




TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Lindsay Ford, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901 

DATE: May 20, 2019

SUBJECT: Board of Environmental Review Case No. BER 2019-05 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL
AND REQUEST FOR HEARING BY THE
MONTANA ENVIRONMENTAL INFORMATION
CENTER AND SIERRA CLUB REGARDING
APPROVAL OF SURFACE MINING PERMIT
NO. C2011003F

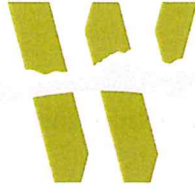
Case No. BER 2019-05 OC

The BER has received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

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May 20, 2019

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Filed with the
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
This 20th day of May 2019
at 4:45 o'clock P.m.
By: Judy Sherer

Re: Appeal Western Energy Company, Rosebud Strip Mine Area F, Permit No. C2011003F

NOTICE OF APPEAL AND REQUEST FOR HEARING

The Montana Environmental Information Center (MEIC) and Sierra Club (collectively, Conservation Groups), pursuant to Montana Code Annotated § 82-4-206(1)-(2), and Administrative Rule of Montana 17.24.425(1), hereby file this notice of appeal and request for a hearing regarding Montana Department of Environmental Quality's (DEQ) April 18, 2019, approval of the Area F Permit No. C2011003F for the Rosebud Strip Mine, in Colstrip, Montana. The Conservation Groups further request that the Board of Environmental Review hold a hearing on this appeal, pursuant to Administrative Rule of Montana 17.24.425(2).

DEQ's approval of the Area F Permit was in error. The grounds of DEQ's error include, but are not limited to, the following:

1. The Surface Mining Control and Reclamation Act (SMCRA) and the Montana Strip and Underground Mine Reclamation Act (MSUMRA) prohibit DEQ from issuing a strip-mining permit unless and until the applicant affirmatively demonstrates and DEQ confirms in

writing based on record evidence that the cumulative hydrologic impacts from the mining operation will not cause material damage to the hydrologic balance outside the permit area. § 82-4-227(3)(a), MCA; 30 U.S.C. § 1260(b)(3); ARM 17.24.405(6)(c). Material damage includes violation of a water quality standard. § 82-4-203(31), MCA. To assure that the cumulative hydrologic impacts will not cause material damage, DEQ must prepare a cumulative hydrologic impact assessment, or “CHIA.” ARM 17.24.314(5). The CHIA must be sufficient to make the material damage determination. *Id.*

2. In assessing the cumulative hydrologic impacts, DEQ must establish a cumulative impact area, which must include the “permit and mine plan area.” ARM 17.24.301(32). The “mine plan area” includes “the area of land and water within the boundaries of all permit areas during the entire life of the strip or underground mining operation.” *Id.* 17.24.301(70). In establishing the cumulative impact area, DEQ must include, in addition to the mine plan area, all areas where mining will result in a measurable change.

3. In addition to preventing material damage to the hydrologic balance outside the permit area, DEQ must assure that mining does not disturb any intermittent or perennial stream channels within the permit boundary. ARM 17.24.651(1)-(2).

4. Furthermore, the applicant must affirmatively demonstrate and DEQ must affirmatively confirm in writing based on record evidence that reclamation can be accomplished. ARM 17.24.405(6)(a). Reclamation requires restoring the land to the same or better condition than it was in prior to mining. Mont. Code Ann. § 82-4-203(43).

5. Here, DEQ’s CHIA was an improvement from prior CHIAs; however, it still suffered a number of significant flaws that violate important provisions of MSUMRA.

6. First, DEQ approved mining operations that will destroy the stream channel of an intermittent to perennial portions of McClure Creek within the permit area. Such destruction of intermittent to perennial streams is not permitted by MSUMRA. ARM 17.24.651. The mining operations will further impermissibly disturb other intermittent to perennial portions of streams within the permit area. Given the limited water resources in this area, such destruction and disturbance of water resources risks causing broader impacts to the health of the economy and ecology of the area.

7. Further, the record fails to affirmatively demonstrate that the intermittent to perennial portion of McClure Creek that will be mined through and other intermittent to perennial portions of streams that will be dewatered within the mine permit area can be reclaimed to support their current or higher uses. In particular, DEQ has admitted that it does not believe that flowing stream reaches can be reclaimed. If these water resources cannot be reclaimed, the mined area cannot be returned to the same or better condition it was in prior to mining. In such circumstance, it was error for DEQ to approve the Area F permit. ARM 17.24.405(6)(a).

8. DEQ's material damage determination was flawed and unlawful because it failed to consider the impacts of additional discharges of iron and aluminum from the mine via surface and ground water to West Fork Armells Creek (WFAC). WFAC is currently impaired and failing to meet water quality standards for growth and propagation of aquatic life due to iron and aluminum pollution that already exceeds the creek's carrying capacity. Mining operations will introduce additional and increased concentrations of iron and aluminum to WFAC, via surface and ground water. WECO has admitted that it cannot comply with water quality standards for iron. Mine operations in East Fork Armells Creek (EFAC) drainage have discharged tons of iron

into the headwaters of that creek. Discharges of additional iron into WFAC will aggravate the creek's current impairment for iron. This will result in violations of water quality standards outside the permit area, in violation of MSUMRA.

9. DEQ's material damage determination was further flawed and unlawful by failing to assess whether anticipated violations of multiple water quality standards in spoils—for total dissolved solids (TDS), sulfate, alkalinity, calcium, sodium, nitrate+nitrite, lead, magnesium, manganese, and zinc—will lead to violations of water quality standards in intermittent or perennial creeks outside the permit area. Mining will remove the Rosebud Coal aquifer, which has the highest quality water in the area. DEQ has determined that the spoils aquifer that will replace the Rosebud Coal aquifer may contain pollution concentrations of the pollutants mentioned above that either exceed applicable standards or that may render the water harmful to livestock and aquatic life. Destruction and replacement of the freshest source of groundwater in the area (the Rosebud Coal aquifer), with a spoils aquifer that violated numerous applicable standards significantly threatens the ability of the area to support the historical uses of livestock, wildlife, and aquatic life. DEQ further failed to assess the impacts to intermittent and perennial stream segments outside the permit area from reductions in water quantity due to destruction of the Rosebud Coal aquifer.

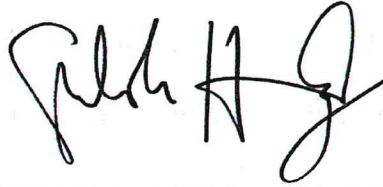
10. DEQ has acknowledged that the impacts of the Area F expansion of the Rosebud Strip Mine may persist for hundreds of years. DEQ further asserts that the water resources in the area are significantly influenced by climate. Any potential recovery of water resources will also be affected by climate. The worsening impacts of climate change in Montana—due to, among other things, the impacts of coal mining and coal combustion—will have significant impacts on water resources over the period of time that Area F strip-mining will impact water resources.

Such impacts will include: more severe drought, decreased summer precipitation, reduced water availability, increased weather variability, and increased groundwater demand. Nevertheless, in assessing the severity of the cumulative hydrologic impacts of the Area F expansion, DEQ declined to assess the impacts of climate change. As its basis for doing this, DEQ asserted that it had no legal authority to consider the impacts of climate change. This was error as a matter of law. MSUMRA places no limits on DEQ's ability to assess the projected impacts of climate change.

11. DEQ also unlawfully constrained the cumulative impact area. DEQ failed to include the entire mine plan area in its cumulative impact area. DEQ further failed to consider cumulative impacts on the main stem of Armells Creek. In the permitting process, both DEQ and WECO identified measurable impacts to water quality from mining in Area F at the confluence of WFAC and East Fork Armells Creek (EFAC). Nevertheless, DEQ failed to include EFAC, WFAC and the main stem of Armells Creek in the cumulative impact area. By so doing, DEQ failed to disclose to the public, the long-term impacts to this water shed from strip-mining operations across approximately 30,000 acres of the headwaters of the Armells Creek drainage. All of these streams are impaired and not meeting water quality standards. MSUMRA requires DEQ to disclose to the public the cumulative impacts of the total mining operations in the mine plan area. The proposed mine expansion may push a watershed that is already marginal for many uses past the point of no return. MSUMRA requires a precautionary approach to expanded mining operations. DEQ must assess the cumulative impacts of the entire mining operation prior to approving the Area F expansion.

12. The Conservation Groups respectfully request that BER declare the Area F permit unlawful and void ab initio and remand this matter to DEQ to reassess the permit application consistent with the requirements of MSUMRA.

Respectfully submitted this 20th day of May, 2019.



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