

## 310 Permitting Workflow Toolkit

### Application Review under the *Montana Natural Streambed and Land Preservation Act*

#### I. Scope

This document was created to outline the procedure for reviewing 310 permit applications. It provides background information and describes the detailed process conservation districts (hereafter, CDs) should follow under Mont. Code Ann. §§ 75-7-112, et seq, and the Administrative Rules of Montana (AMR) 36.2.4. Appendix A includes a complete list of ARM 36.2.4 and Appendix B includes a summary of the application review process.

#### II. Authority

Mont. Code Ann. §§ 75-7-103 provides definitions for review of permit applications and -112 describes the procedures for considering projects. ARM 36.2.4 provides the minimum standards and guidelines for administration of the 310 law, required for adoption by all CDs.

This document is not a substitute for the information found in the statute, the ARM, or a CD's adopted rules. Additional guidance can be found in the CDs' Adopted Rules and CDs should always consult their Adopted Rules for any requirements unique to an individual CD.

#### III. Procedure for Considering a Project

##### STEP 1: APPLICATION

##### Step 1a: Application Received

CDs may receive applications digitally or in hard copy. They should have a policy in place for how they receive applications, such as who they should be emailed to or if they use Gilly software to accept online applications. When an application is received, a preliminary review for completeness should be done. This can be done by either the supervisors or by CD staff, if the board has delegated that responsibility.

ARM 36.2.403 requires applicants to use Form 270, known as the Joint Application, as the Notice of a Proposed Project. As stated in ARM 36.2.410(1), it is the applicant's responsibility to provide sufficient information for the CD to make a determination to approve, deny, or modify the application. Additionally, the CD may reject any applications that are not complete (AMR 36.2.408(3)).

If, following a preliminary review, the application is incomplete, return the application to the applicant and request additional information. If the application appears to be complete, record the date the application was *received* in the appropriate space at the top of the application and proceed to Step 1b.

##### Step 1b: Application Accepted

As described in ARM 36.2.408(3), when a CD accepts an application the time frame for the rest of the review process begins and specific deadlines are triggered. The CD should not accept an application until they are ready to proceed with the review.

Accepting the application can be done formally, with a motion during a board meeting, or informally, by CD staff, if the board has delegated that responsibility to staff. Once an application has been *accepted*, the date should be recorded in the appropriate field at the top of the application form.

If, during any point in the review process, the board determines that the proposed activity is not a project as defined by 75-7-103(5) MCA, the applicant may proceed after they receive written notice from the board (75-7-112(1) MCA).

#### Step 1c: File Created

Immediately following acceptance of an application, the CD should create a file for the application and any associated information. The file may be digital or hardcopy. A standard nomenclature should be used to label files for organized record keeping. Many districts use some combination of the year, the permit number (as determined by how many permits have been received prior to it this year), the stream, and the type of review (application, violation, emergency, maintenance, etc.).

The state records retention schedule requires that all documents associated with a 310 permit be retained by the CD for 5 years, after project completion. This includes the application or notice of an emergency, team member report, and the supervisor decision form, at a minimum. Any other pertinent documents, such as pictures or information submitted by the applicant or the public, should also be included. After five years, the file needs to be kept by the CD indefinitely, only if it is considered to be significant. A permit file may be considered significant if it was contentious, complex, larger than usual, or for any other reason the board determines appropriate.

#### Step 1d: Application Forwarded to FWP

Within 10 working days of accepting the application, the CD must notify Montana Fish Wildlife and Parks (hereafter, FWP) (MCA 75-7-112(1)). Generally, CDs notify FWP by emailing a copy of the application to their appropriate FWP biologist. Area biologists with FWP work with CDs as technical advisors for the 310 review process. Contact information for the FWP biologists for each district can be found here: <https://experience.arcgis.com/experience/4bde82c416634c6ab7bd388a55ab9dd6/page/Fisheries/?views=Fish-Biologist> or by contacting conservation district bureau of DNRC at 406-444-6669.

### STEP 2: ONSITE INSPECTION

#### Step 2a: FWP Requests Onsite Inspection

Once the FWP biologist has received notice from the CD (generally, an emailed copy of the application), they have 5 working days to inform the CD if they are requesting an onsite inspection (MCA 75-7-112(1)). If an onsite inspection is requested by FWP, the supervisors must form a site inspection team within 20 days of FWP's request. Proceed to Step 2b. If the FWP biologist does not request an onsite inspection, the supervisors may proceed to Step 4, Board Decision.

#### Step 2b: Onsite Inspection Completed

If an onsite inspection is requested by FWP, the supervisors must form an inspection team within 20 days of FWP's request (MCA 75-7-112(2)). The inspection team consists of one representative from each FWP, the CD, and the applicant. A CD supervisor is generally the representative for the CD on the inspection team; however, that duty may be delegated to staff or a professional hired for that purpose.

If the FWP or CD representative on the team would like to waive their participation in the onsite inspection, they must submit their waiver in writing to the supervisors within 5 days of the team being formed. Additional supervisors may join the team during the inspection (as long as no quorum is present), but they are not considered part of the team.

Many CDs schedule onsite inspection dates individually as works for applicants' schedules. However, some CDs hold their onsite inspections on standardized days of the week or month. This system can be efficient when onsite inspections are needed frequently. In some circumstances, such as deep snow preventing access to the site, the inspection may be delayed. In this case, the CD should conduct the onsite inspection as soon as reasonably practicable.

### STEP 3: TEAM MEMBER REPORT

#### Step 3a: Team Member Report(s) Completed

Form 272 is used by members of the team to provide a recommendation to the board for approval, approval with modifications, or denial of an application (ARM 36.2.403). Each member of the team must complete a team member report and submit it to the board for review within 30 days of the onsite inspection (MCA 75-7-112(3)); however, the applicant may waive their right to do so.

The team member report should be filled out as completely as possible so that the supervisors have enough information on which to base their decision. In particular, the team should make their best effort to determine if the proposed project is a reasonable means of accomplishing the objective as stated in the application. As described in MCA 75-7-112(9), to determine reasonableness, the team must consider:

1. the effects on soil erosion and sedimentation, considering the methods available to complete the project and the nature and economics of the various alternatives;

2. whether there are modifications or alternative solutions that are reasonably practical that would reduce the disturbance to the stream and its environment and better accomplish the purpose of the proposed project;
3. whether the proposed project will create harmful flooding or erosion problems upstream or downstream;
4. the effects on stream channel alteration;
5. the effects on streamflow, turbidity, and water quality caused by materials used or by removal of ground cover; and
6. the effect on fish and aquatic habitat.

Additional guidance on assessing the effects of a projects or possible modifications to reduce impacts can be found in the *Stream Permitting Guide for Conservation District Supervisors* found digitally here: [https://dnrc.mt.gov/\\_docs/permits-services/StreamPermittingBinderBook2020.pdf](https://dnrc.mt.gov/_docs/permits-services/StreamPermittingBinderBook2020.pdf) or by contacting the conservation district bureau of DNRC at 406-444-6669.

The team may also make recommendations for modifications to the project; however, they should be very careful not to design the project for the applicant as that may make them liable should the project fail. A CD can require an applicant to provide professionally engineered plans and drawings as part of the application. Minor modifications that are not likely to affect the success of the project are common, such as requiring grass to be seeded in areas of disturbed soil. Recommendations for larger modifications that change the overall design of the project are not encouraged. If during the onsite inspection, the team recognizes that larger modifications would reduce the impacts of the projects, the applicant should submit an amended application, rather than the team using Form 272 to suggest large changes.

### Step 3b: Team Member Report(s) Submitted

Team member reports must be submitted to the board within 30 days of the onsite inspection, unless additional time has been granted by the board. The board cannot make a final decision to approve, modify, or deny the proposed project until they have received the team's recommendation(s).

Often, the team member report is completed during the onsite inspection and is signed by all members of the team. However, team members may submit separate reports if they have differing recommendations for the board or it is practical to do so. Any member of the team may request additional time to submit their report. If the board approves the additional time request, the total time from the date of application acceptance to the board's final decision to approve, deny, or modify the application may not exceed one year (MCA 75-7-112(7)). The board should be conscientious of this timeline when determining to approve a team member's request for additional time.

The team member report can also be used to document a team member's request to waive the 15-day waiting period. The waiting period provides a window of opportunity for parties disagreeing with the board's decision to request dispute resolution. The waiting period can only be waived if written permission is given by *all* members of the inspection team *and* by the board (MCA 75-7-112(7)). Generally, this is documented by each team member checking the appropriate box on Form 272 and the board checking the appropriate box on Form 273, the Supervisor Decision Form. The 15-day waiting period should only be waived if deemed necessary by all parties, otherwise the waiting period should be maintained.

## STEP 4: BOARD DECISION

### Step 4a: Public Meeting Held

All permitting decisions should be made by the board during an open, public meeting. The supervisors should be conscientious of only discussing applications during public meetings to avoid issues with open meeting law. This includes conversations by email and text. During meetings, only the applications listed on the meeting agenda should be discussed.

The best practice for meeting minutes is to capture the salient points presented by the team and discussed by the supervisors. Motions should be noted verbatim, and the justification for decision should be clear in the minutes.

### Step 4b: Board Decision to Affirm, Modify, or Overrule Team's Recommendation

Unless additional time for the team to submit their recommendation has been granted, the board will review the team's recommendation and the application then vote to approve, approve with modifications, or deny the application within 60 days of accepting the application (MCA 75-7-112(4)). The board's final decision may be postponed if additional time is needed, but it must be made within one year of accepting the application (MCA 75-7-112(7)).

Much like the team during the onsite inspection, the supervisors, in making their decision must first determine the purpose of the project and if the proposed project is a reasonable means of accomplishing that purpose (MCA 75-7-112(9)). In determining if the project is reasonable, the supervisors must consider:

1. the effects on soil erosion and sedimentation, considering the methods available to complete the project and the nature and economics of the various alternatives;
2. whether there are modifications or alternative solutions that are reasonably practical that would reduce the disturbance to the stream and its environment and better accomplish the purpose of the proposed project;
3. whether the proposed project will create harmful flooding or erosion problems upstream or downstream;
4. the effects on stream channel alteration;

5. the effects on streamflow, turbidity, and water quality caused by materials used or by removal of ground cover; and
6. the effect on fish and aquatic habitat.

If the supervisors determine that modifications to the project are warranted, they may condition their approval on the modifications (MCA 75-7-112(10)).

The supervisors may not approve or modify a proposed project unless they determine that the purpose of the proposed project will be accomplished by reasonable means (MCA 75-7-112(11)). If the proposed project represents an unreasonable means for accomplishing the object, this is justification for denial of the application.

In addition, supervisors must verify that the proposed project meets the standards and guidelines described in 36.2.410, ARM. The full standards and guidelines can be found in Appendix A.

#### Step 4c: Supervisor Decision Form is Signed and Copy Sent to Applicant and FWP

The Supervisor Decision Form 273 is used by the board to document their decision to approve, modify, or deny the application (36.2.403, ARM).

It is best practice for the supervisors to fill out the entire form during the meeting. Make sure to include an explanation for the final decision, the date the permit expires, and the date work may commence (15 days from the decision date, unless the waiting period has been waived). It is recommended that all supervisors who voted should sign the decision form. If attending the meeting virtually, supervisors may delegate someone else to sign on their behalf.

If the final decision is to approve the application with modifications, make sure all modifications are clearly specified on the supervisor decision form.

The Supervisor Decision Form 273 is also used to convey the CD's decision to the team members and the applicant. A copy should be sent to each FWP and the applicant. The applicant must then sign and return the form to the CD within 30 days of receipt of the decision (75-7-112(5)(6), MCA). If any member of the team disagrees with the decision, proceed to Step 5, Dispute Resolution.

#### STEP 5: DISPUTE RESOLUTION

Arbitration and judicial review are the two formal processes for dispute resolution regarding the supervisors' decision to approve, modify, or deny an application. Arbitration may be requested by any member of the inspection team, but judicial review may only be requested by the applicant. See Step 5a and 5b for more details.

A declaratory ruling is a formal dispute resolution process that may be requested by any directly affected person who disagrees with the supervisors' determination of jurisdiction. A declaratory ruling is not used to address disputes about the supervisors' decision to approve, modify, or deny an application.

Informal dispute resolution is always preferable. CDs are welcome to schedule special meetings or otherwise attempt to work through disputes prior to arbitration or judicial review. For assistance with dispute resolution, CDs should contact their county attorney or request legal support through MACD.

#### Step 5a: Team Member, Other Than Applicant, Disagrees with Board's Decision

If a member of the team, other than the applicant, disagrees with the board's decision, they may request arbitration within 5 working days of receipt of the board's decision (75-7-112(5), MCA). The arbitration agreement can be found on the back of the Supervisor Decision Form 273. Arbitration can often be an arduous process and should not be taken lightly. Informal dispute resolution is always preferable, when possible.

#### Step 5b: Applicant Disagrees with Board's Decision

If the applicant disagrees with the board's decision, within 30 working days of receipt of the decision, they may either request arbitration or seek judicial review in district court (75-7-112(5), MCA). To notify the CD of their request, they should complete and sign the appropriate section on the supervisor decision form and return it to the CD. If the applicant chooses to seek judicial review, the applicant is responsible for pursuing that option in district court. Completing the supervisor decision form and signing the appropriate section does not initiate action in district court but rather gives the CD notice of the applicant's intentions. A CD should not give legal advice to an applicant on how to seek judicial review other than to advise the applicant it is an option available to them.

### STEP 6: RECORDS RETENTION

The state records retention schedule requires that all documents associated with a 310 permit be retained by the CD for 5 years, after project completion. This includes the application or notice of an emergency, team member report, and the supervisor decision form, at a minimum. Any other pertinent documents, such as pictures or information submitted by the applicant or the public, should also be included. After five years, the file needs to be kept by the CD indefinitely, only if it is considered to be significant. A permit file may be considered significant if it was contentious, complex, larger than usual, or for any other reason the board determines appropriate.

## APPENDIX A

### ADMINISTRATIVE RULES OF MONTANA 36.2.410 STANDARDS AND GUIDELINES

- (1) It is the applicant's responsibility to provide sufficient information for the district to make a reasonable determination to approve, modify, or deny a notice of proposed project. Information to be provided by the applicant, may include, but is not limited to, the purpose of the project, a detailed project description of how the project will be accomplished, project plans and drawings, maps of the site, time of construction, length of time to complete the project, and engineering designs if required by the district.
- (2) Projects must be designed and constructed using methods that minimize:
  - a. adverse impacts to the stream, both upstream and downstream;
  - b. future disturbance to the stream.
- (3) All disturbed areas must be managed during construction and reclaimed after construction to minimize erosion.
- (4) Temporary structures used during construction must be designed to handle high flows reasonably anticipated during the construction period. Temporary structures must be completely removed from the stream channel at the conclusion of construction and the area must be restored to a natural or stable condition.
- (5) Channel alterations must be designed to retain original stream length or otherwise provide hydrologic stability.
- (6) Streambank vegetation must be protected except where removal of such vegetation is necessary for the completion of the project. When removal of vegetation is necessary, it must be kept to a minimum.
- (7) Riprap, rock, or other material used in a project must be of adequate size, shape, and density and must be properly placed to protect the streambank from erosion.
- (8) The district may:
  - a. limit the time and duration of construction to minimize impacts to the stream or associated aquatic life;
  - b. require the applicant to submit engineering designs when in the district's judgment the project's complexity requires a greater assurance of project stability to minimize impacts to the stream;
  - c. require the applicant to provide project completion documentation, which may include photographs.
- (9) Unless specifically authorized by the district, the following projects are prohibited:
  - a. the placement of road fill material in a stream;
  - b. the placement of debris or other materials in a stream where it can erode or float into the stream;
  - c. projects that permanently prevent fish migration;
  - d. operation of construction equipment in a stream; and
  - e. excavation of streambed gravels.



## APPENDIX B

### 310 APPLICATION REVIEW SUMMARY

Step 1: Application	
1a: Application Received	Internal review to make sure the application is complete. The board may delegate this responsibility to staff.
1b: Application Accepted	May be done formally during a meeting or informally by staff, if the board has delegated that responsibility. Starts the timeline for all other steps.
1c: File Created	Use a standard nomenclature or naming system
1d: Application Forwarded to FWP	CD must notify FWP within 10 <b>working</b> days of accepting the application.
Step 2: Onsite Inspection	
2a: FWP Requests Onsite Inspection	Within 5 <b>working</b> days of receiving the notification, FWP must inform the CD if they request a site inspection.
2b: Onsite Inspection Completed	The onsite inspection team must be called together within 20 days of receiving the request from FWP to complete the inspection.
Step 3: Team Member Report	
3a: Team Member Report(s) Completed	Each member of the team must complete a Team Member Report, form 272, with their recommendation to approve, modify, or deny. May be on one form or each member may submit separate forms. The applicant may waive their right to submit a recommendation.
3b: Team Member Report(s) Submitted	Team member reports must be submitted to the board within 30 days of the onsite inspection.
Step 4: Board Decision	
4a: Public Meeting Held	The application is listed on the agenda for a public meeting.
4b: Board Decision to Affirm, Modify, or Overrule Team's Recommendation	Within 60 days of accepting the application, the board will review the proposed project and vote to affirm, modify, or overrule the team's recommendation(s).
4c: Supervisor Decision Form is Signed and Copy Sent to Applicant and FWP	Form 273 is completed and signed by all voting supervisors. FWP and the applicant are notified of the decision.
Step 5: Dispute Resolution	
5a: Team Member, Other Than Applicant, Disagrees with Board's Decision	Within 5 <b>working</b> days of notification of the board's decision, any member of the team, other than the applicant, that disagrees may request arbitration.
5b: Applicant Disagrees with Board's Decision	If the applicant disagrees, they may either request arbitration or appeal the decision to district court within 30 <b>working</b> days of notification of the board's decision.
Step 6: Record Keeping	
6a: Records Retention	All permitting documents are maintained by the CD for 5 years, following the records retention schedule. Significant records are kept permanently.