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BEFORE THE BOARD OF ENVIRONEMENTAL REVIEW
OF THE STATE OF MONTANA

VIOLATIONS OF THE OPENCUT MINING ACT BY WAGONER FAMILY PARTNERSHIP, D/B/A WAGONER'S SAND AND GRAVEL, AT RIVER GRAVEL PIT, FLATHEAD COUNTY, MONTANA (OPENCUT NO. 1798; FID 2512)	**Docket No. BER 2017-02 OC** **OPERATOR'S WRITTEN STATEMENT BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**

I. Introduction.

COMES NOW the Operator, Wagoner Family Partnership d/b/a Wagoner's Sand and Gravel (hereinafter referred to as "Wagoner"), and through its counsel of record, respectfully submits this Written Statement Before the Board of Environmental Review in lieu of oral arguments. It is Operator's understanding that this matter is an action item scheduled before the Board of Environmental Review for February 9, 2018. However, the undersigned has a pre-existing conflict with this schedule, and as such, will be unable to attend the meeting. Accordingly, pursuant to Hearing Examiner Sarah Clerget's January 11, 2018 Order on Motion

to Clarify, this Written Statement is respectfully submitted as Wagoner's final position on the above-entitled matter.

II. Brief statement of Wagoner's position.

It is Wagoner's position, based on the facts and circumstances presented in this particular case, that DEQ does not have jurisdiction or authority to find that Wagoner violated the Opencut Mining Act. Further, DEQ does not have jurisdiction or authority to find that Wagoner should be penalized for any action or inaction. Last but not least, under principles of equity, Wagoner should not be considered in violation of the Opencut Mining Act, and they should not be penalized for any alleged violation.

III. Factual and procedural background.

A. Factual background.

In 1973, Wagoner began operating a gravel mine on gravel bars created by and in the vicinity of the Flathead River. Wagoner initially began its operations under a "contract for mining." The "contract for mining" was unilaterally converted by DEQ to an Opencut Mining Permit, under Permit No. 1798. The Permit was amended in 2000 and stated that the "estimated date of final reclamation is December, 2015." The Permit was amended again in 2004. The Permit was assigned to Wagoner on April 20, 2006.

On December 31, 2015, Wagoner submitted an application to DEQ to amend Permit No. 1798 to extend the mining operations and to add additional acreage. Wagoner admittedly did not take affirmative steps to begin reclaiming the site, because they had submitted an application

to extend the mining operations. It appears from the record that DEQ did not receive the application until January 4, 2016.[1]

Mont. Code Ann. § 82-4-423(4)(a)(i), in conjunction with Mont. Code Ann. § 82-4-432(11)(a), states that that DEQ is required to review the application and notify the Operator whether the application is complete within 5 working days.

On January 11, 2016, DEQ sent Wagoner a letter stating the application was incomplete. This letter advised Wagoner that it had 30 days to either (1) submit a completed application to amend the permit, or (2) cease mining and reclaim the site. Under the second option, as noted by Examiner Clerget in her initial Order, if Wagoner chose to cease mining and reclaim the site, they had to complete it by June 6, 2016, with vegetative success achieved by August 30, 2018.

As noted by the Hearing Examiner, Wagoner chose the first option – i.e., to continue pursuing an amendment. On February 10, 2016, Wagoner, through its consultant, Samdahl Consulting Services, sent a letter to DEQ advising DEQ that Wagoner was moving forward with their amendment to the Permit. Wagoner requested a 60-day extension to submit the application; DEQ refused a 60-day extension, but granted Wagoner until March 16, 2016.

In DEQ's Statement of Undisputed Facts, at Paragraph 11, DEQ acknowledged that Wagoner submitted additional information to DEQ in support of their application to amend their Permit. In fact, DEQ specifically stated "[Wagoner] furnished other required information and materials in an effort to provide a completed amendment application." (Emphasis added). At the same time, Wagoner challenged some of DEQ's requirements DEQ responded to Wagoner on April 8, 2016, addressing the arguments. However, DEQ also gave Wagoner another 30 days (i.e., to May 8) to submit a completed application to amend the permit.

[1] This makes sense, considering that January 1, 2016 was a Friday and a holiday, January 2-3 was a Saturday and Sunday, and DEQ did not reopen for business until Monday, January 4, 2016. It is likely that the documents were in DEQ's mailbox on January 2.

On April 26, 2016, Wagoner, acting through its consultant, submitted an amended application. In this submission, Wagoner's consultant noted that there were some issues with the process, and requested information with respect to various elements of the application and the reclamation process. DEQ responded to this letter on May 3, 2016. Rather than work with the Operator to address the issues raised and the questions asked, DEQ simply said the application was incomplete. DEQ said it required additional information, including a reclamation map, Weed Board notification of Opencut Operation, a Reclamation Bond Spreadsheet, and a Reclamation Bond. DEQ extended the deadline for submitting a completed application to June 3, 2016.

Wagener submitted the required information to DEQ to complete the application. On June 2, 2016, DEQ responded with another letter stating that the application was still incomplete. In this letter, DEQ demanded an additional form that it had not previously demanded – a Zoning Compliance Form. DEQ's reasoning for this additional form was that additional acreage was being added to the application. DEQ extended the deadline to provide the required information to July 3, 2016.

It appears that Wagoner attempted to follow DEQ's requirements, and DEQ responded on July 6, 2016, requiring additional information. It does not appear that DEQ deemed the application either complete or incomplete at this point.

Ultimately, Wagoner continued working with DEQ to provide DEQ information that it continually requested. DEQ continued to grant Wagoner extensions to provide the information requested. On July 12, 2016 DEQ sent Wagoner another letter stating that the application was incomplete, and requested additional information. DEQ gave Wagoner an extension to August 11, 2016.

On August 16, 2016, DEQ issued a "Violation Letter" claiming that Wagoner was operating without a permit. It is important to note that the primary purpose of this letter was to notify Wagoner that DEQ personnel had observed Wagoner conducting mining operations on August 9, 2016. DEQ stated "As the Permit's reclamation date expired, DEQ has determined that the Permit is no longer valid; therefore, Opencut operations can no longer occur at the Site."

DEQ's Violation Letter recited its April 8, 2016 letter to Wagoner, which stated that "If you fail to submit a complete application to amend the Permit on forms provided by DEQ, or if you fail to reclaim the site as specified within 30 days of the date of this letter, the DEQ will forward this matter to its Enforcement Division." (Emphasis added). Wagoner points out this emphasized language because it conflicts with DEQ's prior letter dated January 11, 2016, which told Wagoner that if they did not choose to amend their permit, they had to reclaim the site by June 6, 2016, as opposed to May 8, 2016. Regardless, it is obvious, as outlined above, that Wagoner did in fact continue pursuing an amendment.

DEQ's Violation Letter went on to state "As of the date of this letter, DEQ has not received a complete application[2] to amend the Permit and the site has not been reclaimed, as evidenced by ongoing opencut operations observed by DEQ on August 9, 2016." The letter then stated as follows:

> This letter is to inform Wagoner's Sand and Gravel that is in violation of the Opencut Mining Act (OMA) and Administrative Rules of Montana, implementing the OMA, by conducting Opencut operations after the Permit's reclamation date expired.

(Emphasis added). The only violation noted in this "Violation Letter" was the accusation that Wagoner was conducting operations without a permit. Notably absent from this

[2] This is debatable; Wagoner contends it did everything requested of DEQ and DEQ kept stringing the process along demanding additional information, thus rendering every submission by Wagoner "incomplete."

Violation Letter was any official notice that Wagoner was in violation of the Opencut Mining Act for failing to reclaim the site by December 2015. Obviously, it would be nonsensical to reclaim the site while an application to amend was still pending.[3]

DEQ's Violation Letter gave Wagoner 10 days to dispute the violation or evidence to prove that the violation did not occur. As the Hearing Examiner noted in her order on summary judgment, Wagoner submitted an amended application on August 24, 2016 wherein Wagoner sought to include an additional 3.2 acres to the mining operations.

On August 29, 2016 DEQ notified Wagoner that the application was incomplete. The only document missing was the Zoning Compliance Form. The Hearing Examiner noted at Paragraph 22 of her Findings of Fact that "This time, however, DEQ did not extend the deadline; instead, DEQ informed Wagoner that the matter had been referred to Enforcement." However, while it is true that DEQ stated the matter had been referred to enforcement, the only issue that was ostensibly being referred to for enforcement was the violation set forth in its August 16, 2016 Violation Letter – conducting opencut operations without a permit, a matter which DEQ has since withdrawn and is no longer an issue. What the Examiner failed to mention was that in this same sentence DEQ said "Submit the necessary documents to make this application complete." (Emphasis added). In other words, the letter left it open-ended as to when Wagoner had to submit these "necessary documents."

On September 6, 2016, Wagoner submitted additional documentation, which DEQ accepted. The Examiner noted that on September 21, 2016 Wagoner submitted a Zoning Compliance Form to DEQ. On September 22, 2016, DEQ wrote Wagoner a

[3] The application had obviously not been determined to be abandoned by DEQ at the date of this Violation Letter.

letter stating their application for an amendment to Permit No. 1978 was complete. DEQ stated it had 45 days to identify any deficiencies with the application. DEQ then stated that no further opencut mining operations could be conducted until the application was determined acceptable and approved.

It is important to note that at no point in the process did DEQ ever issue a cease and desist order or demand that Wagoner reclaim the site.

The 45 days from DEQ's September 22, 2016 notice that Wagoner's application was complete, came and went. DEQ did not provide Wagoner with notice of any deficiencies. As the Hearing Examiner noted in Paragraph 29 of her Findings of Fact, the date the 45-day period expired was November 6, 2016. Mont. Code Ann. § 82-4-432(10(c) states "If the application is acceptable, the department shall issue a permit to the operator that entitles the operator to engage in the opencut operation on the land described in the application." (Emphasis added). The words "shall issue" is mandatory. DEQ failed to issue a permit on or about November 6, 2016.[4]

DEQ waited until March 17, 2017 to issue Wagoner's amendment to "Open Cut Mining Permit # 1798," precluding operations from November 6, 2016 to March 17, 2017.

B. Procedural background.

On January 6, 2017 DEQ brought charges against Wagoner alleging (a) Wagoner conducted mining operations without a permit; and (b) Wagoner failed to reclaim the mining site

[4] Wagoner has a claim against DEQ for delaying issuance of their mining permit, but this claim will be raised in District Court.

by December 2015. DEQ sought over $25,000 in penalties for the alleged violations, and then after issuing these charges and demand for payment of penalties, approved an application to Wagoner's opencut mining permit, allowing them to continue their operations.

Wagoner timely requested a hearing on DEQ's Notice of Violation and Penalty Order. Wagoner then moved for summary judgment on both of DEQ's claims. The primary basis for Wagoner's motion for summary judgment was that DEQ failed to follow their statutory procedures before issuing a Notice of Violation and Penalty Order.

After Wagoner's motion was filed, DEQ's counsel contacted the undersigned and admitted that Wagoner's motion had some merit. On August 9, 2017, DEQ filed a response to Wagoner's motion. In this response, DEQ withdrew their claim that Wagoner had wrongfully conducted mining operations without a permit. When DEQ filed its response to Wagoner's motion for summary judgment, it also filed a cross-motion contending that even though they had failed to follow the requisite statutory procedures, they were still entitled to an order on their claim that Wagoner failed to reclaim the site by the "deadline."

On November 30, 2017, Hearing Examiner Sarah Clerget ruled on the parties' respective motions for summary judgment. Examiner Clerget found that Wagoner violated the Opencut Mining Permit because it failed to reclaim the mining site between August 11, 2016 and September 22, 2016 (42 days). Examiner Clerget's basis for this ruling was that Wagoner "did not have a completed application pending before DEQ and it had not completed reclamation." *See,* Order on Motion to Clarify, Page 2 (Jan. 11, 2018).

However, in ruling that DEQ was entitled to partial summary judgment on their Notice of Violation and Penalty Order, Examiner Clerget expressly stated "it is also unreasonable to require Wagoner to complete reclamation while an amendment (which was ultimately approved)

was pending. *Order*, Page 25. The Examiner stated "it is also inappropriate for DEQ to penalize an Operator for an aspirational suggestion ("should" versus "must") in the application that is not a requirement of statute or administrative rule." *Order*, Page 18, ¶ 21. The Examiner also noted that Wagoner's completed application for amendment was submitted 42 days after DEQ's last extension, but then stated that DEQ was 131 days late in approving the amended application. The Examiner stated "based on equity, it is not reasonable to punish Wagoner for a delay that was approximately one third as long as DEQ's."

On January 22, 2018, Wagoner submitted its exceptions to Hearing Examiner Clerget's Orders. DEQ did not submit any exceptions to the Orders.

IV. Argument.

A. It remains Wagoner's position that DEQ violated the statutory and regulatory process applicable to the facts of this case.

The only violation which is at issue now is whether or not Wagoner failed to timely reclaim the mining site. This should be a moot point, considering that Wagoner began the process of amending its permit in December 2015, and was finally granted an amendment to continue operations in March 2017. Nonetheless, DEQ has been relentless in its pursuit of penalties against Wagoner, so Wagoner is required to defend its position. Accordingly, the outline set forth below illustrates how DEQ failed to follow the requisite procedures, which Wagoner contends precludes DEQ from enforcing a violation and collecting penalties.

With the understanding that the only violation at issue is failure to timely reclaim the site, Mont. Code Ann. § 82-4-434(4) states that if reclamation according to a plan of operation has not been completed in the time specified, DEQ must give the operator 30 days' written notice. Mont. Code Ann. § 82-4-434(4) states that after DEQ provides written notice, DEQ must order the operator to cease mining. The statute continues and states "...if the operator does not cease

[DEQ] may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action to enjoin further operation and may sue for damages for breach of the conditions of the permit, for performance of the performance bond, or both." There is no dispute that DEQ did not follow this statute.

DEQ has attempted to excuse its negligence by claiming that regardless of whether it followed these procedures, it still has an independent right pursuant to Mont. Code Ann. § 82-4441(5) to bring an enforcement action and seek administrative penalties. Unfortunately, the Hearing Examiner agreed. In Paragraph 23 of the Examiner's Conclusions of Law, she stated that the authority to bring an enforcement action and seek administrative penalties is independent of the authority to order an operator to cease mining operations. In Paragraphs 24 and 25 of the Examiner's Conclusions of Law, she concluded that in effect, DEQ has two options: (1) it can use Mont. Code Ann. § 82-4-434(4) and order an operator to cease mining and issue an order of reclamation; (2) or it can use Mont. Code Ann. § 82-4-441 to seek enforcement and penalties.

There are some very serious issues with the Hearing Examiner's analysis. First, if the Hearing Examiner's position is accepted as true, then Mont. Code Ann. § 82-4-434(4) is a stand-alone statute which applies to situations involving a failure to reclaim a mining site. Mont. Code Ann. § 82-4-441 would deal with everything else. Of course if this were true, then arguably, Mont. Code Ann. § 82-4-441 would be inapplicable in this case, since the only alleged violation is failure to timely reclaim the site.

Second, Mont. Code Ann. § 82-4-434(4) is not permissive – it is mandatory. If reclamation according to a plan of operation has not been completed in the time specified, DEQ must give the operator 30 days' written notice to reclaim the site. This is not a permissive statute – it is the procedure which must be strictly followed. Here, DEQ did not give the operator

written notice pursuant to Mont. Code Ann. § 82-4-434(4): instead, it submitted a letter stating that Wagoner's application for an amendment was not complete, and then gave Wagoner the option of continuing with the amendment process or reclaiming the site within 6 months.

From December 2015 to January 6, 2017, DEQ never issued a written notice to Wagoner that it was in specific violation for failing to reclaim their mining site by December 2015. Mont. Code Ann. § 82-4-434(4) states that after DEQ gives the operator 30 days' written notice, DEQ must issue an order to the operator to cease mining. DEQ has never sent Wagoner an order telling them to cease mining or to reclaim the site.

It is Wagoner's position that according to Mont. Code Ann. § 82-4-434(4), DEQ may only issue an order to reclaim, a notice of violation, or an order of abatement or institute an action to enjoin further operation and may sue for damages for breach of the conditions of the permit, for payment of the performance bond, or for both, IF the operator does not cease operations. In other words, it is the operator's failure to abide by DEQ's written notice that triggers the enforcement under Mont. Code Ann. § 82-4-441. Wagoner's argument is based on the language in Mont. Code Ann. § 82-4-434(4) which states "if the operator does not cease, [DEQ] may issue an order to reclaim, a notice of violation, an order of abatement, or institute an action..." Mont. Code Ann. § 82-4-441 sets out the "action" and the "notice of violation" procedures.

Third, there does not appear to be a statute of limitations for when DEQ can start/stop assessing penalties. Here, DEQ gave Wagoner the option of pursuing an amendment, which Wagoner did. The amendment application was deemed complete on September 22, 2016, and required issuance of a permit by November 6, 2016 if there were no deficiencies. DEQ waited until January 6, 2017 to assess penalties, and then waited an additional two months to issue a

permit. DEQ basically stacked the deck against Wagoner in this case. At the very least, this is patently unfair and inequitable, particularly when Wagoner was doing its best to comply with DEQ's demands, and particularly since DEQ refused to respond to Wagoner's requests for information and clarification during the process. It is likely that had DEQ been more responsive during the applicant process, the application would have been resolved long before August 2016. The point here is that if the Hearing Examiner's position is accepted as true, then DEQ would be able to extend the time period in which to assess penalties at its leisure.

Fourth, the two statutes should operate in harmony, not independently. According to Mont. Code Ann. § 82-4-434(4), DEQ may not issue a notice violation until after it complies with the notice requirements. The Examiner circumvents Mont. Code Ann. § 82-4-434(4) based on language in Mont. Code Ann. § 82-4-441(5)(a), which says "in addition to the violation letter pursuant to subsection (1), the department may also issue an order...The order may require necessary corrective action within a reasonable period of time, may assess an administrative penalty determined in accordance with this section, or both." However, the key words in this statute are the words "in addition to..." The statute does not say "in lieu of..." In other words, a penalty order can only be issued if there is a valid notice of violation. Again, Mont. Code Ann. § 82-4-434(4) explains that the violation letter as it pertains to reclamation can only be sent after proper notice.

In this case, DEQ did send a Violation Letter on August 16, 2016. However, the only violation alleged in this "Violation Letter" was as follows:

> This letter is to inform Wagoner's Sand and Gravel that is in violation of the Opencut Mining Act (OMA) and Administrative Rules of Montana, implementing the OMA, by conducting Opencut operations after the Permit's reclamation date expired.

As has been pointed out numerous times, DEQ has withdrawn this violation. It is no longer a basis for this action. DEQ has *never* sent out a Notice of Violation under Mont. Code Ann. § 82-4-434(4). The Hearings Examiner ruled that Wagoner was technically in violation of the Opencut Mining Act for failing to reclaim the site from August 11, 2016 to September 22, 2016 (42 days). However, there was never a notice from DEQ that Wagoner had to reclaim the site. Absent a written notice under either Mont. Code Ann. § 82-4-434(4) or Mont. Code Ann. § 82-4-441 that Wagoner had to reclaim the site, there can be no violation.

Accordingly, applying these statutes in harmony, DEQ never followed the mandatory notice requirements, they failed to provide a Notice of Violation until after the amendment application was deemed complete, and until after the permit should have been issued. DEQ's failure to follow the statutory procedures set forth in the Opencut Mining Act means they do not have standing to accuse Wagoner of violating their permit by failing to timely reclaim, and they do not have standing to assess penalties.

B. Equity dictates that Wagoner had no obligation to reclaim the site while an application for an amendment to their permit was pending.

It really is disingenuous for DEQ to claim that Wagoner is in "violation" for failing to reclaim the mining site when they knew full well Wagoner was attempting to secure an amendment. If DEQ truly required reclamation during the pendency of the Operator's application, why would it not send an operator a Violation Letter and Order specifically demanding that the operator reclaim the property until the application has been resolved?

DEQ may argue that it did not have to, that is the operator's job: however, Mont. Code Ann. § 82-4-434(4) disagrees. DEQ is required to send written notice and essentially give the operator a chance to cure the issues. In this case, DEQ never gave the requisite written notice, but instead, invited Wagoner to amend the permit so it could continue operating. After several

months of going back and forth, including months were DEQ refused to respond to Wagoner's request for information, DEQ finally notified them their application was complete, and then arbitrarily withheld issuance of the permit until after it sent a notice of violation and a demand for penalties.

Common sense dictates that an operator would *not* expend the time, money, and effort necessary to reclaim the mining site only to undo that work once they are granted an amendment to continue. Equity suggests there is no violation here, and even the Hearing Examiner seems to agree:

> 38. While it is true that Wagoner submitted a completed application for amendment 42 days after DEQ's last extended deadline (August 11, 2016, to September 22, 2016), Wagoner was not mining during this period. DEQ was then also 131 days late in approving Wagoner's amendment application (November 6, 2016, to March 17, 2017). **Based on equity, it is not reasonable to punish Wagoner for a [42] delay that was approximately one third as long as DEQ's.** It is also unreasonable to require Wagoner to complete reclamation while an amendment (which was ultimately approved) was pending.

Order, Page 25, Paragraph 38 (emphasis added).

VI. Conclusion.

For the reasons cited above, Wagoner respectfully requests that the Board of Environmental Review reject the Order proposed by Hearing Examiner Clerget, and that instead, the Board dismiss DEQ's Notice of Violation and Penalty Order.

DATED this 1st day of February, 2018.

GANGLE LAW FIRM, PC.
Attorneys for Operator

By: /s/Cory R. Gangle
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this 1st day of February, 2018.

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