within the meaning of Section 82-4-203(40), MCA.

2 5. Westmoreland operates a surface coal mine, known as the Absaloka Mine, under  
3 Permit No. C1985005 (Permit) located near Hardin, Montana. The Permit was issued by the  
4 Department under the Act.

5 6. Westmoreland, therefore, is an "operator" as defined by Section 82-4-203(36), MCA.

6 7. As an operator, Westmoreland is subject to the requirements of the Act, the  
7 administrative rules adopted under the Act, and the provisions of the Permit.

8 8. Section 82-4-231(10)(e), MCA, requires an operator to use explosives in  
9 connection with the operation only in accordance with Department regulations designed to  
10 minimize noise, damage to adjacent lands, and water pollution, ensure public safety, and for  
11 other purposes.

12 9. ARM 17.24.623 implements Section 82-4-231(10)(e), MCA. ARM 17.24.623(1)  
13 requires an operator to publish a blasting schedule before beginning a blasting program in which  
14 blasts that use more than five pounds of explosive or blasting agent are detonated. The blasting  
15 schedule must be published once in a newspaper of general circulation in the locality of the  
16 blasting site. ARM 17.24.623(2) requires an operator to distribute by mail the blasting schedule  
17 to local governments and public utilities and by mail or delivered to each residence within one-  
18 half mile of the permit area. ARM 17.24.623(3) requires an operator to republish and  
19 redistribute the blasting schedule by mail at least every 12 months.

20 10. According to Department records, Westmoreland published its blasting schedule  
21 on September 23, 2010. Therefore, pursuant to ARM 17.24.623(3), Westmoreland was required  
22 to republish and redistribute by mail the blasting schedule by September 23, 2011.

23 11. On November 15, 2011, Westmoreland contacted the Department and  
24 self-reported that the annual publication of a blasting notice was not published in the local

1 newspaper on or before the publication anniversary date. Westmoreland indicated that it did,  
2 however, provide notification letters to property owners as required.

3 12. In a letter dated December 12, 2011, Westmoreland provided the Department with  
4 a copy of an affidavit of publication documenting that the blasting schedule was published in the  
5 Big Horn County News on November 17, 2011.

6 13. On December 15, 2011, the Department issued a Notice of Noncompliance and  
7 Order of Abatement (NON 11-05-02) alleging that Westmoreland violated Section 82-4-  
8 231(10)(e), MCA, and ARM 17.24.623(3). The Order of Abatement required Westmoreland to  
9 submit proof of publication and distribution of the blasting schedule to the Department.

10 14. In its December 22, 2011 letter of mitigating circumstances, Westmoreland  
11 provided copies of the mine blasting schedule, dated September 30, 2011, that were sent to local  
12 governments, public utilities and residences located within one-half mile of the Permit area as  
13 well as a copy of an affidavit of publication documenting that the blasting schedule was  
14 published in the Big Horn County News on November 17, 2011.

15 15. The Department issued a Termination of Abatement Order to Westmoreland on  
16 January 17, 2012.

17 16. On February 16, 2012, the Department issued Westmoreland the Order. The  
18 Order alleged that Westmoreland violated Section 82-4-231(10)(e), MCA, and ARM  
19 17.24.623(3) by failing to republish its blasting schedule in the newspaper of general circulation  
20 in the locality of the blasting site. The Order assessed an administrative penalty in the amount of  
21 \$2,500 to resolve the violation.

22 17. On March 12, 2012, Westmoreland requested a hearing before the Board of  
23 Environmental Review (BER).

24 18. The matter, Case No. BER 2012-03 SM, is pending before the BER.

1 19. The Department and Westmoreland have reached an agreement, as set forth in in this  
2 Consent Order, to resolve the violation alleged in the Department's Order.

3 **ADMINISTRATIVE ORDER ON CONSENT**

4 Now, THEREFORE, the Department hereby ORDERS and Westmoreland AGREES as  
5 to the following:

6 20. Westmoreland shall execute a Stipulation to Dismiss its appeal, Case No. BER  
7 2012-02 SM, which is currently pending before the BER.

8 21. Westmoreland agrees to pay an administrative penalty in the amount of \$2,400 for the  
9 violation cited herein.

10 22. Within 60 days from the effective date of this Consent Order, Westmoreland shall  
11 pay to the Department the administrative penalty of \$2,400 to resolve the violation cited herein.  
12 The penalty must be paid by check or money order, made payable to the "Montana Department  
13 of Environmental Quality," and shall be sent to:

14 John L. Arrigo, Administrator  
15 DEQ Enforcement Division  
16 1520 East Sixth Ave.  
17 P.O. Box 200901  
18 Helena, MT 59620-0901

17 **CONSENT TO ADMINISTRATIVE ORDER**

18 23. Westmoreland waives its right to administrative appeal or judicial review of the  
19 Findings of Fact and Conclusions of Law and Administrative Order on Consent set forth herein  
20 and agrees that this Consent Order is the final and binding resolution of the issues raised.

21 24. None of the requirements in this Consent Order are intended to relieve  
22 Westmoreland from complying with all applicable state, federal, and local statutes, rules,  
23 ordinances, orders, and permit conditions.

24 //

1 25. The terms of this Consent Order constitute the entire agreement between the  
2 Department and Westmoreland with respect to the issues addressed herein notwithstanding any  
3 other oral or written agreements and understandings made and entered into between the  
4 Department and Westmoreland prior to the effective date of this Consent Order.

5 26. Except as herein provided, no amendment, alteration, or addition to this Consent  
6 Order shall be binding unless reduced to writing and signed by both parties.

7 27. Each party shall bear its own costs incurred in this action, including attorney fees.

8 28. Each of the signatories to this Consent Order represents that he or she is  
9 authorized to enter into this Consent Order and to bind the parties represented by him or her to  
10 the terms of this Consent Order.

11 29. Full payment of the penalty assessed herein shall constitute full and complete  
12 satisfaction of the terms of this Consent Order.

13 30. This Consent Order becomes effective upon signature of the Director of the  
14 Department or his designee.

15 IT IS SO ORDERED:

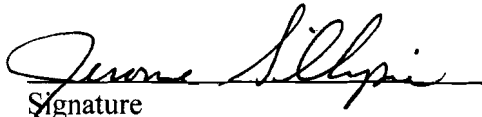
16 STATE OF MONTANA  
17 DEPARTMENT OF ENVIRONMENTAL QUALITY

18   
19 JOHN L. ARRIGO, Administrator  
Enforcement Division

20 6/6/12  
21 Date

IT IS SO AGREED:

WESTMORELAND RESOURCES, INC.

22   
Signature

23 Jerome Gillespie  
Printed Name

24 Pres + GM  
Title

6/7/12  
Date

1  
2  
3  
4  
5 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
6 **OF THE STATE OF MONTANA**

7 **IN THE MATTER OF: VIOLATIONS OF**  
8 **THE MONTANA STRIP AND**  
9 **UNDERGROUND MINE RECLAMATION**  
10 **ACT BY WESTMORELAND**  
11 **RESOURCES, INC. AT THE ABSALOKA**  
12 **MINE, BIG HORN COUNTY, MONTANA**  
13 **[FID #2133, DOCKET NO. SM-12-02]**

**CASE NO. BER 2012-03-SM**

**DISMISSAL ORDER**

14 The parties have filed a Stipulation pursuant to Rule 41(a), M.R.Civ.P., stating that the  
15 parties have settled their differences and agree that this matter should be dismissed with  
16 prejudice. As provided in the parties' Stipulation and for good cause appearing:

17 **IT IS HEREBY ORDERED THAT** this appeal is dismissed with prejudice. Each party  
18 shall bear its own costs.

19 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

20 **BOARD OF ENVIRONMENTAL REVIEW**

21  
22 By: \_\_\_\_\_  
23 JOSEPH W. RUSSELL, M.P.H.  
24 Chairman

1 Jane B. Amdahl  
Department of Environmental Quality  
2 P.O. Box 200901  
1520 E. Sixth Avenue  
3 Helena, MT 59620-0901

4 W. Anderson Forsythe  
Brandon JT Hoskins  
5 Suite 1900 Crowne Plaza  
P.O. Box 2559  
6 Billings, MT 59103-2559

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24



**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

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

DATE: May 22, 2012

SUBJECT: Board of Environmental Review case, Case No. BER 2012-04 PWS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE PUBLIC WATER  
SUPPLY LAWS BY THE CITY OF RONAN  
AT THE CITY OF RONAN PUBLIC WATER  
SUPPLY SYSTEM, PWSID #MT0000318,  
RONAN, LAKE COUNTY, MONTANA.  
[FID #2139, DOCKET NO. PWS-12-06]

Case No. BER 2012-04 PWS

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2139, Docket No. PWS-12-06).

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

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

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

Attachments



1 Raymond Law Office, PLLC  
2 **JAMES RAYMOND**  
3 407 First Street West  
4 Polson, Montana 59860  
5 406.883.5588  
6 Ronan City Attorney

Filed with the  
**MONTANA BOARD OF  
ENVIRONMENTAL REVIEW**  
This 21<sup>st</sup> day of May, 2012  
at \_\_\_\_\_ o'clock \_\_\_\_\_ .m.  
By: [Signature]

7  
8 BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY,  
9 STATE OF MONTANA

10 )  
11 )  
12 )  
13 )  
14 )  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

IN RE THE MATTER OF:  
VIOLATIONS OF THE PUBLIC WATER  
SUPPLY LAWS BY THE CITY OF  
RONAN PUBLIC WATER SUPPLY  
SYSTEM, PWSID #MT0000318,  
RONAN, LAKE COUNTY, MONTANA.  
(FID #2139)

Docket No. PWS-12-06

**REQUEST FOR HEARING**

COMES NOW the City of Ronan, Montana, by and through counsel, and herewith  
requests a hearing of all issues, all pursuant to Section 75-6-109(3), MCA, and Title 2, chapter  
4, part 6 of the Montana Codes.

DATED this 18<sup>th</sup> day of May, 2012.

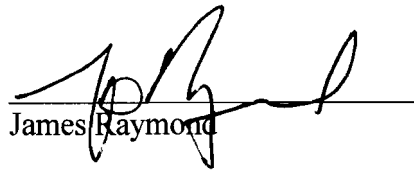
[Signature]  
James Raymond,  
Raymond Law Office, PLLC  
Ronan City Attorney

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he served a copy of the foregoing pleading on the following persons by United States mail, first-class postage prepaid and addressed to:

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

John Arrigo,  
Enforcement Division  
PO Box 200901  
Helena, MT 59620-0901



James Raymond

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

2 OF THE STATE OF MONTANA

3 IN THE MATTER OF:  
4 VIOLATIONS OF THE PUBLIC WATER  
5 SUPPLY LAWS BY THE CITY OF RONAN AT  
6 THE CITY OF RONAN PUBLIC WATER  
SUPPLY SYSTEM, PWSID #MT0000318,  
RONAN, LAKE COUNTY, MONTANA.  
(FID #2139)

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE COMPLIANCE  
ORDER

Docket No. PWS-12-06

7 **I. NOTICE OF VIOLATION**

8 Pursuant to the authority of Section 75-6-109(1), Montana Code Annotated (MCA), the  
9 Department of Environmental Quality (Department) hereby gives notice to the City of Ronan  
10 (Respondent) of the following Findings of Fact and Conclusions of Law with respect to  
11 violations of the Public Water Supply Laws (PWSL) (Title 75, chapter 6, part 1, MCA) and  
12 Administrative Rules of Montana (ARM) (Title 17, chapter 38) adopted thereunder.

13 **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

- 15 1. The Department is an agency of the executive branch of government of the State  
16 of Montana, created and existing under the authority of Section 2-15-3501, MCA.
- 17 2. The Department administers the PWSL.
- 18 3. Respondent is a city in Montana, and is therefore a "person" as defined in Section  
19 75-6-102(11), MCA.
- 20 4. Respondent owns and operates the public water supply system that serves the City of  
21 Ronan (System), PWSID #MT0000318, in Ronan, Montana. The System regularly serves water to at  
22 least 25 persons daily for any 60 or more days in a calendar year. Respondent is therefore a "supplier  
23 of water" and subject to the requirements of the PWSL and the rules adopted thereunder. *See* ARM  
24 17.38.202 and 40 CFR 141.2 as incorporated therein.

1 5. The System regularly serves water to at least 25 year-round residents. Therefore,  
2 the System is a "community water system" within the meaning of Section 75-6-102(3), MCA.

3 6. The System is supplied by surface water.

4 ***Failure to install filtration treatment***

5 7. A public water system that uses a surface water source or a ground water source  
6 under the direct influence of surface water, and does not meet all of the criteria to avoid  
7 filtration, must install and properly operate filtration and disinfection treatment within 18 months  
8 of the failure to meet one of the filtration avoidance criteria. *See* ARM 17.38.208 and 40 CFR  
9 141.70-73 (Surface Water Treatment Rule) as incorporated therein.

10 8. On June 18, 2010, the Department notified Respondent in writing that the  
11 System's filtration avoidance status had been rescinded because the Department and the  
12 Environmental Protection Agency determined that the System did not meet all criteria for  
13 filtration avoidance. The letter further notified Respondent that it must achieve compliance  
14 with the Surface Water Treatment Rule within 18 months from the date of the letter (no later  
15 than December 23, 2011) by installing filtration or finding a different source of water.

16 9. On January 3, 2012, the Department notified Respondent in writing that it was in  
17 violation of the Surface Water Treatment Rule for failing to provide filtration treatment in  
18 accordance with ARM 17.38.208. The letter further notified Respondent that in order to return to  
19 compliance, it must provide filtration treatment in accordance with ARM 17.38.208 or find an  
20 approved new source.

21 10. Respondent violated and continues to violate ARM 17.38.208 by failing to  
22 provide filtration treatment for a public water system supplied by a ground water source under  
23 the direct influence of surface water.

24 //

1 ***Failure to provide public notice***

2 11. Owners of public water supplies must provide public notice for a treatment  
3 technique requirement violation as soon as practical, but no later than 30 days after the system  
4 learns of the violation. The notice must remain in place for as long as the violation persists, but  
5 in no case for less than seven days, even if the violation is resolved. *See* ARM 17.38.239(1) and  
6 40 CFR 141.203 as incorporated therein. Within 10 days of completing the public notice, the  
7 owners or operators of a public water system must certify to the Department that they have  
8 complied with the public notification regulations. *See* ARM 17.38.234(6)(a) and 40 CFR  
9 141.31(d) as incorporated therein.

10 12. On January 3, 2012, the Department notified Respondent in writing that it was in  
11 violation of the Surface Water Treatment Rule. The letter further notified Respondent that it was  
12 required to provide tier 2 public notice for the failure to install filtration treatment and to submit  
13 a certification to the Department that public notice was provided. Records maintained by the  
14 Department indicate that Respondent has not sent the requested certification to the Department.

15 13. Respondent violated ARM 17.38.239(1) by failing to provide public notice of the  
16 failure to provide filtration treatment for the System.

17 **III. ADMINISTRATIVE ORDER**

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

24 //

1           14.     Within 30 days from receipt of this Order, Respondent shall provide tier 2 public  
2 notice of the failure to provide filtration treatment for the System. The notice must meet the  
3 requirements of ARM 17.38.239(1). Within 10 days after providing public notice, Respondent  
4 shall send the Department a copy of the public notice that was given along with a certification  
5 that it has fully complied with the public notice requirements of ARM 17.38.239(1). Further,  
6 Respondent shall repeat the public notice every three months until notified by the Department  
7 that Respondent is no longer in violation of Surface Water Treatment Rule. Within 10 days after  
8 Respondent has provided each repeat public notice, Respondent shall send the Department a  
9 copy of the public notice along with certification that it has fully complied with the public notice  
10 requirements of ARM 17.38.239(1).

11           15.     Within 60 days from receipt of this Order, Respondent must submit to the  
12 Department a compliance plan and schedule (Plan) that identifies a corrective action that will  
13 return Respondent to compliance with the Surface Water Treatment Rule or states that  
14 Respondent intends to find an approved new source. *See* ARM 17.38.208 and 40 CFR 141.70-  
15 73 as incorporated therein. The Plan must include an implementation schedule, which includes a  
16 final compliance date. The Plan shall be sent to:

17                     John L. Arrigo, Administrator  
18                     Enforcement Division  
19                     Department of Environmental Quality  
20                     1520 East Sixth Avenue  
21                     P.O. Box 200901  
22                     Helena, MT 59620-0901

23           16.     The Department will review the Plan and provide written comments to Respondent.  
24 Respondent must respond in writing to any deficiencies within the timeframe specified in the  
Department's review letter.

//

1 17. The Plan will be incorporated by reference into this Order as enforceable  
2 requirements upon written approval by the Department.

3 18. Respondent must achieve compliance with the Surface Water Treatment Rule by  
4 the compliance date specified in the approved Plan. If implementation of the Plan fails to  
5 achieve compliance, the Department will require Respondent to implement additional corrective  
6 actions under this Order and/or the Department may seek penalties in accordance with Section  
7 75-6-109(6)(a)(ii), MCA.

8 19. Respondent must comply with the requirements of ARM 17.38.101, *et seq.*,  
9 including, but not limited to, the submittal of a design report, plans, specifications, as-built  
10 drawings, and written certification for any necessary modifications to the System.

11 20. If any event occurs that may prevent Respondent from meeting a compliance  
12 deadline required by this Order, Respondent shall notify the Department in writing within ten (10)  
13 days after Respondent becomes aware of the event. The notice of delay must include: (a) an  
14 explanation of the reasons for the delay; (b) the expected duration of the delay; and (c) a description  
15 of all action taken or to be taken to prevent or minimize the delay and a schedule for  
16 implementation of those actions. The notice must be sent to the address listed in Paragraph 15.

17 21. The Department shall review any notices of delay sent by Respondent under  
18 Paragraph 20 and, if appropriate, modify the Plan incorporated by reference in Paragraph 17.

19 22. Failure to take the required corrective actions by the specified deadlines, as  
20 ordered herein, constitutes a violation of Title 75, chapter 6, part 1, MCA, and may result in the  
21 Department seeking a court order assessing civil penalties of up to \$10,000 per day of violation  
22 pursuant to Section 76-6-114, MCA.

23 //  
24 //

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

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

7 **IV. NOTICE OF APPEAL RIGHTS**

8 25. Respondent may appeal this Order under Section 75-6-109(3), MCA, by filing a  
9 written request for a hearing before the Montana Board of Environmental Review no later than  
10 30 days after service of this Order. Any request for a hearing must be in writing and sent to:

11 Board Secretary  
12 Board of Environmental Review  
13 P.O. Box 200901  
14 Helena, MT 59620-0901

15 26. Hearings are conducted as provided in the Montana Administrative Procedure Act,  
16 Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court  
17 proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to the  
18 hearing may include formal discovery procedures, including interrogatories, requests for production  
19 of documents, and depositions. Because Respondent is not an individual, Respondent must be  
20 represented by an attorney in any contested case hearing. See ARM 1.3.231(2) and Section 37-61-  
21 201, MCA.

22 27. If a hearing is not requested within 30 days after service of this Order, the  
23 opportunity for a contested case appeal is waived.

24 //

//





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

---

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF THE PUBLIC WATER**  
5 **SUPPLY LAWS BY THE CITY OF**  
6 **RONAN AT THE CITY OF RONAN**  
7 **PUBLIC WATER SUPPLY SYSTEM,**  
8 **PWSID #MT0000318, RONAN, LAKE**  
9 **COUNTY, MONTANA. [FID #2139,**  
10 **DOCKET NO. PWS-12-06]**

**CASE NO. BER 2012-04 PWS**

---

8                                   **FIRST PREHEARING ORDER**

---

10                   Mr. James Raymond, Ronan City Attorney, on behalf of the City of Ronan  
11 (hereafter, Appellant) has requested a hearing for the appeal of the Notice of  
12 Violation and Administrative Compliance and Penalty Order, Docket No. PWS-12-  
13 06 pertaining to violation of legal requirements and imposition of penalties under  
14 the Montana Public Water Supply Laws, Montana Code Ann. Title 75, Chapter 6,  
15 Part 1, and administrative rules adopted under Title 17, Chapter 38, Sub-chapters 1  
16 through 6, Administrative Rules of Montana (ARM).

17                   The following guidelines and rules are provided to assist the parties in an  
18 orderly resolution of this contested case.

19                   1.       REFERENCES: This matter is governed by the Montana  
20 Administrative Procedure Act, Mont. Code Ann. tit. 2, Ch. 4, Pt. 6; and ARM  
21 17.4.101, by which the Board of Environmental Review (Board) has adopted the  
22 Attorney General's Model Rules for contested cases, ARM 1.3.211 through 1.3.225;  
23 and by Mont. Code Ann. Tit. 75, Ch. 6, Pt. 1.

24                   2.       FILING: Except for discovery requests and responses (which are not  
25 routinely filed), **original** documents shall be sent for filing with the Board,  
26 addressed as follows:  
27

1 JOYCE WITTENBERG  
2 Secretary, Board of Environmental Review  
3 Department of Environmental Quality  
4 1520 East Sixth Avenue  
5 P.O. Box 200901  
6 Helena, MT 59620-0901

7 One **copy** of each document that is filed should be sent to the Hearing  
8 Examiner addressed as follows:

9 KATHERINE J. ORR  
10 Hearing Examiner  
11 Agency Legal Services Bureau  
12 1712 Ninth Avenue  
13 P.O. Box 201440  
14 Helena, MT 59620-1440

15 Although discovery documents are not normally filed, when a motion or brief  
16 is filed making reference to discovery documents, the party filing the motion or  
17 brief should also attach the relevant discovery documents.

18 3. SERVICE: Copies of all documents filed with the Board and  
19 provided to the Hearing Examiner, including correspondence, must be served upon  
20 the opposing party. A certificate of service should be provided.

21 4. EX PARTE COMMUNICATIONS: The Montana Administrative  
22 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model  
23 Rule 18 in ARM 1.3.222, prohibit *ex parte* communications with a hearing examiner  
24 concerning any issue of fact or law in a contested case. In addition to observing this  
25 rule, please contact the opposing party before you communicate with the Hearing  
26 Examiner, even on purely procedural matters such as the need for a continuance.

27 5. SCHEDULING: The parties are requested to consult with each other  
and propose a schedule upon which they agree to the Hearing Examiner by  
**June 22, 2012**. The schedule should include the following dates:

- (a) for joinder/intervention of additional parties;
- (b) for disclosure by each party to the other parties of: (1) the

1 name and address of each individual likely to have discoverable  
2 information that the disclosing party may use to support its  
3 claims or defenses, and, (2) a copy of, or a description by  
4 category and location of, all documents and tangible things that  
5 are in the possession, custody, or control of the party and that  
6 the disclosing party may use to support its claims or defenses;

7 (c) for completion of discovery (if any party wishes to conduct  
8 discovery);

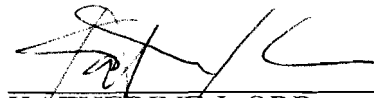
9 (d) for exchange of lists of witnesses and copies of documents that  
10 each party intends to offer at the hearing;

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

12 (f) for a prehearing conference to hear argument on any motions  
13 and resolve other prehearing matters; and,

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

15 DATED this 31<sup>st</sup> day of May, 2012.

16  
17 

18 KATHERINE J. ORR  
19 Hearing Examiner  
20 Agency Legal Services Bureau  
21 1712 Ninth Avenue  
22 P.O. Box 201440  
23 Helena, MT 59620-1440  
24  
25  
26  
27

1 **CERTIFICATE OF SERVICE**

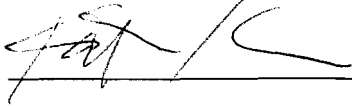
2 I hereby certify that I caused a true and accurate copy of the foregoing First  
3 Prehearing Order to be mailed to:

4 Ms. Joyce Wittenberg  
5 Secretary, Board of Environmental Review  
6 Department of Environmental Quality  
7 1520 East Sixth Avenue  
8 P.O. Box 200901  
9 Helena, MT 59620-0901  
10 **(original)**

11 Ms. Carol Schmidt  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

16 Mr. John Arrigo  
17 Administrator, Enforcement Division  
18 Department of Environmental Quality  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 Mr. James Raymond  
22 Ronan City Attorney  
23 Raymond Law Office, P.L.L.C.  
24 407 First Street West,  
25 Polson, MT 59860

26 DATED: May 31, 2012  \_\_\_\_\_  
27



**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

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

DATE: May 23, 2012

SUBJECT: Board of Environmental Review Case No. BER 2012-05 SW

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
THE REQUEST FOR HEARING BY WILLIAM  
E. SMITH, ON BEHALF OF MIKE ADKINS,  
REGARDING PARK COUNTY'S DENIAL TO  
VALIDATE ADKINS CLASS III WASTE  
TIRE MONOFILL LICENSE NO. 517.

Case No. BER 2012-05 SW

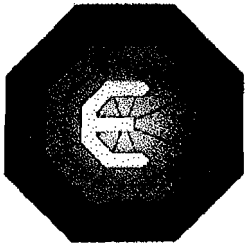
The BER has received the attached request for hearing. Also attached is DEQ's administrative document(s) relating to this request.

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

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

Ed Thamke, Bureau Chief  
Waste & Underground Tank Mgmt Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Attachments



**OCTAGON**  
Consulting Engineers, LLC  
BIOENERGY • CIVIL • MECHANICAL

✓ ER 2012-05 SW

May 22, 2012

Ms. Joyce Wittenberg  
Office of the Director  
Montana Dept of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901


Re: Adkins Waste Tire Landfill License No. 517: Appeal of Denial to Validate License  
by Park County Public Health Officer

Dear Ms. Wittenberg:

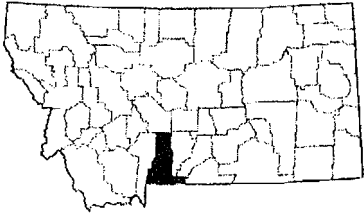
We were informed by letter dated May 4, 2012 from Mary Hendrickson, Solid Waste Program - Licensing that DEQ approved the application for license of the Adkins Class III Waste Tire Monofill and assigned License No. 517. Pursuant to applicable MCA and Administrative Rules, the Department sent the license to Park County Sanitarian for validation by the Public Health Officer. On Monday May 21, 2012, Mike Adkins received by Certified Mail a letter dated May 18, 2012 addressed to "To Whom It May Concern" and signed by Dr. Douglas Wadle, M.D., Public Health Officer. The letter stated that due to perceived deficiencies noted in the letter, Dr. Wadle declined to validate this license without further evaluation.

As a follow up to my email to Mary Hendrickson and telephone conversation with you on Monday May 21, 2012, this letter serves as our notice to appeal this denial to the State Board of Environmental Review in accordance with MCA 75-10-223 (2) and ARM 17.50.514 (2). We believe that the Public Health Officer did not fulfill his obligation set forth in MCA 75-10-223 (1), and that the basis for his denial is subjective, superficial and unjustified based on the magnitude of detail submitted, extent of review undertaken by the DEQ Solid Waste Program and the site specific conditions incorporated into the license.

We look forward to you assigning a hearing officer and informing us of our next step. If you wish to talk to us directly, please feel free to contact Mike Adkins on his cell phone at 406-579-4408 or me at 406-333-9040.

Sincerely,  
OCTAGON CONSULTING ENGINEERS, LLC  
  
William E Smith, P.E., CEM  
Consulting Engineer

cc: Mike Adkins, Property Owner  
Dr. Wadle, M.D., County Health Officer  
Barbara Woodbury, R.S., Park County  
Environmental Health Dept.



## Park County Environmental Health

414 E. Callender

Livingston, MT 59047

406 222 4145 Fax 406-222 4109

---

18 May 2012

To Whom It May Concern:

As the Public Health Officer of Park County, MT I have been asked to validate a license for the Adkins Class III Waste Tire Mono-Fill. The application has gone through an Environmental Assessment (EA), a public comment period, and finally approval by the DEQ. Due to the deficiencies noted below, I am unable to validate this license without further evaluation in the form of an Environmental Impact Statement (EIS) or additional mitigating processes to protect the groundwater in the event of a fire.

My Chief concern is that of water quality. The fact that the Yellowstone River and multiple private wells are contained in close proximity raises significant concerns. While tires are rated as a class III waste product, they have quite clearly been shown to release a number of dangerous chemicals and oils in the setting of a fire. A fire should not be considered a remote threat, as a significant proportion of Tire Mono-fills in Montana have had fires. The public comments raised concern regarding this possibility. The DEQ response to the comments appropriately focused on prevention of fire, but did not address the contingency of a fire occurring and its effects on the ground water. This is not in the scope of an EA and would require an EIS to adequately assess these risks. This would address the range of alternatives for this project, whether the project is feasible, and what the environmental and financial mitigation plan would be in the event of a fire.

Also of concern is the risk of mosquito-borne pathogens such as West Nile Disease. The requirement under the DEQ's administrative rules (ARM's) for tires to be covered every 3 months seems substantially inappropriate and should be readdressed by the department. The mosquito's life cycle from egg to flying adult may be completed in the span of 7-10 days, so the coverage of tire carcasses during spring and summer should take that into consideration. The quartering of tires is not helpful in this regard, as the tires can still hold water unless they are shredded. However, I recognize that Mr. Adkins (who has agreed to cover tires every 3 weeks) and the DEQ have followed the appropriate ARM's. For that reason I am not refusing validation based on this point, but do wish to point out these inadequacies for reconsideration by the DEQ.

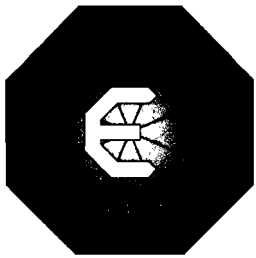
I regret adding another level of complexity to this application, but feel that the license cannot reasonably be approved in its present context. While the DEQ issued a Finding of No Significant Impact (FONSI), they did not address the contingency of the very real threat of a tire fire. It is imperative to preserve our water quality for both the Yellowstone River and the local citizens whose lives are dependent on clean water in this aquifer.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Wadle'.

Douglas P. Wadle, MD  
Public Health Officer  
Park County, MT





**OCTAGON**  
Consulting Engineers, LLC  
BIOENERGY • CIVIL • MECHANICAL

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW

This 24<sup>th</sup> day of May 2012

at \_\_\_\_\_ o'clock \_\_\_\_\_ m.

By: William E. Smith

May 22, 2012

Ms. Joyce Wittenberg  
Office of the Director  
Montana Dept of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Re: Adkins Waste Tire Landfill License No. 517: Appeal of Denial to Validate License  
by Park County Public Health Officer

---

Dear Ms. Wittenberg:

We were informed by letter dated May 4, 2012 from Mary Hendrickson, Solid Waste Program - Licensing that DEQ approved the application for license of the Adkins Class III Waste Tire Monofill and assigned License No. 517. Pursuant to applicable MCA and Administrative Rules, the Department sent the license to Park County Sanitarian for validation by the Public Health Officer. On Monday May 21, 2012, Mike Adkins received by Certified Mail a letter dated May 18, 2012 addressed to "To Whom It May Concern" and signed by Dr. Douglas Wadle, M.D., Public Health Officer. The letter stated that due to perceived deficiencies noted in the letter, Dr. Wadle declined to validate this license without further evaluation.

As a follow up to my email to Mary Hendrickson and telephone conversation with you on Monday May 21, 2012, this letter serves as our notice to appeal this denial to the State Board of Environmental Review in accordance with MCA 75-10-223 (2) and ARM 17.50.514 (2). We believe that the Public Health Officer did not fulfill his obligation set forth in MCA 75-10-223 (1), and that the basis for his denial is subjective, superficial and unjustified based on the magnitude of detail submitted, extent of review undertaken by the DEQ Solid Waste Program and the site specific conditions incorporated into the license.

We look forward to you assigning a hearing officer and informing us of our next step. If you wish to talk to us directly, please feel free to contact Mike Adkins on his cell phone at 406-579-4408 or me at 406-333-9040.

Sincerely,  
OCTAGON CONSULTING ENGINEERS, LLC

William E Smith, P.E., CEM  
Consulting Engineer

cc: Mike Adkins, Property Owner  
Dr. Wadle, M.D., County Health Officer  
Barbara Woodbury, R.S., Park County  
Environmental Health Dept.



Montana Department of  
**ENVIRONMENTAL QUALITY**

**MAILED**  
5-7-12 *fh*

Brian Schweitzer, Governor  
Richard H. Opper, Director

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

May 4, 2012

Mr. Michael Adkins  
P.O. Box 32  
Pray, MT 59065

**RE: LICENSE APPLICATION - ADKINS CLASS III WASTE TIRE MONOFILL - APPROVED**

Dear Mr. Adkins:

The Department of Environmental Quality (Department) has approved the application for licensure of the Adkins Class III Waste Tire Monofill. The 11.7-acre facility is located at 19 Chicory Road in Pray, Park County, Montana. The license must be reviewed and validated by the Park County Health Officer. The health officer will mail the signed license to you under a separate cover.

According to 75-10-222, MCA, the health officer has 15 days to either accept or reject the license. If the health officer decides not to sign the license, based on finding that the requirements of the Montana Solid Waste Management Act cannot be satisfied according to 75-10-223, MCA, they must provide written notification of that decision to you, the Department, and all interested parties. If that occurs, you may appeal the health officer's decision to the Board of Environmental Review within 30 days of receiving such written notice from the health officer.

The pertinent solid waste laws and rules, all information submitted with the application, and commitments made to the Department during the review process, are conditions of your license. Moreover, based upon comments received during the public comment period, the Department determined that additional license conditions are necessary. A copy of the license conditions and a map of the facility license boundary is enclosed.

If you have any questions, please do not hesitate to contact me directly in the Permitting and Compliance Division, Waste and Underground Tank Management Bureau, Solid Waste Section.

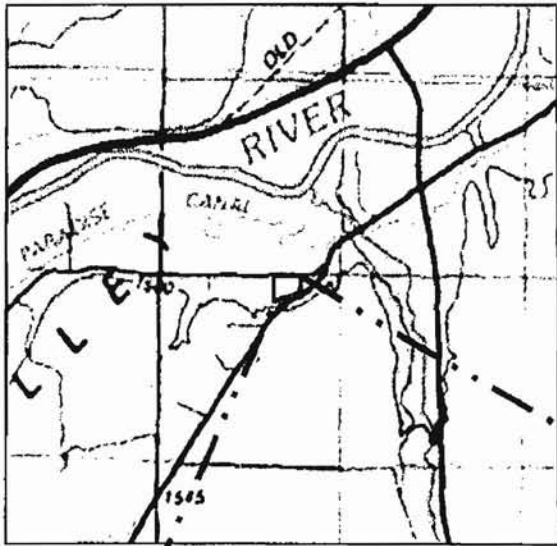
Sincerely,

Mary Louise Hendrickson  
Solid Waste Program - Licensing  
Phone: 406-444-1808; Fax: 406-444-1374  
Email: [mhendrickson@mt.gov](mailto:mhendrickson@mt.gov)

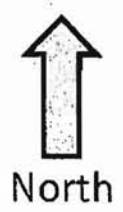
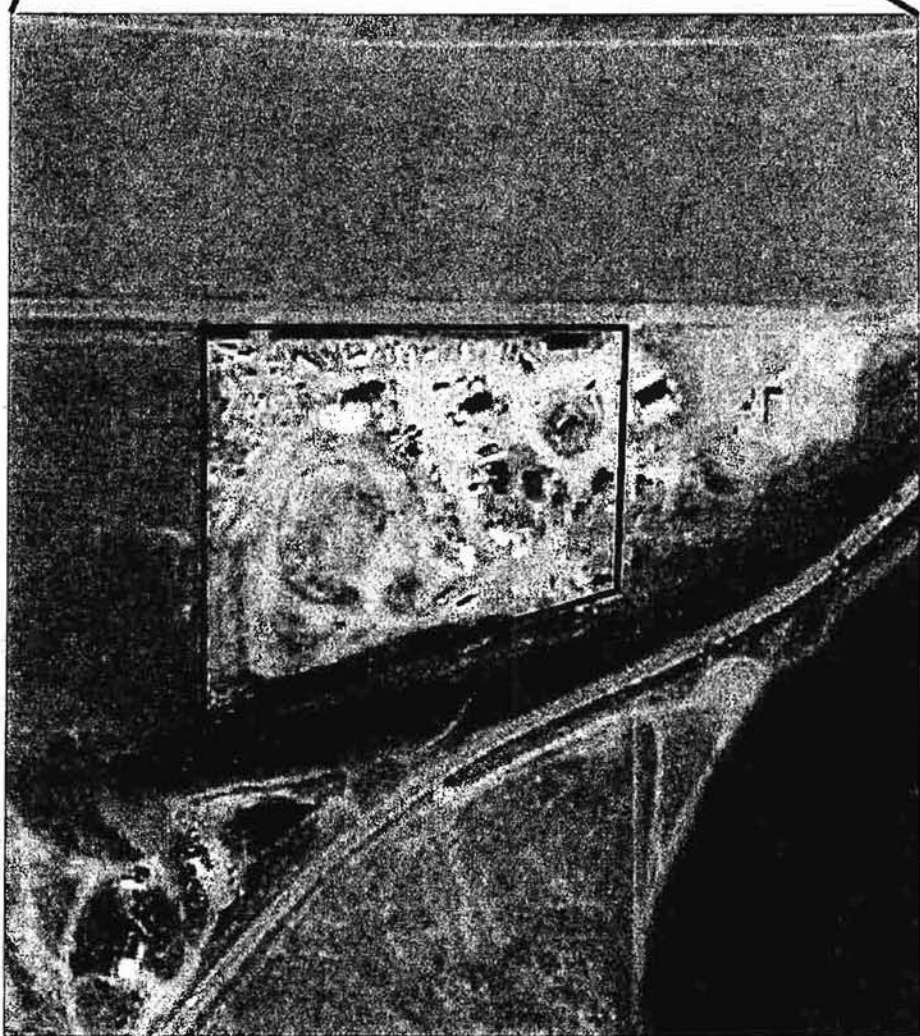
Encl: Map of license boundary and license conditions  
File: Lic. # 517 Park Co/ Class III/Adkins Class III Waste Tire Monofill/Main

Attachment A

SOLID WASTE LICENSE NO. 517  
ADKINS CLASS III WASTE TIRE MONOFILL  
SITE LOCATION AND FACILITY LICENSE BOUNDARY



∩ = License Boundary



## Attachment B

### SOLID WASTE LICENSE NO. 517 ADKINS CLASS III WASTE TIRE MONOFILL SITE SPECIFIC LICENSE CONDITIONS

The Adkins Class III Waste Tire Monofill facility will meet the minimum requirements of the Montana Solid Waste Management Act and the administrative rules regulating solid waste management. Along with the Solid Waste Management System license issued by the Department, and the approved facility Operations and Maintenance Plan, the licensee must adhere to the following license conditions:

1. The facility will install a 10-ft chain link fence and locking gates to protect access points.
2. Gates will be locked when the facility is closed.
3. The facility will install and maintain 'No Trespassing' signs on the perimeter fence.
4. The facility will establish and maintain clear ingress and egress points for emergency vehicles at all times.
5. The facility will maintain an adequate stockpile of fine-medium textured soil to be used in the event of a tire fire.
6. The facility will install a fire suppression system inside all tire processing buildings.
7. The facility will maintain access to fire suppression equipment (fire extinguishers 2A10BC-rated or higher) during pit operations.
8. Any area of uncovered waste tires shall not exceed 9,000 square feet within the active disposal unit.
9. The total volume of whole tires in storage on site at any one time will not exceed 250 cubic yards. Whole tires in storage must be fully covered for fire protection or placed in an enclosed structure by the end of every working day.
10. At least 6-inches of soil cover will be applied to exposed waste tires every 3 weeks.
11. No open-burning or open-flames within 1000 feet of the tire pile.
12. No welding or other heat-generating devices within 200-feet of the pile.
13. Smoking is allowed in designated areas only.
14. Lightning rods conforming to local and/or state codes will be placed on the facility, but away from any waste tire pile.
15. Piles will not be located near or below power lines.
16. No receipt of trucks or other vehicles hauling waste tires to the landfill before 8:30 a.m. or after 3:00 p.m. on Monday through Friday during the school year.
17. No equipment operations at the facility before 8:30 a.m. or after 6:00 p.m.



**Montana Department of  
ENVIRONMENTAL QUALITY**

**Brian Schweitzer, Governor  
Richard H. Opper, Director**

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

May 4, 2012

**CERTIFIED MAIL: 7010 2780 0000 9972 2677**

Dr. Douglas Wadle, M.D.  
**PARK COUNTY HEALTH OFFICER**  
414 East Callender Street  
Livingston, MT 59047

**RE: SOLID WASTE MANAGEMENT SYSTEM LICENSE NO. 517  
ADKINS CLASS III WASTE TIRE MONOFILL**

Dear Dr. Wadle:

The new Solid Waste Management System License No.517 for the Adkins Class III Waste Tire Monofill is enclosed. The approval establishes an 11.7-acre area for waste tires only disposal and the associated solid waste management activities. Please sign the license, mail the signed original with attachments to the licensee, and mail a copy of the signed license to the Department of Environmental Quality. For your convenience, two addressed and stamped envelopes are enclosed.

Your signature is required to validate this license. According to 75-10-222, MCA, you must make your decision to accept or reject this application within fifteen (15) days. If you decide not to sign the license, based on finding that the requirements of the Montana Solid Waste Management Act cannot be satisfied according to 75-10-223, MCA, you must notify, in writing, the applicant, the Department, and all interested parties. The applicant may then appeal your decision to the Board of Environmental Review within thirty (30) days of receiving your written notice.

If you have any questions or need additional information, please contact me directly at the Permitting and Compliance Division, Waste and Underground Tank Management Bureau, Solid Waste Program.

Sincerely,

Mary Louise Hendrickson  
Project Lead  
Solid Waste Licensing Program  
Phone: 406-444-1808; Fax: 406-444-1374  
Email: [mhendrickson@mt.gov](mailto:mhendrickson@mt.gov)

Encl: License, Addressed and stamped envelope  
File: **Lic. #517/Park Co/Adkins Class III Tire Monofill/ Main**

STATE OF MONTANA  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
Permitting and Compliance Division  
Solid Waste Licensing Program

**LICENSE TO OPERATE A SOLID WASTE MANAGEMENT SYSTEM**

LICENSE NUMBER: **517**

DATE: **May 4, 2012**

NAME OF FACILITY: **ADKINS CLASS III WASTE TIRE MONOFILL**  
**19 Chicory Road**  
**Pray, MT 59065**

This license authorizes the licensee to operate a Class III Solid Waste Management System on 11.7-acres in the N ½ of the NE ¼ of Section 18, T5S, R9E, M.P.M, Park County, Montana. The facility is located on private property at 19 Chicory Road in Pray, Montana. (See Attachment A for facility license boundary map)

SIZE BY TONNAGE OR TYPE: **Major (annually accepts more than 1,000 tons)**

SHORT DESCRIPTION OF SYSTEM: A Class III Solid Waste Management System that disposes of only waste tires in an onsite Class III landfill. Waste tires are delivered by public, commercial or private vehicles.

LICENSEE:

**Michael D. and Magdalen M. Adkins**  
**PO Box 32**  
**Pray, MT 59065**

LANDOWNER:

**Michael D. and Magdalen M. Adkins**  
**PO Box 32**  
**Pray, MT 59065**

SITE CLASSIFICATION: **Class III Waste Tire Monofill**

THIS LICENSE IS CONDITIONED ON THE MANAGEMENT OF THE SYSTEM AS APPROVED BY THE DEPARTMENT. THE LICENSEE SHOULD BE AWARE THAT ITS FAILURE TO COMPLY WITH APPLICABLE LAW OR RULE, IN PARTICULAR TITLE 75, CHAPTER 10, PARTS 1 AND 2, MONTANA CODE ANNOTATED, AND ADMINISTRATIVE RULES OF MONTANA TITLE 17, CHAPTER 50, SUB-CHAPTERS 4, 5, AND 10-14, MAY RESULT IN ENFORCEMENT ACTIONS OR LICENSE REVOCATION OR DENIAL OF AN APPLICATION FOR ANNUAL RENEWAL.

CONDITIONS OF LICENSE: **See Attachment A for facility location and license boundary. See Attachment B for facility specific license conditions.**

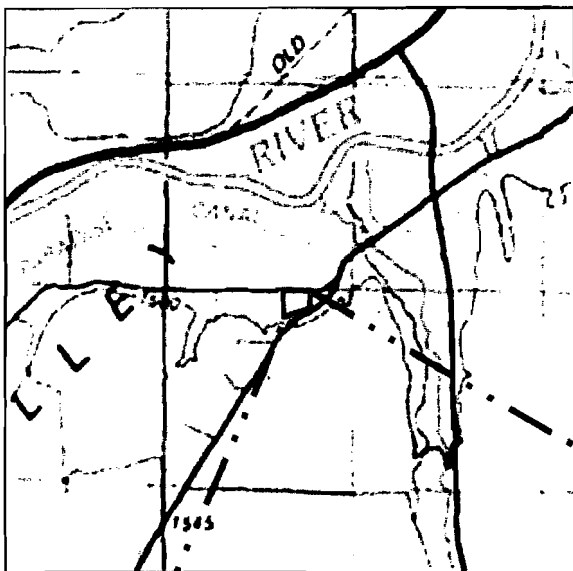
HEALTH OFFICER

*(License must be validated before it is effective.)*

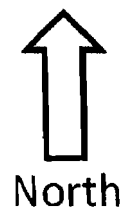
  
EDWARD A. THAMKE, BUREAU CHIEF  
Waste & Underground Tank Management Bureau

# Attachment A

## SOLID WASTE LICENSE NO. 517 ADKINS CLASS III WASTE TIRE MONOFILL SITE LOCATION AND FACILITY LICENSE BOUNDARY



— = License Boundary



## Attachment B

### SOLID WASTE LICENSE NO. 517 ADKINS CLASS III WASTE TIRE MONOFILL SITE SPECIFIC LICENSE CONDITIONS

The Adkins Class III Waste Tire Monofill facility will meet the minimum requirements of the Montana Solid Waste Management Act and the administrative rules regulating solid waste management. Along with the Solid Waste Management System license issued by the Department, and the approved facility Operations and Maintenance Plan, the licensee must adhere to the following license conditions:

1. The facility will install a 10-ft chain link fence and locking gates to protect access points.
2. Gates will be locked when the facility is closed.
3. The facility will install and maintain 'No Trespassing' signs on the perimeter fence.
4. The facility will establish and maintain clear ingress and egress points for emergency vehicles at all times.
5. The facility will maintain an adequate stockpile of fine-medium textured soil to be used in the event of a tire fire.
6. The facility will install a fire suppression system inside all tire processing buildings.
7. The facility will maintain access to fire suppression equipment (fire extinguishers 2A10BC-rated or higher) during pit operations.
8. Any area of uncovered waste tires shall not exceed 9,000 square feet within the active disposal unit.
9. The total volume of whole tires in storage on site at any one time will not exceed 250 cubic yards. Whole tires in storage must be fully covered for fire protection or placed in an enclosed structure by the end of every working day.
10. At least 6-inches of soil cover will be applied to exposed waste tires every 3 weeks.
11. No open-burning or open-flames within 1000 feet of the tire pile.
12. No welding or other heat-generating devices within 200-feet of the pile.
13. Smoking is allowed in designated areas only.
14. Lightning rods conforming to local and/or state codes will be placed on the facility, but away from any waste tire pile.
15. Piles will not be located near or below power lines.
16. No receipt of trucks or other vehicles hauling waste tires to the landfill before 8:30 a.m. or after 3:00 p.m. on Monday through Friday during the school year.
17. No equipment operations at the facility before 8:30 a.m. or after 6:00 p.m.



UNITED STATES POSTAL SERVICE



First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

• Sender: Please print your name, address, and ZIP in this box

DEPT OF ENVIRONMENTAL QUALITY  
SOLID WASTE PROGRAM  
PO BOX 200901  
HELENA MT 59620-0901

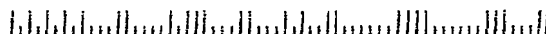
RECEIVED

MAY 08 2012

DEPT. OF ENVIRO QUALITY  
WASTE & UNDERGROUND TANK  
MANAGEMENT BUREAU

*Hendrickson*  
# 517

1901



SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature  <input checked="" type="checkbox"/> <i>M Sykes</i> <input checked="" type="checkbox"/> Agent  <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>M Sykes</i> C. Date of Delivery <i>5/7/12</i></p>
<p>1. Article Addressed to:</p> <p>DOUGLAS WADLE PARK CO HEALTH OFFICER 414 E CALLENDER STREET LIVINGSTON MT 59047</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type  <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail  <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>2. Article Number-  (Transfer from service label) <i>7010 2780 0000 9972 3677</i></p>	

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

---

3 **IN THE MATTER OF:**  
4 **THE REQUEST FOR HEARING BY**  
5 **WILLIAM E. SMITH, ON BEHALF OF**  
6 **MIKE ADKINS, REGARDING PARK**  
7 **COUNTY'S DENIAL TO VALIDATE**  
8 **ADKINS CLASS III WASTE TIRE**  
9 **MONOFILL LICENSE NO. 517.**

**CASE NO. BER 2012-05 SW**

---

10                                   **FIRST PREHEARING ORDER**

---

11                   On May 22, 2012, Mr. William E. Smith P.E., CEM, Consulting Engineer for  
12                   Octagon Consulting Engineers, LLC, on behalf of Mike Adkins (hereafter,  
13                   Appellant), filed a notice of appeal and request for hearing, appealing the refusal by  
14                   the Public Health Officer of Park County Montana to validate the Adkins Class III  
15                   Waste Tire Monofill License No. 517.

16                   The following guidelines and rules are provided to assist the parties in an  
17                   orderly resolution of this matter.

18                   1.       REFERENCES: This matter is governed by the Montana  
19                   Administrative Procedure Act, Contested Cases, Mont. Code Ann. Tit. 2, ch. 4, pt.  
20                   6, and Mont. Admin. R. 17.4.101, by which the Board has adopted the Attorney  
21                   General's Model Rules for contested cases, Mont. Admin. R. 1.3.101, 1.3.102,  
22                   1.3.201 through 1.3.233, and by Mont. Code Ann. Tit. 75, ch. 10, pt. 2.

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

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

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

3 KATHERINE J. ORR  
4 Hearing Examiner  
5 Agency Legal Services Bureau  
6 1712 Ninth Avenue  
7 P.O. Box 201440  
8 Helena, MT 59620-1440

9 Although discovery documents are not normally filed, when a motion or brief  
10 is filed making reference to discovery documents, the party filing the motion or  
11 brief should also attach the relevant discovery documents.

12 3. SERVICE: Copies of all documents filed with the Board and  
13 provided to the Hearing Examiner, including correspondence, must be served upon  
14 the opposing party. A certificate of service should be provided.

15 4. EX PARTE COMMUNICATIONS: The Montana Administrative  
16 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model  
17 Rule 18 in Mont. Admin. R. 1.3.222, prohibit *ex parte* communications with a  
18 hearing examiner concerning any issue of fact or law in a contested case. In  
19 addition to observing this rule, please contact the opposing party before you  
20 communicate with the undersigned, even on purely procedural matters such as the  
21 need for a continuance.

22 5. SCHEDULING: The undersigned requests the parties to consult with  
23 each other and to propose a schedule upon which they agree to the undersigned by  
24 **June 29, 2012**. The schedule should include the following dates:

- 25 (a) for joinder/intervention of additional parties;  
26 (b) for disclosure by each party to the other parties of: (1) the  
27 name and address of each individual likely to have discoverable  
information that the disclosing party may use to support its  
claims or defenses, and (2) a copy of, or a description by

1 category and location of, all documents and tangible things that  
2 are in the possession, custody, or control of the disclosing party  
3 and that the disclosing party may use to support its claims or  
4 defenses;

5 (c) for completion of discovery (if any party wishes to conduct  
6 discovery);


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

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

10 (f) for a prehearing conference to hear argument on any motions  
11 and resolve other prehearing matters; and,

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

13 DATED this 17<sup>th</sup> day of June, 2012.

14 

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing First  
3 Prehearing Order to be mailed to:

4 Ms. Joyce Wittenberg  
5 Secretary, Board of Environmental Review  
6 Department of Environmental Quality  
7 1520 East Sixth Avenue  
8 P.O. Box 200901  
9 Helena, MT 59620-0901  
10 **(original)**

11 Mr. Dana David  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

16 Mr. Ed Thamke, Bureau Chief  
17 Waste & Underground Tank Mgmt Bureau  
18 Department of Environmental Quality  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 Mr. William E. Smith, P.E., CEM  
22 Consulting Engineer  
23 Octagon Consulting Engineers, LLC  
24 P.O. Box 78  
25 Emigrant, MT 59027

26 Mr. Douglas P. Wadle, MD  
27 Public Health Officer,  
Park County Environmental Health  
Park County  
414 E. Callander  
Livingston, MT 59047

28 DATED: June 4, 2012 



Montana Department of

**ENVIRONMENTAL QUALITY**

**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

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

DATE: June 11, 2012

SUBJECT: Board of Environmental Review case, Case No. BER 2012-06 SW

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:

VIOLATIONS OF THE MONTANA SOLID  
WASTE MANAGEMENT ACT BY VALLEY  
COUNTY REFUSE DISTRICT #1 AT THE  
VALLEY COUNTY LANDFILL, GLASGOW,  
VALLEY COUNTY, MONTANA [SOLID  
WASTE LICENSE NO. SW-295; FID  
#2138; DOCKET NO. SW-12-01]

Case No. BER 2012-06 SW

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2138, Docket No. SW-12-01).

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

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

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

Attachments

BER 2012-06 SW

Filed with the

MONTANA BOARD OF

ENVIRONMENTAL REVIEW

This 8<sup>th</sup> day of June 2012

at \_\_\_\_\_ o'clock \_\_\_\_\_ m.

By: Nickolas C. Murnion

NICKOLAS C. MURNION  
Valley County Attorney  
501 Court Square, #20  
Glasgow, MT 59230  
(406)228-6286  
Attorney for State of Montana

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

IN THE MATTER OF:  
VIOLATIONS OF THE MONTANA  
SOLID WASTE MANAGEMENT ACT BY  
VALLEY COUNTY REFUSE DISTRICT  
#1 AT THE VALLEY COUNTY  
LANDFILL, GLASGOW, VALLEY  
COUNTY, MONTANA (SOLID WASTE  
LICENSE NO. SW-295, FID #2138)

Docket No. SW-12-01

REQUEST FOR HEARING

Comes Now Nickolas C. Murnion, Valley County Attorney, on behalf of the Valley County Landfill, and requests a hearing before the Montana Board of Environmental Review concerning the Notice of Violation and Administrative Compliance and Penalty Order issued May 14, 2012 in the above-entitled matter.

RESPECTFULLY SUBMITTED this 6th day of June, 2012.

VALLEY COUNTY ATTORNEY

Nickolas C. Murnion  
NICKOLAS C. MURNION

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of June, 2012, a true and correct copy of the foregoing document was served upon:

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

by placing the same this day in the United States mail at Glasgow, Montana, first-class mail, postage prepaid.

VALLEY COUNTY ATTORNEY

By: Sherry Wright

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



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

3 IN THE MATTER OF:  
4 VIOLATIONS OF THE MONTANA SOLID  
5 WASTE MANAGEMENT ACT BY VALLEY  
6 COUNTY REFUSE DISTRICT #1 AT THE  
7 VALLEY COUNTY LANDFILL, GLASGOW,  
8 VALLEY COUNTY, MONTANA (SOLID  
9 WASTE LICENSE NO. SW-295, FID #2138)

NOTICE OF VIOLATION  
AND  
ADMINISTRATIVE COMPLIANCE  
AND  
PENALTY ORDER

Docket No. SW-12-01

8 **I. NOTICE OF VIOLATION**

9 Pursuant to the authority of Section 75-10-227(1), Montana Code Annotated (MCA), the  
10 Department of Environmental Quality (Department) hereby gives notice to Valley County  
11 Refuse District #1 (Valley County) of the following Findings of Fact and Conclusions of Law  
12 with respect to violations of the Montana Solid Waste Management Act (Act), Title 75, chapter  
13 10, part 2, MCA, and the administrative rules (Administrative Rules of Montana (ARM), Title  
14 17, chapter 50) adopted thereunder.

15 **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

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

19 2. The Department administers the Act.

20 3. The Department is authorized under Section 75-10-227, MCA, to issue this  
21 Notice of Violation and Administrative Compliance and Penalty Order (Order) to Valley County  
22 to address the violations of the Act alleged herein, and to require corrective actions and assess  
23 penalties to resolve the violations.

24 //

1 4. ARM 17.50.1101(1) provides, in part, that “[a]ll applicants, licensees, owners,  
2 and operators of solid waste management systems and facilities shall comply with this  
3 subchapter.

4 5. Valley County is a person as defined in Section 75-10-203, MCA, and ARM  
5 17.50.502(30).

6 6. On January 8, 1988, the Department issued Valley County a license to operate a  
7 Class II solid waste management system at the Valley County Landfill (Landfill) under License  
8 No. 295. Valley County has renewed the license annually as License Nos. 295 and/or 295a  
9 (License).

10 7. Valley County is the “owner” and “operator” of the Landfill within the meaning  
11 of the ARM 17.50.1102(25) and ARM 17.50.1102(24), respectively, and is subject to the  
12 requirements of the Act and the administrative rules adopted thereunder, including without  
13 limitation ARM 17.50.1101(1).

14 **Failure to cover disposed solid waste daily**

15 8. ARM 17.50.1104(1) states that “Except as provide in (2), the owner or operator of  
16 a Class II landfill unit shall cover disposed solid waste with six inches of earthen material at the  
17 end of each operating day, or at more frequent intervals if necessary, to control disease vectors,  
18 fires, odors, blowing litter, and scavenging.” ARM 17.50.1104(2) sets forth the requirements for  
19 the approval and use of alternate daily cover materials.

20 9. Number 5 of Attachment B of the License, states “All waste disposed of in the  
21 Class II disposal unit must be covered on a daily basis with a Department-approved cover  
22 material.

23 //

24 //

1 10. On December 13, 2006; August 9, 2007; November 6, 2007; August 11, 2009;  
2 July 13, 2010; October 4, 2011; and December 6, 2011; the Department inspected the Landfill.  
3 During these inspections, the Department's inspectors observed that Valley County was not  
4 covering disposed solid waste at the Landfill with either soil or an alternate Department-  
5 approved cover material on a daily basis at the end of each operating day.

6 11. The Department notified Valley County in writing after each of the inspections  
7 listed in Paragraph 10 that the failure to cover disposed solid waste at the each operating day is a  
8 violation of the Act and requested Valley County to return to compliance by covering disposed  
9 solid waste on a daily basis.

10 12. The Department's October 21, 2011 letter specifically requested Valley County  
11 to correct its failure to cover disposed solid waste on a daily basis by November 21, 2011 or the  
12 Department would initiate an enforcement action. The Department's December 6, 2011 follow-  
13 up inspection found that Valley County was not covering disposed solid waste on a daily basis.

14 13. Valley County violated ARM 17.50.1104(1) and the conditions of their License at  
15 least seven times by failing to cover disposed solid waste at the Landfill on a daily basis.

16 **Administrative penalty**

17 14. Section 75-10-228(1), MCA, provide, in part, that a person who violates a rule  
18 adopted under this part is subject to an administrative penalty not to exceed \$250. Each day of  
19 violation constitutes a separate violation.

20 15. Only the July 13, 2010, October 4, 2011 and December 6, 2011 violations are  
21 within the two-year statute of limitations. (See Paragraph 10.)

22 //

23 //

24 //

1 16. The Department has calculated an administrative penalty in the amount of \$750.00  
2 for the three violations listed in Paragraph 13. See Section 75-1-1001, MCA, and ARM 17.4.301  
3 through 17.4.308. The attached Penalty Calculation Worksheet is incorporated by reference  
4 herein.

5 **III. ADMINISTRATIVE ORDER**

6 This Order is issued to Valley County pursuant to the authority vested in the State of  
7 Montana, acting by and through the Department under the Montana Solid Waste Management  
8 Act Section 75-10, part 2, *et seq.*, MCA, and ARM Title 17, chapter 50. Based on the foregoing  
9 Findings of Fact and Conclusions of Law and the authority cited above, the Department hereby  
10 ORDERS Valley County to do the following:

11 17. Valley County shall comply with all conditions of its License.

12 18. Valley County is hereby assessed an administrative penalty in the amount of  
13 \$750.00 to resolve the violations listed in Paragraph 13.

14 19. Within 60 days from the date of receipt of this Order, Respondent shall pay to the  
15 Department the \$750.00 administrative penalty that is assessed to resolve the violations cited  
16 herein. The penalty must be paid by check or money order, made payable to the "Montana  
17 Department of Environmental Quality," and shall be sent to:

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

22 20. Failure to comply with the requirements of this Order, as ordered herein,  
23 constitutes a violation of Title 75, chapter 10, part 2, MCA, and may result in the Department

24 //

1 seeking a court order requiring Valley County to comply with this Order and requesting civil  
2 penalties of up to \$1,000 per day of violation pursuant to Section 75-10-228, MCA.

3 21. None of the requirements in this Order are intended to relieve Valley County from  
4 complying with all applicable state, federal, and local statutes, rules, ordinances, orders, and  
5 permit conditions.

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

9 23. This Order becomes effective upon signature of the Director of the Department or  
10 his designee.

#### 11 IV. NOTICE OF APPEAL RIGHTS

12 24. Respondent may appeal this Order under Section 75-10-227, MCA, by filing a  
13 written request for a hearing before the Montana Board of Environmental Review no later than  
14 30 days after service of this Order. Any request for a hearing must be in writing and sent to:

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

19 25. Hearings are conducted as provided in the Montana Administrative Procedure  
20 Act, Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to  
21 court proceedings, with witnesses being sworn and subject to cross-examination. Proceedings  
22 prior to the hearing may include formal discovery procedures, including interrogatories, requests  
23 for production of documents, and depositions. Because Valley County is not an individual,  
24 Valley County must be represented by an attorney in any contested case hearing. *See* ARM  
1.3.231(2) and Section 37-61-201, MCA.



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

Responsible Party Name:	Valley County Refuse District #1 (Valley County) at the Valley County Landfill (Landfill)		
FID:	2138	Lic. #295	
Statute:	Solid Waste Management Act (Act)		
Date:	2/1/2012		
Name of Employee Calculating Penalty:	Judy Watkins		
Maximum Penalty Authority:	\$250.00		

Penalty Calculation #1	
Description of Violation:	Valley violated ARM 17.50.1104(1) by failing to cover solid waste at the end of each operating day.

**I. BASE PENALTY**

**Nature**

Explanation:	
The failure to cover exposed solid waste daily allows disease vectors to have access to garbage and other wastes, permits the wind to blow litter into the environment, and allows scavengers access to waste. Therefore, the nature of this violation is such that it has the potential to cause harm to human health and the environment.	
Potential to Harm Human Health or the Environment	X
Potential to Impact Administration	

**Gravity and Extent**

Gravity Explanation:
ARM 17.4.303(5)(ii) states that a violation has moderate gravity if it poses a potential to harm human health and the environment. The failure to cover disposed solid waste by the end of each operating day creates the potential for human health and the environment to be harmed by allowing disease vectors to have access to garbage and other wastes, by permitting the wind to blow litter into the environment, and by allowing scavengers to have access to the waste. Further, the rule provides that an example of a violation that may have "moderate" gravity is one where there is a failure to construct or operate in accordance with a permit or approval. Valley County's failure to provide daily cover of disposed waste violates one of the conditions under which its license was approved. The gravity of this violation is moderate.
Extent Explanation:
During seven consecutive inspections of the Landfill over a five-year period, the Department documented Valley County's failure to cover disposed solid waste on a daily basis. These failures are a major deviation from the regulatory requirement that disposed solid waste must be covered by the end of each operating day. The extent of this violation is major.

**Harm to Human Health or the Environment**

**Gravity**

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

**Impact to Administration**

**Gravity**

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

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

**\$175.00**

**II. ADJUSTED BASE PENALTY**

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

Explanation:	
Valley County's behavior in this violation exhibits at least moderate culpability. As a licensed landfill operation, Valley County should have been knowledgeable about the regulations that apply to the operation of landfills as well as the conditions of its license and requirements of the incorporated Operation and Maintenance Plan. The Department also notified Valley County in writing of the violation after each of the inspections and informed Valley County what was necessary to correct the violation. Valley County should have foreseen that its continued failure to cover waste at the end of the operating day would result in a violation. Finally, Valley County had complete control over the circumstances of the violation. Therefore, an additional 20% is being added for Circumstances.	
Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$35.00

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

Explanation:	
Valley County did not voluntarily disclose the violation to the Department; therefore, there is no reduction in the Base Penalty.	
Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$0.00

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

Explanation:	
The Department is not aware of any expenditures that Valley County paid to mitigate the violation beyond what is required to return to compliance.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

**ADJUSTED BASE PENALTY SUMMARY**

Base Penalty	\$175.00
Circumstances	\$35.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$210.00</b>

**III. DAYS OF VIOLATION**

Explanation:	
The Department observed this violation during inspection of the landfill on December 13, 2006; August 9, 2006; November 6, 2007; August 11, 2009; July 13, 2010; October 4, 2011; and December 6, 2011. Section 75-10-228, MCA, provides that the Department may assess a penalty for each day of violation. Because the December 13, 2006; August 9, 2006; November 6, 2007; and August 11, 2009 inspections fall outside the two-year statute of limitations, the Department is using only the violations that were observed during the July 13, 2010; October 4, 2011; and December 6, 2011, inspections, a total of three days, to calculate this penalty.	
Number of Days:	3

**ADJUSTED BASE PENALTY x NUMBER OF DAYS: \$630.00**

Other Matters as Justice May Require Explanation:	
Not applicable.	
<b>OTHER MATTERS AS JUSTICE MAY REQUIRE TOTAL:</b>	<b>\$0.00</b>



**IV. ECONOMIC BENEFIT**

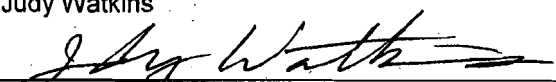
**Explanation:**

Considering labor, equipment, and materials, the Department estimates that it would have cost Valley County at least \$250 to cover its disposed waste at the end of each operating day. Using the \$250 amount, Valley County saved \$750 by not complying with the solid waste regulations and the conditions of its license by not providing daily cover for the three days of violation cited herein. Because the maximum statutory authority for administrative penalties under the Act is \$250 per violation, the Department may assess a total penalty of no more than \$250 for each day of violation or total penalty of no more than \$750 for the three days of violation cited herein. Given that the Department has calculated an adjusted base penalty of \$210 for each day of violation, the Department may not add more than \$40 of economic benefit for each day of violation or a total of \$120 for the three days of violation Valley County was cited for in the administrative order.

**ECONOMIC BENEFIT REALIZED:**

**\$120.00**

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

Responsible Party Name:	Valley County Refuse District #1 (Valley County) at the Valley County Landfill (Landfill)
FID:	2138
Statute:	Solid Waste Management Act (Act)
Date:	5/11/2012
Signature of Employee Calculating Penalty:	Judy Watkins 

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

	<b>Penalty #1</b>
Maximum Penalty Authority:	\$250.00
Percent Harm - Gravity and Extent:	0.70
Percent Impact - Gravity:	0.00
<b>Base Penalty:</b>	<b>\$175.00</b>

**II. Adjusted Base Penalty**

Base Penalty:	\$175.00
Circumstances:	\$35.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$210.00</b>

<b>Totals</b>
\$175.00
\$35.00
\$0.00
\$0.00
<b>\$210.00</b>

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

3

**Adjusted Base Penalty Total** \$630.00

\$630.00

**Other Matters as Justice May Require Total**

\$0.00

\$0.00

**IV. Economic Benefit**

\$120.00

\$120.00

**V. History\***

\$0.00

**TOTAL PENALTY**

**\$750.00**

\*Valley does not have a prior history of violations of the Solid Waste Management Act documented in either an administrative order, judicial order, or judgment within the last three years.



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

3 KATHERINE J. ORR  
4 Hearing Examiner  
5 Agency Legal Services Bureau  
6 1712 Ninth Avenue  
7 P.O. Box 201440  
8 Helena, MT 59620-1440

9 Although discovery documents are not normally filed, when a motion or brief  
10 is filed making reference to discovery documents, the party filing the motion or  
11 brief should also attach the relevant discovery documents.

12 3. SERVICE: Copies of all documents filed with the Board and  
13 provided to the Hearing Examiner, including correspondence, must be served upon  
14 the opposing party. A certificate of service should be provided.

15 4. EX PARTE COMMUNICATIONS: The Montana Administrative  
16 Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model  
17 Rule 18 in Mont. Admin. R. 1.3.222, prohibit *ex parte* communications with a  
18 hearing examiner concerning any issue of fact or law in a contested case. In  
19 addition to observing this rule, please contact the opposing party before you  
20 communicate with the undersigned, even on purely procedural matters such as the  
21 need for a continuance.

22 5. SCHEDULING: The undersigned requests the parties to consult with  
23 each other and to propose a schedule upon which they agree to the undersigned by  
24 July 6, 2012. The schedule should include the following dates:

- 25 (a) for joinder/intervention of additional parties;  
26 (b) for disclosure by each party to the other parties of: (1) the  
27 name and address of each individual likely to have discoverable  
information that the disclosing party may use to support its  
claims or defenses; and, (2) a copy of, or a description by

1 category and location of, all documents and tangible things that  
2 are in the possession, custody, or control of the disclosing party  
3 and that the disclosing party may use to support its claims or  
4 defenses;

5 (c) for completion of discovery (if any party wishes to conduct  
6 discovery);

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

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

10 (f) for a prehearing conference to hear argument on any motions  
11 and resolve other prehearing matters; and,

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

13 DATED this 25<sup>th</sup> day of June, 2012.

14  
15 for Anna M. Scheig  
16 KATHERINE J. ORR  
17 Hearing Examiner  
18 Agency Legal Services Bureau  
19 1712 Ninth Avenue  
20 P.O. Box 201440  
21 Helena, MT 59620-1440  
22  
23  
24  
25  
26  
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing First  
3 Prehearing Order to be mailed to:

4 Joyce Wittenberg  
5 Secretary, Board of Environmental Review  
6 Department of Environmental Quality  
7 1520 East Sixth Avenue  
8 P.O. Box 200901  
9 Helena, MT 59620-0901  
10 **(original)**

11 Dana David  
12 Legal Counsel  
13 Department of Environmental Quality  
14 P.O. Box 200901  
15 Helena, MT 59620-0901

16 John Arrigo  
17 Administrator, Enforcement Division  
18 Department of Environmental Quality  
19 P.O. Box 200901  
20 Helena, MT 59620-0901

21 Nickolas C. Murnion  
22 Valley County Attorney  
23 501 Court Square, #20  
24 Glasgow, MT 59230

25 DATED: June 25, 2012 James W. Scheig  
26  
27



**MEMO**

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

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

DATE: July 11, 2012

SUBJECT: Board of Environmental Review case, Case No. BER 2012-07 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:

VIOLATIONS OF THE OPENCUT MINING  
ACT BY RUSSELL OLSEN AT PAVECO  
PIT, FLATHEAD COUNTY, MONTANA.  
[PERMIT NO. 1520, FID #2124, DOCKET  
NO. OC-12-02]

Case No. BER 2012-07 OC

TITLE

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request (Enforcement Case FID #2124, Docket No. OC-12-02).

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

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

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

Attachments



2828 Helena Flats Road Kalispell, Mt 59901~406-752-0051~Fax 406-752-1194~www.pavecomt.com

BER 2012-07 DC

July 1, 2012

Board Secretary  
Board of Environmental Review  
1520 East Sixth Avenue  
Box 200901  
Helena, MT 59620-0901

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 11<sup>th</sup> day of July 2012  
at \_\_\_\_\_ o'clock \_\_\_\_\_ m.  
By *[Signature]*

Appeal to Section 82-4-441, MCA

We would like to request an appeal hearing for this order.

Thank you,

*[Signature]*  
\_\_\_\_\_  
Russell Olsen



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

3 IN THE MATTER OF:  
4 VIOLATIONS OF THE OPENCUT MINING  
5 ACT BY RUSSELL OLSEN AT PAVECO  
6 PIT, FLATHEAD COUNTY, MONTANA.  
7 (PERMIT NO. 1520, FID 2124)

8 NOTICE OF VIOLATION  
9 AND  
10 ADMINISTRATIVE COMPLIANCE AND  
11 PENALTY ORDER

12 Docket No. OC-12-02

13 **I. NOTICE OF VIOLATION**

14 Pursuant to the authority of Section 82-4-441, Montana Code Annotated (MCA), the  
15 Department of Environmental Quality (Department) hereby gives notice to Russell Olsen  
16 (Respondent) of the following Findings of Fact and Conclusions of Law with respect to  
17 violations of the Opencut Mining Act (the Act), Title 82, chapter 4, part 4, MCA, and the  
18 Administrative Rules of Montana (ARM) adopted thereunder.

19 **II. FINDING OF FACT AND CONCLUSIONS OF LAW**

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

- 21 1. The Department is an agency of the executive branch of government of the State  
22 of Montana, created and existing under the authority of Section 2-15-3501, MCA.
- 23 2. The Department administers the Act.
- 24 3. The Department is authorized under Section 82-4-441, MCA, to issue this Notice  
of Violation and Administrative Compliance and Penalty Order (Order) to Respondent to address  
the alleged violations of the Act, the administrative rules implementing the Act, and provisions  
of the reclamation permit issued under the Act, and to obtain corrective action and assess  
penalties for the alleged violation.
4. ARM 17.24.225(1) provides that "An operator shall comply with the provisions  
of its permit, this subchapter, and the Act."

1           5.       Respondent is a "person" as defined in Section 82-4-403(10), MCA.

2           6.       The Department issued Respondent a permit to operate an opencut mine in  
3 Section 2, Township 29 North, Range 21 West in Flathead County, Montana. Respondent  
4 operates or has operated the Paveco opencut mine under Permit No. 1520 (Permit). Respondent,  
5 therefore, is an "operator" within the meaning of Section 82-4-403(8), MCA, and subject to the  
6 requirements of the Act and the rules adopted thereunder.

7           7.       On or before March 1 of each year, an operator who possesses one or more  
8 permits shall submit to the Department an annual progress report for the previous calendar year  
9 on a form furnished by the Department. *See* Section 82-4-437(1), MCA, and ARM 17.24.214.

10          8.       Section 82-4-437(2), MCA, requires each permitted operation, except for those  
11 that mine, extract or produce bentonite, to submit with the annual progress report a fee of 2.5  
12 cents per cubic yard of material mined (severance fees) during the period covered by the annual  
13 progress report.

14          9.       A review of the Department's opencut mining permit file establishes that  
15 Respondent has not submitted an annual progress report or severance fees for calendar year  
16 2010.

17          10.      On April 29, 2011, the Department sent Respondent a Violation Letter, via  
18 certified mail, for his failure to submit an annual progress report and severance fees for calendar  
19 year 2010. The Department's Violation Letter requested that Respondent submit the delinquent  
20 annual progress report and required severance fees within 30 days of receipt of the letter.  
21 Respondent accepted delivery of the Violation Letter on May 12, 2011.

22          11.      Respondent failed to submit the annual progress report and severance fees for  
23 calendar year 2010 within 30 days of receiving the Department's Violation Letter.

24 //

1 12. Respondent violated ARM 17.24.214 one time by failing to submit an annual  
2 progress report and severance fees, if any were required, for calendar year 2010 by March 1, 2011.

### 3 III. ADMINISTRATIVE ORDER

4 This Order is issued to Respondent pursuant to the authority vested in the State of Montana,  
5 acting by and through the Department under the Act and administrative rules adopted thereunder,  
6 ARM Title 17, chapter 24, sub-chapter 2. Based on the foregoing Findings of Fact and Conclusions  
7 of Law and the authority cited above, the Department hereby ORDERS Respondent to do the  
8 following:

9 13. Within 45 days of service of this Order, Respondent shall:

- 10 a. Submit to the Department the annual progress report for 2010 for the Permit  
11 listed in Paragraph 6 of this Order. The 2010 annual progress report must be  
12 submitted on the *Annual Progress Report* form that is attached to this Order  
13 and that is incorporated herein as Attachment A; and
- 14 b. Pay to the Department in full the severance fees, if any, that are due and  
15 owing for the period covered by the 2010 annual progress report. Severance  
16 fees must be paid by check or money order, made payable to the "Department  
17 of Environmental Quality" and include the Respondent's Permit number and  
18 the notation "Severance Fees."

19 14. The *Annual Progress Report* and severance fees must be sent to the address listed  
20 in Paragraph 16.

21 15. The Department has calculated a penalty of \$480 for Respondent's failure to  
22 submit the annual progress report for 2010.

23 16. No later than 60 days after service of this Order, Respondent shall pay to the  
24 Department the administrative penalty in the amount of \$480 for the violation specified above.

1 The penalty must be paid by check or money order, made payable to the "Montana Department  
2 of Environmental Quality," and sent to:

3                     John L. Arrigo, Administrator  
4                     Enforcement Division  
5                     Department of Environmental Quality  
6                     P.O. Box 200901  
7                     Helena, MT 59620-0901

8             17.     Failure to comply with the requirements of this Order by the specified deadlines, as  
9 ordered herein, may result in the Department seeking a court order assessing civil penalties of not  
10 more than \$5,000 for each day the violation continues pursuant to Section 82-4-441(3), MCA.

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

#### 14   IV. NOTICE OF APPEAL RIGHTS

15             19.     Respondent may appeal this Order under Section 82-4-441, MCA, by filing a  
16 written request for a hearing before the Montana Board of Environmental Review no later than  
17 30 days after service of this Order. Service of this Order is complete three business days after  
18 mailing. Any request for a hearing must be in writing and sent to:

19                     Board Secretary  
20                     Board of Environmental Review  
21                     1520 East Sixth Avenue  
22                     P.O. Box 200901  
23                     Helena, MT 59620-0901

24             20.     Hearings are conducted as provided in the Montana Administrative Procedure Act,  
Title 2, chapter 4, part 6, MCA. Hearings are normally conducted in a manner similar to court  
proceedings, with witnesses being sworn and subject to cross-examination. Proceedings prior to  
the hearing may include formal discovery procedures, including interrogatories, requests for //

1 production of documents, and depositions. Respondent has the right to be represented by an  
2 attorney in any contested case hearing.

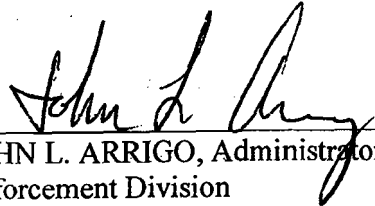
3 21. If a hearing is not requested within 30 days after service of this Order, the  
4 opportunity for a contested case appeal is waived.

5 22. This Order becomes effective upon signature of the Director of the Department or  
6 his designee.

7 IT IS SO ORDERED:

8 DATED this 3<sup>rd</sup> day of January, 2012.

9 STATE OF MONTANA  
10 DEPARTMENT OF ENVIRONMENTAL QUALITY

11   
12 \_\_\_\_\_  
13 JOHN L. ARRIGO, Administrator  
14 Enforcement Division

# ATTACHMENT A

DEQ OPENCUT MINING PROGRAM PO BOX 200901 -- HELENA MT 59620-0901 -- PHONE: 406-444-4970 -- FAX: 406-444-4988 -- Email: DEQOpencut@mt.gov

## ANNUAL PROGRESS REPORT AND FEE CALCULATION

**INSTRUCTIONS:**

1. Verify the address shown below.
2. Indicate the current phone number and email address for the operator.
3. For each permit and short form site listed below, print or type the information requested for the 2010 calendar year.
4. Complete the fee calculation and certification sections at the end of the report.
5. This form is not available online once submitted, therefore operators should retain a copy of the completed form for their records.

**NOTE:** In accordance with the Opencut Mining Act (MCA 82-4-437) each operator must submit this annual report and fee payment to the Opencut Mining Program by March 1, 2011

**OLSEN RUSSELL**

Phone : \_\_\_\_\_

2828 HELENA FLATS ROAD  
KALISPELL, MT. 59901

Email : \_\_\_\_\_

Permit Number	Site Name	County	Year Site Was Last Mined:	Number of Cubic Yards Mined in 2010
1520	PAVECO	FLATHEAD		
<b>ANNUAL FEE CALCULATION</b>			<b>Total Cubic Yards Mined :</b>	
NOTE: If no material was mined during 2010, the fee due is \$0.				<b>x \$0.025</b>
			<b>Total Annual Fee Due :</b>	<b>\$</b>

\*\* Indicates Short Form Mine Site

**SIGN AND DATE BELOW AND ATTACH PAYMENT OF TOTAL ANNUAL FEES DUE.**

**I CERTIFY THIS REPORT AND FEE CALCULATION ARE COMPLETE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.**

Name: \_\_\_\_\_

Title : \_\_\_\_\_

Operator Name: OLSEN RUSSELL

Date : \_\_\_\_\_

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

Responsible Party Name:	Russell Olsen (Respondent)	
FID:	2124	Permit No. 1520
Statute:	Opencut Mining Act (Act)	
Date:	12/22/2011	
Name of Employee Calculating Penalty:	Daniel R. Kenney	
Maximum Penalty Authority:	\$1,000.00	

Violation #1
Description of Violation: Respondent violated Section 82-4-437, MCA, ARM 17.24.214(1) and ARM 17.24.225(1) by not submitting an annual progress report and severance fees, if any, for calendar year 2010 to the Department on or before March 1 of the following year (2011).

**I. BASE PENALTY**

**Nature**

Explanation: The Department relies on operators to self-report on the progress of their mining operations. The Department uses the information to determine whether the operator is in compliance with its reclamation permit. The annual report also provides the Department with a method to update ownership and contact information. The failure to submit an annual progress report impacts administration of the Act because it impairs the Department's ability to identify and promptly deal with violations.	
Potential to Harm Human Health or the Environment	
Potential to Impact Administration	X

**Gravity and Extent**

Gravity Explanation: ARM 17.4.303(5)(b)(ii) provides that the gravity for the violation, "a failure to monitor, report, or make records," is moderate.
Extent Explanation: Not applicable.

**Harm to Human Health or the Environment**

	Gravity			
Extent	Major	Moderate	Minor	
Major	0.85	0.70	0.55	
Moderate	0.70	0.55	0.40	
Minor	0.55	0.40	0.25	Gravity and Extent Factor: 0.00

**Impact to Administration**

	Gravity			
Major	Moderate	Minor		
.50	.40	.30	Gravity Factor:	0.40

**BASE PENALTY (Maximum Penalty Authority x Gravity Factor):** **\$400.00**

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

Explanation:	
Respondent had control over the circumstances surrounding the violation and did not file the annual progress report when it was due. In addition, Respondent has a reclamation permit issued by the Department and should be knowledgeable of the open-cut regulations. Furthermore, Respondent failed to submit the report after the Department notified Respondent in writing of the violation and what he needed to do to return to compliance. Therefore, the Department is adding 20% to the base penalty to reflect a moderate degree of culpability.	
Circumstances Percent:	0.20
Circumstances Adjustment (Base Penalty x Circumstances Percent)	\$80.00

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

Explanation:	
The Department is not aware of any actions completed to correct the violation.	
Good Faith & Coop. Percent:	0.00
Good Faith & Coop Adjustment (Base Penalty x G F & Coop. Percent)	\$0.00

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

Explanation:	
The Department is not aware of any amounts voluntarily expended to complete the annual report. Therefore, no decrease to the Base Penalty is calculated for Amounts Voluntarily Expended.	
AVE Percent:	0.00
Amounts Voluntarily Expended Adjustment (Base Penalty x AVE Percent)	\$0.00

**ADJUSTED BASE PENALTY SUMMARY**

Base Penalty	\$400.00
Circumstances	\$80.00
Good Faith & Cooperation	\$0.00
Amt. Voluntarily Expended	\$0.00
<b>ADJUSTED BASE PENALTY</b>	<b>\$480.00</b>

**III. DAYS OF VIOLATION**

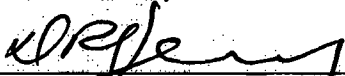
Explanation:	
Respondent violated Section 82-4-437, MCA, ARM 17.24.225 and ARM 17.24.214(1) one time by failing to submit the annual progress report for calendar year 2010 and severance fees, if any, by March 1, 2011. Therefore, the Department is calculating one day of violation.	
Number of Days:	1
<b>ADJUSTED BASE PENALTY x NUMBER OF DAYS:</b>	<b>\$480.00</b>

**IV. ECONOMIC BENEFIT**

Explanation:	
The Department has determined that Respondent did not gain a significant economic benefit by delaying submittal of the annual progress report and that the failure to pay the associated 2.5 cent fee is a delayed cost and would not create a significant economic benefit. The Department estimates it would take less than two hours to complete and mail the annual progress report to the Department. The savings Respondent gained by delaying compliance is not significant.	
<b>ECONOMIC BENEFIT REALIZED:</b>	<b>\$0.00</b>



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

Responsible Party Name:	Russell Olsen (Respondent)	
FID:	2124	Permit No. 1520
Statute:	Opencut Mining Act (Act)	
Date:	1/3/12	
Signature of Employee Calculating Penalty:	Daniel R. Kenney 	

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

	<b>Violation #1</b>
Maximum Penalty Authority:	\$1,000.00
Percent Harm - Gravity and Extent:	0.00
Percent Impact - Gravity:	0.40
<b>Base Penalty:</b>	<b>\$400.00</b>

**II. Adjusted Base Penalty**

Base Penalty:	\$400.00
Circumstances:	\$80.00
Good Faith and Cooperation:	\$0.00
Amount Voluntarily Expended:	\$0.00
<b>Adjusted Base Penalty:</b>	<b>\$480.00</b>

<b>Totals</b>
\$400.00
\$80.00
\$0.00
\$0.00
<b>\$480.00</b>

**Days of Violation or  
Number of Occurrences** 1

**III. Total Adjusted Penalty** \$480.00

**IV. Economic Benefit** \$0.00

**V. History\***

**TOTAL PENALTY**

\$480.00

\$0.00

\$0.00

**\$480.00**

\*Respondent does not have a prior history of violations of the Opencut Mining Act documented in an administrative order, judicial order, or judgment within the last three years.