

**Chapter: Executive Policies and Procedures****Effective Date February 9, 2018**

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**Submitting Information to the Montana Board of Environmental Review**

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**PURPOSE:** The purpose of this policy is to give the public, interested persons, and parties to contested cases guidance on how to submit documents or other information to the Montana Board of Environmental Review (BER). This policy will govern any materials submitted to the BER for the purpose of review or consideration and filings in contested cases, unless governed by other, specific rules, or by case-specific orders.

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This policy is intended to apply to all documents or other materials submitted for BER consideration regarding any agenda action item for a scheduled meeting of the BER. This policy does not apply to any form of communication, correspondence, or comments made to the BER or to one of its appointed hearing examiners under specific rules or statutes. For example, comments on proposed rulemaking or other form of noticed BER action can be made as directed by the BER in its public notice announcement. In general, any item relating to a BER agenda action item that is not submitted to the BER in accordance with this policy may be refused or may not be considered by the BER, at the discretion of the chair in consultation with the Board attorney.

Any questions about submitting material to the BER which are not addressed by this policy should be directed to the Board Secretary at the contact information below.

With regard to action items as well contested cases, the BER encourages electronic submission because it assists in a more-timely dissemination of information to the public and BER members, and is environmentally conscious.

The Board Secretary can be contacted as follows:  
Ms. Sandy Moisey Scherer  
DEQ Director's Office Support Coordinator/Board Secretary  
Email: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)  
Phone: (406) 444-5225  
Mailing: 1520 East 6th Avenue, Helena, MT 59601

**A. Submissions to the BER for agenda action items, other than Contested Cases:**

1. All materials regarding an agenda action item for consideration by BER members must be submitted no later than two weeks (14 calendar days) before the scheduled meeting. All submissions must be made by sending the materials to the Board Secretary; materials should not be sent directly to any BER members.

2. Members of the general public and regulated entities are encouraged to submit all material to the BER electronically as set out in ¶¶ A.3-4 below.

3. Materials should be submitted utilizing the following computer software formats:

- Microsoft Word, 6.0 or later
- Microsoft Excel, 6.0 or later
- Microsoft Power Point, 6.0 or later
- Adobe Acrobat PDF (searchable)
- JPEG, MP4, or ZLC

4. Materials should be submitted to the BER via the Board Secretary at the e-mail address listed above. Return receipts are encouraged, but not required. It is the responsibility of those making the submission to ensure receipt by the Board Secretary. If materials are too large to attach to an email, the State of Montana's EPass File Share system, also called the file transfer system (FTS), should be used. Prior to submitting large attachments via FTS, please call or email the Board Secretary to arrange for the transfer of materials or for directions/questions on using the FTS.

5. The Department of Environmental Quality, and any employee thereof, must make all submissions to the BER electronically as described above, unless electronic submission is impossible or impractical. Materials that have been submitted to DEQ employees by the public and that are not in electronic format, should be scanned and submitted to the BER as searchable PDF files.

6. If electronic submission is impossible or impractical, a hard copy may be mailed or delivered to the Board Secretary at the address listed above.

7. Submissions should not be made directly to any BER members. The Board Secretary will ensure that information submitted to the BER is distributed to the appropriate BER members, personnel, and posted to the BER website in a timely manner. The Board Secretary will post copies of documents submitted to the BER on the BER's website, <http://deq.mt.gov/DEQAdmin/ber>, one week (7 calendar days) prior to each regularly scheduled meeting and at least 48 hours before any special meeting.

**B. Submissions to the BER or Hearing Examiner in Contested Cases:**

1. Hearings and all prehearing matters will be conducted pursuant to the Montana Administrative Procedures Act (MAPA), Title 2, Chapter 4, Part 6, MCA, the Montana Rules of Civil Procedure (Mont. R. Civ. P.), Montana Rules of Evidence (Mont. R. Evid.), and the Administrative Rules of Montana (ARMS), including but not limited to ARM 17.4.101, adopting the Attorney General's model rules.

2. The procedural status of contested cases will be discussed at subsequent BER meetings until a final agency decision is rendered and any appeal is complete. The schedule and agenda for BER meetings are available online at <http://deq.mt.gov/DEQAdmin/ber>, and all meetings are open to the public, either remotely or in person. Parties in contested cases are encouraged, although not required, to check the website regularly for updates and attend any BER meeting where their case is included on the agenda.

3. Parties are responsible for notifying the BER or hearing examiner and the hearing assistant, of any change in contact information by making a formal filing, served on all parties.

4. **FILING.** After a contested case is initiated, if the BER assigns a hearing examiner, all filings in that case should be made to the hearing examiner and hearing assistant rather than to the BER directly, unless specifically directed otherwise. If the BER retains jurisdiction in a case or if the BER has not yet assigned the case (because, for example, the case is new and has not yet appeared on a BER meeting agenda), then all filings should be made to the BER, unless instructed otherwise. Parties may file by electronic or traditional (hard copy) means as set out below. Electronic filing is the preferred method of filing; hard copies will not be required if parties use electronic filing. Whatever method is used, all proposed orders or proposed findings of fact and conclusions of law must also be submitted in Microsoft Word format (in addition to .pdf format) so that the document can be edited by the BER or hearing examiner. Although discovery documents should not be routinely filed, when a motion or brief is filed making reference to discovery documents, the party filing the motion or brief should also attach the relevant discovery documents.

a. **Electronic Filing.** If a party chooses to use electronic filing, in addition to parties on the service list, e-mail filings must be sent to:

1. If the BER retains jurisdiction or a hearing examiner has not been assigned, please send to Sandy Moisey Scherer, Board Secretary: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov) and for the File Transfer Service: [DEQBERSecretaryFTS@mt.gov](mailto:DEQBERSecretaryFTS@mt.gov).
2. The Hearing Examiner, using contact information set forth in the Prehearing Order.

Electronic filings will be accepted until midnight of the filing deadline unless the hearing examiner orders otherwise; the document will be deemed "filed" based on the date and time received by the board secretary. All briefs and motions filed

electronically must be in PDF format, in a manner that is searchable by electronic means. A party may sign electronically filed documents using the /s/ method, rather than a hand signature; e.g., “/s/ Jane E. Attorney.”

b. *Traditional (Hard Copy) Filing.* If a party chooses to file traditionally, original documents must be sent or hand delivered for filing to the following address:

- i. If the BER retains jurisdiction or a hearing examiner has not been assigned:
  1. Sandy Moisey Scherer  
Board Secretary  
Board of Environmental Review  
1520 East 6<sup>th</sup> Avenue  
Helena, MT 59601
- ii. If a hearing examiner has been assigned:
  1. To the Hearing Examiner’s address as provided in the Preliminary Prehearing Order.

Any hard copy filing that contains more than 100 pages of exhibits must be accompanied by an electronic copy of the exhibits which complies with the requirements of ¶ B.6.

5. JURISDICTION. If the BER has assigned a hearing examiner to issue a proposed decision, the hearing examiner will retain jurisdiction of the case for procedural purposes until a final decision is rendered by the BER, such that any filing made between the time that the hearing examiner issues the proposed decision and the final decision is issued by the BER should be directed to the hearing examiner, unless the BER specifically orders otherwise.

6. EXHIBITS. DEQ will use letters to mark its exhibits and Appellant will use numbers. Any exhibit provided in an electronic format—whether filed electronically or submitted on removal media pursuant to ¶ B.4.b above—must be its own individual file with the name of the exhibit and a brief description, in the following format: “Exhibit A – Affidavit of John Doe.” A single file containing multiple exhibits will be rejected and returned for reformatting. Any electronic exhibit too large to send via email must be provided in PDF form on removable media (thumb drive, CD-ROM, etc.); parties are also free to use the State’s FTS.

7. INTERVENTION. Parties or individuals wishing to move for intervention in any contested case, may file for intervention in accordance with Rule 24, Mont. R. Civ. P. Parties are encouraged to file such a request using the Filing procedures outlined above at ¶ B.4.

8. FORM OF FILINGS: All filings should be in Times New Roman font, size 14, and double-spaced. A motion and supporting brief should be submitted as separate documents. **Briefs in support of a motion and response briefs are limited to 6,500 words. Reply briefs are limited to 3,250 words.** Word limitations are computed to

exclude the caption, signature lines, tables, appendices or certificates of compliance and service. Any motion to file an over-length brief must be presented reasonably in advance of the briefing at issue. Any motion for over-length brief filed contemporaneously with an over-length brief will be denied. All briefs should cite to legal authority using a citation method that reasonably enables the reader to find the material, including pinpoint references; the hearing examiner follows the uniform system of citation in the most current edition of the ALWD Citation Manual. Tables of contents and tables of authority are not required but are highly recommended. Any motion or brief with more than three exhibits or affidavits attached should be accompanied by a table of exhibits.

9. **SUMMARY JUDGMENT:** Any party filing a motion for summary judgment must simultaneously file a separate Statement of Undisputed Facts. Any party opposing a motion for summary judgment must file a separate Statement of Disputed Facts simultaneously with (but separate from) their response brief.

a. The Statement of Undisputed Facts must set forth in serial form each fact on which the party relies to support the motion, along with a pinpoint cite to the specific evidence supporting each fact; failure to provide a pinpoint cite for an “undisputed” fact will result in the fact being treated as “disputed.” The moving party must e-mail a word processing version of the Statement of Undisputed Facts to each party against whom summary judgment is sought.

b. The opposing party’s Statement of Disputed Facts must set forth whether each fact in the moving party’s Statement is “undisputed” or “disputed.” Any “disputed” fact must be accompanied by a pinpoint citation to the specific piece of evidence to oppose the fact. Failure to provide a pinpoint cite for a “disputed” fact will result in the fact being treated as “undisputed.”

i. Any party opposing a motion for summary judgment may also add to its Statement of Disputed Facts additional facts to oppose summary judgment. Any additional fact must be set forth in serial form, along with a pinpoint cite to the specific evidence to support the fact. The moving party may respond to any such additional facts in its reply brief.

c. In lieu of the foregoing, the parties can agree to file a Joint Statement of Stipulated Facts.

**Failure to file a Statement of Undisputed Facts will be deemed an admission material facts are in dispute. Conversely, failure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute.**

10. **SERVICE:** All parties are assumed to consent to service by electronic mail; if a party does not consent, it must so-state expressly in its Notice of Appearance. In its Notice of Appearance, each party must indicate its preferred electronic service address, as well as an address for physical service in the event e-service cannot be used. Parties may submit the name, physical address and electronic address of one additional individual (*e.g.*, paralegal or agency representative) to appear on the service list. If a party requires more than one additional representative on the service list, that party may make such a request in the form of a motion supported by good cause.

Copies of all documents filed must be served upon the opposing party, preferably electronically. Each filed document must include, or be accompanied by, a certificate of service.

11. EX PARTE COMMUNICATIONS: The Montana Administrative Procedure Act (MAPA) in Mont. Code Ann. § 2-4-613, and the Attorney General's Model Rule 18 in Mont. Admin. R. 1.3.222, prohibit ex parte communications with a hearing examiner or the BER concerning any issue of fact or law in a contested case. Communication concerning any contested case with the hearing examiner or BER outside of the record is prohibited. This includes email, telephone, or in person communication. As with any other court proceeding, communication with the BER or the hearing examiner concerning this case will be conducted on the record, in the form of filings. The only exception will be for communication between the parties and the hearing assistant or Board Secretary for the purpose of scheduling, e.g. setting a date for a conference of the parties. In addition to observing this rule, parties should contact any opposing party before communicating with the assigned hearing examiner or the BER, even on purely procedural matters such as the need for a continuance.

*Approved:*

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Chair,  
Montana Board of Environmental Review

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Date