

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

|  |   |                             |
|--|---|-----------------------------|
| In the matter of the adoption of NEW   | ) | NOTICE OF PUBLIC HEARING ON |
| RULE I and NEW RULE II and the         | ) | PROPOSED ADOPTION AND       |
| amendment of ARM 17.36.101,            | ) | AMENDMENT                   |
| 17.36.112, 17.36.123, 17.36.310,       | ) |                             |
| 17.36.321, 17.36.323, 17.36.605,       | ) | (SUBDIVISIONS)              |
| 17.36.610, 17.36.802, 17.36.914,       | ) |                             |
| 17.36.918, 17.38.101, and              | ) |                             |
| 17.38.102, pertaining to the review of | ) |                             |
| sanitation facilities in subdivisions  | ) |                             |
| such as water wells, onsite sewage     | ) |                             |
| disposal systems, and stormwater       | ) |                             |
| amenities. In addition, the proposed   | ) |                             |
| amendment to Circular DEQ-4 and        | ) |                             |
| Circular DEQ-20                        | ) |                             |

TO: All Concerned Persons

1. On September 18, 2023, at 10:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf building, in Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

Members of the public may participate either in-person or virtually. For in-person meetings. Registration with Zoom may be made at the following link: Join Zoom Meeting

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Please contact Loryn Johnson, paralegal, at the Department of Environmental Quality at (406) 444-1388 or Loryn.Johnson2@mt.gov should you encounter any difficulties.

2. The Department of Environmental Quality will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Environmental Quality no later than 5:00 p.m. on September 11, 2023, to advise us of the nature of the accommodation that you need. Please contact the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail DEQSubDivRuleUpdate@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I CERTIFICATION OF INDEPENDENT REVIEWERS AS THE REVIEWING AUTHORITY (1) An engineer or sanitarian may be certified as an independent reviewer to review files under 76-4-104(4), MCA, subject to the requirements in this rule.

(2) An engineer or sanitarian must complete the following before becoming certified as an independent reviewer to perform subdivision reviews:

(a) complete a training program developed by the department; and

(b) pass, with a score of at least 90 percent, a written examination

administered by the department that demonstrates knowledge of:

(i) Title 76, chapter 4, MCA;

(ii) this chapter;

(iii) applicable department circulars;

(iv) Title 75, chapter 5, MCA;

(v) ARM Title 17, chapter 30, subchapters 5 and 7; and

(vi) other applicable laws and regulations.

(3) An independent reviewer is subject to the limitations and requirements set forth in 76-4-104(12) through (15), MCA.

(4) To maintain certification, an independent reviewer must have completed at least one subdivision review in the preceding two years. Independent reviewers who have not completed at least one subdivision review in the preceding two years shall satisfy the requirements in (2)(b) prior to performing subdivision review.

(5) The department may suspend or revoke the certification of an independent reviewer if the department determines that the independent reviewer has not complied with the Sanitation in Subdivisions Act or other applicable statutes or rules.

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

REASON: HB 364 from the 2023 legislative session required the department to assign certified independent reviewers to review subdivision applications if the department receives 110 or more new applications in a month. The requirement in proposed (2) fulfills the department's statutory obligation to develop procedures for certification of independent reviewers and to develop a training curriculum. The requirements to become certified in proposed (2)(b) are identical to those required by local boards of health in order to review subdivision files. Making the certification criteria match will ensure that existing training and exams can be used to certify independent reviewers. In addition, the existing criteria for local boards of health have a demonstrated track record for determining whether a reviewer is competent. Proposed (3) will ensure there are no conflicts between statute and rules. Proposed (4) is the same requirement as that for local health authorities and ensures that independent reviews are up to date on new procedures and rules. Proposed (5) is necessary to ensure that independent reviewers comply with the Sanitation in Subdivisions Act and other applicable requirements.

NEW RULE II SUBDIVISIONS EXEMPT FROM MEPA REVIEW (1) A department action under this subchapter is exempt from conducting an environmental review under Title 75, chapter 1, parts 1 and 2, MCA, if the subdivision meets the criteria in [SB 240].

(2) To qualify for this exemption, the applicant must submit a detailed explanation and supporting documentation and maps that demonstrate compliance with the criteria in [SB 240].

AUTH: [SB 240]  
IMP: [SB 240]

REASON: This proposed new rule implements SB 240 from the 2023 legislative session, which set criteria for when subdivision applications are exempt from MEPA review. Proposed (1) ensures there are no conflicts between rule and statute. Proposed (2) identifies the information the applicant needs to submit in order to verify the subdivision application is eligible for the MEPA exemption. Department mapping shows properties eligible for the MEPA exclusion are located in Glacier County (one location), Liberty County (one location), Hill County (one location), Blaine County (two locations), and Valley County (one location). The map can be viewed at <https://deq.mt.gov/files/Water/WQInfo/Documents/Subdivisions/MEPA-Exclusion-Area-Map.jpg>.

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

17.36.101 DEFINITIONS (1) through (65) remain the same.

(66) "Well isolation zone" means the area within a 100-foot radius of a water well unless a smaller, site-specific radius is approved by the department under Circular DEQ-20, Standard 1.8.

(67) remains the same.

AUTH: 76-4-104, MCA

IMP: 76-4-104, MCA

REASON: SB 327 modified the definition of "well isolation zone" in 76-4-102, MCA, to allow the department to approve a source-specific well isolation zone that is smaller than 100 feet. The proposed amendment to (66) is necessary to ensure that the regulatory definition reflects the statutory change and to direct applicants to the appropriate review criteria.

17.36.112 REVIEW OF PREVIOUSLY APPROVED FACILITIES: PROCEDURES (1) remains the same.

(2) A facility previously approved by a local reviewing authority but not under Title 76, chapter 4, MCA, is not subject to review if the applicant submits evidence that the facility:

(a) meets the criteria in (1);

(b) complies with all required setbacks in ARM 17.36.323; and

(c) if the lot was created after the effective dates for mixing zones and well isolation zones, complies with all required setbacks in ARM 17.36.122.

(2) through (6) remain the same but are renumbered (3) through (7).

AUTH: 76-4-104, MCA

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

REASON: SB 285 from the 2023 legislative session required the department to provide a basis for exempting from review facilities previously approved by a local reviewing authority if certain enumerated criteria were met. Proposed (2) establishes the statutorily prescribed procedure in rule. Proposed (2)(a) requires compliance with the criteria in (1)(a) through (c) because those are the same criteria mandated by SB 285. The bill also required compliance with setback rules, and (2)(b) and (c) are necessary to provide cross-references to the relevant setback requirements.

17.36.123 CONNECTION TO PUBLIC WATER SUPPLY AND WASTEWATER SYSTEMS (1) through (3) remain the same.

(4) Subject to the criteria in (2) and (3), a municipal or county water and/or sewer district must accept a connection request from a proposed subdivision and make public wastewater service available if requested by an applicant if:

(a) any boundary of the subdivision is within 1000 feet of any component of a public municipal or county sewer district wastewater system; and

(b) any boundary of the subdivision borders surface water or where surface water is present or the subdivision is unable to pass the nonsignificance criteria in 75-5-301, MCA, for surface water impacts.

(5) In addition to new water and sewer facilities in (1), this rule applies to rewrites of certificates of subdivision approval that include an increase in water or wastewater flows or load and to reviews of lots that were created under ARM 17.36.605(2)(a).

AUTH: 76-4-104, MCA

IMP: 76-4-104, MCA

REASON: SB 215 of the 2023 legislative session required the department to adopt rules requiring connection to an existing municipal or county sewer district main if any boundary of the subdivision is less than 1000 feet of the municipal or county sewer district mains, if the boundary of the subdivision is adjacent to surface waters, or if the subdivision fails the nonsignificance analysis in Title 75, chapter 5, MCA, and the parent system has adequate capacity and water rights to meet the needs of the subdivision. Proposed (5) clarifies that this rule also applies to rewrites to existing certificates of subdivision approval that increase water demand or wastewater volume or load and to lots created with the ARM 17.36.605(2)(a) exclusion. Increasing water demand or wastewater volume or load, such as by the addition of a second dwelling unit or expansion of the capacity of a commercial unit, will have similar impacts as new sewage disposal facilities and should be subject to this rule. Likewise, development of lots that were initially created under the no-facilities exclusion under ARM 17.36.605(2)(a) will have similar impacts and should be subject to this rule.

17.36.310 STORM DRAINAGE (1) through (5) remain the same.

~~(6) The reviewing authority shall exempt the~~ The requirements of (1), (2), (3), and (4) are not required for either of under the following circumstances:

(a) subdivisions located entirely within a first-class or second-class municipality, as described in 7-1-4111, MCA, or within a Municipal Separate Storm Sewer System (MS4) general permit area, as defined in ARM 17.30.1102, if:

(i) remains the same.

(ii) the municipal or MS4 entity either accepts the stormwater into a municipal storm water system or requires the applicant to comply with municipal or MS4 storm water drainage design standards;

(b) lots 5 acres or larger in size if the applicant provides information demonstrating that the total impervious area on the lot will be less than 5% of the lot area, including easements and right-of-ways; or

(c) lots that are exempt from review under 76-3-207(1)(a), (d), (e), or (f), MCA, if the parcels are used for one living unit and no more than 25% of each qualifying parcel is impervious. To qualify for this exemption, the applicant must provide an estimate of each parcel's total impervious area and verification of the intended use. A change in the percentage of impervious area beyond 25% or changing from more than one living unit will require review.

(7) through (10) remain the same.

AUTH: 76-4-104, MCA

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

REASON: The proposed amendments to the first sentence of (6) consist of housekeeping changes to improve readability. The proposed amendment to (6)(c) implements the requirements of SB 285 from the 2023 legislative session, which directed the department to establish a new storm water exception pursuant to specific enumerated criteria. Because the statutory exemption is available only if the lot is used for single-family residential purposes and if the lot includes no more than 25% impervious area, it is necessary to require the applicant to provide information demonstrating the number of living units and the amount of impervious area. Likewise, it is necessary to provide clarity that the exemption is no longer valid if those criteria are no longer met in the future.

17.36.321 SEWAGE SYSTEMS: ALLOWABLE NEW AND REPLACEMENT SYSTEMS (1) and (2) remain the same.

(3) The following sewage systems may not be used for new systems, but may be used as replacement systems subject to the limitations provided in Department Circular DEQ-4:

- (a) ~~cut systems;~~
- (b) ~~fill systems;~~
- (c) through (g) remain the same but are renumbered (a) through (e).
- (4) and (5) remain the same.

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

REASON: Under the department's existing rules, cut and fill systems are prohibited for new systems but may be used as replacement systems. In HB 592, the 2023 Legislature directed the department to remove the prohibition for new systems. The proposed changes to ARM 17.36.321 are necessary to implement that statutory directive.

17.36.323 SETBACKS (1) Minimum setback distances, in feet, shown in Table 2 of this rule must be maintained, except as provided in the table footnotes or as allowed through a deviation granted under ARM Title 17, chapter 38, subchapter 1. The setbacks in this rule are not applicable to gray water irrigation systems that meet the setbacks and other requirements of ARM 17.36.319.

TABLE 2  
SETBACK DISTANCES  
(in feet)

|      |                         |   |  |
|------|-------------------------|---|--|
| From | To Drinking Water Wells | To Sealed Components (1) and Other Components (2) | To Drainfields/Soil Absorption Systems (3) |
|------|-------------------------|---|--|

|  |                   |  |                   |
|--|-------------------|--|-------------------|
| Public or multiple-user drinking water wells/springs | -                 | 100 (4)  | 100               |
| Individual and shared drinking water wells           | -                 | 50 (4) (18)  | 100 (18)          |
| Other wells (5)                                      | -                 | 50 (4)   | 100 (4)           |
| Suction lines  | -                 | 50   | 100               |
| Cisterns   | -                 | 25   | 50                |
| Roadcuts, escarpment                                 | -                 | 10 (6)   | 25                |
| Slopes > 35 percent (7)                              | -                 | 10 (6)   | 25                |
| Property boundaries                                  | 10 (8)            | 10 (8)   | 10 (8)            |
| Subsurface drains                                    | -                 | 10   | 10                |
| Water mains  | -                 | 10 (9)   | 10                |
| Drainfields/Soil absorption systems                  | 100               | 10   | -                 |
| Foundation walls                                     | -                 | 10   | 10                |
| Surface water (10), springs                          | 100 (4) (11) (12) | 50 (4) (11)  | 100 (4) (11) (13) |
| Floodplains  | 10 (4) (11)       | - Sealed components - no setbacks (1)<br>Other components - 100 (2) (4) (11) | 100 (11) (14)     |
| Mixing zones   | 100 (4) (18)      | -  | -                 |
| Storm water ponds and ditches (15)                   | 25 (4) (16)       | 10 (4)   | 25 (4)            |
| Sewage Lagoons                                       | 1000 (17)         | -  | -                 |

Footnotes (1) through (11) remain the same.

Footnote (12) Pursuant to ~~ARM 17.36.331~~ Department Circular DEQ-20, the reviewing authority may require greater than a 100-foot horizontal separation between a well and surface water if there is a potential that the well may be influenced by contaminants in the surface water.

Footnotes (13) through (17) remain the same.

Footnote (18) This setback applies unless the department has approved a smaller source-specific well isolation zone under Department Circular DEQ-20, Standard 1.8. In that case, the source specific well isolation zone distance applies.

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

REASON: The proposed amendment to Footnote 12 corrects an incorrect citation.

SB 327 from the 2023 legislative session directed the department to allow source-specific well isolation zones that are smaller than 100 feet. The proposed addition of Footnote 18 reflects the department's authority to allow the source-specific well isolation zone smaller than 100 feet under Circular DEQ-20, Standard 1.8.

17.36.605 EXCLUSIONS (1) and (2) remain the same.

~~(3) Aggregations of parcels are not subdivisions subject to review, except that an aggregation is subject to review under 76-4-130, MCA, if any parcel included in the aggregation has a previous approval issued under Title 76, chapter 4, part 1, MCA.~~

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

REASON: Current ARM 17.36.605(3) provides that aggregations are not subdivisions and are reviewed only under 76-4-130, MCA, which applies when a parcel included in an aggregation has a prior approval under the Sanitation Act. This rule provision was based on a previous legal opinion rather than direct statutory language.

SB 285 from the 2023 legislative session contained an express exemption for aggregations from Sanitation Act review. Therefore, it is not necessary to have additional language in rule exempting such aggregations. This proposed deletion ensures there is no conflict between the rule and the statute.

17.36.610 CERTIFYING AUTHORITY UNDER 76-4-127, MCA (1) remains the same.

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

(a) remains the same.

~~(b) is a first or second class municipality or is within a jurisdictional area covered by a growth policy pursuant to Title 76, chapter 1, MCA; and~~

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

(c) when applicable, certifies the additional connections are subject to the provisions of Title 76, chapter 3, MCA, and the municipality is in compliance with a development plan approved by the department pursuant to ARM 17.38.101(20).

(3) A municipality that has been authorized to act as a certifying authority under this rule may be authorized to approve requests for a subdivision exemption under 76-4-125(1)(d), MCA, if the on-staff or retained professional engineer has completed an annual training program conducted by the department.



AUTH: 76-4-104, MCA

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

REASON: The proposed deletion of (2)(b) reflects enactment of HB 55 in 2019, which removed the limitation that the municipal facilities exemption could only be used in first and second class municipalities and jurisdictional areas covered by a growth policy.

SB 237 from the 2023 legislative session directed the department to allow municipal systems to authorize connections beyond their current rated capacity with a department-approved development plan. Consistent with SB 237, proposed (2)(c) provides that capacity under a development plan can be used to authorize new connections for review under Title 76, chapter 4, MCA. Details for the development plan conditions are set forth in ARM 17.38.101(19).

Proposed (3) implements HB 364 from the 2023 legislative session, which directed the department to allow municipalities, in lieu of the reviewing authority, to approve requests for a municipal facilities exclusion under 76-4-125(1)(d), MCA. To ensure the exemptions are approved when appropriate, proposed (3) requires the municipality to complete an annual training session regarding the appropriate use of the municipal facilities exclusion. Annual re-training will ensure municipal employees stay up to date on any changes to the applicable statutes or rules.

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

- (a) remains the same.
- (b) type of water system:
  - (i) individual or shared water supply system (existing, previously approved, and proposed)
    - (A) per unit \$110
    - (B) source-specific well isolation zone, each \$250
  - (ii) and (iii) remain the same.
- (c) type of wastewater disposal:
  - (i) existing or previously approved systems per unit \$90
  - (ii) new gravity fed system per drainfield \$120
  - (iii) new dosed system, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, nutrient removal, and whole house subsurface drip irrigation systems:
    - (A) per design ~~\$ 240~~ \$180 (plus \$130/hour for review in excess of two hours)
    - (B) per drainfield ~~\$ 60~~ \$120
  - [(iv) through (vi) missing]
- (d) other:
  - (i) through (vi) remain the same.
  - (vii) storm drainage plan review:
    - (A) and (B) remain the same.
    - (C) storm water review exception \$130
  - (viii) preparation of environmental assessments/environmental impact statements/MEPA exemptions: actual cost

(ix) remains the same.

AUTH: 76-4-105, MCA

IMP: 76-4-105, MCA

REASON: The department is proposing three new review fees in response to the enactment of SB 327, SB 240, and SB 285 in the 2023 legislative session. No fee changes are proposed for existing fee items that were not changed by legislation.

Proposed (1)(b)(i)(B) sets a new \$250 fee for source-specific well isolation zone (SSWIZ) reviews. The department estimates SSWIZ reviews will take approximately the same amount of time as source-specific mixing zones, so the same fee is proposed. Because this is a new procedure enacted by the 2023 Legislature, the department cannot estimate the number of persons who may request a SSWIZ. Proposed (1)(c)(iii)(A) reduces the existing fee for design of non-gravity drainfields from \$240 to \$180 to reflect lower costs for reviewing designs. SB 285 eliminated design details for most individual and shared systems, and this fee change reflects the amount of time it would take the department or a county contracted to do subdivision reviews to complete the review. Proposed (1)(c)(iii)(B) increases the fees for non-gravity drainfields to match the existing fees for gravity drainfields of \$120, because those reviews have similar levels of effort. Because individual and shared onsite wastewater systems no longer require design fees, the department believes that this fee change will ultimately reduce the overall fees required for individual and shared onsite wastewater systems. The department estimates that these fee changes will affect approximately three to four hundred applications per year. Proposed (1)(d)(vii)(C) adds a new \$130 fee to review the qualifying criteria for storm water exceptions. The department estimates it will take one hour of reviewer time to verify that a project qualifies for the exception. Like the SSWIZ, this is a new procedure enacted by the Legislature, and the department is unable to estimate the number of persons affected by this change. Finally, proposed (1)(d)(viii) adds a fee to cover the costs to process the MEPA exemptions in NEW RULE II. The fee will be actual costs, calculated by multiplying the existing \$130 per hour review rate times the number of hours needed to review the exemption. Because of the limited number of sites to which that exemption will apply, the department estimates that this fee will affect very few applicants.

In addition, the department proposes to add the phrase "previously approved" to both individual and shared water and wastewater systems. Under SB 285, certain previously approved systems are exempt from further review if the systems meet certain criteria. This fee is commensurate with the review necessary to determine whether the exemption criteria have been satisfied. The department estimates that this review may apply to one to two hundred applications per year.

17.36.914 WASTEWATER TREATMENT SYSTEMS - TECHNICAL REQUIREMENTS (1) and (2) remain the same.

(3) Wastewater treatment systems must be located to maximize the vertical separation distance from the bottom of the absorption trench to the seasonally high ground water level, bedrock, or other limiting layer, but under no circumstances may

this vertical separation be less than four feet of natural soil. For elevated sand mounds constructed in accordance with Department Circular DEQ 4, the depth of the key may be included as part of the separation distance between the infiltrative surface and a limiting layer.

(4) through (7) remain the same.

AUTH: 75-5-201, MCA

IMP: 75-5-305, MCA

REASON: In the department's recent rulemaking in MAR Notice No. 17-421, the department modified ARM 17.36.320 to allow for reviews conducted under the Sanitation in Subdivisions Act, but did not modify the requirement in the state minimum standards for local health departments. The proposed change is substantively necessary for the reasons cited in MAR Notice No. 17-421 and is necessary here to ensure that there is no conflict between department rules and local health rules.

17.36.918 HORIZONTAL SETBACKS, FLOODPLAINS (1) Minimum horizontal setback distances (in feet) are as follows:

TABLE 1  
SETBACK DISTANCES  
(in feet)

| From   | To Sealed components (1) and other components (2) | To Absorption systems (3) |
|--|---|---------------------------|
| Public or multiple-user drinking water wells/springs | 100   | 100                       |
| Individual and shared drinking water supply wells    | 50 (9)  | 100 (9)                   |
| Other wells (4)                                      | 50  | 100                       |
| Suction lines  | 50  | 100                       |
| Cisterns   | 25  | 50                        |
| Roadcuts, escarpments                                | 10 (5)  | 25                        |
| Slopes > 35 percent (6)                              | 10 (5)  | 25                        |
| Property boundaries (7)                              | 10  | 10                        |
| Subsurface drains                                    | 10  | 10                        |
| Water mains (8)                                      | 10  | 10                        |
| Drainfields/sand mounds (3)                          | 10  | -                         |

|                        |   |     |
|------------------------|---|-----|
| Foundation walls       | 10  | 10  |
| Surface water, springs | 50  | 100 |
| Floodplains            | --Sealed components<br>- no setbacks (1)<br>Other components - 100<br>(2) | 100 |

Footnotes (1) through (8) remain the same.

(9) This setback applies unless the department has approved a smaller source specific well isolation zone under Circular DEQ-20, Standard 1.8. In that case, the source specific well isolation zone distance applies.

(2) through (5) remain the same.

AUTH: 75-5-201, MCA

IMP: 75-5-305, MCA

REASON: SB 327 directs the department to allow source-specific well isolation zones that are smaller than 100 feet. The proposed amendment adding Footnote (9) recognizes that a smaller source-specific well isolation zone may be approved by the department under DEQ-20, Standard 1.8, and that the appropriate setback will be that smaller distance, rather than the default 100 feet. The proposed amendment to ARM 17.36.918 is necessary to ensure that there is no conflict between the department's rules and the state minimum standards for local health departments.

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR PUBLIC SEWAGE SYSTEM (1) and (2) remain the same.

(3) As used in this rule, the following definitions apply in addition to those in 75-6-102, MCA:

(a) through (l) remain the same.

(m) "Professional engineer" means an engineer licensed or otherwise authorized to practice engineering in Montana pursuant to Title 37, chapter 67, MCA; and

(n) remains the same.

(o) "Development plan" has the meaning in [Section 1(9)(a), SB 237]; and

(p) "Rated capacity" has the meaning in [Section 1(9)(b), SB 237].

(4) A person may not commence or continue the construction, alteration, extension, or operation of a public water supply system or public sewage system until the applicant has submitted a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and has received written approval. Three sets of plans and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or public sewage system consistent with the approved design report, plans, and specifications. Failure to construct or operate the system according to the approved plans and specifications or the department's

conditions of approval is an alteration for purposes of this rule. Design reports, plans, and specifications must meet the following criteria:

(a) through (c) remain the same.

(d) the ~~board~~ department adopts and incorporates by reference ARM 17.36.320 through 17.36.325. The design report, plans, and specifications for public subsurface sewage treatment systems must be prepared in accordance with ARM 17.36.320 through 17.36.325, and with the format and criteria set forth in Department Circular DEQ-4, "Montana Standards for Subsurface Wastewater Treatment Systems." For public subsurface sewage treatment systems with a design flow greater than or equal to 2500 gallons per day, the design report, plans, and specifications must be prepared by a professional engineer.

(e) the ~~board~~ department adopts and incorporates by reference ARM 17.36.319 for purposes of review of public gray water irrigation systems. The design report, plans, and specifications for public gray water irrigation systems must be prepared in accordance with ARM 17.36.319, and in accordance with the format and criteria set forth in Department Circular DEQ-4, "Montana Standards for Subsurface Wastewater Treatment Systems." For purposes of this chapter, "gray water" means wastewater that is collected separately from a sewage flow and that does not contain industrial chemicals, hazardous wastes, or wastewater from toilets.

(f) through (9) remain the same.

(10) Continuously active public water supply systems with a public water system ID number that have never submitted plans and specifications for department review are not required to submit plans and specifications unless specifically required by the department.

(a) All Community and non-transient, non-community public water supply systems that are inactive for three or more years must submit a design report, plans, and specifications, as required by (4) with the appropriate fees specified in this subchapter, for approval prior to reactivation. Previously approved systems that have been inactive for three or more years may, at the department's discretion, use the abbreviated review process described in (9)(a).

(b) Transient non-community public water supply systems that have been inactive for three or more years are not required to submit a design report, plans, and specifications to re-activate if:

(i) current water samples show the source is coliform-absent and nitrogen levels less than the maximum contaminant level;

(ii) no water system facility modifications have been made to the system during inactivation;

(iii) any significant deficiencies or sanitary defects previously identified have been corrected;

(iv) the water source is not under the influence of surface water; and

(v) the PWSID number is submitted to the department.

(11) through (19) remain the same.

(20) Fees for review and approval of development plans will be at the hourly rate provided for in ARM 17.38.106(3).

(21) The review timeframe for development plans is 60 calendar days.

~~(20)~~(22) For purposes of this chapter, the ~~board~~ department adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

(a) through (k) remain the same.

~~(24)~~(23) A copy of any of the documents adopted under ~~(20)~~(22) may be viewed at the Department of Environmental Quality, 1520 East Sixth Avenue, Helena, MT 59620-0901.

AUTH: 75-6-104, MCA

IMP: 75-6-104, 75-6-112, 75-6-121, MCA

REASON: The proposed amendments to (3)(o) and (p) and (21) and (22) implement SB 237 from the 2023 legislative session, which directed the department to allow municipalities to certify additional connections if they are operating under a department-approved development plan. Proposed (3)(o) and (3)(p) provide cross-reference to the statutory text for regulatory clarity and ease of use for the regulated community. SB 237 directed the department to set a fee that is commensurate with the costs of the department reviewing the development plans. The department does not yet have an accurate estimate of the time these reviews will take, so proposed (20) imposes a fee based on an hourly rate rather than a flat fee. Also, because this is a new procedure enacted by the 2023 Legislature, the department cannot estimate the number of persons who may be affected by this change. Proposed (23) provides the timeframe for development plan reviews will be the same as other public water and wastewater reviews, because they require the same level of effort.

The proposed changes to (4)(d) and (e) replace references to the Board of Environmental Review to the department. These housekeeping changes are necessary following SB 233 from the 2021 legislative session, which transferred rulemaking authority from the board to the department. The proposed text reflects the fact that, going forward, the department, not the board, will be responsible for adopting rules for public water and wastewater engineering requirements.

In (10), the department proposes to no longer require plan review of transient non-community systems that have been inactive for three or more years in certain circumstances. Sources of contamination for transient public water systems are limited to nitrogen and pathogens, both of which can be identified through water samples. Likewise, proposed (b)(i) through (iv) ensure that there is low risk of contamination if the system is reactivated. The requirement in (b)(iv) that any systems with a surface water source must be reviewed before reactivation is necessary because of the increased risk of contamination inherent to surface water sources. Proposed (b)(v) ensures that the department can correctly identify the system. The department does not propose to change the requirements for community and non-transient, non-community systems because the range of contaminants that could impact these systems is much larger and may not be adequately addressed by sampling, as well as required system redundancies.

17.38.102 DELEGATION OF REVIEW OF SMALL PUBLIC WATER AND SEWAGE SYSTEM PLANS AND SPECIFICATIONS (1) The department ~~may~~ shall delegate to divisions of local government the review of plans and specifications for:

- (a) remains the same.
- (b) extensions or alterations of existing public water and public sewage systems ~~that involve 50 or fewer connections.~~
- (2) remains the same.
- (3) Local governments shall be reimbursed 90% of the review fee for performing these reviews and the department must receive the remaining 10% of the review fee.
- (4) Local governments conducting reviews under this rule shall complete all documents necessary to complete the review and comply with:
  - (a) the Montana Environmental Policy Act provided in Title 75, chapter 1, parts 1 through 3, MCA;
  - (b) real property takings requirements in accordance with Title 70, MCA; and
  - (c) nondegradation and nonsignificance determinations required in accordance with Title 75, chapter 5, MCA.

AUTH: ~~75-6-103~~, 75-6-104, 75-6-121, MCA  
IMP: 75-6-121

REASON: The proposed amendments to ARM 17.38.102 implement mandatory provisions required by HB 364 from the 2023 legislative session and are necessary to ensure that the rule does not conflict with the statute. The department chose to incorporate the statutory language in order to avoid any potential misunderstanding regarding statutory requirements.

5. The Circulars are proposed to be amended as follows, new matter underlined, deleted matter interlined:

Circular DEQ-4 General 1.1.1 General. These minimum standards apply to all subsurface wastewater treatment systems in Montana. In some cases, a reviewing authority (other than the Department of Environmental Quality) may have requirements that are more stringent than those set out in this Circular. Design details, as described in this Circular, are required for ~~all~~ multiple-user and public wastewater treatment systems and individual and shared systems with wastewater that exceeds residential strength. The information required for individual and shared wastewater treatment systems for residential strength waste is found in ARM 17.36.320(3).

The rest of section 1.1.1 remains the same.

REASON: SB 285 from the 2023 legislative session directed the department to no longer require design details for individual and shared systems in most circumstances, so long as the wastewater does not exceed residential strength. The amendment to 1.1.1 is necessary to ensure that the circular does not conflict with the mandatory statutory requirement.

Circular DEQ-4 Standard 2.2.1. General. Site modifications, as described in Sections ~~2.2.2, 2.2.3, and 2.2.4~~ of this Subchapter, may be used only for

replacement of failing systems. Site preparation for cut and fill modifications must be completed prior to final approval. Cut and fill systems must be designed to provide a minimum of 4 feet of natural soil separation to a limiting layer after the cut or fill has taken place. Cut or fill cannot be used to overcome a horizontal or vertical separation. Minor leveling, and cut and fill systems as described in Sections 2.2.3, 2.2.4, and 2.2.5 of this Subchapter, will be allowed for both new systems and replacement systems. All new and replacement subsurface wastewater treatment systems must meet the requirements of this Circular.

REASON: HB 592 from the 2023 legislative session directed the department to allow cut and fill systems to be used for new subsurface wastewater systems, rather than just for replacement systems. HB 592 also directed the department to prevent the use of cut or fill to overcome a horizontal or vertical separation. The proposed change to 2.2.1 implements these mandatory statutory directives by removing the requirement that cut systems in 2.2.3 and fill systems in 2.2.4 be used only for replacement systems, providing the mandatory statutory conditions on cut and fill, and making appropriate updates to the cross-references in the rule.

Circular DEQ-4 Standard 2.2.3. Cut Systems. ~~Cut systems may be used only for the replacement of failing systems and may not be used for new subsurface wastewater treatment systems.~~ Site modification for replacement subsurface wastewater treatment systems under this section must be completed prior to approval by the reviewing authority.

REASON: HB 592 directed the department to allow cut and fill systems to be used for new systems, rather than just for replacement systems. The proposed change removes the limitation on the use of cut systems to ensure that there is no conflict between the statute and associated design standard.

Circular DEQ-4 Standard 2.2.3.2. Design A. Cut areas for the replacement absorption system must be physically completed prior to approval. Two soil test holes must be excavated and detailed soil profile descriptions of the final receiving soils must be provided prior to excavation. ~~Percolation tests may be required after the cut has been complete.~~ All soil information must be submitted to the reviewing authority. Three percolation tests evenly spaced across the completed cut must be performed at the depth of the proposed infiltrative surface as a basis for the design application rate.

REASON: HB 592 directed the department to allow cut and fill systems to be used for new systems, rather than just for replacement systems. The proposed change removes the limitation to only replacement systems to ensure that there is no conflict between the statute and associated design standard. In addition, requiring three percolation tests across the cut horizon is necessary to ensure that the drainfield will be sized at the appropriate compacted application rate if the natural soil has been compacted during cutting. This proposed change matches the existing required percolation tests for fill systems.



Circular DEQ-4 Standard 2.2.4. Fill System. ~~Fill systems may be used only for replacement of existing failed systems and may not be used for new subsurface wastewater treatment systems.~~ The reviewing authority must initially approve the fill location with the site modification completed prior to final system approval. Fill areas for ~~replacement~~ absorption systems under this section must be physically completed prior to approval by the reviewing authority.

REASON: HB 592 directed the department to allow cut and fill systems to be used for new systems, rather than just for replacement systems. The proposed change removes the limitation on the use of fill systems, thus allowing for use of both new and replacement systems, to ensure that there is no conflict between the statute and associated design standard.

Circular DEQ-4 Standard 6.7.1. General. Elevated sand mounds may be used to achieve separation distance between the treatment system and a limiting layer. Four feet of natural soil must be maintained between the ~~modified site ground surface~~ and the limiting layer.

The rest of 6.7.1 remains the same.

REASON: In MAR Notice No. 17-421, the department modified ARM 17.36.320 to allow the sand mound key depth to count toward the separation distance. This change ensures there is no conflict between department rules, local health rules, and the design circular.

Circular DEQ-4 Standard 6.7.4.1 The ground surface where a mound is to be placed must be plowed, scarified, or keyed into the natural ground 4 inches to 8 inches parallel to the land contour. This must be achieved by removing a portion of the topsoil with the plow throwing the soil up slope to provide a proper interface between the fill and natural soils. When mounds are keyed in, the removed soil must be replaced with the same sand as required for the rest of the mound, and this sand will not count as part of the required 21 inches of sand in the mound as described in Subsection 6.7.3.4. A minimum of 4 feet of natural soil from the bottom of the ~~plowed surface, scarified surface, or key~~ ground surface to the limiting layer must be maintained.

REASON: In MAR Notice No. 17-421, the department modified ARM 17.36.320 to allow the sand mound key depth to count toward the separation distance. This change ensures there is no conflict between department rules, local health rules, and the design circular.

Circular DEQ-4 Drawing 6.7-1 This drawing will be modified to reflect that 4' of separation is required from the ground surface to the limiting layer. [track changes]

REASON: In MAR Notice No. 17-421, the department modified ARM 17.36.320 to allow the sand mound key depth to count toward the separation

distance. This change ensures there is no conflict between department rules, local health rules, and the design circular.

Circular DEQ-20, Standard 1.4.2.b Each existing and proposed drinking water well must be centered within a 100-foot radius well isolation zone or a smaller source specific isolation zone approved by the department.

REASON: SB 327 allows for source specific well isolation zones that are smaller than 100 feet, if the zone is approved by the department. This proposed change provides that a smaller source specific well isolation zone can be approved by the department. This change is proposed in accordance with new Standard 1.8, which outlines the requirements for such approval.

Circular DEQ-20, Standard 1.4.2.d The minimum setback distances set out in ARM 17.36.323 must be maintained for all new and existing water sources. A drinking water supply well may not be constructed within 100 feet of a drainfield or ground water mixing zone granted pursuant to ARM Title 17, chapter 30, subchapter 5-, unless a smaller source-specific well isolation zone is approved by the department.

REASON: SB 327 directed the department to allow source specific well isolation zones that are smaller than 100 feet. This statement provides that a smaller source-specific well isolation zone can be approved by the department in accordance with new DEQ-20, Standard 1.8, and ensures there is no conflict between statute and rule.

Circular DEQ-20, Standard 1.8 The Department may approve a source specific well isolation zone (SSWIZ) for existing individual wells that have well logs if the requirements of this standard are met. Wells that were constructed in violation of 76-4-121 or 76-4-130 are not eligible for a source specific well isolation zone request.

- a. A request for a source specific well isolation zone of less than 100 feet must be in writing and must be accompanied by information substantiating the request and by the applicable fee. To support the request, the applicant must submit the following:
  1. a driller's log of the well;
  2. total nitrogen and total coliform sample results from the well collected within the past 6 months;
  3. a lot layout or map showing the well location and potential sources of contamination within 200' of the well;
  4. the groundwater flow direction as determined by triangulation or published gradients;
  5. a virus attenuation analysis calculating the minimum horizontal distance needed to ensure the well is protected from sewage viruses;

6. any additional information the applicant believes would substantiate the request; and
  7. if the request requires a variance from the Board of Water Well Contractors, the approved variance must be submitted with the request.
- b. The applicant must demonstrate that the SSWIZ:
1. would be unlikely to cause pollution of state water in violation of 75-5-605, MCA;
  2. would protect the quality and potability of water for drinking water supplies and domestic uses and would protect the quality of water for other beneficial uses, including those uses specified in 76-4-101, MCA; and
  3. would not adversely affect public health, safety, and welfare.

REASON: SB 327 from the 2023 legislative session allows for source-specific well isolation zones (SSWIZ) that are less than 100 feet, if the zone is approved by the department. The prohibition against a SSWIZ for an illegal well is necessary to discourage evasions of the Sanitation in Subdivisions Act.

To justify the SSWIZ request, a driller's log is necessary to verify the subsurface conditions, depth, and grouting of the well, all of which are key components when determining whether to grant a SSWIZ. A recent total nitrogen and total coliform sample is necessary to determine whether the well meets water quality standards. A lot layout or map and triangulated or published gradient data is necessary to identify whether there are any surrounding sources of pollution that could negatively impact the well. A virus attenuation analysis is necessary to determine how far sewage viruses could travel at the site-specific location, which will impact the decision whether to grant a SSWIZ. The requirement that any required variance from the Board of Water Well Contractors be granted before applying to the department is necessary to ensure that the department does not approve source-specific isolation zones that conflict with another regulatory authority.

The criteria provided in (b) is necessary to ensure that the source specific well isolation zone would not threaten the environment or public health. The proposed criteria are the same as those currently used for evaluating deviation requests and are therefore familiar to applicants in their submittals and the department in its review.

6. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to the Department of Environmental Quality, at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; telephone (406) 444-1388; fax (406) 444-4386; or e-mail [DEQSubDivRuleUpdate@mt.gov](mailto:DEQSubDivRuleUpdate@mt.gov), and must be received no later than 5:00 p.m., September 25, 2023.

7. Aaron Pettis, attorney for the department, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. 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 at the address above, with ATTN: Shawn Rowland, or email at [DEQSubDivRuleUpdate@mt.gov](mailto:DEQSubDivRuleUpdate@mt.gov), or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsors were contacted by mail on June 6, 2023.

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

/s/ Angela Colamaria  
ANGELA COLAMARIA  
Rule Reviewer

/s/ Christopher Dorrington  
CHRISTOPHER DORRINGTON  
Director  
Department of Environmental Quality

Certified to the Secretary of State August 15, 2023.