

# MEMORANDUM

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FROM: Caitlin Overland, Overland Legal Services, PLLC, contract legal counsel, DNRC-Conservation District Bureau

TO: Conservation Districts within the State of Montana

RE: Utility boring and the 310 permitting process

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Multiple conservation districts have inquired about the 310 permitting process relative to utility companies seeking to bore under streams. Amongst the concerns are the need for an adequate and efficient review process in light of the fact many utility companies propose to bore under hundreds of stream crossings as part of a single project. This memorandum attempts to answer some of the most common questions and offer legal advice to those conservation districts.

## **Initial application review**

Question: Some proposed projects include hundreds of stream crossings – do we need to require a separate application for each crossing location? Does the application need to list all the streams?

Answer: The CD should require a detailed map or schematic which shows all proposed crossings for review as one application. It is the applicant's duty to provide sufficient information for review by the CD. Upon review of this initial application, the CD has the discretion to require additional information, or an additional application, if the crossings are dissimilar in nature or raise any red flags to the CD about possible impacts to the stream(s). The information should be detailed enough to allow the CD to apply review criteria. The CD can reject the application if there is not sufficient information detailing the proposed project. A.R.M. 36.2.408; A.R.M. 36.2.410.

Question: Is a site visit required for every location or can a representative site be viewed?

Answer: The CD can exercise their discretion and determine to only conduct one site visit *IF*, after reviewing the application, it appears that one site visit will be sufficient. The CD must confirm with FWP that one site visit is sufficient. If FWP requests multiple sites be visited the CD must conduct them as part of the application review process. §§ 75-7-112(1)-(2), M.C.A.

Question: Is a signature required by each landowner, either private or for public lands?

Answer: It is the responsibility of the applicant to confirm they have permission to access public or private lands as part of a boring project. A signature from each landowner impacted as part of a multiple stream boring project is not required. However, the applicant is responsible for obtaining all necessary permission from the respective landowners.

### **Changes to Adopted Rules**

Question: Can a CD amend its adopted rules regarding boring?

Answer: Yes. Activities that will not affect the stream are not considered a project and do not need a 310 permit. If a CD can develop standards specifications for boring activities that would negate their impacts, then any activities that met those standards could be exempted from needing a permit. A CD can amend its adopted rules to state if boring is a minimum depth below the stream and a minimum distance from the top of the bank, it will not impact the stream and is exempt, for example. The applicant must still supply an application which outlines the proposed project but can be deemed exempt upon review by the CD if it meets the requirements set out in the rule.

Question: Do we need to go through the Rules amendment process to do this?

Answer: Yes. You will need to formally adopt a rule regarding utility boring. The rule should include findings regarding the potential for significant impacts to the stream from boring and the requirements to be exempt.