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MONTANA BOARD OF ENVIRONMENTAL REVIEW

IN THE MATTER OR THE APPLICATION FOR AN AMENDMENT OF A MAJOR FACILITY SITING ACT CERTIFICATE BY TALEN MONTANA LLC	**Case No. _____** **DEQ'S BRIEF OPPOSING WESTMORELAND'S EMERGENCY MOTION FOR RELIEF FROM ARM 17.20.1803(d)**

The Department of Environmental Quality (DEQ) respectfully files this motion in opposition to the Emergency Motion for Expedited Relief from ARM 17.20.1803 (d) filed by Westmoreland Mining, LLC, and Westmoreland Rosebud Mining, LLC (collectively referred to as Westmoreland) on May 20, 2019. Paragraphs 1 through 18 and 24 through 27 contain background assertions that are extraneous to Westmoreland's request for relief from ARM 17.20.1803(d) and, therefore, are not addressed.

ARM 17.20.1803(d) governs the amendment of a certificate of compliance (Certificate) issued by DEQ under the Major Facility Siting Act, Sections 75-20-101, *et seq.*, MCA. It provides as follows:

> CERTIFICATE AMENDMENT PURSUANT TO CHANGE IN DEPARTMENT OF ENVIRONMENTAL QUALITY OR BOARD OF ENVIRONMENTAL REVIEW PERMIT
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> (1) An amendment affecting, amending, altering or modifying a decision, opinion, order, certification or permit issued by the department of environmental quality or board of environmental review under the applicable statutes administered by those agencies in

accordance with 75-20-219 , MCA, shall be adopted by the department and incorporated as a certificate amendment, as follows:

(a) within 10 days of the issuance of an amendment by the department or board, the certificate holder shall serve the department with a certified copy of the amendment;

(b) the department shall issue a notice of proposed action to modify the certificate to fully and completely incorporate the amendment authorized by the department or board;

(c) upon the timely filing of a request for hearing, the board shall hold a show-cause hearing why the proposed action should not be taken. A request for hearing may be made by any person affected by the proposed action;

(d) a person requesting a show-cause hearing shall file with the board all testimony, evidence and exhibits in writing that it intends to present at the hearing within 15 days after filing a request for hearing. Failure to comply with this rule shall be deemed a waiver of a person's request for hearing and of rights to participate in the hearing, if any;

(e) if no show-cause hearing is requested or required, the department shall take the proposed action as set forth in the notice pursuant to (1) (b) ;

(f) a show-cause hearing, if any, shall be limited to issues over which the board has jurisdiction.

Westmloreland is seeking relief from subsection (d) which requires a person requesting a show-cause hearing to file with the board all testimony evidence and exhibits in writing that it intends to present at the hearing within 15 days after filing a request for hearing. It further provides that if a person fails to comply with this requirement, the person waives its request for a show-cause hearing. Thus, subsection (d) is jurisdictional in nature. A person only properly requests a show-cause hearing, invoking the jurisdiction of the Board of Environmental Review (Board), by filing with the Board all testimony evidence and exhibits within 15 days after filing a request for a hearing. Absent that filing, the Board does not have jurisdiction to hold the hearing.

Westmoreland asserts that the Board "could not possibly have been intended to apply to a matter" such as DEQ's amendment to Talen's Certificate. Westmoreland offers no legal analysis to support this assertion. Westmoreland also asserts that it would be "severely prejudiced by application of subsection (d) and that subsection (d) "cannot reasonably be applied in light of the high stakes and the numerous complex issues central to Talen's requested amendment." Westmoreland offers no legal support for its position that application of subsection (d) should be

based on the "stakes" and the "complexity" of the certificate amendment. In addition, Westmoreland asserts that requiring compliance with the 15-day deadline violate" Westmoreland's rights under state law, and the state and federal constitutions. Westmoreland, however, fails to specify which state laws or constitutional provisions adherence to subsection (d) would violate.

Westmoreland also asserts that the only sensible application of ARM 17.20.1803(d) would be in an instance where a change in a separate permit called for a mere conforming or technical amendment that does not involve changing or eliminating any significant or material condition in the certificate. Rules of statutory construction apply equal to the interpretation of administrative rules. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been asserted. Section 1-2-101, MCA. The plain language of subsection (d) does not support Westmoreland's position. Subsection (d) contains no language suggesting that it apply only to conforming or technical amendments and it would be a violation of Section 1-2-101, MCA, to insert that language into subsection (d).

Westmoreland also asserts that subsection (d) does not apply where increased environmental impacts are resulting from the amendment are identified in the hearing notice. The plain language of subsection (d) does not support this position. It would be violation of Section 1-2-101, MCA, to insert this language into the rule.

Finally, Westmoreland asserts that the Board is not a slave to its rules and that it has the authority to relax or modify its procedural rules. All but one of the cases cited by Westmoreland are readily distinguishable because, unlike subsection (d), the rules at issue were not jurisdictional in nature. NRLB v. Grace Co., 184 F.2d 126, 129 (8th Cir. 1950) (Board's rule that the existence

of a valid written and signed bargaining agreement between an employer and an appropriate bargaining representative is a bar to a certification proceeding for a different representation); Connecticut State Labor Relations Bd. v. Connecticut Yankee Greyhound Racing, Inc., 402 A.2d 777, 782 (Conn. 1978) (National Labor Relations Board refused to proceed to an election in the presence of a collective bargaining contract); City of Fremont v. FERC, 336 F.3d 910, 917 (9th Cir. 2003) (FERC waiving its orphaned project regulations allowing Pacific Gas & Electric to compete for a new FERC license); Sun Oil Company v. FPC, 256 F.2d 233, 239 (5th Cir. 1958) (Federal Power Commission's ad hoc change to its procedure to prohibit or restrict duplicate rate schedule filings.); Martorano v. Dep't of Pub. Utils., 516 N.E.2d 131, 134-35 (Mass.1987) (Even where a regulation is meant to protect a party is violated, the party should be unable to insist on new proceedings when there is little possibility that the violation had effect on the agencies' actions); Forque v. State, 677 P.2d 1236, 1243-44 (Alaska 1984) (Failure to submit evidence according to an administrative deadline.); Mentor v. Kitsap Cty., 588 P.2d 1226, 1229 (Washington. App. 1978) (Planning Commission treatment of a letter as a formal petition for approval of a development permit.)

The only case cited by Westmoreland in which an agency relaxed a jurisdiction provision is NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953). In that case, the National Labor Relations Board accepted an application for review that was filed six days after the time fixed by the rules of the National Labor Relations Board for filing an application for review. For the reasons stated below, DEQ does not believe the Board has authority to waive subsection (d) under Montana law.

In Cottonwood Hills v. Dept. of Labor and Ind., 238 Mont. 404, 777 P.2d 1301 (1989), the Montana Supreme Court affirmed the district court's dismissal of a complaint seeking judicial review of a workers' compensation action, stating as follows:

> Procedures for judicial review of administrative rulings are found in Part 7, Montana Administrative Procedure Act (MAPA), §§2-4-701 through 711, MCA. Additionally, there are detailed review provisions set forth under the "Unemployment Insurance" statutes which govern the initial dispute in this case. Specifically applicable are §39-51-1109 (tax appeals); §39-41-2043 (decisions of appeals referee); and § 39-41-2404, (appeal to board). **Compliance with the procedures is *mandatory* because only after the procedures have been followed is the District Court vested with jurisdiction.** F.W. Woolworth Company v. Employment Security Division (Mont. 1981), [___ Mont. ___] 627 P.2d 85, 38 St.Rep. 694.

In his concurring and dissenting opinion in F.W. Woolworth, Justice Sheehy stated as follows:

> In a recent case involving the perfection of an appeal to the District Court from an administrative agency, Rierson v. State (1980), 188 Mont. 522, 614 P.2d 1020, 37 St. Rep. 627, we had before us an appeal from an administrative agency under the general provision for judicial review from administrative agencies, section 2-4-702, MCA. That statute provides that in seeking review, the party must file a petition in the District Court within 30 days from the service of the final decision of the agency and it further provides that "copies of the petition shall be promptly served upon the agency and all parties of record." In Rierson, the decision hinged upon whether Rierson had "promptly" served copies of his petition for review. The decision of the majority of this Court against Rierson was based largely upon his laches in not serving the copy of the petition for review promptly, but inherent in the decision of the court is the sense that compliance with the review provisions necessary to vest jurisdiction in the District Court is mandatory.
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> The appellants contend that under Rule 61, M.R.Civ.P., the court had the power to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Appellants argue that since the union intervened, and was before the District Court, no substantial prejudice resulted to the unnamed parties arising out of the failure to name them as party defendants and so the District Court in the exercise of its discretion could disregard defects in the steps taken by the appellants to seek judicial review. The appellants also content that the court could have required the joinder of the unnamed parties under Rule 19, M.R.Civ.P., and that the pleadings thereafter could relate back to the commencement of the action under Rule 15(c),M.R.Civ.P.
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> The appellants cite Professor Moor's treatise with respect to the reasonableness of the relation-back of corrective amendments under Rule 15. 3 Moore's Federal Practice, ¶15.15.[4.1]. We disagree.

> This is a case where we must put aside our personal inclinations respecting our preference for decisions on the merits, in the interest of consistency with respect to previous decisions regarding appellate jurisdiction both from District Courts to this Court, and from administrative agencies to the District Courts. When statutes provided for review from an administrative agency, or from a lower court, and set forth the procedures necessary to obtain such review, including the essential steps with respect to the notice to be given, the time for such notice and the parties to be named or served; the statutory procedure constitutes jurisdiction guides which must be followed to vest authority in the reviewing or appellate tribunal. Indeed, the presence of the requirements in the statutes gives us no other choice, because it is only by virtue of statues that the appellate adjudicatory power or reviewing power vest in the other tribunal, as we have indicated foregoing in our discussion of jurisdiction.
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> The District Court in these cases, after examining carefully the defects in the procedure taken for review, as is shown from it memorandum aforementioned, had no discretion to overlook the defects. The court had no jurisdiction to act, and no discretion to waive the jurisdictional defects.

Under ARM 17.20.1803(1)(c), the jurisdiction of the Board to conduct a hearing is invoked by the timely filing of a request for a hearing. Subsection (d) requires the person requesting a show-cause hearing to file with the Board all testimony, evidence and exhibits in writing that it intends to present at the hearing within 15 days after filing a request for a hearing. A failure to do so is **required** to be deemed a waiver of a person's request for hearing. If the person's request for a hearing is deemed waived, the person has not invoked the jurisdiction of the Board under ARM 17.20.1803(1)(c). Under Cottonwood Hills and F.W. Woolworth, the Board would not have jurisdiction to act.

Dated this 22nd day of May, 2019.

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Certificate of Service

I certify that on May 22, 2019, I provided the original copy of the foregoing document to the Secretaryof the Board of Environmental Review at 1520 East Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901, with copies being sent by e-mail to the following :

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