

**STATE OF MONTANA**  
**DEPARTMENT OF JUSTICE**  
**AGENCY LEGAL SERVICES BUREAU**

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TO: The Montana Board of Environmental Review  
FROM: Sarah Clerget, Board Attorney  
RE: IN THE MATTER OF: APPEAL AMENDMENT AM4, WESTERN  
ENERGY COMPANY, ROSEBUD STRIP MINE AREA B, PERMIT NO.  
C1984003B, CASE NO. BER 2016-03 SM  
DATE: May 28, 2019

The purpose of this memo is to advise the BER members, pursuant to the contested case provisions of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. § 2-4-601 *et. seq.*, on the law applicable to their review of the *Proposed Findings of Fact, Conclusions of Law and Order* (Proposed FOFCOL) in the above-captioned case. This memo is written in my capacity as the BER Board attorney, although I also acted (after the Board's appointment) as the hearing examiner in this case.

The record before the Board on this case consists of a written record and an opportunity for the parties to make oral arguments to the Board, which will occur at the meeting on May 31<sup>st</sup>, 2019. In the Board packet for the May 31<sup>st</sup> meeting, Board Members will find the following items, which constitute all of the docketed filings since the Proposed FOFCOL (Note: items marked with a \* were previously produced to the BER in a serial fashion, as discussed at the last meeting):

- (2) (Doc. 134) Proposed FOFCOL\*
- (3) (Doc. 135) Order on Exceptions\*
- (4) (Doc. 139) DEQ exceptions\*
- (5) (Doc. 140) Western exceptions\*
- (6) (Doc. 141) MEIC exceptions and 6 exhibits\*
- (7) (Doc. 142) Joint motion to extend word limit
- (8) (Doc. 143) Order denying motion on word limit
- (9)(Doc. 144) Affidavit of Martin (Western Obj. to Board Members)
- (10) (Doc. 145) MEIC Response to Objection and Exhibit 1
- (11) (Doc. 146) DEQ response to Petitioner's Exceptions and 3 exhibits

- (12) (Doc. 147) MEIC response
- (13) (Doc. 149) Western response to MEIC Obj to Prop FOFCOL
- (14) (Doc. 148) Western's Motion to Strike

As the above docket list reflects, in addition to the Proposed FOFCOL, Exceptions briefs, and Response briefs (Docs. 134, 139-141, 146-147, and 149), there was a request for additional words in the response briefs (Doc. 142), which was denied (Doc. 143). Additionally, pursuant to my Order on Exceptions (Doc. 135), Intervenors filed an Affidavit regarding the participation of BER members in the decision on this case (Doc. 144). Conservation Groups responded to that Affidavit (Doc. 145) and Intervenors filed a Motion to Strike that response (Doc. 148). The Motion to Strike and the issues raised in the Affidavit are therefore also before the BER for decision, in addition to the Proposed FOFCOL.

Based on the written record and the oral arguments before the Board, it must decide, by seconded motion, what to do with the Proposed FOFCOL. MAPA provides BER with the following options:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

Mont. Code Ann. § 2-4-621(3). In other words, BER has three options regarding what action to take upon review of a hearing examiner's Proposed FOFCOL:

- (1) Accept the Proposed FOFCOL in its entirety and adopt it as the Board's final agency action;
- (2) Accept the Findings of Fact (FOF) in the Proposed FOFCOL, but modify the Conclusions of Law (COL) in the Board's final agency action; or
- (3) Reject the Proposed FOFCOL, review the entire record that was before the hearing examiner, and then take the Board's final agency action (which can be a new or modified FOFCOL).

When choosing among these three options, the Board should keep certain legal standards in mind. Regarding options (2) and (3), the agency may “correct a hearing examiner’s incorrect conclusions of law” in a final order, without having to review the entire factual record. *Mont. Dept. Transp. v. Mont. Dept. Labor and Indus.*, 2016 MT 282, ¶ 23 (herein, *MDOT*); Mont. Code Ann. § 2-4-621(3).

However, the agency is more constrained with regard to modifying findings of fact. The agency cannot discard a hearing examiner’s factual findings. *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶¶ 7, 27-29. “Under MAPA, an agency may reject a hearing officer’s findings of fact only if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence.” *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 25 ((internal quotations marks omitted; citing *Moran v. Shotgun Willies*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995), Mont. Code Ann. § 2-4-621(3)). “In reviewing findings of fact, the question is not whether there is evidence to support *different* findings, but whether competent substantial evidence supports the findings actually made.” *Mayer*, ¶ 27 (citing *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21 (emphasis supplied in *Knowles*)). “An agency abuses its discretion if it modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence.” *Stricker*, ¶ 25. “[A]n agency’s rejection or modification of a hearing officer’s findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner’s findings are not supported by substantial evidence.”<sup>1</sup> *Id.* (internal citations omitted). With regard to whether substantial credible evidence supports the factual findings, *Stricker* explained:

Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance. The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence.

*Stricker*, ¶ 26 (internal citations and quotations omitted); *see also Mayer*, ¶ 27 (quoting Black’s Law Dictionary 635, 636, 639, 640 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009)).

Members of the Board may therefore look at any portions of the underlying record in order to decide whether or not findings of facts are supported by “competent substantial evidence,” but once the Board determines that factual findings are not so supported, the

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<sup>1</sup> This standard should not be confused with the legal determination of whether the facts, as found, meet a party’s burden of proof by a preponderance of the evidence. *See Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, P17-26.

Board must review the entire record before modifying any fact found by the hearing examiner.

Once a decision is made, the BER may utilize the Board Secretary or Board Attorney to assist in drafting the final order memorializing the Board's substantive decision, for the signature of the Board Chair. If the decision is dispositive (ending the case), then the aggrieved party may appeal to state District Court for review. If the Board's decision is not dispositive, the Board can decide to retain jurisdiction of this matter or assign it to a hearings examiner for further proceedings.

Hearing Examiner's Proposed  
Findings of Fact and  
Conclusions of Law

Doc. 134

**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. C1984003B**

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

**PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW**

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## INTRODUCTION

This case has three parties: “(1) the Department of Environmental Quality (DEQ or “the Department”); (2) the Petitioners, Montana Environmental Information Center (“MEIC”) and Sierra Club (collectively, “Conservation Groups” or “Petitioners”); and (3) the Respondent-Intervenors Western Energy Company (“Western Energy” or WECO), Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (collectively, “Intervenors”).

This case concerns Conservation Groups’ appeal of DEQ’s decision to approve an amendment (the “AM4 Amendment”) to Western Energy’s mining permit for Area B of its Rosebud Coal Mine. The case examines DEQ’s implementation of the Montana Strip and Underground Mining Reclamation Act (“MSUMRA”), Mont. Code Ann. § 82-4-201, *et seq.* The question is whether the Department properly assessed the probable “cumulative hydrologic impacts” of all anticipated mining in the area on the “hydrologic balance” and sufficiently determined, in writing and upon record evidence, that the AM4 Amendment is designed to prevent “material damage” to the “hydrologic balance” outside the permit area. Mont. Code Ann. § 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c); *In re Signal Peak Energy (Bull Mountain Mine No. 1)*, BER-2-13-07-SM, Findings of Fact, Conclusions of Law and Order, at 56 (Jan. 14, 2016) (herein, *Signal Peak*).

## **PROCEDURAL HISTORY**

Conservation Groups filed a Notice of Appeal and Request for Hearing on January 4, 2016, identifying seven issues of alleged error in DEQ's permitting decision. Intervenors moved to intervene on January 25, 2016; their motion was granted on January 28, 2016. Conservation Groups moved for summary judgment on June 15, 2016. On December 9, 2016, the Montana Board of Environmental Review (BER) denied the motion for summary judgment and referred the matter for a hearing before a hearing examiner. BER, Transcript of Proceedings (Dec. 9, 2016), 12:19-13:24.

The undersigned hearing examiner assumed jurisdiction over this case in September 2017 and issued a new Scheduling Order (January 12, 2018) setting the case for a hearing. The parties filed five extensive motions in limine, on which oral arguments were held. On March 15, 2018, the undersigned ruled on those motions holding that "Conservation Groups will be limited to those issues contained in the administrative record, including those issue[s] raised in their August 3, 2015 objections and also preserved in the January 4, 2016 Notice of Appeal." Or. Mots. in Limine, at 7, 9 (Mar. 15, 2018) (Ex. A hereto). The Order excluded from consideration the following issues for failure by Conservation Groups to preserve:

- a. Arguments related to the definition of “anticipated mining” and potential interactions between the AM4 Permit and Area F (Hrg. Tr. Vol. 1<sup>1</sup>, 134:5-25, 137:7-13, 158:2-5);
- b. Arguments related to DEQ’s alleged failure to make a material damage determination regarding alleged dewatering of East Fork Armells Creek (EFAC) regarding the entire interaction of the AM4 Permit with all previous mining (Hrg. Tr. Vol. 1, 227:20-228:9);
- c. Arguments related to alleged impacts of the AM4 Permit on Rosebud Creek (Hrg. Tr. Vol. 1, 43:15-44:25);
- d. Arguments related to the alleged impacts from blasting (Hrg. Tr. Vol. 1, 56:15-17, 60:24-61:5);
- e. Arguments regarding the impact of dissolved oxygen levels in EFAC on aquatic life (Hrg. Tr. Vol. 1, 302:22-303:12);
- f. Arguments regarding the impact of chloride levels in EFAC on aquatic life (Hrg. Tr. Vol. 2, 32:18-33:25).

Or. Mots. In Limine, at 9 (Mar. 15, 2018) (Ex. A hereto). The undersigned determined at a hearing that Conservation Groups’ challenge to the AM4 Permit is limited to the following issues preserved in Conservation Groups’ Public Comments and Notice of Appeal and Request for Hearing:

- g. The material damage determination regarding increased TDS levels in EFAC.
- h. The material damage determination regarding increased nitrogen levels in EFAC.
- i. The material damage determination regarding aquatic life use of EFAC.

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<sup>1</sup> “Hrg. Tr.” refers to the transcript of the evidentiary hearing held before the undersigned in March of 2018 (as opposed to the transcript of proceedings held before the BER in December of 2016). “Vol.” refers to the volume of the transcript, which corresponds to the day of the hearing, e.g. Vol. 1 is the first volume of the hearing transcript proceedings held on March 19, 2018.

*Id.*, at 9. A four-day contested case hearing was held March 19 through 22, 2018. At the hearing, the parties were represented by: Mark Lucas for DEQ; Shiloh Hernandez, Derf Johnson, Walton Morris, and Roger Sullivan for Conservation Groups; and John Martin, William W. Mercer, Victoria A. Marquis, Samuel Yemington, and Jeremy Cottrell for Intervenors.

At the hearing, the parties presented testimony from the following witnesses: Alex Bonogofsky, Steve Gilvert, Dr. William Gardner (designated an expert in hydrology and statistics), Sean Sullivan (designated an expert in aquatic ecology and taxonomy), Chris Yde, Dr. Emily Hinz (designated an expert in hydrology), Martin Van Oort (designated an expert in hydrology), Eric Urban (designated an expert in water quality assessment), Wade Steere, William Schafer (designated an expert in hydrology, statistics, and soil science), Dr. Michael Nicklin (designated an expert in hydrology, groundwater, and groundwater modeling), Penny Hunter (designated an expert in aquatic toxicology and biological monitoring), and David Stagliano (designated an expert in aquatic ecology and prairie stream ecology).

At the close of Conservation Groups' case-in-chief, Intervenors moved for the functional equivalent of a directed verdict pursuant to Rule 52, Mont.R.Civ.P. DEQ joined that motion. The undersigned reserved judgement on the motion at the hearing.

At a post-hearing status conference on March 29, 2018, the parties were ordered to submit proposed findings of fact and conclusions of law (FOFCOL) and then to respond to each other's proposed FOFCOLs. After several extensions, the proposed FOFCOLs and responses were fully submitted to the undersigned on September 28, 2018.

### **LEGAL BACKGROUND**

DEQ reviews an application for a strip-mining permit or major permit revision under the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") to determine if the application affirmatively demonstrates that the proposed operation is designed to prevent material damage to the hydrologic balance outside the permit area. To approve the application, DEQ must confirm, in writing, that the applicant has made the requisite showing and the information available to DEQ at the time does not show otherwise. Mont. Code. Ann. § 82-4-227(3)(a); Admin. R. Mont. 17.24.405(6)(c). With respect to water specifically, the law is:

The department may not approve an application... unless the application affirmatively demonstrates and the department's written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

...

c) the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area....

Admin. R. Mont. 17.24.405(6). The following definitions apply:

“Material Damage” means, “with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality and quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.” Mont. Code. Ann. § 82-4-203(31); Admin. R. Mont. 17.24.301(68).

“Hydrologic Balance” means “the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit, such as a drainage basin, aquifer, soil zone, lake, or reservoir, and encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground water and surface water storage.” Mont. Code. Ann. § 82-4-203(24); Admin. R. Mont. 17.24.301(55).

“Cumulative Hydrologic Impact Area” means, “the area, including, but not limited to, the permit and mine plan area within which impacts to the hydrologic balance resulting from the proposed operation may interact with the impacts of all previous, existing and anticipated mining on surface and ground water systems.” Admin. R. Mont. 17.24.301(32).

“Cumulative Hydrologic Impacts” means, “the expected total qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance.” Admin. R. Mont. 17.24.301(31).

To determine whether the proposed permit amendment has been designed to prevent “material damage” to the “hydrologic balance” outside the permit area, DEQ assesses the “cumulative hydrologic impacts” of the proposed operation and all anticipated mining upon surface and groundwater systems in the “cumulative

impact area.” Mont. Code Ann. § 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c); Admin. R. Mont. 17.24.301(31), (32), (55), (68). A “material damage” determination must therefore assess whether the probable cumulative impacts from the proposed mining permit at issue will cause a violation of water quality standards outside the permit area. *See Signal Peak*, at 87 (citing Mont. Code Ann. § 82-4-203(31)); *see also* Admin. R. Mont. 17.24.301(68). This assessment is reflected in DEQ’s Cumulative Hydrologic Impact Assessment (“CHIA”), which is attached to the permit amendment.

### **FINDINGS OF FACT**

Having reviewed the evidence submitted, the Hearing Officer makes the following factual findings:

#### **A. General Background on The Rosebud Mine**

1. Western Energy operates the Rosebud Mine, which is a 25,752-acre coal strip-mine located in Colstrip, Montana, approximately 123 miles east of Billings and 36 miles south of Forsyth. DEQ Ex. 1A at 3-1, 3-2.
2. Northern Pacific Railway originally started strip-mining coal in Colstrip in the 1920s to fuel locomotives. *Id.* at 3-1. The mine shut-down in 1958 when the railroads modernized and switched the locomotives to diesel. *Id.*
3. Montana Power Company purchased the rights of the mine and the town in 1958. It formed a wholly-owned subsidiary, Western Energy Company, to

manage and develop the Colstrip properties, and in 1968 Western Energy began mining. In 2001, Westmoreland purchased the Rosebud Coal Mine, making Western Energy Company a subsidiary of Westmoreland Mining, LLC. *Id.* at 3-1.

4. The Rosebud Mine currently has a total permit area of approximately 25,752 acres in five individual permit areas: titled/labeled Areas A through Area E, which have been generally in existence since the late 1970s to early-to-mid 1980s. *Id.* at 3-2; *see also* DEQ Ex. 1A at Figure 5-1; Hrg. Tr. Vol. 2, at 167:13-15.

5. Maps of the Rosebud Mine and the areas involved in this case appear at Figures 1-1, 3-1, 4-1, 4-4, 5-1 of the CHIA. DEQ Ex. 1A at 13-1, 13-2, 13-3, 13-6, 13-7.

6. Currently Area B currently includes 6,182 acres of mineable land. DEQ Ex. 1 at 2, ¶ 6.

7. The AM4 Amendment proposes the following changes to the current Area B Permit: a 49 acre increase in the area permitted; a 146 acre increase in the proposed amount of surface disturbance limit; 8.6% increase in the minable coal reserve (approximately 12.1 million tons); 306 more acres of coal removal or 8.3% increase in the amount of coal aquifer disturbed; re-calculation of the performance bond to account for current practices and future conditions (increase from \$48,403,696 to \$73,650,000); and, changes to the post-mine topography (PMT). DEQ Ex. 1; DEQ Ex. 1A at Figures 3-1 and 9-9; Hrg. Tr. Vol. 2, at 174:8-25, Vol.

3, at 190:13-17. The total proposed permit area for the Area B Permit with the AM4 Amendment will be 6,231 acres. DEQ Ex. 1 at 2.

**B. Standing**

8. Alexis Bonogofsky is a member of Montana Environmental Information Center (MEIC) and Sierra Club. Hrg. Tr. Vol. 1, at 36:14-24.

9. Steve Gilbert is a resident of Helena, Montana, and a member of MEIC and Sierra Club. Hrg. Tr. Vol. 1, at 100:7-13, 101:5-17.

10. Ms. Bonogofsky and Mr. Gilbert use, recreate in, and visit the area affected by the Rosebud Mine, including the lands surrounding the mine, they are concerned that additional mining will impact their interests in the area, and believe that their concerns would be addressed in part by the cessation of additional mining. Hrg. Tr. Vol. 1, at 37:3-38:9, 46:4-16, 53:21-54:14, 61:25-62:19, 76:12-14, 101:23-102:10, 107:16-111:25, 126:22-128:19.

11. Ms. Bonogofsky hunts and takes photographs in the Colstrip area. Hrg. Tr. Vol. 1, at 37:5-25, 70:9-18, 71:14-20.

12. Ms. Bonogofsky visits ranches that “circle the industrial complex of the – Colstrip, the power plant, and the mine.” Hrg. Tr. Vol. 1, at 77:4-12.

13. Ms. Bonogofsky professed a general concern about the impact of additional mining on water because she “know[s] a lot of ranchers” and they “talk

about [water] a lot, about the salinity in the water.” Hrg. Tr. Vol. 1, at 54:8-25, 55:1-3.

14. Mr. Gilbert has familiarity with the EFAC watershed because he “would visit the area to hunt upland birds.” Hrg. Tr. Vol. 1, at 108:11-15.

15. Mr. Gilbert presented conflicting testimony, as he admitted that he had not hunted in EFAC since 2007 (Hrg. Tr. Vol. 1, at 125:3-15) but also testified that he had “probably” birded in the EFAC watershed last summer or “probably” during turkey season in 2017 (Hrg. Tr. Vol. 1, at 126:22-25, 127:1-3).

16. Mr. Gilbert stated that the recreational value of “hunting upland birds” is impaired if there are impacts to wildlife “including upland birds” and that additional mining impacts his “perspective as a hunter.” Hrg. Tr. Vol. 1, at 109:13-15.

17. Mr. Gilbert testified that adverse impacts to EFAC “has an effect” on his experience in the area “from an aesthetic perspective” and that his aesthetic sense was harmed because he could see an “industrial zone” that he described as the “power plant, mines, city [of Colstrip] itself.” Hrg. Tr. Vol. 1, at 108:8-20, 131:5-7.

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### **C. Permitting Process**

18. Western Energy's application for an amendment to its permit for Area B of its Rosebud Mine (AM4 Permit) was received by DEQ on June 15, 2009.

DEQ Ex. 1, at 2, ¶ 7; Western Ex. RR.

19. DEQ determined that Western Energy's application was complete and that an environmental impact statement was not required on August 7, 2009. DEQ Ex. 1, at 2, ¶ 7; Western Ex. SS.

20. The AM4 Amendment application materials submitted by WECO to DEQ included WECO's Comprehensive Evaluation of Probable Hydrologic Consequences (DEQ Ex. 6) and Addendum to the Comprehensive Evaluation of Probable Hydrologic Consequences (DEQ Ex. 6A). DEQ Ex. 1A, at 2-7; DEQ Ex. 1, at ¶ 5.

21. A timeline of the application and public notice process appears at DEQ Ex 1 at 2-5.

22. Public notice of the application was provided on August 27, September 3, September 10, and September 17, 2009. DEQ Ex. 1, at 2, ¶ 7.

23. From 2009-2015 DEQ and Western Energy completed eight rounds of Acceptability Deficiency notices and responses. DEQ Ex. 1, at 2-4, ¶ 7; Western Exs. TT through III.

24. The seventh deficiency letter requested that Western Energy conduct an aquatic life survey of EFAC. MEIC Ex. 47<sup>2</sup>.

25. DEQ issued an Acceptability Determination on July 8, 2015, more than six years after WECO's application was first submitted. DEQ Ex. 5.

26. Public notice of the Acceptability Determination was provided on July 8, 2015. DEQ Ex. 1 at 4.

27. The comment period closed on August 3, 2015, on which date the Western Environmental Law Center (WELC) submitted a timely comment letter (a.k.a. "objections"), with exhibits thereto. DEQ Ex. 1 at 4; Exs. 4, 4a thru 4l.

28. On December 4, 2015, DEQ issued the AM4 Amendment. Stipulated Facts; *See* DEQ Ex. 1, *passim*; DEQ Ex. 3; Hrg. Tr. Vol. 1 32:1-35:1, Hrg. Tr. Vol. 2, at 164:20-23.

29. DEQ's "Written Findings," released with the permit approval, include a section titled "Responses to Public Comments" in which DEQ specifically responded to each of the issues raised in the Public Comments, including WELC's comment letter. DEQ Ex. 1, at 8-14.

30. In its December 4, 2015 Written Findings and Cumulative Hydrologic Impact Assessment (CHIA), DEQ assessed the cumulative hydrologic impacts of all anticipated coal mining on the hydrologic balance within the cumulative impact

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<sup>2</sup> For brevity's sake, Conservation Groups' exhibits are collectively cited herein as MEIC.

area associated with AM4 mining and determined, *inter alia*, that the AM4 Amendment would not result in material damage to the hydrologic balance outside the permit area. DEQ Ex. 1, at ¶ 12.

31. DEQ’s Written Findings and AM4 Amendment Approval were based in part on information provided by WECO in its amendment application, as well as the AM4 CHIA, and in part on other information available to DEQ. DEQ Ex. 1 at ¶ 5; DEQ Ex. 1A.

32. DEQ’s December 4, 2015 approval triggered a 30-day appeal period. ARM 17.24.425(1). Conservation Groups timely filed an appeal on January 4, 2016 (January 3 was a Sunday). Notice of Appeal (Jan. 4, 2016).

33. The public comments, including those by WELC, raised a number of challenges to DEQ’s approval of the AM4 Amendment, some of which were preserved in Conservation Groups’ Notice of Appeal. *Compare* DEQ Ex. 4 with Notice of Appeal.

**D. Hydrologic Impacts of Strip-Mining Generally**

34. Strip-mining for coal at the Rosebud Mine includes the removal and salvage (stockpiling) of soil and excavation of subsurface overburden layers (which are afterwards called “spoil”) in order to reach and remove the Rosebud coal seam. DEQ Ex. 1A, at 3-2; Figure 9-21; Hrg. Tr. Vol. 2, at 177:6-15, 178:1-9.

35. The Rosebud coal seam is an aquifer, which is partially removed by mining operations and eventually replaced with backfilled spoils. DEQ Ex. 1A, at 3-1 to 3-2; 8-11.

36. Once the coal has been removed from the excavation, spoil materials are used to refill the excavation. DEQ Ex. 1A, at 3-2; Hrg. Tr. Vol. 2, at 177:6-15.

37. The backfilled spoil is regraded to an approved post-mine topography and salvaged topsoil or other approved suitable material is spread on the surface, after which seeding and planting of approved vegetation takes place. DEQ Ex. 1A, at 3-2.

38. The hydrologic system, including both groundwater and surface water, will experience both short- and long-term impacts from the strip-mining of coal which include diminishment of surface water flow due to sediment ponds placed below the mine disturbance, drawdown of groundwater levels or declines in pressure head, and changes in water quality in both surface water and groundwater. DEQ Ex.1A, at 9-2; *see also* Hrg. Tr. Vol. 2, at 183:24-184:5.

39. Strip-mining's effects to groundwater quantity include a phenomenon known as "drawdown," which involves reductions in water levels in water-bearing subsurface strata adjacent to the excavation as water flows into the void created by the excavation and removal of the Rosebud coal aquifer. DEQ Ex. 1A, at 9-27 and 9-38; Hrg. Tr. Vol. 2, at 183:24-184:13.

40. The AM4 Amendment will increase the drawdown or reduction in water levels in adjacent water-bearing subsurface strata in the immediate vicinity of the additional AM4 mine cuts, as shown in Figure 3-1 of the CHIA. DEQ Ex. 1A, at 9-80 to 9-81, Figure 9-84; Hrg. Tr. Vol. 2, at 188:7-10.

41. Once the spoil has been backfilled to replace the removed Rosebud coal aquifer, the spoil gradually re-saturates from recharging lateral flows of groundwater from the existing coal seam, and from infiltration of precipitation or surface water runoff in through the spoil. DEQ Ex. 1A, at 9-55 to 9-56, and 9-81; Hrg. Tr. Vol. 2, at 180:1-20.

42. Strip-mining also affects groundwater quality by causing increases in concentrations of dissolved solids in the spoil relative to what was present in the coal or overburden prior to mining. DEQ Ex. 1A, at 9-56; Hrg. Tr. Vol. 2, at 184:18-25.

43. Such increases in concentrations of dissolved solids occur because the spoils include broken up rocks which contain more reactive surfaces than the intact strata that existed prior to mining, which increase the exchange of ions with water. Hrg. Tr. Vol. 2, at 184:18-25.

44. Once the water levels have recovered in the spoil to approximate the pre-mine condition, some of that increased total dissolved solids (TDS) in the spoil can move downgradient towards either bedrock units outside of the mine or

towards the alluvial aquifer associated with EFAC. DEQ Ex. 1A, at 9-27; Hrg. Tr. Vol. 2, at 185:5-10.

**E. East Fork Armells Creek (EFAC)**

45. EFAC is a sub-basin to the Armells Creek watershed, which transects the majority of the mining from the Rosebud Mine, including most of Area B and all of the AM4 Amendment area. Hrg. Tr. Vol. 2, at 200:1-14; DEQ Ex. 1A, Figure 5-1.

46. Drainage from the AM4 Permit area discharges to EFAC. With the exception of a small area—from which water discharges are not expected to occur—the area subject to the AM4 Permit is located within the Upper EFAC drainage area. DEQ Ex. 1A at 5-1.

47. EFAC (that is, the creek itself) is outside the permit areas of the Rosebud Mine. Ex. DEQ 1A, at 9-20; *see also id.* Figs. 4-4, 5-1, 6-1.

48. EFAC is designated as a C-3 surface water. DEQ Ex. 1A, at 2-3; Hrg. Tr. Vol. 2, at 200:23-24; Admin. R. Mont. 17.30.611(1)(c).

49. The relevant water quality standard requires C-3 waters to be maintained to support “bathing, swimming, and recreation, and growth and propagation of non-salmonoid fishes and associated aquatic life, waterfowl, and furbearers.” DEQ Ex. 1A, at 2-3 (quoting Admin. R. Mont. 17.30.629(1)).

50. EFAC is an ephemeral stream with a few intermittent sections that flows through the area of the Rosebud Mine, between Area A and Area B in the east (downstream) part of the mine area, and then between Area B and Area C to the west (upstream). DEQ Ex. 1A at 4-4, 8-8.

51. That portion of EFAC existing upstream of the Rosebud Mine and continuing to the highway bridge downstream of the AM4 Permit is referred to as Upper EFAC. Hrg. Tr. Vol. 2, at 229:3-13, 230:13-18.

52. Upper EFAC is a C-3 ephemeral water. DEQ Ex. 9, at 1; DEQ Ex. 10, at 1. DEQ Ex. 1A, at 9-6; Hrg. Vol. 1, at 226:7-23; Hrg. Tr. Vol. 2, at 183:17-23, 186:23-187:17, 200:15-20.

53. An ephemeral stream flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and has a channel bottom that is always above the local water table. DEQ Ex. 1A at 2-3, (citing Mont. Code Ann. § 82-4-203(18); Admin. R. Mont. 17.24.301(39), and Admin. R. Mont. 17.30.602(10))

54. An intermittent stream is a stream or reach of a stream that is below the local water table for at least some part of the water year, and obtains its flow from both surface runoff and ground water discharge. DEQ Ex. 1A, at 2-3, (citing Mont. Code Ann. § 82-4-203(29), Admin. R. Mont. 17.24.301(61), and Admin. R. Mont. 17.30.602(61)).

55. While livestock grazing and channel use by livestock occurs in areas upstream of mined areas, coal mining activity (open pits, reclaimed lands, sediment ponds, mining facilities, and associated infrastructure) dominates the potential anthropogenic pollutant sources in upper [EFAC]. DEQ Ex. 1A, at 9-6.

56. That portion of EFAC existing downstream of the highway bridge and continuing through the town of Colstrip until its conflux with the West Fork Armells Creek is referred to as Lower EFAC. Hrg. Tr. Vol. 2, at 229:3-13, 230:13-18.

57. Lower EFAC, from Colstrip to its confluence with the Yellowstone River, has large reaches with perennial to intermittent flow. DEQ Ex.1A, at 9-6.

58. Lower EFAC water quality is “much worse” than Upper EFAC water quality. Hrg. Tr. Vol. 2, at 230:13-19.

59. Because EFAC is predominantly ephemeral, many of its designated uses only exist on a seasonal basis when water is flowing. Hrg. Tr. Vol. 2, at 201:22-24.

60. The CHIA includes a series of photographs of EFAC where it flows through the Rosebud Mine which fairly and accurately depict the predominantly ephemeral conditions of EFAC at those locations and illustrate the nature of the creek. DEQ Ex. 1A, Appendix A A-5 to A-12, Figure A1; Hrg. Tr. Vol. 2, at 202:25-203:9.

61. The upper sections of EFAC which flow through the Rosebud Mine show well-vegetated conditions with a narrow and defined stream channel without any flowing water. DEQ Ex. 1A, Appendix A, Photo point # 3, A-5; Hrg. Tr. Vol. 2, at 203:18-21.

62. Photo Nos. 17 and 18 depict EFAC where it flows between permit Areas B and C of the Rosebud Mine in May and July, respectively, and likewise show well-vegetated conditions with no flowing water and a broader stream channel. Hrg. Tr. Vol. 2, at 204:16-21; DEQ Ex. 1A, Appendix A, Photo points # 17 and # 18, A-11.

63. Photo No. 4 depicts conditions which are indicative of most of EFAC where it flows through Area B of Rosebud Mine, and shows a wide and very poorly defined stream channel which does not regularly see flow. Hrg. Tr. Vol. 2, at 204:22 to 205:7; DEQ Ex.1A, Appendix A, Photo point # 4, A-5.

64. Most of the EFAC bed upstream of Rosebud Mine Area A is dry, while short stretches of intermittent flow have been identified downstream. Ponded sections, facilitated by the presence of four small dams built to retain water for livestock, contribute to intermittent flow conditions. DEQ Ex. 1A, at 8-8; Hrg. Tr. Vol. 2, at 203:24-204:1-9.

65. Ponding occurs in the intermittent sections of EFAC because of in-stream dams and road crossings, as shown in Photo No. 6. Hrg. Tr. Vol. 2, at 205:8-21; DEQ Ex. 1A, Appendix A, Photo point # 6, A-6 to A-7.

66. A number of photographs of EFAC appear in Appendix A of the CHIA. DEQ Ex. 1A, Appendix A.

67. Photo No. 9 shows a portion of EFAC with water flowing as a direct result of an in-stream stock dam. Hrg. Tr. Vol. 2, at 203:22-204:1; DEQ Ex. 1A, Appendix A, Photo point # 9, A-9.

68. Photo No. 9 was taken in the springtime, which is the time of the year with the most water flowing through EFAC. Hrg. Tr. Vol. 2, at 203:24-204:9.

69. Photo No. 10 depicts this intermittent ponded flow area where EFAC flows through Area A and B of the Rosebud Mine. Hrg. Tr. Vol. 2, at 205:21-25; DEQ Ex. 1A, Appendix A, Photo point # 10, A-9.

70. Photo No. 10 on was taken in April 25, 2014, during a time of extreme high-water levels in the stream. Hrg. Tr. Vol. 2, at 206:1-8.

71. Increased concentrations of TDS, nitrogen and various other constituents sampled in Lower EFAC are not attributable to past mining. Hrg; Tr; Vol. 2, at 230:19-25.

72. Lower EFAC is influenced by groundwater inflow and surface water runoff from a variety of anthropogenic sources, including cattle grazing,

agriculture, fertilizer from residential lawns, fertilizer from a commercial golf course, and discharges from a municipal water treatment plant. DEQ Ex.1, at 9, ¶ 4; DEQ Ex. 1A, at 9-6, 9-7, 9-79; Hrg. Tr. Vol. 2, at 207:11-25, 230:13-25.

**F. Groundwater in Vicinity of Rosebud Mine**

73. Groundwater in the EFAC alluvium is classified predominantly as Class II and Class III groundwater. DEQ Ex. 1A, at 8-8; Hrg. Tr. Vol. 2, at 213:5-7.

74. Groundwater monitoring wells in the vicinity of the Rosebud Mine frequently and naturally vacillate between Class II and Class III waters, and the variability occurs over space and time. Hrg. Tr. Vol. 3, at 100:18-25, 101:20-22.

75. The EFAC alluvium in the vicinity of the Rosebud Mine has a wide range of naturally occurring specific conductance varying from approximately 1,800 microsiemens per centimeter to over 4,000 microsiemens per centimeter. Hrg. Tr. Vol. 3, at 97:21-24.

76. The baseline concentration of TDS in the EFAC alluvium is 2,299 milligrams per liter, which is equivalent to a specific conductance of 2,650 microsiemens per liter. Hrg. Tr. Vol. 3, at 102:17-22; DEQ Ex. 1A, at 9-33.

77. Groundwater with a specific conductance (or electrical conductivity) of 2,650 microsiemens per liter is classified as a Class III water. Hrg. Tr. Vol. 3, at 97:19-98:3, 102:6-103:5.

78. Groundwater in the alluvium between Areas A and B, where the impacts from the AM4 Permit Amendment will occur, is classified as Class III groundwater. DEQ Ex. 1A, at 9-31.

**G. EFAC Impairment**

79. DEQ's Water Quality Planning Bureau, which includes the Water Protection Bureau, assesses Montana waters pursuant to Section 303(d) of the federal Clean Water Act every two years and produces a list of impaired waters which is included in a biennial integrated report to EPA. Hrg. Tr. Vol. 3, at 115:20-118:1, 162:2-7; DEQ Ex. 9, at 1; Hrg. Tr. Vol. 2, at 152:7-11, 224:1-6.

80. DEQ's Coal Section does not make impairment determinations. The Coal Section considers impairment determinations, but has no responsibilities connected to them or their inclusion in the Section 303(d) impaired waters list managed by DEQ's Water Quality Planning Bureau. Hrg. Tr. Vol. 2, at 152:7-12, 224:1-6.

81. Since 2006, EFAC has been listed on DEQ's 303(d) list as impaired for the function of aquatic life use support. Hrg. Tr. Vol. 3, at 123:11-22, 161:17-25, 177:5-21.

82. DEQ utilizes "Attainment Records" (a.k.a. "assessment records") to document and summarize all the information for a specific assessment unit (or stream reach), and to make impairment decisions for Clean Water Act 303(d)-

listing purposes as to whether or not the uses have been affected and whether or not the stream is in compliance with water quality standards. Hrg. Tr. Vol. 3, at 139:12-19.

83. DEQ's "assessment records" assess which pollutants are affecting a waterbody, describe a level of confidence (high, medium, or low) as to whether the use is impaired, and determine whether the source of any such pollutant(s) have been confirmed or remain unconfirmed. Hrg. Tr. Vol. 3, at 140:13-20.

84. The ephemeral nature of an ephemeral stream also affects the nutrient criteria which apply to such a stream. DEQ's nutrient criteria are identified in DEQ's Circular 12-A. Those criteria describe their applicability to wadable streams. "Wadable streams" is defined in that Circular and is specific to intermittent and perennial (and not ephemeral) waters. Hrg. Tr. Vol. 3, at 154:8-15.

85. DEQ's Water Quality Planning Bureau has not completed a remedial plan—called a Total Maximum Daily Load (TMDL)—to correct the water quality violations identified in East Fork Armells Creek. DEQ Ex. 10 at 20 ("[A] TMDL is required to address the factors causing the impairment or threat."); *see also* Hrg. Tr. Vol. 3 at 126:15-18 ("[W]e would leave that to the next program—that would be the TMDL program—if there was impairment to do more of a thorough source identification and follow the next steps of the Clean Water Act process.").

86. Because no TMDL has been prepared, DEQ's Water Quality Planning Bureau has not calculated and assigned pollution limitations—called waste load allocations and load allocations—calculated to bring East Fork Armells Creek back into compliance with water quality standards. Hrg. Tr. Vol. 3 at 131:3-11 (“And from there, if not in compliance, that water body would then go to the TMDL. ‘TMDL’ is an acronym for ‘total maximum daily load.’ It’s really a restoration plan, bring a stream back into compliance with the standards. That’s incorporated into any permitting process, whether—if it’s a permitted source, it would have a waste load allocation through the TMDL; non-permitted source would have a load allocation. And by ‘permitted,’ I mean MPDES [Montana Pollution Discharge Elimination System] permitted.”).

*i. Upper EFAC Impairment*

87. In 2006, DEQ's Water Quality Planning Bureau assessed the upper portion of EFAC, from its headwaters to Colstrip, to determine if the creek was meeting applicable water quality standards. DEQ Ex. 9, at 1.

88. The resulting “Water Quality Standards Attainment Record” (a.k.a. “assessment record”) concluded that the creek was “Not Supporting” its designated use of supporting “Aquatic Life.” DEQ Ex. 9, at 11. This determination was based on “Information from local residents,” “Non-fixed station

physical/chemical” data, “Ecological/habitat surveys,” “Visual observation,” and “Other Agencies/Organizations provided monitoring data.” *Id.*

89. DEQ’s assessment record for Upper EFAC characterizes it as “[n]ot [s]upporting” aquatic life and identifies “[a]lteration in stream-side or littoral vegetation covers” as the cause, with surface mining identified as a possible, but unconfirmed source of the alteration. DEQ Ex. 9, at 11-12; Hrg. Tr. Vol. 3, at 141:1-9, 142:17-143:24.

90. The basis for identifying mining as a possible source of the impairment in Upper EFAC was anecdotal information from before 2006 (when the document was authored). Hrg. Tr. Vol. 3, at 145:19-146:3, 155:19-23; DEQ Ex. 9.

91. At the time DEQ issued the CHIA in December 2015, DEQ (including the Coal Section and the Water Quality Planning Bureau) was aware that the information contained in the 2014 Assessment Record which attributed the impairment of aquatic life use in EFAC to alteration of streamside vegetative cover caused by surface coal mining was incorrect. Hrg. Tr. Vol. 3, at 147:15-149:12, 123:11-124:19.

92. Mining adjacent to EFAC, which began in 1992, never got closer than three hundred feet to the stream channel. DEQ Ex. 1A at 9-9.

93. The Rosebud Mine never mined through the upper EFAC stream channel. Hrg. Tr. Vol. 3, at 145:19-146:3, 148:14-149:3; DEQ Ex. 1A, at 9-9.

94. The Rosebud Mine is not responsible for alterations in streamside vegetation, and DEQ's Attainment Record does not demonstrate otherwise. Hrg. Tr. Vol. 3, at 148:8-13; DEQ Ex. 9.

*ii. Lower EFAC Impairment*

95. In 2008 the Water Quality Planning Bureau assessed the lower portion of EFAC, from Colstrip to its confluence with the Yellowstone River, to determine if that portion of the creek was meeting applicable water quality standards. DEQ Ex. 10, at 1.

96. The resulting "Water Quality Standards Attainment Record" concluded that the creek was "Not Supporting" its designated use of supporting "Aquatic Life." DEQ Ex. 10, at 18. The "Water Quality Standards Attainment Report" determined with low confidence that the causes of the impairment were "Specific Conductance," "Total Dissolved Solids [TDS]," "Nitrate/Nitrite (Nitrite + Nitrate as N)," and "Nitrogen (Total)." *Id.* at 19. The "Water Quality Standards Attainment Record" identified "Coal Mining" as one unconfirmed source of the excessive TDS and specific conductance. *Id.*; Hrg. Tr. Vol. 3, at 155:15-156:2, 156:24-157:23, 157:15-23, 15:15-19.

97. The Lower EFAC Attainment Record identifies three possible, unconfirmed sources of the pollution: transfer of water from an outside watershed, agriculture, and coal mining. DEQ Ex. 10.

98. Typically, the Water Quality Planning Bureau lists impairment causes with low confidence, indicating that additional investigation is needed, before drawing conclusions about the cause. Hrg. Tr. Vol. 3, at 160:23-161:4.

99. The Water Quality Planning Bureau does not usually confirm a source of impairment until the next phase of the assessment process, which is development of a Total Maximum Daily Load (“TMDL”). Hrg. Tr. Vol. 3, at 150:7-12.

100. Of the potential impairment causes, coal mining is only associated with specific conductance and TDS; coal mining is not identified as a potential source of nitrate/nitrite or total nitrogen. DEQ Ex. 10 at 19; Hrg. Tr. Vol. 3, at 157:4-158:3.

101. The “Water Quality Standards Attainment Record” further stated: “The [specific conductance] values do not appear to be vastly different from other drainages in the region; however, the probable impact from municipal sources and industrial pond seepage cannot be ignored. The past and present impacts from changes in groundwater chemistry, surface flow, and atmospheric deposition

merit[] further investigation. Salinity/TDS/chlorides will remain a cause of impairment.” DEQ Ex. 10.

102. In the CHIA, the Coal Section of DEQ distinguished the impacts of mining on TDS or specific conductance in Lower EFAC from the impacts on those parameters that are attributable to other sources. DEQ Ex. 1A, at 9-85 to 9-87.

103. DEQ has identified the town of Colstrip, discharges from the water treatment plant, infiltration and runoff from the golf course, agriculture, and grazing as sources of nitrogen, specific conductance, and TDS in Lower EFAC. Because the contribution from mining, which was analyzed in the CHIA, is not significant and because the section of Upper EFAC closest to and immediately downstream of the mine exhibits better water quality than Lower EFAC, DEQ concluded that mining is not a likely cause of the impairment. DEQ Ex. 1 at 9, ¶ 4; DEQ Ex. 1A, at 9-6 to 9-7, 9-79; Hrg. Tr. Vol. 2, at 207:11-25, 229:3-231:24.

104. Information available to the Coal Section of DEQ at the time it was evaluating the AM4 Permit application and reflected in the CHIA contradicts the unverified, anecdotal information utilized by the Water Quality Planning Bureau. Specifically, Department inspections and records demonstrate that WECO had not mined through the creek bed and mining at the Rosebud Mine was never closer than 300 feet from EFAC. Hrg. Tr. Vol. 3, at 147:15-148:13; DEQ Ex. 1A, at 8-2, 9-9.

105. Mining associated with the AM4 Permit will not cause violations of water quality standards. Hrg. Tr. Vol. 2, at 211:17-212:12, 265:6-12; DEQ Ex. 1A, at 9-26 to 9-27, 10-1.

106. Although Lower EFAC was impaired for TDS, mining is not the source of that impairment because the “data right next to the mine” from Upper EFAC, which provides the most appropriate determination of mine impacts, does not show increased TDS. Hrg. Tr. Vol. 2, at 231:1-24.

#### **H. Total Dissolved Solids (TDS), Salt, and Salinity**

107. Salinity is a term that generally describes how salty water is. TDS, which is simply a measure of the total weight of dissolved solids in a liter of water, serves as the most reliable way to measure salinity in water. Electrical conductivity, which is a measurement of how easily water transmits an electrical current, is another way to measure of salinity in water which is proportional, but not equal to TDS. Hrg. Tr. Vol. 2, at 236:2-15; DEQ Ex. 1A, at 9-28.

108. In EFAC, TDS values and electrical conductivity values are nearly commensurate with each other and may be used somewhat interchangeably. Hrg. Tr. Vol. 3, at 232:15-233:5.

109. EFAC exhibits extremely variable flow and a specific conductance (or electrical conductivity) that ranges widely from 2,000 to 10,000 microsiemens per

centimeter. Hrg. Tr. Vol. 3, at 231:1-7, 232:4-14, 235:18-236:16; Hrg. Tr. Vol. 4, at 88:13-89:23.

110. Over time, TDS loading in EFAC has gone down, although not significantly. Hrg. Tr. Vol. 4, at 90:20-25.

111. The Probable Hydraulic Consequences Addendum to the CHIA included a mass water balance calculation that determined the estimated increase of 13% over baseline TDS concentrations in the EFAC alluvium. Hrg. Tr Vol. 2, at 235:15-236:1; DEQ Ex. 6A, at 4, 29; DEQ Ex. 1A, at 9-31; DEQ Ex. 1, at ¶ 10.

112. The CHIA describes the effects of the predicted 13% increase in both TDS and specific conductance on the EFAC alluvium based (as noted) on the reasonable assumption that the increase in each parameter would be proportional. Hrg. Tr. Vol. 3, at 100:4-9; DEQ Ex. 1A, at 9-33.

113. Alluvium consists of unconsolidated geologic deposits of valley fill material which is typically composed of differing amounts of silt, sand, and gravel depending on degree of stream development, which a river or stream deposits and erodes. DEQ Ex. 1A, at 8-7; Hrg. Tr. Vol. 1, at 219:22-220:16.

114. Alluvium is often found as a narrow body of geologic material that surrounds a stream on either side in the floodplain, where groundwater and surface water connect and interact as the alluvial groundwater moves generally down gradient and parallel to the stream. Hrg. Tr. Vol. 1, at 220:9-16.

115. The EFAC alluvium has a wide range of natural specific conductance which varies both spatially and temporally over a range from approximately 1,800 to over 4,000 microsiemens per centimeter. Hrg. Tr. Vol. 3, at 97:19-24, 218:6-24, 246:20-25, 247:9-25, Vol. 4, at 24:19-25:1, 25:22-27:17; *see also* DEQ Ex. 1A, at 8-8, 9-23, well WA-104.

116. The median and average concentrations for specific conductance in the EFAC alluvium in baseline conditions, which is undisturbed by mining, is Class III. Hrg. Tr. Vol. 3, at 97:25-98:3.

117. Monitoring wells in EFAC frequently change between the ranges of Class II and Class III groundwater in the natural condition. Hrg. Tr. Vol. 3, at 100:23-25; DEQ Ex. 1A, at 9-33.

118. This phenomenon is illustrated by CHIA Figure 9-23, which shows EFAC alluvial monitoring wells which are upgradient of mining responding to natural changes in water level and quality between the Class II and Class III ranges. Hrg. Tr. Vol. 3, at 101:6-10; DEQ Ex. 1A, Figure 9-23.

119. The graphs depicted in CHIA Figure 9-23 illustrate the natural variability in both time and space in TDS concentrations in the EFAC alluvium, with the hydrograph for monitoring well WA-118 showing TDS variability between about 1,600 to about 3,000 milligrams per liter. Hrg. Tr. Vol. 3, at 101:20-25; DEQ Ex. 1A, Figure 9-23.

120. While it is likely that a 13% increase in TDS in the EFAC alluvium would cause some monitoring wells located therein (which are just below the threshold of Class II/Class III groundwater) to fall within the conductivity range of Class III (*see* ARM 17.30.1006), this type of change also occurs naturally (*see* CHIA Figure 9-23, well WA-104) and in much larger magnitude than a 13% change. These changes are not therefore likely to be distinguishable from natural variations. DEQ Ex. 1A, at 9-33; ARM 17.30.1005(3); Hrg. Tr. Vol. 3, at 218:6-24.

121. A 13% increase in TDS in the EFAC alluvium does not constitute a change in water quality at the level of the hydrologic unit (that is, the alluvial aquifer). Hrg. Tr. Vol. 3, at 102:7-103:11, 76:13-77:14.

122. The 13% predicted increase in TDS in the EFAC alluvium would result from currently permitted mining, and the mining operations associated with the AM4 Amendment would not result in any increase in the TDS concentration in the EFAC alluvium. Hrg. Tr. Vol. 3, at 98:9-20; DEQ Ex. 1A, at 9-33.

123. Conservation Groups offered expert testimony from Professor William Gardner, who testified generally that additional mining associated with the AM4 Amendment would result in shorter- and longer-term impacts on the salt load in EFAC. Hrg. Tr. Vol. 1, at 174:3-9.

124. According to Prof. Gardner, the long-term salinity load will be increased in EFAC as migrating spoil water, which has higher TDS than Rosebud coal water, replaces Rosebud coal discharge to the alluvial system. Hrg. Tr. Vol. 1, at 185:21-186:7.

125. Professor Gardner, however, did not calculate an increase in salinity in EFAC associated with the AM4 Amendment. Hrg. Tr. Vol. 1, at 260:23-261:5, 265:6-267:7.

126. Nor did Prof. Gardner consider the fate and transport of calcite and gypsum, which he agreed would affect the volume of TDS, and therefore the amount of salt, that could migrate downstream. Hrg. Tr. Vol. 1, at 261:3-5, 262:2-19.

127. Instead, Prof. Gardner calculated an “observable” 20% increase in TDS for alluvial groundwater. Hrg. Tr. Vol. 1, at 260:23-261:5, 265:2-11.

128. Professor Gardner’s testimony also did not address the extent to which the AM4 Amendment would increase the long-term salt-loading to EFAC. Hrg. Tr. Vol. 1, at 260:23-261:5, 264:5-16.

129. Nor did Prof. Gardner’s testimony address the question of whether the claimed increase in salt loading to EFAC from the AM4 Amendment would be significant. Hrg. Tr. Vol. 1, at 264:5-16.

130. Instead, Prof. Gardner offered an unsubstantiated opinion that any addition of salt to the hydrologic system constituted an addition of salt to the hydrologic system. Hrg. Tr. Vol. 1, at 264:5-16.

131. DEQ's experts Dr. Emily Hinz and Mr. Martin Van Oort convincingly refuted Prof. Gardner's contentions. Hrg. Tr. Vol. 2, at 232:7-234:8.

132. The AM4 Amendment could not increase the salinity to EFAC because a large section of previously-mined and since-reclaimed spoil area lies between AM4 mining area and EFAC, and therefore mining at AM4 will not increase the concentration of TDS in the existing spoil water which is already migrating towards EFAC. Hrg. Tr. Vol. 2, at 231:25-233:4.

133. The magnitude of the salt loading to EFAC will not increase as a result of the AM4 Amendment; although the duration of the loading will increase. Hrg. Tr. Vol. 2, at 233:13-16, 238:5-13.

134. Regarding the "longer duration of increased TDS entering the alluvium," and "which a portion of that would enter into base flow," the "increased TDS entering the alluvium" that DEQ considered in the CHIA was the increase from *all* mining, including the AM4 Permit:

Q. Dr. Hinz, you talked about the impacts of mining on East Fork Armells Creek surface water. Is it your understanding that mining from the AM4 expansion will lead to additional salt moving into East Fork Armells Creek?

A. It is my understanding that it would not result in additional salt beyond what would have occurred from the spoils already approved

and in place in the Area B permit between East Fork Armells Creek and AM4.

Hrg. Tr. Vol. 2, at 264:23-265:2.

135. Dr. Hinz also testified, “The spoil from AM4 would just basically result in additional spoil, so it would result in more of the same. Essentially the water has a carrying capacity of salt that’s going through the groundwater, and it just doesn’t pick up more than is already going to be picked up.” Hrg. Tr. Vol. 2, at 265:6-12.

136. Probabilistic analyses conducted of pre-mine and post-mine salinity in the EFAC alluvium and surface water control reach estimate that only a “very, very, small quantity” of TDS is attributable to mining when compared to the background loading in the system, and the TDS contributions from mining “would not be measurable.” Hrg. Tr. Vol. 4, at 24:19-25:1, 33:24-34:9.

137. Because the conducted probabilistic analyses account for all TDS contributions from all prior mining activities on the control reach — Area A, Area B and Area C — it can be expected that the AM4 Permit would contribute a significantly smaller quantity of TDS than that estimated by the probabilistic analysis of all mining and in concentrations not measurable or detectable. Hrg. Tr. Vol. 4, at 14:15-16:4, 38:9-20, 63:8-64:25.

138. The AM4 Permit will not cause an additional increase in TDS levels in groundwater. The AM4 Permit will extend the duration of time that TDS

concentrations increase in groundwater in the vicinity of the Rosebud Mine as a result of all permitted mining. Hrg. Tr. Vol. 3, at 98:12-20, at 236:17-24, 238:14-22, Hrg. Tr. Vol. 2, at 186:12-187:17.

139. Because groundwater inflow to the alluvium provides a minor contribution to EFAC surface water, TDS levels in EFAC will not be significantly impacted by groundwater TDS levels associated with the AM4 Permit. Hrg. Tr. Vol. 2, at 186:12-187:17, 233:25-234:7; Hrg. Tr. Vol. 3, at 239:8-240:3.

140. The “amount of change [of TDS caused by mining associated with the AM4 Permit] would not be statistically significantly measurable” due to other sources of TDS and the “inherent variability of the system.” Hrg. Tr. Vol. 3, at 218:6-24.

141. A statistical analysis shows that differences in the pre-mine and post-mine condition resulting from all mining, in terms of TDS levels, cannot be measured. Hrg. Tr. Vol. 3, at 246:20-25.

142. Mining associated with the AM4 Permit will not impact that statistical analysis. Hrg. Tr. Vol. 3, at 247:9-25.

143. Conservation Groups did not calculate the degree to which mining associated with the AM4 Permit would allegedly change the concentration of TDS in EFAC. Hrg. Tr. Vol. 1, at 260:23-261:5, 261:25-262:4, 266:10-267:7, 268:18-23; Hrg. Tr. Vol. 3, at 218:25-219:24.

144. Mining associated with the AM4 Permit will cause “no measurable change to quantity or quality of ephemeral runoff ... off the permit area into East Fork Armells Creek.” Hrg. Tr. Vol. 2, at 186:12-22.

145. The AM4 Permit will not change the Class III groundwater classification of EFAC alluvium because the AM4 Permit will not increase the TDS concentrations in groundwater in the vicinity of the Rosebud Mine. Hrg. Tr. Vol. 3, at 98:4-11; 102:6-103:5.

146. The anticipated 13% increase in the concentration of TDS in EFAC would not adversely affect the aquatic life in the water body. Hrg. Tr. Vol. 3, at 66:10-67:1.

147. No evidence was presented showing that mining associated with the AM4 Permit will change the concentration of TDS outside the permit boundary in a manner or to an extent that the C-3 designated uses of EFAC would be adversely affected. Hrg. Tr. Vol. 2, at 201:3-24.

### **I. Nitrogen**

148. The CHIA does not explicitly reference numeric standards for total nitrogen from DEQ-12A, however the data and conclusions in the CHIA demonstrate that the AM4 Permit is designed to prevent material damage from nitrogen impacts. Hrg. Tr. Vol. 3, at 72:20-73:21.

149. The CHIA determined that any addition of nitrate/nitrite to EFAC from AM4 permitted mining would essentially be so diluted as to be immeasurable, and thus well below the DEQ-12A total nitrogen standard of 1.3 milligrams per liter. Hrg. Tr. Vol. 3, at 33:4 to 34:6, 73:15-21; DEQ Ex. 1A, at 9-26.

150. There is a potential for residual blasting agents such as nitrogen, nitrate and nitrite to remain in the spoils after mining. However, the current Rosebud Mine MSUMRA permit identifies blasting techniques as part of the plan for the protection of the hydrologic balance. Hrg. Tr. Vol. 3, at 18:10-14, 19:20-21; DEQ Ex. 1A, at 9-26, 9-57, and 9-78 to 9-79.

151. The current DEQ-approved blasting plan requires the use of the best technology available, including the utilization of an emulsion and ammonium nitrate fuel oil (rather than dynamite), which more completely consumes the blasting agents. Hrg. Tr. Vol. 3, at 196:3-6, 197:4-21.

152. DEQ does not anticipate that any residual nitrogen or nitrate/nitrite associated with the AM4 Amendment will reach EFAC in concentrations of concern. Hrg. Tr. Vol. 3, at 18:15-19:4, 26:1-7; DEQ Ex. 1A, at 9-26.

153. Nitrogen, if any, occurs in the spoils at low levels and does not necessarily migrate to the surface water system or move downstream in the surface water system. Hrg. Tr. Vol. 4, at 30:15-22.

154. Historical residual nitrogen (not associated with the AM4 Permit) remaining in the spoils after historical mining adjacent to EFAC, if any, potentially migrated to EFAC. Hrg. Tr. Vol. 3, at 18:15-19:2. However, the AM4 Permit, being over 6,000 feet upgradient from and not adjacent to EFAC, has less potential to contribute nitrogen to EFAC than historical mining adjacent to EFAC. Hrg. Tr. Vol. 3, at 19:2-7; DEQ Ex.1A, at 9-26.

155. DEQ's conclusion that no material damage would result to EFAC from nitrogen, nitrate or nitrite from AM4 Amendment mining operations was based on an analysis of 30 years of modern data from Rosebud Mine spoils to determine the mobility and likelihood of movement of nitrate/nitrite through those spoils. Hrg. Tr. Vol. 3, at 28:25-29:4.

156. Thirty years of EFAC water samples have not detected a mining signature for nitrogen. Hrg. Tr. Vol. 3, at 38:23-24.

157. As mining has expanded, nitrogen has decreased in EFAC. Hrg. Tr. Vol. 3, at 38:8-24, 79:17-18.

158. Figure 9-17 of the CHIA was created based on monitoring data, and shows that as mining expanded at the Rosebud Mine the data did not reflect any correlating annual increases in nitrate/nitrite in stream samples (which would indicate that mining was the source of nitrate/nitrite exceedances), but instead

show decreasing concentrations of nitrogen. Hrg. Tr. Vol. 3, at 36:16-22, 38:15-24, 77:17-78:9, 79:10-18; DEQ Ex. 1A, at Figure 9-17.

159. There is no discernable trend in the correlation between increased mining and concentrations of nitrogen in EFAC. Hrg. Tr. Vol. 3, at 79:10-16.

160. Upper EFAC does not exceed nitrogen water quality standards. Hrg. Tr. Vol. 2, at 229:14-16.

161. Lower EFAC exceeds nitrogen water quality standards, but the excess nitrogen is not attributable to mining. Hrg. Tr. Vol. 2, at 228:25-230:25; DEQ Ex. 1A, at 9-26.

162. Excess nitrogen in Lower EFAC is attributable to the town of Colstrip, a golf course, a sewage treatment plant, a power plant, municipal run-off, and agriculture. Hrg. Tr. Vol. 2, at 229:3-230:8, 277:10-279:12; Hrg. Tr. Vol. 3, at 80:4-81:12.

163. Excess nitrogen concentrations detected in surface waters downstream of active mining (Lower EFAC) are likely attributable to livestock rather than mining. Hrg. Tr. Vol. 2, at 277:10-12; DEQ Ex. 1A, at 9-26.

164. Excess nitrogen concentrations detected in groundwater wells are anomalous and likely attributable to anthropogenic and agricultural sources rather than mining. DEQ Ex. 1A at 9-78 to 9-79.

165. Residual nitrogen may remain in the AM4 Permit spoils after mining, but if any remains, it is not likely to migrate from the AM4 Permit spoils to EFAC or the EFAC alluvium because of distance and dilution. Hrg. Tr. Vol. 3, at 18:15-19:7, 21:5-12, 33:1-8.

166. AM4 Permit mining is not expected to contribute measurable nitrogen to EFAC. Hrg. Tr. Vol. 3, at 73:15-17.

167. Contributions of nitrogen to EFAC, if any, resulting from the AM4 Permit will be diluted and not in concentrations of concern. Hrg. Tr. Vol. 3, at 29:5-8, 33:4-18.73:15-17.

168. Mining associated with the AM4 Permit will not cause violations of water quality standards, including water quality standards for nitrogen and nitrate + nitrite. Hrg. Tr. Vol. 2, at 211:17-212:12; DEQ Ex. 1A, at 9-26 and 9-27, 10-1.

169. Conservation Groups' experts did not analyze impacts from mining associated with the AM4 Permit specific to nitrogen levels in groundwater or in EFAC surface water.

## **J. Aquatic Life**

170. In a June 2014 deficiency letter (prior to permitting), the Coal Section's surface water hydrologist, Dr. Hinz, made the following request of WECCO:

EFAC existing and anticipated uses included water for livestock, wildlife, and aquatic life. Please confirm, based on current

and future anticipated concentrations in the stream, that uses have not or will not be impaired. Three aquatic life surveys were completed in the 1970's but there have been none since that time. Please conduct a current aquatic survey along stretches of EFAC adjacent to the Rosebud Mine permit areas (Areas A, B, and C) to identify assemblages of aquatic life using the stream habitat. This information also will be useful for future permit revisions in Area A and Area C.

Western Energy Ex. FFF, at 2.

171. Dr. Hinz requested that WECO collect updated macroinvertebrate sampling data so that DEQ could qualitatively assess whether, for MSUMRA purposes, EFAC was supporting aquatic life and also to compare such data to sampling data from the 1970s. Hrg. Tr. Vol. 2, at 219:20-220:11, 221:18 to 222:2; Hrg. Tr. Vol. 3, at 69:6-9.

172. Flow data coupled with observations of EFAC during regular mine inspections indicate that the reach between the Area A facilities and the Area A Tipple may have intermittent to perennial water, at least since 2011. DEQ Ex. 1A at 9-7.

173. Dr. Hinz explained the impact of this intermittent water with respect to the CHIA:

So as we were writing the hydrological impact assessment, we became concerned that there was a section of stream that could be intermittent, the section I described before between the Area A facilities and the juncture of [EFAC] with the highway. Because it would be intermittent, it – if it was intermittent, then different standards would apply as I described before where we would have some numeric standards relating to aquatic life. So part of our assessment was to ask the mine to collect some current

macroinvertebrate data so that we could qualitatively assess the use of that stream for aquatic life, plus we had some data from the 1970s and some anecdotal data from the '90s that stated that this section was supporting aquatic life. So we used it purely as just yet one more line of evidence to determine if the [EFAC] was currently supporting its uses and -- with respect to just being an intermittent stream. It was not meant to go beyond the scope of MSUMRA.

Hrg. Tr. Vol. 2, at 219:14-220:11.

174. Aquatic life surveys were conducted in the 1970s along EFAC in connection with prior permitting for the Rosebud Mine, and only used as a general analysis of stream habitat conditions, rather than to determine specific stressors.

DEQ Ex. 1A, at 9-7.

175. In response to Dr. Hinz's request, WECO engaged Penny Hunter from ARCADIS U.S., Inc., who surveyed aquatic macroinvertebrates in EFAC in October 2014, and produced a report (Arcadis Report). DEQ Ex. 7.

176. The 2014 Arcadis Report was not intended to serve as a water quality assessment; therefore, calculation of metrics such as the O:E and Bray Curtis indices and comparison to reference stream were not necessary and were not part of the 2014 Arcadis Report. Hrg. Tr. Vol. 1, at 298:13-20, Vol. 2, at 18:6-25, Vol. 3, at 162:25-163:14, 164:4-6, Vol. 4, at 179:17-20, 187:3-22, 261:4-20, 263:2-22.

177. Western Energy, through ARCADIS, conducted the aquatic life survey consistent with guidance provided by DEQ regarding appropriate methodology and protocols and submitted the aquatic life survey to DEQ on

February 2, 2015, with its response to the seventh deficiency letter from June 2014. Western Ex. GGG; DEQ Ex. 7; MEIC Ex. 45; DEQ Ex. 11; MEIC Ex. 25; Western Ex. V.

178. The 2014 Arcadis Report produced data showing macroinvertebrate diversity in EFAC. Hrg. Tr. Vol. 1, at 298:13-20.

179. Dr. Hinz discussed her request for Upper EFAC macroinvertebrate sampling data from Western Energy in connection with the AM4 Amendment with staff of DEQ's Water Quality Planning Bureau before she requested WECO gather updated macroinvertebrate data. Hrg. Tr. Vol. 3, at 162:8-17; MEIC Ex. 15.

180. DEQ directed ARCADIS to utilize DEQ's Sample Collecting, Sorting, Taxonomic Identification, and Analysis of Benthic Macroinvertebrate Community Standard Operating Procedure (March 2012), (MEIC Ex. 25), to collect, but not analyze, updated macroinvertebrate data from upper EFAC in connection with the AM4 Amendment permitting process. Hrg. Tr. Vol. 3, at 165:20-166:4, 183:22-184:8, MEIC Ex. 43; Hrg. Tr. Vol. 2, at 87:24-90:1.

181. Water Quality Planning Bureau Chief Eric Urban, advised DEQ Coal Section staff, consistent with DEQ's Water Quality Assessment Methods (Nov. 2011) (DEQ Ex. 11 Table A-2), that analyzing macroinvertebrate data in conjunction with indices of biologic integrity would not provide an accepted or reliable indicator of aquatic life support functionality in an eastern Montana

ephemeral stream for Section 303(d) listing purposes. Hrg. Tr. Vol. 3, at 163:8-14, 164:1-6.

182. Consistent with DEQ's Water Quality Assessment Methods (DEQ Ex. 11) Mr. Urban directed his staff to report on taxa and assist with any discussions of what the stand-alone sampling showed. Hrg. Tr. Vol. 3, at 163:8-14; 164:1-23; *see also* MEIC Ex. 15, at 2.

183. Mr. Urban did not disagree that the macroinvertebrate data at issue could be used to assess individual species, or be utilized from another angle or discipline other than the direct assessment of overall stream health for 303(d) listing and assessment purposes. Hrg. Tr. Vol. 3, at 164:1-6; *see also id.*, at 179:1-11.

184. DEQ's Water Quality Assessment Methods, reflects the Departments findings that the ephemeral nature of ephemeral streams affects the communities of aquatic biota that a stream is capable of supporting and thus affects the types of analytical data which could be gathered from such streams, thereby limiting the usefulness or reliability of macroinvertebrate data for the purposes of determining whether an ephemeral stream is in compliance with water quality standards. DEQ Ex. 11, at Table A-2; Hrg. Tr. Vol. 3, at 151:7-24, 179:4-11.

185. In November of 2011, and after extensive investigation and consideration, DEQ revised its Water Quality Assessment Methods to reflect its

determination that naturally occurring variables such as low flow, high temperatures, poor sediment, and high salinity (all of which are indistinguishable from anthropogenic impacts) preclude macroinvertebrate sampling from serving as a reliable or useful metric for assessing the aquatic life support functions of eastern Montana prairie streams for purposes of DEQ's Clean Water Act Section 303(d) impaired waters list. Hrg. Tr. Vol. 3, at 136:4-138:24, 166:23-176:3, DEQ Ex. 11, at Table A-2.

186. DEQ accordingly does not utilize or consider analyses of macroinvertebrate data via indices of biological integrity such as the Montana Hilsenhoff Biotic Index (MT-HBI) or Montana Observed: Expected model (MT O:E) or any "reference stream" approach to assess aquatic life support standard compliance in prairie streams for 303(d) listing purposes. Hrg. Tr. Vol. 3, at 167:4-25; 168:2-4; 169:1-8.

187. DEQ instead assesses aquatic life support functions of eastern Montana ephemeral prairie streams with important physical metrics such as streamside alteration of vegetative habitat. Hrg. Tr. Vol. 3, at 154:16 to 155:14; DEQ Ex. 9.

188. In connection with DEQ's AM4 material damage determination, Dr. Hinz appropriately utilized the updated macroinvertebrate sampling data via a qualitative analysis as an indicator of whether or not aquatic life was still being

supported in EFAC at its current TDS concentrations. Hrg. Tr. Vol. 2, at 221:18-222:12, 226:21-24.

189. A qualitative analysis differs from a quantitative analysis, which typically involves a statistical assessment of numeric data or using of one or more selected metrics. Hrg. Tr. Vol. 2, at 220:20-221:2.

190. Dr. Hinz's concluded the updated macroinvertebrate survey empirically demonstrated that a diverse community of macroinvertebrates, consisting of taxa commonly found in eastern Montana prairie streams, was using the stream reach at issue. Hrg. Tr. Vol. 2, at 257:1-5, 258:1-7, 259:2-4; Hrg. Tr. Vol. 3, at 87:1-13; DEQ Ex. 1A, at 9-8; DEQ Ex. 1, at 9.

191. Dr. Hinz also compared the updated (2014) macroinvertebrate sampling data to the 1970s macroinvertebrate data to conclude that the data from 2014 was consistent, in terms of taxa richness (that is, numbers), with the data collected in the 1970s. DEQ Ex. 1A, at 9-7, Table 6-3.

192. The prior 1970s macroinvertebrate sampling data provided a baseline of conditions in EFAC before a large amount of mining took place in the EFAC drainage basin. Hrg. Tr. Vol. 2, at 223:15-225:25.

193. The 2014 Arcadis Report shows that EFAC's beneficial use of aquatic life is supported and is consistent with natural conditions of ephemeral prairie

streams and with historic data. Hrg. Tr. Vol. 2, at 221:14-222:11; Hrg. Tr. Vol. 4, at 189:7-13, 258:11-259:12, 260:23-261:20.

194. “[T]axa richness was similar at all the sites sampled along East Fork Armells Creek” in the 1970s, and the 2014 Arcadis Report demonstrates similar diversity of the macroinvertebrate community in EFAC. DEQ Ex. 1A, at 9-7 to 9-8.

195. Ms. Hunter, a qualified expert in aquatic toxicology and biological monitoring, agreed with Dr. Hinz’s conclusion that the taxa richness had remained consistent in EFAC between the sampling events in the 1970s and 2014. Hrg. Tr. Vol. 4, at 174:22-175:5, 184:4-187:2.

196. DEQ obtained and utilized the updated macroinvertebrate sampling data for purposes of an impact assessment for material damage determination under MSUMRA rather than to assess whether EFAC was currently meeting water quality standards under Section 303(d) of the Clean Water Act. Hrg. Tr. Vol. 3, at 88:6-13.

197. Dr. Hinz assessed multiple lines of evidence (physical, chemical and biological) in order to reach her determination that there would be no material damage to the aquatic life uses of EFAC from the AM4 Amendment. Hrg. Tr. Vol. 3, at 70:21-71:2; Hrg. Tr. Vol. 2, at 228:3-10; DEQ Ex. 1A at 9-7 to 9-8, 9-11, 9-26.

198. As the CHIA demonstrates, DEQ Coal Section staff assess available biological, physical, and chemical data in its entirety in order to make a material damage determination. Hrg. Tr. Vol. 3, at 71:1-6.

199. Sean Sullivan, an expert in aquatic ecology and taxonomy, understood that macroinvertebrate monitoring can be conducted for purposes other than an attainment demonstration under the 303(d) list, and agreed that macroinvertebrate data could be used to assess the question of whether there was macroinvertebrate life in EFAC. Hrg. Tr. Vol. 2, at 98:6-10, 114:10-115:13.

200. Mr. Sullivan's fieldwork experience has predominantly involved western Montana streams, which have significantly different physical, chemical and biological characteristics as compared to eastern Montana streams. His fieldwork has not included eastern Montana prairie streams, and he has not visited or observed conditions in East Form Armells Creek. Hrg. Tr. Vol. 2, at 37:3-25, 38:12 to 39:9.

201. Streams in eastern Montana differ significantly from western Montana streams in terms of geomorphology, stream channel formation, substrates, aquatic life habitat and overall system ecology. Hrg. Tr. Vol. 3, at 129:23-130:5.

202. Eastern Montana streams typically originate in an ephemeral nature, being snowmelt-driven, which usually occurs in a February to March timeframe. Hrg. Tr. Vol. 3, at 129:14-22.

203. Mr. Sullivan did not conduct a material damage assessment in this case, nor has he ever conducted such an assessment as of the date of his testimony. Hrg. Tr. Vol. 2, at 44:22-45:10.

204. Unlike DEQ staff, Mr. Sullivan, did not compare any of the water chemistry upstream of the mine to water chemistry downstream from the mine. Hrg. Tr. Vol. 2, at 74:3-7.

205. Mr. Sullivan's testimony did not include any kind of causal assessment or empirical data addressing any potential cause of impairment in EFAC. Hrg. Tr. Vol. 2, at 69:24-72:4.

206. Mr. Sullivan understood and agreed that DEQ does not use macroinvertebrate data to make attainment demonstrations for purposes of the 303(d) list in the Eastern Montana prairie streams, although Mr. Sullivan does not really know how DEQ went about making its 303(d) determination that EFAC is impaired for aquatic life use support. Hrg. Tr. Vol. 2, at 80:10-15, 95:10-17.

207. Mining associated with the AM4 Permit will not cause violations of water quality standards, including water quality standards designed to protect aquatic life. Hrg. Tr. Vol. 2, at 211:17-212:12; DEQ Ex. 1A at 9-26-9-27, 10-1.

208. Coal mining has never been a confirmed "source of impairment" for aquatic life beneficial use in either Upper EFAC or Lower EFAC. Hrg. Tr. Vol. 3,

at 123:11-124:19, 125:17-126:14, 126:19-127:9, 142:17-143:7, 148:8-149:3, 156:12-157:10, 160:13-161:4.

**K. Material Damage**

209. The AM4 CHIA assesses the cumulative hydrologic impacts of the AM4 Amendment and provides an affirmative demonstration that material damage to surface water or groundwater will not result from mining associated with the AM4 Amendment. DEQ Ex. 1A at 9-1 to 9-87, 10-1 to 10-2; *see also* Hrg. Tr. Vol. 2, at 195:4-17, 197:24-198:6, 197:7-15.

210. The CHIA includes a cumulative impact analysis of all mining that would interact with AM4. Hrg. Tr. Vol. 3, at 72:9-13; DEQ Ex. 1A, at 2-7.

211. DEQ's determination material damage assess impacts to the hydrologic balance at the level of a hydrologic unit, such as an aquifer (in the case of groundwater) or a stream basin or sub-basin (in the case of surface water). Hrg. Tr. Vol. 2, at 196:18-22, 196:23-197:5, 196:18-197:5.

212. DEQ determined for every impact analyzed in connection with the AM4 Amendment that it was more likely than not that there would be no material damage from AM4 to the hydrologic balance outside of the permit boundary. Hrg. Tr. Vol. 2, at 211:6-10, 211:11-16.

*i. Surface Water Material Damage Assessment*

213. For surface waters, DEQ's material damage criteria include narrative, numeric and other generally applicable water quality standards, except in the case of ephemeral streams to which numeric water quality standards are inapplicable. Hrg. Tr. Vol. 2, at 211:17-212:12; DEQ Ex. 1A, at 2-3 to 2-5.

214. DEQ's surface water assessment here analyzed multiple lines of data (physical, biological and chemical) to identify the likely impacts of the AM4 Amendment outside the permit boundary. Hrg. Tr. Vol. 2, at 212:3-6.

215. The CHIA concluded that mining associated with the AM4 Amendment would not result in any additional water quality impacts to EFAC or cause EFAC to fail to meet designated uses of the C-3 classification outside the permit boundary. Hrg. Tr. Vol. 2, at 186:20-22, 201:9-12; DEQ Ex. 1A, at 9-9 and 9-11.

216. For example, mining from the AM4 expansion will not lead to higher salt concentrations in EFAC beyond those already resulting from spoil currently in place between EFAC and AM4 which was previously approved in the Area B permit and analyzed under earlier CHIAs. Hrg. Tr. Vol. 2, at 264:20-265:2.

217. Groundwater in spoil has what is essentially a carrying capacity in terms of salt saturation beyond which salt concentrations are not likely to increase, which in this case is not expected to cause exceedances of material damage

thresholds, although the duration of increased salt concentrations and the overall load of salt are expected to increase as a result of the AM4 Amendment. Hrg. Tr. Vol. 2, at 232:11-233:4, 265:8-12.

218. Surface water and groundwater systems are considered to be connected. Hrg. Tr. Vol. 1, at 219:9-11.

219. The duration of an impact below the material damage threshold has no effect on a material damage determination, because material damage is merely a magnitude threshold. Hrg. Tr. Vol. 2, at 190:4-12, 234:3-6.

220. After mining, the additional spoil water associated with the AM4 Amendment would flow through the existing spoils and eventually reach EFAC, resulting in more similar-quality spoil water reaching the creek, without increasing the concentration of TDS at any given time in EFAC. Hrg. Tr. Vol. 2, at 233:5-234:8.

221. The process by which groundwater moves from bedrock adjacent to the alluvium into the alluvium is known as “lateral recharge.” Hrg. Tr. Vol. 1, at 219:12-18.

222. Although Prof. Gardner posited that lateral recharge from the Rosebud coal to the alluvium plays an important role contributing to the surface water flow dynamics of EFAC, the data shows that the groundwater discharge from the alluvium (with contributions from Rosebud coal) to EFAC is insignificant and not

a critical component of the groundwater balance. Hrg. Tr. Vol. 1, at 223:5-224:7, 269:15-272:19; MEIC Ex. 6, at 157-158; Hrg. Tr. Vol. 2, at 236:16-237:4.

223. Previously approved mining adjacent to EFAC in Area B was completed decades ago (generally in the 1970s and 1980s), and the spoil from this mining has become saturated in the intervening years and developed the existing concentrations of TDS. Hrg. Tr. Vol. 2, at 233:17-24; DEQ Ex. 1A, at 9-58 to 9-59.

224. The monitored water quality in EFAC downstream of the Rosebud Mine and upstream of the town of Colstrip nonetheless shows that the water exiting the permit area has lower specific conductance, TDS and nitrate-nitrite concentrations than samples taken downstream of the mine in Colstrip where EFAC is subject to multiple non-mining anthropogenic impacts. Hrg. Tr. Vol. 2, at 228:16-231:24; DEQ Ex. 1 at 9.

225. The AM4 Amendment is located over 6,000 feet upgradient from EFAC and is not adjacent to the creek. Hrg. Tr. Vol. 3, at 19:2-4; DEQ Ex. 1A, at 9-26.

226. During mining, ponds and impoundments for the AM4 Amendment will be located along the edge of the permit boundary between the mining area and the stream, and will intercept surface runoff to EFAC, resulting in reduced surface runoff to the stream during mining. Hrg. Tr. Vol. 2, at 181:18-23.

227. These structural best management practices are, however, designed to protect water quality by preventing excess sediment from disturbed ground which has been stripped of vegetation from reaching EFAC until approximate pre-mine conditions are restored. Hrg. Tr. Vol. 2, at 183:4-7.

228. Increases in sediment in runoff are the primary changes in surface water quality associated with the AM4 Amendment. Hrg. Tr. Vol. 2, at 183:2-4.

229. While strip-mining causes impacts to surface water quality and quantity, once the excavation is backfilled and replaced with graded, post-mine topography, measurable changes to the quantity and quality of surface runoff from the Rosebud Mine are not expected. Hrg. Tr. Vol. 2, at 186:12-22.

230. Following mining and reclamation, surface water quantity and quality is expected to return to pre-mine conditions. Hrg. Tr. Vol. 2, at 182:20-183:2, 186:15-22.

231. The AM4 Permit will cause no measurable change in the quality of ephemeral runoff flowing over the surface of the land and into EFAC. Hrg. Tr. Vol. 2, at 186:15-20.

232. Mining associated with the AM4 Permit, as presented in the application and as analyzed by DEQ, would not result in material damage to surface water. Hrg. Tr. Vol. 2, at 197:7-15, 201:3-24.

*ii. Groundwater Material Damage Assessment*

233. In terms of water quantity impacts to groundwater, the AM4 Amendment will increase the drawdown or reduction in water levels which already exists from previous mining in the immediate vicinity of those additional mine cuts that are shown in Figure 3-1 in the CHIA. Hrg. Tr. Vol. 2, at 188:3-13; DEQ Ex. 1A, at 9-80 to 9-81, Figure 9-84.

234. The CHIA concluded that the AM4 Amendment would have impacts to groundwater quantity, particularly in the overburden and the Rosebud coal near the mine pits, although not in a manner or to the extent that material damage will occur to the hydrologic balance outside the permit area. Hrg. Tr. Vol. 2, at 210:9-15; DEQ Ex. 1A, at 9-83.

235. The additional proposed mining associated with the AM4 Amendment is expected to take approximately six years, which will extend the Area B drawdown by six years, expand the spoils aquifer by roughly 8%, and proportionally extend the time for the Area B spoils aquifer to re-saturate by roughly the same amount (8%). Hrg. Tr. Vol. 2, at 189:5-10, 17-25.

236. Given that groundwater in the vicinity of Rosebud Mine (like all groundwater in Montana) is classified based on the natural specific conductance of the groundwater, DEQ looked at each hydrologic unit and what the concentrations of specific conductance were for those units, and determined which standards

apply based upon the class of those groundwater units. Hrg. Tr. Vol. 2, at 212:19-213:4; DEQ Ex. 1A, at 2-5.

237. In general, the groundwater units in the Rosebud Mine area fall into Class II and Class III waters. Class II groundwaters waters have specific conductance between 1,000 and 2,500 microsiemens per centimeter, while Class III groundwaters waters have specific conductance between 2,500 and 15,000 microsiemens, and narrative standards also apply to both classes based on the uses designated for such classes. Hrg. Tr. Vol. 2, at 213:5-15; DEQ Ex. 1A, at 2-5.

238. Figure 9-21 depicts with cross-sections the subsurface hydrologic units assessed in the CHIA. Hrg. Tr. Vol. 2, at 208:3-7; DEQ Ex. 1A, Figure 9-21.

239. The first layer depicted in CHIA Figure 9-21 is alluvial material, consisting of highly permeable and transmissive gravel and silt, and unconsolidated material. Hrg. Tr. Vol. 2, at 208:14-25; DEQ Ex. 1A, at Figure 9-21.

240. Below the alluvium, water-bearing bedrock units depicted in Figure 9-21 include overburden, which consists of a varied series of sedimentary rocks including sandstone, silt stone and mud stone. Hrg. Tr. Vol. 2, at 209:4-16; DEQ Ex. 1A, at Figure 9-21.

241. Beneath the overburden is the Rosebud coal seam, followed in descending order by a layer of sedimentary interburden, the McKay coal seam and

the sub-McKay underburden. Hrg. Tr. Vol. 2, at 209:19-210:5; DEQ Ex. 1A, at Figure 9-21.

242. In terms of water quality, the spoil that is produced as a result of the AM4 mining is expected to have a similar water quality as the previously existing and currently permitted spoil areas, so it is not expected to have any impact on the offsite water quality. Hrg. Tr. Vol. 2, at 188:14-19, 210:16-25.

243. Mining associated with the AM4 Permit will only increase the duration of time that groundwater impacts the small intermittent reach of EFAC closest to the mine; mining associated with the AM4 Permit will not increase the severity of the impact. Hrg. Tr. Vol. 2, at 186:23-187:5.

244. Mining associated with the AM4 Permit “would have no change to the water quality impacts from mining on EFAC.” Hrg. Tr. Vol. 2, at 186:20-22.

245. The hydrologic consequences and cumulative hydrologic impacts of mining associated with the AM4 Permit, specifically the anticipated increase in surface water TDS, will not preclude existing land uses outside the mining area. DEQ Ex. 1A, at 10-1.

246. EFAC is classified as a C-3 surface water and the designated uses of EFAC outside the AM4 Permit area, but within the cumulative impacts area, are bathing, swimming, recreation, growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl and fur bearers and marginal support of drinking,

culinary, and food processing purposes, agriculture and industrial water supply. Historic and current surface water uses in and adjacent to the mine include domestic, livestock, wildlife and industrial. However, because EFAC is “predominantly ephemeral, many of these uses are really only in existence when water is flowing.” Hrg. Tr. Vol. 2, at 201:3-24; DEQ Ex. 1A, at 6-1 to 6-3.

247. Mining associated with the AM4 Permit would not result in any changes to the C-3 designated uses of EFAC. Hrg. Tr. Vol. 2, at 201:3-24.

248. No evidence was presented showing that mining associated with the AM4 Permit will cause any changes outside the permit boundary in a manner or to an extent that land uses would be adversely affected. Hrg. Tr. Vol. 1, at 260:23-261:5, 261:25-262:4, 266:10-267:7, 268:18-23; Hrg. Tr. Vol. 4, at 245:22-246:9.

### **DISCUSSION**

Generally, the Conclusions of Law (below) follow from the Findings of Fact (above) without the necessity of additional explanation. There are two exceptions, however: the Conclusions regarding (1) the burden of proof, and (2) the material damage determination for TDS. The following discussion is provided for the purpose of clarifying how the Finding of Facts lead to the Conclusions of Law on these two particular issues.

## A. Burden of Proof

Throughout the life of this permit (to date), different parties have had different responsibilities imposed by statute and rule: First, WECO had an obligation to present a permit application to DEQ that “affirmatively demonstrate[d]... that... the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” Admin. R. Mont. 17.24.405(6); *see also* Mont. Code Ann. §§ 82-4-227(1), (3), (11).

Second, after receiving the application, DEQ was required to review the “information set forth in the application or *information otherwise available that is compiled by the department*” (Admin. R. Mont. 17.24.405(6)), including “an onsite inspection and [] an evaluation of the operation by the department” (Mont. Code Ann. § 82-4-227(1)) and information brought to DEQ’s attention through the public participation process (*id.* §§ 82-4-222(1)(1), -226(8); Admin. R. Mont. 17.24.401-405). Based on all of this available information, DEQ then had to confirm whether (or not) it could lawfully issue the permit. Admin. R. Mont. 17.24.405(6). The law is:

The department *may not* approve an application ... *unless* the application affirmatively demonstrates and the department's written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

...

c) the hydrologic consequences and cumulative hydrologic impacts *will not result* in material damage to the hydrologic balance outside the permit area....

Admin. R. Mont. 17.24.405(6) (emphasis added); *see also* Mont. Code Ann. § 82-4-227(1). DEQ was therefore required to confirm that the proposed mining affirmatively will not result in “material damage” to water outside the permit area. ARM 17.24.405(6).

Third, and finally, comes the contested case. Mont. Code Ann. § 82-4-206(1)-(2); Admin. R. Mont. 17.24.425(1). The Montana Supreme Court has held that, in a permitting action like this one, “as the party asserting the claim at issue, Conservation Group had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department’s decision violated the law.” *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 964. The “facts essential” must also be proved by a preponderance of the evidence. *Id.* ¶ 22. In this contested case hearing, therefore, Conservation Groups have the burden of proving by a preponderance of the evidence that DEQ’s decision to issue the permit violated the law. *Id.* What that means within the legal framework of this particular case, however, is somewhat entangled.

Intervenors argue that in this contested case proceeding, Conservation Groups have a burden to prove “by a preponderance of the evidence that

cumulative hydrologic impacts *will* result in violation of water quality standards.”

This is not correct, but in a very subtle way: Conservation Groups need not prove a certainty—a more likely than not possibility will suffice. Conservation Groups only have the burden to show that DEQ issued a permit that violated the law. The law will be violated if DEQ granted a permit that, based on the information available to it at the time, did not affirmatively demonstrate that there *will not* be “material damage.” In other words, if a permit *could* result in “material damage,” then it cannot be said that it affirmatively *will not*. Admin. R. Mont. 17.24.405(6); *see also Signal Peak*, BER 2013-07 SM at ¶¶ 103, 116 (“‘Prevent’ does not mean ‘minimize’” “the record before DEQ showed only that the proposed operation may or may not be designed to prevent material damage ... This showing does not constitute affirmative evidence that the cumulative hydrologic impact will not result in material damage.... ”)

Therefore, Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it, at the time of issuing the permit, that indicated issuing the permit *could* result in “material damage.” If DEQ had such information available to it, and issued the permit anyway, then DEQ issued the permit in violation of the law. As shown in the Findings of Fact (above) and Conclusions of Law (below), however, Conservation Groups did not meet even this lesser burden (than the one urged by

Intervenors). Conservation Groups did not provide sufficient evidence to show a more likely than not possibility that the AM4 Amendment will result in “material damage” as defined in Mont. Code. Ann. §§ 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68).

### **B. TDS and Material Damage**

In their Notice of Appeal, Conservation Groups alleged that DEQ’s permit “did not support a negative material damage determination with respect to ... violations of water quality standards in the upper and lower segments of [EFAC], which DEQ has previously attributed to operations of the Rosebud Mine.” Notice of Appeal, at 3. Conservation Groups essential argument is that because EFAC is already listed as a 303(d) impaired water (*i.e.*, already violating water quality standards for salinity and not supporting its Class III beneficial uses), *any* increased violations of water quality standards—(*e.g.*, in salinity) to EFAC will necessarily cause material damage to EFAC and therefore violate Mont. Code Ann. § 82-4-227(3)(a) and Admin. R. Mont. 17.24.405(6).<sup>3</sup>

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<sup>3</sup> Conservation Groups also make much of the fact that DEQ has not completed a Total Maximum Daily Load (TMDL) analysis for EFAC. However, Conservation Groups point to no law that requires a TMDL analysis for the purpose of MSUMRA’s “material damage” assessment. If DEQ were required to undertake a TMDL for EFAC (which is by no means certain), such a requirement would be found in the Water Quality Act, not MSUMRA. The only issue in this case is the analysis of the AM4 Amendment pursuant to MSUMRA: is the permit designed to prevent “material damage.” Therefore, absent some law engrafting the Water Quality Act’s TMDL requirements onto MSUMRA’s material damage assessment (as the water quality standards have been engrafted pursuant to Mont. Code. Ann. § 82-4-203(31) and Admin. R. Mont. 17.24.301(68)), discussion of a TMDL for EFAC is irrelevant to the present case.

First, the evidence presented at hearing belied Conservation Groups' claim, that EFAC's existing impairment was "previously attributed to operations of the Rosebud Mine." Testimony from Mr. Urban, Dr. Hinz, and Mr. Van Oort, in conjunction with exhibits DEQ 10 and DEQ 1A, at 9-85 to 9-87, showed that the Water Quality Planning Bureau and the Coal Section did not believe EFAC's existing impairments were attributable to coal mining. Rather, the evidence showed that salinity in Upper EFAC was likely attributable to its inherent nature as an ephemeral stream and the loss of streamside vegetation, most likely as a result of agriculture. *See supra*, at FOF § G. With respect to Lower EFAC, impairments were likely attributable to other downstream sources (*e.g.*, the town of Colstrip). *Id.* Similarly, Upper EFAC was not supporting most of its beneficial uses (*e.g.*, wading, swimming, salmonid fishes, etc.) because of its ephemeral nature. *Id.* Conservation Groups did not produce any convincing evidence that EFAC's existing impairment was previously attributed to operations of the Rosebud Mine.

Second, Conservation Groups' conclusion (that the AM4 will increase salinity and therefore necessarily cause increasing violations of water quality standards) is faulty both as a matter of fact and as a matter of law.

As a matter of fact, Conservation Groups' conclusion fails because there is no evidence that the AM4 Amendment, which is the only permitting decision at issue in this case, will cause any increase in salinity to the EFAC alluvium.

Conservation Groups make much of a calculation in the PHC Addendum to the CHIA that salinity will increase 13% over baseline TDS concentrations in EFAC alluvium. DEQ Ex. 6A, at 29. However, Conservation Groups fail to grasp (or intentionally oviscape) the fact that this calculation in the PHC is for groundwater in the spoils of all of Areas A and B of the mine after mining is complete. *Id.* The exact quote from the PHC is:

The transport of groundwater containing higher TDS concentrations will increase with time as groundwater levels in spoils recover toward pre-mine conditions in both Areas A and B. Once those water levels fully recover, it is estimated that increase in TDS in the alluvium will be about 13 percent when compared to baseline conditions.

*Id.* Thus, the 13% increase in TDS is not specific to the amount of TDS added to the alluvium by the AM4 Amendment, but rather the overall TDS that is added to the groundwater by all the mining in the area, including previously permitted areas. Conservation Groups repeatedly confuse this potential 13% increase in the total TDS alluvium groundwater under Areas A and B of the mine to mean that the AM4 amendment “will increase salt by at least 13% in EFAC.” *See, e.g.,* MEIC Resp. to Prop. FOFCOL, at 17. This is simply not a fact. Nothing in the evidence indicates that the surface water in EFAC (to the extent it exists at all in the ephemeral portions) will have a 13% salt increase as a result of the AM4 Amendment. The only evidence of any 13% increase in TDS concentrations is the

PHC's estimation for all the groundwater alluvium, including previously-permitted Areas A and B.

Regarding AM4 specifically (which is all this case concerns), DEQ and Intervenor presented convincing expert testimony to support the CHIA's conclusion that even a 13% increase in salinity (if the general impact from all mining presented by the PHC Addendum were applied specifically to the EFAC alluvium) would not materially damage EFAC's alluvium. DEQ's and Intervenor's experts explained that this type and level of change occurs naturally and in much larger magnitude than a 13% change within the EFAC alluvium. *See, e.g.*, CHIA Figure 9-23, well WA-104; Hrg. Tr. Vol. 3, at 218:6-24. Therefore, the "amount of change would not be statistically significantly measurable" due to other sources of TDS and the "inherent variability of the system." Hrg. Tr. Vol. 3, at 218:6-24, 246:20-25, 247:9-25. The TDS, or salt loading, caused by all previous mining (not just mining associated with the AM4 Permit) provides a "very, very small quantity" of the salt load in the basin when compared to the natural background levels of salt in EFAC. Mining may only contribute less than 2 percent of the load. Hrg. Tr. Vol. 4, at 24:19-25:1, 25:22-27:17.

As a matter of law, Conservation Group's arguments regarding salinity fail because there must be some causal connection between the permitted mining activity and a water quality violation. If water is already exceeding water quality

standards for reasons *not* associated with mining, as is the case with EFAC, then exceedance alone cannot be the basis for denial of a mining permit application.

The analysis is whether “the proposed operation is designed to prevent the probable cumulative impacts from causing material damage to the hydrologic balance outside the permit area.” Mont. Code Ann. § 82-4-227(3)(a)). As

Intervenors explain:

material damage is defined as “degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent” that the impact meets one of three thresholds: (1) land uses or beneficial uses of water are adversely affected; (2) water quality standards are violated; and/or (3) water rights are impacted. These three thresholds implicate specific portions of the Montana Water Quality Act. But in the context of material damage determinations, the analysis must focus on whether the impact from mining complies with the specific portions of the Montana Water Quality Act, not whether existing conditions in the stream overall do. Therefore, the analysis must focus on the impacts from mining.

The Montana Water Quality Act does not treat beneficial uses as “water quality standards.” Instead, it distinguishes between beneficial uses, which are used to classify state water (Mont. Code Ann. § 75-5-301(1)), and water quality standards, which are designed to “protect the beneficial uses set forth in the water use descriptions for the . . . classifications of water.” Admin. R. Mont. 17.30.620; Mont. Code Ann. § 75-5-301(2). MSUMRA’s material damage definition, which treats beneficial uses and water quality standards as distinct elements, is consistent with this feature of the Montana Water Quality Act. . . .

MSUMRA does not ask whether impacts from proposed mining will “contribute to existing violations of water quality standards” but whether the mine has been “designed to prevent material damage,” *i.e.*, “degradation or reduction by coal mining and reclamation operations in a manner or to an extent that . . . water quality standards are violated.” Petitioners do not and cannot demonstrate that the AM4

Permit will cause violations of water quality standards. Petitioners cite two chemical parameters – salinity and nitrogen – in support of their claim, but the evidence demonstrates that the AM4 Permit has been designed to prevent material damage on both of these parameters...

Petitioners' argument on salinity fails because the record clearly demonstrates that the AM4 Permit will not change the salinity in the affected waters and because Petitioners have identified no water quality standard violation. The Department applies a narrative standard to evaluate impacts from salinity. Admin. R. Mont. 17.30.637(1)(d). To demonstrate that the AM4 Permit will cause a violation of this narrative water quality standard, Petitioners must provide proof of causation between mining under the AM4 Permit and the presence of salts in the water at toxic or harmful levels. Admin. R. Mont. 17.30.637(1). Petitioners presented no evidence that salinity from current mining (which will remain unchanged under the AM4 Permit), is toxic or harmful, let alone any evidence that salinity from the AM4 Permit alone is toxic or harmful. Petitioners' proposed conclusions relating to increased "salt loading" misstate the testimony, fail to establish any violation of this narrative water quality standard, and fail to connect the mine's impact to violation of this narrative water quality standard.

Intervenors Resp. Prop. FOFCOL at 2-5.

Conservation Groups also argue that, as a factual matter, the increase in salinity from the AM4 specifically will increase the amount of time it takes for the groundwater to return to pre-mine conditions. However, Conservation Groups failed to provide sufficient evidence even to make this hypothesis into a more likely than not possibility. Dr. Gardner only hypothesized about an increase in salt migrating to the alluvium of EFAC based on removal of Rosebud coal; he never actually calculated a change in TDS concentration or load for EFAC and did not

consider the fate and transport of calcite and gypsum, which would affect the volume of TDS that could migrate downstream. Hrg. Tr. Vol. 1, at 261:3-5, 262:2-19, 278:5-12. Further, Dr. Gardner testified that the AM4 Permit “has the potential to either increase the TDS or maintain higher concentrations for longer.” Hrg. Tr. Vol. 4, 233:21-25. Thus, Prof. Gardner provided two options. The experts who actually did the calculations (testifying for DEQ and Intervenors) concluded the result would be the later, not the former. The calculations support the conclusion, consistent with the PHC Addendum (as explained above), that the AM4 Permit will not cause an additional increase in TDS levels in groundwater.

Conservation Groups point to Dr. Hinz’s testimony on cross-examination regarding the “longer duration of increased TDS entering the alluvium, which a portion of that would enter into base flow.” Hrg. Tr. Vol. 2, at 264:23-25, 265:1-2. However, again Conservation Groups fail to point out that the “increased TDS entering the alluvium” that was being considered was the increase from *all* mining, including the AM4 Permit. DEQ Ex. 6A, at 29. Dr. Hinz again clarified her answer when asked again:

The spoil from AM4 would just basically result in additional spoil, so it would result in more of the same. Essentially the water has a carrying capacity of salt that’s going through the groundwater, and it just doesn’t pick up more than is already going to be picked up.

Hrg. Tr. Vol. 2, at 265:6-12. Here, Dr. Hinz was explaining that DEQ had considered the cumulative impact of all mining, including the AM4 Permit, and

had concluded that the impact would not change with the *additional* mining associated with the AM4 Permit. DEQ’s conclusion was the latter of the two options provided by Prof. Gardner — that it would “maintain higher concentrations for longer.” Hinz, Vol. 2, 187:23-24 (“the duration would increase”); *see also* Hrg. Tr, Vol. 2, at 188:14-25, 189:1-10 (“In terms of water quality, the spoil that is produced as a result of the AM4 mining is expected to have a similar water quality as the previously existing and currently permitted spoil areas, so it is not expected to have any impact on the offsite water quality” but would extend the recovery time).<sup>4</sup>

DEQ and Intervenors explain that, as a matter of law, this increase in duration of time is not measurable or relevant for a material damage analysis because a “[m]aterial damage is merely a magnitude threshold.” Hrg. Tr. Vol. 2, at 235:3-6. The anticipated impact of the AM4 Amendment, including the increased duration, was calculated and considered by DEQ in the context of a material damage determination where it is the magnitude of the *impact* that matters. Hrg.

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<sup>4</sup> Neither side presented any convincing evidence about exactly how or to what extent the duration of time for “salt loading” would actually increase because of the AM4 Amendment specifically. The most detailed evidence provided on the subject was the Intervenor’s, which stated that: the additional proposed mining associated with the AM4 Amendment is expected to take approximately six years, which will extend the Area B drawdown by six years, expand the spoils aquifer by roughly 8%, and proportionally extend the time for the Area B spoils aquifer to re-saturate by roughly the same amount (8%). Hrg. Tr. Vol. 2, at 189:5-10, 17-25. DEQ’s expert, Dr. Hinz, stated generally that the duration of time could increase “some tens to hundreds of years” but noted that “[i]t’s very hard to give exact numbers for spoil recovery.” Hrg. Tr. Vol. 2, at 187:23 to 188:2. As this was the most precise evidence offered, and apparently precise evidence on this point may be impossible, it is difficult to know how to value the potential increase in the duration of time from the AM4 Amendment with respect to a “material damage” determination.

Tr., Vol. 2, at 190:4-8. In this case, DEQ found the magnitude of the impact from the AM4 Permit to be indistinguishable from the current mining impact.

Therefore, the AM4 Permit causes no increase in salinity and no material damage.

As DEQ explains:

[W]hile the AM4 Amendment will increase duration of increased salt concentrations and the overall load of salt to the alluvium over time, it will not increase the concentration of such salt in the alluvium Tr. Vol. 2 at 232:11-233:4; 265:8-12, Vol. 4 at 39:4-20. From a scientific perspective, simply saying that there will be “more” salt in the system fails to differentiate between load and concentration. *Id.* The distinction is critical for the purposes of a material damage assessment, however, since the narrative and numeric standards applicable to groundwater in the area of the Rosebud Mine are expressed in terms of pollutant concentrations. *See* ARM 17.30.1006. Concentrations are always expressed in units in mass per volume of water, typically milligrams per liter. Tr. Vol. 4 at 63:23-64:10. The narrative and numeric standards applicable to [EFAC] are likewise expressed in terms of pollutant concentrations. *See* ARM 17.30.637(1)(d); 17.30.629(f) and (h). The AM4 Amendment will not increase the concentration of salt (zero “contribution”) but it will increase the duration of the increased TDS entering the alluvium. Tr. Vol. 2 at 264:18-265:12. As Mr. Van Oort explained:

The changes in the PHC and CHIA which were discussed—and, again, Dr. Dicklin’s 13 percent estimate is an estimate that is the changes in TDS from the currently permitted mining. AM4 will not increase that estimate because it simply extends the duration of time that that same amount or same concentration of spoil water will enter the stream. So, the addition of AM4 does not add to the concentration of TDS for conductivity in the [EFAC] alluvium. Tr. Vol. 3 at 98:12-20; *see also* DEQ-1A at 9-33.

MEIC’s expert, Professor Gardner, by contrast, did not address changes in pollutant concentrations and instead simply testified that

any additional TDS from mining would add more salinity to the hydrologic system. Tr. Vol. 1 at 174:3-175:6, 185:20-186:7, 187:7-10, 260:23-261:5, 264:5-16, 277:5-278:14, Vol. 4 at 233:7-234:5. Professor Gardner also did not calculate an increase in salinity in [EFAC] associated with the AM4 Amendment. Tr. Vol. 1 at 260:23-261:5, 265:6-267-7.

DEQ Resp. Prop. FOFCOL at 89-90.

As a matter of law, a material damage assessment is a threshold determination because it must be determined by water quality standards. *Signal Peak*, No. BER 2013-07 SM, at ¶¶ 48, 131 (“it is violation of water quality standards...that is the standard for material damage.”) (*citing* Mont. Code Ann. §§ 82-4-203(31), 227(3)(a)); Admin. R. Mont. 17.24.301(68), 17.24.405(6)(c). Water quality standards are, in turn, evaluated through pollutant concentrations. Admin. R. Mont. 17.30.1006. Essentially, either a pollutant concentration is exceeded, or it is not; and, if the pollutant concentration is not exceeded, then there is no water quality violation. Here, the AM4 will not violate a water quality standard for TDS because it will not increase the pollutant concentration (or will not increase it beyond what has already been permitted). As the AM4 will not violate a water quality standard, it will not cause “material damage.” *Signal Peak*, No. BER 2013-07 SM, at ¶ 131; Mont. Code Ann. §§ 82-4-203(31), 227(3)(a)); Admin. R. Mont. 17.24.301(68), 17.24.405(6)(c).

In other words, there is no way to scientifically or legally measure (or at least none was presented in this case) the increase in the duration of time vis-à-vis

a water quality standard. Because the increase in the duration of time has no meaning for the determination of a pollutant concentration, and therefore for a water quality standard, time legally cannot be a measure of material damage. Even assuming, *arguendo*, that there were evidence to conclusively establish that the AM4 Amendment specifically will extend the duration of the “salt loading” in the EFAC alluvium by any amount of time (which there is not), Conservation Groups have not shown how this could legally constitute “material damage” under MSUMRA, pursuant to Mont. Code. Ann. § 82-4-227(3)(a) and Admin. R. Mont. 17.24.405(6)(c) and all the definitions that apply.<sup>5</sup>

Ultimately, the burden of proof in this action falls to Conservation Groups to present a more-likely-than-not possibility that a water quality standard could be violated by the permitted action. Conservation Groups have not met that burden. Dr. Gardner’s generalized hypothesis regarding “salt loading” was unconvincing

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<sup>5</sup> Conservation Groups cite no case law that would support a conclusion of law finding a duration of time to constitute “material damage” under MSUMRA. *See* MEIC Resp. Prop. FOFCOL at 17. The only case that Conservation Groups cite in connection to their argument on this point is *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-15 (9th Cir. 2007). *Pinto Creek* is a federal case in which a federal court addressed the EPA’s issuance of an NPDES permit under § 402 of the Clean Water Act and found a discharge of copper violative. *Id. Pinto Creek* does not apply MSUMRA (or even its federal equivalent), does not contain the words “material damage,” and does not concern any increase in the duration of time for anything. It is therefore neither precedential nor on point. Although not raised by any party, in *Signal Peak*, the BER rejected DEQ’s “mistaken belief that the material damage determination may be limited to an arbitrary 50-year horizon” and found that “[i]n short, there is no basis in law for limiting the material damage assessment and determination to 50 years.” No. BER 2013-07 SM, at ¶¶ 126-129. This indicates that the BER has been previously concerned with the duration of time and a material damage assessment. *Id.* However the main problem the BER had with the Signal Peak permit was DEQ’s total failure to address water quality standards in the CHIA. *Id.* at ¶ 48. Therefore, the analysis of the duration of time in Signal Peak was wrapped up with the failure to address water quality standards: essentially the BER was concerned about the significant evidence before them that “degraded gob water” was going to migrate outside of the permit area either during or after DEQ’s 50-year horizon. *Id.* at ¶¶ 126-129. DEQ has not imposed any horizon on its consideration of material damage in the present case, and it has certainly considered water quality standards in the CHIA. Therefore, DEQ (and WECO) have addressed the BER’s concerns in Signal Peak. Additionally, nothing in Signal Peak provides a legal standard for when or how an increase in the duration of time might be evaluated with respect to a material damage assessment under MSUMRA. The undersigned has simply found no law instructive on this point.

and not supported by facts sufficient to rebuff the experts from Intervenors and DEC, who convincingly articulated that, because the AM4 amendment will not result in any violation of narrative or numeric water quality standards, it was designed such that “the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” Admin. R. Mont. 17.24.405(6).

### **CONCLUSIONS OF LAW**

From the foregoing findings of fact, the Hearing Officer makes the following conclusions of law:

#### **A. Standing**

1. “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.’”

*Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In addition to injury in fact, the plaintiff must show that “the injury is traceable to the challenged action of the defendant” and that “the injury will be redressed by a favorable decision.” *Laidlaw*, 528 U.S. at 181.

2. Under Montana law, “an association can assert associational standing without a showing of injury to itself when ‘(a) at least one of its members would

have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, *and* (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit.” *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 27, 374 Mont. 229, 328 P.3d 586 (quoting *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 43, 360 Mont. 207, 255 P.3d 80) (emphasis added).

3. Steve Gilbert has already been determined to have standing to challenge actions involving water at the Rosebud Mine. *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, No. CDV-2012-1075, 2016 Mont. Dist. LEXIS 14, at \*\*21-24 (Mont. 1st Jud. Dist., Seeley, J. (Mar. 14, 2016)). Although not dispositive, this is persuasive authority.

4. Mr. Gilbert's and Ms. Bonogofsky's testimony shows that their aesthetic and recreational values in the area of the Rosebud Mine will be lessened by continued mine expansion, which is attributable to DEQ's and Intervenors' action in this case. As they are members of the Conservation Groups, and the three factors in *New Hope* are met, the Conservation Groups have standing.

## **B. Burden of Proof**

5. “[A]s the party asserting the claim at issue, MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination

that the Department's decision violated the law.” *MEIC*, 2005 MT 96, ¶ 16. The “facts essential” must be proved by a preponderance of the evidence. *Id.* ¶ 22. In this contested case hearing, therefore, MEIC has the burden of proving by a preponderance of the evidence that DEQ’s decision to issue the permit violated the law. *Id.*

6. DEQ may not approve the AM4 Amendment unless the application affirmatively demonstrates that the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by DEQ and the proposed operation of the mine has been designed to prevent material damage to the hydrologic balance outside the permit area. Mont. Code Ann. § 82-4-227(3)(a); Admin. R. Mont. 17.24.405(6)(c).

7. With respect to protection of the hydrologic balance, “material damage” means:

- (a) degradation or reduction by coal mining and reclamation operations
- (b) of the quality or quantity of water outside of the permit area
- (c) in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted.

Violation of a water quality standard, whether or not an existing water use is affected, is material damage. Mont. Code Ann. § 82-4-203(32).

8. A material damage determination must assess whether the action at

issue will cause a violation of water quality standards. *Signal Peak*, BER-2-13-07-SM at 87 (citing Mont. Code Ann. § 82-4-203(31)).

9. The narrative and numeric standards applicable to groundwater in the area of the Rosebud Mine are expressed in terms of pollutant concentrations. *See* Admin. R. Mont. 17.30.1006.

10. Concentrations are always expressed in units in mass per volume of water, typically milligrams per liter. Hrg. Tr. Vol. 4, at 63:23-64:10.

11. The narrative and numeric standards applicable to East Fork Armells Creek are likewise expressed in terms of pollutant concentrations. *See* Admin. R. Mont. 17.30.637(1)(d), 17.30.629(f) and (h).

12. Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated issuing the permit could result in land uses or beneficial uses of water being adversely affected, water quality standards being violated, or water rights being impacted. Mont. Code Ann. §§ 82-4-203(31), 203(32), 222(1)(l), 226(8), 227(3)(a); Admin. R. Mont. 17.24.401-405; *Signal Peak*, BER-2-13-07-SM at 87.

### **C. Relevance**

13. The relevant analysis and the agency action at issue is that contained

within the four corners of the Written Findings and CHIA. Issued Dec. 4, 2015, BER-2-13-07-SM, at ¶¶ 56, 66, 124.

14. The only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision. *Id.*

15. For the reasons stated in the Order on Motions in Limine, at 7, incorporated herein by reference, relevant evidence is limited to those issues contained in the administrative record, including those issues raised by Conservation Groups in their August 3, 2015 objections and also preserved in the January 4, 2016 Notice of Appeal.

16. For the reasons stated in the Order on Motions in Limine, at 7, incorporated herein by reference, and as stated in the Procedural History herein, the following issues were properly excluded from consideration for failure by Conservation Groups to preserve:

- a. Arguments related to the definition of “anticipated mining” and potential interactions between the AM4 Permit and Area F (Vol. 1, 134:5-25, 137:7-13, 158:2-5);
- b. Arguments related to the Department’s alleged failure to make a material damage determination regarding alleged dewatering of EFAC regarding the entire interaction of the AM4 Permit with all previous mining (Vol. 1, 227:20-228:9);
- c. Arguments related to alleged impacts of the AM4 Permit on Rosebud Creek (Vol. 1, 43:15-44:25);

- d. Arguments related to the alleged impacts from blasting (Vol. 1, 56:15-17, 60:24-61:5);
- e. Arguments regarding the impact of dissolved oxygen levels in EFAC on aquatic life (Vol. 1, 302:22-303:12);
- f. Arguments regarding the impact of chloride levels in EFAC on aquatic life (Vol. 2, 32:18-33:25).

17. For the reasons stated in the Order on Motions in Limine, at 7, incorporated herein by reference and as stated in the Procedural History herein, Conservation Groups challenge to the AM4 Permit was therefore appropriately limited to the following issues preserved in their Public Comments and Notice of Appeal and Request for Hearing:

- a. The material damage determination regarding increased TDS levels in EFAC.
- b. The material damage determination regarding increased nitrogen levels in EFAC.
- c. The material damage determination regarding aquatic life use of EFAC.

**D. Material Damage**

18. Conservation Groups did not provide sufficient evidence to show a more likely than not possibility that the AM4 Amendment will result in “material damage” as defined in Mont. Code. Ann. §§ 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). Mont. Code Ann. §82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c).

19. To the contrary, the evidence demonstrates that (first) WECO met its

obligation and affirmatively demonstrated in its application that “the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” Mont. Code Ann. §§ 82-4-203(31), 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c), 17.24.301(68).

20. The evidence also shows that (second) DEQ discharged its responsibilities with respect to gathering additional information—both on its own and through public comment. Admin. R. Mont. 17.24.405(6). DEQ appropriately “confirmed” what WECO’s application affirmatively demonstrated, and what the evidence at the hearing showed: based on the information available at the time, “the hydrologic consequences and cumulative hydrologic impacts” of the proposed AM4 amendment “will not result in material damage to the hydrologic balance outside the permit area.” Mont. Code Ann. § 82-4-227(3)(a); Admin. R. Mont. 17.24.405(6).

21. The cumulative hydrologic impacts which must be assessed in determining material damage include the expected total qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance. Mont. Code Ann. § 82-4-227(3); Admin. R. Mont. 17.24.301(31).

22. As defined in the context of a material damage assessment,

“hydrologic balance” describes the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit, such as a drainage basin, aquifer, soil zone, lake, or reservoir, and encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in groundwater and surface water storage. Mont. Code Ann. § 82-4-203(25).

Assessing material damage accordingly requires a determination as to whether mining and/or reclamation operations have degraded the water quality of an off-site hydrologic unit (such as an aquifer, soil zone or drainage basin) in a manner or to an extent that land uses or beneficial uses of the hydrologic unit are adversely affected, the water quality standards of the hydrologic unit are violated, or water rights in the hydrologic unit are impacted. Mont. Code Ann. §§ 82-4-227(3), 82-4-203(25) and (32); Admin. R. Mont. 17.24.301(31); *see also* Hrg. Tr. Vol. 2, at 195:4-197:4.

23. The evidence presented at the hearing demonstrated that the AM4 Amendment will not degrade the water quality of an off-site hydrologic unit (such as an aquifer, soil zone or drainage basin) in a manner or to an extent that land uses or beneficial uses of the hydrologic unit are adversely affected, the water quality standards of the hydrologic unit are violated, or water rights in the hydrologic unit are impacted. Mont. Code Ann. §§ 82-4-227(3), 82-4-203(25) and (32); Admin. R. Mont. 17.24.301(31); *see also* Hrg. Tr. Vol. 2, at 195:4-197:4.

24. The AM4 CHIA assessed the probable cumulative impact of all anticipated mining in the area on the hydrologic balance and sufficiently determined in writing and on affirmative record evidence that the proposed AM4 Amendment mining operation is designed to prevent material damage to the hydrologic balance outside the permit area. Mont. Code Ann. § 82-2-227(3)(a), Admin. R. Mont. 17.24.405(6)(c); *Signal Peak*, BER-2-13-07-SM at 56.

25. The AM4 CHIA and Written Findings assessed all expected total qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance. Admin. R. Mont. 17.24.301(31); Mont. Code Ann. § 82-4-227(3).

26. DEQ's Written Findings and CHIA provide and articulate specific reasons for its permitting decision based on a defensible level of reliable scientific confidence and sufficient supporting record evidence, including the application or otherwise compiled by DEQ in the record. *Signal Peak*, BER-2-13-07-SM at 56 (*citing* Admin. R. Mont. 17.24.405(5) and (6)).

27. DEQ's AM4 Written Findings and CHIA assessed and responded to comments made on the AM4 Amendment application and PHC. Mont. Code Ann. § 82-4-227(3)(a), Admin. R. Mont. 17.24.314(5) 17.24.405(6)(c). (*See* Written Findings at pp. 8-14); *see also* or Mots. In Limine (excluding Conservation Groups' issues not raised in their comments).

*i. EFAC Impairment*

28. The beneficial uses of Class C-3 surface waters, the degradation of which cannot be permitted, include suitability for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers. Admin. R. Mont. 17.30.629(1).

29. The quality of Class C-3 surface waters is naturally marginal for drinking, culinary, and food processing purposes, agriculture, and industrial water supply uses. Admin. R. Mont. 17.30.629(1).

30. Ephemeral streams are not subject to the specific water quality standards of Admin. R. Mont. 17.30.620 through 17.30.629 (including Circular DEQ-7, Montana Numeric Water Quality Standards). Admin. R. Mont. 17.30.637(4). DEQ Ex. 1A at 2-3.

31. In assessing whether water quality standards have been violated, DEQ does not require that groundwater discharges be treated to a purer condition than the natural condition of the receiving water. Admin. R. Mont. 17.30.1005(3).

32. Conservation Groups' evidence offered in support of their claims of existing water quality violations was limited to water quality assessments and Clean Water Act 303(d) impairment determinations made by DEQ's Water Quality Planning Bureau.

33. As a matter of law, water quality assessments (or Attainment Records) and impairment determinations made by the Water Quality Planning Bureau pursuant to the Clean Water Act do not equate to determinations of water quality standard violations or “material damage” determinations that may prevent permit approval pursuant to MSUMRA. *Compare* Mont. Code Ann. § 82-4-201, *et seq.* with 40 CFR Subchapter D.

34. Attainment Records (like DEQ Ex. 9) are used for informational and planning purposes and do not conclusively identify any prohibited activity or pollutant source for the purpose of MSUMRA. Instead, water quality violations are shown through enforcement mechanisms, such as when DEQ takes action against an entity identified as being responsible for causing pollution, violating a permit, causing degradation, or conducting other prohibited activity. *Compare* Mont. Code Ann. §§ 75-5-701 through 75-5-705, *with* Mont. Code Ann. §§ 75-5-601 through 75-5-641.

35. The Water Quality Planning Bureau’s Impairment determinations and DEQ’s Attainment Records for Upper EFAC and Lower EFAC do not show that EFAC’s impairments are attributable to mining. Testimony at the hearing from Mr. Urban, Dr. Hinz, and Mr. Van Oort, in conjunction with exhibits DEQ 10 and DEQ 1A, at 9-85 to 9-87, convincingly confirmed (what the Water Quality

Planning Bureau and the Coal Section believed at the time of issuing the permit) that EFAC's existing impairments were not attributable to coal mining.

36. Instead, the salinity in Upper EFAC was likely attributable to its inherent nature as an ephemeral stream and the loss of streamside vegetation, most likely as a result of agriculture and Lower EFAC, impairments were likely attributable to other downstream sources (*e.g.*, the town of Colstrip). Similarly, Upper EFAC was not supporting most of its beneficial uses (*e.g.*, wading, swimming, salmonid fishes, etc.) because of its ephemeral nature.

37. Conservation Groups did not produce any convincing evidence that EFAC's existing impairment was "previously attributed to operations of the Rosebud Mine."

38. Conservation Groups failed to present evidence necessary to establish the existence of any water quality standard violations with respect to the AM4 Amendment that would prohibit DEQ from approving the AM4 Permit. Mont. Code Ann. §§ 82-4-203(31), 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c), 17.24.301(68).

*ii. TDS*

39. For the reasons stated in Subsection B of the Discussion Section, above, which is incorporated herein by reference, Conservation Groups failed to present evidence necessary to establish the facts essential to a determination that

the AM4 Permit will cause material damage to the hydrologic balance outside of the permit boundary by increasing TDS levels in EFAC. Mont. Code Ann. § 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c).

*iii. Nitrogen*

40. Conservation Groups failed to present evidence necessary to establish the facts essential to a determination the AM4 Permit will cause material damage to the hydrologic balance outside of the permit boundary by increasing nitrogen levels in EFAC to an extent that land uses, the Class C-3 designated uses, or water rights would be impacted or adversely effected. Mont. Code Ann. §§ 82-4-203(31), 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c), 17.24.301(68).

41. No evidence was presented showing that nitrogen exceedances in Lower EFAC are specifically attributable to mining.

*iv. Aquatic Life*

42. Conservation Groups failed to present evidence necessary to establish the facts essential to a determination that the AM4 Permit will cause material damage to aquatic life use of EFAC. Mont. Code Ann. §§ 82-4-203(31), 82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c), 17.24.301(68).

43. WECO and DEQ presented convincing evidence—through expert testimony and the ARCADIS Report—that EFAC is supporting aquatic life

sufficiently to satisfy its the requirements of MSUMRA. Mont. Code Ann. § 82-4-201, *et seq*; Admin. R. Mont. 17.24.301(68), 17.24.405(6).

**RECOMMENDED DECISION**

44. Based on the foregoing Findings of Fact and Conclusions of Law Conservation Groups have failed to meet their burden of proof to show that DEQ's action in approving the AM4 permit amendment violated the law.

Therefore, IT IS ORDERED

- a. that Intervenor and DEQ's Motion for Directed Verdict is GRANTED;
- b. Judgment is entered in favor of DEQ and the Intervenors, Conservation Groups' appeal is DISMISSED, and DEQ's approval of the AM4 Permit is AFFIRMED.

DATED this 11th day of April, 2019.

/s/ Sarah M. Clerget

SARAH M. CLERGET

Hearing Examiner

Agency Legal Services Bureau

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing  
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DATED: 4/11/19

/s/ Aleisha Solem

**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. C1984003B**

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

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**ORDER ON MOTIONS IN LIMINE**

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**BACKGROUND**

Together, the parties have filed five motions in limine in this case, as follows: Intervenor Respondents, Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (WECO) filed a (1) *Motion in Limine Regarding Issues Waived* and a separate (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony*. The Montana Department of Environmental Quality (DEQ) filed its (3) *First Motion in Limine*. The Montana Environmental Information Center and Sierra Club (collectively Conservation Groups) filed a (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells*

*Creek*, as well as a separate (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning*. The motions were fully briefed on March 5, 2018.

The parties requested oral argument which was held on March 13, 2018. At the end of oral argument, the undersigned issued an oral ruling from the bench on two and a half of these motions: WECO's (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony*; Conservation Groups' (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells Creek*; and part (b) of DEQ's (3) *First MOTION in Limine*, regarding Conservation Groups' responses to Interrogatories and Requests for Admission (RFAs). As indicated during the hearing, this written order reiterates the oral rulings and resolves the remaining motions in limine.

### **DISCUSSION**

The remaining motions on which the undersigned did not rule during the oral argument include: Part (a) of DEQ's (3) *First Motion in Limine* regarding limiting Conservation Groups' evidence to such issues raised in the August 3, 2015 comments and the January 4, 2016 Notice of Appeal; WECO's (1) *Motion in Limine Regarding Issues Waived*; and Conservation Groups' (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning*.

Although couched in different ways, these motions all contemplate the same

thing: that all the evidence presented during the hearing should be limited by what happened during the administrative process.

The administrative process in this case began in 2009, when WEC<sub>o</sub> submitted its permit application and the original PHC to DEQ. WEC<sub>o</sub> and DEQ then engaged in a correspondence that included at least 8 deficiency letters and responses, all of which were publicly available. During this time, DEQ also responded to public records requests, including at least one from MEIC. WEC<sub>o</sub> then issued an addendum to the PHC in January of 2015. On July 8, 2015, DEQ released a draft of the EA Checklist and Written Findings for the AM4, indicating that DEQ intended to approve the permit. Conservation Groups filed written objections on August 3, 2015 (“objections”). On December 3, 2015, DEQ issued its final EA Checklist and on December 4, 2015, DEQ issued its final Written Findings and CHIA approving the AM4 permit. On January 5, 2016, Conservation Groups filed their Notice of Appeal before the BER. The remainder of the procedural history of this case is contained within the docket of this case.

All the parties agree that at the hearing on this issue MEIC has the burden to prove by a preponderance of the evidence that the AM4 permit, and the corresponding CHIA, were not “designed to prevent material damage.” *MEIC v. DEQ*, 2005 MT 96; MCA 82-4-227(3)(a). Conservation Groups seek to limit DEQ and WEC<sub>o</sub> to the CHIA and exclude any evidence that came “post hoc” - i.e. after

the CHIA. This indicates some agreement from the Conservation Groups that the relevant evidence is only that which appears in, or serves to directly explain, the prior administrative record. Similarly, DEQ and WECO both seek to limit Conservation Groups to the record they created before the agency - i.e. those issues raised in the objections to the Written Findings and also preserved in the notice of appeal. If the Conservation Groups are desirous of limiting the evidence presented by DEQ and WECO to the issues raised by the administrative record, and DEQ and WECO are desirous of limiting the Conservation Groups' evidence to only those issues raised in the administrative record, then the parties actually seem to agree (without actually agreeing) that it is the administrative process that determines the relevance of all the evidence offered at the hearing. If evidence can be tied to the administrative process, as either offered to explain the permit decision or the objections to it, then it is relevant and admissible. If it cannot be tied to the administrative record, then it is probably not admissible.

All of the relevant statutes, rules, and the statements from BER itself—in *Signal Peak*, No. BER 2013-07 SM (Jan. 14, 2016), *Sterling Mining*, Permit No. 2414-04 (Jan. 13, 2003), and at the conclusion of the summary judgment hearing in this case—seem to contemplate an evidentiary hearing, resolving disputed issues of material fact, that reviews and explains of the administrative decisions made by DEQ during this administrative process and ultimately determines the sufficiency

of the permit decision and its CHIA. This hearing must therefore fall somewhere between a records review and a freewheeling attack on, or defense of, the permit. All parties are limited by the permitting process itself—DEQ and WEC<sub>o</sub> are limited by the CHIA and the Written Findings and Conservation Groups are limited by their written objections and the notice of appeal. No party may bring entirely new evidence, but all parties can “explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy,” or, according to the Conservation Groups, do not satisfy “the applicable legal standards.” *Signal Peak*, No. BER 2013-07 SM ¶ 70.

In other words, Conservation Groups may explain and support their objections to DEQ’s written findings, using expert testimony as necessary, in an effort to meet its burden to show by a preponderance that DEQ should not have issued the permit over its objections. DEQ and WEC<sub>o</sub> may in turn explain and support the CHIA and written findings, with expert testimony as needed. Neither party, however, may make arguments or present evidence that is entirely new, or which it cannot tie back to the administrative record before DEQ at the time of the permitting decision.

From this administrative record, it is clear to the undersigned that anyone from the public, including Conservation Groups, has had ample notice and opportunity to examine, in exhaustive detail, the permit at issue in this case. It is

true that DEQ did not issue a draft CHIA, and therefore did not offer the public the opportunity to object to or comment on that specific document before it was issued – the objections that Conservation Groups made were to the draft checklist and written findings only. It also appears to be true that the objections to DEQ’s acceptability determination were due approximately four months before the CHIA was finalized and made public.

However, there does not appear to be any argument that anything contained in the CHIA was manifestly new or different than any of the issues previously raised by the administrative record between 2009 and 2015. In other words, the undersigned is not aware of any argument by Conservation Groups that anything in the CHIA was an entirely surprising issue, unheard of in the previous six years, never mentioned by the PHC, the PHC addendum, or any of the deficiency correspondence. Rather, the Conservation Groups have argued that potential evidence in this case was not contained in the CHIA<sup>1</sup> – not that anything in the CHIA was a surprise.

If, however, the Conservation Groups can point to a portion of the CHIA that contains an entirely new issue, never canvassed anywhere in the previous years of administrative record and to which they had no opportunity to object prior to

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<sup>1</sup> As discussed above, DEQ and WECO are equally limited by the administrative record.

filing the notice of appeal in this case, then the undersigned will entertain such a discussion. The ultimate purpose of this hearing is the sufficiency of the CHIA and the permit. Therefore, if there were a fundamental issue with the CHIA and the permit, and if that issue were introduced for the first time with the publication of the CHIA and after the public had an opportunity to make objections, then this appeal before the BER would be the only forum in which to address such a deficiency. While this seems unlikely, it does present a very limited instance in which an appeal before the BER would be the public's only opportunity to object to and potentially correct a deficiency with the CHIA that was previously unaddressed in the administrative record. If Conservation Groups can articulate such an instance in this case, where they have not been previously given any notice or opportunity to object, then the undersigned will entertain an offer of evidence. Otherwise, as described above, the Conservation Groups will be limited to those issues contained in the administrative record, including those issued raised in their August 3, 2015 objections and also preserved in the January 4, 2016 Notice of Appeal. DEQ and WECO will similarly be limited to those issues presented in the administrative record, including the written findings and the CHIA.

While these principles will guide specific evidentiary rulings during the hearing, and should guide the evidence offered into evidence by all parties, the undersigned is not comfortable, based on the current record, issuing specific

rulings on the items of evidence listed, mentioned, or summarized in the various motions. Thus, evidence will be admitted or refused based on contemporaneous objections at the hearing, consistent with the conclusions herein.

### **ORDER**

Based on the forgoing IT IS HEREBY ORDERED:

1. WECO's (1) *Motion in Limine Regarding Issues Waived* is DENIED in part and GRANTED in part. Conservation Groups' evidence will be limited to those issues that were raised in the administrative process and put before DEQ in advance of the permitting decision, as described *infra*.

2. WECO's (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony* is DENIED. As stated at the end of oral argument, Conservation Groups' experts will be permitted to testify consistent with their respective expert disclosures (as allowed by prior rulings).<sup>2</sup> The parties should object to at the hearing to any evidence offered that they contend is inconsistent with the 30(b)(6) testimony and that also does not appear in the expert disclosures and supplementary disclosures; rulings on such evidence will be made on a case-by-case basis.

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<sup>2</sup> This testimony will, of course, be limited concomitant with the rulings in this Order.

3. DEQ's (3) *First Motion in Limine*:

a. Part (a) of this motion is GRANTED in part and DENIED in part. Conservation Groups' evidence will be limited to those issues that were raised in the administrative process and put before DEQ in advance of the permitting decision, including those issues raised in the August 3, 2015 Written Objections and the January 4, 2016 Notice of Appeal. However, the undersigned will not rule on the specific items to be excluded (for example, those items listed in (a) through (d) on page 9 of DEQ's motion), unless and until those items are offered as evidence and if there is a contemporaneous objection at the hearing. In such instances, Conservation Groups should be prepared to point to the specific portion(s) of the administrative record that they allege put the issue before DEQ at the time of the permitting decision. If specific evidence is excluded at the hearing, Conservation Groups may make offers of proof if they so choose.

b. Part (b) of this motion, to exclude Conservation Groups' answers to Interrogatories Nos. 37-46 and RFAs Nos. 68, 69, 70, and 74, is DENIED. As stated at the end of oral argument, the parties are reminded that there are several other rules of evidence (for example, hearsay) that may affect if or how these responses are admissible, and these must be resolved based on contemporaneous objections at the hearing.

4. Conservation Groups' (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells Creek* is GRANTED in part and DENIED in part. As stated at the end of oral argument, DEQ and WECO's experts can testify about the Arcadis report to the extent they can explain how they relied on it to reach their expert opinions (as, for example, hydrologists). Testimony by these experts about the data or method underlying the report, beyond those contained in the expert disclosures, will not be permitted. From the disclosures, however, it does not appear that DEQ/WECO intends to introduce such evidence through any of these experts. To the extent such evidence is proposed or offered at the hearing, objections from MEIC based on this Motion in Limine will be entertained.

5. Conservation Groups' (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning* is GRANTED in part and DENIED in part. DEQ and WECO's evidence will be limited to evidence that "explain[s] and demonstrate[s] that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards." *Signal Peak*, No. BER 2013-07 SM ¶ 70. However, the undersigned will not rule on the specific items to be excluded (for example, the seven items listed in the motion), unless and until those items are offered as evidence and if there is a contemporaneous objection at the hearing. In such instances, DEQ and WECO should be prepared to

point to the specific portion(s) of the CHIA that they allege address the issue. If specific evidence is excluded, DEQ and WECO may make offers of proof if it so chooses at the hearing.

DATED this 15<sup>th</sup> day of March, 2018.

*/s/ Sarah Clerget* \_\_\_\_\_  
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Hearing Examiner  
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**CERTIFICATE OF SERVICE**

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

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DATED: 3/15/18

/s/ Aleisha Solem

# Order on Exceptions

Doc. 135

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

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**IN THE MATTER OF:  
APPEAL AMENDMENT AM4, WESTERN  
ENERGY COMPANY, ROSEBUD STRIP  
MINE AREA B, PERMIT NO. C1984003B**

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

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**ORDER ON EXCEPTIONS AND NOTICE OF SUBMITTAL**

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The undersigned has issued Proposed Findings of Fact, Conclusions of Law (Proposed Order). The Proposed Order has been served on the parties. Mont. Code Ann. § 25-4-621 affords “each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.” *See* Mont. Admin. R. 1.3.223(1).

Mont. Code Ann. § 2-4-621(3) provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

The hearing examiner's Proposed Order is now before the BER, which constitutes the "officials who are to render the decision." Mont. Admin. R. 1.3.223 (1). The parties therefore have the opportunity to submit Exceptions and make oral arguments before the BER concerning the hearing examiner's Proposed Order. Based on the Proposed Order, any Exceptions, and any oral arguments presented, the BER will decide on the final agency action pursuant to the options stated in Mont. Code Ann. § 2-4-621.

**The Board Chair has instructed the undersigned to notify the parties that the BER will hear oral arguments on this case at its next scheduled meeting on May 31, 2018.** Therefore, the undersigned has set an Exceptions briefing schedule that will allow the BER to review the proposed order and exceptions briefs prior to the meeting, and then hear oral argument at the May meeting. If the parties find this schedule impossible, the undersigned will consult with the Board Chair regarding any extension requested, but parties are warned that such an extension is highly unlikely.

For these reasons, IT HEREBY ORDERED:

1. Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before **May 10, 2019**. If no party files exceptions this matter will be deemed submitted.

2. Each party may file one Response brief to any exceptions that are

filed (there should, therefore, be no more than three responsive briefs filed total, even if all three parties file Exceptions). Responses are due on or before **May 24, 2019**. Responses are **limited to 3,250 words**.

3. The parties may **not** file Reply briefs. Any arguments in reply to the Responses can be addressed at oral argument.

4. If any party believes that any current member of the BER should be disqualified from participating in the decision on this case because of “personal bias, lack of independence, disqualification by law, or other disqualification,” that party will file “in good faith... a timely and sufficient affidavit” explaining the reasons why disqualification is appropriate. Mont. Code Ann. § 2-4-611(4). Such an affidavit must be filed “not less than 10 days before” the BER Meeting, i.e. **by May 21, 2019**. *Id.* **Failure to file such an affidavit will be deemed a waiver of the parties’ right to argue that a BER member is unqualified to render a decision on the Proposed Order.**

5. This matter will be submitted for final agency action and placed on the **May 31, 2019** agenda of the BER as an action item for final agency action.

6. The parties may present oral argument, in person, in front of the board at the **May 31, 2019** meeting, or submit written statements in lieu of appearing and arguing in person. If a party chooses to submit a written statement rather than appear, it must be filed no later than **May 28, 2019**. Failing to appear in person or

file a written statement will be deemed a waiver of the party's right to oral argument in front of the BER.

7. The location, time, and agenda for the BER meeting, as well as the "Board packet" materials given to the BER members, will be publicly available on the BER's website <http://deq.mt.gov/DEQAdmin/ber> at least one week in advance of the BER meeting. The parties are encouraged to regularly check the Board's website for any additional updates on the meeting. Parties may attend the meeting telephonically if necessary, although they are encouraged to appear in person.

8. The undersigned, acting as Board Attorney, will prepare a memorandum outlining the MAPA process and standards to be used in reviewing the proposed decision for the Board, so the parties need not advise the Board of such their exceptions briefs. Prior examples of these memorandums, which are fairly standardized, are available in prior meeting materials on the Board's website. The memorandum for this case will included with the "Board packet," along with the Proposed Order (and the Order on Motions in Limine, which is an exhibit thereto) and the Exceptions and Response briefs.

9. To facilitate consideration by the BER members, the Proposed Order, Exceptions, and Responses will be provided to the BER serially, as they are filed, to give the BER more time to review them. The complete "Board packet" (including everything serially distributed to the BER) will be available to the

parties (and the public) on the BER website one week prior to the BER meeting.

DATED this 11<sup>th</sup> day of April, 2019.

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# DEQ Exceptions

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**STATE OF MONTANA BOARD OF ENVIRONMENTAL REVIEW**

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

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

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY'S  
EXCEPTIONS TO PROPOSED  
ORDER**

COMES NOW Respondent, the Montana Department of Environmental Quality (“the Department” or “DEQ”), by and through its undersigned counsel and pursuant to § 2-4-621(3), MCA, and the Presiding Hearing Examiner’s April 11, 2019 Order on Exceptions and Notice of Submittal, and respectfully takes exception to and seeks modification of Conclusion of Law ¶ 12 (Burden of Proof) and the associated discussion thereof at Page 65 of the April 11, 2019 Proposed Findings of Fact and Conclusions of Law (the “Proposed Ruling”) in the above matter.

## Summary of Argument

This case involves the appeal of the Montana Environmental Information Center and the Sierra Club (collectively, “Petitioners”) from DEQ’s decision to approve the so-called “AM4 Amendment” to the existing Western Energy permit for the Rosebud Coal Mine, located in Colstrip, Montana. This case addresses whether the proposed coal mining project at issue is designed to prevent “material damage” to the hydrologic balance outside the permit area within the meaning of the Montana Strip and Underground Mining Reclamation Act (“MSUMRA”). § 227(3)(a), MCA.

In Montana, coal mines must be designed to prevent violations of water quality standards, adverse impacts to land uses or beneficial water uses, or impacts to water rights. § 82-4-203(32), MCA; *see also In re Signal Peak Energy (Bull Mountain Mine No. 1)*, BER-2013-07 SM, Findings of Fact, Conclusions of Law and Order, at 56 (Jan. 14, 2016) (herein, *Signal Peak*). While the Proposed Ruling is clearly in the Department’s favor, the Department nevertheless (and in what could be considered an abundance of caution) takes exception to what appears to be some inconsistent articulations of Petitioner’s burden of proof.

The Proposed Order correctly concludes that Petitioners had the burden of presenting the evidence in this case necessary to establish, by a preponderance of the evidence, the facts essential to a determination that the Department's decision

violated the law. Proposed Ruling at 78-79, citing *Mont. Env'tl. Info. Ctr. v. Mont. Dept. of Env'tl. Quality*, 2005 MT 96, ¶¶ 16; 22, Mont. 502 (2005). As noted, the legal issue in this case is whether the proposed coal mining project at issue is designed to prevent “material damage” to the hydrologic balance outside the permit area. § 227(3)(a), MCA. In making this finding, the Department is directed to assess “the probable cumulative impact of all anticipated mining in the area on the hydrologic balance. . .” § 227(3)(a), MCA (emphasis supplied).

The Proposed Ruling departs from the statutory language by stating that Petitioners could have met their burden of proof by making a preponderance of the evidence showing that water quality violations “could result” from the permit decision at issue. Proposed Ruling at 65, citing ARM 17.24.405(6) and *Signal Peak* at ¶¶ 103, 116. Such a standard departs from the plain wording of MSUMRA, which does not require DEQ to find that, under any possible circumstances, a water quality violation “could not” occur if the project is permitted. DEQ is directed to require that the project be designed to prevent material damage, and not to find that the project will unquestionably prevent material damage. § 227(3)(a), MCA. Such a standard also lessens the burden of proof from a preponderance standard (that is, it is more likely than not that material damage will occur) to a standard which is met by a mere showing that material damage “could” occur.

Finally, such a standard exceeds the certitude which can be attained with

respect to projecting potential impacts through reliable science, which, in turn, involves assessing the most probable outcome, and not simply what “could” occur. Hrg. Tr. Vol. 2, 211:6-16. Even Petitioners’ own expert witness agreed that science cannot absolutely prove a negative. Tr. Vol. 4, 61:21 to 62:3. For example, Petitioner’s expert agreed that science cannot prove that Yetis do not exist, but can only show that the existence of Yetis has not been proven. *Id.* at 62:4-7.

The Proposed Ruling’s ultimate conclusion, however, is that Petitioners “did not provide sufficient evidence to show a more likely than not possibility that the AM4 Amendment will result in ‘material damage’” Proposed Ruling, Conclusions of Law, ¶ 18; see also Conclusions of Law ¶¶ 39-40; 42 (internal citations omitted). Such a showing must be made by a preponderance of the evidence, and must address the legal question at issue, that is, whether the project is or is not designed to prevent material damage. § 227(3)(a), MCA.<sup>1</sup>

### Argument

#### *a) The Proper Legal Standard for a Material Damage Determination*

The Board's role in this contested case proceeding is to receive evidence from

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<sup>1</sup> While the Proposed Ruling notes in dicta that the Hearing Examiner was unable to find any case law on point with respect to how the duration of an impact is considered in a material damage assessment (*see id.* at 76, n.5), the Proposed Ruling correctly recognizes that “The duration of an impact below the material damage threshold has no effect on a material damage determination, because material damage is merely a magnitude threshold.” *Id.* at 56, ¶ 219 Hrg. Tr. Vol. 2, at 190:4-12, 234:3-6.

the parties, enter findings of fact based on the preponderance of the evidence presented and then enter conclusions of law based on those findings. *Mont. Env'tl. Info. Ctr. v. Mont. Dept. of Env'tl. Quality*, 2005 MT 96, ¶22; 26 Mont. 502 (2005). As *Signal Peak* explains, the question in an MSUMRA material damage case is whether the proposed operation was designed to prevent material damage to the hydrologic balance outside the permit area. *Id.* at pp. 76-87, ¶¶ 113-136.

Here, the Proposed Ruling's ultimate conclusion addresses the same legal standard

The AM4 CHIA assessed the probable cumulative impact of all anticipated mining in the area on the hydrologic balance and sufficiently determined in writing and on affirmative record evidence that the proposed AM4 Amendment mining operation is designed to prevent material damage to the hydrologic balance outside the permit area. Mont. Code Ann. § 82-2-227(3)(a), Admin. R. Mont. 17.24.405(6)(c); *Signal Peak*, BER-2-13-07-SM at 56.

Proposed Order, Conclusions of Law, ¶ 24. But the Proposed Order elsewhere misarticulates the burden of proof by lowering the bar for Petitioner and effectively re-allocating the burden to the Department and to the Applicant to prove a negative, that is, that water quality violations "could not" occur (regardless of whether the project meets the MSUMRA design standard or not).

While it could be argued that such error in this case is harmless (since

Petitioner could not even meet this lesser-imposed burden<sup>2</sup>), the Board should nevertheless correct this error of law for the purposes of providing a clearer record for appeal and to ensure the correctness of the Board’s own precedent.

This misarticulation of the burden of proof in the Proposed Ruling reads as follows:

The law will be violated if DEQ granted a permit that, based on the information available to it at the time, did not affirmatively demonstrate that there *will not* be “material damage.” In other words, if a permit *could* result in “material damage,” then it cannot be said that it affirmatively *will not*.

Proposed Ruling at 65, citing ARM 17.24.405(6) and *Signal Peak*, BER 2013-07 SM at ¶¶ 103, 116. The Proposed Ruling appears to confuse the requirement of an affirmative<sup>3</sup> demonstration that the subject project is designed to prevent material damage with a guarantee that such damage will not occur, and in so doing effectively reads the word “designed” out of the statute. *See* § 82-4-227(3)(a), MCA.

The Proposed Ruling consequently and impermissibly transforms the

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<sup>2</sup> The Proposed Ruling describes in detail how Petitioners in this case failed to even present evidence sufficient to show that water quality standards “could” be violated. *See* Conclusions of Law ¶¶ 5-11; 18-43. By way of example and not of limitation, Petitioners’ hydrology expert failed to calculate any increases in pollutant concentrations (*see id.* at 80, ¶¶ 8-11; 36, ¶ 125), while Petitioners’ aquatic biology expert did not assess material damage to aquatic life uses (*see id.* at 53, ¶¶ 203-205) and was constrained to agree with DEQ that DEQ’s methods to assess impacts to designated aquatic life uses were appropriate to the task (*see id.* 52, ¶ 199; 88, ¶ 38).

<sup>3</sup> “Affirmative” means asserting a fact is so. *See* <https://www.merriam-webster.com/dictionary/affirmative>. Thus, an affirmative demonstration is one that speaks directly to the issue and shows the basis for the contention.

MSUMRA design standard into a guarantee that material damage will be “prevented” and thus “could not” occur. No such requirement exists in MSUMRA. Requirements which are not present in the text of a statute cannot be inserted absent a legislative amendment. *See Stenstrom v. Child Support Enforcement Div.*, 280 Mont. 321, 327 (1996); MCA § 1-2-101. A court’s role is instead to “simply to ascertain and declare what is in terms or in substance contained” in legislation, and “not to insert what has been omitted or to omit what has been inserted.” *Id.*

By extension, a reviewing court also should not inaccurately paraphrase previous precedent to reach a conclusion which is manifestly at odds with the cited precedent. Nothing in the *Signal Peak* ruling stands for or supports the proposition that “if a permit *could* result in ‘material damage,’ then it cannot be said that it affirmatively *will not*.” Proposed Ruling at 65, citing *Signal Peak* at ¶¶ 103; 116.

*Signal Peak* addressed facts where the Board found that DEQ “failed entirely to assess whether the proposed mining operation will cause violation of water quality standards outside the permit area.” *Signal Peak* at 63, ¶ 86. In responding to DEQ’s incorrect argument that MSUMRA’s design standard should be limited to require “only reasonable and feasible constraints on coal mine operations” which would “minimize” hydrologic impacts both inside and

outside the permit area, the Board in *Signal Peak* noted that the applicable design standard required a showing that the operation has been designed to prevent (and not simply minimize) material damage to the hydrologic balance outside the permit area. *Signal Peak* at 71, ¶¶ 102-103, citing § 82-4-227(3)(a), MCA.

Paragraph 103 of the Board's *Signal Peak* ruling consequently does not stand for, or in any way support, the proposition that a Petitioner need only show that a permit "could" result in material damage to prevail. This section of the *Signal Peak* ruling instead rejects DEQ's arguments that a project need only minimize, but not prevent, material damage. As the Board explained, "prevent" does not mean "minimize." *Signal Peak* at 71, ¶ 103, citing § 82-4-227(3)(a), MCA.

Nor does Paragraph 116 of the *Signal Peak* ruling stand for or support the Proposed Ruling's proposition that a Petitioner need only show that a permit "could" result in material damage to prevail. That Paragraph of *Signal Peak* reads in pertinent part as follows:

The record evidence presented by SPE in the Groundwater Model and the other evidence before DEQ at the time of its decision demonstrated only that it was as likely as not that that degraded water that violates water quality standards would migrate beyond the mine permit boundary within 50 years. The lack of any likelihood or defensible level of confidence that material damage will not result does not constitute an affirmative demonstration of record evidence that the expansion of the Bull Mountain

Mine is designed to prevent material damage to the hydrologic balance outside the permit area. Cf. Mont. Code Ann. § 82-4-227(3)(a); ARM 17.24.314(5); ARM 17.24.405(6)(c).

*Signal Peak* at 78-79, ¶ 122. Thus, the record in *Signal Peak* “showed only that the proposed operation may or may not be designed to prevent material damage to the hydrologic balance outside the permit area within 50 years after mining.” *Id.* at 75, ¶ 116. The record in this case shows the opposite.

In the permitting process<sup>4</sup>, the burden is on the Applicant and DEQ to affirmatively demonstrate with record evidence that the project is designed to prevent material damage. *Id.* at 76, ¶ 116. In that context, “A showing that material damage may or may not occur does not constitute affirmative evidence that material damage will be prevented.” *Id.*; *see also id.* at 79, ¶ 122; 86-87, ¶ 133. Once again, nothing in *Signal Peak* stands for, or in any way supports, the proposition that a Petitioner need only show that a water quality violation “could” occur in order to prevail. *Signal Peak*, which was submitted on questions or pure law and undisputed facts, did not in any way address (or need to address) Petitioner’s burden of proof. *See id.* at 2 and *passim*.

Here, the parties clearly disputed whether the project at issue is “designed to prevent” material damage such as violations of water quality standards or other

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<sup>4</sup> Once a permit decision is appealed as a contested case, however, the burden shifts to the party taking the appeal. *See Proposed Ruling* at 64, citing *MEIC v. DEQ*, 2005 MT 96 at ¶ 16.

impermissible affects to beneficial uses or impacts to water rights. See § 82-4-227(3)(a), MCA. By focusing only on whether a water quality violation “could” occur, the Proposed Ruling eviscerates the word “design” from the statute. Each word and phrase in a statute should be given meaning. *Fulton v. Fulton*, 2004 ML 2087, 11, 2004 Mont. Dist. LEXIS 3373, \*5. The Proposed Ruling’s internally inconsistent articulation of the legal standard is contrary to both the plain language of the statute and Board’s ruling in *Signal Peak* (*see id.* at pp. 76-87, ¶¶ 113-136).

While the Department’s interpretation of the statutes and rules which it administers is entitled to deference (*see Norfolk Holdings v. Dep’t of Revenue*, 249 Mont. 40, 44 (1991); *State Pers. Div. v. Dep’t of Pub. Health & Human Servs., Child Support Div.*, 2002 MT 46, P63, 308 Mont. 365, 379), the Board can readily determine the appropriate legal standard and burden of proof from the plain meaning of MSUMRA, as well as the overall structure of MSUMRA. The Board should simply read § 82-4-227(a)(3) without isolating the word “prevent” and giving meaning to the word “designed” within overall context of the statute and rules. *See State v. Martel* (1995), 273 Mont. 143, 148, 902 P.2d 14, 17.

*b) The Preponderance of the Evidence Standard*

The Proposed Ruling effectively jettisons the applicable preponderance of evidence standard by setting Petitioner’s burden of proof to a mere showing that

material damage “could” occur:

Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated issuing the permit could result in land uses or beneficial uses of water being adversely affected, water quality standards being violated, or water rights being impacted. Mont. Code Ann. §§ 82-4-203(31), 203(32), 222(1)(l), 226(8), 227(3)(a); Admin. R. Mont. 17.24.401-405; Signal Peak, BER-2-13-07-SM at 87.

Proposed Ruling, Conclusions of Law, ¶ 12 (emphasis supplied). A showing that something “could” happen both relaxes the preponderance of evidence standard and turns a the well-settled MSUMRA hydrologic design standard into a mandated guarantee that something basically “could not” occur.

The Department consequently takes exception to the Proposed Ruling’s articulation of the burden of proof given that the issue herein is whether the proposed operation of the mine has been designed to prevent material damage to the hydrologic balance outside the permit area, and not whether adverse effects to land uses or water, water rights impacts or water quality violations “could” occur if DEQ issued the subject permit. *Compare* Mont. Code Ann. § 82-4-227(3)(a).

The Proposed Ruling nevertheless correctly concludes that

DEQ may not approve the AM4 Amendment unless the application affirmatively demonstrates that the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by DEQ and the proposed operation of the

mine has been designed to prevent material damage to the hydrologic balance outside the permit area. Mont. Code Ann. § 82-4-227(3)(a); Admin. R. Mont. 17.24.405(6)(c).

Proposed Ruling, Conclusions of Law, ¶ 6. The ultimate conclusion of the Proposed Ruling, moreover, does not include the word “could” but instead reverts to the applicable design standard

Conservation Groups did not provide sufficient evidence to show a more likely than not possibility that the AM4 Amendment will result in “material damage” as defined in Mont. Code. Ann. §§ 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). Mont. Code Ann. §82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c).

Proposed Ruling, Conclusions of Law, ¶ 18; *see also* Conclusions of Law ¶¶ 39-40; 42.

MSUMRA provides a design standard for the prevention of material damage from coal mining operations, which is in turn assessed based upon the probable hydrologic consequences of the project. By definition, an assessment of probable hydrologic consequences cannot provide an absolute guarantee against the occurrence of material damage. § 82-4-227(3)(a), MCA. MSUMRA defines probable hydrologic consequences as “the projected results . . . that may be reasonably expected to alter, interrupt, or otherwise affect the hydrologic balance.” ARM 17.24.301(93); *see also* ARM 17.24.314(3) (restating the applicable probability standard). As the Department’s hydrologists Dr. Emily

Hinz and Martin Van Oort explained at hearing

Dr. Hinz, what, if any, degree of certainty do you have with respect to your findings in the CHIA regarding surface water impacts?

A. (By Ms. Hinz) So we determined for every impact we analyzed that it was more likely than not that there would be no material damage from the AM4 to the hydrologic balance outside of the permit boundary.

Q. Mr. Van Oort, what, if any, degree of certainty do you have with respect to the findings in the AM4 CHIA regarding groundwater impacts?

A. (By Mr. Van Oort) So the findings in the CHIA are based upon the most probable outcome. That is, the outcome that is more likely than not.

Hrg. Tr. Vol. 2, 211:6-16.

MSUMRA further anticipates and recognizes that unanticipated material damage may occur, despite all design measures to the contrary. As noted, an adverse impact to a water supply constitutes material damage. *See* § 82-4-203(32), MCA. Yet ARM 17.24.901 requires that a domestic water supply affected by underground mining be replaced, and ARM 17 24.301(107) defines “replace adversely affected domestic water supply” (in the context of underground mining) to require temporary and permanent replacement with water “equivalent to premining quantity and quality.”

Section 82-4-253(2)(d), MCA, requires the operator to replace water

supplies “for domestic, agricultural, industrial, or other legitimate use” immediately with the “needed water” on a temporary basis and then, within a reasonable time, to replace the impacted water supply with a water supply water “in like quality, quantity, and duration” within a reasonable time. Coal mining projects must be bonded upon a condition for the faithful performance of the requirements set forth in MSUMRA and the Board’s rules, including the requirement to prevent material damage (§ 82-4-223(1), MCA). Bond release is similarly and conditionally premised upon a retrospective demonstration that material damage “has been prevented.” ARM 17.24.1116(6)(d).

### Relief Requested

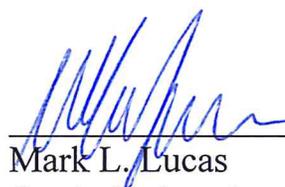
Based on all the foregoing, the Department respectfully requests that the Board include the following deletions and insertions to the Proposed Ruling’s Conclusion of Law ¶ 12 (with deletions in strikethrough and additions in underlined format):

Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that ~~indicated issuing the permit could result that the project at issue is not designed to prevent~~ in land uses or beneficial uses of water from being adversely affected, water quality standards from being violated, or water rights from being impacted. Mont. Code Ann. §§ 82-4-203(31), 203(32), 222(1)(l), 226(8), 227(3)(a); Admin. R. Mont. 17.24.401-

405; *Signal Peak*, BER-2-13-07-SM at 87.

The Department further requests that the discussion on the Burden of Proof set forth on Page 65 of the Proposed Ruling be revised to explain the applicable burden of proof consistent with the discussion set forth herein and § 82-4-227(3)(a), MCA. Finally, the Department further and/or in the alternative respectfully requests that the Board provide to the Department such other and further relief as may seem just and proper.

Dated: May 10, 2019



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### **CERTIFICATE OF SERVICE**

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DATED: 5/10/19

/s/ Mark Lucas

# Western Exceptions

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OF: )  
APPEAL AMENDMENT AM4 )  
WESTERN ENERGY COMPANY, )  
ROSEBUD STRIP MINE AREA B ) CAUSE NO. BER 2016-03 SM  
PERMIT NO. C1984003B )  
)

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**INTERVENOR-RESPONDENTS' EXCEPTIONS TO PROPOSED  
FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

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## INTRODUCTION

The Hearing Examiner’s Proposed Findings of Fact and Conclusions of Law (“Proposed Findings and Conclusions”) – based upon a four-day hearing and extensive pre- and post-trial briefing – concludes that Petitioners Montana Environmental Information Center and Sierra Club (collectively “Petitioners” or “MEIC”), did not prove their claims that the Department of Environmental Quality’s (“Department”) approval of an amendment to the permit for Western Energy Company’s Rosebud Mine ( “AM4 Permit”) violated the law. Intervenors Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (collectively “Intervenors”) concur with the Hearing Examiner’s ultimate conclusion. To the extent, however, portions of the Proposed Findings and Conclusions could be interpreted in ways inconsistent with governing law, and for the sole purpose of clarifying those discussions, Intervenors lodge exceptions to elements of the Proposed Findings and Conclusions regarding (1) burden of proof; (2) scope of review; and (3) material damage. Intervenors respectfully request the Board of Environmental Review (the “Board”) to clarify these Conclusions of Law in the final order.

## ARGUMENT

### 1. **Intervenors Lodge an Exception to Potential Ambiguities in the Burden of Proof Discussion in the Proposed Findings and Conclusions.**

Intervenors concur with much of the Proposed Findings and Conclusions summary of the parties' shifting burdens throughout the application and review process. In particular, Intervenors concur with the most fundamental statement of Petitioners' burden of proof in this proceeding: "MEIC has the burden of proving by a preponderance of the evidence that DEQ's decision to issue the permit violated the law." *See* Proposed Findings and Conclusions at ¶ 5; *see also* Proposed Findings and Conclusions at p. 64 ("Conservation Groups have the burden of proving by a preponderance of the evidence that DEQ's decision to issue the permit violated the law."). As the Hearing Examiner went on to observe, however, "What that means within the legal framework of this particular case, however, is somewhat entangled." *Id.* Ultimately, the Proposed Findings and Conclusions explain "what that means" in denying Petitioners' challenge: "Conservation Groups did not provide sufficient evidence to show a *more likely than not possibility* that the AM4 Amendment *will* result in 'material damage[.]'" *See* Proposed Findings and Conclusions at ¶ 18 (emphasis added). Intervenors do

not take exception with this aspect of the Hearing Examiner’s conclusion on Petitioners’ burden of proof in this proceeding.<sup>1</sup>

Nevertheless, to the extent the Proposed Findings and Conclusions and the Hearing Examiner’s “additional explanation” (Discussion<sup>2</sup> at 63-66) regarding Petitioners’ burden of proof is ambiguous or subject to misinterpretation, Intervenors seek clarification. More specifically, Intervenors anticipate that, although the Proposed Findings and Conclusions ultimately found that the Petitioners had not met their burden to demonstrate that the Department had violated the law, certain portions of the Proposed Findings and Conclusions and Discussion nevertheless could be interpreted (or construed) to imply that Petitioners could have carried their burden by demonstrating a “slight chance” that the Department erred, rather than making the showing by a preponderance of the evidence. Such an interpretation would improperly require the Department to achieve absolute certainty as to all possible impacts prior to issuing a permit.

Evidence of a mere “possibility” of material damage, however, is not a

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<sup>1</sup> Intervenors’ concurrence with the language of conclusion ¶ 18 is based upon the presumption, in the context of the applicable law, this case, and the remainder of the Proposed Findings and Conclusions, that the phrase “more-likely-than-not” modifies the word “possibility.” In addition, Intervenors presume that the conclusion has taken into consideration the “is not designed” language in referencing the “AM4 Amendment.” In other words, Intervenors interpret conclusion ¶ 18 to mean that MEIC must show that it is more likely than not that the AM4 Amendment was not designed to prevent material damage. *See* discussion below.

<sup>2</sup> “Discussion” refers to the Hearing Examiner’s “additional explanation” concerning (1) Burden of Proof; (2) TDS and Material Damage. Proposed Findings and Conclusions at pp. 62-77.

sufficient basis to overturn a Department permitting decision. Nor is the Department obligated to base its permitting decisions on absolute certainty. Intervenors thus take exception to and seek clarification or modification of the following statements regarding Petitioners' burden of proof:

Conservation Groups need not prove a certainty – a more likely than not *possibility* will suffice. [Discussion at p. 65]

[...]

Conservation Groups did not provide sufficient evidence to show a more likely than not *possibility* that the AM4 Amendment will result in “material damage” as defined in Mont. Code Ann. 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). [Discussion at p. 66]

[...]

However, Conservation Groups failed to provide sufficient evidence even to make this hypothesis into a more likely than not *possibility*. [Discussion at p. 71]

[...]

Ultimately, the burden of proof in this action falls to Conservation Groups to present a more-likely-than-not *possibility* that a water quality standard could be violated by the permitted action. [Discussion at p. 76]

[...]

Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated issuing the permit *could* result in land uses or beneficial uses of water being adversely affect, water quality standards being violated, or water rights being impacted. [Proposed Findings and Conclusions at ¶ 12]

[...]

Conservation Groups did not provide sufficient evidence to show a more likely than not *possibility* that the AM4 Amendment will result in “material damage” as defined in Mont. Code. Ann. 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). [Proposed Findings and Conclusions at ¶ 18]

Proposed Findings and Conclusions at pp. 65-66, 71, 76, ¶¶ 12 and 18 (emphasis added).<sup>3</sup> Intervenors similarly lodge exceptions to any other portions of the Proposed Findings and Conclusions that may be thus interpreted.

**a. Petitioners’ Burden of Proof is Well-Established.**

The relevant statutory and regulatory provisions, as well as the case law, make clear that Petitioners bear the burden of proof in challenging the Department’s permitting decision: “The burden of proof at a [contested case] hearing is on the party seeking to reverse the decision of the board.” Admin. R. Mont. 17.24.423(7); *see also* Proposed Findings and Conclusions ¶ 5; Proposed Findings and Conclusions at p. 64; *MEIC v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, ¶14, ¶16 (citing Mont. Code Ann. §§ 26-1-401 and 402).

The law is also clear that Petitioners are subject to a “preponderance of the evidence standard.” Mont. Code Ann. § 26-1-403(1); *MEIC*, 2005 MT 96, ¶ 22;

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<sup>3</sup> Some of, and perhaps all of these statements can be read to align with Intervenors’ discussion below. To the extent, however, that they are ambiguous and subject to misinterpretation, Intervenors take exception to these statements and seeks clarification from the Board. For example, the order might be clarified by substituting the word “probability” for the word “possibility” in the cited passages. This substitution would conform the Discussion with the text of the proposed findings and conclusions.

Mont. Code Ann. § 82-4-227(3)(a). A “preponderance of the evidence” is “such evidence as, when weighted with that opposed to it, has more convincing force and the greater probability of truth.” *State v. Sebastian*, 2013 MT 347, ¶ 16. More specifically, to satisfy that burden in this case, Petitioners needed to prove, by a preponderance of the evidence, that the AM4 Permit was not designed to prevent material damage to the hydrologic balance outside the permit area. *See* Mont. Code Ann. § 26-1-403(1); *MEIC*, 2005 MT 96, ¶22; Mont. Code Ann. §82-4-227(3)(a); Order on Motions in Limine at p. 3 (“All parties agree that at hearing on this issue MEIC has the burden to prove by preponderance of the evidence that the AM4 permit, and the corresponding CHIA, were not “designed to prevent material damage.”).<sup>4</sup> The Proposed Findings and Conclusions confirmed this standard in rejecting Petitioners’ claims: “Conservation Groups did not provide sufficient evidence to show a more likely than not possibility that the AM4 Amendment will result in ‘material damage[.]’” *See* Proposed Findings and Conclusions at ¶ 18 and FN 1 above.

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<sup>4</sup> Applying similar language in review of a federal Surface Mining Control and Reclamation Act (“SMCRA”) permit, the Interior Board of Land Appeals (“IBLA”) rejected such a notion. *See NRDC v. OSMRE*, 89 IBLA 1, 25, 37 (1985). The IBLA held that the party challenging the permit had the “burden of showing by a preponderance of the evidence that OSMRE erred in approving” the permit. *Id.* at 25. Applying that burden to the question of whether OSMRE properly approved the extraction methods to be used, IBLA concluded that NRDC’s “bare assertions” could not carry the burden when weighed against the expert testimony of witnesses from the State and permittee.

**b. Intervenor's Agree that Petitioners Are Not Subject to an "Absolute Certainty" Standard.**

The Hearing Examiner's Burden of Proof Discussion centers on the fact that although the Petitioners bear the burden of proof in their challenge of the Department's decision, that burden does not require them to prove a "certainty."<sup>5</sup> Proposed Findings and Conclusions at pp. 64-65. However, Intervenor's have never intended to assert that Petitioners must "prove a certainty" of material damage to prevail on their claims. Proposed Findings and Conclusions at p. 65. Rather, Intervenor's maintain that Petitioners must demonstrate that it is more likely than not that the Department should not have issued the permit:

Petitioners may explain and support their objections to the Department's decision, using expert testimony as necessary, to meet their burden of showing, *by a preponderance of the evidence*, that the *Department should not have issued the AM4 Permit* over their objections. Significantly, Petitioners do not meet their burden by simply arguing that the record evidence is insufficient; rather, *Petitioners must present evidence necessary to establish the facts essential* to a determination that the Department's decision violated the law.

See Intervenor's Proposed FOF/COL at pp. 7-10 (emphasis added).

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<sup>5</sup> See, e.g., Intervenor's Response to Petitioners' Proposed FOF/COL at p. 7 and 10 ("Petitioners must prove by a *preponderance of the evidence* that the AM4 Permit *was not designed to prevent material damage* to the hydrologic balance outside the permit area.") (emphasis added); (Petitioners must prove "*by a preponderance of the evidence* in the record that 'the hydrologic consequences and cumulative hydrologic impacts *will result in material damage* to the hydrologic balance outside the permit area.'") (emphasis added); ("contested case concerns "whether Petitioners can demonstrate, by a *preponderance of the evidence*, that the administrative *record does not support* the Department's determination that the AM4 Permit was '*designed to prevent material damage.*'") (emphasis added).

Intervenors, however, evidently created the impression that they sought to apply a “certainty” burden of proof standard to Petitioners in responding to Petitioners’ proposed findings of fact and conclusions of law. More specifically, in attempting to underscore that the general burden of proving claims rested on Petitioners, Intervenors rephrased Petitioners’ description of their claim. *Compare* Intervenors’ Response to Petitioners’ FOF/COL at p. 9 (inverting Petitioners’ description of their alleged proof of Claim 1 from “*Evidence did not affirmatively demonstrate that cumulative hydrologic impacts will not result in violation of water quality standards*” to “*Petitioners proved by a preponderance of the evidence that cumulative hydrologic impacts will result in violation of water quality standards.*”) (emphasis added). Consequently, the Burden of Proof Discussion in the Hearing Examiner’s Proposed Findings and Conclusions focuses on rebutting the argument that Petitioners must prove a “certainty.” *See, e.g.*, Proposed Findings and Conclusions at pp. 64-65 (“Intervenors argue that in this contested case proceeding, Conservation Groups have a burden to prove ‘by a preponderance of the evidence that cumulative hydrologic impacts will result in violation of water quality standards.’ This is not correct, but in a very subtle way: ***Conservation Groups need not prove a certainty*** – a more likely than not possibility will suffice.”) (emphasis added). Intervenors agree Petitioners need not prove material damage by a certainty to prevail on their claims in this proceeding.

**c. Petitioners Also Are Not Subject to a “Slight Chance” Burden of Proof.**

Although Petitioners need not prove a certainty, neither are they able to meet their burden by showing a mere possibility, no matter how slim, of material damage. Rather, as the Montana Administrative Procedure Act (“MAPA”), the Montana Strip and Underground Mine Reclamation Act (“MSUMRA”), and case law make clear, the applicable burden of proof standard – demonstration of the Department’s violation of the law by a preponderance of the evidence – falls between those extremes. In refuting the notion that Petitioners must establish certainty, however, the Burden of Proof Discussion becomes imprecise in referencing what Petitioners actually are required to prove. Proposed Findings and Conclusions at pp. 64-65 (“Conservation Groups need not prove a certainty – *a more likely than not possibility will suffice.*”) (emphasis added).

Consequently, the language in that rebuttal arguably suggests that Petitioners need only establish the remotest of possibilities that a disputed permit could result in material damage. For example, the Burden of Proof Discussion states that “if a permit *could* result in ‘material damage,’ then it cannot be said that it affirmatively *will not.*” Proposed Findings and Conclusions at p. 65 (emphasis in original). This could be misinterpreted to suggest that if there is even a minuscule chance that some concatenation of events could lead to a permit causing “material damage,”

then the Department acts illegally if it approves the permit.

Similarly, in some instances, the Burden of Proof Discussion appears to separate the “preponderance of the evidence” standard from the object of proof – material damage, as if they are to be evaluated in isolation. In other words, these statements could be misread to mean that if the weight of the evidence shows the existence of an extremely slim possibility of material damage, Petitioners will have met their burden. This impression is complicated by the potential ambiguity of the word “possibility,” which is used in this context. *See, e.g.*, Discussion at 65 (“a more likely than not *possibility* will suffice. [...] Therefore, Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it, at the time of issuing the permit, that indicated issuing the permit *could* result in ‘material damage.’”) (emphasis in original).

These potential misinterpretations are manifestly incorrect: Petitioners cannot show that the Department violated the law merely by showing a slight possibility of material damage. In numerous instances, the Proposed Findings and Conclusions confirm that such a minimal burden of proof does not apply. Indeed, as the Burden of Proof Discussion summed up:

As shown in the Findings of Fact (above) and Conclusions of Law (below), however, Conservation Groups did not meet even this *lesser burden* (than the one urged by Intervenors). Conservation Groups did not provide sufficient evidence to

show a *more likely than not possibility that the AM4 Amendment will result* in “material damage[.]”

Proposed Findings and Conclusions at 65-66 (emphasis added); *see also* ¶ 5 (“‘facts essential’ must be proved by a preponderance of the evidence”); ¶18 (“Conservation Groups did not provide sufficient evidence to show a *more likely than not possibility that the AM4 Amendment will result in “material damage”*) (emphasis added); ¶ 39 (“Conservation Groups failed to present evidence necessary to establish the facts essential to a determination that the AM4 Permit *will* cause material damage to the hydrologic balance outside the permit boundary by increasing TDS levels in EFAC.”) (emphasis added); ¶ 40 (same language applied to nitrogen levels); ¶ 42 (same language applied to aquatic life use of EFAC).

**d. Reducing Petitioners’ Burden to a “Slight Chance” Might be Read to Raise Impermissibly the Department’s Burden to a “Certainty.”**

Granting MEIC a “slight chance” burden of proof would necessarily require imposing on the Department the same implausible “certainty” standard that the Hearing Examiner concluded could not apply to Petitioners. MEIC carries the burden to prove (by a preponderance of the evidence) that the Department violated the law. To establish that the Department violated the law, Petitioners must show, by a preponderance of the evidence, that the Department did not properly confirm,

based on the probable cumulative impacts, that the proposed mining operation was designed to prevent material damage. If Petitioners could satisfy that burden by showing any mere possibility of “material damage,” no matter how remote, then the Department, in order to act legally and withstand a lawsuit, would necessarily have to prove the converse. In other words, the Department would have to prove to a *certainty* that material damage could not occur under any circumstances, no matter how remote. Neither of these highly skewed burdens is consistent with the standards set forth in the statute or the regulations.

The proposed findings, in other places, recognize that the Department is not subject to a standard of absolute certainty. In addressing the ultimate question of “material damage,” the Proposed Findings and Conclusions incorporate the “preponderance” standard: “DEQ determined for every impact analyzed in connection with the AM4 Amendment that it was *more likely than not that there would be no material damage* from AM4 to the hydrologic balance outside of the permit boundary.” Proposed Findings and Conclusions at ¶ 212 (emphasis added). The proposed conclusions also make clear that the Department is not subject to a certainty standard. Proposed conclusion ¶ 6 refers to the Department’s obligation with respect to permit issuance:

DEQ may not approve the AM4 Amendment unless the application affirmatively demonstrates that the assessment of the *probable cumulative impact* of all anticipated mining in the

area on the hydrologic balance has been made by DEQ and the proposed operation of the mine *has been designed to prevent material damage* to the hydrologic balance outside the permit area. Mont. Code Ann. §82-4-227(3)(a); Admin. R. Mont. 17.24.405(6)(c).

Proposed Findings and Conclusions at ¶ 6 (emphasis added). Thus, having assessed the “probable cumulative impact” of mining (*i.e.*, the cumulative impact that is more likely than not to occur), the Department must confirm, that the proposed operation “has been designed to prevent material damage.” *See also* Proposed Findings and Conclusions at ¶ 4.

The Hearing Examiner’s proposed conclusion ¶ 24 affirms this description of the law, holding that “the AM4 CHIA assessed the *probable cumulative impact* of all anticipated mining in the area on the hydrologic balance and *sufficiently determined* in writing and *on affirmative record evidence* that the proposed AM4 Amendment mining operation *is designed to prevent material damage* to the hydrologic balance outside the permit area.” Proposed Findings and Conclusions at ¶ 24 (emphasis added).

**e. The “Designed to Prevent” Language Confirms that the Department Need Not Prove a Certainty.**

The fact that the Department need only show that an operation “has been designed to prevent” material damage outside the permit area provides another important gloss on both the Department’s and Petitioners’ respective burdens of

proof. *See* Mont. Code Ann. § 82-4-227(3)(a). The Proposed Findings and Conclusions incorporate the “as designed” language, and the Burden of Proof Discussion quotes the language. Proposed Findings and Conclusions at ¶¶ 4, 8, 148, 6 and 24; n. 3; Discussion at pp. 63-66, 70-71; 77. Nothing in the Proposed Findings and Conclusions, however, discusses its import. Intervenors take exception to the Burden of Proof Discussion to the extent that it could be interpreted to read the qualifying phrase “designed to prevent” out of the applicable burdens on the Department and on MEIC.

Requiring that an operation be “designed to prevent” material damage is not the same as requiring it “prevent material damage.” The difference is that the first is a planning standard – it evaluates the applicant’s plans; the second is a performance standard that would require the Department to guarantee future results. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1218-19 (9th Cir. 2015) (distinguishing between a planning standard which requires an operator to provide certain information, from a requirement that an operator provide an estimated recovery rate, *i.e.*, a performance standard). Because MSUMRA imposes a planning standard, it freezes the inquiry into the Department’s compliance at the moment of the permit’s issuance and focuses the inquiry on the elements of the permit: the Department is charged with evaluating the impacts of the operation *as designed* and is not obligated to ensure that any possible, far-

fetches contingency is addressed in the permit. Including that phrase also makes clear that the Department's review is not required to serve as an absolute guarantee: in other words, the Department is not subject to an "absolute certainty" standard.

By omitting the "designed to prevent" phrase from its analysis, the Burden of Proof Discussion increases the likelihood that both the Department's obligations, as well as the Petitioners' obligations, will be misconstrued. Intervenor thus take exception to the characterizations of the Department's burden of proof in the Burden of Proof Discussion that do not include recognition of the "as designed" qualifying language.

**2. The Proposed Findings and Conclusions Mischaracterize the Scope of Review of a Contested Case under MSUMRA.**

Intervenor objects to the Hearing Examiner's conclusions regarding the scope of review and admissible evidence in a contested case. Proposed Findings and Conclusions at ¶¶ 13-14. Bound by the Board's decision in *In re Bull Mountains*, No. BER 2013-07 SM (Jan. 14, 2016), the Hearing Examiner proposes that the relevant analysis be restricted to "that contained within the four corners of the Written Findings and CHIA" and the facts be limited to "those concluded by the agency in the permitting process before the agency makes its permitting decision." Proposed Findings and Conclusions at ¶¶ 13-14. This formulation

misstates the scope of review in a contested case proceeding because binding precedent (*MEIC. v. Mont. Dep't of Env'tl. Quality*, 326 Mont 502) establishes a much broader scope of review for administrative contested cases under MAPA and MSUMRA, and, in any case, the Board's conclusions in *Bull Mountain* (when read contextually) do not stand for the proposition that evidence in a contested case is strictly limited to the facts before Department prior to the permitting decision.

*First*, Intervenors respectfully submit that the Board should take this opportunity to revisit its analysis in *Bull Mountain* and clarify the scope of review mandated by MAPA for contested cases involving challenges to permits issued under MSUMRA. As demonstrated by the repeated efforts by Petitioners in this case, *Bull Mountain* is susceptible to an interpretation that the substantive provisions of MSUMRA allegedly conflict with and displace the procedural requirements of MAPA. *See, e.g.*, Petitioners' Proposed FOF/COL at ¶ 1 (relying on *Bull Mountain* for the assertion that the Board "may, in its discretion, rely entirely on the record before it . . .").

However, when presented with the same choice – between the substantive approval standards for an environmental permit and the procedural requirements of the contested case provisions – the Montana Supreme Court found no such conflict. In *MEIC* the petitioners challenged an air quality permit. The statutory and regulatory standards imposed on the applicant and Department for air permits

are similar to those imposed by MSUMRA. Compare *MEIC*, ¶ 36 (“The Department is precluded from issuing an air quality permit unless the applicant affirmatively demonstrates to it that the proposed project will not cause or contribute to an adverse impact on visibility in Class I areas. See Rules 17.8.1106(1) and 17.8.1109(2), ARM.”) with Mont. Admin. R. § 17.24.405(6) (“The department may not approve an application . . . unless the application affirmatively demonstrates and the department’s written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department that: . . . (c) the hydrological consequences and cumulative impacts will not result in material damage to the hydrologic balance outside the permit area.”). Notwithstanding the Department’s obligation to ensure that the proposed permit would meet substantive environmental standards prior to issuing the permit, the Supreme Court held that the Board’s role in a contested case proceeding is to “receive evidence from the parties.” *MEIC*, ¶ 22. Thus, the substantive environmental permit standards do not limit the Department’s (or the permit applicant’s) statutory right under MAPA to present evidence in a contested case hearing.<sup>6</sup>

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<sup>6</sup> The Supreme Court’s remand instruction in *MEIC* does not suggest that the Board should forego its critical function of receiving evidence from the parties in other cases. Rather, after concluding that the Board had applied an incorrect standard of review when developing its findings of fact and conclusions of law following the first contested case hearing in that matter, the Supreme Court remanded the case to the Board with instructions to apply the correct standard

Indeed, in this case, the Board has rejected the reading advanced by MEIC that this case should be confined to the terms of the CHIA based upon the *Bull Mountain* decision. Cognizant that, unlike the parties in *Bull Mountain*, the parties here have not stipulated that no disputed issues of fact exist or that all relevant facts are those compiled in the administrative record (*see Bull Mountain* Final Order at ¶ 64), the Board explicitly rejected MEIC’s argument. *Western Energy*, Transcript (Dec. 9, 2016) at pp. 4-6, 9-11. In the hearing, reacting to MEIC yet again advancing this argument, Board Member Tweeten explained that, “making a decision based on what’s in front of us I think would be reversible error given the substantial number of points that are contested . . . .” *Id.* at p. 5. Consistent with Member Tweeten’s observation, the Board should make clear that the *Bull Mountain* decision was never intended to preclude parties from presenting evidence in a contested case where there is no stipulation as to the material facts. Mr. Tweeten’s observation conforms to the Montana Supreme Court’s understanding that, in a contested case of this sort, “all parties to such a proceeding

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of review. *MEIC*, ¶ 26. The Court instructed that, in completing the task on remand, “the Board may, in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate.” *Id.* In the context of the Supreme Court’s decision, in which the Court emphasized the applicability of all of the MAPA, including the fact-finding role, it is clear that the Board’s discretion to “rely entirely on the record” was specific to the remand proceedings where the Board had *already* conducted a contested case hearing, and not applicable to other cases. Moreover, the reference to the “record” in that passage properly refers to the record developed by the Board in the original contested case, not the record developed by the Department in the challenged administrative decision.

must be afforded the opportunity to respond and present evidence and argument on the issues raised.” *MEIC*, ¶ 13 (citing Mont. Code Ann. § 2-4-612(1)) (emphasis added).

Language in *Bull Mountain* may be read to suggest that the Board may depart from the MAPA directives in a fashion entirely at odds with *MEIC*. See *Bull Mountain* at ¶ 60 (“The Board may, in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate.”). The Supreme Court instructed in *MEIC* that *all* elements of MAPA Part 6 apply in a contested case hearing in the absence of specific statutory instruction to the contrary. *MEIC*, ¶ 22. Intervenors urge the Board to take this opportunity to clarify that the holding on the merits of *MEIC*, rather than the case-specific remand instruction, governs.

*Second*, even if the *Bull Mountain* decision is read to restrict the Board’s review to the CHIA and other record documents, *Bull Mountain* includes an important caveat:

This is not to say that DEQ is limited in its permitting defense to presenting the administrative record to the Board and saying no more. DEQ’s counsel may surely present argument to explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards. What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA. See . . . [ARM] 17.24.405(6)(c) (stating that the permitting decision

must be based on findings “on the basis of information set forth in the application or information otherwise available that is compiled by the department”).

*Bull Mountain* at ¶ 70; see also *Pac. Shores Subdivision Cal. Water Distr. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 6, (D.D.C. 2006) (additional evidence is permitted “when simply reviewing the administrative record is not enough to resolve the case”). Where, as in the instant case, the permit challengers seek to demonstrate error in the Department’s decision by presenting expert testimony on issues far more specific than they raised in their public comments, the Department and permittee are properly entitled to present responsive evidence to address the highly specific theories explicated for the first time in the contested case. An overly narrow reading of *Bull Mountain* runs the risk of creating an asymmetrical contested case in which permit challengers may withhold their concerns during the public comment period and then argue that the Department and permittee may not respond to newly raised concerns in the contested case. Intervenors urge the Board to clarify the scope of review to ensure that the contested case does not devolve into a game of “gotcha” rather than fulfilling its intended function as a forum to resolve good faith concerns with the Department’s permitting decision.

### **3. The Statutory Definition of “Material Damage” Limits the Department’s Analysis to Concentration as Opposed to Duration.**

The Hearing Examiner raises a question of whether “an increase in the duration of time [of an impact] might be evaluated with respect to a material damage assessment under MSURMA.” Proposed Findings and Conclusions at p. 76, n.5. The Hearing Examiner concludes that she has “simply found no law instructive on this point.” *Id.* Intervenors respectfully disagree with the Hearing Examiner’s conclusion.

Binding statutory authority on point defines “material damage” and does not allow for an impact that does not meet the statutory definition of “material damage” to thereafter transform into “material damage” simply because time elapses. *See* Mont. Code Ann. § 82-4-302(31) (statutory definition of “material damage”); Admin. R. Mont. 17.24.301(68) (defining “material damage” by quoting the statutory definition). MSUMRA defines “material damage” as “degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent” that the impact meets one of three thresholds: (1) land uses or beneficial uses of water are adversely affected; (2) water quality standards are violated; and/or (3) water rights are impacted. Mont. Code Ann. § 82-4-302(31). An impact rising to one or more of these thresholds is material damage. An impact that does not cross any of these

thresholds is not material damage. The duration of an impact is irrelevant to the determination of whether the impact meets one of these three thresholds. A sub-material damage impact is not rendered material damage simply by the passage of time.

*Bull Mountain* does not provide otherwise. There, the Board was concerned with whether the Department had failed to identify material damage by arbitrarily limiting the window of its analysis to 50 years in the future. *Bull Mountain* at ¶¶ 126-29. The Board remanded the matter so that the Department could confirm in the first instance that the project, as designed, would not cause material damage at any point in the future. *Id.* at ¶ 136. This is not the same as allowing circumstances that do not constitute material damage to be re-labeled after some time limit has passed. *Bull Mountain* cannot be read to establish a new, extra-statutory form of material damage based upon the longevity of an impact.

Indeed, Montana law prohibits adjudicators from revising statutory terms. The role of a judge when construing a statutory definition is to “to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *In re RLS*, 293 MT 288 (quoting Mont. Code Ann. § 1-2-101); *Saari v. Winter Sports, Inc.*, 314 MT 212, ¶¶ 22-24 (Mont. 2003) (overruling a prior decision that “ignored our basic rules of statutory interpretation and inserted language into the statute which is not there”); *cf. State v.*

*Tadewaldt*, 277 MT 261 (repudiating a decision that indicated a test other than the “statutory definition” should be used). MSUMRA’s definition of “material damage” does not include a duration analysis, and it would be clear error to include one.

### **CONCLUSION**

For the foregoing reasons, Intervenors respectfully request that the Board adopt as amended the Hearing Examiner’s Proposed Findings of Fact and Conclusions of Law.

DATED: May 10, 2019.

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# MEIC Exceptions and Exhibits

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Environmental Review

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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' Objections to Proposed  
Findings of Fact and Conclusions of  
Law**

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## EXHIBITS

- Exhibit 1            *In re Bull Mountains*, No. BER 2013-07 SM (Mont. Bd. of Env'tl. Rev. Jan. 14, 2016)
- Exhibit 2            S. Rep. No. 95-128, at 80 (1977)
- Exhibit 3            *W. Watersheds Project v. U.S. Dep't of the Interior*, No. 1:15-cv-00047-REB, 2016 WL 5745094 (D. Idaho Sept. 30, 2016)
- Exhibit 4            *Save Our Cumberland Mountains v. Office of Surface Mining*, NX-97-3-PR (Dep't of Interior July 30, 1998)
- Exhibit 5            *M.L. Johnson Family Props. v. Office of Surface Mining*, NX-2015-05-R (Dep't of Interior Oct. 30, 2015)
- Exhibit 6            *Park Cnty. Env'tl. Council v. DEQ*, No. DV-17-126 (Mont. 6th Jud. Dist. Apr. 12, 2019)

## ABBREVIATIONS AND SHORT FORMS

AM4	AM4 Amendment to the Area B Permit for the Rosebud Strip Mine
BER	Montana Board of Environmental Review
CHIA	Cumulative hydrologic impact assessment
Conservation Groups	Montana Environmental Information Center and Sierra Club
CWA	Clean Water Act
DEQ	Montana Department of Environmental Quality
DNRC	Montana Department of Natural Resources and Conservation
EFAC	East Fork Armells Creek
MAPA	Montana Administrative Procedure Act
MEIC	Montana Environmental Information Center
MSUMRA	Montana Strip and Underground Mine Reclamation Act
OSM	U.S. Office of Surface Mining
Findings	Proposed Findings of Fact and Conclusions of Law
SMCRA	Surface Mining Control and Reclamation Act
TDS	Total dissolved solids, a measure of salinity pollution
TMDL	Total maximum daily load, a plan to remedy impaired waters

WEC

Western Energy Company

## INTRODUCTION

In this case, Petitioners Montana Environmental Information Center (MEIC) and the Sierra Club (collectively, “Conservation Groups”) challenged the Montana Department of Environmental Quality’s (DEQ) approval of an expansion (the AM4 Amendment of the Area B Permit, or “AM4”) of the Rosebud Strip Mine, in Colstrip, Montana.

The challenge centers on East Fork Armells Creek (EFAC), which is impaired and not meeting water quality standards for aquatic life due to, among other things, excessive salinity pollution. The question is whether DEQ can allow expanded strip-mining that will cause still more salinity pollution into the stream without first preparing and implementing a plan to remedy the stream’s impairment. By law, if the cumulative impacts of mining may result in violations of water quality standards, additional mining may not be permitted.

Following a hearing and post-hearing briefing, the Hearing Examiner issued proposed Findings of Fact and Conclusions of Law (Findings) recommending a ruling against the Conservation Groups. The proposed Findings are significantly flawed as to multiple questions of law.

First, the proposed Findings improperly reversed the burden of proof, which by legislative design rests with DEQ and the coal company (here, Western Energy

Company or “WECO”). Thus, rather than employ the precautionary standard mandated by the statute under which a polluter must affirmatively demonstrate that environmental harm *will not result*, the proposed Findings required the Conservation Groups to show that harm *will result*, turning the statutory framework on its head.

Second, the proposed Findings erroneously and illogically determined that the addition of increased amounts of salt to a stream that is already impaired and not meeting water quality standards due to excessive salt will not result in violation of water quality standards.

Third, the proposed Findings erroneously determined that the mere presence of aquatic life in EFAC was sufficient to demonstrate that water quality standards for growth and propagation of aquatic life were, in fact, met. The proposed Findings’ approval of DEQ’s is-anything-alive test for water quality standards would render Montana’s water quality standards—which is one standard by which mining operations are assessed—meaningless.

Fourth, the proposed Findings erroneously applied extra-statutory requirements of issue exhaustion to dismiss multiple claims of the Conservation Groups, even though the relevant statutory text and all persuasive authority demonstrate that issue exhaustion is not required for an administrative appeal

under the Montana Strip and Underground Mine Reclamation Act (MSUMRA).

The authority on which the proposed Findings relied to require issue exhaustion—the Montana Board of Environmental Review (BER) recent decision *In re Bull Mountains*, No. BER 2013-07 SM (Mont. Bd. of Env'tl. Rev. Jan. 14, 2016) (attached as Exhibit 1)—contained no discussion of issue exhaustion.

Fifth, the proposed Findings erroneously relied on improper extra-record evidence and post hoc arguments from DEQ and WECO, in direct violation of BER's recent decision *In re Bull Mountains*.

Because of these significant flaws, BER should reject the proposed Findings' erroneous conclusions of law and recommendations, and instead conclude that, as a matter of law, DEQ violated MSUMRA by allowing expanded strip-mining that will cause additional salinity pollution to a stream that is already impaired and not meeting water quality standards due to excessive salinity. BER should further conclude that DEQ applied a legally erroneous standard (the is-anything-alive standard) for assessing water quality standards for growth and propagation of aquatic life.

Finally, BER should conclude that the proposed Findings erred as a matter of law with respect to the correct burden of proof, administrative issue exhaustion, and extra-record evidence and post hoc arguments.

## DISCUSSION

### I. The Montana Administrative Procedure Act.

Under the Montana Administrative Procedure Act (MAPA), parties to a contested case are entitled to file briefs and exceptions and give oral argument regarding a hearing examiner's proposed findings and conclusions. Mont. Code Ann. § 2-4-621(1). BER in turn may adopt, reject, or modify the findings and conclusions. *Id.* § 2-4-621(2)-(3). BER has plenary authority to reject proposed conclusions of law. *Id.* BER may reject a proposed finding of fact when, following a review of the complete record, BER states “with particularity” that the finding is not “based on competent substantial evidence” or the “proceedings on which the findings were based did not comply with essential requirements of law.” *Id.*

If a conclusion of law is improperly characterized as a finding of fact, BER retains plenary authority to reject the conclusion. *Christie v. DEQ*, 2009 MT 364, ¶ 32, 35 Mont. 227, 220 P.3d 405; *see also Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 879 (10th Cir. 2005) (“An appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may put on it.” (quoting 9A Wright & Miller, *Federal Practice & Procedure Civ.*, § 2579 (2d ed. 1995)). When a question requires “consider[ation] [of] legal concepts in the mix of fact and law and [the] exercise [of] judgment about the values that animate legal

principles,” it is a conclusion of law subject to plenary review. *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001).

BER’s final decision must include findings of fact and conclusions of law and must respond to each proposed finding of fact submitted a party. *Id.* 2-4-623(1)(a), (4).

## **II. The Montana Strip and Underground Mine Reclamation Act and the Surface Mining and Control and Reclamation Act.**

In assessing the proposed Findings and DEQ’s underlying permit decision, BER is guided by the purposes of the underlying statutes: the Montana Strip and Underground Mine Reclamation Act (MSUMRA), the Surface Mining Control and Reclamation Act (SMCRA), and the Clean Water Act (CWA). *See Westmoreland Res. Inc. v. Dep’t of Revenue*, 2014 MT 212, ¶ 11, 376 Mont. 180, 330 P.3d 1188 (“When interpreting a statute, [a court’s] objective is to implement the objectives the legislature sought to achieve.” (quoting *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499)).

Relevant here, BER has previously explained in detail the goals and functions of MSUMRA and SMCRA:

Strip and underground coal mining is governed nationally by the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328. Congress enacted SMCRA in response to widespread social and environmental abuse from the coal mining industry....

*The principal purpose of SMCRA is to protect society and the environment from the adverse effects of surface coal mining....*

SMCRA establishes a system of cooperative-federalism in which states can assume responsibility for day-to-day regulation of coal mining operations, subject to federal oversight....

....

As a safeguard against ineffective state regulation of coal mining operations, SMCRA contains important provisions for federal oversight and citizen participation in permitting decisions and enforcement....

*A central purpose of SMCRA is to protect water resources from coal mine development....*

On lands where coal mining has not been prohibited outright, multiple provisions of SMCRA assure that mining may not proceed if it will cause undue damage to water resources....

....

Under Montana's delegated program, DEQ regulates coal mining pursuant to the provisions of MSUMRA, Mont. Code Ann. §§ 82-4-201 to -254, and its implementing regulations, ARM 17.24.301 to 1309. DEQ's regulation of coal mining is also subject to Montana's constitutional environmental protections....

*[DEQ] may not issue [a] permit unless and until [the] agency finds in writing based on record evidence that the cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area[.]*

In making any decision on a permit application, DEQ must prepare a cumulative hydrologic impact assessment, or "CHIA." ....

*In re Bull Mountains*, at 59-62, ¶¶ 71-81 (emphasis added, internal quotation marks and citations omitted).

MSUMRA defines “material damage”—the central issue involved in this case—to include any “violation of a water quality standard.” ARM 17.24.301(68) (quoting Mont. Code Ann. § 82-4-203(31)). Water quality standards are, in turn, defined by the Clean Water Act (CWA). 33 U.S.C. § 1313(c)(2)(A) (providing that water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses”).

The purpose of the CWA is to “*restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*” *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 21, 356 Mont. 296, 234 P.3d 51 (quoting 33 U.S.C. § 1251(a)) (emphasis added).

**III. The proposed Findings erroneously placed the burden of proof on the Conservation Groups, contravening the express language of MSUMRA and the Board of Environmental Reviews’s prior ruling.**

The proposed Findings erroneously placed the burden of proof on the Conservation Groups to prove by a preponderance of the evidence that “the AM4 Amendment *will result*” in material damage. Findings at 65-66 (emphasis added); *id.* at 78-79, ¶ 5; *id.* at 82, ¶ 18.<sup>1</sup>

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<sup>1</sup> Inconsistently, the proposed Findings also stated in places that the Conservation Groups have the burden only to show by a preponderance of evidence that the AM4 Amendment “could” result in material damage. Findings at 65; *id.* at 80, ¶ 12. In other places, the proposed Findings indicated that the Conservation

Just three years ago, BER unambiguously ruled that “[b]y law the burden of proof in the permitting process rests with the mine applicant and DEQ.” *In re Bull Mountains*, at 76, ¶ 115. This is based, BER explained, on the plain language of MSUMRA that “[t]he *applicant* for a permit or major revision *has the burden* of establishing that the application is in compliance with this part and the rules adopted under it.” Mont. Code Ann. § 82-4-227(1) (emphasis added). Consistent with MSUMRA’s allocation of the burden of proof, implementing regulations prohibit DEQ from issuing a permit “unless the application affirmatively demonstrates and the department’s written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that ... cumulative hydrologic impacts will not result in material damage.” ARM 17.24.405(6)(c).

This allocation of the burden of proof is consistent with the congressional intent behind SMCRA, as well as the precautionary principle that animates MSUMRA. S. Rep. No. 95-128, at 80 (1977) (“*The applicant is required to ... assume, if a public hearing [i.e., a contested case] is held, the burden of proving*

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Groups’ burden was to “conclusively” establish contested facts. *Id.* at 76; *id.* 87, ¶ 34. Such inconsistency is arbitrary and unlawful. *In re Bull Mountains*, at 84, ¶ 129 (stating that inconsistency is the hallmark of arbitrary action).

*that the application is in compliance with State and Federal laws (including provisions of this Act [SMCRA]).”(emphasis added)* (attached as Exhibit 2); *MEIC v. DEQ (MEIC I)*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 (constitutional environmental protections are “anticipatory and preventative”); Mont. Code Ann. § 82-4-202(1) (MSUMRA enacted to uphold constitutional environmental protections).<sup>2</sup> Thus the risk of uncertainty is properly borne by the polluter, not the public and not the environment.

The proposed Findings erroneously determined that the Conservation Groups had the burden of proof in light of *MEIC v. DEQ (MEIC II)*, 2005 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 963, which held that in a contested case challenging DEQ’s issuance of an air quality permit, the party challenging the permit “had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department’s decision violated the law.” Critically, though, in that case the Court applied the default statutory burdens of proof<sup>3</sup> because the parties had not identified “any statute relating directly to the Department or the Board [that] provides for alternative evidentiary rules in a hearing before the

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<sup>2</sup> See also 30 U.S.C. § 1260(b)(3) (placing burden on applicant and agency to show that material damage will not occur).

<sup>3</sup> Mont. Code Ann. §§ 26-1-401, -402.

Board.” *Id.*, ¶ 13. Unlike in *MEIC II*, here, both the Montana Legislature and the U.S. Congress have mandated that the burden of demonstrating compliance with the provisions of SMCRA and MSUMRA rests with the permit applicant and DEQ. Mont. Code Ann. § 82-4-227(1); 30 U.S.C. § 1260(b)(3); S. Rep. No. 95-128, at 80 (1977).

In contrast to *MEIC II*, where there was no specific statutory provision assigning the burden of proof, when a specific statute imposes the burden of proof on a permit applicant, as MSUMRA does, the applicant must carry that burden in a contested case proceeding. In *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 369 Mont. 150, 296 P.3d 1154, a property developer appealed DNRC’s denial of its application for a water use permit following a contested case. Like MSUMRA, the relevant provision of the Montana Water Use Act places on the applicant the burden of satisfying statutory criteria, including demonstrating the lack of certain adverse effects. *Compare* Mont. Code Ann. § 85-2-311(1) (requiring application to “prove[] by a preponderance of evidence” that criteria for issuance of a permit area met), *with* Mont. Code Ann. § 82-4-227(1) (“applicant for [coal mining] permit ... has the burden” to demonstrate compliance with MSUMRA and rules adopted under it); ARM 17.24.405(6)(c) (DEQ must deny

permit unless applicant “affirmatively demonstrates” and DEQ “confirm[s]” that “cumulative hydrologic impacts will not result in material damage”).

On appeal, the applicant (Bostwick) argued that potential adverse impacts were uncertain. *Bostwick*, ¶ 36 (“Bostwick seeks to shift the burden of proof to DNRC, however, and thereby require DNRC to grant the permit if no net depletion, and so no adverse effect, could be shown.”). The Supreme Court rejected the argument because the statute “clearly places the burden of proof on the applicant to demonstrate lack of adverse effect.” *Id.* So too here. MSUMRA expressly places the burden of demonstrating the lack of material damage on the permit applicant and DEQ. Mont. Code Ann. § 82-4-227(1); ARM 17.24.405(6)(c). Thus, in this administrative appeal the applicant and DEQ must “affirmatively demonstrate[.]” that material damage “will not result.” *In re Bull Mountains*, at 76, ¶ 115; *id.* at 86, ¶ 133 (“Here, at most, the record demonstrates that the proposed expansion of the Bull Mountains mine may (or may not) be designed to prevent material damage to the hydrologic balance outside the permit area for 50 years and that there may (or may not) be water available to mitigate the operation’s impacts to water quality and quantity. This does not satisfy the legal standard of MSUMRA.”); *see Bostwick*, ¶ 36.

By “shift[ing] the burden of proof” to the Conservation Groups to “show a more likely than not possibility that the AM4 Amendment *will result* in ‘material damage,’” Findings at 65-66 (emphasis added); *id.* at 78-79, ¶ 5; *id.* at 82, ¶ 18, the proposed Findings violated the plain language of MSUMRA and the prior controlling precedent of BER. The proposed Findings thus upended the precautionary principle of MSUMRA and the Montana Constitution by which uncertainty of potential harm is resolved against allowing environmentally harmful activity to proceed—i.e., “when in doubt, err on the side of safety.”<sup>4</sup> *See* Mont. Code Ann. § 82-4-202(1); *MEIC I*, ¶ 77; *see also Bostwick*, ¶ 36.

**IV. The proposed Findings’ assessment of material damage from anticipated increased salinity discharged into a stream that is already impaired and beyond its carrying capacity for salinity was legally erroneous.**

The proposed Findings erroneously concluded that the Conservation Groups did not submit sufficient evidence to show “a more likely than not possibility that the AM4 Amendment will result in material damage.”<sup>5</sup> Findings at 82, ¶ 18; *see also id.* at 88, ¶¶ 38, 39. The Findings reached this conclusion despite finding that:

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<sup>4</sup> Thomas O. McGarrity, *MTBE: A Precautionary Tale*, 28 Harv. Envtl. L. Rev. 281, 334 (2004).

<sup>5</sup> As noted, the proposed Findings imposed a legally erroneous burden of proof. *See infra* Part III. However, given the undisputed facts outlined above (the mine

- East Fork Armells Creek (EFAC) is impaired and not meeting water quality standard due to excessive salinity (as determined by total dissolved solids (TDS)). *Id.* at 29, 32, ¶¶ 96, 106; *id.* at 69-70 (stating that “[i]f a water is already exceeding water quality standards ... as is the case with EFAC”). DEQ has not prepared and implemented a total maximum daily load (TMDL) to remedy the impairment of EFAC, *id.* at 26, ¶ 85, though the CWA requires the agency to do so<sup>6</sup>;
- The cumulative effect of existing mining operations in Areas A and B of the Rosebud Strip Mine will cause a 13% increase in salinity in the alluvium of EFAC, which will enter EFAC as baseflow. *Id.* at 35, 37, ¶¶ 120, 134.
- The mining passes in the AM4 Amendment to the Area B Permit expansion will extend by tens or hundreds of years the duration

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will add more salt pollution to a stream impaired for salt), DEQ’s permitting decision would be erroneous under any standard of proof.

<sup>6</sup> See *Friends of the Wild Swan v. EPA*, 130 F. Supp. 2d 1184, 1188-89 (D. Mont. 1999) (describing duty to prepare TMDLs and Montana’s historic reluctance to prepare them).

that the increased salinity from the mine will flow into the creek.

*Id.* at 37, ¶ 133; *id.* at 73 & n.4.

These findings—that (1) the cumulative impact of mining will increase salinity pollution in a stream that is exceeding water quality standards and beyond its carrying capacity for salt and (2) the AM4 expansion of Area B of the strip mine will extend the duration of the increased salinity in the already impaired stream by tens to hundreds of years—establish as a matter of law that DEQ and WECO failed to affirmatively demonstrate that the “cumulative hydrologic impacts will not result in” a “violation of water quality standards.” ARM 17.24.405(6)(c) (material damage determination); *id.* 17.24.301(68) (material damage includes a violation of water quality standards); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into creek that is impaired for excessive copper will cause or contribute to violation of water quality standards). In short, if the stream is already impaired and DEQ has not prepared a plan to remedy the impairment (a TMDL under the Clean Water Act), *any* additional discharge of the pollutant causing the impairment will result in a

violation of water quality standards, precluding issuance of a strip-mining permit under MSUMRA. See *Friends of Pinto Creek*, 504 F.3d at 1011-12.<sup>7</sup>

The proposed Findings evaded this straightforward conclusion by relying on a series of legal errors. First, the proposed Findings erroneously determined that the material damage determination could ignore the anticipated 13% increase in salinity from existing mining operations that will occur regardless of the AM4 Amendment. Findings at 67 (“Conservation Groups’ conclusion fails because there is no evidence that *the AM4 Amendment*, which is the only permitting decision at issue in this case, will cause any increase in salinity to the EFAC alluvium.”); *id.* at 68 (“Conservation Groups repeatedly confuse this potential 13% increase in the total TDS [in] alluvi[al] groundwater under Areas A and B of the mine to mean that the AM4 Amendment ‘will increase salt by at least 13% in EFAC.’”).

Contrary to analysis of the proposed Findings that considered the impacts of the additional cuts proposed under the AM4 expansion in isolation from the

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<sup>7</sup> The Findings incorrectly disregarded *Friends of Pinto Creek* on the basis that it addresses the CWA, but not MSUMRA. Findings at 76 n.5. *Friends of Creek* explains when adding more pollution to an impaired stream will *violate water quality standards*, 504 F.3d at 1011-12, which the Findings acknowledged is the standard for assessing material damage under MSUMRA. Findings at 87-88, ¶¶ 34, 38; see also *id.* at 66 n.3 (recognizing that “water quality standards have been engrafted” onto MSUMRA).

impacts of existing operations, the material damage determination *must* consider the “*cumulative* hydrologic impacts.” ARM 17.24.405(6)(c) (emphasis added). This means the “*total* ... direct and indirect effects of mining and reclamation operations.” *Id.* 17.24.301(31) (emphasis added); *see also* Mont. Code Ann. § 82-4-203(35) (defining operations to include “all of the premises” and “all activities”). This sweeping language does not permit the piecemeal analysis employed in the proposed Findings.

If the anticipated effects of the mine’s *existing* operations will exceed the material damage threshold (as here, by increasing salt levels flowing into EFAC by 13% when the stream is already impaired due to excessive salinity and past its carrying capacity for salinity), then DEQ may not permit operations that will add more pollution until the existing impairment is remedied. The U.S. Office of Surface Mining (OSM) explained this when it promulgated its initial material damage rules in 1983 (which are still in effect):

The final rule allows a “first come first served” analysis *with each subsequent operation being based upon its potential for material damage with respect to any preceding operations*. This approach is not inconsistent with the Act’s intent to protect the environment because no later or revised operations can be approved until a cumulative hydrologic impact assessment is completed indicating that there will be no material damage to the hydrologic balance outside the permit area.

48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (emphasis added). Thus, if existing operations will use up the assimilative capacity of the stream—as is the case here because EFAC is already failing to meet water quality standards due to excessive salinity—expanded operations cannot be approved (until the impairment is remedied).

The Supreme Court of Alaska explained the basis for the *cumulative* impact analysis when it rejected an attempt, analogous to that at issue here, by Alaska regulators to piecemeal the material damage assessment for a coal mine under Alaska’s SMCRA program:

One of ASCMCRA’s [the Alaska Surface Coal Mining Control and Reclamation Act] purposes is “to prevent the adverse effects to society and the environment resulting from unregulated surface coal mining operations.” Other express purposes are “to assure that surface coal mining operations are conducted in a manner that will prevent unreasonable degradation of land and water resources,” and “to strike a balance between protection of the environment and other uses of the land and the need for coal as an essential source of energy.” These purposes cannot be accomplished by ignoring cumulative impacts. Based on the policies inherent in these purposes, we conclude that DNR may not ignore cumulative effects of mining and related support facilities by unreasonably restricting its jurisdiction or by permitting facilities separately. These purposes require that *at the time DNR reviews any ASCMCRA permit application it consider the probable cumulative impact of all anticipated activities which will be a part of a “surface coal mining operation,” whether or not the activities are part of the permit under review. If DNR determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.*

*Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992) (emphasis added) (internal citations omitted). So too here. If the *existing* operations of the Rosebud Strip Mine will exceed the material damage threshold by contributing to violations of water quality standards (as here, where the strip mine’s existing operations will cause a 13% increase in salinity discharged to EFAC, which is already impaired for salt), then it does not, as the Findings illogically concluded, give DEQ license to allow the strip mine to *expand* operations (i.e., the AM4 Amendment) that will extend those violations for tens or hundreds of years. As the Alaska Supreme Court explained, that would undermine the law’s purpose. The mandate of MSUMRA is clear: DEQ must “*prevent* material damage.” Mont. Code Ann. § 82-4-227(3)(a). “[P]revent’ does not mean ‘minimize.’” *In re Bull Mountains*, at 71, ¶ 123. The material damage limit, here, is a violation of water quality standards. Mont. Code Ann. § 82-4-203(31).

Because, as the proposed Findings found, EFAC is currently *not* meeting water quality standards due to excessive salinity and the existing operations will add still more salinity to the stream (13%), continuing to add “more of the same” is not permitted. *Friends of Pinto Creek*, 504 F.3d at 1011-12; *cf.* Findings at 72 (employing piecemeal, rather than cumulative analysis). As a federal district court in Florida stated: “[A] small contribution to an impairment is still a contribution.

Someone once said that a person in a hole should stop digging. It is good advice, and it applies as well to a lake with excessive [pollution]. It makes sense to stop putting in more water with excessive nutrients.” *Fla. Wildlife Fed’n v. Jackson*, 853 F. Supp. 2d 1138, 1170 (N.D. Fla. 2012); *see also* Mont. Code Ann. § 75-5-103(18) (when “loading capacity” of stream is exceeded, additional pollution will cause “a violation of surface water quality standards”).

Second, the proposed Findings recognized that even (improperly) restricting its analysis exclusively to the impacts of the mine cuts in the AM4 Amendment, “the AM4 Amendment will *increase [the] duration of increased salt concentrations* and the overall load of salt to the alluvium over time.” Findings at 74 (emphasis added) (quoting DEQ Resp. Prop. FOFCOL at 89-90). The proposed Findings further recognized that this extended duration of increased salinity from the AM4 Amendment will persist for “some tens to hundreds of years.” *Id.* at 73 n.4. Nevertheless, the proposed Findings discounted *decades to centuries* of increased discharges of salt to a stream already impaired for salt (EFAC) because, they proffer, “this increase in duration of time is not ... relevant for a material damage analysis.” *Id.* at 73. This was an error of law. The Findings’ support for this conclusion was the testimony of a DEQ hydrologist. *Id.* at 73 (quoting testimony of DEQ hydrologist). While agency scientists may properly testify about

matters within their area of expertise (e.g., AM4 will extend the duration of increased salinity for decades to centuries), it is black letter law that experts *may not testify* about what they think the law means. *Citizens for a Better Flathead v. Bd. of Cty. Comm'rs of Flathead Cnty.*, 2016 MT 256, ¶¶ 17-18, 385 Mont. 156, 381 P.3d 555 (expert evidence offering “legal conclusions” inadmissible); *accord*, e.g., *Nationwide Transp. Fin. v. Cass Info Sys., Inc.*, 523 F.3d 1051, 1058-59 (9th Cir. 2008). It was legal error for the Findings to rely on expert testimony to resolve questions of law—i.e., the legal meaning of material damage. *See Nationwide*, 523 F.3d at 1059 (“Resolving doubtful questions of law is the distinct and exclusive province of the trial judge.” (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1983))).

Moreover, as in *Nationwide*, the legal conclusion of DEQ’s hydrologist on which the proposed Findings relied (to conclude that decades to centuries of increased salt discharges to EFAC, which is impaired for salt, is legally irrelevant) was, itself, erroneous. 523 F.3d at 1059 (noting that reliance on erroneous expert testimony about the law was “not only superfluous but mischievous” (quoting *United States v. Brodie*, 858 F.2d 492, 497 (9th Cir. 1988))). BER recently and roundly rejected DEQ’s efforts to ignore the *duration* of impacts in assessing material damage:

By law, DEQ may not ignore the long-term water pollution impacts of the mine. Montana Code Annotated § 82-4-227(3)(a) does not contain an exception for material damage outside the permit area that occurs 50 years after mining. The Board declines DEQ’s invitation to write such an exception into the law.

The legislative history of SMCRA shows that Congress enacted the CHIA provision of the law to prevent “long-term impacts” to water resources.... When OSM promulgated its initial regulations implementing SMCRA’s hydrology protections, the federal agency clarified that the time frame for the analysis of impacts to water resources must be coextensive with the time period that such impacts are expected to persist .... As the Montana Supreme Court has taught and Montana history repeatedly shows, long-term pollution impacts from mining are among the most serious environmental problems, because after a mine closes the mine operator will be gone and the polluted discharge will continue and cannot be shut off.

*In re Bull Mountains*, at 82-83, ¶¶ 127-128 (internal citations and quotation marks omitted).<sup>8</sup>

Further indicative of the relevance of duration of impacts, violations of water quality standards under the CWA (which are the relevant criteria for assessing material damage under MSUMRA, ARM 17.24.405(6)(c); *id.*

17.24.301(68)) are measured on a *daily basis*—each additional day of pollution is an additional violation. Mont. Code Ann. § 75-5-611(9)(a); *see also* Mont. Code

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<sup>8</sup> The Findings mistakenly asserted that no party cited *In re Bull Mountains* in relation to the question of duration of impacts. Findings at 76 n.5. The Conservation Groups stated in their response that “under *In re Bull Mountains*, the Department cannot ignore the duration of mining impacts in its material damage determination.” Pet’rs’ Combined Resp. at 21 (Sept. 27, 2018).

Ann. § 82-4-254(1)(a) (MSUMRA also measures violations on a daily basis). Thus, under controlling law, if expanded mining operations cause elevated pollution levels that contribute to a violation of water quality standards for just *one day* (much less the “tens to hundreds of years” at issue here, Findings at 73 n.4), it is impermissible.

Finally, the misinterpretation<sup>9</sup> of MSUMRA proposed by DEQ and the Findings—that DEQ can disregard impacts that extend by “tens to hundreds of years” increased salt loading to a stream that is already impaired and past its carrying capacity for salt—is anathema to the very purposes of the CWA and MSUMRA. The purposes of these statutes are, respectively, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and “maintain and improve the state’s clean and healthful environment for present and future generations,” Mont. Code Ann. § 82-4-202(2)(a). “When interpreting a statute, [a court’s] objective is to implement the objectives the legislature sought to achieve.” *Westmoreland Res. Inc.*, ¶ 11 (quoting *Mont. Vending*, ¶ 21); see *In re Bull Mountains*, at 60-61, ¶¶ 72, 76 (citing goals of MSUMRA to guide analysis). Thus, BER must reject the Findings’ legal

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<sup>9</sup> See *In re Bull Mountains*, at 82-83, ¶¶ 127-28 (duration is critical).

conclusions that would undermine the goals of the CWA and MSUMRA, and reaffirm its holding from *In re Bull Mountains* that the material damage determination must consider duration of impacts. *See also Friends of Pinto Creek*, 504 F.3d at 1011-12 (explaining that allowing additional copper pollution into stream impaired due to excessive copper would be contrary to the purpose of CWA).

In sum, given the proposed Findings’ determinations that (1) EFAC is impaired and exceeding water quality standards for excessive salt, (2) existing mining is going to increase salt concentrations in the alluvium discharging to EFAC by 13%, and (3) the AM4 Amendment will prolong these increased salt discharges by tens to hundreds of years, it follows as a matter of law and logic that DEQ and WECO failed to affirmatively demonstrate that the “cumulative hydrologic impacts” of the AM4 Amendment “will not result in material damage,” which includes “violation of water quality standards.” ARM 17.24.405(6)(c); *id.* 17.24.301(68).

**V. The proposed Findings’ assessment of DEQ’s material damage determination regarding applicable water quality standards for growth and propagation of aquatic life was legally erroneous.**

The Findings erroneously concluded that “WECO and DEQ presented convincing evidence—through expert testimony and the ARCADIS Report—that

EFAC is supporting aquatic life sufficiently to satisfy the requirements of MSUMRA.” Findings at 89-90, ¶ 43. The Findings’ conclusion with respect to aquatic life support—an applicable water quality standard—is flawed in multiple respects and, if adopted, would undermine foundational environmental protections of both MSUMRA and the CWA.

First, and most fundamentally, the Findings erroneously determined as a matter of law that the *mere presence* of aquatic life in a stream is sufficient to show compliance with the water quality standard for aquatic life support. Findings at 49-53, ¶ 188, 193, 199, 207; *id.* at 61-62, ¶¶ 246-47; *id.* at 89, ¶¶ 42-43 (finding that assessment of “whether there was macroinvertebrate life in EFAC” was sufficient to show compliance with “water quality standards designed to protect aquatic life”). In reaching this erroneous conclusion, the Findings adopted DEQ’s erroneous reasoning.

By law, DEQ may not approve a mining permit unless the evidence in the record affirmatively demonstrates that the “cumulative hydrologic impacts will not result in material damage.” ARM 17.24.405(6)(c). Material damage in turn is defined to include any “violation of a water quality standard.” *Id.* 17.24.301(68). As the Findings recognized, MSUMRA’s express use of water quality standards as material damage criteria incorporates these provisions of the CWA into

MSUMRA. Findings at 66 n. 3. Under the CWA water quality standards consist of designated uses and criteria designed to protect those uses. 33 U.S.C.

§ 1313(c)(2)(A); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 714-15 (1994).<sup>10</sup>

Here, the applicable water quality standards for EFAC include that the “[w]aters ... are to be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life.” ARM 17.30.629(1); *see also* Findings at 55, ¶ 215 (recognizing applicability of these standards). It is undisputed—and the proposed Findings found—that the simple assessment of whether any life is present in a stream is *not* a method used by the DEQ’s Water Quality Planning Bureau for assessing compliance with the water quality standard of aquatic life support. Findings at 47-49, ¶¶ 181-186. Neither the proposed Findings nor any party has identified a valid legal basis for the is-anything-alive standard for assessing aquatic life support. The mere presence of a trace of life in a stream does

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<sup>10</sup> The proposed Findings erred in adopting WECO’s mistaken assertion that “[t]he Montana Water Quality Act does not treat beneficial uses as ‘water quality standards.’” Findings at 70 (quoting Intervenors’ Resp. to Prop. FOFCOL at 2-5). *E.g.*, ARM 17.30.629 (C-3 water quality standards included designated uses and criteria); *accord PUD No. 1 of Jefferson Cnty.*, at 714-15 (water quality standards include designated uses and criteria).

not mean the stream is being “maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life.” ARM 17.24.629(1).

As a matter of law, it is plain error for DEQ to employ an erroneous standard to assess material damage. *In re Bull Mountains*, at 65, ¶ 91 (holding that DEQ erred because the “material damage standard employed in the CHIA’s material damage assessment and determination was not equivalent to any of the water quality standards applicable to [the receiving water]”). Because aquatic life can be found in even the most toxic environments—like the Berkeley Pit<sup>11</sup>—the proposed Findings’ is-there-any-life-in-the-stream test for assessing the water quality standard for aquatic life support is plainly inconsistent with the environmental protection purposes of MSUMRA and the CWA and, if adopted, would effectively nullify the Legislature’s express command that water quality standards from the CWA are material damage criteria. ARM 17.24.301(68).<sup>12</sup>

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<sup>11</sup> See *Life in the Berkeley Pit*, Mont. Standard (Feb. 6, 2004), available at [https://mtstandard.com/news/local/life-in-the-berkeley-pit/article\\_f62914bd-f7cf-5595-95c0-49698fcfee62.html](https://mtstandard.com/news/local/life-in-the-berkeley-pit/article_f62914bd-f7cf-5595-95c0-49698fcfee62.html).

<sup>12</sup> At various points, the proposed Findings stated that aquatic life in EFAC was “diverse,” Findings at 47, ¶ 178; *id.* at 50-51, ¶¶ 190, 194; however, despite the scientific connotation of this term, DEQ admitted at hearing that it was not using the term as “some kind of expert determination of aquatic biology,” but only in the sense that DEQ identified more than one species of aquatic life in EFAC. Hrg. Tr.

Second, in addition to adopting the erroneously permissive and ultimately meaningless is-anything-alive standard, the proposed Findings’ analysis of aquatic life is inconsistent and contradictory. The proposed Findings found that analysis of macroinvertebrates is not a *reliable* means of assessing water quality standards for aquatic life in eastern Montana streams, yet nevertheless *relied* on a sample of macroinvertebrates to conclude that the eastern Montana stream at issue here, EFAC, is meeting applicable water quality standards for aquatic life. *Compare* Findings at 47-49, ¶¶ 181, 185 (finding that macroinvertebrates “would not provide an accepted or reliable indicator of aquatic life support functionality” for eastern Montana streams and are not a “reliable or useful metric” for assessing water quality standards for aquatic life support in such streams), *with id.* at 49-54, ¶¶ 188, 193, 207 (finding that macroinvertebrate sample showed EFAC was meeting water quality standard for aquatic life support). BER has previously sanctioned DEQ for such inconsistency. *In re Bull Mountains*, at 84, ¶ 129 (“Inconsistency of agency analysis is the hallmark of arbitrary action.” (internal quotation marks omitted) (citing *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2014))). As BER previously explained, “DEQ cannot have it both ways.” *Id.* If

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Vol. 2 at 257:8-15; *see also* Hrg. Tr. Vol. 1 at 297:10 to 298:20. The proposed Findings are therefore misleading in stating that aquatic life is “diverse” in EFAC.

DEQ believes *analysis of macroinvertebrates* is an unreliable means of assessing water quality standards for aquatic life support, DEQ may not be permitted, as the proposed Findings would allow, to rely on *analysis of macroinvertebrates* to conclude that a stream is meeting water quality standards for aquatic life support. In short, DEQ cannot lawfully *rely* on something it believes to be *unreliable*—that would be arbitrary. By adopting DEQ’s reasoning, the proposed Findings’ analysis is, itself, contradictory and unlawful.

Third, the proposed Findings further erred as a matter of law by basing the bulk of their analysis of DEQ’s assessment of the water quality standard for aquatic life support on the testimony of DEQ’s hydrologist, Emily Hinz, Ph.D., and portions of the CHIA written by Dr. Hinz. Findings at 49-53, ¶¶ 188-94, 196-97, 207. Dr. Hinz is a hydrologist with no expertise in aquatic life or aquatic ecology. Hrg. Tr. Vol. 2 at 253:22 to 257:10; Hr. Tr. Vol. 3 at 86:20-21 (hearing examiner stating, “We all agree that she’s [Dr. Hinz] not an expert in aquatic life of any kind”). If a witness does not have expertise in a given field, she may not give expert testimony in that field, even if she possesses expertise in a different field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, ¶ 13, 356 Mont. 468, 237 P.3d

37.<sup>13</sup> It was legal error for the proposed Findings to rely on Dr. Hinz's testimony about aquatic life health, despite her admission of no expertise in the field. *See In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995) (reversible error for hearing examiner to admit improper expert testimony).

The proposed Findings' improper reliance on the inexpert testimony of Dr. Hinz aquatic life epitomizes the arbitrariness of DEQ's assessment of water quality standards for aquatic life support. DEQ failed to have *any* qualified expert assess aquatic life in EFAC. Hrg. Tr. Vol. 2 at 258:8-12. Worse, DEQ *prohibited* anyone in the agency with expertise in aquatic biology from assessing aquatic life in EFAC, and further prohibited anyone from analyzing water quality standards. Hrg. Tr. Vol. 2 at 223:15 to -224:6; *id.* Vol. 3 at 183:3 to 184:8; MEIC Ex. 15. Worse still, as the proposed Findings recognized, DEQ then *prohibited* WECO's expert in aquatic biology from *analyzing* the macroinvertebrates that she sampled in EFAC. Findings at 47, ¶ 180. It would make a mockery of MSUMRA and the CWA to conclude, as the proposed Findings do, that DEQ adequately assessed water quality standards for aquatic life, when DEQ, in fact, prohibited *anyone* from actually

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<sup>13</sup> *Accord Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002) (Posner, J.) ("A scientist, however well credentialed [she] may be, is not permitted to be the mouthpiece of a scientist in a different specialty.").

analyzing aquatic life health in EFAC. *Cf.* ARM 17.24.405(6)(c) (mandating that DEQ “confirm” based on record evidence that cumulative hydrologic impacts will not, among other things, result in a violation water quality standards); *id.* 17.24.301(68) (water quality standards are material damage criteria).

At bottom, the undisputed facts regarding DEQ’s assessment of water quality standards for aquatic life demonstrate that DEQ’s material damage assessment and determination were unlawful. DEQ employed a legally erroneous is-anything-alive test to assess water quality standards for growth and propagation of aquatic life, DEQ relied on an “analysis”<sup>14</sup> of a parameter (macroinvertebrates) that it admitted was not a reliable means of assessing water quality standards for aquatic life support, and then DEQ prohibited any qualified expert from actually assessing aquatic life. As a matter of law, DEQ’s irrational and contradictory assessment of the water quality standard for growth and propagation of aquatic life failed to meet the standard imposed by MSUMRA. ARM 17.24.405(6)(c); *id.*

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<sup>14</sup> As noted, “[i]t wasn’t some kind of expert determination of aquatic biology.” Hrg. Tr., Vol. 2 at 257:6-7. The only “analysis” was DEQ’s determination that WECO had yet not sterilized the stream. Hr. Tr. Vol. 2 at 221:5-8 (“A. (By Ms. Hinz) So essentially what I did is determine was there or was there not aquatic life in the stream, and that’s as far as we used the data for.”).

17.24.301(68); *id.* 17.30.629(1) (applicable water quality standard for aquatic life support).

**VI. The proposed Findings erroneously applied the administrative exhaustion doctrine.**

The proposed Findings erroneously dismissed multiple claims of the Conservation Groups for failing to exhaust the issues in pre-decisional administrative comments on WECO’s permit application. Findings at 81, ¶ 16 & Ex. A. Administrative issue exhaustion, however, is emphatically not required in administrative permit appeals under MSUMRA. The draconian extra-statutory exhaustion requirement of the proposed Findings—in which the public is limited to claims identified *before* ever seeing DEQ’s analysis and decision—fundamentally defeats the public participation provisions of MSUMRA, SMCRA, and the Montana Constitution. Even if exhaustion were required—and it plainly is not—the Conservation Groups’ administrative comments on WECO’s permit application adequately notified DEQ of their concerns about anticipated mining in Area F and dewatering of EFAC.

**A. Administrative exhaustion does not apply to permit appeals under MSUMRA.**

As the Supreme Court has explained, “requirements of administrative issue exhaustion are largely creatures of statute.” *Sims v. Apfel*, 530 U.S. 103, 107

(2000). Here, neither MSUMRA nor SMCRA requires administrative exhaustion prior to an administrative appeal. The only statutory requirements for bringing an administrative appeal, as here, are (1) that the appellant have an “interest that is or may be adversely affected” by the operation and (2) that the appeal notice be filed “within 30 days after the department’s decision.” Mont. Code Ann. § 82-4-206; 30 U.S.C. § 1264(c) (federal counterpart); ARM 17.24.425(1).<sup>15</sup> Accordingly, the U.S. Secretary of the Interior, who oversees implementation of SMCRA, has explained that a person who is adversely affected by a permitting decision may appeal that decision *without submitting comments at all prior to the appeal*. 56 Fed. Reg. 2139, 2141 (Jan. 22, 1991) (explaining that “if a person does not file comments” on a permit application, it “in no way vitiates the right of any person who is or may be adversely affected by an OSMRE decision to file a request for a hearing under section 514(c) [30 U.S.C. § 1264(c), the federal analogue to Mont. Code Ann. § 82-4-206]”).

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<sup>15</sup> The Montana legislature knows how to require administrative exhaustion, when it wishes for it to apply. Thus, while there is no textual requirement for issue exhaustion prior to administrative appeals under MSUMRA or contested cases under MAPA, exhaustion is required under MAPA prior to *judicial review*. Compare Mont. Code Ann. § 2-4-702(1)(a) (requiring exhaustion of administrative remedies prior to judicial review of contested case), with Mont. Code Ann. § 82-4-206(1) (no exhaustion requirement); Mont. Code Ann. § 2-4-601 (no exhaustion requirement).

Recently, the Federal District Court of Idaho rejected arguments identical to those adopted by the proposed Findings. In that case, federal agencies argued, as DEQ has here, that they did not have to consider issues in an administrative appeal (there, a protest) that plaintiffs had failed to raise in pre-decisional administrative comments. *W. Watersheds Project v. U.S. Dep't of the Interior*, No. 1:15-cv-00047-REB, 2016 WL 5745094, at \*15-16 (D. Idaho Sept. 30, 2016) (attached as Exhibit 3). The court corrected this mistaken assumption, pointing out that, as here, there was no express regulatory requirement to include an issue in pre-decisional comments in order to later raise the issue in an administrative appeal. *Id.* Instead, regulatory language, identical to that at issue here, that allowed any “person whose interest is adversely affected” to file a timely administrative appeal meant that there was *no restriction* on issues that could be raised for the first time in the administrative appeal. *Id.* So too here. *See* ARM 17.24.425(1). In short, administrative exhaustion simply does not apply.

Consistent with the plain language of MSUMRA and SMCRA and the Secretary of Interior’s controlling interpretation of that language, the only administrative decisions to address the application of issue exhaustion to administrative permit appeals under SMCRA have concluded that issue exhaustion *does not* apply.

With respect to the issues which any adversely-affected person may raise, a limitation of issues to those brought to OSM's [the federal regulatory authority] attention during the permitting process would conflict with OSM's duty to approve only those permit applications for which it finds, on the basis of information set forth in the application or from information otherwise available, that all the applicable requirements of SMCRA and the regulations have been complied with. *See* 30 U.S.C. § 1260; 30 C.F.R. § 773.15(c). Regardless of whether an issue of potential noncompliance is brought to OSM's attention, OSM is charged with ensuring that the applicant has complied with all statutory and regulatory requirements prior to issuance of a permit.

*Save Our Cumberland Mountains v. Office of Surface Mining*, NX-97-3-PR, at 17 (Dep't of Interior July 30, 1998) (attached as Exhibit 4); *accord M.L. Johnson Family Props. v. Office of Surface Mining*, NX-2015-05-R, at 9-10 (Dep't of Interior Oct. 30, 2015) (attached as Exhibit 5). The reasoning in *Save Our Cumberland Mountains* echoes the Montana Supreme Court's reasoning in *Bostwick*, ¶ 36: the ultimate duty to assure compliance with MSUMRA rests with DEQ, and DEQ may not shift that duty to the public by limiting its permitting analysis to those issues raised by the public in pre-decisional comments. *See id.*

Indeed, the Montana Supreme Court has taken a dim view of efforts to restrict the scope of administrative appeals under MAPA. In *Citizens Awareness Network v. BER*, 2010 MT 10, 355 Mont. 60, 227 P.3d 583, the Court overturned BER's decision to limit the claims that community groups could raise when challenging an air pollution permit. The Court explained: "From the Conservation

Groups’ original affidavit [appealing the permit], DEQ knew that *its decision to issue the air quality permit would be fully sifted* and that the groups’ theories for challenging the permit would not be confined to those presented in the original affidavit.” *Id.* ¶ 23 (emphasis added). The Court therefore held that the community groups could raise new claims revealed during discovery. *Id.* ¶ 30. Under the reasoning of *Citizens Awareness Network*, administrative exhaustion does not apply to contested case hearings.

Consistent with the reasoning in *Citizens Awareness Network* and the above-cited authorities, imposing an extra-statutory exhaustion requirement to permit appeals under MSUMRA would be illogical, impractical, and unfair. Here, the Conservation Groups challenged flaws in DEQ’s CHIA, including the agency’s use in the CHIA of a legally erroneous definition of anticipated mining.<sup>16</sup> The Conservation Groups’ claims were bolstered through information obtained in discovery. Like the community groups in *Citizens Awareness Network*, ¶ 30, the groups had no opportunity to raise claims specific to the CHIA in their pre-decisional administrative comments because DEQ prepared its CHIA *after* the

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<sup>16</sup> Compare DEQ Ex. 1A at 5-1 (erroneously defining anticipated mining to exclude unpermitted operations with pending applications), with ARM 17.24.301(32) (correct definition).

groups submitted their comments and the groups did not have access to discovery until the contested case began. Courts universally refuse to impose administrative issue exhaustion when the issue a party seeks to raise arose *after the public comment period*. E.g., *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1034 & n.13 (9th Cir. 2018) (holding that issue exhaustion did not apply to issue that arose for first time in final environmental impact statement (FEIS) and rejecting agency argument that “some obscure combination of maps and tables in the Draft Environmental Impact Statement and its appendix would have put [plaintiff] on notice”); *Bowen v. City of New York*, 476 U.S. 467, 482 (1986) (holding that it would be “unfair to penalize [plaintiffs] for not exhausting” when they did not know about the challenged policy).<sup>17</sup> It is illogical, as the Montana Supreme Court pointed out in *Citizens Awareness Network*, ¶ 30, to prevent petitioners in a MAPA contested case from raising new claims that are uncovered after the submission of public comments and in discovery.

More fundamentally, the draconian extra-statutory issue exhaustion requirements proffered by the proposed Findings would undermine the public participation provisions of MSUMRA, SMCRA, and the Montana Constitution. In

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<sup>17</sup> *Accord Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1246-47 (D. Or. 2006).

stressing the importance of public participation under MSUMRA and SMCRA, BER explained that the public must be allowed to review DEQ's analysis (CHIA) and permitting decision prior to determining whether to bring an administrative appeal, *In re Bull Mountains*, at 57-58, ¶ 68—but such review of the CHIA and permitting decision would be meaningless if appeals were limited to the issues identified *before* reviewing the CHIA and decision. Further, the Montana Constitution establishes fundamental rights of the public to know and participate in public decision-making. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶ 31, 312 Mont. 257, 60 P.3d 381. The public's right to participate is violated if the public is denied information necessary to participate in an informed manner. *Id.*, ¶¶ 44-46. Limiting the Conservation Groups claims to those they were able to identify in comments *prior to seeing DEQ's analysis and decision*—as the Findings propose—“would essentially relegate the right of participation to paper tiger status.” *Id.*, ¶ 45; *see also Park Cnty. Env'tl. Council v. DEQ*, No. DV-17-126, slip op. at 20-21 (Mont. 6th Jud. Dist. Apr. 12, 2019) (holding that statute that limited effectiveness of public participation was unconstitutional) (attached as Exhibit 6).

The only authority offered by the proposed Findings for their draconian, extra-statutory issue exhaustion requirement was *In re Bull Mountains*. Findings, Ex. A at 5. *In re Bull Mountains*, however, is wholly inapposite. There, BER

expressly held that *DEQ and the permit applicant* are limited to the evidence and argument presented in the administrative record. *Id.* at 56-59, ¶¶ 64-70. The case contains zero discussion of administrative issue exhaustion. It was error for the proposed Findings to base their extra-statutory exhaustion requirement on a decision that never addressed issue exhaustion and, in fact, outlined the importance of public participation and the need for the public to be able review DEQ's final analysis in order formulate issues for appeal. *Id.* at 57-58, ¶ 68; *id.* at 60-61, ¶ 75.

In sum, the plain text of MSUMRA and SMCRA, guiding interpretations of these statutes, and the goal of encouraging public participation enshrined in the statutes and the Montana Constitution demonstrate that administrative exhaustion does not apply to permit appeals under MSUMRA. The public is not required to predict errors that DEQ may make in its CHIA and permitting decision. It is DEQ's duty to follow the law, regardless of whether the public submits comments. The proposed Findings erred as a matter of law in imposing draconian, extra-statutory exhaustion requirements and thereby dismissing multiple claims asserted by the Conservation Groups.

**B. Even if exhaustion were required—and it plainly is not—the Conservation Groups’ comments alerted DEQ of their concerns about anticipated mining in Area F and dewatering of East Fork Armells Creek.**

Even though exhaustion is not required, here the Conservation Groups provided DEQ with notice of their concerns about anticipated mining in Area F and dewatering of EFAC by the strip mine.

**1. Anticipated mining in Area F.**

In the groups’ notice of appeal, they raised a claim that DEQ’s CHIA had improperly excluded analysis of anticipated mining in Area F. Appeal at 2, ¶ 4. This was based on the CHIA’s use of a demonstrably incorrect definition of “anticipated mining” that *excluded* proposed mining operations for which an application had been *submitted*, but which had not been approved, as was the case with Area F (a 6,500 acre expansion of the mine to the northwest). DEQ Ex. 1A at 5-1; *cf.* ARM 17.24.301(32).<sup>18</sup> Discovery then revealed that DEQ excluded the Area F expansion from its cumulative impacts analysis on the basis of this erroneous definition. MEIC Ex. 19. The proposed Findings, however, deemed that the groups had forfeited this claim by failing to raise it in their comments on

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<sup>18</sup> The groups could not have foreseen that DEQ would apply a legally incorrect definition of anticipated mining.

WECO's permit application, even though the CHIA (where DEQ first employed the demonstrably erroneous definition) was not issued until *after* they filed their comments. Findings at 81, ¶ 16.a; *id.* Ex. A at 5-6.

Despite the fundamental unfairness and, indeed, unconstitutionality of forcing the public to raise all claims *before* seeing the agency's analysis or decision (even in draft form), the groups' comments did in fact note DEQ's duty to consider the cumulative impacts of mining in Area F. Attached to and incorporated into the comments were prior comments the groups had submitted to federal authorities regarding an adjacent expansion of the Rosebud Mine. DEQ Ex. 4 at 1 & n.1; DEQ Ex. 4L; *see also Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 847 (9th Cir. 2013) (attachments to comments are properly considered in assessing exhaustion). In the attached letter, the groups plainly requested the agency to analyze the cumulative effects of mining in Area B (the AM4 mine expansion at issue here) and Area F: "[F]uture mining in Area B and Area F, as well as other potential mine expansions, will lead to additional cumulative effects." DEQ Ex. 4L at 24. Elsewhere, the groups stated that the agency "must include the two other proposed mine expansions: Area B and Area F" in its analysis, and explained that "because the other mine expansions [Area B and Area F] will have cumulatively significant impacts on multiple resources, including groundwater (the Rosebud

coal aquifer), surface waters (Rosebud Creek and East Fork Armells Creek), wildlife, ranching operations, and reclamation, they are cumulative actions, which must be considered together with the proposed lease modification.” *Id.* at 17.

Given that the groups had to submit their comments before DEQ issued its CHIA and decision, this more than adequately notified DEQ of the need to evaluate cumulative impacts from Area F, satisfying the “lenient[.]”<sup>19</sup> and “general”<sup>20</sup> requirements of administrative issue exhaustion. Indeed, the Montana Supreme Court has held that by filing a contested case under MAPA to challenge a permit, a plaintiff gives notice to DEQ that the “permit [will] be fully sifted and that the [plaintiff’s] theories for challenging the permit [will] not be confined to those presented in the original affidavit.” *Citizens Awareness Network*, ¶ 23.<sup>21</sup> Moreover, the requirements of issue exhaustion do not apply if an agency in fact

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<sup>19</sup> *Or. Natural Desert Ass’n v. McDaniel*, 751 F. Supp. 2d 1151, 1162 (D. Or. 2011).

<sup>20</sup> *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (“[A]lerting the agency in general terms will be enough if the agency has been given “a chance to bring its expertise to bear to resolve [the] claim.” (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 889 (9th Cir. 2002))).

<sup>21</sup> Consistent with the Montana Supreme Court’s decision in *Citizens Awareness Network*, MAPA itself only requires exhaustion of administrative remedies when a contested case is appealed to district court. Mont. Code Ann. § 2-4-702(1)(a).

knew about the issue, but simply chose to gloss over it. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011). Here, the record demonstrates that DEQ was well aware of the anticipated mining in Area F, but chose to forego any analysis of the cumulative effects of that 6,500-acre operation on the basis of a legally erroneous definition of anticipated mining. MEIC Exs. 19-23.

In sum, the Conservation Groups gave ample notice of their concerns about Area F, satisfying any issue exhaustion requirement. The proposed Findings' conclusion to the contrary, Findings at 81, ¶ 16.a, was error.

## **2. Dewatering of East Fork Armells Creek.**

In their notice of appeal, the Conservation Groups further claimed that the CHIA's analysis of the strip mine's dewatering of an intermittent portion of EFAC (referred to as "Section 15") was unlawful because DEQ applied an incorrect burden of proof and the CHIA's material damage determination regarding dewatering was unsupported. Appeal at 3, ¶ 5.a. The proposed Findings erroneously determined that the groups failed to preserve this claim because even though the groups raised concerns about dewatering of EFAC in their pre-decisional comments on WECO's permit application, they had not articulated the "specific" errors in the CHIA's assessment of dewatering of EFAC that they raised on appeal. Findings at 81, ¶ 16.b (citing Hrg. Tr. Vol. 1 at 227:2 to 228:9).

Contrary to the proposed Findings’ analysis, courts hold that issue exhaustion even on *judicial review* only requires parties to raise issues in “general terms”<sup>22</sup> and does not require “precise legal formulations.”<sup>23</sup> Moreover, issue exhaustion does not apply if an agency has actual knowledge of and addresses an issue.<sup>24</sup> Here, the Conservation Groups’ comments plainly alerted DEQ to their concerns about the strip mine’s dewatering of Section 15 of EFAC:

Indeed, WECO acknowledges that an upper section of the creek in Section 15 was intermittent in 1986 and that recent surveys indicate that it is now dry.... Removing the water from a creek also removes all designated uses associated with that creek, in violation of water quality standards .... Because this portion of the creek is outside the permit boundary, the dewatering of the creek by WECO constitutes material damage outside the permit area.

DEQ Ex. 4 at 2-3. This comment unquestionably alerted DEQ to the issue of dewatering EFAC in Section 15 because DEQ then addressed the issue in the CHIA and responded to the comment, asserting that it was uncertain whether the strip mine dewatered EFAC in Section 15 and, based on that uncertainty, DEQ could not make a material damage determination regarding that portion of the stream. DEQ Ex. 1 at 9-10; DEQ Ex. 1A at 9-9 to 9-10. Because the Conservation

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<sup>22</sup> *Lands Council*, 629 F.3d at 1076.

<sup>23</sup> *Native Ecosystems Council*, 304 F.3d at 900.

<sup>24</sup> *Barnes*, 655 F.3d at 1132-34.

Groups raised the issue of dewatering, and DEQ addressed the issue in both its CHIA and its response to comments (by improperly reversing the burden of proof regarding material damage), any requirements of issue exhaustion were abundantly satisfied. *Lands Council*, 629 F.3d at 1076; *Native Ecosystems Council*, 304 F.3d at 900; *Barnes*, 655 F.3d at 1132-34. The Conservation Groups were not required, as the proposed Findings found, to *anticipate* in their pre-decisional comments the legal errors DEQ would later make in responding to those comments (flipping the burden of proof). Although issue exhaustion does not even apply here, it most certainly does not require clairvoyance. *See Alliance for the Wild Rockies*, 897 F.3d at 1034 & n.13.

**C. The proposed Findings improperly employed issue exhaustion to prohibit the Conservation Groups from citing evidence in the administrative record to support their existing claims.**

The proposed Findings further employed issue exhaustion to prohibit the Conservation Groups from discussing or presenting *evidence* (not raising a claim) from *DEQ's record* to support its existing claims. Findings at 81-82, ¶ 16.e-f; Hrg. Tr. Vol. 1 at 300:7 to 304:5; Hrg. Tr. Vol. 2 at 21:24 to 33:25. As noted, one of the central issues in this case is whether DEQ conducted a lawful analysis of water quality standards for growth and propagation of aquatic life. DEQ argued and the proposed Findings found that an un-analyzed sample of macroinvertebrates by

WECO (the “Arcadis Report”) showed that aquatic life was present in EFAC—and therefore the stream was not devoid of life and consequently met water quality standards for growth and propagation of aquatic life. *See supra* Part V. At hearing, the Conservation Groups attempted to counter this argument by eliciting testimony that the water quality samples *in* the Arcadis Report showed dissolved oxygen levels that violated numeric water quality standards. Hrg. Tr. Vol. 1 at 300:3-7; DEQ Ex. 7 at tbl. 1 (showing dissolved oxygen level of 3.52 mg/L); ARM 17.30.629(2)(b); DEQ Circular 7 at 77 (2017) (daily minimum standard of 5.0 mg/L for early life stages of aquatic life). At the urging of DEQ and WECO, the proposed Findings prohibited the Conservation Groups from citing this *record evidence* from the report relied on by DEQ and WECO (and the proposed Findings) on the basis that the groups had not cited this evidence in their pre-decisional comments. Findings at 81-82, ¶ 16.e-f; Hrg. Tr. Vol. 300:7 to 304:5. There is no basis in law for this Kafkaesque use of issue exhaustion.

Citing issue exhaustion, the proposed Findings similarly prohibited the Conservation Groups from citing *record evidence* about increased chloride in EFAC that *DEQ stated* was causing material damage. Findings at 81-82, ¶ 16.e-f; Hrg. Tr. Vol. 2 at 21:24-33:25; *see* DEQ Ex. 4C at 3 (summarizing meeting with DEQ in which DEQ was “concerned there is material damage off the mine site”

and identifying “chlorine<sup>[25]</sup> issue”); DEQ Ex. 10 at 17 (finding EFAC impaired for chlorides). DEQ’s CHIA similarly showed extremely high levels of chloride adjacent to the mine and upstream of other sources of pollution. DEQ Ex. 1A at 13-47 to -49, fig. 9-15. Indeed, it was because of “steadily increasing concentrations of ionic water quality components” that DEQ required WECO to sample aquatic life in EFAC in the first place. WECO Ex. FFF at 1-2. Because this was information developed by DEQ, there was no question that the agency knew of it. *See Barnes*, 655 F.3d at 1132-34 (issue exhaustion does not apply if agency was aware of issue). The Conservation Groups sought to use this information to further undermine DEQ’s irrational and inconsistent conclusion that, based on the Arcadis Report, EFAC was meeting water quality standards for growth and propagation of aquatic life. Hrg. Tr. Vol. 2 at 22:23 to 23:1. Yet the proposed Findings precluded the groups from citing this record evidence on the basis of issue exhaustion. Findings at 81-82, ¶ 16.f; Hrg. Tr. Vol. 2 at 21:24-33:25. There is no basis in law for the proposed Findings’ use of issue exhaustion to preclude citation to *record evidence* to support existing claims and rebut agency arguments.

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<sup>25</sup> Chloride is an ion of chlorine.

In sum, the proposed Findings’ imposition and application of administrative issue exhaustion was egregious. It was contrary to the plain language of the relevant statutes, it undermined the purposes of these statutes and the constitutional right to public participation, and it had no support in relevant case law. Indeed, it would place the burden of MSUMRA compliance on the predictive powers of the public, not on DEQ, where it should be. Moreover, the proposed Findings would preclude the Conservation Groups from arguing issues they plainly raised and citing evidence DEQ itself produced and relied on. This was legal error.

**VII. The proposed Findings erroneously relied on extra-record evidence and post hoc arguments.**

At the same time the proposed Findings read a non-existent issue exhaustion requirement *into* BER’s *In re Bull Mountains* decision, *see* Findings, Ex. A at 5-6, they also read the extensive record review discussion *out* of that decision. *Id.* at 4-5. As a result, the proposed Findings repeatedly and erroneously relied on extra-record evidence and post hoc arguments that (1) the cumulative hydrologic impacts will supposedly not result in a change in salt concentration in EFAC but only in increased duration of elevated salt levels—even though the CHIA expressly based its analysis on a projected 13% increase in salinity, Findings at 37-38, ¶¶ 132-135; *id.* at 67-76; (2) under an artificial “probabilistic” analysis—that appeared nowhere in the record—the increased salt contributions to EFAC would not be measurable,

*id.* at 38-39, ¶¶ 136-42; *id.* at 69; and (3) macroinvertebrate taxa found in EFAC in 2014 were consistent with and similar to sampling from the 1970s—even though the CHIA determined that samples from 2014 and the 1970s were *not comparable* because different methodologies were used. *Id.* at 50-51, ¶¶ 193-195. None of this evidence or argument was presented to the public in DEQ’s CHIA. It was improper and legal error for the proposed Findings to rely on it.

Controlling here, in *In re Bull Mountains*, BER explained at length that permit appeals under MSUMRA are limited to the “administrative record” compiled at the time of DEQ’s permitting decision and emphatically rejected any reliance on extra-record evidence or argument not presented to the public in DEQ’s CHIA and decision:

DEQ and SPE [the coal company intervenor] contend that DEQ should be permitted to support the adequacy of its CHIA and permitting decision with extra-record evidence, as well as with arguments and analyses that were never articulated in the CHIA....

Under MSUMRA, DEQ’s CHIA alone “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.” ARM 17.24.314(5). *Thus, the only relevant analysis is that contained within the four corners of the CHIA and the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision.*

Further support for the Board’s conclusion is found in ARM 17.24.405(6), which requires DEQ [to] issue written findings based on

record evidence to support its permitting decision. The written findings must be shared with the interested public. These provisions, which require DEQ to provide specific reasons for its permitting decision (including those in the CHIA) based on evidence “compiled by the department,” would be rendered a dead letter or hollow formality if, in a contested case proceeding, DEQ were permitted to present all new evidence, analysis, and argument to support its permitting decision that was never compiled in the record, articulated in the CHIA, or made available to the public....

Allowing DEQ to present new evidence, analysis, and argument to support its CHIA and permitting decision would also negate MSUMRA’s goals of public participation. As noted, DEQ must provide the interested public with written findings based on record evidence demonstrating, among other things, that the “cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” ARM 17.24.405(5), (6)(c). These provisions allow the public to oversee DEQ’s permitting decision and decide, in turn, whether to pursue an appeal and contested case. *Id.* 17.24.425(1). The public’s ability to rely on DEQ’s express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture novel analysis and argument.... In effect, DEQ’s position would allow the agency to conceal its actual analysis and evidence until a member of the public makes the significant investment necessary to engage in extensive litigation in a contested case proceeding with the agency.

....

This is not to say that DEQ is limited in its permitting defense to presenting the administrative record to the Board and saying no more. DEQ’s counsel may surely present argument to explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards. What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA.

*In re Bull Mountains*, at 56-59, ¶¶ 66-70 (emphasis added); accord *Am. Petroleum Instit. v. Costle*, 609 F.2d 20, 23-24 (D.C. Cir. 1979) (explaining that language analogous to ARM 17.24.405(6) is intended to facilitate review, allow the public to review the basis for agency decisions, and prevent agencies from attempting to “shore up inadequately justified positions by adding Post hoc rationalizations to the record”).<sup>26</sup>

**A. The post hoc arguments about increased salinity pollution.**

In DEQ’s CHIA and written findings, the agency based its material damage analysis and determination on an anticipated 13% increase in salinity in the EFAC alluvium and EFAC.

*Baseflow in EFAC by SW-55 [surface water station number 55] is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L. This increase in TDS comes from spoils replacing the Rosebud coal aquifer feeding baseflow to the stream. This increase will not occur until the spoil has resaturated and groundwater flows from the spoils to the alluvium of*

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<sup>26</sup> In allowing DEQ and WECO to present post hoc evidence, the Findings misread *In re Bull Mountains* to allow expert testimony to “explain and support the CHIA.” Findings, Ex. A at 4-5 (citing *In re Bull Mountains*, at 59, ¶ 70). But the cited sentence in that case plainly prohibits admission of *extra-record evidence* or *post hoc arguments*, but only allows *counsel to explain the analysis within the CHIA*: “DEQ’s *counsel* may surely present arguments to explain and demonstrate that evidence before the agency at the time of permitting and analysis within the CHIA satisfy applicable legal standards.” *In re Bull Mountains*, at 59, ¶ 70 (emphasis added).

EFAC. The proposed action will increase the volume of spoils generated by the mine, and groundwater from the recharged spoils may ultimately become baseflow in the creek. The postmine water quality should continue to support livestock use, although the water quality in the stream may be diminished from premine quality.... Because the creek should be able to support its designated beneficial uses, even when spoil water contributes to baseflow, the proposed mine plan is designated to prevent material damage.

CHIA at 9-9 (emphasis added); *accord id.* at 9-31, 9-32, 9-33, 9-58, 9-85. Thus, in its response to comments about the impacts of increased salinity on EFAC, which is already impaired and beyond its carrying capacity due to excessive salinity, DEQ responded that “[f]or the most sensitive use of EFAC water, aquatic life, there is no scientific evidence that *the 13% increase in TDS* will adversely affect macroinvertebrates in EFAC.” DEQ Ex. 1 at 11 (emphasis added).<sup>27</sup>

Despite the CHIA’s use of the 13% increase in salt in EFAC as the basis of its material damage assessment and determination, at hearing DEQ presented and the proposed FOFOCL relied on novel testimony from its hydrologists that the

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<sup>27</sup> There is no dispute and the proposed Findings agree that EFAC is *currently* impaired and not meeting water quality standards for aquatic life support due to the existing, excessive concentrations of salt. Findings at 29, ¶ 96; *id.* at 32, ¶ 106; *id.* at 69-70. This impairment will only be aggravated by DEQ’s projected 13% increase. DEQ’s statement about the 13% increase in salt not adversely affecting aquatic life was not made by anyone with any expertise in aquatic life—indeed DEQ prohibited its own aquatic life expert from assisting with the CHIA’s analysis. *See supra* Part V.

AM4 Amendment would *not* result in *any* increase in salt concentrations, but only an increase (by tens or hundreds of years) in the duration of increased salinity levels. Findings at 37-38, ¶¶ 132-135; *id.* at 67-76. This extra-record evidence and post hoc analysis appear nowhere in the administrative record, much less within the four corners of the CHIA (which instead based its (faulty) analysis on an anticipated 13% increase in salinity). BER has been clear that DEQ may not blindside the public by proffering new analysis and new evidence in a contested case. It was error for the proposed Findings to rely on and adopt this extra-record evidence and post hoc argument.

**B. The post hoc “probabilistic” analysis.**

At hearing WEC<sub>o</sub> presented and the proposed Findings relied on a “probabilistic” analysis of anticipated salinity pollution by which—under artificially narrow experimental constraints (12 samples)—the anticipated 13% increase in salinity in EFAC would supposedly not be “measurable.” Findings at 38-39, ¶¶ 136-142. But all parties stipulated on the record that this evidence was *not* in the administrative record and the “probabilistic” analysis was post hoc. Hrg. Tr. Vol. 4 at 33:4-20 (“We [WEC<sub>o</sub>] will stipulate that the probabilistic analysis was not contained in either the PHC or the CHIA. MR. HERNANDEZ: DEQ, do you so stipulate? MR. LUCAS: We do. HEARING EXAMINER CLERGET: All

right.”). As BER previously explained, allowing WECO to “manufacture [this] novel analysis and argument” effectively negated the “public’s ability to rely on DEQ’s express written findings and analysis supporting its permitting decision.” *In re Bull Mountains*, at 57-58, ¶ 68; accord *Am. Petroleum Instit.*, 609 F.2d at 23-24. Accordingly, under the clear language of *In re Bull Mountains*, it was error for the proposed Findings to rely on this extra-record evidence and post hoc analysis. Findings at 38-39, ¶¶ 136-142.

**C. The post hoc comparison of recent and historic macroinvertebrate samples.**

The proposed Findings found that macroinvertebrate samples from EFAC in 2014 and prior samples from the 1970s were supposedly “similar” and “consistent.” Findings at 50-51, ¶¶ 193-195. The proposed Findings relied on this comparison to reach its conclusion that EFAC supports aquatic life and therefore the AM4 Amendment will purportedly not violate water quality standards for growth and support of aquatic life.<sup>28</sup> Findings at 50, ¶ 193; *id.* at 53, ¶ 207.

The CHIA, however, expressly *rejected* any reliance on this type of comparison due to the different sampling methodologies used to collect the

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<sup>28</sup> Inconsistently, the proposed Findings also found that EFAC is currently impaired and not meeting water quality standards for aquatic life due to excessive salinity pollution. Findings at 29, 32, ¶¶ 96, 106; *id.* at 69-70.

samples in the 1970s and in 2014. CHIA at 9-8 (“The sampling methodology [used in 2014], which followed DEQ’s WQPBWQM-009 (2012), differed from the methodologies used in the previous studies so that taxa richness may not be directly comparable.”). All experts agreed with the CHIA’s statement that macroinvertebrate samples collected with different methodologies are not directly comparable. Hrg. Tr. Vol. 1 at 295:11 to 296:21 (Sullivan); Hrg. Tr. Vol. 4 at 197:3 to 198:14 (Hunter); Hrg. Tr. Vol. 4 a 275:18 to 276:19 (Stagliano). It was, accordingly, error for the proposed Findings to rely on a direct comparison of the samples. *In re Bull Mountains*, at 56, ¶ 66 (“the only relevant analysis is that contained within the four corners of the CHIA”).

## **CONCLUSION**

In sum, the proposed Findings are fatally flawed as a matter of law on each of the grounds set forth above. BER should reject the proposed Findings’ erroneous conclusions of law and conclude that, as a matter of law, DEQ violated MSUMRA by allowing expanded strip-mining that will cause additional salinity pollution to a stream that is already impaired and not meeting water quality standards due to excessive salinity.

BER should further conclude that DEQ applied a legally erroneous standard (the is-anything-alive standard) for assessing water quality standards for aquatic life support.

Finally, BER should conclude that the proposed Findings erred as a matter of law with respect to the correct burden of proof, administrative issue exhaustion, and extra-record evidence and post hoc arguments.

The Conservation Groups request that BER vacate DEQ's unlawful approval of the AM4 Amendment and remand the matter to DEQ remedy its legal errors.

Respectfully submitted this 10th day of May 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I served a true and correct copy of the foregoing on counsel to this contested case via email at the following addresses:

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

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**IN THE MATTER OF:  
THE NOTICE OF APPEAL AND  
REQUEST FOR HEARING BY  
MONTANA ENVIRONMENTAL  
INFORMATION CENTER REGARDING  
DEQ'S APPROVAL OF COAL MINE  
PERMIT NO. C1993 017 ISSUED TO  
SIGNAL PEAK ENERGY LLC FOR  
BULL MOUNTAIN MINE NO. 1 IN  
ROUNDUP, MT**

**CASE NO. BER 2013-07 SM**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

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**PROCEDURAL HISTORY**

On October 5, 2012, Signal Peak Energy (SPE) sought approval for amendment to its mining and reclamation plan from Montana Department of Environmental Quality (DEQ) to increase the amount of coal to its permitted area for its Bull Mountains No. 1 Mine under permit ID SMP C1993017. DEQ notified SPE its application was technically acceptable on September 13, 2013, and on October 18, 2013, DEQ issued its approval of that permit. DEQ based that approval on its Cumulative Hydrologic Impact Assessment (CHIA), an analysis of anticipated hydrologic impacts associated with mining in and adjacent to the proposed permit area.

Administrative Rule of Montana (ARM) 17.24.314(1) requires that DEQ determine that a given proposed mining and reclamation operation has been designed to minimize disturbance to the hydrologic balance on and off the mine plan area, and prevent material damage to the hydrologic balance outside the permit area. In order to evaluate whether the proposed mining and reclamation plan has been designed to

prevent material damage, a CHIA is prepared by DEQ. Prior to making a permitting decision, DEQ makes an assessment of cumulative hydrologic impacts of all existing and anticipated mining operations. The CHIA analysis must be sufficient to determine whether mining impacts to the hydrologic balance on and off the permit area have been minimized and material damage outside the permit area has been prevented [ARM 17.24.314(5)]. DEQ found that the operational and reclamation plans for the Bull Mountains Mine No. 1 were designed to minimize impacts to the hydrologic balance within the permit area and to prevent material damage outside of the permit area.

On November 18, 2013, the Montana Environmental Information Center (MEIC), pursuant to Montana Code Annotated § 82-4-206(1)-(2), and Montana Administrative Code 17.24.425(1), filed its notice of appeal and request for hearing.

MEIC stated that the grounds for this appeal were that DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the assessment employed the incorrect legal standard; and DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the permit application did not affirmatively demonstrate and DEQ could not, therefore, rationally conclude that the proposed mine expansion was designed to prevent material damage to the hydrologic balance. Both of these arguments were based purely on questions of law, and the parties have never disputed the record or the relevant facts or evidence therein.

On April 11, 2014, MEIC filed its Motion for Summary Judgment; on May 30, 2014, SPE filed its Cross-Motion for Summary Judgment. The parties agreed the matter was capable of determination via summary judgment motions. *See Order Adopting Joint Stipulated Procedural Schedule for Administrative Review* (Jan. 6, 2014). For summary judgment to be appropriate, there must be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law. *See Mont. R. Civ. P. 56(c)(3)*. Each of the parties agreed that there was no genuine issue of material fact. The parties argued the matter before the Board on July 31, 2015, and submitted proposed findings of fact and conclusions of law.

The Board met again on October 16, 2015, to determine whether or not there were sufficient material within these proposed findings of fact and the conclusions of law to allow a decision without any further hearing; and whether it were possible to rule on the facts in the CHIA and the administrative record.

Ultimately, the Board voted to rule on the motions for summary judgment, deeming the proposed findings of fact as undisputed, and disposition available upon adjudicating the issues of law. The Board chose to adopt MEIC's proposed findings of fact and conclusions of law, with amendments.

In accordance with the Board's order, both DEQ and SPE submitted proposed findings of fact. As Mont. Code Ann. § 2-4-623 requires that the decision must include a ruling upon each proposed finding, those findings are set out below in italics, and each is followed by its ruling.

## DEQ PROPOSED FINDINGS OF FACT

Appellee DEQ has submitted the following Proposed Findings of Fact, each of which the Board will now address.

### **Procedural History and Issues Presented for Review**

1. *On October 5, 2012, SPE submitted the AM3 Application to DEQ to “increase the mine permit area of [the SPE Mine] by adding 7,161 acres and expanding the mine from five longwall panels . . . to fourteen longwall panels”, and “approximately 176 million tons of in-place coal reserves or 110 million tons of mineable coal.”* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

2. *In the AM3 Application, SPE proposed to continue longwall coal mining beyond the boundaries of the current permit. Accordingly, DEQ reviewed the AM3 Application as a proposed amendment the existing permit.* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

3. *On December 14, 2012, DEQ notified SPE that the AM3 Application was complete. After three rounds of notice and response to technical deficiencies, DEQ notified SPE that the Application was technically acceptable on September 13, 2013.* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

4. *On October 18, 2013, after public notice and receipt of public comment required by MSUMRA, DEQ approved the Application, and issued an amendment to*

*the permit along with the written findings as required by ARM 17.24.405(6). This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

5. *MEIC does not allege that DEQ violated any of the public notice requirements of MSUMRA. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

6. *On November 11, 2013, MEIC timely filed its request for hearing. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

7. *DEQ reviewed the Application for compliance with the requirements of MSUMRA which are set forth in §§ 82-4-201 through 254, Montana Code Annotated ("MCA"), along with its implementing rules in ARM 17.24.301 through 17.24.1826. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

8. *MEIC limits its challenge to the legal sufficiency of the CHIA and the information that DEQ used to prepare the CHIA. MEIC does not challenge findings relating to impact of mining on seeps, springs, and other surface waters. Nor does MEIC argue that DEQ neglected to perform any required determination regarding alluvial valley floors. Furthermore, MEIC does not challenge the statement in the CHIA that drawdown in the Mammoth Coal during mining will not impair any water right in the cumulative impact area. This proposed finding of fact is an accurate*

statement taken from the record, and is not at variance with the Board's Conclusions of Law.

9. *MEIC challenges only the legal sufficiency of the CHIA and the Probable Hydrologic Consequences ("PHC") evaluation, upon which the CHIA is based, relating to possible impacts due to salinity as measured by natural specific conductance<sup>1</sup> in the Mammoth Coal. This proposed finding of fact is inaccurate, and is at variance with the Board's Conclusions of Law. See ¶¶ 94-116. Although MEIC argues that the CHIA is legally insufficient because it analyzes only one water quality standard for one parameter (MEIC Reply Br. 6), the CHIA does indeed address multiple parameters of concern, including toxic parameters listed in DEQ-7. See DEQ Ex. C-0, CHIA p. 8-3 (DEQ-7<sup>2</sup> standards do not apply to sampling events from stormwater events and on ephemeral streams); p. 9-10 ("arsenic concentrations in overburden are located up gradient from the mine and have declined below detection limits"); 9-11 ("[n]o exceedances of DEQ-7 standards were observed in any of the Mammoth Coal wells"); 9-13 ("[b]ased upon monitoring well information, there is no evidence of any mining related impacts to upper underburden or to the relatively deep upper underburden water quality in the vicinity of the Bull Mountains Mine No. 1 and no exceedances of DEQ-7 water quality standards have been reported in the wells."). No evidence in the record before the Board controverts the baseline information in the*

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<sup>1</sup> "Natural specific conductance," the measure of total dissolved solids used to classify groundwaters in ARM 17.30.1006, is equivalent to "electrical conductivity" as defined in ARM 17.30.602(7). Ex. D (Van Oort Aff. ¶ 13).

<sup>2</sup> DEQ-7 sets forth numeric standards for metals including arsenic and lead and other toxic parameters.

*PHC and the analysis in the CHIA eliminating parameters of concern other than salinity, as measured by EC, from the material damage determination. This proposed finding of fact is inaccurate, and is at variance with the Board's Conclusions of Law. See ¶¶ 94-116.*

### **The SPE Mine Operation**

10. *The AM3 Application proposes that mining continue at the SPE Mine using the current longwall system for an additional 10 years. SPE's proposal does not contemplate adding another longwall or substantially increasing annual production above the capacity of the mine at the time of submittal of the SPE-AM3 Application.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

11. *"Coal at [SPE Mine] is recovered using continuous mining and longwall mining methods. Continuous mining includes cutting parallel entries (main entries) approximately 8 to 10 feet high by about 20 feet wide intersected by regularly spaced tunnels or crosscuts."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

12. *Longwall mining is a mechanical mining method that does not involve blasting.* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

13. *"Longwall mining is a method that removes all coal from each longwall panel, effectively achieving 100 percent coal extraction, and causes surface subsidence. Longwall mining uses a series of hydraulic supports, or shields, set up along the*

*longwall face that function as temporary supports to protect workers and equipment. A cutting machine or shearer moves back and forth along the coal face and line of shields, cutting the coal in a series of passes. After the shearer completes a pass the entire system (shields, shearer, and face conveyor) advances (perpendicular to the shearer) and unsupported overburden is allowed to collapse into the void formally occupied by coal." This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

14. *"[A]ccess to the longwall panels [is] via 'gate roads.' Gate roads are driven roughly perpendicular to the [main entries], and consist of three parallel entries. Besides providing worker access to the longwall panels, gate roads are vital for the installation of longwall equipment, ventilation of the working area, and transportation. Once gate roads have been developed around a panel, the longwall equipment can be installed." This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

15. *"Subsidence impacts include those hydrologic impacts introduced as a result of surface subsidence cracks or deformation of overlying strata as the coal is mined. Each longwall panel at the Bull Mountains Mine No. 1 consists of a large block of coal, approximately 1,250 feet in width by 15,000 to 23,300 feet in length. Surface depressions or subsidence troughs are expected to form as the overburden is undermined and coal is extracted. Overburden rocks are allowed to flex downward, fracture (creating a Fractured Zone) and collapse or cave into the void (forming a Caved Zone) causing immediate and progressive surface subsidence as the longwall*

*system advances along the length of the panel.*” This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

16. *“No significant changes to the [existing] reclamation plan are proposed since Amendment No. 3 only addresses expansion of the permit area to allow continuation of underground mining.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

### **The Hydrologic Setting of the SPE Mine**

17. *“The Mammoth Coal seam ranges in thickness from 8 to 12 feet in the permit area, so approximately seven to eight feet of surface subsidence is expected.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

18. *“Groundwater flow in [the Mammoth Coal] is toward the north-northwest, following the direction of synclinal plunge. Recharge reaches the Mammoth Coal via exposed outcrops, subcrops, and from infiltration through the overburden.”* DEQ Ex. C-0, CHIA p. 8-5. *“Water levels indicate that the Mammoth Coal aquifer is isolated from overlying overburden aquifers.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

19. *“The geometric mean hydraulic conductivity of the Mammoth Coal is 0.16 ft./day.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

20. *“Although the hydraulic conductivities for the Mammoth Coal are relatively higher than the overburden, they are typically inadequate to provide a*

*reliable source of well water and few production wells are completed in the coal.”*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

21. *No wells located within the cumulative impact area produce water solely from the Mammoth Coal. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.*

22. *“Water levels in most Mammoth Coal wells showed little natural fluctuation and did not vary more than two feet over the period of baseline monitoring, except in one well near the Mammoth coal outcrop which showed larger fluctuations apparently in response to precipitation.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

23. *“Baseline water quality of the Mammoth Coal aquifer was determined from samples from 10 wells. Generally, sodium and sulfate are the dominant ions in groundwater collected from most Mammoth Coal monitoring wells. SC and sulfate baseline concentrations in the Mammoth Coal tend to be greater than in the overburden. SC ranged from 1,400  $\mu$ S/cm to 3730  $\mu$ S/cm with an average of 2,272  $\mu$ S/cm. Sulfate concentrations ranged from 251 mg/L to 1,690 mg/L, with an average of 798 mg/L.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

24. *“Approximately one-half of the Mammoth Coal wells produce Class II water and one-half produce Class III water. This data is consistent with Mammoth*

*Coal baseline water quality (Class II to Class III).*" This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

25. *"Mammoth Coal groundwater is generally suitable for watering livestock."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

26. *"The baseline water quality of the upper underburden is similar to that of the Mammoth Coal. Sulfate was the dominant anion and sodium tended to be the dominant cation. Underburden groundwater generally fell into Class II and III. Respective SC and sulfate concentrations of the upper underburden aquifer ranged from 1,440  $\mu\text{S}/\text{cm}$  to 4,280  $\mu\text{S}/\text{cm}$  and 216 mg/L to 2,680 mg/L. Average SC and sulfate concentrations were 2,721  $\mu\text{S}/\text{cm}$  and 1,121 mg/L. Upper underburden wells are typically suitable for livestock use, and some are marginally suitable for domestic use."* The hydraulic conductivity of the upper underburden is similar to the Mammoth Coal. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

27. *"[T]he relatively deep sandstones of the lower underburden aquifer are hydraulically isolated from the Mammoth Coal and upper underburden aquifers."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

28. *"The hydraulic conductivity of this 50-foot thick sandstone [encountered in the underburden approximately 350 feet below the Mammoth Coal] is relatively high and a pumping test showed that [a test well] is capable of sustaining a yield of more*

than 10 [gallons per minute]." This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.

29. *"Water quality analysis of a sample from the [mine] office well completed in the deeper underburden indicated Class I groundwater, and is suitable for the mine public water supply. Most deeper underburden wells are suitable for domestic and livestock use."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

### **Review of the AM3 Application and Assessment of Material Damage**

30. *When DEQ reviewed the SPE application for an amendment to its existing coal mine operating permit, DEQ prepared an assessment of the cumulative impacts of the proposed mine operation on the hydrologic balance outside the permit area by preparing a CHIA. DEQ Ex. C-0, CHIA, p. 1-1. DEQ adopted the CHIA as part of its written findings supporting issuance of the Amendment.* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.

31. *When it prepared the CHIA, DEQ looked in part to information that MSUMRA requires applicants such as SPE to provide in an application to amend a coal mine operating permit, including the PHC.* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

32. *The PHC submitted by SPE is identified as MEIC Exhibit No. 5. The PHC includes a Groundwater Model. See MEIC Ex. 6. The Groundwater Model is described in the CHIA as a "transient flow [particle tracking] model."* The material

damage determination set forth in the CHIA is based in part on the results of the Groundwater Model. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

33. *The CHIA describes the “cumulative impact area” that is the areal limit for the hydrologic information that it evaluates.* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

34. *The cumulative impact area described in the CHIA is based on drawdown in the upper underburden that has a greater areal extent than for the Mammoth Coal.* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

35. *The CHIA summarizes MSUMRA’s requirements for assessing potential material damage to the hydrologic balance in and adjacent to the SPE Mine site as follows:*

*Administrative Rule of Montana (ARM) 17.24.314(1) requires that DEQ determine that a given proposed mining and reclamation operation has been designed to minimize disturbance to the hydrologic balance on and off the mine plan area, and prevent material damage to the hydrologic balance outside the permit area. In order to evaluate whether the proposed mining and reclamation plan has been designed to prevent material damage, a Cumulative Hydrologic Impact Assessment (CHIA) is prepared by DEQ. Prior to making a permitting decision, DEQ makes an assessment of cumulative hydrologic impacts of all existing and anticipated mining operations. The CHIA analysis must be sufficient to determine whether mining impacts to the hydrologic balance on and off the permit area have been minimized and material damage outside the permit area has been prevented.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

36. *The CHIA explains the methodology for the material damage assessment of the SPE Mine operation proposed in the AM3 Application:*

*Following the definition of material damage in [§ 82-4-203(32), MCA], material damage criteria are established for the evaluation of both groundwater and surface water quality and quantity, and are used to determine whether water quality standards and beneficial uses of water, including water rights, outside the permit boundary have been or are expected to be impacted by mining activities. The interruption or diminution of a surface water or groundwater supply to the extent that an existing use is precluded is considered to be material damage. When material damage occurs mitigation is required; mitigation would include dependable, long-term replacement of a resource acceptable for the designated use [ARM 17.24.314(1)(c) and 17.24.648] or treatment to return water quality to state standards. Material damage criteria include applicable numeric and narrative water quality standards, and criteria established to protect existing beneficial uses of water.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

37. *The CHIA described how surface water quality standards inform the material damage determination.* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

38. *The CHIA identifies the indicators of material damage to groundwater and the applicable groundwater quality standard:*

*Groundwater material damage occurs when, as a result of mining, any of the following circumstances occur:*

- Groundwater quality standards outside of the permit area are violated*
- Land uses or beneficial uses of groundwater outside of the permit area are adversely affected to the extent that an existing use is precluded*
- A groundwater right is adversely impacted*

*Protection of groundwater quality for beneficial uses is based on narrative standards established by ARM 17.30.1006 (Table 2-4) and numeric standards for individual parameters in Circular DEQ-7 (Table 2-2). Water quality guidelines established for livestock use are shown in Table 2-3. Groundwater quality in the area may naturally exceed these*

*livestock water quality guidelines. Groundwater released from the mine is not required to be purer than natural, background conditions [75-5-306, MCA and ARM 17.30.629(2)(k)].*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

39. *The groundwater regime assessed in the CHIA, “occurs in the alluvial, overburden, Mammoth Coal, and underburden aquifers. Groundwater flow is generally toward the north-northwest except in the often dry alluvial aquifer system.”*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

40. *The CHIA describes sources of groundwater for livestock watering as follows:*

*Water quality in surface water, springs, and shallow wells is variable and may change seasonally with the availability and use of the water source. Deeper wells provide a more consistent and reliable water source. DEQ Ex. C-0, CHIA p. 6-1.*

*60 wells that lie within the groundwater [cumulative impact area] are identified for stockwater use in the [Montana Groundwater Information Center] and [Department of Natural Resources and Conservation] databases. The completion depths listed for stockwater wells indicate that groundwater resources used for supply include alluvium, overburden, coal, and upper and deep underburden aquifers.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

41. *“Beneficial uses of groundwater outside the permit boundary include livestock and domestic use. Wells completed in the alluvium, overburden, and underburden supply livestock water. Wells for domestic use typically have reported*

completion depths that suggest utilization of groundwater from the underburden.” This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

42. *“The alluvial hydrographs discussed [in section 9.5.2.2 (Impacts from Dewatering-Alluvium)] indicate that there is no evidence that mining and associated dewatering of the Mammoth Coal have affected water levels of the alluvial aquifer system. Because the alluvial aquifer is typically a perched aquifer supplied by recent precipitation or snow melt, additional mining is not expected to affect water levels in the alluvial aquifer.”* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

43. *For water resources in the overburden:*

*The abrupt decline of water levels [in two shallow overburden wells] suggests that the relatively shallow overburden and perched aquifer system in the vicinity of wells was partially drained via subsidence fractures that healed over the period between February and April 2012 leading to the water level rebound as seen in Figure 9-4. Well log data indicates that relatively impermeable gray shale occurs below the respective screened intervals. These rocks may have become fractured, allowing perched groundwater to drain into the mine workings, and then healed due to compression and settling. This data may illustrate that the various perched aquifers within the upper overburden may have become temporarily dewatered by subsidence fractures in the vicinity of BMP-60 and BMP-90 due to mining. . . . Similar temporary overburden dewatering may occur over all longwall mining areas as subsidence occurs, but these effects are expected [to be] limited in spatial and temporal extent. No long term effects on overburden water quantity are expected as a result of mining.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

44. *No exceedances of DEQ-7 standards were observed in any of the Mammoth Coal wells. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

45. *"Domestic or private wells in the area generally produce water under confined conditions from relatively deep underburden sandstones that are hydrologically separated from the upper underburden aquifer and Mammoth Coal, although a few domestic wells are completed in the upper underburden."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

46. *The Groundwater Model:*

*simulates flow in all aquifers of concern but is focused on the Mammoth Coal and upper underburden, as these aquifers are expected to experience the greatest effects from mining. The groundwater model is calibrated by comparing model results to measured water levels from monitoring wells and adjusting model parameters to achieve the best simulation of groundwater conditions. After calibration the model was run forward in time to predict water levels at the end of mining. In this predictive simulation, the mine tunnels are added to the model according to the proposed mine plan schedule as drains which simulate the dewatering associated with mine development. As mining progresses the material properties of the Mammoth Coal and overburden layers are also modified to simulate the collapse of material into the void left behind by longwall mining, and the subsidence and fracturing that occurs above the mined out areas. The results of this simulation are shown in Figure 9-7, which displays the predicted drawdown in the Mammoth Coal and upper underburden at the end of mining. In the Mammoth Coal, the area of the mine workings is completely dewatered, and an area of drawdown extends primarily to the north of the mine. A drawdown cone of depression is formed in the upper underburden, centered on the northern part of the mine workings and extending throughout the life of mine area and to the north. Drawdown to the south, east, and west in both the Mammoth Coal and the upper underburden is limited by the outcrops of the aquifers in those directions.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

47. “[P]article tracking [using the Groundwater Model] does not account for potential influence of adsorption/desorption influences for given analytes. Rather, it simply simulates and tracks flow paths. Particle tracking also does not account for effects of dilution as other contributions to groundwater flow occur (e.g., recharge, etc.) In effect, particle tracking serves as a very conservative predictor of the implications of solute transport.” This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

48. “The [Groundwater Model] provides a conservative [i.e., overestimates the potential impacts] and consistent basis for comparing the hydrologic response and relative impacts to the ground water associated with mining in the proposed disturbance area.” This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

49. “The steady-state calibrated model utilizes hydraulic parameters that are consistent with baseline data.” This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

50. “The [Groundwater Model] produces simulated water levels that are in reasonable conformance with water level observations over time. In addition, the same transient simulations that had been conducted demonstrated that the model provided discharge rates reasonably consistent with observations.” This proposed finding of

fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.

51. *In its review of the PHC submitted by SPE, DEQ concluded that the Groundwater Model included in the PHC was based on generally accepted methodologies and that it provides a reasonable prediction of groundwater flow in the confined aquifers, such as the Mammoth Coal, at Bull Mountain Coal Mine #1. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

52. *DEQ also concluded that the particle-tracking analysis applied by the Groundwater Model provides a conservative prediction [i.e., overestimates the potential impacts] of the rate that gob water may migrate through the undisturbed Mammoth Coal. MEIC offered no evidence of any other model or methodology. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

53. *DEQ states that it is not aware of a generally accepted groundwater model or modeling methodology capable of predicting, with a reasonable probability of certainty, the concentration of inorganic constituents at any time in a hydrologic unit subject to migration of groundwater from an area mined by underground methods that permit caving of overburden. MEIC did not offer any evidence of the availability of a groundwater model with superior predictive capability to the model provided by SPE. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

54. *The uncontroverted evidence in the record is that the source of recharge water for the Mammoth Coal outside the permit area and the mine pool will be from above rather than from lateral migration through the Mammoth coal. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

55. *The Groundwater Model analyzes two scenarios: Scenario 1, the movement of particles if the gate roads collapse, and Scenario 2, the movement of particles if the gate roads remain open. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law. Scenario 1 analyzes potential impacts of the SPE Mine as it was designed, while Scenario 2 was established "to 'bound' the range of uncertainty for the simulations."* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.

56. *"The two post-mine scenario simulations were run to 50 years in the future to evaluate the long-term response to mining at [the SPE Mine]."* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law. *"The [Groundwater Model] prediction in the PHC indicates that groundwater associated with the Mammoth Coal and the upper underburden aquifers will recover to near premining levels approximately 50 years after the cessation of mining."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

57. *The uncontroverted evidence in the record is that the results for Scenario 1 of the Groundwater Model, which simulates the resaturation of the Mammoth Coal inside and outside the mined area if the gate roads collapse, predicts recovery to a uniform hydraulic gradient to the northwest across the northern permit boundary within 50 years after mining stops. This condition represents the long-term ground-water level response at the end of mining and for a time period extending up to 50 years after mining. The Board found this finding of fact to be unpersuasive in light of the findings of fact and conclusions of law set out below at ¶¶ 29-32 and 124-126.*

58. *The uncontroverted evidence in the record is that the results for Scenario 2 of the Groundwater Model, which simulates the resaturation of the Mammoth Coal inside and outside the mined area if the gate roads remain open, predicts recovery to steeper hydraulic gradient to the northwest across the northern permit boundary and a constant mine pool elevation of 3850 feet, within 50 years after mining stops. This condition represents the worst-case, long-term ground-water response at the end of mining and for a time period extending up to 50 years after mining. The Board found this finding of fact to be unpersuasive in light of the findings of fact and conclusions of law set out below at ¶¶ 29-32 and 124-126.*

59. *“The particle tracking results for Scenario 1 [gate roads collapse] show that given the limiting assumptions described in the flow modeling effort, and also in accordance with the [described limitations], it is projected that any inorganic constituents emanating from the mine gob will be retained within the mine permit*

*boundary.*” The Board found this finding of fact and conclusions of law to be unpersuasive in light of the findings of fact set out below at ¶¶ 29-32 and 124-126.

60. *The gate roads in the Bull Mountains Mine are designed to collapse over time.* The Board found this finding of fact and conclusions of law to be unpersuasive in light of the findings of fact set out below at ¶¶ 29-32 and 124-126.

61. *The United States Department of Interior, Bureau of Land Management reported in its environmental assessment for the SPE Mine also explained that the gate roads are designed to collapse with time:*

*[T]he pillars supporting the gateroad openings have been designed to slowly fail as the longwall panel progresses. Failure of the gateroad pillars would result in partial subsidence over the gateroads. In longwall mining, surface subsidence typically occurs as a series of troughs over the longwall panels. But because the gateroads are designed to yield under the stress of the mined-out panels, the expected result is less extreme transitions between each trough. The expected outcome is that the surface subsidence would be uniform and less surface cracking would occur.*

This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

62. *“The particle tracking results for Scenario 2 [gate roads remain intact] shows that with the same limiting/conservative assumptions described heretofore, that it is possible that some flow from the mine gob may flow just outside the permit boundary.”* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board’s Conclusions of Law.

63. *The CHIA concludes that the SPE mine as designed will not cause material damage by reducing the quantity of water in the alluvial, overburden, Mammoth Coal, or underburden aquifers:*

*Mining is not expected to affect the alluvial aquifer beyond the permit boundary. The alluvial section within the boundary is generally dry. Groundwater levels in the overburden, Mammoth Coal and upper underburden near the western permit boundary have been lowered as a result of mining and drawdown in these aquifers will continue as mining advances. Mining proposed in Amendment 3 will result in continued drawdown to the east, south and north of the mine but is expected to remain largely within the mine permit boundary and drawdown will not affect most groundwater users. Mining related drawdown in these aquifers may affect a few domestic wells completed in the upper underburden north of the permit area. Since most domestic and stock wells produce from relatively deep sandstones (deep underburden aquifer) that are hydraulically isolated from mining by a relatively thick section of alternating shales and siltstones, no impact to these deeper wells is expected. SPE is committed to replacing any water supplies affected by mine related drawdown with a comparable permanent supply.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

64. *The CHIA concludes that the SPE mine as designed will not cause material damage to the quality or quantity of surface water:*

*To date, no material damage to surface waters is evident. Narrative standards for surface waters have not been violated or exceeded, and the quantity of surface waters (springs and ephemeral runoff) has not been impacted due to mining activity, and surface water rights have not been impacted. Accordingly, because current mining activities are proposed throughout the expanded permit area, disturbance of the hydrologic balance on and off the permit area and material damage to surface waters outside the permit area are not expected from continued underground mining.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

65. *The CHIA paraphrases the Groundwater Model and concludes that the SPE mine as designed will not cause material damage to water quality in the Mammoth Coal:*

*Because mine dewatering produces groundwater flow towards the mine working during mining, no water quality affects [sic] are expected during mining. After mining is completed, some of the mine gob will become saturated. Groundwater quality in the mine gob is expected to be degraded relative to natural water quality, however, due to the small quantity of gob influenced water and the slow water movement in the Mammoth Coal this poor quality water is not expected to migrate outside the permit boundaries within 50 years after mining.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

66. *The CHIA concludes that the SPE mine as designed will not cause material damage by producing acid mine drainage in the mined area:*

*Post mining groundwater quality within the mined-out area (Caved Zone) is expected to degrade after coming into contact with fresh rock surfaces exposed in subsidence fractures and mineralized rubble or gob. . . . Due to the buffering capacity of the alkaline mineralogy of the overburden and shallow underburden, development of acidic conditions in water present in the gob is extremely unlikely.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

67. *The CHIA concludes that the SPE mine as designed will not cause material damage to water quality in the upper underburden immediately below the Mammoth Coal:*

*Similar to the Mammoth Coal, water quality in the upper underburden aquifer may be locally affected by poor quality water from the mine gob after mining is completed and water levels in the mine area recover. No water quality effects on the deeper underburden aquifer are expected due to the hydraulic separation between this aquifer and the mine.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

68. *"Based upon monitoring well information, there is no evidence of any mining related impacts to upper underburden or to the relatively deep upper underburden water quality in the vicinity of the Bull Mountains Mine No. 1 and no exceedances of DEQ-7 water quality standards have been reported in the wells."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

69. *"Currently, there is no evidence that local and off permit groundwater quality of any of the hydrologic units has been degraded or impacted by mining. Groundwater quality of shallow and deep aquifers (alluvium, overburden, coal, and underburden) is monitored regularly by a network of 105 monitoring wells to alert DEQ about the potential for material damage during or post mining."* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

70. *The CHIA summarized the obligations that MSUMRA places on the operator to mitigate potential impacts to the environment including impairment of water resources as follows:*

*Among these measures are requirements and performance standards [that] include requirements and standards for drainage control, pond*

*design and maintenance, sediment control, road design and maintenance, reclamation, permitted discharges to surface waters, and protection of undisturbed drainages. In addition, adherence to Best Technology Currently Available (BTCA) and Best Management Practices (BMPs) in the design and implementation of equipment, devices, systems, methods, and techniques is required for the minimization of hydrologic disturbance. These requirements and performance standards established in ARM 17.24 subchapter 5 through subchapter 12 are incorporated into operation and reclamation plans included throughout the Bull Mountains Mine No. 1 surface mining permit (SMP C1993017), and have been reviewed and approved by DEQ.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

71. *The CHIA recognized and explained measures taken by SPE to minimize adverse impacts to the hydrologic balance as follows:*

- a. measures to convey and treat mine and stormwater runoff within the disturbed area;*
- b. each MPDES-permitted outfall at the facility is associated with a sediment pond designed to contain the runoff from a 10-year, 24-hour rainfall event;*
- c. runoff controls at the waste disposal area;*
- d. minimizing surface impacts to ephemeral watercourses throughout the mine area through best management practices;*
- e. post mining controls for portal discharge;*
- f. documentation of recovery of springs after undermining and subsidence;*
- g. explanation of evidence of recovery of water in wells in overburden after undermining and subsidence.*

This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

72. *The CHIA also considered mitigation measures for water sources:*

*Impacts to surface water supply and water rights are evaluated with respect to regional and local impacts to surface water resources and natural variations in seasonal and yearly runoff. Mitigation for the loss of a beneficial use of surface water or a water right requires provision of a dependable, long-term replacement water resource of acceptable quality for the designated use and adequate quantity to support the existing and/or planned future use [ARM 17.24.314(1)(c) and 17.24.648].*

In addition:

*Mitigation of impacts from subsidence generally involves replacement of water supplies lost or diverted by subsidence-related processes with the purpose of maintaining premine land uses. Mitigation plans in the permit include restoring springs, stream reaches, and ponds by opportunistic development of springs where they appear, guzzler emplacements, horizontal wells, vertical wells, pipeline systems, deepening or rehabilitating existing wells, reclamation of stream reaches and function, water treatment where appropriate or necessary, and restoring premine land uses (MDSL, 1993). Detailed monitoring and mitigation plans are provided in Permit C1993017, Vol. 2, Section 313, Appendix 313-2 Spring/Seep Mitigation Plan.*

The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶ 130-132. This is echoed by the permit which provides:

*The permittee is committed to mitigating hydrologic impacts caused by mining by the measures approved in the permit, or, should these approved measures fall short, by alternative measures to be developed in consultation with the Department. To implement these measures, the permittee has developed a strategy for mitigation of any long-term hydrologic and wetlands impacts that occur due to mine development and operation. The goals of the permittee mitigation strategy are:*

- No net loss of wetlands (no decrease in total wetland area due to mining); and*
- Long-term maintenance by the permittee (until bond release) of adequate water supply in regards to quantity, quality and location for existing levels of wildlife and livestock.*

• *After bond release, maintenance of the water replacement facilities is expected to be provided for by a trust fund established by Permittee and administered by its Department appointed trustees. -*

*This strategy uses a phased approach that begins with planning, followed by implementation of the plan, and includes monitoring to ensure success. Successful mitigation is defined as the achievement through replacement or enhancement of resource which provides the potential for postmining land use equal to premine conditions. Success will be measured through appropriate testing and statistical comparison of data collected during baseline and postmining periods (see discussions of resources within the 17.24.313 RECLAMATION PLAN)*

The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶ 130-132.

73. *The CHIA addresses mitigation of disruption of surface and groundwater rights:*

*Likewise, the rights of present and future groundwater and surface water owners or users will be protected in accordance with ARM 17.24.314(1)(b) and 17.24.648. ARM 17.24.648 states that "the permittee will replace the water supply of any owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial or other legitimate use from a surface or underground source if such supply has been affected by contamination, diminution, or interruption proximately resulting from strip or underground mining operation by the permittee". To protect uses replacement water must be of a quality and quantity sufficient to satisfy premining consumption requirements.*

This statement is supported by specific commitments by SPE, set forth in the permit, to protect water rights:

*The rights of present and future groundwater and surface water owners or users will be protected in accordance with Rules 17.24.314(1)(b) and 17.24.648. Existing groundwater and surface water rights within the Bull Mountains Mine No. 1 study area are listed in Addendum 1, Table 304 (5)-10 and in Addendum 5, Table 304 (6)-46.*

*The permittee will replace the water supply of any owner of real property who obtains all or part of his supply of water for domestic,*

*agricultural, industrial or other legitimate use from a surface or underground source if such supply has been affected by contamination, diminishment, or interruption proximately resulting from the underground mining operation of the permittee. Such replacement water shall be of a quality and quantity sufficient to satisfy premining consumptive requirements. Several possible sources of replacement water are being considered, including overburden and underburden wells, horizontal drains, surface water impoundments, precipitation collection devices, and the opportunistic development of existing unaffected or relocated springs.*

The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶ 130-132.

74. *The CHIA describes how the monitoring plan will be revised in the event of potential damage to the hydrologic balance:*

*As mining proceeds or potential impacts are anticipated, the monitoring plan is revised to accommodate changes, including replacement of monitoring sites or development of new sites. Monitoring is required to continue through the final phase of bond release.*

*As longwall mining approaches monitored springs, the frequency of flow monitoring increases from monthly or quarterly to weekly so that any discernible impacts may be evaluated and mitigated in a timely manner and in accordance with the approved mitigation plan.*

*As subsurface strata continues to deform and heal, it is anticipated that water levels will be reestablished at a stratigraphic level equivalent to pre-undermining. Continued monitoring of water levels will inform understanding of short and long-term response of underlying strata and consequent flow paths to undermining and subsequent recovery.*

These statements are echoed by the detailed monitoring and mitigation plans described in the permit:

*In order to detect potential impacts to springs, weekly monitoring of flow/discharge and pond levels (where applicable) will be will be*

*conducted for all springs identified in Appendix 314-3, Table 314-3.1. This weekly monitoring will commence two months prior to longwall mining beneath each identified spring and continue for twelve months after longwall undermining the same spring. This weekly monitoring will also be conducted for springs that are within 150 feet of the edge of a panel being mined. This weekly monitoring in addition to the monitoring conducted in accordance with Appendix 314-4 and associated data analysis will detect potential mining impacts.*

*Weekly monitoring will be conducted during periods of anticipated potential impact (2 months before and 12 months after undermining).*

*As mining progresses, the Permittee will develop tentative mitigation plans for each of the springs that may be impacted by mining, as listed in Table 314-3-1, and the monitoring frequencies specified in Appendix 314-4 (MQAP) will be reviewed annually and necessary revisions will be proposed in conjunction with the Annual Hydrology Report. As the effects of mining approach more distant springs, (e.g., those in the eastern portions of the Permit Area and beyond), monitoring frequencies will be modified as necessary to ensure prompt detection of impacts and address monitoring of springs historically impacted and associated replacement water sources.*

The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶ 130-132.

### **SPE PROPOSED FINDINGS OF FACT**

Intervenor SPE explicitly adopted and incorporated the proposed findings of fact submitted by DEQ, and in addition has submitted the following Proposed Findings of Fact, each of which the Board will now address.

1. *MEIC challenges the legal standards used in and the sufficiency of DEQ's written findings supporting approval of Amendment No. 3 to SPE's underground mine operating permit (Permit No. C1993017) (the "Application") for*

*SPE's Bull Mountain No. 1 Mine.* This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.

2. *MEIC challenges the sufficiency of a specific portion of DEQ's approval of SPE's Application: the Cumulative Hydrologic Impact Assessment ("CHIA"). This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law. The CHIA contains DEQ's assessment of whether the proposed mine expansion is designed to minimize disturbance to the hydrologic balance in areas inside and adjacent to the mine area, including whether the proposed amendment is designed to prevent material damage to the hydrologic balance outside the permit area. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

3. *MEIC provided no evidence or facts outside of the CHIA and other parts of the administrative record for the Board's consideration in this matter. In particular, MEIC provided no expert opinion contradicting or otherwise calling into question the conclusions of the Groundwater Model included in the Application. Therefore, the CHIA, including its descriptions of the hydrologic regime and formation of the mine pool, and the factual basis, scientific methodology, and conclusions reached in the Groundwater Model regarding movement of mine pool water away from the mine area, supply all of the undisputed and undisputable facts necessary for the Board's consideration of MEIC's challenge. This proposed finding of fact is an accurate*

statement taken from the record, and is not at variance with the Board's Conclusions of Law.

4. *The CHIA summarizes statutory requirements for assessing whether the Application was designed to prevent material damage to the hydrologic balance in and adjacent to the permit area. The CHIA also includes a Groundwater Model, described as a "transient flow [particle tracking] model." The material damage determination as stated in the CHIA is based in part on the conclusions of the Groundwater Model. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

5. *The CHIA explains the methodology DEQ used for its material damage assessment. Specifically, the CHIA discusses changes DEQ observed to the hydrologic balance resulting from the current mining procedures, and it uses the Groundwater Model to evaluate whether the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

6. *In its material damage assessment, the CHIA notes that a violation of water quality standards would constitute material damage under the statute. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.*

7. *However, the CHIA concludes that "[t]here is no evidence from monitoring data to suggest a change in predictions made in the PHC with regard to*

*potential impacts to water quality and levels.*" This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

8. *The CHIA notes that the Probable Hydrologic Consequences ("PHC"), including those set forth in the Groundwater Model, predict the proposed expansion will not cause material damage to the quality of the groundwater in various aquifers, including the alluvial, the overburden, the Mammoth Coal, the upper underburden, and the deeper underburden. CHIA, p. 9-9 ("The additional proposed mining is not expected to have any effects on alluvial water quality."); id., p. 9-10 ("Because overburden groundwater does not flow through the mine workings, or come into contact with the mine gob, mining is not expected to affect overburden groundwater quality."); id., p. 9-11 ("Groundwater quality in the mine gob is expected to be degraded relative to natural water quality, however, due to the small quantity of gob influenced water and the slow water movement in the Mammoth Coal this poor quality water is not expected to migrate outside the permit boundaries within 50 years after mining."); id., p. 9-13 ("Similar to the Mammoth Coal, water quality in the upper underburden aquifer may be locally affected by poor quality water from the mine gob after mining is completed and water levels in the mine area recover. No water quality effects on the deeper underburden aquifer are expected due to the hydraulic separation between this aquifer and the mine.")).* This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself.

9. *DEQ concluded the Groundwater Model was based on generally accepted methodologies and provides a reasonable prediction of groundwater flow in*

*the confined aquifers, including the Mammoth Coal. DEQ Ex. D (Van Oort Aff., ¶ 9). DEQ also concluded the particle tracking analysis applied in the Groundwater Model provides a conservative prediction of the rate that gob water may migrate through the undisturbed Mammoth Coal. Id. MEIC has not presented any evidence contradicting the findings and predictions of the Groundwater Model. This proposed finding of fact is an accurate statement taken from the record, and is not at variance with the Board's Conclusions of Law.*

10. *The Groundwater Model predicts that particles of mineralized gob water are unlikely to migrate from the mined areas and cross the permit boundary within a period of fifty years after mining ceases, assuming the gate roads collapse. This is taken from the contents of the CHIA, which is part of the administrative record and as such speaks for itself. The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶29-32, 122-126.*

11. *The proposed mine expansion is designed so that the gate roads will collapse over time. The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶29-32, 122-126.*

12. *In its Material Damage Assessment, the CHIA concludes the following:*

*Post mining groundwater quality within the mined-out area (Caved Zone) is expected to degrade after coming into contact with fresh rock surfaces exposed in subsidence fractures and mineralized rubble or gob. Oxidizing conditions are anticipated until after mining is complete and resaturation of the collapsed material has occurred. These conditions may result in increased sulfide oxidation, cation exchange, leaching, and weathering, which together may cause an increase in the concentrations of calcium, magnesium, sulfate and sodium ions. Due to the buffering capacity of the alkaline mineralogy of the overburden and shallow underburden, development of acidic conditions in water present*

*in the job is extremely unlikely. As explained above at 9.5.2, any degradation of groundwater quality is not expected to render groundwaters unsuitable for current or anticipated use. Accordingly, because current mining methods are proposed throughout the expanded permit area, material damage to the quality or quantity of groundwater resources outside the proposed permit area is not expected from continued underground mining.*

The Board found this finding of fact to be unpersuasive in light of the findings of fact it has adopted. See ¶¶29-32, 122-126.

As was stated above, the Board has adopted the following as its findings of fact in this case:

#### **FINDINGS OF FACT**

1. In this case, Appellants Montana Environmental Information Center and the Sierra Club (collectively, "MEIC") challenge the Montana Department of Environmental Quality's (DEQ) approval of a large expansion of the Bull Mountain Mine No. 1, alleging inadequate assessment of the proposed expansion's impact to groundwater resources. DEQ Ex. B at 1.

2. The Bull Mountains, where the proposed mine expansion is located, are arid eastern foothills of the Rocky Mountains on the edge of the Great Plains. MEIC Ex. 1 at 3-3 [hereinafter Lease EA]. "Topography varies from uplands, rock outcrops, and ravines forested with ponderosa pine and Rocky Mountain juniper at higher elevations, to adjoining sagebrush and mixed prairie grassland communities on benches, slopes, and drainages where soils are deeper." MEIC Ex. 12 at III-18 [hereinafter 1992 EIS]. From the summit of Dunn Mountain, the highest point in the

Bull Mountains, an observer can view the distant peaks of the Snowy, Big Horn, Pryor, Beartooth, and Crazy Mountains. Lease EA at 3-80.

3. The Bull Mountains form the hydrologic divide between the Musselshell River to the north and the Yellowstone River to the south. MEIC Ex. 10 at 3-3 [hereinafter CHIA]. The area to be undermined by the proposed mine expansion forms the headwaters of numerous tributary streams of both rivers, including Rehder Creek and Fattig Creek, which flow north, and Pompey's Pillar Creek and Railroad Creek, which flow south. *Id.* at 4-1; 1992 EIS at III-11 to -12. These creeks are mostly ephemeral, flowing only in response to precipitation, though there are intermittent portions, fed by springs or seeps associated with base groundwater flow. CHIA 4-1; 1992 EIS at III-11.

4. Approximately 15 acres of wetlands dot the mine area. 1992 EIS at III-22. Because the Bull Mountains are so arid, the limited water resources are extremely important. *See* 1992 EIS at III-19 ("The wetland vegetation community accounts for less than 0.1 percent of the Bull Mountains and surrounding communities but plays an important role in local ecosystems."); *Id.* at III-22 ("All animals found in the mine plan area use the streams, ponds, and springs, and related habitat to a greater or lesser degree."). Wetlands throughout the Bull Mountains are fed by groundwater springs, including springs originating in the Mammoth Coal aquifer. 1992 EIS at III-13, -19 to -20, -23; CHIA tbl. 8-1. The proposed mine expansion would remove the Mammoth Coal aquifer throughout the 7,161-acre mine expansion area of the Bull Mountains. MEIC Ex. 2 at 5 [hereinafter 2013 EA].

5. The varied vegetative communities of the Bull Mountains support a wide variety of wildlife, including elk, deer, antelope, coyotes, cottontails, turkeys, sharp-tailed grouse, bluebirds, wrens, and a great variety of raptors. 1992 EIS at III-20 to -23. Aquatic and semi-aquatic life, including waterfowl, tiger salamanders, chorus frogs, northern leopard frogs, and painted turtles, inhabit the groundwater-fed stream segments and wetlands in the Bull Mountains. *Id.* at III-22 to -23. All wildlife in the Bull Mountains depends on the area's sparse water resources. *Id.* at III-23.

6. The dominant historical land use in the Bull Mountains is ranching. Lease EA at 4-55; 1992 EIS at III-42. The limited water resources in the Bull Mountains, in particular groundwater-fed springs, are critical for stock watering and ranching operations. 1992 EIS at III-19, -42. A small portion of surface water in the general mine area is used for irrigation. CHIA at 5-1, 6-2.

7. The Bull Mountains and Roundup area also have a long history of coal mining. 1992 EIS at III-38; Lease EA at 2-1. This history "has followed a 'boom-and-bust' pattern" with "good economic times followed by economic recession." 1992 EIS at III-38.

8. The Montana Department of State Lands (MDSL) concluded that the development of the Bull Mountains Mine would follow this same historical boom-and-bust pattern. *Id.* at iv. After short-term benefits to public revenue and employment and income in Musselshell County, "over the long term" there would be "major and negative impacts" to public revenues and "moderate and negative impacts" to employment and income due to inevitable mine closure. *Id.*

9. On October 5, 2012, Signal Peak Energy, LLC, (SPE) submitted its Permit Amendment Application No. 3 to DEQ to “increase the mine permit area of their underground coal mine (Bull Mountain Mine No. 1) by adding 7,161 acres and expanding the mine from five longwall panels (approved under Amendment 00187) to fourteen longwall panels.” CHIA at 3-1.

10. The expanded mining operation would “add approximately 176 million tons of in-place coal reserves or 110 million tons of mineable coal.” 2013 EA at 1.

11. SPE’s application included a Probable Hydrologic Consequences assessment (PHC) and a Groundwater Model. MEIC Ex. 5 [hereinafter PHC]; MEIC Ex. 6 [hereinafter Groundwater Model].

12. MEIC submitted public comments on SPE’s application. MEIC Ex. 7 [hereinafter MEIC Comments]. Among other issues, MEIC raised concerns that the mine expansion could cause material damage to the hydrologic balance outside the permit area. *Id.* at 4-7.

13. On October 18, 2013, DEQ approved SPE’s application. MEIC Ex. 8. Along with the approval, DEQ issued a final Checklist Environmental Assessment (2013 EA) and a Cumulative Hydrologic Impact Assessment or “CHIA.” 2013 EA; CHIA.

14. DEQ’s CHIA determined that the 7,161-acre mine expansion would not cause material damage to the hydrologic balance outside the mine permit area because “any degradation of groundwater is not expected to render groundwaters unsuitable for current or anticipated use.” CHIA at 10-4.

15. On November 18, 2013, MEIC filed its Notice of Appeal and Request for Hearing with the Board of Environmental Review. DEQ Ex. B at 1.

16. The coal seam SPE seeks to remove is saturated with water and functions as an aquifer, the Mammoth Coal aquifer. 2013 EA at 5.

17. The Mammoth Coal aquifer is the water source for domestic wells in the Bull Mountains. PHC at 314-5-12 (“[A] few domestic wells tap the Mammoth Coal as a water supply.”); CHIA at 8-5 (“[F]ew production wells are completed in the coal.”) & tbl. 6-1 (identifying domestic wells 168805 and 167885 drawing water in part from Mammoth Coal aquifer). The Mammoth Coal aquifer is also a source of wells used for watering livestock. CHIA tbl. 6-1. The “geometric mean hydraulic conductivity of the Mammoth Coal is 0.16 ft/day,” which is an order of magnitude higher than the hydraulic conductivity of the overburden or underburden. *Id.* at 8-5 & tbl. 8-5. One of the highest yielding wells in the area is sourced in the Mammoth Coal aquifer, as are some of the highest yielding springs, including one spring (spring 53475) that yields approximately 10 gallons per minute (gpm). *Id.* tbl. 6-1 (well 19944) & tbl. 8-1 (springs 53455, 53485, 53475).

18. The Mammoth Coal aquifer is not isolated. There are “hydraulic connections between the Mammoth Coal aquifer and the upper underburden.” *Id.* at 9-12. Some of the highest yielding wells in the area are sourced in the upper underburden. *Id.* tbl. 6-1 (wells 161859, 40C 30009594). Domestic wells are also sourced in the upper underburden. *Id.* (wells 18164, 18167, 18213, 40C 83115 00). Degradation of water quality in the Mammoth Coal aquifer could cause degradation of

water in the upper underburden. *Id.* at 9-12 to -13. Additionally, polluted water from mining may also occur in the “highly fractured zones immediately above the mined out area.” PHC at 314-5-47.

19. SPE proposed to remove the 110 million tons of coal from the 7,161-acre expansion using a method known as longwall mining. CHIA at 3-2. Longwall mining “removes all coal from each longwall panel, effectively achieving 100 percent coal extraction, and causes surface subsidence.” *Id.* When the coal is removed, the “[u]nsupported overburden rocks flex (subside), fracture (fracture zone), and begin to collapse into the void formerly occupied by the coal. The collapsed material in the mine voids is known as gob.” 2013 EA at 5.

20. To mine a longwall panel, the mine operators first excavate a set of parallel entries or “mains” on either side of the panel. CHIA at 3-2. The mains are designed to remain intact and allow access to the coal panel via gate roads. *Id.* “Gate roads are driven roughly perpendicular to the mains and consist of three parallel entries.” *Id.* The gate roads allow the mine operator to install their cutting machine, called a “shearer.” *Id.* “After the shearer completes a pass the entire system (shields, shearer, and face conveyor) advances (perpendicular to the shearer) and unsupported overburden is allowed to collapse in the void formerly occupied by the coal.” *Id.* “Each gate road is designed to stay open for the first panel, but yield as the adjacent panel is mined-out . . . .” *Id.*

21. The proposed mine expansion will “lead to transitions in both groundwater quality and quantity,” particularly in the Mammoth Coal aquifer. PHC at

314-5-44. The removal of the coal seam and Mammoth Coal aquifer will create a “cone-of-depression” causing groundwater from areas adjacent to the mine to flow toward and into the mine void. CHIA at 9-10 to -11; PHC at 314-5-63 to -64; Groundwater Model 314-6-22 to -24. This will lead to drawdown, i.e., lowering of groundwater levels, in areas around the mine, including areas up to three miles outside the mine permit boundary. CHIA at 5-2, 9-10 to -11; PHC 314-5-63 to -64; Groundwater Model 314-6-22 to -24. The water draining into the mine during mining operations will be pumped out and discharged via settling ponds into surface waters. 2013 EA at 5.

22. When mining ends, the mine void will begin to fill with water, which will eventually flow out of the mine void and into the drawdown area adjacent to the mine. CHIA at 9-11 (“Following the completion of mining, water levels will begin to recover, and are expected to reach a post-mine equilibrium within 50 years.”); *Id.* 9-13 (“Similar to the Mammoth Coal, water quality in the upper underburden may be locally affected by poor quality water from the mine gob after mining is completed and water levels in the mine area recover.”); PHC at 314-5-53 (“[A]s this groundwater [in the gob] reaches the native strata at the mine boundary, groundwater will tend to seep very slowly outside the mine area . . . .”); *see* also 2013 EA at 6-8; PHC 314-5-56 to -58, -63 to -64; Groundwater Model 314-6-22 to -24.

23. The water that collects in the mine void after mining “is expected to be degraded relative to natural water quality.” CHIA at 9-11; PHC at 314-5-47 (“A general increase in total dissolved solids, sodium, and sulfate concentration is

anticipated in the groundwater that flows through the gob and potentially in the highly fractured zones immediately above the mined out area . . .”).

24. Most of the groundwater in the mine area, including the Mammoth Coal aquifer, is high-quality Class II groundwater. CHIA at 8-5 (“[W]ater from most Mammoth Coal wells is Class II groundwater.”); 2013 EA at 7 (indicating that average quality of groundwater in Mammoth Coal aquifer is 2,272 microSiemens/cm or Class II); *see* also CHIA at 9-11 (“[A]pproximately one-half of the Mammoth Coal wells produce Class II water and one-half produce Class III water.”); PHC at 314-5-28 (“Generally, groundwater in the vicinity of LOM [life of mine] area is either Class II or Class III.”); 1992 EIS at III-18 (“Using State of Montana classification, spring and ground water in the Bull Mountains are Class II waters, suitable for wildlife and livestock use, and marginally suitable for public and private water supplies.”).

25. Class II groundwaters “are those ground waters with a natural specific conductance that is greater than 1,000 and less than or equal to 2,500 microSiemens/cm at 25°C.” ARM 17.30.1006(2). Class II groundwater is considered “[h]igh quality water[.]” Mont. Code Ann. § 75-5-103(13). Beneficial uses of Class II groundwater are: “(i) public and private water supplies; (ii) culinary and food processing purposes; (iii) irrigation of some agricultural crops; (iv) drinking water for most livestock and wildlife; and (v) most commercial and industrial purposes.” ARM 17.30.1006(2)(a).

26. Class III groundwaters “are those ground waters with a natural specific conductance that is greater than 2,500 and less than or equal to 15,000 microSiemens/cm at 25°C.” ARM 17.30.1006(3)(a). Class III groundwater is not

considered high-quality water. Mont. Code Ann. § 75-3-103(13)(a). Beneficial uses of Class III groundwater are “(i) irrigation of some salt tolerant crops; (ii) some commercial and industrial purposes; (iii) drinking water for some livestock and wildlife; and (iv) drinking, culinary, and food processing purposes where the specific conductance is less than 7,000 microSiemens at 25°C.” ARM 17.30.1006(3)(a).

27. DEQ projects that the water that collects in the gob material in the mine void following mining will degrade to Class III groundwater:

The eventual groundwater quality within the mined-out area or Caved Zone may become similar to the groundwater quality within abandoned coal mines near Roundup, MT where the average TDS, sulfate, and specific conductance concentrations are 2,042 mg/L, 1,106 mg/L and 3,038 µS/cm, respectively. However, the groundwater quality within the Caved Zone may exceed these concentrations since the groundwater in the abandoned mines near Roundup does not come into contact with mineralized gob.

CHIA at 10-2 to -3; accord 2013 EA at 7. SPE also determined that “there is potential that some of this groundwater will change from a Class II to a Class III designation.”

PHC at 314-5-52; accord. *Id.* 314-5-48 to -50.

28. SPE submitted a Groundwater Model with its application for the mine expansion. *See generally* Groundwater Model. The Groundwater Model partially evaluated the migration of degraded gob water after the cessation of mining. *Id.* at 314-6-23 to -26. The model developed two scenarios to establish bounds for its analysis. *Id.* at 314-6-23. In Scenario 1 the mine’s gate roads collapse. *Id.* In Scenario 2 the gate roads remain intact. *Id.*

29. The Groundwater Model explained the significance of whether the gate roads collapse:

In the event that the gate roads remain intact, they will serve as long term sinks. The gate roads would then convey groundwater northward where it would “pool” in northern portions of the mine. On the other hand, if the gate roads collapse, the fragmentation zone would be more uniform, the groundwater flow would be more uniform, and the tendency to pool would be less significant as well. Presently, the gate roads are remaining intact. However, this does not necessarily confirm that the gate roads will remain intact in the future.

Groundwater Model at 314-6-23.

30. Both DEQ and SPE stated that it was uncertain whether the gate roads would collapse. DEQ wrote: “After the conclusion of mining, the gate roads may remain intact or may collapse, thus each scenario was tested using the groundwater model.” CHIA at 10-2. SPE wrote: “It may well be that some gate roads remain intact yet others collapse into the future. It is also possible that gate road collapsing will occur gradually over time.” PHC at 314-5-54; *Id.* at 314-5-64 (noting possibility that “gate road integrity [may] persist[] far into the future after the Amendment 3 mining ceases”). “Presently, the mine gate roads have tended to remain intact.” *Id.* at 314-5-54; accord Groundwater Model at 314-6-23.

31. The Groundwater Model conducted a particle tracking evaluation for each scenario “using a 50 year time frame simulation.” Groundwater Model at 314-6-25. The “particle tracking [did] not account for potential influence of adsorption/desorption influences for given analytes” and it did “not account for effects of dilution as other contributions to groundwater flow occur.” *Id.* The particle tracking evaluation only “simulate[d] and track[ed] flow paths.” *Id.*

32. In Scenario 2, in which the gate roads remain intact, the gob water would migrate beyond the mine permit boundary in numerous locations within 50 years. *Id.* at

314-6-26 and fig. 14M (bottom frame). In Scenario 1, in which the gate roads collapse, the gob water would migrate away from the mine, but would not move past the mine boundary within 50 years. *Id.* at 314-6-25 and fig. 14M (top frame). Within the 50 year timeframe, the gob water in Scenario 1 would migrate approximately half the distance it would in Scenario 2. 2013 EA at 7-8 (water would migrate approximately 2,000 feet in Scenario 2 and 1,000 feet in Scenario 1).

33. Summarizing the particle tracking analysis from the Groundwater Model, the PHC concluded: “[I]t is considered highly unlikely that groundwater quality will be degraded outside the mine permit boundary within the next 50 years. Any issues that may occur at some time in the distant future are likely to be limited to groundwater in the Mammoth Coal as it is relatively more permeable than either the Overburden or Underburden.” PHC at 314-5-57 (emphasis added).

34. While Groundwater Model and PHC limited their analysis of impacts to groundwater quality to 50 years, their analysis of groundwater quantity turned on water levels outside the mine permit boundary recovering “at 50 years,” meaning that after 50 years the same quantity of water would be available as was available at the inception of mining. Groundwater Model at 314-6-24; *Id.* at 314-6-26 to -27 (“Much of the drawdown to the north/northwest of the LOM boundary will dissipate with time [i.e., after 50 years].”); PHC at 314-5-63 to-64 (noting that drawdown “is predicted to recede following cessation of mining” and referencing 50-year timeframe from Groundwater Model). SPE discounted drawdown for 50 years because it will only be “temporal.” PHC at 314-5-44. The CHIA adopted the same analysis, discounting impacts to water

quantity from drawdown on the basis that water levels will “recover to near pre-mining levels approximately 50 years after the cessation of mining.” CHIA at 10-2 (emphasis added); *see also Id.* 9-11 (same). Thus, for DEQ and SPE, the relevant time frame for water quality was the short-term, up to 50 years, and the relevant time frame for water quantity was the long-term, 50 years and beyond.

#### Mitigation

35. DEQ’s CHIA states that “SPE is committed to replacing any waters affected by mine-related drawdown with a comparable permanent supply.” *Id.* at 10-4. DEQ and SPE identified “relatively deep underburden sandstones” “as a source of replacement water if shallower supplies are impacted and must be replaced.” 2013 EA at 6; PHC at 314-5-41 (noting “plans to use [deep Underburden] aquifer as a primary mitigation source”).

36. SPE was uncertain whether the deep underburden aquifer has the capacity to support all potential mitigation needs. SPE wrote: “[I]f this aquifer is to be used to serve the existing uses, and also serve potentially as a mitigation sources [sic], a better understanding of its overall capacity to meet existing and potential future demands is necessary.” PHC at 314-5-42. SPE further cautioned, “While the evidence to date suggests that the deeper underburden aquifer has the characteristics to meet existing demands, what is not so clear is does that aquifer have the capacity to provide full-scale mitigation water for wetlands and stream reaches.” *Id.* at 314-5-35 (emphasis added). Underscoring this uncertainty, SPE concluded, “If significant mitigation flow from the Underburden either evolves, or becomes necessary, additional hydrogeologic

evaluations will be necessary to ensure that existing groundwater users dependent upon the deeper Underburden are not adversely affected.” *Id.* at 314-5-66. Accordingly, the PHC suggested a “supplemental investigation to assist in defining the capability of this aquifer to provide sufficient water for the present and future demands that could ensue if significant volumes of water were required for mitigation purposes.” *Id.*

37. The Groundwater Model provided additional explanation about the multiple uncertainties that could limit or preclude use of the deep underburden aquifer as the primary source of mitigation water:

One of the potentially more significant uses that has been proposed is to use this same source as a mitigation source for flowing springs, and for stream reaches in the Bull Mountain area. Some of the springs flow at very significant rates. For instance, spring 52455 (near northeastern corner of LOM) flows at rates commonly exceeding 10 gallons per minute. Such a flow rate exceeds the typical demands at the mine public water supply well (projected at 6 gpm). Given that there are a large overall number of springs, ponds, and identified stream reaches, seasonal flow rates could substantially exceed 100 gpm.

Using the deep Underburden aquifer may have other issues as well, including differences in water quality between native spring/stream sources compared to the water quality of the deeper Underburden. There are likely to be issues related to the Beneficial Use application process of the Montana Department of Natural Resources and Conservation. Demonstration of a beneficial use is required before a permit will be issued by the DNRC. Such applications routinely receive objections so that in the event a permit is issued, the process can be rather lengthy. In the event the aforementioned hurdles could be overcome, it would still be necessary to convince the DNRC that the aquifer system has the capacity to meet all the existing uses plus intended uses before a permit could be obtained.

Groundwater Model, Attachment 3M (pdf. 85). SPE’s existing public water supply well sourced in the deep underburden has a daily average pumping rate of 6 gpm. PHC at 314-5-34.

## DEQ's Material Damage Assessment and Determination

38. The CHIA explained that by law DEQ must “determine whether . . . material damage outside the permit area has been prevented.” CHIA at 2-1. The CHIA further explained that the “CHIA analysis” itself “must be sufficient” to make this determination. *Id.* Citing Mont. Code Ann. § 82-4-203(31), the CHIA acknowledged that “[v]iolation of a water quality standard, whether or not an existing water use is effected, is material damage.” CHIA at 2-1 n.1. Thus, “material damage criteria include applicable numeric and narrative water quality standards, and criteria established to protect existing beneficial uses of water.” *Id.* at 2-1.

39. The CHIA then laid out the threshold and limits that should guide the material damage analysis and determination. *Id.* tbl. 2-1. The CHIA identified the following threshold indication of potential for material damage:

Observation of persistent or long-term change in water quality within the permit boundary that is associated with mining and is approaching or commonly exceeds narrative or numeric (Circular DEQ-7) limits, may be expected to extend to areas outside the permit area with time and cannot be mitigated, treated, or replaced by alternate water supply.

*Id.*

40. The CHIA further established the following limit, at which material damage would occur:

Degradation or reduction by coal mining and reclamation operations of water quality outside the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, or violation of water quality standard occurs outside the permit area.

*Id.* (emphasis added).

41. After describing relevant background and hydrology of the area, the CHIA considered probable effects of mining to groundwater, including the Mammoth Coal aquifer and the underburden. *Id.* at 9-10 to -13. The CHIA noted that while groundwater would flow toward the mine during mining, temporarily obviating pollution of groundwater outside the mine area, upon cessation of mining, the mine would fill with water, which would become polluted and begin to migrate away from the mine:

Because mine dewatering produces groundwater flow toward the mine working during mining, no water quality effects are expected during mining. After mining is completed, some of the mine gob will become saturated. Groundwater quality in the mine gob is expected to be degraded relative to the natural water quality, however, due to the small quantity of gob influenced water and the slow water movement in the Mammoth Coal this poor quality water is not expected to migrate outside the permit boundaries within 50 years after mining.

*Id.* 9-11. In response to discovery propounded by MEIC, DEQ refused to state how long the degraded gob water would continue to migrate away from the mine area.

MEIC Ex. 11 at 20 [hereinafter DEQ Discovery Response].

42. Regarding the underburden, the CHIA found: "Similar to the Mammoth Coal, water quality in the upper underburden aquifer may be locally affected by poor water quality water from the mine gob after mining is completed and water levels in the mine recover." *Id.* 9-13.

43. The CHIA further noted that the decline in groundwater quality in the Mammoth Coal aquifer would be enough to require the water to be reclassified from high-quality Class II water to low-quality Class III groundwater:

A decline of groundwater quality is expected as longwall mining and subsidence continue to produce additional panels of collapsed and mineralized rubble in the Caved Zone (gob). . . . The eventual groundwater quality within the mined-out or Caved Zone may become similar to the groundwater quality within abandoned coal mines near Roundup, MT where the average TDS, sulfate, and specific conductance concentrations are 2,042 mg/L, 1,106 mg/L, and 3,038  $\mu$ S/cm, respectively. However, the groundwater quality within the Caved Zone may exceed these concentrations since the groundwater in the abandoned mines near Roundup does not come into contact with mineralized gob.

*Id.* 10-2; *see* also 2013 EA at 7 (anticipating change in specific conductance that would cause transition from Class II to Class III groundwater).

44. The CHIA did not state how long the degradation of water in the mine void would persist. In its response to discovery from MEIC, DEQ refused to state whether or when the water in the mine void would cease to have elevated levels of total dissolved solids (TDS), sulfate, or specific conductance (SC). DEQ Discovery Response at 21-22.

45. After setting out the relevant information about the effects of the mine expansion on water resources, the CHIA made its material damage assessment and determination:

Post mining groundwater quality within the mined-out area (Caved Area) is expected to degrade after coming into contact with fresh rock surfaces exposed in subsidence fractures and mineralized rubble or gob. Oxidizing conditions are anticipated until after mining is complete and resaturation of the collapsed material has occurred. These conditions may result in sulfide oxidation, cation exchange, leaching, and weathering, which together may cause an increase in the concentrations of calcium, magnesium, sulfate, and sodium ions. . . . As explained above at 9.5.2, any degradation of groundwater quality is not expected to render groundwaters unsuitable for current or anticipated use. Accordingly, because current mining methods are proposed throughout the expanded permit area, material damage to the quality or quantity of

groundwater resources outside the proposed permit area is not expected from continued underground mining.

CHIA at 10-4 (emphasis added). The CHIA's material damage assessment and determination did not address the material damage threshold or limit laid out earlier in the CHIA in Table 2-1. Cf. *Id.* tbl. 2-1; see supra ¶¶ 39-40. The material damage assessment and determination did not address whether the 7,161-acre mine expansion would cause violations of water quality standards outside the permit area. Cf. *Id.* at 10-4.

46. In its final EA, DEQ presented a different basis for concluding that there would be no degradation of groundwater outside the permit area. DEQ reasoned that various factors that the Groundwater Model expressly did not evaluate would limit the concentration of pollutants in the gob water as it migrates away from the mine:

Particle tracking was conducted using the groundwater model to estimate the rate of movement of lower quality groundwater away from the mine in the Mammoth coal aquifer after mining ceases. The results of this modeling showed that particles placed near the edge of the mine voids traveled less than 2,000 feet in 50 years for the scenario where the gate roads remained intact forming a mine pool. Particle transport in the scenario where gate roads collapsed was less than 1,000 feet in 50 years. Because the particle tracking model uses conservative assumptions which increase particle transport rates, the actual distance of movement of lower quality water from the mine pool should be less than these estimates. Particle tracking also does not consider dilution or attenuation of lower quality groundwater which would occur during transport away from the mine. Because of these factors, no degradation of groundwater quality outside the permit area is expected to occur after mining.

2013 EA at 7-8.

### **Administrative Proceedings**

47. MEIC appealed DEQ's approval of the mine expansion on two bases: first, DEQ's material damage assessment and determination "employed the incorrect legal standard"; and second, the record before the agency did not "affirmatively demonstrate" that the "mine expansion was designed to prevent material damage to the hydrologic balance." DEQ Ex. B at 1.

48. SPE subsequently moved to intervene in the appeal. On December 9, 2013, the hearing examiner granted SPE's motion to intervene pursuant to Montana Rule of Civil Procedure 24(a). Or. on Mot. to Intervene at 3 (Dec. 9, 2013).

49. On January 6, 2014, pursuant to an agreement among all parties, the hearing examiner adopted a procedural schedule for administrative review of the appeal. Or. Adopting Joint Stipulated Procedural Schedule for Administrative Review (Jan. 6, 2014).

50. The parties engaged in discovery. In its discovery requests, MEIC asked DEQ to "state how long, in years, DEQ anticipates that low-quality water from the mine will continue to migrate away from the mine into downgradient portions of the Mammoth Coal aquifer." DEQ Discovery Resp. at 20.

51. DEQ's response simply directed MEIC to the administrative record and DEQ's decision documents:

In this appeal, MEIC charges that DEQ's approval of SPE Amendment No. 3 violates the requirements of MSUMRA. The issuance of the permit is supported by the Written Findings, information provided in the application, including the PHC, and other information available to DEQ. All information, analyses, determination and conclusions by DEQ regarding impacts from activities described in the Amendment No. 3

application on water quality are set forth in those documents. These documents speak for themselves and specifically address the likelihood that groundwater with significantly higher TDS than normal condition will transport outside the life of mine boundary. To the extent that Interrogatory No. 1 calls on DEQ to speculate beyond information, analyses, determinations, and conclusions set forth in the documents described in this Answer, DEQ is unable to do so.

*Id.*

52. MEIC further asked DEQ to “state whether, regardless of whether the mine gate roads remain intact, groundwater from within the mine will migrate downgradient to areas beyond the mine permit boundary at some point in the future.”

*Id.* at 21.

53. DEQ again limited its response to the administrative record at the time of its permitting decision, stating that all relevant information was in the permitting documents and that the agency was “unable” to “speculate beyond the information, analyses, determinations, and conclusions” in those documents. *Id.*

54. MEIC asked DEQ to state “when, in DEQ’s estimation, water in the mine void will cease to have elevated levels of total dissolved solids, sulfate, and specific conductance.” *Id.*

55. DEQ again limited its response to citing information in the administrative record at the time of the agency’s permitting decision. DEQ stated that “[a]ll information, analyses, determination, and conclusion by DEQ regarding impacts” from the mine expansion “are set forth in those documents” and that the agency was “unable” to “speculate” beyond that information. *Id.* at 22.

56. On April 1, 2014, MEIC moved to amend its appeal to join the Sierra Club as a co-appellant. Appellant Mont. Env'tl. Info. Ctr.'s Mot. to Amend and Join Sierra Club as Co-Appellant and Br. in Spt. (Apr. 1, 2014). DEQ did not oppose the motion, but SPE did. *Id.* at 2. The Board will deny that motion as moot.

57. On April 11, 2014, MEIC moved for summary judgment. DEQ filed a response brief. SPE filed a response and cross-motion for summary judgment. MEIC filed a reply. DEQ filed a surreply. SPE filed a reply in support of its motion for summary judgment. MEIC then filed a surreply.

58. On July 31, 2015, the Board heard oral arguments from the parties on the competing motions for summary judgment and ordered the parties to submit proposed findings of fact and conclusions of law by September 11, 2015. Contested Case Hrg. Or. (July 29, 2015).

59. The Board finds that there are no genuine issues of material fact and that resolution of this matter is appropriate via summary judgment, based on the undisputed record evidence presented by the parties.

### CONCLUSIONS OF LAW

Having adopted the findings of fact set out above, the Board makes the following conclusions of law based on the rationale set out in the transcript of proceedings before it on December 4, 2015, a copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference.

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## Standard of Review

60. The Board may, in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate. *Mont. Env'tl. Info. Ctr. v. DEQ*, 2005 MT 96, ¶¶ 18, 26, 326 Mont. 502, 112 P.3d 964.

61. Under the Montana Strip and Underground Mine Reclamation Act (MSUMRA), any person adversely affected by DEQ's approval of an application to increase a mine's permit area "may request a hearing before the board." Mont. Code Ann. § 82-4-206(1)(c). "The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing before the board under subsection (1)." *Id.* § 82-4-206(2).

62. Under MSUMRA, DEQ must withhold approval of a permit application unless and until the applicant demonstrates and DEQ finds in writing that the "proposed operation of the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area." Mont. Code Ann. § 82-4-227(3)(a). This analysis must be set forth in writing in a cumulative hydrologic impact assessment (CHIA). ARM 17.24.314(5). By law, the CHIA, itself, "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." *Id.*

63. Summary judgment is proper when the available evidence shows that "there is no general issue as to any material fact and that the movant is entitled to judgment as a matter of law." M.R.Civ.P. 56(c)(3). Summary Judgment procedures

may be used in contested cases under MAPA when the case satisfies the requirements of M.R.Civ.P. 56. *In re Peila*, 249 Mont. 272, 280, 815 P.2d 139, 144-145 (1991).

64. In their briefs and statements at oral argument, the parties agree that there are no disputed issues of fact and that all relevant facts are those compiled in the administrative record when DEQ's approved SPE's application, including the PHC, Groundwater Model, CHIA, and 2013 EA. Consequently, all parties agree that this matter is appropriate for resolution by summary judgment.

65. DEQ and SPE contend that DEQ should be permitted to support the adequacy of its CHIA and permitting decision with extra-record evidence, as well as with arguments and analyses that were never articulated in the CHIA. As support for its position, DEQ cites *Montana Environmental Information Center v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, and Mont. Code Ann. § 2-4-623(1).

66. Under MSUMRA, DEQ's CHIA alone "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." ARM 17.24.314(5). Thus, the only relevant analysis is that contained within the four corners of the CHIA and the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision.

67. Further support for the Board's conclusion is found in ARM 17.24.405(6), which requires DEQ issue written findings based on record evidence to support its permitting decision. The written findings must be shared with the interested public. *Id.* 17.24.405(5). These provisions, which require DEQ to provide specific

reasons for its permitting decision (including those in the CHIA) based on evidence “compiled by the department,” would be rendered a dead letter or hollow formality if, in a contested case proceeding, DEQ were permitted to present all new evidence, analysis, and argument to support its permitting decision that was never compiled in the record, articulated in its CHIA, or made available to the public. Mont. Code Ann. § 1-2-101 (laws should not be construed in a way that renders other provisions meaningless); *see also NRDC v. OSM*, 89 I.B.L.A. 1, 29 (1985) (“The recitation of statutory findings is insufficient if the permit record does not affirmatively demonstrate that OSM [U.S. Office of Surface Mining] made a [CHIA] of all anticipated mining in the area and the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.”); *Id.* at 32 (stating that only the regulatory authority’s CHIA may satisfy the CHIA requirement).

68. Allowing DEQ to present new evidence, analysis, and argument to support its CHIA and permitting decision would also negate MSUMRA’s goals of public participation. As noted, DEQ must provide the interested public with written findings based on record evidence demonstrating, among other things, that “cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” ARM 17.24.405(5), (6)(c). These provisions allow the public to oversee DEQ’s permitting decision and decide, in turn, whether to pursue an appeal and contested case. *Id.* 17.24.425(1). The public’s ability to rely on DEQ’s express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture

novel analysis and argument. See *Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 35, 301 Mont. 1, 6 P.3d 972 (“The public is not benefited by reviewing an EIS [environmental impact statement] which does not explicitly set forth the actual cumulative impacts analysis and the facts which form the basis for the analysis.”); cf. *NRDC*, 89 I.B.L.A. at 96-97 (Frazier, Admin. J, concurring) (“Like an environmental impact statement (and for similar reasons), the [CHIA] must ‘explain fully its course of inquiry, analysis, and reasoning,’ . . . .” (quoting *Minn. Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1299-300 (9th Cir. 1976))). In effect, DEQ’s position would allow the agency to conceal its actual analysis and evidence until a member of the public makes the significant investment necessary to engage in extensive litigation in a contested case proceeding with the agency.

69. The Board notes that while DEQ asserts the right to provide new evidence, analysis, and argument to support its CHIA, in response to MEIC’s discovery requests about the persistence and expected extent of groundwater pollution, DEQ repeatedly stated that the relevant information was limited to the administrative record existing at the time of the permitting decision and that DEQ was “unable” to provide any information about anticipated groundwater pollution impacts beyond that contained in the record documents. DEQ Discovery Resp. at 20-22. If, as DEQ asserted in its discovery responses, the only relevant evidence is that contained in the permitting record, then extra-record evidence and novel analyses are also not relevant to the determination of the validity of DEQ’s CHIA.

70. This is not to say that DEQ is limited in its permitting defense to presenting the administrative record to the Board and saying no more. DEQ's counsel may surely present argument to explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards. What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA. *See* ARM 17.24.314(5) (stating that the CHIA "must be sufficient" for the material damage determination); *Id.* 17.24.405(6)(c) (stating that the permitting decision must be based on findings "on the basis of information set forth in the application or information otherwise available that is compiled by the department").

#### **Statutory and Regulatory Background**

71. Strip and underground coal mining is governed nationally by the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328. Congress enacted SMCRA in response to widespread social and environmental abuse from the coal mining industry. *Id.* § 1201(c), (h), (k); e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277-80 (1981). Prior to the enactment of SMCRA, individual states had proven unwilling or unable to police the coal mining industry to prevent such abuse. *In re Permanent Surface Mining Regulation Litig. (In re Permanent)*, 653 F.2d 514, 520 (D.C. Cir. 1981); *Hodel*, 452 U.S. at 280; John D. Edgcomb, Comment, Cooperative Federalism and Environmental Protection: The

Surface Mining Control and Reclamation Act of 1977, 58 Tulane L. Rev. 299, 305-11 (1983).

72. The principal purpose of SMCRA is to “protect society and the environment from the adverse effects of surface coal mining.” 30 U.S.C. § 1202(a). Under SMCRA, “[s]urface mining” includes “surface impacts incident to an underground coal mine.” *Id.* § 1291(28)(A).

73. SMCRA establishes a system of cooperative-federalism in which states can assume responsibility for day-to-day regulation of coal mining operations, subject to federal oversight. *See In re Permanent*, 653 F.2d at 521 (“[C]ongress was not interested in perpetuating the existing tradition of state mining regulation, and . . . Congress saw the need for both federal standards and federal oversight to guarantee an effective change.”).

74. Under SMCRA, the U.S. Secretary of the Interior may grant a state regulatory authority over coal mining if the state establishes and demonstrates that it has the capacity to implement a program that meets minimum federal requirements. 30 U.S.C. § 1253(a)-(b). States are free to develop standards that exceed the minimum requirements of SMCRA. *Id.* § 1255(b). The State of Montana oversees an approved state regulatory program, though it remains subject to continuing federal oversight. *See generally* 30 C.F.R. Part 926.

75. As a safeguard against ineffective state regulation of coal mining operations, SMCRA contains important provisions for federal oversight and citizen participation in permitting decisions and enforcement. *In re Permanent*, 653 F.2d at

520-21; 30 U.S.C. §§ 1254(a)-(b), 1267(a), 1270(a)(2), 1271(a)-(b), 1276(e). Citizens are entitled to inspect permit applications, object to permit applications, administratively appeal permitting decisions, seek judicial review of administrative decisions, and bring citizen suits in state or federal court against state regulatory authorities and mine operators. 30 U.S.C. §§ 1257(e), 1263(b), 1264(c), (f), 1270(a), 1276(a)(2), (e).

76. A central purpose of SMCRA is to protect water resources from coal mine development. *Id.* § 1201(c). Citizens may petition regulators for a blanket prohibition of coal mining that affects “aquifers and aquifer recharge areas” where mining will cause “substantial loss or reduction of long-range productivity of water supply.” *Id.* § 1272(a)(3)(C) (emphasis added).

77. On lands where coal mining has not been prohibited outright, multiple provisions of SMCRA assure that mining may not proceed if it will cause undue damage to water resources. Any application for mining must include extensive and detailed information about the “hydrologic regime,” including surface and groundwater that may be affected. *Id.* § 1257(b)(10)-(11). This information must be made available for public inspection. *Id.* § 1257(e).

78. The regulatory authority is prohibited from approving any mine permit application unless the “application affirmatively demonstrates” and the “regulatory authority finds in writing” that “the proposed operation . . . has been designed to prevent material damage to [the] hydrologic balance outside [the] permit area.” *Id.* 1260(b)(3).

79. Under Montana's delegated program, DEQ regulates coal mining pursuant to the provisions of MSUMRA, Mont. Code Ann. §§ 82-4-201 to -254, and its implementing regulations ARM 17.24.301 to 1309. DEQ's regulation of coal mining is also subject to Montana's constitutional environmental protections. Mont. Code Ann. § 82-4-202(1); Mont. Const. art. II, § 3, art. IX, §§ 1-3.

80. Like SMCRA, MSUMRA requires DEQ to withhold approval of a mining permit application unless the applicant "affirmatively demonstrates" and the agency determines in writing based on record evidence that "the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area." Mont. Code Ann. § 82-4-227(3)(a); ARM 17.24.405(6) (agency may not issue permit unless and until agency finds in writing based on record evidence that the "cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area").

81. In making any decision on a permit application, DEQ must prepare a cumulative hydrologic impact assessment, or "CHIA." ARM 17.24.314(5). 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." *Id.*

82. MSUMRA defines "material damage":

"Material damage" means, with respect to the protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality and quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights

are impacted. Violation of a water quality standard, whether or not an existing use is affected, is material damage.

Mont. Code Ann. § 82-4-203(31) (emphasis added).

83. The U.S. Secretary of the Interior struck down amendments to MSUMRA by the 2003 Montana Legislature that attempted to limit consideration of impacts on water resources to only those impacts that would affect “uses of land and water within the area affected by mining and the adjacent area.” 70 Fed. Reg. 8002, 8004-05 (Feb. 16, 2005).

#### **DEQ’s CHIA Employed an Incorrect Material Damage Standard**

84. As a matter of law, DEQ’s CHIA employed an incorrect legal standard in its material damage assessment and determination. Thus, the CHIA was not “sufficient to determine . . . whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.” ARM 17.24.314(5).

85. MSUMRA specifically requires DEQ to assess whether a proposed mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Mont. Code Ann. § 82-4-227(3)(a); ARM 17.24.314(5), 405(6)(c). Material damage is statutorily defined to include “[v]iolation of a water quality standard, whether or not an existing use is affected.” Mont. Code Ann. § 82-4-203(31).

86. The material damage assessment and determination in DEQ’s CHIA failed entirely to assess whether the proposed mining operation will cause violation of water quality standards outside the permit area. Instead, the CHIA determined that no material damage was expected because “any degradation of groundwater quality is not

expected to render groundwaters unsuitable for current or anticipated use.” CHIA at 10-4.

87. DEQ’s material damage assessment and determination failed to address either the threshold or limit for material damage to groundwater quality that the CHIA itself laid out in Table 2-1. *Id.* tbl. 2-1. The material damage determination failed to assess, as a threshold, whether there may be any “persistent or long-term change in water quality within the permit area” that “is approaching or commonly exceed[ing] narrative or numeric limits” and “may be expected to extend to areas outside the permit area with time.” Compare *Id.* tbl. 2-1, with *Id.* at 10-4. The CHIA’s material damage assessment did not address the limit of whether “violation of water quality standard [would occur] outside the permit area.” Compare *Id.* tbl. 2-1, with *Id.* at 10-4.

88. The CHIA’s complete failure to address applicable water quality standards when making the material damage assessment and determination was unlawful and in violation of Mont. Code Ann. §§ 82-4-203(31), 227(3)(a), and ARM 17.24.314(5), 405(6)(c). See *NRDC v. OSM*, 89 I.B.L.A. at 28-33 (finding CHIA unlawful because it failed to adequately address impacts to groundwater).

89. DEQ contends that the standard employed in the material damage assessment and determination in the CHIA—that no material damage is expected because “any degradation of groundwater quality is not expected to render groundwaters unsuitable for current or anticipated use,” CHIA at 10-4—is equivalent to applicable narrative and nondegradation standards for salinity, which, DEQ contends, is the “sole parameter of concern.” DEQ Resp. Br. at 29-31 (May 30, 2014).

90. DEQ's argument is mistaken. First, DEQ is wrong that MEIC's sole concern is with DEQ's failure to consider potential water quality violations of narrative and nondegradation standards for salinity. MEIC's appeal raised two separate claims: first, that DEQ's material damage assessment "employed the incorrect legal standard" and, second, that record evidence did not support DEQ's conclusion that the mine expansion was "designed to prevent material damage to the hydrologic balance." DEQ Ex. B at 1. While MEIC's second claim focused on salinity pollution, MEIC Opening Br. at 24-30 (Apr. 11, 2014), its first claim addressed DEQ's failure "to address potential violations of water quality standards" in general, *Id.* at 20-24.

91. Second, the material damage standard employed in the CHIA's material damage assessment and determination was not equivalent to any of the water quality standards applicable to Class II groundwater.

92. Administrative Rules of Montana establish three general water quality standards applicable to Class II groundwater:

Except as provided in ARM 17.30.1005(2), a person may not cause a violation of the following specific water quality standards for Class II ground water:

- (i) the human health standards for ground water listed in DEQ-7;
- (ii) for concentrations of parameters for which human health standards are not listed in DEQ-7, no increase of a parameter to a level that renders the waters harmful, detrimental, or injurious to the beneficial uses listed for Class II water. . . .
- (iii) no increase of a parameter that causes a violation of the nondegradation provisions of 75-5-303, MCA.

ARM 17.30.1006(2)(b).

**DEQ's CHIA Failed to Address Numeric Water Quality Standards.**

93. The CHIA's material damage assessment and determination failed to address the numeric standard set forth in ARM 17.30.1006(2)(b)(i); that is, whether ground water pollution from the mine would violate the human health standards listed in DEQ-7. Cf. CHIA at 10-4. DEQ attempts to excuse this failure by asserting that numeric standards are not of concern because groundwater monitoring wells have not detected any exceedances of numeric standards. DEQ Surreply at 3-4 (July 30, 2014). The CHIA, however, refutes DEQ's argument: "No exceedances of DEQ-7 standards were observed in any of the Mammoth Coal wells. Because mine dewatering produces groundwater flow towards the mine workings during mining, no water quality effects are expected during mining." CHIA at 9-11 (emphasis added). The absence of exceedances in groundwater monitoring wells is not because there is no potential for such exceedances. Instead, as the CHIA clarifies, it is because at present groundwater is flowing "towards the mine working[s]." Only after mining ceases will "degraded" gob water from the mine workings begin to flow away from the mine. *Id.* at 9-11, -13; PHC 314-5-53, -56 to -58, -63 to -64; Groundwater Model 314-6-22 to -24.

**DEQ's CHIA Failed to Address Narrative Water Quality Standards.**

94. The standard applied by the CHIA—"not expected to render groundwaters unsuitable for current or anticipated use," CHIA at 10-4—is not equivalent to the narrative standard for Class II groundwater. The narrative standard for Class II groundwater prohibits increases in pollution that "render the waters

harmful, detrimental, or injurious to the beneficial uses of Class II water.” ARM

17.30.1006(2)(b)(ii). The beneficial uses of Class II groundwater include:

- (i) public and private water supplies;
- (ii) culinary and food processing purposes;
- (iii) irrigation of some agricultural crops;
- (iv) drinking water for most livestock and wildlife; and
- (v) most commercial and industrial purposes.

ARM 17.30.1006(2)(a). The CHIA’s material damage assessment does not address each beneficial use of Class II water. Cf. CHIA 10-4. The only current and anticipated uses identified by the CHIA were “livestock and domestic use.” *Id.* at 2-4. “[C]urrent and anticipated use” is a narrower category than “beneficial uses” and is, therefore, less protective. The standard employed for the CHIA’s material damage assessment and determination was not equivalent to the narrative water quality standard applicable to Class II groundwater.

95. The CHIA and record evidence indicate the potential for groundwater outside the permit area to degrade from Class II to Class III. *See infra* Part D. The beneficial uses of Class III groundwater include:

- (i) irrigation of some salt tolerant crops;
- (ii) some commercial and industrial purposes;
- (iii) drinking water for some livestock and wildlife; and
- (iv) drinking, culinary, and food processing purposes where the specific conductance is less than 7,000 microSiemens/cm at 25°C.

ARM 17.30.1006(3)(a) (emphasis added). Degradation of groundwater from Class II to Class III either eliminates or limits each designated beneficial use. Compare ARM 17.30.1006(2)(a), with ARM 17.30.1006(3)(a). Pollution that eliminates or curtails a beneficial use is “harmful, detrimental, or injurious” to that beneficial use and therefore violates the narrative standard for Class II groundwater. *See* ARM 17.30.1006(2)(b)(ii).

96. DEQ contends that potential degradation of groundwater from Class II to Class III would not violate the narrative water quality standard because the uses that would be eliminated—water supply and irrigation—are “not feasible” due to the “low transmissivity” of the Mammoth Coal aquifer. DEQ Resp. Br. at 31-32, 35. The Board disagrees.

97. First, DEQ’s argument, which focuses exclusively on uses that are eliminated, does not account for those uses of Class II water that, while not eliminated, are limited if the water is degraded to Class III. Class II groundwater may be used as drinking water for “most livestock and wildlife,” but Class III groundwater may only be used as drinking water for “some livestock and wildlife.” Compare ARM 17.30.1006(2)(a)(iv), with *id.* 17.30.1006(3)(a)(iii). Class II groundwater may be used for “most commercial and industrial purposes,” but Class III groundwater may only be used for “some commercial and industrial purposes.” Compare *id.* 17.30.1006(2)(a)(v), with *id.* 17.30.1006(3)(a)(ii). Thus, degradation from Class II to Class III may be “harmful, detrimental, or injurious” to some beneficial uses, even when it does not eliminate those uses altogether.

98. Second, DEQ's argument about eliminated uses is unsupported by the law or the facts. As a matter of law, there is no "feasibility" exception to the narrative water quality standards for Class II groundwater. Regulations create a narrow exception to water quality standards for groundwater with low hydraulic conductivity, ARM 17.30.1006(5), but that exception is only for Class III and Class IV groundwater and it is only for groundwater with a hydraulic conductivity of less than 0.1 feet per day. Because most groundwater in the Mammoth Coal aquifer is Class II groundwater with a hydraulic conductivity of 0.16 feet per day, CHIA at 8.5 & tbl. 8-5; 2013 EA at 7, the narrow exception does not apply. The regulations' express recognition of this narrow exception precludes an adjudicative body or court from implying any additional exceptions. *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013); *Omimex Canada, Ltd. v. State*, 2008 MT 403, ¶ 25, 347 Mont. 176, 201 P.3d 3.

99. Further, there is no evidence in the record that groundwater from the Mammoth Coal aquifer is not capable of being used for irrigation or public or private water supply. The only citation offered by DEQ regarding irrigation says nothing about the suitability of the Mammoth Coal aquifer for irrigation. Cf. DEQ Resp. Br. at 31, ¶ 99 (citing CHIA 8-5); see CHIA at 8-5 (noting low hydraulic conductivity of Mammoth Coal aquifer and stating that only a "few production wells are completed in the coal").

100. Nor does the record compiled by DEQ demonstrate that the Mammoth Coal aquifer is not suitable for public or private water supplies due to its low hydraulic conductivity. In the arid Bull Mountains, the Mammoth Coal aquifer is an important

source of water. Its geometric mean hydraulic conductivity is an order of magnitude higher than the overburden and the underburden. CHIA 8-5 & tbl. 8-5. Some of the highest yielding wells and springs are sourced in the Mammoth Coal aquifer, including one spring (spring 53475) yielding nearly 10 gpm. *Id.* tbl. 6-1 (well 19944) and tbl. 8-1 (springs 53455, 53485, 53475). Domestic wells also tap the Mammoth Coal aquifer. PHC at 314-5-12 (stating that “a few domestic wells tap the Mammoth Coal as a water supply”); CHIA at 8-5 (noting that a “few production wells are completed in the coal”) and tbl. 6-1 (identifying domestic wells 168805 and 167885 drawing water in part from Mammoth Coal aquifer). The Board notes that a pumping rate of 6 gpm is sufficient for SPE’s public water supply well (sourced in the deep underburden). PHC at 314-5-34. No evidence shows that the Mammoth Coal aquifer cannot produce a similar yield.

101. While the CHIA states that the hydraulic conductivity of the Mammoth Coal aquifer is “typically inadequate to provide a reliable source of well water,” it acknowledges that a “few production wells are completed in the coal.” CHIA at 8-5 (emphasis added); accord PHC at 314-5-12. Nor is it significant that no wells produce water solely from the Mammoth Coal aquifer. DEQ Surreply at 5. That does not mean that it is not possible for wells to produce water solely from the Mammoth Coal aquifer. Numerous springs, including high yielding springs, are sourced in the Mammoth Coal aquifer. CHIA tbl. 8-1. While existing wells in the Mammoth Coal aquifer may also draw water from the overburden or the upper underburden, *Id.* tbl. 6-1, post-mining water pollution is expected to affect both the upper underburden and the fractured zone above the mine void, CHIA at 9-12 to -13; PHC at 314-5-47. In sum, no evidence in

the record demonstrates that the Mammoth Coal aquifer could not feasibly be a source of irrigation, or public or private water supplies.

102. DEQ contends that the CHIA's failure to consider all beneficial uses was justified because "the provisions of MSUMRA that protect the hydrologic balance must be construed to require only reasonable and feasible constraints on coal mine operations." DEQ Resp. Br. at 35. At oral argument, counsel for DEQ went further, averring that the hydrologic protections of MSUMRA may not be construed in a manner that would prevent DEQ from permitting a coal mining operation. The Board disagrees.

103. As support for its position, DEQ cites Mont. Code Ann. § 82-4-231(10)(k), and a sentence of SMCRA's legislative history. Montana Code Annotated § 82-4-231(10)(k), establishes a performance standard by which a coal mine operator must "minimize disturbances to the prevailing hydrologic balance at the mine site and in adjacent areas." *Id.* (emphasis added). But an operator's duty to minimize disturbance to the hydrologic balance does not alter DEQ's duty to withhold a permit in the first instance unless and until the applicant demonstrates and the record shows that the "operation has been designed to prevent material damage to the hydrologic balance outside the permit area." *Id.* § 82-4-227(3)(a) (emphasis added). "Prevent" does not mean "minimize." The Board must honor the legislative decision to use "prevent," not "minimize," in Mont. Code Ann. § 82-4-227(3)(a). *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning to those words.").

This accords with the U.S. Office of Surface Mining's (OSM) original understanding of the identical language from the federal statute, SMCRA. 48 Fed. Reg. 43956, 43965 (Sept. 26, 1983) (stating that the hydrologic protection plan's goal is "to minimize disturbance to the hydrologic balance in the permit area and adjacent area, and to prevent material damage outside the permit area" (emphasis added)).

104. DEQ also cites a sentence of legislative history that reads: "The total prevention of adverse hydrologic effects from mining is impossible and thus the bill sets attainable standards to protect the hydrologic balance of impacted areas within limits of feasibility." H.R. Rep. No. 95-218, at 110 (1977), cited in DEQ Resp. Br. at 33. But the next sentence of the report clarifies that the "imperative" provisions of SMCRA (like 30 U.S.C. § 1260(b)(3) and the Montana equivalent at § 82-4-227(3)(a)) may preclude mining altogether in certain critical and hydrologically fragile areas to prevent irreparable damage: "For most critical areas [and] [in] certain fragile hydrologic settings, the bill sets standards that are imperative to begin to assure that adverse impacts to the hydrologic balance are not irreparable." H.R. Rep. No. 95-218, at 110 (1977) (emphasis added); *see* also 30 U.S.C. § 1272(a)(2) (prohibiting coal mining in areas where full reclamation is not feasible); *Id.* § 1260(b)(5) (prohibiting coal mining in alluvial valley floors); § 1272(a)(3)(C) (allowing blanket prohibition of mining in hydrologically fragile areas, such as aquifer recharge areas).

105. Contrary to DEQ's position, MSUMRA (like SMCRA) requires "the adjustment of [a mining] operation to the environmental protection standards rather than the opposite." H.R. Rep. No. 95-218, at 115. The drafters of SMCRA "rejected

the notion that the standards should be adjusted to what individual mine operators state they can or cannot afford." *Id.*; accord S. Rep. No. 95-128, at 51-52 (1977) (noting that pre-SMCRA laws were "inadequate" because "they [were] tailored to suit ongoing mining practices, rather than requiring modification of mining practices to meet established environmental standards"). If a mining operation cannot meet mandatory legal standards, the DEQ's legal duty is to deny approval of the mining operation unless and until the mining operation can be adjusted to meet the standard. Mont. Code Ann. § 82-4-227(3)(a). DEQ may not adjust the law to allow a mining operation to proceed.

**DEQ's CHIA Failed to Address Nondegradation Water Quality Standards.**

106. Contrary to DEQ's assertion, the standard applied in the CHIA's material damage assessment and determination was not equivalent to the nondegradation standard for salinity.

107. The nondegradation standard for Class II groundwater prohibits increases in any parameter that would cause "a violation of the nondegradation provisions of 75-5-303, MCA." ARM 17.30.1006(2)(b)(iii). Under the administrative regulations implementing the nondegradation provisions of Mont. Code Ann. § 75-5-303, a change in groundwater quality is deemed insignificant and, therefore, exempt from further nondegradation review if it meets criteria set forth in ARM 17.30.715(1)-(2). Mont. Code Ann. § 75-5-301(5)(c).

108. An increase in concentration of salinity may be deemed insignificant if it satisfies the initial criteria of ARM 17.30.715(1)(h). However, before making any nonsignificance determination, DEQ must also consider whether an increase in salinity

that otherwise satisfies the criteria of ARM 17.30.715(1)(h) should nevertheless be deemed significant and thus subject to further nondegradation review on the basis of various factors set forth in ARM 17.30.715(2). *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 43, 347 Mont. 197, 197 P.3d 482. One relevant consideration under ARM 17.30.715(2) is whether the pollution at issue will continue in perpetuity. Mont. Code Ann. § 75-5-301(5)(c)(iii) (nondegradation must consider “the length of time degradation will occur”); *Clark Fork Coal.*, ¶¶ 43, 49 (holding DEQ violated nondegradation standard when it failed to undertake “an independent examination of the length of time the proposed discharge of polluted water will continue” under ARM 17.30.715(2)).

109. Under ARM 17.30.715(1)(h), an increase in salinity may be deemed insignificant if it “will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.” ARM 17.30.715(1)(h) (emphasis added). As noted, the CHIA determined that material damage was not expected to occur because “any degradation of groundwater quality is not expected to render groundwaters unsuitable for current or anticipated use.” CHIA at 10-4 (emphasis added). The standard employed in the material damage determination of the CHIA is less stringent than the nonsignificance nondegradation standard. Thus, the standard employed in the CHIA was not equivalent to the nondegradation water quality standard for Class II water.

110. Further, even if the standard employed in the CHIA were equivalent to the standard in ARM 17.30.715(1)(h), DEQ would still have been required to consider

the discretionary factors set forth in ARM 17.30.715(2), including the length of time that degradation will occur. Mont. Code Ann. § 75-5-301(5)(c)(iii); *Clark Fork Coal.*, ¶¶ 43, 49. The CHIA nowhere examines the length of time that polluted water will continue to migrate from the mine void after the cessation of mining, beyond the arbitrary 50-year horizon established in the Groundwater Model. Cf. CHIA 9-11, 10-4. Indeed, in its responses to MEIC's specific discovery requests, DEQ asserted that it was "unable" to "speculate" on how long the water in the mine void would continue to degrade or how long the degraded water would continue to migrate away from the mine. DEQ Discovery Resp. at 20-23.

111. The CHIA's material damage assessment and determination was not equivalent to the nondegradation standard for Class II groundwater because it did not assess whether changes in salinity concentrations would have a "measurable effect" on existing and anticipated uses as required by ARM 17.30.715(1)(h) and because the analysis did not consider the discretionary factors of ARM 17.30.715(2), including specifically the length of time that the degraded water would continue to migrate from the mine. *Clark Fork Coal.*, ¶ 49.

112. In sum, the CHIA's material damage assessment and determination failed to address whether the proposed mining operation would cause violation of water quality standards outside the permit boundary. As such, it was insufficient as a matter of law.

**Record Evidence Does Not Affirmatively Demonstrate that the Proposed Operation Was Designed to Prevent Material Damage to the Hydrologic Balance Outside the Permit Area.**

113. Section 82-4-227(3)(a), MCA, provides:

The department may not approve an application for a strip- or underground-coal-mining permit or major revision unless the application affirmatively demonstrates that:

(a) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the department and the proposed operation of the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area . . . .

114. The implementing regulation, ARM 17.24.405(6)(c), provides:

The department may not approve an application submitted pursuant to ARM 17.24.401(1) unless the application affirmatively demonstrates and the department's written findings confirm, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

...

(c) the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area; . . . .

115. By law the burden of proof in the permitting process rests with the mine applicant and DEQ to demonstrate with record evidence that material damage will not result. Mont. Code Ann. § 82-4-227(3)(a); ARM 17.24.405(6)(c).

116. Here, SPE's application and the record before DEQ showed only that the proposed operation may or may not be designed to prevent material damage to the hydrologic balance outside the permit area within 50 years after mining. This showing

does not constitute affirmative evidence that the “cumulative hydrologic consequences will not result in material damage to the hydrologic balance outside the permit area.”

ARM 17.24.405(6)(c) (emphasis added).

117. The record demonstrates that at present the groundwater in the Mammoth Coal aquifer is predominantly high-quality Class II water. 2013 EA at 7 (average specific conductance is 2,272 microSiemens/cm); CHIA at 8-5 (“[W]ater from most Mammoth Coal wells is Class II groundwater.”); 1992 EIS at III-18 (groundwater in mine area is Class II). DEQ and SPE agree that after the cessation of mining the gob water in the mine void will degrade from Class II to Class III. CHIA at 10-2 to -3; 2013 EA at 7; PHC at 314-5-52; accord *Id.* 314-5-48 to -50.

118. Because degradation of high-quality Class II groundwater to low-quality Class III groundwater eliminates some beneficial uses and limits others, it violates the narrative water quality standard of ARM 17.30.1006(2)(b)(ii) (prohibiting increase in any parameter that “renders the waters harmful, detrimental, or injurious” to beneficial uses); compare *Id.* 17.30.1006(2)(a) (beneficial uses of Class II groundwater), with *id.* 17.30.1006(3)(a) (beneficial uses of Class III groundwater).

119. The only analysis that considered migration of the plume of polluted gob water beyond the mine permit boundary was the Ground Water Model. The Groundwater Model conducted a particle tracking evaluation under two scenarios, one in which the gate roads collapse and one in which they remain intact. Groundwater Model at 23-26. Neither the Groundwater Model, the PHC, nor the CHIA stated that either scenario was more likely than the other. See PHC at 314-5-54 (“Presently, the

mine gate roads have tended to remain relatively intact. . . . It may well be that some gate roads remain intact and yet others collapse into the future.”); CHIA at 10-2 (“After the conclusion of mining, the gate roads may remain intact or may collapse . . . .”); Groundwater Model at 314-6-23 (expressing uncertainty about whether gate roads will collapse).

120. Using a 50-year timeframe, the particle tracking evaluation determined that in Scenario 2, in which the gate roads remain intact, the degraded gob water will migrate beyond the mine permit boundary in numerous locations. Groundwater Model at 314-6-26 & fig. 14M (lower frame). In Scenario 1, in which the gate roads collapse, the gob water would migrate more slowly, traveling approximately half the distance it would in Scenario 2. Groundwater Model at 314-6-25 & fig. 14M (upper frame); 2013 EA at 7-8. In Scenario 1, the degraded gob water would migrate towards, but would not pass, the mine permit boundary within 50 years. Groundwater Model at 314-6-25 and fig. 14M (upper frame).

121. The record evidence presented by SPE in the Groundwater Model and the other evidence before DEQ at the time of its decision demonstrated only that it was as likely as not that that degraded water that violates water quality standards would migrate beyond the mine permit boundary within 50 years. The lack of any likelihood or defensible level of confidence that material damage will not result does not constitute an affirmative demonstration of record evidence that the expansion of the Bull Mountain Mine is designed to prevent material damage to the hydrologic balance outside the permit area. Cf. Mont. Code Ann. § 82-4-227(3)(a); ARM 17.24.314(5);

ARM 17.24.405(6)(c). To approve a coal mining permit, the law requires DEQ to determine that “cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” ARM 17.24.405(6)(c) (emphasis added).

122. In light of the uncertainty surrounding whether the gate roads will remain intact, DEQ’s 2013 EA determined that material damage outside the permit area would not occur because of factors that the Groundwater Model had failed to address:

Because the particle tracking model uses conservative assumptions which increase particle transport rates, the actual distance of movement of lower quality water from the mine pool should be less than these estimates. Particle tracking also does not consider dilution or attenuation of lower quality groundwater which would occur during transport away from the mine. Because of these factors, no degradation of groundwater quality outside the permit area is expected to occur after mining.

2013 EA at 8; *see also* Groundwater Model at 314-6-25 (noting that “particle tracking does not account for potential influence of adsorption/desorption influence of given analytes” and “does not account for the effects of dilution as other contributions to groundwater flow occur”). This analysis does not meet the standard of Mont. Code Ann. § 82-4-227(3)(a), and ARM 17.24.314(5), 405(6)(c). An analysis that is not conducted and evidence that is not presented does not constitute an “affirmative[] demonstrat[ion]” “on the basis of information set forth in the application or information otherwise available that is compiled by the department.” ARM 17.24.405(6).

123. In briefing before this Board, DEQ developed various additional arguments. DEQ contends that the evidence before the agency was sufficient to support permit approval because the gob water is not likely to migrate a great distance beyond the mine permit boundary within 50 years and because the pollution impacts would be

limited to the Mammoth Coal aquifer and upper underburden. DEQ Resp. Br. at 37 (“[G]ob water will migrate no further than a few hundred feet outside the permit boundary fifty years after mining . . . .”); *Id.* at 40 (“Contamination by higher salinity water migrating outside the permit area will only affect, if at all, water in the Mammoth Coal, and possibly the upper underburden . . . .”). This argument fails because it is premised on the mistaken belief that Mont. Code Ann. § 82-4-227(3)(a), does not “establish[] a prohibition” but merely requires DEQ to develop “reasonable and feasible measures . . . to minimize potential impacts.” DEQ Resp. Br. at 39. As explained above, *see supra* Part C.2, Mont. Code Ann. § 82-4-227(3)(c), employs the term “prevent” and prevent does not mean “minimize,” a term used elsewhere in the statute. The express language of the statute allows no exception for small amounts of material damage that harm only one, potentially two, aquifers.

124. DEQ argues in its briefs that the gob water will not migrate beyond the mine permit boundary because “the gate roads are designed to collapse.” DEQ Resp. Br. at 37; DEQ Surreply at 6. DEQ’s proposed analysis, however, was not presented in the CHIA or the 2013 EA and, as such, is not properly before the Board. *See* ARM 17.24.314(5) (providing that the CHIA “must be sufficient” for the material damage determination). Both the CHIA and the PHC determined that it was uncertain whether the gate roads would collapse. CHIA at 10-2 (stating that “the gate roads may remain intact or may collapse”); PHC at 314-5-54 (stating that the “mine gate roads have tended to remain intact”); *Id.* at 315-5-64 (acknowledging possibility that the “gate road integrity [may] persist[] far into the future”). As mentioned, the transparency

requirements and the public oversight provisions of MSUMRA would be nullified if, during a contested case proceeding, DEQ could present analyses and arguments that were never articulated in the CHIA or its other written findings. Cf. ARM 17.24.314(5) (CHIA “must be sufficient” for material damage determination); *Id.* 17.24.405(6)(c) (application must “affirmatively demonstrate[]” and DEQ’s “written findings” must confirm based on record evidence that “cumulative hydrologic impacts will not result in material damage”); *see supra* Part A.

125. DEQ’s argument is also unavailing on the merits. The sole support cited by DEQ is two sentences from an application appendix: “Ground movements should be relatively uniform and subsidence gradual because of the massive sandstone beds. These should concentrate the overburden loads on the gate pillars causing them to crush and lower the surface uniformly.” DEQ Ex. K at 3. The CHIA also stated that the gate roads are “designed to . . . yield as the adjacent panel is mine-out.” CHIA at 3-2. These statements, however, cannot bear the weight DEQ places on them. First, as SPE pointed out, the actual operation of the mine has disproved the initial engineering prediction: “Presently the gate roads are remaining intact.” Groundwater Model at 314-6-23; accord PHC 314-5-54 (“Presently, the mine gate roads have tended to remain intact.”). It would be illogical and unreasonable for DEQ to premise its material damage analysis on a design prediction (prompt gate road collapse) that has proven inaccurate. Accordingly, neither SPE’s PHC nor DEQ’s CHIA premised its material damage analysis on the assumption that the gate roads would promptly collapse and thus prevent degraded water from migrating. Instead, as noted, both SPE and DEQ

stated that the gate roads may or may not collapse and, accordingly, evaluated two scenarios to account for this uncertainty. CHIA at 10-2; PHC at 314-5-54, -64; Groundwater Model 314-6-23 to -26.

126. DEQ's argument about the gate roads also fails because it is premised on the mistaken belief that the material damage determination may be limited to an arbitrary 50-year horizon. The Groundwater Model expressly limits its analysis to 50-years. Groundwater Model at 314-6-25 ("The particle tracking was conducted using a 50 year time frame simulation."). Thus, in the most optimistic scenario in which all gate roads promptly collapse (a scenario that has not happened and that both the CHIA and PHC concluded is uncertain), the Groundwater Model concludes that "groundwater leaving the mine workings is predicted to remain well within the LOM [life of mine] boundary at the end of 50 years." PHC at 314-5-56 (emphasis added). DEQ's CHIA adopted the same temporal limitation, concluding that "this poor quality [gob] water is not expected to migrate outside the permit boundaries within 50 years after mining." CHIA at 9-11. There is no record evidence showing that the degraded gob water will remain within the mine permit boundary over the long term, even if the gate roads promptly collapse. In its discovery responses DEQ refused to "speculate" on whether, in the event of gate road collapse, the gob water would eventually leave the mine permit boundary. DEQ Discovery Resp. at 21.

127. By law, DEQ may not ignore the long-term water pollution impacts of the mine. Montana Code Annotated § 82-4-227(3)(a), does not contain an exception for

material damage outside the permit area that occurs 50 years after mining. The Board declines DEQ's invitation to write such an exception into the law.

128. The legislative history of SMCRA shows that Congress enacted the CHIA provision of the law to prevent "long-term impacts" to water resources. H.R. Rep. No. 95-218, at 113 (1977) ("These specific standards are emphasized at the permit approval stage due to the critical and long-term impacts mining can have on the water resources of the area affected." (emphasis added)); see also 30 U.S.C. § 1272(a)(3)(C) (allowing states to prohibit mining in areas if mining could cause "reduction of long-range productivity of water supply" (emphasis added)); accord Mont. Code Ann. § 82-4-228(2)(b)(iii) (same). When OSM promulgated its initial regulations implementing SMCRA's hydrology protections, the federal agency clarified that the time frame for the analysis of impacts to water resources must be coextensive with the time period that such impacts are expected to persist: "[T]he impacts resulting from [mining and reclamation] activities may extend beyond the time required to complete actual mining and reclamation. The predictive analysis in the PHC determination [and, therefore the CHIA] must cover the full extent of such impacts." 48 Fed. Reg. at 43971 (emphasis added). As the Montana Supreme Court has taught and Montana history repeatedly shows, long-term pollution impacts from mining are among the most serious environmental problems, because after a mine closes, "[the mine operator] will be gone, and the polluted discharge will continue and cannot be shut off." *Clark Fork Coal.*,

¶ 44.

129. Indeed, with respect to water quantity, the CHIA determined that the appropriate time frame for analysis was the period 50 years after cessation of mining. The CHIA determined that the impacts of drawdown outside the permit boundary were acceptable because groundwater “will recover to near pre-mining levels approximately 50 years after the cessation of mining.” CHIA at 10-2. DEQ cannot have it both ways: if the period after 50 years is appropriate for assessing impacts to water quantity, it must also be appropriate for assessing impacts to water quality. *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2014) (“inconsistency” of agency analysis is the “hallmark of arbitrary action” (quoting *Sierra Club v. EPA*, 719 F.2d 436, 459 (D.C. Cir. 1983))). In short, there is no basis in law for limiting the material damage assessment and determination to 50 years.

130. DEQ’s final argument is that even if the polluted gob water migrates beyond the mine permit boundary, any polluted water could be replaced by water from the deep underburden aquifer. DEQ Resp. Br. at 41-42; DEQ Surreply at 9-10. The Board disagrees.

131. First, DEQ’s mitigation argument repeats the CHIA’s misunderstanding of material damage to the hydrologic balance. Replacing water supplies polluted by the mining operation only alleviates harm to existing and anticipated water users, but it does not prevent violation of water quality standards. It is violation of water quality standards, regardless of the effect on existing and anticipated water use, that is the standard for material damage. Mont. Code Ann. §§ 82-4-203(31), 227(3)(a); *see also supra* Part C.

132. Second, the proposed mitigation with water from the deep underburden aquifer is illusory, as SPE admitted repeatedly in the record. The Groundwater Model admits that there are multiple physical and legal barriers to the use of the deep underburden aquifer as a source of mitigation water:

One of the potentially more significant uses that has been proposed is to use this same source [the deep underburden aquifer] as a mitigation source for flowing springs, and or stream reaches in the Bull Mountain area. Some of the springs flow at very significant rates. For instance, spring 52455 (near northeastern corner of LOM) flows at rates commonly exceeding 10 gallons per minute. Such a flow rate exceeds the typical demands at the mine public water supply well (projected at 6 gpm). Given that there are a large overall number of springs, ponds, and identified stream reaches, seasonal flow rates could substantially exceed 100 gpm.

Using the deep Underburden aquifer may have other issues as well, including differences in water quality between native spring/stream sources compared to the water quality of the deeper Underburden. There are likely to be issues related to the Beneficial Use application process of the Montana Department of Natural Resources and Conservation. Demonstration of a beneficial use is required before a permit will be issued by the DNRC. Such applications routinely receive objections so that in the event a permit is issued, the process can be rather lengthy. In the event the aforementioned hurdles could be overcome, it would still be necessary to convince the DNRC that the aquifer system has the capacity to meet all the existing uses plus intended uses before a permit could be obtained.

Groundwater Model, Attachment 3M (pdf. 85). Thus, the PHC concluded that further investigation was required to determine whether the deep underburden aquifer would be suitable to meet all potential mitigation needs. PHC at 314-5-35, -42, -66. The mere possibility of mitigation is not sufficient to meet the standard of Mont. Code Ann. § 82-4-227(3)(c), and ARM 17.24.405(6)(c).

133. DEQ may not approve a permit application unless “the application affirmatively demonstrates and the department’s written findings confirm, on the basis of information set forth in the application or otherwise available that is compiled by the department that . . . cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area.” ARM 17.24.405(6)(c); accord Mont. Code Ann. § 82-4-227(3)(a). Here, at most, the record demonstrates that the proposed expansion of the Bull Mountain mine may (or may not) be designed to prevent material damage to the hydrologic balance outside the permit area for 50 years and that there may (or may not) be water available to mitigate the operation’s impacts to water quality and quantity. This does not satisfy the legal standard of MSUMRA.

134. The proposed 7,161-acre expansion of the Bull Mountain Mine is a considerable undertaking. It promises sizeable economic benefits in the short-term. 1992 EIS at iv. However, as the Montana Department of State Lands determined years ago, it also threatens significant economic harm in the long-term. *Id.* at iv. The record before the Board suggests that long-term environmental harm may also result. The Bull Mountains are an arid landscape. Existing ranching operations and ecosystems in the Bull Mountains are wholly dependent on the area’s limited water resources. *Id.* at III-19, 22-23, 42.

135. MSUMRA prohibits DEQ from approving an application to expand mining operations unless the permit application affirmatively demonstrates and DEQ confirms in writing based on record evidence that the operation is “designed to prevent material damage to the hydrologic balance outside the permit area.” Mont. Code Ann.

§ 82-4-227(3)(a), ARM 17.24.405(6)(c); accord 30 U.S.C. § 1260(b)(3). By statute, DEQ's material damage assessment and determination must consider whether the mine expansion will cause violation of water quality standards. Mont. Code Ann. § 82-4-203(31).

136. Here, DEQ's approval of SPE's application committed two errors. First, DEQ material damage determination failed to consider whether the mine expansion would lead to violations of water quality standards. Second, the record evidence did not affirmatively demonstrate that the mine expansion is designed to prevent material damage to the hydrologic balance outside the permit area. Instead, it demonstrated only that the mine expansion, as currently designed, may or may not cause material damage outside the permit area in the next 50 years and that there may or may not be water resources available for mitigation.

### **ORDER**

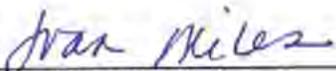
1. It is **HEREBY ORDERED** that MEIC's motion for summary judgment is **GRANTED**, and SPE's cross-motion for summary judgment is **DENIED**;

2. The Board **THEREFORE REMANDS** this matter to DEQ for further proceedings consistent with the Consent Decree and Order filed on January 11, 2016 with the Board. That Consent Decree and Order is attached hereto as Exhibit "A" and, by this reference, is incorporated herein.

3. It is **FURTHER ORDERED** that this case be closed, subject to the Board's continuing authority to assure compliance with this Order.

4. It is FURTHER ORDERED that MEIC's motion to amend its appeal to join the Sierra Club is DENIED as MOOT.

DATED this 14<sup>th</sup> day of January, 2016.

  
\_\_\_\_\_  
JOAN MILES, Chair  
Board of Environmental Review  
1520 E 6th Avenue  
PO Box 200901  
Helena, MT 59620-0901

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Findings of Fact, Conclusions of Law, and Order to be mailed to:

Dana David  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

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P.O. Box 1697  
Helena, MT 59624

DATED: Jan. 14, 2016 

# EXHIBIT "A"

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 11 day of January, 2016  
at 10:57 o'clock A. m.  
By: Hillary Hule

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF AMENDMENT NO. 3 TO THE MINING PERMIT FOR BULL MOUNTAIN COAL MINE NO. 1 (PERMIT ID: SMP C1993017)	Case No. BER 2013-07 SM  <b>CONSENT DECREE AND ORDER</b>
----------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------

Petitioner Montana Environmental Information Center (MEIC), Respondent Montana Department of Environmental Quality (DEQ), and Intervenor Signal Peak Energy, LLC, (SPE) (collectively, the "Parties") respectfully file this Consent Decree and Order with respect to the remedy in the above-captioned matter, requesting that the Montana Board of Environmental Review (Board) approve this Consent Decree and Order, including the terms and conditions by which the Parties agree to resolve this matter, and retain jurisdiction solely to assure that the terms and conditions are implemented. Accordingly, the Parties stipulate and agree as follows:

RECITALS

WHEREAS, DEQ administers the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201 to -254 (MSUMRA), as an approved regulatory program under the Surface Mining Control and Reclamation Act of 1977, §§ 30

U.S.C. §§ 1201-1328, and is the regulatory authority to approve revisions of mining permits. § 82-4-221(3), MCA;

WHEREAS, on October 5, 2012, SPE sought approval for an amendment, called Amendment No. 3, to its mining and reclamation plan from DEQ under Permit ID SMP C1993017;

WHEREAS, on October 18, 2013, DEQ approved SPE's application for Amendment No. 3 to Permit SMP C1993017;

WHEREAS, on November 18, 2013, MEIC initiated this proceeding by filing its Notice of Appeal and Request for a Hearing on DEQ's approval of Amendment No. 3 to Permit SMP C1993017;

WHEREAS, MEIC moved for summary judgment, and SPE filed a cross-motion for summary judgment;

WHEREAS, on July 31, 2015, the Board heard oral argument on the pending motions for summary judgment;

WHEREAS, on September 11, 2015, the Parties submitted their proposed findings of fact and conclusions of law;

WHEREAS, on October 16, 2015, the Board voted to grant MEIC's motion for summary judgment and adopt MEIC's proposed findings of fact and conclusions of law;

WHEREAS, on December 4, 2015, the Board held a hearing at which it affirmed its decision to grant MEIC summary judgment on the merits of MEIC's appeal with certain changes to MEIC's proposed findings of fact and conclusions of law and directed the Parties to attempt to negotiate an appropriate remedy that would be incorporated into the Final Order of the Board in this matter;

WHEREAS, on December 4, 2015, the Board gave the Parties until January 7, 2016, to enter into an agreement or inform the Board of the failure to reach an agreement;

WHEREAS, on January 7, 2016, the Board's attorney was contacted regarding the status of negotiations and granted an extension to facilitate further negotiations;

WHEREAS, the Parties have negotiated in good faith to reach an amicable settlement of an appropriate remedy in this matter that best meets the interests of each party;

### PROVISIONS

NOW, THEREFORE, the Parties hereby stipulate and agree as follows:

1. DEQ shall have one hundred and eighty (180) days from the date of issuance of the Final Order of Board in this matter to undertake, pursuant to the established regulatory process and time frames, the receipt and consideration of additional information, and issue revised written findings including a new Cumulative

Hydrologic Impact Assessment (CHIA) supporting approval or denial of the application for a revised Amendment No. 3 permit. Reasonable extensions may be agreed to by the parties.

2. Nothing herein shall be construed to limit activities authorized under Amendment No. 2.

3. Signal Peak will be authorized to continue mining operations under Amendment No. 3, as it was approved on October 18, 2013, during the time period set forth in Paragraph No. 1, subject to the following conditions:

A. There will be no long-wall mining within the boundaries of the permitted section (Amendment No. 3 - Panels 6 and 7 as depicted on the attached map) during this time period.

B. The only ongoing mining operations authorized by Amendment No. 3 boundary will be the continued development for Panels 6 and 7.

C. The development work for the gate road between Panels 7 and 8, as depicted on the attached map, is authorized to continue from the northwest toward the southeast until it reaches the South East corner of Section 21, Township 6N, Range 27E, at which point development work in Section 27 will not be allowed during the 180 day time period.

D. Development work currently underway at the mine includes construction of entries, which form blocks of coal that remain un-mined and

also includes the construction of the infrastructure needed for future long-wall mining.

E. Development work includes, among other things, the installation of belt conveyors, pumps, electrical systems and ventilation control devices.

Development work does not include long-wall mining.

4. The regulatory process for the revised CHIA and permit amendment will follow the normal permitting procedures and include public review and comment as specified under MSUMRA.

5. Any DEQ decision on the revised CHIA and permit amendment will be subject to a new challenge and review under MSUMRA and normal Montana Administrative Procedures Act (MAPA) process.

6. If a revised CHIA and permit amendment is not issued within the time period specified in Paragraph 1, SPE agrees to cease operations authorized under Amendment No. 3, as it was approved on October 18, 2013, until such revised CHIA and permit amendment is issued by DEQ. If for reasons outside the sole control of SPE the time period is not sufficient for such a decision by DEQ, the Parties agree that a reasonable extension of the time period may be obtained through the mutual agreement of the Parties. Agreement on an extension will not be unreasonably withheld.

7. The Parties agree to forebear filing any petition for judicial review of the Final Order of the Board in this contested case over Amendment No. 3, as it was approved on October 18, 2013. This does not preclude or limit any potential challenge over the issuance of a revised Amendment No. 3.

8. The Parties agree that no provision of this Consent Decree and Order, and the Final Order of the Board in this matter, or any other order of the Board addressing the merits of this matter, shall constitute or be construed as grounds for precluding or barring a person or Party from raising any issue or offering any evidence in any administrative review proceeding before the Board or before any reviewing court in any other matter, including any review of DEQ's determination on Amendment No. 3 on remand.

9. The Parties agree that no term of this Consent Decree and Order or the Final Order of the Board in this matter shall preclude or bar a party from asserting a provision of the Final Order of the Board or any findings of fact or conclusion of law of the Board in this matter, for its precedential value as a previous decision of the Board in any administrative review proceeding before the Board or before any reviewing court in any matter.

10. The parties agree that the binding effect of paragraphs 1, 3, and 6 of this Consent Decree and Order shall be limited to the period of remand of the Application for Amendment No. 3 to Bull Mountain Coal Mining Permit No.

C1993017 as set forth in paragraphs 1, 3, and 6 of this Consent Decree and Order, that the binding effect of paragraphs 1, 3, and 6 of this Consent Decree and Order shall terminate upon a decision by DEQ to either approve or deny that application during the period described in paragraphs 1, 3, and 6 of this Consent Decree and Order, and that paragraphs 1, 3, and 6 of this Consent Decree and Order shall have no effect and shall not be used in any other matter, administrative proceeding, or judicial review action.

11. Upon the effective date of the Final Order of the Board in this matter, this contested case will be closed, subject to the Board's continuing authority to assure compliance with the provisions of this Consent Decree and Order and the Final Order of the Board with respect to this contested case over Amendment No. 3, as approved on October 18, 2013.

12. The Parties agree that this Consent Decree and Order cannot be used by any Party in any other matter.

13. MEIC and SPE have reached a separate confidential agreement with other material terms related to this Consent Decree and Order. MEIC does not support confidentiality; however, MEIC acquiesces to the confidentiality of the separate agreement in a good faith effort to amicably settle this matter.

14. The Parties agree that if the Board issues an order that does not incorporate or reference this Consent Decree and Order in its entirety, or includes language in

any order that alters the terms of this Consent Decree and Order, or the separate agreement referenced in paragraph 13, any Party may void this Agreement.

15. All Parties agree to use all reasonable efforts, commencing promptly on the execution of this Consent Decree and Order, to take, or cause to be taken in good faith, all actions, and to do, or cause to be done, all things necessary and proper to consummate and make effective the actions contemplated by this Consent Decree and Order and the separate agreement referenced in paragraph 13.

16. This Consent Decree and Order and the separate agreement between MEIC and SPE referenced in paragraph 13 constitute the entire agreement and understanding among the Parties with respect to its subject matter and supersedes all prior contemporaneous negotiations, representations, or agreements, whether written or oral. None of the parties' respective duties and obligations under this Consent Decree and Order, and the separate agreement referenced in paragraph 13, nor any portion hereof, may be waived, modified, or amended except by a writing executed by the Parties.

17. The validity, construction, and interpretation of this Consent Decree and Order shall be governed by, and construed in accordance with, the substantive laws of the State of Montana. In no event shall any Party to this Consent Decree and Order be entitled to receive any indirect, special, or consequential damages for any breach of this Consent Decree and Order. In an action to enforce the terms of this

Consent Decree and Order, a court is authorized to require specific performance of the terms of this Consent Decree and Order.

18. To the extent any Party to this Consent Decree and Order is an organization or entity, that Party represents and warrants that the terms of this Consent Decree and Order have been approved by the Party's respective governing body, if such approval is necessary, and that the individual executing this Consent Decree and Order on behalf of the Party is duly authorized to enter into this Consent Decree and Order.

19. The effective date of this Consent Decree and Order is the date of issuance of the Final Order of the Board in this matter.

20. This Consent Decree and Order inures to the benefit of, and is binding on, all affiliates, transferees, agents, successors, heirs, representatives, and assigns of the Parties hereto.

21. This Consent Decree and Order and each stipulation or other document contemplated by this Consent Decree and Order may be executed in one or more counterparts. Facsimile signatures shall be considered as original signatures.

22. The Recitals are hereby fully incorporated into this Consent Decree and Order.

23. If any provision of this Consent Decree and Order becomes or is held to be invalid or unenforceable by operation of any applicable law or by decision of a

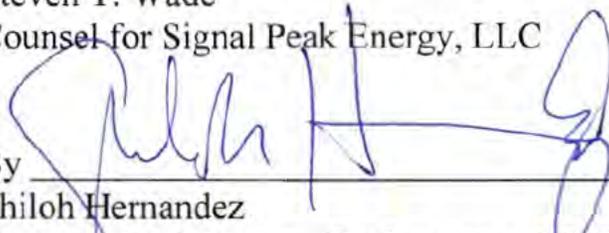
Court of competent jurisdiction, unless the invalid or unenforceable provision is material to the Party's or Parties' compliance with the Consent Decree and Order, that determination pursuant to the operation of any applicable law or by Court decision, so long as the intent of the Parties is not materially changed, will not affect the validity or enforceability of the rest of the Consent Decree and Order, and this Consent Decree and Order will be considered amended to the extent necessary to remove the non-material cause of the invalidity or unenforceability. If any provision of this Consent Decree and Order which is held to be invalid or unenforceable by operation of applicable law or by a Court of competent jurisdiction is material to the Party's or Parties' compliance with the Consent Decree and Order or if the invalidation or unenforceability of any provision of this Consent Decree and Order results in the remaining provisions of this Consent Decree and Order being contrary to the intent of the Parties in entering into this Consent Decree and Order, the Parties agree to enter into negotiations to amend this Consent Decree and Order to reflect the intent of the Parties in light of the invalidity or unenforceability of the material provision.

24. DEQ shall pay \$30,000 to MEIC for attorney's fees and costs in this matter due and payable on June 30, 2016. MEIC asserts that this is a significant reduction of MEIC's fees and costs done as a good faith gesture to reach an amicable settlement. DEQ's agreement to the fees and costs in this matter is for purposes of

this matter only and is in no way to be deemed an admission in any matter with respect to the basis for or the reasonableness of the specific amounts or rates charged.

DATED this 11<sup>th</sup> day of January, 2016.

By   
Steven T. Wade  
Counsel for Signal Peak Energy, LLC

By   
Shiloh Hernandez  
Counsel for Montana Environmental Information Center

By   
Dana David  
Counsel for Montana Department of Environmental Quality

Pursuant to the above agreement of the Parties, IT IS SO ORDERED

DATED this 12<sup>th</sup> day of January, 2016

By   
Joan Miles  
Chair  
Montana Board of Environmental Review

## Calendar No. 107

95TH CONGRESS }  
1st Session }

SENATE }

REPORT  
No. 95-128SURFACE MINING CONTROL AND  
RECLAMATION ACT OF 1977

MAY 10 (legislative day, MAY 9), 1977.—Ordered to be printed

Mr. METCALF, from the Committee on Energy and Natural Resources,  
submitted the following

## REPORT

together with

## ADDITIONAL AND MINORITY VIEWS

[To accompany S. 7]

The Committee on Energy and Natural Resources, to which was referred the bill, S. 7, to provide for the cooperation between the Secretary of the Interior and the States with respect to the regulation of surface mining operations, and the acquisition and reclamation of abandoned mines, and for other purposes, having considered the same, reports favorably therein with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Surface Mining Control and Reclamation Act of 1977".

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## TITLE I—STATEMENT OF FINDINGS AND POLICY

## FINDINGS

SEC. 101. The Congress finds and declares that—

(a) extractions of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;

(b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(e) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;

(f) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal mining, on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(g) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(h) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(i) the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

## PURPOSES

SEC. 102. It is the purpose of this Act to—

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible; \*

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this Act;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals; and

(k) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

## TITLE II—OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

### CREATION OF THE OFFICE

SEC. 201. (a) There is established in the Department of the Interior, the Office of Surface Mining Reclamation and Enforcement (hereinafter referred to as the "Office").

(b) The Office shall have a Director who shall report directly to the Secretary and who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5 of the United States Code, and such other employees as may be required. The Director shall have the responsibilities provided under subsection (c) of this section and those duties and responsibilities relating to the functions of the office which the Secretary may assign, consistent with this Act. Employees of the Office shall be recruited on the basis of their professional competence and capacity to administer the provisions of this Act. No legal authority, program, or function in any Federal agency which has as its purpose promoting the development or use of coal or other mineral resources or regulating the health and safety of miners under provisions of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742), shall be transferred to the Office.

(c) The Secretary, acting through the Office, shall—

(1) administer the programs for controlling surface coal mining operations which are required by this Act; review and approve or disapprove State programs for controlling surface coal mining operations and reclaiming abandoned mined lands; make those investigations and inspections necessary to insure compliance with this Act; conduct hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and production of written or printed material as provided for in this Act; issue cease-and-desist orders; review and vacate or modify or approve orders and decisions; and order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto;

(2) publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act;

(3) administer the State grant-in-aid program for the development of State programs for surface coal mining and reclamation operations provided for in title V of this Act;

(4) administer in lieu of an approved State program the program for the purchase and reclamation of abandoned and unreclaimed mined areas pursuant to title III of this Act;

(5) administer the surface mining and reclamation research and demonstration project authority provided for in this Act;

(6) consult with other agencies of the Federal Government having expertise in the control and reclamation of surface mining operations and assist States, local governments, and other eligible agencies in the coordination of such programs;

(7) maintain a continuing study of surface mining and reclamation operations in the United States;

(8) develop and maintain an Information and Data Center on Surface Coal Mining, Reclamation, and Surface Impacts of Underground Mining, which will make such data available to the public and the Federal, regional, State, and local agencies conducting or concerned with land use planning and agencies concerned with surface and underground mining and reclamation operations;

(9) assist the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements of the Act and, at the same time, reflect local requirements and local environmental and agricultural conditions;

(10) assist the States in developing objective scientific criteria and appropriate procedures and institutions for determining those areas of a State to be designated unsuitable for all or certain types of surface coal mining pursuant to section 422;

(11) monitor all Federal and State research programs dealing with coal extraction and use and recommend to Congress the research and demonstration projects and necessary changes in public policy which are designated to (A) improve feasibility of underground coal mining, and (B) improve surface mining and reclamation techniques directed at eliminating adverse environmental and social impacts;

(12) cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement and administration of this Act; and

(13) perform such other duties as may be provided by law and relate to the purposes of this Act.

(d) The Director shall not use either permanently or temporarily any person charged with responsibility of inspecting coal mines under the Federal Coal Mine Health and Safety Act of 1969, unless he finds and publishes such finding in the Federal Register, that such activities would not interfere with such inspections under the 1969 Act.

(e) The Office shall be considered an independent Federal regulatory agency for the purposes of sections 3502 and 3512 of title 44 of the United States Code.

(f) No employee of the Office or any other Federal employee performing any function or duty under this Act shall have a direct or indirect financial interest in underground or surface coal mining operations. Whoever knowingly violates the provisions of the above sentence shall, upon conviction, be punished by a fine of not more than \$2,500, or by imprisonment for not more than one year, or both. The Director shall (1) within sixty days after enactment of this Act publish regulations, in accordance with section 553 of title 5, United States Code, to establish the methods by which the provisions of this subsection will be monitored and enforced, including appropriate provisions for the filing by such employees and the review of statements and supplements thereto concerning their financial interests which may be affected by this subsection, and (2) report to the Congress as part of the annual report (section 506) on the actions taken and not taken during the preceding calendar year under this subsection.

(g) (1) After the Secretary has adopted the regulations required by section 401 of this Act, any person may petition the Director to initiate a proceeding for the issuance, amendment, or repeal of a rule under this Act.

(2) Such petitions shall be filed in the principal office of the Director and shall set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule under this Act.

(3) The Director may hold a public hearing or may conduct such investigation or proceeding as the Director deems appropriate in order to determine whether or not such petition should be granted.

(4) Within 90 days after filing of a petition described in paragraph (1), the Director shall either grant or deny the petition. If the Director grants such petition, the Director shall promptly commence an appropriate proceeding in accordance with the provisions of this Act. If the Director denies such petition, the Director shall so notify the petitioner in writing setting forth the reasons for such denial.

### TITLE III—ABANDONED MINE RECLAMATION

#### ABANDONED MINE RECLAMATION FUND

SEC. 301. (a) There is created on the books of the Treasury of the United States a trust fund to be known as the Abandoned Mine Reclamation Fund (hereinafter referred to as the "fund") which shall be administered by the Secretary of the Interior.

(b) The fund shall consist of amounts deposited in the fund, from time to time, derived from—

- (1) the sale, lease, or rental of land reclaimed pursuant to this title;
- (2) any user charge imposed on or for land reclaimed pursuant to this title, after expenditures for maintenance have been deducted; and
- (3) the reclamation fees levied under subsection (c) of this section.

(c) All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that there shall be no reclamation fee for lignite coal. Such fee shall be paid no later than thirty days after the end of each calendar quarter beginning with the first calendar quarter occurring after January 1, 1977, and ending fifteen years after the date of enactment of this Act unless extended by an Act of Congress.

(d) Amounts covered into the fund shall be available for the acquisition and reclamation of land under section 305, administration of the fund and enforcement and collection of the fee as specified in subsection (d), acquisition and filling of voids and sealing of tunnels, shafts, and entryways under section 306, and for use under section 304, by the Secretary of Agriculture, of up to one-fifth of the money deposited in the fund annually and transferred by the Secretary of the Interior to the Secretary of Agriculture for such purposes. Such amounts shall be available for such purposes only when appropriated therefor; and such appropriations may be made without fiscal year limitations: *Provided*, That no new budget is authorized to be appropriated for fiscal year 1978.

(e) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the program needs for the funds. Fifty per centum of the funds collected annually in any State or Indian reservation shall be expended in that State or Indian reservation by the Secretary or State regulatory authority pursuant to any approved State abandoned mine reclamation program to accomplish the purposes of this title after receiving and considering the recommendations of the Governor of that State or the head of the governing body of that tribe having jurisdiction over that reservation, as the case may be: *Provided, however*, That if such funds have not been expended within three years after being paid into the fund, they shall be available for expenditure in any area. The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this title.

#### OBJECTIVES OF FUND

SEC. 302. The primary objective for the obligation of funds is the reclamation of areas affected by previous mining; but other objectives shall reflect the following priorities in the order stated:

- (a) the protection of health or safety of the public;
- (b) protection of the environment from continued degradation and the conservation of land and water resources;
- (c) the protection, construction, or enhancement of public facilities such as utilities, roads, recreation and conservation facilities and their use; and
- (d) the improvement of lands and water to a suitable condition useful in the economic and social development of the area affected.

## ELIGIBLE LANDS

SEC. 303. The only lands eligible for reclamation expenditures under this title are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment of this Act, and for which there is no continuing reclamation responsibility under State or other Federal laws.

## RECLAMATION OF RURAL LANDS

SEC. 304. (a) In order to provide for the control and prevention of erosion and sediment damages from unreclaimed mined lands, and to promote the conservation and development of soil and water resources of unreclaimed mined lands and lands affected by mining, the Secretary of Agriculture is authorized to enter into agreements of not more than ten years with landowners (including owners of water rights), residents and tenants, and individually or collectively, determined by him to have control for the period of the agreement of lands in question therein, providing for land stabilization, erosion, and sediment control, and reclamation through conservation treatment, including measures for the conservation and development of soil, water (excluding stream channelization), woodland, wildlife, and recreation resources, and agricultural productivity of such lands. Such agreements shall be made by the Secretary with the owners, including owners of water rights, residents, or tenants (collectively or individually) of the lands in question.

(b) The landowner, including the owner of water rights, resident, or tenant shall furnish to the Secretary of Agriculture a conservation and development plan setting forth the proposed land uses and conservation treatment which shall be mutually agreed by the Secretary of Agriculture and the landowner, including owner of water rights, resident, or tenant to be needed on the lands for which the plan was prepared. In those instances where it is determined that the water rights or water supply of a tenant landowner, including owner of water rights, residents, or tenant have been adversely affected by a surface or underground coal mine operation which has removed or disturbed a stratum so as to significantly affect the hydrologic balance, such plan may include proposed measures to enhance water quality or quantity by means of joint action with other affected landowners, including owner of water rights, residents, or tenants in consultation with appropriate State and Federal agencies.

(c) Such plan shall be incorporated in an agreement under which the landowner, including owner of water rights, resident, or tenant shall agree with the Secretary of Agriculture to effect the land uses and conservation treatment provided for in such plan on the lands described in the agreement in accordance with the terms and conditions thereof.

(d) In return for such agreement by the landowner, including owner of water rights, resident, or tenant the Secretary of Agriculture is authorized to furnish financial and other assistance to such landowner, including owner of water rights, resident, or tenant in such amounts and subject to such conditions as the Secretary of Agriculture determines are appropriate in the public interest for carrying out the land use and conservation treatment set forth in the agreement. Grants made under this section, depending on the income-producing potential of the land after reclaiming, shall provide up to 80 per centum of the cost of carrying out such land uses and conservation treatment on not more than one hundred and twenty acres of land occupied by such owner including water rights owners, resident, or tenant, or on not more than one hundred and twenty acres of land which has been purchased jointly by such landowners including water rights owners, residents, or tenants under an agreement for the enhancement of water quality or quantity or on land which has been acquired by an appropriate State or local agency for the purpose of implementing such agreement; except the Secretary may reduce the matching cost share where he determines that (1) the main benefits to be derived from the project are related to improving offsite water quality, offsite esthetic values, or other offsite benefits, and (2) the matching share requirement would place a burden on the landowner which would probably prevent him from participating in the program.

(e) The Secretary of Agriculture may terminate any agreement with a landowner including water rights owners, operator, or occupier by mutual agreement if the Secretary of Agriculture determines that such termination would be in the public interest, and may agree to such modification of agreements previously entered into hereunder as he deems desirable to carry out the purposes

of this section or to facilitate the practical administration of the program authorized herein.

(f) Notwithstanding any other provision of law, the Secretary of Agriculture, to the extent he deems it desirable to carry out the purposes of this section, may provide in any agreement hereunder for (1) preservation for a period not to exceed the period covered by the agreement and an equal period thereafter of the cropland, crop acreage, and allotment history applicable to land covered by the agreement for the purpose of any Federal program under which such history is used as a basis for an allotment or other limitation on the production of such crop; or (2) surrender of any such history and allotments.

(g) The Secretary of Agriculture shall be authorized to issue such rules and regulations as he determines are necessary to carry out the provisions of this section.

(h) In carrying out the provisions of this section, the Secretary of Agriculture shall utilize the services of the Soil Conservation Service.

(i) Funds shall be made available to the Secretary of Agriculture for the purposes of this section, as provided in section 301 (c).

#### ACQUISITION AND RECLAMATION OF ABANDONED AND UNRECLAIMED MINED LANDS

SEC. 305. (a) (1) The Congress declares that the reclamation and, if necessary, acquisition of any interest in land or mineral rights in order to eliminate hazards to the environment or to the health or safety of the public from mined lands, or to construct, operate, or manage reclamation facilities and projects constitutes for the purposes of this title reclamation and, if necessary, acquisition for a public use or purpose, notwithstanding that the Secretary or State regulatory authority pursuant to an approved State abandoned mine reclamation program plans to hold the interest in land or mineral rights so reclaimed or acquired as an open space or for recreation, or to resell, if acquired, the land following completion of the reclamation facility or project.

(2) The Secretary or State regulatory authority pursuant to an approved State abandoned mine reclamation program may acquire by purchase, donation, or easement, or otherwise, land or any interest therein which has been affected by surface mining in accordance with section 303 hereof. Prior to making any acquisition of land under this section, the Secretary or State regulatory authority pursuant to an approved State abandoned mine reclamation program shall make a thorough study with respect to those tracts of land which are available for acquisition under this section and based upon those findings he shall select lands for purchase or acquiring easements according to the priorities established in section 302. Title to all lands or interests therein acquired by the Secretary shall be taken in the name of the United States. The price paid for land under this section shall take into account the unrestored condition of the land. Prior to any individual acquisition under this section, the Secretary or the State regulatory authority pursuant to an approved State abandoned mine reclamation program shall specifically determine the cost of such acquisition and reclamation and the benefits to the public to be gained therefrom.

(3) If the Secretary, or the appropriate regulatory authority pursuant to an approved State program, makes a finding of fact that (1) a mine fire, refuse bank fire, stream pollution, or subsidence resulting from coal mining operations is at a stage where, in the public interest, immediate action should be taken; and (2) the owner or owners of the property upon which entry must be made to combat the mine fire, refuse bank fire, stream pollution, or subsidence resulting from coal mining operations, are not known, are not readily available, or will not give permission for the Secretary or State regulatory authority, political subdivisions of the State or municipalities, their agents, employees, or contractors to enter upon such premises, then, upon giving notice by mail to the owner or owners, if known, or if not known, by posting notice upon the premises and advertising in a newspaper of general circulation in the area in which the land lies the Secretary, or State regulatory authority, political subdivision of the State or municipalities, their agents, employees, or contractors shall have a right to enter upon the premises and any other land in order to have access to the premises to combat the mine fire, refuse bank fire, stream pollution, or subsidence resulting from coal mining operations and do all things necessary and expedient to do so. Such entry shall not be construed as an act of condemnation of property or of trespass thereof. The moneys expended for such work and the benefits accruing to any such premises entered upon shall be chargeable against such lands and shall mitigate or offset any claim in or any action brought by

any owner of any interested in such premises for any alleged damages by virtue of such entry: *Provided, however,* That this provision is not intended to create new rights of action or eliminate existing immunities.

(4) The Secretary or the State regulatory authority pursuant to an approved abandoned mine reclamation program shall prepare specifications for the reclamation of lands to be reclaimed or acquired under this section. In preparing these specifications, the Secretary or State regulatory authority shall utilize the specialized knowledge or experience of any Federal or State department or agency which can assist him in the development or implementation of the reclamation program required under this title.

(5) In selecting lands to be acquired pursuant to this section and in formulating regulations for the making of grants to the States to acquire lands pursuant to this title, the Secretary shall give priority to lands in their unreclaimed state which will meet the objectives as stated in section 402 above when reclaimed. For those lands which are reclaimed for public recreational use, the revenue derived from such lands shall be used first to assure proper maintenance of such facilities thereon and any remaining moneys shall be deposited in the fund or an appropriate fund established by the State regulatory authority pursuant to an approved State abandoned mine reclamation program.

(6) Where land purchased and reclaimed pursuant to this section is deemed to be suitable for industrial, commercial, residential, or private recreational development, the Secretary or State regulatory authority pursuant to an approved State abandoned mine reclamation program may sell such land by public sale under a system of competitive bidding, at not less than fair market value and under such other regulations as he may promulgate to insure that such lands are put to proper use, as determined by the Secretary or State regulatory authority. If any such land sold is not put to the use specified by the Secretary or State regulatory authority in the terms of the sales agreement, then all right, title, and interest in such land shall revert to the United States or appropriate State. Money received from such sale shall be deposited in the fund or State fund.

(7) The Secretary or State regulatory authority shall hold a public hearing, with the appropriate notice, in the county or counties or the appropriate subdivisions of the State in which lands purchased to be reclaimed pursuant to this title are located. The hearings shall be held at a time which shall afford local citizens and governments the maximum opportunity to participate in the decision concerning the use of the lands once reclaimed.

(8) The Secretary shall utilize available data and information on reclamation needs and measures, including the data and information developed by the Corps of Engineers in conducting the National Strip Mine Study authorized by section 233 of the Flood Control Act of 1970. In connection therewith the Secretary may call on the Secretary of the Army, acting through the Chief of Engineers, to assist him or the State regulatory authority in conducting, operating, or managing reclamation facilities and projects, including demonstration facilities and projects conducted by the Secretary pursuant to this section.

(b)(1) The Secretary is authorized to use money in the fund to acquire, reclaim, and transfer land to any State, or any department, agency, or instrumentality of a State or of a political subdivision thereof, or to any person, firm, association, or corporation if he determines that such is an integral and necessary element of an economically feasible plan for a project to construct or rehabilitate housing for persons employed in mines or work incidental thereto, persons disabled as the result of such employment, persons displaced by governmental action, or persons dislocated as the result of natural disasters or catastrophic failure from any cause. Such activities shall be accomplished under such terms and conditions as the Secretary shall require, which may include transfers of land with or without monetary consideration: *Provided, That,* to the extent that the consideration is below the fair market value of the land transferred, no portion of the difference between the fair market value and the consideration shall accrue as a profit to such person, firm, association, or corporation.

(2) The Secretary may carry out the purposes of this subsection directly or he may make grants and commitments for grants, and may advance money under such terms and conditions as he may require to any State; or any department, agency, or instrumentality of a State, or any public body or nonprofit organization designated by a State.

(3) The Secretary may provide, or contract with public and private organizations to provide information, advice, and technical assistance, including demonstrations, in furtherance of this subsection.

## FILLING VOIDS AND SEALING TUNNELS

SEC. 306. (a) The Congress declares that voids, and open and abandoned tunnels, shafts, and entryways resulting from any previous mining operation, constitute a hazard to the public health or safety and that surface impacts of any underground or surface mining operation may degrade the environment. The Secretary, at the request of the Governor of any State without an approved State program, or the chairman of any tribe, is authorized to fill such voids, seal such abandoned tunnels, shafts, and entryways, and reclaim surface impacts of underground or surface mines which the Secretary determines could endanger life and property, constitute a hazard to the public health and safety, or degrade the environment. State regulatory authorities are authorized to carry out such work pursuant to an approved abandoned mine reclamation program.

(b) Funds available for use in carrying out the purpose of this section shall be limited to those funds which must be expended in the respective States or Indian reservations under the provisions of section 301 (e).

(c) The Secretary may make expenditures and carry out the purposes of this section without regard to provisions of section 303 in such States or Indian reservations where requests are made by the Governor or tribal chairman and only after all reclamation with respect to abandoned coal lands or coal development impacts have been met, except for those reclamation projects relating to the protection of the public health or safety.

(d) In those instances where mine waste piles are being reworked for coal conservation purposes, the incremental costs of disposing of the wastes from such operations by filling voids and sealing tunnels may be eligible for funding providing that the disposal of these wastes meets the purposes of this section.

(e) The Secretary may acquire by purchase, donation, easement, or otherwise such interest in land as he determines necessary to carry out the provisions of this section.

## FUND REPORT

SEC. 307. Not later than January 1, 1979, and annually thereafter, the Secretary shall report to the Congress on operations under the fund together with his recommendations as to future uses of the fund.

## TRANSFER OF FUNDS

SEC. 308. The Secretary of the Interior may transfer funds to other appropriate Federal agencies, in order to carry out the reclamation activities authorized by this title.

## TITLE IV—CONTROL OF THE ENVIRONMENTAL IMPACTS OF SURFACE COAL MINING

## ENVIRONMENTAL PROTECTION STANDARDS

SEC. 401. (a) Not later than the end of the ninety-day period immediately following the date of enactment of this Act, the Secretary shall promulgate and publish in the Federal Register regulations covering an interim regulatory procedure for surface coal mining and reclamation operations setting mining and reclamation performance standards based on and incorporating the provisions of subsections 415 (b) (2), 415 (b) (3), 415 (b) (5), 415 (b) (10), 415 (b) (13), 415 (b) (15), 415 (b) (19), and 415 (d) of this Act. The issuance of the Interim regulations shall be deemed not to be a major Federal action within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969. (42 U.S.C. 4332). Such regulations shall not be promulgated and published by the Secretary until he has—

(A) published proposed regulations in the Federal Register and afforded interested persons and State and local governments a period of not less than forty-five days after such publication to submit written comments thereon;

(B) obtain the written concurrence of the Administrator of the Environmental Protection Agency with respect to those regulations promulgated under this section which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.); and

(C) held at least one public hearing on the proposed regulations.

The date, time, and place of any hearing held on the proposed regulations shall be set out in the publication of the proposed regulations. The Secretary shall consider all comments and relevant data presented at such hearing before full promulgation and publication of the regulations.

(b) Not later than one year after the enactment of this Act, the Secretary shall promulgate and publish in the Federal Register regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and incorporating the provisions of title IV and establishing procedures and requirements for preparation, submission, and approval of State programs and development and implementation of Federal programs under the title. The Secretary shall promulgate these regulations in accordance with the procedures in section 401(a).

#### INITIAL REGULATORY PROCEDURES

Sec. 402. (a) No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority.

(b) All surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued after six months from the date of enactment of this Act shall comply, and such permits shall contain terms requiring compliance with, the provisions of subsections 415(b) (2), 415(b) (3), 415(b) (5), 415(b) (10), 415(b) (13), 415(b) (19), and 415(c) of this Act. Prior to final disapproval of a State program or prior to promulgation of a Federal program or a Federal lands program pursuant to this Act, a State may issue such permits.

(c) On or after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State which are in operation pursuant to a permit issued before or within six months after the date of enactment of this Act shall comply with the provisions of subsections 415(b) (2), 415(b) (3), 415(b) (5), 415(b) (10), 415(b) (13), 415(b) (19), and 415(c) of this Act, with respect to lands from which overburden and the coal seam being mined have not been removed: *Provided, however*, That surface coal mining operations in operation pursuant to a permit issued by a State before the date of enactment of this Act and operated by a person whose annual production of coal from surface coal mining operations does not exceed two hundred thousand tons shall not be subject to the provisions of this subsection except with reference to the provision of subsection 415(c) (1) until thirty months from the date of enactment of this Act.

(d) Not later than two months following the approval of a State program pursuant to section 403 or the implementation of a Federal program pursuant to section 404, regardless of litigation contesting that approval or implementation, all operators of surface and coal mines who expect to operate such mines after the expiration of eight months from the approval of a State program or the implementation of a Federal program, shall file an application for a permit with the regulatory authority. Such application shall cover those lands to be mined after the expiration of eight months from the approval of a State program or the implementation of a Federal program. The regulatory authority shall process such applications and grant or deny a permit within eight months after the date of approval of the State program or the implementation of the Federal program unless specially enjoined by a court of competent jurisdiction, but in no case later than forty-two months from the date of enactment of this Act."

(e) Within six months after the date of enactment of this Act, the Secretary shall implement a Federal enforcement program which shall remain in effect in each State in which there is surface coal mining until the State program has been approved pursuant to this Act or until a Federal program has been implemented pursuant to this Act. The enforcement program shall—

(1) include inspections of surface coal mine sites which shall be made on a random basis (but at least one inspection for every site every three months), without advance notice to the mine operator and for the purpose of ascertaining compliance with the standards of subsections (b) and (c) above. The Secretary shall order any necessary enforcement action to be implemented pursuant to the Federal enforcement provision of this title to correct violations identified at the inspections;

(2) provide that upon receipt of inspection reports indicating that any surface coal mining operation has been found in violation of subsections (b) and (c) above, during not less than two consecutive State inspections or upon receipt by the Secretary of information which would give rise to reasonable belief that such standards are being violated by any surface coal mining operation, the Secretary shall order the immediate inspection of such operation by Federal inspectors and the necessary enforcement actions, if any, to be implemented pursuant to the Federal enforcement provisions of this title. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection;

(3) for purposes of this section, the term "Federal inspector" means personnel of the Office of Surface Mining Reclamation and Enforcement and such additional personnel of the United States Geological Survey, Bureau of Land Management, or of the Mining Enforcement and Safety Administration so designated by the Secretary, or such other personnel of the Forest Service, Soil Conservation Service, or the Agricultural Stabilization and Conservation Service as arranged by appropriate agreement with the Secretary on a reimbursable or other basis;

(4) provide that the State regulatory agency file with the Secretary and with a designated Federal office centrally located in the county or area in which the inspected surface coal mine is located copies of inspection reports made;

(5) provide that moneys authorized by section 511 shall be available to the Secretary prior to the approval of a State program pursuant to this Act to reimburse the States for conducting those inspections in which the standards of this Act are enforced and for the administration of this section.

(f) Following the final disapproval of a State program, and prior to promulgation of a Federal program or a Federal lands program pursuant to this Act, including judicial review of such a program, existing surface coal mining operations may continue surface mining operations pursuant to the provisions of section 402 of this Act. During such period no new permits shall be issued by the State whose program has been disapproved. Permits which lapse during such period may continue in full force and effect until promulgation of a Federal program or a Federal lands program.

#### STATE PROGRAMS

SEC. 403. (a) Each State in which there are or may be conducted on lands within such State surface coal mining operations, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on such lands, except as provided in section 421 and title III of this Act, shall submit to the Secretary, by the end of the eighteen-month period beginning on the date of enactment of this Act, a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this Act, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act;

(4) A State law which provides for the effective implementation, maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulation of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 422;

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with this Act.

(b) The Secretary shall not approve any State program submitted under this section until he has—

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date of such State program was submitted to him.

(c) If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised State program, or portion thereof. The Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) For the purposes of this section and section 404, the inability of a State to take any action the purpose of which is to prepare, submit, or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles III and V of this Act or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 402 of this Act, until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 403 and 404 shall again be fully applicable.

#### FEDERAL PROGRAMS

SEC. 404. (a) The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty months after the date of enactment of this Act if such State—

(1) fails to submit a State program covering surface and coal mining and reclamation operations by the end of the eighteen-month period beginning on the date of enactment of this Act;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program: *Provided*, That the Secretary shall not implement a Federal program prior to the expiration of the initial period allowed for submission of a State program as provided for in clause (1) of this subsection; or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this Act.

If State compliance with clause (1) of this subsection requires an act of the State legislature, the Secretary may extend the period of submission of a State program up to an additional six months. Promulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this Act. After promulgation and implementation of a Federal program the Secretary shall be the regulatory

authority. If a Federal program is implemented for a State, subsections 422 (a), (c), and (d) shall not apply for a period of one year following the date of such implementation. In promulgating and implementing a Federal program for a particular State the Secretary shall take into consideration the nature of that State's terrain, climate, biological, chemical, and other relevant physical conditions.

(b) In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 421, of that part of the State program not being enforced by such State.

(c) Prior to promulgation and implementation of any proposed Federal program, the Secretary shall give adequate public notice and hold a public hearing in the affected State.

(d) Permits issued pursuant to an approved State program shall be valid but reviewable under a Federal program. Immediately following promulgation of a Federal program, the Secretary shall undertake to review such permits to determine that the requirements of this Act are not violated. If the Secretary determines any permit to have been granted contrary to the requirements of this Act, he shall so advise the permittee and provide him an opportunity for hearing and a reasonable opportunity for submission of a new application and reasonable time, within a time limit prescribed in regulations promulgated pursuant to section 401, to conform ongoing surface mining and reclamation operations to the requirements of the Federal program.

(e) A State which has failed to obtain the approval of a State program prior to implementation of a Federal program may submit a State program at any time after such implementation. Upon the submission of such a program, the Secretary shall follow the procedures set forth in section 403(b) and shall approve or disapprove the State program within six months after its submittal. Approval of a State program shall be based on the determination that the State has the capability of carrying out the provisions of this Act and meeting its purposes through the criteria set forth in section 403(a) (1) through (6). Until a State program is approved as provided under this section, the Federal program shall remain in effect and all actions taken by the Secretary pursuant to such Federal program, including the terms and conditions of any permit issued thereunder shall remain in effect.

(f) Permits issued pursuant to the Federal program shall be valid under any superseding State program: *Provided*, That the Federal permittee shall have the right to apply for a State permit to supersede his Federal permit. The State regulatory authority may review such permits to determine that the requirements of this Act and the approved State program are not violated. Should the State program contain additional requirements not contained in the Federal program, the permittee will be provided opportunity for hearing and a reasonable time, within a time limit prescribed in regulations promulgated pursuant to section 401, to conform ongoing surface mining and reclamation operations to the additional State requirements.

(g) Whenever a Federal program is promulgated for a State pursuant to this Act, any statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations subject to this Act shall be preempted and superseded by the Federal program. The Secretary shall set forth in rules and regulations any State law or regulation which is preempted and superseded by the Federal program.

(h) Any Federal program shall include a process for coordinating the review and issuance of permits for surface mining and reclamation operations with any other Federal or State permit process applicable to the proposed operation.

#### STATE LAWS

SEC. 405. (a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

(b) Any provision of any State law or regulation in effect upon the date of enactment of this Act, or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operations than do the provisions of

this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act. The Secretary shall set forth in the rules and regulations any State law or regulation which is construed to be inconsistent with this Act. Any provision of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act.

#### PERMITS

Sec. 406. (a) On and after eight months from the date on which a State program is approved by the Secretary, pursuant to section 403 of this Act, or on and after eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 404 of this Act, no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 402 of this Act, may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this Act, but the initial administrative decision has not been rendered.

(b) All permits issued pursuant to the requirements of this Act shall be issued for a term not to exceed five years and shall be nontransferable: *Provided*, That a successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's application is granted or denied.

(c) A permit shall terminate if the permittee has not commenced the surface coal mining and reclamation operations covered by such permit within three years of the issuance of the permit: *Provided*, That with respect to coal to be mined for use in a synthetic fuel facility, the permittee shall be deemed to have commenced surface mining operations at such time as the construction of the synthetic fuel facility is initiated.

(d) (1) Any valid permit issued pursuant to this Act shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holder of the permit may apply for renewal and such renewal shall be issued, subsequent to public hearing, if requested, unless the regulatory authority finds in writing that—

(A) the terms and conditions of the existing permit are not being satisfactorily met; or

(B) the present surface coal mining and reclamation operation is not in full compliance with the environmental protection standards of this Act and the approved State plan or Federal program pursuant to this Act; or

(C) the renewal requested jeopardizes the operator's continuing responsibility on existing permit areas; or

(D) the operator has not provided evidence that the performance bond in effect for said operation will continue in full force and effect for any renewal requested in such application as well as any additional bond the regulatory authority might require pursuant to section 409; or

(E) any additional revised or updated information required by the regulatory authority has not been provided. Prior to the approval of any renewal of permit the regulatory authority shall provide notice to the appropriate public authorities.

(2) If an application for renewal of a valid permit includes a proposal to extend the mining operation beyond the boundaries authorized in the existing permit, the portion of the application for revision of a valid permit which addresses any new land areas shall be subject to the full standards applicable to new applications under this Act.

(3) Any permit renewal shall be for a term not to exceed the period of the original permit established by this Act. Application for permit renewal shall be made at least one hundred and twenty days prior to the expiration of the valid permit.

## APPLICATION REQUIREMENTS

Sec. 407. (a) Each application for a surface coal mining and reclamation permit pursuant to an approved State program or a Federal program under the provisions of this Act shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of receiving, administering and enforcing such permit issued pursuant to a State or Federal program. The regulatory authority may develop procedures so as to enable the cost of the fee to be paid over the term of the permit.

(b) The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things—

(1) the names and addresses of (A) the permit applicant; (B) every legal owner of the property (surface and mineral), to be mined; (C) the holders of any leasehold interest in the property; (D) any purchaser of record of the property under a real estate contract; (E) the operator if he is a person different from the applicant; and (F) if any of these are business entities other than a single proprietor, the names and addresses of the principals, officers, and resident agent;

(2) the names and addresses of the owners of record of all surface and subsurface areas within five hundred feet of any part of the permit area;

(3) a statement of any current or previous surface coal mining permits in the United States held by the applicant and the permit identification;

(4) if the applicant is a partnership, corporation, association, or other business entity, the following where applicable: the names and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of any person owning, of record or beneficially either alone or with associates, 10 per centum or more of any class of stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation within the United States;

(5) a statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant, has ever held a Federal or State mining permit which subsequent to 1960 has been suspended or revoked or has had a mining bond or similar security deposited in lieu of bond forfeited and, if so, a brief explanation of the facts involved;

(6) a copy of the applicant's advertisement to be published in a newspaper of general circulation in the locality of the proposal site at least once a week for four successive weeks, and which includes the ownership, a description of the exact location and boundaries of the proposed site sufficient so that the proposed operation is readily locatable by local residents, and the location of where the application is available for public inspection;

(7) a description of the type and method of coal mining operation that exists or is proposed, the engineering techniques proposed or used, and the equipment used or proposed to be used.

(8) the anticipated or actual starting and termination dates of each phase of the mining operation and number of acres of land to be affected;

(9) a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: *Provided*, That nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.

(10) the name of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged;

(11) a determination of the hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability: *Provided, however*, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency;

(12) when requested by the regulatory authority, the climatological factors that are peculiar to the locality of the land to be affected, including the average seasonal precipitation, the average direction and velocity of prevailing winds, and the seasonal temperature ranges;

(13) an accurate map or plan to an appropriate scale clearly showing (A) the land to be affected as of the date of application and (B) all types of information set forth on topographical maps of the United States Geological Survey of a scale of 1:24000 or larger, including all manmade features and significant known archeological sites existing on the date of application. Such a map or plan shall, among other things specified by the regulatory authority, show all boundaries of the land to be affected, the boundary lines and names of present owners of record of all surface areas abutting the permit area, and the location of all buildings within one thousand feet of the permit area;

(14) cross-section maps or plans of the land to be affected including the actual area to be mined, prepared by or under the direction of and certified by a qualified registered professional engineer, with assistance from experts in related fields such as land surveying, landscape architecture, and geology, showing pertinent elevation and location of test borings or core samplings and depicting the following information; the nature and depth of the various strata of overburden; the location of subsurface water, if encountered, and its quality; the nature and thickness of any coal or rider seam above the coal seam to be mined; the nature of the stratum immediately beneath the coal seam to be mined; all mineral crop lines and the strike and dip of the coal to be mined within the area of land to be affected; existing or previous surface mining limits; the location and extent of known workings of any underground mines, including mine openings to the surface; the location of "aquifers;" the estimated elevation of the water table; the location of spoil, waste, or refuse areas and topsoil preservation areas; the location of all impoundments for waste or erosion control; any settling or water treatment facility; constructed or natural drainways and the location of any discharges to any surface body of water on the area of land to be affected or adjacent thereto; and profiles at appropriate cross sections of the anticipated final surface configuration that will be achieved pursuant to the operator's proposed reclamation plan;

(15) a statement of the result of test borings or core samplings from the permit area, including logs of the drill holes; the thickness of the coal seam found, an analysis of the chemical properties of such coal; the sulfur content of any coal seam; chemical analysis of potentially acid or toxic forming sections of the overburden; and chemical analysis of the stratum lying immediately underneath the coal to be mined; and

(16) information pertaining to coal seams, test borings, or core samplings as required by this section shall be made available to any person with an interest which is or may be adversely affected: *Provided*, That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental content which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record.

(c) Each applicant for a permit shall be required to submit to the regulatory authority as part of the permit application a certificate issued by an insurance company authorized to do business in the United State certifying that the applicant has a public liability insurance policy in force for the surface mining and reclamation operations for which such permit is sought, or evidence that the applicant has satisfied other State or Federal self-insurance requirements. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons damaged as a result of surface coal mining and reclamation operations including use of explosives and entitled to compensation under the applicable provisions of State law. Such policy shall be maintained in full force and effect during the terms of the permit or any renewal, including the length of all reclamation operations.

(d) Each applicant for a permit shall be required to submit to the regulatory authority as part of the permit application a reclamation plan which shall meet the requirements of this Act.

(e) Each applicant for a surface coal mining and reclamation permit shall file a copy of his application for public inspection with the recorder at the court-

house of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur, except for that information pertaining to the coal seam itself.

#### RECLAMATION PLAN REQUIREMENTS

SEC. 408. (a) Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:

(1) the identification of the lands subject to surface coal mining operations over the estimated life of those operations and the size, sequence, and timing of the subareas for which it is anticipated that individual permits for mining will be sought;

(2) the condition of the land to be covered by the permit prior to any mining including:

(A) the uses existing at the time of the application, and if the land has a history of previous mining, the uses which preceded any mining; and

(B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover;

(3) the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, State, and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(4) a detailed description of how the proposed post-mining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(5) the engineering techniques proposed to be used in mining and reclamation and a description of the major equipment; a plan for the control of surface water drainage and of water accumulation; a plan, where appropriate, for backfilling, soil stabilization, and compacting, grading, and appropriate revegetation; an estimate of the cost per acre of the reclamation, including a statement as to how the permittee plans to comply with each of the requirements set out in section 415;

(6) the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards;

(7) the consideration which has been given to developing the reclamation plan in a manner consistent with local, physical environmental, and climatological conditions and current mining and reclamation technologies;

(8) the consideration which has been given to insuring the maximum economically practicable recovery of the mineral resource;

(9) a detailed estimated timetable for the accomplishment of each major step in the reclamation plan;

(10) the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs;

(11) all lands, interests in lands, or options on such interests held by the applicant or pending bids on interests in lands by the applicant, which lands are contiguous to the area to be covered by the permit;

(12) the results of test borings which the applicant has made at the area to be covered by the permit, including the location of subsurface water, and an analysis of the chemical properties including acid-forming properties of the mineral and overburden: *Provided*, That information about the mineral shall be withheld by the regulatory authority if the applicant so requests;

(13) a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;

(B) the rights of present users to such water; and

(C) the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured;

(14) such other requirements as the regulatory authority shall prescribe by regulation.

(b) Any information required by this section which is not on public file pursuant to State law shall be held in confidence by the regulatory authority.

#### PERFORMANCE BONDS

SEC. 409. (a) After a surface coal mining and reclamation permit application has been approved but before such a permit is issued, the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond for performance payable, as appropriate, to the United States or to the State, and conditional upon faithful performance of all the requirements of this Act and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section. The amount of the bond required for each bonded area shall depend upon the reclamation requirements of the approved permit and shall be determined by the regulatory authority. The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture and in no case shall the bond for the entire area under one permit be less than \$10,000.

(b) Liability under the bond shall be for the duration of the surface coal mining and reclamation operations and for a period coincident with operator's responsibility for vegetation requirements in section 415.

The bond shall be executed by the operator and a corporate surety licensed to do business in the State where such operation is located, except that the operator may elect to deposit cash, negotiable bonds of the United States Government or such State, or negotiable certificates of deposit of any bank organized or transacting business in the United States. The cash deposit or market value of such securities shall be equal to or greater than the amount of the bond required for the bonded area.

(c) The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount.

(d) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. Such securities shall be security for the repayment of such negotiable certificate of deposit.

(e) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

#### PERMIT APPROVAL OR DENIAL

SEC. 410. (a) Upon the basis of a complete mining application and reclamation plan or a revision or renewal thereof, as required by this Act and pursuant to an approved State program or Federal program under the provisions of this Act, including public notification and an opportunity for a public hearing as required by section 413, the regulatory authority shall grant or deny the application for a permit and notify the applicant in writing no later than six months after submission of the complete mining and reclamation plan. Within ten days after the granting of a permit, the regulatory authority shall notify the local official who has the duty of collecting real estate taxes in the local political subdivisions in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land.

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) all the requirements of this Act and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this act and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

(3) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 407(b) has been made by the regulatory authority and the proposed operation thereof has been designed to prevent significant irreparable offsite damage to hydrologic balance;

(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 422 of this Act or is not within an area under study for such designation in an administrative proceeding commenced pursuant to section 422(a)(4)(D) or section 422(c) (unless in such an area as to which an administrative proceeding has commenced pursuant to such sections, the operator making the permit application demonstrates that, prior to the date of enactment of this Act, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit); and

(5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would not have a substantial adverse effect on alluvial valley floors underlain by unconsolidated stream laid deposits where farming can be practiced in the form of irrigated, flood irrigated, or naturally subirrigated hay meadows or other crop lands (excluding undeveloped range lands), where such valley floors are significant to the practice of farming or ranching operations, including potential farming or ranching operations if such operations are significant and economically feasible: *Provided*, That this subparagraph (5) shall not affect those surface coal mining operations which in the year preceding the enactment of this Act (1) produced coal in commercial quantities, and (2) were located within or adjacent to alluvial valley floors or had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors or for which substantial financial and legal commitments, as determined by the Secretary, had been made prior to January 1, 1977.

(c) The applicant shall file with his permit application a schedule listing any and all notices of violations of this Act and any law, rule, or regulation of the United States or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the one-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to in this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation, and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern or willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act.

#### REVISION OF PERMITS

Sec. 411. (a) (1) During the term of the permit the permittee may submit an application, together with a revised reclamation plan, to the regulatory authority for a revision of the permit.

(2) An application for a revision of a permit shall not be approved unless the regulatory authority finds that reclamation as required by this Act and the State or Federal program can be accomplished under the revised Reclamation Plan. The revision shall be approved or disapproved within a period of time established by the State or Federal program. The regulatory authority shall establish guidelines for a determination of the scale or extent of a revision request for which all permit application information requirements and procedures, including notice and hearings, shall apply: *Provided*, That any revisions which propose a substantial change in the intended future use of the land or significant alterations in the Reclamation Plan shall, at a minimum be subject to notice and hearing requirements.

(3) Any extensions to the area covered by the permit except incidental boundary revisions must be made by application for another permit.

(b) No transfer, assignment, or sale of the rights granted under any permit issued pursuant to this Act shall be made without the written approval of the regulatory authority.

(c) The regulatory authority shall within a time limit prescribed in regulations promulgated by the regulatory authority, review outstanding permits and may require reasonable revision or modification of the permit provisions during the term of such permit: *Provided*, That such revision or modification shall be based upon a written finding and subject to notice and hearing requirements established by the State or Federal program.

#### COAL EXPLORATION PERMITS

SEC. 412. (a) Each State or Federal program for a State shall include a requirement that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with exploration regulations issued by the regulatory authority. Such regulations shall include, at a minimum, (1) the requirement that prior to conducting any exploration under this section, any person must file with the regulatory authority notice of intention to explore and such notice shall include a description of the exploration area and the period of supposed exploration and (2) provisions for reclamation in accordance with the performance standards in section 415 of this Act of all lands disturbed in exploration, including excavations, roads, drill holes, and the removal of necessary facilities and equipment.

(b) Information submitted to the regulatory authority pursuant to this subsection as confidential concerning trade secrets or privileged commercial or financial information which relates to the competitive rights of the person or entity intended to explore the described area shall not be available for public examination.

(c) Any person who conducts any coal exploration activities which substantially disturb the natural land surface in violation of this section or regulations issued pursuant thereto shall be subject to the provisions of section 418.

(d) Coal exploration on Federal lands shall be governed by section 4 of the Federal Coal Leasing Amendments Act of 1975 (90 Stat. 1085).

#### PUBLIC NOTICE AND PUBLIC HEARINGS

SEC. 413. (a) At the time of submission of an application for a surface coal mining and reclamation permit, or revision of an existing permit, pursuant to the provisions of this Act or an approved State program, the applicant shall submit to the regulatory authority a copy of his proposed advertisement of the ownership, precise location, and boundaries of the land to be affected. At the time of submission such approved advertisement shall be placed by the applicant in a local newspaper of general circulation in the locality of the proposed surface mine at least once a week for four consecutive weeks. At the time of submission the regulatory authority shall notify various local governmental bodies, planning agencies, and sewage and water treatment authorities, or water companies in the locality in which the proposed surface mining will take place, notifying them of the operator's intention to surface mine a particularly described tract of land and indicating the application's permit number and where a copy of the proposed mining and reclamation plan may be inspected. These local bodies, agencies, authorities, or companies have obligation to submit written comments within thirty days of receipt of notification on the mining applications with respect to the effect of the proposed operation on the environment which are

within their area of responsibility. Such comments shall be made available to the public at the same locations as are the mining applications.

(b) Any person with a valid legal interest or the officer or head of any Federal, State, or local governmental agency or authority shall have the right to file written objections to the proposed initial or revised application for a permit for surface coal mining and reclamation operation with the regulatory authority within thirty days after the first publication of the above notice. The regulatory authority shall provide the applicant with copies of all objections and the applicant shall have thirty days thereafter to file written response with the regulatory authority if he so desires. If written objections are filed and not considered frivolous by the regulatory authority and a hearing requested, the regulatory authority shall then hold a public hearing in the locality of the proposed mining or at the option of the objector at the State capital within thirty days of the receipt of such objections: *Provided*, That approval or denial of the applications shall be accomplished pursuant to section 410(a). The regulatory authority may arrange with the applicant upon request by any party to the administrative proceeding access to the proposed mining area for the purpose of gathering information relevant to the proceeding. At this public hearing, the applicant for a permit shall have the burden of establishing that his application is in compliance with the applicable State and Federal laws. Not less than ten days prior to any proposed hearing, the regulatory authority shall respond to the written objections in writing. Such response shall include the regulatory authority's preliminary proposals as to the terms and conditions, and amount of bond of a possible permit for the area in question and answers to material factual questions presented in the written objections. The regulatory authority's responsibility under this subsection shall in any event be to make publicly available its estimate as to any other conditions of mining or reclamation which may be required or contained in the preliminary proposal. In the event all parties requesting the hearing stipulate agreement prior to the requested hearings, and withdraw their request, such hearings need not be held.

(c) Without prejudice to the rights of the objectors or responsibilities of the regulatory authority pursuant to this section, the regulatory authority may establish an informal conference procedure to resolve such written objection in lieu of holding a formal transcribed procedure.

(d) The procedures for conduct of hearings under the Act shall be established by the regulatory authority. The Secretary shall not prescribe such procedures as a condition for approval of a State program.

(e) For the purpose of such hearing, the regulatory authority may administer oaths, subpoena witnesses, or written or printed materials, compel attendance of the witnesses, or production of the materials, and take evidence including but not limited to site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation. A verbatim record of each public hearing required by this Act shall be made, and a transcript made available on the motion of any party or by order of the regulatory authority.

(f) Where the lands included in an application for a permit are the subject of a Federal coal lease in connection with which hearings were held and determinations were made under sections 2(a) (3) (A), (B) and (C) of the Mineral Lands Leasing Act, as amended (30 U.S.C. 201a) (3) (A), (B) and (C), such hearings shall be deemed as to the matters covered to satisfy the requirements of this section and such determinations shall be deemed to be a part of the record and conclusive for purposes of section 410 and of this section.

#### DECISIONS OF REGULATORY AUTHORITY AND APPEALS

SEC. 414. (a) If a public hearing has been held pursuant to section 413(b), the regulatory authority shall issue and furnish the applicant for a permit and persons who are parties to the administrative proceedings with the written finding of the regulatory authority, granting or denying the permit in whole or in part and stating the reasons therefor, within thirty days of said hearings.

(b) If there has been no public hearing held pursuant to sections 413(b), the regulatory authority shall notify the applicant for a permit no later than six months after the date on which a complete application was filed, whether the application has been approved or disapproved. If the application is approved, the permit shall be issued. If the application is disapproved, specific reasons therefor must be set forth in the notification. Within thirty days after the applicant is

notified that the permit or any portion thereof has been denied, the applicant may request a hearing on the reasons for the said disapproval. The regulatory authority shall hold a hearing within thirty days of such request and provide notification to all interested parties at the time that the applicant is so notified. Within thirty days after the hearing the regulatory authority shall issue and furnish the applicant, and all persons who participated in the hearing pursuant to section 413(b) with the written decision of the regulatory authority granting or denying the permit in whole or in part and stating the reasons therefor.

(c) Any applicant, or any other party to the administrative proceeding who filed written objections and participated in the hearing if one was held, and who is aggrieved by the decision or by the failure of the regulatory authority to act within the time limits specified in this section and in section 413 of this Act, shall have the right of appeal in accordance with sections 426 of this Act.

#### ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

SEC. 415. (a) Any permit issued under any approved State or Federal program pursuant to this Act to conduct surface coal mining operations shall require that such surface coal mining operations will meet all applicable performance standards of this Act, and such other requirements as the regulatory authority shall promulgate.

(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operator as a minimum to—

(1) conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered by using the best technology currently available so that re-affecting the land in the future through surface coal mining can be minimized;

(2) restore the land affected to a condition at least fully capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or degradation below water quality standards established pursuant to applicable Federal and State law and the permit applicants' declared proposed land use following reclamation is not deemed to be (i) impractical or unreasonable, (ii) inconsistent with applicable land use policies and plans, (iii) involving unreasonable delay in implementation, or (iv) violative of Federal, State, or local law;

(3) with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this Act): *Provided, however*, That in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region: *And provided further*, That in surface coal mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall after restoring the approximate contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose, and to cover

all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that such overburden or spoil shall be shaped and graded in such way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of this Act: *And provided further*, That in surface coal mining where the mining operation will remove an entire coal seam or seams running through the upper section of a mountain, ridge or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no high walls remaining, and capable of supporting postmining agricultural, industrial, commercial, residential, or public facility uses, the requirements of this section with respect to restoration to approximate original contour with all high walls, spoil piles and depressions eliminated shall not be applicable.

(4) stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution;

(5) remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation;

(6) restore the topsoil or the best available subsoil which is best able to support vegetation;

(7) protect offsite areas from slides or damage occurring during the surface coal mining and reclamation operations, and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area;

(8) create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated that—

(A) the size of the impoundment is adequate for its intended purposes;

(B) the impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Public Law 83-566 (16 U.S.C. 1006);

(C) the quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream;

(D) the level of water will be reasonably stable;

(E) final grading will provide adequate safety and access for proposed water users; and

(F) such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses;

(9) seal all auger holes with an impervious and noncombustible material in order to prevent drainage except where the regulatory authority determines that the resulting impoundment of water in such auger holes may create a hazard to the environment or the public health or safety;

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to—

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses ;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters ;

(B) (i) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area above natural levels under seasonal flow conditions as measured prior to any mining, and avoiding channel deepening or enlargement in operations requiring the discharge of water from mines ;

(ii) constructing any siltation structures pursuant to subparagraph (B) (i) of this subsection prior to commencement of surface coal mining operations, such structures to be certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan ;

(C) removing temporary or large siltation structures from drainways after disturbed areas are revegetated and stabilized ;

(D) restoring recharge capacity of the mined area to approximate pre-mining conditions ;

(E) replacing the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately resulting from mining ;

(F) preserving throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semiarid areas of the country ; and

(G) such other actions as the regulatory authority may prescribe ;

(11) with respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine working or excavations, stabilize all waste piles in designated areas through construction in compacted layers including the use of incombustible and impervious materials if necessary and assure the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of this Act ;

(12) refrain from surface coal mining within five hundred feet from active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners : *Provided*, That the regulatory authority shall permit an operator to mine closer to an abandoned underground mine : *Provided*, That this does not create hazards to the health and safety of miners ; or shall permit an operator to mine near, through or partially through an abandoned underground mine working where such mining through will achieve improved resources recovery, abatement of water pollution or elimination of public hazards and such mining shall be consistent with the provisions of the Act ;

(13) design, locate, construct, operate, maintain, enlarge, modify, and remove, or abandon, in accordance with the standards and criteria developed pursuant to subsection (c) of this section, all existing and new coal mine waste piles consisting of mine wastes, tailings, coal processing wastes, or other liquid and solid wastes and used either temporarily or permanently as dams or embankments ;

(14) insure that all debris, acid forming materials, toxic materials, or materials constituting a fire hazard are buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and that contingency plans are developed to prevent sustained combustion ;

(15) insure that explosives are used only in accordance with existing State and Federal law and the regulations promulgated by the regulatory authority, which shall include provisions to—

(A) provide adequate advance written notice by publication and/or posting of the planned blasting schedule to designated units of local governments and to residents who might be affected by the use of such explosives and maintain for a period of at least two years a log of the magnitudes and times of blasts which shall be available to the public ; and

(B) limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent (i) injury to persons, (ii) damage to public and private property outside the permit area, (iii) adverse impacts on any underground mine, and (iv) change in the course, channel, or availability of ground or surface water outside the permit area;

(C) require that all blasting operations be conducted by trained and competent persons as certified by the regulatory authority.

(16) insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations: *Provided, however*, That where the applicant proposes to combine surface mining operations with underground mining operations to assure maximum practical recovery of the mineral resources, the regulatory authority may grant a variance for specific areas within the reclamation plan from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

(A) if the regulatory authority finds in writing that:

(i) the applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(ii) the proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(iii) the applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(iv) the areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(v) no substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this Act;

(vi) provisions for the off-site storage of spoil will comply with section 415(d) (1);

(B) if the Secretary has promulgated specific regulations to govern the granting of such variances in accordance with the provisions of this subsection and section 401, and has imposed such additional requirements as he deems necessary;

(C) if variances granted under the provisions of this subsection are to be reviewed by the regulatory authority not more than three years from the date of issuance of the permit; and

(D) if liability under the bond filed by the applicant with the regulatory authority pursuant to section 409(b) shall be for the duration of the underground mining operations and until the requirements of sections 415(b) and 419 have been fully complied with.

(17) insure that the construction, maintenance, and postmining conditions of access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property to the extent that the operator retains legal control of the access roads in question: *Provided*, That the regulatory authority may permit the retention after mining of certain access roads where consistent with State and local land use plans and programs and where necessary may permit a limited exception to the restoration of approximate original contour for that purpose;

(18) refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water;

(19) establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan;

(20) assume the responsibility for successful revegetation, as required by paragraph (19) above, for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with paragraph (19) above, except in those areas or regions of the country where the annual average precipitation is twenty-six inches or less, then the operator's assumption of responsibility and liability will extend for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work: *Provided*, That when the regulatory authority approves a long-term intensive agricultural postmining land use, the applicable five- or ten-year period of responsibility for revegetation shall commence at the date of initial planting for such long-term intensive agricultural postmining land use: *Provided further*, That when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan, the authority may grant exception to the provisions of paragraph (19) above;

(21) provide for an undisturbed natural barrier beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for such distance as the regulatory authority shall determine shall be retained in place as a barrier to slides and erosion; and

(22) meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.

(c) The following performance standards shall be applicable to steep-slope surface coal mining and shall be in addition to those general performance standards required by this section: *Provided, however*, That the provisions of this subsection (d) shall not apply to those situations in which an operator is mining on flat or gently rolling terrain, on which an occasional steep slope is encountered through which the mining operation is to proceed, leaving a plain or predominantly flat area or, except for provisions of subparagraph (1) of this subsection, to those situations where the mining operation will remove an entire coal seam or seams running through the upper section of a mountain, ridge or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and in granting a permit for such a mining operation the regulatory authority shall require that—

(A) the toe of the lowest coal seam mined and the overburden associated with it are retained in place as a barrier to slides and erosion;

(B) the reclaimed area is stable;

(C) the resulting plateau of rolling contour drains inward from the out-slopes except at specified points;

(D) no damage will be done to natural water courses;

(E) all excess spoil material not retained on the mountaintop be placed in a valley fill utilizing french rock drains constructed through the complete height of the fill to insure maximum drainage control unless the operator demonstrates that more advanced techniques achieving an equal or higher level of drainage control are feasible;

(F) all other requirements of this Act will be met; and

(G) the regulatory authority shall promulgate specific regulations to govern the granting of permits and may impose such additional requirements as he deems to be necessary.

(1) Insure that when performing surface coal mining on steep slopes, no debris, abandoned or disabled equipment, spoil material, or waste mineral matter be placed on the downslope below the bench or mining cut, except that where necessary soil or spoil material from the initial block or short linear cut of earth necessary to obtain initial access to the coal seam in a new surface coal mining operation can be placed on a limited and specified area of the downslope below the initial cut if the permittee demonstrates that such soil or spoil material will not slide and that the other requirements of this subsection can still be met: *Provided*, That spoil material in excess of that required for the reconstruction of the approximate original contour under the provisions of paragraph 415(b)(3) or 415(c)(2) or excess spoil from a surface coal mining operation granted a permit under subsection 415(c) may be permanently stored at such offsite spoil storage areas in such a manner as to assure that—

(A) spoil is transported and placed in a controlled manner in position for concurrent compaction and in such a way to assure mass stability and to prevent mass movement;

(B) the areas of disposal are within the bonded permit areas and all organic matter shall be removed immediately prior to spoil placement;

(C) appropriate surface and internal drainage systems and diversion ditches are used so as to prevent spoil erosion and movement;

(D) the disposal area does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented;

(E) if placed on a slope, the spoil is placed upon the most moderate slope among those upon which, in the judgment of the regulatory authority, the spoil could be placed in compliance with all the requirements of this Act, and shall be placed, where possible, upon, or above, a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement;

(F) where the toe of the spoil rests on a downslope, a rock toe buttress, of sufficient size to prevent mass movement, is constructed;

(G) the final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses;

(H) design of the spoil disposal area is certified by a qualified registered professional engineer in conformance with professional standards; and

(I) all other provisions of this Act are met.

(2) Complete backfilling with spoil material shall be required to cover completely the highwall and return the site to the approximate original contour, which material will maintain stability following mining and reclamation.

(3) The operator may not disturb land above the top of the highwall unless the regulatory authority finds that such disturbance will facilitate compliance with the environmental protection standards of this section: *Provided, however*, That the land disturbed above the highway shall be limited to that amount necessary to facilitate said compliance.

(4) For the purposes of this section, the term "steep slope" is any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State.

(d) The Secretary, with the written concurrence of the Chief of Engineers, shall establish within one hundred and thirty-five days from the date of enactment, standards and criteria regulating the design, location, construction, operation, maintenance, enlargement, modification, removal, and abandonment of new and existing coal mine waste piles referred to in section 415(b) (13) and section 415(b) (5). Such standards and criteria shall conform to the standards and criteria used by the Chief of Engineers to insure that flood control structures are safe and effectively perform their intended function. In addition to engineering and other technical specifications the standards and criteria developed pursuant to this subsection must include provisions for: review and approval of plans and specifications prior to construction, enlargement, modification, removal, or abandonment; performance of periodic inspections during construction; issuance of certificates of approval upon completion of construction; performance of periodic safety inspections; and issuance of notices for required remedial or maintenance work.

#### SURFACE EFFECTS OF UNDERGROUND COAL MINING OPERATIONS

SEC. 416. (a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 401 of this Act: *Provided, however*, That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining. Such rules and regulations shall not conflict with nor supersede any provision of the Federal Coal Mine Health and Safety Act of 1969 nor any regulation issued pursuant thereto, and shall not be promulgated until the Secretary has obtained the written concurrence of the head of the department which administers such Act.

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence to the extent technologically and economically feasible, maximize

mine stability, and maintain the value and use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided*, That nothing in this subsection shall be construed to prohibit the standard methods of room and pillar continuous or conventional mining;

(2) seal all portals, entryways, drifts, shafts, or other openings between the surface and underground mine working when no longer needed for the conduct of the mining operations;

(3) fill or seal exploratory holes no longer necessary for mining, maximizing to the extent technologically and economically feasible return of mine and processing waste, tailings, and any other waste incident to the mining operation, to the mine workings or excavations;

(4) with respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine workings or excavations, stabilize all waste piles created by the permittee from current operations through construction in compacted layers including the use of incombustible and impervious materials if necessary and assure that the leachate will not degrade below water quality standards established pursuant to applicable Federal and State law surface or ground waters and that the final contour of the waste accumulation will be compatible with natural surroundings and that the site is stabilized and revegetated according to the provisions of this section;

(5) design, locate, construct, operate, maintain, enlarge, modify, and remove, or abandon, in accordance with the standards and criteria developed pursuant to section 415(e), all existing and new coal mine waste piles consisting of mine wastes, tailings, coal processing wastes, or other liquid and solid wastes and used either temporarily or permanently as dams or embankments;

(6) establish on regraded areas and all other lands affected, a diverse and permanent vegetative cover capable of self-regeneration and plant succession and at least equal in extent of cover to the natural vegetation of the area;

(7) protect offsite areas from damages which may result from such mining operations;

(8) eliminate fire hazards and otherwise eliminate conditions which constitute a hazard to health and safety of the public;

(9) minimize the disturbances of the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quantity of water in surface ground water systems both during and after coal mining operations and during reclamation by—

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to—

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells to keep acid or other toxic drainage from entering ground and surface waters; and

(B) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area above natural levels under seasonal flow conditions as measured prior to any mining, and avoiding channel deepening or enlargement in operations requiring the discharge of water from mines;

(10) to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable;

(11) with respect to other surface impacts not specified in this subsection including the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface resulting from or incident to such activities operate in accordance

with the standards established under section 415 of this title for such effects which result from surface coal mining operations: *Provided*, That the Secretary shall make such modifications in the requirements imposed by this subparagraph as are necessary to accommodate the distinct difference between surface and underground coal mining;

(12) locate openings for all new drift mines working acid-producing or iron-producing coal seams in such a manner as to prevent a gravity discharge of water from the mine.

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of title IV of this Act relating to State and Federal programs, permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permits application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining. The Secretary shall promulgate such modifications in accordance with the rulemaking procedure established in section 401 of this Act.

#### INSPECTIONS AND MONITORING

SEC. 417. (a) The Secretary shall cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs, or to develop or enforce any Federal program, and for such purposes authorized representatives of the Secretary shall have a right of entry to, upon, or through any surface coal mining and reclamation operations.

(b) For the purpose of developing or assisting in the development, administration, and enforcement of any approved State or Federal program under this Act or in the administration and enforcement of any permit under this Act or of determining whether any person is in violation of any requirement of any such State or Federal program or any other requirement of this Act—

(1) the regulatory authority shall require any permittee to (A) establish and maintain appropriate records, (B) make monthly reports to the regulatory authority, (C) install, use, and maintain any necessary monitoring equipment or methods, (D) evaluate results in accordance with such methods, at such locations, intervals, and in such manner as a regulatory authority shall prescribe, and (E) provide such other information relative to surface coal mining and reclamation operations as the regulatory authority deems reasonable and necessary;

(2) for those surface coal mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydrologic balance of water use either on or off the mining site, the regulatory authority shall specify those—

(A) monitoring sites to record the quantity and quality of surface drainage above and below the minesite as well as in the potential zone of influence;

(B) monitoring sites to record level, amount, and samples of ground water and aquifers potentially affected by the mining and also directly below the lower most (deepest) coal seam to be mined;

(C) records of well logs and borehole data to be maintained; and

(D) monitoring sites to record precipitation.

The monitoring data collection, and analysis required by this section shall be conducted according to standards and procedures set forth by the regulatory authority in order to assure their reliability and validity; and

(3) the authorized representatives of the regulatory authority, with or without advance notice and upon presentation of appropriate credentials (A) shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained under paragraph (1) of this subsection are located; and (B) may at reasonable times, and without delay, have access to and copy any records, inspect any monitoring equipment or method of operation required under this Act.

(c) The inspections by the regulatory authority shall (1) occur on an irregular basis averaging not less than one inspection per month for the surface coal mining and reclamation operations covered by each permit; (2) occur without prior notice to the permittee or his agents or employees except for necessary onsite meetings with the permittee; and (3) include the filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of this Act and the regulatory authority shall make copies of such inspection reports immediately and freely available to the public at a central location in the pertinent geographic area of mining. The Secretary or regulatory authority shall establish a system of continual rotation of inspectors so that the same inspector does not consistently visit the same operations.

(d) Each permittee shall conspicuously maintain at the entrances to the surface coal mining and reclamation operations a clearly visible sign which sets forth the name, business address, and phone number of the permittee and the permit number of the surface coal mining and reclamation operations.

(e) Each inspector, upon detection of each violation of any requirement of any State or Federal program or of this Act, shall forthwith inform the operator in writing, and shall report in writing any such violation to the regulatory authority.

(f) Copies of any records, reports, inspection materials, or information obtained under this title by the regulatory authority shall be made immediately available to the public at central and sufficient locations in the county, multi-county, and State area of mining so that they are conveniently available to residents in the areas of mining.

(g) No employee of the State regulatory authority performing any function or duty under this Act shall have a direct or indirect financial interest in any underground or surface coal mining operation. Whoever knowingly violates the provisions of this subsection shall, upon conviction, be punished by a fine of not more than \$2,500, or by imprisonment of not more than one year, or by both. The Secretary shall (1) within sixty days after enactment of this Act, publish in the Federal Register, in accordance with section 553 of title 5, United States Code, regulations to establish methods by which the provisions of this subsection will be monitored and enforced by the Secretary and such State regulatory authority, including appropriate provisions for the filing by such employees and the review of statements and supplements thereto concerning any financial interest which may be affected by this subsection, and (2) report to the Congress as part of the Annual Report (section 506) on actions taken and not taken during the preceding year under this subsection.

(h) (1) Any person who is or may be adversely affected by a surface mining operation may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which he has reason to believe exists at the surface mining site. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation. The Secretary shall furnish such persons requesting the review a written statement of the reasons for the Secretary's final disposition of the case.

(2) The Secretary shall also, by regulation, establish procedures to insure that adequate and complete inspections are made. Any such person may notify the Secretary of any failure to make such inspections, after which the Secretary shall determine whether adequate and complete inspections have been made. The Secretary shall furnish such persons a written statement of the reasons for the Secretary's determination that adequate and complete inspections have or have not been conducted.

#### PENALTIES

SEC. 418. (a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 402 or during Federal enforcement of a State program pursuant to section 421 of this Act, any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 421, the civil penalty shall be assessed. Such penalty shall not exceed \$5,000 for each violation. Each day of a continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at

the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

(b) (1) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 42 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(2) Any person who requested a hearing respecting the assessment of a civil penalty or who is aggrieved by an order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for any circuit in which the surface coal mining operation is located. Such a petition may only be filed within the thirty-day period beginning on the date the order making such assessment was issued.

(c) If no complaint, as provided in this section, is filed within thirty days from the date of the final order or decision issued by the Secretary under subsection (b) of this section, such order and decision shall be conclusive.

(d) Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 per cent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(e) Civil penalties owed under this Act, either pursuant to subsection (c) of this section or pursuant to enforcement order entered under section 421 of this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States or by the State regulatory authority in a court of competent jurisdiction.

(f) Any person who willfully and knowingly violates a condition of a permit issued pursuant to a Federal program, a Federal lands program, or Federal enforcement pursuant to section 402 or during Federal enforcement of a State program pursuant to section 421 of this Act or fails or refuses to comply with any order issued under section 425 or section 426 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act, except an order incorporated in a decision issued under subsection (b) of this section or section 504 of this Act, shall, upon conviction; be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year or both.

(g) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 402 or Federal enforcement of a State program pursuant to section 421 of this Act or fails or refuses to comply with any order issued under section 421 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act except an order incorporated in a decision issued under subsection (b) of this section or section 504 of this Act, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (f) of this section.

(h) Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to a Federal program or a Federal lands program or any order or decision issued by the Secretary under this Act, shall, upon conviction be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year or both.

(i) Any operator who fails to correct a violation for which a citation has been issued under section 421(a) within the period permitted for its correction (which period shall not end until the entry of a final order by the Secretary, in the case of any review proceedings under section 425 initiated by the operator wherein the Secretary orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings under section 426 initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation), shall be assessed a civil penalty of not less than \$750 for each day during which such failure or violation continues.

(j) As a condition of approval of any State program submitted pursuant to section 403 of this Act, the civil and criminal penalty provisions thereof shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement right or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

#### RELEASE OF PERFORMANCE BONDS OR DEPOSITS

SEC. 419 (a) The permittee may file a request with the regulatory authority for the release of all or part of a performance bond or deposit. Within thirty days after any application for bond or deposit release has been filed with the regulatory authority, the operator shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such advertisement shall be considered part of any bond release application and shall contain a notification of the precise location of the land affected, the number of acres, the permit number and the date approved, the amount of the bond filed and the portion sought to be released, and the type and the approximate dates of reclamation work performed, and a description of the results achieved as they relate to the operator's approved reclamation plan. In addition, as part of any bond release application, the applicant shall submit copies of letters which he has sent to adjoining property owners, local governmental bodies, planning agencies, and sewage and water treatment authorities, or water companies in the locality in which the surface coal mining and reclamation activities took place, notifying them of his intention to seek release from the bond.

(b) Upon receipt of the notification and request, the regulatory authority shall within thirty days conduct an inspection and evaluation of the reclamation work involved. Such evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance of future occurrence of such pollution, and the estimated cost of abating such pollution. The regulatory authority shall notify the permittee in writing of its decision to release or not to release all or part of the performance bond or deposit within sixty days from the filing of the request, if no public hearing is held pursuant to section 419(f), and if there has been a public hearing held pursuant to section 419(f), within thirty days thereafter.

(c) The regulatory authority may release in whole or in part said bond or deposit if the authority is satisfied that reclamation covered by the bond or deposit or portion thereof has been accomplished as required by this Act according to the following schedule:

(1) When the operator completes the backfilling, regrading, and drainage control of a bonded area in accordance with his approved reclamation plan, the release of 60 per centum of the bond or collateral for the applicable permit area;

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan. When determining the amount of bond to be released after successful revegetation has been established, the regulatory authority shall retain that amount of bond for the revegetated area which would be sufficient for a third party to cover the cost of reestablishing revegetation and for the period specified for operator responsibility in section 415 of reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area above natural levels under seasonal flow conditions as measured prior to any mining and as set forth in the permit. Where a silt dam is to be retained as a permanent impoundment pursuant to section 415(b)(8), the bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

(3) When the operator has completed successfully all surface coal mining and reclamation activities, but not before the expiration of the period specified for operator responsibility in section 415:

*Provided, however,* That no bond shall be fully released until all reclamation requirements of this Act are fully met.

(d) If the regulatory authority disapproves the application for release of the bond or portion thereof, the authority shall notify the permittee, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure said release and allowing opportunity for a public hearing.

(e) With any application for total or partial bond release filed with the regulatory authority, the regulatory authority shall notify the municipality in which a surface coal mining operation is located by certified mail at least thirty days prior to the release of all or a portion of the bond.

(f) Any person with a valid interest which might be adversely affected by release of the bond or the responsible officer or head of any Federal, State, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to such operations shall have the right to file written objections to the proposed release from bond to the regulatory authority within thirty days after the last publication of the above notice. If written objections are filed, and a hearing requested, the regulatory authority shall inform all the parties, of the time and place of the hearing, and hold a public hearing in the locality of the surface coal mining operation proposed for bond release or at the State capital at the option of the objector, within thirty days of the request for such hearing.

(g) Without prejudice to the rights of the objectors and applicant or the responsibilities of the regulatory authority pursuant to this paragraph, the regulatory authority may establish an informal conference procedure to resolve such written objections in lieu of holding a formal transcribed hearing.

(h) For the purpose of such hearing the regulatory authority shall have the authority and is hereby empowered to administer oaths, subpoena witnesses, or written or printed materials, compel the attendance of witnesses, or production of the materials, and take evidence including but not limited to inspections of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing required by this Act shall be made, and a transcript made available on the motion of any party or by order of the regulatory authority.

#### CITIZEN SUITS

SEC. 420. (a) Except as provided in subsection (b) of this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act—

(1) against—

(A) the United States,

(B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution who is alleged to be in violation of the provisions of this Act or the regulations promulgated thereunder, or order issued by the regulatory authority; or

(C) any other person who is alleged to be in violation of any rule, regulation, order, or permit issued pursuant to this Act; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice in writing under oath of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or his authorized representative or the State regulatory authority has issued a notice or order with respect to such alleged violation in accordance with section 421 or an approved State program, or has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this Act, or any rule, regulation, order, or permit issued pursuant to this Act, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right; or

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice in writing under oath of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(c) (1) Any action pursuant to this section may be brought only in the judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation, including reasonable attorney and expert witness fees to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in sufficient amount to compensate for any losses or damages suffered in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of the provisions of this Act and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(f) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located.

Sec. 421. (a) (1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides ade-

quate proof that an imminent danger or significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 402, or section 404(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, but such violation does not create an imminent danger to the health or safety of the public, or cause can be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 402 or section 404(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required,

the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs.

(b) Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act, the Secretary shall enforce, in the manner provided by this Act, any permit condition required under this Act, shall issue new or revised permits in accordance with requirements of this Act, and may issue such notices and orders as are necessary for compliance therewith: *Provided*, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this Act before suspending or revoking the State permit.

(c) The Secretary may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which the permittee thereof has his principal office, whenever such permittee or his agent (A) violates or fails or refuses to comply with any order or decision issued by the Secretary under this Act, or (B) interferes with, hinders, or delays the Secretary or his authorized representatives in carrying out the provisions of this Act, or (C) refuses to admit such authorized representative to the mine, or (D) refuses to permit inspection of the mine by such authorized representative, or (E) refuses to furnish any information or report requested by the Secretary in furtherance of the provisions of this Act, or (F) refuses to permit access to, and copying of, such records as the Secretary determines necessary in carrying out the provisions of this Act. Such court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended. Any relief granted by the court to enforce an order under clause (A) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this title, unless, prior thereto, the district court granting such relief sets it aside or modifies it.

(d) As a condition of approval of any State program submitted pursuant to section 403 of this Act, the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement rights or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

#### DESIGNATING AREAS UNSUITABLE FOR SURFACE COAL MINING

SEC. 422. (a) (1) To be eligible to assume primary regulatory authority pursuant to section 403, each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in para-

graphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the Act of any area so designated.

(2) Upon petition pursuant to subsection (c) of this section, the State regulatory authority shall designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of this Act is not technologically and economically feasible.

(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—

(A) be incompatible with existing State land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes—

(A) a State agency responsible for surface mining lands review;

(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act or under a permit issued pursuant to this Act, or where substantial legal and financial commitments in such operations are in existence prior to the date of the enactment of this Act.

(b) The Secretary shall conduct a review of the Federal lands to determine, pursuant to the standards set forth in paragraphs (2) and (3) of subsection (a) of this section, whether there are areas on Federal lands which are unsuitable for all or certain types of surface coal mining operations: *Provided, however,* That the Secretary may permit surface coal mining on Federal lands prior to the completion of this review. Subject to valid existing rights, when the Secretary determines an area on Federal lands to be unsuitable for all or certain types of surface coal mining operations he shall withdraw such area or condition any mineral leasing or mineral entries in a manner so as to limit surface coal mining operations on such area. Where a Federal program has been implemented in a State pursuant to section 404, the Secretary shall implement a process for designation of areas unsuitable for surface coal mining for non-Federal lands within such State and such process shall incorporate the standards and procedures of this section.

(c) Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations.

Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any other party to the hearing, a written decision regarding the petition, and the reasons therefor. In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

(d) Prior to designating pursuant to this section any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resource of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.

(e) Subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress;

(2) On any Federal lands within the boundaries of any National Forest: *Provided, however*, That surface coal mining operations may be permitted on such lands which do not have significant forest cover within those National Forests west of the one hundredth meridian if the Secretary of Agriculture finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and where the Secretary of Agriculture determines that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, and the National Forest Management Act of 1976, and the Secretary determines that such mining is consistent with the Federal Coal Leasing Amendment Act of 1975 and the provisions of this Act: *And provided further*, That no surface coal mining operations may be permitted within the boundaries of (1) the Custer National Forest and (2) any national forest in Alaska;

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

#### FEDERAL LANDS

SEC. 423. (a) No later than one year after the date of enactment of this Act, the Secretary shall promulgate and implement a Federal lands program which shall be applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on any Federal lands: *Provided*, That except as provided in section 508 the provisions of this Act shall not be applicable to Indian lands. The Federal lands program shall, at a minimum, incorporate all of the requirements of this Act and shall take into consideration the diverse physical, climatological, and other unique characteristics of the Federal lands in question. Where Federal lands in a State with an approved State program are involved, the Federal lands program shall, at a minimum, include the requirements of the approved State program: *Provided*, That the Secretary shall retain his duties under sections 2(a), (2) (B) and 2(a) (3) of the Federal Mineral Leasing Act, as amended, and shall continue to be responsible for designation of Federal lands as unsuitable for mining in accordance with section 422 (b) of this title.

(b) The requirements of this Act and the Federal lands program or the approved State program, whichever is applicable, shall be incorporated by reference or otherwise in any Federal mineral lease, permit, or contract issued

by the Secretary which may involve surface coal mining and reclamation operations. Incorporation of such requirements shall not, however, limit in any way the authority of the Secretary to subsequently issue new regulations, revise the Federal lands program to deal with changing conditions or changed technology, and to require any surface mining and reclamation operations to conform with the requirements of this Act and the regulations issued pursuant to this Act.

(c) Any State with an approved State program may elect to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State: *Provided*, That the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement in accordance with the provisions of this Act. States with cooperative agreements existing on the date of enactment of this Act, may elect to continue regulation on Federal lands within the State, prior to approval by the Secretary of the State program, or imposition of a Federal program: *Provided*, That such an existing cooperative agreement is modified to fully comply with the initial regulatory procedures set forth in section 402 of this Act. Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands, to designate certain Federal lands as unsuitable for surface coal mining pursuant to section 422 of this Act, or to regulate other activities taking place on Federal lands.

#### PUBLIC AGENCIES, PUBLIC UTILITIES, AND PUBLIC CORPORATIONS

SEC. 424. Any agency, unit, or instrumentality of Federal, State, or local government, including any publicly owned utility or publicly owned corporation of Federal, State, or local government, which proposes to engage in surface coal mining operations which are subject to the requirements of this Act shall comply with the provisions of title IV.

#### REVIEW BY SECRETARY

SEC. 425. (a) (1) A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a) (2) or (a) (3) of section 421 of this title, or pursuant to a Federal program or the Federal lands program or any person having an interest which is or may be adversely acted by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the applicant or the person having an interest which is or may be adversely affected, to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(2) The permittee and other interested persons shall be given written notice of the time and place of the hearing at least five days prior thereto. Any such hearing shall be held within thirty days after requested and shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(b) Upon receiving the report of such investigation and hearings, the Secretary shall make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings therein. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations issued pursuant to the provisions of subparagraph (a) (2) or (a) (3) of section 421 of this title, the Secretary shall issue the written decision within thirty days of the receipt of the application for review, unless temporary relief has been granted by the Secretary pursuant to subparagraph (c) of this section or by the court pursuant to subparagraph (c) of section 425 of this title.

(c) Pending completion of the investigation and hearing required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 421 of this title, a Federal program or the Federal lands program together with a de-

tailed statement giving reasons for granting such relief. The Secretary shall issue an order or decision granting or denying such relief expeditiously: *Provided*, That where the applicant requests relief from an order for cessation of coal mining and reclamation operations issued pursuant to subparagraph (a) (2) or (a) (3) of section 421 of this title, the order or decision on such a request shall be issued within five days of its receipt. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(d) Following the issuance of an order to show cause as to why a permit should not be suspended or revoked pursuant to section 421, the Secretary shall hold a public hearing after giving written notice of the time, place, and date thereof. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Within sixty days following the public hearing, the Secretary shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. If the Secretary revokes the permit, the permittee shall immediately cease surface coal mining operations on the permit area and shall complete reclamation within a period specified by the Secretary, or the Secretary shall declare as forfeited the performance bonds for the operation.

#### JUDICIAL REVIEW

Sec. 426. (a) (1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this Act shall be subject to judicial review only by the United States Court of Appeals for the circuit which contains the State whose program is at issue. Any action by the Secretary promulgating standards pursuant to sections 401, 415, and 423 shall be subject to judicial review only in the United States Court of Appeals for the District of Columbia. All other orders or decisions issued by the Secretary shall be subject to judicial review only by the United States Court of Appeals for the circuit in which the surface coal mine operation is located. A petition for review of such action shall be filed in the appropriate court of appeals within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such application may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

(2) In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this Act, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. The availability of review established in this subsection shall not be construed to limit the operation of the rights established in section 420 except as provided therein.

(b) The court shall hear such petition or complaint solely on the record made before the Secretary. The findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(c) In the case of a proceeding to review any order or decision issued by the Secretary under this Act, including an order or decision issued pursuant to subparagraph (c) or (d) of section 425 of this title pertaining to any order issued under subparagraph (a) (2), ~~(a) (3),~~ or (a) (4) of section 421 of this title for cessation of coal mining and reclamation operations, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if—

(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

(d) The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the action, order, or decision of the Secretary.

(e) Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 420 except as provided therein.

#### SPECIAL BITUMINOUS COAL MINES

SEC. 427. The regulatory authority is authorized to and shall issue separate regulations for those special bituminous coal surface mines located west of the one hundredth meridian west longitude which meet the following criteria :

(a) the excavation of the specific mine pit takes place on the same relatively limited site for an extended period of time ;

(b) the excavation of the specific mine pit follows a coal seam having an inclination of fifteen degrees or more from the horizontal, and continues in the same area proceeding downward with lateral expansion of the pit necessary to maintain stability or as necessary to accommodate the orderly expansion of the total mining operation ;

(c) the excavation of the specific mine pit involves the mining of more than one coal seam and mining has been initiated on the deepest coal seam contemplated to be mined in the current operation ;

(d) the amount of material removed is large in proportion to the surface area disturbed ;

(e) there is no practicable alternative method of mining the coal involved ;

(f) there is no practicable method to reclaim the land in the manner required by this Act ; and

(g) the specific mine pit has been actually producing coal since January 1, 1972, in such manner as to meet the criteria set forth in this section, and, because of past duration of mining, is substantially committed to a mode of operation which warrants exceptions to some provisions of this title. Such alternative regulations shall pertain only to the standards governing on-site handling of spoils, elimination of depressions capable of collecting water, creation of impoundments, and regarding to the approximate original contour and shall specify that remaining highwalls are stable. All other performance standards in this title shall apply to such mines.

#### SURFACE MINING OPERATIONS NOT SUBJECT TO THIS ACT

SEC. 428. The provisions of this Act shall not apply to any of the following activities :

(1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him ;

(2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less ; and

(3) the extraction of coal when done solely in the process of Federal and State highway construction, and such other construction under regulations established by the regulatory authority.

### TITLE V—ADMINISTRATIVE AND MISCELLANEOUS PROVISIONS

#### DEFINITIONS

SEC. 501. For the purposes of this Act—

(1) "Secretary" means the Secretary of the Interior, except where otherwise described ;

(2) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and Guam ;

(3) "Office" means the Office of Surface Mining, Reclamation, and Enforcement established pursuant to title II ;

(4) "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and

any other place outside thereof, or between points in the same State which directly or indirectly affect interstate commerce;

(5) "surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 416, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 $\frac{2}{3}$  per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 412 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities;

(6) "surface coal mining and reclamation operations" means surface mining operations and all activities necessary and incident to the reclamation of such operations after date of enactment of this Act;

(7) "lands within any State" or "lands within such State" means all lands within a State other than Federal lands and Indian lands;

(8) "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands;

(9) "Indian lands" means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by any Indian tribe;

(10) "Indian tribe" means any Indian tribe, band, group, or community having a governing body recognized by the Secretary;

(11) "State program" means a program established by a State pursuant to section 403 to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act;

(12) "Federal program" means a program established by the Secretary pursuant to section 404 to regulate surface coal mining and reclamation operations on lands within a State in accordance with the requirements of this Act;

(13) "Federal lands program" means a program established by the Secretary pursuant to section 423 to regulate surface coal mining and reclamation operations on Federal lands;

(14) "reclamation plan" means a plan submitted by an applicant for a permit under a State program, or Federal program which sets forth a plan for reclamation of the proposed surface coal mining operations pursuant to section 408;

(15) "State regulatory authority" means the department or agency in each State which has primary responsibility at the State level for administering this Act;

(16) "regulatory authority" means the State regulatory authority where the State is administering this Act under an approved State program or the Secretary where the Secretary is administering this Act under a Federal program;

(17) "person" means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization;

(18) "permit" means a permit to conduct surface coal mining and reclamation operations issued by the State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program;

(19) "permit applicant" or "applicant" means a person applying for a permit;

(20) "permittee" means a person holding a permit;

(21) "fund" means the Abandoned Mine Reclamation Fund established pursuant to section 301;

(22) "other minerals" means clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form;

(23) "approximate original contour" means that surface configuration achieved by backfilling and grading of the mined area so that it closely resembles the surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles, and depressions eliminated except that water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 415(b) (8) of this Act;

(24) "operator" means any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location;

(25) "permit area" means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator's bond as required by section 409 of this Act and shall be readily identifiable by appropriate markers on the site;

(26) "unwarranted failure to comply" means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of this Act due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care;

(27) "alluvial valley floor" means the unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities;

(28) "Imminent danger to the health or safety of the public" means the existence of any condition or practice, or any violation of a permit or other requirement of this Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before condition, practice, or violation can be abated;

(29) "lignite coal" means consolidated lignitic coal having less than 8,300 British thermal units per pound, moist and mineral matter free.

#### OTHER FEDERAL LAWS

SEC. 502. (a) Nothing in this Act shall be construed as superseding, amending, modifying, or repealing the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a), the National Environmental Policy Act of 1969 (42 U.S.C. 4321-47), or any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to—

(1) The Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 721-740).

(2) The Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742).

(3) The Federal Water Pollution Control Act (79 Stat. 903), as amended (33 U.S.C. 1151-1175) the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.

(4) The Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

(5) The Solid Waste Disposal Act (42 U.S.C. 3251-3259).

(6) The Refuse Act of 1899 (33 U.S.C. 407).

(7) The Fish and Wildlife Coordination Act of 1934 (16 U.S.C. 661-666c).

(8) The Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.).

(b) Nothing in this Act shall affect in any way the authority of the Secretary or the heads of other Federal agencies under other provisions of law to include in any lease, license, permit, contract, or other instrument such conditions as may be appropriate to regulate surface coal mining and reclamation operations on land under their jurisdiction.

(c) To the greatest extent practicable each Federal agency shall cooperate with the Secretary and the States in carrying out the provisions of this Act.

(d) Approval of the State programs, pursuant to section 403 (b), promulgation of Federal programs, pursuant to section 404, and implementation of the Federal lands programs, pursuant to section 423 of this Act, shall not constitute a major action within the meaning of section 102(2) (C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). Adoption of regulations under section 401 (b) shall constitute a major action within the meaning of section 102(2) (C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

#### EMPLOYEE PROTECTION

SEC. 503. (a) No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

(b) Any employee or a representative of employees who believes that he had been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary for a review of such firing or alleged discrimination. A copy of the application shall be sent to the person or operator who will be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to the alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 555 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that a violation did occur, he shall issue a decision incorporating therein and his findings in an order requiring the party committing the violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no violation, he shall issue a finding. Orders issued by the Secretary under this subsection shall be subject to judicial review in the same manner as orders and decisions of the Secretary are subject to judicial review under this Act.

(c) Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the persons committing the violation.

#### PROTECTION OF GOVERNMENT EMPLOYEES

SEC. 504. Section 1114 of title 18, United States Code, is hereby amended by adding the words "or of the Department of the Interior" after the words "Department of Labor" contained in that section. Any person who shall willfully resist, prevent, impede, or interfere with the Secretary or any of his agents in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

#### GRANTS TO THE STATES

SEC. 505. (a) The Secretary is authorized to make annual grants to any State for the purpose of assisting such State in developing, administering, and enforcing State programs under this Act. Except as provided in subsection (c) of this

section, such grants shall not exceed 80 per centum of the total costs incurred during the first year, 60 per centum of total costs incurred during the second year, and 50 per centum of the total costs incurred during each year thereafter.

(b) The Secretary is authorized to cooperate with and provide assistance to any State for the purpose of assisting it in the development, administration, and enforcement of its State programs. Such cooperation and assistance shall include—

(1) technical assistance and training including provision of necessary curricular and instruction materials, in the development, administration, and enforcement of the State programs; and

(2) assistance in preparing and maintaining a continuing inventory of information on surface coal mining and reclamation operations for each State for the purposes of evaluating the effectiveness of the State programs. Such assistance shall include all Federal departments and agencies making available data relevant to surface coal mining and reclamation operations and to the development, administration, and enforcement of State programs concerning such operations.

(c) If, in accordance with section 423(d) of this Act, a State elects to regulate surface coal mining and reclamation operations on Federal lands, the Secretary may increase the amount of the annual grants under subsection (a) of this section by an amount which he determines is approximately equal to the amount the Federal Government would have expended for such regulation if the State had not made such election.

#### ANNUAL REPORT

SEC. 506. The Secretary shall submit annually to the President and the Congress a report concerning activities conducted by him, the Federal Government, and the States pursuant to this Act. Among other matters, the Secretary shall include in such report recommendations for additional administrative or legislative action as he deems necessary and desirable to accomplish the purposes of this Act.

#### SEVERABILITY

SEC. 507. If any provision of this Act or the applicability thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

#### INDIAN LANDS

SEC. 508. (a) The Secretary is directed to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this Act and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of coal mined lands reclamation on Indian lands within the exterior boundaries of any Federal Indian reservation.

(b) The study report required by subsection (a) together with drafts of proposed legislation and the view of each Indian tribe which would be affected shall be submitted to the Congress as soon as possible but not later than January 1, 1979. The preparation of this study shall in no event preclude the Secretary from approving any coal leases on Indian lands prior to the completion, of the study.

(c) On and after one hundred and thirty-five days from the enactment of this Act, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by subsections 415(b) (2), 415(b) (3), 415(b) (5), 415(b) (10), 415(b) (13), 415(b) (19), and 415c of this Act and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(d) On and after thirty months from the enactment of this Act, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by sections 407, 408, 409, 410, 415, 416, 417, and 419 of this Act and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(e) With respect to leases issued after the date of enactment of this Act on Indian lands within the exterior boundaries of a Federal Indian reservation,

the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) as may be requested by the Indian tribe in such leases.

(f) Any change required by subsection (c) or (d) of this section in the terms and conditions of any coal lease on Indian lands existing on the date of enactment of this Act, shall require the approval of the Secretary: *Provided*, That if the coal lease requiring changes has already been the subject of an environmental impact statement, if the mining and reclamation plan for the proposed coal surface mining operation thereon also has been the subject of an environmental impact statement, the secretarial approval of these changes shall not constitute major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(g) The Secretary shall provide for adequate participation by the various Indian tribes affected in the study authorized in this section and not more than \$700,000 of the funds authorized in section 511(a) shall be reserved for this purpose.

#### STUDY OF RECLAMATION STANDARDS FOR SURFACE MINING OF OTHER MINERALS

SEC. 509. (a) The Chairman of the Council on Environmental Quality is directed to contract with the National Academy of Sciences-National Academy of Engineering, other Government agencies or private groups as appropriate, for an in-depth study of current and developing technology for surface and open pit mining and reclamation for minerals other than coal designed to assist in the establishment of effective and reasonable regulation of surface and open pit mining and reclamation for minerals other than coal. The study shall—

(1) assess the degree to which the requirements of this Act can be met by such technology and the costs involved;

(2) identify areas where the requirements of this Act cannot be met by current and developing technology;

(3) in those instances described requirements most comparable to those of this Act which could be met, the costs involved, and the differences in reclamation results between these requirements and those of this Act; and

(4) discuss alternative regulatory mechanisms designed to insure the achievement of the most beneficial postmining land use for areas affected by surface and open pit mining.

(b) The study together with specific legislative recommendations shall be submitted to the President and the Congress no later than eighteen months after the date of enactment of this Act: *Provided*, That, with respect to surface or open pit mining for sand and gravel the study shall be submitted no later than twelve months after the date of enactment of this Act: *Provided further*, That with respect to mining for oil shale and tar sands that a preliminary report shall be submitted no later than twelve months after the date of enactment of this Act.

(c) There are hereby authorized to be appropriated for the purpose of this section \$500,000.

#### EXPERIMENTAL PRACTICES

SEC. 510. In order to encourage advances in mining and reclamation practices, the regulatory authority may authorize departures in individual cases on an experimental basis from the environmental protection performance standards promulgated under sections 415 and 416 of this Act. Such departures may be authorized if (i) the experimental practices are potentially more or at least environmentally protective, during and after mining operations, as those required by promulgated standards; (ii) the mining operation is no larger than necessary to determine the effectiveness and economic feasibility of the experimental practices; and (iii) the experimental practices do not reduce the protection afforded public health and safety below that provided by promulgated standards.

#### AUTHORIZATION OF APPROPRIATIONS

SEC. 511. There is authorized to be appropriated to the Secretary for the purposes of this Act the following sums; and all such funds appropriated shall remain available until expended:

(a) The Secretary is authorized to enter into contracts implementing sections 402, 423, 305(b)(3), and 508 in such amounts as are provided in appropriations

Acts, but not to exceed \$10,000,000 per annum in each of the three fiscal years 1977, 1978, and 1979.

(b) For administrative and other purposes of this Act, except as otherwise provided for in this Act, authorization is provided for the sum of \$10,000,000 for the fiscal year ending June 30, 1978, for each of the two succeeding fiscal years the sums of \$20,000,000 and \$30,000,000 for each fiscal year thereafter.

#### FEDERAL LESSEE PROTECTION

SEC. 512. In those instances where the coal proposed to be mined by surface coal mining operations is owned by the Federal Government and the surface is subject to a lease or a permit issued by the Federal Government, the application for a permit shall include either:

(1) the written consent of the permittee or lessee of the surface lands involved to enter and commence surface coal mining operations on such land, or in lieu thereof;

(2) evidence of the execution of a bond or undertaking to the United States or the State, whichever is applicable, for the use and benefit of the permittee or lessee of the surface lands involved to secure payment of any damages to the surface estate which the operations will cause to the crops, or to the tangible improvements of the permittee or lessee of the surface lands as may be determined by the parties involved, or as determined and fixed in an action brought against the operator or upon the bond in a court of competent jurisdiction. This bond is in addition to the performance bond required for reclamation under this Act.

#### ALASKA COAL

SEC. 513. Nothing in this Act shall be construed as increasing or diminishing the rights of any owner of coal in Alaska to conduct or authorize surface coal mining operations for coal which has been or is hereafter conveyed out of Federal ownership to the State of Alaska or pursuant to the Alaska Native Claims Settlement Act: *Provided*, That such surface coal mining operations meet the requirements of the Act.

#### WATER RIGHTS

SEC. 514. Nothing in this Act shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation.

#### SURFACE OWNER PROTECTION

SEC. 515. (a) The provisions of this section shall apply where coal owned by the United States under land the surface rights to which are owned by a surface owner as defined in this section is to be mined by methods other than underground mining techniques.

(b) Any coal deposits subject to this section shall be offered for lease pursuant to section 2(a) of the Mineral Lands Leasing Act of 1920, as amended.

(c) The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has obtained evidence of such consent. Valid written consent given by any surface owner prior to the enactment of this Act shall be deemed sufficient for the purposes of complying with this section.

(d) In order to minimize disturbance to surface owners from surface coal mining of Federal coal deposits and to assist in the preparation of comprehensive land-use plans required by section 2(a) of the Mineral Lands Leasing Act of 1920, as amended, the Secretary shall consult with any surface owner whose land is proposed to be included in a leasing trace and shall ask the surface owner to state his preference for or against the offering of the deposit under his land for lease. The Secretary shall, in his discretion but to the maximum extent practicable, refrain from leasing coal deposits for development by methods other than underground mining techniques in those areas where a significant number of surface owners have stated a preference against the offering of the deposits for lease.

(e) For the purpose of this section the term "surface owner" means the natural person or persons (or corporation, the majority stock of which is held by a person or persons who meet the other requirements of this section) who—

- (1) hold legal or equitable title to the land surface;
- (2) have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations; and
- (3) have met the conditions of paragraphs (1) and (2) for a period of at least three years prior to the granting of the consent.

In computing the three-year period the Secretary may include periods during which title was owned by a relative of such person by blood or marriage during which period such relative would have met the requirements of this subsection.

(f) This section shall not apply where the surface owner is an Indian tribe or title to the land surface is held in trust for or by an Indian tribe.

(g) Nothing in this section shall be construed as increasing or diminishing any property rights by the United States or by any other landowner.

## I. PURPOSE

The purpose of S. 7, the "Surface Mining Reclamation Act of 1975", is to establish an environmentally strong and administratively realistic program for the regulation of coal surface mining activities and the reclamation of coal mined lands. More specifically, the purposes of S. 7 as reported by the Committee, are to assure that surface coal mining operations—including exploration activities and the surface effects of underground mining—are conducted so as to prevent or minimize degradation to the environment, and that such surface coal mining operations are not conducted where reclamation is not feasible according to the terms and conditions of the Act.

Federal legislation regulating surface mining—and particularly surface mining for coal—is needed now. While a number of States do have surface mining reclamation programs, regulation of surface coal mining is not uniform, and in many instances is inadequate. S. 7 as reported by the Committee would provide minimum Federal standards for surface coal mining and reclamation activities to be administered and enforced by the States, and by the Secretary of the Interior on public lands. S. 7 would provide assistance to the States to improve their regulatory and enforcement programs and authorizes funding to the States for that purpose. In the event that a State fails to comply with the Act, the bill provides for Federal enforcement of the State Program, or for establishment of a Federal Program under the authority of the Secretary of the Interior.

The bill also provides for an abandoned mine land reclamation fund for the reparation of past damages.

## II. NEED

In recent years the coal industry has experienced a significant shift in technology from predominantly underground mining. Although strip mining first started before World War II, it did not become a significant technology for mining coal until the early 1960's when, for the first time, over 30 percent of the country's coal was produced in surface mines. In 1976, over 60 percent of the coal produced came from surface mines.

Each week some 1,000 acres of land are disturbed by the surface mining for coal. As of January 1, 1972 there were 4 million acres of land disturbed by surface mining, of which 1.7 million acres (43 percent) were disturbed by surface mining for coal, 1.3 million of these acres in the Eastern coalfields. Only about half these lands have been reclaimed.

Federal legislation to regulate surface coal mining is long overdue. The coal industry can afford the cost of reclaiming surface mined land. What it cannot afford is the continuing uncertainty created by failure to resolve this issue. Enactment of this Surface Mining Control and Reclamation Act will enable the coal industry to proceed with development of our Nation's vast coal resources in a manner which will assure that the other natural resources of our country will not be unnecessarily damaged.

Congress has been actively considering surface coal mining legislation for the past 6 years. During the 93d Congress the Senate passed a bill in October of 1973 by a vote of 82 to 8. The House passed its amendment to the Senate bill in July of 1974 by a vote of 291 to 81. The conference committee met almost 30 times for over 100 hours to resolve the differences between the Senate and House versions of the bill.

In May 1975, after 4 years of intensive congressional debate, Congress believed that it had resolved the surface mining issue by sending to the President a bill, H.R. 25 (which passed the Senate by a vote of 84-13). Unfortunately, the end product of all this intensive study and debate did not become law because the President vetoed that bill and the House failed by a margin of 3 votes to override the President's veto.

It is also worth recalling today that industry has in the past fought strip mining bills having far less stringent measures than the legislation before Congress today. The delay in enacting legislation, caused largely by industry's opposition, has brought the nature and scope of the strip mining problem more sharply into focus. The need for strong regulation of strip mining practices is more apparent—to more people—than ever before.

President Carter and members of his Administration have repeatedly stressed the need for early passage of a strong strip mine bill.

Surface coal mining activities have imposed large social and environmental costs on the public at large in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty. Uncontrolled surface coal mining in many regions has effected a stark, unjustifiable, and intolerable degradation in the quality of life in local communities.

If surface mining and reclamation are not done carefully, significant environmental damage can result. In addition, unreclaimed or improperly reclaimed surface coal mines pose a continuing threat to the environment, and at times are a danger to public health and safety, public or private property. Similar hazards also occur from the surface effects of underground coal mining, including the dumping of coal waste piles, subsidence and mine fires.

Erosion and siltation of streams occur as a result of surface mining. In the Eastern coalfields, where spoil is pushed downslope of mountain mines, landslides, erosion, sedimentation and flooding are common hazards of mountain surface mining. Unstable highwalls are a hazard to life and property. Highwalls that crumble and erode from weathering ruin drainage patterns and significantly add to water pollution. Material falling off the highwall can retard surface water flow. Erosion increases dramatically when the protective vegetative cover is removed and the soil is not stabilized. Suspended sediment concentration in small Appalachian streams draining strip mined areas can be increased 100 times over that in forest lands. Over 2,000 miles of streams have been affected by surface run-off from coal stripping operations.

In the Western coalfields, many of which are in arid or semi-arid areas, the environmental problems associated with surface mining are somewhat different. Erosion rates on Western range lands are among the highest in the United States for upland areas not under cultivation. The arid climate does not provide sufficient moisture for a protective vegetal cover. Once this fragile vegetative cover has been disturbed by mining, erosion increases dramatically. More important, in areas with little rainfall, restoration of vegetative cover is virtually impossible without irrigation. Furthermore, in most of the Western coalfields the coal beds that lie close to the surface are also aquifers. (For example, the strippable coal seams in the Gillette, Wyoming, area serve as an aquifer.) Removal of the coal by surface mining operations would intersect such aquifers that are the source of water for many wells. Flow patterns in such aquifers would be changed and some parts undoubtedly would be dewatered, resulting in reduced availability of water for other uses.

There are also areas where surface coal mining is totally inappropriate, such as wilderness areas, areas of historical importance, parks, and wildlife refuges. In other areas, it may be desirable to prohibit surface mining because it would be incompatible with existing or planned land use patterns. Of course, under the provisions of the Act, no surface mining may take place in an area which cannot be properly reclaimed.

Because mining conditions, climate, and terrain vary so greatly among the different coalfields, administration of a coal surface mining regulation and reclamation program is more properly done by the States. For example, a program geared to insure proper mining and reclamation in the mountains of Appalachia must understandably be different from one suited to regulating these activities in the arid and semi-arid areas of the West. (Similarly, these regional differences must be reflected in Federal standards promulgated for surface mining and reclamation on Federal lands.)

While many States already do have laws regulating surface coal mining operations, in many instances these laws are inadequate, or are not fully enforced. Most existing State laws and Federal regulations for surface mining and reclamation are inadequate in that they are tailored to suit ongoing mining practices, rather than requiring modification of mining practices to meet established environmental

standards. A recent study completed by the Congressional Research Service reviewing the stringency of State surface mining regulation has documented a number of areas of inadequacy both regarding laws and regulations and enforcement capability. It is the purpose of this Act to effect changes in those mining practices which result in unacceptable or permanent environmental damage, and to eliminate those mining operations which cannot be properly reclaimed.

Regardless of the adequacy of a State's mining and reclamation laws, and assuming good faith on the part of the regulatory agency, problems of enforcing such laws frequently stem from a lack of funding and manpower to adequately insure compliance. As a result, violations of the law and regulations are frequent.

Uniform minimum Federal standards are therefore needed to establish minimum criteria for regulating surface mining and reclamation activities throughout the country, on both public and private lands, and to assure adequate environmental protection from the environmental impacts of surface mining in all States.

In order to assure appropriate local administration of these Federal requirements by the various States, adequate funding and manpower in the State regulatory agencies are essential. For this reason, financial assistance and guidelines are needed for the design and enforcement of State surface mining and reclamation programs in conformance with Federal criteria. It is the purpose of the bill to provide this necessary assistance.

The Committee recognizes that there is an urgent need to balance our growing demand for energy resources with the increasing stress we place on the environment in satisfying that demand.

Much emphasis is being placed today on greater utilization of our domestic coal resources as a means for achieving greater energy self-sufficiency. President Carter, in his April 20 energy message to the Congress called for increasing coal production by two-thirds by 1985.

The essential requirement for an adequate supply of domestic energy resources to support the Nation's social and economic well-being is thus being increasingly recognized as a major national issue. It is clear, particularly in the case of coal, that we have ample reserves. By all estimates our physical coal reserves are sufficient to meet our needs, even at greatly increased rates of consumption, for hundreds of years. We have an abundance of coal in the ground. Simply stated, the crux of the problem is how to get it out of the ground and use it in environmentally acceptable ways and on an economically competitive basis.

Federal legislation to regulate coal surface mining and reclamation is a crucial measure to insure an adequate energy supply while preserving and maintaining a satisfactory level of environmental quality.

The Committee is aware that representatives of the coal industry and the previous Administration have expressed great concern about possible "production losses" which enactment of S. 7 might cause. The figures given vary so widely as to render them basically meaningless. For example, the Ford Administration has at various times, indicated "losses" ranging from 14-141 million tons per year.

The Ford Administration's estimates are based on four assumptions

- (1) Coal prices would not increase.
- (2) Mining technology would remain at its present state.

(3) New mining areas would not be opened in the West.

(4) Capital investments would not increase in mining and related industries.

It is important to note that the Ford Administration expressly stated that "If the reverse of any of the above assumptions occurred, the overall coal production could increase." When President Ford vetoed H.R. 25 on May 20, 1975, he claimed that it would restrict coal production, increase dependence on mid-East oil, raise consumer prices and increase unemployment. However, a report issued by the General Accounting Office has found serious deficiencies in the methodology used by the Bureau of Mines to support the coal production loss claims. There is little reason to accept either the credibility of this hasty and ill-conceived study by the Bureau or the claims that were based upon it.

In view of the rapid and continuing increase in coal prices and the large number of proposed new coal mines in the West, it appears very unlikely that there would be any significant losses of production.

The fact is that at current production levels, this country has more than 500 years of coal reserves. It is ridiculous to talk about a diminution in production at present prices, must less those anticipated in the future, and it is even more ridiculous, given the massive amount of our coal reserves, to refuse to assume the relocation of mining operations, for example, to areas which can be prudently mined—in estimating the impact of this bill.

The purpose of this bill is to effect the internalization of mining and reclamation costs, which are now being borne by society in the form of ravaged land, polluted water, and other adverse effects, of coal surface mining. The Committee believes that this can be done without significant losses in coal production, under the provisions of S. 7.

### III. MAJOR PROVISIONS

#### (1) SURFACE MINING AND RECLAMATION STANDARDS

The informational and environmental requirements of this bill are its most vital provisions. The purpose of the bill is to end the present environmental degradation from surface coal mining and to prevent it in the future. To this end the bill sets forth a series of minimum uniform requirements for all coal surface mining operations on both federal and state lands. These standards deal with three basic issues: pre-planning, mining practices, and post-mining reclamation. The first requires that an operator applying for a permit has done certain research regarding adjacent land uses, the characteristics of the coal and the overburden, and hydrologic conditions. He must include in his application the planned methodology and timetable for the operation in a reclamation plan. The second set of requirements provide that mining methods be used which will minimize or obviate environmental damage or injuries to public health and safety. These include restrictions on the placement of overburden, blasting regulations, water pollution control requirements, and waste disposal standards. The third group of standards regard reclamation and restoration of the mined land to its pre-mined condition. These requirements include backfilling and regrading to approximate original contour, restoration of water qual-

ity and quantity, revegetation to pre-mining conditions and elimination of erosion and sedimentation.

It is the Committee's understanding that certain States may wish to impose more stringent requirements than those minimum standards set forth in the bill. Some States in fact are already contemplating such measures. However, it was felt that some minimum uniform floor had to be established for the protection of the environment at a time when the growth of surface coal mining is projected to double over the next decade, often in environmentally delicate areas.

### (2) PROTECTION OF WATER RESOURCES

There are a number of provisions in this bill which are designed to protect the quality and quantity of water in areas where surface coal mining operations are being conducted. While coal is in abundant supply in the United States in certain areas, water is frequently a scarce or precious commodity which must be protected during the course of mining. Of course, the Committee recognizes that hydrology conditions vary from region to region. In the East, for example, heavy rainfall or high sulfur content of the coal in certain areas result respectively in heavy sedimentation and acid mine drainage. In the West, where coal seams are frequently aquifers, and rainfall is infrequent, mining results in loss of water sources and requires years, perhaps decades, for proper reclamation.

In addition, where water is so scarce, competing land uses can complicate the regulatory agency's decision to allow mining. For example, at a time when the world is facing an acute food shortage, some of the coal in the West underlays alluvial valley floors, which are the only arable lands in such areas.

For these reasons, the bill incorporates a number of carefully drawn provisions for the protection of any area to be mined. The provisions are not restrictive, but they are fully intended to protect the hydrological integrity of any area to be surface coal mined or impacted by such mining. The Committee fully recognizes that there is likely to be some temporary disturbance to water quality and quantity during the actual mining process, and the language of the bill reflects this understanding. Thus, the permit application requirements, reclamation standards, and provisions for designation of areas unsuitable for mining provide for the protection of scarce and vital water resources.

### (3) DESIGNATION OF AREAS UNSUITABLE FOR MINING

A decision to permit the surface mining of coal is a land use decision, and as such may at times conflict with other demands on scarce or valued land resources. For this reason the bill provides for a mechanism—on both State and Federal lands—for citizens to petition that certain areas be designated as unsuitable for surface coal mining. Such designation is always subject to review and revision, but it is designed to minimize land use conflicts with regard to surface coal mining. However, in order to prevent a state regulatory authority from conducting an indefinite review, and thus locking up production needlessly, the bill requires a one year deadline on all decisions as to designation.

In addition to this designation process, the Committee has made a judgment that certain lands simply should not be subject to new surface coal mining operations. These include primarily and most emphatically those lands which cannot be reclaimed under the standards of this Act and the following areas dedicated by the Congress in trust for the recreation and enjoyment of the American people: lands within the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests with certain exceptions, and areas which would adversely affect parks or National Register of Historic Sites.

In addition, for reasons of public health and safety, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.

Since mining has traditionally been accorded primary consideration as a land use there have been instances in which the potential for other equally or more desirable land uses has been destroyed. The provisions discussed in this section were specifically designed and incorporated in the bill in order to restore more balance to Federal land use decisions regarding mining.

#### (4) VARIANCES

The Committee was adamant that there should be no broad exceptions to the vital mining and reclamation standards of this bill. To provide for unlimited exceptions would render the bill meaningless, since it would then be likely that the exceptions would become the rule. On the other hand, the Committee did recognize that there are some valid and important reasons for allowing limited variances to the prescribed standards of the bill, where such variances provide equal or better protection to the environment, and result in a higher post-mining land use. For this reason, there are two provisions in the bill which permit variances to the mining-reclamation standards of the bill. One variance would allow surface mine operators to postpone reclamation of limited segments of his mined area where he can prove to the regulatory authority that such segments are necessary to the operation of a planned underground coal mine. The committee believes an allowance of this sort will ensure maximum recovery of the coal resource and reduce the total surface disturbance so long as the stringent conditions attached to the granting of the variance are strictly adhered to.

The second permits variances from any of the mining and reclamation standards of the Act, at the Secretary's discretion, for experimental practices that show potential for improved environmental protection over prescribed or currently accepted practices.

Mountaintop removal operations would not require a variance. However, the regulatory authority must attach certain stringent performance standards to the permit. These are intended to ensure against the possible failure of massive valley fills associated with such operations. In addition, new regulations are to be promulgated. The Committee is aware that the experts are not in agreement as to the best method of stabilizing these spoil placement areas; this experience gained should

be reflected in new requirements. A study of valley fill engineering standards currently being required by West Virginia and Kentucky, done by the consulting firm of Skelly and Loy for the Environmental Protection Agency, emphasized the fact that long-term stability of valley fills under those standards has by no means been conclusively established. The study recommends certain changes, some of which have been incorporated in the Act.

#### (5) PROTECTION OF SURFACE OWNER RIGHTS

Since the mining of coal became a profitable enterprise, there have been numerous instances in which the mineral estate and the surface estate were separated, both on public and private lands. State laws govern the resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such State laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights.

However, with regard to lands where the Federal government owns the coal, but not the surface estate, the bill does provide for some departure from existing practice.

When vast areas of public lands were transferred to private interests in the early part of this century, the mineral rights were withheld for the people of the United States, as a then revolutionary conservation measure. Over time and aggravated by the current wish to develop Western coal, this situation has led to a serious land use confrontation between surface users such as farmers and ranchers and federal coal lessees. In an effort to mitigate such rivalries the bill provides for limited and circumscribed surface owner consent as a condition of issuing a *new* Federal coal lease. (Existing leases are not affected by this provision.)

#### (6) ABANDONED LAND RECLAMATION

This bill provides for a fund to be used to reclaim "orphaned" or abandoned mined lands. The fund is to be derived from a reclamation fee to be levied on every ton of coal mined: 35 cents/ton for surface mined coal and 15 cents/ton for all coal mined by underground methods, or 10 percent of the value of the coal at the mine, whichever is less. The reclamation fee would not apply to lignite coal, however, since the Committee is aware of no orphan lands resulting from the mining of lignite.

It is estimated that a million and a half acres of land have been directly disturbed by all coal mining and over 11,500 of streams polluted by sedimentation or acidity from surface or underground mines.

Estimates for the cost of repairing these continuing damages run from \$6-\$25 billion.

Although some feel that today's operators should not be required to pay for their precursor's damages, the Committee strongly believes

that the burden of paying for this reclamation is rightfully assessed against the coal industry, and, by extension, the consumers of coal. Furthermore, the use of the fund is not limited to past damages. The bill provides that 50 percent of all fees collected in any one state be returned to that State. Provisions are made in this title for the rehabilitation of both publicly acquired and private lands, under the jurisdiction of the States, the Secretary of the Interior, or the Secretary of Agriculture.

#### (7) FEDERAL-STATE RELATIONSHIP

The role of the Federal government has been carefully delineated in this bill, particularly in regard to its activities in those situations where the State is the prime regulatory authority. During the interim period, section 402(e) provides that beginning no later than six months from the date of enactment and continuing until a State program has been approved or a federal program has been implemented, the Secretary is required to carry out a federal enforcement program which includes inspections and enforcement actions in accordance with the provisions of section 421. The intent of this provision is to place the Secretary in the role of assuring compliance with the interim standards during the time of the initial regulatory procedure. The Committee recognizes that this may to some extent duplicate State activity, however it is the view of the Committee that this sort of federal presence at the most crucial time of the administration of this Act will result in uniform, equitable enforcement of the interim standards and will assure that the requirements of the Act get off to a good start. *The Committee firmly believes that there is no adequate substitute for the Secretary's oversight role, because of the wide variation in the ability of existing State regulatory authorities to enforce compliance with the interim environmental protection performance standards.* A recent study by the Congressional Research Service has documented State regulatory deficiencies in this regard.

Since practically all surface coal mining operations covered by the initial regulatory procedure are presently regulated by existing State regulatory authorities (the major exception being operations on federal and Indian lands), it is not the purpose of this interim federal enforcement program to place the Secretary of the Interior in the business of issuing mining permits for operations on lands within the jurisdiction of the States. The bill imposes a duty upon the States to review and revise existing permits to insure compliance with the interim standards of section 402, and obliges the States to issue new permits in accordance with those standards. It is the view of the Committee, however, that the Secretary would be required to assure State performance of these duties and obligations, pursuant to the federal inspection and enforcement provisions of section 402(e).

#### (8) ENFORCEMENT

S. 7 contains comprehensive provisions for inspections, enforcement notices and orders, administrative and judicial review, and penalties.

These requirements are of equal importance to the provisions of the bill regarding mining and reclamation performance standards since experience with state surface mining reclamation laws has amply demonstrated that the most effective reclamation occurs when sound performance standards go hand in hand with strong, equitable enforcement mechanisms.

Generally the enforcement provisions of this bill have been modeled after the similar provisions of the Federal Coal Mine Health and Safety Act of 1969. Where the enforcement provisions of this bill depart of the 1969 Health and Safety Law, they do so either to improve enforcement or to accommodate the fact that this bill encourages the states to retain or develop regulatory authority over surface coal mining and reclamation operations, and seeks to protect the environment and the public health and safety as opposed to the protection afforded the coal miner on coal mine property by the Coal Mine Health and Safety Act.

*Judicial Review.*—Section 526 of the bill established specific provisions for judicial review of Secretarial actions. Because of the thoroughness and degree of due process afforded judicially reviewable actions by the Secretary, judicial review is to be based on the record made before the Secretary. The courts should render their decisions on the basis of whether or not the Secretary's decision was arbitrary and capricious or supported by the record. Testimony relief from Secretarial decisions may be granted only under the same kind of narrowly prescribed circumstances as discussed above in the context of administrative review.

*Penalties.*—Where the Secretary is the regulatory authority or a Federal inspection is being conducted pursuant to section 402, 404(b) or subsection (b) of section 421, section 418 of the Act provides that civil penalties will be mandatory for violations leading to a cessation order under section 421 or a cessation order entered by a court pursuant to section 418. The Secretary has discretionary authority to assess civil penalties for other violations.

The Secretary is required to make findings of fact and issue a written decision as to the occurrence of a violation and the amount of the penalty which is warranted only where the person charged has availed himself of the opportunity for a public hearing and the hearing has, in fact, been held. The Act also provides that approved State programs must contain criminal and civil penalties no less stringent than the Federal provisions with the same or similar procedural requirements relating thereto.

This section also requires the operator (or permittee) to pay the proposed penalty within thirty days after he has been assessed a penalty for violation of the Act or permit. If the permittee wishes to contest either the fact of violation or the amount of the penalty, he shall so notify the Secretary when making the remittance. Upon receipt of a payment from a permittee the Secretary shall place it in an escrow account and should the permittee's challenge be sustained, the payment is to be returned to the permittee with interest. The Com-

mittee is of the belief that this procedure will avoid the problem of non-collection of fines.

#### (9) CITIZEN PARTICIPATION

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. Moreover, a number of decisions to be made by the regulatory authority in the designation and variance processes under the Act are contingent on the outcome of land use issues which require an analysis of various local and regional considerations. While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirement of the Act.

In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

#### IV. LEGISLATIVE HISTORY

Surface mining has been the subject of legislation for several years. The first hearings were held by the Committee on Interior and Insular Affairs in the 90th Congress. No bills were reported during the 90th and 91st Congresses. During the 92d Congress, the Subcommittee on Minerals, Materials and Fuels held 4 days of hearings. The Committee unanimously reported a bill (S. 630) in September 1972 with the understanding that Committee members reserved the option to offer amendments on the Senate floor.

The House of Representatives passed a bill (H.R. 6482) in October 1972. The 92d Congress adjourned before the Senate considered either bill.

The 93d Congress gave intensive consideration to surface coal mining legislation. The Interior Committee held hearings on bills then before it on March 13, 14, 15, and 16. On April 30 the Subcommittee

on Minerals, Materials and Fuels held a hearing on the report prepared by the Council on Environmental Quality entitled "Coal Surface Mining and Reclamation—An Environmental and Economic Assessment of Alternatives."

In addition, as part of the study of National Fuels and Energy Policy, the Full Committee and ex-official members held 3 days of hearings on coal policy issues, which included discussions of the potential impact of Federal surface mining legislation on coal development.

The Committee met in public mark-up session for 10 days to consider amendments to S. 425. On September 10, 1973, the Committee completed action on the bill and ordered S. 425 favorably reported to the Senate with the recommendation that the bill as amended be passed. After 2 days of debate S. 425 was passed by the Senate on October 18, 1973, by a vote of 82-8. The bill as amended passed the House on July 25 by a vote of 291-81.

Conferees met for more than 100 hours to reconcile the differences between the House and Senate revisions of S. 425. On December 5, 1974, they reported a conference report to their respective houses, which was approved by both bodies. However, the President pocket vetoed the bill, after the Congress had adjourned, thus precluding the opportunity for an override.

S. 7 as introduced was identical to the conference report on S. 425. Despite the fact that the Committee had already scrutinized exhaustively the provisions of the bill, on February 19, 1975, the Committee heard Administration witnesses discuss proposed changes in S. 7.

S. 7 passed the Senate on March 7, by a vote of 84-13. The Senate passed H.R. 25, amending it to contain the language of S. 7, and upon the disagreement by the House, the bill went to conference on April 18, 1975.

On May 5, 1975, the Senate agreed to the conference report on H.R. 25. President Ford vetoed H.R. 25 on May 20, 1975 and the House subsequently sustained the veto by vote of 278-143, on June 10, 1975.

Reintroduced in the 95th Congress as S. 7, the Surface Mining Control and Reclamation Act of 1977 was identical to H.R. 25 except for the following major differences:

1. State mining and mineral resource institutes (old title III) was deleted.
2. Designation of lands unsuitable for non-coal mining (Old Title VI) was deleted.
3. Reclamation fee for orphan lands program was made to apply only to Federal coal.
4. State regulatory authorities were afforded greater access into the orphan lands program.
5. Special provisions for anthracite mines and Alaska mines were deleted.
6. Surface owner consent provision was deleted and replaced by the Mansfield amendment banning all strip mining of Federally-owned coal underlying non-Federal surface.
7. States were given the option of enforcing the Federal standards on Federal lands.
8. Coal exploration provisions for Federal coal lands were deleted as redundant.

Four days of hearings on S. 7 were held by the Subcommittee on Materials, Minerals and Fuels, on February 7 and March 1, 2 and 3, 1977. The newly constituted Subcommittee on Public Lands and Resources proceeded to mark up the bill on March 31, reporting it out on May 2, 1977.

Meanwhile the House passed H.R. 2, the companion bill, by a vote of 241 to 64, on April 29, 1977, and sent it to the Senate.

## V. COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Committee on Energy and Natural Resources recommends that S. 7, as amended, be approved by the Senate.

Pursuant to Section 133(b) of the Legislative Reorganization Act of 1946, as amended, the following is a tabulation of votes of the Committee during consideration of S. 7:

1. During the Committee's consideration of the Surface Mining and Reclamation Act of 1977 many voice votes and formal roll call votes were taken on amendments to the bill. These votes were taken in open public session and, because they were previously announced by the Committee in accord with the provisions of Section 133(b), it is not necessary that they be tabulated in the Committee Report.

2. S. 7, was ordered favorably reported to the Senate on a roll call vote of 14 yeas and 4 nays. The vote was as follows:

Jackson, Yea	Hansen, Yea
Church, Yea	Hatfield, Yea
Metcalf, Yea	McClure, Yea
Johnston, Nay	Bartlett, Nay
Abourezk, Yea	Weicker, Yea
Haskell, Yea	Domenici, Nay
Bumpers, Yea	Laxalt, Nay
Ford, Yea	
Durkin, Yea	
Metzenbaum, Yea	
Matsunaga, Yea	

## VI. COMMITTEE AMENDMENTS

During the course of markup the Committee adopted approximately 200 amendments to S. 7. While many of these were technical, there were a number of significant changes. The most significant of these are outlined below.

1. *Surface owner consent.*—This amendment (Section 515) is explained under Major Provisions and in the section-by-section analysis portion of this report. It replaces the Mansfield Amendment, which would have banned all surface mining of coal on lands where the surface is under non-Federal ownership and the coal is owned by the Federal Government.

2. *Small and medium operators' 30-month exemption.*—This amendment is explained in section 402 of the section-by-section analysis.

Under the amendment, operators producing no more than 200,000 tons of coal annually would qualify for special treatment.

3. *Mountaintop removal*.—This amendment deletes the previous variance procedure, thus allowing mountaintop removal operations to proceed under regular permit, with stringent conditions attached. It is discussed under “Variances” in the Major Provisions, and under section 415 of the section-by-section analysis.

4. *Reclamation fee*.—This amendment places a special fee for reclamation of orphan lands upon all coal mined (except lignite), as opposed to the previous language which covered Federal coal only. It is discussed in Section 301 of the section-by-section analysis and also under “Abandoned Land Reclamation” in Major Provisions.

5. *Surface effects of underground mining*.—This amendment requires the Secretary to consider the “distinct difference” between surface and underground coal mining in his promulgation of regulations as discussed in section 416 of the section-by-section analysis.

6. *Alluvial valley floor grandfather clause*.—This amendment exempts certain operations from restrictions against mining on or near alluvial valley floors. It is described in section 410 of the section-by-section analysis.

7. *Timing of implementation*.—This amendment adopts a more rational timetable for bringing the Act into full implementation. Its main provisions are described in section 402, 403; and 404 of the section-by-section analysis.

8. *NEPA exemptions*.—This amendment waives the requirement for an environmental impact statement with respect to certain Secretarial actions. Section 505 of the section-by-section analysis contains an explanation.

9. *Federal Funding for State Programs*.—This amendment to Section 505 authorizes Federal grants for State programs on a continuing basis rather than for only four years. It also increases the Federal grant from 40 percent to 50 percent of State program cost from the third year on.

## VII. SECTION-BY-SECTION ANALYSIS

### TITLE I—STATEMENT ON FINDINGS AND PURPOSES

#### SECTION 101. FINDINGS

This section sets out congressional findings relating to surface mining of coal and other minerals. These include the fact that (1) surface mining is only one of various methods of mining; (2) surface and underground coal mining are significant activities in our national economy; (3) surface mining has numerous adverse economic, environmental and social effects; and (4) surface mining and reclamation technology are developing so that effective and reasonable regulation of surface coal mining is appropriate and necessary to minimize these adverse effects.

These findings conclude that (1) because of the diversity of terrain, climate, biologic, chemical, and other physical conditions, the States should have the primary responsibility for regulating surface mining and reclamation, but that a Federal-State cooperative effort is essential to the success of this program and (2) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to provide a basis for effective and reasonable regulation.

#### SECTION 102. PURPOSES

This section states that the purpose of Congress in passing this Act is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations as well as the surface impact of underground coal mining operations. It sets out twelve specific purposes as steps toward achieving that goal. These recognize that, while all adverse effects of surface mining cannot be prevented immediately and that coal is an essential source of energy, a strong nationwide regulatory program based on minimum Federal standards should be implemented rapidly. This program would assure that surface coal mining operations are not conducted where reclamation which meets these minimum standards is not feasible. The Federal Government would assist the States in developing and implementing such a program. If and when a State manifests a lack of desire or an inability to participate in or implement that program and to meet the requirements of the Act, the Federal Government is to exercise the full reach of Federal constitutional powers to insure the effectiveness of that program.

Another significant purpose of the Act is to provide a means for development of the data and analyses necessary for Congress to decide in the future whether to establish effective and reasonable regulation of surface mining for all minerals other than coal.

S. 7 establishes procedures for public participation in the development, revision, and enforcement of regulations, standards, reclamation plans or programs established by any regulatory authority under this Act. The bill also establishes a program for the rehabilitation of lands previously mined and left unreclaimed which continue to substantially degrade the quantity of the environment or endanger the health or safety of the public.

#### TITLE II—OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

To insure administration of the program by an independent agency with neither a resource development (the promotion of mining, marketing, or use of minerals) or resource preservation (pollution control, wilderness, or wildlife management) bias or mission, this title establishes the Office of Reclamation and Enforcement in the Department of the Interior. This Office will be separate from any of the Department's existing bureaus or agencies. It is intended that the

Office exercise independent and objective judgment in implementing the Act.

To insure sufficient authority to administer the Act the Office will have a Director to be compensated at the rate provided for in level IV of the Executive Pay Schedule. Officers and employees of the Office are to be recruited on the basis of their professional competence and capacity to administer the Act objectively. The Act specifically states that there cannot be transferred to the Office any legal authority which has as its purpose promoting the development or use of coal or other minerals.

The duties of the Secretary, acting through the Office, include: Administering the various grant-in-aid programs provided in the Act; administering research and development projects provided in the Act; reviewing and approving State programs for surface mining and reclamation operations; developing and administering any Federal program for surface mining and reclamation operations for States which do not have or are not enforcing State Programs; maintaining a Surface Mining and Reclamation Information and Data Center; cooperating with States in dissemination of relevant data and in standardizing methods of collecting and classifying such data; providing technical assistance to the States to enable them to undertake responsibilities provided for in the Act; monitoring all Federal and State research programs dealing with coal extraction; and recommending research projects designed to improve the feasibility of underground coal mining or develop improved surface mining and reclamation techniques.

Concern has been expressed that the establishment of a new office at the Federal level implicitly requires a similar entity in every State in order to manage the State program. This is not the case. It should be noted that many States already have a particular governmental unit regulating surface coal mining industry. Some aspects of the regulatory program might be carried out on the State level by more than one agency, especially where States with surface coal mining agencies have another agency which regulates surface impacts of underground mines.

In fact, the Secretary, acting through the Director, is specifically instructed to cooperate with Federal and State authorities to minimize duplication of enforcement and administration of the Act.

### TITLE III—ABANDONED MINE RECLAMATION

#### SECTION 301. ABANDONED MINE RECLAMATION FUND

This section establishes in the U.S. Treasury an Abandoned Mine Reclamation Fund which derives its dollars from: funds from the lease, sale, rental of lands reclaimed under this Act; user charges on

reclaimed lands; and from a reclamation fee collected over a period of 15 years of 35 cents/ton for surface mined coal and 15 cents/ton for all coal mined by underground methods, or 10 percent of the value of the coal at the mine, whichever is less.

The differential fee was adopted recognizing the differing costs in meeting various health and safety objectives mandated by law.

The purpose of the 10 percent provision is to prevent an undue economic burden on low cost, lower grade western coal. There is to be no fee imposed on lignite coal due to the low thermal value, and absence of any known orphan lands associated with lignite mining. The basis for calculation of the tonnage to which this fee applies shall be prescribed by the Secretary by regulation.

Estimated revenue yields from the reclamation fee as submitted by the Bureau of Mines is as follows:

ESTIMATED CUMULATIVE REVENUE GENERATED BY RECLAMATION FUND

(All coal excluding lignite)

3. Based on an income of \$0.15 per ton for underground coal and \$0.35 per ton for surface coal.

	<i>Millions</i>
5-year period.....	\$1, 090. 55
10-year period.....	2, 466. 45
15-year period.....	4, 082. 90
20-year period.....	5, 923. 85

The fee is quite small relative to the current prices of coal. When translated into power cost per kilowatt hour (assuming conservative figures of 10,000 BTU/lb and a conversion rate of 10,000 BTU/kwh) it is less than 0.015 cents per kwhr of electricity. For consumers utilizing from 250 to 750 kwhr per month, this represents an increase of 4-12 cents per month on their utility bill. Such a small increase would not be a burden on current coal consumers or inflationary in nature.

The Committee takes the position that the Federal government has a responsibility to remove this longstanding blight from regions which fueled the industrial growth of America prior to the advent of the internal combustion engine. The cost of rehabilitation is estimated at \$25 billion.

In all, it is estimated that a million and a half acres of land have been directly disturbed by all coal mining and over 11,500 miles of streams polluted by sedimentation or acidity from surface or underground mines.

Estimates of program costs for correcting these problems have been made by the Department of Interior totaling \$25 billion and are consolidated and summarized as follows:

SUMMARY OF EXTENT OF ABANDONED MINED LANDS AND ESTIMATED COST OF REHABILITATION—COAL

[Dollar amounts in millions]

	Abandoned lands		Subsidence		Waste banks		Waste bank fires		Mine fires		Total <sup>1</sup>	
	Acres	Amount	Acres	Amount	Acres	Amount	Acres	Amount	Number	Amount	Acres	Amount
East.....	344,900	\$1,379.6	385,500	\$11,565	164,650	\$1,399.6	2,953	\$244.13	64	\$69.5	898,003	\$14,675.8
West <sup>2</sup> .....	38,300	153.2	32,800	984	9,480	80.5	267	21.73	197	6.03	80,847	1,245.4
Total.....	383,200	1,532.8	418,300	12,549	174,130	1,480.1	3,220	265.9	261	75.53	978,850	15,903.2

<sup>1</sup> Total dollars excludes \$10,000,000,000 estimated for acid mine drainage.

<sup>2</sup> West assumed to be those States west of the Mississippi.

838

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These estimates provide a basis for identifying the order of magnitude of funds required to correct these problems.

The burden of paying for reclamation is rightfully assessed against the coal industry. The bill adopts the principle that the coal industry, and by extension the consumers of coal, must bear the responsibility for supporting special rehabilitation programs to recover and reclaim areas which have been severely impacted in the past by coal mining operations.

Fifty percent of the revenues derived from a county, school district or lands of an Indian tribe are to be returned to that county, school district or Indian tribe for use in accomplishing the purposes of this title.

The Act specifies that the Secretary of Interior must use the money in the Fund for certain purposes and must make available to the Secretary of Agriculture up to one-fifth of the Fund for purposes set forth under section 305.

#### SECTION 302. OBJECTIVES OF FUND

The primary objective of the Fund is reclamation of previously mined areas. However, this section does provide for other objectives which are to be given a priority on the following basis: (1) protection of health or safety of the public; (2) protection of the environment from continuing degradation and conservation of land and water; (3) the protection, construction, and or enhancement of public facilities and their use; and (4) improvements of lands and waters to a suitable condition useful in the economic and social development of the area affected.

#### SECTION 303. ELIGIBLE LANDS

This section specifies that only those lands which were mined for coal or affected by such mining, waste banks, coal processing or other mining processes and abandoned or left in an inadequate reclamation condition prior to the enactment of this Act are eligible for expenditures under the Fund. In addition, there must be no continuing responsibility for reclamation under State or other Federal laws for such lands to be eligible.

The inclusion of lands "affected by" coal mining means that in various areas the fund could be used to repair public facilities which have been damaged by activity relating to coal mining. In Eastern Kentucky, for example, public roads have suffered extensive damage from coal-hauling. This is especially true of roads which serve mines that are otherwise inaccessible.

#### SECTION 304. RECLAMATION OF RURAL LANDS

This section establishes a program to provide small rural landowners technical and financial resources to reclaim lands affected by coal surface mining operations which were left unreclaimed or inadequately reclaimed.

Any one landowner (including owner of water rights), resident, or tenant is limited to a total of 100 acres of land on which reclamation can be conducted under this section, and the Federal share of such

work shall not exceed 80% of the costs. The Secretary has discretionary authority to increase the Federal share where he determines that (1) the main benefits from the project are related to off-site water quality or other off-site benefits, and (2) the landowner cannot participate in the program if required to put up 20% of the cost.

This program is administered by the Secretary of Agriculture and the reclamation work is to be accomplished according to a mutually-agreed-upon plan through contracts with the landowner, for periods of not more than ten years, to accomplish the land stabilization conservation work required in order to reclaim the affected lands. This program is to be implemented through the Soil Conservation Service. While the Soil Conservation Service may want to integrate such projects on a watershed or drainage area basis in order to enhance program effectiveness, it is not intended that such an approach and its planning process slow down reclamation or deny work in those areas or instances where the landowners are willing to participate but the watershed planning is not completed. It is also intended that the rural lands program will be coordinated with the reclamation program implemented by the Department of Interior.

Up to one-fifth of the money available in the Abandoned Mine Reclamation Fund during any one year shall be made available to the Secretary of Agriculture for the purposes of this section.

#### SECTION 305. ACQUISITION AND RECLAMATION OF ABANDONED AND UNRECLAIMED MINED LANDS

This section establishes a program, administered by the Secretary of Interior or by the State regulatory authority pursuant to an approved State abandoned mine reclamation program, for the reclamation of abandoned mine lands or lands affected by surface coal mining operations which are large tracts, or lands to be developed for specific purposes such as commercial, industrial, residential, and other intensive land uses. This program complements the rural lands program provided in Section 304.

Four basic steps are required under this program: land identification, land acquisition, land reclamation, and post-reclamation land use including disposition.

Prior to initiating reclamation programs on particular tracts of land, the Secretary or the State shall make a thorough study of the areas involved, identifying those lands needing reclamation and establishing projects according to the priorities established in Section 302 above and with costs and benefits computed.

Land acquisitions for those parcels on which work will be done can be accomplished by either the Secretary of Interior or the States involved. If a State acquires such land and transfers it to the Federal Government, up to 90 percent of the acquisition costs may be Federally funded. For those projects which because of public health or safety or environmental damages require quick and easy acquisition, specific authorities for condemnation and quick land and mineral acquisition are provided to the Secretary of Interior.

The reclamation of these acquired lands is to be conducted under Federal control. Contracts for reclamation are to be entered into on a

competitive basis. Costs of reclamation are to be borne entirely by the fund.

The Secretary of the Interior is given authority to reclaim lands to be used for the purposes of housing for miners, mining related employees or persons displaced by natural disasters or catastrophic failures.

After reclamation, land may be retained in Federal ownership, made available to States or local governments, or disposed of to parties in the private sector. If such land was originally made available to the Federal Government through State acquisition, such State may have a preference to purchase lands after reclamation. The Secretary has the authority to sell land to State or local governments at a price less than fair market value, providing that it is used for valid public purpose and that the cost to the State and local governments shall be no less than the cost to the Fund for the purchase and reclamation of the land.

Disposition of the land to the private sector is allowed in those instances for industrial, commercial, residential, or other intensive private uses. States have the option of exercising the authority to acquire and reclaim orphan lands, under this section, if the Secretary has approved their abandoned mine reclamation program.

#### SECTION 306. FILLING VOIDS AND SEALING TUNNELS

This section specifically establishes programs for subsidence control and sealing those tunnel shafts and entryways resulting from mining which constitute a hazard for public health or safety. The Secretary is to acquire such interest in lands as he determines necessary to carry out provisions of this section. State regulatory authorities are authorized to carry out such work pursuant to an approved abandoned mine reclamation program.

#### SECTION 307. FUND REPORT

This section requires the Secretary to make an annual report to Congress beginning on January 1, 1979 on reclamation activities accomplished and underway which are supported by the Fund along with recommendations as to future uses of the Fund.

#### SECTION 308. TRANSFER OF FUNDS

This section authorizes the Secretary of the Interior to transfer funds to other Federal agencies to accomplish the purposes of this title. It was recognized that this authority might be desirable since such agencies have appropriate program responsibilities and expertise, such as reducing sediment and other pollution from entering reservoirs, navigable waterways as well as in acid mine drainage control.

### TITLE IV—CONTROL OF THE ENVIRONMENTAL IMPACTS OF SURFACE COAL MINING

#### SECTION 401. ENVIRONMENTAL PROTECTION STANDARDS

This section requires that within 90 days of the date of enactment of the Act, after due notice, upon concurrence of the Administrator

of EPA, and public hearings, the Secretary promulgate and publish in the Federal Register interim regulations for the establishment of State and Federal programs for the implementation of this Act.

Interim regulations should make compliance with the interim performance standards of the Act by the operator easier and more enforceable. Promulgation of these regulations would not require filing of an environmental impact statement, in view of the need for timely issuance and the eventual compliance with requirements for an environmental impact statement upon promulgation of the permanent regulations (within 12 months).

#### SECTION 402. INITIAL REGULATORY PROCEDURES

Subsection 402(a) requires that, after the date of enactment of this Act, no person shall conduct any surface mining operations on non-Federal lands without a permit from the appropriate State regulatory agency.

Subsection 402(b) requires that, after six months from the date of enactment of this Act, all new mines must be required to comply with 7 key environmental standards.

One of these standards pertains to the use of mine waste impoundments to dispose of wastes from both underground and surface mines and coal processing plants. The balance of the standards represent other key provisions of the permanent program pertaining to surface coal mining operations: post-mining land use objectives, regrading to approximate original contour, steep slope requirements including limitation of spoil placement on downslopes, segregation and preservation of topsoil, protection of the hydrologic balance and revegetation requirements. Nine months after enactment of this Act, subsection 402(c) applies these same standards to mines in operation pursuant to a permit issued prior to six months after the date of enactment of this Act. The standards are applicable to lands from which overburden and the coal seam being mined have not been removed. Operations in operation under a State permit issued before date of enactment and producing at least 200,000 tons annually are specifically exempted for a period of 30 months except for the prohibition against placing spoil on the downslope.

The application of these standards to existing mining operations will remedy much of the environmental degradation resulting from current coal surface mining practices and provide a fair basis for transition into the full range of requirements in the program. This appears to the committee to be a practical mechanism for assuring compliance without raising the possibility of unwarranted hardship on the operator.

Subsection 402(d) requires all operators to file for such permits under an anticipated approved State program no later than two months following the approval of a State program or the implementation of a Federal program. Such permits must be granted or denied within 8 months of the approval of a State program, but in no case later than 42 months from the date of enactment of this Act.

Subsection 402(e) requires, within 6 months of the date of enactment of this Act, the establishment of a Federal enforcement program to

carry out inspections and enforce the provisions of the Act, until such time as an approved State program or a Federal program has been established. Under this oversight function, Federal inspectors shall have the authority to order correction of violations.

Subsection 402(b) allows existing operations to continue in the interval between disapproval of a State program and implementation of a Federal program.

All surface coal mining operations, which include, by definition surface impacts incident to underground coal mines, are subject to the initial regulation procedures of section 402 of this bill, but only to the extent that they are located on lands on which operations are regulated by a State. Surface coal mining operations located in the two States (Alaska and Arizona) which presently have no regulatory programs directed toward the environmental control of surface coal mining operations are not subject to section 402. Neither are the surface effects of underground coal mining operations subject to section 402, unless the existing State regulatory program is directed at the effects of these operations. This policy is entirely consistent with the State-lead philosophy of this legislation. However, it should be noted that States which do not have a regulatory program established by statute may still participate in the interim program through administrative action of a suitable State agency. Certification of this fact by the Governor of a State to the Secretary of the Interior is sufficient to qualify that State for the interim funding provided in section 402.

#### SECTION 403. STATE PROGRAMS

In order for any State to assume exclusive state jurisdiction in administering surface mining regulation on non-Federal lands, this section requires submission to the Secretary of Interior, within 18 months after the passage of the Act, of a State program which demonstrates that the State has legal, financial, and administrative capability for carrying out the provisions of the Act under regulations of the Secretary.

The State program must specifically show that the State has a law providing for the regulation of surface mining and reclamation in accordance with all provisions of the Act and subsequent regulations. The State program must provide for sanctions or penalties for all violations of State laws, regulations, or conditions of permits concerning surface mining, must meet the minimum requirements of this Act, must provide sufficient administrative and technical personnel with funding to fully implement and enforce provisions of this Act, must show that a process for designating areas unsuitable for surface coal mining has been established and that a process exists for coordinating review of any mine permit with any other Federal or State permit issued under this Act.

The Secretary of the Interior is directed to approve or disapprove each State program in whole or in part within 6 months after submission. Prior to such decision he must hold at least one public hearing within the State on the program, disclose views of all Federal agencies having special expertise pertinent to the proposed State program, obtain the written concurrence of the Administrator of the Environ-

mental Protection Agency for those aspects of the State program relating to federal air and water quality laws.

If the Secretary disapproves a State program in whole or in part, the State shall have sixty days to resubmit a revised State program or appropriate portion thereof. The Secretary must approve or disapprove a resubmitted State program within 60 days of its resubmittal but in no case later than 42 months after enactment of the Act (Sec. 402). It is the intention of the committee that any notification of disapproval be in writing and contain the reasons for disapproval. It is intended that the Secretary's notification be very specific. Only with such specificity will a State know how best to revise its State programs so it will meet with the Secretary's approval.

Subsection (d) provides that States that are prevented from preparing, submitting, or enforcing a State program because of a court injunction remain eligible for financial assistance under the Act.

This subsection further provides that, despite the provision of Section 402, no Federal program shall be initiated for a State under these circumstances. This bar on imposition of a Federal program ends when the injunction terminates or after 1 year, whichever comes first. The Committee did not want to penalize States which were making a good faith effort to comply with the Act but were prevented from doing so by court action. On the other hand, the Committee does not want to have any undue delay in establishment of a regulatory program which meets the requirements of the Act.

#### SECTION 404. FEDERAL PROGRAMS

This section provides for Federal regulation of surface mining and reclamation operations in any State which proves unwilling or unable to do the job itself. In accord with the purposes and findings in Title I, Federal regulation is to occur only if a particular State wishes to forgo or fails to assume primary responsibility for regulating surface mining operations within its boundaries.

Subsection (a) directs the Secretary to prepare, promulgate, and implement no later than 30 months after enactment of this Act, a Federal program covering surface mining and reclamation operations for any State which (a) fails to submit a State program within 18 months after enactment, (b) fails to resubmit an acceptable revised State program after the Secretary's disapproval of the original submission, or (c) fails to enforce all or any part of its approved State program.

Promulgation of a Federal program gives the Secretary *exclusive jurisdiction* for regulation of surface mining operations in the State in those areas not being adequately enforced by the State. Surface mine operators need to know which regulations—Federal or State—they must follow at any given point in time. The Committee fully intends that under subsection 404(b) the Secretary will use the enforcement authority granted him under subsections 421(a) (1) through (4), if a State with an approved State program fails to enforce against an operator who is violating the Act.

In preparing and implementing a Federal program, the Secretary is directed to take into account the affected State's terrain, climate, and other physical conditions.

If an Act of the State legislature is required to enable the State to comply with the Act, the Secretary is authorized to extend the deadline for submission of a State program up to an additional 6 months.

Subsection (c) requires that a public hearing must be held in the affected State prior to promulgation of the Federal program.

Subsection (d) provides that all permits issued under an approved State program remain valid after implementation of a Federal program. However, the Secretary is directed to undertake a review of such permits and where such permits fail to meet the requirements of the Act, to afford the permittee reasonable time to conform his operations with those requirements or to submit a new permit application.

Subsection (e) provides procedures and timetables for the lifting of the Federal program in any State when a new State program receives the Secretary's approval.

Subsection (f) provides that permits issued under the Federal program remain valid under the State program, subject to review and revision by this State regulatory authority and subject to the imposition of additional requirements if the State deems necessary and if the permittee is given time to comply.

Subsection (g) further provides that any State laws or regulations regulating surface mining are preempted by the Federal program. This preemption is designed to make it clear to surface mine operators which laws and regulations they must comply with. Other State laws applicable to the operation, such as those relating to air and water quality would not be affected. The Secretary is required to set forth in his rules and regulations those State laws and regulations, if any, which in his judgment are superseded and preempted by the Federal program.

Subsection (h) provides that any Federal program shall contain a process for coordinating issuance of permits with any other applicable Federal or State permit process.

The assumption of regulatory authority over surface mining operations in any State by the Secretary through promulgation of a Federal program for that State is regarded by the Committee as a "last resort" measure. For this reason, no Federal program shall include a process for designation of non-Federal lands as unsuitable for surface mining for 1 year after imposition of a Federal program. The Committee hopes this will be an incentive to the States to develop acceptable programs. It is certainly preferable that the State regulate such operations through State programs which meet the requirements of the Act. The Committee hopes and expects that the States, in good faith, will develop and implement strong State programs. However, if they fail to do so, the purpose of the Act and this section in particular is to insure that the full reach of the Federal constitutional powers will be exercised to achieve the purposes of the Act.

#### SECTION 405. STATE LAWS

This section contains the standard savings clauses protecting the States rights to have or develop laws and regulations providing more stringent or different controls of surface mining and reclamation operations. The Secretary is required by the provisions of this section

to set forth in rules and regulations State laws and regulations, if any, which he determines to be inconsistent with the Act. This is intended to insure against any confusion as to which statutes in a State would be applicable and enforceable and which would not.

#### SECTION 406. PERMITS

This section provides a timetable for obtaining permits to conduct surface mining and reclamation operations pursuant to the Act from either the State regulatory authority under a State program or the Secretary under a Federal program. (Hereafter, the words "regulatory authority" will be used to mean the State regulatory authority where the State is administering the Act under State programs or the Secretary where the Secretary is administering the Act under Federal programs.)

Under subsection (a) no person can engage in surface mining without a valid permit under an approved State program or a Federal program after 8 months after approval of a State program or implementation of a Federal program. There is one exception to this rule. Where there is an approved State program or a Federal program an operation with a valid permit from the State regulatory authority may continue operations if a permit application has been filed but the initial administrative decision has not been rendered. Conscious of the need for increased coal production, the Committee did not want to force current operations to shut down simply because of administrative delay. However, the Committee believes that a firm deadline must be established to serve as an incentive to the Secretary, the States and the operators to comply with the Act.

This deadline provides the States with a reasonable period of time after the Secretary promulgates his regulations to prepare their State programs. (Federal interim regulations are due 3 months after enactment, State programs are due 18 months after enactment date, and the Secretary must approve or disapprove a State program within 6 months after its submission.) The Committee urges the States to develop acceptable programs as rapidly as possible to avoid a hiatus after the deadline. It also expects the Secretary to issue regulations rapidly and actively assist the States to develop acceptable programs.

The exception for operations with valid permits recognizes that there may be delays in the processing of applications which are not the fault of the applicant and for which he should not be penalized. The applicant would be subject to the requirements of the State or Federal program during this period.

Subsection (b) provides that the term of permits or permit renewals or extensions issued under State programs shall not exceed 5 years. The Committee believes that 5 years is a reasonable time period but since many States have 1- or 2-year permits it wishes to allow these to continue.

To assure that no one will be locked into outdated reclamation requirements because permits are taken out and renewed without operations being undertaken, subsection (c) provides that permits will terminate if the permittee has not begun operations within 3 years of the issuance of the permit unless otherwise provided in the permit.

This flexibility recognizes the longer start-up times required for coal liquefaction and gasification projects.

Under Subsection (d), a valid permit includes the right to successive renewals if the permittee has complied with all the requirements of the State or Federal program and has notified the regulatory agency at least 120 days prior to the expiration of his valid permit. As part of the renewal process the regulatory authority may hold a public hearing and may require new conditions or requirements needed to deal with changing conditions. Any application for renewal beyond the original permit boundary areas must be considered as a new permit application. It is the intention of the Committee that the renewal shall be granted unless the regulatory authority specifically finds in writing that the operator in some way has failed to comply with the Act.

#### SECTION 407. APPLICATION REQUIREMENTS

Subsection (a) requires payment of an application fee which may be sufficient to cover the actual or anticipated cost of reviewing, administering, and enforcing the permit. The Committee, however, intends to allow the regulatory authority complete latitude to set the fee at a nominal rate if it so desires, making up the balance of its expenses from other sources of revenue. The cost of the fee may be paid over the term of the permit.

Subsection (b) lists the basic information required in the permit application. The information required here is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met and includes:

(1) identification of all parties, corporations (with their major stockholders), and officials involved to allow identification of parties ultimately responsible for the operation as well as to cross-check the mining application with other applications in the same State and other States;

(2) names and addresses of adjacent surface owners;

(3) summary listing of past mining and reclamation permits including those suspended or revoked;

(4) a copy of the applicant's advertisement published in a local newspaper;

(5) a plan for the entire mining operation for the life of the mine including identification of the subareas anticipated to be included on a permit by permit basis, their sequencing, and mining and reclamation activities and a description of method of mining, starting dates, location, termination dates and schedule of activities;

(6) evidence of the applicant's legal right to mine;

(7) a full description of the on- and off-site hydrologic consequences of mining and reclamation, including the impact on the quality and quantity of water in ground and surface water systems; and

(8) maps and data sufficient to fully describe the surface and sub-surface features of the area to be mined, the chemical and physical properties and geologic setting, so that basic information is available to the regulatory authority in order to determine the impact of the mining operation and to be able to verify the conclusions reached

by the operator with respect to the environmental protection measures proposed in the mining and reclamation plan. Such information shall also include all relevant legal documents, test borings, keyed to the appropriate maps, and independent laboratory analysis of such borings (with certain data regarding the coal seam to be held confidential). The Committee does not mean to require the applicant to assess the probable cumulative impacts of all anticipated mining in the area, recognizing that this responsibility is properly the regulatory authority's.

Subsection (c) requires the applicant to submit either a certificate issued by an insurance company certifying that he has a public liability insurance policy for the proposed surface mining and reclamation operations or appropriate evidence that he has satisfied other State or Federal self-insurance requirements which meet the requirements of the regulations promulgated pursuant to the Act. Damage caused by the operator's use of explosives is to be included in the insurance coverage.

This insurance must be maintained in full force and effect during the term of the permit and all renewals until reclamation operations are complete.

Subsection (d) makes the reclamation plan an integral part of the application.

Under subsection (e) the applicant must file a complete copy of the application with the local court house of the county in which mining is proposed at the time of submission to the State, so that this application will be available for public review.

#### SECTION 408. RECLAMATION PLAN REQUIREMENTS

There is general agreement that since careful preplanning is the key to successful reclamation, submission of a reclamation plan prior to issuance of a mining permit is an essential element of effective regulation. This subsection enumerates the minimum items of information required in any reclamation plan submitted by an applicant for a permit to conduct surface mining operations. A reclamation plan is required as part of the permit application. The plan is the basis by which the regulatory authority determines the feasibility and adequacy of reclamation which is proposed to be done by the applicant under the terms of his permit. It also provides that information provided in the reclamation plan be in the degree of detail necessary to demonstrate that reclamation can be accomplished. The burden of proof is on the applicant. The following specific items of information are required.

408(a) (1) and (2). A description of the condition of the land area which will be effected by the proposed mining and reclamation must be provided together with the size, sequence and timing of the subareas to be mined. This description is intended to include general topography, vegetative cover, the cultural development. If the area has been previously mined, the description should cover both the uses of the land existing at the time of the application and those which existed prior to any mining at the site. The description must also include an evaluation of the capability of the site to support a variety of uses prior to any mining disturbance. This description should give con-

sideration to soil and foundation characteristics, topography, and vegetative cover.

The description is to serve as a benchmark against which the adequacy of reclamation and the degradation resulting from the proposed mining may be measured. It is important that the potential utility which the land had for a variety of uses be the benchmark rather than any single, possibly low value, use which by circumstances may have existed at the time mining began.

408(a)(3). A similar description is also required of the use to which the land affected by the proposed mining is to be put following reclamation and its capacity to support a variety of alternative uses. The relationship of the proposed use to land use policies and plans existing at the time the reclamation plan is filed must also be prescribed. The comparison of this description with that required by 408(a)(1) will provide an evaluation of the net impact which the proposed mining and reclamation will have upon the usefulness of the area affected.

408(a)(5). This section also requires a statement of the techniques and equipment which will be used in the mining and reclamation operations. This should be a complete statement adequate to insure that the reclamation proposed to be accomplished is capable of achievement and that each of the requirements set forth in subsection 415(b) and any regulations promulgated pursuant to that subsection can be complied with.

The techniques and procedures which will be used by the applicant to insure compliance with all applicable air and water quality laws and regulations, and health and safety standards must be described in sufficient detail to permit an evaluation of their adequacy and probable effectiveness.

The reclamation plan must also set forth a description of the particular considerations which have been given to the conditions found at each site: for example, the effect of precipitation, temperatures, wind, and soil characteristics upon revegetation at the site. Furthermore, there must be a statement of the consideration which has been given to new or alternative reclamation technologies.

There must be a discussion of the potential economically practicable recovery of the mineral resources of the site to be mined. To the extent that any portion of the resource will not be recovered, the reasons and justification for nonrecovery shall be set forth.

A detailed time schedule for the completion of the reclamation which is being proposed is to be provided.

A statement is required demonstrating that the permittee has considered all applicable State and local land use plans and programs including the desires of the owner of the surface with regard to post-mining land uses; and disclosure to the regulatory authority of all rights and interest in lands held by the applicant which are contiguous to the lands covered by the permit application is required. The purpose of this disclosure is to provide the regulatory authority with information on the prospective long-term plans of the applicant in the immediate vicinity. The bill would not require public disclosure of this information; however, it does not preclude State law from requiring disclosure of part or all of it.

A disclosure to the regulatory authority of the results of test borings made by the applicant in the area covered by the permit and the results of chemical analyses of the coal or other minerals and overburden is required. This information is essential for the critical evaluation of the adequacy of the reclamation plan by the regulatory authority and the interested public. Because of its proprietary nature, information about the mineral (but not the overburden) will be kept confidential if requested by the applicant.

#### SECTION 409. PERFORMANCE BONDS

This section sets out the requirements for one of the most important aspects of any program to regulate surface mining and reclamation—the performance bond. The requirements of this section will apply to interim permits as well as State and Federal programs inasmuch as all permits issued prior to approval of a State program or implementation of a Federal program must comply with provisions of this section.

Subsection (a) provides that once an application is approved a performance bond must be filed before a permit is issued. The amount of bond must be sufficient to assure completion of the reclamation plan if the work had to be performed by the regulatory authority at no expense to the public. The regulatory authority sets the amount of the bond.

The bond must cover the entire area to be mined during the initial term of the permit. As additional land is mined the bond is increased proportionately for succeeding permit renewals.

Subsection (b) requires that bond liability extend for a period coincident with the operator's liability (5 years after completion of reclamation including revegetation or for 10 years in areas where the average annual rainfall is 26 inches or less). This extension is necessary to assure that the bond will be available if revegetation or other reclamation measures fail after initial accomplishment. The longer time period for liability in arid areas recognizes that permanent reclamation, particularly revegetation, is more difficult and uncertain in such areas. This subsection also permits the deposit of cash and negotiable Government bonds or certificates of deposit in lieu of posting a bond. These meet the objectives of the bond, i.e., having a fund available to accomplish reclamation, just as effectively as a bond.

Subsection (c) recognizes that some applicants can satisfy the objectives of the bond requirement through self-insurance or bonding.

Subsection (e) provides that the bond or deposit may be adjusted at any time if as a result of experience or changed circumstances, it is determined to be inadequate.

#### SECTION 410. PERMIT APPROVAL OR DENIAL

This section provides for the basic requirements for a permit application, outlines the guidelines for permit approval and denial. The section requires that the regulatory authority make a written finding prior to approving a permit, that the following conditions have been met:

- (a) all conditions of this Act have been met;
- (b) reclamation will be accomplished according to this Act;

(c) assessment of the probable cumulative impacts of all anticipated mining in the area has been made by the regulatory authority and all hydrology requirements have been adhered to;

(d) the area is not incorporated in an area designated unsuitable for mining;

(e) the operation would not adversely affect farming or ranching operations on alluvial valley floors west of the 100th meridian, with a grandfather proviso allowing the continuation of operations which during the year preceding enactment of the Act (1) produced commercial quantities of coal, having been located on or adjacent to alluvial valley floors; or (2) having obtained State approval of a permit to so locate, or (3) in addition, those operations which are prospective but have undertaken substantial financial and legal commitments. The Secretary will define this term in his regulations.

Subsection 410(c) requires that any applicant for a permit file with the regulatory agency a schedule of any violations of Federal law for 1 year prior to the application, and a showing of corrections of such violations. The regulatory authority is barred from issuing a permit where it is not convinced that the applicant has satisfied the requirements of the agency involved or where it has determined there is a pattern of willful violation of the Act with irreparable environmental damage resulting.

This subsection prohibits issuance of a mining permit if the application indicated the applicant to be in violation of the Act or a wide range of other environmental requirements. It is not the intention of the Committee that an operator who is charged with the types of violations described in section 410(c) be collaterally penalized through denial of a mining permit if he is availing himself, in good faith, of whatever administrative and judicial remedies may be available to him for the purpose of challenging the validity of violations charged against him. However, the Committee also does not intend that a permit applicant can avoid the purpose of section 410(c) simply by filing an administrative or judicial appeal. It is expected that the regulatory authority will carefully examine those situations where an administrative or judicial appeal is pending in order to insure to the fullest extent possible that such appeals are not merely frivolous efforts to avoid the requirements of section 410(c).

#### SECTION 411. REVISION OF PERMITS

This section establishes a process for the revision of a permit during its term as well as review by either a State regulatory authority or the Secretary of existing permits issued prior to the assumption of regulatory jurisdiction by the current regulatory authority.

An operator may submit an application for a permit revision to the regulatory authority and within a period of time established by that agency, the application shall be approved or disapproved. The regulatory authority is to establish guidelines for procedures which may vary depending upon the scale and extent of the proposed revision. In all events, however, the process will be subject to the Act's notice and hearing requirements and a proposed revision which would extend

the area covered by existing permit (other than incidental boundary revisions) is to be made through the normal permit application process.

The regulatory authority may require revision of a permit during its term provided that it is based on a written finding and that it follows the State or Federal program's notice and hearing requirements.

#### SECTION 412. COAL EXPLORATION PERMITS

This section requires that all coal exploration operations be subject to regulation under a State or Federal program and be required to obtain a permit prior to the beginning of exploration activities, by submitting an application similar to, but simpler than, that for a mining operation, which application is to be accompanied by a fee.

#### SECTION 413. PUBLIC NOTICE AND PUBLIC HEARINGS

This section assigns the responsibility for giving public notice, holding hearings and submitting comments to the mining permit applicant, the regulatory authority, and interested third parties.

The applicant is required to:

(a) place an advertisement approved by the regulatory authority identifying the ownership, precise location, and boundaries of the land to be affected in a local newspaper of general circulation in the locality of the proposed new surface mine. This advertisement must appear at least once a week for 4 consecutive weeks.

(b) submit, along with the mining permit application, a copy of this advertisement;

(c) cooperate with the regulatory authority concerning the inspection of the proposed mine area;

(d) assume, if a public hearing is held, the burden of proving that the application is in compliance with State and Federal laws (including provisions of this Act).

The regulatory authority must:

(a) receive, and make available to the public, comments on the application from local agencies, in the same manner and at the same location as are copies of the mining application;

(b) notify, upon receipt of the application for a mining permit various local governmental bodies whose functions might be affected by the mining operation, informing them of the intention to surface mine, indicating the application's permit number and where a copy of the mining and reclamation plan may be inspected;

(c) provide for non-adjudiciary public hearing upon any request not considered to be frivolous, within 30 days; the hearing may be held at the locality of the mining operation or at the State capitol. An informal conference can substitute for the hearing.

(d) respond in writing to written objections on the mining application received from any party not less than 10 days prior to any proposed hearing. Such response shall include (1) the regulatory authority's preliminary assessment of the mining application; (2) proposals as to the terms and conditions of the permit to mine; (3) the amount of bond to be set for the operation; and

(4) answers to material factual questions presented in the written objections;

(e) make available to the public prior to or at the time of the hearing the regulatory authority's estimate as to any other conditions of mining or reclamation which may be required or contained in the preliminary proposal.

For the purpose of such hearings, the regulatory authority may administer oaths; subpoena witnesses and written or printed materials; compel attendance of witnesses or production of materials; take evidence, including site inspection of the land to be affected or other mining operations carried on by the applicant: arrange with the applicant for access to the proposed mining areas and keep a complete record of each public hearing. The applicant is to receive an opportunity to answer the objections which have been raised, having 30 days to file his response.

Interested citizens may:

(a) review mining applications at specific locations:

(b) file written objections and request hearings concerning mining applications;

(c) request inspection of the proposed mining area relative to the hearing and accompany the inspection tour;

(d) review the regulatory authority's written response to the objections submitted;

(e) appear at public hearings and present views and comments with respect to mining application.

This section is intended to give the Secretary discretion to provide for a hearing procedure which is less formal than an adjudicatory hearing as long as it complies with the provisions of subsection (e) while barring the Secretary from prescribing State regulatory hearing procedures beyond the requirements of subsection (e).

Generally speaking, only where 5 U.S.C. Sec. 554 is involved would the Secretary be required to adopt formal adjudicatory proceedings under the Administrative Procedure Act.

#### SECTION 414. DECISIONS OF THE REGULATORY AUTHORITY AND APPEALS

If hearings on the mining application have been held, within 30 days after their completion, the regulatory authority shall provide to the applicant and all parties to the administrative proceeding its written findings granting or denying the permit in whole or in part and stating its reasons.

In instances where no hearings have been held, the regulatory authority is to notify the applicant in writing of its decision. If the application has been denied in whole or in part, specific reasons for denial must be included. This response must be given within 6 months after submission of the permit application.

Approval of the application results in the issuance of the mining permit. If, however, the permit is denied, then: (a) within 30 days of denial the applicant may request a hearing on the disapproval; (b) upon such a request the regulatory authority will hold the hearing within 30 days notifying all interested parties and following the procedure outlined above.

Any applicant or any person who has participated in the administrative proceedings and has filed written objections shall have the right of judicial review.

SECTION 415. ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

This section sets forth the minimum criteria which must be required by State or Federal programs, the Federal Lands Program, and the interim permit programs regulating surface mining and reclamation operations for coal.

These criteria are as follows:

- (1) maximize coal utilization;
- (2) restore the land to a condition at least fully capable of supporting prior-to-mining land uses;
- (3) restore all mined lands to approximate original contour, except where the operation removes the top of a mountain, ridge or hill;
- (4) stabilize all spoil piles;
- (5) segregate topsoil for ultimate replacement;
- (6) restore topsoil;
- (7) prevent offsite damages;
- (8) create, if necessary, appropriate impoundments within the definitions of this Act, if authorized in the approved permit;
- (9) seal all auger holes;
- (10) minimize the disturbances to the prevailing hydrologic balance of the minesite and associated offsite areas and construct siltation structures certified by a qualified engineer;
- (11) stabilize all waste piles;
- (12) refrain from mining within 500 feet of an underground mine;
- (13) provide for safe mine waste impoundments with respect to both engineering specifications and location;
- (14) prevent hazards to waters from acid-forming materials or fire hazards;
- (15) insure that the use of explosives be carried out by certified blasting personnel after proper notice and precautions;
- (16) assure that reclamation efforts proceed as contemporaneously as possible with the mining operation;
- (17) insure that the maintenance of haul roads will prevent erosion and siltation;
- (18) no alteration of water flow;
- (19) revegetation of natural species following mining;
- (20) operator responsibility for reclamation for five years in areas where rainfall is more than 26 inches a year, and 10 years where rainfall is less than 26 inches a year;
- (21) leave an undisturbed natural barrier to prevent slide and erosions.
- (22) any other criterion which the Secretary deems necessary for the implementation of the purposes of this Act.

Permits may be granted with exemptions from performance standards which require the restoration of the approximate original contour, the covering of all highwalls, and elimination of spoil piles and in cases

of mountaintop removal where industrial, commercial, residential, or public facility development is possible for post-mining land use. Special requirements for treatment of the mountaintop mined area and for the placement and stabilization of excess spoil not retained on the mountaintop are to be conditions imposed upon the permit.

Variations from the requirement that the reclamation proceed as contemporaneously as possible may be granted, thus allowing the provisional retention of highwalls and benches in limited and specific areas where underground mine openings or facilities are planned in conjunction with a surface mining operation. The Committee does not regard this authority to postpone reclamation and restoration of a mined area as justifiable for any reason except facilitating maximum recovery of the coal resource by underground mining.

The Committee recognizes that any spoil which is placed upon a steep slope will require planning and certification by a qualified engineer to insure long-term stability, and that in the case of head-of-hollow or valley fill associated with mountaintop removal operations the large mass of unconsolidated material can pose a serious threat to downstream areas if failure should occur. It is therefore fully intended that the Secretary or the regulatory authority, as the case may be, will impose additional requirements and performance standards upon the operator as further experience and research may dictate.

Subsection (c) sets forth certain other performance standards designed to protect the environment, and applying only to steep slope surface coal mining (which term is not to include mining operations on flat or gently rolling terrain which will leave a plain or predominantly flat area or operations which remove the entire top of a mountain, ridge or hill) as follows:

(1) spoil or waste materials may not be placed on the slope below the bench or cut, except where temporarily necessary to gain access to the coal seam and then only under specified conditions to prevent slides, erosion and water pollution;

(2) the site must be returned to the approximate original contour by covering highwalls completely and limiting disturbance above the highwall;

(3) "steep slope" is defined as any slope above 20 degrees or a lesser slope as determined by the regulatory authority after due consideration of the soil, climate and other environmental characteristics of a region or State.

One of the key environmental protection standards of S. 7 is the requirement to return a mine site to its "approximate original contour". There has been considerable misunderstanding of this concept and exaggerated descriptions of its impact.

Some coal industry concern seems to be focused on two aspects of the definition: (1) the need to regrade the mined site so that it "closely resembles" prior surface configuration and "blends into" surrounding terrain and (2) the need to generally "eliminate depressions." Confusion has existed as to whether or not it will be possible under this definition of approximate original contour to conduct area mining of thick seams covered by a relatively thin layer of overburden.

A great deal of misunderstanding has occurred regarding the performance standard relating to the construction and location of water

impoundments. The provisions of S. 7 require that both new and existing impoundments must be located in such a manner that they "will not endanger *public health and safety* should failure occur." It has been argued that this provision could prohibit the use of impoundments throughout the coal-mining industry since under even the best circumstances a minimal risk of danger to one or more individuals will always occur if an impoundment should fail. This argument is based on a patently unreasonable interpretation of the statutory language.

The Committee does not intend to prohibit all impoundments. The Committee does intend to require not only that impoundments be built in accordance with stringent construction standards, but also that mining companies be required to design their mining plans so as to avoid locating impoundments in areas where failure would cause entire towns to be wiped out. Impoundments are to be constructed only in safe locations. If they cannot be located safely, then they should not be built.

#### SECTION 416. SURFACE EFFECTS OF UNDERGROUND COAL MINING OPERATIONS

Certain of the environmental protection standards for surface mining operations also apply to underground mines. In this section, the Secretary is required to incorporate in his regulations the following key provisions concerning the control of surface effects from underground mining:

Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.

Portals, entryways, shafts or accidental breakthroughs between the surface and underground mine workings must be sealed when they are no longer needed for the conduct of the mining operation.

Environmental standards controlling the surface disposal of mine wastes, including the use of impoundments, are the same as those discussed in the previous section.

The Secretary is specifically required to consider the distinct difference between surface and underground mining in promulgating his regulations and with respect to surface impacts from repair, haulage, processing and similar facilities, to accommodate the difference in establishing requirements for minimizing such impacts.

After surface operations or other mining impacts are complete at a particular site, the area must be regraded and a diverse and permanent vegetative cover established.

Offsite damages must be prevented, fire hazards eliminated, and disturbances to the hydrologic balance minimized both on-site and in associate offsite areas.

In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) pro-

vides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns, and communities and under and adjacent to industrial buildings, major impoundments, or permanent streams.

Subsection (d) provides that all other provisions of the Act and regulations pertaining to State and Federal programs, permits, bonds, inspection and enforcement, public review and administrative and judicial review are applicable to underground mines with such modifications to the application requirements, permit approval and denial procedures and bond requirements deemed necessary by the Secretary in order to accommodate differences between surface and underground mines.

The Committee does not intend to allow any conflict between the overriding importance of ensuring the safety and welfare of mine workers and the protection of environmental quality. Consequently, the Secretary must obtain the written concurrence of the head of the agency administering the Coal Mine Health and Safety Act before issuing any regulations under this section.

#### SECTION 417. INSPECTIONS AND MONITORING

For the purpose of administering and enforcing any approved State or Federal program under this Act, every permittee must establish and maintain appropriate records, make monthly reports to the regulatory authority, install, use and maintain any necessary monitoring equipment or method, evaluate the results of such monitoring in accordance with the procedures established by the regulatory authority, and provide such other information relative to surface mining as the regulatory authority deems reasonable and necessary.

Special additional monitoring and data analysis are specified for those mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydrologic balance or water use either on or off the mining site. Access to the mine site, monitoring equipment, areas of monitoring, and records of such monitoring and analysis must be provided promptly to authorized representatives of the regulatory authority with or without advance notice and upon request.

A clearly visible sign must be maintained at the mine entrance.

This section instructs the regulatory authority to carry out inspection of each mining operation according to the following criteria:

- (1) averaging not less than one per month for each operation;
- (2) occurring without prior notice to the operator except for necessary onsite meetings with the permittee;
- (3) including filing of reports adequate to insure the enforcement of the requirements under this Act;
- (4) rotating inspectors at adequate intervals.

After each inspection, the inspector shall notify the operator and the regulatory authority of each violation of any requirement of the Act. Copies of all inspection reports are to be made available to the affected and interested public at central locations.

Section 417(h) provides that any person who is or may be adversely affected by an inspection of a surface mining operation shall have a

right to obtain informal review of the failure of the Secretary or his authorized representative to issue a citation or order under the Act, or conduct an adequate and complete inspection of a surface mining operation. The Secretary shall establish by regulation procedures for such review and shall supply a written statement of the reasons why a citation or order was not issued, or why an adequate complete inspection was not made. The Committee intends that the informal review be conducted by a neutral person and not be an immediate supervisor of the inspector whose actions are being reviewed.

The provision is intended to provide a speedy, efficient means for citizens who are or may be affected by a surface mining operation to obtain review of a failure to issue a notice or order or to conduct an adequate and complete inspection. This provision could be very useful in avoiding litigation.

#### SECTION 418. PENALTIES

Any permittee who violates any permit condition or who violates any other provisions of this title may be assessed a civil penalty by the Secretary not to exceed \$5,000 for each violation according to this section, with each day of violation deemed a separate violation. The amount of the penalty shall depend on the criteria of the Act.

Under Subsection (d) the permittee must forward the amount of the proposed penalty to the Secretary within 30 days of receipt of the notice of proposed penalty. If the permittee wishes to contest the penalty, the payment will be placed in an escrow account until the matter is finally decided. The Secretary may collect unpaid civil penalties by asking the Attorney General to institute an action in the appropriate District Court.

A civil penalty shall become final only after an opportunity for a public hearing has been afforded the person charged with a violation, and the hearing has been held, or waived by act or by operation of law.

Any person who willfully and knowingly violates a condition of a permit, or fails or refuses to comply with an order issued by the Secretary under this Act, shall be fined not more than \$10,000, or imprisoned for not longer than 1 year, or both.

Under Subsection (i) the Secretary shall assess a minimum mandatory penalty of no less than \$750 for each day an operator fails to correct a violation within the period permitted for its correction.

Appeals from final civil penalty assessments of the Secretary may be taken to the United States Court of Appeals where the surface mine is located by any person who is aggrieved by the order.

Subsection (g) provides that the same penalties apply to the officers of a corporation which violates the provisions of this Act, as to an individual.

Under subsection (h), any person who knowingly makes a false statement, representation, or certification with respect to any application, record, report, plan or other document filed or required to be maintained under this Act shall be fined not more than \$10,000, or imprisoned for not longer than 1 year, or both.

## SECTION 419. RELEASE OF PERFORMANCE BONDS OR DEPOSITS

This section provides that a permittee may obtain the release of all or part of his performance bond upon request, after public notification and an inspection by the regulatory authority. Sixty percent of the bond may be released when backfitting, regrading and drainage control are completed. The remaining 40 percent is released after revegetation has been accomplished, to the extent that no abnormal suspended solids are further contributed to streamflow or runoff outside the permit area; and the operator's responsibility for reclamation has expired. If a silt dam is to become a permanent impoundment, the regulatory authority may only totally release the bond if arrangements have been made for future maintenance by the landowner.

Under subsection (d), if an application for bond release is denied, the permittee is to be notified in writing of the reasons therefor.

This section also provides that any person with a valid legal interest which might be adversely affected may file written objections to a proposed bond release, in which case a public hearing must be held after appropriate public notice. Governmental agencies having special legal responsibilities regarding the operation must also receive an opportunity to file written objections to the bond release.

In lieu of holding a formal hearing, the regulatory authority may institute an informal conference to deal with such objections, in the interest of expediting the decision on the matter.

## SECTION 420. CITIZEN SUITS

Section 420 permits any person having a valid legal interest which is or may be adversely affected to commence a civil action in a United States District Court against (1) the United States, or any other governmental instrumentality or agency alleged to be in violation of any provision of the Act or regulations promulgated thereunder or order issued by the regulatory authority or any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to the Act; or (2) a regulatory authority where there is a failure to perform any act or duty under this Act excepting discretionary actions, including the Secretary. This section does not affect any rights including the right to bring suit or remedies that the person bringing the suit may have under any other law. It is the intent of the Committee that the phrase "any person having a valid legal interest which is or may be adversely affected" shall be construed to be coterminous with the broadest standing requirements enunciated by the United States Supreme Court.

Any resident of the United States injured in any manner through failure of any operator to comply with the provisions of this Act, regulations issued thereto, orders, or permits issued by the Secretary, may bring an action for damages in U.S. District Court.

Citizen suits in most instances may not be commenced before the expiration of 60 days after an operator is notified of the alleged violation, or, if the Secretary or State has commenced and is diligently prosecuting a civil or criminal action to require compliance with a mining permit, orders, or provisions of the Act. However, in such instances, the person may intervene as a matter of right.

Subsection (d) provides that the court in issuing any final order may award litigation costs which may include reasonable attorney and expert witness fees to any party whenever appropriate. This is intended to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who bring meritorious suits to insure that the Act's requirements are being met. The provision is not meant to deter citizens from bringing good faith actions to insure the Act is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. Under this section, a defendant can be awarded reasonable fees from the citizen only if he can show that the citizen brought the action in "bad faith." This is similar to other citizen suits provisions involving the award of attorney's fees.

Subsection (d) also provides that the court may require a bond where a temporary restraining order or preliminary injunction is sought. It is the Committee's intent that the courts will carefully consider the circumstances and probable outcome of litigation in deciding whether to require a bond. This will minimize the possibility that this section might be subject to misuse either by the commencement of frivolous actions against environmentally sound operations or as a substitute for other provisions of this bill which impose more precise requirements for citizen participation in the permit application and performance bond release proceedings.

This section is not intended to override the specific provisions of this bill which provide more precise requirements for citizen participation in the permit application and performance bond release proceedings, or to limit access to remedy for damages under any other statute. It does not limit any person's right under Federal or State law to seek legal or equitable relief; neither does it convey the right for a citizen to sue the Government for costs of litigation.

The Committee believes that citizen suits can play an important role in assuring that regulatory agencies and surface operators comply with the requirements of the Act and approved regulatory programs. The possibility of a citizen suit should help to keep program administrators "on their toes."

#### SECTION 421. FEDERAL ENFORCEMENT

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

Subsection (a) sets forth a number of specific characteristics for the Federal enforcement program.

(1) The Secretary may receive information with respect to violations of provisions of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens.

(2) Upon receiving such information, the Secretary must notify the State on such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary shall order Federal inspection of the operation. If the inspection is based on data from a third party, that party shall be afforded the opportunity to accompany the Federal inspector. The 10-day notification does not apply if the State has failed to act to avoid imminent harm or environmental damage.

(3) If on the basis of inspection, the Secretary determines that a violation has occurred, which creates an imminent danger to public health or safety or can cause imminent significant environmental harm, he shall immediately order cessation of the operation or a relevant portion thereof, until the violation is abated or the order modified by the Secretary. If the cessation order does not abate the imminent danger or environmental harm, the Secretary shall order the permittee to take whatever steps the Secretary deems necessary to abate the danger as quickly as possible.

(4) In the case of a violation which does not cause such imminent danger, the Secretary must issue a notice setting a period of no more than 90 days for abatement of the violation.

If the permittee does not abate the violation within the time permitted, the Secretary or his authorized representative must issue a cessation order, and establish the steps necessary to abate the violation. The Committee intends that this order will place an affirmative obligation on the operator or permittee to abate the violation in the manner prescribed by the Secretary.

Whenever the Secretary or his authorized representative determines that a pattern of violations of any requirements of the Act or any permit conditions, and the violations were caused by the unwarranted failure of the permittee, or were willfully caused, the Secretary must issue an order to show cause why the permit should not be suspended or revoked.

A pattern of violations occurs whenever the permittee violates the same or a related requirement of the Act or permit several times, or when the permittee violates different requirements of the Act or permit at a rate above the national norm.

(5) All orders issued by the Secretary take effect immediately and all orders shall be specific and substantive with respect to the nature of the violation, the remedial action required, time for compliance and seriousness of the violation.

Under Subsection (b), if violations occurring under an approved State program appear to result from the failure of the State to enforce the program effectively, the Secretary shall so inform the State. The Secretary shall give public notice of his finding with respect to the State program and 30 days after giving public notice shall hold a hearing in the State. If as a result of the hearing, the Secretary finds the State is failing to enforce its program effectively, he shall give public notice of his finding. Until the State satisfies the Secretary that it will enforce all provisions of the Act, the Secretary of Interior shall enforce any permit condition required by this Act, shall issue new or renewed permits for surface mining operations, and issue other orders as necessary for compliance with the provisions of this Act.

Subsection (c) provides that upon request of the Secretary, the Attorney General of the United States may enforce such Secretarial orders for various actions in a district court of the United States.

The Secretary may request the Attorney General to apply for injunctive relief whenever a permittee violates an order of the Secretary, hinders implementation of the Act, refuses permit inspection of the mine, or refuses to furnish information.

Efficient enforcement is central to the success for the surface mining control program contemplated by S. 7. For a number of predictable reasons—including insufficient funding and the tendency for State agencies to be protective of local industry—State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment. The Committee believes, however, that the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the experts in the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the Committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

Once State programs or Federal programs replace the interim regulatory procedure, section 417 requires that Federal inspections must be made for purposes of developing, administering, or enforcing any Federal programs, and assisting or evaluating the development, administration, or enforcement of any State program.

By mandating primary enforcement authority to field inspectors, this bill recognizes, as does federal mine health and safety legislation, that inspectors are in the best position to recognize and control compliance problems. The bill establishes three strong but flexible enforcement mechanisms which provide inspectors with the tools necessary to respond to the most minor and the most serious violations.

*Cessation Order (Section 421 (a) (2))*

During any Federal inspection, if the inspector determines that any violation of the Act or permit condition or any other condition or practice exists which creates an imminent danger to the health or safety of the public, or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the inspector must order a cessation of the mining operation causing or contributing to the danger or harm. The cessation order may apply to all or a portion of the surface coal mining and reclamation operation in question. The imminent danger or environmental harm closure provision is so critical that the Federal inspector is required to act even if the inspection is being made for purposes of monitoring a State regulatory authority's performance. To provide otherwise would be to perpetuate the possibility of tragedies such as the Buffalo Creek Flood, which can be at least partially attributed to the sad fact that government regulation of the collapsed mine waste banks

fell between the cracks of the not quite meshed functions of various State and Federal agencies.

The inspector shall issue an imminent danger order whenever he has a reasonable expectation that death or serious physical harm can occur before the condition or practice is likely to be abated. The Committee intends that an imminent danger order should be issued whenever a rational person would not expose himself or herself to the danger during the period it takes to correct the danger. Miners or those affected by the mining activity should not be subjected to greater dangers because of their occupation or the location of their homes than the dangers faced by the average American worker or citizen.

The inspector is also given the duty to order the permittee to take affirmative steps to abate the danger in the most expeditious manner possible whenever merely ceasing mining operations does not remove the danger.

When determining a significant, imminent, environmental harm, the fact that the hazard to the environment is physically capable of being repaired should not preclude a cessation order. Rather, the degree of difficulty with which the damage may be undone should be considered along with the significance of the damage. Imminent is to be construed for the purposes of environmental harm to mean a harm that could occur if the condition is not abated within a reasonable time. The term "significant" should be construed to include factors other than whether environmental damage to land, air or water resources can be repaired. A "significant" effect could be the product of one or more such factors as the geographic scope, intensity, or long lasting effects of the damage.

Since neither the Congress nor any regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining, the bill does not restrict the closure authority of section 421(a)(2) to violations of the Act or permit. Instead any condition or practice giving rise to imminent danger or environmental harm is sufficient to invoke the authority.

*Notice of Violation (Section 420(a)(3))*

Where the Secretary is the regulatory authority or a Federal inspection is being conducted pursuant to sections 402, 404(b) or subsection (b) of section 421, and a Federal inspector determines that a permittee is violating the Act or his permit but that the violation is not causing imminent danger to the health or safety of the public or significant, imminent environmental harm, then the inspector must issue a notice to the permittee setting a time within which to correct the violation. The inspector can extend this initial period for up to ninety days, but the total abatement period cannot exceed ninety days. If the violation has not been corrected within the established time, in the opinion of the inspector, the inspector must immediately order a cessation of the mining operation or the portion relevant to the violation. The inspector when issuing a cessation order under this section shall determine what measures are necessary to abate the violation in the most expeditious manner possible. The inspector shall include the necessary steps in the order of cessation.

The enforcement mechanism of section 420(a) (3) will be utilized by the inspector in the great majority of compliance problems. It not only enables the inspector to gain immediate control of the problem, but also provides him with essential flexibility to appropriately deal with minor as well as major violations.

In order to prevent federal-state overlap, the federal inspector is only to use his authority under section 421(a) (3) where the Secretary is the regulatory authority. However in other circumstances the Secretary must insure, in accordance with the provisions of section 421(a) (1), that the State is notified of the compliance problem so that it may act under the terms of the approved state program.

*Show Cause Order (section 421(a) (4).*—Where the Secretary is the regulatory authority and a federal inspector determines that a *pattern* of violations of the Act or permit exists or has existed and that such violations are caused by the *unwarranted failure* of the permittee to comply or are *willfully* caused by the permittee, the inspector must issue an order to the permittee to show cause as to why his permit should not be suspended or revoked. If the permittee fails to show cause as to why the permit should not be suspended or revoked, the inspector must immediately suspend or revoke the permit.

This provision requires that suspension or revocation of a mining permit be preconditioned upon conduct which demonstrably fails to meet the standards of care and diligence which are to be expected of permittees who seek to comply with the law. This is a sound approach particularly in light of the stringency of the closure authority previously discussed.

While the bill grants a great deal of authority to federal inspectors, it is important to remember that adequate protection must be afforded the regulated parties against the possibility of abuse of this authority. To this end, formal internal administrative review and judicial review of inspectors' decisions are permitted by sections 425 and 426 respectively. Furthermore section 421(a) (5) insures that due process will begin at the field level and provides the opportunity to modify, vacate, or terminate a clearly erroneous notice or order without the burden of more formal administrative review.

Finally it should be noted that while section 421 speaks in terms of federal enforcement, section 421(d) provides that as a condition of approval of any state program submitted pursuant to section 403 of this Act, the enforcement provisions thereof shall at a minimum incorporate sanctions no less stringent than those set forth in section 421 and shall contain the same or similar procedural requirements relating thereto. The Committee expects that the Secretary will use the format of section 421 as the basis for measuring whether state enforcement mechanisms are sufficiently strong and flexible to warrant approval of that portion of submitted state programs.

*Administrative Review.*—In order to assure expeditious review and due process for persons seeking administrative relief of enforcement decisions of Federal inspectors under the provisions of section 421, section 425 of the bill establishes clear, definitive administrative review procedures. Those persons having standing to request such administrative review include permittees against whom notices and orders have been issued pursuant to section 421 and persons having an interest

which is or may be adversely affected by such notice or order. Any person with standing may request a public hearing which must be of record and subject to the Administrative Procedure Act. The person seeking review shall have the ultimate burden of proof in proceedings to review notices and orders issued under Section 421. Pending review the order or notice complained of will remain in effect, except that in narrowly prescribed circumstances temporary relief may be granted from a notice or order issued under section 421(a) (3). In no case, however, will temporary relief be granted if the health or safety of the public will be adversely affected or if significant, imminent environmental harm will be caused. This provision will insure that the mining and reclamation performance standards will continue to protect the public health and safety or the environment during any administrative proceeding in which their validity is challenged, until the issue is determined on the merits.

In all cases where a section 421(a) (4) show cause order has been issued a public hearing must be held. The Secretary must issue a decision within sixty days following the completion of the hearing as to whether or not to suspend or revoke the permit. Pending this decision, the permittee may continue to operate if he is otherwise in compliance with the Act or his permit. The alternatives of suspension or revocation are within the discretion of the Secretary. It is expected that the degree of seriousness of the types of violations and kinds of conduct giving rise to the show cause order will be the dominant factor considered by the Secretary in making his decision. These factors should also be considered by the Secretary in his determination of the lengths of suspension periods. On the other hand, in determining the period following revocation within which reclamation must be completed, weight should also be given to the practicalities of the reclamation which needs to be performed. The Committee also expects that the Secretary will give highest priority to administrative review of section 421(a) (4) show cause orders.

#### SECTION 422. DESIGNATING AREAS UNSUITABLE FOR SURFACE COAL MINING

As a condition of having a State program approved by the Secretary of Interior, subsection (a) requires States to establish a planning process enabling decisions on the unsuitability of lands for all or any type of surface coal mining but not for exploration.

Lands must be so designated if reclamation as required by this Act is not economically or physically possible.

Lands may be so designated if: (1) Surface coal mining would be incompatible with existing State land use plans; (2) the area is a fragile or historic land area; (3) the area is in "renewable resource lands"—those lands where uncontrolled or incompatible development could result in loss or reduction of long-range productivity, and could include watershed lands, aquifer recharge areas, significant agricultural or grazing areas; (4) the area is in "natural hazard lands"—those lands where development could endanger life and property, such as unstable geological areas.

Each study for designation is made only on a case by case basis upon specific petition. In addition, S. 7 contains specific requirements for

petition. The Secretary is intended to issue regulations defining those petitions to be considered valid, to preclude frivolous requests. Also this section does not apply to lands on which surface coal mining operations were being conducted on the date of enactment of this Act or for which substantial legal and financial commitments had been made prior to January 1, 1977. Section 410(b) provides that surface coal mining permits will not be issued for lands being considered for designation as unsuitable for surface coal mining. In order to prevent moratoria caused by administrative delay, Section 422(a) requires the regulatory authority to issue a decision on any designation petition within 12 months. If a decision is not issued within that time, surface coal mining permits may be issued.

In complying with this section, a State must have established an appropriate agency, data base and inventory system, methods for implementing land use planning decisions and affording adequate public review.

With regard to Federal lands, Section 422(b) requires the Secretary to conduct a review of all Federal lands to determine areas unsuitable for mining. But in order to avoid locking up Federal coal in the case of a protracted study (such as the wilderness study), there is no moratorium on leasing during the period of review under the provisions of this subsection.

Under subsection (c), any person having an interest which may be adversely affected may petition either the State or Federal Government to have an area so designated based on the above criteria or to have a designation terminated. Public hearings on any area to be so designated must be held.

In addition, prior to the designation of any area as unsuitable for mining, the regulatory authority must prepare from existing and available information a statement on the potential coal resources in the area affected, the overall demand for coal, and the impact of the designation on the environment, the area's economy and the supply of coal.

In addition to the prohibition of surface mining which may result from the operation of the designation process, subsection (e) provides for certain outright prohibitions on surface coal mining. This subsection would prohibit new surface coal mining operations on lands within the National Park System, the National Wildlife Refuge Systems, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests, in areas which would adversely affect parks or National Register of Historic Sites, within one hundred feet of a public road (except where mine access or haul roads join the right-of-way), within 300 feet of an occupied building or one hundred feet from a cemetery.

All of these bans listed in subsection (e) are subject to valid existing rights. This language is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of 422(e) is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase

“subject to valid existing rights” is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

The prohibition against strip mining in the National forests is not to apply to those lands with no significant forest cover west of the 100th meridian where the Secretary of Agriculture and the Secretary of Interior have found there are not significant surface values relative to the value of the coal to be mined. The prohibition would, however, apply to Custer National Forest and to Alaska national forests.

#### SECTION 423. FEDERAL LANDS

This section requires the Federal Government to “put its own house in order” at the same time that, through this legislation, it requires the States to establish strong regulatory programs.

Subsection (a) requires the Secretary of the Interior to promulgate and implement a Federal Lands Program applicable to all surface mining and reclamation operations taking place pursuant to any Federal law on any Federal lands no later than one year after enactment of the Act. The Federal Lands Program must, at a minimum, incorporate all of the Act’s requirements and where the Federal lands are in a State with an approved State program, the requirements imposed by the States. Thus, while the Secretary could, for example, impose more stringent reclamation requirements on Federal lands than were required on non-Federal lands in the State, he could not permit less stringent requirements.

Subsection (b) provides that the requirements of the Act and the Federal Lands Program are to be incorporated in all Federal mineral leases, permits, or contracts issued by the Secretary involving surface mining and reclamation operations.

Subsection (c) provides that any State with an approved State program may choose to enter into a cooperative agreement with the Secretary for State regulation of surface mining operations on Federal lands within that State, if the Secretary determines the State has the necessary capability. Existing cooperative agreements may continue in effect pending approval of the States’ program. The purpose of this provision is to alleviate a significant problem in Western mining. Where Federal and non-Federal lands are checkerboarded, mining operators could find themselves working under two separate permits, two separate bonds, and two entirely different regulatory systems—Federal and State. The cooperative agreement should allow the operator to conduct his operation under a single regulatory system.

Except as provided in subsection (c) the Secretary is not to delegate to the States his primary authority or jurisdiction to regulate other activities on the Federal lands, or to designate lands unsuitable for mining.

The Committee feels very strongly that stringent reclamation requirements must be developed before any new or expanded coal surface mining operations are permitted on Federal lands. The Committee expects the Secretary to meet the 12 month deadline for implementation of this program established by subsection (a).

SECTION 424. PUBLIC AGENCIES, PUBLIC UTILITIES, AND PUBLIC CORPORATIONS

This section applies the requirements contained in the Act to public corporations, public agencies, and publicly owned utilities, including, for example, the Tennessee Valley Authority, which engage in surface mining.

SECTION 425. REVIEW BY THE SECRETARY

This section provides for administrative review of any order or notice issued by the Secretary or his authorized representative under Section 421. Under this section, any permittee who is issued a notice or order under section 421, or any person who is or may be affected by such notice or order, may apply to the Secretary for review of the order or notice, or review of the termination of the order or notice within 30 days of the issuance or termination of the notice or order. Upon receipt of such an application, the Secretary shall conduct an appropriate investigation, including public hearings, and grant or deny relief expeditiously.

This section also provides for the Secretary to hold a public hearing following the issuance of an order to show cause why a permit should not be revoked or suspended pursuant to section 421. At the hearing the permittee shall have the burden of proof to show why his permit should not be suspended or revoked. Any person who has an interest which is or may be affected by a suspension or revocation of the permit shall be allowed to participate.

SECTION 426. JUDICIAL REVIEW

Any decision of the Secretary approving or disapproving a State program under section 403 or preparing and promulgating a Federal program under section 404 may be reviewed in the United States Court of Appeals for the circuit which contains the State whose program is at issue by a petition filed within 60 days of such decision by a person who participated in the administrative proceedings and who was aggrieved by such decision, according to this section. Action of the Secretary promulgating standards pursuant to sections 401, 415 and 423 may be appealed only in the United States Court of Appeals for the District of Columbia Circuit.

All other decisions or orders of the Secretary shall be reviewable in the appropriate United States Court of Appeals for the circuit in which the surface coal mining operation is located. Commencement of a proceeding under this section shall not operate as a stay of action by the Secretary unless so ordered by the court. Orders and decisions of the Secretary in enforcement proceedings expressly required to be conducted under 5 U.S.C. 554 (1970) are to be reviewed on the basis of the traditional substantial evidence test. However, all other orders, decisions, and actions of the Secretary are to be reviewed for rationality because they will be largely policy determinations made after a legislative-type hearing where affected persons will have an opportunity to present information and their views. It is expected that the Secretary will require supplementation of a verbatim transcript of legislative-type hearing with any other information he may have considered in order to establish the record for review.

## SECTION 427. SPECIAL BITUMINOUS COAL MINES

Section 427 provides for the adjustment of several environmental standards for a limited number of existing mine pits in the United States. There are probably a few "open-pit" type coal mines in the Western States which would be unduly burdened by meeting all of the environmental standards as proposed in the bill. In particular, this special provision has been included in the bill to allow special regulations to be applicable to the "big-pit" mine pit at the Kemmerer mine. However, this section would also be applicable to other mines which have the very unusual characteristics of the "big-pit" at Kemmerer.

In this provision, "special bituminous coal mines" are defined as operations that would result in excess of 900 feet deep according to existing mine plans, were in existence at least 10 years prior to the date of enactment and met several other criteria. Such mines are not exempted from the Act, but the Secretary is authorized to allow appropriate variation from certain requirements dealing with spoil handling, regrading to approximate original contours, elimination of depressions capable of collecting water, and creation of impoundments. It is thought that some mine pits, because of their setting, design and duration of existing operation are sufficiently committed to a mode of operation which makes adjustment to the basic standards in the act difficult. A judgment was made that in these limited cases, such pits could continue with their basic mode of operation, meeting the special requirements of this section and all other requirements of the act.

The language of this section has been carefully drawn to apply to pits which were operational prior to January 1, 1972. New mine pits, those opened or re-started after January 1, 1972, must be designed or adjusted to meet the basic environmental standards of the Act. This applies even in those same settings where existing pits may be determined eligible for the special standards. In other words, only specific pits, not entire operations which may cover thousands of acres, are eligible under this section. Similarly, in determining the practicability of existing pits to adjust to meet the basic environmental standards of the Act, the Secretary should ascertain that the long-range plan of the pit is such that adjustment cannot be made to bring the operation in conformance with the Act. In some instances, it would seem probable that the reworking of old pits or combination of existing pits on a mined site would provide an opportunity for a mining operation adjustment to meet the basic provisions of the Act and the eligibility for exceptions should be so conditioned.

Eligibility is carefully defined under this section so that eligibility for exceptions under this section would not become the rule rather than the exception and so that it specifically applies only to existing mine pits which have been producing coal in commercial quantities since January 1, 1972.

## SECTION 428. SURFACE MINING OPERATIONS NOT SUBJECT TO THIS ACT

This section provides specific exemptions for three types of coal surface mining which would otherwise be subject to the Act.

These are (1) the extraction of coal by a landowner for his own non-commercial use from land owned or leased by him, (2) the extraction

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of coal where surface mining affects 2 acres or less, and (3) extraction of coal in the process of highways or other construction.

The Committee felt that these three classes of surface mining cause very little environmental damage and that regulation of them would place a heavy burden on both the miner and the regulatory authority. The exemption for "noncommercial" use does not include coal surface mining done by one unit of an integrated company which uses all of the coal in its own manufacturing plants (e.g., surface mining of metallurgical coal owned by a steel company for use in the company's steel mills, or surface mining for coal owned by an electric utility for use in its own powerplants).

## TITLE V—ADMINISTRATIVE AND MISCELLANEOUS PROVISIONS

### SECTION 501. DEFINITIONS

This section contains 29 definitions: Secretary; State; Office; commerce; surface coal mining operations; surface mining and reclamation operations; lands within any State; Federal lands; Indian lands; Indian tribe; State program; Federal program; Federal lands program; reclamation plan; State regulatory authority; regulatory authority; person; permit; permit applicant; permittee; fund; other minerals; approximate original contour; operator; permit area; unwarranted failure to comply; and alluvial valley floors.

Of importance to this analysis are "surface mining operations," "Indian lands," "lands within any State," "other minerals," "back-filling to approximate contour," and "alluvial valley floors" and imminent danger to the health or safety of the public.

"Surface mining operations" is so defined to include not only traditionally regarded coal surface mining activities but also surface operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining and surface impacts of underground coal mining are subject to regulation under the Act. Activities included are excavation to obtain coal by contour, strip, augur, dredging, in situ distillation or retorting and leaching or any other form of mining except open pit mining; and the cleaning, or other processing or preparation and loading for interstate commerce of coal at or near the mine site. Activities not included are the extraction of coal in a liquid or gaseous state by means of wells, or pipes unless the process includes in situ distillation of retorting and the extraction of coal incidental to extraction of other minerals where coal does not exceed 16 $\frac{2}{3}$  percent of the tonnage removed. The last exception is designed to exclude operations, such as limestone quarries, where coal is found but is not the mineral being sought. "Surface mining operations" also includes all areas upon which occur surface mining activities and surface activities incident to underground mining. It also includes all roads, facilities structures, property, and materials on the surface resulting from or incident to such activities, such as refuse banks, dumps, culm banks, impoundments and processing wastes.

"Indian lands" is defined to mean all lands within the exterior boundaries of Indian reservations, and all lands held in trust for or supervised by any Indian tribe.

"Land within any State" is so defined and used throughout the Act so as to insure that the States, through their State programs, will not assert any additional authority over Federal lands or Indian lands, other than that authority delegated to them by the Secretary under a cooperative agreement pursuant to Section 423.

"Other minerals" is defined to include clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substance of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form.

"Approximate original contour" is defined so as to bar depressions capable of collecting water except where retention of water is determined by the regulatory authority to be required or desirable for reclamation purposes.

#### SECTION 502. OTHER FEDERAL LAWS

This section contains the standard savings clauses concerning existing State or Federal mine health and safety, and air and water quality laws, and the mining responsibilities of the Secretary and heads of other Federal agencies for lands under their jurisdiction.

Specifically, it disclaims any conflict between the Act or any State regulations approved pursuant to it, and the Federal Metal and Non-metallic Mine Safety Act, the Federal Coal Mine Health and Safety Act, the Federal Water Pollution Control Act, the Clean Air Act as amended, the Solid Waste Disposal Act, the Refuse Act, and the Fish and Wildlife Coordination Act.

This section also specifies that adoption of regulations of the Secretary under section 401(b) must be considered as "major Federal action" for the purpose of Section 102(2)(c) of the National Environmental Policy Act of 1969. At the same time, three other actions of the Secretary are declared not to be major Federal actions and therefore would not require preparation of an environmental impact statement: approval of State programs, promulgation of Federal programs and implementation of a Federal lands program. These are considered by the Committee to require only a yes-or-no decision by the Secretary without consideration of a wide range of options contemplated by Congress when it enacted the National Environmental Policy Act. A similar exemption applies to EPA's approval of State air and water quality plans.

#### SECTION 503. EMPLOYEE PROTECTION

Section 503 makes unlawful the discharge or discrimination against any person who has filed a suit or testified under provisions of the Act, and gives such person recourse to review by the Secretary of Labor. After opportunity for public hearing, the Secretary is to make findings of fact and issue orders where a violation has occurred, for reinstatement of the employee with compensation. The Secretary's orders are subject to judicial review. The applicant in a successful pleading is to be reimbursed for his costs, including attorney fees. The Secretary is required to evaluate the effects of enforcement of the Act on employ-



ment, to investigate complaints, and hold public hearings concerning alleged discharges and layoffs. His subsequent report and any recommendations are to be made public.

The Committee considers an example of instituting a proceeding in subsection (a) to be notifying the regulatory authority or the foreman of the operation of a possible violation of the Act.

#### SECTION 504. PROTECTION OF GOVERNMENT EMPLOYEES

This section extends to surface coal mine inspectors the same rights and protections accorded to other Federal inspectors in the course of their duties.

#### SECTION 505. GRANTS TO THE STATES

This section authorizes the Secretary to cooperate with and to make annual grants to States for administering State programs under the Act, disbursed at the rate of 80 percent of cost during a year prior to program approval for the purpose of developing and submitting a proposed program, 60 percent of total costs during the first year of program operation following approval, and 50 percent of total program costs during each year thereafter. Subsection (c) gives authority to increase these grants where a State is regulating surface mining of Federal coal. The increase would equal the amount the Federal government would have spent. Technical assistance, training, instructional material and a continuing inventory of information for evaluating the effectiveness of State programs are among the types of assistance to be rendered by the Secretary. All Federal departments and agencies having relevant data are to assist as well.

#### SECTION 506. ANNUAL REPORT

This section requires the Secretary to submit to the President and the Congress an annual report on Federal and State activities pursuant to the Act and recommendations for appropriate administrative or legislative action.

#### SECTION 507. SEVERABILITY

This section contains a standard severability clause.

#### SECTION 508. INDIAN LANDS

Section 508 directs the Secretary of the Interior to study the question of regulation of surface mining on Indian lands which will achieve the purposes of the Act and recognize the special jurisdictional status of Indian lands within the exterior boundaries of Federal Indian reservations. The Secretary is directed to consult with Indian tribes and to report to Congress as soon as possible but no later than January 1, 1979.

In the interim, this section also provides that surface coal mining operations on Indian lands meet certain environmental standards at least as stringent as those in this Act, and requires the Secretary to incorporate such standards in all leases.

SECTION 509. STUDY OF RECLAMATION STANDARDS FOR SURFACE MINING  
OF OTHER MINERALS

Section 509 is designed to meet short-term needs for information. It directs the Chairman of the Council on Environmental Quality to contract with the National Academy of Sciences—National Academy of Engineering, and such other government agencies or private groups as may be needed, for an indepth study of current and developing technology for surface mining of minerals other than coal and of open pit mining. This study is to be designed to assist in the establishment of effective and reasonable regulation of surface and open pit mining and reclamation.

The decision by past Congresses to limit the scope of surface mining legislation to coal surface mining was based on several factors. One of these was that it did not have sufficient information about the nature and characteristics of surface mining for other minerals and about open pit mining.

Surface mining of coal is the most immediate and pressing problem. It accounts for 43 percent of the total land disturbed in the United States by all forms of surface mining. However, the Committee recognizes the need to regulate surface mining for other minerals, particularly sand and gravel which accounts for 25 percent of the total surface area disturbed by surface mining. Thus, subsection 509(b) requires that the study together with specific legislative recommendations shall be submitted to the Congress and the President within 18 months after enactment of the Act. The study and recommendations with respect to surface and open pit mining for sand and gravel and oil shale and tar sands is to be submitted within one year.

SECTION 510. EXPERIMENTAL PRACTICES

In order to encourage advances in mining and reclamation practices, this section permits the regulatory authority to authorize departures in individual cases on an experimental basis from the environmental protection performance standards promulgated under this Act.

SECTION 511. AUTHORIZATION OF APPROPRIATIONS

This section authorizes appropriations for the purposes of this Act in the following sums; subsection (a) provides contract authority to the Secretary, to be modified by appropriation Acts, up to \$10 million each for fiscal years 1977, 1978 and 1979; subsection (b) provides \$10 million for the fiscal year ending June 30, 1978; \$20 million for each of the two succeeding fiscal years; and \$30 million for each of the succeeding fiscal years thereafter.

SECTION 512. FEDERAL LESSEE PROTECTION

This section requires that any application for a permit for surface coal mining of Federal coal must include either the written consent of the permittee or lessee of the surface lands to be affected, or evidence of the execution of a bond to secure payment for all damages to the surface estate resulting from the mining operations.

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## SECTION 513. ALASKA COAL

This section protects the rights of owners of coal in Alaska.

## SECTION 514. WATER RIGHTS

This section protects water rights affected by surface mining operations.

## SECTION 515. SURFACE OWNER PROTECTION

Special problems arise where coal deposits have been reserved to the United States but title to the surface has been conveyed to private individuals. This section establishes as Federal coal leasing policy a requirement that the Secretary of the Interior not lease for surface mining, without the consent of the surface owner, Federal coal deposits underlying land owned by a person who has his principal place of residence on the land, or personally farms or ranches the land affected by the mining operation, or receives directly a "significant portion" of his income from such farming. The Committee does not intend by this to impose an arbitrary or mechanical formula for determining what is "significant." This should be construed in terms of the importance of the amount to the surface owner's income. Significant is not intended to be measured by a fixed percentage of income. For example, where a person's gross income is relatively small, a loss of but a fraction thereof may be significant. By so defining "surface owner," the bill should prevent speculators purchasing land only in the hope of reaping a windfall profit simply because Federal coal deposits lie underneath the land.

At the same time, so that there will not be any undue locking up of Federal coal, no stipulation has been placed upon the amount and manner of negotiation between the prospective lessee and the surface owner.

This section will insure that the valuable agricultural lands under which lie deposits of Federal coal will not be unduly disturbed by surface mining. By allowing direct negotiations between the lessee of the coal and the surface owner, individual safeguards can be agreed upon to benefit the land on a case by case basis, making it more likely that the surface owner will be able to remain on the land. It is anticipated that negotiations will take place after the bids are opened, but before the lease is issued by the Secretary.

The Committee is aware that many surface owners have already entered into agreements with coal companies which intend to attempt to obtain Federal coal leases. Section 515 is not intended to apply retroactively so as to require new consents and payments to the surface owner where written consents have already been negotiated.

The requirement that coal deposits subject to Section 515 be offered for lease by competitive bidding is not intended to override any rights which the holder of a Federal prospecting permit may have to a coal lease. If such a permittee has a property right, it is protected under Section 515 (g) which provides that nothing in Section 515 enlarges or diminishes any property rights held by the United States or any other land owner.

Section 515 establishes as one criterion for Federal coal leasing "that the Secretary shall, in his discretion but to the maximum extent

practicable" refrain from leasing Federal coal underlying lands held by surface owners. In implementing this policy, the Secretary should consider economic as well as physical conditions in determining what is "practicable."

Section 515 is not intended to override any rights which the holder of a federal coal prospecting permit may have to a coal lease under Section 2(b) of the Mineral Lands Leasing Act prior to its amendment by Section 4 of the Federal Coal Leasing Amendments Act of 1975. In repealing the prospecting permit system for the acquisition of federal coal leases, Section 4 of the Federal Coal Leasing Amendments Act of 1975 specifically preserved "valid existing rights." If the holder of a federal coal prospecting permit has a property right to the issuance of a lease as a "valid existing right," this section leaves that right unaffected.

### VIII: COST ESTIMATE PURSUANT TO SECTION 252 OF THE LEGISLATIVE REORGANIZATION ACT OF 1970

In accordance with section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91-150, 91st Congress) the Committee provides the following estimate of the cost.

#### A. ADMINISTRATION OF THE ACT

CONGRESSIONAL BUDGET OFFICE,  
U.S. CONGRESS,  
Washington, D.C., May 10, 1977.

HON. HENRY M. JACKSON,  
*Chairman, Committee on Energy and Natural Resources,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 7, the Surface Mining Control and Reclamation Act of 1977.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,  
*Director.*

#### CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill No.: S. 7
2. Bill title: Surface Mining Control and Reclamation Act of 1977
3. Bill status: As reported by the Senate Committee on Energy and Natural Resources
4. Purpose of bill: The bill is designed to control the environmental impacts of surface coal mining at the state and federal level. It would create and specify the responsibilities for an Office of Surface Mining Reclamation and Enforcement in the Department of the Interior. The bill would also establish an Abandoned Mine Reclamation Fund and specify the purposes and maximum amounts of disbursements from the Fund. In addition, it would provide for the federal government to make annual grants to states for the purpose of assisting in

developing, administering and enforcing state programs. This is an authorization bill which requires appropriations action.

5. Cost estimate:

(In millions of dollars, fiscal years)

	1977	1978	1979	1980	1981	1982
Authorization level.....	10.5	20	30	20	30	30
Estimated net costs:						
Added costs.....	2	16	186	186	253	260
Less: additional revenue.....	0	-292	-210	-223	-235	-250
Estimated net cost.....	2	-276	-24	-37	18	10

The costs of this bill fall within budget function 300.

6. Basis of estimate:

*Title III—Abandoned Mine Reclamation Fund*

The primary revenue source assumed for the Abandoned Mine Reclamation Fund is the reclamation fee levied on coal production of 35 cents per ton on surface coal and 15 cents per ton on underground coal. No fees are assumed to be collected on lignite coal. While these reclamation fees will accrue in fiscal year 1977, the actual collection will begin in fiscal year 1978. Other possible sources of revenue are not likely to be of significance in the five-year time frame of this cost estimate—these sources are the sale, lease, or rental of reclaimed land, and user charges collected for land usage. It should be noted, though, that the federal government may eventually sell the reclaimed land acquired under Title III at not less than fair market value.

The disbursement of the funds collected is specified under certain sections of Title III. For this estimate, it was assumed that the bill would be enacted in June 1977, but no budget authority from this fund would be appropriated until fiscal year 1979 (pursuant to Section 301 (d) of the bill). Twenty percent of the fund is assumed to be transferred to the Department of Agriculture for the rural lands program.

In addition, fifty percent of the funds collected in each state are assumed to be reserved for expenditure in that state. Because of the time required for the development and approval of state plans, funds for this purpose are assumed to be appropriated beginning in fiscal year 1980.

The remaining funds are assumed to be used for administration and collection costs (beginning in fiscal year 1979), and the acquisition and reclamation programs specified in Section 305 (beginning in fiscal year 1979). In addition, there would be an estimated \$1 million in fiscal year 1977 and \$3 million in fiscal year 1978 in administrative costs to initiate the process of collecting the reclamation fees.

It should be noted that the Bureau of Mines has estimated the total cost of reclaiming mined areas at over \$24 billion. This figure includes costs for reclamation of abandoned lands, subsidence, waste banks, waste bank fires, mine fires, and acid mine drainage. The cost for just reclaiming abandoned mines is estimated at \$2.3 billion. Therefore, while the fund is projected to show a net income during the initial years of the program, costs are likely to exceed income in later years, since obligations and expenditures will increase as the plans are gradually implemented.

[In millions of dollars; fiscal years]

	1977	1978	1979	1980	1981	1982
TITLE III						
Estimated revenues.....	0	292	210	223	235	250
Estimated costs:						
Transferred to Department of Agriculture (sec. 304).....	0	0	100	45	47	50
Reserved for State of origin (sec. 301).....	0	0	0	50	106	113
Acquisition and reclamation (sec. 305).....	0	0	53	57	60	63
Administration and collection.....	1	3	3	4	4	4
Estimated net costs.....	1	-289	-54	-67	-18	-20

*Title V—Administrative and Miscellaneous Provisions:*

*Section 505, Grants-to-the-States.*—This section allows the Secretary to make annual grants to the states for the purpose of assisting them in developing, administering and enforcing state programs. No funds are explicitly authorized in the bill for this section. However, it is estimated that \$20–30 million per year would be required for this purpose.

*Section 509, Study of Reclamation Mining.*—This section would transfer \$500,000 to the Chairman of the Council on Environmental Quality to contract with the National Academy of Sciences, and other agencies or groups where appropriate, for a study of current and developing mining and reclamation technology. Costs were estimated by using historical disbursement rates for similar studies.

*Section 511a.*—This section authorizes to be appropriated contract funds needed for the initial regulatory procedures, the federal lands program, certain technical assistance, and an Indian lands study. The authorization level is that stated in the bill, and outlays were projected using historical disbursement rates for similar programs of the Department of the Interior.

*Section 511b.*—This section authorizes to be appropriated funds for administrative and other purposes. These funds are assumed to be used primarily for expenses of the Office of Surface Mining and Enforcement. None of these funds are expected to be available for Section 505 grants-to-the-states. Although no funds are authorized to be appropriated in FY 1977, it is estimated that \$1 million will be needed to hire the necessary personnel. The authorization level is that stated in the bill, and outlays were projected using historical disbursement rates for similar programs.

[In millions of dollars; fiscal years]

	1977	1978	1979	1980	1981	1982
TITLE V						
Authorization level.....	10.5	20.0	30.0	20.0	30.0	30.0
Estimated costs:						
Study of reclamation mining (sec. 509).....	.1	.2	.2	0	0	0
Initial regulatory procedures, Federal lands program, technical assistance Indian land study (sec. 511a).....	.2	3.3	10.0	9.7	6.8	0
Administrative (sec. 511b).....	1.0	9.0	19.0	20.0	29.0	30.0
Estimated costs.....	1.3	12.5	29.2	29.7	35.8	30.0

*Revenue Loss.*—The reclamation fees, \$.35/ton of surface mined coal and \$.15/ton of underground mined coal, together with an estimated \$.85/ton of surface mined coal for compliance with mandated reclamation standards, could affect federal revenues. The increased cost per ton of coal could cause the mining companies which lease federal lands to reduce bonus bid payments to the Department of the Interior. The magnitude and timing of such revenue loss would be determined by such speculative factors as the number of leases negotiated per year, the size of tracts used, the depth of seams, and mining company cash flow statistics. However, estimating trends in bonus bid payments is difficult since no lands have been leased since 1971, and the Bureau of Land Management has not yet determined when new coal lease bids will be accepted. If few new tracts are leased, the revenue loss would be expected to be small. For example, if the 1968-71 bonus payment trend is projected and the reclamation fees are assumed to reduce payments to the government by 5 percent of bonus payments, the total loss of revenue would be less than \$300,000 in fiscal year 1978, increasing to less than \$400,000 in fiscal year 1982. If, however, the level of bonus payments increases substantially as new bidding procedures are adopted, the revenue loss under the same assumption could rise significantly.

7. Estimate comparison : None.

8. Previous CBO estimate : On April 20, 1976, CBO prepared a cost estimate for H.R. 2, a similar bill reported by the House Committee on Interior and Insular Affairs.

9. Estimate prepared by : Leslie Wilson (225-7760).

10. Estimate approved by : C. G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

## B. STUDIES

For a study of reclamation standards for surface mining of minerals other than coal, the sum of \$500,000 is authorized to be spent over a period of 18 months after enactment of this Act;

## IX. REGULATORY IMPACT EVALUATION

In compliance with the Standing Rules of the Senate as amended by S. Rés. 4 to require that all Committee reports contain an "evaluation of the regulatory impact which would be incurred in carrying out the bill or joint resolution," the following statement is made:

With the exception of two coal-producing States, Arizona and Alaska, all surface mining of coal and underground coal mining are regulated under State permits or under leases and permits issued by the Secretary of the Interior for Federal coal lands and Indian lands. The amount of coal being mined in Arizona and Alaska is not significant in the overall national coal production picture (7.6 and 0.7 million tons respectively in 1976, out of a total 671 million tons). S. 7 will involve some increase in State regulatory activity depending upon the stringency of existing State laws and regulations. The initial implementation period of up to 48 months in the bill will allow a more or less gradual adaptation to the requirements of S. 7 for States with regulatory programs in place. The Secretary will provide financial

and technical assistance to ensure the orderly development of approved State regulatory programs and to facilitate the enforcement of interim performance standards. Due to the wide range of regulatory capability of the States, a detailed evaluation of the regulatory impact of S. 7 is not practicable.

## X. EXECUTIVE COMMUNICATIONS

The pertinent legislative reports and communications received by the committee from the Executive Office of the President, the Office of Management and Budget, the Department of the Interior and the Department of Justice setting forth Executive agency recommendations relating to S. 7 are set forth below:

THE WHITE HOUSE,  
*Washington, February 15, 1977.*

HON. HENRY M. JACKSON,  
*Chairman, Committee on Energy and Natural Resources,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: From the perspective of energy policy, I should like to express the position of the Administration regarding the strip mining legislation before you. We urge expeditious passage of the legislation which your Committee has so effectively developed.

This nation cannot expect to increase its reliance on coal unless the mining and burning can be done in a healthful and environmentally sound manner. The passage of clear and effective strip mining legislation is therefore a prerequisite to greater use of coal as part of a sound energy policy.

Negative arguments have characterized the strip mining debate for too long. Adequate safeguards of the land are not in conflict with a policy of expanded coal production. The nation's coal resource is quite large and the portion of that resource made unavailable by this legislation is extremely small—less than 1 percent of the resource base and no more than 5 percent of total reserves. The modest costs of reclamation should not noticeably inflate fuel prices. It is money well spent in terms of benefits to the nation. And, with expanded deep mining and more intensive reclamation efforts, more, not fewer, jobs will result.

Years of controversy over this legislation have increased the uncertainties facing the coal industry and the prospects for relying on more coal in this country. One particular reason I am eager to see the bill pass is finally to create a sense of certainty about the rules by which coal strip mining can take place.

Fortunately, the great abundance of coal in this country allows us to declare certain areas off limits to strip mining because of their greater value for competing purposes. Protection of alluvial valley floors in the West, and prime agricultural land should be considered on the basis of the most valuable use of those lands to the nation. It is wise planning to utilize land that is more productive for agriculture for that purpose.

In conclusion, let me emphasize that the energy agencies and the Department of the Interior and the Environmental Protection Agency see eye-to-eye on this legislation. Last year's arguments about this bill

need not be reargued. I support your efforts to pass an effective bill, so that we can get about the business of developing a rational coal policy based on safeguarding the land from the abuses of strip mining.

Sincerely,

JAMES R. SCHLESINGER,  
*Assistant to the President.*

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., February 4, 1977.*

HON. HENRY M. JACKSON,  
*Chairman, Committee on Interior and Insular Affairs,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department concerning S. 7, the "Surface Mining Control and Reclamation Act of 1977".

We strongly support enactment of such legislation. A new law to control surface mining of coal and provide for reclamation of mined lands is badly needed and the legislation your Committee has before it is well conceived to meet that need. Its expeditious passage is a high priority of President Carter.

S. 7 would provide for a cooperative surface coal mining regulatory program with responsibility for implementation being shared between the States and the Secretary of the Interior. Strong reclamation performance standards and permit requirements would assure that both State and Federal mined land would be fully reclaimed and that the environment would be protected. On the other hand, under mechanisms provided by the bill, the production of needed coal could continue under national standards in a reasonable manner. Public participation in decisions about surface coal mining would be provided for. Full development of needed information would be required or encouraged to serve as a basis for effective and reasonable regulation of surface mining operations. Through S. 7's bonding and enforcement provisions, actual compliance with the standards and requirements would be assured.

In addition to the reclamation regulatory program, the bill provides for reclamation of lands already damaged by past mining. Financed in S. 7 through a fee levied against Federal coal, the bill provides both for reclamation of rural lands through the Department of Agriculture and for acquisition and reclamation of abandoned and unreclaimed mined lands and for alleviation of problems related to mining.

The effects of inadequately controlled surface coal mining are well known. Among them are destruction or diminution of the utility of land, erosion and land slide, flooding, water pollution, destruction of fish and wildlife habitat, loss of natural beauty, property damage, health and safety hazards, and adverse social impacts.

Increasingly in the future, the Nation's energy needs will depend on coal mining. Current trends indicate that more and more of this mining will be by surface methods. Federal and other western lands will be called on to supply surface-mined coal, in many instances for the first time. Against this background, the need for legislation such as S. 7 is urgent.

In developing and carrying out an effective and efficient surface coal mining control and reclamation law, the Department will work closely with the Congress. President Carter has indicated that he would have signed the surface mining legislation passed by the last Congress, but vetoed. The President is prepared to approve similar legislation and has directed us to work with Congress in resolving remaining major issues and developing whatever changes in introduced bills may appear advisable to improve them.

Protection of surface owners of land where the Federal Government owns and proposes to lease coal was a particularly difficult issue for the last Congress. Section 423(e) of S. 7 changes the surface owner consent provision finally developed and included in the vetoed bill. That provision afforded a right to consent to specified individuals and limited the amount that could be obtained by such an individual if he does consent. The amount specified had three components to be determined by appointed appraisers: (1) the fair market value of "the surface estate," (2) certain specified losses and damages, and (3) an additional reasonable amount limited to the lesser of the item (2) losses or \$100 per acre. If this provision were adopted, the language of item (1) should be clarified so that it would apply to the fair market value of the "surface estate based on its use for agricultural purposes and exclusive of the value of minerals or the right to consent under this section." Clarified in this way, that type of provision is preferable to Section 423(e) of S. 7 which prohibits surface mining of Federal coal where the surface is owned by a non-Federal party.

The bill will place on small mine operators a heavy administrative and operating burden. Several changes may be desirable to limit this burden, including:

- directing the regulatory authority to undertake the development of some of the information required to obtain a mining permit

- financing this work in part from the reclamation fee collected pursuant to section 301(b)(3)

- permitting reduced application fees

- omission of certain permit application data as determined by the regulatory authority and in some instances requiring less data

- modifying the bond release administrative provisions by limiting the scope of the notice to be given and providing an informal procedure for release.

Departmental staff can work with your Committee in providing specific amendments to accomplish these changes.

A related matter concerns the schedule provided by the bill for implementation of the program. We recommend application of performance standards to new mines beginning six months after enactment and to existing mines beginning after one year. In addition, it appears desirable to have applications for permanent permits made only after a State or Federal program is approved. The regulatory authority's determination whether to issue a permit could not be delayed longer than six months after application is made (or a specified time after enactment of the bill). Tying the permanent permit application pro-

cedure to approval of a State or Federal program in this fashion is administratively preferable to provisions of S. 7 which require permit applications twenty months after enactment, whether or not a program has been approved.

A related matter concerns the requirement of Federal inspections of non-Federal mines beginning 135 days after enactment. While we recognize the desirability of Federal "back-up" enforcement of reclamation requirements principally intended to be a State responsibility, we are concerned that State incentives to carry out that responsibility not be weakened. A full program of regular Federal inspections might weaken those incentives and encourage States to withdraw from the regulatory program. To reduce this possibility, we suggest that Federal "back-up" inspections be provided only where there is an indication of specific need—that is, when the Secretary receives information giving reason to believe that there are violations of the Act's requirements.

With respect to the abandoned land reclamation program set forth in Title III, we recommend that the fees assessed against currently mined coal be made applicable to all coal—not merely coal derived from Federal land and should be in addition to royalties now received from Federal land. In addition, the Administration would like to work further with the Congress to determine whether the provisions of section 305 relating to secondary impacts of mining are best suited to meeting problems posed by abandoned mine lands. It is important that resources of the abandoned land reclamation program be directed to matters of highest priority and that past environmental damage be remedied effectively and expeditiously. To this end, consideration of the requirement that fifty percent of the fees collected for the fund be initially allocated to the State from which they are derived may warrant modification to allow more flexibility in directing resources to areas of greatest need.

An important purpose of this legislation is to protect fish, wildlife and other ecological values. In developing and implementing this program we intend to assure that these values are appropriately recognized.

Section 410(b)(5) recognizes the need for special protection of alluvial valley floors. These areas are essential to the agricultural base of the Nation and the economic life of many parts of the West. We support this protection. Some modification appears desirable, however, to clarify the provision and to provide for the continued operation of mines currently producing coal. To accomplish this we recommend amending section 410(b)(5) to read:

(5) the proposed surface coal mining operations, if located west of the one hundredth meridian west longitude would—

(A) not interrupt, discontinue, or prevent farming on alluvial valley floors that are irrigated or naturally sub-irrigated but, excluding undeveloped rangelands which are not significant to farming on said alluvial valley floors and those lands that the regulatory authority finds that if the farming that will be interrupted, discontinued, or prevented is of such small acreage as to be of

negligible impact on the farm's agricultural production, or,

(B) not adversely affect the quantity or quality of water in surface or underground water systems that supply these valley floors in (A) of subsection (b) (5):

*Provided*, this paragraph (5) shall not affect those surface coal mining operations which in the year preceeding the enactment of this Act (1) produced coal in commercial quantities, and (2) were located within or adjacent to alluvial valley floors or had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors.

We believe that administration of provisions of S. 7 relating to judicial matters may also be improved. With respect to citizen suits seeking to compel the Secretary or a regulatory authority to perform any act or duty under the Act which is not discretionary, it may be appropriate to specify that the citizen suit provision shall constitute the exclusive remedy to assure that the Secretary or regulatory authority will receive sixty days notice except for situations involving an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff. This will allow the Secretary opportunity to remedy any failure that may in fact exist without the necessity for suit. In addition, a provision of the Clean Air Act similar to section 426(a)(1) of S. 7 has been the subject of much needless litigation concerning the specification of "the appropriate" United States Court of Appeals. We recommend that this be clarified by providing that review of actions relating to State programs for a State shall be by the Court of Appeals for the Circuit in which the State is located. Review of orders or decisions of national scope under section 426(a)(2) should be in the U.S. Court of Appeals for the District of Columbia.

Finally, we endorse the provision of section 423(d) which contemplates the application of State programs to Federal lands. This should, however, be carried out by agreement between the States and the Secretary of the Interior rather than at the sole election of a state. To this end, several changes appear desirable. It should be clarified that States with cooperative agreements will be permitted to retain their regulatory function, with appropriate modification, prior to the approval of a State program, that the Department retain its statutory duty to receive and approve mining plans, and that the designation of lands unsuitable for mining will continue to be an Interior responsibility. It should also be specified that the election of the State will be subject to the Department's review and approval as are other aspects of the State program.

This Administration is firmly committed to the prompt enactment of good surface mining control and reclamation legislation. To accomplish this we are prepared to work closely with the Congress, both with respect to the modifications outlined above and to other improvements that may appear advisable as the Congress acts on the measure. More importantly we will continue that close relationship

in implementing an effective program. The harm left in the wake of past surface mining must be ended promptly. Enactment of legislation such as S. 7 in the near future is a high priority both of President Carter's energy policy and his environmental policy.

The Office of Management and Budget has advised that enactment of legislation conforming to the views set forth above would be in accord with the program of the President and it has no objection to the presentation of this report.

Sincerely,

CECIL D. ANDRUS,  
*Secretary.*

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., April 1, 1977.*

HON. HENRY M. JACKSON,  
*Chairman, Committee on Energy and Natural Resources,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This letter supplements the Administration's views set forth in our letter of February 4, 1977, on S. 7, the "Surface Mining Control and Reclamation Act of 1977."

We strongly support your efforts to provide sound strip mine legislation. S. 7 provides a framework for administering a comprehensive, workable, surface mining and reclamation program. We would like to present our views and to offer some amendments in addition to those previously sent which we believe will strengthen the bill.

#### TITLE II—OFFICE OF SURFACE MINING AND RECLAMATION

This Administration strongly supports the creation of an independent Office within the Department of the Interior. In anticipation of passage of the strip mine bill, the Department has begun to work toward smooth implementation of the bill's provisions and to establish the new Office. To allow for the best overall management arrangements, however, we recommend that the statute not require the Office to report directly to the Secretary and that it be clearly authorized to use the personnel of other agencies to carry out the program.

#### TITLE III—ABANDONED MINE RECLAMATION

We suggest provisions to establish State managed abandoned land programs. We recommend that until a State's full regulatory program is approved, allocation of its 50 percent share of funds not be made and that there be no funding of any State abandoned land program. Until such approval is given, the Secretary should also have authority to withhold expenditures for the Federal abandoned land program for a state under section 305. This would encourage the States to obtain approval for a strong State regulatory program rather than allowing a Federal program to be established for that State. The Secretary should not be prevented, however, from expending unearmarked funds within a State where there was not an approved regulatory program; thus in cases where reclamation work would be urgently needed it could be accomplished.

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In order to assure that reclamation is accomplished on abandoned lands as quickly as possible, section 305 should be changed to insure that the first two objectives of the fund specified in section 302, the protection of public health and safety and the prevention of continued environmental harm, be accomplished before money could be spent on public facilities, except for emergency situations.

The program under section 304, Reclamation of Rural Lands, should be preserved. This program will benefit many communities by assuring that the expertise of the Department of Agriculture in reclaiming disturbed lands is put to good use.

Allocating the reclamation fee money in slightly different proportions would provide increased money for areas where there are the most severely disturbed lands. We recommend providing financial assistance for obtaining hydrological data for permit applications of mines producing under 100,000 tons per year, but doing so on a cost-sharing basis with the operator providing 25 percent of the amount necessary for data and analysis. The reclamation fee money would provide the other 75 percent. Additionally we recommend adding a provision for cost recovery in cases where a permit application is not made after the hydrological data financed from the Fund have been collected and analyzed.

We also are of the view that the 50 percent share reserved for expenditure in the State or Indian lands where collected should be determined after 10 percent is allocated for hydrological studies and 20 percent for the Rural Lands Program. This would provide further funds for States having the largest amount of abandoned coal mined lands. Funds reserved to the State or Indian land where collected should be available also for non-coal mine reclamation.

#### TITLE IV—CONTROL OF THE ENVIRONMENTAL IMPACTS OF COAL SURFACE MINING

We support a timetable for implementing the performance standards which provides that Interior regulations are to be issued three months after enactment; new mines must comply six months after enactment and existing mines must comply nine months after enactment. The permanent regulatory program regulations must be promulgated within a year after enactment. This timetable is contingent, however, upon express provision that no environmental impact statement be required for the Interim program regulations. For consistency, the Federal and Indian lands program should also be slated for implementation one year after enactment.

Although the Department does not foresee having to intervene in State regulatory programs after the bill currently provides no method of intervention in cases where the State program may be faltering in only one or two areas short of State program revocation. In these instances the Department needs the authority to review selected permits. We recommend adding a provision which would permit limited intervention without withdrawing approval of a State regulatory program.

Large mining operations often need several years to get mining equipment and other ancillary requirements in place. The regulatory authority needs to evaluate the proposed mining operation before site

development begins, but at the same time must be in a position to give the mine operator a permit for a time period adequate for developing a site and obtaining financing. We recommend that the time of the first permit be not more than five years after the first removal of overburden and that removal of overburden must begin within six years after issuance of the permit. If, however, overburden removal does not begin within three years after issuance, one year prior to scheduled overburden removal the regulatory authority should be required to obtain such information as is necessary to determine whether modifications of the permit pursuant to section 411(c) or otherwise are needed.

The Administration supports strong protection for surface owners; surface owner consent should be required for the entire area covered by a permit application. For Federal lands this consent should be written, given before leasing, and available only to the limited class of persons specified in H.R. 25 in the 94th Congress. We also recommended that with regard to the compensation formula provided herein, that fair market value be defined to exclude the value of the coal resource, as mentioned in our earlier report.

Alluvial valley floors will require strong protection if these important areas are to maintain their hydrological integrity and usefulness for farming and range use. In view of this, we believe our proposed section 410(b)(5) should be revised so as not to exempt undeveloped range lands or small areas where mining would have a negligible impact on agricultural or livestock production. Because information about effects of mining in alluvial valley floors is relatively embryonic and the administrative determination of where these exemptions would apply may be particularly difficult, it appears preferable to clearly exclude mining from the alluvial valley floor without land use exception. The Administration supports "grandfathering" only those mines which are located in alluvial valley floors and in commercial production, as specified in our February 4, 1977, letter.

Section 422 relating to the designation of areas unsuitable for surface coal mining, contains a grandfather exemption to be granted for those operations which have "substantial legal and financial commitments." We believe the term should be further defined or eliminated from the statute. The grandfather clause as written could undermine the integrity of the designation process and be subject to abuse.

We continue to support the bill's designation of national forests as unsuitable for mining. We would also favor authorizing the Secretary to designate critical areas adjacent to the mandatory designation areas under section 422 in order to protect the integrity of these areas. In the case of Federal lands in critical adjacent areas, designation as unsuitable would be mandatory. In the case of private or State lands in the critical areas, the Federal government would petition the State to designate these areas as unsuitable for strip mining, and further, there would be required consultation between the State and the Secretary for any permit within the critical adjacent area.

Prime agricultural lands have recently become the subject of considerable attention. The loss of such agricultural areas as a source of future food production is of as much concern as the possible loss of coal production resulting from prohibiting mining of these lands. We therefore favor an amendment to require restoration of soil produc-

tivity for prime agricultural lands. In addition, we recommend a five year moratorium on surface mining in prime farmlands in order to provide an opportunity to determine the ability to restore the productivity of these valuable lands. An appropriate grandfather exception would also be provided. An amendment for prime agricultural lands protection will be furnished shortly.

Several concerns for essential features of the performance standards set forth in section 415 of the bill deserve emphasis.

We strongly support the principle of return to approximate original contour. We believe this concept as defined in section 501(23) properly embraces use of terracing as an appropriate reclamation technique, whether or not expressly referred to. Such terracing must, however, be for drainage purposes only and designed for the best overall environmental results. Highwalls cannot be permitted under any circumstances.

With respect to siltation structures, we are concerned that maintenance responsibility continue as long as such structures present the possibility of harm. We therefore support an amendment strengthening section 415(b)(10)(C).

We would oppose deleting safety protections provided by the bill. Blasting limitations are particularly important but further information is needed to ascertain whether additional measures beyond those provided in section 415(b)(15) are needed. We believe a study of blasting requirements should be undertaken.

S. 7 allows a variance from specified performance standards for mountaintop mining where certain post-mining land uses will obtain. The most critical feature of mountaintop mining relates to spoil placement. Mountaintop mining which retains spoil on top of the mountain does not require special treatment. Serious problems are presented, however, by operations using head-of-the-hollow or valley fill. For such operations, it is uncertain whether spoil can be placed in an environmentally sound manner. Some evidence exists that technology in which spoil is placed in lifts to create a series of stair stepbenches and french rock drains are used may provide satisfactory protection. In any event, we believe that placement of spoil on the downslope should be limited to the minimum and that strong spoil placement standards are needed to insure that there will be no offsite damages.

We support provisions to strengthen the administrative, judicial, and enforcement provisions of the bill. Among these are provisions relating to citizen suits and we support elimination of the amount-in-controversy and diversity of citizenship requirements of these provisions. We also believe that attorney's fees should be awarded in the discretion of the court against any party. For administrative proceedings, discretionary award of attorneys' fees is appropriate against a losing party (not the United States). In addition, for the permanent enforcement program, we favor a requirement of monthly partial inspections and full inspections once each quarter. We will further review the need for further improvement and updating of the administrative, judicial and enforcement provisions.

Enactment of this legislation will correct a major deficiency in our overall policy of environmental protection. Benefits will directly follow its enactment for protection and enhancement of water quality, fish and wildlife values and for improved land use, among others.

We attach suggested amendments to deal with the problems outlined and certain other matters, including those contained in our February 4, 1977, letter to the Committee on S. 7.

Early passage of strong surface mining legislation remains among the highest priorities of this Administration. We will be prepared to work with the Committee to achieve this goal.

The Office of Management and Budget has advised that enactment of legislation conforming to the views set forth above would be in accord with the program of the President and it has no objection to the presentation of this report.

Sincerely,

CECIL D. ANDRUS,  
*Secretary.*

Enclosure.\*

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., April 22, 1977.*

HON. HENRY M. JACKSON,  
*Chairman, Committee on Energy and Natural Resources, U.S. Senate,  
Washington, D.C.*

DEAR MR. CHAIRMAN: In my April 1, 1977, letter to you concerning S. 7, the "Surface Mining Reclamation and Enforcement Act of 1977," I stated that I would forward a proposed amendment to the bill to carry out our recommendation for the imposition of a five-year moratorium on surface mining of prime agricultural lands, subject to certain "grandfather" exceptions.

Enclosed is that amendment. It would preclude issuance or renewal of any surface mining permit for a five-year period after enactment of the bill unless the applicant demonstrates that prime agricultural farmland comprises not more than ten percent of the surface area to be disturbed. The moratorium would not apply to permits issued prior to April 1, 1977, or to revisions or renewals thereof, including those authorizing contiguous expansions. In addition, the appropriate surface mining regulatory authority could grant an exception to the moratorium where the operator demonstrates that he can restore the land affected to a condition at least fully capable of supporting the uses which it was capable of supporting prior to mining. To accomplish one of the moratorium's main purposes—development of more adequate information about the restorability of prime agricultural land—the amendment would also direct the Secretary of Agriculture to investigate and make recommendations within four years after enactment concerning whether, and with what reclamation procedures, prime farmlands should be made available for surface mining.

It has become increasingly clear that we lack information about how successfully strip mined lands can be reclaimed. This problem is particularly acute with respect to the rich prime farmlands of the Nation. As these lands are more and more subjected to coal development, it becomes essential to assure that they can be fully reclaimed and their long-term productive capability will not be lost.

This Nation has abundant coal resources and we can afford to be selective in deciding how they are used. Time and study are needed to

\*Enclosure has been retained in the committee files.

find out whether and how strip mining of prime farmland should be permitted. I therefore strongly urge Congress to incorporate as a feature of the Surface Mining Reclamation and Control Act of 1977 a five-year prime farmland moratorium as set out in the enclosed proposed amendment.

The Office of Management and Budget has advised that enactment of legislation conforming to the views set forth above would be in accord with the program of the President and it has no objection to the presentation of this report.

Sincerely,

CECIL D. ANDRUS,  
*Secretary.*

Enclosure.

PROPOSED ADMINISTRATION AMENDMENT ESTABLISHING A 5-YEAR  
MORATORIUM ON STRIP MINING ON PRIME FARMLANDS

SECTION 410

(d) (1) For five years following the date of enactment, no application for a permit or revision thereof shall be approved unless the applicant demonstrates that prime farmland does not comprise more than 10% of the surface area to be disturbed pursuant to an applicant's mining plan. Such demonstration shall be based upon soils maps and data verified for accuracy by the Secretary of Agriculture; provided that nothing in this subparagraph shall apply to any permit issued prior to April 1, 1977, or to any revisions or renewals thereof including those authorizing contiguous expansion of such permitted areas.

(d) (2) The regulatory authority may, after consultation with the Secretary of Agriculture, and pursuant to regulations issued hereunder by the Secretary of the Interior with the concurrence of the Secretary of Agriculture, grant a variance from subparagraph (d) (1) if the operator demonstrates and the regulatory authority finds on the basis of data relating to prime farmlands comparable to those covered by the permit application that the operator can restore the land affected to a condition at least fully capable of supporting the uses which it was capable of supporting prior to any mining.

(d) (3) Within 60 days of the date of enactment, the Secretary of Agriculture shall publish a definition of "prime farmland" and a notification of methods for the determination thereof.

(d) (4) Within four years of the date of enactment, the Secretary of Agriculture shall conduct such research, experimentation and studies as are necessary to determine whether, and with what reclamation procedures, prime farmlands should be made available for surface mining operations and based thereon make appropriate recommendations to the President.

DEPARTMENT OF JUSTICE,  
*Washington, D.C., February 10, 1977.*

HON. HENRY M. JACKSON,  
*Chairman, Committee on Interior and Insular Affairs, U.S. Senate,  
Washington, D.C.*

DEAR MR. CHAIRMAN: The Department of Justice desires to take this opportunity to express its views on H.R. 2 and S. 7, bills to provide for the cooperation between the Secretary of the Interior and the

States with respect to the regulation of surface coal mining operations, and the acquisition and reclamation of abandoned mines, and for other purposes.

The proposed bills would authorize the Secretary of the Interior to regulate all phases of surface mining and reclamation including inter alia, site clearing and preparation, blasting, erosion control, maintenance of water and air quality, backfilling and grading, and site closing.

In order to improve the regulatory program which would be authorized by these bills, it may be useful to harmonize the requirements of the instant bills with other statutory authority which affects surface mining operations. One area where there would be substantial overlapping of authority is the regulation of water pollution. Under the Federal Water Pollution Control Act Amendments of 1972, discharges from point sources, which includes discernible pipes, ditches, and channels, are to be abated by application of best practicable control technology currently available by July 1, 1977, and by application of best available technology economically achievable by July 1, 1983. More stringent limitations may be imposed to meet water quality standards. The Federal Water Pollution Control Act also directs the Administrator to study non-point sources of pollution including surface mining operations, and to inform the States and Federal agencies of processes and procedures for controlling same. Section 304(e), 33 U.S.C. sec. 314(e). Also, the Administrator has promulgated effluent limitations guidelines for the Coal Mining Point Source Category. 41 Fed. Reg. 19831-40 (May 13, 1976). An additional provision in the Federal Water Pollution Control Act which may affect surface mining operations is Section 404, 33 U.S.C. 1344(a), which authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into the navigable waters of the United States. The term "navigable waters" is broadly defined in regulations promulgated by the Secretary. 40 Fed. Reg. 31320 et seq. (July 25, 1975).

One means of harmonizing these bills with the aforementioned statutory authority would be to add a provision that compliance with a permit issued pursuant to a State or Federal program under the surface mining law shall be deemed compliance with the Federal Water Pollution Control Act. Alternatively, the bills could be amended to require the Secretary of the Interior to include in surface mining permits conditions required by the Administrator of the Environmental Protection Agency and Secretary of the Army acting pursuant to their regulatory authority. See 16 U.S.C. Section 804.

We suggest that the bills make clear that the powers to be exercised by the Secretary or State Authority in diverting streams, to the extent that they may be applied to physical changes in the courses of navigable waters, are to be subject to the approval of the Secretary of the Army, acting through the Chief of Engineers, in conformity with the provisions of Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403).

Additionally, consideration should be given to excluding from the requirements of NEPA certain of the environmental protective provisions of the bills, such as, for example, the promulgation of environ-

mental protection standards pursuant to section 501 of H.R. 2 or the issuance of permits for new or existing operations pursuant to a Federal program. Precedent for such an exclusion is provided by section 511 of the Federal Water Pollution Control Act, 33 U.S.C. Section 1371(c)(1).

Moreover, the citizen suit and judicial review provisions should be modified in certain respects. Section 520(e) of H.R. 2 and Section 420(e) of S. 7, the so-called citizen suit provision, should be changed to read as follows:

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under this or any statute or common law to seek enforcement of any of the provisions of this Act and the regulations thereunder, or to seek any other relief, except that this section shall be the sole basis of jurisdiction for suits under subsection (a)(2) of this section and failure to comply with the notice requirement of subsection (b)(2) shall require dismissal of the action.

This change is in accordance with the recommendation of the Administrative Conference of the United States for amendments to the Clean Air Act and the Federal Water Pollution Control Act, both of which contain citizen suit provisions. 41 Fed. Reg. 56767 (December 30, 1976). The effect of the proposed modification would be to make the above-mentioned sections the exclusive jurisdictional base for suits seeking to compel the Secretary to perform mandatory duties.

The first sentences of Section 526(a)(1) of H.R. 2 and Section 426(a)(1) of S. 7, both of which deal with judicial review of agency action, should be changed to read as follows:

Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this Act shall be subject to judicial review only by the United States Court of Appeals for the circuit which contains the state whose program is at issue; any action by the Secretary promulgating standards pursuant to Sections 501, 515(e), 516 and 523 [401, 415(e), 416 and 423 in S. 7] shall be subject to judicial review only in the United States Court of Appeals for the District of Columbia. A petition for review of such action shall be filed in the appropriate court of appeals within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the 60th day. Any such application may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

These changes are again in accordance with the recommendations of the Administrative Conference, supra, and will resolve confusion over which circuit court is "appropriate," as well as provide for judicial review of standards of national applicability in the Court of Appeals for the District of Columbia Circuit only.

The Department further recommends that the technical changes on the attached errata sheet be made.

Whether this legislation should be enacted involves policy considerations as to which the Department of Justice defers to the Secretary of the Interior.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

HUGH M. DURHAM,  
*Legislative Counsel.*

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## XI. ADDITIONAL VIEWS

### ADDITIONAL VIEWS OF SENATOR CLIFFORD P. HANSEN

This bill follows along the path typical of legislation passed by the Congress in recent years removing from the jurisdiction of the states governmental functions that can be at best exercised on a local level. Particularly in the area of land use regulation, local control is essential. We live in very diverse lands, from deserts to mountains, from plains to prairies. Each of these diverse localities requires land use regulation on an individual case by case basis. Yet this bill proposes one set of environmental standards that are theoretically to govern the entire nation.

Land use controls are political decisions that should be kept as close or as near to the people as possible. Reclamation standards and reclamation decisions should be set at the local level, not the federal level. This bill prevents the states who much more clearly respect the views of the people from exercising this discretion.

Proponents of this bill will point out the sections of this bill that allow state control. These sections are ineffective if state control is their purpose. State administration of this Act will require state enforcement of federally mandated standards under cumbersome federally mandated procedures. Nowhere does this bill provide a mechanism for the local governments to make any policy decisions. The preservation of the state programs negotiated individually with the Department of Interior is the only bright spot for state control under this bill.

While I endorse the concept of S. 7 and do believe that a federal reclamation law is necessary, I feel that the state control provisions in this Act are not adequate, and I will support an amendment to return that control to the local level.

The defects in this bill are readily apparent. I endorse many of the concepts espoused in the Minority Views of my colleagues. However, we are often faced with bills with which we do not entirely agree. On balance, this is as good a bill as we can expect to pass this session, and I will support its passage.

CLIFFORD P. HANSEN.

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## XII. MINORITY VIEWS

### MINORITY VIEWS OF SENATOR J. BENNETT JOHNSTON

The source of much of my opposition to S. 7, as reported by the Committee, is the inclusion in Section 515 of the so-called "surface owner consent" provision.

The situation addressed by the "surface owner consent" provision concerns those lands where private persons own the surface, but the federal government owns the coal deposits which underlie the surface. The situation occurs for many reasons, but usually because the surface was originally conveyed from the government to homesteaders. No one argues that the conveyances from the government clearly stated that the federal government retained ownership of the coal. Nevertheless, the Committee has adopted a provision which prohibits the mining of the federally-owned coal unless the surface owner has first given his consent to the mining operations.

The surface owner consent provision cannot be justified. The provision will allow some land owners to block forever the production of the government's coal. Other land owners will, in effect, be permitted to sell the government's coal, thus reaping enormous windfall profits. Much of this land is worth only about \$100 per acre. However, Mr. Henry A. Burgess, an attorney in Sheridan, Wyoming, recently estimated the money a surface owner could receive on a 30 foot vein of coal underlying his land as follows:

If the coal is owned by the landowner and he is paid the current royalty rate of fifty cents per ton, his royalties would amount to \$25,000 an acre. On 640 acres, a section, royalties would be \$16,320 per acre. If the coal company will pay a surface owner royalty at the rate of five cents a ton *on the coal leased by the coal miner from the United States*, the landowner would receive \$2,500 an acre or \$1,632,000 a section (p. 461 of the proceedings of the Twenty-second Annual Rocky Mountain Mineral Law Institute; paper entitled "Representing the Landowner in a Mineral or Surface Lease or Sales Transactions"). [Emphasis added.]

It should be noted, as a matter of equity, that the surface owner consent provision confers on certain surface owners a right which is not extended to owners whose land overlies privately owned coal.

I am not totally unsympathetic to the situation of the surface owner, however. In Committee, I offered an amendment which would treat him generously. Under my proposal he would receive the full fair market value of his land, the net income he would lose due to the mining operation, his costs of relocation, and any other damage he would sustain due to the mining and reclamation operations. In addition, the surface owners would retain ownership of the surface which,

under the reclamation regulations provided in this Act, should be quite usable following the mining operation. My amendment, which I intend to offer on the floor of the Senate, is printed in the Report following my comments.

#### SURFACE OWNER COMPENSATION AMENDMENT

Substitute the following for Section 515:

Section 515. (a) The provisions and procedures specified in this section shall apply where coal owned by the United States under land the surface rights to which are owned by a surface owner as defined in this section is to be mined by methods other than underground mining techniques.

(b) Any coal deposits subject to this section shall be offered for lease pursuant to section 2(a) of the Mineral Leasing Act of 1920 (30 U.S.C. 201a), except that no award shall be made by any method other than competitive bidding.

(c) Prior to placing any deposit subject to this section in a leasing tract, the Secretary shall give to any surface owner whose land is to be included in the proposed leasing tract actual written notice of his intention to place such deposits under such land in a leasing tract.

(d) The Secretary shall not approve any mining plan pursuant to this Act until the appraised value of the surface owner's interest has been tendered in accordance with the provisions of subsection (e). Upon such tender and upon approval of the mining plan, the lessee may enter and commence mining operations whether or not the determination of value of the surface owner's interest is subject to judicial review as provided in this section.

(e) Tender of the appraised value of the surface owner's interest shall occur when:

(1) The lessee and the surface owner agree on an amount and method of compensation for the surface owner's interest, whether or not the amount of compensation is fixed in accordance with the provisions of subsection (f), and the surface owner has given the Secretary written consent for the lessee to enter and commence surface mining operations; or

(2) The lessee has deposited the appraised value of the surface owner's interest in the United States district court for the locality in which the leasing tract is located. At any time after the appraised value of the surface owner's interest is deposited in the court and upon execution by the surface owner and the lessee of a final settlement of their rights under this section, the surface owner shall be entitled to withdraw from the registry of the court the full amount of the deposit.

(f) For purposes of this section, the term "appraised value of the surface owner's interest" means the value of the surface owner's interest fixed by the Secretary based on appraisals made by three appraisers. One such appraiser shall

be appointed by the Secretary, one appointed by the surface owner concerned, and one appointed jointly by the appraisers named by the Secretary and such surface owner. In computing the value of the surface owner's interest, the appraisers shall fix and determine:

(1) the fair market value of the surface estate subject to the lease without reference to or consideration of the value of the coal under the said surface estate;

(2) the net income the surface owner can be expected to lose as a result of the surface mining operation during the two years immediately following approval of the mining plan;

(3) the cost to the surface owner for relocation or dislocation during the mining and reclamation process; and

(4) any other damage to the surface caused or reasonably anticipated to be caused by the surface mining and reclamation operations.

(g) For the purpose of this section the term "surface owner" means the natural person or persons (or corporation, the majority stock of which is held by a person or persons who meet the other requirements of this section) who:

(1) hold legal or equitable title to the land surface; and

(2) have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations.

(h) The United States district court for the locality in which the leasing tract is located shall have exclusive jurisdiction to review the determination of the value of the surface owner's interest made pursuant to this section.

(i) This section shall not apply to Indian lands."

J. BENNETT JOHNSTON.

MINORITY VIEWS OF SENATORS BARTLETT, DOMENICI, AND  
LAXALT

For more than five years now, arguments have echoed through the halls of Congress debating the pros and cons of surface mining for coal. The environmental thrust of the late 1960's and early 1970's, which made all of us feel ashamed for the rape and pillage of our lands from time immemorial, is just now catching up to coal strip mining. The fervor and intensity of the emotional environmental arguments have now captured and will retard surface mining for coal as retribution for many of the environmental crimes committed since the early 1900's. If all the problems of the real world could be ignored—such as the fact that we are in a life and death struggle to bail ourselves out of our national energy crisis—we might be persuaded to allow the economic cost of prohibiting surface mining. However, in this day, in this era, in this crisis, we cannot afford to be blind to the stark realities of the potentially disastrous energy shortages which we face. For these reasons, we must look at S. 7 as it is reported by the Committee and measure its purported goals against the regulatory barriers which the bill erects.

President Carter, like President Ford before him, has identified coal as a vital element in our energy policy. Both of these Presidents recognized that while coal accounts for only 19% of our present energy needs, it represents 90% of our total energy reserves. The calls for increased coal production go back to 1973 and the Project Independence proposal to double production by 1985. And now, this Administration has nominated coal as the principal replacement fuel for a massive conversion effort from gas and oil. Yet, the Congressional response to this dilemma is a woefully misdirected surface mining bill which will:

- (1) Severely restrict the acceleration of coal production;
- (2) Scrap every state law, regulation, and administrative procedure that is in place that could be used to expand coal production; and
- (3) Impose restrictions which have no relevance to insuring adequate reclamation.

It is unthinkable to us that the Congress in its first response to the call for greater coal utilization would enact a measure which would accomplish the very opposite result. We feel that it was irresponsible to rush through a surface mining measure which was essentially drafted in the energy environment of 1972 and 1973. The Committee's activities focused on very few of the substantive deficiencies which have existed in this bill since it was initially put forward four years ago. Rather, the Committee spent its time with cosmetic amendments which do nothing to remedy the inherent infirmities in this bill. Unfortunately, the authors and proponents of this measure mistakenly

believe that the language, which was drafted for an energy situation which existed in 1972 through 1974, is still apropos in 1977.

This Committee has ignored the most significant factual finding revealed during four years of hearings—that the individual states are fully competent and presently equipped to regulate surface mining and reclamation within their borders.

The practical effectiveness of surface mining under state regulation is clearly shown by the fact that over 50 percent of all coal produced in 1975 was obtained by this technique, and this percentage without consideration of this bill was projected to increase to over 60 percent by 1985. Thirty-eight states now have strict surface mining and reclamation laws in effect which are achieving coal production in an effective and environmentally sound manner. Furthermore, this is being done within the contexts of each state's unique geological and climatological characteristics.

We find it extremely significant that not one witness before this Committee has challenged or even questioned the effectiveness of any of these state programs on environmental protection, reclamation, or any other grounds. And yet, as the bill is written, a state will either have to choose to have a "Federal" program regulating all surface mining within a state, or a "State" program which is drafted pursuant to the rules and regulations promulgated by the Secretary of Interior. State participation in this regulatory process is illusory since the state would not have the flexibility to influence the substance. The state would merely stand in the shoes of the federal government and act as its agent in performing the myriad responsibilities required by the Act. Moreover, this will still necessitate the revision of existing state surface mining laws and regulations to comport with the federal requirements.

The Exclusive State Regulation amendment would have offered a third option to a state: a state could simply adopt in state law the two core provisions of the bill, the Reclamation Standards set down in Sections 415 and 416. Once these strict, federally-dictated environmental performance standards were adopted as State law, the existing state regulatory machinery—which has been carefully tailored to deal with local requirements—would be used to continue the regulatory job that is being done today. The role of the federal government then would be to monitor the effectiveness of state enforcement of those laws.

We felt that this amendment represented a more appropriate approach considering our desire to have sound National Reclamation Performance Standards adopted in all the states, but at the same time, insuring that the national goal of increased coal production would be met at the earliest possible time. However, the Committee, with only cursory discussion, refused to recognize the desirability or suitability of this option even though the amendment would have adopted the essence of this bill—the environmental performance standards. Such action reflects an inherent distrust of state enforcement and state regulation. The Committee acted without one scintilla of evidence that the states are not performing an adequate job of enforcing environmental protection standards. This gives credence to our belief that the true goal of proponents of this bill is to prevent surface mining in as many places as possible—why else force anything more

on the states than National Environmental Performance Standards unless the remainder of the provisions also ban or limit this type of mining. As a result, this Committee has preempted all state effort and heavily handedly imposed a federal surface mining law which contains the following examples of provisions which will frustrate increased surface coal production.

In the first place there is little subtlety to the bill's clear preferences for underground mining and its repeatedly imposed barriers to surface mining. In Section 104(b), a principal finding posed in support of S. 7 is that "the overwhelming percentage of the nation's coal reserve can only be extracted by underground methods, and it is therefore essential to the national interest to improve the existence of an expanding and economically healthy underground coal mining industry." To contribute to the "economic health" of underground mining, S. 7 would impose only a 15 cent per ton reclamation funding fee for underground mining while charging surface running operators 35 cents per ton. Furthermore, beyond addressing the "surface effects" of underground mining, none of the other restrictive and burdensome provisions of this bill are made applicable to underground operation. As a result, S. 7 reflects a decided Congressional hospitality toward conventional sub-surface mining techniques at the great expense of surface mining.

Beyond these preferences for underground mining, greater utilization of surface recovery techniques are impeded by extremely stringent permit application procedures, environmental protection requirements, and reclamation standards that require returning mined areas to their approximate original contour and to a usable condition that equals or exceeds pre-mining levels of production. Although there is scant disagreement with the general principle that surface-mined lands should not be abandoned until they are made useful, attractive and productive again, these are expensive and time-consuming requirements not required of other recovery methods.

Secondly, in addition to the underground mining preferences, the bill contains a cornucopia of requirements which effectively eliminate prospects for surface mining on what is probably the majority of strip-pable coal lands. Section 422 of S. 7 flatly bans "all" surface mining—through the rubric of designating certain areas "unsuitable" for mining—whenever such operations will:

(A) Be incompatible with existing land use plans or programs; or

(B) Affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural system; or

(C) Affect renewable resource lands in which such operations could result in a substantial loss or reduction of long range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) Affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

This same section also specifically precludes surface mining operations in National Parks, National Wildlife Refuges, National Systems of Trails, National Wilderness Preservation Systems, Wild and Scenic River Systems and any National Recreation Area designated by an Act of Congress. We have little quarrel with most of these areas, but it is the cumulative effect of these prohibitions that is dangerous. Furthermore, no such mining may be undertaken within 100 feet of the outside right of way line of any public road, or within 300 feet of any occupied dwelling, public building, school, church or public park, or within 500 feet of an operating or abandoned underground mine.

Even this plethora of statutorily "unsuitable" surface mining areas—which, incidentally are so designated without regard to the potential of such lands to be reclaimed—becomes insignificant when compared to the effectiveness of the ban imposed by the so-called Alluvial Valley protection requirements found in Section 410(b)(5). This provision benignly states that no mining permits or revisions shall be issued unless the applicant affirmatively demonstrates that:

(5) the proposed surface coal mining operation, if located west of the 100th meridian west longitude, would not have a substantial adverse effect on alluvial valley floors underlain by unconsolidated stream laid deposits where farming can be practiced in the form of irrigated, flood irrigated, or naturally subirrigated hay meadows or other crop lands (excluding undeveloped rangelands), where such valley floors are significant to the practice of farming or ranching operations, including potential farming or ranching operations, if such operations are significant and economically feasible.

There must be no mistake about what this restriction does. First, by its very terms it subjects the entire western half of the United States—beyond the 100th meridian—to reclamation treatment different from that accorded the rest of the country. Second, it precludes surface mining in these alluvial valleys even when such operations would only temporarily alter hydrological balance as interpreted by the regulatory authority. Finally, it issues this surface mining prohibition not because the required reclamation cannot be achieved, but because Congress prefers farming or ranching operations as a land use in apparent disregard to the impact of this policy on national energy supplies.

The full extent to which this provision alone will impede the development and ultimate production of low sulphur western coal cannot be accurately measured. This is so because there has been no inclusive definition of "alluvial valleys". What is clear is that over one-third of our demonstrated national coal reserves are recoverable only by surface mining techniques, and of these reserves, three-fourths—103 billion tons out of 137 billion tons—are located in our western states. The alluvial valley "protection" clause will absolutely bar access to these vast supplies.

Finally S. 7, in the unfortunate fashion of modern federal legislation, creates a veritable maze of administrative requirements which will add years to the time required to begin surface coal mining, and increase operators' administrative costs immensely, which will force

consumers to pay more. All future surface mining operations will require application for an issuance of a permit, and the specifics of this procedure are set forth in Sections 406-410 which cover 15 pages of the Committee print. The horrible thought is that a Secretary of Interior will add hundreds of requirements interpreting what the Congress intended. Required before a permit may be issued are filing fees and performance bonds, highly detailed notice and hearing requirements, five separate findings of fact by the regulatory authority, and thirty individual informational requirements ranging from cross sectional maps of the proposed mining area to a determination of the hydrological and climatological consequences of the mining operations. The potential for administrative delay in dealing with these requirements is made clear by the fact that Section 402 of the bill specifically allows up to forty-two months for permit processing. Added to the delays of processing applications are the opportunities for litigation which could actually stop this process in its tracks. The potential for attacks on the adequacy of environmental impact statements is so well established as not to require comment. However, the citizen suit provisions of Section 420 provide yet another avenue for interfering with surface mining activities from the application process throughout the mining and reclamation procedures whenever "any act or duty under this act is not performed". Section 419 requires continuation of performance bonds for periods of up to ten years after mining operations are completed—and even then, release may be made the subject of public hearings. Thus, the opportunity for litigation is unlimited.

In summary, the consistent thread that runs throughout this bill is the clear attempt to discourage rather than to encourage the increase of coal recovery by surface mining techniques. Ironically, in March of 1975, Senators Paul Fannin and Dewey F. Bartlett in minority views to the Surface Mining Control and Reclamation Act of 1975 asked the question—is the land not really being reclaimed under state enforcement? Where is the evil? What necessitates a federal law? Again, these questions have gone unanswered and undocumented, and this Committee continues to thrust forward a preemption law. Like S. 7 of the 94th Congress, the S. 7 of the 95th Congress is a bill which bans surface mining under the guise of being a "reclamation bill".

We can only lament the fact that this struggle to prevent a federal surface mining and reclamation act is about at an end. Frankly, the Members of the Congress are obviously weary and tired of the issue. Those who believe there should be little or no surface mining have won. But the country has lost. We predict that the goal of increasing coal production to over 1 billion tons a year by 1985 will not be reached and that the goal of greater coal utilization will be frustrated because of the action which this Committee and this Congress have and will take with respect to this bill. We predict that future Congresses will have to pass remedial legislation or that the Act and its environmental standards will be partially or totally ignored because of the weight and necessity of getting to the most abundant domestic fossil fuel that we have to rely upon. It may be that less regard will be paid to our environment and if so, the country will lose on both accounts.

In our opinion, the federal government in the last few years has taken unto itself more and more of the decision making responsibility for every facet of American life. This bill epitomizes that phenomenon. On the floor of the Senate, we hope our colleagues will join us in repudiating this most recent attempt to wrest decision making responsibilities away from the level of government most competent to make day-to-day decisions. Support for our Exclusive State Regulations amendment will help stop this unwarranted trend toward federal intervention into areas of state responsibility.

DEWEY F. BARTLETT.  
PETE V. DOMENICI.  
PAUL LAXALT.

### XIII. CHANGES IN EXISTING LAW

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, S. 7, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

#### SECTION 1114, TITLE 18, UNITED STATES CODE

##### § 1114. *Protection of officers and employers of the United States*

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty, in the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare or of the Department of Labor *or the Department of the Interior* assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his

51. (131)

official duties, or an account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title. (June 25, 1958, ch. 645, 62 Stat. 756; May 24, 1949, ch. 139, § 24, 63 Stat. 93; Oct. 31, 1951, ch. 655, § 28, 65 Stat. 721; June 27, 1952, ch. 477, title 57, § 402(c), 66 Stat. 276; July 29, 1958, Pub. L. 85-568, title III, § 304(d), 72 Stat. 434; July 2, 1962, Pub. L. 87-518, § 10, 76 Stat. 132; Aug. 27, 1964, Pub. L. 88-493, § 3, 78 Stat. 610; July 15, 1965, Pub. L. 89-74, § 8(b), 79 Stat. 234; Aug. 2, 1968, Pub. L. 90-449, § 2, 82 Stat. 611; Aug. 12, 1970, Pub. L. 91-375, § 6(j) (9), 84 Stat. 777; Oct. 27, 1970, Pub. L. 91-513, title II, § 701(i) (1), 84 Stat. 1282; Dec. 29, 1970, Pub. L. 91-596, § 17(h) (1), 84 Stat. 1607.)

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2016 WL 5745094

Only the Westlaw citation is currently available.  
United States District Court, D. Idaho.

**WESTERN WATERSHEDS PROJECT**, Plaintiff,  
v.  
U.S. DEPARTMENT OF INTERIOR, Defendant,  
and  
**Idaho Wool Growers Association**, Minidoka  
Grazing Association, and **Etcheverry  
Sheep Company**, Intervenor Defendants.

Case No.: 1:15-cv-00047-REB

|  
Signed 09/30/2016

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**MEMORANDUM DECISION AND ORDER RE:**

**PLAINTIFF WESTERN WATERSHEDS  
PROJECT'S MOTION FOR SUMMARY  
JUDGMENT (Docket No. 22)**

**FEDERAL DEFENDANT'S CROSS-MOTION  
FOR SUMMARY JUDGMENT (Docket No. 30)**

**FEDERAL DEFENDANT'S MOTION TO  
STRIKE NEW EVIDENCE (Docket No. 33)**

**INTERVENOR DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT (Docket No. 34)**

Honorable **Ronald E. Bush**, Chief U. S. Magistrate Judge

\*1 Currently pending before the Court are (1) Plaintiff Western Watershed Project's Motion for Summary Judgment (Docket No. 22), (2) Federal Defendant's Cross-Motion for Summary Judgment (Docket No. 30), (3) Federal Defendant's Motion to Strike New Evidence (Docket No. 33), and (4) Intervenor Defendants' Motion for Summary Judgment (Docket No. 34). Having carefully reviewed the record, participated in oral argument, and otherwise being fully advised, the undersigned enters the following Memorandum Decision and Order:

**I. INTRODUCTION**

Plaintiff Western Watershed Project ("WWP") seeks review of Defendant U.S. Department of Interior's ("Interior") July 10, 2014 Office of Hearing and Appeals ("OHA") decision, upholding the Bureau of Land Management's ("BLM") decisions to allow grazing on the Big Desert Sheep Allotment ("Allotment"), as well as the accompanying Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"). WWP's allegations are all premised on the fact that the Allotment contains greater sage-grouse habitat.

WWP generally contends that the Interior's approval of 15 BLM final grazing decisions and the environmental analyses underlying those decisions violated the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Administrative Procedure Act ("APA"). Specifically, through this action, WWP alleges that the EA (1) arbitrarily confined the geographic scope of its cumulative impacts assessment by excluding other allotments directly to the west of the Allotment; (2) failed to consider a reasonable alternative location for the BLM's proposed forage reserve within the Allotment; (3) failed to properly analyze the grazing decisions' impacts on wildfire frequency; and (4) contained no analysis of potential indirect impacts to relict vegetation sites found on nearby kipukas (islands of older, undisturbed/ungrazed terrain surrounded by newer lava flows), providing habitat for sage-grouse.

Now before the Court are WWP's Motion for Summary Judgment (Docket No. 22), Interior's Cross-Motion for Summary Judgment (Docket No. 30), and the Intervenor's<sup>1</sup> separate Motion for Summary Judgment

(Docket No. 34).<sup>2, 3</sup> The issues were argued before the undersigned at the federal courthouse in Boise, Idaho. After the considerable sederunt that follows in any administrative appeal such as this case, the Court decided such issues and now memorializes those details in this Memorandum Decision and Order.

## II. RELEVANT FACTUAL BACKGROUND

### A. The Big Desert Sheep Allotment and Sage-Grouse

\*2 1. The 236,990-acre Allotment is located in southeastern Idaho, within an expanse of the Snake River Plain known as the “Big Desert” – it includes rolling plains, lava outcrops, and other volcanic extrusions;<sup>4</sup> is situated 4,350-5,563 feet above sea level; and is relatively dry (averaging 8-16 inches of annual precipitation). *See* Pl.'s SOF Nos. 1-2 (Docket No. 23) (citing AR 982, 984-85); Defs.' SOF No. 1 (Docket No. 31) (citing AR 382).

2. The Allotment provides habitat for a variety of native plant and animal species, some of which are BLM-designated special status species, including the greater sage-grouse. *See* Pl.'s SOF No. 3 (Docket No. 23) (citing Compl., ¶¶ 25-26 (Docket No. 1); Ans., ¶¶ 25-26 (Docket No. 9); AR 1009-10, 1014-19, 1023-24); Defs.' Obj. to Pl.'s SOF No. 3 (Docket No. 32).

3. Sage-grouse within the Allotment are part of the Snake-Salmon-Beaverhead ID population whose trend, as indicated by average number of males per lek (sage-grouse breeding areas), has declined by 57% from 1965-1969 to 2000-2007. Pl.'s SOF No. 12 (Docket No. 23) (citing AR 1017). The five-year baseline from 1996-2000 in the Allotment was 9.23 males per lek and 17.7 males per active lek. *See* Defs. Obj. to Pl.'s SOF No. 12 (Docket No. 32) (citing AR 1017). As of December 2012 (the date of the at-issue EA), the three-year average number of males per lek was 17.88, while the three-year average number of males per active lek was 31.25. *See id.* There are 30 known sage-grouse leks within the Allotment and another 65 leks within five miles of the Allotment – 48% of these 95 leks are occupied; the remaining leks are undetermined, inactive, or not verified. *See* AR 1017.

4. Of the Allotment's 236,990 acres, 134,840 are designated as Preliminary Priority Habitat (“PPH”) for sage-grouse, and 24,807 acres are designated as Preliminary General

Habitat (“PGH”) for sage-grouse. *See* Pl.'s SOF No. 3 (Docket No. 23) (citing AR 1016).

a. Both PPH and PGH are divided into subsets: perennial grasslands and sagebrush – all of the PPH and PGH acres in the Allotment lie within the perennial grasslands subset. *See* AR 1016.

b. PPH and PGH designations within the Allotment are based on sage-grouse populations – PPH is based on combined high male lek attendance, high lek density, and high lek connectivity; PGH provides corridors connecting PPH, potential stepping stones for grouse movements within corridors, or occupied habitats characterized by low lek density. *See* Pl.'s SOF No. 3 (Docket No. 23) (citing AR 1016).

5. Of the Allotment's 236,990 acres, 213,220 acres are identified as Restoration Type 1 sage-grouse habitat, and 1,287 acres are identified as Restoration Type 2 sage-grouse habitat. *See* Obj. to Pl.'s SOF No. 3 (Docket No. 32) (citing AR 1016). Due to past wildfires, there is limited key sage-grouse habitat identified within the Allotment. *See id.*

a. Restoration Type 1 sage-grouse habitat refers to sagebrush-limited areas with acceptable understory conditions in terms of grass species composition. *See* AR 1016. Such areas are often a result of wildfires or seedings. *See id.* The majority of the Allotment is classified as Restoration 1 sage-grouse habitat due to fires within the Allotment that have reduced sagebrush cover, forb (herbaceous flowering plants) diversity, and abundance. *See id.*; *see also* Defs.' SOF No. 3 (Docket No. 31) (citing AR 382). While sagebrush provides critical habitat components (escape cover, nesting habitat) and food for sage-grouse, due to the limited sagebrush canopy cover and lack of forb diversity in Restoration Type 1 sage-grouse habitat areas, sage-grouse very rarely use them. *See* AR 1016.

\*3 b. Restoration Type 2 sage-grouse habitat refers to inadequate sagebrush cover with poor understory herbaceous conditions. *See id.* Although sage-grouse may still use these sites during the winter months when the bulk of their diets are comprised of sagebrush, use during breeding and brood-rearing seasons would be limited due to the poor condition of the understory. *See id.*

6. Ninety-two percent of the Allotment (219,617 acres) is federal public land managed by the BLM's Upper Snake Field Office. *See* Pl.'s SOF No. 1 (Docket No. 23) (citing Compl., ¶¶ 80-81 (Docket No. 1); Ans., ¶¶ 80-81 (Docket No. 9); AR 982-83). The BLM's Upper Snake Field Office manages grazing on the Allotment, which has approximately 15 domestic sheep grazing permittees. Defs.' SOF No. 2 (Docket No. 31) (citing AR 382). The Allotment is "common" to all permittees, meaning that there are no internal pastures and each of the permittees has access to the entire allotment during the season of use. This leaves the Allotment largely free from internal pasture fencing. *See id.*; *see also* Pls.' SOF No. 9 (Docket No. 23) (citing Compl., ¶ 82 (Docket No. 1); Ans., ¶ 82 (Docket No. 9); AR 932, 23893).

### **B. The BLM's Rangeland Health Evaluation for the Big Desert Sheep Allotment**

7. In early 2011, the BLM began a permit renewal process for the Allotment. *See* Defs.' SOF No. 4 (Docket No. 31) (citing AR 387). As part of that process, the BLM deemed it necessary to evaluate conditions on the ground by conducting a rangeland health assessment at representative areas, specifically five "assessment polygons" within the Allotment ranging in size from 31,000 acres to 54,000 acres. *See id.* The BLM then gathered an interdisciplinary team of resource specialists to complete the rangeland health assessment and field work. *See id.* at SOF No. 4 (citing AR 450, 1063).

8. On April 25, 2011, the BLM sent a notice to all permittees and interested members of the public (including WWP), inviting them to participate in the field assessment for the Allotment. *See id.* at SOF No. 5 (citing AR 1062); *see also* Intervenor's SOF No. 1 (Docket No. 35, Att. 1) (citing AR same). Several permittees participated in the assessment; however, no interested members of the public (including WWP) participated. *See* Defs.' SOF No. 5 (citing AR 387); *see also* Intervenor's SOF No. 1 (Docket No. 35, Att. 1) (citing AR 1-483).

9. After the BLM's interdisciplinary team completed field work in July 2011, it prepared an Allotment Assessment summarizing the BLM's findings. *See* Defs.' SOF No. 6 (citing AR 1063-76); *see also* Intervenor's SOF No. 3 (Docket no. 35, Att. 1) (citing AR 469-82). The Allotment Assessment contained explanations of how conditions on the Allotment related to the existing Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing

Management, explaining the rate of departure of key indicators of resource health from expected conditions. *See* Defs.' SOF No. 7 (citing AR 1065-76); *see also* Pl.'s SOF No. 29 (Docket No. 23) (citing AR 462, 469). Four of the eight Rangeland Health Standards applied to the Allotment: Standard 1 (Watersheds), Standard 4 (Native Plant Communities), Standard 5 (Seedings), and Standard 8 (Threatened and Endangered Plants and Animals). *See* Defs.' SOF No. 7 (Docket No. 31) (citing AR 1066-76); Pl.'s SOF No. 29 (Docket No. 23) (citing Compl., ¶ 90 (Docket No. 1); AR 463).<sup>5</sup> As to each of these four Standards, the Allotment Assessment revealed the following:

\*4 a. Standard 1 (Watersheds): The Allotment Assessment noted slight to moderate departure of indicators from expected conditions, and in every case attributed the departure to wildfire. *See* Defs.' SOF No. 7 (Docket No. 31) (citing AR 1066-67).

b. Standard 4 (Native Plant Communities): The Allotment Assessment revealed departure from expected conditions in the form of reduced presence of shrubs, increase in cheatgrass, and a general change in plant community. *See id.* at SOF No. 7 (citing AR 1067-70). As with Standard 1, the Allotment Assessment explained that wildfire was the major driver of the sub-prime conditions. *See id.* at SOF No. 7 (citing AR 1069).

c. Standard 5 (Seedings): The Allotment Assessment determined that the indicators for "biotic integrity" in the four assessment areas were rated as none to slight departure from site potential, except for functional/structural groups (slight to moderate departure for one assessment area, moderate departure for three assessment areas) and invasive plants indicators (none to slight departure for two assessment areas, moderate departure for two assessment areas). *See* AR 1071. Additionally, previously-uncollected vegetative cover studies were conducted in non-native seedings within the Allotment. *See id.*

d. Standard 8 (Threatened and Endangered Plants and Animals): The Allotment Assessment described reduced shrubs and presence of cheatgrass as potential concerns. *See* Defs.' SOF No. 7 (Docket No. 31) (citing AR 1072-76).

10. On November 17, 2011, the BLM sent a cover letter, along with the Allotment Assessment to all permittees and interested members of the public. *See id.* at SOF No. 8 (citing AR 1077); *see also* Intervenor's SOF No. 3 (Docket No. 35, Att. 1) (citing AR same). As with its April 25, 2011 letter, the BLM designed the letter to encourage public involvement and to solicit key issues which were important to the public. *See id.* The cover letter explained that the Allotment Assessment was part of the permit renewal process, allowing the public to review it, and requesting additional Allotment-specific data by December 9, 2011 for the BLM's consideration in the forthcoming Allotment evaluation(s). *See id.* According to Interior and Intervenor, WWP did not contact the BLM regarding the Allotment Assessment, nor did WWP provide additional Allotment-specific data as requested. *See* Defs.' SOF No. 8 (citing AR 387); *see also* Intervenor's SOF No. 3 (Docket No. 35, Att. 1) (citing AR 1-483). WWP disagrees, claiming that “[a] WWP staff member submitted a declaration describing that she did provide comments on BLM's [A]llotment [A]ssessment.” Pl.'s Obj. to Defs.' SOF No. 8 (Docket No. 40) (citing AR 22890-902, 1783-84, 1806-11); *see also* Pl.'s Obj. to Intervenor's SOF No. 3 (Docket No. 41) (citing same).<sup>6</sup>

\*5 11. On December 12, 2011, the BLM's interdisciplinary team prepared an Evaluation Report in an effort to determine whether the Allotment was achieving the Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management. *See* Defs.' SOF No. 9 (Docket No. 31) (citing AR 387, 1078-84). The Evaluation Report included BLM's findings as to whether the Allotment was either “Meeting the Standard,” “Not meeting the Standard but making significant progress toward meeting,” or “Not meeting the Standard.” *See id.* at SOF No. 9 (citing AR 1078-84). As to each of four above-referenced Standards, the Evaluation Report noted the following:

a. Standard 1 (Watersheds): The Evaluation Report indicated that “recent fire activity in the areas has removed a large majority of the shrub composition, as well as reduced the large bunchgrass competition” but, even so, “[t]he large majority of the [Allotment] provides for proper infiltration, retention, and release of water appropriate to soil type, vegetation, climate, and landform to provide for proper nutrient cycling, hydrologic cycling, and energy flow.” *See* Defs.' SOF No. 10 (Docket No. 31) (quoting AR 1080). Ultimately,

it was concluded that the Allotment was “Meeting the Standard.” *See id.*

b. Standard 4 (Native Plant Communities): The Evaluation Report contains findings that “[t]he large majority of the Native Plant Communities in the [Allotment] is not meeting the standard, but is making significant progress toward meeting.” AR 1081, 1083; *see also* Defs.' SOF No. 11 (Docket No. 31) (citing same). Indeed, according to the Evaluation Report, “[t]he repeated disturbance associated with wildfires in the [A]llotment has contributed to the decrease in large bunchgrass composition in the areas and increase in cheatgrass composition,” but that “[t]he shrub component will continue to reestablish in the [A]llotment as long as the [A]llotment isn't affect by future fires.” AR 1081. Despite this reduction in shrub component, the Evaluation Report includes a conclusion that “the grass and forb components are productive and healthy within the [Allotment].” *Id.*

c. Standard 5 (Seedings): As the BLM's finding that the Allotment was “Meeting the Standard,” the Evaluation Report contains comments that it (1) “meets the Standard to maintain life form diversity, production, native animal habitat, nutrient cycling, energy flow, and the hydrologic cycle”; and (2) “[t]he seedings remain productive and provide adequate litter and residual plant material for site protection.” AR 1082; *see also* Defs.' SOF No. 10 (Docket No. 31) (citing same).

d. Standard 8 (Threatened and Endangered Plant and Animals): Consistent with Standard 4, breeding habitat for sage grouse was evaluated, with the Evaluation report finding “an unsuitable habitat rating overall for sage grouse” resulting from “greatly reduced sagebrush cover and heights, and slightly reduced tall bunchgrass densities and heights, and increased composition of annual grasses (cheatgrass) – each a result of past wildfires.” AR 1083; *see also* Defs.' SOF No. 11 (Docket No. 31) (citing same). Still, as with Standard 4, the Evaluation Report also said that, despite the reduction in shrub component, “the large majority of the grass and forb components are productive and healthy within the [Allotment].” *Id.* Ultimately, the Evaluation Report contained a conclusion that the Allotment was “[n]ot meeting the Standard, but making significant progress towards meeting.” *Id.*

12. After completing the Evaluation Report and finding that the Allotment was either meeting certain Standards or, if not, making significant progress towards meeting other applicable Standards (*see supra*), the BLM's interdisciplinary team assembled a draft set of alternatives ("Draft Alternatives") for NEPA evaluation. *See* Defs.' SOF No. 12 (Docket No. 12) (Docket No. 31) (citing AR 1085-87). There were four Draft Alternatives identified, including (1) no action (Alternative A); (2) a slight modification of the season of use with additional flexibility, as proposed by the permittees (Alternative B); (3) a slight modification and extension of the season and the creation of a forage reserve (Alternative C); and (4) no grazing (Alternative D). *See id.*

\*6 13. On December 14, 2011, the BLM circulated the Evaluation Report and Draft Alternatives to all permittees and interested members of the public, including WWP. *See id.* at SOF No. 13 (citing AR 1088); *see also* Intervenor's SOF No. 4 (Docket No. 35, Att. 1) (citing AR 1088, 1085-87). As with its April 25 and November 17, 2011 letters, the December 14, 2011 letter invited the public to comment on these documents by January 9, 2012, this time to ensure that the BLM had accurately evaluated resource conditions and had a good range of alternatives to consider on the Allotment. *See id.* Again, Interior and Intervenor's claim that WWP did not respond to, or otherwise contact, the BLM about the Evaluation Report or the Draft Alternatives. *See* Defs.' SOF No. 13 (citing AR 387); *see also* Intervenor's SOF No. 4 (Docket No. 35, Att. 1) (citing AR 1-483). And, as before, WWP disagrees, claiming that "[a] WWP staff member submitted a declaration describing that she did provide comments on BLM's Allotment Assessment and conformance document." Pl.'s Obj. to Defs.' SOF No. 13 (Docket No. 40) (citing AR 22890-902, 1783-84, 1806-11).<sup>7</sup>

### C. The BLM's Environmental Assessment: Grazing Permit Renewal for Big Desert Sheep Allotment

14. After reviewing data and public feedback regarding the Evaluation Report and Draft Alternatives, the BLM completed an EA in December 2012. *See* Defs.' SOF No. 14 (Docket No. 31) (citing AR 380-461); *see also* Intervenor's SOF No. 5 (Docket No. 35, Att. 1) (citing same). According to Interior, because no permittee or interested member of the public expressed disagreement with the BLM's Allotment Assessment, Evaluation

Report, or Draft Alternatives, the BLM analyzed in detail the four alternatives that it had previously disclosed to the public. *See* Defs.' SOF No. 14 (Docket No. 31); *see also* Intervenor's SOF No. 5 (Docket No. 35, Att. 1) (citing AR 1-483).

a. The BLM's EA noted that naturally-occurring wildfire explained why conditions were not perfect on the Allotment. *See* Defs.' SOF NO. 15 (citing AR 410). The EA also explained that grass and forb components had largely recovered post-fire and provided "productive and healthy habitat" for certain wildlife. *See id.* at SOF No. 15 (citing AR 410, 437). Furthermore, the EA explained that shrubs and sagebrush were naturally coming back to the Allotment, thus allowing for the Allotment to make significant progress toward meeting Standards. *See id.* at SOF No. 15 (citing AR 425, 428-29). The BLM also described its non-grazing, active restoration efforts to plant and seed sagebrush on the Allotment. *See id.* at SOF No. 15 (citing AR 428).

\*7 b. The BLM's EA examined how the Draft Alternatives would impact key resources on the Allotment. *See id.* at SOF No. 16 (citing AR 402-05, 407-08, 425-35).

i. Interior suggests that, "[b]ecause the BLM's field work showed that current grazing management was not causing resource damage on the Allotment, it was not surprising that the BLM's analysis showed that continuation of current management with slight tweaks to the grazing season would allow the Allotment to continue making significant progress toward meeting Standard 4 (Native Plant Communities) and Standard 8 (Threatened and Endangered Plant and Animals)." *Id.* at SOF No. 16 (citing AR 421-24, 429-31). WWP disagrees that with any characterization of the changes to the grazing season in the BLM's final decisions (40 days, including 25 during the critical sage-grouse breeding and nesting season) as "slight tweaks." *See* Pl.'s Obj. to Defs.' SOF No. 16 (Docket No. 40) (citing AR 989, 992, 1020, 14814-15, 14822).

ii. The BLM explained how the forage reserve incorporated into Alternative C would allow the BLM to increase sagebrush in a crested wheatgrass seeding, while providing a place where permittees in the area could graze livestock in emergency

situations. *See* Defs.' SOF No. 17 (Docket No. 31) (citing AR 392-93, 420-22, 430-32). WWP disputes that increased grazing will increase sagebrush "because sheep eat sagebrush and grazing damages sagebrush." Pl.'s Obj. to Defs.' SOF No. 17 (Docket No. 40) (citing Pl.'s SOF No. 18 (Docket No. 23); AR 23243-50, 22756, 22766, 22805-07, 22814-16, 23967-71). In short, WWP contends that the BLM's primary motivation for constructing the forage reserve was to promote livestock grazing. *See* Pl.'s Obj. to Defs.' SOF No. 17 (Docket No. 40) (citing AR 23522).

iii. The BLM also considered the new infrastructure that would be built to accommodate the forage reserve – 14 miles of new boundary fence (including fence posts), three miles of new pasture fence (including fence posts), a well, water delivery devices, a corral, and other smaller projects. *See* Defs.' SOF No. 18 (Docket No. 31) (citing AR 393-94). In addition to noting the EA's recognition that forage reserves could align with various conservation plans/strategies relative to sage-grouse populations, Interior claims that, "[b]ecause [the forage reserve] would be built in restoration sage-grouse habitat, the BLM carefully analyzed the impacts of the new infrastructure on sage-grouse and weighed it against the benefits of the reserve to sage-grouse and other resources." *Id.* at SOF No. 18 (citing AR 415-18, 421, 1346, 1348, 1351, 1363, 1404, 1542-43, 1546, 1132-39); *see also* AR 421-22 (EA concluding that "[p]otential impacts to sage-grouse are minimal due to the lack of suitable sage-grouse habitat and distance to occupied leks. Fence posts would provide perches for predators of sage-grouse nests and chicks but the distance to suitable sage-grouse habitat diminishes the potential for predators to be successful from fence posts."). WWP counters that the forage reserve and associated infrastructure would be built in PPH-designated areas – the most important sage-grouse habitat type. *See* Pl.'s Obj. to Defs.' SOF No. 18 (Docket No. 40) (citing AR 997, 1132, 22690).

#### **D. The BLM's Proposed Decisions for the Big Desert Sheep Allotment, Finding of No Significant Impact, and WWP's Protest**

\*8 15. In early December 2012, after completing the EA, the BLM prepared proposed decisions for the Allotment, ultimately proposing the selection of Alternative C (a

modification and extension of the grazing season and the creation of a forage reserve). *See* Defs.' SOF No. 19 (Docket No. 31) (citing AR 244-352). The rationale for the election of Alternative C included:

This decision is based on the findings of the interdisciplinary team on the available monitoring data, allotment evaluation, consultation, and [the EA]. Implementation of the actions described above, including the permit terms and conditions, will help ensure that the allotment continues to meet or make significant progress toward meeting all applicable standards within the allotment.

The decision for the Big Desert Sheep Allotment is in conformance with the Greater Sage-Grouse Interim Management Policies and Procedures Instruction Memorandum (IM-2012-043).

The rangeland health assessment indicates that Alternative C would also continue to meet Standards 1 and 5, and continue to make significant progress toward meeting Standards 4 and 8 at a similar rate as Alternative B. Use of the Big Desert Sheep Allotment would be similar to Alternative B, except for the creation of the Countyline Forage Reserve Allotment. The establishment of the Countyline Forage Reserve Allotment would include authorizing the construction of a boundary/pasture fence, the construction of a pipeline with three trough sets and two wildlife guzzlers, the drilling of a well, the placement of a storage tank, corral, and the placement of one cattleguard in the forage reserve allotment. Both the Sage Grouse Comprehensive Conservation Strategy (2006) and the Big Desert Sage-Grouse Planning Areas Conservation Planning Areas Conservation Plan (2010) suggest pursuing opportunities for forage reserves to accommodate livestock operators during implementation of rehabilitation and restoration activities. Currently, there are no alternative forage reserves identified in the Big Desert during natural recovery of untreated areas, or during rehabilitation and restoration establishment/rest periods for treated sites. These measures would facilitate resource objectives such as providing rest to improve herbaceous cover in certain nesting and brood-rearing areas. Another potential benefit of a forage reserve would be to reduce fuel loads where forage is being under-utilized, in turn reducing the frequency of wildfire and cause sagebrush to reestablish sooner onsite.

Seventeen miles of fences would be installed to establish the forage reserve. Fencing would be within the crested wheatgrass seedings. The proposed projects are all in conformance with IM 2012-043 (Greater Sage-Grouse Interim Management Policies and Procedures). A primary objective of the fence is to benefit greater sage-grouse habitat by increasing sagebrush cover in crested wheatgrass seeding. The fence will [be] no closer than 1.75 miles from the closest known lek and reflectors will be installed to improve fence visibility to sage-grouse. Approximately 2,800 acres of the proposed forage reserve was homesteaded and farmed in the past, the forage reserve has been seeded into crested wheatgrass multiple times (1952 and 1971). Currently, over 80% of the proposed forage reserve is dominated by crested wheatgrass. The nearest occupied lek is greater than 1.75 miles from the proposed fence. Increased soil surface disturbance and compaction would be expected in a narrow area adjacent to the new fence, as livestock commonly trail along fences more intensively. The portion of the proposed fence located within 2 miles of an active lek would be made more visible by adding reflectors, if subsequent observations determine that sage-grouse are striking the new fence in other locations, the fence would be modified to make it more visible by adding reflectors. The addition of three troughs and wildlife guzzlers would provide a water source for migratory birds and wildlife throughout the spring, summer, and fall. Grazing use in the allotment would only be authorized on a temporary basis to existing BLM operators whose permitted use has been suspended due to fire, vegetation rehabilitation projects, or other causes. The season of use in the allotment would be 4/1-12/30. The expanded season of use in the allotment would give the BLM the flexibility to determine the most appropriate time to graze. Grazing will be used as a tool to improve sage-grouse habitat. Increasing sagebrush would be the primary consideration in determining the authorized annual season of use and amount of use. Permitted AUMs in the new allotment would be 1,300. The AUMs needed to establish the forage reserve would be removed from the AUMs allocated in the Big Desert Sheep Allotment under the MFP.

\*9 The area that would be set aside for the forage reserve has been seeded into crested wheatgrass multiple times (1952 and 1971). By allowing both livestock species to graze within the forage reserve, the diversity

of the plant community has potential to increase. The difference in food selection between the two species could reduce the competitive advantage of the crested wheatgrass, which dominates the area. The area of the proposed forage reserve is in priority sage grouse habitat the currently lacks sagebrush plants. Without taking some kind of action the crested wheatgrass seeding will continue to have an absence of sagebrush cover. Sagebrush cover would increase in the forage reserve considerably more in Alternative C than the other alternatives. Pellant and Lysne (2006) show that livestock grazing can facilitate an increase in the diversification of crested wheatgrass or similar seedings. Another benefit of livestock use at the appropriate time and intensity in crested wheatgrass seedings is to facilitate the return of sagebrush. Sagebrush cover in seedings is less under light to moderate spring livestock use, but increases under higher crested wheatgrass utilization levels for the same period of time (Frischknecht and Harris, 1968). The creation of the forage reserve would have a potential long term positive impact to the permittees in the USFO. Permittees in the field office that have been impacted by short term allotment closures, such as fire/non-fire vegetation treatments, wildfire recovery, or an opportunity to provide for a more rapid attainment of Idaho Standards for Rangeland Health in particular allotments or pastures, would have an opportunity to continue grazing on public land instead of reducing their herds or purchasing forage. The potential economic impact on operators authorized to use the forage reserve on a temporary basis would be a savings of between \$14,625 and \$128,245 when comparing the AUM cost for grazing public versus forage cost associated with private pasture or purchase of forage. The construction of boundary/pastures fences, well, pipeline, corral, wildlife guzzlers, and trough sets under Alternative C would result in additional cost incurred by the USFO in order to implement the forage reserve. Impacts to sage-grouse would be minimal due to the bedding area restrictions around leks and anti-collision reflectors being installed on new fence construction.

AR 275-77.

16. The BLM concluded that the EA and proposed decisions would not have a significant impact on the environment and, on December 3, 2012, sent the EA, the proposed decisions, and the FONSI to all permittees and interested public, including WWP. *See* Defs.' SOF No. 19

(Docket No. 31) (citing AR 1141 (FONSI), 244-379 (EA and proposed decisions)); *see also* Intervenor's SOF NO. 6 (Docket No. 35, Att. 1) (citing AR 1089-97).

17. On December 18, 2012, WWP submitted a protest to BLM's proposed decisions for the Allotment. *See* Defs.' SOF No. 20 (Docket No. 31) (citing AR 1098-120); *see also* Intervenor's SOF No. 7 (Docket No. 35, Att. 1) (citing AR 221-43). Interior claims that, “[a]side from a few references to the Allotment in the first couple pages, the majority of the protest complained about broad BLM policies or conditions, or action on *other* allotments that do not even apply to the Allotment at hand.” Defs.' SOF No. 20 (Docket No. 31) (emphasis added); *see also* Defs.' Opp./Mem. in Supp., p. 8 (Docket No. 30, Att. 1) (“In sum, it was a mostly generic, cut-and-paste document.”).

18. For the first time, WWP's protest criticized the BLM's Draft Alternatives, demanding that the BLM ban grazing and that the area be turned into a “reference study area” and “used for carbon sequestration, including intact and functioning microbiotic crusts, and ungrazed and healthy native plant communities.” *See* Defs.' SOF No. 21 (Docket No. 31) (quoting AR 1098). WWP also complained that the BLM needed to prepare an environmental impact statement (“EIS”) to better consider WWP's new “reference study area” proposal, the “full effects of grazing disturbances,” and how “the effects of this operation are ... destroying biodiversity and promoting global warming.” *See id.*<sup>8</sup> Finally WWP noted its opposition to the infrastructure associated with Alternative C's contemplated forage reserve, explaining that it was inconsistent with sage-grouse conservation. *See id.* at SOF No. 21 (citing AR 1100).<sup>9</sup>

#### **E. The BLM's Final Decisions for the Big Desert Sheep Allotment**

\*10 19. After considering WWP's protest, the BLM reconsidered the EA. Then, on February 6, 2013, final decisions were issued to the 15 separate permittees. *See* Defs.' SOF No. 23 (Docket No. 31) (citing AR 43-208); *see also* Intervenor's SOF No. 8 (Docket No. 35, Att. 1) (citing AR 43-53). As in the proposed decisions, the BLM's final decisions selected Alternative C. *See* Defs.' SOF No. 23 (citing, *e.g.*, AR 69). Each final decision specifically relied on the findings outlined in the EA, explaining that implementation of Alternative C would allow the Allotment to continue to meet or

make significant progress toward meeting Standards 1, 4, 5, and 8. *See id.* at SOF No. 23 (citing, *e.g.*, AR 72); *compare with* AR 275-77 (identical rationale for proposed decisions). The final decisions also explained why the BLM wanted to create the new forage reserve and why the new infrastructure associated with the forage reserve was consistent with conservation plans/strategies relative to sage-grouse populations. *See* Defs.' SOF No. 23 (Docket No. 31) (citing, *e.g.*, AR 72-73).

20. Moreover, the final decisions addressed some of the concerns raised in WWP's protest. *See id.* at SOF No. 24 (citing, *e.g.*, AR 65-68). For example, the BLM said that WWP had failed to participate in the permit renewal process at key moments, and raised issues (like riparian problems) that did not even apply to the Allotment. *See id.* at SOF No. 24 (citing, *e.g.*, AR 66-68); *see also supra* (discussing WWP's May 29, 2012 letter).

#### **F. WWP Appeals the BLM's Final Decisions for the Big Desert Sheep Allotment**

21. On or around March 8, 2013, WWP appealed and petitioned for a stay of all 15 final grazing decisions for the Allotment to the OHA. *See* Defs.' SOF No. 25 (Docket No. 31) (citing AR 484-86); *see also* Intervenor's SOF No. 9 (Docket No. 35, Att. 1) (citing AR 4-42). According to Intervenor, WWP did not serve its appeal to Etcheverry Sheep Company or other persons named in the final grazing decisions. *See* Intervenor's SOF No. 10 (Docket No. 35, Att. 1) (citing AR 4-42).

22. On March 31, 2014, WWP filed with OHA its motion for summary judgment, arguing that (1) the BLM was required to prepare an EIS; (2) the BLM failed to take a “hard look” at the final decisions' effects on greater sage-grouse and sagebrush habitat; (3) the final decisions are inconsistent with the governing land use plans and the BLM's policies on sage-grouse and sensitive species; (4) the EA did not consider several reasonable alternatives; (5) the EA failed to consider impacts to the objects of the Craters of the Moon National Monument and important wilderness values; (6) the EA and FONSI were invalid because the BLM failed to provide a determination for its Rangeland Health Analysis; and (7) the cumulative impacts analysis is flawed. *See* Defs.' SOF No. 26 (citing AR 836-918).

23. On May 19, 2014, the BLM filed a cross-motion for summary judgment. *See id.* at SOF No. 26 (citing AR 925-74).

24. On July 10, 2014, OHA issued an Order and Summary Decision denying WWP's motion for summary judgment, granting the BLM's cross-motion for summary judgment, and affirming the BLM's 15 final grazing decisions. *See id.* at SOF No. 27 (citing AR 2017-44); *see also* Intervenor's SOF No. 12 (Docket No. 35, Att. 1) (citing same). The OHA rejected each of WWP's above-referenced arguments, concluding (in a sometimes overlapping manner) the following:

a. Requirement for EIS:

With respect to NEPA ..., WWP alleges that BLM's Final Decisions violate the statute by failing to take a 'hard look' at environmental alternatives, including moving the new forage reserve further to the west,<sup>[ 10 ]</sup> and by failing to adequately analyze the cumulative impacts of the proposed actions. However, the record is clear that there are no kipukas actually located on the allotment itself. In my opinion, therefore, Appellant has not met the requisite burden of proof to demonstrate that BLM's decisions were without any reasonable basis with respect to alleged grazing damage to kipukas. With respect to the potential requirement for a full EIS, BLM adopted appropriate mitigation measures, which insure that the instant decisions do not implicate "significant" impacts necessary to warrant a full EIS. In turn, the Council on Environmental Quality ("CEQ") regulations implementing NEPA define an EA as a concise document that serves to "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." An EA "... shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2) (E), of environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." The administrative record is clear that the BLM made every effort to consult with WWP and other interested publics during its pre-decisional proceedings. BLM complied with each of the aforementioned regulatory requirements, including consultations with interested publics who chose to participate in the pre-decisional proceedings.

\*11 The requirements for the contents of an EA are also delineated in the Department's NEPA regulations .... For the Appellant to prevail on its Motion for Summary Judgment, there must be a glaring error of fact, a failure to consider a substantial environmental question of material significance, or a clear legal inadequacy in the EA. In my opinion, WWP has not met this burden of proof.

AR 2035 (internal citations omitted).

b. "Hard Look" at Sage-Grouse and Sagebrush Habitat

With respect to whether or not BLM took the requisite "hard look" at sage-grouse habitat and related resource issues, BLM's monitoring data serves as a reasonable basis to support both the EA and the accompanying FONSI. BLM's analyses in the EA ... include reviews of pertinent resources, sensitive wildlife species, especially the sage-grouse, sage-grouse habitat, invasive weeds, cultural resources, and vegetation resources. The scope of these analyses are in consonance with the above-referenced precedents pertaining to "brief" analyses of pertinent environmental issues required for a legally sufficient EA. Indeed, the EA does address historic wildfires and concludes that wildfires have caused historic problems on the allotment but that grazing is not largely responsible for such problems, because grazing, in fact, has been historically relatively light on the allotment. In large part, because of historic wildfires, the allotment is not currently suitable sage-grouse habitat, because of the reduction in sagebrush over a lengthy period of time. In this context, the EA frankly recognizes historic, declining sage-grouse populations on the allotment. Relatedly, BLM took the appropriate "hard look" at how the new fences and watering facilities would impact sage-grouse and other wildlife resources by properly analyzing the impacts of the forage reserve and its new infrastructure. Also, BLM correctly concluded that moving the forage reserve further to the west as recommended by WWP would not be sufficiently different from the selected alternative C, the proposed action, to warrant further analysis. Consequently, the decision maker made informed decisions, as required by NEPA. The Final Decisions disallow grazing around all leks, active and inactive, and, consequently, the permitted grazing is not, as contended by WWP, necessarily incompatible with the protection of sage-grouse.

WWP criticizes BLM for classifying the Big Desert Sheep Allotment as essentially unsuitable for sage-grouse nesting. However, sage-grouse nesting suitability requires some 15% or more of overall sagebrush cover, and the Big Desert Sheep Allotment has less than 15% sagebrush cover. Suitable nesting and early brood-rearing habitats require sagebrush with a healthy herbaceous understory and 15-25% canopy cover of sagebrush, which is significantly lacking on the Big Desert Sheep Allotment. However, BLM did recognize that there was a potential for some grazing impacts upon sage-grouse through reduction of understory grass and forb height and cover. NEPA is a procedural statute, and it is clear that the agency took a hard look at potential grazing impacts upon sage-grouse, and, consequently, that the decision-maker made informed final decisions.

....

With respect to the proposed range improvements on the new forage reserve, the EA analyzes the referenced fence and water projects with respect to potential impacts upon sage-grouse. BLM insured that the new forage reserve and its associated fences are more than 1.75 miles from the nearest occupied lek. Further, BLM committed to mark fences within two miles of an active lek with reflectors. In my opinion, the EA takes the requisite hard look at the likely impacts of the proposed range improvements on the different resource values analyzed, including sensitive wildlife species, such as, the sage-grouse. With respect to the new forage reserve, the BLM archeologist and range management specialist effectuated an alteration in the location of the then-proposed fence and pipeline, so as to avoid ground disturbing impacts to historic properties.

\*12 AR 2035-37 (internal citations omitted).

c. Land Use Plans, BLM Policies, and Rangeland Health

BLM defends its new forage reserve by noting that it is consistent with the Idaho Sage-Grouse Conservation Plan. In particular, it is the historic lack of sagebrush cover that is the main habitat problem for sage-grouse on the allotment, and, further, BLM has demonstrated that it is likely that the new forage reserve will actually improve conditions for sage-grouse, because it is a reserve.

....

WWP further alleges that BLM violated FLPMA, as well as the pertinent land use plans, alleging that the Final Decisions fail to minimize sheep grazing impacts upon sage-grouse habitat, sagebrush, and related vegetative resources on the allotment. However, BLM's analyses in the Final EA confirm that sheep grazing on the allotment is in accord with the pertinent land use plans, and that the allotment will continue to either meet or make significant progress in meeting applicable standards for rangeland health. Relatedly, the permitted sheep are grazed in a controlled and targeted fashion by both sheep herders and dogs, and BLM requires herders to avoid lekking areas during the lekking season. Consequently, multiple-use objectives under the auspices of FLPMA are properly preserved under the purview of BLM's decisions on appeal. Indeed, the remedial action-related requirements of [43 C.F.R. 4180.2\(c\)](#) are not triggered in this case, because BLM determined that the allotment is already making significant progress toward meeting relevant rangeland standards.

With respect to WWP's contention that BLM's grazing decisions violate the relevant land use plans, because they do not include active restoration of sagebrush habitat, such as, provisions for planting sagebrush or removing crested wheatgrass, BLM's Sur-Reply Brief makes a telling point that such restoration activities are not exclusively implemented through the auspices of grazing permits. In particular, BLM notes that "... BLM does not just manage resources through grazing decisions, and the agency is fully capable of conducting restoration activities outside of the grazing permit renewal process." In particular, BLM has been conducting restoration activities in the Craters of the Moon and Big Desert Sheep areas that are generally in accord with the restoration recommendations of WWP.

Consequently, with respect to its overall NEPA and FLPMA allegations, WWP has provided inadequate allotment-specific evidence to carry its burden of proof so as to effectively challenge the Final Decisions, based upon the requisite preponderance of the evidence test.

AR 2037, 2039 (internal citations omitted).

d. Reasonable Alternatives

WWP contends that BLM failed in the Final EA to analyze a reasonable range of alternatives, including potentially moving the new forage reserve further to the west of the allotment. NEPA requires that an EA, as distinguished from a full EIS, include "... brief discussions of the need for the proposal, of alternatives ... of the environmental impacts of the proposed action and alternatives." Agencies are only required to evaluate "all reasonable alternatives," and with respect to eliminated alternatives to briefly discuss the reasons for elimination. Long-standing judicial precedent makes clear that the range of alternatives analyzed by the agency need not extend beyond those "reasonably related to the purposes of the project." Four alternatives were analyzed in the EA. In my opinion, the four alternatives analyzed constituted a reasonable range of alternatives in relation to the subject sheep permit renewals .... In particular, BLM was not required to also analyze a reduced grazing alternative, because its EA determined that the current level of sheep grazing is not negatively impacting the allotment.

\*13 AR 2037-38 (internal citations omitted).

e. Impacts to Craters of the Moon National Monument and Wilderness Values

WWP also alleges that the geographic scope of the EA's Cumulative Impacts Assessment Area ("CIAA") is too narrow and that areas adjacent to the subject allotment which are also used for grazing should have been included in the cumulative impacts analysis. For example, Appellant points out that sage-grouse that breed on leks in the Big Desert Allotment may, in turn, nest in Monument lands to the west of the Big Desert Allotment and that those adjacent lands should have been included in the EA's cumulative impacts analysis.

....

With respect to the CIAA issue, and WWP's allegation that the EA fails to address important sage-grouse habitat located off of the allotment to the west, once again WWP presents no adequate allotment-specific probative evidence to establish that this omission would have materially changed BLM's cumulative impacts analyses. Therefore, in my opinion, BLM's final EA has not failed to analyze any substantial, cumulative issues of material significance.

AR 2029, 2038-39.

g. Cumulative Impacts

BLM's EA analyzes cumulative impacts of past, present, and future potential agency actions, including historic sheep grazing, infrastructure developments, including fencing, vegetation, wildlife, wildlife habitats, and sensitive species, including sage-grouse. The EA and the Final Decisions correctly conclude that the instant proposed actions will not have cumulatively negative impacts upon associated rangeland resources, under circumstances where BLM had determined that the allotment is meeting, or making significant progress toward meeting, pertinent rangeland standards. Furthermore, the EA includes impacts analyses with respect to cultural resources, economic and social values, invasive non-native species, migratory birds, soil resources, threatened and endangered animals, threatened and endangered plants, vegetation resources, visual resources, wilderness study areas, and wildlife resources. WWP has not proffered sufficient allotment-specific evidence to support its contention that climate change, drought, and wildfire, when combined with the impacts of grazing, will result in cumulative impacts to the allotment, and WWP's allegations with respect to this issue are based upon inference.

AR 2038.

25. WWP did not appeal to the Interior Board of Land Appeals ("IBLA"). *See* Defs.' SOF No. 32 (Docket No. 31) (citing AR 2050); *see also* Intervenor's SOF No. 13 (Docket No. 35, Att. 1) (citing same).

26. Now, through the case filed in this federal court, WWP challenges Interior's approval of the 15 BLM grazing decisions and BLM accompanying EA as violating NEPA, FLPMA, and the APA. WWP seeks the following relief: (1) reverse and vacate OHA's July 10, 2014 Order and Summary Decision; (2) order, adjudge, and declare that the BLM's final grazing decisions, EA, and FONSI for the Allotment, as well as the OHA's July 10, 2014 Order and Summary Decision violate FLPMA, NEPA, and the APA; (3) reverse and remand the BLM's final decisions for the Allotment, and the BLM's EA and FONSI; and (4) enjoining BLM from implementing, or proceeding with, any and all construction or ground-

disturbing activities unless and until such time as Defendant has completed a lawful analysis. *See* Compl., pp. 1-2, 33-34 (Docket No. 1).

### III. STANDARD OF REVIEW

\*14 The APA, 5 U.S.C. §§ 701-706, governs the Court's agency review under NEPA and FLPMA. *See ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1135 (9<sup>th</sup> Cir. 1998). The Court must determine if the agency action in question was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” or “without observance of procedure as required by law.” 5 U.S.C. §§ 706(2)(A, D).<sup>11</sup> This standard requires the Court to ensure that the agency has taken the requisite “hard look” at the environmental consequences of its proposed action, the agency's decision is based on a reasoned evaluation of all the relevant factors, and the agency has sufficiently explained why the project's impacts are insignificant. *See National Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722, 730 (9<sup>th</sup> Cir. 2001).

Nonetheless, this is a highly deferential standard and the Court must defer to an agency's decision that is “fully informed and well-considered.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9<sup>th</sup> Cir. 1998) (internal citation omitted). The Court must be careful not to substitute its own judgment for that of agency experts. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9<sup>th</sup> Cir. 1993); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). The APA “does not allow the [C]ourt to overturn an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts.” *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9<sup>th</sup> Cir. 2010) (citation omitted). Likewise, the “[C]ourt may not substitute its judgment for that of the agency concerning the wisdom or prudence of the agency's action.” *Id.* (citation and quotation marks omitted). Even so, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In reviewing that explanation, the Court must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear

error of judgment.” *Id.* (citations omitted); *see also Marsh*, 490 U.S. at 378. “This requirement is not particularly demanding.” *Tabibian v. Secretary of the Interior*, 2016 WL 953246, \*2 (D. Nev. 2016) (citing *Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993)). “Nothing more than a ‘brief statement’ is necessary, as long as the agency explains ‘why it chose to do what it did.’ ” *Tabibian*, 2016 WL 953246 at \*2 (quoting *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001)). If the Court “can ‘reasonably discern[ ]’ the agency's path, it will uphold the agency's decision.” *Tabibian*, 2016 WL 953246 at \*2 (quoting *Pub. Citizen*, 988 F.2d at 197 (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974))).

An agency decision is arbitrary and capricious where it “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency [at the time of its decision] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9<sup>th</sup> Cir. 2008) (quotations omitted). Here, WWP has the burden of showing that any decision or action by the BLM was arbitrary or capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

\*15 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P.* 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In APA actions, however, the Court's review is based on the agency's administrative record. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990). The Court's role is to determine whether the agency's record supports the agency's decision as a matter of law under the APA's arbitrary and capricious standard of review. *See Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9<sup>th</sup> Cir. 1994) (“[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record ....”); *see also Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9<sup>th</sup> Cir. 1985).

#### IV. DISCUSSION AND RATIONALE

##### A. **This Action is Properly Before This Court**

Interior and Intervenors raise two arguments, challenging WWP's ability to bring this action in the first instance: (1) WWP failed to fully participate in the pre-decisional public participation process; and (2) WWP failed to exhaust its administrative remedies by failing to appeal the OHA's Order and Summary Decision to the IBLA. Neither argument is persuasive upon this record.

##### 1. WWP Appropriately Participated in the Administrative Process

Interior contends that all of WWP's claims should be dismissed because it failed to engage in the pre-decisional public participation process in order to have put the BLM on advance notice of WWP's concerns. *See Opp./Cross-MSJ*, p. 13 (Docket No. 30, Att. 1) ("Because it is clear from the record that WWP had ample opportunities to raise its claims with BLM during the NEPA process when BLM could adequately consider and address them, WWP should be barred from raising them in this case."). However, an issue of fact surrounds WWP's actual participation in the process – namely, whether BLM ever received WWP's May 29, 2012 letter (separate and apart from WWP's later-in-time December 18, 2012 protest). Any question in this respect is resolved in WWP's favor at this procedural stage and, therefore, precludes the entry of summary judgment against WWP on this discrete point.<sup>12</sup>

Moreover, a similar argument was considered – and rejected – by the OHA in its July 10, 2014 Order and Summary Decision. Therein, the ALJ resolved the same arguments vis à vis the circumstances leading up to the administrative appeal, concluding in relevant part:

In effect, BLM argues that WWP lacks standing to appeal the instant decisions, because it failed to participate in various pre-decisional solicitations for public comments that were sent to interested publics by BLM, such as, BLM's circulation of the draft EA and BLM's circulation of the Proposed Decisions for public comment. While there is federal case law sustaining such an administrative, pre-decisional procedural requirements, such judicial decisions are premised upon specific, published regulatory requirements that

mandate such pre-decisional participation in order to perfect standing to appeal, following a regulatory agency's ultimate final decision or implementing action. No such requirement appears in the Department's regulatory provisions that delineate the requirements to perfect standing for an appeal of a Taylor Grazing Act decision. The Department's pertinent regulatory requirement is one of actual alleged injury, a well-established test, in order to perfect standing to appeal a BLM Taylor Grazing Act decision, to wit:

*\*16 Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge within 30 days after receiving it or within 30 days after a proposed decision becomes final as provided in Section 4160.3(a) of this title.*

In my opinion, the pre-decisional participation requirement advocated by the BLM would require a formal amendment of the Department's standing-related regulations with respect to the Taylor Grazing Act appeals. *This is because the "any other person whose interest is adversely affected test" makes clear that any "other person" who has been injured by BLM's decision may obtain standing to appeal, notwithstanding whether they have submitted predecisional comments, as might well be routinely expected from an "applicant, permittee, or lessee." Therefore, BLM's request to dismiss all of WWP's claims, because of WWP's alleged failure to participate in pre-decisional public comment procedures, is **DENIED**.*

AR 2019-20 (quoting 43 C.F.R. § 4.70(a)) (underlining, bolding, capitalization in original; italics added) (internal citation omitted). The ALJ's rationale is sound and this Court likewise denies Interior's Cross-Motion for Summary Judgment in this limited respect.<sup>13</sup>

##### 2. WWP Sufficiently Exhausted Its Administrative Remedies

WWP did not appeal the OHA's Order and Summary Decision to the IBLA. From that, Intervenors argue that this action should be dismissed because WWP failed to exhaust its administrative remedies. *See Mem. in Supp. of MSJ*, p. 5 (Docket No. 34, Att. 1) ("When WWP failed to exhaust its administrative remedies by filing a timely

notice of appeal, it became precluded from seeking judicial review.”).

In this respect, the APA provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.... Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section ... unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Thus, under the APA, only final agency action is subject to judicial review and, an agency action is not final if (1) the agency has adopted a rule requiring an administrative appeal before judicial review; and (2) the initial decision would be inoperative pending appeal. See *Darby v. Cisneros*, 509 U.S. 137, 152 (1993). Hence, to determine whether WWP was required to appeal the OHA's Order and Summary Decision to the IBLA before bringing this action, the applicable regulations must be examined.

\*17 Here, under 43 C.F.R. § 4.478(e), “[a]ny party adversely affected by the administrative law judge's decision on the merits has the right to appeal to the [IBLA] under the procedures in this part.” Such language does not clearly prescribe a *requirement* that WWP appeal the OHA's Order and Summary Decision to the IBLA as a prerequisite for seeking judicial review, cutting against a finding that the Order and Summary Decision itself was not a final, appealable agency action. Even so, it is not necessary to definitively decide that issue, because the second part of the *Darby* test is nonetheless lacking.

Under 43 C.F.R. § 4.21(a)(2), “a decision becomes effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petitioner for a stay pending appeal is filed together with a timely notice of appeal.” That is,

there is no automatic stay – indeed, the appellant must first petition for a stay pending appeal and “bears the burden of proof to demonstrate that a stay should be granted.” 43 C.F.R. § 4.21(b)(2). It therefore cannot be said that OHA's Order and Summary Decision would be inoperative pending appeal. See, e.g., *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1139 (D. Mont. 2004) (“Importantly, decisions appealed to the IBLA are not automatically rendered inoperative during the appeal; rather, an aggrieved party must affirmatively ‘request a stay and make a compelling threshold showing to justify the stay.’ Consequently, this statute vests discretion in the IBLA regarding whether to stay an appealed decision.”) (quoting 43 C.F.R. § 4.21(b)); *San Juan Citizens' Alliance v. Babbitt*, 228 F. Supp. 2d 1224, 1233 (D. Colo. 2002) (“This process vests discretion in the [IBLA], whereas the APA requires unequivocally that the statute itself must deem an action *inoperative* while administrative appeal is pending.”) (emphasis in original); *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1141-42 (D. Or. 1997) (“Here, the Department of Interior regulations do require exhaustion, but the regulation does not render the River Plan inoperative pending IBLA review. Rather, the aggrieved party is required to request a stay and make a compelling threshold showing to justify the stay. This process vests discretion in the IBLA to grant or deny a stay pending review. The requirement under the APA is unequivocal. As such, ONDA was not required to proceed with its appeal to the IBLA prior to seeking judicial review of the River Plan.”) (internal citations omitted).

The appeal regulations arguably do not require an administrative appeal or automatically stay a decision pending appeal. As such, WWP was not required to appeal the OHA's Order and Summary Decision to the IBLA before seeking judicial review. The sense of this is apparent when realizing that there is no dispute that the OHA's Order and Summary Decision was, ultimately, a final, appealable agency action. See AR 2050 (ALJ stating: “The time for filing an appeal from my summary decision of July 10, 2014, has expired, the decision having been received by certified mail by the Appellant on July 21, 2014, and by the Respondent on July 14, 2014. Since no appeal has been filed, *my decision is the final action.*”) (emphasis added). Intervenor's Motion for Summary Judgment is therefore denied in this limited respect.

## **B. The Process and Decisions of Interior/BLM Did Not Violate NEPA**

WWP's Complaint raises four NEPA-related claims regarding the BLM's 15 final grazing decisions, alleging that Interior (1) failed to prepare an EIS; (2) "fail[ed] to consider an adequate range of alternative courses of action that meet the stated need and purpose of the action"; (3) "fail[ed] to take the requisite 'hard look' at all the significant and potential direct and indirect environmental impacts of the proposed action"; and (4) "fail[ed] to fully consider the cumulative effects of the proposed action in association with past, present, and reasonably foreseeable future actions across the Big Desert Sheep allotment and surrounding allotments." Compl., ¶¶ 140 (a-d) (Docket No. 1). These claims have been titrated since in the course of the litigation, leading to the current parameters of the parties' respective arguments on summary judgment with WWP now arguing more specifically:

**\*18** In the Big Desert Sheep allotment EA, BLM arbitrarily confined the geographic scope of its cumulative impacts assessment, and thereby deprived the public of a complete picture of the collective impacts of livestock grazing on the local sage-grouse population. BLM declined to consider a reasonable alternative location for its proposed forage reserve, though the record reflects other locations would [be] less harmful to sage-grouse. Further, the EA failed to analyze if or how grazing affects the frequency of fires on the allotment – despite BLM's finding that repeated fires have negatively impacted the native vegetation and wildlife on the allotment. Finally, the EA contains no analysis of potential indirect impacts to relict vegetation sites found on kipukas, which are important scientific and ecological values of both the Craters of the Moon National Monument and Preserve and the Great Rift WSA.

Opening SJ Brief, pp. 11-12 (Docket No. 22, Att. 1).

## 1. NEPA Requirements Generally

### a. NEPA's "Hard Look" Requirement

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA is a procedural statute that " 'does not mandate particular results but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.' " *San Diego Navy Broadway Complex Coalition v. United States Dept. of Def.*, 817 F.3d 653, 659 (9<sup>th</sup> Cir. 2016) (quoting *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 814 (9<sup>th</sup> Cir. 1999)). NEPA exists "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9<sup>th</sup> Cir. 2004). "NEPA requires federal agencies to examine and disclose the environmental impacts of their proposed actions." *Pac. Coast Fed'n of Fishermen's Ass'n v. Blank*, 693 F.3d 1084, 1088 (9<sup>th</sup> Cir. 2012); *see also* 42 U.S.C. § 4332. The purpose of NEPA is: "(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9<sup>th</sup> Cir. 2011). "In order to accomplish this, NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Lands Council*, 395 F.3d at 1027 (quoting *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9<sup>th</sup> Cir. 2003)).

When reviewing an agency's decision, the Court's role is to determine whether the agency took the requisite "hard look" that NEPA demands and provided a "reasonably thorough discussion" of the probable, significant environmental consequences of the proposed action. *Nat. Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9<sup>th</sup> Cir. 2010). Courts review an EA " 'to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment.' " *San Diego Navy Brdwy. Complex Coal.*, 817 F.3d at 659

(quoting *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Com'n*, 635 F.3d 1109, 1119 (9<sup>th</sup> Cir. 2011)). In doing so, the Court considers “ ‘whether the EA fosters both informed decision-making and informed public participation.’ ” *San Diego Navy Brdwy. Complex Coal.*, 817 F.3d at 659 (quoting *Ctr. for Bio. Diversity v. NHTSA*, 538 F.3d 1172, 1194 (9<sup>th</sup> Cir. 2008)).

*b. NEPA's EIS Requirement*

“NEPA requires that an [EIS] be prepared for all ‘major Federal actions significantly affecting the quality of the human environment.’ ” *Nat. Parks & Conservation Ass'n*, 241 F.3d at 730 (quoting 42 U.S.C.A. § 4332(C)); *see also Ocean Advocates v. United States Army Corps of Eng'r*, 402 F.3d 846, 864-65 (9<sup>th</sup> Cir. 2005). That is to say, an “EIS must be prepared if ‘substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.’ ” *Blue Mts.*, 161 F.3d at 1212 (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d, 1146 1149 (9<sup>th</sup> Cir. 1998)).

\*19 The regulations define “significantly” in NEPA as calling for an analysis of both “context” and “intensity.” 40 C.F.R. § 1508.27; *see also Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1239 (9<sup>th</sup> Cir. 2005) (“In benchmarking whether the [ ] Project may have a significant effect on the environment, we turn to the NEPA regulations that define ‘significantly.’ ”) (citing 40 C.F.R. § 1508.27). “Context” is “society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). “Intensity” “refers to the severity of impact” and is evaluated or measured by certain listed factors. 40 C.F.R. § 1508.27(b)(1-9) (discussing various factors that should be considered in evaluating intensity).

Generally, an agency must prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. *See Blue Mts.*, 161 F.3d at 1213 (“significant environmental impact” mandating preparation of EIS where “effects are ‘highly uncertain or involve unique or unknown risks’ ”); 40 C.F.R. § 1508.27(b)(5). Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent “speculation on potential ... effects. The purposes of an

EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.” *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9<sup>th</sup> Cir. 1988); *see also Blue Mts.*, 161 F.3d at 1213-14 (lack of supporting data and cursory treatment of environmental effects in EA does not support refusal to produce EIS).

In reviewing an agency's decision not to prepare an EIS, the question is “whether the agency took a ‘hard look’ at the potential environmental impact of the Project.” *Blue Mts.*, 161 F.3d at 1212. Courts use the arbitrary and capricious standard when reviewing an agency's decision to not complete an EIS. *See id.* at 1211. Under that standard, the Court must determine whether the agency has taken the requisite “hard look” at the environmental consequences of the proposed actions, based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons explaining why the Project's impacts are insignificant. *See Metcalf v. Daley*, 214 F.3d 1135, 1141 (9<sup>th</sup> Cir. 2000); *Blue Mts.*, 161 F.3d at 1211. “A full [EIS] is not required if the agency concludes after a good hard look that the proposed action will not have a significant environmental impact.” *Tillamook Cnty. v. United States Army Corps of Eng'rs*, 288 F.3d 1140, 1144 (9<sup>th</sup> Cir. 2002).

Where, as here, the agency concludes there is no significant effect associated with the proposed Project, it may issue a FONSI in lieu of preparing an EIS. *See Env'tl. Prot. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1009 (9<sup>th</sup> Cir. 2006); *see also Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9<sup>th</sup> Cir. 2000); 40 C.F.R. § 1508.13; 40 C.F.R. § 1508.9(a) (1). However, an agency “cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment.” *Ocean Advocates*, 402 F.3d at 864. The agency “must supply a convincing statement of reasons to explain why a Project's impacts are insignificant.” *Blue Mts.*, 161 F.3d at 1212 (internal quotations omitted).

If the reasons for a finding of no significant impacts are arbitrary and capricious and the complete administrative record demonstrates that the Project may have a significant impact on the environment, ordering the preparation of an EIS is appropriate. *See Ctr. for Bio. Diversity*, 538 F.3d at 1179. Sensibly, in such a

setting, an agency may first prepare an EA to decide whether the environmental impact is significant enough to warrant preparation of an EIS. An EA is a “concise public document ... [that] [b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9. As mentioned earlier, an EA is arbitrary and capricious if it fails to consider an important aspect of the problem, or “offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Sierra Club v. United States Envtl. Prot. Agency*, 346 F.3d 955, 961 (9<sup>th</sup> Cir. 2003).

## 2. Interior's/BLM's Cumulative Impact Assessment Area (“CIAA”) Analysis Was Not Arbitrary and Capricious

\*20 NEPA requires that an agency proposing major federal action analyze the cumulative effects of past, present, and reasonably foreseeable actions. See 40 C.F.R. § 1508.7. This analysis requires “a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9<sup>th</sup> Cir. 1996) (citations omitted). NEPA does not impose any particular geographic area or timeframe on the cumulative effects analysis; instead, identifying the spatial and temporal scope of the cumulative effects analysis is a task assigned to the special competency of the agency and is given considerable deference by the courts. See *Kleppe*, 427 U.S. at 413-14; see also *Sierra Club v. Bosworth*, 510 F.3d 1016, 1030 (9<sup>th</sup> Cir. 2007) (“[W]e recognize that the determination of the extent and effect of [cumulative effect] factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies ....”) (internal quotation marks and citation omitted); see also *Neighbors of Cuddy Mountain*, 303 F.3d 1059, 1071 (9<sup>th</sup> Cir. 2002) (“[U]nder NEPA we defer to an agency's determination of the scope of its cumulative effects review.”). Still, an agency must provide “some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Ocean Advocates*, 402 F.3d at 868. This cumulative analysis “must be more than perfunctory;

it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Id.*

Here, WWP argues that Interior “violated NEPA by failing to analyze the cumulative impacts of the action on sage-grouse in adjacent and nearby allotments,” in particular, allotments situated to the west of the Allotment. See Opening SJ Brief, p. 13 (Docket No. 22, Att. 1); see also *id.* at p. 16 (“Thus, by not including the important sage-grouse areas directly west of Big Desert Sheep allotment in the EA's CIAA, BLM, ‘like a horse with blinders,’ failed to consider the impacts to sage-grouse from its proposed action in combination with grazing on those other allotments.”) (quoting *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1221-23 (D. Idaho 2005)). Though it is certainly possible to argue that BLM could have included those other areas in its EA's cumulative impacts analysis, WWP has not demonstrated that the CIAA itself was arbitrary or capricious by the decision of the BLM not to include those areas.

In pondering these particular points of dispute, the Court has considered (among many things) the context of the Allotment footprint and the adjacent areas. The CIAA represents a much larger area than just the Allotment – more than twice the size of the Allotment in fact, at 623,381 versus 236,990 total acres. AR 440. And, while most of the CIAA is north of the Allotment (with the highest lek concentrations), the BLM's cumulative impacts analysis considered an even larger area in the context of sage-grouse – specifically, a five-mile buffer zone surrounding the entire Allotment, including to the west of the Allotment. AR 417 (“There are thirty known sage-grouse leks within the allotment and another sixty-five leks within five miles of the allotment.... Analysis of occupied lek data gathered by Idaho Fish and Game and BLM within 5 miles of the allotment show sage-grouse populations fluctuate annually and are currently at their ten year average.”); AR 419 (“There would be no impacts to Threatened and Endangered Species under any of the alternatives as there have been no known occurrences within 5 miles of the allotment in the last 10 years.”); AR 1992 (EA's Exhibit 34, identifying CIAA boundary and all known sage-grouse leks therein (none to the immediate west of the Allotment)). Further, the BLM's cumulative impacts considered the overall Snake-Salmon-Beaverhead sage-grouse population, which includes an area much larger than the Allotment, including lands to its

west. AR 417 (“Sage-grouse within the Big Desert Sheep Allotment are part of the Snake-Salmon-Beaverhead ID population..... The current three-year average males per lek are 17.88, which is over 150% of the baseline period. The current three-year average for males on active leks is 31.25, which is also over 150% of the average males for active leks.”) (citation omitted); AR 445-46 (“Sage-grouse within the CIAA are part of a larger population known as the Snake-Salmon-Beaverhead population. A population viability analysis for the Snake-Salmon-Beaverhead population was completed by Garton et al. (2011)..... This analysis included sage-grouse meta-populations within the CIAA. Garton et al. (2011) found that the Snake-Salmon-Beaverhead population had a 0%-27% chance of falling below population viability levels ( $\geq$  male sage-grouse) in the next 100 years.”).

\*21 But more importantly, the BLM reasonably concluded that properly-managed grazing on the Allotment does not significantly impact sage-grouse or sage-grouse breeding and lekking activities, in part because grazing is not currently having significant impacts on the lands. AR 383 (noting that Standards 4 and 8 of Idaho Standards for Rangeland Health were not being met, but nonetheless making significant progress toward being met, before concluding that the frequency and size of wildfires in the Allotment have greatest impact on rate of shrub establishment, but that “grass and forb components are productive and healthy within the [Allotment.]”); AR 419 (“Livestock management practices that provide for the sustainability of perennial grasses and forbs generally maintain or minimally impact sage-grouse habitat..... There would be no impacts to Threatened and Endangered Species under any of the alternatives as there have been no known occurrences [of livestock grazing having direct/indirect impacts on sage-grouse during nesting] within 5 miles of the allotment in the last 10 years.”) (citation omitted).

As a counterbalance to these realities in the cumulative impacts analysis context, the OHA's Order and Summary Decision found that the “WWP presents no adequate allotment-specific probative evidence to establish that [omitting a discussing of impacts to the Allotment's west] would have materially changed BLM's cumulative impacts analysis.” AR 2038-39. Beyond its arguments – more conclusory than not – pertaining to the criticism that the CIAA should have incorporated a more westerly approach to its cumulative impacts analysis, WWP's

briefing in this record is similarly lacking on this point. In short, the BLM went beyond generalized statements about possible effects, taking the necessary “hard look” at the grazing permits' cumulative impacts upon sage-grouse populations on the Allotment itself, as well as neighboring allotments.

With all this in mind, the alleged shortcomings relating to the BLM's cumulative impacts analysis are not as stark as WWP argues and, likewise, the cases WWP cites in support of its position on the issue are distinguishable. As such, WWP has not shown that the BLM's cumulative impacts analysis was inappropriate. Interior's/BLM's CIAA analysis was not arbitrary or capricious. In this limited respect, WWP's Motion for Summary Judgment is denied, and Interior's Cross-Motion for Summary Judgment, and Intervenor's Motion for Summary Judgment are granted.

### 3. The Decision of Interior/BLM Regarding the Forage Reserve's Location Was Not Arbitrary or Capricious

NEPA requires that agencies specify the purpose and need for a proposed action and analyze the environmental consequences of the proposed action as well as a reasonable range of alternative actions. *See* 40 C.F.R. §§ 1502.13, 1502.14; *see also Env't'l Prot. Info. Ctr. (EPIC) v. U.S. Forest Serv.*, 234 Fed. Appx. 440 (9<sup>th</sup> Cir. 2007) (applying purpose and need and range of alternative requirements to EA). Project alternatives derive from the stated purpose and need; hence, the goal of a project necessarily dictates the range of reasonable alternatives. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9<sup>th</sup> Cir. 2004); *see also League of Wilderness Defenders-Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9<sup>th</sup> Cir. 2012) (scope of alternative analysis depends on underlying purpose and need specified by agency). This “alternatives provision” applies whether an agency is preparing an EIS or an EA and requires the agency to give full and meaningful consideration to all reasonable alternatives. *See Native Ecosystems*, 428 F.3d 1233, 1245 (9<sup>th</sup> Cir. 2005). However, “an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.” *Id.* at 1246. “[W]hereas with an EIS, an agency is required to ‘[r]igorously explore and objectively evaluate all reasonable alternatives,’ with an EA, an agency only is required to include a brief discussion of reasonable

alternatives.” *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9<sup>th</sup> Cir. 2008) (quoting 40 C.F.R. § 1502.14(a), citing 40 C.F.R. § 1508.9(b)). NEPA does not require federal agencies to assess, consider, and respond to public comments on an EA to the same degree as it does for an EIS. See *In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1073 (9<sup>th</sup> Cir. 2014).

\*22 Here, WWP argues that “Interior’s failure to study reasonable alternatives was arbitrary and capricious and violated NEPA” because the BLM failed to consider an alternate location site for Alternative C’s forage reserve further to the east. Opening SJ Brief, p. 17 (Docket No. 22, Att. 1). More to-the-point, WWP contends:

WWP recommended that BLM analyze a location for the forage reserve in the east part of the allotment, where its considerable ground disturbance, infrastructure, and additional grazing pressure would be further from known sage-grouse leks and their associated nesting areas; within unclassified or general sage-grouse habitat instead of priority habitat; and adjacent to roads and already-disturbed agricultural lands. According to BLM, sage-grouse no longer use the eastern portion of the allotment. However, BLM refused to consider any alternate sites for its proposed forage reserve.

*Id.* at pp. 17-18 (internal citations omitted). Again, while relocating the forage reserve elsewhere in the Allotment was an option, BLM’s decision not to pursue WWP’s recommendation is neither arbitrary nor capricious in this instance.

Initially, as observed by the Ninth Circuit, the Court is “aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and a preferred action alternative.” *Earth*

*Island*, 697 F.3d at 1022. On this point, the Ninth Circuit commented:

For instance, in *Native Ecosystems Council*, we explained that NEPA’s implementing regulations merely require an EA to include consideration of appropriate alternatives, including a “no action” alternative and the agency must designate a “preferred” alternative. Beyond that, NEPA’s statutory and regulatory requirements do not dictate the minimum number of alternatives that an agency must consider. Therefore, in *Native Ecosystems Council*, we upheld the Forest Service’s consideration of a no action alternative and its preferred alternative, even though no other alternatives were considered in detail.

Similarly, in *North Idaho Community Action Network*, we held that the agency had fulfilled its obligation under NEPA’s alternatives provision when it considered and discussed only two alternatives in the EA. These two alternatives were identical to those in this case: the Project with the changes proposed in the EA, and the Project without the proposed changes. Notably, in *North Idaho Community Action Network*, we did not even discuss the other alternatives the agency had rejected and whether the agency had provided sufficient reasons for rejecting the alternatives. We merely explained that, because the Forest Service briefly discussed two alternatives, and because the Project proposed in the 2005 EA will not result in significant environmental effects,” the analysis was sufficient.

*Id.* (internal quotations and citations omitted).

In contrast, the Court notes that the EA at issue here considered *four* separate alternatives (including Alternative C’s forage reserve option) that align with the “purpose and need” for grazing permit renewal on the Allotment. See AR 983 (“The purpose of the proposed action is to authorize livestock grazing consistent with BLM policy and in a manner that maintains or improves resource conditions and achieves the objectives and desired conditions described in the Big Desert [Management Framework Plan] and the Craters of the Moon National Monument and Preserve [Resource Management Plan]. The action is needed to address the operators’ applications for permit renewal in the Big Desert Sheep Allotment.”); see also AR 986-87 (discussing various plans’ objective to “maintain, protect, and expand sage-grouse source habitat”); AR 1020-21 (same).

\*23 As to forage reserves generally, the BLM's EA clearly described the potential of such reserves to effectively restore sage-grouse habitat:

The [Fire, Fuels, and Related Vegetation Management Direction Plan Amendment (amending the Big Desert MFP) ] has a list of "Selected Conservation Measures to be Considered in Developing Vegetation Treatments Potentially Affecting Greater Sage-Grouse." One measure is to "Reduce competition of crested wheatgrass to facilitate the establishment and persistence of the desired species." Development of a forage reserve is also supported in the state sage-grouse conservation plan. The Idaho Sage Grouse Conservation Plan (2006) states that areas should be identified and when feasible, establish strategically located forage reserves focusing on areas unsuitable for sage-grouse habitat restoration, or lower priority habitat restoration areas. These reserves (such as seedings) would serve to provide livestock operators with temporary alternative forage opportunities during the resting of recently seeded restoration or fire rehabilitation areas and could serve as additional fuel breaks depending on location and configuration, due to reduced fuel loads.

Currently, the availability of forage reserves in Idaho is extremely limited. Without the development of additional reserves, economic incentives, or other processes, the restoration of Idaho's annual grasslands and diversification of exotic perennial grass seedings will proceed slowly, and both operators and sage-grouse will continue to remain at risk of wildfires and their associated after-effects. Pellant and Lysne (2006) show that livestock grazing can facilitate an increase in the diversification of crested wheatgrass or similar seedings. Another benefit of livestock use at the appropriate time and intensity in crested wheatgrass seedings is to facilitate the return of sagebrush. Sagebrush encroachment in seedings is less under light to moderate spring livestock use, but increases under higher crested wheatgrass utilization levels for the same period of time (Frischknecht and Harris, 1968). A grazing system that promotes heavy spring livestock use over a period of years can promote an increase of sagebrush in crested wheatgrass seedings. Angell (1997) found that this same grazing management system would also promote the survival of juvenile sagebrush plants due to

decreased soil water depletion by crested wheatgrass. Thus, once juvenile sagebrush plants are established in a seeding, continued heavy livestock use will accelerate sagebrush growth and potentially increase additional sagebrush recruitment. Without deliberate intervention to improve plant species diversity and structure, some large seeded grasslands are unlikely to support habitat characteristics suitable for sage-grouse within a reasonable management timeframe (Big Desert Conservation Plan, 2010). A forage reserve would allow for increased management flexibility in attaining an increased sagebrush canopy cover. The forage reserve would also be used to facilitate other resources objectives such as riparian recovery or to provide rest to improve herbaceous cover in certain nesting or brood habitat areas (IDFG 2006).

\*24 AR 420-21; *see also* AR 448 ("Both the Sage Grouse Comprehensive Conservation Strategy (2006) and the Big Desert Sage-Grouse Planning Areas Conservation Plan (2010) suggest pursuing opportunities for forage reserves to accommodate livestock operators during implementation of rehabilitation and restoration activities..... These measures would facilitate resource objectives such as providing rest to improve herbaceous cover in certain nesting and brood-rearing areas.").

And, as to the actual forage reserve contemplated within Alternative C, the EA determined that it was far enough away from active sage-grouse leks and sage-grouse habitat to ensure that it would not materially impact sage-grouse populations. *See, e.g.*, AR 421-22 ("The nearest occupied lek is greater than 1.75 miles from the proposed forage reserve fence..... Potential impacts to sage-grouse are minimal due to the lack of suitable sage-grouse habitat and distance to occupied leks. Fence posts would provide perches for predators of sage-grouse nests and chicks but the distance to suitable sage-grouse habitat diminishes the potential for predators to be successful from fence posts."); AR 448 ("A primary objective of the fence is to benefit greater sage-grouse habitat by increasing sagebrush cover in a crested wheatgrass seeding..... Currently, over 80% of the proposed forage reserve is dominated by crested wheatgrass....."); AR 448-49 ("The portion of the proposed fence located within 2 miles of an active lek would be made more visible by adding reflectors, if subsequent observations determine that sage-grouse are striking the new fence in other locations, the fence would be modified to make it more visible by adding reflectors."); AR 449 ("The area of the proposed forage reserve is in

priority sage grouse habitat that currently lacks sagebrush plants. Without taking some kind of action the crested wheatgrass seeding will continue to have an absence of sagebrush cover. Sagebrush cover would increase in the forage reserve considerably more in Alternative C than the other alternatives.”); AR 1143 (collision risk model near forage reserve indicating less than low risk of fence collision on forage reserve).

From such details, the OHA's Order and Summary Decision ruled that WWP had not demonstrated that the forage reserve negatively impacts sage-grouse populations. This Court is in agreement. The Court acknowledges that a choice could have been made to locate the forage reserve in a different, more easterly, portion of the Allotment, and there are those, including the WWP, who would have placed such a reserve in that portion of the Allotment, rather than in the location chosen by the BLM. But the BLM's different decision on this subject was not arbitrary or capricious in light of the full array of the record underlying that decision. In other words, the BLM satisfied its obligation under NEPA to consider alternatives to its action. In this limited respect, WWP's Motion for Summary Judgment is denied, and Interior's Cross-Motion for Summary Judgment, and Intervenor's Motion for Summary Judgment are granted.

#### 4. The EA Adequately Considered Fire Frequency on the Allotment

Arguing that “the EA did not analyze whether the proposed grazing would perpetuate the altered fire cycle or worsen it,” WWP claims that Interior failed to consider a significant aspect of the environmental impact of its grazing decisions in violation of NEPA. Opening SJ Brief, p. 21 (Docket No. 22, Att. 1). In essence, WWP posits that heavy livestock grazing encourages the spread of cheatgrass; cheatgrass fuels larger, more frequent wildfires; wildfires curb sagebrush (sage-grouse habitat) growth; and the EA did not adequately consider this paradigm. *See id.* at pp. 21-22 (citing Pl.'s SOF Nos. 19, 22-24 (Docket No. 23)).

**\*25** No one appears to question that livestock grazing practices *can* impact fire frequency and intensity. But, there is no evidence that the historical grazing activity on the Allotment has done so. The OHA's Opinion and Summary Decision references that, “wildfires have caused historic problems on the allotment, but ... grazing is not largely responsible for such problems, because

grazing, in fact, has been historically relatively light on the allotment.” AR 2036 (citing AR 429 (EA stating: “Historically, the allotment has exhibited light (21-40%) overall utilization.”)). Said another way, WWP points to no evidence that livestock grazing on the Allotment has actually contributed to the understood incidences of wildfires on the Allotment. In this setting, simply describing a possible relationship does not make it so, nor does it make it inescapably necessary that the possibility of such a nexus must move the needle of the BLM's decision process.

Yet, to be clear, it is true that wildfire is the cause of some resource problems on the Allotment. *See, e.g.*, AR 416 (“due to recent wildfires, there is limited key sage-grouse habitat identified within the Big Desert Sheep Allotment.”); AR 425 (“Since 1970, only nine percent of the public land within the allotment has not been affected by wildfire, and large portions of the allotment have been burned repeatedly in the same time period.”). Additionally, the EA contains a recognition that livestock grazing can be a vector for the spread of invasive species (like cheatgrass), and that such species contribute to increased fires. *See* AR 408 (“Livestock are one vector in the transport of invasive species, and the potential for establishment of invasive, non-native species would be slightly higher [for Alternative C] than Alternative A and B.”). However, the record shows that since 1999, the BLM's actual management of grazing on the Allotment is consistent with maintaining quality conditions. *See, e.g.*, 6/30/14 Decl. of Jeremy Casterson, ¶ 17 (AR 1881) (“BLM previously assessed conditions on the Big Desert Sheep Allotment in 1999. At that time, BLM found that the allotment was meeting all of the Idaho Standards for Rangeland Health. Since that time, the only major change to the allotment has been that several large fires have burned most of the allotment.”); AR 383 (noting that Allotment is not meeting two standards currently, but that, even with grazing, Allotment is making significant progress toward meeting those same two standards); AR 429 (“The Evaluation for the Big Desert Sheep Allotment found that the native plant communities were making significant progress towards meeting the standard for Rangeland Health.”). Further, notwithstanding the relatively light average grazing on the Allotment, the EA also describes the BLM's invasive species control program, addressing any possible link between grazing, cheatgrass, and wildfires. *See* AR 408 (“The USFO would continue to

monitor and treat invasive, non-native species within the Big Desert Sheep Allotment following an integrated weed management approach (USDI-BLM-2009b). Continuing to treat known infestations in the allotment would ensure that Standards 4 and 8 would continue to make significant progress toward meeting standards.”).<sup>14</sup>

There is evidence to support the BLM's conclusion that light grazing on the Allotment is not the root cause of its wildfires. There is no reason, on this record, to replace some opposing viewpoint for the OHA's finding that grazing “is not largely responsible” for the historic wildfire problems. In this limited respect, WWP's Motion for Summary Judgment is denied, and Interior's Cross-Motion for Summary Judgment, and Intervenor's Motion for Summary Judgment are granted.

5. Interior/BLM Appropriately Analyzed the Effects of its Decisions on Monument Objects and Important Wilderness Values

\*26 There are no kipukas within the boundaries of the Allotment. *See* 6/30/14 Decl. of Jeremy Casterson, ¶ 18 (AR 1881); *see also* AR 1142 (map showing kipuka locations). As a result, Interior admits that the EA did not address the grazing decisions' risks to kipukas. *See* Opp./Cross-MSJ, p. 23 (Docket No. 30, Att. 1). Regardless, WWP argues that “BLM violated NEPA because it failed to consider potential negative impacts from its actions on the relict ecosystems of the kipukas in the surrounding Great Rift landscape.” Opening SJ Brief, p. 22 (Docket No. 22, Att. 1). The undersigned disagrees.

Kipukas largely exist to the Allotment's west – some of them are even situated on, or very near, the Allotment's boundary. *See* AR 1142. However, despite WWP's generic claims that “[t]hese kipukas can be affected by management on the Allotment,” it points to no real evidence of this ever happening. *See* Opening SJ Brief, p. 25 (Docket No. 22, Att. 1). Significantly, the BLM's Upper Snake Field Office (1) does not authorize livestock to enter kipukas near the Allotment, and (2) has no evidence that livestock permitted to graze on the Allotment have ever entered into a nearby kipuka (intentionally or unintentionally). *See* 6/30/14 Decl. of Jeremy Casterson, ¶¶ 18-19 (AR 1881). The record does not indicate otherwise.

Moreover, WWP's concern that “seed dispersal by wind” can “spread and alter remaining healthy plant communities” (including, presumably, kipukas), while understandable, is simply an inchoate concern on this record. *See* Opening SJ Brief, p. 25 (Docket No. 22, Att. 1). WWP presents no evidence of this ever happening to any kipuka near the Allotment's boundary. Perhaps this is so because prevailing winds in the area most commonly blow west to east – away from the kipukas. *See* 6/30/14 Decl. of Jeremy Casterson, ¶ 19 (AR 1881).

In short, the Court is not persuaded upon the legal standards that it must draw upon here, that the BLM's managed grazing on the Allotment has ever negatively impacted a neighboring kipuka. Absent evidence of the potential for a significant environmental impact, “WWP has provided inadequate allotment-specific evidence to carry its burden of proof” on this claim. In this limited respect, WWP's Motion for Summary Judgment is denied, and Interior's Cross-Motion for Summary Judgment, and Intervenor's Motion for Summary Judgment are granted.

**V. ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that:

1. WWP's Motion for Summary Judgment (Docket No. 22) is DENIED.
2. Interior's Cross-Motion for Summary Judgment (Docket No. 30) is GRANTED, in part, and DENIED, in part, as follows:
  - a. WWP appropriately participated in the administrative process; in this respect, Interior's Cross-Motion for Summary Judgment is DENIED.
  - b. Interior/BLM did not violate NEPA; in this respect, Interior's Cross-Motion for Summary Judgment is GRANTED.
3. Interior's Motion to Strike New Evidence (Docket No. 33) is DENIED, as moot.
4. Intervenor's Motion for Summary Judgment (Docket No. 34) is GRANTED, in part, and DENIED, in part, as follows:

a. WWP sufficiently exhausted its administrative remedies; in this respect, Intervenor's Motion for Summary Judgment is DENIED.

DATED: September 30, 2016.

b. Interior/BLM did not violate NEPA; in this respect, Intervenor's Motion for Summary Judgment is GRANTED.

All Citations

Not Reported in Fed. Supp., 2016 WL 5745094

#### Footnotes

- 1 On September 10, 2015, the Court granted Idaho Wool Growers Association's, Minidoka Grazing Association's, and Etcheverry Sheep Company's (the "Intervenors") Motion to Intervene. See 9/10/15 MDO (Docket No. 26).
- 2 Also before the Court is Interior's Motion to Strike New Evidence (Docket No. 33).
- 3 Interior separately argues that WWP's claims should be dismissed because it failed to raise them during the administrative process. See Opp./Cross-MSJ, pp. 13-16 (Docket No. 30, Att. 1). Additionally, Intervenors submit that WWP failed to exhaust its administrative remedies before filing this action. See Mem. in Supp. of MSJ, pp. 3-8 (Docket No. 34, Att. 1).
- 4 Approximately 54,000 acres of the Allotment lies within the Craters of the Moon National Monument and Preserve. See Defs.' SOF No. 1 (Docket No. 31) (citing AR 382); see also Pl.'s SOF No. 4 (Docket No. 23).
- 5 Because the Allotment contains no riparian areas, streams, or springs, the Allotment Assessment noted that Rangeland Health Standard 2 (Riparian Areas and Wetlands), Standard 3 (Stream Channel/Floodplain), and Standard 7 (Native Plant Communities) did not apply. See Defs.' SOF No. 7 (Docket No. 31) (citing AR 1067, 1072).
- 6 The Second Declaration of Katie Fite states in relevant part that she "provided comments to BLM and included proposed alternative actions for the Big Desert allotment assessment," referencing a "May 29, 2012 Letter to BLM Idaho Falls FO Manager." 6/5/14 Second Decl. of Katie Fite, p. 4 (AR 1809). Ms. Fite goes on to state:  

BLM's claims that WWP did not participate at that point are not correct, and appear to be a smokescreen aimed at trying to cover up the gross deficiencies of the FRH process and EA in sacrificing sage-grouse habitats and populations to the livestock industry. I am very concerned to see that BLM claims that WWP had not commented.

....

In these comments on the deficiencies of the Big Desert assessment, I raised the very issues that BLM now claims were never raised – just as WWP has previously raised these same issues in the context of all the other BLM processes affecting the Big Desert landscape and its declining sage-grouse and other sensitive species populations. It is also my experience that it is not necessary in OHA proceedings to have commented, or protested, a BLM action prior to Appealing.

*Id.* at p. 5 (AR 1810).
- 7 These citations relate to the same ones WWP cited in response to Interior's SOF No. 8, discussed *supra*. In this respect, it should be pointed out that WWP claims to have submitted a May 29, 2012 letter to the BLM, containing "comments on the BLM's allotment assessment and conformance document for the sprawling Big Desert Sheep." See AR 22890-902. In general, these comments reflected a sharp critique of the BLM's Allotment Assessment. See, e.g., AR 22890 ("BLM has also not provided a full and detailed honest analysis of the cause of any shortcomings/failures to meet standards. Tremendous impacts of domestic sheep to wildlife habitat and populations, native vegetation (including rare plants) and their habitat and population, recreation, wilderness values, and aesthetic values, cultural values, and other important values of the public lands are ignored, downplayed, and minimized."). However, the BLM says it never received this letter. See 6/30/14 Decl. of Jeremy Casterson, ¶¶ 5-9 (AR 1879-80) ("Having reviewed paper and electronic correspondence files, I can confidently state that BLM's Upper Snake Field Office never received WWP's May 29, 2012 letter regarding the Big Desert Sheep Allotment. This is consistent with the Big Desert Sheep permit renewal EA where BLM did not identify WWP as a participant in the permit renewal process."). WWP admits that it does not have proof that the BLM ever received its May 29, 2012 letter. See Pl.'s Resp./Reply, p. 4 (Docket No. 37).
- 8 Interior claims that this was the first time WWP made such a complaint. See Defs.' SOF No. 21 (Docket No. 31); see also Intervenor's SOF No. 7 (Docket No. 35, Att. 1). However, it should be pointed out that WWP's May 29, 2012 letter (discussed *supra*) talked about the need for an EIS "that examines all direct, indirect and cumulative adverse impacts of livestock grazing in the Big Desert sheep allotment," including the "benefits of passive restoration (allowing ecosystem components to heal through removal of disturbance and degrading activities) ...." AR 22896; see also Pl.'s Obj. to Defs.'

SOF No. 20 (Docket No. 40) (citing AR 22890-902, 1783-84, 1806-11); Pl.'s Obj. to Intervenor's SOF No. 7 (Docket No. 41) (citing same).

9 Interior claims that much of the balance of WWP's protest had nothing to do with the Allotment. See Defs.' SOF No. 22 (Docket No. 31). In particular, Interior argues:

For instance, WWP protested BLM's failure to consider the impacts of a number of facilities and/or actions. However, many of the facilities and/or action such as powerlines, aquifer depletion, losses of springs and seeps, chainings, siting of energy projects, mines or mining, etc. do not occur in the Allotment. Similarly, WWP included several pages complaining of BLM's failure to protect streams, springs, and wet meadow areas. This makes no sense because there are no such riparian or stream areas within the Allotment. Nevertheless, WWP is critical of "BLM's own data and photographs" regarding riparian areas, BLM's proposal to "develop and irreversibly alter even more fragile springs," and urges BLM to examine "intermittent and ephemeral drainages." There are no springs on the Allotment, BLM is not proposing to develop the non-existent springs, and BLM has no "data" or "photographs" regarding riparian areas.

Defs.' SOF No. 22 (Docket No. 31) (internal citations omitted); see also Intervenor's SOF No. 7 (Docket No. 35, Att. 1) (citing AR 222, 224, 43-53). WWP does not respond/dispute Interior's/Intervenor's arguments in these respects. See generally Pl.'s Obj. to Defs.' SOF (Docket No. 40); Pl.'s Obj. to Intervenor's SOF (Docket No. 41).

10 The ALJ issuing the OHA's Order and Summary Decision misspoke (here and elsewhere) in this respect: WWP recommended that the forage reserve be located further *east*, not west. See *infra*.

11 This standard applies not only to agency decisions themselves, but also to appeals board decisions, like the OHA here. See *Baker v. United States*, 613 F.2d 224, 226 (9<sup>th</sup> Cir. 1980) ("[R]eview is limited to an examination of whether the decision of the [IBLA] was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law.") (emphasis added).

12 The fact that WWP's protest may have represented a scattershot of arguments, even if arguably only of a generic objection to BLM's proposed decisions, may speak to the merits of those arguments/objections; it does not undo WWP's efforts to participate in the administrative process itself.

13 To be clear, this Memorandum Decision and Order takes no position on whether WWP strategically "kept its powder dry" as to its objections/concerns/comments surrounding the BLM's decision-making process involving the Allotment. However, to the extent this is the case, it would not only seem to (1) run counter to various environmental statutes' public comment requirement and related objectives, but also (2) potentially compromise the validity of any legitimate criticism once it is actually made. Alas, if WWP's goal in such respects is to simply delay and postpone for the sake of delaying and postponing itself, that is unfortunate. Regardless, without more, it does not *ipso facto* preclude WWP from pursuing this action in this instance.

14 Similarly, and specifically as to Alternative C, the EA recognized that

The potential increase of cheatgrass as well as other invasive/noxious weeds would be minimal because the proposed location of the fences would not be cleared or bladed before construction. However, all project areas would be monitored closely for new occurrences of noxious weeds. All new and existing infestations would continue to be aggressively treated..... Successful noxious weed treatments, along with changes in authorized use described in Alternative C, would help the allotment continue to make significant progress toward meeting Standards 4 and 8.

AR 408.

July 30, 1998

SAVE OUR CUMBERLAND	:	NX-97-3-PR
MOUNTAINS, INC.,	:	
	:	Application for Permit Review
Petitioner	:	Permit No. 2959
	:	
v.	:	
	:	
OFFICE OF SURFACE MINING	:	
RECLAMATION and ENFORCEMENT,	:	
and SKYLINE COAL COMPANY,	:	
	:	
Respondents	:	
	:	

**DECISION**

Appearances:       Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Petitioner Save Our Cumberland Mountains, Inc.,

                          Charles A. Wagner III, Esq., Knoxville, Tennessee, for Respondent Skyline Coal Company,

                          Charles P. Gault, Esq., Knoxville, Tennessee, for Respondent Office of Surface Mining Reclamation and Enforcement.

Before:               Administrative Law Judge Sweitzer

Skyline Coal Company (Skyline) submitted to the Office of Surface Mining Reclamation and Enforcement (OSM) an application for a permit to mine an area known as Big Brush Creek Number 2 mine site (BB2). OSM approved the application, as modified, and issued Permit No. 2959 to Skyline to mine BB2. Pursuant to § 514(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1264(c), 30 C.F.R. § 775.11, and 43 C.F.R. § 4.1361, Petitioner Save Our Cumberland Mountains, Inc. (SOCM) filed a Request for Review of OSM’s approval of the application and issuance of the BB2 permit, alleging various deficiencies in the hydrologic monitoring plans. The cited statute and regulations require a

hearing to be held within 30 days after submittal of the Request for Review and issuance of a decision within 30 days after the close of the hearing record. However, the parties waived both of these requirements and agreed that a decision should be issued within 60 days of the close of the hearing record.

Administrative Law Judge David Torbett presided over a hearing in the matter held September 3, 4, 5, 8, 9, 29, and 30 and October 1 and 2, 1997, in Knoxville, Tennessee. Recognizing that he was on the verge of retirement and would not be available to render a decision in the matter, Judge Torbett placed on the record at the end of the hearing his finding that all of the witnesses appeared credible based upon his observations of their demeanor (Tr. 1754).

Upon Judge Torbett's retirement, the matter was transferred to the undersigned for further handling and issuance of a decision. Posthearing briefs were then filed by the parties. The hearing record closed on June 3, 1998, upon receipt of the final posthearing brief from SOCM. The matter is now ripe for decision.

Having reviewed and considered the entire hearing record and the parties' briefs, I must conclude, for the reasons set forth below, that OSM's approval of the permit application should be upheld, except with regard to the application deficiencies identified herein, that the BB2 operations may proceed, subject to the condition that Skyline comply with the regulatory requirements of monitoring both surface water and groundwater at least every three months, and that a permit revision application to correct the deficiencies should be submitted by Skyline for comment from SOCM and for evaluation and approval, modification, or denial by OSM.

Contentions regarding errors of fact and law, except to the extent they are expressly or impliedly addressed in this decision, are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial.

#### Statement of Facts

On July 31, 1995, Skyline submitted its BB2 permit application to OSM (Skyline Ex. 20, Vol. IV, p. II-2). Prior to approval of the application, SOCM submitted comments to OSM regarding the application during the public comment period (Tr. 120, 913-15). SOCM did not mention the hydrologic monitoring plans in its comments (*id.*).

OSM sent to Skyline at least six deficiency letters which commented on the mining operation and reclamation and monitoring plans proposed in the application and which required Skyline to respond and make changes to the application (Skyline Ex. 20, Vol. IV, p. II-2; Tr. 112-14, 997). The letters and written responses are voluminous and were incorporated into the application (Tr. 113-14, 407-08). When OSM finally approved the application on April 3, 1997, more than 20 months after its submittal, the application was several thousand pages in length

(Tr. 67; Skyline Ex. 20).

James Mottet, Skyline's President and Mine Manager, Timothy Slone, a professional engineer who spearheaded the development of the BB2 permit application as an independent contractor for Skyline, and Wayne Rosso, an environmental consultant with substantial experience relating to coal mining and water quality issues, each testified that they had never seen more information developed in support of a permit application (Tr. 976, 997, 1390-91, 1492-93). For example, extensive exploratory drilling by Skyline provided unusually detailed information regarding the elevation and contours of the coal pit floor, according to several witnesses, including Robert Liddle, the OSM hydrologist responsible for evaluating the hydrologic aspects of the BB2 permit application (Tr. 74-76, 1015-18, 1271-72, 1413-14; OSM Ex. 7).

In its BB2 permit application, Skyline proposed to conduct area surface mining operations using a large dragline to mine the permit area from south to north (Tr. 52, 89-90). By cast blasting and dragline stripping, an initial swath of overburden is removed and then the underlying coal is extracted, creating an east-west trending pit several hundred feet in length (Tr. 52, 89-90, 991-92). The dragline is then repositioned immediately north of the newly created pit and the process is repeated until the entire area is mined (id.). The mining operations progress rather slowly as each pit takes approximately one month to mine (id.).

The BB2 mining operation is a continuation northward of mining operations in the area immediately south of BB2 known as the Big Brush Creek No. 1 mine site (BB1) (Tr. 794-95, 1003, 1012, 1352). There is no physical separation between BB1 and BB2 (Tr. 53). These areas are permitted jointly by the State of Tennessee under the National Pollutant Discharge Elimination System (NPDES) (Tr. 1007, 1009-10; Ex. 22). The NPDES permit is incorporated by reference and included in the BB2 permit application (Tr. 1003, 1005-06, 1010).

Adjacent to BB1 on the west and east, respectively, are two other Skyline mine sites known as the Gladly Fork Mine and the Pine Ridge East Mine (Tr. 51, 1228-29; OSM Exs. 4, 5, 6). These three mine sites (hereinafter collectively referred to as the "adjacent mine sites") are in various stages of reclamation (Tr. 45-47, 50-53).

Each of the adjacent mine sites and the BB2 site involve mining of the Sewanee coal seam in the Big Brush Creek watershed of southern Tennessee using similar methods (Tr. 45-47, 233-34, 281, 794, 991-92, 1038-42, 1044-45, 1483; OSM Ex. 3). OSM has a great deal of experience in permitting and monitoring mining operations in the Sewanee coal seam, as there are hundreds in the vicinity of BB2 (Tr. 45, 82-83).

The headwaters of Big Brush Creek begin approximately one mile north of BB2 (Tr. 48). The northernmost portion of the watershed, including BB2 and the adjacent mine sites, are located in the gently rolling terrain of the Cumberland Plateau, high within the Cumberland

Mountains at an approximate elevation of 2,000 feet (Tr. 47-48). Big Brush Creek flows south along the eastern border of BB2 and BB1 past its confluence with Glady Fork Creek south of BB1 and down to the Sequatchie River 14 miles distant and 1,200 feet below (Tr. 47-48; OSM Exs. 3, 5).

OSM determined in the Cumulative Hydrologic Impact Assessment (CHIA) section of the BB2 permit that the first order of drainage above the confluence of Big Brush Creek and Glady Fork Creek, including those creeks themselves, was not a material damage protected resource because the streams dry up during the summer, do not continuously support aquatic life, are not used by any other water users, and were mined prior to enactment of SMCRA (Tr. 48-49, 100-01, 109, 117, 335-339; Skyline Ex. 20, Vol. IV, CHIA, p. 53). A material damage protected resource is one which significantly insures the hydrologic balance and therefore should be protected from material damage (see id., pp. 4, 11).

Another water resource determined by OSM not to be a material damage protected resource is the formation and regional aquifer known as the Newton Sandstone, which lies 40-50 feet above the Sewanee coal seam throughout BB2 and therefore will be mined and disrupted by the BB2 operation (Tr. 49, 72, 367; Skyline Ex. 20, Vol. IV, CHIA, pp. 52-53). While this aquifer is capable of supplying water for domestic needs, the water budget shows it does not contribute significantly to the hydrologic balance (id., p. 53). The only water users of the Newton Sandstone are the owners of seven homesites with six wells located near the Hitchcox Cemetery approximately 2,000 feet northeast of the proposed BB2 active mining area (Tr. 49-50, 1046-47). Because the Newton Sandstone lacks reliability as a domestic water source, the State is beginning to develop a rural water district to supply water to users of the Newton Sandstone (Tr. 49-50).

The Sewanee Conglomerate aquifer lying below the pit floor is a material damage protected resource but is not expected to be impacted by the mining operation because it is not expected to receive significant amounts of recharge from the mine spoils, as it is hydrologically isolated from the Newton Sandstone and the coal seam aquifers by a shale unit (Tr. 70, 72; Skyline Ex. 20, Vol. IV, CHIA, pp. 35-36, 53, 62). Other material damage protected resources are the second and third order streams capable of sustaining aquatic life, including Big Brush Creek below the confluence with Glady Fork Creek (id., pp. 52-53).

The BB2 surface water and groundwater monitoring plans at issue are based upon the probable hydrologic consequences (PHC's) of the mining operation identified in the Probable Hydrologic Consequences (PHC) section of the permit application (Tr. 54-57, 291; Skyline Ex. 20, Vol. II, Item 44A). In addition to the PHC determination, Mr. Liddle reviewed nearly the entire permit application, including baseline hydrologic and geologic information from various sources (Tr. 114-16).

The PHC's include the potential for adverse effects (1) on water quality from oxidation of

pyrite materials in the backfill spoils if an adequate toxic materials handling plan (TMHP) is not implemented, (2) on water quantity in or near the wells of the Hitchcox Cemetery community from drawdown of the Newton Sandstone aquifer, and (3) on water quantity to the north and west of BB2 from dewatering associated with the drawdown of the Newton Sandstone aquifer and the shift of the groundwater divide to the west (Tr. 1525-28). The nature and extent of the monitoring plans and the hydrologic reclamation plan (HRP) were then tailored to the predicted risks (likelihood and significance of the potential adverse impacts) (see, e.g., Tr. 100, 1524-29).

To determine the PHC's, a model of the premining groundwater flow paths was developed from an extensive database of premining regional groundwater flow data developed during the 1970's using drill holes and wells (Tr. 77-78). The general premining groundwater flow through the Newton Sandstone was to the southeast towards the monitoring site SWIM-5 on Big Brush Creek (Tr. 74-76, 78, 1289-91). As the postmining water table begins to reestablish, lateral movement of water will be limited until low points in the pit floor are filled and water begins spilling over the ridges of the floor (Tr. 1289-91). Then the flow is expected to be more southerly (to the south-southeast) than the pre-mining flow based, in part, upon the unusually extensive drill hole data regarding the pit floor contours (Tr. 74-76, 78, 1289-93).

Using this drill hole data and a computer program to interpolate the distance and elevations changes between drill holes, a map of the pit floor contours and water flow patterns was developed that is very reliable, according to Mr. Slone (Tr. 74-76, 1018). The postmining groundwater flow is predicted to follow the general downdip of the coal pit floor to the south-southeast, passing through the southern most part of BB2 into BB1 and discharging in the vicinity of basin 003 on BB1 (Tr. 69-83, 123, 163-64, 1027-46, 1056-58, 1274-1306; OSM Exs. 6, 7; Skyline Exs. 25-A, 25-B, 25-C).

Mr. Liddle and Skyline's experts were very confident of the accuracy of the groundwater flow predictions (Tr. 72-83, 1298-1306, 1544). This high confidence level stemmed from several factors.

First, a regional map of the contours of the base of the Sewanee coal seam in a 64-square mile area 10 miles southwest of the Skyline mines had proved very reliable in predicting the location of groundwater discharges of mines within the area (Tr. 1538-44). Mr. Liddle explained that OSM has a proven track record of using this type of analysis to conceptually and accurately model groundwater flows for numerous mines in the area (Tr. 82-83). This thorough understanding of groundwater flow patterns in the area facilitated development of the groundwater monitoring plans (id.). Because the coal pit floor contour map for BB2 was based on more detailed data than the regional map, Mr. Liddle had even more confidence in that map's predictive capabilities (Tr. 1543-44).

Second, the relatively impervious highwall surrounding the area to be mined is expected to divert to the south any microflows to the north, west, or east (Tr. 78-80, 267-81, 1032-44,

1289-93). This diversion is expected because of the disparity between the permeability of the highwall and the spoils. The lower portion of the highwall consists of the Whitwell shale that is essentially impermeable (Tr. 78-80, 1292, 1475-76). Based upon values from relevant literature, its permeability was estimated to be less than 0.001 feet of water per day (Tr. 1280). The upper portion of the highwall consists of the Newton Sandstone with a permeability of approximately 1 foot of water per day, as determined by a pump test (Tr. 1279-80). In comparison, the permeability of spoil materials is estimated to be in excess of 133 feet of water per day based upon a pump test at one of the Glady Fork wells where the spoil materials are similar (Tr. 1278-79). Given these permeabilities, the groundwater is expected to be diverted southward, following the path of least resistance through the permeable backfill and down the slope of the coal pit floor (Tr. 78-80, 1038-42, 1044-45, 1315-16).

Third, OSM considered the possibility that water might travel through fractures in the eastern highwall but found that no significant fracturing was likely because the ground elevation was fairly level 150 feet from the creek and no significant fracturing was observed in the eastern highwall at BB1 (Tr. 302-03, 428-29)

Fourth, a buffer zone of a minimum of 300 feet will be left between Big Brush Creek on the east and the area to be mined (Tr. 102-03, 1013-14, 1315). The buffer zone provides added assurance that no significant amount of water will travel through the eastern highwall via fractures in the Newton Sandstone or otherwise and that any groundwater travelling towards the creek will be diverted to the south because the buffer will decrease the hydraulic gradient to the east and present a lengthy travel path to the creek (Tr. 78-80, 102-03, 302-03, 428, 1315-18).

Fifth, additional assurance is provided by the creation of a “french drain” or “rubble zone” at the base of the eastern highwall. This drain, consisting of boulders, will increase the permeability of the spoils in the area, enhancing the flow of groundwater downdip to the south rather than through the eastern highwall and lowering the water table near the highwall below the level actually predicted in the permit application, so that migration of water through the Newton Sandstone to the creek is even less likely (Tr. 80-81, 302-03, 426-27). In the application the water table is predicted to be below creek level in the northern one-third of the mine and at or a little above the creek level in the southern two-thirds of the mine (Tr. 425-26, 439-441, 447-49).

Sixth, the flow predictions were based upon a conceptual model of groundwater flow developed for the Glady Fork Mine that had proved accurate (Tr. 263-64, 267-81, 1038-45, 1300-05). That model predicts that under saturated flow conditions in the backfill spoil, the groundwater flow on a macroscale will be dictated by the elevations and contours of the coal pit floor, flowing downslope until the water encounters a relatively impervious zone such as a high wall (Tr. 264, 273). The water will then flow along the high wall and discharge at a point with the least amount of head, generally the most permeable spot, either at a low point, through a fracture zone, or into a stream (Tr. 264, 274).

Because both the area to be mined out at BB2 and the mined out area of Glady Fork resemble bathtubs, a depression surrounded by relatively impervious sides (highwalls) with little fracturing, the ground water is expected to drain (exit) at the low points (Tr. 1032-1044). Data from monitoring wells at Glady Fork confirmed the accuracy of this model (Tr. 276).

OSM and Skyline also relied upon field data from Glady Fork and the other adjacent mine sites to predict whether acid or toxic drainage would occur at BB2 and to develop a TMHP to avoid such drainage. OSM issued a permit to Skyline to begin operations at the Glady Fork Mine in August 1987 (Tr. 637). The initial box cuts in the southern portion of Glady Fork were left open and unreclaimed for 18 months or more (Tr. 1245).

Beginning in the summer of 1990 and during the early 1990's, Skyline experienced acid or toxic mine drainage problems at Pine Ridge East and Glady Fork (Tr. 608-16, 621-632, 1125, 1136-37, 1440, 1554; Ex. 42). Water containing excessive levels of iron and manganese was discharging into Glady Fork and Big Brush Creeks, leading OSM to issue several Notices of Violation (NOV's) to Skyline (Tr. 608-16, 621-632, 1125, 1136-37, 1440, 1241-42, 1439-40; Ex. 42). These non-complying discharges were discovered by visual observation, not monitoring (1127, 1129-30, 1136-38, 1141).

OSM and Skyline had not anticipated any such problems because, during testing of the overburden at Pine Ridge East and Glady Fork, it had shown a high alkalinity sufficient to neutralize or minimize the formation of acid or toxic mine drainage from pyrite oxidation (Tr. 237-41, 1454-55, 1552-54; Ex. 42). However, siderite minerals had masked its acid- and toxic-forming potential and its true, lower net alkalinity (Tr. 237-38, 1445-47). Consequently, OSM had not required lime amendment in the backfill or sufficiently contemporaneous reclamation to substantially minimize pyrite oxidation and the resulting elevated levels of iron and manganese in water entering streams from the mine sites (Tr. 233, 238-41, 1449).

In response to the first NOV issued in September of 1990 for non-complying discharges (seepages) into Glady Fork Creek, Skyline drilled holes and dug wells to locate the source of the problem (Tr. 610-11, 1243, 1439-41). Within two months the seepages were eliminated by methods including pumping some of the new wells to dewater the problem areas (Tr. 610-11, 1441-44). Dewatering wells were also used at Pine Ridge East to eliminate the acid/toxic mine seepages (Tr. 234, 245).

By using testing to account for siderite masking, Skyline also discovered the acid- and toxic-forming potential of the overburden (Tr. 1445-47). Prompted by this discovery as well as the September 1990 NOV requirement to develop a long-term mitigation plan to address the impacts to Glady Fork Creek, Skyline developed a proposed TMHP to minimize acid/toxic mine drainage during future mining at Glady Fork (Tr. 1445-49; Ex. 42).

OSM eventually issued a Cessation Order (CO) rather than approving the proposed

TMHP (Ex. 42). Skyline applied for relief from the CO and OSM then submitted the TMHP to a team of experts from its Eastern Support Center (ESC) for re-evaluation (Ex. 42). They concluded that the TMHP would prevent acid/toxic mine drainage (Ex. 42). At a lengthy administrative hearing regarding the CO, OSM sought to discredit the proof from its own ESC experts and the presiding administrative law judge, Judge Torbett, concluded that the TMHP would not work (Ex. 42). Skyline appealed to Federal district court and the court concluded, based upon the “overwhelming expert testimony” that the TMHP would work and enjoined enforcement of the CO (Ex. 42, pp. 12-13).

A nearly identical TMHP for BB1 was found to be approvable by Judge Torbett after a lengthy administrative hearing in which four OSM-selected independent experts concluded that the TMHP would work (Tr. 1485, 1488-89). The permit application for BB1 was approved in 1993.

The six elements of the Glady Fork TMHP are: (1) contemporaneous reclamation, (2) selective handling of the potentially acid- and toxic-forming materials, (3) compaction of such materials, (4) lime amendments, (5) inundation of such materials on the coal pit floor, and (6) hydrologic routing (Tr. 1460). Contemporaneous reclamation is important to minimize the exposure of the potentially acid- and toxic-forming materials to water and oxygen, the agents which either flush out the materials or facilitate the formation of acid and the mobilization of toxic metals through pyrite oxidation (Tr.1449-50, 1453-54). Those materials are coal cleanings on the pit floor and lenticular sandy shale, which either break down easily or are already broken down and thus are more susceptible to being acted upon by the water and oxygen (Tr. 1450).

Selective handling involves leaving the coal cleanings on the pit floor deep within the backfill and placement of the other problematic materials (primarily the lenticular sandy shale within the Whitwell Shale overburden) on the dragline benches (Tr. 1246, 1455-58; Skyline Ex. 20, Vol. IV, CHIA, pp. 72-73). The materials are then compacted to minimize water infiltration and flushing of the materials (Tr. 1455-58). Lime amendments are concentrated in those areas to neutralize the acidity from any pyrite oxidation (Tr. 1450-51). Inundation of the materials at the pit floor minimizes the materials’ exposure to oxygen, as the water deep within the backfill has less than 1% oxygen (Tr. 1456). Finally, cast blasting results in the distribution of sandstone boulders at the bottom of pit, forming east-west trending drains (areas of higher permeability) which tend to route the water (Tr. 1458-60).

The TMHP was eventually incorporated into the Glady Fork permit and the Pine Ridge East permit was also revised to include such a plan (Tr. 632). Thereafter, no further acid or toxic drainage problems have occurred at any of the adjacent mine sites (Tr. 631-36, 1025, 1481, 1489).

A similar TMHP with the same six elements was incorporated into the BB2 permit (Tr. 1245-48). The need for the TMHP was demonstrated by substantial premining drilling to

determine the geochemistry of the area (Tr. 83-88; OSM Ex. 5; SOCM Ex. 28).

The drilling showed that the potentially acid- or toxic-forming materials are distributed sporadically in clusters (Tr. 85-86). This type of distribution is consistent with how it is distributed throughout the area of the Sewanee coal seam (Skyline Ex. 20, Vol. IV, CHIA, p. 72; Tr. 86). Mr. Liddle observed that most or the worst of the problematic material was clustered in the southern one-half or one-third of BB2 in the path of the projected groundwater flow (Tr. 86-89, 126-27, 1557-60).

The goal is to place at least 90% of the potentially acid- or toxic-forming materials (other than the coal cleanings) on or below the dragline bench horizon, with approximately 60 percent used to construct the dragline benches and 30-40 percent cast blasted deep into the pit below the benches (Tr. 1246-47; Skyline Ex. 20, Vol. II, Item 44B).

The distribution of lime amendments will be one-third on the dragline benches, one-third on the pit floor, and one-third at the spoil/topsoil interface (Tr. 1246). The concentration of the lime amendments will be determined by analysis of the coal cleanings and of holes to be drilled premining on 625 foot centers which will intercept the Whitwell Shale overburden and pit floor (Tr. 1246-47; Skyline Ex. 20, Vol. II, Item 44B).

Compaction of the bench pads is designed to create a backfill layer which is less permeable than the spoil and/or blast-cast overburden, limiting infiltration of water through the acid-producing materials below the bench pads and temporarily perching and charging groundwater with alkalinity from the limestone applied to the bench pads (id.). The more pervious zone between the bench pads will channel infiltrating water past the potentially acid-producing material placed below the bench pads (id.).

Drain structures will also be created in the basal sections of the backfill which will connect to sandstone rubble zones established along the ends of the pits (id.). The purpose of the structures is to ensure groundwater flow continuity and maintenance of postmine water table levels well below the projected elevation of the spoil-side dragline bench horizon within the backfill to keep the majority of the acid-producing material free of prolonged contact with the groundwater (id.). However, for some of the acid-producing material (the coal cleanings on the pit floor), inundation is contemplated as a method of minimizing contact with another agent of pyrite oxidation: oxygen (id.).

OSM relied in various ways upon monitoring data and experience from the Glady Fork Mine in evaluating and approving the BB2 permit application (Tr. 264, 267-72, 278-83, 1528-29). First, Glady Fork water quality data was used to model and predict BB2 water quality because the mining method, TMHP, and geochemical characteristics of the overburden at Glady Fork were similar to those identified in the BB2 permit application (Tr. 268, 278-83; Skyline Ex. 20, Vol. II, Item 44A, pp. 38-43, 68-70, Item 44B, p. 6 (limeamend/02-21-97), Appendix 44B-A,

pp. 44B-A-10, 44B-A-11). However, reliance upon the Glady Fork data resulted in conservative projections of the postmining water quality of BB2 because (1) most of the Glady Fork overburden was potentially acid- or toxic-forming, whereas the overburden at BB2 was more variable in its acid- or toxic-forming potential, with less problematic material overall (Tr. 283), and (2) the Glady Fork pit was left open to the elements for long periods rather than being contemporaneously reclaimed.

OSM looked at data from Glady Fork monitoring wells in areas with lime amendments (wells OW-8 and OW-9) and areas without lime amendments (the southern portion which was mined before development of the TMHP) (Tr. 279, 282). Particular reliance was placed on data from well OW-8 at Glady Fork which showed, according to Skyline and OSM, favorable water quality trends (Skyline Ex. 20, Vol. II, Item 44A, pp. 68-70, Item 44B, p. 6 (limeamend/02-21-97), Appendix 44B-A, pp. 44B-A-10, 44B-A-11). The area around OW-8 is most similar to BB2 in its overburden characteristics and was reclaimed in a manner similar to that proposed under the TMHP for BB2 (Skyline Ex. 20, Vol. II, Appendix 44B-A, p. 44B-A-10). Data from well OW-9, despite being located in an area left open and unreclaimed for a considerable period, was also interpreted as displaying favorable water quality trends and acceptable pH levels (Skyline Ex. 20, Vol. II, Item 44B, pp. 6 (limeamend/02-21-97), Appendix 44B-A, p. 44B-A-10). In general, the water quality trends were viewed as favorable, indicating that the TMHP was working (Tr. 1024-25, 1213, 1518, 1528-29).

OSM relied upon monitoring data from wells in the unlimed southern portion of Glady Fork, such as well OW-5, and similar wells at Pine Ridge East as evidence of a worse case scenario (Tr. 207-10, 223-24, 230, 234, 245, 280-83). Mr. Liddle opined that the data showed no acid mine drainage would be expected even without lime amendments (Tr. 210). It also showed that the water quality tends to be poorest immediately after drilling the spoil well and then improves (Tr. 210).

Second, OSM relied upon results of a November 1996 backfill pumping test at Glady Fork (1,000 gallons per day per square foot) to project the permeability of the backfill at BB2 and the anticipated groundwater characteristics (Tr. 268). Third, as previously mentioned, the method of projecting groundwater flow paths for BB2 is nearly identical to the method used for Glady Fork (Tr. 264, 269).

Fourth, Glady Fork field observations and well data led to the conclusion that the ponding of water on the dragline benches would not be substantial (Tr. 270-72). Mr. Riddle observed that rainfall on unreclaimed areas of the dragline bench at Glady Fork did not pool up substantially (Tr. 270-71). He also noted that data from a well OW-6 on a dragline bench at Glady Fork showed that the reclaimed bench was dry (Tr. 270-72, 277).

OSM also relied upon groundwater flow and favorable monitoring data from BB1 (Tr. 979, 1025-26, 1404, 1489-92, 1528-29, 1534-35, 1550-51). The value of the data from

Glady Fork and BB1 for predicting the PHC's at BB2 was recognized even by SOCM's experts (Tr. 889-91, 1631, 1643).

Because the geology, overburden geochemical characteristics, and proposed TMHP's for BB2 are similar to those for BB1 and Glady Fork, similar post-mining water quality is expected and this expectation was confirmed by analytical modeling (Skyline Ex. 20, Vol. II, Item 44A, pp. 38-43, 68-70; Tr. 278-81). As Mr. Liddle noted, "we had the best of both worlds: good models and good field data to support those models." (Tr. 1536)

Skyline and OSM also predicted the extent of the drawdown of groundwater within the Newton Sandstone to be caused by the proposed mining operation. Using a mod-flow model and assuming that the aquifer was confined with no recharge, Mr. Liddle predicted that the drawdown effects might extend as far as 4,000 feet from the boundaries of the area to be mined under a worse-case scenario (Tr. 1321-22). Skyline disagreed with his assumptions and conclusion; it calculated the drawdown effect within the Newton Sandstone to be only 500 to 1,500 feet (Tr. 1320-24).

The development and approval of the monitoring plans at issue were based upon these predictions of the consequences of the mining operation. They were developed by Mr. Liddle, Mr. Slone, and Darrell Nicholas, another consultant for Skyline (Tr. 1227-28).

As shown by OSM Exhibit 6 and Skyline Exs. 25-A, 25-B, and 25-C, the BB2 permit includes groundwater monitoring wells OW-1 and OW-4 on the eastern boundary, wells GWM-12 through GWM-15 in the backfill spoils in the area first to be mined and in the path of the projected groundwater flow, and wells GWM-16 and GWM-17 outside the northeastern boundary in the area of Hitchcox Cemetery. Established groundwater monitoring points under the BB1 and other permits are also identified as sites to be monitored as part of the BB2 ground water monitoring plan.

Although migration of any significant amount of groundwater through the eastern highwall is not anticipated, wells OW-1 (in the Newton Sandstone) and OW-4 (in the Sewanee Conglomerate) are located to detect such migration at the point where migration through the highwall is most likely (Tr. 101-03, 375-76, 1070, 1165-66, 1318-19, 1324). That point is where the hydrologic gradient towards Big Brush Creek should be greatest because it is a topographical low point of the pit floor, the postmining water table is predicted to be at its highest point above Big Brush Creek and the Newton Sandstone/Whitwell Shale interface, and the Newton Sandstone is much more permeable than the Whitwell Shale (Tr. 375-76, 1318-19, 1070-71, 1165-66, 1324). Water will pool at this low point very early in the mining process and therefore the wells will provide an early indication of whether groundwater will migrate through the eastern highwall (Tr. 1070-71).

Additionally, well OW-1 will monitor the extent of the drawdown in the Newton Sandstone as mining advances northward (Tr. 1310). It will also be used to detect the water quality of any water flowing eastward from the mine site into Big Brush Creek and to determine the hydraulic gradient in combination with well GWM-13 (Tr. 1310).

Wells GWM-16 and GWM-17 are also located in an area where significant effects to the hydrologic balance are not anticipated. They are designed to detect any drawdown effect upon the Hitchcox Cemetery community's half-dozen domestic wells within the Newton Sandstone (1310, 1320-24). Under the worse-case scenario developed by Mr. Liddle, these domestic wells 2,000 feet to the northeast would lie within the 4,000 foot range of the drawdown effect and would be seriously impacted (Tr. 1071-72). Mr. Liddle conceded, however, that he required placement of wells GWM-16 and GWM-17 out of an abundance of caution and that they were probably unnecessary (Tr. 72-73, 1320-25, 1527-29, 1532-33, 1560-63).

Of the wells located in the backfill spoils, GWM-13 and GWM-14 were located to intercept the groundwater from where it will first pool at the lowest elevation of the pit floor (Tr. 1061-62, 1307). Samples from these wells should be first available when approximately half of the BB2 area has been mined (Tr. 1063). Spoil wells GMW-12 and GWM-15 are located at the next lowest pit floor elevations where groundwater will next pool (Tr. 1062-63).

The four spoil wells were placed in these locations in the southern portion of the mine, where mining will first be completed, so as to obtain monitoring data as soon as possible (Tr. 88-89, 126-27, 1066-67, 1335-36). Their placement was also based upon the concentration of potential acid- or toxic-forming materials in those areas or areas upgradient therefrom and the fact that the majority of the groundwater flow would pass through those areas before leaving the site (Tr. 88-89, 126-27, 1062, 1066-67, 1307, 1335-36). Thus, the locations are the first points where any impacts of the operation on water quality would materialize (Tr. 1335-36).

Wells GWM-8, GWM-9, GWM-15, GWM-16, and GWM-19 listed on the BB1 permit are also part of the BB2 monitoring program (Tr. 1067-68, 1073-75, 1199-1201, 1306-08, 1579-81). Wells GWM-15, GWM-16, and GWM-19 are located at pit floor low points in the projected groundwater flow path as it leaves BB2 and enters BB1 (*id.*). The groundwater is expected to begin spilling south over an east-west trending structural divide along the border between BB2 and BB1 when the postmining water table reaches the elevation of 1730 feet (Tr. 1036, 1073-75, 1294-95). It is expected to discharge at or near basin 003 and GWM-16, the lowest area of BB1 (Tr. 1036). GWM-15, GWM-16, and GWM-19 will provide additional information as to the quality and quantity of water coming from BB2 (*id.*). GWM-15, in particular, was located, in part, to monitor the water level in the vicinity of the reconstructed stream traversing BB2 and BB1 (Tr. 1228). GWM-8 and GWM-9 are also located at pit floor low points but outside the permits in a previously mined area to detect the quality and quantity of any water that bypasses GWM-15 and GWM-16 on BB1 (Tr. 1074, 1270, 1308-09).

In developing the surface water monitoring plan, OSM considered which water resources were significant ones in need of protection (Tr. 99). Nevertheless, the plan provides for substantial monitoring of surface water before and after entering Big Brush Creek to the east of BB2 and BB1, despite having found that this portion of Big Brush Creek along with the first order drainages above the confluence with Glady Fork Creek were not a material damage protected resource.

Monitoring site SWIM-1 is located upstream of the mine to detect the water quality in Big Brush Creek before any impact from BB2 (Tr. 104, 1311). Site SWIM-5 is located in Big Brush Creek adjacent to the southern end of the mine as far downstream as practical to determine the effects on the creek of any surface water inflow between SWIM-1 and SWIM-5 (Tr. 105-06, 1311). In addition, the BB2 permit incorporates by reference the NPDES permit which covers monitoring points for BB1 and BB2 combined (Tr. 1003-04, 1009-10; Skyline Ex. 11, 21). Those points include a monitoring site at the outflow of each of the numerous sediment ponds which collect surface drainage from the sites before it enters Big Brush Creek or Glady Fork Creek (Tr. 104-05, 109; OSM Ex. 6; Skyline Exs. 11, 21). Those ponds include several downstream from BB2, including ponds 003 and 004 where the groundwater is expected to discharge after passing through BB1 (OSM Ex. 6; Skyline Exs. 11, 21; Tr. 1036). Finally, there are sites SW-3, SW-4, SW-6, and SW-7 along Big Brush Creek (Tr. 109, 1311-12; Skyline Ex. 29).

## Discussion

### I.

#### **Jurisdiction, Scope of Review, and Standard of Review**

Before addressing SOCM's challenges to the hydrologic monitoring plans, the following issues must be addressed: (1) a jurisdictional issue raised by Skyline, (2) the scope of review, and (3) the standard of review. These issues are addressed conjunctively because the resolution of each issue is dependent, in large part, upon the same factor: that these proceedings are administrative, rather than judicial, in nature.

First, Skyline contends that SOCM's appeal should be dismissed for lack of jurisdiction because it failed to exhaust its administrative remedies by failing to object to or challenge the hydrologic monitoring plans during the permitting process when the public was afforded the opportunity to comment upon the permit application. It argues that SOCM may not raise an issue on appeal that was not presented to OSM during the permitting process because OSM and Skyline were thus denied the opportunity to resolve the issue.

Second, under the guise of limiting the scope of review of this proceeding to the scope of OSM's review, OSM makes a similar argument with regard to SOCM's failure to comment upon

the monitoring plans during the permitting process. According to OSM, if materials are considered that OSM has not had an opportunity to review, the administrative hearing would become a continuation of the permit review and the administrative law judge would become the ultimate permit reviewer. OSM argues that this result was not envisioned by anyone, especially as an adversarial hearing is not conducive to correctly resolving matters of technical complexity routinely considered during the permit review process.

Third, to the extent that OSM's permitting decision is based upon scientific or technical determinations, both Skyline and OSM argue for application of a deferential arbitrary and capricious standard of review. They further contend that great deference should be given to OSM's interpretations of the applicable statutes and regulations.

For the most part, these arguments are based upon a false premise: namely, that limitations restricting judicial review of administrative decisionmaking are applicable to an administrative law judge's review of an OSM decision. For instance, Skyline bases its jurisdictional contention upon application of the general principle of administrative law that a party may not advance a theory or raise an issue on appeal of an administrative agency's action that was not presented to the agency below. However, two of the three authorities cited to support application of this principle, McKart v. United States, 395 U.S. 185 (1969), and 2 Am. Jur. 2d Administrative Law § 578, require the exhaustion of administrative remedies as a precondition to seeking judicial, not administrative, review. Skyline has presented no valid authority for the proposition that the doctrine of exhaustion of administrative remedies applies under the circumstances of this case.

The only other cited authority for application of the doctrine is The Hopi Tribe v. OSM, Docket No. TU 6-3-PR (Aug. 15, 1986), excerpted in Surface Mining Law Summary, 424 ALJ., p. 2933 (Aug. 1996). In that case, the Hopi Tribe appealed an OSM decision approving a permit revision and raised matters on appeal that were not brought to OSM's attention when it approved the revision. Referring to those matters, Administrative Law Judge Morehouse suggested that the evidence should be limited to matters that were available to OSM at the time it made its decision. Id. at 11, 424 ALJ at 2935. This suggestion may be true, but it does not address the fact that matters available to or identifiable by OSM are not necessarily equivalent to matters brought to its attention (see below).

Further, this suggestion is dicta, as Judge Morehouse ultimately upheld OSM's decision because he found that the Hopi Tribe's arguments lacked merit. More importantly, Judge Morehouse's entire decision was vacated on appeal for lack of jurisdiction because the Hopi Tribe had not timely filed its appeal of OSM's decision. Hopi Tribe v. OSM, 103 IBLA 44, 46-47 (1988).

The following comments of the Interior Board of Indian Appeals, Office of Hearings and Appeals (OHA), U.S. Department of the Interior, are equally applicable to an administrative law

judge of OHA's Hearings Division:

The Board is not a reviewing court. It is part of the administrative body making the determination and is acting by specific delegation from the head of that administrative body. It, therefore, is not limited by statutes restricting judicial review of administrative decisionmaking. *See Walch Logging Co. v. Portland Assistant Area Director (Economic Development)*, 11 IBIA 85, 101, 90 I.D. 88, 96 (1983). The scope of review of administrative decisions by the Secretary has recently been discussed by the Interior Board of Land Appeals:

The Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of appellate review and decisionmaking as to be *required* to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review *de novo* all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving the exercise of discretion. Act of March 3, 1849; 9 Stat. 395. [*See also* 5 U.S.C. § 557(b).] The Secretary's inherent authority in this regard may not be diminished or constrained by those whose only authority derives from the delegated powers of the Secretary. Therefore, the scope of appellate review by or on behalf of the Secretary can be so limited only by the Secretary himself in a duly promulgated regulation, or by the Congress through enacted law. No such restraint on the scope of agency review has been imposed in cases such as this one. Therefore, the Board has a duty to consider and decide them "as fully \* \* \* as might the Secretary."

Pueblo of Laguna v. Ass't Secretary for Indian Affairs, 12 IBIA 80, 90 I.D. 521, 527 (1983) (quoting United States Fish & Wildlife Service, 72 IBLA 218, 220-221 (1983)); see also Wyoming Independent Producers Assn., 133 IBLA 65, 83 n.13 (1995).

In the present case, there is no statutory or regulatory limitation on the scope of the Department's review or jurisdiction. The pertinent authorities - SMCRA and the applicable regulations - do not limit access to administrative review to persons who have submitted pertinent comment on the underlying permit application or to issues brought to OSM's attention. Rather, SMCRA states, without qualification, that "any person having an interest which is or may be adversely affected" by an OSM decision may seek administrative review. 30 U.S.C.

§ 1264(c); see also 43 C.F.R. § 4.1361.

Nor is there a basis for implying or interpolating such limitations on access to administrative review. Words may be interpolated in a statute only when the statutory language is equivocal or where literal interpretation leads to absurdity so gross as to shock the general moral or common sense. Hatfried, Inc. v. C.I.R., 162 F.2d 628, 631 (3<sup>rd</sup> Cir. 1947). Neither of the conditions for interpolation exist in the present case.

In other statutory provisions, Congress has shown that it knows how to limit the right of appeal to those persons who have participated in the proceedings from which appeal is sought. For instance, SMCRA expressly limits the right to appeal permitting decisions to Federal court to “any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector \* \* \*” 30 U.S.C. § 1264(f) (emphasis supplied).<sup>1</sup> “Where Congress knows how to say something but chooses not to, its silence is controlling.” In re Haas, 48 F.3d 1153, 1156 (11<sup>th</sup> Cir. 1995).

In adopting proposed regulations governing review of permitting decisions, the Secretary has acknowledged the right of any adversely-affected person to challenge a permitting decision even if that person did not file comments during the permitting process.

It is true, as the commenter notes, that if a person does not file comments or participate in an informal conference under section 513(b) [30 U.S.C. § 1263(b)], he or she will not receive written notification of OSMRE’s decision on the application. Nothing in section 514(c) [30 U.S. C. § 1264(c)] requires that notice of OSMRE’s decision be given in a local newspaper or in the Federal Register, or both, in addition to notifying the applicant, as the commenter suggests, and we believe the commenter’s suggestion that this be done is both administratively cumbersome and legally inadvisable. Failure to receive such notification in no way vitiates the right of any person who is or may be adversely affected by an OSMRE decision to file a request for a hearing under section 514(c) [30 U.S.C. § 1264(c)]; it simply means he or she must take the initiative to monitor the regulatory authority’s decisionmaking. \* \* \* Placing this responsibility on those who do not file comments or participate neither discriminates irrationally against such persons nor deprives them of due process of law.

56 Fed. Reg. 2139, 2141 (Jan. 22, 1991) (emphasis supplied).

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<sup>1</sup> The Secretary has also shown that he knows how to limit the right of appeal to those persons who have participated in the proceedings from which appeal is sought. He has promulgated regulations using the same language to require States to afford limited access to judicial review of State permitting decisions. 30 C.F.R. § 775.13(a) and (b).

With respect to the issues which any adversely-affected person may raise, a limitation of issues to those brought to OSM's attention during the permitting process would conflict with OSM's duty to approve only those permit applications for which it finds, on the basis of information set forth in the application or from information otherwise available, that all the applicable requirements of SMCRA and the regulations have been complied with. See 30 U.S.C. § 1260(b); 30 C.F.R. § 773.15(c). Regardless of whether an issue of potential noncompliance is brought to OSM's attention, OSM is charged with ensuring that the applicant has complied with all statutory and regulatory requirements prior to issuance of a permit. See, e.g., id.; 30 U.S.C. § 1260(b); 30 C.F.R. §§ 778.10(a), 779.18(b), 780.2, and 780.10(a).

A limitation of issues to those brought to OSM's attention would also conflict with the principles upon which an agency's decision is evaluated. Generally, an agency is obligated to make a full and careful review of the relevant factors and available relevant data and to initiate necessary tests and studies. See The Sierra Club, 104 IBLA 76, 89 (1988); see also Natural Resources Defense Council, Inc. v. OSM, 4 IBSMA 4, 16 (1982) (in a hearing on petition for review of permit approval decision, reference may be made to all evidence that was available to OSM); Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 462 U.S. 29, 42-43 (1983) (agency must examine the relevant data). An agency decision may be set aside if it fails to consider relevant or important factors. See id.; Uintah Mountain Club, 112 IBLA 287, 289 (1990). The fact that information or concerns were not brought to OSM's attention during the permitting process does not mean that the information was not available or that the concerns were not relevant factors to consider.

With respect to permit applications, OSM must fully and carefully review the information in the application or otherwise available to ensure compliance with statutory and regulatory requirements. See 30 U.S.C. § 1260(b); 30 C.F.R. § 773.15(c). This process necessarily requires identification of potential noncompliance issues, relevant factors, and informational needs. OSM is authorized and obligated to require from the applicant additional data, information, or action, including additional monitoring, to ensure compliance. See 30 C.F.R. §§ 779.18, 779.19, 779.24(l), 780.16(a)(1), 780.21(b), (d), (i)(1), and (j)(3), and 780.22(c). These obligations persist, regardless of whether potential noncompliance issues, relevant factors, or informational needs are brought to its attention.

The issues raised by SOCM are indeed relevant concerns which OSM was duty bound to identify and consider. Those issues are addressed in detail below.

Having determined that SOCM's objections to the permit decision are within my jurisdiction and the scope of review, the standard of review must still be determined. As stated in United States Fish and Wildlife Service, the general rule is de novo review. 72 IBLA at 220-21.

Despite the broad scope of review (de novo review), the Interior Board of Land Appeals

(Board) has recognized that “as a general rule we will not substitute our judgment for that of the experts employed by the Department to analyze facts and to make recommendations in their particular fields of expertise, in the absence of a showing that the decision is contrary to the evidence of record or otherwise arbitrary or capricious.” National Organization for River Sports, 138 IBLA 358, 363 (1997); see also Woods Petroleum Co., 86 IBLA 46, 52 (1985) (“A determination by Departmental technical experts will not be set aside where it is not arbitrary or capricious, and is supported by competent evidence.”). Likewise, in the United States Fish and Wildlife Service case, the Board stated that “in certain classes of cases involving judgmental decisions by agency personnel who have special authority and/or qualifications to make such decisions, the Board may accord considerable weight or deference to such decisions if they are supported by substantial evidence, but they may be overcome, nevertheless, by a preponderance of countervailing evidence.” 72 IBLA at 221. “It is well settled that the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary’s technical staff.” American Gilsonite Co., 111 IBLA 1, 33 (1989); see also Benson-Montin-Greer Drilling Corp., 118 IBLA 8, 12 (1991) (“A difference of opinion concerning the interpretation of the available information does not establish such error.”). Thus, to the extent OSM’s decision was based upon substantial technical analysis, it will not be set aside absent a showing of error, *i.e.*, a showing that it is contrary to the evidence or otherwise arbitrary or capricious.

SOCM argues that this deferential standard does not apply to matters arising under SMCRA because SMCRA, unlike other statutes governing Departmental activities, encourages private citizens to retain expert witnesses (in permit review proceedings) to insure that the decisions and actions of OSM are grounded upon complete and full information and comply with SMCRA. See 30 U.S.C. § 1275(e); 43 C.F.R. § 4.1294(b); H.R. Rep. No. 95-218, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 89 (1977); S. Rep. No. 95-218, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 59 (1977). According to SOCM, it makes no sense to encourage citizens to hire expert witnesses if administrative law judges are bound to defer to OSM experts when their opinions conflict with those of the private experts.

SOCM’s argument is rejected. SOCM cites no authority, and none could be found, that supports this argument. Encouraging private citizens to hire expert witnesses is not inconsistent with the standard of deferring to OSM’s technical analyses when differences of expert opinion arise, as private expert testimony may still be useful to show error in OSM’s analysis.

SOCM does cite several cases which allegedly show that the Board does not defer to OSM technical opinions. Natural Resources Defense Council, Inc. (NRDC) v. OSM, 89 IBLA 1, 92 I.D. 389 (1985); Clifford Mackey, 99 IBLA 285 (1987); Mr. and Mrs. William J. Hamilton, 105 IBLA 160 (1988). None of those cases are apposite and none address the issue of the appropriate standard of review to apply when OSM technical analyses are involved.

NRDC involved a petition for review of an OSM approval of a permit. The Board found

OSM's cumulative hydrologic impact study wanting because it contained virtually no discussion of the impacts of mining on groundwater. 92 I.D. at 405. It did not find fault with the technical analysis actually performed but with the absence of such analysis regarding groundwater. The Board also found that OSM had erred by approving the permit prior to the applicant's submission of certain information. By permit stipulations OSM had required post-approval submittal of the information, but the governing regulations required submittal prior to permit issuance. *Id.* at 416-17. Again, no fault was found with any technical analysis; the error was a matter of timing and procedure.

In the other two cases cited by SOCM, the Board simply addressed the issue of whether a disputed issue of material fact existed so as to require a hearing. The standard of review for determinations involving OSM technical analyses was not implicated because the Board did not engage in such a substantive determination.

OSM and Skyline assert that a similar deferential standard applies to OSM's interpretations of SMCRA and the implementing regulations promulgated by the Secretary. They repeatedly argue that deference should be afforded to long-standing practices of OSM arising out of such interpretations. The cases cited by Skyline and OSM in support of this assertion are simply inapposite, as they relate to judicial review of agency statutory and regulatory interpretations. An analysis of relevant authority requires rejection of this assertion.

In at least one pertinent case, the Board has reviewed de novo an OSM regulatory interpretation. Larosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996). As SOCM points out, that case is now on appeal to the United States Court of Appeals for the Fourth Circuit and the Secretary has filed a brief supporting de novo review of OSM regulatory interpretations by the Board. West Virginia Highlands Conservancy, Inc. v. Babbitt, appeal docketed, Nos. 97-2559 and 97-2603 (4<sup>th</sup> Cir. Nov. 7, 1997). In that case the Conservancy has argued that the Board should defer to OSM's interpretation of a regulation. In response, the Secretary first noted that the Board speaks for the Secretary as his authorized representative and then argued in his brief:

Requiring superior authority within an executive agency to defer to its enforcement branch in interpreting the agency's regulation is simply not, as the Conservancy implies, analagous to that of a court in the judicial branch of the government deferring to an executive branch agency interpreting its own regulation. Rather, the fact that [the Board] does possess the authority to fully and finally decide issue[s] in administrative litigation before the Department suggests that no deference is due the enforcement arm of the agency [(OSM)]. This authority indicates that the adjudicative body is empowered to perform the function of interpreting the law applicable to cases before it.

See also Pueblo of Laguna, 90 I.D. at 527; Wyoming Independent Producers Assn., 133 IBLA at 83 n.13; Dvorak Expeditions, 127 IBLA 145, 151 n.5 (1993).

The Board's authority to speak for the Secretary is set out at 43 C.F.R. § 4.1, which lists the Board as a component of the Office of Hearings and Appeals (OHA), U.S. Department of the Interior, and provides that OHA "is an authorized representative of the Secretary for the purpose of hearing, considering, and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." The Hearings Division, which is comprised of administrative law judges, is also listed as a component of OHA. Thus, an administrative law judge also speaks for the Secretary, occupying a position of superior authority similar to that of the Board, and is likewise empowered to interpret the applicable laws without deference to OSM's interpretations.

In light of the foregoing, the repeated arguments of Skyline and OSM that deference should be afforded to OSM's customary or long-standing practices and interpretations are rejected. The substantive issues will be addressed de novo, except to the extent that substantial technical analysis is involved, without further reference to arguments regarding such practices or interpretations.

## II.

### **The Standards by Which a Permit Application's Form and Content Should be Evaluated**

30 C.F.R. § 780.21(i) mandates that each permit application shall include a groundwater monitoring plan and specifies content requirements for the plan. 30 C.F.R. § 780.21(j) contains a similar mandate and content requirements for a surface water monitoring plan.

SOCM challenges the validity of Skyline's hydrologic monitoring plans on four grounds. Before addressing the validity of the plans, a threshold issue raised by SOCM must be resolved: namely, what portion(s) of the permit application should be considered when evaluating the validity of the plans.

Items 62 and 63 of the application are entitled "Surface-Water Monitoring Plan" and "Ground-Water Monitoring Plan", respectively. SOCM argues that only those portions of the application contained or referenced in Items 62 and 63 may be considered part of the hydrologic monitoring plans to be evaluated.

According to SOCM, if components of monitoring plans are scattered throughout a permit application without reference thereto in the plans, then the plans will be indecipherable and inaccessible to members of the public, State agencies that interact with OSM, administrative law judges, and OSM officials other than the staff member(s) who conducted the permit review. SOCM argues that if the plans are so scattered, members of the public will be unable to exercise their rights to review and use monitoring plans in the manner Congress intended.

That intent is manifested at 30 U.S.C. § 1202(i), which provides that one of the purposes of SMCRA is to “assure the appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamations plans, or programs established by the Secretary or any State under this chapter.” Another purpose of SMCRA is to “assure that surface coal mining operations are so conducted as to protect the environment.” 30 U.S.C. § 1202(d). These purposes are melded in Congress’ statutory declaration that “the cooperative effort [of the Federal Government, States, and public] established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.” 30 U.S.C. § 1201(k).

Consistent with this declaration and the aforementioned purposes, the legislative history of SMCRA provides:

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing.

\* \* \* \* \*

While citizen participation is not, and can not be, a substitute for government authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information.

\* \* \* \* \*

Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the Act.

H.R. Rep. No. 95-218, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 88-89 (1997); see also S. Rep. No. 95-128, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 59 (1997).

Those provisions contemplating active citizen involvement include 30 U.S.C. § 1257(e) (requiring that a proposed permit application be made available for public inspection), 30 U.S.C. § 1263 (providing for public notification of the proposed surface mine, for public entity comment upon such applications during the review process, and for potentially adversely affected persons to file written objections to such applications), 30 U.S.C. 1267(f) (requiring that certain

information be made available to the public), 30 U.S.C. § 1267(h) (allowing potentially adversely affected persons to report violations of SMCRA or failures to make adequate and complete inspections and requiring the regulatory authority to provide such persons with a written statement explaining any action taken in response to the report), and 30 U.S.C. § 1270 (allowing citizen suits to compel compliance with SMCRA).

The aforementioned purposes of SMCRA are not unlike those of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1988). The requirement of preparing an environmental impact statement (EIS) under NEPA serves two ends. “A properly prepared EIS ensures that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences, and it provides the public with information on the environmental impact of a proposed action and encourages public participation in the development of that information.” Oregon Environmental Council v. Kunzman, 817 F.2d 484, 492 (9<sup>th</sup> Cir. 1987).

In order to achieve these purposes, NEPA and the applicable regulations state that an EIS “shall be concise, clear, and to the point,” 40 C.F.R. § 1500.2(b), and contain a “detailed statement” regarding the environmental impacts of the proposed action and other topics, 42 U.S.C. § 4332(2)(c). See Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1299-1300 (8<sup>th</sup> Cir. 1976). Likewise, a coal mining permit application must be “clear and concise,” 30 C.F.R. § 777.11(a)(2), and must contain great detail regarding the environmental impacts of the proposed mining operation and other topics, see, e.g., 30 C.F.R. Parts 777, 779, and 780.

OSM uses this detailed information to make required findings and determinations, such as whether the applicant has complied with all requirements of the regulatory program, an assessment of the probable cumulative impact of all anticipated mining on the hydrologic balance, and whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. See 30 U.S.C. § 1260(b). Recognizing the similarities between an EIS and OSM’s assessment of the probable cumulative impact on the hydrologic balance, Administrative Judge Irwin has stated:

Like an [EIS] (and for similar reasons), the assessment must “explain fully its course of inquiry, analysis and reasoning,” must contain “*reasoned* analysis in response to conflicting data or opinions on environmental issues” (italics in original), and “must not be so vague, general, and conclusory that it cannot form the basis for reasonable evaluation and criticism.” *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1299-1300 (8<sup>th</sup> Cir. 1976); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346 (8<sup>th</sup> Cir. 1972).

NRDC, 92 I.D. at 441, Irwin, A.J., dissenting.

Seeking guidance from precedent establishing content standards for an EIS need not be limited to the evaluation of the content of the probable cumulative impact assessment. Given the similarities in content and purposes between an EIS and the entire permit application, such precedent offers useful guidance in evaluating the content of the entire permit application, including the hydrologic monitoring plans.

In order for OSM and the public to reasonably evaluate and criticize such plans, the permit application must explain fully the course of inquiry, analysis and reasoning which led to the selection of the components of the plans and how those components may be used to determine the impacts of the operation upon the hydrologic balance and to assess whether the objectives for protection of the hydrologic balance are being met. This conclusion follows from the requirements of 30 C.F.R. §§ 780.21(i)(1), (j)(1), and (j)(2), 30 U.S.C. § 1267(b), and the aforementioned precedent.

Section 1267(b) gives OSM authority to require monitoring “[f]or the purpose of developing or assisting in the development, administration, and enforcement of [the regulatory program] or in the administration and enforcement of any permit \* \* \*, or of determining whether any person is in violation of any requirement of [the regulatory] program or any other [SMCRA] requirement \* \* \*.” In furtherance of these purposes, regulatory sections 780.21(i)(1), (j)(1), and (j)(2) require each plan to contain certain components. Each must provide for monitoring of parameters that relate to the objectives for protection of the hydrologic balance (*i.e.*, monitoring for noncompliance with SMCRA or the regulatory program), identify those parameters and the monitoring site locations, and describe how the monitoring data may be used to determine the impacts of the operation upon the hydrologic balance. An explanation of the selection and use of the parameters, site locations, and data is necessary to reasonably evaluate and criticize the monitoring plans’ ability to meet the purposes of section 1267(b), including detecting noncompliance, and the purposes of SMCRA, including encouraging informed public participation and protecting the environment from harm.

The fulfillment of this content standard does not necessarily require establishment of the rule for which SOCM advocates. The required explanation may be adequate regardless of whether the entire explanation is located or referenced in that portion of the application designated as the hydrologic monitoring plan.

Precedent regarding the content of an EIS once again provides useful guidance. A court reviewing an EIS must make a pragmatic judgment as to whether the EIS’s form, content, and preparation foster both informed decisionmaking and informed public participation. See Oregon Environmental Council, 817 F.2d at 492. The reviewing court may not flyspeck an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies. *Id.* When reviewing a coal mining permit application, a similar judgment ought to be made regarding its form and content, being careful to avoid flyspecking and keeping in mind that the format of an application is left to the discretion of the regulatory authority, see 30 U.S.C. § 1257(b); 30 C.F.R. § 777.11(a)(3).

Establishment of a general rule to govern the form of presentation of information in permit applications, as SOCM urges, unnecessarily limits the discretion of the regulatory authority in a manner that may amount to flyspecking in individual cases. At least one court has characterized general objections to the level of detail and form of presentation of information in an EIS as unwarranted flyspecking. Stein v. Barton, 740 F.Supp. 743, 749 (D. Alaska 1990). Application of the rule for which SOCM advocates is not warranted in general or in the present case, as the contents of the monitoring plans are intelligible from a review of the permit application (except to the extent that parts of the plans, such as monitoring sites, were omitted from the permit application entirely).

### III.

#### The Substantive Issues

In light of the evidence adduced at hearing, SOCM “presses” four objections to OSM’s approval of the hydrologic monitoring plans discussed in Parts III.A., III.B., III.C.1., and III.D. below (SOCM’s opening posthearing brief, pp. 1-2). The remaining issues are addressed in Parts III.C.2, III.E., and IV below. SOCM has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the plans fail in some manner to comply with the applicable requirements of SMCRA or the regulations, or that OSM should have imposed certain terms and conditions that were not imposed. 43 C.F.R. § 4.1366(a)(2).

#### A.

##### **Each of the Monitoring Plans Does Not Comply with the Requirement To Identify the Site Locations at Which Monitoring Will Occur**

SOCM maintains that each of the hydrologic monitoring plans is defective because it fails to meet the regulatory requirement that the “plan shall identify the \* \* \* site locations” at which monitoring will occur. 30 C.F.R. § 780.21(i)(1) and (j)(1); see also 30 U.S.C. § 1267(b)(2). It is undisputed that the permit application (and NPDES permit which is incorporated by reference into the application) does not identify many site locations which OSM will use to determine the impacts of the BB2 mining operation on the hydrologic balance and to assess whether the objectives for protection of the hydrologic balance are being met. Those sites include 11 groundwater monitoring wells (GWM-8, GWM-9, GWM-12 through GWM-19 on the BB1 permit, and OW-9 on the Gladly Fork permit) and one (SWIM-BB-8) or possibly two (SWIM-3) surface water monitoring sites (Tr. 69-70, 121-22, 125, 130-32, 138-39, 142-44, 147-48, 367, 1054, 1190-93, 1579, 1612; Skyline Ex. 20, Vol. III (Mining Operations Plan Map (4)); Skyline Ex. 24; OSM Ex. 6).

30 U.S.C. § 1260(b) and 30 C.F.R. § 773.15(c)(1) provide that no permit application shall be approved unless the application affirmatively demonstrates and OSM finds that it is accurate

and complete and that all the requirements of SMCRA and the regulatory program have been complied with. In light of the omissions of monitoring sites, SOCM convincingly argues that the permit application was, and is, not accurate or complete and that OSM violated 30 C.F.R. § 773.15(c)(1) by approving an inaccurate and incomplete application.

The responsive arguments of Skyline and OSM are unavailing. They argue that compliance with the law is achieved by listing only those monitoring sites located within the BB2 permit area or those to be created pursuant to the specific permit for BB2. They point to the fact that OSM regularly relies upon data from monitoring sites of other permits as a useful or helpful tool (Tr. 107), implying that the off-permit monitoring sites are not necessary components of the BB2 monitoring plans. Neither the law nor the facts support these arguments.

The sites to be monitored for purposes of determining the impacts of the BB2 mining operation on the hydrologic balance and assessing whether the objectives for protection of the hydrologic balance are being met were repeatedly identified as including the aforementioned off-permit sites. Among these off-permit sites is the expected discharge point of the groundwater after exiting the backfilled areas of the BB2 mine. Mr. Liddle testified that if the BB1 mine were shutdown, the responsibility for monitoring the BB1 sites used to monitor the BB2 operations would be transferred to the BB2 permit (Tr. 165). Clearly, the unidentified off-permit sites are necessary.

Such sites must be identified in the BB2 permit application under the plain regulatory language requiring identification of the site locations. There is no qualifying terminology limiting identification to those sites “within the permit area” or “to be created under the permit.”

Contrary to OSM’s arguments, the failure to identify all monitoring sites is not cured or rendered legal by the fact that Mr. Liddle or other OSM personnel may be willing to assist inquiring members of the public in understanding the permit application (Tr. 146, 187-88, 190-91, 408-09). The plain regulatory and statutory mandate is to identify the sites in the permit application.

While the legislative and regulatory histories do not make clear the reason(s) for this mandate, it certainly facilitates the statutory purpose to encourage informed public participation. At a minimum, the application’s failure to identify all the sources of monitoring data for the mine impaired the public’s ability to reasonably evaluate and criticize the monitoring plans and diminishes the public’s capacity to monitor for, define, and report violations and insure compliance with SMCRA by appropriate legal action under 30 U.S.C. §§ 1267(h) or 1270.

**B.**

**Each of the Monitoring Plans Does Not Comply with the Requirement  
To Describe How the Monitoring Data Will Be Used**

Both the groundwater monitoring plan and the surface water monitoring plan must “describe how the [monitoring] data may be used to determine the impacts of the operation upon the hydrologic balance.” 30 C.F.R. §§ 780.21(i)(1) and (j)(2). SOCM argues that a description can satisfy this requirement only if it (1) identifies the parameters that the operator and OSM intend to use to determine the success or failure of the HRP with respect to each PHC and each HRP objective, and (2) outlines the mechanisms by which such determinations will be made, such as the specific data trends, parameter levels, or statistical analyses that will indicate the potential failure of the HRP and trigger action on the part of the mining company and OSM. SOCM contends that Skyline’s data use descriptions do not do so and therefore fail to satisfy the regulatory requirement. If this regulatory requirement is not satisfied, then OSM violated 30 C.F.R. § 773.15(c)(1) by approving the application.

The required description of data usage should satisfy a requirement similar to SOCM’s requirement (1) because the regulations contemplate monitoring based upon the PHC determination so as to meet the HRP’s objectives for protection of the hydrologic balance. The HRP must specify measures to meet various objectives for protection of the hydrologic balance and address potential adverse hydrologic consequences identified in the PHC determination. 30 C.F.R. § 780.21(h). The monitoring plans also must be based upon the PHC determination and must monitor parameters that relate to the same objectives for protection of the hydrologic balance. 30 C.F.R. §§ 780.21(i)(1) and (j)(1).

For the groundwater monitoring plan, the permit application provides the following vague description of how the data will be used:

The primary location of during mining and reclamation monitoring points will be **OW-1 & OW-4**. These are the same collection points used for background data collection and will allow for comparison of monitoring data to pre-mining data to determine if any potential impacts have occurred due to the mining operation.

The ground-water monitoring plan will also include **GWM-12, GWM-13, GWM-14 and GWM-15**. These wells are proposed wells and will be utilized for verification of the acid/toxic materials plan.

(SOCM Ex. 3). In a similarly vague manner, the surface water monitoring plan provides:

THE PRIMARY LOCATIONS OF THE DURING AND AFTER MINING MONITORING POINTS WILL BE SWIM-1 AND SWIM-5. THESE POINTS WILL BE IN THE SAME VICINITY OF BASELINE DATA COLLECTION POINTS CONDUCTED BY THE APPLICANT AND WILL ALLOW FOR

COMPARISON OF MONITORING DATA TO PRE-MINING DATA TO ASSIST IN THE DETERMINATION IF ANY POTENTIAL IMPACTS HAVE OCCURRED DUE TO THE MINING OPERATION.

(SOCM Ex. 4).

These descriptions are so vague and general that they cannot form the basis for reasonable evaluation and criticism of the monitoring plans. They are therefore inadequate.

At a minimum, the descriptions should explain, as witnesses did at the hearing, what each monitoring site is designed to monitor either by itself or by comparison to or in conjunction with other monitoring sites. On pages 9 through 13 of Skyline's posthearing brief, it summarizes the testimony as to the "logic" of the hydrologic monitoring plans to show that they provide for adequate monitoring of the PHC's of the BB2 operation so as to meet the objectives for protection of the hydrologic balance. That logic is the type of explanation that should be set forth in the permit application to allow for reasonable evaluation and criticism of the monitoring plans, including how they will use the data to determine the impacts of the operation on the hydrologic balance.

That logic explains, among other things, that the groundwater monitoring wells within the backfill spoil were concentrated in the southeastern portion of the mine because that area will be the first area to be mined and reclaimed, is in the path of the groundwater flow, is where the groundwater will first pool, is within or immediately down gradient from the areas where the worst potentially acid- or toxic-forming materials are located, and is where the groundwater will discharge into BB1. Further, that logic informs the reviewer that the southeastern concentration of wells will allow OSM to obtain "verification as early as possible to show whether the mine plan is working [and] to get a very quick handle on whether or not there may be problems by this operation." (Skyline's posthearing brief, p. 12 (quoting Tr. 127)).

Some detail should also be given as to how the chosen parameters "may" be used to determine if the mine plan is working or whether there is a potential problem. Some illumination of the mechanisms which "may" be used to make such determinations is also warranted, such as indicating whether statistical analysis, trend analysis, or certain parameter levels will be used. This might involve description of a range of trend variations or trend interpretation guidelines for determining if a potential problem exists (see Tr. 1609-10 (example of description of such mechanisms for the BB1 mine)). Without such information, the public or OSM personnel unfamiliar with the mining operation would find it difficult to determine if the monitoring plan is adequate or if a potential problem or violation exists or to offer constructive information or suggestions for improvement of the plan.

Contrary to the contentions of Skyline and OSM, providing such detail will not unduly restrict OSM's discretion or flexibility in analyzing monitoring data and acting upon its analyses.

The regulations require a description of how the data “may” be used. 30 C.F.R. §§ 780.21(i)(1) and (j)(2). It does not require OSM to commit irrevocably to how the data “shall” or “will” be used.

Skyline and OSM are correct that the monitoring plans generally need not include trigger points which require specific action to be taken or contingency plans in the event of detection of potential problems. Mr. Liddle credibly testified that contingency plans are only necessary “if the risk is great and the probability is great of an impact. \* \* \* But it’s not possible or even necessary to try to develop contingency plan for every conceivable thing that may go wrong at the mine site, because generally you don’t know what to do until it actually happens and you investigate the problem.” (Tr. 1600-01; see also Tr. 1078-80, 1220, 1250, 1343, 1388-90, 1506-07, 1548-50, 1600).

### C.

#### **The Frequency of Monitoring**

##### 1.

#### **Each of the Monitoring Plans Is Inadequate Because It Fails To Require Monitoring Every Three Months**

Under 30 C.F.R. § 780.21(i)(1), the various parameters for groundwater “shall be monitored and data submitted to [OSM] at least every 3 months for each monitoring location [and OSM] may require additional monitoring.” Similarly, “[t]he monitoring reports [for surface water] shall be submitted to [OSM] every 3 months [and OSM] may require additional monitoring.” 30 C.F.R. § 780.21(j)(3).

SOCM argues that Skyline’s monitoring plans do not require the collection and submission of monitoring data at least every 3 months and therefore violate these regulatory mandates. If the application fails to comply with these mandates, then approval of the application violated 30 C.F.R. § 773.15(c)(1).

The approved monitoring plans require Skyline to collect monitoring data 4 times per year, but they allow Skyline the flexibility to go as long as 6 months without doing so (SOCM Exs. 3, 4; Tr. 680, 1099-1100, 1588). More specifically, the plans call for quarterly monitoring, preferably in March, July, September, and November to correspond with seasonal variations in water flow (Tr. 1098-1100); but they allow Skyline to vary from the preferred months by one-half month in either direction (SOCM Exs. 3, 4; Tr. 680, 1099-1100, 1588). Allowing Skyline the flexibility to go as long as 6 months between data collections does not comply with the plain regulatory language requiring monitoring every 3 months.

OSM and Skyline characterize the “every 3 months” requirement as a “quarterly” requirement that OSM has reasonably interpreted to allow for the collection of data at the most meaningful times according to seasonal variations, thus maximizing the effectiveness of the monitoring. Certainly, OSM and Skyline may pursue the objective of maximizing monitoring effectiveness, but they may not do so in violation of a clear regulatory mandate.

The selection of the minimum monitoring frequency requirement of every 3 months was made after consideration of numerous comments in favor of a more flexible requirement, including one based upon seasonal variations in conditions. 48 Fed. Reg. 43975 (Sept. 26, 1983). If local hydrologic conditions make additional monitoring necessary or advisable in order to obtain data at low flow and high flow periods, OSM is still obligated to establish a monitoring schedule that requires monitoring at least every 3 months, but it may also exercise its discretion to mandate additional monitoring at critical times. In light of the failure to comply with the regulatory requirements to establish monitoring plans that mandate monitoring “every 3 months”, OSM’s approval of the permit application violated 30 C.F.R. § 773.15(c)(1).

## 2.

### **SOCM Failed To Show That OSM Erred By Not Requiring Monthly Monitoring**

SOCM further argues that OSM abused its discretion by not ordering more frequent monitoring on a monthly basis. The exercise of OSM’s discretion to determine whether additional (more frequent) monitoring than “every 3 months” was necessary involves substantial technical analysis. Therefore, its determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence. American Gilsonite Co., 111 IBLA at 33.

Mr. Liddle explained that quarterly monitoring was sufficient to identify any trends because the groundwater moves very slowly, as determined through OSM’s vast experience regulating mines in the Sewanee coal seam over the last 20 years, including the adjacent mine sites (Tr. 58, 90-92, 1601). Mr. Rosso concurred (Tr. 1349, 1385-86). The sufficiency of quarterly monitoring was also justified by Mr. Liddle and other witnesses based upon the fact that monthly monitoring at the adjacent mine sites showed little change in the chemistry of the water from month to month (Tr. 92, 360-61 (Mr. Liddle), 1101-02 (Mr. Slone), 1385-86 (Mr. Rosso). As a result, the monitoring schedules at those mines were changed from monthly to quarterly (Tr. 92-93, 1101-02).

Based upon 6 months of data for acidity and alkalinity from one well at Glady Fork (OW-10), one spike in sulfate levels at another Glady Fork well (OW-8), and a vague reference to additional data, Richard Dipretoro, an expert witness for SOCM, challenged the premise that the chemistry of the water at the adjacent mine sites has not varied much (Tr. 682-83, 732-37, 1624-25). He concluded that the limited amount of data from the one well and “significant amounts” of other data showed rapid changes in the chemistry of the water (Tr. 1624-25). In so

concluding, he did concede that some of the data does not show rapid changes (Tr. 1625).

His opinion, based upon such a limited amount of data from a single well, one spike in another well, and other unidentified data, does not show error in the contrary conclusion reached by Mssrs. Liddle, Slone, and Rosso based upon their own reviews of the data from all of the adjacent mine sites. Such a mere difference of opinion will not suffice to reverse the reasoned opinion of a member of the Secretary's technical staff, Mr. Liddle. American Gilsonite Co., 111 IBLA at 33.

Mr. Dipretoro noted that quarterly, as opposed to monthly, monitoring would delay the accumulation of a statistically significant sample of monitoring data and opined that this delay will unreasonably increase the lead time before problems can be identified and actions taken to protect the environment (Tr. 684, 1623-24, 1648-49). If quarterly monitoring generally suffers from such a defect, then presumably the Secretary would not have promulgated the regulations (30 C.F.R. §§ 780.21(i)(1) and (j)(3)) establishing quarterly monitoring as the appropriate minimum frequency.

Mr. Dipretoro failed to adequately explain why the BB2 site is so distinctive as to require a more rapid accumulation of data than that implicitly and generally regarded as sufficient by regulation. He merely alluded to the largeness, uniqueness, and acid-producing potential of BB2 (Tr. 1648). He did not identify BB2's unique characteristics, unless he intended to do so by his general references to its large size and acid-producing potential. He did not explain why largeness or acid-producing potential should bear upon the monitoring frequency. Further, the evidence does not show that the size of BB2 is large in comparison to the average size of a surface coal mine, but it does show that the acid-producing potential of BB2 is not extraordinary. In fact, it has less acid-producing potential than the adjacent mine sites (see e.g. Tr. 283) and the years of data from those similarly mined sites with more problematic overburden inspires confidence in the efficacy of quarterly monitoring (see, e.g. Tr. 1404).

SOCM makes much of the fact that Skyline and OSM have referenced OSM's authority and intent to make necessary changes in the TMHP and the HRP in response to any indication that the current formulation is not working. SOCM argues that "[f]ailure to require monthly monitoring is inconsistent with [this expression of authority and intent,] upon which OSM's approval of the entire permit depends, because failure to monitor monthly will almost certainly preclude the detection and remediation of any failure before mining is complete and changes are therefore impossible to make."

This argument cannot be sustained. The evidence does not show that monthly monitoring is needed to detect and remediate any problems before mining is complete. SOCM's own expert, Mr. Dipretoro, testified that the success of the TMHP could be determined under the monitoring plans long before mining even reaches the northern portion of the mine (Tr. 1740).

Furthermore, OSM and Skyline will have the benefit of weekly or biweekly monitoring of many surface water sites, as required through the NPDES permit (Tr. 109-10, 1055, 1058, 1421-22; Skyline Ex. 22), which is incorporated by reference into the permit application. They will also gain useful knowledge from monitoring in the northern half of BB1, which Mr. Dipretoro characterized as the best information on the future performance of BB2 (Tr. 1631; see also Tr. 1404).

In sum, SOCM has not shown that OSM erred by not ordering monitoring on a monthly basis. At best, SOCM has shown a difference of opinions among experts which does not justify disturbing OSM's determination.

#### D.

#### **OSM Did Not Err in Approving the Selection of Monitoring Wells**

SOCM's final challenge to the adequacy of the monitoring plans is a claim that the location and number of groundwater monitoring wells are insufficient to enable Skyline, OSM, and the public to determine (1) the suitability of groundwater and surface water for current and approved post-mining land uses, (2) the success or failure of the HRP for the mine, and (3) the impacts of the operation on the hydrologic balance. OSM's determination of the location and number of monitoring wells involves substantial technical analysis which will not be disturbed in the absence of a showing that the decision was in error, *i.e.*, that it is contrary to the evidence or is otherwise arbitrary or capricious. See National Organization for River Sports, 138 IBLA at 363; Woods Petroleum Co., 86 IBLA at 52; United States Fish and Wildlife Service, 72 IBLA at 221. American Gilsonite Co., 111 IBLA at 33; Benson-Montin-Greer Drilling Corp., 118 IBLA at 12.

SOCM has the burden of proof to show that OSM acted arbitrarily or capriciously. It may do so by showing that OSM failed to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. See Motor Vehicle Manufacturers Assn., 463 U.S. at 43. Additionally, OSM's decision may be found arbitrary and capricious if it is shown that it (1) relied on factors which an applicable regulation did not permit it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Id. Even where OSM's factual findings are supported by substantial evidence, its decision must be set aside if SOCM can show that it was based on an error of law. Wassenburg v. United States R.R. Retirement Bd., 75 F.3d 294, 296 (7<sup>th</sup> Cir. 1996).

At pages 36 and 37 of its opening posthearing brief, SOCM alleges:

OSM breached these standards and violated the governing regulations in approving

monitoring plans for the Big Brush No. 2 mine that do not include (1) monitoring wells capable of detecting the impact of the Big Brush No. 2 mine on areas west and north of the permit boundary, (2) monitoring wells capable of detecting the movement of spoil water through the northern portion of the unmined boundary formation west of Big Brush Creek, and (3) monitoring wells capable of detecting the formation and movement of toxic water in areas of the backfill outside the southeastern quadrant of the mine. In approving the current number of site locations for monitoring, OSM failed to implement a mandatory requirement of the applicable regulation, relied on factors which the regulation does not permit it to consider, entirely failed to consider important aspects of the problem, and offered an explanation for its decision that runs counter to the evidence.

Before addressing SOCM's allegations, some general comments are warranted. SOCM and its experts have raised numerous criticisms or observations regarding the monitoring plans and the analytical process by which the content of the monitoring plans was determined. Despite SOCM's assurances that it is not challenging the validity of the CHIA or PHC determination (see, e.g., Tr. 23), many of these criticisms or observations arguably relate to the validity of the PHC determination and CHIA.

The indirect challenges to their validity relate to the recurring issue of what level of risk of adverse impacts to the hydrologic balance implicates the need for monitoring. The nature and extent of necessary monitoring obviously depends upon the level of risk (degree of likelihood and significance) of adverse impacts. Particularly through its experts' testimony as opposed to posthearing argument, SOCM has attempted to discredit the analyses upon which OSM relied in order to show that the level of risk, and hence the need for monitoring, is greater.

In general, the criticisms or observations amount to mere differences of opinion with OSM and Skyline experts. "Because SOCM agrees that the issue is whether OSM acted arbitrarily or capriciously, the appropriate focus is not on the competing technical views that OSM, Skyline, and SOCM offer. The critical question is whether OSM considered all of the relevant factors, avoided consideration of any irrelevant factor, based its decision on credible evidence in the record, and satisfactorily articulated a reasonable basis for its decision." (SOCM's posthearing reply brief, p. 27).

One example of the many differences of opinion involves the statements of Mr. Dipretoro and Mr. Norris that the hydrologic modeling of Skyline and OSM cannot be accurate or realistic because the input data was not consistent for all the models (Tr. 1636-37; SOCM Ex. 12, p. 3). Mr. Nicholas and Mr. Liddle countered that it was appropriate to use different input values for different models in developing reasonable worse-case scenarios (Tr. 1297-98, 1536-38).

Another example is the dispute over whether the TMHP is proven or experimental in nature. Mr. Dipretoro opined that it was experimental because he viewed the data from Gladly Fork as showing mixed results and the data from BB1 as insufficient in quantity to reach any

conclusions (Tr. 710, 1628-30, 1635-36). Msrs. Liddle, Slone, Nicholas, and Mottet disagreed, noting that the TMHP has been used at the adjacent mine sites for 5 or 6 years without any acid mine drainage and that the data trends are positive (Skyline Ex. 20, Vol. II, Item 44A, pp. 68-70, Item 44B, pp. 6 (limeamend/02-21-97), Appendix 44B-A, pp. 44B-A-10, 44B-A-11; Tr. 89, 116, 1024-25, 1213, 1518, 1528-29, 1746-48).

Mr. Dipretoro was concerned that no marked change in water quality occurred after implementation of the TMHP at the adjacent mine sites, but Mr. Mottet explained that the absence of substantial change is not surprising in light of the slow movement of the groundwater (Tr. 1746-48). Further, Mr. Dipretoro's opinion was based upon less data, as he reviewed data only through October of 1996, whereas Mr. Mottet had reviewed six more months of data (see, e.g., Tr. 1628-29, 1746-48).

In general, the opinions of SOCM's experts, as compared to those of SOCM's experts, were grounded in more detailed and comprehensive familiarity and understanding of the site conditions, monitoring, operations, and permit contents for BB2 and the adjacent mine sites.<sup>2</sup> Both individually and collectively, the opinions of SOCM's experts are insufficient to meet SOCM's burden to show that OSM's approval of the number and placement of the monitoring wells was arbitrary or capricious under the standards described above.

## 1.

### **Monitoring to the West and North**

30 U.S.C. § 1267(b)(2) "describes the characteristics of ground-water resources that must be monitored. They are all strata 'that serve as aquifers which significantly insure the hydrologic balance \* \* \*.'" 48 Fed. Reg. at 43974 (quoting section 1267(b)(2)).

If an applicant can demonstrate by the use of the PHC determination and other available information that a particular water-bearing stratum in the proposed permit and adjacent areas is not one which serves as an aquifer which significantly ensures the hydrologic balance within the cumulative impact area, then monitoring of that stratum may be waived by the regulatory authority.

30 C.F.R. § 780.21(i)(2).

This exception to the general rule requiring monitoring of groundwater resources "has been narrowly drawn and requires the operator seeking the exemption to demonstrate to the

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<sup>2</sup> SOCM's experts were disadvantaged, in part, because the BB2 permit application does not adequately identify the monitoring sites or how the data will be used.

regulatory authority that a particular resource has a limited effect, if any, on the hydrologic balance.” 48 Fed. Reg. at 43975. “No lowering of environmental protection or loss of resources which will be useful in the future is expected.” *Id.* Environmental protection includes “minimiz[ing] disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values \* \* \*.” 30 U.S.C. § 1266(b)(11). Thus, “[i]ssues of \* \* \* use by wildlife have to be resolved to the satisfaction of the regulatory authority.” 48 Fed. Reg. at 43975.

The premises for SOCM’s argument that OSM erred in deciding not to require monitoring of the potential impacts of the mining operation to the west and north of the permit area are several: (1) that OSM relied upon the unsubstantiated assumption that streams to the west are not perennial and do not support aquatic life, (2) that OSM’s decision is inconsistent with prior findings of OSM that undesirable effects of mining on the streams similar to the streams to the west of the permit constituted material damage to the hydrologic balance, and (3) that the decision is inconsistent with OSM’s determination to require monitoring of the Newton Sandstone aquifer to the east of the permit in consideration of the human water users in the Hitchcox Cemetery community. SOCM concludes that the waiver of monitoring to the west was based solely upon the absence of identified human water users of the streams to the west and that OSM arbitrarily gave short shrift to the water needs of aquatic and other wildlife west of the permit area.<sup>3</sup>

SOCM’s conclusion is at odds with the evidence showing that OSM considered the water needs of aquatic and other wildlife west of the permit area and that the decision not to monitor was not based solely upon the absence of identified human water users to the west. The following comments and findings of OSM in its CHIA show that the needs of wildlife and aquatic life were on its radar screen and that the Newton Sandstone was found not to be a Material Damage Protected Resource because it does not significantly insure the hydrologic balance.

During coal mining activities other natural resources and uses are temporarily adversely affected by mining such as \* \* \* wildlife habitat \* \* \*. The key is that the impacts are minimized so that the resources and their uses can be restored after mining. Hydrologic impacts are considered in this same logic. Water resources in most cases can be temporarily affected as long as they will be restored after mining and that no water users will be materially damaged in the

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<sup>3</sup> SOCM focuses primarily on the alleged deficiency of failing to monitor for impacts to the west as opposed to the north. This focus is undoubtedly related to the fact that the risk of significant adverse impacts to the north is less and, hence, the alleged need for monitoring is not as great. Consequently, the focus of this decision is likewise on the OSM’s evaluation of the need for monitoring to the west. However, OSM’s evaluation of the need for monitoring to the north has also been considered and is found rational and not arbitrary or capricious.

process. Water users include \* \* \* wildlife [and] aquatic life \* \* \*. The goal is to manage the hydrologic resources by minimizing disturbance by mining. However, as with impacts to any natural resource or land use there are certain critical levels that may cause irreparable damage to either the user or the resource. In hydrology this critical level is termed “Material Damage”.

This document \* \* \* describes the water resources that are to be protected from material damage \* \* \*.

(Skyline Ex. 20, Vol. IV, CHIA, p. 4) (emphasis supplied).

The Newton Sandstone was found not to be a Material Damage Protected Resource “even though it is an aquifer \* \* \*. This is due to the fact the water bearing unit is a small portion of the hydrologic balance and the material damage criteria applies to the hydrologic balance not specific well users.” (Id., p 64) OSM explained in the CHIA that

the presence of aquifers is not the best overall indicator of significant ground water resources since aquatic life uses, [threatened and endangered] species of fish and wildlife, agricultural and other non-human water uses are not considered in the aquifer definition. \* \* \* SMCRA refers to prevention of material damage to the “hydrologic balance” which includes something more than just appeasing current aquifer water users. Evaluating the significance of the ground water resource to the overall hydrologic balance is the primary directive of the regulatory agency \* \* \*; if a ground water is significant it is a material damage protected resource.

(Skyline Ex. 20, Vol. IV, CHIA, p. 11). OSM concluded that “the water budget shows [the Newton Sandstone] does not contribute significantly to the hydrologic balance; even though it is an aquifer capable of supplying water for domestic needs \* \* \*.” (Id., p. 53)

As Mr. Liddle explained, OSM did not require Skyline to monitor the Newton Sandstone west or north of the permit because it was not an aquifer which significantly insures the hydrologic balance (Tr. 367-74). The absence of users of the streams to the west was one factor leading to the conclusion that the aquifer does not significantly insure the hydrologic balance and that no monitoring was necessary to the west or north (see Tr. 367-74, 385, 1527, 1530, 1597-98).

Certainly, the absence of users of the streams to the west and north, which may receive some flow from the Newton Sandstone, is a relevant factor. In determining whether a waiver of monitoring is warranted for a stratum, “the focus [should be] on adverse effects to the hydrologic balance rather than the significance or marginality of an individual resource. Current and

potential uses of the ground-water resource would be relevant to any decision for waiver of monitoring.” 48 Fed. Reg. at 43975. If the particular resource supplies water to other water resources that are significant, whether as a supply for fish and wildlife or other uses, those other uses are relevant. See id. Likewise, the absence of such uses is relevant.

The major factors which OSM considered are appropriately related to the risk (likelihood and significance) of any adverse effects on the hydrologic balance (Tr. 100, 1524-25) so as to determine the nature and extent of monitoring necessary to protect the hydrologic balance. In addition to the absence of water users to the west and north, OSM relied upon the following factors in determining that there are no probable significant hydrologic effects to the north or west to necessitate monitoring.

First, the discharge of any significant amount of groundwater to the north or west is not probable for several reasons: (1) because the postmining watertable elevation to the north and west is predicted to be 60-80 feet below the Whitwell Shale/Newton Sandstone interface and thus the groundwater will be contained by the virtually impermeable shale, (2) because even if the water table were to rise to the level of the Newton Sandstone, it is much less permeable than the spoils, and (3) because the postmining groundwater is reasonably predicted to flow from northwest to south-southeast (Tr. 284, 367-74, 385, 1325-32, 1548; Skyline Ex. 35).

Second, the possible drawdown and dewatering effects to the north and west are insignificant because there are no water resources to the north or west which would be significantly impacted even under a worse-case scenario (Tr. 367-74, 385, 1329-32, 1526-30, 1597-98). Mr. Liddle relied upon calculations showing (1) that, at most, the BB2 mining operation would shift the groundwater divide a few thousand feet to the west, and (2) that the Newton Sandstone receives only one to three inches of the approximately 19 inches of available annual precipitation for recharge, whereas the streams receive the remaining 16 to 18 inches of recharge per year from interflow at the soil/bedrock interface, indicating that the streams receive, at best, a small portion of their flow from the Sandstone (Tr. 367-68, 1597-98; Skyline Ex. 20, Vol. IV, CHIA, pp. 31, 41, 50, 64). From these calculations, he reasonably concluded that the BB2 mining operation would result in an insignificant amount of dewatering of the area west or north of the permit (Tr. 367-68, 1329-32, 1529-30, 1597-98).

Other factors upon which Mr. Liddle relied include the limited value of placing monitoring wells in the northern spoils because they would not provide data until after mining is completed (Tr. 126-27). OSM preferred to rely upon wells that would provide early indications of the impacts and effectiveness of the mining and reclamation plans, such as Wells OW-1 and OW-4 on the eastern edge of the permit, which will be monitored to determine, among other things, the extent of the drawdown of groundwater within the Newton Sandstone (Tr. 1529-30).

There was some dispute over the extent of the drawdown and its effects, but it amounted to a mere difference of opinion. Mr. Dipretoro speculated as to potential effects on the western

streams and even less likely effects to the north under what amounted to a worse-case scenario which is similar to that employed by Mr. Liddle and which is based upon a drawdown effect of 4,000 feet discussed in the CHIA (Tr. 701-03, 748-752, 824-25).

However, Mr. Dipretoro did not review those portions of the permit detailing the interchange between OSM and Skyline regarding the likely extent of the drawdown and the suspect assumptions of the worse-case scenario nor did he study Skyline's reasonable calculations that the drawdown was more likely to range from 500 to 1,500 feet (Tr. 824-25, 830-31). Skyline relied, in part, upon the fact that well OW-1 showed no drawdown effect when mining operations on BB1 came within 2,000 feet thereof (Tr. 1322-24). Mr. Dipretoro countered that drawdown effects were evidenced by a 5-foot drop in the water level in OW-1 and a 13-foot drop in the water level of well OW-9, which is farther away from the BB1 mining (Tr. 1620-21). He later acknowledged, however, that those drops could be explained by seasonal variations and the proximity of OW-9 to a creek (Tr. 1699-1700).

While Charles Norris, one of SOCM's experts witnesses, testified that the shift in the groundwater divide may be greater than predicted because OSM and Skyline did not account for the fact that the recharge of the Newton Sandstone may be greater after dewatering, and while he offered other criticisms of Skyline and OSM modeling (Tr. 547-55, 558-59), neither he nor the other SOCM experts made their own calculations of the potential extent of the shift in the groundwater divide (see, e.g., Tr. 751). Further, Mr. Dipretoro did not know if the suspect worse-case scenario would result in a significant amount of dewatering, and he ultimately concluded that there was not enough data to make a determination as to whether the effect on the western streams would be insignificant (Tr. 751-52, 840).

These opinions do not show error or arbitrariness in Mr. Liddle's analysis. They are simply differences of opinion regarding the necessity of additional data and the interpretation of the available data.

Turning to the three premises of SOCM's argument, premise (1) is not correct. Mr. Liddle's assumption that the western streams are not perennial and do not support aquatic life (Tr. 331-35) was reasonably based upon facts known at the time of permit approval and was substantiated at the hearing.

In determining whether monitoring sites should be located to monitor possible impacts to the west, Mr. Liddle evaluated whether there were any water users, including aquatic life, of the potentially affected water resources to the west (Tr. 331-32). Those resources are the unnamed first order tributaries of Green Sea Branch and Rocky River (Tr. 1048, 1093-94, 1314). He concluded that there were no users (Tr. 331-35). The information upon which he relied included a Skyline inventory of all water users, except aquatic life (Tr. 331-33). That inventory found no users (Tr. 332). He also relied upon the fact that the western streams were similar in size and elevation to the first order streams (Big Brush Creek and its tributaries) to the northeast above the

Big Brush Creek/Glady Fork Creek confluence (Tr. 333-35, 1593-95, 1597; Skyline Ex. 20, Vol. II, Appendix 40-A, p. 40-A-10). Because the northeastern streams dry up during the summer and do not continuously support aquatic life, as determined by a biological survey, and because of their similarity to the western streams, Mr. Liddle reasonably concluded that the western streams also dry up and do not continuously support aquatic life (Tr. 333-35, 1593-95, 1597).<sup>4</sup>

At the hearing, several witnesses, including Mr. Dipretoro, confirmed that the western streams dry up during the summer (Tr. 702, 1048, 1093-94, 1314, 1511-12). In fact, the permit application points out, based upon substantial data, that most first and second order streams throughout the Cumberland Plateau dry up during the summer and that some first order streams in the cumulative impact area dry up and do not sustain aquatic life (Skyline Ex. 20, Vol. II, pp. 44-A-7, 44-A-8, Vol. IV, CHIA, p. 7, 10, 30). Based upon the evidence available at the time of permit approval and, as confirmed at the hearing, Mr. Liddle's conclusions regarding the western streams were supported by competent evidence, did not run counter to the evidence, and were not otherwise arbitrary or capricious.

SOCM's argument that OSM should have required Skyline to gather and submit data on the actual extent of aquatic life in the western streams cannot be sustained. 30 C.F.R. § 780.16(a) provides that the scope and level of detail for fish and wildlife information "shall be determined by the regulatory authority in consultation with State and Federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under paragraph (b) of this section." The relevant portion of paragraph (b) states that the protection and enhancement plan shall apply, "at a minimum, to species and habitats identified under paragraph (a) of this section." Those identified are listed or proposed threatened or endangered species or their critical habitats, habitats of unusually high value for fish and wildlife, and other species or habitats identified through agency consultation as requiring special protection. 30 C.F.R. § 780.16(a)(2). Such State and Federal agencies were consulted and OSM concluded "that the operation, as proposed, should have no effect on any threatened or endangered species, or result in destruction or adverse modification of critical habitats." (Skyline Ex. 20, Vol. I, Item 34, Vol. IV, p. II-4)

The implication of Mr. Liddle's testimony is that a full inventory of the western streams' aquatic life was deemed unnecessary. SOCM never explored through cross-examination of Mr. Liddle or otherwise OSM's decisionmaking process regarding the scope and level of detail of fish and wildlife information that was required. There is no basis for concluding that OSM acted arbitrarily in exercising its discretion to determine what information was required.

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<sup>4</sup> Mr. Dipretoro likewise did not doubt the intermittent nature of streams with flows unknown to him based upon their similarity to streams which he knew to be intermittent (Tr. 840).

Moreover, even assuming, arguendo, that the western streams in the cumulative impact area support aquatic life, the evidence shows that the likelihood of any adverse impact to the western streams is minimal. This low probability was an important factor in OSM's decision not to monitor to the west and is ample justification for concluding that monitoring was not necessary to protect the hydrologic balance, including any aquatic life in the western streams.

Contrary to SOCM's premise (2), OSM's decision not to requiring monitoring to the west is not rendered arbitrary by the prior findings of OSM that the undesirable effects of mining on streams similar to the streams to the west of the permit constituted material damage to the hydrologic balance. The fact that the prior findings may be inconsistent with OSM's decision does not render it arbitrary. It may be that the prior findings were arbitrary or that they were based upon different facts or considerations. Manifestly, the prior findings pertained to different permit areas and were based, in part, upon the significance of actual effects to the hydrological balance, whereas OSM's present decision is based upon both the significance and likelihood of potential effects. The prior findings do not show that OSM failed to consider all relevant factors, considered irrelevant factors, failed to base its current decision upon credible evidence in the record, failed to articulate a rational basis for its decision, or otherwise show that it is arbitrary.

SOCM's third and final premise for the arbitrariness of OSM's determination not to monitor to the west is its alleged inconsistency with OSM's determination to require monitoring of the Newton Sandstone aquifer to the east of the permit. In a vacuum, one might just as easily argue that the disparate treatment shows that the determination to require monitoring to the east was arbitrary or unnecessary. Indeed, the actual facts show that monitoring to the east was probably unnecessary because the drawdown was not likely to extend that far, but that it was required out of an abundance of caution related to the "high profile" nature of the permit and the relevant distinction that there is an identified water user to the east, the Hitchcox Cemetery community, and no users to the west (Tr. 72-73, 1320-25, 1527-29, 1532-33, 1560-63).

## 2.

### **Monitoring the Backfill Spoil and the Unmined Boundary**

In an effort to discredit the selection of the number and placement of backfill monitoring wells for the BB2 mine, SOCM contrasted their relatively small number and their concentrated placement with the larger number of relatively more evenly spaced wells at the adjacent mine sites (see, e.g. Skyline Ex. 3, p. 8; Tr. 1228-31, 1243, 1251-53, 1614, 1688-91). However, many of the wells at Gladly Fork and Pine Ridge East were not part of the original monitoring plans but were added during mining to identify problems that developed before implementation of the TMHP's (Tr. 1228-31, 1251-53). More importantly, the comparison is simply not persuasive evidence of something amiss with the monitoring plans for BB2 or of arbitrariness in OSM's actions.

SOCM's experts repeatedly attacked the bases for concentrating the wells in the southeastern portion of BB2. As SOCM notes, its "experts have cautioned at length that water may move through the backfilled spoil at [BB2] in very different patterns than OSM and Skyline predict, and SOCM questions whether Skyline's [TMHP] has actually worked in the past as claimed or will work at [BB2]." (SOCM's posthearing opening brief, p. 41).

SOCM maintains, however, that these expert disputes over the bases for the monitoring plans need not be resolved because OSM's approval of the number and placement of spoil and boundary wells is arbitrary for two reasons. First, the approval was allegedly based on a clearly erroneous assessment of the distribution of acid- and toxic-forming materials in the overburden of the BB2 mine and thus runs counter to the evidence. Second, OSM allegedly failed to consider an important factor: the possibility that its predictions of ground water flow and water chemistry may prove erroneous or, as otherwise stated, the capability of the monitoring plan to detect the failure as well as the success of Skyline's HRP.

SOCM contends that Mr. Liddle erroneously concluded that the acid- and toxic-forming materials were concentrated in the southern third of BB2 based upon OSM Ex. 5, a map which Mr. Liddle prepared (see Tr. 88-89, 126-27, 1557-60 (most or the worst of the problematic materials are in the southern one-half or one-third of the mine site immediately north or northwest of the monitoring wells)). Based upon the testimony of Mr. Dipretoro, SOCM correctly maintains that SOCM Ex. 28, a map prepared and included by Skyline in the permit application, more accurately depicts the distribution of problematic materials (see Tr. 1630-44, 1734-37).

According to Mr. Dipretoro, the Skyline map shows that the quality of the materials in the north is worse (Tr. 1633-35, 1735-37; SOCM Ex. 28). A fair reading of this map is that the problematic material is rather evenly distributed between north and south and that the worst material is located to the mid-east and southeast (see SOCM Ex. 28; Tr. 1737-38).

Mr. Dipretoro acknowledged that the spoil wells are located within or immediately south of the areas with the worst material and that the wells would intercept the water from these areas if the projected groundwater flow is correct (Tr. 1737-39). He also stated that the mining operation would not reach another area of problematic material farthest to the north for four or five years so that the TMHP would have been implemented over a substantial portion of the mine before that northern area would be mined (Tr. 1739-40). He therefore conceded that the proposed monitoring points, including the sites on BB1, would generate data from which determinations could be made as to the success of the TMHP long before the mining operation reached that northern area (Tr. 1631, 1643, 1740).

Thus, while Mr. Liddle may have mischaracterized the distribution of problematic materials to some extent, he was correct that the worst of the materials is located in the southeast (with some in the mid-east as well) and that the projected groundwater flow from the problematic

areas should be intercepted by the groundwater wells. His complete analysis and approval of the groundwater monitoring plan was confirmed by Mr. Dipretoro to a large extent. It simply does not run contrary to the evidence but is amply supported thereby.

His complete analysis and approval was based upon the several factors - not just the distribution of acid- and toxic-forming materials. Those factors lead to the conclusion that the plan would allow Skyline and OSM to determine the impacts of mining and the success of the TMHP as soon as possible to insure protection of the hydrologic balance and the suitability of the groundwater for current and approved postmining land uses. Those factors include selecting locations to the east and south to intercept the groundwater from where it is likely to pool first so as to obtain monitoring data as soon as possible.

The placement of wells farther north was considered but rejected for numerous reasons in addition to the location of most or the worst of the problematic materials (Tr. 126-27, 317, 371-74, 1066-67, 1088-89, 1092-97, 1319-20). First, all of BB2 will be mined before a northern spot could be reclaimed, a spoil well could be dug, the water table could restore there, and data could be gathered (Tr. 126-27, 1066-67, 1231-32). By that time, if the data shows a potential problem, corrective adjustments to the TMHP would be impossible because mining would already be completed (*id.*). Second, as previously discussed, there is no chance of a significant amount of groundwater escaping in the north to the west, north, or east because the projected postmining water table lies far below the Whitwell Shale/Newton Sandstone interface and the virtually impervious Whitwell Shale will contain the groundwater. Third, as already mentioned, there are no water users, other than the Hitchcox Cemetery community, nor water resources that significantly insure the hydrologic balance to the west, north, or east, which require protection. Fourth, once the water table is fully established, with all the low points filled in, nearly all the water in the north should eventually flow south through the areas in BB2 and BB1 where the monitoring wells are located (Tr. 1336). In other words, there is no likely significant harm to be monitored to the north and no significant additional benefit from placing a well there (Tr. 384-385, 1332).

In an attempt to show arbitrariness to meet the standard of review, SOCM couches its second reason for challenging the number and placement of the groundwater wells in terms of a failure to consider an alleged relevant factor: the possibility that the predictions of groundwater flow and water chemistry may prove erroneous or, as otherwise stated, the capability of the monitoring plan to detect the failure as well as the success of Skyline's HRP. This characterization of the issue begs such questions as (1) to what extent, if any, is the alleged factor relevant, (2) what should a monitoring plan be capable of detecting, and (3) is the possibility of error in predictions relevant no matter how unlikely or immaterial the adverse effects upon the hydrologic balance and the suitability of the water for the current and approved postmining land uses?

Relying primarily upon Mr. Dipretoro's opinions, SOCM argues that the monitoring

plans are not capable of detecting: (1) the predicted saturation of the pit floor to a depth of 5 feet throughout the mine, (2) the predicted direction of the groundwater flows throughout the backfill, (3) the predicted location and unpredicted timing of groundwater discharge points, (4) the predicted relationship of the postmining water table to streams and buried dragline bench horizons, (5) the predicted absence of effect on the Sewanee Conglomerate aquifer, (6) the predicted benign chemistry or absence of acid mine drainage, (7) the absence of quantity and quality effects on all aquifer areas outside the permit, and (8) upgradient and background or baseline conditions (see, e.g., Tr. 24-26; Skyline Ex. 3, p. 7). In Mr. Dipretoro's opinion, "the monitoring program has to be based on prudent assumptions that the predictions may not be correct." (Tr. 1537-38)

Taking Mr. Dipretoro's position to its logical extreme, the predictions, i.e., the determination of the PHCs, are worthless and there is no limitation upon or basis for determining the extent and nature of necessary monitoring. There must be some limitations upon and bases for monitoring and, by law, those are derived from the PHC determination and the analysis of all baseline hydrologic, geologic, and other information in the permit application. See, e.g., 30 C.F.R. §§ 780.21(i)(1) and (j)(1).

The preamble to the rule promulgating the monitoring plan requirements states, "Monitoring is to be based on the PHC determination and must be sufficient to measure the suitability of the \* \* \* water for current and approved postmining land uses [and] to meet the objectives for protecting the hydrologic balance as set forth in the [HRP] \* \* \*. Monitoring for these objectives should result in the data necessary to indicate any unforeseen changes." 48 Fed. Reg. at 43976. "The ongoing monitoring will provide the regulatory authority with operational data so that adjustments to the [HRP] or other permit conditions may occur." Id. at 43965.

The PHC determination necessarily involves an analysis of the risks (the likelihood and the significance or materiality) of potential adverse impacts in order to meet the objectives for protecting the hydrologic balance and insuring the suitability of the groundwater and surface water for the current and approved postmining land uses. Skyline and OSM correctly tailored the monitoring program to that risk analysis and those objectives (see, e.g., Tr. 100, 114-17, 291, 325, 327, 410, 1102-04, 1312, 1315, 1334, 1350-52, 1524-29).

In so doing, OSM clearly considered the possibility that the analysis of the risk (the predictions) may prove incorrect (see, e.g., Skyline Ex. 20, Vol. II, Appendix 44B-A, pp. 44B-A-10, 44B-A-11). Monitoring is required at OW-1 and OW-4 on the eastern border despite the fact that no significant groundwater movement is expected to the east and that the adjacent stream system was found not to be a material damage protected resource (see, e.g., Tr. 378-79, 1090). Monitoring near the Hitchcox Cemetery community was also required despite serious doubts as to its necessity. In choosing not to locate monitoring wells elsewhere to the north, east, or west, the likelihood that a significant amount of groundwater might discharge to the north, east, or west (i.e., that the predictions might be incorrect) was considered but found insignificant, especially as

there were no significant water resources or users (other than the Hitchcox Cemetery community) in those directions and there was a TMHP that was likely to succeed.

The entire monitoring plan selection process involved consideration of the likelihood and significance of potential future events and their impacts, including potential events and impacts that were ultimately found (predicted) to be unlikely and/or insignificant. The degree, if any, to which those potential events and impacts should be monitored must depend upon the degree of risk of adverse impacts to the hydrologic balance and the suitability of the water for the current and approved postmining land uses.

The main thrust of SOCM's evidence and the unspoken premise of many of its experts' opinions is that OSM and Skyline have miscalculated the likelihood and significance (*i.e.*, the risk) of potential adverse impacts of the BB2 operations and/or that OSM and Skyline have established a threshold level of risk for which monitoring is required that is too high. At most, the evidence shows a difference of opinion regarding the risks; it does not show that OSM failed to consider relevant factors, that its rationale for approval of the monitoring plans runs counter to or is not supported by competent evidence, or that it otherwise acted arbitrarily.

Mr. Dipretoro opined that a network of piezometers or other monitoring sites were needed to make the monitoring plans adequate. His opinion was supported by SOCM's other experts, Mr. Norris and Ellen Smith. They based their opinions upon numerous contentions which, in general, were effectively rebutted in the expert witness report of Mr. Nicholas, which is amply supported by the record as a whole. To reiterate, SOCM's challenges, at best, amount to differences of opinion that do not show that OSM acted arbitrarily.

First, Mr. Dipretoro opined that the southeastern spoil wells will not detect the groundwater table level to the north and therefore that installation of a grid of piezometers is necessary to effectively monitor whether saturation of the pit floor takes place north of the southeastern monitoring wells (Tr. 952-53; Skyline Ex. 3, p. 9). It is anticipated in the HRP that the basal 5 feet of the pit floor will be permanently inundated following mining and reclamation as a measure to prevent pyrite oxidation and subsequent acid mine drainage (Skyline Ex. 12). Mr. Dipretoro characterized this expectation as "an essential part of Skyline's plan to avoid [acid mine drainage.]" (Skyline Ex. 3, p. 9). SOCM's other expert witnesses, Mr. Norris and Ms. Smith, concurred that other monitoring points were needed because the southeastern wells will not detect the water table level farther north (Tr. 558-59, 569-72, 896, 948-49, 952-54).

Using a generally accepted engineering method for calculating water levels in an excavated area, Skyline predicted that the water levels in the north portion of the backfill would range from 1810 to 1820 feet, with the levels gradually decreasing to the south where they would range from 1750 to 1770 feet (Skyline Exs. 6 (pp. 6-7), 36 (p. 9)). Mr. Norris disputed the accuracy of the modeling, opining that the assumptions of the model - the aquifer is horizontal and a constant thickness - do not match the conditions at the mine (Tr. 566-69). He concluded

that even if the conditions matched the assumptions, the modeling would not provide a reasonable scientific basis for restricting the groundwater wells to the southeastern portion of the mine (Tr. 568-69).

Mr. Nicholas disagreed, opining that the water table modeling was conducted in accordance with standard scientific practices and that the modeling is accurate within a reasonable degree of scientific certainty (Tr. 1264, 1333). He also noted that both a pumping test in the reclaimed backfill of Glady Fork and monitoring results showing saturation of the pit floors at Glady Fork and BB1 supported the model's prediction of submersion of the pit floor at BB2 (Skyline Ex. 36, p. 9; Tr. 268, 293, 384, 1554-55). Mr. Liddle echoed Mr. Nicholas, stating that the modeling and the experiences at Glady Fork and BB1 showed that inundation of most of the pit floor would probably occur (Tr. 1554-55).

Further, Mr. Liddle opined that even if the pit floor was not completely inundated, the TMHP will still be effective in preventing acid mine drainage because leaving the pyritic material dry may be as good as or better than keeping it submerged in anoxic water, especially when combined with lime amendments (Tr. 1555-56). Also, the highest pit floor elevations, where inundation is least likely, are in the northwest where the overburden is generally net alkaline (Tr. 1556-58; SOCM Exs. 7, 28). Consistent with this testimony, Mr. Slone and Mr. Nicholas stated that while inundation provided some benefit, it was not essential to prevent acid mine drainage, as other components of the HRP were more important (Tr. 1150-51, 1337).

While piezometers or wells in the northern backfill would give precise measurements of the water table, Mr. Nicholas and Mr. Liddle opined that data from the southeastern wells can be used at an early date to verify the accuracy of the water table modeling and to extrapolate the level of the water table in the north plus or minus 10 feet (Tr. 310-15, 427-28, 379-80, 1333-34, 1340). Other monitoring points, such as OW-1, will be useful in determining gradients which, in turn, can be used to determine whether the water table is above or below a certain level (Tr. 310-15). Mr. Liddle concluded that data from the spoil wells can be used to determine to a reasonable degree of scientific certainty whether the pit floor is completely saturated (Tr. 379-80).

In sum, the evidence amounts to mere differences of opinion as to the validity and accuracy of the water table prediction and as to the need for additional monitoring. SOCM has not shown that OSM acted arbitrarily.

Mr. Dipretoro and Ms. Smith believed that the piezometer network or other monitoring in all directions is needed after reclamation for two additional reasons. They opined that it will provide data to support or refute the groundwater flow predictions and to give early warning if the hydraulic gradient appears to favor discharge at a location other than the predicted location near basin 003 (Skyline Ex. 3, pp. 9-10; Tr. 693-701, 704-05, 911). Mr. Dipretoro noted that the

backfill will have a higher topographic profile than the original landscape that could cause water elevations to rise higher than expected in relation to undisturbed streams, creating gradients favoring discharge near SW-6 (just north of well OW-1) on Big Brush Creek at an elevation of 1780 feet or elsewhere (id.; Tr. 704-05; see Skyline Ex. 29). He opined that OSM and Skyline could not reliably assume that the dip of the pit floor will strictly control groundwater gradients (Skyline Ex. 3, p. 10).

Ms. Smith was also concerned that the water table might rise substantially higher, creating eastward gradients towards the creek, if the water does not drain south through the backfill as efficiently as anticipated (Tr. 893, 895, 904-05, 949-51). Both Mr. Dipretoro and Ms. Smith were particularly worried about the possibility of such gradients developing through the Newton Sandstone in the northern two-thirds of the mine (Tr. 693-94, 700-01, 879-81, 886, 891).

Mr. Norris likewise disagreed with the modeling of OSM and Skyline that predicted that the groundwater will follow the dip of the coal pit floor, because a groundwater table typically forms a subdued replica of the surface topography, with water movement from ridges to low points under streams (Tr. 537-40). He stated that the determinant of groundwater flows is hydrologic gradient not structural contours but implied that gradient may, in fact, follow such contours (Tr. 537-38). Further, even if he had confidence in the modeling of OSM and Skyline, he would still monitor to the north and west until sufficient data was gathered to show that the model was accurate (Tr. 540).

Mssrs. Slone, Nicholas, and Liddle defended the groundwater flow predictions, stating that the high permeability of the backfill dictates that topographical influences will be minimal and that the flow will follow the downdip of the pit floor to the south-southeast (Tr. 1038-42, 1044-45, 1280, 1286, 1533-35). The proven accuracy of similar groundwater flow predictions at Glady Fork and BB1 supports their position and Ms. Smith acknowledged that data from those operations is valuable (id.; Tr. 889-91).

Mr. Dipretoro disputed the alleged fact that the groundwater flow at Glady Fork was all to the south, asserting that there was some flow east into Spring Branch (a creek) (Tr. 1606-07, 1615-17, 1627, 1653-57, 1660). He relied, in part, upon Glady Fork data showing that the water table at well OW-5, which lies south of wells OW-7, OW-8, and OW-9, was 2 feet higher than the water table at those wells (Tr. 1606-07). He opined that this fact indicated that any southerly gradient does not extend past OW-5 and that a more reasonable explanation of the data was that water was flowing east into Spring Branch, given that the wells were higher in elevation than the creek (Tr. 1606-07). He also relied upon a masters thesis study made by Charles Blackburn which opined that water discharge was most likely to the east into Spring Branch based upon elevations in the water wells relative to the creek (Tr. 1607, 1728).

However, Mr. Dipretoro did not perform any studies to determine why the water table

was higher at OW-5 and he acknowledged that the higher table at OW-5 may be attributable to the large amount of water being pumped into the backfill above OW-5 (Tr. 1653-54, 1749-53). Also, the fact that Spring Branch goes dry calls into question Mr. Blackburn's thesis that there may be groundwater flows into Spring Branch (see Tr. 1653-57, 1738-32). Further, SOCM's experts' knowledge of the operations and conditions at Glady Fork and BB1 was certainly not as comprehensive as that of Mssrs. Liddle, Slone, and Nicholas (see Tr. 889, 915-924).

Mr. Nicholas effectively addressed the concerns that the pit floor downdip will not control flow and that groundwater might discharge near SW-6 at an elevation of 1780 feet or elsewhere:

First, experience at Big Brush No. 1, Glady Fork, and Pine Ridge mines shows that the dip of the coal seam does control ground water levels. Second, existing ground water levels in the Newton sandstone are already below the level of the post-mining highwall and SW-6. To discharge near SW-6, post-mining water levels would have to increase. Mining will remove the impermeable Whitwell shale, which underlies the Newton sandstone. With the removal of the Whitwell shale, the ground water table will reform on the next relatively impermeable layer, which is the pit floor. Since the pit floor is more than 30 feet lower, it is virtually certain that post-mining ground water levels will be lower than pre-mining levels. Mining impacts will lower the ground water level, not increase them, making a discharge near SW-6 unlikely.

Although ground water levels are predicted to remain considerable below the top of the highwall, monitoring stations are in place to detect impacts if groundwater did discharge as SOCM's expert claims. Four sediment ponds are located in topographic lows, which correspond to the points where ground water would first intercept the surface. Each of these points is monitored under the NPDES permit. Also, surface water monitoring station SW-5 is located downstream from these discharge points. Any discharging ground water would be detected by this monitoring network.

From the structural maps, it is clear that areas located along the northern and western perimeter of the mine of Big Brush No. 2 will not control the direction of ground water flow. Based on the detailed structural map of the pit floor, monitoring wells GWM-12, 13, 14, and 15 are located in the path of ground water flow. Although flow is not expected in this direction, Skyline's ground water monitoring plan also includes wells in the Newton sandstone aquifer located down dip from the mine site. A well is located between the mine site and Big Brush Creek to monitor any ground water flow through the highwall. Monitoring wells are also located between the mine site and ground water users. These wells provide the information needed to verify the predicted ground water flow

direction.

\* \* \* \* \*

In the figure "Estimated Post-mining Water Level Contours and Sewanee Coal Structure" in Appendix 44-C of the permit, the expected ground water discharge point is clearly shown approximately 1000 feet south of the boundary between Big Brush No. 1 and Big Brush No. 2. Sufficient structural data is available to accurately determine the ground water discharge point.

SOCM's expert also contends that a piezometer network is needed to provide data to help estimate the monitoring of the timing of the discharge. This ignores the fact that the proposed monitoring points are located in the likely ground water flow paths. The monitoring wells are located updip from the expected groundwater discharge point and will provide data that allows the timing of any discharge. Since the southeastern quadrant of the mine is closest to the predicted discharge point and this portion of the mine will be mined first, wells GWM-12, 13, 14, and 15 located in the southeastern portion of the mine will verify predictions concerning post-mining water levels, ground water flow directions, and the timing and location of the ultimate discharge points at an early stage in the mine's life. If ground water moves offsite in an unexpected direction, wells OW-1, OW-4, GWM-16, and GWM-17 will identify this fact. While these wells are adequate to identify the discharge location and timing, other wells are also available.

As noted by SOCM's expert, ground water will leave the Big Brush No. 2 mine at a structural low near SW-4 and enter the Big Brush No. 1 permit. Monitoring wells have been located to intercept ground water flowing through this structural low. In addition to the network of wells on Big Brush No. 2, well GWM-15, GWM-16, and GWM-19 on the Big Brush No. 1 monitor the timing of discharges between the southern boundary of Big Brush No. 2 and the ultimate discharge point. After passing the network of monitoring wells, ground water exiting the backfill will also flow through a sediment pond and NPDES monitoring point located on Big Brush No. 1. Finally, the impact of this discharge is monitored at SWIM-3 on Big Brush Creek.

Skyline Ex. 36, pp. 10-11 (see also Tr. 371-74, 383, 1088-91, 1166-67, 1391-20; other portions of this decision discussing the degree of likelihood and significance of flows to east, west, or north).

Both Mr. Dipretoro and Ms. Smith acknowledged that the predicted southeast groundwater flow was plausible (Tr. 848, 896-97, 1727). Mr. Dipretoro also acknowledged that

if the water table elevation predictions are correct, there will be no flow to the north or west (Tr. 748). While the monitoring plans will not be able to detect groundwater flow directions in the north or west portions of the mine (Tr. 799, 896, 948-49, 952-54, 1146), OSM reasonably concluded that there was no need for such detection, given the unlikeliness and insignificance of discharges in those areas and the early warning capabilities of the proposed monitoring sites.

A fourth reason for Mr. Dipretoro's advocacy of additional monitoring points was his concern that groundwater would emerge into the streams traversing the mine site or would rise above the projected level of the dragline bench horizon within the backfill (Skyline Ex. 3, pp. 10-11). He was concerned that the lateral drains paralleling the benches might not prevent groundwater from damming and rising to problematic levels (id.).

Once again, Mr. Nicholas effectively responded to Mr. Dipretoro's concerns:

SOCM's expert contends that piezometers are needed in other areas to monitor continuity of the lateral drains. He suggests that damming of the ground water would raise water levels unacceptably high. Lateral drains of the type proposed in this permit are a well proven technology, having been used for hundreds of years. The engineering literature contains the results of extensive research on rock drains and design criteria are well established. Literally thousands of drains have been installed in civil and mining engineering works in this country. Rock drains of this type have been successfully used to remove groundwater from foundations, roadways, hazardous waste sites, landslides, and hollow fills. Skyline's consultants have successfully used rock drains of this type to intercept and direct ground water flow at mine sites in Tennessee, Kentucky, and West Virginia. Based on successful application of this technology at numerous sites, installation of piezometers is not necessary to verify the continuity of the lateral drains.

As previously described, removing the Whitwell shale and increasing the hydraulic conductivity of the backfill is expected to lower water levels. In Item 44A of the permit, predicted post-mining ground water levels were compared to the elevation of reconstructed streams crossing the reclaimed mine. From reviewing stream profiles presented in Appendix 44-B of the permit application and post-mining potentiometric maps included in Appendix 44-C, the only place where the post-mining ground water table is likely [to] intercept the stream is the southeastern quadrant of the mine site. Wells GWM-12, 13, and 14 are located in the proper place to monitor this potential impact. However, if water levels did increase due to "damming" of the lateral, the result would be reflected in the water levels in the ground water monitoring network. An increase in water level would result in a change in the hydraulic gradient, an impact that would be identified through monitoring of wells GWM-12, 13, 14, and 15. In addition, a significant increase in water levels would reverse the hydraulic gradient between the spoil

wells and wells GWM-16, GWM-17, and OW-1.

(Skyline Ex. 36, p. 12).

Mr. Liddle concurred that the water level in relation to the dragline benches could be determined (Tr. 381-82). Furthermore, this relationship is not critical, as some water on the benches was predicted and other components of the TMHP, such as deep burial and lime treatment of the problematic materials, are more important (Tr. 383, 151-53, 1155-56, 1337). The evidence does not amount to a showing that OSM acted arbitrarily.

Mr. Dipretoro and Ms. Smith also questioned the efficacy of the vaguely described “french drain” or “rubble zone” along the base of the eastern highwall as a means of increasing permeability and lowering the water table there (Tr. 708, 822, 883, 903-04, 936-38). But the water table elevation projections were made without consideration of the effects of the “french drain” (Tr. 426-27). The testimony of Mr. Liddle and Mr. Mottet clearly show that it was not a key component in the planning, but that it can be created without specific design or much additional effort in the natural course of mining and that it will increase the permeability and lower the water table to some unknown extent (Tr. 80-81, 302-03, 426-27, 513-15). The fact that its design has not been specified and therefore that its effectiveness cannot be accurately predicted does not render OSM’s decision arbitrary under the circumstances.

Fifth, Mr. Dipretoro opined that the Sewanee Conglomerate should be, but cannot be, adequately monitored under the monitoring program (Skyline Ex. 3, p. 11). Mr. Nicholas, once again, provided an effective answer:

On page 11, SOCM's expert states that Skyline cannot adequately test the hypothesis that "...the proposed mine site will not interfere with ground water flow in the aquifers below the Sewanee coal."

Skyline has already tested this hypothesis. As part of the background data collected during the permitting process, Skyline monitored three wells in the Sewanee conglomerate. As shown in the permit application, two wells monitoring the Sewanee conglomerate were located near the northern boundary of Big Brush No. 1. Mining on Big Brush No. 1 had no effect on water levels in the Sewanee conglomerate. In addition, the monitoring data showed that the Sewanee conglomerate was a confined aquifer. In other words, ground water in the Sewanee conglomerate is kept under pressure by impermeable confining layers of rock. On several occasions during background monitoring, ground water was completely purged from wells in the Sewanee conglomerate. Despite the complete dewatering of the wells in the Sewanee conglomerate, water levels in adjacent cluster wells were unaffected, demonstrating that there is no hydraulic connection between the Sewanee conglomerate and overlying units in the vicinity

of Big Brush No. 2.

SOCM's expert also contends that "...Skyline will have affected the floor of the mine with numerous exploration boreholes, by blasting and by stress relief by removing the overburden." None of these factors significantly affect the floor of the mine. First, Skyline plugs exploration boreholes. Next, blasts are designed to minimize coal breakage; consequently, fracturing of the pit floor below the coal seam due to blasting is minimal. Finally, stress relief fracturing occurs due to relief of stress due to the weight of overlying rock.

Fracturing occurs only when the tensile strength of the rock is exceeded. In Skyline's case, the weight of the rock is removed only long enough for material to be moved from one side of the pit to the other. The total weight of rock remaining after mining is the same as before mining. Due to the limited time that rock is removed from the pit floor, stress relief fracturing would be minor if not non-existent. In addition, the pit floor consists of shale, which is more likely to yield in a plastic manner instead of fracturing. Also, the compressive stress applied after the rock is replaced would close any fractures that did open.

Also, if the above causes did result in fracturing through more than 20 feet of underlying rock, background monitoring shows that the potentiometric level of the Sewanee conglomerate is more than 40 feet higher than the pit floor. This means that water would flow upward from the Sewanee conglomerate instead of downward from the pit floor! Upward-flowing ground water from the Sewanee conglomerate has not been observed at either the Big Brush No. 1, Pine Ridge East, or Gladly Fork mine. As presented in the permit, background monitoring results and observations at previously mined sites demonstrate that the proposed mine could be expected to not interfere with ground water flow in the aquifers below the Sewanee coal.

Finally, despite the evidence that the Sewanee coal will not be affected, Skyline is indeed monitoring the Sewanee conglomerate. Well OW-4 is located near a structural low in the pit floor and will be the first location to have a significant accumulation of water in the backfill. This well monitors the most likely location of an impact to the aquifer in the Sewanee Conglomerate.

(Skyline Ex. 36, pp. 12-14; see also Tr. 298-301; Skyline Ex. 20, Vol IV, CHIA, pp. 35-36, 62).

Sixth, additional monitoring points are needed after reclamation, according to Mr. Dipretoro and Ms. Smith, because of the variability in the overburden's net neutralization potential (Skyline Ex. 3, pp. 11-12; Tr. 711-13, 883-85, 896, 908-11, 953-56). They opine that without monitoring points spread throughout the permit area, Skyline and OSM will not be able

to detect to the north the chemistry of the water or the effectiveness of the TMHP in addressing varying levels of net neutralization potential (id.). Were the monitoring plan able to do so, according to Ms. Smith, the knowledge gained would allow for (1) appropriate adjustments in future mining, and (2) early detection of potential problems that would be useful in developing mitigation strategies, especially if the groundwater discharges elsewhere than to the southeast (Tr. 908-11, 954-56). Ms. Smith concluded that location of the additional monitoring points may be best determined after completion of mining to take advantage of the additional data gathered during mining regarding the overburden chemistry (Tr. 909-10).

Mr. Nicholas effectively responded:

On page 11 of 25, SOCM's expert argues that Skyline has not proposed a sufficient number of monitoring wells to gauge the performance of its reclamation technique in preventing [acid mine drainage]. In January 1997, Skyline met with OSM to determine the appropriate number and location of wells to monitor the backfill water chemistry. Several factors were considered in locating the monitoring wells. Monitoring wells were located to: 1) be near the point where mining started, 2) be near the overburden with the most problematic material, and 3) to be located in the path of ground water flow. First, mining will start in the southeast quadrant of the mine site and proceed to the north. Skyline's wells are located to provide the earliest possible verification of the material handling plan. Well GWM-12 is located in the area where mining will begin and at the point where ground water will exit the mine site to the south. Well GWM-13 and GWM-15 are located in structural lows where ground water will first accumulate. Wells GWM-13, 14, and 15 are located near the most problematic material. These wells were placed immediately down-dip from the overburden holes with the greatest acid-producing potential.

If the plan is successful in dealing with the material with the greatest acid-producing potential, then the plan will be successful on the remainder of the site. If the plan is unsuccessful, OSM will require a change in the material handling plan before mining proceeds further. In any event, as mining progresses the monitoring wells are properly located. The proposed ground and surface water monitoring stations are properly located to make this determination.

(Skyline Ex. 36, p. 14).

Mr. Slone and Mr. Liddle concurred that the southeastern wells are sufficient to show if the TMHP will work in the area of the most problematic materials, and if it does work there, then it will work to the north as well (Tr. 383-85, 1168-70, 1547-48). The water quality there will be known before the water table could rise high enough (i.e., above the virtually impervious Whitwell Shale) to possibly discharge elsewhere and therefore adjustments could be made, if

necessary, before such discharge, if any, occurs (Tr. 1547-48). Furthermore, as both Ms. Smith and Mr. Liddle acknowledge, drilling on 625 foot centers during mining will provide even greater detail as to the overburden chemistry from which to make determinations regarding additional monitoring (Tr. 908-911, 1559-60). The dispute as to whether additional monitoring must necessarily be required now, later, or ever to protect the hydrologic balance and insure the suitability of the water for current and approved postmining land uses is a mere difference of opinion.

Seventh, Mr. Dipretoro advocated additional monitoring to document drawdown, recovery and quality effects, if any, on groundwater outside the permit area, referring particularly to effects to the west (Skyline Ex. 3, p. 12). The alleged need for additional monitoring for such purposes is discussed in part III.D.1. of this decision.

Eighth, and finally, Mr. Dipretoro opined that the wells available for comparison of premining data to postmining data is inadequate, especially as wells OW-1 and OW-4 may be eliminated by mining and OW-1 will be dewatered because of the proximity to mining (Skyline Ex. 3, pp. 12-13; Tr. 696, 1613). He would require additional monitoring sites outside the eastern, western, and northern boundaries (Skyline Ex. 3, pp. 12-13).

As mentioned, the alleged need for additional monitoring to the west and north is addressed in part III.D.1. of this decision. Mr. Nicholas' retort to Mr. Dipretoro's concerns is also relevant:

On page 12 and 13 of 25, SOCM's expert is concerned that mining could eliminate wells OW-1 and OW-4. SOCM's expert also is concerned that well OW-1 will be dewatered as the pits approach. He also claims that well GWM-13 is redundant with well OW-1. Additionally, he states that this redundancy removes the only well in the Newton sandstone available for comparison of monitoring data to pre-mining data.

First, a large body of background data is available for the aquifers in the area. Baseline water quality is well established from this data. In addition to the data collected for this mine site, background data is available for monitoring wells located at nearby mine sites. Water quality data is also available from sampling of drinking water wells in the area and published data is available for aquifers on the Cumberland Plateau. Background water quality is well established and additional monitoring is not necessary to establish baseline conditions.

Despite SOCM's expert's concern, wells OW-1 and OW-4 are clearly located outside the limits of mining. Mining will not eliminate these wells. One of the purposes of well OW-1 is to monitor aquifer dewatering and the effect on Big Brush Creek. SOCM's expert requests that a piezometer nest be installed between

the east pit wall and the creek. Yet, the piezometer nest of OW-1 in the Newton sandstone and OW-4 in the Sewanee conglomerate is located between the creek and the east wall of the pit as SOCM's expert requests.

Despite SOCM's expert's claim that wells GWM-13 and OW-1 are redundant, they serve quite different purposes. Well OW-1 monitors drawdown and water quality effects in the Newton sandstone. Well GWM-13 monitors water levels and water quality in the backfill. GWM-13 is part of the network of well that allows Skyline to verify that ground water predictions and that the material handling plan is working as designed. SOCM's expert's claim that the redundancy of OW-1 and GWM-13 removes the only well in the Newton sandstone available for comparison of monitoring data to pre-mining data is wrong and ignores the large amount of background data that is already available.

(Skyline Ex. 36, pp. 15-16).

Mr. Nicholas' retort is accurate, except for the comment that OW-1 and OW-4 will not be eliminated. In fact, it is uncertain whether OW-1 and OW-4 will survive mining, but they will be replaced if they are damaged or destroyed (Tr. 1223-24, 1585).

In sum, SOCM has failed to show that OSM acted arbitrarily in its selection of the number and locations of the monitoring wells. SOCM's own witness, Ms. Smith, conceded that "there is some good logic with the current construction of the plan" and that Mr. Liddle "made a rational decision." (Tr. 912)

## E.

### **SOCM Failed To Show That OSM Erred by Not Requiring Toxicity Testing or Monitoring of Dissolved Oxygen**

In a prehearing report prepared by Mr. Dipretoro, he asserted that the monitoring plans should have contained testing for dissolved oxygen and toxicity (Tr. 757-58). These tests are not required by regulation (see, e.g., Tr. 1085-86) but SOCM has maintained that they are necessary.

The purpose of dissolved oxygen testing is to monitor for the oxidation reduction potential of the backfill spoil water. Maintaining low oxygen levels is important in preventing material damage to the hydrologic balance outside the permit area through the effects of pyrite oxidation (see Tr. 1157).

Skyline's experts testified that such testing was not warranted because oxygen levels where the pyritic materials are concentrated deep underground at the pit floor are typically minimal and because the testing is unreliable (Tr. 1085, 1165, 1180, 1344-45, 1377-82). At the

hearing Mr. Dipretoro agreed with Skyline's expert witnesses that dissolved oxygen testing was not warranted because the testing is not reliable (Tr. 758, 1345, 1377-82).

He maintained, however, that the oxidation reduction potential of the backfill spoil water should still be monitored because while OSM monitored for the byproduct of pyrite oxidation, iron (dissolved and total iron), it did not monitor to detect the two different oxides of iron (ferrous and ferric), and ferrous iron has a much more deleterious effect on streams which requires different remediation techniques than those for high ferric iron concentrations (Tr. 672, 674-76, 723-24, 758, 761-62). He later clarified that such testing would only be necessary if dissolved iron reached a certain level (Tr. 724).

While he asserted that such testing would also assist in determining whether the HRP was working (Tr. 724), he never adequately explained what additional benefit such testing would provide for this purpose that testing for dissolved and total iron does not provide. Skyline's experts testified convincingly that there is no additional benefit and that they had never heard of such testing being required (Tr. 1088, 1345-47, 1381-82). In consideration of this testimony, Mr. Dipretoro backtracked again and declared that testing for speciation of iron was not worth pursuing (Tr. 1638-39).

The primary, if not sole, benefit of the proposed additional testing apparently relates to remediation if a problem arises. The testing for dissolved and total iron is adequate to detect a problem and, if one occurs, the additional testing may be required then, if necessary. SOCM has not shown that OSM acted arbitrarily in not requiring iron speciation testing.

Mr. Dipretoro recommended toxicity testing of groundwater wells to ensure that groundwater discharges from BB2 will meet in-stream standards as opposed to NPDES effluent limitations because the mine discharge will constitute nearly all of the creek flow for substantial periods after mining is complete (Tr. 676-77, 1639). He opined that monitoring plan requirements to test for heavy metal concentrations would not necessarily be sufficient because some organisms are sensitive to high total dissolved solids regardless of the nature of the material or because a combination of metals may be toxic despite the fact that the metals individually test below toxic concentrations (NPDES water quality standards) (Tr. 764-70).

Mr. Rosso was not aware of toxicity testing ever being required for groundwater (Tr. 1382). Such testing is simply is not designed for groundwater and it is costly (Tr. 1383-84, 1409-11; Skyline Ex. 27, p. 28). In response to Mr. Rosso's opinions, Mr. Dipretoro retracted his advocacy of toxicity testing for groundwater wells but insisted that it should still be performed on a large spoil spring that is predicted to develop from mining BB2 and BB1 (Tr. 1638-39).

While Mr. Rosso conceded that heavy metals testing was not a substitute for toxicity testing and that a combination of metals possibly could be toxic despite the fact that the metals

individually test below the NPDES water quality standards, he opined that that possibility was remote at the BB2 mine (Tr. 1401-03, 1409, 1411, 1419). He further opined that toxicity testing was typically not performed at the beginning of a mining operation and that metals testing would identify any problem at BB2 (Tr. 1382, 1409-10; see also Tr. 1087 (Mr. Slone), 1348 (Mr. Nicholas)).

Mr. Slone concurred, explaining that extensive monitoring at the adjacent mine sites has shown which metals are present at detectable limits and which are known to be toxic to aquatic life at elevated levels, and monitoring for those parameters has been incorporated into the NPDES permit (Skyline Ex. 27, pp. 28-29). While toxicity testing at the adjacent mine sites has been employed in response to problems, it is incapable of identifying the specific element(s) which may be causing a toxicity problem (Tr. 1086). Therefore, additional testing was done to determine which metals were causing the problem and testing for those metals is sufficient to detect toxicity problems at BB2 and adjacent mine sites (Tr. 1086-87). Mr. Liddle likewise testified that OSM knows which parameters to monitor from its vast experience regulating mining in the Sewanee coal seam over the past 20 years, including the adjacent mine sites (Tr. 91-92, 94).

Toxicity monitoring tests for problems related not only to metals but also to organic compounds, and such compounds of any significance are not expected to be present at BB2 (Tr. 1418-19). The test is not used at the beginning of an operation because of its costs, inability to actually identify the specific element(s) causing the problem, and the variability of its results (Tr. 1383-84, 1409-11; Skyline Ex. 27, p. 28).

Mr. Dipretoro failed to rebut this testimony. Instead, he acknowledged that he did not know whether the likelihood of a toxicity problem would be remote if metals testing showed compliance with NPDES within-stream standards (Tr. 1676-78). He further acknowledged that he was not aware of any instance in which toxicity testing was required at the beginning of an operation before any problems are detected (Tr. 1678, 1682-83).

As to the likelihood that toxicity testing would be necessary, Mr. Dipretoro did reference the fact that water from a similar mining operation, Glady Fork, had failed toxicity testing (Tr. 1640). However, this happened before implementation of the TMHP at Glady Fork, the testing occurred at a spoils basin that was not allowed to discharge, and metals testing also indicated that there was a problem, as the metals were exceeding NPDES standards (Tr. 1744-45).

In sum, SOCM has not shown that OSM acted arbitrarily. The evidence shows that testing for metals and total and dissolved iron is sufficient at the BB2 mine site. At best, SOCM has shown there is a difference of opinion as to whether testing for toxicity is necessary.

#### IV.

## Remedy

The final issue is what remedy is appropriate, given the failures (1) to identify all of the monitoring sites, (2) to describe how the monitoring data will be used to determine the impacts upon the hydrologic balance, and (3) to require monitoring at least every 3 months. Where, as here, the party challenging the approval of a permit has actively waived or acquiesced in waiver of the review deadlines in 30 U.S.C. § 1264(c) and deficiencies are identified, this office is not restricted automatically to denying the permit in whole or in part and to putting a halt to mining. See Natural Resources Defense Council, Inc. (NRDC) v. OSM, 94 IBLA 269, 283 (1986). Under such circumstances, this office is not bound to the same remedies as OSM in reviewing the permit application but may fashion relief which is appropriate to the case. See id.

SMCRA provides for stringent review deadlines for challenges to OSM's permit decisions and 43 C.F.R. § 4.1365 provides that a request for review shall not stay the effectiveness of an OSM decision pending completion of administrative review. Based upon that review, the permit may be denied or granted in whole or in part. 30 U.S.C. § 1264(c).

The apparent purpose of the stringent review deadlines in SMCRA is to benefit the permit applicant, i.e., to provide it with expeditious resolution of the status of its permit application, such that the permittee will not incur a lengthy delay in its operations. NRDC, 94 IBLA at 282. On the other hand, if the application is disapproved, presumably Congress intended that the applicant can seek speedy review of that denial and possibly take remedial action to secure the permit as soon as possible. Id.

One of the ultimate purposes of SMCRA is to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). These purposes should guide the fashioning of a remedy in this case.

The first two deficiencies are technical or "paper" violations that pose no immediate threat of environmental harm. They relate primarily to the public's ability to participate in monitoring of the mining operation and are easily correctable. The third deficiency involves only a slight deviation from the regulatory requirements of monitoring at least every 3 months and is also easily correctable.

Given these facts as well as the fact that the monitoring plans have been found otherwise adequate herein, the approval of the permit is upheld, except with respect to the aforementioned deficiencies, and mining operations may proceed, subject to the condition that Skyline comply with the regulatory requirements to monitor both groundwater and surface water at least every 3 months. Further, within 30 days of receipt of this decision, Skyline shall (1) submit to OSM an application for a permit revision to correct the deficiencies and (2) provide a copy of the application to SOCM. Within 30 days of receipt of the permit revision application, SOCM may

file with OSM written comments or objections to the application. OSM shall evaluate the application in accordance with 30 C.F.R. § 774.13(c) and issue a written decision, within a reasonable time after expiration of the 30-day comment/objection period, either granting, requiring modification of, or denying the application. That decision shall be subject to review in accordance with 30 C.F.R. Part 775.

Harvey C. Sweitzer  
Administrative Law Judge



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Departmental Cases Hearings Division

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October 30, 2015

M.L. JOHNSON FAMILY	)	NX-2015-05-R
PROPERTIES, LLC,	)	
	)	Application for Review
Applicant	)	
v.	)	Termination of
	)	Cessation Order
OFFICE OF SURFACE MINING	)	No. C14-081-538-001
RECLAMATION AND	)	
ENFORCEMENT (OSM) and	)	Permit No. 898-0944
PREMIER ELKHORN COAL	)	
COMPANY,	)	
	)	
Respondents	)	
	)	
	)	
COMMONWEALTH OF KENTUCKY,	)	
ENERGY AND ENVIRONMENT	)	
CABINET,	)	
	)	
Intervenor	)	

### DECISION

Appearances: Joe F. Childers, Mary Varson Cromer, and Walton D. Morris, Jr., attorneys for Applicant M.L. Johnson Family Properties LLC

John C. Martin, Timothy C. Means, Sarah C. Bordelon, Charles C. Baird, and David L. Baird, attorneys for Respondent Premier Elkhorn Coal Company

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J. Nicklas Holt, attorney for Respondent Office of Surface  
Mining Reclamation and Enforcement

Samuel J. Short and J. Michael West, attorneys for Intervenor  
Commonwealth of Kentucky, Energy and Environment Cabinet

Before: Administrative Law Judge Harvey C. Sweitzer

## I. Introduction

This proceeding relates to the decision by the Office of Surface Mining Reclamation and Enforcement ("OSM" or "OSMRE") to terminate Cessation Order ("CO") No. C14-081-538-001. The M.L. Johnson Family Properties, LLC ("Johnson LLC") has challenged the validity of that decision. OSM maintains that the CO issued to Premier Elkhorn Coal Company ("Premier Elkhorn") has been properly terminated because the company abated the violations cited in the CO and satisfied the applicable criteria for establishing a right of entry. Based upon a thorough review of the administrative record and the pleadings, and for the reasons discussed herein, this Decision upholds OSM's decision to terminate the CO.

## II. Legal Framework

At all times material hereto, the Commonwealth of Kentucky has, through the Energy and Environment Cabinet ("Kentucky Cabinet"), exercised primary authority for administering the State's equivalent of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201-1328, and its implementing regulations, subject to OSM's oversight authority. Kentucky received the requisite approval for its regulatory program, including the applicable statutory and regulatory provisions, in May of 1982. *See* 30 C.F.R. § 917.10; *see generally* Ky. Rev. Stat. ("KRS") Ch. 350; 405 Ky. Admin. Reg. ("KAR") Ch. 1-30. Subsequent amendments and approval dates relative to the Kentucky program are set forth at 30 C.F.R. § 917.15.

At issue in this proceeding are the requirements for establishing a valid right of entry under SMCRA and the Kentucky State program. Under SMCRA, no permit shall be approved unless the application affirmatively demonstrates, and the regulatory authority finds in writing, that:

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(6) in cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted to the regulatory authority –

(A) the written consent of the surface owner to the extraction of coal by surface mining methods; or

(B) a conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law: *Provided*, That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

30 U.S.C. § 1260(b)(6). OSM's termination of the CO issued to Premier Elkhorn and the Johnson LLC's Application for Review raise issues specific to subsection (C) of § 1260(b)(6) and the corresponding Federal and State regulations.

SMCRA's implementing regulation is similar to the statutory language, but has been restated to require the applicant to submit documentation. It provides, in pertinent part, that:

(a) An application shall contain a description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining and reclamation operations in the permit area and shall state whether that right is the subject of pending litigation. The description shall identify the documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, an applicant shall also submit –

....

(3) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under

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applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this section shall be construed to provide the regulatory authority with the authority to adjudicate property rights disputes.

30 C.F.R. § 778.15.

Kentucky's regulatory counterpart also focuses on the documentary requirements. During the time periods relevant to this proceeding, the State's approved program provided, in part, that:

(1) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin surface mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(2) If the private mineral estate to be mined has been severed from the private surface estate, the application shall contain:

....

(c) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, a copy of the original instrument of severance upon which the applicant bases his right to extract coal by surface mining methods and documentation that under applicable state law, the applicant has the legal authority to extract the coal by those methods.

405 KAR 8:030 Sec. 4 (2014).<sup>3</sup>

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<sup>3</sup> Kentucky has taken action to amend this regulatory provision to more closely mirror the Federal regulation. Kentucky's proposed amendment and an opportunity for public comment were published in the Federal Register on June 12, 2015. See 80 Fed. Reg. 33456 (June 12, 2015). This Decision cites the 2014 approved regulatory provision which OSM relied upon when issuing its termination.

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### III. Background

Premier Elkhorn has a permit to mine coal in Pike County near Virgie, Kentucky. Jt. Stip. ¶ 2; R. 1139. Although the company's permit involves multiple tracts, this proceeding only relates to Tract 46. On December 19, 2014, this tribunal issued a Decision that sets forth an extensive description of the background and prior litigation related to Tract 46 which will not be repeated herein. Instead, a brief summary of the relevant facts and procedural background is provided to establish the context for this proceeding.<sup>2</sup>

#### A. Ownership and Permitting

The mineral and surface estates for Tract 46 have been severed since the early 1900s. Jt. Stip. ¶¶ 3-4. Premier Elkhorn's affiliate, the Pike-Letcher Land Company ("PLLC"),<sup>3</sup> owns the mineral estate associated with Tract 46. Jt. Stip. ¶¶ 1, 4; *see also* R. 297. The surface estate (consisting of about 450 acres) was previously owned by M. L. Johnson who left an undivided  $\frac{1}{8}$  interest (12.5%) to each of his eight heirs when he passed away. R. 17, 268, 510, 1487. Two heirs conveyed their 12.5% interest in Tract 46 to PLLC and five heirs transferred their interests to the Johnson LLC. R. 13, 267-74, 276-77, 506, 1487-88, 1501-12, 1593-94. By the fall of 2014, the surface estate was owned collectively by the Johnson LLC (62.5%), PLLC (25%), and Shirley Akers (12.5%)<sup>4</sup> as tenants in common. Jt. Stip. ¶¶ 2-3; *see also* R. 17, 510. Although the members of the Johnson LLC have never consented to surface mining on Tract 46, PLLC has executed an Amended Right of Entry Agreement with

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<sup>2</sup> As part of the prior consolidated proceeding before this tribunal (Docketed as NX-2014-01-R and NX-2014-02-R) involving Tract 46 and the same litigants, the parties submitted factual material in the form of joint stipulations ("Jt. Stip.") and a joint written record ("R.") totaling more than 1600 pages. Pursuant to this tribunal's June 4, 2015, Order, those joint submissions were resubmitted and made part of the administrative record for this proceeding.

<sup>3</sup> Premier Elkhorn and PLLC are both subsidiaries of TECO Coal Corporation. Jt. Stip. at ¶ 1.

<sup>4</sup> According to the Opening Brief of Premier Elkhorn, Shirley Akers has now sold her share of the surface estate to Premier Elkhorn, giving the coal company and its affiliate a 37.5% share of the surface estate. *See* Premier Elkhorn's Opening Brief at 1 n.1. Premier Elkhorn did not, however, make the sale documentation part of the administrative record for this proceeding.

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Premier Elkhorn that granted the coal company a right to enter and conduct surface mining. Jt. Stip. ¶¶ 7, 14; R. 313-18, 322-27, 331-36, 1580-85.

On October 16, 2003, Kentucky issued Permit No. 898-0944 to Premier Elkhorn. Jt. Stip. ¶ 9; R. 165-67. That permit authorized surface mining operations on a total of 370.80 acres encompassing multiple different tracts,<sup>5</sup> including approximately 6 acres within Tract 46. Jt. Stip. ¶¶ 5, 9; R. 165-67, 1141-42. On May 1, 2014, Kentucky issued Amendment #1 which added 179.60 acres to the entire permit area, including approximately 61 additional acres within Tract 46. Jt. Stip. ¶¶ 6, 9; R. 160-62, 1141-42.

Thereafter, Kentucky approved three additional minor revisions to Premier Elkhorn's permit relevant to Tract 46. It approved Minor Revision #1 on May 23, 2014, which updated the surface ownership information for Tract 46 to include the names and addresses of each individual owner. R. 1346-50. On June 6, 2014, Kentucky approved Minor Revision #2, finding that the permit application contained the documentation necessary to satisfy the right of entry requirements under subsection (c) of 405 KAR 8:030 Sec. 4(2). Jt. Stip. ¶¶ 10-11; R. 766-68, 1144. And, on September 18, 2014, Kentucky approved Minor Revision #3 which corrected the procedural deficiencies associated with Minor Revision #2 and re-approved the right of entry for Premier Elkhorn's permit as to Tract 46. R. 1459-1545.

### **B. Prior Litigation**

The Johnson LLC has litigated various issues associated with Premier Elkhorn's permit in multiple different forums. On May 14, 2014, the Johnson LLC filed a civil action under the citizen suit provisions of SMCRA in the United States District Court for the Eastern District of Kentucky ("District Court") requesting declaratory and injunctive relief. R. 12-33. About a month later, on June 13, 2014, the District Court issued a Memorandum Opinion and Order granting the Johnson LLC's motion for preliminary injunction and ordering Premier Elkhorn to cease mining pending an inspection by the Secretary. *M.L. Johnson Family Properties LLC v. Jewell*, 27 F. Supp.3d 767 (E.D. Ky. 2014), *vacated*, No. 14-5867 (6<sup>th</sup> Cir. Oct. 31, 2014).

The District Court determined that the Johnson LLC was likely to succeed on the merits because the permit did not contain all the information required by 30 U.S.C. § 1260(b)(6). Specifically, the District Court found that the regulator who

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<sup>5</sup> Premier Elkhorn's permit relates to 48 different tracts. Of that total, 17 tracts are directly affected by surface mining and the rest are contiguous tracts. R. 1142.

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approved the permit application did so under subsection (A) which required the applicant to submit "the written consent of the surface owner to the extraction of coal by surface mining methods." 30 U.S.C. § 1260(b)(6)(A). *Johnson v. Jewell*, 27 F.3d at 771. Relying on canons of statutory interpretation, the District Court concluded that subsection (A) requires the consent of all surface owners – thus, the consent of a single surface owner would not suffice. *Id.* at 771-73.

In accordance with the District Court's order, OSM conducted an inspection of Premier Elkhorn's permit for Tract 46 and issued a Federal Inspection Report dated July 17, 2014. Jt. Stip. ¶ 18; R. 1138-47. In that report, OSM cited the District Court's decision that found Premier Elkhorn's original permit application did not comply with subsection (A) of § 1260(b)(6). OSM also considered whether Minor Revision #2, which issued during the pendency of the District Court proceeding, satisfied Kentucky's regulatory counterpart to subsection (C) of § 1260(b)(6). Because the District Court had not examined the validity of Minor Revision #2, OSM performed its own analysis and found the revision procedurally flawed for failing to provide notice and an opportunity to object. R. 1146. Based on these findings, OSM concluded that Premier Elkhorn did not have a valid permit for Tract 46 and issued a CO. R. 1136-37, 1146-47, 1155-57; Jt. Stip. ¶ 20.

Both Premier Elkhorn and the Kentucky Cabinet filed Applications for Review with the Office of Hearings and Appeals ("OHA") challenging OSM's issuance of the CO.<sup>6</sup> Those Applications for Review were consolidated for purposes of adjudication, and the Johnson LLC moved for, and received, permission to intervene as a full party in the consolidated proceeding.

During the pendency of that proceeding, the Kentucky Cabinet approved Minor Revision #3. Premier Elkhorn submitted its third revision in order to satisfy the remedial measures set forth in the CO which required the permittee to take one of three actions in order to abate the violation: (1) immediately commence reclamation of the disturbed area on Tract 46; (2) obtain the written consent of each surface owner for Tract 46 and apply for a permit in accordance with the approved Kentucky program; or (3) take action in accordance with the approved Kentucky

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<sup>6</sup> Premier Elkhorn also appealed the District Court's preliminary injunction order to the Sixth Circuit Court of Appeals. J. Stip. ¶ 16. On October 31, 2014, while the Applications for Review remained pending, the Sixth Circuit issued a ruling, dismissing Premier Elkhorn's appeal of the preliminary injunction as moot and vacating the District Court's order. *M.L. Johnson Family Properties LLC v. Jewell*, No. 14-5867 (6<sup>th</sup> Cir. Oct. 31, 2014).

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program to establish a right of entry for Tract 46 under "alternate means" and comply with the notice and comment process required for revisions. R. 1147. Premier Elkhorn submitted its permit revision based upon the third remedial option. R. 1485.

The Johnson LLC filed an objection to the requested revision, and after responding to those objections in writing, the Kentucky Cabinet approved Minor Revision #3 on September 18, 2014. R. 1459-61. OSM determined, based upon this approval, that the violations listed in the CO had been abated and submitted a motion for approval to terminate the CO pursuant to 30 C.F.R. § 843.11(f).

On December 19, 2014, this tribunal issued a Decision upholding OSM's issuance of the CO (No. C14-081-538-001) as a valid exercise of OSM's oversight and enforcement authority and granted the motion for approval to terminate the CO. *Premier Elkhorn et al. v. OSM*, NX-2014-01-R Consolidated (Dec. 19, 2014). The Johnson LLC, Kentucky Cabinet, and Premier Elkhorn each filed separate appeals of that Decision with the Interior Board of Land Appeals ("IBLA" or "Board"). In addition, the Johnson LLC petitioned the Board for a stay of that portion of the Decision granting OSM's motion for approval to terminate the CO. *Johnson LLC et al. v. OSM*, IBLA 2015-73 (Mar. 13, 2015).

In an Order issued on March 13, 2015, the Board concluded that this tribunal lacked jurisdiction to approve termination of the CO. Based on that conclusion, the Board vacated that portion of the decision granting the motion to terminate the CO and then dismissed the Johnson LLC's appeal and petition for a stay as moot. *Johnson LLC et al. v. OSM*, IBLA 2015-73 (Mar. 13, 2015). The appeals filed by Premier Elkhorn and the Kentucky Cabinet remain pending before the Board.

### **C. Termination of the CO and Application for Review**

On March 24, 2015, following receipt of the Board's Order, OSM's Lexington Field Office issued a letter terminating the CO. Ex. JPF 001-002.<sup>7</sup> That letter attached and relied on the reasoning contained in the original termination and narrative document prepared on October 24, 2014. Ex. JPF 003-007. The Johnson LLC filed an

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<sup>7</sup> Although the parties were encouraged to confer and jointly stipulate to a supplemental record for this proceeding, they could not reach an agreement. Instead, the parties agreed to provide supplemental exhibits during the briefing process and to identify them with a party abbreviation and document number.

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Application for Review of the Termination with OHA and requested emergency temporary relief on March 26, 2015.

After the parties had briefed the request for temporary relief, the Johnson LLC and Premier Elkhorn engaged in discussions about the requested relief and reach a joint stipulation. In order to conserve judicial resources they agreed, in part, that Premier Elkhorn would forgo mining and that the Johnson LLC would hold its request for emergency relief in abeyance pending a decision on the merits, unless Premier Elkhorn provided written notice of its intent to commence mining on Tract 46 at some earlier date. *See* Joint Stipulation (April 16, 2015).

After conducting discovery, all the parties to this proceeding agreed to waive an evidentiary hearing and to proceed with a resolution on the merits based upon the written record and briefing. *See* Post-Teleconference Order (June 4, 2015). The parties then submitted opening, response, and reply briefs along with additional exhibits to be included as part of the record in this proceeding.

#### IV. Discussion

##### **A. The Johnson LLC's Failure to Exhaust its State Administrative Remedies Did Not Result in a Waiver.**

Both OSM and the Kentucky Cabinet argue that because the Johnson LLC failed to raise any issues regarding the interpretation of Kentucky law before the State administrative authority, it waived its ability to challenge the Kentucky Cabinet's re-approval of Premier Elkhorn's right of entry via Minor Revision #3 under the State's counterpart to subsection (C) of § 1260(b)(6). *See* R. 1459-61 (letter to counsel for the Johnson LLC providing notice of the right to petition for review under the Kentucky administrative system). As demonstrated by the narrative attached to the termination of the CO, OSM relied on this re-approval in terminating the CO:

Kentucky has reapproved Premier Elkhorn's permit as to right of entry under subpart (c) based on its finding that the amended surface lease and right of entry agreement constitute "documentation" that under applicable state law assists in determining the "legal relationship" between the surface property interests and the subsurface property interests.

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... Based on this finding by Kentucky regarding the legal relationship of the property interests under subpart (c), OSMRE has determined that all violations listed in the Cessation Order have been abated and the Cessation Order can be terminated under 30 CFR 843.11(f).

Ex. JFP 006-007.

As previously explained by the Board, "exhaustion of state remedies or the failure to do so in no way affects OSM's statutory mandate to ensure that provisions of SMCRA or state programs implementing SMCRA are enforced in individual primacy states." *Armstrong*, 130 IBLA 228, 231 (1994). As part of OSM's oversight responsibilities, it has an obligation to ensure that the minimum requirements of SMCRA have been satisfied. The failure of the Johnson LLC to exhaust its State administrative remedies cannot relieve OSM of that responsibility. In addition, none of the parties to this proceeding dispute that the Johnson LLC had a right to file an application for review of OSM's termination of the CO. *See* 43 C.F.R. § 4.1160(b); *see also* Ex. JFP 001 (providing notice of right to appeal). Thus, the Johnson LLC has not waived its ability to challenge any of the grounds relied upon by OSM in support of its decision to terminate the CO.

#### **B. Kentucky State Law Governs the Right of Entry Determination.**

In accordance with SMCRA, states are allowed to enact and administer their own regulatory programs. *See Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981). While a State's regulatory program may be more demanding than SMCRA, it cannot be less stringent than the Federal standards. 30 U.S.C. §§ 1253, 1254; *see also Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 316 (3d Cir. 2002).

To obtain a surface mining permit, both SMCRA and Kentucky's regulatory program require applicants to demonstrate a right to enter and extract coal by surface mining methods. *See* 30 U.S.C. § 1260(b)(6)(A)-(C); 405 KAR 8:030 Sec. 4(2)(a)-(c). This showing can be made by complying with one of three listed alternatives. Originally, the Kentucky Cabinet approved Premier Elkhorn's permit under the State's counterpart to subsection (A) of § 1260(b)(6).<sup>8</sup> In September of 2014, following litigation in the District Court and issuance of the CO by OSM, the Kentucky Cabinet approved Minor Revision #3, finding that Premier Elkhorn had

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<sup>8</sup> Issues surrounding the interpretation of subsection (A) of 30 U.S.C. § 1260(b)(6) and the validity of the CO remain pending before the Board.

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satisfied the requirements of Kentucky's regulatory counterpart to subsection (C) of § 1260(b)(6). See 405 KAR 8:030 Sec. 4(2)(c).

Subsection (C), unlike the other alternatives listed in 30 U.S.C. § 1260(b), specifically requires that right of entry determinations be made in accordance with State law. It provides that when "the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship *shall be determined in accordance with State law.*" 30 U.S.C. § 1260(b)(6)(C) (emphasis added). The statute's implementing regulation requires the applicant to submit "documentation that *under applicable State law*, the applicant has the legal authority to extract the coal by those methods." 30 C.F.R. § 778.15(b)(3) (emphasis added). And, Kentucky's regulatory analogue at subsection (c) requires the application to contain "a copy of the original instrument of severance upon which the applicant bases his right to extract coal by surface mining methods and documentation that *under applicable state law*, the applicant has the legal authority to extract the coal by those methods." 405 KAR 8:030 Sec. 4(2)(c) (emphasis added).

Thus, whether Premier Elkhorn has established a valid right of entry and a right to extract coal by surface mining methods must be determined in accordance with Kentucky State law.

**C. State Common Law Supports the Kentucky Cabinet's Approval of Minor Revision #3.**

No dispute exists regarding ownership of the property relating to Tract 46. All parties concede that PLLC owns the entire mineral estate and owned 25% of the surface estate as tenants in common with the other surface owners during the time periods relevant to this proceeding. Jt. Stip. ¶¶ 2, 3, 4.

PLLC leased its rights to Premier Elkhorn and specifically authorized Premier Elkhorn to enter and extract coal using surface mining methods pursuant to an Amended Right of Entry Agreement signed on April 17, 2013. Jt. Stip. ¶¶ 4, 7, 15; R. 322-27. The Kentucky Cabinet, OSM, and Premier Elkhorn all contend that a right of entry can be established based upon a lease agreement from less than all the cotenants and cite a 2009 Kentucky Court of Appeals decision discussing the rights of cotenants to enter into agreements related to surface mining. See *Johnson v. Envtl. and Pub. Prot. Cabinet*, 289 S.W.3d 216 (Ky. App. 2009).

The 2009 Kentucky Court of Appeals case also involved Premier Elkhorn, but a different group of surface owners. In that case, the Kentucky Cabinet issued a

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permit to Premier Elkhorn for surface mining over the objection of a group of appellants who owned between 52% and 56% of the surface estate as tenants in common. The remaining surface owners signed surface lease agreements with PLLC, which in turn executed right of entry leases with Premier Elkhorn. *Johnson*, 289 S.W.2d at 218. After administrative and technical review of the permit application, as well as the documents submitted by the parties, the Kentucky Cabinet determined that the permit application was complete and that Premier Elkhorn had made a prima facie demonstration of its right to enter and mine the subject property. *Id.*

On review, the Kentucky Court of Appeals noted that permit applications must demonstrate a legal right of entry as set forth in 405 KAR 8:030 Sec. 4(2). Applying Kentucky's common law regarding cotenancy, the court found that Premier Elkhorn established a right of entry based upon lease agreements executed by a minority of the surface cotenants.

Under Kentucky's common law:

A cotenant may use and enjoy a common estate in real property in the same manner as if he or she were the sole owner. . . . "The primary characteristic of a tenancy in common is unity of possession by two or more owners. Each cotenant, regardless of the size of his fractional share of the property, has a right to possess the whole."

*Johnson*, 289 S.W.2d at 219 (internal citations omitted). These general rules carry over into the field of minerals, where it has been recognized that a "tenant in common without the consent of his cotenant, has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants." *Id.* at 220 (quoting *Taylor v. Bradford*, 244 S.W.2d 482 (Ky. App. 1951)).

The appellants in *Johnson*, like the Johnson LLC in this proceeding, argued that surface mining without the consent of all the surface owners violated the Broad Form Deed Amendment to the Kentucky Constitution. See Ky. Const. § 19(2). Broad form deeds were commonplace in eastern Kentucky around the turn of the century. In general, a broad form deed conveyed all the subsurface minerals and simultaneously granted the right to use the surface to the extent necessary or convenient for gaining access to the minerals. *Ward v. Harding*, 860 S.W.2d 280, 282 (Ky. 1993), *cert. denied*, 510 U.S. 1177 (1994). As technology changed, surface mining became more common and Kentucky courts found that broad form deeds allowed

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mineral owners to conduct strip mining operations even though the practice was virtually non-existent in the early 1900s when most of the broad form deeds were executed.

Then, in 1988, Kentucky ratified the Broad Form Deed Amendment as Section 19(2) to the Kentucky Constitution. Under that Amendment, an instrument "purporting to sever the surface and mineral estate or to grant a mineral estate or to grant a right to extract minerals," which fails to expressly state the method of coal extraction shall be interpreted to only allow coal extraction by the methods commonly known to be in use at the time the instrument was executed. *See Ward*, 860 S.W.2d at 281-89.

In reviewing this Constitutional provision, the Kentucky Court of Appeals determined that the Broad Form Deed Amendment "did not change in any fundamental way the long-standing law of cotenancy." *Johnson*, 289 S.W.2d at 221. It found the appellants' reliance on this Amendment to be misplaced because Premier Elkhorn did not claim surface rights through a broad form deed. Rather, Premier Elkhorn based its right to enter and to conduct approved surface mining operations on rights granted by appellants' cotenants pursuant to the surface leases along with the deed to Premier Elkhorn's affiliate. Thus, the court found that it was "the terms of the lease itself that give Premier Elkhorn the right to mine coal on the property in question, not an application of a broad form deed." *Id.*

With respect to Tract 46 in this proceeding, Premier Elkhorn submitted, and the Kentucky Cabinet considered: (1) copies of the original severance deeds, (2) additional chain of title documents, including the deeds from two M.L. Johnson heirs conveying their interests in the surface estate (totaling 25%) to PLLC; and (3) the original and amended Right of Entry Agreements between PLLC and Premier Elkhorn (dated October 26, 1995, and April 17, 2013). *See* R. 313-18, 322-27, 331-36, 1485-1512. The original severance deeds provided by Premier Elkhorn date back to the early 1900s and do not expressly grant the right to extract coal by surface mining methods. R. 1487; *see also* Jt. Stip. ¶¶ 4, 13. Had Premier Elkhorn relied solely on those original severance documents in this case, the Broad Form Deed Amendment would likely have precluded surface mining. But, Premier Elkhorn does not rely solely on the original severance deeds. Instead, it claims a right of entry based upon Kentucky's common law of cotenancy and relies on the Amended Right of Entry Agreement executed between Premier Elkhorn and PLLC which grants the right to enter and extract coal using surface mining methods on Tract 46. R. 1485-88. Given the similar fact pattern and legal issues, the 2009 decision in *Johnson* represents

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controlling State law precedent that supports the Kentucky Cabinet's decision to approve Minor Revision #3.

As noted by the Kentucky Court of Appeals, cotenants are not without legal remedies. The Johnson LLC may have other State law grounds for relief based upon waste, partition, or property damage. However, those types of remedies must be pursued in the appropriate State court forum. See *Johnson*, 289 S.W.2d at 221-22.

This tribunal has no authority to modify or overturn the Kentucky Court of Appeals decision. Nevertheless, the Johnson LLC argues that the State court "erred" because it "did not grapple at all with the language of or requirements of the federal statute or the Kentucky regulation." Johnson LLC Reply at 7. The following sections address the Johnson LLC's specific claims relating to the statutory language of SMCRA and the corresponding Kentucky regulatory program regarding the requirements for demonstrating a valid right of entry.

**D. Neither SMCRA Nor Kentucky's Regulatory Program Limit State Law Right of Entry Determinations to Interpretations of the Original Severance Instrument.**

The Johnson LLC asserts that subsection (C) of § 1260(b)(6) and subsection (c) of 405 KAR 8:030 Sec. 4(2) only allow the regulatory authority to consider State law interpretations of the original severance instrument. OSM, the Kentucky Cabinet, and Premier Elkhorn maintain that the Federal and State provisions contain no such restrictions and that the agencies may consider any relevant State law and supporting documentation. For the reasons discussed herein, the overly-narrow construction of the statutory and regulatory provisions advocated by the Johnson LLC is inconsistent with the plain language, the surrounding context, and the legislative/regulatory history.

**1. SMCRA's Subsection (C) of § 1260(b)(6)**

The first step in statutory construction requires a determination as to "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In performing this review, the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

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Subsection (C) of SMCRA's right of entry provision provides, in relevant part, that "if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law." 30 U.S.C. § 1260(b)(6). Although the Johnson LLC maintains that the phrase "surface-subsurface legal relationship" can only be interpreted as referencing the original conveyance that severs the minerals from the surface estate, nothing in the plain language of the statute places any express limitation on the categories of State law or type of documents that may be considered.

Relying on other principles of statutory construction, the Johnson LLC asserts that the phrase "surface-subsurface legal relationship" must mean the original conveyance if this phrase is to be harmonized with the introductory clause of subsection (C) which specifically refers to "the conveyance." However, the introductory clause clearly limits application of subsection (C) to situations where the conveyance is silent and "does not expressly grant the right to extract coal by surface mining methods." 30 U.S.C. § 1260(b)(6). Had Congress intended to limit the second clause to interpretations of that same conveyance document, it would have made consistent use of the same terminology by including a specific reference to "the conveyance" in the second clause rather than adding a reference to the "surface-subsurface legal relationship."

Looking at § 1260(b)(6) in its entirety, the Johnson LLC's argues that the broad construction of subsection (C) advocated by the Kentucky Cabinet and OSM renders subsection (A) "superfluous." This assertion must be rejected for two reasons. First, this assertions fails to acknowledge that § 1260(b)(6) contains three separate and independent alternatives for establishing the right to enter and extract coal using surface mining methods. Second, this is a Federal statute with nationwide applicability and it must be interpreted in that context. Because subsection (C) requires that determinations be made in accordance with State law – which has the potential to be quite variable – a party cannot prove that Congress intended a narrow reading based upon the application of one individual State's laws.

Nevertheless, the Johnson LLC argues that the interpretation adopted by the Kentucky Cabinet and OSM must be implausible because their determinations rest in part on Kentucky's law of cotenancy. See *Johnson v. Envtl. and Pub. Prot. Cabinet*, 289 S.W.3d 216 (Ky. App. 2009). According to the Johnson LLC, by considering Kentucky's law regarding cotenancy, the Kentucky Cabinet and OSM have improperly looked at the "surface-surface" relationship rather than the "surface-

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subsurface" relationship. However, this claim mischaracterizes and oversimplifies the legal analysis. In the 2009 *Johnson* case, the State court evaluated the rights of cotenants and found that in Kentucky, a surface cotenant may enter into contracts, leases, or other agreements with the mineral owner, or its successor in interest, relating to the development of minerals – including surface mining. These types of legal arrangements, and their many variants,<sup>9</sup> relate to the surface-subsurface relationship which must "determined in accordance with State law" under § 1260(b)(6)(C).

Assuming that subsection (C) of § 1260(b)(6) is ambiguous with respect to the phrase "surface-subsurface legal relationship," nothing in the plain language of SMCRA's implementing regulation, 30 C.F.R. § 778.15, supports the narrow reading proposed by the Johnson LLC. That regulation, which was duly promulgated following notice and comment rulemaking, requires that an application contain a "description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining" and specifies that the description "identify the documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant." 30 C.F.R. § 778.15(a). It goes on to provide that, "[i]f the conveyance does not expressly grant the right to extract the coal by surface mining methods, [an applicant shall submit] documentation that under applicable State law, the applicant has the legal authority to extract the coal by those methods." 30 C.F.R. § 778.15(b)(3). The regulation broadly references "documents" and does not place any restriction on the types of documentation or the scope of applicable State law to be considered.

SMCRA's legislative history does not compel a different result. When considering a statute's history, conference reports are recognized as the "most reliable evidence of congressional intent" because they represent the final statement of the terms agreed to by both houses. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9<sup>th</sup> Cir. 1996); see also *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462-63 (11<sup>th</sup> Cir. 1992).

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<sup>9</sup> It is both impractical and unnecessary for purposes of this analysis to examine the various ways in which multiple entities can own property or the types of legal relationships that can be established via contract, lease, deed, reservation, conveyance, etc. under the laws of Kentucky or other states. Although many variants exist, this particular case involves ownership of the surface estate by tenants in common which makes Kentucky's 2009 *Johnson* decision particularly relevant.

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As explained in the Conference Report resolving the difference between the House and Senate versions of the bill:

H.R. 2 required consent of the surface landowner for stripmining if both the surface and mineral estates were in separate private ownerships. The applicant would have to show: (a) written consent; (b) a conveyance expressly granting the right to stripmine; or (c) other evidence establishing that the conveyance authorized stripmining. It was presumed that in the absence of such evidence the conveyance was intended to limit coal mining to the practices in general use at the time of conveyance.

The Senate amendment had no such provision.

The matter was resolved by providing that in those cases in which there is no written consent of the surface owner or no express coverage of the right to mine coal by surface methods in the relevant legal instruments that (1) the determination of whether or not the private mineral estate owner or a successor-in-interest has the right to mine the coal by surface methods shall be made in accordance with applicable state law, and (2) jurisdiction to make that determination under applicable State law shall remain in the body – most probably the State courts – given that jurisdiction by the state in question. In those cases in which the applicant has neither the written consent of the surface owner nor a legal instrument expressly providing for surface mining, *the applicant would be able to furnish the regulatory authority with any appropriate evidence of its right to engage in surface mining*, including the original severance instrument and legal authority under applicable State law that the language in such instrument gives it the right to mine coal by surface methods.

If there is any legal question, the body designated by State law to determine property rights will resolve the issue.

H.R. Rep. No. 95-493, at 105-06 (1977) (Conf. Rep.) (emphasis added). While Congress could have limited evidence under the State law option to just the original severance deed and legal interpretations thereof, it did not. Instead, the explanatory statement set forth in the Conference Report supports a much broader approach based upon the submission of “any appropriate evidence,” with deference to state court determinations regarding right of entry.

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In sum, while case law interpreting the language of original severance instruments represents one possible application of State law, the plain language of the Federal statute and implementing regulation as well as the surrounding context and legislative history support consideration of all applicable State law, including any appropriate documentary evidence.

*2. Kentucky's Subsection (c) of 405 KAR 8:030 Sec. 4(2)*

Kentucky's statutory scheme requires that a permit application state "[t]he source of the applicant's legal right to mine the coal on the land affected by the permit." Ky. Rev. Stat. Ann. ("KRS") § 350.060(3)(d). When the Kentucky Cabinet approved Minor Revision #3 (which serves as the basis for OSM's decision to terminate the CO), subsection (c) of Kentucky's approved right of entry regulation provided that "[i]f the conveyance does not expressly grant the right to extract the coal by surface mining methods," the application must contain:

a copy of the original instrument of severance upon which the applicant bases his right to extract coal by surface mining methods and documentation that under applicable state law, the applicant has the legal authority to extract the coal by those methods.

405 KAR 8:030 Sec. 4(2)(c). Although Kentucky's approved right of entry regulation does not contain exactly the same language as its Federal counterpart, the Kentucky Cabinet's interpretation is reasonable and consistent with SMCRA.

The Johnson LLC argues that subsection (c) of the Kentucky regulation must be limited to interpretations of the original severance instrument. It maintains that the first clause of the quoted language, which requires the applicant to submit "a copy of the instrument of severance upon which the applicant bases his right to extract coal by surface mining methods," can only be satisfied by the submission of a document that authorizes the mineral owner to extract coal by surface mining methods. With respect to the second clause, which requires "documentation that under applicable state law, the applicant has the legal authority to extract coal by those methods," it argues that the term "documentation" must necessarily refer to the severance instrument mentioned in the first clause. The other parties to this proceeding assert that the Johnson LLC's interpretation of Kentucky's regulation fails to consider the language of subsection (c) as a whole and improperly treats the second clause as mere surplusage.

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The Kentucky regulation, like the Federal implementing regulation, focuses on the applicant's submission of documentation. *Compare* 30 C.F.R. § 778.15 with 405 KAR 8:030 Sec. 4. Even though the Kentucky regulation specifically requires the applicant to submit a copy of the original severance instrument, it also provides for the submission of additional "documentation." The presence of the word "and" between the clause referencing the severance deed and the term "documentation," suggests that "documentation" means something in addition to the original severance instrument. Moreover, the State regulation contains no express limits on the type of "documentation" that can be considered by the regulatory authority nor are there any restrictions regarding the "applicable state law."

Assuming the State's regulation is ambiguous as to its scope, OSM's approval of the Kentucky regulatory provision supports an interpretation consistent with SMCRA. When OSM approved this portion of Kentucky's regulatory program, 405 KAR 8:030 Sec. 4, the Director made a finding that Kentucky's regulation was "substantively identical" and no less effective than its Federal counterpart:

Kentucky proposes to revise subsection (2) regarding the information required to be submitted with the permit application if the private mineral estate to be mined has been severed from the private surface estate. *As revised, subsection (2) is substantively identical to the Federal rule set forth at 30 C.F.R. 778.15(b).* Therefore, the Director finds that the proposal is no less effective than the Federal counterpart.

59 Fed. Reg. 27235, 27236 (May 26, 1994) (Director's finding #4) (emphasis added).

Even though the right of entry regulation was amended in 1994, the Johnson LLC cites and relies on comments made with respect to an earlier version of the regulation approved in 1982. At that time, Kentucky's right of entry regulation required that an applicant submit "a copy of the document of conveyance that grants or reserves the right to extract the coal by surface mining methods." 47 Fed. Reg. 21404, 21413 (May 18, 1982). Although the Secretary initially found this regulation to be inconsistent with 30 C.F.R. § 778.15, it subsequently approved the provision based upon Kentucky's then-prevailing interpretation of broad form deeds. In reaching that conclusion, the provisions of the Federal implementing regulation were summarized as requiring the applicant to provide: "(1) A written consent by the surface owner, (2) A copy of the document of conveyance expressly granting the right to extract coal by surface mining methods, or (3) Where the right is not expressly granted, documentation that under applicable State law the

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conveyance permits the applicant to extract coal by surface mining methods." 47 Fed. Reg. at 21413.

The Johnson LLC points to this summary as proof that the Federal regulation only intended for determinations under State law to consider the original conveyance severing the two estates. However, the Johnson LLC overstates the significance of the discussion that accompanied the 1982 approval. That summary did not purport to change the wording of the Federal regulation, but merely paraphrased the requirements in the context of analyzing Kentucky's then-prevailing law regarding broad form deeds. As the commentary went on to explain:

Under Kentucky law, the conveyance of mineral rights by means of so called "broad-form" deeds is held to confer the right to extract coal by surface mining methods. . . . The broad-form deed is the deed-form widely used in Kentucky. Consequently, the Kentucky regulation need not distinguish between those situations where the conveyance expressly grants or reserves the right to extract coal and where the conveyance merely conveys the rights to the minerals. As for Kentucky's not including a specific provision for the alternative of written surface owner consent, such a provision is implicit in the Kentucky rule. If the broad-form deed has not been used, the applicant would have to submit the written consent of the surface owner.

*Id.* After ratification of the Broad Form Deed Amendment, Kentucky modified its regulation. The revised provision, approved in 1994, follows the Federal regulation. See 59 Fed. Reg. 27235, 27236 (May 26, 1994).

To the extent that the Johnson LLC may be arguing or suggesting that the Kentucky regulation is, in fact, more stringent than SMCRA, other State statutory provisions prohibit the Kentucky Cabinet from promulgating more stringent regulatory provisions. For instance:

An administrative body may promulgate administrative regulations to implement a statute only when the act of the General Assembly creating or amending the statute specifically authorizes the promulgation of administrative regulations or administrative regulations are required by federal law, in which case *administrative regulations shall be no more stringent than the federal law or regulations.*

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Ky Rev. Stat. § 13A.120(1)(a) (emphasis added). With respect to surface mining, the Kentucky Cabinet is given the authority to adopt administrative regulations, but its regulations cannot be more stringent than required by SMCRA:

The Energy and Environment Cabinet shall have and exercise the following authority and powers . . . [t]o adopt administrative regulations to allow the state to administer and enforce the initial and permanent regulatory programs of Public Law 95-87, "Surface Mining Control and Reclamation Act of 1977." *Administrative regulations shall be no more stringent than required by that law.* Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing any of the acts listed in Section 702(a) of Public Law 95-87, or any administrative regulation promulgated thereunder.

Ky. Rev. Stat. § 350.028(5) (emphasis added); *see also* Ky. Rev. Stat. § 350.465(2); *Laurel Mountain Res. v. Kentucky Cabinet*, 360 S.W.3d 791 (Ky. App. 2012) (finding a Kentucky regulatory provision that was more stringent than SMCRA to be null, void, and unenforceable).

Although the submission of documentation that interprets the language of original severance instruments represents one possible application of State law, the Johnson LLC has not demonstrated that the narrow construction it advocates represents the only possible interpretation of 405 KAR 8:030 Sec. 4(2)(c). Based upon the language of Kentucky's regulation and other statutory and regulatory provisions applicable to Kentucky's regulatory program, the Kentucky Cabinet has applied a reasonable interpretation that is consistent with SMCRA.

**E. Kentucky's Issuance of RAM #159 Did Not Constitute an Improper Modification of State Law.**

Following the District Court's June 13, 2014, Memorandum Opinion and Order granting the Johnson LLC's motion for preliminary injunction, the Kentucky Cabinet issued Reclamation Advisory Memorandum ("RAM") #159. Ex. JFP 0070-72. That document, dated June 27, 2014, established guidelines for identifying property ownership within the permit application and provided interim guidelines for applications to mine severed mineral estates by surface mining methods. *Id.* at 0071.

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The Johnson LLC characterizes issuance of RAM #159 as an official change to Kentucky's approved State program without seeking prior approval from the Secretary under 30 C.F.R. § 732.17(g). This characterization must be rejected, however, because RAM #159 is a guidance document that does not purport to modify subsection (c) of 405 KAR 8:030 Sec. 4(2).

The Kentucky Cabinet issued RAM #159 in response to the District Court's 2014 Memorandum Opinion in *Johnson v. Jewell* which invalidated a permit approved under subsection (a) of 405 KAR 8:030 Sec. 4(2) for failing to obtain the consent of all the surface owners. RAM #159 provided, in part, that:

As a result of on-going litigation in U.S. District Court, this RAM is intended to provide interim guidelines for applications to mine severed mineral estates by surface mining methods. A federal judge recently decided that a permit issued by the Cabinet is invalid because the applicant did not obtain the consent of all the cotenants of the surface to mining by surface mining methods. He ruled that state case law authorizing a permit with the consent of less than all the cotenants did not satisfy the minimum requirements of the federal statute, SMCRA. His decision is not yet final and until it is the Division of Mine Permits will be reviewing the information required by Item 9.9 in the application according to the requirements listed in 405 KAR 8:030 Section 4(2)(a)(b) and (c).

405 KAR 8:030 Section 4(2) applies to the documentation an applicant must submit for right of entry when the surface and subsurface estates have been severed. In cases of severed estates where the surface estate has multiple landowners (cotenancy), the DMP [Division of Mine Permits] is suspending use of Item 9.9 until it is revised and will be applying the requirements of 405 KAR 8:030 as follows:

- If the applicant has consent or leases from all the cotenants for mining by surface mining methods then right of entry will be deemed valid under 8:030 Section 4(2)(a)

.....

- If the conveyance does not specifically allow mining by surface mining methods, the applicant must produce copies of the original severance documents and documentation to demonstrate that under

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Kentucky state law it has the right to mine by those methods. Pending further orders of the Court, the Cabinet intends to find 8:030 Sec. 4(2)(c) satisfied if the additional documentation consists of the consent of less than all the cotenants because state case law has so held. See *Johnson v. Environmental and Public Protection Cabinet*, Ky. App., 289 S.W.3d 216 (2009). Other documentation of this right under state law may also be sufficient and will be considered.

Ex. JFP 0071-72.

Prior to the District Court's 2014 Memorandum Opinion in *Johnson v. Jewell*, the Kentucky Cabinet considered and applied Kentucky's law of cotenancy consistent with the 2009 *Johnson* Court of Appeals decision when determining whether permit applications met the consent provisions of subsection (a) of 405 KAR 8:030 Sec. 4(2). See R. 1142. In the course of rendering its decision in *Johnson v. Jewell*, the District Court found that while the corresponding Federal statute, § 1260(b)(6), expressly allowed for consideration of State law in subsection (C), subsection (A) did not. *Johnson v. Jewell*, 27 F.3d at 773.<sup>10</sup> After receipt of that ruling, the Kentucky Cabinet issued RAM #159, clarifying that the Kentucky Cabinet would apply State common law and subsection (c) of 405 KAR 8:030 Sec. 4(2) when considering an application based upon the consent of less than all the cotenants. Thus, while RAM #159 expressed an intention to follow a different right of entry subsection in response to the District Court's findings, the document did not purport to change existing State law. Consequently, RAM #159 did not violate the amendment procedures under 30 C.F.R. § 732.17.

After issuing RAM #159, Kentucky took steps to amend its right of entry regulation to more closely mirror the language used in SMCRA and the implementing Federal regulatory provision. Kentucky submitted the final version of its amendments to OSM in January of 2015, and they were published in the Federal Register on June 12, 2015. See 80 Fed. Reg. 33456 (June 12, 2015). Members of the public have been provided with an opportunity to comment and changes to the State regulation do not take effect for purposes of the State program until approved as an amendment. 30 C.F.R. § 732.17(g). As a result, the approved language of 405 KAR 8:030 Sec. 4(2) at the time Minor Revision #3 issued governs

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<sup>10</sup> The District Court declined to consider whether Premier Elkhorn's permit application would have satisfied the State analogue to subsection (C) of § 1260(b)(6). *Johnson v. Jewell*, 27 F.3d at 773 n.2.

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and RAM #159 only provides guidance regarding the Kentucky Cabinet's regulatory interpretation.

**F. Kentucky Did Not Improperly Adjudicate a Property Rights Dispute.**

Both SMCRA and Kentucky law prohibit the regulatory authority from adjudicating property rights disputes. *See* 30 U.S.C. § 1260(b)(6)(C); 30 C.F.R. § 778.15(c); *Ky. S. Coal Corp. v. Ky. Energy and Env't Cabinet*, 396 S.W.3d 804, 808 (Ky. 2013). However, Congress has drawn a clear distinction between the regulatory authority making determinations about whether a permit applicant has established, with appropriate documentation, the nature of the surface-subsurface legal relationship under State law versus adjudicating a bona fide property rights dispute. In this case, the Kentucky Cabinet relied upon established State law regarding the legal relationship of the parties when making the required permitting decision under SMCRA and the State regulatory program.

The Johnson LLC argues that the Kentucky Cabinet violated the prohibition against adjudicating property rights disputes when it approved Minor Revision #3 because: (1) Premier Elkhorn's revised application failed to acknowledge the litigation pending in District Court;<sup>11</sup> and (2) the Federal litigation involves a property rights dispute which the Kentucky Cabinet unlawfully adjudicated. However, all parties, including the Kentucky Cabinet, were well-aware of the prior District Court proceedings, and the Johnson LLC has failed to demonstrate that its citizen suit involves a bona fide property rights dispute that precluded the Kentucky Cabinet's consideration of Minor Revision #3.

As demonstrated by the record, the Johnson LLC initiated its citizen suit against the Secretary of the Interior in District Court pursuant to 30 U.S.C. § 1270(a)(2). R. 12-33, 504-27. While this tribunal will not speculate about what issues may or may not be legitimately raised before the District Court in the future, the June 13, 2014, Memorandum Opinion and Order discussed and analyzed the minimum Federal requirements of 30 U.S.C. § 1260(b)(6)(A). Based upon its conclusion that subsection (A) of § 1260(b)(6) required the consent of all the surface owners, the District Court ordered the Secretary to perform an immediate inspection of Premier Elkhorn's mining operations and to report whether she planned to take

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<sup>11</sup> As part of its application for Minor Revision #3, Premier Elkhorn responded to the question regarding pending litigation by indicating it was not applicable. R. 1484, 1633.

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further action. See *Johnson v. Jewell*, 27 F. Supp.3d at 771-75.<sup>12</sup> In rendering its decision, the District Court did not undertake any analysis of property law.

Although the District Court docket remains open, this tribunal is not aware of any recent litigation activity in that proceeding. Given that the Johnson LLC initiated its District Court action against the Secretary in order to compel action under SMCRA, the Johnson LLC has not shown that the Federal proceeding involves an adjudication of the respective property rights of PLLC, Premier Elkhorn, and the Johnson LLC or that the Kentucky Cabinet improperly adjudicated any property rights when it approved the permit revision. Nor has the Johnson LLC established that the citizen suit barred the Kentucky Cabinet from considering permit revisions under its regulatory program. Just because some of the parties to this proceeding have engaged in past litigation related to Tract 46 does not mean that the litigation involved a bona fide property rights dispute.

By way of comparison, the cases cited by the Johnson LLC involved bona fide property rights disputes. In *Ky. S. Coal Corp. v. Ky. Energy and Env't Cabinet*, 396 S.W.3d 804 (Ky. 2013), the dispute centered around a prior State Court judgment that granted the mining company a 15-year surface lease. At the end of the 15-year lease, the mining company was to return the leasehold to the surface owners reclaimed in accordance with State and Federal regulations. The lease expired while the application for renewal was pending before the regulatory authority. The Kentucky Supreme Court found that the Kentucky Cabinet properly determined that whether the mining company had a legal right of entry was unclear given the expiration of the prior lease. It concluded that a bona fide property dispute existed and that the State Circuit Court had jurisdiction to determine the rights granted by the deed and the effect the prior judgment had on those rights. *Id.* at 809.

*Paul F. Kuhn*, 120 IBLA 1 (1991), involved an inaccurate survey of the property's boundary line. The property owner notified the regulatory authority of the boundary dispute and eventually the mining company conceded that a boundary error had occurred. *Id.* at 12 n. 5, 25-26. The Board found that when a citizen alleges that the permit boundaries are inaccurate, the State has an obligation to take appropriate action short of adjudicating a property rights dispute. *Id.* at 25.

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<sup>12</sup> The District Court also enjoined mining by Premier Elkhorn pending completion of the Secretary's inspection. The Sixth Circuit subsequently dismissed Premier Elkhorn's appeal of the preliminary injunction as moot and vacated the District Court's order. See *M.L. Johnson Family Properties LLC*, No. 14-5867 (6<sup>th</sup> Cir. Oct. 31, 2014).

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In *Kuhn*, the Board concluded that the State regulatory authority should have suspended mining within the disputed area of the permit until the boundary dispute was resolved. *Id.* at 25-26.

The property rights dispute in *Marion A. Taylor*, 125 IBLA 271 (1993), *vacated on appeal sub nom., Coal-Mac v. Babbitt*, Civ. No. 93-117 (E.D. Ky. 1995), involved interpretation of an original severance deed and the subsequent reservation of mineral rights contained in a 1971 deed from the prior surface owner. By the time the regulatory authority issued the mining company a permit, the surface owners had already initiated litigation in State court to ascertain whether the reservation in the 1971 deed allowed the prior surface owner to authorize surface mining on the property. *Id.* at 273, 276. The Board held that the State regulatory authority should have suspended mining (and OSM should have directed the suspension of mining) on the disputed land pending resolution of the State court litigation. *Id.* at 277.

Like the surface owners in the *Marion A. Taylor* litigation, the Johnson LLC could have initiated an action in Kentucky State court (or other appropriate State forum). In State court, the Johnson LLC could have directly challenged the 2009 Johnson decision issued by the Kentucky Court of Appeals discussing and applying the law of cotenancy. It could have raised Constitutional arguments related to Kentucky's Broad Form Deed Amendment. And, it could have pursued other legal remedies based upon waste, partition, or property damages. Instead, the Johnson LLC has not taken any action in State court to adjudicate these or any other property law issues.

The Johnson LLC may well have strategic or tactical reasons for not initiating an action in State court (or other appropriate State forum) based upon Kentucky's existing law governing property rights. However, this tribunal has no authority to overturn or reconsider existing State court decisions as those property law issues must be resolved in the appropriate State forum. *See* H.R. Rep. No. 95-493 at 106 ("If there is any legal question, the body designated by State law to determine property rights will resolve the issue.").

According to the Johnson LLC, its failure to initiate an action in Kentucky should be disregarded because SMCRA's prohibition against adjudicating property rights disputes imposed a burden on the permit applicant to obtain a final, unappealable judicial order prior to approval of the application. Although the permit applicant has a burden to submit documentation to the regulatory authority sufficient to satisfy one of the right of entry requirements, neither SMCRA nor Kentucky's regulatory scheme imposes any obligation on permit applicants to pre-

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litigate the "surface-subsurface" legal relationship and obtain a final judicial order as a precondition for permitting.

In support of its position, the Johnson LLC points to Kentucky's internal agency Reviewer's Manual which requires an applicant to submit a notarized copy of: a judicial order granting or reserving the right to surface mine, a letter or lease from the surface owner(s) consenting to surface mining, or a conveyance expressly granting or reserving the right to surface mining. R. 1573-74. While this manual is not part of Kentucky's regulatory scheme,<sup>13</sup> Premier Elkhorn cited and relied on documentation which satisfied the manual's provisions: (1) a published, controlling decision issued by the Kentucky Court of Appeals in 2009 which adjudicated the rights of individual cotenants to enter into agreements regarding surface mining, *see Johnson*, 289 S.W.2d at 219-22, and (2) the Right of Entry and Amended Right of Entry Agreements executed by PLLC which granted the lessee, Premier Elkhorn, the right to enter and conduct surface mining. *Jt. Stip.* ¶ 15; R. 313-18, 1485-88. The manual does not require the permit applicant to commence litigation in State court prior to permit approval.

Even though the Johnson LLC disagrees with OSM and the Kentucky Cabinet about the proper legal interpretation of SMCRA's right of entry provisions and Kentucky's regulatory counterpart, the Johnson LLC has failed to demonstrate that the Kentucky Cabinet adjudicated a bona fide property rights dispute when it approved Minor Revision #3. As previously noted, the parties do not dispute any issues surrounding ownership of Tract 46 or the interpretation of any documents describing the parties' legal relationships. To the extent that the Johnson LLC has raised arguments in this proceeding challenging the State law aspects of the 2009 *Johnson* decision issued by the Kentucky Court of Appeals, this tribunal has no jurisdictional authority to modify State law.

To date, there is no evidence in the administrative record that the Johnson LLC has attempted to challenge the 2009 *Johnson* decision in a forum that can adjudicate its State law claims. Given the Johnson LLC's reluctance or unwillingness to seek out the proper State venue, the Kentucky Cabinet did not improperly adjudicate a property rights dispute by relying on the controlling 2009 *Johnson* decision when it approved Minor Revision #3.

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<sup>13</sup> Agency guidance documents, unlike regulations, do not have the force and effect of law. *See, e.g., Shamrock Metals, LLC*, 184 IBLA 1, 5-6 (2013) (involving an agency handbook).

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### G. OSM Properly Terminated the CO.

OSM issued the CO to Premier Elkhorn after conducting an inspection mandated by the District Court. R. 1138-47. However, the District Court did not order or otherwise require the Secretary to issue an order of cessation. Instead, the District Court's preliminary injunction required an immediate inspection and a report to the court indicating whether the Secretary planned to take further action. *Johnson v. Jewell*, 27 F. Supp.3d at 774-76. After OSM complied with the requirements of the preliminary injunction, it was dissolved and later vacated by the Sixth Circuit. R. 1158-59, 1195; *M.L. Johnson Family Properties LLC*, No. 14-5867 (6<sup>th</sup> Cir. Oct. 31, 2014). There is no evidence in the record to suggest that the District Court has ordered the Secretary (or OSM) to take any other specific action or prohibited any further action as part of the citizen suit filed by the Johnson LLC.

On March 24, 2015, OSM terminated the CO based upon its determination that the Kentucky Cabinet's approval of Minor Revision #3 abated all the violations identified in the CO. 30 C.F.R. § 843.11(f); Ex. JFP 001-007, R. 1147. During the approval process, the Kentucky Cabinet provided the requisite notice and an opportunity to comment and, after considering the comments filed by the Johnson LLC, concluded that all applicable statutory and regulatory requirements had been satisfied. R. 1459-61; Ex. JFP 005. OSM reviewed Kentucky's regulatory program and determined that the State's re-approval of the right of entry under subsection (c) of 405 KAR 8:030 Sec. 4(2) was "based on its finding that the amended surface lease and right of entry agreement constitute 'documentation' that under applicable state law assists in determining the 'legal relationship' between the surface property interest and the subsurface property interests." Ex. JFP 006-007.

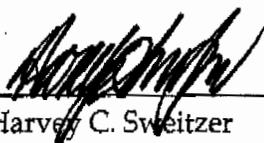
According to the applicable regulations, "an authorized representative of the Secretary *shall* terminate a cessation order by written notice to the permittee when he or she determines that all conditions, practices or violations listed in the order have been abated." 30 C.F.R. § 843.11(f) (emphasis added). OSM explained that the Cabinet's "reapproval of Premier Elkhorn's permit, including DMP's [Division of Mine Permits] determination of the legal relationship of property interests under State law, satisfies one of the three alternate remedial measures specified by OSMRE in Cessation Order No. C14-081-538-001, specifically subpart (c)." Ex. JFP at 006. Consequently, having found that Kentucky's approval of Minor Revision #3 abated the prior violations, OSM properly terminated the CO.

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Thus, for all the reasons discussed herein, OSM has met its burden to establish a prima facie case as to the validity of its decision to terminate of the CO, which the Johnson LLC failed to overcome. *See* 43 C.F.R. § 4.1171.

#### V. Conclusion

Without belaboring this Decision with additional references to contentions of fact and law, the parties are hereby advised that all contentions submitted by the parties have been considered and, except to the extent they have been expressly or impliedly adopted herein, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or are immaterial. Based upon the foregoing, OSM's decision to terminate Cessation Order No. C14-081-538-001 is upheld.

  
\_\_\_\_\_  
Harvey C. Sweitzer  
Administrative Law Judge

#### Appeal Information

Any party adversely affected by this Decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations at 43 C.F.R. Part 4, Subparts B and L (see enclosed information pertaining to appeals procedures).

See pages 30-31 for distribution.

NX-2015-05-R

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DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT  
PARK COUNTY

PARK COUNTY ENVIRONMENTAL  
COUNCIL and GREATER YELLOWSTONE  
COALITION,

Plaintiffs,

vs.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY and  
LUCKY MINERALS, INC.,

Defendants,

and

STATE OF MONTANA, by and through  
The OFFICE OF THE ATTORNEY  
GENERAL,

Intervenor.

Case No. DV-17-126

**ORDER RULING ON PLAINTIFFS'  
MOTION FOR VACATUR OF  
EXPLORATION LICENSE**

The Plaintiffs, Park County Environmental Council and Greater Yellowstone Coalition, (hereinafter, "Plaintiffs") filed their Motion for Vacatur of Exploration License and Brief in support on June 1, 2018. The Defendant Montana Department of Environmental Quality (hereinafter, "DEQ") initially responded to the Plaintiffs' Motion with DEQ's Opposition to Plaintiffs' Filing of First Amended Complaint for Declaratory and Injunctive Relief, Motion for Vacatur of Exploration

License, Plaintiffs' Brief in Support of Motion for Vacatur of Exploration License and to Proposed Order, filed June 6, 2018. Plaintiffs filed their Response to DEQ's Opposition to Plaintiffs' Filing of Fist (sic) Amended Complaint, Motion for Vacatur, Brief in Support of Motion for Vacatur, and Proposed Order on June 7, 2018. The State Attorney General filed its Special Appearance on June 21, 2018. Plaintiffs filed their Response to Special Appearance of the Office of the Attorney General and State of Montana on June 27, 2018. The Court entered an Order Regarding Procedure Required Upon Challenge to Constitutionality of Statute on June 29, 2018. The Court entered an Order Granting Defendant Lucky Minerals, Inc.'s Motion to Amend the June 18, 2018 Scheduling Order to allow more time for Briefing of Responses to the Motion for Vacatur. The Plaintiffs filed a Reply Brief in Support of Motion for Vacatur on July 17, 2018.

Plaintiffs filed their Renewed Notice of Constitutional Question on June 29, 2018, and served the State Attorney General by certified mail. Defendant Lucky Minerals, Inc. (hereinafter, "Lucky Minerals" or "Lucky") filed its Response in Opposition to Plaintiffs' Motion for Vacatur on July 11, 2018. The State of Montana, by and through the Attorney General, Timothy C. Fox, (hereinafter referred to as "the State") filed its Notice of Intervention herein on August 20, 2018. The State Attorney General filed its Brief in Response to Plaintiffs' Motion for Vacatur of Exploration License on October 19, 2018. The Plaintiffs filed their Reply Brief in Response to the State of Montana's Brief and in Support of Motion for Vacatur on November 7, 2018.

The Court heard oral argument with respect to the Motion for Vacatur at a hearing on January 3, 2018. The Court took the matter under advisement. Having considered the Motion and Briefs, the oral argument of counsel, and applicable legal authority, the Court now finds good cause for entry of the following Decision and Order.

## DECISION

### I. The Plaintiffs' Position

Plaintiffs seek an Order vacating the exploration license issued to Lucky Minerals by the DEQ. The Plaintiffs maintain that the 2011 Legislature's amendment to MEPA, §75-1-201(6)(c) and (d) (hereinafter "the Amendments") were unconstitutional, as applied to this case, and that the Court should vacate Lucky Mineral's exploration license.

Plaintiffs maintain that the Amendments unconstitutionally infringe on the Plaintiffs' fundamental right to a clean and healthful environment and further violate the State's corresponding obligation to provide adequate remedies to protect that right. Mont. Const., Article II, Section 3; Article IX, Section 1. The Plaintiffs point to *Ravalli Cty. Fish & Game Ass'n, Inc., v. Mont. Dep't of State Lands*, 273 Mont. 371, 384, 903 P.2d 1362, 1371 (1995), where the Court noted that MEPA promotes informed decision-making by requiring agencies to analyze impacts before reaching a decision. The Amendments provide that the only remedy for adjudicated MEPA violations is a remand to the agency, directing it to perform further analysis. The permit, license or other authorization issued by an agency is valid and cannot be enjoined, nullified, revoked, modified or suspended, pending the completion of an environmental review that may be remanded by a court. § 75-1-201(6)(d) MCA.

Plaintiffs argue that the Amendments upend the MEPA mandate from what was a "look before you leap" structure to a "leap before you look" structure under the Amendments. Plaintiffs maintain that the Montana Constitution prohibits this result.

The Supreme Court has held that the right to a clean and healthful environment and to reasonable public participation, found in Article II of Montana's Constitution, are fundamental rights because they are guaranteed by the Declaration of Rights. *Mont. Env'tl. Info. Ctr. v. Dept. of*

*Env't. Quality*, ("MEIC"), 1999 MT 248 ¶ 63, 296 Mont. 207, 988 P.2d 1236. Any statute or rule that impacts those rights must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective. *Id.*

To demonstrate a compelling interest, the State must show, "at a minimum, some interest 'of the highest order and. . .not otherwise served' or 'the gravest abuse[] endangering [a] paramount [government] interest.'" *Armstrong v. State*, 1999 MT 261, ¶ 41, n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

The environmental protection provided by Montana's Constitution was thought by the drafters, "to be the strongest environmental protection provision found in any state constitution". *MEIC*, ¶ 66 (citing Mont. Const. Convention, Vol. IV at 1200 (Mar. 1, 1972)). The Montana Constitution, Article II, Section 3 and Article IX, Section 1 do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC*, ¶ 77. Rather, they provide environmental "protections which are both anticipatory and preventative." *Id.*

Plaintiffs argue that the Amendments at issue do not serve any compelling State interest. Once the Plaintiffs demonstrate that a statute infringes upon a fundamental right then the burden shifts to the State to prove that the statute can survive strict scrutiny. *MEIC* ¶ 63, *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311, (1986). Plaintiffs maintain that the Legislators' speculation that the Amendments would stimulate or expedite industrial development in the State is not a governmental interest "of the highest order" that justifies eliminating public remedies protecting a fundamental constitutional right. *Armstrong, supra*, ¶ 41 n. 6.

Plaintiffs point to the requirement in the Montana Constitution that the Legislature “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources”, Mont. Const. Art. IX, § 1- not to eliminate such remedies for the purpose of expediting private projects before the State has adequately evaluated their significant environmental impacts. Plaintiffs argue that, even if the DEQ could demonstrate a compelling interest for eliminating any effective remedy for MEPA violations, the Amendments are not “the least onerous path that can be taken to achieve the State’s objective.” *MEIC* ¶ 63. Plaintiffs argue that the Amendments are not narrowly tailored to serve a compelling state interest and, therefore, fail the strict scrutiny test.

The Plaintiffs further argue that the Amendments violate the Plaintiffs’ constitutional right to participate meaningfully in DEQ’s decision-making process before the agency makes a final decision. The Montana Constitution provides at Article II, Section 8, that “[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Legislation that impairs the right to public participation is subject to strict scrutiny. *Reesor v. Mont. State Fund*, 2004 MT 370 ¶ 13, 325 Mont. 1, 103 P.3d 1019.

Plaintiffs argue that, although one of MEPA’s purposes is to ensure that “the public is informed of the anticipated impacts in Montana of potential state actions”, (§ 75-1-102(1)(b) MCA), the Amendments thwart this purpose. That is, under the Amendments, where DEQ is required to re-do an unlawful MEPA analysis, the public has no meaningful opportunity to participate in the DEQ’s new decision because, as a practical matter, DEQ’s unlawful decision will already have been fully implemented before a new decision-making process can occur. Thus, DEQ’s initial decision, would, for all practical purposes, constitute its final decision and public participation in a MEPA remand process would be reduced to a meaningless exercise.

Based upon Plaintiff's analysis of the unconstitutionality of the Amendments, they seek an Order vacating Lucky Minerals' exploration license. Plaintiffs reason that vacatur has been the normal remedy for an agency action that fails to comply with MEPA and that, given the invalidity of the Amendments, the same result should apply here. Plaintiffs argue that vacatur is necessary in order that the DEQ can meaningfully consider the environmental impacts of Lucky Minerals' exploration project before the decision to authorize exploration has been made and before that exploration and its environmental impacts have already occurred. Plaintiffs maintain that such vacatur is the only means of preventing the environmental harm that formed the basis for the Court's findings that DEQ violated MEPA.

## **II. The Defendant DEQ's Position**

The DEQ filed its Response to Plaintiffs' Motion for Vacatur, explaining that, "while the DEQ respectfully disagrees with the District Court's determination that the environmental assessment prepared by DEQ regarding Lucky Minerals' exploration project was inadequate under the Montana Environmental Policy Act, the Court's summary judgment ruling remains the law of the case. Without waiving any grounds for appeal of the Court's summary judgment ruling, DEQ respectfully submits that it does not oppose, in substance, Plaintiffs' motion to vacate the exploration license issued to Lucky Minerals based upon a determination that Sections 75-1-201(6)(c) and (d), MCA, violate Article II, section 3 and Article II, section 8 of the Montana Constitution as applied to this case." DEQ filed a Clarification to their Response making it clear that it was describing the basis for the Plaintiff's Motion in the above-quoted sentence. DEQ clarified that it was not opposing Plaintiffs' Motion based upon the DEQ's determination that the statutory provisions were unconstitutional. DEQ made it clear it is taking no position one way or the other with respect to Plaintiffs' Motion.

### III. The Defendant Lucky Minerals' Position

Lucky Minerals filed its Response in Opposition to Plaintiffs' Motion for Vacatur. Lucky Minerals initially emphasizes the legal standard, presuming acts of the Legislature to be constitutional. Lucky Minerals points out that legislative action is not to be declared invalid unless it, "conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 606, 508-509 (1993). cert. denied, 510 U.S. 1011, 114 S. Ct. 600, 126 L. Ed. 2d 566 (1993). Lucky Minerals argues that the Plaintiffs have misread the applicable law and have misconstrued the Constitution.

Lucky Minerals points to language in the intent and purpose section of MEPA stating that it is procedural. It argues that, in this case, the Court has determined that DEQ's Environmental Assessment was out of compliance, ordered that it be remanded to DEQ for further review, and that ends the matter. Lucky Minerals' position is that MEPA is a "procedural statute with a procedural remedy".

Lucky Minerals believes that Plaintiffs are misapprehending the Legislature's stated purpose in the MEPA Amendments, which were designed to foreclose the very type of litigation that is before the Court. Lucky maintains that, "[i]t is perfectly appropriate for the Legislature to balance Montana's economic interests with other fundamental rights and declare that MEPA is indeed purely procedural as the statute itself has proclaimed for nearly 50 years." It argues that MEPA was not intended to be a regulatory Act and that other statutes exist for the purpose of regulating water quality, air quality and pollution from mining activity. In the event that an exploration project succeeds and a mineral resource is located that is suitable for mining, an entirely new statutory scheme for obtaining an operating permit is triggered, which operations are heavily regulated.

Lucky Minerals rejects Plaintiffs' argument that Article II and Article IX of the Montana Constitution are violated by the 2011 Amendments to MEPA. Lucky points to Montana's Bill of Rights that, in addition to providing for a clean and healthful environment as an inalienable right; also provides for the right to pursue life's basic necessities, which include employment, in addition to enjoying private property and seeking health and happiness in all lawful ways. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1176 (1996).

Lucky maintains that Plaintiffs' assumption that Article II and Article IX are self-executing is mistaken and that there is no remedy provided that arises directly from the Constitution. The Constitution, Lucky argues, instructs the Legislature to "provide for the administration and enforcement" of the duty to "maintain and improve a clean and healthful environment in Montana . . ." *MEIC v. DEQ*, 1999, MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. Lucky reasons that the Legislature has done so by passing and amending MEPA. Lucky maintains that, where Plaintiffs' cause of action arises solely from MEPA, Plaintiffs only remedy is MEPA's remedy, which is remand.

Lucky Minerals further takes issue with Plaintiffs' Article II, Section 8 argument. Lucky points out that Plaintiffs and Plaintiffs' members commented at length on DEQ's Environmental Assessment. The right to comment and be involved in the decision-making process is integral to MEPA. Lucky points out that the same statutory right to be involved in the MEPA process will be available to the Plaintiffs on remand. Lucky maintains that this is the Plaintiffs' remedy— participation in the MEPA process on remand.

#### IV. The Position of the State of Montana, Intervenor

The State first maintains that strict scrutiny does not apply to Plaintiffs' constitutional challenge because the Court must balance the competing rights of the Plaintiffs to a clean and healthy environment with Lucky Minerals' private property rights. The State asserts that these rights are on equal footing. The right to a clean and healthful environment is entitled to no greater protection than the rights of private landowners to possession and use of their private property. See *Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987), holding that the real property interests of private landowners are important, as are the public's property interest in water.

The State points to the Court's duty to review the statute at issue and determine whether it adequately balances the competing fundamental rights of Plaintiffs and Lucky Minerals. The State maintains that the Court is obligated to presume the statute is constitutional and cannot find the MEPA amendment invalid unless, in the judgment of the Court, it conflicts with the Constitution beyond a reasonable doubt. Plaintiffs bear the burden of proving the statute unconstitutional beyond a reasonable doubt and every presumption must be indulged in favor of the statute.

The State's analysis is that a MEPA injunction is not necessary, given the environmental protections under the Metal Mine Reclamation Act (MMRA). The State maintains that the rigorous environmental protections of the MMRA, during the exploration phase, ensure protection of the right to a clean and healthful environment. The State cites to ARM 17.24.105 that governs activities during the exploration phase. The MMRA also provides for rigorous environmental protections during the post-exploration reclamation phase, which the State advances as ensuring protection of the right to a clean and healthful environment.

The State argues that the MMRA provides ample environmental protections and remedies, including injunctive relief in the event that the operator fails to comply with the MMRA safeguards.

The State maintains that, given the MMRA protections and available remedies, removal of the MEPA injunction remedy has not compromised the right to a clean and healthful environment.

In terms of the Plaintiffs' argument concerning the right of public participation, the State responds by pointing out that the public had the right to participate in the legislative process that led to elimination of the remedy of an injunction under MEPA. The State points to the public participation in the EA process undertaken by DEQ. Finally, the State submits that if, after the exploration phase, Lucky Minerals applies for an operating permit, an EIS is a certainty and the public will have exhaustive opportunities to fully participate.

#### V. Plaintiffs' Position in Reply

In their Reply Brief, Plaintiffs take issue with Lucky's position that Plaintiffs' rights are protected by remand of the Environmental Assessment. Plaintiffs point out that after remand, the DEQ would evaluate the potential impacts of actions that would have already occurred. Plaintiffs argue that the remand without injunctive relief would turn the MEPA review into a "meaningless paper exercise".

Plaintiffs rely upon the purpose of MEPA's procedures being to "prevent or eliminate environmental damage", *Pompey's Pillar Historical Ass'n v. Mont. Dep't of Env'tl. Quality*, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148, and ensure that agencies "may make informed decisions" about our state's natural resources. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 Mont. 234, ¶ 14, 366 Mont. 399, 288 P.3d 169.

Plaintiffs continue to maintain that the Legislature has already balanced the competing interests of the right to a healthful environment and the right to use private property free of undue government regulation in adopting MEPA. However, Plaintiffs argue that the requirement that these interests be balanced was obliterated by the 2011 Amendments.

Plaintiffs point to *MEIC, supra*, as well as *Cape-France Enters. v. Estate of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, to refute Lucky Minerals' claim that Plaintiffs have no remedy under the clean and healthful provision of the Montana Constitution because those provisions are not "self-executing". The Supreme Court has made it clear that statutes that implicate these rights should be declared unconstitutional if they do not withstand strict scrutiny. *MEIC*, ¶¶ 80, 81.

Plaintiffs take issue with Lucky Minerals' argument that other environmental regulations provide the protection sought by the Plaintiffs, such as the Montana Water Quality Act and provisions of the MMRA. Plaintiffs argue that the Legislature determined that, in addition to such statutes, MEPA's requirement that environmental impacts be studied before action is taken was necessary to implement the right to a clean and healthful environment. Plaintiffs argue that requirement cannot be arbitrarily discarded. Plaintiffs cite § 75-1-102(1) (MEPA enacted to implement the constitutional environmental rights); Mont. Laws 2003, Ch. 361 (HB 437) (providing for the legislative implementation of Article II, Section 3 and Article IX of the Montana Constitution through a number of statutes, including the Montana Water Quality Act, the Montana Clean Air Act, mine permitting laws, and MEPA).

Plaintiffs refute Lucky Minerals' argument that there is no violation of Plaintiffs' right to public participation by the Amendments because Plaintiffs will have an opportunity to participate in the MEPA process on remand. Plaintiffs point to the language of the Constitution guaranteeing "participation . . . *prior* to the [agency's] final decision." Mont. Const., Art. II, Section 8. (emphasis added). Plaintiffs argue that the 2011 Amendments prohibit meaningful participation.

In Reply to the Intervenor's Brief, Plaintiffs disagree with the emphasis on Lucky Minerals' private property rights, given that Lucky's right to use and enjoy its property is subject to reasonable environmental regulation, including MEPA's environmental review requirement.

Plaintiffs argue that the State acknowledges as much by asserting that the MMRA imposes, “exhaustive environmental safeguards” on operators like Lucky Minerals.

To the extent that Lucky argues that vacatur would constitute a deprivation of its enjoyment of protected property interests, Plaintiffs point to this same remedy being available under the MMRA, and the fact that MEPA did not face a constitutional challenge over the forty years it existed with no limit on a vacatur remedy.

## VI. Court’s Analysis

### A. Construing Plaintiffs’ Constitutional Challenges

The fundamental purpose, “in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it”. *General Agric. Corp. v. Moore* (1975), 166 Mont. 510, 518, 534 P.2d 859, 864. Accordingly, the Court, “should keep in mind the object sought to be accomplished . . . and proper regard should be given to the evils, if any, sought to be prevented or remedied. . .”. *Id.*

The legal standard is that acts of the Legislature are presumed to be constitutional. Legislative action is not to be declared invalid unless it, “conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.” *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 606, 508-509 (1993). cert. denied, 510 U.S. 1011, 114 S. Ct. 600, 126 L. Ed. 2d 566 (1993).

The Plaintiffs’ challenge to the constitutionality of the Amendments is based upon violations of Article II, Section 3 and Article IX, Section 1 of the Constitution.

Article IX, of the Constitution of the State of Montana, at Section 1 provides:

#### ENVIRONMENT AND NATURAL RESOURCES

Section 1. Protection and improvement.

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

Article II of the Constitution of the State of Montana, at Section 3, sets forth certain

Inalienable Rights, as follows:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment, and enjoying the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

### **B. The Level of Scrutiny**

“In order to be fundamental, a right must be found within Montana’s Declaration of Rights or be a right without which other constitutionally guaranteed rights would have little meaning”. *In re C.H.* (1984), 210 Mont. 184, 201, 683 P.2d 931, 940. In *Armstrong v. State*, 1999 MT 261, ¶ 41, 296 Mont. 361, 986 P.2d 364, the Court addressed the fundamental right of individual privacy under Montana’s Constitution requiring that the government demonstrate a “compelling state interest for infringing this right.” The Court noted that, “[w]e have not, heretofore, specifically defined what makes a state interest ‘compelling’, rather leaving that determination to be made case by case.” *Id.* The Court went on to hold that,

Nonetheless, we agree with the United States Supreme Court’s test in the First Amendment free exercise cases that to demonstrate that its interest justifying infringement of a fundamental constitutional right is ‘compelling’ the state must show, at a minimum, some interest ‘of the highest order and . . . not otherwise served, see *Wisconsin v. Yoder*, (1972), 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, or “the gravest abuse[], endangering [a] paramount [government] interest[],” *Thomas v. Collins*, (1945), 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430.

In the case before the Court, the parties dispute the standard to be applied in addressing the constitutionality of the Amendments. The Plaintiffs argue that, given the fundamental right to a clean and healthful environment is implicated, the Court must strictly scrutinize the Amendments at issue and determine whether there is a compelling state interest for them. Lucky Minerals and the State both argue that the Court must balance the competing interests of the right to a clean and healthful environment against Lucky Minerals' private property rights.

The State relies upon *Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987), where the Court addressed the real property interests of private landowners and the public's interest in water. The Court held that both such rights are constitutionally protected, and that, "[t]hese competing interests, when in conflict, must be reconciled to the extent possible." The Court found the portion of §23-2-311(3)(e) MCA, requiring landowners to bear the cost of constructing a portage route around artificial barriers on water courses to be unconstitutional. The Court found the unconstitutional portions of the statute to be subject to severance and therefore, left the balance of the statute intact.

The State further relies upon the "right to know" cases, where the Court has balanced the right to know provisions of Article II, Section 9 against the right of privacy found in Article II, Section 10. *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 224, 859 P.2d 435, 439 (1993). See also *Krakauer v. State*, 2016 MT 231, 384 Mont. 527, 381 P.3d 524.

However, in more recent decisions, our Supreme Court has addressed the level of scrutiny to be applied in cases involving the right to a clean and healthful environment where private property interests were also at stake. In *Mont. Env'tl. Info. Ctr. V. Dep't of Env'tl. Quality*, ("MEIC"), 1999 MT 248 ¶¶ 63-65, 296 Mont. 297, 988 P.2d 1236, the Court addressed a constitutional challenge to § 75-5-317(2)(i) MCA (1995), allowing discharges of water from wells or monitoring well tests,

which degrade high quality waters without review, pursuant to Montana's nondegradation policy found at §75-5-303(3) MCA (1995). The Plaintiff environmental group sued the DEQ and the mining company, Seven-Up Pete Joint Venture subsequently intervened.

In *MEIC*, the Plaintiffs challenged the statute at issue as violating Article IX, Section 1(1) and (3) of the Montana Constitution. The issue on appeal was whether the Plaintiffs had standing to challenge the constitutionality of the statute and whether the statute implicated either Article II, Section 3 or Article IX, Section 1 of the Constitution. The Court held that the Plaintiffs did have standing and applied strict scrutiny in its analysis:

Applying the preceding rules to the facts in this case, we conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path than can be taken to achieve the State's objective.

*MEIC*, ¶63.

The Court, in *MEIC*, reviewed the record of the Montana Constitutional Convention and concluded that,

[t]he delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.

*MEIC*, ¶ 77.

Ultimately, the Court, in *MEIC*, held that to the extent § 75-5-317(2)(i), MCA (1995) arbitrarily excluded certain activities from nondegradation review, it violated the environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, as applied to the facts of that case. *MEIC* at ¶80. Significantly, *MEIC* addressed a circumstance where, as here, the mining company having private property interests was a party. The Court nonetheless applied strict scrutiny in its constitutional analysis.

Based upon the Plaintiffs' challenge of the Amendments based upon Article II, Section 3 in addition to Article IX, Section 1, and the authority set forth above, this Court concludes that strict scrutiny must be applied in its constitutional analysis.

### **C. Application of Strict Scrutiny**

In analyzing the constitutionality of the Amendments, the purposes of MEPA are pertinent. MEPA requires that an agency take procedural steps to review "projects, programs, legislation, and other major actions of state government significantly affecting that quality of the human environment" in order to make informed decisions". §75-1-201(1)(b)(iii); §26.2.643, ARM. One of MEPA's purposes is to "prevent, mitigate, or eliminate damage to the environment". § 75-1-102(2) MCA. The Court has reiterated that the purpose of MEPA's procedures is to "prevent or eliminate environmental damage". *Pompey's Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality*, 2002 MT 352, ¶17, 313 Mont. 401, 61 P.3d 148.

The Amendments eliminated the injunctive relief that was available under MEPA since its enactment over forty years ago. Under the Amendments, the only remedy for a Court's determination of a MEPA violation is to remand the matter to the decision-making agency. The agency's decision, whether it be a permit, license, or other authorization cannot be enjoined, suspended or otherwise affected, pending the remand process. § 75-1-201 (6)(d) MCA.

The Amendments eliminated any ability on the part of a Court to prevent any environmental harm that would ensue from a MEPA violation, while the matter is further addressed by the agency upon remand. The Amendments violate the fundamental right to a clean and healthful environment and directly contravene the State's corresponding obligation to provide adequate remedies to protect that right. The Amendments leave a party who has succeeded in challenging an agency's MEPA decision with a meaningless remedy. The underlying environmental issues and concerns about degradation, leading to a determination that an agency's MEPA decision was insufficient, would unfold for what could be a very considerable period of time, given the remand process and litigation that could follow. The agency would be left evaluating the "potential" impacts of actions that would already have occurred.

Given the Court's determination that the Amendments violate a fundamental constitutional right, the burden shifts to the State to show a compelling state interest for the elimination of injunctive relief. That is, at a minimum, the State must show some interest 'of the highest order and . . . not otherwise served'. *Armstrong, supra*. The Legislators' speculation that the Amendments would stimulate industrial development is not a governmental interest 'of the highest order and not otherwise served' sufficient to justify eliminating public remedies protecting a fundamental constitutional right. Even if the State could demonstrate a compelling interest for the Amendments, they are not "the least onerous path that can be taken to achieve the State's objective". *MEIC* ¶ 63. In passing the Amendments at issue, the Legislature failed to give credence to its constitutional obligation to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources". Mont. Const. Article IX, Section 1.

#### D. Consideration of Lucky Minerals' Private Property Rights

The Court's decision in *MEIC* did not balance the competing private property rights against the right to a clean and healthful environment. However, from its inception, MEPA itself balanced those competing rights. When adopting MEPA, the Legislature recognized that its purpose is,

...to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans...

§75-1-102(2) MCA. This has been the stated purpose of MEPA since it was enacted over forty years ago. Yet, the Amendments upset the balance by rendering the remand process ineffective and meaningless.

The State and Lucky argue that, nonetheless, the Court should balance their private property rights against the right to a clean and healthful environment. The Court recognizes Lucky Minerals' private property interests are fundamental and significant. However, where "regulations are designed to 'have a real and substantial bearing upon the public health, safety, morals and general welfare of a community', such regulations do not unduly interfere with the fundamental nature of private property ownership." *Williams v. Bd. of Cy. Comm'rs of Missoula Cty.*, 2013 MT 243, ¶ 56, 371 Mont. 356, 308 P.3d 88, quoting *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934).

Lucky Minerals' private property interests in terms of mining are subject to regulation, including licensing requirements. Striking the Amendments from MEPA at issue here would not preclude Lucky from exercising its intended use of the property, subject to DEQ's compliance with MEPA. Any delay of Lucky's ability to proceed when balanced with the need for a meaningful,

informed process of agency decision-making is warranted. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-342, 122 S. Ct. 1465, 1488-1489, 152 L. Ed. 2d 517, 551-553.

Just as the State and Lucky argue that Lucky Minerals' private property interests would be violated by voiding the Amendments, they also assert that the protections of the MMRA provide adequate environmental protection. This argument fails to appreciate the manner in which MEPA and the MMRA have worked in tandem. Historically, the MEPA process has been used to identify environmental impacts and the DEQ uses that information to propose mitigation measures that reduce environmental impacts. Such mitigation measures have been incorporated into DEQ's final permit decision and the exploration license issued to the permit applicant. The mitigation measures can then be enforced under the MMRA as permit requirements. See § 82-4-361(2)(a) MCA.

Thus, a MEPA process that retains timely public input provides valuable information that helps DEQ to make informed decisions. When the exploration license is finalized, the MEPA review cannot be revisited to correct any errors or shortcomings. This is the value of the vacatur remedy-- to prevent harmful activity until the environmental impacts can be addressed in a meaningful way. Under *MEIC*, "anticipatory and preventative" measures are essential to upholding the right to a clean and healthful environment. *MEIC, supra*, ¶ 77.

Thus, the State and Lucky Minerals' position that the Amendments should stand because the MMRA would provide sufficient environmental protections and uphold their property rights is not well-taken. The State and Lucky have failed to demonstrate a compelling state interest.

Indulging every presumption in favor of their constitutionality, the Amendments, as applied to this case, violate Article II, Section 3, Article II, Section 8 of the Montana Constitution beyond a reasonable doubt.

### **E. The Lengthy History of Vacatur as a Remedy**

When considering Lucky Minerals' private property interests in light of the Amendments at issue, the Court cannot ignore the lengthy history of vacatur as a remedy upon an adjudicated MEPA violation. Prior to the Amendments being passed, MEPA had been in effect since its enactment in 1971, without limitation on a vacatur remedy and with express, if stringent, provisions for injunctive relief. During its long history, MEPA had not been successfully challenged on the basis of these remedies violating constitutional property rights.

Moreover, the National Environmental Policy Act, (NEPA) was enacted in 1970 and the remedy of vacatur remains in effect in NEPA cases. "As the presumption is in favor of remand with vacatur vis-à-vis remand without vacatur, so is the presumption in favor of vacatur vis-à-vis a permanent injunction." *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1113, 2018 U.S. Dist. LEXIS 67855, citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010). Our Court has held that since MEPA is modeled after NEPA, "when interpreting MEPA, we find federal case law persuasive". *Kadillak v. Anaconda Co.* (1979) 184 Mont. 127, 137, 602 P.2d 147, 153.

Without demonstrating a compelling state interest, the Legislature eliminated a long-established remedy under MEPA and, in doing so, upset the balance between the fundamental right to a healthful environment and fundamental property rights that was intrinsic in MEPA from its inception.

### **F. Violation of Right to Public Participation**

The Plaintiffs bring a constitutional challenge to the Amendments based upon Article II, Section 8 of the Constitution of the State of Montana, which provides that:

Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable

opportunity for citizen participation in the operation of agencies prior to the final decision as may be provided by law.

Legislation that impairs the right to public participation is subject to strict scrutiny. *Reesor v. Mont. State Fund*, 2004 MT 370 ¶ 13, 325 Mont. 1, 103 P. 3d 1019.

Under the Amendments, when a DEQ decision is declared to be in violation of MEPA, and the matter is remanded to DEQ, the public has no meaningful chance to participate in the agency decision. This is so because without a vacatur remedy, the project is allowed to go forward and the initial decision that violated MEPA, as a practical matter, becomes the final agency decision. Although Plaintiffs would not be prevented from participating in the MEPA remand process, their participation would be meaningless.

The State's and Lucky's responses to the Plaintiffs' challenge based upon their right to public participation ring hollow. That Plaintiffs could have participated in the Legislative process that led to the Amendments is of no import here. The fact that the public has participated in the prior EA process does not resolve the issue of the lack of a meaningful right to participate on remand.

The Court concludes that the Amendments, as applied to this case, do violate the Plaintiffs right to participate, in violation of Article II, Section 8 of the Montana Constitution. Indulging every presumption in favor of their constitutionality, the Amendments violate the Plaintiffs' right to participate, as applied to this case, beyond a reasonable doubt.

## VII. Conclusion

The Montana Supreme Court has spoken eloquently to this issue:

It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can

conscientiously and with due regard to duty and official oath decline the responsibility... The Constitution apportions the powers of governments but it does not make any one of the three departments subordinate to another when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. ... they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.

*State v. Dixon* (1923), 66 Mont. 76, 84-85, 213 P. 227, 229.

The environmental protection provided by Montana's Constitution was thought by the drafters, "to be the strongest environmental protection provision found in any state constitution". *MEIC, supra*, ¶177, citing Mont. Const. Convention, Vol. IV at 1200 (Mar. 1, 1972). In passing the Amendments at issue here, the Legislature upset the balance of competing fundamental rights that was inherent in MEPA since its enactment. The Amendments do not survive strict scrutiny. Recognizing Lucky Minerals' private property rights, and the State's desire to stimulate industrial development, the Amendments are not interests that justify eliminating the Plaintiffs' ability to meaningfully challenge MEPA's decision, even where it has been determined to be in violation of MEPA's terms. The Legislature violated its constitutional responsibilities, as applied to this case, under Article IX, Section 1, in passing the Amendments.

The Amendments, as applied to this case, violate Article II, Section 3, Article II, Section 8, and Article IX, Section 1 of the Montana Constitution. Indulging every presumption in favor of their constitutionality, the Court concludes that the Amendments, as applied, violate the Montana Constitution beyond a reasonable doubt.

As such, the decision to issue an exploration license to Lucky Minerals is deemed void. The Plaintiffs' Motion for Vacatur must be granted.

## ORDER

### I.

The 2011 Legislature's amendments to the Montana Environmental Policy Act set forth in, §75-1-201(6)(c) and (d) MCA are unconstitutional, and violate Article II, Section 3, Article II, Section 8, and Article IX, Section 1 of the Montana Constitution, as applied to this case.

### II.

The remaining provisions of §75-1-201 MCA are not affected by this Order and remain in full force and effect.

### III.

The Plaintiffs' Motion for Vacatur is granted. The Exploration License that is the subject of this case issued by DEQ to Lucky Minerals, Inc. is void and of no further force and effect.

DATED this 12<sup>th</sup> day of April, 2019.

  
HON. BRENDA GILBERT  
District Court Judge

Cc: Jenny Harbine/ Joshua R. Purtle  
KD Feedback  
C. Edward Hayes  
Robert Cameron

> MLD 041219-ME

# Joint Motion to Extend Word Limit

Doc. 142

Mark L. Lucas  
Sarah Christopherson  
1520 East Sixth Avenue  
Helena, Montana 59601

*Attorneys for Respondent Montana Department of Environmental Quality*

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*Attorneys for Intervenors Western Energy Company,  
Natural Resource Partners, L.P., International Union of Operating Engineers,  
Local 400, and Northern Cheyenne Coal Miners Association*

MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OF: )  
APPEAL AMENDMENT AM4 )  
WESTERN ENERGY COMPANY, )  
ROSEBUD STRIP MINE AREA B ) CAUSE NO. BER 2016-03 SM  
PERMIT NO. C1984003B )

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**RESPONDENT AND INTERVENORS’  
UNOPPOSED MOTION TO EXPAND WORD COUNT**

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Pursuant to and in accordance with the Montana Rules of Civil Procedure and the Hearing Examiner’s April 11, 2019 Order on Exceptions and Notice of Submittal (“Order”), Respondent Montana Department of Environmental Quality

(“Department”) and Respondent-Intervenors Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400 and Northern Cheyenne Coal Miners Association (collectively, “Intervenors”) hereby jointly move for an expansion of the response briefing word count limit. The Intervenors provide good cause as follows:

1. Pursuant to and in accordance with the Order, the parties lodged exceptions to the Hearing Examiner’s Proposed Findings of Fact and Conclusions of Law on May 10, 2019.

2. The Order did not place a word limit on the lodged exceptions, and Petitioners Montana Environmental Information Center and Sierra Club (collectively “MEIC”) lodged exceptions exceeding 12,500 words.

3. The Order permits the parties to respond to the lodged exceptions by filing response briefs on or before May 24, 2019; however, pursuant to the Order, response briefs are limited to 3,250 words.

4. The parties are not permitted to file reply briefs.

5. The Department and Intervenors are unable to fully and adequately respond to MEIC’s extensive legal and factual exceptions in 3,250 words.

6. Intervenors request the Hearing Examiner expand the response briefing word count limit from 3,250 to 6,250 words for all parties on account of the complex and fact-intensive nature of the exceptions lodged by MEIC.

7. The Department and Intervenors believe that an expansion of the response briefing word count limit from 3,250 to 6,250 will allow the parties to better and more fully respond to the exceptions lodged by MEIC.

8. MEIC does not oppose the requested word count expansion.

9. A proposed order is attached hereto.

DATED this 15th day of May 2019.

/s/ Mark Lucas

Mark L. Lucas  
Sarah Christopherson  
1520 East Sixth Avenue  
Helena, Montana 59601

ATTORNEYS FOR THE MONTANA  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY AIR

/s/ John C. Martin

John C. Martin  
Holland & Hart LLP  
975 F Street NW  
Suite 900  
Washington, D.C. 20003

ATTORNEY FOR INTERVENORS

## CERTIFICATE OF SERVICE

The undersigned certifies that on May 15, 2019, the original or a copy of the foregoing was delivered or transmitted to the persons named below as follows:

<p><b>By electronic mail and post:</b> Lindsay Ford Records Management Coordinator 1520 E. 6th Ave. P.O. Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Sarah Clerget Hearing Examiner Agency Legal Services Bureau 1712 Ninth Ave. PO Box 201440 Helena, MT 59620-1440 sclerget@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner asolem@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Shiloh Hernandez Western Environmental Law Center 103 Reeder's Alley Helena, MT 59601 hernandez@westernlaw.org</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Derf Johnson Montana Environmental Information Center 107 W. Lawrence St., #N-6 Helena, MT 59624 djohnson@meic.org</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Walton D. Morris, Jr. Morris Law Office, P.C. 1901 Pheasant Lane Charlottesville, VA 22901</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail</p>

wmorris@fastmail.net	<input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Mark Lucas Sarah Christopherson Montana Department of Environmental Quality 1520 East Sixth Avenue Helena, Montana 59601 Mark.Lucas@mt.gov Sarah.Christopherson@mt.gov	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Roger Sullivan McGarvey, Heberling, Sullivan & Lacey 345 1st Avenue E Kalispell, Montana 59901 rsullivan@mcgarveylaw.com	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery

/s/John C. Martin \_\_\_\_\_  
John C. Martin

# Order Denying Motion on Word Limit

Doc. 143

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

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**IN THE MATTER OF:  
APPEAL AMENDMENT AM4, WESTERN  
ENERGY COMPANY, ROSEBUD STRIP  
MINE AREA B, PERMIT NO. C1984003B**

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

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**ORDER DENYING MOTION TO EXPAND WORD COUNT**

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On May 15, 2019, DEQ and Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400 and Northern Cheyenne Coal Miners Association filed an *Unopposed Motion to Expand Word Count* (Motion). In its Motion the parties requested the word count of responsive briefs be expanded from 3,250 word to 6,250 words.

The undersigned has conveyed the motions to the Board Chair, who does not agree that expanding the word count is necessary. Therefore, the parties' motion is DENIED.

DATED this 21st day of May, 2019.

/s/ Sarah Clerget

SARAH CLERGET

Hearing Examiner

Agency Legal Services Bureau

1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

**CERTIFICATE OF SERVICE**

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

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Secretary, Board of Environmental  
Review  
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DATED: 5/21/19

/s/ Sarah Clerget

Affidavit of Martin (Western  
Obj. to Board Members)

Doc. 144

5/21/19 at 3:33 PM

By: Aleisha Solem

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*Attorneys for Intervenors Western Energy Company,  
Natural Resource Partners, L.P., International Union of Operating Engineers,  
Local 400, and Northern Cheyenne Coal Miners Association*

MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OF: )  
APPEAL AMENDMENT AM4 )  
WESTERN ENERGY COMPANY, )  
ROSEBUD STRIP MINE AREA B ) CAUSE NO. the Board 2016-03 SM  
PERMIT NO. C1984003B )  
)

---

**AFFIDAVIT OF JOHN MARTIN  
PURSUANT TO MONT. CODE ANN. § 2-4-611(4)**

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)  
DISTRICT OF COLUMBIA : ss  
)

I, John C. Martin, being first duly sworn upon oath, depose and state as follows:

1. That I am over the age of 18 years.

2. I represent Intervenors International Union of Operating Engineers, Natural Resource Partners, L.P., Northern Cheyenne Coal Miners Association, and Western Energy Company (collectively, "Intervenors") in this matter. Intervenors respectfully submit this affidavit requesting recusal of two Board Members based on prior statements and actions relating to the subject of the current appeal. Intervenors bring to the attention of the Board of Environmental Review's Chair, Ms. Christine Deveny and Board Member, Dr. David Lehnerr, previous communications that indicate the presence of a conflict or appearance of a conflict rendering recusal appropriate.

3. By way of background, the Rosebud Mine is the sole source of coal for the Colstrip Steam Electric Generating Station in Colstrip, Montana. Petitioners have challenged an expansion of the Mine that entails an Amendment (known as "AM4") to one of the permits applicable to the Rosebud Mine. the Board

3. On April 11, 2019, Hearing Examiner Clerget issued Proposed Findings of Fact and Conclusions of Law. Pursuant to the Hearing Examiner's Order on Exceptions and Notice of Submittal of the same date, this matter was submitted to the the Board for decision. The Board will hear oral argument on the matter during its May 31, 2019 meeting.

4. Hearing Examiner Clerget's Order on Exceptions and Notice of Submittal instructed the parties that, in accordance with Mont. Code Ann. § 2-4-611(4):

If any party believes that any current member of the BER should be disqualified from participating in the decision on this case because of 'personal bias, lack of

independence, disqualification by law, or other disqualification,' that party will file 'in good faith... a timely and sufficient affidavit' explaining the reasons why disqualification is appropriate. Mont. Code Ann. § 2-4-611(4). Such an affidavit must be filed 'not less than 10 days before' the BER Meeting, i.e. by May 21, 2019. *Id.* Failure to file such an affidavit will be deemed a waiver of the parties' right to argue that a BER member is unqualified to render a decision on the Proposed Order.

Order on Except. and Not. of Sub. (April 11, 2019), p. 3 (emphasis in the original).

5. Board Member Dr. David Lehnerr, apparently on behalf of the Sierra Club, submitted two comments during the EIS public scoping process objecting to expansion of the Rosebud Mine. The Sierra Club is one of the Petitioners challenging the AM4 permit at issue in this litigation. The AM4 permit at issue in this matter would allow expansion of the Rosebud Mine. Dr. Lehnerr's November 2, 2012 comment is attached as Exhibit A. It expresses opposition to expansion of the Rosebud Mine. Dr. Lehnerr submitted a second comment that apparently adopted the text of a form letter in October 2013. Attached as Exhibit B.

6. In the November 2012 email comment, the subject line reads, "Stop the expansion of the Rosebud coal-strip mine!" Dr. Lehnerr alleges that the mine "will be a source of water pollution for 200 years." In his second email, he asserts that, "[e]xpanding the Rosebud mine will have serious impacts on both water availability and water quality north of the mine." We believe these assertions are inaccurate and, in any event, they implicate the Hearing Examiner's proposed findings in the AM4 litigation. Mr. Lehnerr also alleges various detriments from coal power and expresses his opposition to coal as an energy source.

7. These statements may be read to reflect personal bias against coal, in general, and specifically against the Rosebud Mine. His opposition, on behalf of the Sierra Club, which is one of the litigants in this proceeding, also suggests personal support for a party in this litigation. Each of these factors serves as a basis for disqualifying Dr. Lehnerr from deciding this matter.

8. On January 28, 2016, Board Chair Christine Deveny sent an email to the “UTC Commissioners” regarding “Clean Energy, Not Coal.” Exhibit C attached. Ms. Deveny urged the commissioners “not to acknowledge any proposal that does not address a transition plan for Puget Sound Energy’s (PSE) dirty and increasingly expensive Colstrip coal-fired plant. Montana and the region need to plan for a transition from dirty energy sources to clean energy.” Ms. Deveny’s email also alleges that “coal is too costly and risky for ratepayers” and that “[i]t is time to develop a plan to transition off coal and to invest in clean energy.” Exhibit C.

9. Ms. Deveny’s January 28, 2016 email states opposition to coal generally and to the Colstrip plant’s use of coal, which comes from the Rosebud Mine. These statements can be read to reflect personal bias against coal and specifically against the use of coal from the Rosebud Mine at the Colstrip power plant. The email therefore serves as a basis for disqualifying Ms. Deveny from deciding this matter.

10. We strongly believe that Dr. Lehnerr and Ms. Deveny will do their utmost to be fair to all the litigants in this proceeding. But we also believe that their participation would create an appearance of impropriety and that it may be difficult for them to disregard views they have expressed about the Rosebud Mine and use of coal as a fuel source. Accordingly, Intervenor respectfully request that they recuse themselves from participation in this matter.

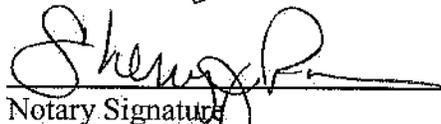
FURTHER AFFLIANT SAYETH NOT.

Executed this 2<sup>nd</sup> day of MAY, 2019.

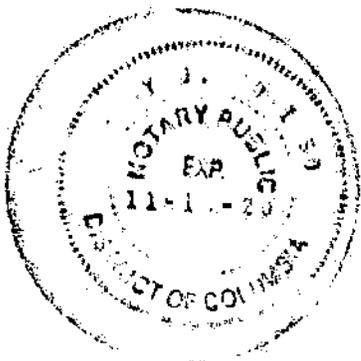
  
\_\_\_\_\_  
John C. Martin

)  
DISTRICT OF COLUMBIA : ss  
)

SUBSCRIBED AND SWORN to before me on May 21, 2019, by John C. Martin.

  
\_\_\_\_\_  
Notary Signature  
*[Affix seal/stamp as close to signature as possible]*

SHERRY J. ROBINSON  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires November 14, 2020



# **EXHIBIT A**

**From:** Sierra Club <information@sierraclub.org> on behalf of David Lehnerr <mtxdoc@earthlink.net>  
**Sent:** Friday, November 2, 2012 9:13 PM  
**To:** DEQ Coal Comments  
**Subject:** Stop the expansion of the Rosebud coal-strip mine!

Nov 2, 2012

MT DEQ Director Greg Hallsten  
PO Box 200901  
Helena, MT 59620-0901

Dear MT DEQ Director Hallsten,

As part of the DEQ's environmental impact study on the Rosebud mine expansion I urge the department to consider the following in their analysis:

(1) Consider whether the mine will further harm water quality in the area. Nearby streams like East Fork Armells are already impaired from discharges at the mine. The mine's owner, Western Energy Co., concedes that that pit will be a source of water pollution for 200 years;

(2) Consider air quality modeling that shows violations in the Colstrip area of EPA's new 1-hr standard for sulfur dioxide. DEQ should analyze whether the mine's sulfur dioxide emissions would further contribute to violations of the health based 1-hr SO<sub>2</sub> standard and should be reduced;

(3) Consider the climate change impacts of burning coal from the mine at Pennsylvania Power's Colstrip power plant for 19 more years. Currently the Colstrip plant has the 8th highest greenhouse gas emissions in the United State. DEQ should consider what impacts climate change is having on Montana agriculture, water quantity, fisheries, and our economy; and

(4) Quantify and monetize the externalities of the coal burned, given that recent research shows that burning coal--when all costs are included--is a net economic loss.

Sincerely,

David Lehnerr  
2222 Spruce St  
Billings, MT 59101-0537  
(406) 671-7377

# **EXHIBIT B**



Western-Energy-Area-F-EIS, OSM <osm-western-energy-area-f-eis@osmre.gov>

## Fwd: Study all impacts regarding the expansion of the Rosebud Mine in area F.

61 messages

**Bartlett, Franklin** <fbartlett@osmre.gov>

Thu, Oct 17, 2013 at 1:52 PM

To: OSM Western-Energy-Area-F-EIS <osm-western-energy-area-f-eis@osmre.gov>

----- Forwarded message -----

From: **Christine Wilcox** <promotepositivechange@gmail.com>

Date: Fri, Oct 4, 2013 at 10:12 AM

Subject: Study all impacts regarding the expansion of the Rosebud Mine in area F.

To: [fbartlett@osmre.gov](mailto:fbartlett@osmre.gov)

Oct 4, 2013

Mr. Franklin Bartlett

Dear Mr. Bartlett,

I am writing to ask that my concerns regarding the expansion of the Rosebud Mine into area F are addressed in the scoping process of the Environmental Impact Statement. Expanding the Rosebud mine will have serious impacts on both water availability and water quality North of the mine and will add greenhouse gases into our atmosphere, further accelerating global climate change.

I request that the full scope of environmental and social impacts are studied in the EIS, including the cumulative impacts of this expansion coupled with the operation of the Sarpy Creek Mine (also Westmoreland), existing mining at Rosebud, and the operation of the Colstrip power plant. Please address the following in the study:

- \* How will the expansion of the mine contribute to climate change?
- \* Is there a market for this coal and are there alternative uses for the land which would be mined that are both environmentally and economically more stable, given the declining demand for coal and electricity generated by coal?
- \* What are the downstream impacts for East Fork Armells, West Fork Armells, and Sarpy Creek drainages?
- \* Will the mine be able to restore the hydrologic balance in the reclamation process? Will they be required to do so?
- \* Are there alluvial valley floors in the area to be mined or downstream that could be impacted by strip mining?

Thank you for addressing these concerns. I applaud OSM's decision to get involved in this study and look forward to participating in a robust and thorough review.

[Quoted text hidden]

Keith Erwin  
923 Elm St  
Missoula, MT 59802-3804

--

Frank Bartlett  
Program Analyst  
GIS/Environmental Protection  
DOI-OSMRE  
150 East B Street  
Casper, WY 82601  
307-261-6543  
[fbartlett@osmre.gov](mailto:fbartlett@osmre.gov)

---

**Bartlett, Franklin** <[fbartlett@osmre.gov](mailto:fbartlett@osmre.gov)>  
To: OSM Western-Energy-Area-F-EIS <[osm-western-energy-area-f-eis@osmre.gov](mailto:osm-western-energy-area-f-eis@osmre.gov)>

Thu, Oct 17, 2013 at 2:15 PM

[Quoted text hidden]

Gabriella Green  
515 E Lewis St  
Livingston, MT 59047-3142

--

Frank Bartlett  
Program Analyst  
GIS/Environmental Protection  
DOI-OSMRE  
150 East B Street  
Casper, WY 82601  
307-261-6543  
[fbartlett@osmre.gov](mailto:fbartlett@osmre.gov)

---

**Bartlett, Franklin** <[fbartlett@osmre.gov](mailto:fbartlett@osmre.gov)>  
To: OSM Western-Energy-Area-F-EIS <[osm-western-energy-area-f-eis@osmre.gov](mailto:osm-western-energy-area-f-eis@osmre.gov)>

Thu, Oct 17, 2013 at 2:15 PM

[Quoted text hidden]

David Lehnerr  
2222 Spruce St  
Billings, MT 59101-0537  
(406) 671-7377

# **EXHIBIT C**

**Wyse, Lisa (UTC)**

---

**From:** Christine Deveny <cmdeveny7@gmail.com>  
**Sent:** Thursday, January 28, 2016 5:58 PM  
**To:** Wyse, Lisa (UTC)  
**Subject:** Clean Energy, Not Coal

Dear UTC Commissioners,

As a concerned resident of Montana, I urge you not to acknowledge any proposal that does not address a transition plan for Puget Sound Energy's (PSE) dirty and increasingly expensive Colstrip coal-fired plant. Montana and the region need to plan for a transition from dirty energy sources to clean energy, and PSE's IRP needs to reflect this inevitable transition.

Montana has one of the best wind energy resources in the nation, and is uniquely poised to supply clean wind energy to the region, including Washington State. Development of clean energy in Montana can assist in the transition taking place in Washington to clean energy and reduce carbon emissions.

All across the country, communities and utilities have declared that coal is too costly and risky for ratepayers, including Portland General Electric and TransAlta (two other utilities invested in Colstrip). More than 200 coal plants are slated to retire. It is time to develop a plan to transition off coal and to invest in clean energy for the benefit of the regions ratepayers, our local economy, and our children's future.

--  
Christine Deveny  
cmdeveny7@gmail.com  
Helena, Montana

## CERTIFICATE OF SERVICE

The undersigned certifies that on July 19, 2018, the original or a copy of the foregoing was delivered or transmitted to the persons named below as follows:

<p><b>By electronic mail and post:</b> Lindsay Ford Records Management Coordinator 1520 E. 6th Ave. P.O. Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Sarah Clerget Hearing Examiner Agency Legal Services Bureau 1712 Ninth Ave. PO Box 201440 Helena, MT 59620-1440 sclerget@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner ASolem@mt.gov</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Shiloh Hernandez Western Environmental Law Center 103 Reeder's Alley Helena, MT 59601 hernandez@westernlaw.org</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Derf Johnson Montana Environmental Information Center 107 W. Lawrence St., #N-6 Helena, MT 59624 djohnson@meic.org</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Walton D. Morris, Jr. Morris Law Office, P.C. 1901 Pheasant Lane Charlottesville, VA 22901 wmorris@fastmail.net</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Mark Lucas Montana Department of Environmental</p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail</p>

Quality 1520 East Sixth Avenue Helena, Montana 59601 Mark.Lucas@mt.gov	<input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Roger Sullivan McGarvey, Heberling, Sullivan & Lacey 345 1st Avenue E. Kalispell, Montana 59901 rsullivan@mcgarveylaw.com	<input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery

*/s/ John C. Martin* \_\_\_\_\_  
John C. Martin

12522678\_v1

# MEIC Response to Objection and Exhibit 1

Doc. 145

Environmental Review

5/24/19 at 10:39 AM

By: Aleisha Solem

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*Attorneys for Petitioners Montana  
Environmental Information Center  
and Sierra Club*

**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' Objection to WECO's  
Motion for Disqualification of Board  
Chair Deveny and Board Member  
Lehnerr.**

## INTRODUCTION

Respondent Western Energy Company's (WECO) attempt to disqualify Board Chair Deveny and Board Member Lehnerr is meritless judge shopping and should be denied for three reasons.

1. Under Montana law the *only* basis for mandatory disqualification of a member of an administrative board (which the coal company seeks) is a demonstration of a *significant economic* conflict of interest, which is not alleged here;
2. The U.S. Supreme Court and federal courts have repeatedly held that political statements by an adjudicator *prior* to the assumption of an adjudicatory role (which is all WECO has cited here) are no basis for disqualification or recusal; and,
3. The Montana Supreme Court has held that a board member's statements that merely raise questions or concerns about potential impacts of a project (which is all the emails provided by WECO state) do not demonstrate bias and are no basis for disqualification or recusal.

## DISCUSSION

### I. Legal Standard

The Montana Administrative Procedure Act (MAPA) allows a party to file an affidavit seeking to disqualify a Board member by demonstrating actual bias or lack of independence:

On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case.

Mont. Code Ann. § 2-4-611(4). The statute requires a demonstration of actual bias—not a mere appearance of bias (as WEC0 contends). *Id.* Upon such a filing, the Board, in its discretion, “may disqualify the hearing examiner or agency member.” *Id.*

It is only a “*substantial*[]” “*economic*” interest in a given proceeding that requires recusal of a public officer (which includes a “member of a quasi-judicial board”). *Id.* § 2-2-105(2). “To prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an ‘irrevocably closed’ mind on the subject under investigation or adjudication.” *Madison River R.V. Ltd. v. Town of Ennis*, 2000 MT 15, ¶ 15, 298 Mont. 91, 994 P.2d 1098. A board member’s assertion of “uncertainties” or “question[s]” about a

project is insufficient to demonstrate an “irrevocably closed” mind, i.e., bias. *Id.* ¶¶ 16-18.

Further, an individual’s political statements made *prior* to becoming an adjudicator are no basis for recusal. “The fact of past political activity alone will rarely require recusal ....” *Higginbotham v. Okla. ex rel. Okla. Transp. Comm’n*, 328 F.3d 638, 645 (10th Cir. 2003); *see also, e.g., In re Martinez–Catala*, 129 F.3d 213, 221 (1st Cir. 1997) (“*Former* affiliations with a party may persuade a judge not to sit; but they are rarely a basis for compelled recusal.”); *In re Mason*, 916 F.2d 384, 386 (7th Cir.1990) (“Courts that have considered whether pre-judicial political activity is ... prejudicial regularly conclude that it is not.”) (collecting cases). Then-Justice Rehnquist explained this longstanding precedent when he declined to recuse himself in a case that involved the constitutionality of a law he opined on publicly prior to ascending to the bench:

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

*Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Rehnquist, J.). Indeed, “[p]roof that a [judge’s] mind at the time he joined the Court was a complete *tabula rasa* ... would be evidence of lack of qualification, not lack of bias.” *Id.* at 835.

Thus, absent specific evidence of bias, judges are presumed to be impartial. *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 84, 93 (D.D.C. 2009).<sup>1</sup> This rule—that statements made prior to confirmation are no basis for disqualification—is particularly apt for members of the Board, who are selected as members of the public, serving on their own time, and entitled to freedom of speech. *See* Mont. Code Ann. § 2-15-3502; U.S. Const. amend. I.

Similarly, activities of a judicial officer from the distant past are no basis for recusal. *E.g.*, *Universal City Studios, Inc. v. Reimerdes*, 104 F. Supp. 2d 334, 351, 356-57 (S.D.N.Y. 2000) (derogatory statement made 19 years earlier was not basis for recusal); *In re Starr*, 986 F. Supp. 1157, 1158 (E.D. Ark. 1997) (political activities of judge seven years prior to assuming bench no basis for recusal).

In assessing a motion to disqualify a judge, “the judge must be alert to the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.”<sup>13</sup>D Wright & Miller,

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<sup>1</sup> On the other hand, statements made by a judicial officer *after* assuming the bench or *during* the pendency of a case may be a valid basis for recusal. *E.g.*, *United States v. S. Fla. Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1360-61 (S.D. Fla. 2003) (judge should be recused for making numerous public statements to press about case during the pendency of the case); *In re Sherwin-Williams Co.*, 607 F.3d 474, 476-78 (7th Cir. 2010) (recusal appropriate where “commented-upon-case was pending before the district judge,” but not required in case at bar where judge had previously written law review article supporting position opposed by one party to case).

Federal Practice and Procedure, § 3549 (3d ed.). That is, judges should not recuse themselves in the face of meritless allegations—to do so would “punish the other parties to the litigation and encourage the tactic of judge shopping.” *Cooney v. Booth*, 262 F. Supp. 2d 494, 508 (E.D. Pa. 2003).

While the Montana Supreme Court has not addressed the issue, federal courts review “a district court’s denial of a disqualification motion for an abuse of discretion.” *Mangini v. United States*, 314 F.3d 1158, 1161 (9th Cir. 2003).

**II. WECO has failed to demonstrate that Board Chair Deveny has either an economic interest in this proceeding or that her mind is irrevocably closed.**

WECO’s data-mining effort and affidavit fail to provide any basis for recusal of Board Chair Deveny. The coal company makes no allegation that Ms. Deveny has any economic interest in the outcome of the current appeal. There is, therefore, no basis for disqualification of the Board Chair. Mont. Code Ann. § 2-2-105. Further, the emails that WECO refers to was written in Ms. Deveny’s personal capacity in 2016, prior to her confirmation to the Board in 2017. It is therefore no basis for recusal. *See, e.g., Laird*, 409 U.S. at 831 (Rehnquist, J.); *Higginbotham*,

328 F.3d at 645. Indeed, WECO has failed to provide *any* authority supporting recusal in such circumstances.<sup>2</sup>

Moreover, contrary to WECO's insinuation, the cited email does not address any issue in this case (impacts to water quality from the AM4 expansion of the Rosebud Strip Mine) and does not create any appearance of bias. Rather the email merely asked a utility commission in Washington to *consider a transition* plan for Washington utilities that obtain electricity from the Colstrip Generating Station (a large power plant that currently obtains coal from the Rosebud Strip Mine). WECO Ex. C. The seven-sentence email raised concerns about costs and risks to ratepayers from continued reliance on the Colstrip plant, as well as concerns about greenhouse gas pollution from coal combustion. *Id.* Finally, the email advocated consideration of renewable wind resources in Montana. *Id.* There is no discussion of the Rosebud Mine, much less any statement of "opposition to coal generally." *Cf.* Martin Aff., ¶ 9. Such expression of concerns—unrelated to issues of coal mining and water quality—does not come close to demonstrating that Board Chair

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<sup>2</sup> See *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 922 (2004) (Scalia, J.) (declining to recuse himself from case involving then-Vice President Cheney in part because the party seeking recusal had not provided any on-point authority for recusal in similar circumstances).

Deveny has an “irrevocably closed’ mind on the subject” of this case. *Madison River*, ¶¶ 15-18.

Ms. Deveny’s single pre-Board statement to the Washington utility commission about a different matter is no basis for recusal.

**III. WECO has failed to demonstrate that Board Member Lehnherr has either an economic interest in this proceeding or that his mind is irrevocably closed.**

Nor has WECO provided any valid basis for recusal of Board Member Lehnherr. First, as with Board Chair Deveny, WECO has provided no evidence of Dr. Lehnherr’s having any economic interest in the outcome of this matter. As such, there is no mandatory basis for disqualification. Mont. Code Ann. § 2-2-105. Second, the nearly seven-year-old emails (from 2012 and 2013) that the coal company has dredged up significantly preceded Dr. Lehnherr’s confirmation to the Board, and are therefore no basis for disqualification. *See, e.g., Laird*, 409 U.S. at 831 (Rehnquist, J.); *Higginbotham*, 328 F.3d at 645 (political statements prior to assuming bench no basis for recusal). The Seventh Circuit rejected a similar attempt to seek disqualification on the basis of a judge’s bygone activities, calling the motion “preposterous.” *Nicholson v. City of Peoria*, 860 F.3d 520, 524–25 (7th Cir. 2017) (party sought to disqualify judge on basis that he worked for defendant 40 years earlier). These points are dispositive.

Further, while Dr. Lehnherr’s two short emails from 2012 and 2013 briefly raised *concerns* about potential impacts from an expansion of the Rosebud Mine, such concerns do not demonstrate *bias*. See WECO Exs. A-B (asking agency to “consider” “whether” certain potential harmful impacts will come to pass). Indeed, the Montana Supreme Court has specifically held that simply *raising questions* about a proposal, as Dr. Lehnherr did in the two emails, does not demonstrate that an adjudicator has an “irrevocably closed’ mind on the subject” of the case, requiring recusal. *Madison River*, ¶¶ 16-18 (affirming district court decision that planning board member was not disqualified because while “Commissioner Kensinger did express doubts about the subdivision’s effects on Ennis, these expressions of uncertainty are evidence that his mind was anything but irrevocably made up on the subject.”). So too here—questions do not demonstrate a closed mind. To paraphrase then-Justice Rehnquist, proof that a board member had never had raised questions about environmental impacts “would be evidence of lack of qualification, not lack of bias.” See *Laird*, 409 U.S. at 835.

Moreover, while WECO obscures the point, the 2012 and 2013 emails did not address the AM4 expansion, but rather raised questions related to environmental review under the National Environmental Policy Act (NEPA) and the Montana Environmental Policy Act (MEPA) for the Area F expansion of the

Rosebud Mine, a 6,500-acre expansion to the north. *See* WEC Co Exs. A-B (referring to environmental impact statement and Area; no environmental impact statement was prepared for the AM4 expansion). This Board has no jurisdiction over questions of NEPA or MEPA. Because the emails did not address the AM4 expansion, or any law over which the Board has jurisdiction, they do not, as the coal company contends, “implicate the Hearing Examiner’s proposed findings.” *Martin Aff.*, ¶ 6.

Board Member Lehnherr’s nearly seven-year-old emails, predating his confirmation to the Board, that merely raised questions about a different mine expansion under different laws are no basis for recusal.

#### **IV. The Board should reject WEC Co’s judge-shopping tactics.**

It is clear from WEC Co’s exhibits that the coal company has engaged in significant data-mining related to the current Board. It is also clear that WEC Co is only attempting to disqualify Board members who have raised environmental concerns (as private citizens prior to their confirmation on the Board). WEC Co’s research undoubtedly turned up Board Member Busby’s multiple social media postings (both during his time on the Board and before) supporting mining and coal mining specifically (including at Colstrip), opposing conservation organizations, and questioning the scientific consensus on climate change. *See* Ex.

1 (attached). Yet WECO did not seek to disqualify Board Member Busby. Thus, the coal company's asserted concerns about avoiding "an appearance of impropriety" ring hollow. *Martin Aff.*, ¶ 10. The Board should reject WECO's blatant judge shopping tactics.

## CONCLUSION

Montana law only requires disqualification of Board members if they have a *substantial, economic* interest in the outcome of a case. Because no such conflict has been alleged, recusal is not warranted. Further, under controlling precedent of the U.S. Supreme Court and the Montana Supreme Court, Board Chair Deveny's and Board Member Lehnerr's statements made *prior to being confirmed* to the Board, which merely *raised concerns* about potential impacts of *different* actions under *different* regulatory regimes provide no basis for recusal.

Like WECO, the Conservation Groups strongly believe all board members will do their utmost to be fair to all litigants. Because the coal company has failed to present any valid basis for the recusal of Board Chair Deveny and Board Member Lehnerr, its request for recusal should be denied.

Respectfully submitted this 24th day of May, 2019.

/s/ Shiloh Hernandez  
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Western Environmental Law Center

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*Attorneys for Petitioners Montana  
Environmental Information Center and  
Sierra Club*

## CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I served a true and correct copy of the foregoing on counsel to this contested case via email at the following addresses:

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/s/ Shiloh Hernandez  
Shiloh Hernandez

# Exhibit 1



**Dexter Busby**  
@Dexter1517

Tweets  
**370**

Following  
**118**

Followers  
**53**

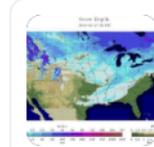
Likes  
**1,043**

Follow



**Jason McEndoo** @JasonMcEndoo · 17 Jan 2018

Yeah, about that global warming... 🤔



**James Aydelott** @jamesaydelott

There's snow on the ground in all 50 states. Barely in Florida, but barely counts.

1 2 32



**Dexter Busby**  
@Dexter1517

Tweets  
**370**

Following  
**118**

Followers  
**53**

Likes  
**1,042**

### Dexter Busby

@Dexter1517

Retired

Great Falls, Montana

Joined January 2011

Tweet to

Message

8 Followers you know



25 Photos and videos



### Tweets Tweets & replies Media

Dexter Busby Retweeted



**DGalt** @DGalt · May 21

Interesting and accurate: New York's energy policy depends on an impossible fantasy [nypost.com/2019/05/20/new...](http://nypost.com/2019/05/20/new...) via @nypost



#### New York's energy policy depends on an impossible fantasy

Last Wednesday, the Cuomo administration blocked construction of the proposed Northeast Supply Enhancement project, a 24-mile gas pipeline t... [nypost.com](http://nypost.com)

1 2

**Dexter Busby**  
@Dexter1517

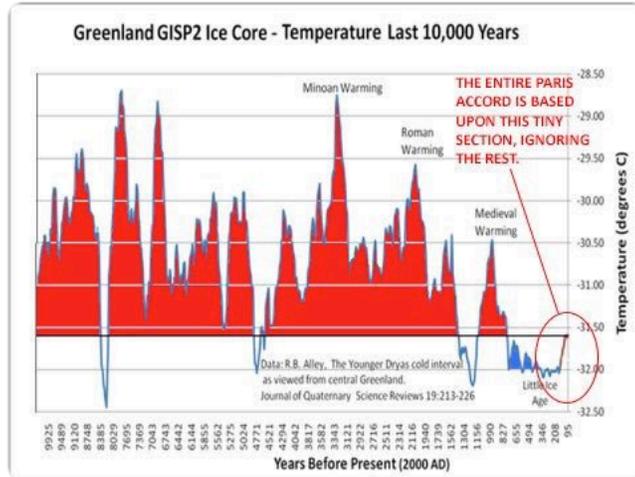
Tweets **370** Following **118** Followers **53** Likes **1,042**

Dexter Busby Retweeted



**Mike Jagger** @JaggerMickOZ · Mar 6

Replying to @EcoSenseNow @swcrisis and 47 others  
Tiny Blip - CAGW



6 67 90

**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,042**

Dexter Busby Retweeted



**Montana Mining Assoc** @MTMiningAssoc · 11 Dec 2018

Mined minerals... it's what the holidays are made of! From the presents under the tree, to freshly baked cookies, and the trains, planes, and automobiles that bring families together - mining makes it all possible. #miningmatters #merrymining



Happy Holidays from the National Mining Association...  
youtube.com

9 5

**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,042**

Dexter Busby Retweeted



**Montana Mining Assoc** @MTMiningAssoc · 7 Nov 2018

We may have won this battle, but the war on natural resource development and blue collared workers is not over. We cannot stop fighting now! Please invite your friends to "like" our page. Let the education campaign on mining continue!!!  
[youtu.be/\\_qtUxXBj3HA](https://youtu.be/_qtUxXBj3HA)

7 7



**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,042**

Dexter Busby Retweeted



**StopI186** @StopI186 · 25 Oct 2018

"Out-of-state environmental groups have been pushing to get rid of mining in our state and advance their extremist agenda." #mtpol #stopI186  
"I-186 — their latest ploy to mislead Montanans..."



**I-186 threatens Montana mining industry**

Montana used to be known as the Treasure State. But in recent years, there has been a noticeable shift. Out-of-state environmental groups have bee...

[billingsgazette.com](http://billingsgazette.com)



**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,043**

Dexter Busby Retweeted



**MEC** @MECEducation · 23 Jul 2018

Mining has been a part of the Earth's history since prehistoric times. Without #mining, we wouldn't have transportation, farming, modern medical care, #technology, or building materials. Learn more about the need for mining in our everyday lives [ow.ly/CE330cEJP7](http://ow.ly/CE330cEJP7)



14 retweets 9 likes



**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,043**



**Dexter Busby** @Dexter1517 · 22 Jun 2018

"What I-186 is really about is litigation and shutting down the mining industry in Montana. It isn't about clean water. It's about tying projects up in court until they go away."

1 retweet 2 likes



**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,043**

Dexter Busby Retweeted



**Count on Coal MT** @CountonCoalMT · 21 Sep 2015

Can Colstrip survive under #CPP?

[goo.gl/Et9bx2](http://goo.gl/Et9bx2) #mtpol #mtnews

1 3 1



**Dexter Busby**  
@Dexter1517

Tweets **370** Following **118** Followers **53** Likes **1,043**



**Minerals Make Life** @MiningFan · Feb 14

Happy Valentine's Day from Minerals Make Life! #bemined



7 14

 **Dexter Busby**  
@Dexter1517

Tweets **370**   Following **118**   Followers **53**   Likes **1,043**



**Montana Minded** @MontanaMinded · 7 Sep 2018  
See that image on the top right? That is what modern coal mines in Montana look like when they've been reclaimed. It's just another reason why we are proud to support Montana's coal industry.



#MontanaMinded #Montana #mtpol #MiningMatters #mtcoal #coal #mtnews #mtsen



  11    16   

# DEQ Response to Petitioner's Exceptions and 3 exhibits

Doc. 146

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*Attorneys for Respondent Montana  
Department of Environmental Quality  
Air, Energy and Mining Division*

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

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

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

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY'S  
RESPONSE TO PETITIONERS'  
EXCEPTIONS TO PROPOSED  
ORDER**

The Montana Department of Environmental Quality responds to Petitioners' Exceptions to the April 11, 2019 Proposed Findings of Fact and Conclusions of Law (the "Proposed Ruling") as follows:

**I: Montana Law Controls**

*a) Montana Coal Mining Regulation*

Petitioners' argument that the Board should consider the federal Surface Mining Control and Reclamation Act ("SMCRA") and the Secretary of the Interior's

“controlling interpretation” of that law in this case must be rejected. Petitioners’ Exceptions at 33. This case involves the Montana Surface and Underground Mining Reclamation Act (“MSUMRA”) and its implementing rules. *In re Signal Peak Energy*, BER 2013-07 SM, Findings of Fact, Conclusions of Law and Order, at 59-62, ¶¶ 71-81. (Jan. 14, 2016) (herein, Signal Peak) (internal citations omitted). Federal law does not control where a state like Montana achieves “primacy” to regulate coal mining under SMCRA. *Mont. Env’tl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1187 (9th Cir. 2014); *Mont. Env’tl. Info. Ctr. v. Opper*, 2013 U.S. Dist. LEXIS 29184, \*7; \*13 2013 WL 485652; 30 C.F.R. §§ 926.10; 926.30.

*b) Montana’s Regulation of Coal Mining’s Water Quality Impacts*

Two sections of the Clean Water Act have been put into dispute herein, only one of which bears any substantive relationship with MSUMRA. CWA § 303 (33 U.S.C. § 1313(a)-(c)) authorizes states to establish federally enforceable water quality standards as state law (which Montana has done). Section 402 of the CWA applies to the federally-delegated Montana Pollutant Discharge Elimination System (“MPDES”) permit program for point source discharges and is utterly inapplicable to this case. *See* 33 U.S.C. § 1342; § 75-5-402, MCA.

Petitioners urge the Board to apply a MPDES “cause or contribute” standard to this case. *See* Petitioners’ Exceptions at 14, citing *Friends of Pinto Creek v. United States EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007). The Proposed Ruling correctly

rejected Petitioner’s attempt to amalgamate inapplicable MPDES standards with MSUMRA’s material damage standard. *Id.* at 66, n 3. MPDES permits apply to “point sources” which are defined by § 75-5-103(29), MCA. MPDES permits are required to discharge pollutants into state waters from a point source. § 75-5-605(2)(c), MCA. DEQ may not issue a MPDES Permit “if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” ARM 17.30.1311(7); *compare Pinto Creek*, 504 F.3d at 1011-12. This case does not involve an appeal of a MPDES Permit.

The Department’s material damage assessment addressed impacts to groundwater hydrology and to surface water hydrology and the relationship between the two. *See* Proposed Ruling, Findings of Fact ¶ 213-232 (surface water material damage assessment); ¶ 233-248 (groundwater material damage assessment). With respect to “point source” surface water discharges, the AM4 CHIA explains that protection from such discharges is ensured by MPDES permit requirements. **DEQ-Exh-1A**, AM4 CHIA at 2-6 to 2-7; 7-1 to 7-2; 9-21; 9-30 to 9:31. *See also* ARM 17.30.1311(1) (MPDES Permits require compliance with all applicable water quality standards).

The material damage standard contained in MSUMRA does not refer to “contribution.” MSUMRA instead defines “material damage” to mean degradation or reduction of water quality or quantity by coal mining. § 82-4-203(32), MCA

(emphasis added). Thus, by definition, the inquiry herein (against which the design standard at issue is measured) involves the question of whether the proposed project will cause violations of water quality standards, adverse effects to beneficial uses, or impacts to water rights. §§ 82-4-203(32); 82-4-227(3)(a), MCA; *Signal Peak*, 2-13-07 SM at 63, ¶ 86; 75, ¶ 112 (applying causation standard).

### **III: CWA § 303(d)**

In addition to authorizing states to establish water quality standards via CWA § 303(a)-(c), Section 303(d) of the CWA on the other hand requires the states to identify waterbodies that do not meet water quality standards. 33 U.S.C. § 1313(d). In some circumstances, states must develop a Total Maximum Daily Load (“TMDL”) for an impaired waterbody, which is basically a pollutant budget for a waterbody. *See* 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(i). DEQ’s Water Quality Planning Bureau conducts assessments and issues a biennial report listing impaired waters to EPA pursuant to CWA § 303(d). Proposed Ruling at 24, ¶ 79. Such biennial reports must also include a list of DEQ’s TMDLs. 40 C.F.R. § 130.7. An aggrieved person can appeal EPA’s approval of DEQ’s biennial report to federal court. *Friends of the Wild Swan, Inc. v. United States EPA*, 130 F. Supp. 2d 1184, 1187 (D. Mont. 1999). DEQ’s Coal Section does not make impairment determinations. Proposed Ruling at 24, ¶ 80.

#### **IV: Burden of Proof**

The applicant in the permitting process before the Department bears the burden of affirmatively demonstrating with record evidence that the project is designed to prevent material damage. *Signal Peak* at 76, ¶ 116. The contested case provisions of the Montana Administrative Procedure Act, however, apply to this contested case before the Board. § 82-4-206(2), MCA; Proposed Ruling at 64, citing *MEIC v. DEQ*, 2005 MT 96 at ¶ 16. The Department otherwise incorporates its own Exceptions at pp. 2-10 by reference on this point.

#### **V: Issue Exhaustion**

An agency decision may not be reversed “unless the administrative body not only has erred but has erred against objection made at the appropriate time under its practice.” *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 37 (1952). A party who has failed exhaust the remedies provided cannot later be heard to decry the process of which they failed to avail themselves. *See Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund*, 2001 MT 72, ¶ 40, 305 Mont. 40, 23 P.3d 193.

The Board applied issue exhaustion (without denominating it as such) against the Department in *Signal Peak* when it precluded the Department from presenting *both* extra-record evidence and arguments. BER-2-13-07 SM at ¶ 68, P. 57. Issue

exhaustion must be applied uniformly across the board to all parties precisely because the only relevant facts in this case are those compiled by the Department in the permitting process before the Department makes its permitting decision. *See Signal Peak*, 2013-07 SM at 56, ¶ 66; 8-81, ¶ 124, citing ARM 17.24.314(5); 17.24.305(6)(c). Otherwise, a party could fail to raise an issue below and then be able to have the Board reverse DEQ on appeal for not addressing an issue which was not raised in the permitting process in the first place.

The Order on Motions in Limine is based upon the statutory and regulatory structure of MSUMRA, as well as prior Board decisions. *Id.* at pp. 4-5. The issue exhaustion requirement in MSUMRA derives from the structure of the statute itself. Petitioners' citation to *Sims v. Apfel*, 530 U.S. 103 (2000), for the proposition that courts should not create exhaustion requirements which do not exist in statute or regulation is accordingly unavailing.

Also unavailing is Petitioners' argument that *Signal Peak* stands for the proposition that DEQ may only defend a CHIA based upon the arguments of counsel, and may not offer expert testimony for that purpose. Petitioners' Exceptions at 50, n. 26. *Signal Peak* was submitted for summary judgment based upon undisputed facts and "pure[] questions of law. . ." *See id.* at 2. Thus, that ruling indicated that DEQ was not limited in its permitting defense to presenting the

administrative record and nothing more, and that DEQ's counsel could present argument as well. *Id.* at 59, ¶ 70.

## **VI: East Fork Armells Creek**

East Fork Armells Creek ("EFAC") originates upstream of the Rosebud mine, as "Upper EFAC," which continues through the mine and to a highway bridge downstream of the mine, at which point it becomes "Lower EFAC." Proposed Ruling at 19, ¶ 41; 20, ¶ 45. Lower EFAC continues through the town of Colstrip until its conflux with the West Fork Armells Creek. *Id.* at 21, ¶ 56.

Upper EFAC is not listed as a so-called "impaired water" by DEQ for aquatic life uses based upon TDS or specific conductance ("salt" to a layperson). *Id.* at 28, ¶ 89 to 29, ¶ 94. Lower EFAC, which has "much worse" water quality than Upper EFAC (*id.* at 21, ¶ 58), is listed by DEQ as an impaired water for aquatic life support functions based upon specific conductance or TDS as a potential cause. *Id.* at 29, ¶ 96.

DEQ's Attainment Records identify specific conductance and TDS with low confidence as the cause of Lower EFAC's impairment, and identify coal mining as one unconfirmed source of the TDS and specific conductance in Lower EFAC. *Id.* at 29, ¶ 96. DEQ's Attainment Records for both Upper EFAC and Lower EFAC do

not, however, show that EFAC's impairments are attributable to mining. *Id.* at 87, ¶ 35.

Impairment determinations made by the Water Quality Planning Bureau pursuant to CWA § 303(d) do not equate to determinations of water quality standard violations or “material damage” determinations that may prevent permit approval pursuant to MSUMRA. Proposed Ruling at 87, ¶ 33 citing § 82-4-201, MCA et seq. and 40 CFR Subchapter D.<sup>1</sup>

With respect to the material damage issue herein, DEQ Staff testimony and record evidence “convincingly confirmed” that none of EFAC's existing impairments (Upper or Lower) were attributable to coal mining. *Id.* at 87-88, ¶ 35. DEQ's material damage assessment found that “mining is not the source” of Lower EFAC's TDS impairment based, in part on Upper EFAC “data right next to the mine” (which provides the most appropriate determination of mine impacts) which did not show increased TDS from mining. Proposed Ruling at 29, ¶ 96; 32, ¶ 106; *see also id.* at 23-24, ¶¶ 71-72; 88, ¶ 36. Increased concentrations of TDS or “salt” sampled in Lower EFAC “are not attributable to past mining.” *Id.* at 23, ¶ 71. Lower EFAC “is influenced by groundwater inflow and surface water runoff from a variety of anthropogenic sources, including cattle grazing, agriculture, fertilizer from

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<sup>1</sup> The support for Petitioners' claims of existing water quality violations below, however, was “limited to water quality assessments and Clean Water Act 303(d) impairment determinations made by DEQ's Water Quality Planning Bureau.” Proposed Ruling at 86, ¶ 32.

residential lawns, fertilizer from a commercial golf course, and discharges from a municipal water treatment plant.” *Id.* at 23-24, ¶ 72. Lower EFAC impairments are likely attributable to such sources (e.g., the town of Colstrip). *Id.* at 88, ¶ 36.

## **VII: The Cumulative Impacts of All Mining**

### *a) TDS*

Strip-mining for coal at the Rosebud Mine basically involves excavating through the “overburden” (or “spoil”) materials down to the coal seam (which is then removed), and backfilling the excavation with overburden. Proposed Ruling at 16-17, ¶¶ 34-35. Groundwater re-saturates the backfilled spoil resulting in increased concentrations of ionic components (such as TDS) in the groundwater, some of which moves downgradient towards either bedrock units outside the mine or towards EFAC. *Id.* at 16-19, ¶¶ 34-45.

Petitioners’ claim that the Proposed Ruling finds “The cumulative effect of existing mining operations . . . will cause a 13% increase in salinity in the alluvium of EFAC, which will enter EFAC as baseflow.” *Id.* at 13 (emphasis added); *see also id.* at 13; 18; 23; 50-52. Petitioners also attempt to distort the Proposed Ruling as concluding that the cumulative impacts of mining will increase salinity pollution in EFAC, resulting in a violation of water quality standards. Petitioners’ Exceptions at 14. Relying on the inapplicable *Pinto Creek* case, Petitioners claim that “any

discharge<sup>2</sup> of the pollutant causing the impairment will result in a violation of water quality standard . . .” *Id.* at 14-15. These claims are incorrect.

First, the Proposed Ruling found that mining from AM4 will not lead to higher salt concentrations in EFAC beyond those already resulting from previously approved mining which was analyzed under earlier CHIAs. *Id.* at 55, ¶ 216; *see also id.* at 36, ¶ 124 to 38, ¶ 135. Such previously approved mining was completed decades ago, and the spoil from this mining has become saturated in the intervening years and developed the existing concentrations of TDS. *Id.* at 57, ¶ 223.

Second, the Proposed Ruling does not conclude that the pre-existing and previously-permitted potential 13% increase in alluvial TDS “will enter EFAC as baseflow” but instead finds that only “a portion” of the TDS entering the alluvium from mining “would enter into base flow.” *Id.* at 37, ¶ 134.<sup>3</sup> Petitioners’ expert failed to calculate an increase in salinity in EFAC (as opposed to the alluvium) to support his opinion. *Id.* at 36, ¶ 125, 39, ¶ 143. Groundwater baseflow from the alluvium to EFAC is actually insignificant, which means “TDS levels in EFAC will not be

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<sup>2</sup> Petitioners also presented no evidence at hearing to support any conclusion that the baseflow groundwater to EFAC constitutes a “discharge” as that term is defined by Montana law. § 75-5-103(29), MCA.

<sup>3</sup> The EFAC alluvium near the Rosebud Mine has a wide range of naturally occurring specific conductance (salinity, here also measures as TDS). Proposed Ruling at 34, ¶ 115. The natural variability of TDS in the alluvium is of a much larger magnitude than a 13% change in TDS. Such changes are not therefore likely to be distinguishable from natural variations. Proposed Ruling at 34-35, ¶¶ 115-122.

significantly impacted by groundwater [alluvium] TDS levels associated with the AM4 Permit.” *Id.* at 56-57, ¶¶ 221-222; 39, ¶ 139.

*b) Aquatic Life*

Petitioners’ claim that the Proposed Ruling “determined that the mere presence of aquatic life in EFAC was sufficient to demonstrate that water quality standards for growth and propagation of aquatic life were, in fact, met . . .” (*id.* at 2; *see also id.* at 24-26) is incorrect. The Department considered biological data along with other lines of evidence (such as physical and chemical data). *Id.* at 45, ¶ 173; 51-52, ¶¶ 197-198.

Dr. Hinz (a DEQ hydrologist) requested that the applicant gather biological data so DEQ could qualitatively compare the biota which were present in Upper EFAC adjacent to the mine in the 1970s with current conditions. *Id.* at 49-51, ¶ 188. The 2014 data empirically demonstrated the existence of a diverse community of macroinvertebrates, which consisted of taxa commonly found in eastern Montana prairie streams and was consistent (in terms of taxa richness) with the 1970s sampling data. *Id.* at 50-51, ¶¶ 189-194.

Petitioners’ additional claims that the record shows that the qualitative use of macroinvertebrate sampling data was not a reliable means to empirically assess impacts in making a material damage determination is likewise false. Petitioners’ Exceptions at 27-28. The Department, to be sure, does not consider

macroinvertebrate data when making CWA § 303(d) impairment determinations for eastern Montana streams. *Id.* at 27-28. This is because the Department considers biological data to be an unreliable metric for assessing whether an eastern Montana stream is meeting water quality standards pursuant to CWA § 303(d). *Id.* at 47-48, ¶ 181; 48-49, ¶ 183-187; 50, ¶ 189.

But here, the question is not whether the entire stream reach is or is not meeting water quality standards. This case involves an impact assessment which addresses whether the proposed project is designed to prevent violations to water quality standards. DEQ utilized biological data for purposes of the impact assessment at issue, rather than to assess whether EFAC was currently meeting water quality standards under CWA § 303(d). *Id.* at 51, ¶ 196; *see also id.* at 46, ¶ 176; 48, ¶ 183; 49-50, ¶¶ 188-192. Petitioners' aquatic ecology expert agreed that macroinvertebrate data could be used for such purposes, as did all testifying experts in aquatic ecology and/or water quality assessment. *Id.* at 51, ¶ 200; 52, ¶¶ 203-206; 51, ¶ 195; 48, ¶ 183.<sup>4</sup>

Petitioners' also attack Dr. Hinz's qualifications on the grounds that she is a hydrologist rather than an expert in aquatic life or ecology. *Id.* at 28-31. The Order

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<sup>4</sup> The Department did not, as Petitioners claim, "prohibit" anyone from analyzing macroinvertebrates or water quality standards. Petitioners' Exceptions at 29-31. The Department simply ensured that the macroinvertebrate data would be appropriately analyzed and utilized for a qualitative impact analysis rather than to inform a CWA § 303(d) listing decision. Proposed Ruling at 45, ¶ 171; 46-47, ¶¶ 176-177; 47-50, ¶¶ 179-189.

on Motions in Limine rejected such arguments, and permitted experts such as DEQ's hydrologists to explain how they relied on biological data to reach their expert opinions. *Id.* at 10. M. R. Evid. 703 "allows an expert to rely upon third-party generated data in forming his or her opinion. Reference to such data is admissible if it is 'reasonably relied upon by experts' in that particular field." *Weber v. BNSF Ry. Co.*, 2011 MT 223, 38, 362 Mont. 53, 261 P.3d 984, citing M. R. Evid. 703. Such is the case at bar. *See* Affidavits of DEQ Coal Section hydrologists, Exhibits **A** and **B** hereto, which were furnished in response to Petitioners' Motions in Limine.

#### **VIII: Other Distortions of the Record**

Petitioners' Exceptions also falsely claim:

- (a) That AM4 will extend the duration of salinity impacts "by tens or hundreds of years . . ." *Id.* at 13-14; 18-19; 22-23. The record instead reflects that this "could occur," that neither side presented convincing evidence on this point, and that "precise evidence on this point may be impossible. . ." Proposed Ruling at 73, n. 4;
  
- (b) That DEQ "stated" that chloride "was causing material damage", when DEQ instead stated that DEQ was "concerned" that material damage may be occurring (Petitioners' Exceptions at 45);

- (c) That § 82-4-227(a)(3) authorizes DEQ to assess claims of past (rather than prospective) material damage, such as the alleged dewatering of EFAC. Petitioners' Exceptions at 42-44. Notably, the federal Office of Surface Mining, Reclamation and Enforcement (OSMRE) has already rejected such claims (which were properly brought as enforcement and not permitting claims). *See* Exhibit C hereto, July 12, 2018 OSMRE Decision.
- (d) That the comparison of 1970s and 2014 macroinvertebrate data was a "post hoc" analysis. Petitioners' Exceptions at 53. That analysis was contained in the CHIA. Proposed Ruling at 44-47, ¶¶ 170-178; 50-51, ¶¶ 190-194, and;
- (e) That Petitioners' had raised MSUMRA issues during the permitting process regarding alleged cumulative hydrologic impacts between AM4 and the proposed Area F expansion at the mine. Petitioners' Exceptions at 41-42. The record instead reflects that Petitioners' AM4 comments attached and incorporated scoping comments which Petitioners had made to OSMRE on an Area F coal lease modification which argued that OSMRE should consider AM4 and the Area F as "[c]onnected and cumulative actions" within the meaning of the National Environmental Policy Act. *See* March 13, 2018 Motion Argument Transcript at 45:25 to 48:17, citing DEQ-Exh-4L at 17-18.

The Department respectfully reserves its rights to address the balance of Petitioners' distortions at hearing.

### Conclusion

Based on all the foregoing, the Board should reject Petitioners Exceptions, clarify the burden of proof per DEQ's Exceptions, and otherwise affirm the Proposed Ruling.

Dated: May 24, 2019

Respectfully submitted,



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Total Word Count: 3,250

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2019, a true and accurate copy of DEQ's Response to Petitioner's Exceptions to Proposed Order with Exhibits A, B and C in BER 2016-03 SM was mailed by electronic mail, addressed as follows:

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

	)	Case No. BER 2016-03 SM
	)	
IN THE MATTER OF:	)	<b>AFFIDAVIT OF MARTIN VAN</b>
APPEAL AMENDMENT AM4	)	<b>OORT IN OPPOSITION TO</b>
WESTERN ENERGY COMPANY	)	<b>PETITIONER THE MONTANA</b>
ROSEBUD MINE AREA B,	)	<b>ENVIRONMENTAL</b>
PERMIT NO. C1984003B.	)	<b>INFORMATION CENTER'S</b>
	)	<b>MOTION IN LIMINE TO EXCLUDE</b>
	)	<b>DEQ STAFF TESTIMONY</b>

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STATE OF MONTANA	}
	}
COUNTY OF LEWIS	}
AND CLARK	}

**MARTIN VAN OORT**, being of majority age, and having first been duly sworn, deposes and states:

1. I am a Hydrologist serving in the Coal Section of the Montana Department of Environmental Quality (DEQ), a position which I have held since 2013. In that capacity, I am fully familiar with the facts, circumstances and permitting and procedural history associated with the AM4 Amendment to Western Energy Company, Rosebud Coal Mine Area Permit No. C1984003B which is at issue in the above-captioned appeal.

2. I was personally and substantially involved with DEQ's issuance of the AM4 Amendment, including review and consultation with the authors of DEQ's Comprehensive Hydrologic Impact Assessment (CHIA), Dr. Emily Hinz and Angela McDannel. I also made the final editorial changes to the groundwater portions of the CHIA after Mrs. McDannel's retirement in 2015.

3. I make this Affidavit based upon my personal knowledge, my aforementioned direct involvement with the AM4 Amendment process, and my review and understanding of DEQ's files associated with the Rosebud Mine and Western Energy's coal mining operations.

4. My curriculum vitae, attached as **Exhibit R** to the DEQ Response to MEIC's Motions in Limine, fairly and accurately summarizes my education, experience and training.

5. I make this Affidavit in opposition to the February 12, 2018 Motion in Limine by Petitioner the Montana Environmental Information Center (MEIC) to Exclude DEQ Staff's Expert Regarding the Health of Aquatic Life in East Fork Armells Creek (MEIC's Aquatic Life Motion).

6. The DEQ Coal Section is charged with determining whether the proposed operation of AM4 is designed to prevent material damage outside the permit area. In order to make this determination, sound scientific practice requires the assessment of a wide variety of chemical, physical, and biological parameters of water quality.

7. DEQ Coal Section hydrologists rely on various information outside of their specific expertise to evaluate the hydrologic impacts of mining. Information developed by professionals in fields such as engineering, chemistry, and biology are routinely evaluated by DEQ Coal Section hydrologists and used to inform the conclusions in CHIAs. The scientific training acquired by DEQ Coal Section hydrologists through their education and experience qualifies them to use this interdisciplinary information in an appropriate scientific manner while drawing conclusions about hydrology.

8. DEQ Coal Section hydrologists accordingly assess a variety of long-term datasets in connection with the Coal Section's permitting determinations. Macroinvertebrate sampling has routinely been included in baseline data collection at coal mines in Montana.

9. With respect to the question of whether the proposed operation of AM4 is designed to prevent material damage to aquatic life support standards in East Fork Armells Creek, DEQ Coal Section hydrologists assessed chemical

(sulfate, chloride and salinity<sup>1</sup>), physical (intermittent vs. ephemeral flows<sup>2</sup>) and biological (macroinvertebrate sampling and observations of vegetation) parameters of data and lines of evidence in connection with DEQ's negative material damage determination in the AM4 CHIA.

10. The CHIA includes the assessment of additional third party biological data such as wetland assessments and macroinvertebrate surveys conducted on upper East Fork Armells Creek (CHIA at 9-7 through 9-8).

11. DEQ Coal Section hydrologists, like all hydrologists, routinely and reasonably rely on such third-party generated data (chemical, physical and biological) in forming our opinions.

12. DEQ Coal Section hydrologists first obtained and assessed biological water quality data in the form of macroinvertebrate sampling in the 1970s in connection with the early permitting of the Rosebud Mine.

13. DEQ Coal Section hydrologists do not purport to be qualified to collect macroinvertebrate samples or to identify the taxa present in those samples. Collection of the macroinvertebrate samples was conducted by qualified Arcadis staff, and taxa identification was conducted by qualified Normandeau Associates staff. These qualified professionals created a third-party report, the Arcadis Report, for the use of DEQ Coal Section hydrologists.

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<sup>1</sup> CHIA at 9-8.

<sup>2</sup> CHIA at 2-3; 9-7 to 9-8.

14. As DEQ Staff's Disclosure explains DEQ's CHIA included a line of evidence which assessed the impacts of mining on the aquatic life use of the upper segment of East Fork Armells Creek by comparing a recent (2014) aquatic life (macroinvertebrate) survey with previous aquatic life surveys (1976, 1977 and 1978) (DEQ Staff Disclosure at 40-42).

15. DEQ Coal Section hydrologists requested the applicant to gather additional biological data via a June 3, 2014 Seventh Round Deficiency Letter to the Rosebud Mine (the "Seventh Round Deficiency Letter", attached as **Exhibit O** to the DEQ Response to MEIC's Motions in Limine) during the permitting process which requested that the applicant confirm that existing and anticipated ionic components have not impaired and will not impair aquatic life uses in East Fork Armells Creek (*id.* at 1-2).

16. DEQ's Seventh Round Deficiency Letter also requested the applicant to conduct a current aquatic survey along stretches of upper East Fork Armells Creek adjacent to the Rosebud Mine permit areas to identify assemblages of aquatic life using the stream habitat in order to update aquatic life surveys conducted in the 1970s (*id.*).

17. DEQ Coal Section Staff confirmed with DEQ Water Quality Bureau Staff the understanding that the updated aquatic life survey was not being sought to determine whether East Fork Armells Creek was impaired, but instead to "compare existing assemblages to these historic assemblages. . ." (MEIC Aquatic Life Motion **Exhibit 4**, Emails between Peter Schade, DEQ, and David Feldman, DEQ (May 2014)).

18. The applicant conducted the aquatic life sampling and provided Arcadis Report, December 2014 Rosebud Mine Aquatic Survey Assessment, (**Exhibit P** hereto).

The Arcadis Report was considered by the DEQ Coal Section hydrologists in connection with our material damage determination of the impact of the proposed operation of AM4 on the beneficial use of aquatic life support in East Fork Armells Creek (DEQ Staff Disclosure at 40-42).

19. In approving AM4, DEQ noted that Western Energy's Arcadis Report "provides empirical evidence that Aquatic Life support is not adversely affected by mining activity."<sup>3</sup> This conclusion was not formed based on specialized knowledge of aquatic ecology or upon a quantitative analysis comparing the taxa from the 1970s with the 2014 sampling data. This conclusion was instead based upon a qualitative analysis of information provided by a qualified third party and using general scientific knowledge of data analysis and comparison.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 23 day of FEBRUARY 2018

By: \_\_\_\_\_



Martin Van Oort  
DEQ Coal Section Hydrologist

Subscribed and sworn to before me this 23rd day of FEBRUARY 2018, by Martin Van Oort,

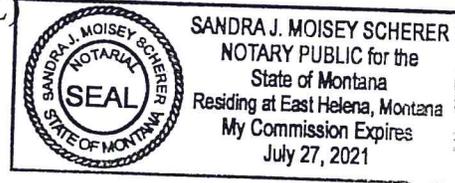
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<sup>3</sup> DEQ December 4, 2015 Written Findings on the Rosebud Mine AM4 Amendment, **Exhibit A** to the Department's February 12, 2018 Motion in Line at 9.

NAME: Sandra J. Moisey Scherer

NOTARY PUBLIC for the State of Montana

(SEAL)



Residing in Lewis and Clark County.

My Commission Expires: \_\_\_\_\_

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

	)	Case No. BER 2016-03 SM
	)	
IN THE MATTER OF:	)	<b>AFFIDAVIT OF DR. EMILY HINZ</b>
APPEAL AMENDMENT AM4	)	<b>IN OPPOSITION TO PETITIONER</b>
WESTERN ENERGY COMPANY	)	<b>THE MONTANA</b>
ROSEBUD MINE AREA B,	)	<b>ENVIRONMENTAL</b>
PERMIT NO. C1984003B.	)	<b>INFORMATION CENTER'S</b>
	)	<b>MOTION IN LIMINE TO EXCLUDE</b>
	)	<b>DEQ STAFF TESTIMONY</b>

---

STATE OF MONTANA        }  
                                          }  
COUNTY OF LEWIS        }  
AND CLARK                    }

**DR. EMILY HINZ**, being of majority age, and having first been duly sworn,  
deposes and states:

1. I am currently employed as a Computer Software Engineer with Montana Fish, Wildlife and Parks (“FWP”) and have been employed in that position for just over two years.

2. I was previously employed by the Montana Department of Environmental Quality (“DEQ”) as a hydrologist, in the Coal Section of the Industrial and Energy Minerals Bureau. I served in that position for 4.5 years.

3. My curriculum vitae, attached as **Exhibit Q** to the DEQ Response to MEIC’s Motions in Limine, fairly and accurately summarizes my education, experience and training.

4. The Coal Section of the Industrial and Energy Minerals Bureau is responsible for permitting strip and underground coal mines in Montana. As a part of my regular duties at DEQ, I reviewed applications for permits and major revisions to permits for strip and underground mines in Montana.

5. I was one of the hydrogeologists that worked on the preparation of the CHIA for the AM4 Amendment to Western Energy Company’s Rosebud Coal Mine Area B (“AM4”). I served as the primary surface water hydrogeologist, while Angela McDannel, who is now retired from DEQ, served as the primary ground water hydrologist on the CHIA.

6. I am thus fully familiar with the facts, circumstances and permitting and procedural history associated with the AM4 Amendment to Western Energy Company, Rosebud Coal Mine Area Permit No. C1984003B which is at issue in the above-captioned appeal.

7. I make this Affidavit based upon my personal knowledge, my aforementioned direct involvement with the AM4 Amendment process, and my review and understanding of DEQ's files associated with the Rosebud Mine and Western Energy's coal mining operations.

8. I make this Affidavit in opposition to the February 12, 2018 Motion in Limine by Petitioner the Montana Environmental Information Center (MEIC) to Exclude DEQ Staff's Expert Regarding the Health of Aquatic Life in East Fork Armells Creek (MEIC's Aquatic Life Motion).

9. DEQ relies primarily on the information, including a wide variety of data, included in the permit application, including the Plan for Protection and the PHC to assess the probable cumulative impact of all anticipated mining on the hydrologic balance in the area and to make the material damage determination required pursuant to § 82-4-227(3), MCA.

10. The DEQ Coal Section is charged with determining whether the proposed operation of AM4 is designed to prevent material damage outside the permit area. In order to make this determination, sound scientific practice requires the assessment of a wide variety of chemical, physical, and biological parameters of water quality.

11. DEQ Coal Section hydrologists rely on various information outside of their specific expertise to evaluate the hydrologic impacts of mining. Information developed by professionals in fields such as engineering, chemistry, and biology are routinely evaluated by DEQ Coal Section hydrologists and used to inform the conclusions in

CHIAs. The scientific training acquired by DEQ Coal Section hydrologists through their education and experience qualifies them to use this interdisciplinary information in an appropriate scientific manner while drawing conclusions about hydrology.

12. DEQ Coal Section hydrologists accordingly assess a variety of long-term datasets in connection with the Coal Section's permitting determinations. Macroinvertebrate sampling has routinely been included in baseline data collection at coal mines in Montana.

13. With respect to the question of whether the AM4 Amendment is designed to prevent material damage to aquatic life support standards in East Fork Armells Creek, DEQ Coal Section hydrologists assessed chemical (sulfate, chloride and salinity), physical (intermittent vs. ephemeral flows) and biological (macroinvertebrate sampling and observations of vegetation) parameters of data and lines of evidence in connection with DEQ's negative material damage determination.

14. The CHIA includes the assessment of additional third party biological data such as wetland assessments and macroinvertebrate surveys conducted on upper East Fork Armells Creek (CHIA at 9-7 through 9-8).

15. DEQ Coal Section hydrologists, like all hydrologists, routinely and reasonably rely on such third-party generated data (chemical, physical and biological) in forming our opinions.

16. DEQ Coal Section hydrologists first obtained and assessed biological water quality data in the form of macroinvertebrate sampling in the 1970s in connection with

the early permitting of the Rosebud Mine.

17. DEQ Coal Section hydrologists do not purport to be qualified to collect macroinvertebrate samples or to identify the taxa present in those samples. Collection of the macroinvertebrate samples was conducted by qualified Arcadis staff, and taxa identification was conducted by qualified Normandeau Associates staff. These qualified professionals created a third-party report, the Arcadis Report, for the use of DEQ Coal Section hydrologists.

18. As DEQ Staff's Disclosure explains DEQ's CHIA included a line of evidence which assessed the impacts of mining on the aquatic life use of the upper segment of East Fork Armells Creek by comparing a recent (2014) aquatic life (macroinvertebrate) survey with previous aquatic life surveys (1976, 1977 and 1978) (DEQ Staff Disclosure at 40-42).

19. DEQ Coal Section hydrologists requested the applicant to gather additional biological data via a June 3, 2014 Seventh Round Deficiency Letter to the Rosebud Mine (the "Seventh Round Deficiency Letter", attached as **Exhibit O** to the DEQ Response to MEIC's Motions in Limine) during the permitting process which requested that the applicant confirm that existing and anticipated ionic components have not impaired and will not impair aquatic life uses in EFAC (id. at 1-2).

20. DEQ's Seventh Round Deficiency Letter also requested the applicant conduct a current aquatic survey along stretches of upper East Fork Armells Creek adjacent to the Rosebud Mine permit areas to identify assemblages of aquatic life using the stream

habitat in order to update aquatic life surveys conducted in the 1970s (*id.*).

21. DEQ Coal Section Staff confirmed with DEQ Water Quality Bureau Staff the understanding that the updated aquatic life survey was not being sought to determine whether East Fork Armells Creek was impaired, but instead to “compare existing assemblages to these historic assemblages. . .” (MEIC Aquatic Life Motion **Exhibit 4**, Emails between Peter Schade, DEQ, and David Feldman, DEQ (May 2014)).

22. The applicant conducted the aquatic life sampling and provided Arcadis Report, December 2014 Rosebud Mine Aquatic Survey Assessment, (**Exhibit P** to the DEQ Response to MEIC’s Motions in Limine). The Arcadis Report was considered by the DEQ Coal Section hydrologists in connection with our material damage determination of the impact of the proposed operation of AM4 on the beneficial use of aquatic life support in East Fork Armells Creek (DEQ Staff Disclosure at 40-42).

23. In approving AM4, DEQ noted that Western Energy’s Arcadis Report “provides empirical evidence that Aquatic Life support is not adversely affected by mining activity.” DEQ December 4, 2015 Written Findings on the Rosebud Mine AM4 Amendment, **Exhibit A** to the Department’s February 12, 2018 Motion in Limine at 9.

24. This conclusion was not formed based on specialized knowledge of aquatic ecology or upon a quantitative analysis comparing the taxa from the 1970s with the 2014 sampling data. This conclusion was instead based upon a qualitative analysis of information provided by a qualified third party and using general scientific knowledge of data analysis and comparison.

FURTHER AFFIANT SAYETH NOT.

DATED this 22 day of February 2018.

By:   
EMILY HINZ, Ph.D.

Subscribed and sworn to before me this 22<sup>nd</sup> day of 2018, by Dr. Emily Hinz,

NAME:   
NOTARY PUBLIC for the State of Montana

(SEAL)  SANDRA J. MOISEY SCHERER  
NOTARY PUBLIC for the  
State of Montana  
Residing at East Helena, Montana  
My Commission Expires  
July 27, 2021

Residing in Lewis and Clark County.

My Commission Expires: \_\_\_\_\_

## United States Department of the Interior



OFFICE OF SURFACE MINING  
 Reclamation and Enforcement  
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July 12, 2018

Edward Coleman, Chief  
 Coal and Opencut Mining Bureau  
 Department of Environmental Quality  
 P.O. Box 200901  
 Helena, Montana 59620-0901

RE: Montana's Response to Ten Day Notices #X18-010-549-001, #X18-010-549-002, #X18-010-549-003, and WildEarth Guardians Citizen's Complaint – Hydrologic Protection and Clean Water Standards at Rosebud Mine in Montana

Dear Mr. Coleman,

The Office of Surface Mining Reclamation and Enforcement (OSMRE) received your letter, dated July 2, 2018, responding to the Ten-Day Notices (TDNs) #X18-010-549-001, #X18-010-549-002, #X18-010-549-003 issued to your office on May 23, 2018. These TDNs transmitted WildEarth Guardians' (WEG) citizen's complaint pertaining to Hydrologic Protection and Clean Water Standards at the Rosebud Mine for your review and response.

Pursuant to OSMRE's INE-35 and applicable regulation, the Field Office shall consider the regulatory authority's (RA) response to a TDN as constituting appropriate action to cause a violation to be corrected or good cause for failure to do so, unless the Field Office makes a written determination in accordance with 30 CFR 842.11(b)(1)(ii)(B)(I) that your response is arbitrary, capricious, or an abuse of discretion under the approved regulatory program. OSMRE will not substitute its judgment for that of the RA unless the RA's response is arbitrary, capricious, or an abuse of discretion.

Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be abated. Good cause for not taking action includes that the possible violation does not exist, the State RA requires a reasonable and specified amount of additional time to determine whether a violation exists, or the State lacks jurisdiction over the possible violation or operation.

Pursuant to OSMRE's INE-35 and applicable regulation, arbitrary, capricious, or an abuse of

discretion generally means, with respect to an RA response to a TDN, that the RA has acted—

- (1) Irrationally in that the RA's interpretation of its program is inconsistent with the terms of the approved program or any prior RA interpretation recognized by the Secretary of the Interior;
- (2) Without adhering to correct procedures;
- (3) Inconsistent with applicable law; or
- (4) Without a rational basis after proper evaluation of relevant criteria.

## FINDINGS and DETERMINATION

WEG's citizen's complaint alleged that Western Energy Company (WECO) was violating the Surface Mine Control and Reclamation Act (SMCRA), stating that WECO has violated and continues to violate performance standards related to hydrologic criteria at the Rosebud Mine, in Rosebud County, Montana. Specifically, WEG states that WECO's coal mining operations have allegedly de-watered a nearby creek, which would constitute a violation of SMCRA performance standards and SMCRA regulations. Consequently, WEG asserted that because WECO had allegedly caused material damage to a creek outside of the permit area, WECO has violated and continues to violate both SMCRA, SMCRA performance standards, and Montana regulations. WEG also alleged a violation of the Clean Water Act and the Rosebud Mine's Montana Pollutant Discharge Elimination System (MPDES) Permit limits pertaining to total maximum daily load, specifically for iron. Finally, WEG provided that "given that WECO's ongoing violations of hydrologic performance standards may reasonably cause significant and imminent environmental harm to water resources in the area, we request OSRME issue a cessation order pursuant to 30 CFR § 843.11(a)(1)(ii)." OSMRE subsequently issued three TDN's to your office on May 23, 2018. OSMRE did not, however, issue a cessation order pursuant to 30 CFR § 843.11(a)(1)(ii), because WEG did not provide adequate proof that imminent danger or harm existed, or that a cessation order was warranted due to an alleged violation of hydrologic performance standards that may reasonably cause significant and imminent environmental harm to water resources in the area.

In your response, you explain that the Montana Strip and Underground Mine Reclamation Act (MSUMRA) provides the governing law for the regulation of surface coal mining and reclamation operations in the State of Montana and that the complainant erroneously alleges various violations of SMCRA when in fact the State of Montana has achieved primacy under SMCRA. You also explain that the evidence does not support WEG's contention that East Fork Armells Creek is or was an intermittent to perennial stream, and that the WEG complaint fails to present reliable, credible and substantial evidence that the operation of the Rosebud Mine has caused material damage to the hydrologic balance of the East Fork Armells Creek basin. You further explain that a WEG requested cessation order from OSMRE to WECO is not warranted because WEG failed to identify any violation of a water quality standard or a causal nexus between the Rosebud Mine's operations and the alleged dewatering of the Upper East Fork

Armells Creek that could reasonably be expected to cause significant and imminent harm to water resources in the area.

You also indicated that you forwarded the WEG allegation of the Rosebud Mine's violation of its MPDES Permit to MT DEQ's Water Quality Division's Water Protection Bureau, as they are the State Bureau with jurisdiction over those particular matters. The MT DEQ Water Protection Bureau provided a response to the WEG complaint that pertains to the alleged violation of the Rosebud Mine's MPDES Permit, which explains that a single violation of a permit condition does not equate to a resulting violation of the receiving water's ambient water quality. Accordingly, the WEG complaint provides no basis for OSMRE to find that the Rosebud Mine has violated MSUMRA or its permit issued thereunder or that significant and imminent environmental harm is occurring or could reasonably be expected to occur to water resources.

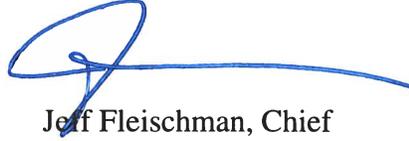
Your response states and provides supporting documentation to substantiate that the alleged violations of MSUMRA at the Rosebud Mine did not occur, are not continuing to occur, and therefore, do not exist. Further, as mentioned above, you forwarded the portion of the WEG complaint that alleged MPDES permit violations to the MT DEQ Water Protection Bureau, and the MT DEQ Water Protection Bureau assessed and rejected WEG's contentions that the Rosebud Mine is operating in violation of its MPDES Permit. And lastly, your response states and provides supporting documentation to substantiate that a cessation order from OSMRE to WECO is not warranted because the WEG complaint fails to provide the necessary justification for a cessation order to be issued.

Your response demonstrates a rational basis for concluding that the Rosebud Mine is not in violation of MSUMRA, has not dewatered East Fork Armells Creek, and has not caused material damage to a creek outside of the permit area. The MT DEQ Water Protection Bureau has assessed and rejected the allegations of MPDES Permit violations. Finally, you have demonstrated that a cessation order is not warranted because the alleged violations do not exist. Your conclusion that the Rosebud Mine is not in violation of MSUMRA is consistent with applicable law.

OSMRE has determined, pursuant to 30 CFR 842.11(b)(1)(ii)(B)(4), that you have shown good cause for not taking enforcement or other action within ten days to cause the identified potential violations to be corrected because the alleged violations do not exist under your approved regulatory program. This determination applies to TDNs #X18-010-549-001, #X18-010-549-002, and #X18-010-549-003. No further action is required under these TDNs.

If you have any questions regarding this determination, please contact me at (307) 261-6550.

Sincerely,

A handwritten signature in blue ink, consisting of a large, stylized initial 'J' followed by a horizontal line that extends to the right and then curves slightly downwards at the end.

Jeff Fleischman, Chief  
Denver Field Division – Casper Area Office

Cc: Shannon Hughes, WildEarth Guardians

# MEIC Response

Doc. 147

Environmental Review

5/24/19 at 4:03 PM

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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' Response to the  
Exceptions of DEQ and WEC**

## INTRODUCTION

The majority of the arguments raised by DEQ and WECO are rebutted in the Conservation Groups' previously filed objections and were previously rejected by the Board in *In re Bull Mountains*. Applying the principle of mercy, the groups will not repeat those arguments here. Instead, the groups briefly address novel arguments presented by DEQ and WECO.

## DISCUSSION

### **I. Burden of proof: “By law the burden of proof in the permitting process rests with the mine applicant and DEQ.”**

Both DEQ and WECO acknowledge that the proposed Findings' are inconsistent in their statements about the applicable burden of proof. The Conservation Groups agree. The Findings' errors on this fundamental point undermines their entire analysis.

Respondents' arguments for reversing the burden of proof are rebutted in the Conservation Groups objections, Pet'rs' Objections at 7-12, and are further refuted by the Board's decision in *In re Bull Mountains*, No. BER 2017-03 SM, at 76, ¶ 115 (Mont. Bd. of Env'tl. Rev. Jan. 14, 2016) (“By law the burden of proof in the permitting process rests with the mine applicant and DEQ.”); accord Mont. Code Ann. § 82-4-227(1); ARM 17.24.405(6).

Respondents fail to present a compelling basis for overruling the Board’s clear pronouncement in *In re Bull Mountains*. As such, their arguments for reversing the burden of proof should be rejected. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (explaining doctrine of *stare decisis* “ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact”).

Citing *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015), WECO attempts to draw some distinction between a “planning standard” and a “performance standard.” WECO Exception at 14. However, that case does not create the purported distinction, but only noted in passing the attempt of a federal agency (the Bureau of Safety and Environmental Enforcement (as the Mineral Management Service was renamed after the Deepwater Horizon spill)) to create such a distinction was subject to some internal “confusion.” *Id.* at 1219. The court nevertheless upheld the agency’s decision on different grounds. *Id.* While WECO’s proposed “planning standard” is similarly unclear, it is mistaken if it is an attempt to weaken the requirements of the material damage determination. The Board’s

rule regarding material damage requires DEQ to deny a permit unless and until the applicant affirmatively demonstrates and DEQ confirms based on record evidence that “cumulative hydrologic impacts *will not result in material damage.*” ARM 17.24.405(6)(c). It is not the duty of the public to prove that material damage will result. It is the burden of WECO, the seeker of the strip-mining permit, to prove that material damage “will not result.”

**II. Scope of review: “[T]he only relevant analysis is that contained within the four corners of the CHIA and the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision.”**

WECO’s arguments about the proper scope of review are rebutted in the Conservation Group’s objections, Petr’s’ Objections at 47-50, and were emphatically rejected by the Board in *In re Bull Mountains*, at 56-59, ¶¶ 66-70. WECO provides no compelling reason for the Board to overrule its prior decision. *Vasquez*, 474 U.S. at 265-66.

WECO cites only one case to support its position, *MEIC v. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 963, but that case is inapposite. *MEIC*, which addressed an appeal of an air pollution permit under the Clean Air Act of Montana, contains *no* discussion of the appropriate scope of review (though it discusses burden of proof and standard of review). *See generally id.* The applicable rules under the Montana Strip and Underground Mine Reclamation Act (MSUMRA),

require that the information on which DEQ bases its permitting decision to be “compiled by the department.” ARM 17.24.405(6). The purpose of such a provision is to facilitate review of DEQ’s decision and assure that the decision “will be based on the materials in that record. The provision requires explanation by the agency at the time of promulgation [of the decision],” and prevents “Post hoc rationalizations.” *See Am. Petroleum Instit. v. Costle*, 609 F.2d 20 (D.C. Cir. 1979) (explaining similar provision limiting decision to information compiled by agency).

WECO’s “gotcha” argument is ironic. In rejecting similar arguments in *In re Bull Mountains*, the Board explained that to allow post hoc evidence and argument to *defend* a strip-mining permit (as WECO proposes), would allow DEQ and permittees to sandbag members of the public. *In re Bull Mountains*, at 57-58, ¶ 68. That is not, and should not be, the law.

### **III. Material damage: extending the period of time that violations of water quality standards occur is material damage.**

WECO’s arguments about material damage are refuted in the Conservation Group’s objections, Petr’rs’ Objections at 19-23, and were rejected by the Board in *In re Bull Mountains*, at 82-83, ¶¶ 127-28. WECO’s argument that extending the duration of impacts is irrelevant could be considered accurate, but for the fact that in the instant case, the *existing conditions* exceed the material damage threshold—

that is to say that existing conditions are violating water quality standards. Findings at 29, 32, ¶¶ 96, 106; *id.* at 68-69. Extending the duration of conditions that already violate water quality standards will not only prolong the violation but cause more material damage. ARM 17.24.301(68) (violation of a water quality standard is material damage). The essence of WECO's argument is that once a stream is impaired (i.e., violating water quality standards), additional strip-mining can be permitted to extend the duration of that impairment indefinitely without violating MSUMRA. WECO's argument has no merit. *See In re Bull Mountains*, at 82, ¶ 127 ("By law, DEQ may not ignore the long-term water pollution impacts of the mine.").

### CONCLUSION

For the reasons stated in the Conservation Groups' objections and above, the Board should reject the Findings' erroneous conclusions and hold that DEQ violated MSUMRA when it approved the AM4 expansion of the Rosebud Strip Mine.

Respectfully submitted this 24th day of May, 2019.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I served a true and correct copy of the foregoing on counsel to this contested case via email at the following addresses:

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/s/ Derf Johnson  
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# Western Response to MEIC Obj. To Prop FOFCOL

Doc. 149

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OF: )  
APPEAL AMENDMENT AM4 )  
WESTERN ENERGY COMPANY, )  
ROSEBUD STRIP MINE AREA B ) CAUSE NO. BER 2016-03 SM  
PERMIT NO. C1984003B )  
)

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**INTERVENOR-RESPONDENTS' RESPONSE TO PETITIONERS'  
OBJECTIONS TO PROPOSED FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW**

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## GLOSSARY

Findings	Proposed Findings of Fact and Conclusions of Law
Petitioners	Montana Environmental Information Center and Sierra Club
Department	Department of Environmental Quality
Objections	Petitioner's Objections to the Proposed Findings of Fact and Conclusions of Law
MSUMRA	Montana Strip and Underground Mine Act, §§ 82-4-201, <i>et seq.</i> , MCA
MAPA	Montana Administrative Procedure Act, §§ 2-4-601 MCA
Board	Board of Environmental Review
Intervenors	Western Energy Company, Natural Resources Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association
SMCRA	Surface Management Control and Reclamation Act
Intervenors' Exceptions	Intervenor-Respondents' Exceptions to the Proposed Findings of Fact and Conclusions of Law
AM4	[include Rosebud Mine]
EFAC	East Fork Armells Creek
TMDL	Total Maximum Daily Load
Western Energy	Western Energy Company
Order	Order on Motions in Limine, attached as Exhibit A to Findings
ARCADIS Report	2014 ARCADIS Macroinvertebrate Survey
PHC	Probable Hydrologic Consequences

## **INTRODUCTION**

The Examiner's Findings demonstrate that Petitioners did not prove their case. The evidence overwhelmingly shows the Department's approval of the AM4 Permit complied with the law. Petitioners' Objections attempt to rehabilitate their case by mischaracterizing the Findings, evidence, and law.

Two laws govern the contested case: MSUMRA and MAPA. These statutes, coupled with the Montana Supreme Court's controlling precedent, *MEIC v. DEQ*, 2005 MT 96, require Petitioners to prove their claims by a preponderance of the evidence. The Examiner found Petitioners failed to do so. Not to be deterred, Petitioners now claim they need not (1) preserve their claims through the public comment process or (2) prove their claims in the contested case. Decades of administrative law, the Montana Supreme Court, and now the Examiner have rejected these arguments. The Board should reject them as well.

Petitioners did not prove their claims, and the evidence, viewed in the light most favorable to the Department and Intervenors, solidly supports the Examiner's Findings. Thus, modification or rejection of the Findings is prohibited by law.

## **STANDARD OF REVIEW**

The Board "may not reject or modify the findings of fact unless the [Board] first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial

evidence or that the proceedings on which the findings were based did not comply with essential elements of law.” § 2-4-621(3), MCA. The standard of review “is not whether there is evidence to support findings different from those made by the trier of fact but whether substantial credible evidence supports the trier’s findings.” *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶26. “Substantial evidence . . . consists of more [than] a mere scintilla of evidence but may be less than a preponderance,” and the Board evaluates the evidence “in the light most favorable to the *prevailing* party.” *Id.* (emphasis added). Likewise, the Board may not summarily “reject or modify” conclusions of law (§ 2-4-621(3), MCA), but instead must “particularize which of the hearing examiner’s findings of fact” supported the rejected conclusion and justify rejecting those factual findings based upon a lack of substantial evidence. *Ulrich v. State ex rel. Bd. of Funeral*, 1998 MT 196, ¶¶29, 40-42.

## ARGUMENT

### I. MSUMRA AND MAPA ESTABLISH A PERMIT EVALUATION PROCESS WITH APPROPRIATE PUBLIC INVOLVEMENT.

Contrary to Petitioners’ claim, (Obj., 5-6, 31-34) only MSUMRA – not SMCRA – governs the substantive permitting standards.<sup>1</sup> It is well-settled under SMCRA’s cooperative federalism that a state with an approved program has

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<sup>1</sup> The federal Clean Water Act also is not relevant because this appeal does not involve a water discharge permit. Petitioners imply the term “water quality standards” in MSUMRA is “defined” by the Clean Water Act (Obj. 7), but MSUMRA makes no such cross-reference. § 82-4-203, MCA.

“exclusive jurisdiction over the regulation of surface coal mining and reclamation operations.” *MEIC v. Opper*, 2013 U.S. Dist. LEXIS 29184 \*7-8 (D. Mont.) (Christensen, J.) (quoting *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 288-89 (4th Cir. 2001)), *aff’d sub. nom on other grounds by MEIC v. Stone-Manning*, 766 F.3d 1184 (9th Cir. 2014).

MSUMRA and its implementing regulations establish a three-step process in which the Department and the public evaluate a proposed mining permit:

- **Application and Public Review:** The application must “affirmatively demonstrate[]” the proposed mine will satisfy all statutory and regulatory requirements. § 82-4-227, MCA. Complete applications are noticed for public inspection. ARM 17.24.401. The public may comment and meet with the Department to discuss any concerns. ARM 17.24.402(2)(a), 17.24.403.
- **Department Review:** The Department may not issue the permit unless it “confirm[s]” the application’s conclusions that the proposed mine will meet all requirements. ARM 17.24.405(6).
- **Contested Case:** If the Department’s decision is challenged, MSUMRA requires the Board to follow MAPA’s contested case procedures. § 82-4-130, MCA.

**A. Controlling Precedent Requires that Petitioners Bear the Burden of Proof in a Contested Case.**

The Montana Supreme Court ruled that (1) the burdens on the Department and the applicant in the permitting stages do not extend into the contested case, and (2) the permit challenger bears the burden of proving its claims in the contested case by a preponderance of the evidence. *See MEIC*, ¶¶10-16, 21-26. Petitioners previously accepted this (*see* Order, 3), but they now disavow their concession. Obj., 9.

**1. Once the Department issues the Permit, Petitioners in the Contested Case Shoulder the Burden of Proof.**

Petitioners do not object to the Examiner’s description of the burdens on Western Energy and the Department in the permitting stages (Findings, 63-64); they do, however, argue that these burdens relieve Petitioners from proving their claim (that the Department violated the law) in the contested case. Obj., 8-10. Petitioners claim that *MEIC* does not apply and that another Supreme Court decision, *Bostwick Properties, Inc. v. MDNRC*, 2013 MT 48, supports their position. Petitioners have it backwards. *MEIC* is controlling law, and *Bostwick* is inapposite.

Petitioner *MEIC* already litigated the theory that it need not prove its claims in contested cases before the Montana Supreme Court, which soundly rejected it. *MEIC*, ¶¶10-16. Unless otherwise instructed by a “specific statute,” “Montana’s

general common law and statutory rules of evidence apply to a contested case hearing . . .” *Id.*, ¶13. Thus, the “party asserting a claim for relief bears the burden of producing evidence in support of that claim.” *Id.*, ¶14.

Petitioners maintain that MSUMRA includes a “specific” burden-shifting instruction. Obj., 9-10. This is wrong. The MSUMRA “instruction” Petitioners cite is the applicant’s burden in the *first* stage of permit review. *See* Obj., 10 (citing § 82-4-227(1), MCA).<sup>2</sup> An instruction relieving Petitioners’ burden in the *contested case* would be in the contested case provisions. Fatally for Petitioners’ argument, *MEIC* held that contested case instructions functionally identical to MSUMRA’s did *not* include such an instruction.<sup>3</sup> Indeed, Petitioners’ position – that they need not prove the Department violated the law – would obviate the need for a contested case (contrary to the express provisions of MSUMRA).

Moreover, Petitioners ignore the controlling Board regulation codifying *MEIC*’s holding for MSUMRA contested cases: “The burden of proof at a

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<sup>2</sup> Obj., 10. Petitioners miscite *Bull Mountain*; the cited discussion merely identifies the burdens on the applicant and Department “in the permitting process.” *Bull Mountain*, ¶115 (citing § 82-4-227(3)(a), MCA (Department’s review standard) and ARM 17.24.405(6)(c) (burden on applicant in application)).

<sup>3</sup> *Compare* § 75-2-211(10), MCA (“The contested case provisions of the Montana Administrative Procedure Act . . . apply to a hearing before the board under this subsection.”) *with* § 82-4-130, MCA (“The contested case provisions of the Montana Administrative Procedure Act . . . apply to a hearing held under this part.”).

[contested case] hearing is on the party seeking to reverse the decision of the board.” ARM 17.24.423(7).

Finally, *Bostwick* provides Petitioners no support because there the agency *denied* the permit, and the *applicant* was seeking to overturn the decision. *Bostwick*, ¶¶13-14. Therefore, *because it was making the claim*, the applicant bore the burden of proof to show the agency erred, *i.e.*, that the applicant made the necessary showing and the agency illegally withheld the permit. Here, Petitioners make the claim and bear the burden of proof.

**2. Petitioners must prove their claims by a preponderance of the evidence.**

Petitioners claim that the Examiner required them to “prove by a preponderance of the evidence that ‘the AM4 Amendment *will result*’ in material damage.” Obj., 7 (quoting Findings, 65-66 (emphasis in Obj.)). Preferring to challenge a soundbite, Petitioners disregard the thorough articulation of the burden earlier on the page and in the Proposed Conclusions: Petitioners “have the burden to show, by a preponderance of the evidence, that DEQ had information available to it, at the time of issuing the permit, that indicated issuing the permit *could* result in ‘material damage.’” Findings, 65 (emphasis in original), *id.*, Proposed Conclusion ¶12. Indeed, the Examiner emphasized that Petitioners need not prove a certainty. As revised per Intervenors’ Exceptions, 2-13, the Examiner’s statement of burden is correct.

## **B. The Examiner Properly Delimited the Scope of the Case.**

The Examiner explained how the limits articulated by the Montana Supreme Court apply: “Neither party . . . may make arguments or present evidence that is entirely new, or which it cannot tie back to the administrative record before DEQ at the time of the permitting decision.” Order, 5. Petitioners rail against this conclusion (Obj., 31-54), but they prove too much. Petitioners claim they may raise any issue at any time, but the Department and Intervenors may respond based only upon the administrative record. *See* Obj., 38 (“*DEQ and the permit applicant are limited to the evidence and argument presented in the administrative record*” but “administrative exhaustion does not apply to permit appeals under MSUMRA”).

Bluntly, Petitioners propose the “sandbag” theory. They may withhold comment (thereby preventing the Department from addressing the concern), then raise the concern in the contested case and force a remand because the administrative record does not explicitly address the undisclosed issue. Indeed, that is precisely what they attempted with Area F and the alleged dewatering in EFAC. *See* Obj., 39-44.<sup>4</sup> They did not raise these matters in their comments, and

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<sup>4</sup> The Hearing Examiner found Petitioners did not preserve: (1) Area F contentions because Petitioners only reference was in a footnote, in an attachment, and related to a different statute; and (2) broad AM4 claims about prospective dewatering of EFAC, because Petitioners had only claimed that past mining in different areas may have dewatered specific sections of EFAC.

they now assail the Department for failing to address their undisclosed concerns. The Board should reject such gamesmanship. *See* Intervenors' Exceptions, 15-20.

**1. The Examiner Properly Identified the Claims Petitioners Could Pursue.**

The Examiner applied well-settled waiver principles to define the scope of the hearing. Contrary to Petitioners' suggestion, the idea that concerns must be raised at the appropriate time or be forfeited is a core principle of administrative law. The Supreme Court explained "Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Said otherwise, the agency should have the opportunity to address concerns before it is accused of overlooking them.

Petitioners argue MSUMRA allows them to make entirely new objections at any point before judicial review, but the authority they cite is inapposite. Obj., 31-36 (citing case law under different statutes and SMCRA cases not subject to MSUMRA's procedural requirements). MSUMRA and its implementing regulations clearly identify the "appropriate" time to raise concerns after review of the application. *See supra* Section I.A.1. The permitting regime gives the public the opportunity to raise concerns and imposes the responsibility to inform the Department of perceived errors in the application.

Petitioners complain the Examiner imposed a “draconian extra-statutory exhaustion requirement” that “limited” them to “claims identified *before* even seeing” the Department’s analysis. Obj., 31 (emphasis in original). In fact, the record (including the PHC report and its addenda, seven deficiency notices and their responses, and the record developed over a six-year period of time) included all of the matters that are the subject of this litigation. More importantly, Petitioners take liberties with the Examiner’s words. The Order included a clear exception for “an entirely new issue, never canvassed anywhere in the previous years of administrative record and to which [Petitioners] had no opportunity to object prior to filing the notice of appeal in this case.” *Id.*, 6-7. Despite Petitioners’ vociferous complaints about being “limited,” the record shows that all excluded issues were apparent in the comment period.

## **2. The Examiner’s Evidentiary Rulings Were Appropriate.**

Petitioners’ objections to the Examiner’s evidentiary rulings demonstrate the one-sided process they envision. First, Petitioners complain the Examiner excluded evidence on certain pollutants supporting their broad claim of material damage to aquatic life. Obj., 44-47. The Examiner evaluated Petitioners’ comment letter, which identified specific pollutants of concern, and allowed testimony on those pollutants. Transcript, Vol. 1, 302:24-35 to 303:1-6. She concluded that, given the specificity of the list, the Department was not on notice

of the Petitioners' concerns regarding other pollutants. *Id.* Where Petitioners properly preserved issues, such as salinity, however, the Examiner allowed them to present expert testimony significantly expanding upon the short notice provided in the comments. *See Findings*, ¶¶123-129.

Conversely, Petitioners complain that the Examiner allowed Intervenors to present rebuttal testimony (Obj., 50-53) which contradicted Petitioners' extra-record theory that the increase in salinity would be "observable." *See Findings*, ¶¶127, 136-137. In short, Petitioners arrogate the exclusive right to raise any issue, regardless of whether they raised it in comments, and then expand on "notice" level comments with expert testimony that neither the Department nor Intervenors may rebut. Petitioner's favored approach is both unlawful and unfair and must be rejected by the Board.

**II. THE EXAMINER PROPERLY CONCLUDED PETITIONERS DID NOT DEMONSTRATE ERRORS IN THE DEPARTMENT'S MATERIAL DAMAGE DETERMINATION.**

The Examiner found that the AM4 Permit would not materially damage EFAC. *Findings*, ¶209. Petitioners distort the record in trying to refute this finding regarding salinity and aquatic life, but they cite nothing suggesting it is not supported by "competent substantial evidence."

## **A. Salinity**

The Examiner found that prior mining did not cause salinity impairment downstream of the Rosebud Mine and that the AM4 Permit would not increase salinity in groundwater or EFAC. Mining has not caused EFAC's TDS impairment. *See Findings*, ¶¶67-69. Petitioners' three arguments do not refute these facts. *See Obj.*, 13.

### **1. Downstream Salinity Impairment Does Not Bar a MSUMRA Permit.**

Petitioners wrongly assert that Clean Water Act issues – downstream impairment and lack of a TMDL – bar the AM4 Permit. This is incorrect. MSUMRA bars a permit that will cause “material damage” (including a water quality standard violation), but “impairment,” as found by Montana's Water Protection Bureau, is not a water quality standard violation.<sup>5</sup> *Compare* §§ 75-5-701 to 75-5-705, MCA *with* §§ 75-5-601 to 75-5-641, MCA. Similarly, a TMDL has no bearing on whether the AM4 Permit is “designed to prevent ‘material damage.’” *Findings*, 66, and n.3.

*Friends of the Wild Swan v. EPA*, which addressed an EPA-issued discharge permit, is not to the contrary. Petitioners improperly cite the lower court opinion, but on appeal the Ninth Circuit clarified that banning all permits violates the

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<sup>5</sup> Further, the mine did not cause downstream impairment. *Findings*, ¶106.

regulations, which only “preclude[e] issuance of new permits for new sources that *will cause or contribute to* a violation of water quality standards.” 74 F. App’x 718, 724 (2003) (emphasis added).

**2. MEIC’s “13%” Argument Misstates the Facts, the Law, and the Examiner’s Findings.**

Petitioners continue to “confuse” and “fail to grasp (or intentionally [obfuscate])” key salinity facts. Findings, 68. They incorrectly claim the Examiner found that mining will “increase[] salt levels flowing into EFAC by 13%.” Obj., 14, 16, 18. Actually, the Examiner found: “The *only evidence of any 13% increase in TDS concentrations* is the PHC’s estimation for all the *groundwater alluvium*, including previously-permitted Areas A and B.” Findings, 68-69 (emphasis added). This does not show “material damage,” or even impact, *to EFAC*. See Findings, 68-69.

In fact, salinity concentrations in groundwater migrating into EFAC, and in EFAC itself, will not increase because the groundwater is already at its maximum carrying concentration for salinity. Findings ¶¶216, 220, 223. Although salinity levels in the *alluvium* may increase 13% due to cumulative impacts of past mining and anticipated mining, even that increase is *within natural variation* and *not statistically significant*. Findings, 69. It would not violate water quality standards, or cause “material damage.” Findings, 67-69. Even if that 13% increase were applied specifically to EFAC, no material damage would result. See Findings, 69.

The Department and Examiner considered cumulative impacts. *See, e.g., Findings, 67-69.* Petitioners suggest, however, that analyzing cumulative impacts for impaired waters requires prohibiting discharges that *do not* cause material damage as well as those that do. Nothing supports this position. Neither of the cases Petitioners cite (Obj., 14-18) vitiates the need for a causal link under federal Clean Water Act requirements. *See also Wild Swan, 74 F. App'x 718, 724.* More importantly, MSUMRA is clear. The relevant inquiry is whether “the *proposed operation* is designed to prevent the probable cumulative impacts from causing material damage . . . .” § 82-4-227(3)(a)), MCA (emphasis added).

Petitioners did not show that the AM4 Permit is more-likely-than-not to cause any relevant impacts, let alone material damage. *See Findings, ¶¶232, 242, 244-48, and pp. 66-77.* The record affirmatively demonstrates it will not. *See, e.g., Findings, ¶¶209, 234; Proposed Conclusions ¶¶23-27.*

### **3. Duration is not “Material Damage.”**

Longevity does not turn impacts below the statutory thresholds into material damage. Intervenor’s Exceptions, 21-23. Moreover, Petitioners do not establish facts supporting “material duration damage.” They merely misrepresent the Examiner’s Findings, claiming that “this extended duration of increased salinity from the AM4 Amendment will persist for ‘some tens to hundreds of years.’” Obj., 19 (quoting Findings, 73). The Findings found neither “increased salinity

from the AM4 Amendment” nor a duration of “tens to hundreds of years.” *See e.g.*, Findings, 74 (“AM4 Permit causes no increase in salinity”); *id.*, 71-73, n.4 (“[i]t’s very hard to give exact numbers for spoil recovery,”), 75-76.

## **B. Aquatic Life**

Petitioners object to the Examiner’s conclusion that “EFAC is supporting aquatic life sufficiently to satisfy the requirements of MSUMRA.” *Obj.*, 23-24. Petitioners wanted more analysis, but this is not a sufficient reason to modify or reject proposed findings and conclusions regarding aquatic life.

First, Petitioners failed to meet their burden to prove that the AM4 Permit, as designed, will more-likely-than-not degrade or reduce the quality or quantity of EFAC such that aquatic life would be adversely affected. Petitioners offered only the testimony of Sean Sullivan, whose “fieldwork has predominantly involved western Montana streams, which have significantly different physical, chemical and biological characteristics as compared to eastern Montana streams.” Findings, ¶200. Mr. Sullivan did not visit EFAC, conduct a material damage assessment, compare water chemistry upstream and downstream of the mine, or conduct a causal assessment of the alleged impairment. Findings, ¶¶200, 202-04. Petitioners offered no proof to carry their burden. In contrast, the record is replete with biological, physical, and chemical data supporting the Department’s material damage determination.

Second, Petitioners falsely assert the Examiner’s aquatic life conclusion is based solely on “the mere presence” of macroinvertebrates in EFAC and the “inexpert” testimony of Dr. Hinz. *See* Obj., 24-30. The Examiner considered extensive record and expert testimony evidence and made 38 separate findings of fact prior to reaching her conclusions that (1) EFAC is supporting an aquatic life community; and (2) the AM4 Permit, as designed, will not degrade or reduce the quality or quantity of EFAC in a manner that the EFAC aquatic life community will be adversely affected. *See* Findings, ¶¶170-208.

The totality of evidence emphatically supports the Examiner’s conclusion that “the Conservation Groups failed to present evidence necessary” to overcome the Department’s “convincing evidence – through expert testimony and the ARCADIS Report – that EFAC is supporting aquatic life sufficiently to satisfy the requirements of MSUMRA.” Findings, ¶¶42-43.<sup>6</sup>

## **CONCLUSION**

For the foregoing reasons and those in Intervenors’ Exceptions, Intervenors respectfully request the Board adopt the Examiner’s Findings with appropriate clarifications.

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<sup>6</sup> Notably, Petitioners failed to even present evidence necessary to overcome the Motion for Directed Verdict, much less prove their claims by a preponderance of the evidence. Findings, ¶44.a.

DATED: May 24, 2019.

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## CERTIFICATE OF SERVICE

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# Western's Motion to Strike

Doc. 148

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OF: )  
APPEAL AMENDMENT AM4 )  
WESTERN ENERGY COMPANY, )  
ROSEBUD STRIP MINE AREA B ) CAUSE NO. BER 2016-03 SM  
PERMIT NO. C1984003B )  
)

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**MOTION TO STRIKE PETITIONERS' OBJECTION  
TO AFFIDAVIT PURSUANT TO MONT. CODE ANN. § 2-4-611(4)**

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Intervenor-Respondents Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (collectively “Intervenors”) hereby move to strike Petitioners’ Objections to Affidavit of John Martin Pursuant to Mont. Code Ann. § 2-4-611(4) (“Objections”)<sup>1</sup> as improper under Montana law and outside the established briefing schedule.

The Montana Administrative Procedure Act (“MAPA”) establishes a specific protocol to identify and resolve potential disqualification of agency members:

On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as part of the record and decision in the case. [...] The affidavit must state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing.

§ 2-4-611(4), MCA.

First, a party may, “in good faith” file a “timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other

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<sup>1</sup> Petitioners erroneously style their filing as “Objections to WECO’s Motion for Disqualification of Board Chair Deveny and Board Member Lehnerr.” As discussed below, Intervenors did not file a motion.

disqualification.” *Id.* Intervenors did so by filing an affidavit pursuant to the schedule established by the Hearing Examiner. *See* Order on Exceptions and Notice of Submittal at 4. The statute then provides that “the *agency* shall determine the matter as part of the record and decision in the case.” § 2-4-611(4), MCA (emphasis added). Thus, the statute charges the Board with determining what action, if any, to take in response to a timely affidavit. It does not provide for a separate, satellite litigation. There is no opportunity for the *parties* to engage in advocacy over whether a Board member should be recused. The only statutory role for the parties is bringing the potential basis for disqualification to the Board’s attention via affidavit.

Moreover, the Hearing Examiner’s Order on Exceptions and Notice of Submittal did not create an extra-statutory invitation for parties to “object to” or “rebut” information raised in a timely affidavit; rather, the Order on Exceptions and Notice of Submittal clearly states (with emphasis) that failure by a party to timely file an affidavit foreclosed the party from participating in the disqualification process:

If any party believes that any current member of the BER should be disqualified from participating in the decision on this case because of “personal bias, lack of independence, disqualification by law, or other disqualification,” that party will file “in good faith ... a timely and sufficient affidavit” explaining the reasons why disqualification is appropriate. Mont. Code Ann. § 2-4-611(4). Such an affidavit must be

filed “not less than 10 days before” the BER Meeting, i.e., **by May 21, 2019. *Id.* Failure to file such an affidavit will be deemed a waiver of the parties’ right to argue that a BER member is unqualified to render a decision on the Proposed Order.**

Order on Exceptions and Notice of Submittal at 4 (emphasis in original).

Petitioners did not file an affidavit pursuant to the schedule established by the Hearing Examiner or prior to the 10 day cutoff required by § 2-4-611(4), MCA. Perhaps in an attempt to justify their untimely and unauthorized filing, Petitioners incorrectly style their “Objections” as a response to a “Motion.” However, Intervenors did not file a motion; rather, Intervenors simply filed an affidavit as prescribed by the Order on Exceptions and Notice of Submittal and § 2-4-611(4), MCA. Intervenors decline to engage in extra-statutory advocacy regarding disqualification absent an express invitation from the Board.

Intervenors accordingly move the Board to strike Petitioners’ improper Objections as part of the record and decision in the case.

DATED: May 24, 2019.

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/s/John C. Martin  
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