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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

**IN THE MATTER OF:  
APPEAL AMENDMENT AM4,  
WESTERN ENERGY COMPANY,  
ROSEBUD STRIP MINE AREA B  
PERMIT NO. C198400B**

**CASE NO. BER 2016-03 SM**

**Petitioners' Reply in Support of  
Motion for Summary Judgment**

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 15<sup>th</sup> day of August 2016  
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## EXHIBITS<sup>1</sup>

**Ex. 38:** Western Energy Company, MPDES #MT0023965 Permit Modification Application (Jan. 13, 2015).

**Ex. 39:** Montana Department of Environmental Quality, Permit No. MT0023965, Permit Fact Sheet (January 27, 2016).

**Ex. 40:** Montana Department of Environmental Quality, Bull Mountains Mine No. 1, Cumulative Hydrologic Impact Assessment, Amendment AM3 (July 8, 2016).

**Ex. 41:** U.S. Office of Surface Mining, Mid-Continent Region, Hydrologic Considerations for Permitting and Liability Release (June 2007).

**Ex. 42:** Montana Department of Environmental Quality, Department of Environmental Quality's Brief in Response to Plaintiffs' Motion for Summary Judgment, *MEIC v. DEQ*, CDV 2012-1075 (1st Mont. Dist. Mar. 16, 2015).

**Ex. 43:** Letter from Western Environmental Law Center, to Montana Department of Environmental Quality (Oct. 10, 2014).

**Ex. 44:** David Hansen, *Colstrip*, Montana (Taverner Press 2010).

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<sup>1</sup> Exhibits are provided on a CD accompanying this reply. Citations are provided as [Exhibit #] at [Page #]. The original pagination of the document is given where available. If a document is not numbered, page numbers are given counting from the first page.

Petitioners Montana Environmental Information Center and the Sierra Club (collectively, “Citizens”) respectfully submit the following reply in support of their motion for summary judgment.

### STANDARD OF REVIEW

**A. Summary Judgment Is Favored and Cannot Be Defeated by Inadmissible Evidence or Contradictory Statements of the Party Opposing Summary Judgment.**

The Department is incorrect to state that “[s]ummary judgment is clearly not favored in the courts.” DEQ Resp. at 3. On the contrary, “[w]hen th[e] requirements [of Rule 56] are met the procedure **should be viewed with favor** and applied according to its terms. This conclusion was affirmed by a series of summary-judgment cases decided by the Supreme Court in the 1980s.” 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2712 (3d ed. 2016) (internal citations omitted) (emphasis added). Summary judgment “is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials when no genuine issues of fact have been raised.” *Id.* (internal citations omitted); *accord Silvestrone v. Park Co.*, 2007 MT 261, ¶ 9, 339 MT 299, 170 P.3d 950.

On summary judgment, “only admissible evidence can be considered.” *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 7-8, 640 P.2d 453, 456 (1982). A party opposing summary judgment “must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, that raise a genuine issue of material fact.” *Estate of Willson v. Addison*, 2011 MT 179, ¶ 14, 361 Mont. 269, 258 P.3d 410. Importantly, a party may not manufacture an issue of material fact by contradicting its own prior statements. *Stott v. Fox*, 246 Mont. 301, 309, 805 P.2d 1305, 1309-10 (1990) (“The plaintiffs can not make a material issue of fact . . . through the use of his own contradictory testimony.”).

There is no question that contested cases under the Montana Administrative Procedure Act (MAPA), § 2-4-601 to -631, may be resolved via summary judgment. *Anaconda Pub. Schs. v. Whealon*, 2012 MT 13, ¶¶ 15-16, 363 Mont. 344, 268 P.3d 1258; *In re Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991).

**B. Neither the Department Nor WEC Co May Present Post-Decisional Evidence Or Post Hoc Rationalizations.**

In *In re Bull Mountain Mine*, No. BER 2013-07 SM, 55-59, ¶¶ 60-70 (Jan. 14, 2016), this Board elaborated at length the proper standard and scope of review

of a decision by the Department approving a strip-mining permit pursuant to Administrative Rules 17.24.314(5) and 17.24.405. Despite their obvious displeasure with that correct standard, neither the Department nor WECO provides new authority or sound argument for abandoning it.

The Department and WECO largely repeat arguments based on *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, and the provisions of the Montana Administrative Procedure Act (MAPA), § 2-4-612(1), MCA, that the Board recently rejected in *In re Bull Mountain Mine*. DEQ Br. at 9-12; WECO Br. at 20-22. These arguments fail because, as the Board explained in *In re Bull Mountain Mine*, while the cited authorities recognize the right of parties in contested cases to present evidence, they do not entitle parties to present **irrelevant, post hoc** evidence. *In re Bull Mountain Mine*, at 56, ¶¶ 65-66.<sup>2</sup> The Department's material damage determination and permitting decision must be made "**on the basis of information** set forth in the application or information

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<sup>2</sup> See Mont. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

otherwise available that is **compiled by the department.**” ARM 17.24.405(6) (emphasis added).<sup>3</sup>

For the same reason, the Department’s citation to Montana Rule of Civil Procedure 56 is misplaced. While Rule 56 allows parties to present affidavits and other materials to attempt to establish genuine issues of material fact, it does not entitle them to present irrelevant, inadmissible evidence. Mont. R. Civ. P. 56(e)(1); *see, e.g., Brown*, 197 Mont. at 7-8, 640 P.2d at 456. As the Board held in *In re Bull Mountain Mine*, post-decisional evidence and argument is simply irrelevant to its assessment of the adequacy of a cumulative hydrologic impact assessment and decision to issue a strip-mining permit under MSUMRA. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70.

*Keily Contruction, LLC v. City of Red Lodge*, 2002 MT 241, ¶¶ 2-3, 312 Mont. 52, 57 P.3d 836, is a recent, analogous case that explains the basis for excluding post-decisional evidence and argument. In that case, a construction company appealed the Red Lodge city council’s denial of a subdivision

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<sup>3</sup> *See also* ARM 17.24.314(5) (mandating that **the CHIA** “must be sufficient to determine, for purposes of a permit decision, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area”).

application. *Id.* ¶¶ 2-3. Like the provisions of MSUMRA, Montana Code Annotated §§ 76-3-608(2), -620, require a governing body to “issue written findings” and “prepare a written statement” containing specific statutory information, including the reasons for its decision, whenever it makes a decision on a subdivision application. The Red Lodge commission never issued the required written statement and findings. *Keily Constr.*, ¶ 12. The Montana Supreme Court held that the trial court properly refused to admit other “documents and testimony that demonstrated the reasons the City Council denied [the] application.” *Id.* ¶¶ 93, 96-97. The Court held that official minutes containing statements by council members at the public meeting at which the council denied the application were properly excluded because “[t]he council meeting minutes **are not the equivalent of the written statement** the council was statutorily required to issue, **and cannot be used as a substitute.**” *Id.* ¶ 96 (citing § 76-3-620, MCA) (emphasis added). Similarly, the Court upheld exclusion of “‘post decision’ statements” by the council members attempting to justify the subdivision denial: “**Nor were the after-the-fact opinions** of individual council members as to the reasons for the denial **relevant.**” *Id.* ¶ 97 (emphasis added).

The Court's reasoning in *Keily* mirrors that of the Board in *In re Bull Mountain Mine*: when a government body is required by statute to make certain written findings in a specific document in order to approve a given action, post-decisional statements by members of the government body "are not the equivalent" to the required written statement and are, therefore, not "relevant" or admissible. *Keily*, ¶¶ 96-97; cf. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70.

The federal Interior Board of Land Appeals reached the same conclusion with respect to the CHIA requirement in an early and influential administrative decision, *NRDC v. Office of Surface Mining (NRDC v. OSM)*, 89 IBLA 1, 30 (1985). There, citing the agency's duty under the Surface Mining Control and Reclamation Act (SMCRA) to make specific written findings before issuing a permit,<sup>4</sup> the Interior Board held:

The recitation of statutory findings is **insufficient** if the **permit record** does not **affirmatively demonstrate** that OSM [Office of Surface Mining] made a PCI assessment [i.e., CHIA] of all anticipated mining in the area and that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

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<sup>4</sup> That provision is 30 U.S.C. § 1260(b)(3), the federal equivalent of ARM 17.24.405(6)(c).

*Id.* (emphasis added).<sup>5</sup> Accordingly, the Interior Board refused to consider external evidence submitted by the coal company regarding potential hydrologic impacts:

Although ARCO [the coal company] argues that the MRP's [mining and reclamation plans from other nearby mines] of the five mines in the general area establish that there will be no cumulative impact on ground water, **the duty to assess the cumulative impacts is entrusted to the regulatory authority, in this case OSM.** MRP's are prepared by permit applicants, and only OSM's objective assessment of the information therein (and whatever other data it may rely on) can satisfy the requirements of section 510 [30 U.S.C. § 1260(b)(3), the CHIA requirement].

*Id.* at 32 (first emphasis added, second emphasis in original).

In sum, the standard of review established in *In re Bull Mountain Mine* is fully consistent with MSUMRA, MAPA, rulings of the Montana Supreme Court, and rulings of the Interior Board of Land Appeals in federal administrative appeals of coal mining permits issued under SMCRA.<sup>6</sup>

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<sup>5</sup> See also *Save Our Cumberland Mountains*, 108 IBLA 70, 85-86 (1989) (noting that the administrative record starts with the document "initiat[ing] the process" and ends with "the decision and proof of service" and that if "the agency's action is not sustainable on the administrative record," "courts are instructed to vacate the agency decision").

<sup>6</sup> The Department's suggestion that due process entitles it to present post-decisional evidence that was never presented to the public to support its decision, DEQ Br. at 11, fails because due process protects "person[s]"—not the state—from illegal state action. U.S. Const. amends. V, XIV, § 1; Mont. Const. art. II, § 17; *accord Creek v. Village of Westhaven*, No. 83 C 1851, 1987 WL 5429, at \*7 (N.D.

**C. On Appeal Before the Board, the Citizens Have the Burden of Showing that the Record Does Not Support the Department's Decision.**

Finally, both the Department and WECO discuss the proper burden of proof. The Citizens agree that in this contested case hearing, they have the burden of showing that the Department acted unlawfully. *See MEIC v. DEQ*, ¶ 16. To carry this burden, the Citizens need only show that “the [permit] record is devoid” of materials or analysis affirmatively demonstrating that the “cumulative hydrologic impacts” “will not result” in material damage, including violation of water quality standards. *NRDC v. OSM*, 89 IBLA at 29; ARM 17.24.405(6)(c); § 82-4-203(31), MCA; accord *In re Bull Mountain Mine*, at 87, ¶ 136.<sup>7</sup> Regarding the Department's **legal** determinations, on summary judgment, the Citizens need only show that such determinations are incorrect. *Pennaco Energy, Inc. v. Mont. BER*, 2008 MT 425, ¶ 18, 347 Mont. 415, 199 P.3d 191.

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Ill. Jan. 15, 1987) (“The due process clause provisions protect natural persons . . . , not government, from arbitrary actions by the sovereign.”).

<sup>7</sup> *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 331-33 (1986) (White, J., concurring) (explaining in summary judgment context how party that does not carry ultimate burden of proof can obtain summary judgment by demonstrating the absence of evidence supporting the non-moving party's case).

## ARGUMENT

### A. **The Department's Determination that the Mine Would Not Cause Violations of Water Quality Standards in East Fork Armells Creek Was Unlawful.**

To issue a mining permit, the Department must "confirm" that the "cumulative hydrologic impacts **will not result in material damage,**" which includes violation of "a **water quality standard.**" ARM 17.24.405(6)(c) (emphasis added); § 82-4-203(31), MCA (emphasis added).

Here, the Department admits the CHIA's determination that East Fork Armells Creek was meeting water quality standards **did not follow** the Department's **own protocols** for assessing compliance with **water quality standards** in East Fork Armells Creek. Worse, in making this determination, the Department rejected its own prior assessments that were conducted pursuant to established departmental protocols and that determined that the upper and lower segments of the creek were **not meeting water quality standards.** As such, Department's material damage determination was irrational and unlawful, and the Citizens are entitled to summary judgment as a matter of law.

There is no dispute that, pursuant to its obligations under the federal Clean Water Act,<sup>8</sup> the Department's Water Quality Bureau has determined that the upper and lower segments of East Fork Armells Creek **are not meeting water quality standards.**<sup>9</sup> There is no dispute that the determination was made pursuant to the Department's established protocols for assessing compliance with water quality standards. Pet'rs' Ex. 6; Pet'rs' Ex. 7; DEQ Ex. E, ¶¶ 7, 15, 17, 23. Nor is there any dispute that the Department identified coal mining as a potential source of pollution causing the creek to fail to meet water quality standards. DEQ Ex. E, ¶¶ 18, 24. The Department has stood by and continues to stand by this assessment in its official biennial filings with EPA for the past ten years. DEQ Ex. E, ¶ 16.<sup>10</sup>

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<sup>8</sup> 33 U.S.C. § 1313(d)(1)(A), (2) (requiring states to "identify" state waters that do not meet "water quality standard[s]" and submit the list identifying such waters to the U.S. Environmental Protection Agency).

<sup>9</sup> DEQ Ex. E, ¶¶ 6-7 (admitting "Water Quality Standards Attainment Records" "are developed . . . for determining whether a stream is meeting its designated uses," i.e., meeting water quality standards); *id.* ¶ 17 (lower segment of creek "is 'impaired' for the aquatic life designated use," i.e., not meeting water quality standards for aquatic life); *id.* ¶ 24 (upper segment "impairment of aquatic life," i.e., not meeting water quality standards); *accord* Pet'rs' Exs. 6, 7.

<sup>10</sup> *See also* Montana Dep't of Env'tl. Quality, Montana's Clean Water Act Information Center, 305(b) and 303(d) Documents, <http://deq.mt.gov/Water/WQPB/cwaic/reports>. Both segments are listed in the draft

It is likewise uncontested that in approving the AM4 Amendment to the Area B Permit, the Department disregarded its prior official Water Quality Standards Assessment Reports (that determined that both segments of East Fork Armells Creek were **not meeting** water quality standards) on the basis of an aquatic life survey conducted by WECO's consultant. Pet'rs' Ex. 2 at 9-8; Pet'rs' Ex. 1 at 8-9. It is undisputed that the survey conducted by WECO's consultant **did not** follow the Department's established protocols for assessing compliance with water quality standards. DEQ Ex. E, ¶¶ 33, 36; Pet'rs' Exs. 20, 35.<sup>11</sup> Yet, on the basis of the survey, the Coal Program's hydrologists (rather than the Water Quality Bureau's Macroinvertebrate Specialist) determined that the creek had a "diverse<sup>12</sup>] community of macroinvertebrates" and "therefore, the reach currently meets the

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2016 report. *Id.* (follow "Appendix A – Impaired Waters" hyperlink, listing is on page A-164).

<sup>11</sup> Indeed, the Department's "Coal Program staff" specifically "instructed" Dave Feldman, the Macroinvertebrate Specialist with the Department's Water Quality Bureau, "not to advise [WECO's consultant for the survey] how the sample results **could be used to determine aquatic life health,**" i.e., compliance with water quality standards. Resp't Ex. E, ¶ 33 (emphasis added).

<sup>12</sup> Mr. Feldman, the Water Quality Bureau's Macroinvertebrate Specialist, on the other hand, said the samples were "**not very diverse**" and indicated "low" water quality. Pet'rs' Ex. 35 at 2 (emphasis added).

narrative [water quality] standard of providing a beneficial use for aquatic life.”

Pet’rs’ Ex. 2 at 9-8; Pet’rs’ Ex. 1 at 8-9.

The material facts are undisputed. As a matter of law it was irrational and unlawful for the Department to conclude that East Fork Armells Creek was meeting water quality standards for aquatic life—and therefore that the AM4 Amendment “will not result in material damage”—based on an assessment that **did not** follow the Department’s own established protocols for determining compliance with water quality standards. ARM 17.24.405(6)(c); § 82-4-203(31), MCA.<sup>13</sup> This failure is outstanding in light of the prior and continuing determination by the Department’s Water Quality Bureau, made pursuant to the Department’s established protocols for assessing water quality standards, that East Fork Armells Creek is **not meeting** water quality standards for aquatic life. *Motor Vehicle Mfrs.*

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<sup>13</sup> *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (in issuing a permit the Department must articulate “a rational connection between the facts found and the choice made”); *accord Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (“[A]dministrative agencies are required to engage in reasoned decisionmaking.” (quotation omitted) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998))).

*v. State Farm*, 463 U.S. 29, 57 (1983) (“[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change . . .”).<sup>14</sup>

The Department’s and WECO’s various counter arguments raise immaterial points insufficient to avoid summary judgment. The Department notes that per the instruction of the Department’s Coal Bureau, the Water Quality Bureau’s Macroinvertebrate Specialist, Mr. Feldman, “did not advise [WECO’s consultant] how the [survey] sample results could be used to determine aquatic health.” DEQ SDF at 30. But that point cuts strongly against the Department because it shows the Department **intentionally** avoided supplying information to WECO that might have resulted in an analysis of water quality standards that comported with the Department’s own protocols.

Next the Department states that the Water Quality Bureau “does not believe that the health of aquatic life in eastern Montana streams can be determined by the composition of a macroinvertebrate sample alone.” *Id.* This point, however, is immaterial. While the Departments’ protocols for determining compliance with

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<sup>14</sup> It is revealing that even though the Department has arrogated the ability to present post hoc evidence and analysis, it has not attempted to reassess the creek’s compliance with water quality standards under the proper protocols.

water quality standards may involve more than just assessing the diversity of aquatic macroinvertebrates,<sup>15</sup> the point here is that Department management specifically instructed staff to make a determination of compliance with water quality standards for aquatic life, **without regard** to its own established protocols for determining compliance with water quality standards for aquatic life—that is they instructed staff to make an irrational determination. Resp'ts' Ex. E, ¶¶ 33, 36; Pet'rs' Exs. 20, 35.

Finally, the Department argues that it was not using WECO's survey to determine whether East Fork Armells Creek was meeting water quality standards, as required by the Clean Water Act, but only to make the material damage determination required by MSUMRA. DEQ Br. at 34; DEQ SDF at 30-31. This purely legal argument fails because under MSUMRA the material damage

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<sup>15</sup> See Pet'rs' Ex. 34 at 14 (“Depending on the availability and rigor of other biological data, benthic macroinvertebrate data **may not** be used exclusively for aquatic life and fisheries beneficial use support determinations [i.e., determinations of compliance with water quality standards].” (emphasis in original)); DEQ Ex. E, ¶ 28 (noting that the Water Quality Bureau typically assesses physical habitat, chemistry, and biology in making determinations of compliance with water quality standards). Of course, the Department's hydrologists requested WECO to sample aquatic life because they identified worsening chemistry in the creek—increased concentrations of harmful pollutants. DEQ Ex. C, ¶ 53.

determination specifically requires an assessment of compliance with “**water quality standards.**” § 82-4-203(31), MCA; ARM 17.24.405(6)(c). The CHIA for the AM4 Amendment recognized this: “Material damage criteria include applicable . . . **water quality standards** . . . .” Pet’rs’ Ex. 2 at 2-2 (emphasis added). An assessment that does not accurately assess compliance with “water quality standards” does not pass legal muster under MSUMRA.

WECO’s arguments are equally unavailing. First, WECO suggests that the upper portion of East Fork Armells Creek is “wholly or largely ephemeral” and therefore exempted from aquatic life water quality standards for C-3 waters. WECO Br. at 45. WECO’s argument is disingenuous. Both the CHIA and WECO’s own supplemental Probable Hydrologic Consequences report recognize that a portion of the upper segment of East Fork Armells Creek adjacent to Areas A and B of the strip mine “has intermittent to perennial water.”<sup>16</sup> Further, in 2015 WECO

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<sup>16</sup> Pet’rs’ Ex. 2 at 9-7; Pet’rs’ Ex. 32, Report Assessment of East Fork Armells Creek Vicinity of Areas A and B, at 9-10 (pdf. 77-78) (noting transition of creek from ephemeral to intermittent conditions adjacent to mine); WECO Ex. 6, ¶ 25 (noting recovery of intermittent water levels in portion of creek adjacent to mine). WECO may not manufacture an issue of material fact by contradicting its own prior statements that at least one portion of the creek is intermittent adjacent to the mine. *Stott*, 246 Mont. at 309, 805 P.2d at 1309-10.

applied for and was granted a modification of its water pollution discharge permit in recognition of “the intermittent reach” of the upper segment of the creek adjacent to the mine, acknowledging the applicability of water quality standards for aquatic life.<sup>17</sup> Thus, water quality standards for aquatic life apply to the relevant segment of East Fork Armells Creek by **WECO’s own request**. Moreover, the First Judicial District Court of Montana recently ruled that by law the Department must treat **all** portions of East Fork Armells Creek as intermittent and subject water quality standards for aquatic life until the Department complies with the applicable legal procedure required to reclassify streams.<sup>18</sup> Thus, WECO’s argument has no merit.

Next WECO points out that its consultant conducted her aquatic life survey pursuant to “the Department’s standard operating procedures.” WECO Br. at 46. This argument fails because, while WECO’s consultant asserts that she complied with the Department’s methodology for **collecting** macroinvertebrate **samples**, she admits that she did not follow the Department’s protocol for **assessing compliance**

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<sup>17</sup> Pet’rs’ Ex. 38 at 3-4 & Attach. C at 10-11 (pdf. 395-96); Pet’rs’ Ex. 39 at 2-3.

<sup>18</sup> *MEIC v. DEQ*, cdv 2012-1075, slip op. at 18-20 (1st Mont. Dist. Mar. 14, 2016) (attached as Petitioners’ Exhibit 30).

**with water quality standards.** WECO Ex. 10, ¶ 35. Again, she did not follow the protocol for assessing water quality standard because the Department **instructed her not to.** *Id.*<sup>19</sup> Further, while WECO's consultant did calculate results from one biological index (the Hilsenfoff Biotic Index),<sup>20</sup> it is undisputed—and WECO does not suggest—that this calculation alone does not constitute the Department's established protocol for assessing compliance with water quality standards.<sup>21</sup>

Finally, WECO contends that the Department's assessment of East Fork Armells Creek's compliance with water quality standards for aquatic life consisted of more than merely observing that some aquatic life was surviving in the creek. WECO Br. at 47-48. The argument is irrelevant. What is relevant is that the Department determined in the CHIA process and continues to assert on appeal, as a matter of law, that it could lawfully assess East Fork Armells Creek's compliance with water quality standards, without following its established protocols for

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<sup>19</sup> *Accord* Pet'rs' Ex. 20 at 1; DEQ Ex. E, ¶¶ 32-34.

<sup>20</sup> The results of which showed “poor” to “very poor” stream conditions. WECO Ex. 10, ¶ 41.

<sup>21</sup> *See* Pet'rs' Ex. 34 at 14-16 (elaborating additional analyses, including “observed/expected” model and “Bray-Curtis Index”); DEQ Ex. E, ¶ 28 (noting assessment of water quality standards also involves assessment of habitat and chemistry).

assessing compliance with water quality standards. Pet'rs' Ex. 20; Pet'rs' Ex. 35; DEQ Ex. E, ¶¶ 32-36. As noted above, this legal argument is irrational and contrary to the express terms of MSUMRA.

**B. The Department Omitted Analysis of Anticipated Mining Operations by Employing a Legally Erroneous Definition of “Anticipated Mining.”**

The undisputed evidence plainly demonstrates that the Department excluded multiple anticipated mining operations from consideration in its CHIA on the basis of an erroneous **legal** determination. The Department attempts to argue that it excluded analysis of such operations on the basis of a **factual** determination, but the record—including the Department's own statements—contradicts the Department's argument.

**1. The Permit Record Demonstrates the Department Excluded Analysis of Operations with Pending Applications Based on an Erroneous Legal Definition of “Anticipated Mining.”**

The Department does not dispute that its CHIA erroneously defined “anticipated mining” as “the entire projected life through bond release of all **permitted operations**,” Pet'rs' Ex. 2 at 5-1 (emphasis added), rather than “all operations with **pending applications**,” as required by law, ARM 17.24.301(32)

(emphasis added).<sup>22</sup> Nor does the Department dispute the authenticity of official letters, emails, and departmental meeting notes in which the Department developed its erroneous definition of “anticipated mining” and, **on the basis of which**, instructed WECO to exclude analysis of hydrologic impacts from multiple operations with “pending applications.” DEQ SDF at 1-9.

A summary of relevant record documents reveals the Department’s legal error. On May 3, 2013, Chris Yde, Section Supervisor of the Department’s Coal Program, DEQ Ex. B, ¶¶ 4, 7, sent a letter to WECO stating that the required hydrologic analysis for the AM4 Amendment should include all permitted areas and the proposed cuts associated with the AM4 Amendment, but that it **should not** include other operations for which **applications had been submitted but not approved** (i.e., “all anticipated mining,” ARM 17.24.301(32)):

The PHC needs to be comprehensive for Areas A, B, and C. The PHC should include analysis of potential impacts for all **permitted mining** in Rosebud Mine Areas A, B, and C, as well as the proposed cuts in Area B (AM4). There is no need to complete PHC’s for individual areas, as the Rosebud Mine as a whole needs to have a single comprehensive analysis for all surface and ground water impacts. **The**

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<sup>22</sup> In apparent recognition of its error in the AM4 Amendment CHIA, the Department corrected its definition of “anticipated mining” in its most recent CHIA for the Bull Mountains Mine. *See* Pet’rs’ Ex. 40 at 2-10 n.6.

**proposed cuts associated with currently unapproved minor revisions for Area A should not be included.**

Pet'rs' Ex. 17 at 1 (emphasis added).

Two weeks later, on May 16, 2013, WECO's hydrology consultant provided the Department with an outline of modeling options for its Probable Hydrologic Consequences report. Pet'rs' Ex. 27; Pet'rs' Ex. 16 at 9 (admitting outline was given to Coal Section Supervisor prior to call). One option included evaluating the "significance of **all proposed permits**, including the permit under consideration." Pet'rs' Ex. 27 at 1 (emphasis added). By "all proposed permits," WECO's consultant meant "all future pending permit applications for B-East, B-Ext [Extension], Area A MR62, Area [A] MR66, and Area F." *Id.* The other option—ultimately selected by the Department—was to evaluate only the "significance of a proposed permit." *Id.* Under this option, "[n]o other pending or proposed permits that have not been approved would be a component of this modeling effort." *Id.*

On May 16, 2013, Department personnel, including Coal Section Supervisor Yde and hydrologists Emily Hinz and Angela McDannel, and WECO representatives discussed the issue on a conference call. Pet'rs' Ex. 16 at 9; Pet'rs' Ex. 24. Supervisor Yde's notes from the call indicate that the Department chose to

exclude analysis of operations with pending, but unapproved applications, **based on an incorrect definition of “anticipated mining.”** Pet’rs’ Ex. 24. Supervisor Yde’s notes summarize their discussion of “what is needed for Area B Amendment PHC.” *Id.* Supervisor Yde wrote that this included “anticipated mining,” which he defined erroneously as including only operations that are “approved—but not mined.” *Id.*<sup>23</sup> Supervisor Yde then wrote that “proposed Area F and additional mining in Area A [are] **not included.**” *Id.* (emphasis added). As noted above, the Department repeated its erroneous definition of “anticipated mining” in the CHIA and excluded Area F and other operations with pending applications. Pet’rs’ Ex. 2 at 5-1.

Subsequent emails between WECO personnel and its hydrology consultant confirm that the Department chose not to require an assessment of hydrologic impacts from operations with pending applications based on its “newly defined potential [i.e., “anticipated”] mining.” Pet’rs’ Ex. 19 at 1. WECO’s Permit Coordinator Dicki Peterson, WECO Ex. 11, ¶ 1, wrote to WECO’s consultant:

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<sup>23</sup> *Cf.* ARM 17.24.301(32) (“anticipated mining” includes “operations with pending applications”).

My understanding of **the Department's newly defined potential mining** is "the proposed action for the area"—my interpretation for Area B . . . currently approved is the base and then App 00184 [AM4 Amendment] is the potential future mining. I don't know how difficult it is on your end, but **at the very least B-Extension would need to be taken off**. The Area A information was submitted as a minor and is under review (which you are aware).

When I talked to Michael [Nicklin, whom WECO hired to prepare its PHC, WECO Ex. 6 at 5] this morning he didn't think leaving the line for Area F would be problematic. But I'm sure anything that involved B-Extension would be since they have not seen that information formally.

Pet'rs' Ex. 19.

WECO's consultant responded:

It is easy for us to take any of the potential areas off the figure or take the entire figure out. **Based on the definition of potential mining below, I think we should only show App 00184 [AM4 Amendment]**. As that is shown on Figure 3a, there is no need for Figure 3c [showing Area F and other anticipate mining].

That being said, we have no problem showing exactly what you think is best for Western Energy.

**It is much more difficult to strip all of the Area F references** and boundary from the main Rosebud Mine Groundwater Model Report which is meant to encompass the greater Rosebud Mine.

*Id.* (emphasis added); Pet'rs' Ex. 26 (showing Figure 3c with Area F).<sup>24</sup>

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<sup>24</sup> Of course, the Department eventually did insist that WECO "strip" all references to Area F from its Probable Hydrologic Consequences report. Pet'rs' Ex. 18 at 1.

The record is clear: the Department instructed WECO to exclude all analysis of mining operations with pending applications based on its legally erroneous definition of “anticipated” or “potential” mining. The Department repeated its erroneous definition of “anticipated mining” in its CHIA. Pet’rs’ Ex. 2 at 5-1. The Citizens are entitled to summary judgment on this issue.

**2. The Department’s Post Hoc Rationalizations Based on Post Decisional Explanations by Department Staff Must Be Rejected.**

The Department attempts to manufacture a factual dispute about the reasons for its exclusion of anticipated mining operations, DEQ Br. at 18; DEQ SDF at 4, but its argument fails for three reasons. First, the Department may not rely on “post-decisional” statements by Department personnel. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70; *Keily Constr.*, ¶¶ 96-97. The post-decisional affidavits of Coal Program personnel<sup>25</sup> about why the Department supposedly excluded consideration of all anticipated mining operations with pending application are not the equivalent of the CHIA or the statement of written findings required by ARM 17.24.405(6)(c) and cannot be used as a substitute. Accordingly, such post-decisional statements are simply not relevant to the Board’s review of the Department’s approval of the

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<sup>25</sup> DEQ Ex. B, ¶ 24; DEQ Ex. C, ¶ 19, DEQ Ex. D, ¶ 20.

AM4 Amendment. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70; *Keily Constr.*, ¶¶ 96, 97; *NRDC v. OSM*, 89 IBLA at 30-32.

### 3. The Department's Cumulative Impact Area Argument Fails.

Second, the Department's own admissions defeat its argument about Area F being outside the cumulative impact area. Proffering a novel definition of cumulative impact area, the Department contends that it properly excluded Area F because it determined that the anticipated operation is entirely outside the cumulative impact area. DEQ Br. at 15-19 (relying on definition of "cumulative impact area," ARM 17.24.301(32)); DEQ SDF at 1-10. This argument fails because the Department has **conclusively admitted** that "portions [of] the proposed Area F permit area **are within the cumulative hydrologic impact area** identified in DEQ's CHIA for Amendment AM4." Pet'rs' Ex. 5 at 4 (emphasis added); Mont. R. Civ. P. 36(b) (admissions are conclusive).<sup>26</sup> By law, the CHIA was required to assess the cumulative impacts of all anticipated mining in the cumulative impact area. ARM 17.24.314(5).

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<sup>26</sup> The Department **has also conceded under oath** that "[h]ydrologic impacts from the proposed Area F operation may occur within the cumulative impact area identified in DEQ's CHIA for Amendment AM4." Pet'rs' Ex. 5 at 5; Mont. R. Civ. P. Mont. R. Civ. P. 33(b)(3) (answers to interrogatories made under oath).

Moreover, the Department may not manufacture an issue of material fact by contradicting its prior statements. *Stott*, 246 Mont. at 309, 805 P.2d at 1309-10.<sup>27</sup> All relevant documents in the permit record demonstrate that the Department excluded Area F and other operations with pending applications based on its erroneous **legal** definition of “anticipated mining.” *See supra* Part B.1. The Department acknowledges that “[n]o [pre-decisional] documents exist” in which it makes a **factual** determination that Area F and the AM4 Amendment of the Area B permit will not have cumulative impacts. Pet’rs’ Ex. 5 at 5. On summary judgment, the Board may reject “the nonmoving party’s story [that] is irrefutably contradicted by documentary evidence,” including its own statements. *Respect, Inc.*, 781 F. Supp. at 1367 (internal quotation omitted) (quoting *Stewart v. RCA, Corp.*, 790 F.2d 624, 628 (7th Cir. 1982)); *Stott*, 246 Mont. at 309; *accord Seshadri*, 130 F.3d at 801-04.

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<sup>27</sup> *Accord, e.g., Meadow Lakes Estates Homeowners Ass’n v. Shoemaker*, 2008 MT 41, ¶ 46, 341 Mont. 345, 178 P.3d 81; *Kaseta v. Nw. Agency of Great Falls*, 252 Mont. 135, 139, 825 P.2d 804, 807 (1992); *Seshadri v. Kasraian*, 130 F.3d 798, 801-04 (7th Cir. 1997) (Posner, J.); *Wilson v. Westinghouse*, 838 F.2d 286, 289 (8th Cir. 1988); *Respect, Inc. v. Comm. on Status of Women*, 781 F. Supp. 1358, 1367 (D. Ill. 1992).

**4. Even with Post-Decisional Affidavits, the Department's Basis for Excluding Area F Was Unlawful.**

Even if the Board accepts the Department's post-decisional affidavits, the Department's basis for excluding Area F—the purported lack of a hydrologic connection between Area F and Area B<sup>28</sup>—is unsupported. This is because the Department entirely ignores the downstream connection of waters from West Fork Armells Creek and East Fork Armells Creek.

The Department cites the following statement of Ms. Hinz:

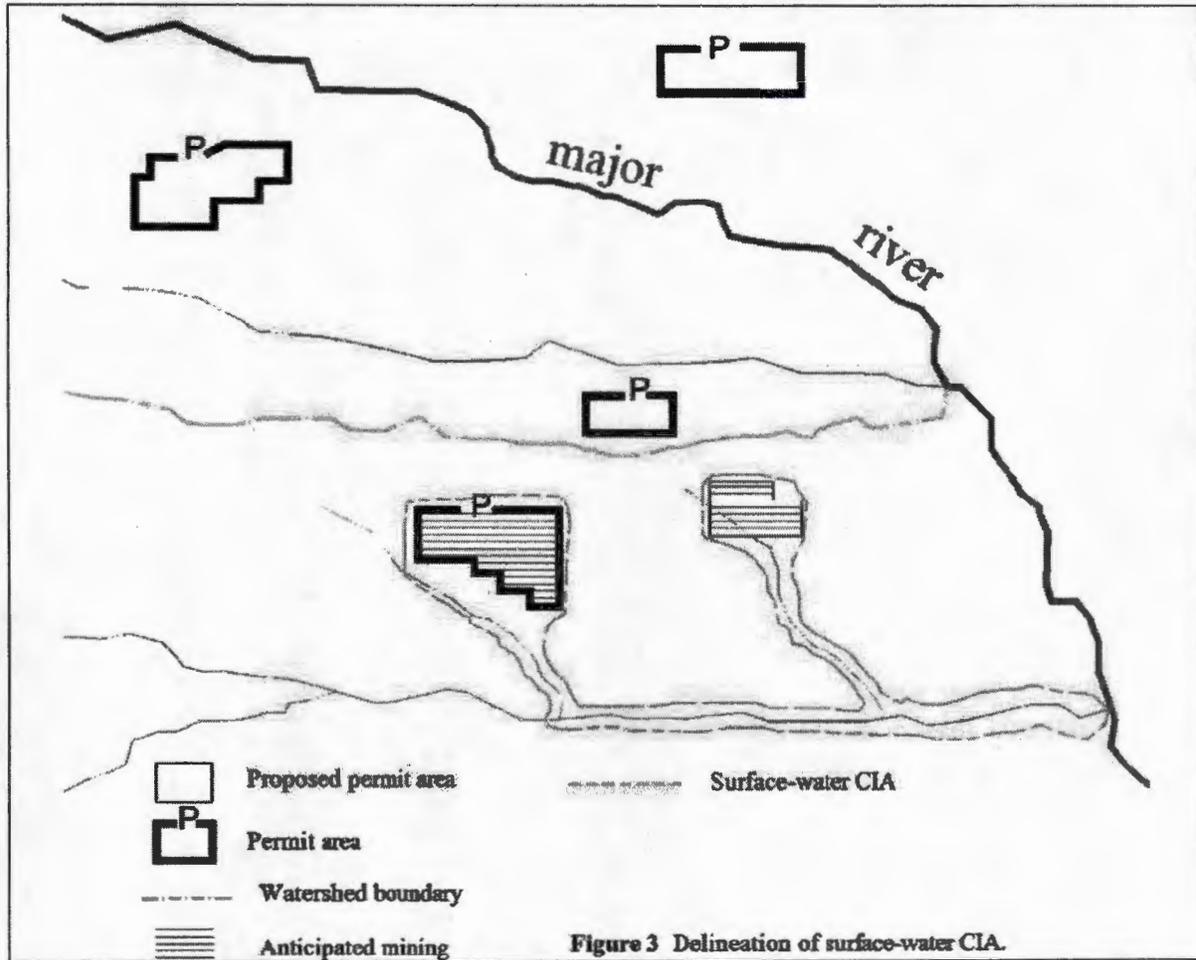
The lack of hydrologic connection between surface water in Area B/AM4 and Area F results from the surface water divide between EFAC [East Fork Armells Creek] and WFAC [West Fork Armells Creek] that occurs in Area C. Accordingly, surface water from AM4 does not interact with surface water from Area F[.]

DEQ Ex. 5, ¶ 20. This statement, while accurate with respect to a limited surface water divide between the two branches of Armells Creek, fails completely to assess potential cumulative impacts downstream. It is unquestionably the case that the “surface water divide” between East Fork Armells Creek and West Fork Armells Creek ends at the **confluence** of the two creeks. Petr'rs' Ex. 2 at fig. 8-1; WECO Ex. 6, Ex. B (map of creek drainages). Downstream impacts of adjacent mining

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<sup>28</sup> DEQ Br. at 18; DEQ SDF at 5.

operations are precisely the type of cumulative hydrologic impact that the CHIA process is intended to address:<sup>29</sup>



<sup>29</sup> Pet'rs' Ex. 41 at 24, fig. 3 (sample cumulative impact area from OSM CHIA guidance); *id.* at 20 (In delineating the cumulative impact area “[o]ne could reasonably expect that the cumulative effect of runoff from two mines could have a measurable impact on a small common watershed.”).

This is particularly the case, here, where the downstream portion of the Armells Creek watershed has been designated as not meeting water quality standards, likely, due to salinity, Pet'rs' Ex. 7 at 17, and Area B and Area F are predicted to contribute additional salts to upstream portions of the small watershed, Pet'rs' Ex. 32 at 4; Pet'rs' Ex. 33 at 14, 19-20.<sup>30</sup> The Department may not entirely disregard these potential effects without first conducting some kind of scientific assessment.<sup>31</sup> Its **complete** failure to do this was arbitrary and unlawful. *See In re Bull Mountain Mine*, at 64, ¶¶ 87-88 (complete failure to consider relevant issue was unlawful).<sup>32</sup>

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<sup>30</sup> Pet'rs' Ex. 42 at 9 (In its briefing in *MEIC v. DEQ*, No. CDV-2012-1075 (1st Jud'l Dist.), the Department acknowledged that the mine contributes pollutants to the lower segment of East Fork Armells Creek: “[S]egment MT42K002\_110 is downstream of the mine, and the **mine contributes pollutants that are the cause of the impairment . . .**”) (emphasis added).

<sup>31</sup> *See, e.g.*, Pet'rs' Ex. 41 at 19-27 (explanation by OSM office of scientific process for establishing the cumulative impact area).

<sup>32</sup> *Clark Fork Coal. v. DEQ*, 2012 MT 240, ¶ 20, 366 Mont. 427, 288 P.3d 183 (agency permitting decision is arbitrary and capricious if it fails to consider “relevant factors”); *NRDC v. OSM*, 89 IBLA at 32-33 (holding CHIA unlawful for failing entirely to consider impacts to certain water resources); *Motor Vehicle Mfrs.*, 463 U.S. at 43 (agency action may be set aside if it fails to consider relevant factors).

Finally, the Department's argument that "there was not sufficient data available at the time for [the Department] to perform an adequate analysis of the hydrologic impacts of Area F" is both legally irrelevant and factually disingenuous. DEQ SDF at 7-8. It is legally irrelevant because the limiting language "for which there is actual mine-development information" on which the Department relies applies only to "operations required to meet diligent development requirements," not to "all operations with pending applications."<sup>33</sup> Factually, in 2013 WECO's hydrology consultant informed the Department he could assess cumulative impacts of Area F only to be instructed not to do so by the Department, based on the Department's "newly defined potential mining." Pet'rs' Exs. 17-19, 24, 27. Thus, any supposed lack of data is a problem of the Department's making.

Unlike the Department, WECO's hired consultants address potential downstream interaction of cumulative impacts from Area F and impacts from Area B in their post-decisional affidavits. WECO Ex. 6, ¶¶ 50, 51; WECO Ex. 7, ¶¶ 14,

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<sup>33</sup> Compare ARM 17.24.301(32), with 30 C.F.R. § 701.5 (federal regulation on which state rule is modeled making clear distinction); 30 U.S.C. § 1253(a)(1) (approved state programs must be as stringent as federal program).

16. However, as the Interior Board of Land Appeals held in *NRDC v. OSM*, after-the-fact declarations by coal company experts are insufficient to satisfy the **regulatory authority's** duty to assess cumulative impacts to the hydrologic balance and determine whether the cumulative hydrologic impacts will cause material damage in the first instance. 89 IBLA at 32; *see also Keily Constr.*, ¶¶ 96-97; *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70.

**5. WECO's Exhaustion Arguments Are Without Merit.**

WECO's administrative exhaustion argument is unavailing. First, administrative exhaustion does not apply to administrative CHIA appeals, the only legal requirement of which is that the appealing party be "adversely affected" (which is uncontested here). § 82-4-206(1), MCA; ARM 17.24.425(1).<sup>34</sup> Second, the Citizens detailed comments apprised the Department of their concerns about cumulative impacts from Area F.<sup>35</sup> Third, the exhaustion doctrine does not bar the

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<sup>34</sup> 56 Fed. Reg. 2139, 2141 (Jan. 22, 1991) (failure to submit comments does not vitiate the right to appeal issuance of strip-mining permit).

<sup>35</sup> WECO Ex. 1 at 1 n.1; Pet'rs' Ex. 43 at 8 n.24, 10 n.33, 17, 19, 24 (repeatedly citing Probable Hydrologic Consequences report for Area F operations and requesting analysis of cumulative effects of anticipated Area F operations).

Citizens from raising a “purely legal issue,” like the Department’s legally erroneous definition of “anticipated mining.”<sup>36</sup>

Finally, the exhaustion doctrine does not apply when an agency “has in fact considered the issue” that a plaintiff raises, because the agency was aware of the issue and had the opportunity to correct it. *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); *see Shoemaker v. Drake*, ¶ 18 (explaining purpose of doctrine). Here, the Department was plainly aware of potential cumulative impacts from Area F. The record shows and Coal Program Supervisor Yde admits that the Department “had multiple communications with [WEC] concerning the scope of the PHC, including DEQ’s interpretation of which areas of the Rosebud Mine needed to be included in the PHC for AM4.” DEQ Ex. B, ¶¶ 18, 19; *see also* Pet’rs’ Exs. 17, 19, 24, 27.<sup>37</sup> However, as the record demonstrates, based on its erroneous definition of “anticipated mining,” the Department intentionally excluded consideration of all anticipated operations except the AM4 Amendment. *See supra*, Part B.1.

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<sup>36</sup> *Shoemaker v. Drake*, 2004 MT 11, ¶ 20, 319 Mont. 238, 83 P.3d 4 (“Montana recognizes an exception to the exhaustion doctrine when a purely legal issue is at the center of the dispute.”).

<sup>37</sup> Notably, the Department does not raise the issue of exhaustion.

**C. The Department's Complete Failure to Assess Electrical Conductivity Was Unlawful.**

The Department does not dispute (1) that water quality standards for electrical conductivity are material damage criteria, (2) that WECO has told the Department that it cannot comply with water quality standards for electrical conductivity, and (3) that, despite this, the Department's CHIA failed entirely to assess electrical conductivity in its material damage assessment. The Department and WECO raise contrary legal arguments that fail as a matter of law. Accordingly, the Citizens are entitled to summary judgment on this claim.

As their principal defense, the Department and WECO contend that the Department permissibly limited its material damage assessment of the "proposed operation" to only the additional mining cuts added to the Area B permit by the AM4 Amendment. The Department and WECO insist that since pollution discharges from those cuts will not flow into Rosebud Creek or its tributaries—even though other portions of the Area B permit area do discharge into Rosebud Creek and its tributaries—the Department's complete failure to assess electrical conductivity standards (which only apply to Rosebud Creek and its tributaries) was justified. DEQ Br. at 23; WECO Br. at 28-30, 34.

Respondents' attempt to limit the material damage analysis to a narrow segment of the proposed operation, however, is contrary to the express language of MSUMRA, the statutory structure, and the Department's own statements in its written findings. The plain text of MSUMRA prohibits such segmentation in applications for permit amendments, as here: "**All procedures** of this part pertaining to original applications **apply to applications for the increase of the area of land affected** [i.e., permit amendment applications], except for incidental boundary revisions." § 82-4-225, MCA (emphasis added).<sup>38</sup> One such requirement is that the Department may not approve the application unless it confirms that the "**cumulative hydrologic impacts** will not result in material damage." ARM 17.24.405(6)(c) (emphasis added). Again, the "cumulative hydrologic impacts" are defined as "the expected **total** qualitative and quantitative, **direct and indirect effects of mining and reclamation operations** on the hydrologic balance." *Id.* 17.24.301(31) (emphasis added). And again, operations, are defined as

(a) **all of the premises**, facilities, railroad loops, roads, and equipment used in the process of producing and removing mineral from and

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<sup>38</sup> The is no allegation that the AM4 Amendment was an "incidental boundary revision."

reclaiming a designated strip-mine or underground mine area, including coal preparation plants; **and**

(b) **all activities**, including excavation, incident to operations, or prospecting for the purpose of determining the location, quality, or quantity of a natural mineral deposit.

§ 82-4-203(35), MCA (emphasis added).

The manifest purpose of this expansive language—“all,” “cumulative,” “total”—is to prevent the Department from segmenting its analysis of permit amendments. Instead of applying “all procedures” to its review of the AM4 Amendment of the Area B permit and confirming that the “total,” “cumulative” effects of “all of the premises” and “all activities” will not result in material damage, the Department proposes to apply only a “subset” of its procedures and confirm that “some” of the effects from “some” of the premises and “some” of the activities will not result in material damage. This is contrary to both the plain text and the comprehensive structure of MSUMRA and, therefore, impermissible.

*Fleihler v. Uninsured Employers Fund*, 2002 MT 125, ¶ 13, 310 Mont. 99, 48 P.3d 746 (court “read[s] and construe[s] the statute as a whole” in light of its “text, language, structure, and object”). Indeed, here, the Department’s written findings identify the “[t]otal proposed permit area” as “6,231 acres,” which is the **totality**

of the Area B permit area. Pet'rs' Ex. 1 at 2 (emphasis added). Accordingly, the material damage determination should have applied to the "[t]otal permit area."

Seizing on the phrase "**designated** strip-mine . . . **area**" from the definition of "operation," WECO contends that the Department could limit its analysis to the few additional hundred acres added to the Area B permit by the AM4 Amendment. WECO Br. at 29 (quoting § 82-4-203(35), MCA) (emphasis added by WECO). This argument fails, however, because there is no "designated AM4" area, and WECO has identified none. The AM4 Amendment added 49 acres to the designated Area B permit area, 146 acres of surface disturbance to the Area B permit area, and 306 acres of coal removal to the Area B permit area. Pet'rs' Ex. 1 at 1. The result of the permit amendment is to designate a single, expanded Area B permit area. *Id.* at 2. Hence, the written findings identify the "[t]otal proposed permit area," as the totality of Area B. *Id.*

WECO further contends that it would be a meaningless "paperwork exercise" for the Department to consider potential material damage resulting from continued operations in the other portions of the designated Area B permit area. WECO Br. at 30. In effect, WECO contends it is irrelevant to a proposed expansion of existing strip-mining operations that those very existing operations are causing or will

cause material damage. WECo's proposal would undermine the very purpose and promise of SMCRA and MSUMRA, which is to "protect society and the environment from the adverse effects of surface coal mining" by assuring, among other things, that material damage to water resources "will not result." 30 U.S.C. § 1202(a); ARM 17.24.405(6)(c).

The Department's and WECo's remaining arguments lack merit. The Department's reference to § 75-5-103(30)(b)(i), MCA,<sup>39</sup> is irrelevant because the definition does not apply to MSUMRA, *id.* § 75-5-103, MCA (definitions only apply to "this chapter," i.e., Title 75, chapter 5, the Montana Water Quality Act). The Department and WECo's arguments about the size of the mine's settling ponds in the Rosebud Creek drainage<sup>40</sup> are both improper post hoc rationalizations and immaterial. While the size of the ponds may limit the likelihood of discharges into Rosebud Creek tributaries, there is no dispute that the Department has granted WECo a permit to discharge mine water into Lee Coulee (a tributary of Rosebud Creek) from seven outfalls in Area B. Pet'rs' Ex. 37 at 174; *see also In re Bull*

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<sup>39</sup> DEQ SDF at 8.

<sup>40</sup> DEQ SDF at 8-9; WECo Br. at 33-34.

*Mountain Mine*, at 56-59, ¶¶ 66-70 (post hoc rationalizations not permitted);  
*accord Keily Constr.*, ¶¶ 96-97; *NRDC v. OSM*, 89 IBLA at 32.

**D. The Department's Failure to Make a Material Damage Assessment with Respect to Potential Dewatering of East Fork Armells Creek in Section 15 Was Unlawful.**

The Department does not dispute that it failed to make a material damage determination with respect to the impact of mining in Area B on the segment of East Fork Armells Creek in section 15 that the Department and WECO have historically identified as intermittent.<sup>41</sup> As a matter of law, the Department cannot approve a permit application unless it can confirm that available evidence “affirmatively demonstrates” that material damage “will not result.” ARM 17.24.405(6)(c). Here, however, the Department unlawfully approved the AM4 Amendment to the Area B permit, despite its admitted inability and complete failure to make a material damage determination. Pet’rs’ Ex. 1 at 7 (approving application).

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<sup>41</sup> DEQ Br. at 30-31 (admitting that Department found insufficient information to make material damage determination for section 15); *accord* DEQ SDF at 12-13; Pet’rs’ Ex. 2 at 9-10 (“Without knowing the true nature of the stream flow and the interaction between groundwater and surface water, **a determination of material damage cannot be made.**” (emphasis added)).

The Department's principal argument is purely legal and mistaken. The Department argues that, by law, it was not required to make a material damage assessment for the totality of the designated Area B permit area, but only the additional segment added via the AM4 Amendment. DEQ Br. at 30-31. As elaborated above, *supra* Part C, such segmentation of the analysis is contrary to MSUMRA. Further, the Department's grousing about the lack of baseline data to determine the "true nature" of East Fork Armells Creek in section 15 actually cuts against the agency: if there was insufficient baseline data, the Department was prohibited from approving the Area B permit in the first place. § 82-4-222(1)(m), MCA ("[A] permit may not be approved until [baseline] information is available and is incorporated into the application."). The Department also contends that eliminating the water from a creek does not necessarily eliminate the designated uses of the water. DEQ Br. at 29-30. That argument contains its own refutation.

WECO attempts to manufacture an issue of fact via post-decisional affidavits that, like the Department, raise doubts about the "true nature" of East Fork Armells Creek in section 15 and about whether the segment is now ephemeral. WECO Br. at 43-44. But, again, the post-decisional statements of WECO's experts are not "equivalent" to the Department's required material damage determination and are

therefore irrelevant.<sup>42</sup> *Keily Constr.*, ¶¶ 96-97; *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70, *NRDC v. OSM*, 89 IBLA at 32.

**E. The Department's Complete Failure to Assess Potential Violation of Numeric Water Quality Standards for Nitrogen Was Unlawful.**

The Department admits that numeric water quality standards for nitrogen to protect aquatic life apply to surface waters in the cumulative impact area designated in the CHIA for the AM4 Amendment. DEQ Resp. at 27; DEQ SDF at 21; DEQ Ex. C, ¶ 41.<sup>43</sup> The Department admits that its Water Quality Bureau has determined through application of its proper assessment protocol, albeit with low confidence, that the lower segment of East Fork Armells Creek is not meeting applicable water quality standards for aquatic life and found that nitrogen was a potential cause of the impairment. DEQ SDF at 19.<sup>44</sup>

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<sup>42</sup> It is noteworthy that the 1986 Probable Hydrologic Consequences report, which identified intermittent conditions in section 15 and which WECO now contests as inaccurate, was produced by none other than WECO itself. WECO Br. at 43; *cf.* Pet'rs' Ex. 14. Contrary to WECO's suggestion, the 1986 report is not extra-record evidence. In fact, it was cited and relied upon by WECO in its Probable Hydrologic Consequences report for the AM4 Amendment. Pet'rs' Ex. 8 at 28.

<sup>43</sup> *Accord* Pet'rs' Ex. 5 at 16; Pet'rs' Ex. 16 at 12.

<sup>44</sup> *Accord* Pet'rs. Ex. 7 at 19.

It is clear that pollution from the Rosebud Mine may play some role in the creek's failure to meet water quality standards for aquatic life due to nitrogen pollution. The Department admits:

- that operations at the Rosebud Mine “contribut[e]” to the nitrogen pollution load in East Fork Armells Creek, albeit at comparatively “minimal” levels. DEQ Br. at 27; DEQ SDF at 17-18; DEQ Ex. C, ¶ 36;
- that “high nitrogen may be in surface water samples due to residual chemicals from blasting,” DEQ Ex. C, ¶ 37 (quoting CHIA, Pet’rs’ Ex. 2 at 9-26); and
- that “many of the highest values [of nitrogen] have been detected downstream of active mining.” DEQ Ex. C, ¶ 37 (quoting CHIA, Pet’rs’ Ex. 2 at 9-26).

Finally, the Department concedes that its CHIA failed entirely to assess whether the cumulative hydrologic impacts would lead to violations of numeric water quality standards for nitrogen to protect aquatic life. DEQ Br. at 25.<sup>45</sup>

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<sup>45</sup> The Board may note that the Department’s most recent CHIA for the Bull Mountains mine assesses numeric water quality standard for aquatic life. Pet’rs’ Ex. 40 at 2-5.

The Department's complete failure to assess an applicable water quality standard that could be violated due to the cumulative hydrologic impacts of the AM4 Amendment to the Area B permit was unlawful. *In re Bull Mountain Mine*, at 64, ¶ 88; ARM 17.24.314(5), 405(6)(c); *see also NRDC v. OSM*, 89 IBLA at 28-33. The Citizens are entitled to summary judgment on this claim.

The various counterarguments raised by the Department and WECO are unavailing. The Department argues at length that the numeric nitrogen standards for aquatic life do not apply to **some** streams in the cumulative impact area, DEQ Br. at 25-27, but as noted above, the Department ultimately concedes that there are other streams and stream segments in the designated cumulative impact area to which the standards do apply. DEQ Resp. at 27; DEQ SDF at 21; DEQ Ex. C, ¶ 41.

The Department next argues that "there was no reason" to analyze numeric nitrogen standards for aquatic life because "the available data<sup>[46]</sup> indicated that coal mining was not the source of the nitrogen in lower EFAC [East Fork Armells

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<sup>46</sup> The Department does not indicate what "available data" it is referring to. However, it appears to reference the Water Quality Bureau's Water Quality Standards Attainment Report, which appears to list only "agriculture" as a suspected source of the high nitrogen levels. Pet'rs' Ex. 7 at 19. As the Department has noted repeatedly, however, the Water Quality Standards Attainment Report is not a conclusive determination. *See, e.g.*, DEQ SDF at 18; DEQ Ex. E, ¶¶ 9-11.

Creek].” DEQ Br. at 27; DEQ SDF at 21-22; DEQ Ex. C, ¶ 43. This argument, found nowhere in the CHIA or the pre-decisional record, is an impermissible post hoc rationalization. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70. Indeed, it is entirely at odds with the Department’s admissions in the CHIA and in briefing that the mine “contributes” nitrogen to the lower segment of East Fork Armells Creek,<sup>47</sup> that “high nitrogen may be in surface water samples due to residual chemicals from blasting,”<sup>48</sup> and that “many of the highest values [of nitrogen] have been detected downstream of active mining.”<sup>49</sup> Again, the Department cannot manufacture an issue of fact by contradicting itself. *Stott*, 246 Mont. at 309, 805 P.2d at 1309-10; *Seshadri*, 130 F.3d at 801-04.

More importantly, even if nitrogen pollution from blasting at the mine is not the initial or even the greatest source of nitrogen levels in East Fork Armells Creek, the acknowledged additional **contribution** of nitrogen to the system will only **worsen** the situation and thus constitute a cause of further violation of water quality standards and, accordingly material damage, which is prohibited. ARM

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<sup>47</sup> DEQ Br. at 27; DEQ SDF at 17-18; DEQ Ex. C, ¶ 36.

<sup>48</sup> DEQ Ex. C, ¶ 37 (quoting CHIA, Pet’rs’ Ex. 2 at 9-26).

<sup>49</sup> DEQ Ex. C, ¶ 37 (quoting CHIA, Pet’rs’ Ex. 2 at 9-26).

17.24.405(6)(c).<sup>50</sup> The fact that there may be other and potentially greater contributors to the violation of water quality standards in East Fork Armells Creek does not give the Department authority to allow the situation to worsen. The legally mandated solution—which the Department appears unwilling to undertake—is to “develop a Total Maximum Daily Load (TMDL)” for the creek, identify precisely which pollutants are causing the impairment and who is responsible for them, and then mandate across-the-board pollution reductions to remediate the stream. *See* 33 U.S.C. § 1313(d)(1)(C). What the Department may not do, however, is to continue to ignore the impairment (as here), continue to point fingers at absent parties (as here), and continue to allow additional sources of pollution that will contribute to the problem (as here).

The Department also misses the mark in its post-hoc rationalization based on post-decisional evidence that exceedences of numeric nitrogen standards for aquatic life have not been detected at one monitoring site on the upper segment of East Fork Armells Creek. DEQ Br. at 27-28. In addition to being improper, *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70, the argument is also irrelevant because it

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<sup>50</sup> For this same reason, the Department’s “harmless error” argument fails.

says nothing of the downstream violations of water quality standards to which mining operations are admittedly contributing.

WECO complains that the Citizens did not sufficiently acknowledge other sources that potentially contribute nitrogen to East Fork Armells Creek. WECO Br. at 38. The possible contribution of other sources, while convenient for WECO's finger-pointing, is irrelevant to the question of whether the cumulative hydrologic impacts of mining operations will **contribute** to identified water quality violations. See ARM 17.24.405(6)(c). WECO also argues at some length that the Department adequately assessed numeric nitrogen standards for aquatic life. WECO Br. at 35. But, the Department itself "concedes that it did not apply the more stringent numeric water quality standards for nitrogen that protect aquatic life." DEQ Br. at 25. WECO suggests that it was enough for the Department to assess numeric **human health standards** for nitrogen. WECO Br. at 40. WECO is mistaken. Because the human health standards are an order of magnitude weaker than the aquatic life standards, evaluation of the human health standards cannot assure protection of aquatic life.<sup>51</sup>

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<sup>51</sup> Mont. Dep't of Env'tl. Quality, Department Circular DEQ-12A: Montana Base Numeric Nutrient Standards, at 3, *available at*

**F. The Department Acted Unlawfully by Reversing the Burden of Proof in Its Material Damage Assessment of Electrical Conductivity for Rosebud Creek.**

The Department does not dispute that it reversed the burden of proof in its material damage assessment of electrical conductivity for Rosebud Creek. The sole justification that the Department offers is that its assessment of material damage was limited exclusively to the cuts associated with the AM4 Amendment to Area B and not the totality of proposed operations in the amended Area B permit area. DEQ Br. at 24. As noted above, the Department's purely legal argument on this point is mistaken. *See supra*, Part C. The Citizens are, accordingly, entitled to summary judgment on this claim.

**G. The Department Failed Entirely to Assess Impacts to Class I Groundwater Outside the Permit Area.**

The Department does not dispute that

- it has identified some of the highest quality ground water, Class I ground water, in the Rosebud Coal aquifer, including ground water in the vicinity of Area B, DEQ Br. at 35;

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<http://deq.mt.gov/Water/TFA/srf/circulars>; Mont. Dep't of Env'tl. Quality, Department Circular DEQ-7: Montana Numeric Water Quality Standards, at 51 (2012), *available at* <http://deq.mt.gov/Water/TFA/srf/circulars>; *see also* Pet'rs' Ex. 5 at 14.

- spoils water with increased concentrations of salts from some portions of Area B will migrate towards unmined portions of the coal aquifer between Area B and the Big Sky Mine, *id.*, and;
- the material damage assessment in the Department’s CHIA failed *entirely* to assess impacts of low quality spoils water on high quality Class I ground water in the Rosebud Coal aquifer, *see id.*

Instead, the Department contends—mistakenly—that it did not have to consider these impacts because it properly limited its material damage determination to the additional AM4 cuts (rather than considering the totality of Area B operations following the amendment). As noted, *supra* Part C, the Department’s argument is unavailing.

The Department also denies that there is “sufficient evidence to support the conclusion that Class I groundwater” exists in the aquifer between the Rosebud and Big Sky strip-mines. DEQ Br. at 35. The Board should reject the Department’s request to continue to ignore impacts to the most valuable water resources in the area. The Department’s own CHIA acknowledged “Rosebud coal groundwater at the Rosebud Mine is **Class I**, Class II, and Class III.” Pet’rs’ Ex. 2 at 8-11 (emphasis added). The Department also admits that at least one sample detected

Class I groundwater north of the Big Sky Mine in the area between the two mines. DEQ Br. at 35; Pet'rs' Ex. 2 at 9-59. The Department's indifference toward impacts to the highest quality waters raises grave concerns about its ability to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a). In any event, the Department's post-hoc rationalizations may not make up for the inadequacy of its CHIA. *In re Bull Mountain Mine*, at 56-59, ¶¶ 66-70. Nor may it defeat summary judgment by simply denying its prior statements. *Stott*, 246 Mont. at 309, 805 P.2d at 1309-10. In sum, the Department's complete failure to assess impacts to highest quality groundwater was unlawful. The Citizens are entitled to summary judgment.<sup>52</sup>

### CONCLUSION

For the foregoing reasons, the Citizens are entitled to summary judgment on all claims.

Respectfully submitted this 15th day of August, 2016.

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<sup>52</sup> The Department takes issue with the Citizens' passing reference to "ranches destroyed by the mine." DEQ SDF at 10-11 & n.7. This question of background fact is not material to any claim. To allay the Department's concerns, Citizens direct the Board to page twelve of *Colstrip, Montana*, by David Hansen, a courtesy copy of which is attached as Exhibit 44. *David Hansen, Colstrip, Montana* at 12 (Taverner Press 2010).

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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2016, I submitted the foregoing Petitioners' Reply in Support of Motion for Summary Judgment to the Montana Board of Environmental Review, and served a true and correct copy of the foregoing on the following parties or counsel via email or hand delivery:

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