

October 5, 2016

Hillary Houle
Secretary
Board of Environmental Quality
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

RE: Case No. BER 2015-08 JV

Dear Ms. Houle:

Enclosed please find an original *Payne Logging's List of Exceptions to Hearing Examiner's Proposal for Decision* to be filed in the above matter.

Also enclosed please find a copy of the first page only of this document. Please return the copy (first page only) with your filing data indicated thereon in the self-addressed, stamped envelope provided.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,



Laura Welker
Legal Secretary
thunderdomelaw2@gmail.com

Encls.

James E. Brown
THE JAMES BROWN LAW OFFICE, PLLC
30 South Ewing Street, Suite 100
Helena, MT 59601
Telephone: (406) 449-7444
Facsimile: (406) 443-2478
Email: thunderdomelaw@gmail.com

Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 11 day of October
at 1:53 o'clock P.m.
By: Sandra L. Wing Carroll

Attorney for Payne Logging, Inc.

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

IN THE MATTER OF:
TERMINATION BY DEQ OF THE
APPLICATION BY PAYNE LOGGING,
INC. REQUESTING TO MOVE
BOUNDARIES OF THE PAYNE
LOGGING FACILITY IN LIBBY,
LINCOLN COUNTY, MONTANA

Cause No. BER 2015-08 JV

**PAYNE LOGGING'S LIST OF
EXCEPTIONS TO HEARING
EXAMINER'S PROPOSAL
FOR DECISION**

COMES NOW PAYNE LOGGING, INC., (Payne Logging) by and through its undersigned attorney, and hereby files its list of exceptions to the hearing examiner's Proposal for Decision of July 14, 2016. A copy of the Proposal for Decision is attached as Exhibit "A".

1. The Hearing Examiner's Order is erroneous on its face as the Hearing Examiner repeatedly cites to the wrong statute(s).

The Proposal for Decision repeatedly cites to MCA Section 70-10-515 as the operative and controlling statute. *See*, Exh. "A", Proposal for Decision at pp. 3, 4, 5, and 6. This is a clear error of law on the part of the Hearing Examiner. The primary statute at issue is actually MCA Section 75-10-516 (**emphasis added**). Thus, the Proposal for Decision is erroneous on its face, and may not be adopted by the full Board as the Decision is affected by an error of law. *Accord*, MCA 2-4-704(2)(iv).

2. Payne Logging takes exception to the Hearing Examiner's legal conclusion that Lincoln County was not specifically required to find that Mr. Payne's proposed boundary relocation would or will "significantly affect the quality of life of adjoining landowners and the surrounding community" in order for the County's opposition resolution to be lawful and enforceable by the Department.

The Hearing Examiner determined, as a matter of law, that Lincoln County was not legally required to make a finding that Mr. Payne's proposed boundary change location "will significantly affect the quality of life of adjoining landowners and the surrounding community" in order for the County's Resolution opposing Mr. Payne's facility to be valid and legally enforceable. *See*, Exh. "A" at pp. 5-6. The Hearing Examiner asserts that MCA 75-10-516(2) gives the County, through the use of the word "may" in the statute, the discretion to hold a public hearing on and/or to make a finding that Mr. Payne's facility would "significantly affect the quality of life", but does not require the County to either hold a public hearing or to make a 'quality of life' determination in order for the County's adopted opposition resolution to be legally enforceable. The Hearing Examiner's legal conclusion constitutes reversible legal error.

On the face of the statutes, MCA Section 75-10-516 (1) and (2), as correct statutes at issue, provide that if a county, Lincoln County in this case, options to conduct a public hearing on an application for a motor vehicle wrecking facility or motor vehicle graveyard, the County then must (1) hold a public hearing and (2) determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community. Contrary to what the Hearing Examiner concluded, the quality of life finding is required before the County's, Lincoln County here, opposition resolution can become legally operative and binding. *See*, MCA Section 75-10-516(2)(b).

As that statute is applied in the present case, the plain language of MCA Section 75-10-516(2) gave Lincoln County the discretion to hold a public hearing on Mr. Payne's application to

adjust his facility boundaries. Once the County decided to do so, as it did in this case, the County was and is required under the statute to hold a public hearing to which Mr. Payne as the applicant was to be notified and to make a ‘significantly affect the quality of life’ finding. *See*, MCA Section 75-10-516(2)(a). The latter finding is triggered by the County’s election under MCA Section 75-10-516(2) to weigh in on the application. Again, contrary to what the Hearing Examiner determines in his Proposal for Decision, if the County does not hold the public hearing and make the finding(s) required under MCA Section 75-10-516(2)(a), the County’s resolution opposing the location of Mr. Payne’s proposed facility is void *ab initio*. Because the Hearing Examiner determined that Payne was not given notice of the “public meeting” before it was held and determined that the Resolution makes no finding that Payne’s proposed boundary adjustment would significantly affect the quality of life of adjoining landowners and the surrounding community¹, as a matter of law, the County’s resolution has no legal affect for the purposes of applying MCA 75-10-516(3) (delineating the Department’s actions when the County adopts a resolution in opposition to the location of the proposed facility).

The Hearing Examiner’s construction of the statute that the statute is merely permissive as to the County’s obligations is clearly undermined by the legislative history behind the enactment of MCA Section 75-10-516(2). The legislative history from the 1991 Montana legislative session demonstrates that the public hearing and quality of life finding(s) are mandatory requirements to be performed by the County in order for their opposition resolution to be legally valid and enforceable by the Department under MCA Section 75-10-516(3). The opening statement by the bill sponsor supports Payne’s reading and construction of the statute(s). Bill sponsor Representative Cohen of House District 3, Whitefish, stated in his testimony that the

¹ *See*, Exh. “A” p. 3, paragraphs 1-3.

bill, HB 706, and the statute enacted through passage of that bill, would require the 'governing body' of the County to conduct a hearing and establish specific criteria for the decision by the Department to license a facility. More specifically, the bill sponsor Rep. Cohen stated that "county commissioners *must* be notified, public notices *must* be sent, and a hearing *must* be held in the county commissioner's office" (*emphasis added*). The use of the word 'must' denotes that the action required is mandatory, not permissive. *See*, MCA Section 1-2-102; Hern Farms v. Mutual Benefit Life Ins. Co. (1996), 280 Mont. 436, 930 P.2d 84.

With the correct application of law applied, the Hearing Examiner's legal conclusion that the Department was required to deny Mr. Payne's application merely because the County adopted an opposition resolution, even if the County's actions in adopting that resolution did not comply with the clear requirements of law, is clearly erroneous. *See*, Exh. "A" at p. 5; *Accord*, MCA Section 2-4-704(2)(v). This conclusion is promoted by the Department's concession in its legal briefing that the County failed to provide notice to Payne Logging and Mr. Payne of the alleged public meeting conducted by the County on Payne's application, thereby evidencing a 'true' public meeting was not held as mandated by statute. Further, the Department conceded in its briefing, and the Hearing Examiner agrees in the Proposal for Decision, that the County made no finding that Payne's facility would 'significantly affect the quality of life of adjoining landowners and the surrounding community'. Moreover, such finding, even if it had been made by Lincoln County, would be directly undermined by the Department's own conclusion that Mr. Payne's application would result in Mr. Payne effectively hiding junk vehicles from public view, an action requested by the Department in order to improve the quality of life of adjoining landowners and the surrounding community. *See*, Exh. "A" at p. 3, paragraph 3.

In sum, the Proposal for Decision is affected by errors of law and is clearly erroneous in view of the evidence on the administrative record. Therefore, the Board must reverse and reject the Proposal for Decision. *Accord*, MCA Section 2-4-704(2). In turn, the Board must order the Hearing Examiner to grant the relief sought in Payne Logging's Petition.

- 3. The Hearing Examiner erred as a matter of law by concluding that the Department's decision to deny Payne's application to adjust his boundaries is valid, enforceable and unreviewable despite the County's process and resolution decision being unlawful or when the Department's decision may conflict with another statute or legislative intent.**

In his Proposal for Decision, the Hearing Examiner concludes, as a matter of law, that the Department's denial decision is legally valid even in instances where the Department's decision is based solely on a county process or denial decision that is itself unlawful or when the decision may conflict with legislative intent or other statutory provisions. *See*, Exh. "A" at p. 6. In support of this legal conclusion, the Hearing Examiner construes that the plain reading of MCA Section 75-10-516(3) serves as an absolute barrier for Payne to challenge the legality of the Department's denial decision or to obtain full judicial review of the process used to make the Department's denial decision. This is because, as the Hearing Examiner determines, Lincoln County adopted a resolution opposing Mr. Payne's application to modify the boundaries of his existing facility. Because Lincoln County adopted a resolution opposing the facility, the Hearing Examiner concludes that the Department was strictly required to deny the Payne application and to enforce such denial decision regardless of the separate statutory right to appeal the merits of that denial decision set forth in MCA Section 75-10-515, which such review necessarily encompasses reviewing the process used to promulgate the Department's denial decision.

The Hearing Examiner's interpretation and application of the Motor Vehicle Recycling and Disposal statutory scheme is erroneous because it neither takes into account the legislative

history of the enactment of the county review and resolution process (discussed in more detail below) nor does it comport with the Examiner's legal duty to read the relevant statutes in their entirety. *See, Kokoszka v. Belford* (1973), 417 U.S. 642, 650; *Carlson v. City of Bozeman*, 2001 MT 46, ¶ 15, 304 Mont. 277, 20 P.3d 792. This canon of construction is known as the 'Whole Act Rule'. *See, Dukes v. City of Missoula*, 2005 MT 196, ¶14, 328 Mont. 155, 159, 119 P.3d 61, 64.

In accordance with the Whole Act Rule and in reading the four corners of the statutory scheme set forth in Title 75 Chapter 10, it becomes readily apparent that the Hearing Examiner erroneously read the statutory scheme too narrowly. The resulting narrow reading of the statutory scheme by the Hearing Examiner foreclosed Payne from effectively exercising his right to appeal and challenge the legality of the Department's decision to deny his application as afforded by MCA Section 75-10-515. Further, the Hearing Examiner's narrow statutory construction results in an unlawful scenario where the Department's denial decision escapes full judicial review.

Under the full statutory scheme, it is the DEQ, not the County that rendered the final decision to deny Payne Logging's Application. Under the applicable statutory scheme, it is the Department, not Lincoln County, whom is tasked with administering the Motor Vehicle Recycling and Disposal program. *See*, MCA Sections 75-10-501(3) and 75-10-503. As such, in order to give full effect to the Legislature's choice to provide for a meaningful and substantive statutory appeal process challenging a Department denial decision under MCA Section 75-10-515, the full statutory scheme must be read in its entirety and interpreted to authorize the Board to consider: (1) whether the County's exercise of its discretionary authority under MCA Section 75-10-516(2) to adopt a resolution opposing the location of Mr. Payne's proposed facility was

conducted lawfully and/or (2) to consider whether the County's resolution was inappropriate in the first instance given Mr. Payne's existing facility is not a "new facility" and, therefore, not subject to Lincoln County review or approval. *See*, MCA Section 75-10-504 (noting that the prohibition concerning the approval of a new motor vehicle wrecking facility or graveyard site does not apply to a facility that was licensed as such at any time within the 18 months immediately preceding the date an application for licensure of such site).

The Hearing Examiner's conclusion that the Department's decision to deny Payne's application is not subject to any form of substantive review to determine the legality of the DEQ decision and the process used to support the same is specifically undermined when one considers the relief available to Payne Logging for an erroneous or unlawful Department decision, as well as the decision criteria for determining the legal validity of the Department's denial decision, as the same are set forth in Montana law. As noted above, MCA Section 75-10-515 authorizes this administrative review and appeals proceeding, which such proceeding necessarily authorizes the Hearing Examiner and/or this Board to overturn the Department's denial decision when the decision is arbitrary, capricious, or affected by an error of law. *See*, MCA Section 2-4-704(1) & (2) (setting forth the standard of review which this Board utilizes in reaching its determination as to the merits of the Proposal for Decision as to the Department's denial decision). Under this statutory scheme, the Board is authorized to overturn or reverse the Department's decision to deny the Payne application if that denial decision is affected in any way by an error of law or is the product of an irregular process that resulted in the Department's denial decision.

Here, the Hearing Examiner determined that the Department denied Payne's Application solely because Lincoln County had adopted and transmitted a resolution to the Department opposing Payne's application pursuant to the County review process under MCA Section 75-10-

516(2). *See*, Exh. "A" at p. 5. As a result, because the Department used the County's opposition resolution as the sole legal basis for the Department's own denial decision and incorporated the County's adopted process and decision(s) into the Department's final denial order, MCA Section 75-10-515 requires the Hearing Examiner (and now this Board) to review, as part of the appeal process on the Department's denial decision, whether the County's actions in adopting the opposition resolution were lawful in the first instance. More specifically, before upholding the Department's denial decision, the Hearing Examiner was lawfully obligated to determine whether the County satisfied the procedural requirements of MCA Section 75-10-516(2), mandating Lincoln County to hold a public hearing and to make a quality of life finding as part of its adopted resolution.

As the Proposal for Decision demonstrates on its face, the Hearing Examiner refused to review the lawfulness of the County's actions despite Payne requesting such review and in contravention of Payne's appellate right as provided for in MCA Section 75-10-515. Payne files an exception to this legal conclusion. The Hearing Examiner's refusal to review the lawfulness of Lincoln County's adopted process is a misapplication of the statutory scheme passed by the Legislature, endorses the Department's attempt to evade judicial review, and constitutes a reversible error of law. *See*, MCA Section 2-4-702(a) (authorizing the Board to review whether the Department's denial decision was made upon an unlawful procedure or is based on actions that violate statutory provisions).

The law is clear and unambiguous as to the legally required outcome of Mr. Payne's appeal. An agency decision, such as the Department's denial decision in this case, which is based on unlawful action, even when such action is taken by another government entity, is unlawful and unenforceable on its face. *See, e.g.* *Kalb v. Feurestein*, 308 U.S. 433, 60 S. Ct. 343,

84 L ed. 370 (1940) (a void decision does not create any binding obligation); *see, also, U.S. v. Holtzman*, 762 F.2d 720 (9th Cir. 1985). Here, as the administrative record shows, the Department promulgated its now challenged denial decision solely on the County's opposition resolution. That Resolution was adopted by the County after the County held a so-called "public meeting" of which Mr. Payne, the affected party, was not notified and after the County failed to make any kind of finding that Mr. Payne's proposed boundary adjustment within his existing facility footprint would affect the quality of life of adjoining landowners and the surrounding community. *See*, Exh. "A" at p. 3, paragraphs 1-3. Therefore, as the County's resolution is the product of an unlawful process, said resolution is not legally binding on the Department. Accordingly, the Department's denial decision is itself unlawful and void.

Moreover, the Hearing Examiner's Proposal for Decision is erroneous as it forecloses any review by this Board to challenge the Department's denial decision based on other relevant statutes contained in Title 75, Chapter 10 – the Motor Vehicle Recycling and Disposal Act. The Hearing Examiner is tasked with interpreting Chapter 10 of Title 75 in accordance with the will of the Legislature. *See*, MCA Section 1-2-102; *see, also, Hern Farms v. Mutual Benefit Life Ins. Co.* (1996), 280 Mont. 436, 930 P.2d 84. As discussed herein, the clear intent of the Legislature in enacting HB 706 during the 1991 Montana legislative session was to provide the counties a say in the licensing of new facilities in order to ensure such facilities comply with county land use plans and zoning regulations. *See*, testimony of Jon Dilliard, DHES, to the House Local Government Committee (Feb. 21, 1991). During the Senate Local Government Committee hearing held on HB 706 on March 14, 1991, Jon Dilliard of the Department indicated the bill would prevent an existing facility that is renewing its license yearly from going through the county hearing process and testifying that "existing facilities would not be affected."

In light of this legislative history revealing the Legislature's intent to exempt existing facilities from county review, the Hearing Examiner's legal conclusion that the County's opposition resolution serves as an absolute bar to this Board's review of the lawfulness of the Department's decision to deny Payne's application on any and all grounds cannot be substantiated. The Hearing Examiner's legal conclusion that the County's opposition resolution is further called into question by the clear and unambiguous terms of MCA Section 75-10-504, which governs shielding requirements for "new" facilities. This statute supports Payne's reading that his facility application should not have gone through the county review process in the first instance.

Clearly, the Legislature enacted MCA Section 75-10-515 to allow the Board to review all aspects of the Department's denial decision. The Hearing Examiner's legal conclusion that the Department's denial decision is automatically valid and legally unassailable merely because a Montana county, Lincoln County in this case, adopted a resolution in opposition to the location of the proposed facility is an obvious error of law. *See*, Exh. "A" at p. 3. Thus, the Proposal for Decision must be rejected as it is affected by an error of law. *Accord*, MCA Section 2-4-704(2)(v).

- 4. As requested by Mr. Payne, the Hearing Examiner failed to make a legal finding that the legislative history of House Bill 706 indicates that the Legislature did not intend that the county participation and review process set forth in MCA Section 75-10-516 (1) and (2) apply to facilities with an existing license. Therefore, the Proposed Order is the product of an error of law.**

Montana law makes clear that an administrative decision must be rejected if it fails to address a finding of fact or conclusion of law requested by one of the parties. *Accord*, MCA Section 2-4-704(2)(b). As that legal maxim is applied here, the record demonstrates that the

Proposal for Decision fails to address an argument raised by Mr. Payne that is essential to the validity of the Proposal for Decision.

As part of his briefing on this case, Mr. Payne argued that his application to modify his existing facility boundary is not even subject to the county hearing and approval process set forth in MCA Section 75-10-516(2). This is because MCA Section 75-10-516(2) was not intended by the Legislature to apply to an application designed to modify the terms of an existing license. It is undisputed that Payne Logging was not applying for approval of a new motor vehicle facility license. Rather, Payne submitted an application to modify its existing license.

MCA Section 75-10-516(2) was enacted into law during the 1991 Montana legislative session as a result of the passage of HB 706. As the legislative history of HB 706 denotes, HB 706 was passed by the Legislature in order to ensure that the counties had a say in the approval and/or licensing of **new** vehicle wrecking facilities and motor vehicle graveyards in order to ensure that the proposed facility or graveyard complied with county land use plans. This position is supported by the testimony of bill sponsor Rep. Cohen and Jon Dilliard, Program officer for Motor Vehicle Recycling and Disposal during the House and Senate Committee hearings on HB 706.

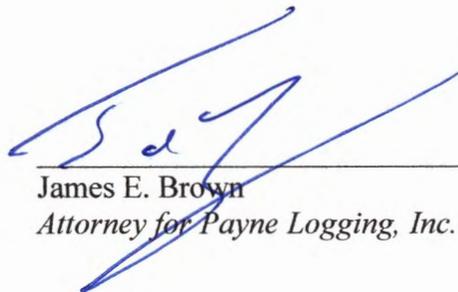
During the House Local Government Committee hearing on HB 706 held on February 21, 1991, bill sponsor Cohen stated that the counties “should have the vote if they need a *new* site for a wrecking facility and should discuss this with the residents who live in the area” (*emphasis added*). Further, Mr. Dilliard testified that the bill was intended to create an area zoning effort for or against new wrecking facilities. In the Senate hearing on HB 706 held on March 21, 1991, Mr. Dilliard testified that the county hearing and approval process contained in the bill was imposed to allow counties to provide input on *proposed* wrecking facilities and

motor graveyards to ensure such proposed facilities comply with county land use plans (*emphasis added*). More critically, Mr. Dilliard testified during the Senate hearing that, under the bill, an already licensed facility would be grandfathered in and would not have to go through the county review process.

Montana law, namely MCA Section 1-2-102 and Supreme Court case law make clear that, when construing a statute, implementing the Legislature's intent in enacting the statute is paramount. *See*, MCA Section 1-2-102; Hern Farms v. Mutual Benefit Life Ins. Co. (1996), 280 Mont. 436, 930 P.2d 84. In light of the above-referenced legislative history related to the enactment of HB 706 which indicates the Legislature's intent in enacting the county hearing and approval process set forth in MCA Section 75-10-516 (2) and (3) allowing counties a say in the licensing of new facilities, the Hearing Examiner erred in failing to make a finding as to whether the Department erred by initially sending Payne's modified application on an existing, licensed facility to the County's approval in the first instance. *See, e.g.* MCA Section 2-4-702(2)(b). As a result, the Board must reject and reverse the Proposal for Decision. Correspondingly, the Board must order the Hearing Examiner to grant the relief sought in Payne Logging's Petition.

Respectfully submitted this 5th day of October, 2016.

THE JAMES BROWN LAW OFFICE, PLLC



James E. Brown
Attorney for Payne Logging, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Payne Logging's List of Exceptions to Hearing Examiner's Proposal for Decision* was served via U.S. first-class mail, postage prepaid, on this 5th day of October, 2016, upon the following:

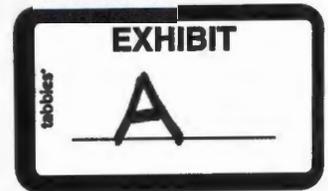
Benjamin Reed
Interim Hearing Examiner
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440
(also via email to BenReed@mt.gov)

Hillary Houle
Secretary, Board of Environmental Review
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Bradley Jones
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901



Laura Welker
Legal Secretary



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

**IN THE MATTER OF:
TERMINATION BY DEQ OF THE
APPLICATION BY PAYNE LOGGING,
INC. REQUESTING TO MOVE
BOUNDARIES OF THE PAYNE
LOGGING FACILITY IN LIBBY,
LINCOLN COUNTY, MONTANA.**

CASE NO. BER 2015-08 JV

PROPOSAL FOR DECISION

BACKGROUND

On October 23, 2015, Payne Logging, Inc. ("Payne") filed its notice of appeal and request for hearing, with supporting exhibits. It argued the Montana Department of Environmental Quality ("DEQ") acted improperly when it denied Payne's application to modify the boundaries of a wrecking facility within the property boundaries. DEQ based its denial on Lincoln County's ("County") opposition to the permit.

The exhibits attached to the appeal were: the County's documentation of non-compliance, and a compliance plan recommending that Payne's 2015 license be issued (Exhibit A); County Resolution 947, indicating Payne's non-compliance with the shielding requirements set out in Admin. R. Mont. 17.50.202, and that the County opposed Payne's application to modify its license (Exhibit B); and DEQ's notice to Payne that DEQ had terminated its application for modification of its license (Exhibit C).

DEQ filed a motion to dismiss under M.R.Civ.P 12(b)(6) on April 12, 2016; in turn, on May 16, 2016, Payne filed a motion for judgment on the pleadings under M.R.Civ.P 12(c). The parties have fully briefed these motions. Payne has requested oral argument in this matter; DEQ believes this to be unnecessary. For the reasons stated below, the undersigned will propose that DEQ's motion be granted.

1 Mont. at 102, 951 P.2d at 1354). The only relevant document when considering a
2 motion to dismiss is the appeal and any documents it incorporates by reference.
3 Here, this includes only the exhibits submitted with the appeal.

4 ANALYSIS

5 Setting aside the legal conclusions or allegations that have no factual basis,¹
6 the relevant facts set out in Payne's appeal are these:

7 1. Payne was not given direct notice of the public hearing, so no
8 representative of Payne Logging was present at the "public" hearing. The
9 Resolution only states that there was "unanimous opposition and no proponents."
10 Payne Logging was not given a chance to explain or advocate for the boundary
11 adjustment.

12 2. The boundary adjustment requested in the Application is not an
13 increase in acreage, but a change in the location of the delineated boundaries. The
14 adjustment would allow for a more practical space to store and process the junk
15 vehicles. With this boundary adjustment, Payne Logging would be better able to
16 satisfy its shielding requirements.

17 3. If these requested improvements, which will also include shielding of
18 junk vehicles, are allowed, the neighboring landowners will benefit.
19 The facts that are contained within Payne's exhibits also ought properly to be
20 included in this analysis, and are reviewed below.

21 Payne's legal arguments in its notice of appeal are threefold. First, it states
22 that DEQ's denial is based solely on the County's denial. Second, it argues that,
23 because the County did not make a quality-of-life finding that was required by law,

24 ¹ Payne's statement that the County may only oppose the location of a proposed
25 facility if that location will "significantly affect the quality of life of adjoining
26 landowners and the surrounding community" is a legal conclusion and is addressed
27 below. Payne's statement that this appeal is timely and proper pursuant to Mont.
Code Ann. § 75-10-515, and that Lincoln County's 30-day statutory period to
conduct another public hearing and object to the project has now passed, are both
legal conclusions, and neither is germane to this decision.

1 and because the hearing was without proper notice, the County's denial was
2 improper. Finally, it argues that, since the County's denial was improper, DEQ's
3 denial of the permit is, in turn, improper.

4 Payne's first two arguments can be addressed through a plain reading of the
5 statute. its first argument is that DEQ's denial of the Application was improper
6 because it is based solely on the County's opposition. Mont. Code Ann. § 75-10-516
7 reads as follows:

8 **75-10-516. Motor vehicle wrecking facilities and motor vehicle**
9 **graveyards -- licensing process -- decision criteria.** (1) When an
10 application for a motor vehicle wrecking facility or motor vehicle graveyard
11 is filed with the department, the department shall notify by mail:

12 (a) each owner of property adjoining the proposed facility;

13 (b) the governing body of the county in which the proposed facility is to
14 be located; and

15 (c) a newspaper of general circulation in the area where the proposed
16 facility is to be located.

17 (2) Within 30 days of receipt of the notification in subsection (1)(b), the
18 governing body of the county may:

19 (a) conduct a public hearing to determine whether the proposed facility
20 will significantly affect the quality of life of adjoining landowners and the
21 surrounding community; and

22 (b) adopt a resolution in support of or opposition to the location of the
23 proposed facility and transmit a copy of the resolution to the department.

24 (3) The department may not grant a license to a facility that a governing
25 body has opposed under subsection (2)(b).

26 (4) In making its decision to grant or deny a license application, the
27 department shall consider the effect of the proposed facility on adjoining
landowners and land uses.

The Montana Supreme Court has repeatedly held that implementing the
intention of the Legislature when interpreting a statute is paramount. *In re K.M.G.*,
2010 MT 81, P 26, 356 Mont. 91, 229 P.3d 1227 (citing Mont. Code Ann. § 1-2-
102; *Montana Vending v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1,
78 P.3d 499). One determines the intention of the Legislature first from the plain
meaning of the words used, and if interpretation of the statute can be so determined,

1 one may not go further and apply any other means of interpretation. *State v. Trull*,
2 2006 MT 119, P 32, 332 Mont. 233, 136 P.3d 551 (citing *Dunphy v. Anaconda Co.*,
3 151 Mont. 76, 79-81, 438 P.2d 660, 662 (1968)); *see also Tongue River Elec. Coop.*
4 *v. Montana Power Co.*, 195 Mont. 511, 515, 636 P.2d 862, 864 (1981); *Haker v.*
5 *Southwestern R.R.*, 176 Mont. 364, 369, 578 P.2d 724, 727 (1978); *State ex rel.*
6 *Huffman v. District Court*, 154 Mont. 201, 204, 461 P.2d 847, 849 (1969). “In the
7 search for plain meaning, ‘the language used must be reasonably and logically
8 interpreted, giving words their usual and ordinary meaning.’” *Gaub v. Milbank Ins.*
9 *Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445 (1986) (quoting *In re McCabe*, 168
10 Mont. 334, 339, 544 P.2d 825, 828 (1975)).

11 In this case, a plain reading of Mont. Code Ann. § 70-10-516(3) does not
12 support Payne’s contentions. The plain language of the statute clearly states, “The
13 department may not grant a license to a facility that a governing body has opposed
14 under subsection (2)(b).” The plain meaning of this is that the County’s opposition
15 is not only sufficient grounds to deny the permit, but is, in fact, an absolute barrier
16 to granting that permit. This argument therefore fails.

17 Payne’s second argument is that the County may *only* oppose the location of
18 a proposed facility under Mont. Code Ann. § 70-10-516(2)² if that location will
19 “significantly affect the quality of life of adjoining landowners and the surrounding
20 community.” Again, this is not supported by a plain reading of the statute, which
21 reads as follows:

- 22 (2) Within 30 days of receipt of the notification in subsection (1)(b), the
23 governing body of the county *may*:
- 24 (a) conduct a public hearing to determine whether the proposed facility will
25 significantly affect the quality of life of adjoining landowners and the
26 surrounding community; and
 - (b) adopt a resolution in support of or opposition to the location of the
proposed facility and transmit a copy of the resolution to the department.

27 ² Payne also refers to Mont. Code Ann. §70-10-516(3), but this statute is not
applicable to the County.

1 Mont. Code Ann. § 70-10-516(2) (*emph. added*). The “may” emphasized above is
2 permissive. It allows, but does not require, the County to conduct such a public
3 hearing, and to adopt a resolution supporting or opposing the location of the facility.
4 However, there is no statutory requirement that the County do so, nor, more
5 importantly, is there a statutory requirement that DEQ consider the basis of the
6 County’s support or opposition. This argument is therefore similarly unpersuasive.

7 Payne’s third argument requires more than purely facial analysis. Payne
8 makes the allegation that the County conducted its determination illegally. It is
9 possible to construe this as a statement of fact, and not a conclusion of law.
10 However, Payne goes on to argue that DEQ has an independent obligation to justify
11 its own denial, and this independent obligation includes an inquiry into the legality
12 and basis of the County’s determination. Payne Reply Brief, p.3.

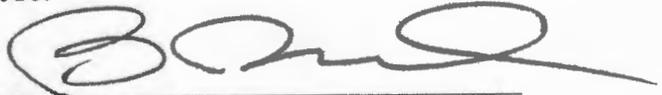
13 Payne argues that, functionally, this is because DEQ’s denial has the
14 improper effect of allowing the County’s judgment to replace its own, and cites
15 *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, to support that
16 argument. Payne Reply Brief p.3. This case is inapposite. It relies on an entirely
17 different statutory scheme, and on statutory requirements for DEQ, that are not
18 relevant to Payne’s permit application. The relevant decision criteria, as set out
19 above, do not allow inquiry into whether DEQ was required to engage in
20 independent analysis. Rather, the criteria forbid DEQ from engaging in such
21 analysis. The County’s opposition to Payne’s application prohibited DEQ from
22 granting Payne its license. The County adopted a resolution in opposition to the
23 location of the proposed facility and transmitted a copy of the resolution to DEQ,
24 which, in turn, was statutorily prohibited from granting a license to a facility that the
25 County has opposed. Even assuming, *arguendo*, that the Board were to overturn or
26 remand DEQ’s decision, Mont. Code Ann. § 70-10-516(3) would prohibit DEQ
27 from granting Payne its license.

1 Payne states that the only relief available to it is through recourse to the
2 Board. This is incorrect. The Board of Environmental Review lacks the power to
3 grant such relief. It may only review DEQ's decision. The undersigned takes notice
4 of Mont. Code Ann. Title 27, Chapter 19, Part 2, and its applicability to fact
5 scenarios such as this. *See, e.g., Sweet Grass Farms, Ltd. v. Board of County*
6 *Comm'rs, 2000 MT 147.* And, as the analysis above shows, there is no set of facts
7 in support of Payne's claim that would entitle it to the relief it seeks from the
8 Board.³

9 **CONCLUSION**

10 Even when viewed in the light most favorable to Payne, with all allegations
11 of fact contained therein taken as true, Payne's appeal does not reveal any error on
12 the part of DEQ. It is beyond a reasonable doubt that Payne can prove no set of
13 facts which would entitle it to relief, given that the County has opposed its license
14 application. Therefore, DEQ's motion to dismiss ought to be granted, and Payne's
15 denied.

16 DATED this 14th day of July, 2016.

17 

18 BENJAMIN REED
19 Hearing Examiner
20 Agency Legal Services Bureau
21 1712 Ninth Avenue
22 P.O. Box 201440
23 Helena, MT 59620-1440

24 ³ Payne raises a new argument in its briefing. This is that DEQ has failed to follow
25 its own rules – specifically, Admin. R. Mont. 17-50-202 and -203 – in denying
26 Payne's application. These rules involve shielding of facilities from public view.
27 Payne argues that its filing an application is tantamount to evidence of its
compliance with the shielding requirements, and generally with Mont. Code Ann.
Title 75, Chapter 10, Part 5; therefore, DEQ was required to have determined that
the Payne was complying with shielding and other requirements, and was therefore
required to issue the license. But Exhibits A and B contradict this, inasmuch as they
both indicate that Payne was not in compliance with the shielding requirements.

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CERTIFICATE OF SERVICE

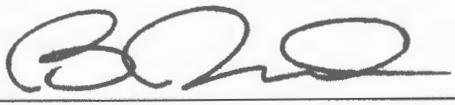
I hereby certify that I caused a true and accurate copy of the foregoing Order
to be mailed to:

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Helena, MT 59620-0901
(original)

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Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. Ed Thamke, Bureau Chief
Waste & Underground Tank Management Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. James E. Brown
The James Brown Law Office, PLLC
20 S. Ewing St., Ste. 100
Helena, MT 59601

DATED: 14 July 2016 

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

3 **IN THE MATTER OF:**
4 **TERMINATION BY DEQ OF THE**
5 **APPLICATION BY PAYNE LOGGING,**
6 **INC. REQUESTING TO MOVE**
7 **BOUNDARIES OF THE PAYNE**
8 **LOGGING FACILITY IN LIBBY,**
9 **LINCOLN COUNTY, MONTANA.**

CASE NO. BER 2015-08 JV

10 **PROPOSAL FOR DECISION**

11 **BACKGROUND**

12 On October 23, 2015, Payne Logging, Inc. ("Payne") filed its notice of
13 appeal and request for hearing, with supporting exhibits. It argued the Montana
14 Department of Environmental Quality ("DEQ") acted improperly when it denied
15 Payne's application to modify the boundaries of a wrecking facility within the
16 property boundaries. DEQ based its denial on Lincoln County's ("County")
17 opposition to the permit.

18 The exhibits attached to the appeal were: the County's documentation of non-
19 compliance, and a compliance plan recommending that Payne's 2015 license be
20 issued (Exhibit A); County Resolution 947, indicating Payne's non-compliance with
21 the shielding requirements set out in Admin. R. Mont. 17.50.202, and that the
22 County opposed Payne's application to modify its license (Exhibit B); and DEQ's
23 notice to Payne that DEQ had terminated its application for modification of its
24 license (Exhibit C).

25 DEQ filed a motion to dismiss under M.R.Civ.P 12(b)(6) on April 12, 2016;
26 in turn, on May 16, 2016, Payne filed a motion for judgment on the pleadings under
27 M.R.Civ.P 12(c). The parties have fully briefed these motions. Payne has requested
oral argument in this matter; DEQ believes this to be unnecessary. For the reasons
stated below, the undersigned will propose that DEQ's motion be granted.

1 Mont. at 102, 951 P.2d at 1354). The only relevant document when considering a
2 motion to dismiss is the appeal and any documents it incorporates by reference.
3 Here, this includes only the exhibits submitted with the appeal.

4 ANALYSIS

5 Setting aside the legal conclusions or allegations that have no factual basis,¹
6 the relevant facts set out in Payne's appeal are these:

7 1. Payne was not given direct notice of the public hearing, so no
8 representative of Payne Logging was present at the "public" hearing. The
9 Resolution only states that there was "unanimous opposition and no proponents."
10 Payne Logging was not given a chance to explain or advocate for the boundary
11 adjustment.

12 2. The boundary adjustment requested in the Application is not an
13 increase in acreage, but a change in the location of the delineated boundaries. The
14 adjustment would allow for a more practical space to store and process the junk
15 vehicles. With this boundary adjustment, Payne Logging would be better able to
16 satisfy its shielding requirements.

17 3. If these requested improvements, which will also include shielding of
18 junk vehicles, are allowed, the neighboring landowners will benefit.
19 The facts that are contained within Payne's exhibits also ought properly to be
20 included in this analysis, and are reviewed below.

21 Payne's legal arguments in its notice of appeal are threefold. First, it states
22 that DEQ's denial is based solely on the County's denial. Second, it argues that,
23 because the County did not make a quality-of-life finding that was required by law,

24 ¹ Payne's statement that the County may only oppose the location of a proposed
25 facility if that location will "significantly affect the quality of life of adjoining
26 landowners and the surrounding community" is a legal conclusion and is addressed
27 below. Payne's statement that this appeal is timely and proper pursuant to Mont.
Code Ann. § 75-10-515, and that Lincoln County's 30-day statutory period to
conduct another public hearing and object to the project has now passed, are both
legal conclusions, and neither is germane to this decision.

1 and because the hearing was without proper notice, the County's denial was
2 improper. Finally, it argues that, since the County's denial was improper, DEQ's
3 denial of the permit is, in turn, improper.

4 Payne's first two arguments can be addressed through a plain reading of the
5 statute. its first argument is that DEQ's denial of the Application was improper
6 because it is based solely on the County's opposition. Mont. Code Ann. § 75-10-516
7 reads as follows:

8 **75-10-516. Motor vehicle wrecking facilities and motor vehicle**
9 **graveyards -- licensing process -- decision criteria.** (1) When an
10 application for a motor vehicle wrecking facility or motor vehicle graveyard
is filed with the department, the department shall notify by mail:

11 (a) each owner of property adjoining the proposed facility;

12 (b) the governing body of the county in which the proposed facility is to
be located; and

13 (c) a newspaper of general circulation in the area where the proposed
facility is to be located.

14 (2) Within 30 days of receipt of the notification in subsection (1)(b), the
governing body of the county may:

15 (a) conduct a public hearing to determine whether the proposed facility
will significantly affect the quality of life of adjoining landowners and the
surrounding community; and

16 (b) adopt a resolution in support of or opposition to the location of the
proposed facility and transmit a copy of the resolution to the department.

17 (3) The department may not grant a license to a facility that a governing
body has opposed under subsection (2)(b).

18 (4) In making its decision to grant or deny a license application, the
department shall consider the effect of the proposed facility on adjoining
landowners and land uses.

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22 The Montana Supreme Court has repeatedly held that implementing the
23 intention of the Legislature when interpreting a statute is paramount. *In re K.M.G.*,
24 2010 MT 81, P 26, 356 Mont. 91, 229 P.3d 1227 (*citing* Mont. Code Ann. § 1-2-
25 102; *Montana Vending v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1,
26 78 P.3d 499). One determines the intention of the Legislature first from the plain
27 meaning of the words used, and if interpretation of the statute can be so determined,

1 one may not go further and apply any other means of interpretation. *State v. Trull*,
2 2006 MT 119, P 32, 332 Mont. 233, 136 P.3d 551 (citing *Dunphy v. Anaconda Co.*,
3 151 Mont. 76, 79-81, 438 P.2d 660, 662 (1968)); *see also Tongue River Elec. Coop.*
4 *v. Montana Power Co.*, 195 Mont. 511, 515, 636 P.2d 862, 864 (1981); *Haker v.*
5 *Southwestern R.R.*, 176 Mont. 364, 369, 578 P.2d 724, 727 (1978); *State ex rel.*
6 *Huffman v. District Court*, 154 Mont. 201, 204, 461 P.2d 847, 849 (1969). “In the
7 search for plain meaning, ‘the language used must be reasonably and logically
8 interpreted, giving words their usual and ordinary meaning.’” *Gaub v. Milbank Ins.*
9 *Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445 (1986) (quoting *In re McCabe*, 168
10 Mont. 334, 339, 544 P.2d 825, 828 (1975)).

11 In this case, a plain reading of Mont. Code Ann. § 70-10-516(3) does not
12 support Payne’s contentions. The plain language of the statute clearly states, “The
13 department may not grant a license to a facility that a governing body has opposed
14 under subsection (2)(b).” The plain meaning of this is that the County’s opposition
15 is not only sufficient grounds to deny the permit, but is, in fact, an absolute barrier
16 to granting that permit. This argument therefore fails.

17 Payne’s second argument is that the County may *only* oppose the location of
18 a proposed facility under Mont. Code Ann. § 70-10-516(2)² if that location will
19 “significantly affect the quality of life of adjoining landowners and the surrounding
20 community.” Again, this is not supported by a plain reading of the statute, which
21 reads as follows:

- 22 (2) Within 30 days of receipt of the notification in subsection (1)(b), the
23 governing body of the county *may*:
24 (a) conduct a public hearing to determine whether the proposed facility will
25 significantly affect the quality of life of adjoining landowners and the
26 surrounding community; and
27 (b) adopt a resolution in support of or opposition to the location of the
proposed facility and transmit a copy of the resolution to the department.

² Payne also refers to Mont. Code Ann. §70-10-516(3), but this statute is not applicable to the County.

1 Mont. Code Ann. § 70-10-516(2) (*emph. added*). The “may” emphasized above is
2 permissive. It allows, but does not require, the County to conduct such a public
3 hearing, and to adopt a resolution supporting or opposing the location of the facility.
4 However, there is no statutory requirement that the County do so, nor, more
5 importantly, is there a statutory requirement that DEQ consider the basis of the
6 County’s support or opposition. This argument is therefore similarly unpersuasive.

7 Payne’s third argument requires more than purely facial analysis. Payne
8 makes the allegation that the County conducted its determination illegally. It is
9 possible to construe this as a statement of fact, and not a conclusion of law.
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11 its own denial, and this independent obligation includes an inquiry into the legality
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6 *Comm'rs, 2000 MT 147.* And, as the analysis above shows, there is no set of facts
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8 Board.³

9 **CONCLUSION**

10 Even when viewed in the light most favorable to Payne, with all allegations
11 of fact contained therein taken as true, Payne's appeal does not reveal any error on
12 the part of DEQ. It is beyond a reasonable doubt that Payne can prove no set of
13 facts which would entitle it to relief, given that the County has opposed its license
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