

CONSERVATION DISTRICT COAL BED METHANE PROTECTION ACT

COMMITTEE STATEMENT OF INTENT AND EXPLANATION OF RULES AND PROCEDURES

I. Overview

The 2001 Montana Legislature adopted the Coal Bed Methane Protection Act (Act). The Act established the Coal Bed Methane Protection Program (Program) for the purpose of compensating private landowners and water right holders for certain damages that are attributable to coal bed methane development. The Act assigns administrative authority over the Program to local Conservation Districts that have coal beds within their exterior boundary, or whose water sources (ground or surface), may be adversely affected by the extraction and/or development of coal bed methane. Conservation Districts meeting these criteria are directed to establish procedures for evaluating claims for compensation submitted by a landowner or a water right holder.

Under the Act, Conservation Districts have authority to approve or deny claims for compensation and to receive compensation from the Coal Bed Methane Protection Account, administered by Department of Natural Resources and Conservation (DNRC) for their administrative expenses under the Program. DNRC is also responsible for approval of Conservation District-established procedures for evaluating claims for compensation under the Act.

In the interest of encouraging a consistent approach among Conservation Districts administering the Act, the Coal Bed Methane Protection Act Committee (Committee), consisting of representatives from the Big Horn, Custer, Carbon, Powder River, Rosebud, Treasure, Wibaux, and Prairie Conservation Districts, has prepared the following procedures, guidelines, and forms, which have been approved by DNRC as required by the Act. While each Conservation District may develop its own local procedure, changes to the documents provided must be approved separately by DNRC.

II. Statement of Intent and Explanation of the Rules and Procedures

RULE 1: DESCRIPTION OF PROGRAM. Rule 1 orients Conservation Districts and Applicants to the history and purpose of the Act, as well as the roles of the various entities involved in its implementation.

RULE 2: DEFINITIONS. The Act only defines a few of the terms used therein, and uses inconsistent terminology in describing the same or similar things. Rule 2 clarifies the key terms used in the Act. Several definitions require specific discussion, which follows.

- A. “Agricultural Production” is defined in the Act.
- B. “Caused by Coal Bed Methane Development” is not defined in the Act. The key triggering mechanism for compensation under the Act is that the harm must be materially and causally related to coal bed methane development. The concept of causation has many potential meanings and applications from the law of torts, environmental law, and other legal subject areas. The main issue in this area was to provide a mechanism for excluding from eligibility the damages or harms, or portions of damages or harms, that were caused by something other than coal bed methane development, such as drought, hail, poor management, or the like. In some instances, there may be two or more causes for a particular harm or damage, so the rule provides compensation for at least that part of the damage or harm that could be proven to have been caused by coal bed methane development. The definition requires compensation to be tied to coal bed methane development and also allows for proportionate awards if that could be proven. Even if an Applicant can show that a particular harm or damage was only ten percent caused by coal bed methane development, compensation should be available under the Act to that extent.
- C. “Claim” is not defined in the Act. The main issue here is whether seasonal, cyclical, recurrent, or temporary type of damages or harms constitutes one or more than one claim. Rather than trying to prospectively address all of the conceivable scenarios that could be presented in this regard, the definition provides a practical solution to this question. It does not matter whether a type of damage or harm is temporary, seasonal, recurrent, or cyclical. All compensable harms for that period, season, cycle, or timeframe could be made as one claim or as a number of claims, at the Applicant’s discretion. The limitations would be that a private landowner or water right holder could not be compensated more than once for the same damage or harm; and secondly, that the aggregate amount any private landowner or water right holder would ever be entitled to recover under the Act, no matter how many claims he or she may have, would be \$50,000. If the statutory cap were to be increased, additional consideration might then be given to this question. Rule 3(G) and Rule 3(H) clarify that an entity/person can file a claim and recover as a Water Right Holder and a Private Landowner but only once in each capacity regardless of the number of claims filed.
- D. “Coal Bed Methane Developer or Operator” is defined in the Act.
- E. “Contamination, Diminution, or Interruption of Surface Water or Ground Water” is not defined in the Act. This definition makes the determination of whether surface of groundwater is either physically contaminated or its supply affected dependent on whether the involved contamination or supply affect correspondingly affects the water’s ability to be beneficially used. Beneficial use is a key concept in water use law, and it is appropriate to apply the Act consistent

with that concept. The definition also refers to the Minimum Filing requirements, which are contained in the Application, which is attached to the Rules and Procedures.

F. “Conservation District” is not defined in the Act. This definition specifies that a conservation district has jurisdiction over claims where the damage occurred (not necessarily where the damage was caused).

G. “Improvement” is not defined in the Act. The definition makes it clear that physical alteration to the land (i.e. ditches, dikes, laterals, leveling, etc.), so long as it is used in Agricultural Production, can, and should be treated as an improvement under the Act.

H. “Loss of Agricultural Production and Income” is not defined in the Act. This definition makes it clear that an Applicant would have to show both a reduction in productive capacity of the land, and that this reduction in productive capacity reduced his or her income from that same land. The definition also refers to the Minimum Filing requirements, which are contained in the Application.

I. “Lost Land Value” is not defined in the Act. Lost land values must be proven by objective measures (such as the loss of productive capacity or lost market value as certified by a qualified real estate professional), and that subjective criteria or claims (such as for aesthetic or emotional values) were not compensable under the Act. The definition refers to the Minimum Filing requirements, which are contained in the Application.

J. “Lost Value of Improvements” is not defined in the Act. The value of an improvement is based on the extent to which it benefits the landowner or water right holder in generating revenue or producing more crops or forage from the land. The definition refers to the Minimum Filing requirements, which are contained in the Application.

K. “Minimum Filing Requirements” is not defined in the Act. The Minimum Filing Requirements are an additional set of criteria set out in the Application that an Applicant must satisfy as a precondition to compensation under the Act. The Minimum Filing requirements set out a certain minimum level and type of evidence necessary to conclude that a claim has *prima facie* validity.

L. “Private Landowner” is not defined in the Act. There are three main issues addressed in the definition. First, it is limited to the legal title holder. Accordingly, a trustee of a trust would be eligible to apply, but beneficiaries would not. The definition also would preclude a lessee from

applying but the proviso relating to due authorization would allow the lessee to do so on the fee owner's behalf if the lessee could show he or she were authorized to do so. Second, a "private landowner" excludes governments. The most difficult issue here has to do with tribal lands. The distinction in the definition most closely follows the private vs. governmental distinction made in the Act. Finally, the definition is intended to aggregate all lands owned by the same individual and all jointly/commonly-controlled entities under one ownership.

M. "Water Right Holder" is not defined in the Act. The definition recognizes the many different ways a water right could be acquired and/or held in Montana. The proviso for due authorization is intended to accomplish the same purpose as discussed above. Finally, the definition is intended to aggregate all water rights owned by the same individual and all jointly/commonly-controlled entities under one ownership.

RULE 3: ELIGIBILITY REQUIREMENTS. This rule addresses what an applicant must show in order to be eligible for compensation under the Act. In large part it parallels the Act's requirement's, but attempts to set those requirements out in a clearer fashion so the Applicant will have adequate guidance in making applications under the Act. A few of the provisions warrant specific discussion, which follows.

A. This provision tracks the statutory language and the purpose is to make clear, in order to be eligible for compensation under the Act, a Private Landowner must be involved in Agricultural Production, at least in respect to the land subject of the Claim. By contrast, a Water Right Holder need not be engaged in commercial agricultural production in order to be eligible for compensation. The Act's intended beneficiaries are landowners who are agricultural producers. If a homeowner whose domestic water supply (well) was affected by coal bed methane development, the homeowner could apply and be eligible for compensation as a Water Right Holder, but not as a Private Landowner. The language tracks the statute but in this provision the Act is intended to benefit agricultural producers, as some provisions of the statutes make clear.

B. and C. These provisions are keyed on the provisions of the Act. Filing details and specific requirements in regards to each of these criteria are set out in the Minimum Filing Requirements, contained in the attachment.

D. and E. These sections reflect that the funds are to be administered and allocated as a fund of last resort. These provisions ensure that an Applicant seeking compensation from the fund has exhausted other remedies, including private remedies available from any Developer or Operator and any government remedies that might be available to an Applicant.

F. The primary responsibility for compensation of landowners and water right holder for impacts caused by coal bed methane development lies with the developers themselves, and encourages all landowners to secure adequate surface use and mitigation agreements, at least to the extent development occurs on their own lands. This provision is intended to allow the Conservation Districts to be refunded for amounts disbursed for claims that are subsequently paid by the developer. This provision will assure that the fund's resources go to its intended purposes.

G. - H. The limit set out in § 76-15-905(6), MCA, constituted a maximum lifetime limit for a Private Landowner or Water Right Holder. The limit applies to a Water Right Holder or Private Landowner and that an entity/person can file a claim and recover as a Water Right Holder and a Private Landowner but only once in each capacity regardless of the number of claims filed.

I. This part of the Rule tracks the Act.

RULE 4: APPLICATION PROCESS. This rule is intended to set out the process for submitting a complete Application. The purpose of this rule is to provide for an initial technical review of the Application involving only two Conservation District Supervisors and the technical consultants that may be available to assist in the investigation and analysis of the Claim.

RULE 5: DECISION PROCESS. The purpose of this rule is to ensure that only after the initial review team (the "ART") issues its decision does the matter go to the full Conservation District Board of Supervisors for decision. In the event the two Supervisors on the ART disagree, each is expected to submit his or her decision and the reasons for it to the Conservation District Board of Supervisors, and at that point the Applicant should file exceptions. The Applicant may elect to appear before the full Board and explain why the Application should be granted. In all cases under the Rule the full Board of Supervisors of the involved Conservation District is the final decision maker.

RULE 6: APPLICATION DETERMINATION, RANKING, AND PAYMENT. This Rule sets out the decision standard the Conservation District Board of Supervisors should apply, and if an Application is approved, the subsequent payment process.

A. The decision standard is the "more likely than not" (or "preponderance") standard.

B. and C. The Application Ranking is important only if the Fund has become sufficiently depleted so as to not have enough funds to pay all of the approved claims then before it for payment. In addition, this rule clarifies that DNRC's role is to pay all properly documented and properly approved Applications, and that the Agency does not have additional review or decision making authority in regards to Claims. Finally, all funds are channeled from DNRC through the involved Conservation District for payment to the successful Applicant.

C (iv). The appropriate administration fee for the Conservation District submitting an approved Claim should not exceed ten percent of the funded claim.