

# Whitefish Wastewater (Sewer) Impact Fee Issue

## Phantom Solar Array Project

The City of Whitefish has been overcharging builders and residents impact fees since at least Jan 1, 2019. One of the issues that led to these overcharges was the inclusion of a **Solar Array** project when calculating sewer impact fees. The following summarizes the City errors associated with this project.

1. *First, the City included this project when it failed to meet the requirements required by Montana law and its basic **nexus** test. (Note 5)*
2. *The City then failed to remove this project from impact fee calculations after admitting the project was not going to be developed.*
3. *Finally, the City failed to issue refunds to those who were overcharged these fees, again violating State mandates.*

The City Manager stated in an email copied the Mayor and City Attorney that she did not remove this project from calculated fees because of offsetting new costs associated with the new Wastewater Treatment Plant (WWTP). However, she never performed a re-calculation of fees nor submitted this to the Impact Fee Committee and Council for approval. She likewise failed to recognize the new capacity of the WWTP that resulted from these additional costs.

By not properly accounting for and removing the Solar Array project, the City overcharged every homeowner who applied for a new home building permit after Jan 1, 2019 at least **\$430**.

### BACKGROUND

To calculate sewer impact fees, the 2018 Impact Fee Update study lists projects (both current and future) that must meet Montana Statute requirements. On page 15, in chart IV-3, appears a project labeled "Solar Array" with a 2018 project date and cost of \$4,000,000. This is the second most expensive project used for sewer impact fee calculations. This item represents nearly 19% of Improvement Fees. It represents nearly 13% of Total and Charge per ERU (CPE) listed on page 16, Table IV-4. It adds at least \$430 to every home permit in Whitefish.

**Table IV-3: Wastewater Improvement Fee Cost Basis**

Capital Project	Year	Current Cost (Uninflated)	% Utility-Funded	% Allocable to Growth	Amount In Cost Basis
WWTP Improvements – Design	2018	\$ 1,000,000	100.0%	27.0%	\$ 270,000
WWTP Improvements	2019	17,725,000	95.0%	27.0%	4,428,000
Manhole & Pipe Rehab	2018	250,000	100.0%	0.0%	-
Flathead Ave. Sewer	2018	100,000	100.0%	100.0%	100,000
Sewer Main Upgrade N of Hospital – Greenwood to Columbia	2018	125,000	100.0%	0.0%	-
Piping – Future Capacity Enhancements	2019	400,000	100.0%	30.0%	120,000
Whitefish Urban Project – US 93 – Design & Construct	2021	200,000	100.0%	0.0%	-
Cow Creek Sewer Extension	2022	880,000	100.0%	28.41%	250,000
Generator (Emergency Power) & Access Improvements	2018	110,000	100.0%	0.0%	-
Glenwood Lift Station	2018	15,000	100.0%	0.0%	-
Houston Point Lift Station	2019	100,000	100.0%	0.0%	-
Emergency Services Center / Public Works Expansion	2018	20,000	100.0%	0.0%	-
<b>Solar Array</b>	2018	<b>4,000,000</b>	<b>100.0%</b>	<b>27.0%</b>	<b>1,080,000</b>
Less: Existing Wastewater Impact Fee Fund Balance					(494,905)
<b>Total</b>		<b>\$24,475,000</b>			<b>\$5,753,095</b>

## **Solar Array Project Not Even Studied until Late 2019**

Prior to the FCS impact fee update, the only public reference to this project was found in the Whitefish Climate Action Plan (CAP) which listed a project to convert traditional energy used at the Wastewater Treatment Plant to solar. In 2017, the Public Works Director met with members of CAP where this project was discussed, as documented in their minutes. There is no record of this project in any of the FY 2017-2021 Capital Improvement Programs. This is REQUIRED by Whitefish Ordinance 10-2-10 and Montana Statute 7-6-1602(2)(k). There is no reference to it on the Public Works Department's website as a present or past project. This is all highly unusual for a \$4 Million project.

The Whitefish Planning Department was contacted about this project. The project had been discussed several years ago, according to a spokesperson. A feasibility study was conducted in late 2019 (one year AFTER the FCS Impact Fee Update) which did not produce promising results. The payback period was too long. After this study was published and presented to the City Council, Whitefish decided not to proceed with this project.

The *Solar PV Feasibility Study, 11/30/19* suggested a portion of City land near the Whitefish Water Treatment Plant be used to build a Solar Array. The cost estimate was \$881,647 but the savings would only be \$31,831 a year, with a payback of 27.7 years. The spokesperson said this project was presented to the City Council but not approved. It is unlikely to ever move forward, according to the spokesperson and if it was resurrected, it would probably be funded by donations or private capital, NOT by Public Works funds.

The project was studied but never included in any capital improvement plan or budgeted, yet it was listed in the Impact Fee Update as a 2018 operational project.

## **Project Does Not Meet State Requirements**

According to the 2018 FCS Impact Fee Update (page 2) and Montana statute 7-6-1603, for a project to be included in Impact Fee calculations, it must meet one of two criteria:

1. *"Montana Code allows for a government entity to 'recoup costs of excess capacity in existing capital facilities' (7-6-1603 (3))."* The solar array project certainly does not represent excess capacity and is not part of any existing facility and as such does not meet this criterion.
2. *"The improvement fee methodology must include only the cost of projected capital improvements or portions of improvements needed to increase system capacity for future users."* The project adds nothing to capacity, nor is it needed to increase capacity. It replaces one form of inexpensive energy (mostly hydro-electric) with expensive energy (solar) with limited return.

The Solar Array project meets none of the criteria necessary to be included in Whitefish impact fees. If anything, it falls into the category of operation or maintenance expense, which is specifically excluded from impact fee consideration by Montana statute 7-6-1602 (7e). Further, the project fails even the basic **nexus** test required of projects included in impact fee calculations (Note 5) since new development received no benefit from this project.

## **Impact Fees Still Reflect Cost of This Phantom Project**

This unapproved, unfunded and unimplemented project produced significant sewer impact fee overcharges and continues to do so.

This project should never have been placed in the 2018 Impact Fee Update. The Flathead Electric Community Solar group in Kalispell was contacted and asked about general solar feasibility for major projects in the Whitefish and Kalispell area. This group researches and installs solar panels throughout the Flathead Valley and manages several solar array projects located between Whitefish and Kalispell. The spokesperson candidly admitted that *“there is just not enough sunshine to make it economically feasible”* and she confirmed the study’s findings that solar projects in our area simply have *“too long of a payback period”*.

### **Refunds Not Issued, Violating City Ordinance**

This project did not satisfy Montana Statute (7-6-1602) and further, the city decided not to construct the Solar Array. City Ordinance 10-2-8 Refunds (A) states:

*“If the City fails to collect or spend the impact fees in accordance with this chapter, or in accordance with Montana Code Annotated section 7-6-1602, the City shall refund any impact fees collected to the current owner of the property on which impact fees have been paid.”*

The Department instead opted to use these funds for other projects, in violation of Montana law and City Ordinance.

### **City Continues To Charge Residents for This Project**

Residents continue to be charged significantly more in sewer impact fees while the City does nothing to correct this problem. The overcharge is estimated to exceed \$200,000 for the last 3 years for just residential applicants alone. This is a violation of Montana statute 7-6-1602 (5).

## **CITY RESPONSE**

The City of Whitefish was notified of this problem in correspondence with the City Manager, Mayor, and certain Council members. A report was also submitted to several Montana State agencies. The City did respond to this report in July, 2021.

In an email dated July 21, 2021, the City Manager rationalized that since there were offsetting costs associated with the new WWTP (Wastewater Treatment Plant), she could justify her decision to not remove this project and continue to charge residents.

*“We did remove the Solar Array from the City’s adopted capital improvement plan when the cost of the WWTP increased from the estimate of \$18.725 million to just over \$22 million. This information was known after the impact fees were adopted and would not change the calculation”.*

However, there are several serious flaws and omissions in this statement.

1. The Solar Array was NEVER included in any City’s adopted capital improvement plan as stated in this email (and as required by law). In an August 30<sup>th</sup> 2021 meeting at City Hall with the City Manager and Finance Director, the City Manager was asked to identify this plan, and she could not. Viewing FY 2017 – FY 2022 CIP reveals NO such project in any of these documents. The project should never have been included in the wastewater impact fee calculations. (Note 4)

2. When costs for the WWTP did increase as stated by the City Manager, there was no re-calculation performed or presented to the Impact Fee Committee or City Council for approval. There was no determination what the differences were between the new cost and the Solar Array project costs.
3. The only document relevant to the approximate \$22M cost (referenced in her email) for the WWTP was the awarded contract to Swank Construction in late 2019 or early 2020. The contract to build the new WWTP was \$20.4M and actually was less than \$20M. (Note 3)
4. **Most importantly**, the City Manager failed to account for the 30% increased capacity of the new WWTP as a result of these increased costs. *This would significantly REDUCE the wastewater impact fees*, contrary to her assertion that the impact fees would not be affected. Increased capacity allows more new homes to share the cost of the new WWTP.

### REMOVE SOLAR ARRAY, RECALCULATE FEES, ISSUE REFUNDS

The following shows the recalculation of the wastewater impact fees that would result from the removal of the Solar Array project. The City Manager acknowledged that the project was not being developed. Therefore, the project should be removed from the sewer impact fee calculation.

Table IV-3 below shows this project as listed in the 2018 FCS Impact Fee Update:

**Table IV-3: Wastewater Improvement Fee Cost Basis**

Capital Project	Year	Current Cost (Uninflated)	% Utility-Funded	% Allocable to Growth	Amount In Cost Basis
WWTP Improvements – Design	2018	\$ 1,000,000	100.0%	27.0%	\$ 270,000
WWTP Improvements	2019	17,725,000	95.0%	27.0%	4,428,000
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Flathead Ave. Sewer	2018	100,000	100.0%	100.0%	100,000
Sewer Main Upgrade N of Hospital – Greenwood to Columbia	2018	125,000	100.0%	0.0%	-
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Whitefish Urban Project – US 93 – Design & Construct	2021	200,000	100.0%	0.0%	-
Cow Creek Sewer Extension	2022	880,000	100.0%	28.41%	250,000
Generator (Emergency Power) & Access Improvements	2018	110,000	100.0%	0.0%	-
Glenwood Lift Station	2018	15,000	100.0%	0.0%	-
Houston Point Lift Station	2019	100,000	100.0%	0.0%	-
Emergency Services Center / Public Works Expansion	2018	20,000	100.0%	0.0%	-
<b>Solar Array</b>	2018	4,000,000	100.0%	27.0%	1,080,000
Less: Existing Wastewater Impact Fee Fund Balance					(494,905)
<b>Total</b>		<b>\$24,475,000</b>			<b>\$5,753,095</b>

By removing this project from Table IV-3, the Cost Basis for the sewer fee would be reduced by \$1,080,000, leaving \$4,673,095. The next table was used to calculate the sewer impact fee:

**Table IV-4: Summary of Updated Wastewater Impact Fee**

Wastewater Impact Fee Calculation	Reimbursement Fee	Improvement Fee	Administrative Fee	Total
Total Costs	\$2,736,963	<b>\$5,753,095</b>	5%	\$8,490,058
Growth in ERUs	2,634	2,634		2,634
<b>Charge per ERU</b>	<b>\$1,039</b>	<b>\$2,184</b>	<b>\$141</b>	<b>\$3,384</b>

Replacing the \$5,753,095 Improvement Fee with \$4,673,095 would result in a *Total* of \$7,410,058 rather than \$8,490,058 above. Dividing this number by 2,634 (*Growth in ERUs*) results in \$2,813. Adding a 5% *Admin Fee* and the *Charge per ERU* becomes **\$2954**, not **\$3,384**, which is the current wastewater impact fee charged by the City. The total overcharge was **\$430**, (including admin fee of 5%) per typical new single family residents. (Note 1)

Going forward, the sewer impact fee for new building permits should be reduced by this amount. The collection chart used by the City should be updated to lower the *Base Impact Fee* along with the lower *Additional Cost per Fixture Unit Above Base*.

The City should recalculate and refund all building permit applicants that were overcharged sewer impact fees since Jan 1, 2019 per Montana statute 7-6-1603 (1c) and City Ordinance 10-2-8 Refunds (A).

## **ALTERNATE SEWER IMPACT FEE RECALCULATIONS**

The City Manager states in the July 21, 2021 email that she left the Solar Array project in the impact fees collected because she had identified additional costs associated with the WWTP that offset the fees collected from the non-existent Solar Array project. But if she chose to recalculate the sewer impact fees using these increased costs, she needs to factor in the increased sewer capacity as well.

### **Additional WWTP Costs and Increased Capacity**

According to the Whitefish Public Works Department webpage, the bid to construct the new WWTP was awarded to Swank Construction in early 2020. Their bid was \$20.4 Million. (Note 3)

The Department stated that the new capacity of the WWTP would be 2.07 mgd with a peak demand capacity of 6.06 mgd (Note 2). The planned capacity of this new WWTP in the 2018 FCS Update was only 1.59 mgd as described below.

This comes from the 2018 FCS Update, page 12.

### **ERU Calculation Explanation**

#### **IV.A. SYSTEM CAPACITY & CUSTOMER BASE**

The Wastewater Impact Fee calculation expresses the customer base in terms of Equivalent Residential Units (ERUs), recognizing the potential demand that each meter imposes on the City's wastewater system. 2018 customer data provided by the City, indicates that the City currently serves 4,644 ERUs. The 2016 Wastewater Treatment Plant plan (pg. 3) indicates that the Average Day Demand per ERU for the City is 218 gallons. Information provided by the City indicates the planned capacity of the Wastewater Treatment plant is 1.59 MGD supporting a capacity of 7,278 ERUs. This leaves a planned capacity of 2,634 additional ERUs.

The 1.59 mgd came from a 2016 Engineering Study that also estimated the cost of the new plant (with design) at \$18,725,000. This is also reflected in the FCS Update in Table IV-3. The new cost of the WWTP scheduled for completion in 2021 increased to \$20,400,000, but the capacity grew 30% from 1.59 mgd to 2.07 mgd, per the Whitefish Public Works Department (Note 2).

To fairly compute sewer impact fees, both the increased cost AND increased capacity numbers MUST be included in any new calculations. The increased capacity of the new WWTP would result in more homes being supported by the new plant.

### **Recalculate Number Of Supported Homes**

The new capacity of 2.07 mgd identified above MUST be used to calculate the number of homes supported.

Using the method described in the **ERU Calculation Explanation** above, substitute 2.07 mgd for the 1.59 mgd and divide by the 218 gpd consumed by 1 ERU, leaving 9,495 total ERUs that the new wastewater treatment plant can

support. Subtract the current number of ERUs in the city (4644), leaving 4851, which is the future capacity of the new WWTP.

### Recalculate Improvement Fee in Table IV-3

The new Improvement Fee must next be recalculated. First remove the \$4,000,000 Solar Array project, which eliminates \$1,080,000 from the *Amount In Cost Basis*. Next substitute the \$20,400,000 for the original \$17,725,000 WWTP Improvements. The *Amount In Cost Basis* for this project increases to \$5,232,600 (20,400,000 x .95 x .27).

Recalculate the *Total Improvement Fee* after these two changes. The resultant number is \$5,477,695 which is carried forward to Table IV-4.

### Recalculate Sewer Impact Fee in Table IV-4

Two numbers should be changed in Table IV-4. Substitute the new 4,851 for the 2,634 as the *Growth in ERUs number*. Replace the \$5,753,095 *Improvement Fee* with \$5,477,696 which would result in a *Total* of \$8,214,658 rather than \$8,490,058. Divide this number by 4,851 (*Growth in ERUs*) and the results is \$1,693. Adding a 5% *Admin Fee* and the *Charge per ERU* now becomes \$1,778, rather than the current \$3,384, the wastewater impact fee used by the City.

The total overcharge was \$1606, (including admin fee of 5%) per typical new single family resident. More new residents will be sharing the increased cost, resulting in lower impact fees.

As shown above, if the City Manager tries to justify the substituting the Solar Array costs with future costs for the new WWTP, the new wastewater impact fees are dramatically REDUCED.

## NOTES

1. \$3348 above is actually a transposition of the actual calculated amount of \$3384. \$8,490,058 divided by 2,634 is \$3,223. Adding 5% Admin Fee results in a wastewater impact fee of \$3,384.
2. Neil Dezort of the Whitefish Public Works Department left a recorded voicemail stating the current capacity of WWTP is 2.07 mgd with a peak capacity of 6.06 mgd. This was a 30% increase from the 1.59 mgd used in the FCS calculations. **Nereda**, which provides the treatment technology, states on their website describing the new Whitefish WWTP: “The current (Whitefish) plant is treating a municipal effluent load of 34,600 p.e. with a daily average flow of 9,245 m<sup>3</sup>/a day and a peak flow of 1,094 m<sup>3</sup>/hour.” 1 m<sup>3</sup> = 264.172052 gallons (US). This equates to 2.442 mgd with a peak of 6.935 mgd. (<https://www.royalhaskoningdhv.com/en-gb/nereda/nereda-plants-a-to-z/usa-whitefish/13580>)
3. Whitefish Department of Public Works Website > Current Projects > Wastewater Facility Improvement: “Bids for construction of the City’s Wastewater Treatment Plant were opened in November of 2019 and construction is now underway. The project was awarded to Swank Construction of Kalispell for a contract amount of \$20,370,000.” Bid was actually reduced to \$19,895 after savings.
4. Montana Statute 7-6-1602(2)k – The City failed to include any of the necessary components (cost, timetable, etc.) relating to the Solar Array project in a Council approved CIP.
5. 2007 HDR Impact Fee Study, page 5-6, “The City, as a matter of policy, may charge any amount up to the allowable impact fee, but not over that amount. Charging an amount greater than the allowable impact fee would not meet the **nexus** test of a cost-based impact fee”. Cil Pierce, HDR Engineering. Further, Overstreet Law defines nexus: “The new law requires that there be a reasonable connection, called a **rational nexus**, between impact fees and the actual expenditures required as a result of the new home construction, and that the residents of those new homes receive some benefit from the impact fees they pay.” In 1994, the

United States Supreme Court ruled in *Dolan v. City of Tigard* (Oregon) that exactions made by governments must be "roughly proportional" to the impacts caused by the development that is subject to the exaction. Synonyms for "roughly proportional" include (1) "**rational nexus of benefit**" between system development charges and development, (2) "proportionate share" of public facilities to be paid by system development charges, and (3) costs "reasonably related" to expected impacts.

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