

**FREQUENTLY ASKED QUESTIONS ABOUT THE PROCEDURE FOR APPEALING DECISIONS OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO THE BOARD OF ENVIRONMENTAL REVIEW**

*These frequently asked questions summarize the process that the Board of Environmental Review employs in hearing contested case matters. While the requirements and deadlines provided below are only guidelines followed by the Board and may be modified given the issues presented and the needs of the particular case, the parties to any contested case should expect to follow those procedures throughout the contested case.*

**Q:** How does a person aggrieved by a decision of the Department of Environmental Quality seek relief?

**A:** Under Montana law, some, but not all, decisions of the Department of Environmental Quality can be administratively appealed to the Board of Environmental Review, which conducts a contested case proceeding.

**Q:** What is a contested case?

**A:** A contested case is a proceeding before an agency (not a court) in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. Laws specifically pertaining to contested case procedures are in Montana Code Annotated, Title 2, chapter 4, part 6. The goal of the Board of Environmental Review is to provide fair and timely contested case hearings.

**Q:** What laws allow a person to request a contested case hearing with the Board of Environmental Review?

**A:** Many different laws allow a person to request a contested case hearing with the Board. A person's right to appeal, or seek review of, a decision of the Department of Environmental Quality varies with the subject matter and the specific terms of the applicable statute. Pertinent statutes include the following:

Montana Code Annotated Section 37-42-321 (appeal of order of Department of Environmental Quality revoking the certificate of a water treatment plant operator)

Montana Code Annotated Section 75-2-211 (appeal of approval or denial by Department of Environmental Quality of air quality permit for construction, installation, alteration, or use)

Montana Code Annotated Section 75-2-218 (appeal of approval or denial by Department of Environmental Quality of air quality operating permit)

Montana Code Annotated Section 75-2-401 (appeal of administrative enforcement action of Department of Environmental Quality for violation of air quality laws)

Montana Code Annotated Section 75-2-515 (appeal of administrative enforcement action of Department of Environmental Quality under Asbestos Control Act)

Montana Code Annotated Section 75-5-303 (appeal of decision of Department of Environmental Quality authorizing degradation of high-quality waters)

Montana Code Annotated Section 75-5-403 (appeal of denial or modification of water quality permit issued by Department of Environmental Quality by applicant or holder of water quality permit)

Montana Code Annotated Section 75-5-611 (appeal of order and administrative penalty issued by Department of Environmental Quality for violation of water quality laws)

Montana Code Annotated Section 75-6-109 (appeal of administrative enforcement action of Department of Environmental Quality for violation of public water supply laws)

Montana Code Annotated Section 75-10-224 (appeal of denial or revocation of license to operate a solid waste management system issued by Department of Environmental Quality)

Montana Code Annotated Section 75-10-227 (appeal of administrative enforcement action of Department of Environmental Quality for violation of waste and litter control laws)

Montana Code Annotated Section 75-10-406 (appeal of denial or revocation of hazardous waste management permit issued by Department of Environmental Quality)

Montana Code Annotated Section 75-10-413 (appeal of administrative enforcement action of Department of Environmental Quality for violation of hazardous waste management laws)

Montana Code Annotated Section 75-10-515 (appeal of decision of Department of Environmental Quality to issue, deny, or revoke a motor vehicle wrecking facility license)

Montana Code Annotated Section 75-10-540 (appeal of administrative enforcement action of Department of Environmental Quality for violation of motor vehicle recycling and disposal laws)

Montana Code Annotated Section 75-11-525 (appeal of administrative enforcement action of Department of Environmental Quality under Underground Storage Tank Act)

Montana Code Annotated Section 76-4-108 (appeal of notice of violation of sanitation in subdivisions laws issued by Department of Environmental Quality)

Montana Code Annotated Section 76-4-126 (appeal of denial of approval of subdivision plans and specifications relating to environmental health facilities issued by Department of Environmental Quality)

Montana Code Annotated Sections 82-4-112, -129, -130 (appeals of orders to adopt remedial measures, suspending or revoking permits, or other final decisions of Department of Environmental Quality under Strip and Underground Mine Siting Act)

Montana Code Annotated Sections 82-4-205, -206, -254 (appeals of orders to adopt remedial measures, suspending or revoking permits, proposed administrative penalties, or other final decisions of Department of Environmental Quality under Strip and Underground Mine Reclamation Act)

Montana Code Annotated Sections 82-4-337, -338, -341, -353, -361, -362 (appeals of modifications or refusals to modify reclamation plans, bond level adjustments, orders to abate conditions or to commence reclamation, denials of applications for permits and licenses and amendments or revisions to permits or licenses, administrative penalties, revocation of permits and licenses and forfeiture of performance bond by Department of Environmental Quality under Metal Mine Reclamation Act)

Montana Code Annotated Sections 82-4-427, -441 (appeals of final decisions and proposed civil penalties issued by Department of Environmental Quality under the Opencut Mining Act)

The following chart summarizes most of subjects and laws relating to the right to initiate a contested case with the Board of Environmental Review:

SUBJECT MATTER	STATUTORY REFERENCE FROM THE MONTANA CODE ANNOTATED
Water treatment plant operator	37-42-321
Air quality permits	75-2-211 and 75-2-218
Air quality enforcement actions	75-2-401
Degradation of high-quality waters	75-5-303
Water quality permits	75-5-403
Asbestos Control Act enforcement actions	75-2-515
Water quality enforcement actions	75-5-611
Public water supply enforcement actions	75-6-109
Solid waste management system licenses	75-10-224
Waste and litter control enforcement actions	75-10-227
Hazardous waste management permits	75-10-406
Hazardous waste management enforcement actions	75-10-413
Motor vehicle wrecking facility licenses	75-10-515
Motor vehicle recycling and disposal enforcement actions	75-10-540
Underground Storage Tank Act enforcement actions	75-11-525
Subdivision sanitation notice of violations	76-4-108
Subdivision plans	76-4-126

Decisions involving the Strip and Underground Mine Siting Act	82-4-112, -129, -130
Decisions involving the Strip and Underground Mine Reclamation Act	82-4-205, -206, -254
Decisions involving the Metal Mine Reclamation Act	82-4-337, -338, -341, -353, -361, -362
Decisions involving the Opencut Mining Act	82-4-427, -441

**Q:** How does a person request a contested case hearing?

**A:** The process varies, depending on the statute that applies. Generally the request must be in writing and must be made within a time period specified in the applicable statute and must be made by a person adversely affected by the challenged decision. The person requesting the contested case hearing should read and comply with the applicable statute to ensure that the appeal is properly and timely filed.

**Q:** What procedures apply to contested cases?

**A:** The Board of Environmental Review has adopted the Attorney General's model procedural rules, which are published in the Administrative Rules of Montana. The specific rules for contested cases are 1.3.211 through 1.3.225. The general provisions, rules 1.3.230 through 1.3.233, also apply to contested cases.

**Q:** Are contested case procedures similar to the procedures that apply in civil suits in Montana district courts?

**A:** Yes, the procedures are similar. Instead of a judge, a hearing examiner, who is a lawyer appointed by the Board of Environmental Review, regulates the course of contested case proceedings. Some of the Attorney General's model rules incorporate the Montana Rules of Civil Procedure, which are in Title 25, chapter 20 of the Montana Code Annotated. For example, 1.3.217, which is Model Rule 13, generally follows the discovery rules that apply to civil suits, and 1.3.232, which is Model Rule 27, generally provides that all motions and pleadings will be served in accordance with the Montana Rules of Civil Procedure.

**Q:** Besides the person requesting the hearing and the Department of Environmental Quality, who else may be a party in a contested case before the Board of Environmental Review?

**A:** In cases involving permitting decisions, in which the person requesting the hearing is not the permit applicant, the permit applicant will be notified of the request for hearing and may become a party (intervene) in the contested case by complying with the hearing examiner's prehearing order. When the permit applicant timely complies with the hearing examiner's order, a motion to intervene is not required. The hearing examiner's order will usually contain a paragraph similar to the following example:

A copy of this order is being provided to counsel for the permit applicant. No separate motion to intervene is required if the permit applicant complies with this order and proposes a schedule for further proceedings after consultation with the other parties. The permit applicant shall be considered to have intervened in these contested case proceedings by timely submitting a proposed schedule.

**Q:** How long does the contested case process take?

**A:** The goal of the Board of Environmental Review is that hearings be held within 120 days of the request for hearing. Where the parties agree on a faster or slower schedule, the hearing examiner will normally approve their agreed schedule. If a party requests that the Board of Environmental Review hear the case, instead of a hearing examiner appointed by the Board, the time needed to bring the case to hearing may exceed 120 days.

**Q:** How is a schedule for a contested case established?

**A:** After a hearing is requested, the Standing Interim Hearing Examiner issues a prehearing order that is mailed to the parties and, if a permit applicant is not a party, to the permit applicant. The order will give the parties about two weeks to consult with each other and propose an agreed schedule to the hearing examiner. If the parties are unable to agree on a schedule, the hearing examiner will set a schedule for the contested case.

**Q:** Suppose that a hearing is requested on February 1 and the parties are not able to agree on a schedule by the February 15 deadline set in the hearing examiner's prehearing order. What would a typical scheduling order provide?

**A:** Here is an example scheduling order, based upon the dates suggested in the question.

The following schedule is set:

1. No later than February 28: disclosure by each party to the other parties of: (a) the name and address of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, and (b) a copy of, or a description by category and location of, all documents and tangible things that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses.
2. No later than March 7: joinder/intervention of additional parties.
3. No later than April 14: completion of discovery. Discovery requests should be served at least 30 days prior to that date in order to allow sufficient time for responses to be filed by the date for completion of discovery.
4. No later than April 22: submission of any motions and briefs in support.

5. No later than May 7, 2002: submission of answer/response briefs.
6. No later than May 14:
  - a. submission of reply briefs;
  - b. exchange of lists of witnesses and copies of documents that each party intends to offer at the hearing.
7. May 22, at 9 a.m.: pursuant to Mont. Code Ann. § 2-4-611, a prehearing conference shall be held by telephone. The hearing examiner shall initiate the telephone conference. The purpose of the prehearing conference is to consider simplification of facts and issues by consent of the parties, hear argument on any outstanding motions, and confirm a schedule for further proceedings, including the date, time, and place of hearing.
8. June 1, beginning at 9 a.m.: contested case hearing.
9. If this schedule becomes unworkable for any party, that person should consult with the other party and propose a revised schedule upon which the parties agree.

**Q:** May a party file documents with the hearing examiner by e-mail or facsimile?

**A:** Yes. The Board follows the Attorney General's model rules of procedure. Model Rule 27, which is Administrative Rule of Montana 1.3.232, generally provides that papers may be served in accordance with the Montana Rules of Civil Procedure. Rule 5(e) of the Montana Rules of Civil Procedure allows the filing of papers by facsimile or other electronic means, provided that the original document is filed within five business days of the receipt of the facsimile or electronic copy.

**Q:** How are papers filed with the Board?

**A:** By providing them to the Secretary, Board of Environmental Review, Department of Environmental Quality, Metcalf Building, 1520 East Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901. The facsimile number is (406) 444-4386. The e-mail address is [ber@mt.gov](mailto:ber@mt.gov) . If papers are submitted by e-mail, the preferred software is Microsoft Word 6.0, or later.

## **FREQUENTLY ASKED QUESTIONS ABOUT REQUESTS FOR HEARINGS REGARDING AIR QUALITY PERMITS**

**Q:** What air quality permits are subject to appeal?

**A:** The Department of Environmental Quality issues two air quality permits that are subject to appeal. Appeals of a Montana air quality permit, commonly referred to as a pre-construction permit, are governed by Montana Code Annotated Section 75-2-211(10). Appeals of an air quality operating permit are governed by Montana Code Annotated Section 75-2-218(5).

**Q:** Montana Code Annotated Sections 75-2-211(10) and 75-2-218(5) both state that a request for a hearing before the Board must include an affidavit. What is an affidavit?

**A:** An affidavit is a written declaration under oath. Normally, an affidavit is notarized by a notary public. For more information about affidavits and specific requirements for affidavits made outside of Montana, see Montana Code Annotated Sections 26-1-1001 through –1006.

**Q:** What information should be included in the affidavit?

**A:** In most cases the affidavit should contain the following information:

The person making the affidavit should be identified, including name, address, and, capacity in which the person is filing the appeal. For example, an officer of a corporation, union, or other legal entity should state his or her title and provide information about the entity the officer represents.

The affidavit should state how the person (including a legal “person” such as a corporation) is adversely affected by the decision of the Department of Environmental Quality. The affidavit should set forth some connection between the decision being challenged and some legally-protected interest of the person making the affidavit.

Montana Code Annotated Sections 75-2-211(10) and 75-2-218(5) require that the affidavit set forth the grounds for the request. Because air quality permits are usually lengthy, the affidavit should state what specific provision(s) of the permit is/are challenged and state the reasons for the challenge. Simply stating that a paragraph of a permit is “capricious and arbitrary” or “illegal” is usually not helpful. Instead, the affidavit should contain a succinct, clear statement of the reason for the challenge.

The affidavit should state what relief is requested.

**Q:** After an affidavit requesting a hearing has been submitted, may the grounds for requesting the hearing be changed?

**A:** It depends. The time within which to file a request for a hearing is 15 days for permits under Montana Code Annotated Section 75-2-211(10) and 30 days for permits under Montana

Code Annotated Section 75-2-218(5). Suppose an affidavit requesting the hearing and setting forth the grounds for the request is filed before the statutory deadline. The person requesting the hearing would have until the statutory deadline to change the grounds for requesting the hearing. By comparison, if the request for hearing were filed on the day of the deadline, then a later change in the grounds for the request would be untimely, because it would be made after the time period allowed by the statute. As a practical matter, during the discovery process the grounds for requesting the hearing are often clarified. Some grounds may be modified and others abandoned. Nevertheless, after the statutory deadline has expired, the introduction of materially different grounds for appeal may prejudice the rights of the other party(ies) and unduly delay the proceedings. Unlike civil suits, in which amended and supplemental pleadings are liberally allowed, the Board may not allow liberal amendments in contested cases involving air quality permits, because of the strict time period established in the statutes. Therefore, amendments after the expiration of the statutory deadline should only clarify, but not expand, the grounds for appeal set forth in the affidavit.