



Brian Schweitzer, Governor
Richard H. Opper, Director

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March 17, 2010

Representative Mike Phillips
Capitol Building
P.O. Box 200400
Helena, MT 59620-0400

Dear Representative Phillips:

In your March 10, 2011, letter, you ask three questions pertaining to this agency's authority in its permitting programs over fish and wildlife, cultural resources, and public safety. First, you ask how each of the Department of Environmental Quality's (DEQ) permitting statutes deals with those topics. Second, you ask whether the permitting acts require information on the three topics to be collected, analyzed, and disclosed to the public. Third, you ask to what level the permitting acts allow a permit to be conditioned to protect fish and wildlife, cultural resources, and public safety. It appears to me that answering the last two questions answers the first, so I will address the last two questions. Because each of the DEQ's permitting statutes and implementing rules are different, I will answer these questions for each permitting act separately.

Under the Clean Air Act of Montana, a permit applicant is not required to submit any information pertaining to fish or wildlife, cultural resources, or public safety. No information on these topics is provided to the public, and the DEQ has no authority to impose permit conditions based on fish or wildlife, cultural resources, or public safety except to the extent that emission limits and ambient standards protect fish and wildlife.

Similarly, under the water quality permitting statutes, a permit applicant is not required to submit any information pertaining to fish or wildlife, cultural resources, or public safety. No information on these topics is provided to the public, and the DEQ has no authority to impose permit conditions based on fish or wildlife, cultural resources, or public safety except to the extent that protection of water quality protects fish and wildlife.

Under the Asbestos Control Act, the applicant is not required to submit information on fish or wildlife or cultural resources. However, this program regulates asbestos removal from buildings, so this type of information is not really relevant to this program. An application must contain a health and safety plan for workers.

Under the act providing for regulation of public water and sewer systems, an applicant for plan and specification approval is not required to submit any information pertaining to fish or wildlife, cultural resources, or public safety. No information on these topics is provided to the public, and the DEQ has no authority to impose permit conditions based on fish or wildlife, cultural resources, or public safety.

The rules adopted pursuant to the Montana Solid Waste Management Act provide that an applicant for a solid waste license must provide a site map that shows the historic sites within the proposed license area and within one mile of that area. It must also contain a demonstration that the landfill: (a) would not pose a bird threat to an airport; (b) would not have adverse impact on a floodplain; (c) is not

located within a wetland, or, if it is, that it would not degrade the wetland or fish or wildlife within the wetland; and (d) is not located within a significant fault area, seismic impact zone, or an unstable area. Furthermore, with regard to public safety, the application must contain plans for methane control, cover requirements for fire prevention, and restrictions on public access. In addition, the application must contain all information necessary to allow the DEQ to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The DEQ has authority to deny or condition a license based on fish or wildlife and public safety to the degree indicated above. Furthermore, the DEQ may deny or condition a license if the proposed operation would result in a taking of a threatened or endangered fish or wildlife species or would destroy or adversely modify critical habitat of a threatened or endangered species. The DEQ does not have authority to deny or condition a license to protect cultural resources.

The Montana Hazardous Waste Act and rules establish a permitting program that is similar to the solid waste program. The discussion above related to solid waste also applies to hazardous waste, except that the applicant is not required to submit all information necessary for the DEQ to prepare an EA or EIS and there is no provision related to bird hazards for airports. Also, because of the nature of hazardous waste, public safety information requirements and the facility design and contingency plan requirements are greater.

Under the motor vehicle wrecking facility statutes, the applicant is not required to submit information on cultural resources, fish or wildlife, or public safety, and DEQ has no authority to condition a permit based on impacts in those areas.

Under the act for regulation of cleaning of cesspools, septic tanks, and privies and the disposal of septage, the applicant is not required to submit information on cultural resources, fish or wildlife, or public safety. The DEQ is required to ensure that application of septage would not adversely affect a threatened or endangered species or its habitat. The DEQ does not have authority to condition a permit to protect other species of fish or wildlife, cultural resources, or public safety.

Under the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, a permit application for a tank installation must include information on fish, wildlife, and birds, threatened or endangered species, and historic and archeological resources. The applicant must also include information on spill and overflow prevention, corrosion prevention, and leak detection. This information is available in the DEQ's files. The DEQ has authority to condition a permit to protect the environment and public health, safety, and welfare. Therefore, the DEQ has authority to protect fish and wildlife, archeological resources, and public safety.

Under the Montana Major Facility Siting Act and rules, the applicant is required to include in the application detailed information regarding cultural resources, fish and wildlife, and public safety. The DEQ has authority to condition a certificate to protect any or all of these resources.

Under the DEQ's regulatory statutes dealing with water, septage disposal, and solid waste in subdivisions, the applicant is not required to submit information on cultural resources, fish or wildlife, or public safety, and the DEQ has no authority to condition a permit based on impacts in those areas. For those subdivisions reviewed by local government under the Montana Subdivision and Platting Act,

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information regarding public safety and wildlife protection is generated and local government has authority to condition based on impacts in these areas.

Under the Montana Strip and Underground Mine Reclamation Act, the applicant must submit detailed information on cultural resources and must submit a plan providing for protection of cultural resources. The applicant must also submit detailed information regarding fish and wildlife and must include in the application a plan providing for protection of fish and wildlife. The applicant is not required to submit information regarding public safety per se, but the application must include a blasting plan that protects public safety, a mine plan that contains facility engineering designs and buffer zones that protect public safety, and a subsidence control plan for underground mining. The application must be available for public review in the area of the mine. To the extent that the requirements described above are not met, the DEQ may deny or condition the permit.

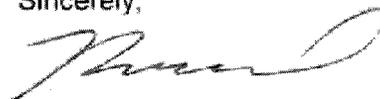
Under the hard rock mining regulation act, an applicant must submit with the application an operations plan that includes protective measures for archeological and historical values and measures to avoid foreseeable situations of unnecessary damage to flora and fauna in or adjacent to the permit area. No information regarding public safety is required. The DEQ has authority to condition a permit to protect archeological and historical values and to avoid foreseeable situations of unnecessary damage to flora and fauna in or adjacent to the permit area.

Under the Opencut Mining Act, the applicant must submit with the application a map that shows residential structures and wildlife habitat within the permit area and 1,000 feet of the permit area. The application must contain a plan of operation that provides for appropriate protection of archaeological and historical values on affected lands, prevents significant physical harm to life forms on the permit area and adjacent land, and minimizes impacts on residential areas and structures. To the extent that these requirements are not met, the DEQ may deny or condition a permit.

As part of your second question, you have also asked whether information on cultural resources, fish and wildlife, and public safety is disclosed to the public. Of course, all permit applications are public information. Therefore, any information on cultural resources, fish and wildlife, and public safety in an application may be viewed by the public at the DEQ's office. To this extent, the information is disclosed to the public. However, our permitting statutes and rules do not generally require that this information be summarized and provided to the public in the manner that the Montana Environmental Policy Act (MEPA) and the MEPA rules require.

I hope this answers your questions satisfactorily. If you need further information, please feel free to contact me at (406) 444-2544.

Sincerely,



Richard H. Opper
Director