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**MONTANA BOARD OF ENVIRONMENTAL REVIEW**

<b>IN THE MATTER OF:</b>	)	<b>CAUSE NO. BER 2016-03 SM</b>
<b>APPEAL AMENDMENT AM4</b>	)	
<b>WESTERN ENERGY</b>	)	<b>RESPONDENT-INTERVENORS'</b>
<b>COMPANY, ROSEBUD STRIP</b>	)	<b>OPPOSITION TO PETITIONERS'</b>
<b>MINE AREA B</b>	)	<b>MOTION FOR SUMMARY</b>
<b>PERMIT NO. C1984003B</b>	)	<b>JUDGMENT</b>
_____	)	

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## INTRODUCTION

Respondent-Intervenors International Union of Operating Engineers, Local 400, Natural Resource Partners, L.P., Northern Cheyenne Coal Miners Association, and Western Energy Company submit the following Opposition to Petitioners' Motion for Summary Judgment.

This contested case is the latest episode in a long campaign of litigation targeting the town of Colstrip, the Colstrip Power Plant that provides electricity to 1.5 million homes in Montana and the Pacific Northwest,<sup>1</sup> and the Rosebud Surface Coal Mine (the "Rosebud Mine") that supplies the power plant.<sup>2</sup> Petitioners Montana Environmental Information Center ("MEIC") and Sierra Club challenge the Department of Environmental Quality's ("the Department's") approval of a permit amendment allowing Respondent-Intervenor Western

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<sup>1</sup> Elizabeth Hardball, *Inside a Western Town that Refuses to Quit Coal*, SCIENTIFIC AMERICAN (Apr. 12, 2016), <http://www.scientificamerican.com/article/inside-a-western-town-that-refuses-to-quit-coal/> (noting that the Colstrip Power Plant powers 1.5 million homes and examining the economic consequences on the town of Colstrip if the plant is shuttered).

<sup>2</sup> *Montana Env'tl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184 (9th Cir. 2014) (rejecting current Petitioners' federal SMCRA case attacking permits at Rosebud Mine); *Nat'l Parks Conservation Ass'n v. E.P.A.*, 788 F.3d 1134 (9th Cir. 2015) (vacating EPA's regional haze Federal Implementation Plan for Montana as it applied to the Colstrip Steam Electric Station); *Mont. Env'tl. Info. Ctr. v. Mont. Dept. of Env'tl. Quality, et al.*, No. ADV-2012-935 (1st Jud. Dist. 2012) (determining that an administrative order on consent governing remediation was a valid agency action); *Sierra Club, et al. v. Talen Mont., LLC*, No. 1:13-cv-00032-DLC-JCL (D. Mont. filed in 2013) (alleging, at one point, over 60 violations of the federal Clean Air Act's New Source Review provisions, which were pared down to two through motions practice and the plaintiffs' voluntary abandonment); *In re: Mont. Air Quality Oper. Permit No. OP0513-08 for the Colstrip Steam Elec. Stat.*, Case No. BER 2013-01 AQ (Bd. of Env'tl. Rev. filed in 2012) (alleging the Title V permit for the Colstrip Power Plant was deficient, because it did not include sufficient particulate monitoring requirements); *Sierra Club, et al. v. Mont. Dept. of Env'tl. Quality et al.*, No. DV 12-42 (16<sup>th</sup> Jud. Dist. filed in 2012) (alleging that an administrative order on consent detailing the operation, closure, and remediation of coal ash impoundments at the Colstrip Power Plant was an improper enforcement action).

Energy Company (“Western Energy”) to mine additional acreage within the Rosebud Mine. Petitioners seek, in this Motion for Summary Judgment (“Motion”), to invalidate a decision the Department reached after over six years of exhaustive consideration and analysis of extensive scientific data, without permitting the Department or Respondent-Intervenors International Union of Operating Engineers, Local 400, Natural Resource Partners, L.P, the Northern Cheyenne Miners Association, and Western Energy (“Respondent-Intervenors”) to present evidence or argument at a hearing. In order to win their Motion, Petitioners bear the burden of proving that (i) the Department’s decision is defective as a matter of law, and (ii) there are no disputed issues of material fact. The Petitioners fail to prove either contention and, as a result, the Board should deny the Motion.

*First*, Petitioners’ contentions that Department’s approval is deficient as a matter of law and that they are entitled to summary judgment are premised on erroneous interpretations of the applicable legal standards. As they did over ten years ago before the Montana Supreme Court in *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964 (“*MEIC*”), Petitioners confuse the distinction between an applicant’s burden before the Department and the burdens imposed in a contested case. In binding precedent, the Montana Supreme Court rejected Petitioners’ interpretation of Montana administrative law and held that the party challenging a permit and seeking summary judgment bears the “burden of presenting evidence necessary to establish the facts essential to a determination that the Department’s decision violated the law.” *Id.* at ¶ 16. Petitioners cannot satisfy that burden with conclusory allegations that the Department or Western Energy failed to meet the standards applicable at previous stages of this administrative process.

*Second*, although disagreement with Department’s technical and scientific judgments about the predicted scope and severity of hydrological impacts related to the amendment is a primary theme of Petitioners’ brief, Petitioners nevertheless claim that there are no disputed issues of material fact. Notably, Petitioners do not provide a statement of undisputed facts to support their Motion. Corroborating this Opposition to Petitioners’ Motion for Summary Judgment, Respondent-Intervenors provide seven declarations regarding key issues of fact (Exhibits 6-12) and adopt by reference Respondent’s Statement of Disputed Facts in Opposition to Petitioners’ Motion for Summary Judgment (“Statement of Disputed Facts”). In that document, the Department identifies no less than 11 areas of dispute with the facts alleged in Petitioners’ factual background and upon which Petitioners base their claim. On that basis alone, the Board should deny summary judgment.

It is undisputed that Petitioners oppose the operation of the Rosebud Mine and the Colstrip Power Plant. But their opposition and policy objections to the mining and combustion of coal do not override the law. To obtain summary judgment Petitioners are required to carry their burden to demonstrate that there are no material disputes of fact and that they are entitled to judgment as a matter of law. They have manifestly failed to do either, so the Board should not grant summary judgment.

### **FACTUAL AND PROCEDURE BACKGROUND**

The Respondent-Intervenors incorporate by reference the Statement of Disputed Facts and summarize the following key elements for resolution of the Motion.

#### **A. The “AM4” Application**

Western Energy operates the Rosebud Mine on approximately 25,752 permitted acres near Colstrip, Montana. *See Pet’rs’ Ex. 2 at 3-2 (CHIA)*. The Rosebud Mine has five individual permit areas: Area A, Area B, Area C, Area D, and Area E. *See Id.* Currently, Area B includes

6,182 acres of mineable land. On June 15, 2009, Western Energy applied for an amendment to its Area B Permit, seeking to expand the permit area by 49 acres – Amendment Application 04 (“AM4”). Pet’rs’ Ex. 1 at 1. Approval of the application would increase the amount of surface disturbance by 146 acres and would increase mineable coal reserves in Area B by 12.1 million tons. *Id.*

The Rosebud Mine encompasses three drainages, from east to west: the Rosebud Creek drainage (portions of Area B, Area D, and Area E sit within this drainage); the East Fork Armells Creek drainage (AM4, other portions of Area B, small portions of Area D, Area A, and most of Area C sit within this drainage); and the West Fork Armells Creek drainage (part of Area C and all of the proposed Area F sit within this drainage). *See* Declaration of Michael Nicklin Ex. B (“Nicklin Decl.”) (Resp.-Int’vrs’ Ex. 6).

### **B. The Regulatory Approval Standards**

The Montana Strip and Underground Mine Reclamation Act (“MSUMRA”), Mont. Code Ann. § 82-4-201, *et seq.*, governs the Department’s evaluation of applications for mining permits and permit amendments, such as AM4. MSUMRA includes detailed and comprehensive standards that must be met before the Department may approve a mining permit. *Id.* at § 82-4-227. The statute is implemented by regulation codified at Mont. Admin. R. 17.24.400, *et seq.* As applicable to the Motion, these standards are discussed in more detail *infra*, Section I.A.3.

### **C. Key Record Documents**

The Department undertook a lengthy, iterative review process of the proposed AM4 operations. Since Western Energy first filed its application in 2009, the Department has issued, and Western Energy has responded to, eight rounds of deficiencies. Pet’rs’ Ex. 1 at 1. This comprehensive review process generated a substantial record. The key documents for resolution of the Motion include the following:

**1. Western Energy’s Comprehensive Evaluation of Probable Hydrologic Consequences**

In support of its AM4 application Western Energy submitted a 448-page Comprehensive Evaluation of Probable Hydrologic Consequences (“PHC”) identifying the likely hydrologic impacts from mining within AM4 in accordance with Mont. Admin. R. 17.24.314(3). Pet’rs’ Ex. 8. The PHC evaluates the proposed Amendment’s effect, if any, on groundwater and surface water within and near mine Areas A, B, and C’s permit boundaries. *Id.* at 7. In making these evaluations, the PHC describes both the baseline (pre-mine) conditions, short-term effects (during mining and reclamation), and long-term impacts (post-mining and bond release). *See id.* at Sections I-II (demonstrating organization of analysis). The PHC relies on a multitude of data sources and modeling, including a regional groundwater model (the “Rosebud Mine model”), which was used to characterize the Rosebud Mine as a whole and to evaluate the localized impacts of the proposed AM4 operations. *See id.* at 7-9 and Attachments D and E; *see also* Nicklin Decl. ¶ 7.

**2. Addendum to Evaluation of Probable Hydrologic Consequences**

At the Department’s request, Western Energy also submitted a 117-page Addendum to the Comprehensive Evaluation of Probable Hydrologic Consequences (“PHC Addendum”) in January 2015 addressing “the long-term effects of mining on surface water flow and quality and alluvial groundwater flow and quality.” Pet’rs’ Ex. 32, at 1; *see also* Mont. Admin. R. 17.24.314(c). Where the PHC was developed based on data collected through water year 2011,<sup>3</sup> the Addendum incorporates additional data collected in 2012 and 2013 (and Attachment 1 to the Addendum includes some data collected in 2014). Pet’rs’ Ex. 32 at 1 and Attachment 1 at 1

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<sup>3</sup> The water year used for purposes of these analyses runs October 1 — September 30. *See* Pet’rs’ Ex. 8 at 9 (PHC).

(PHC Addendum). The Addendum also adds an evaluation of AM4's potential impact on the alluvium of East Fork Armells Creek, a survey of aquatic life in upper East Fork Armells Creek, and an evaluation of the potential effects of the use lignin sulfonate for dust suppression instead of magnesium chloride. *Id.* at 1-2.

### **3. Petitioners' Comments on the AM4 Application**

After the Department deemed Western Energy's application complete and released a Draft Checklist Environmental Assessment for AM4, the Department responded to public records requests from Petitioners' counsel, including one on July 22, 2015. Petitioners' counsel then submitted Comments on the AM4 permit amendment on August 3, 2015. Pet'rs' Ex. 1 at 4; Resp.-Int'vrs' Ex. 1 (Petitioners' August 3, 2015 Comments).

Petitioners' Comments identified a number of concerns, including many of the issues they continue to pursue in this contested case hearing. However, in their Comments they failed to raise two of the primary issues they now raise in this contested case: (i) their contention that the Department's cumulative hydrological impact analysis does not address interaction between AM4 and Area F, and (ii) the assertion, raised for the first time in the Motion, that the Department's cumulative hydrological impact analysis should have analyzed the impacts from mining operations in the whole of Area B, rather than just the proposed action within AM4. When confronted with their failure to raise the Area F issue during discovery, Petitioners did not dispute that the issue was not raised in the text of their Comments but instead claimed that a footnote's reference to a 40-page scoping document containing sporadic mention of Area F was sufficient to have put the Department on notice of this contention. *See* Resp.-Int'vrs' Ex. 2 at 26:7 (Rule 30(b)(6) Deposition of Petitioners). As explained in greater detail below, this oblique reference did not—and could not possibly be expected to—put the Department on notice of Petitioners' concerns about Area F. Nor did Petitioners argue, prior to this Motion, that the

Department's cumulative hydrological impact analysis should have evaluated the hydrologic impacts of operations in all of Area B rather than from those within AM4, the permitting action actually at issue here. Indeed, neither Petitioners' Comments nor their Request for Hearing even suggest this line of argument. *See* Resp.-Int'vrs' Ex. 1 (Petitioners' August 3, 2015 Comments). Petitioners cannot now raise either of these new theories for the first time in the contested case hearing.

#### **4. The Department's Decision Documents**

The Department spent six years assessing Western Energy's AM4 permit application. The key documents generated by the Department as part of its review and approval are identified below.

##### **a. Environmental Assessment**

The Department issued its Environmental Assessment Checklist ("EA") for AM4 on December 3, 2015. *See* Resp.-Int'vrs' Ex. 3. The document assessed AM4's impact on the physical and human environments, discussed the alternatives that were considered (including the "No Action" alternative), and recommended that an Environmental Impact Statement for the project was not needed. Five Department employees, including a groundwater hydrologist, a surface water hydrologist, and an engineer contributed to the EA. *Id.* at 15.

##### **b. Written Findings**

DEQ issued its Written Findings approving the AM4 permit application on December 4, 2015. The document includes the 2015 Cumulative Hydrologic Impact Assessment, which was incorporated by reference as Attachment 1, and Western Energy Company's Response to Objections to DEQ's Acceptability Determination for Rosebud Area B Expansion. *See* Pet'rs' Ex. 1. The Written Findings explain the genesis of the AM4 application, the Permit and Review Chronology, and, most importantly, it concludes that

DEQ has made an assessment of the cumulative hydrologic impacts of all anticipated coal mining on the hydrologic balance within the cumulative impact area. *See* Attachment 1 [the Cumulative Hydrologic Impact Assessment] which is incorporated into these findings by reference. In that assessment, DEQ has determined that this amendment will not result in material damage to the hydrologic balance outside the permit area.

*Id.* at 5–6.

**c. Cumulative Hydrologic Impact Assessment**

The Department issued the Cumulative Hydrologic Impact Assessment (“CHIA”) on December 4, 2015, in conjunction with the Written Findings. The CHIA analyzes AM4’s anticipated hydrologic impacts in accord with Mont. Admin. R. 17.24.314(5). As part of that analysis, the 329-page CHIA examines AM4’s probable effect on surface water, groundwater, and water resource uses, and assesses whether the proposed permit is “designed to minimize impacts to the hydrologic balance inside and outside the permit area and to prevent material damage to the hydrologic balance outside the permit area.” Pet’rs’ Ex. 2 at 9-1. The Department’s Written Findings, relying on the CHIA, concluded that AM4 satisfied this requirement.

**d. Response to Comments**

The Department addressed each comment properly raised by Petitioners. *See* Pet’rs’ Ex. 1 at 8-14. For instance, it responded directly to Petitioners’ argument that East Fork Armells Creek (“EFAC”) is not meeting water quality standards due to surface mining by explaining that a “recent aquatic survey provide[d] empirical evidence that Aquatic Life support is not adversely impacted by mining activity.” *Id.* at 9. Likewise, it addressed Petitioners’ concerns that the lower portion of the stream is not meeting water quality standards for Nitrate/Nitrite, total nitrogen, specific conductance, and total dissolved solids due to coal mining, and that the Department did not use the appropriate sulfate standard for livestock. *Id.* at 8-11. In short, the Department’s Response to Comments addresses every issue for which it was put on notice.

**e. Approval**

The Department approved AM4 on December 4, 2015. Pet’rs’ Ex. 1. The agency conditioned its approval on Western Energy’s adoption of mitigation and monitoring measures designed to prevent AM4’s causing any material damage to the hydrologic balance outside the permit area.<sup>4</sup> *Id.* at ¶ 23. Despite the adoption of these mitigation measures and the Department’s finding, supported by the 329-page CHIA, that AM4 was designed to prevent material damage to the hydrologic balance outside the permit area, Petitioners filed a Request for Hearing on January 4, 2016.

**D. Material Facts**

Dr. Michael Nicklin, Dr. William Schafer, Ms. Penny Hunter, and other scientific experts contributed to the PHC and PHC Addendum. Those experts’ declarations, which are attached to this motion, explain the science that undermines Petitioners’ allegations and serves as the basis for the experts’ and the Department’s conclusion that AM4 will not materially damage the hydrologic balance in the cumulative hydrologic impact area. For instance, Dr. Schafer notes that the quality of water discharged from the Rosebud Mine does not actually differ from the quality of water in East Fork Armells Creek and Rosebud Creek. Declaration of William Schafer at ¶ 7 (“Schafer Decl.”) (Resp.-Int’vrs’ Ex. 7). And Dr. Nicklin’s declaration explains that neither surface water nor groundwater will move from AM4 into the Rosebud Creek drainage. Surface water from AM4 flows north, away from Rosebud Creek and its tributaries, *see* Nicklin Decl. ¶ 14, while groundwater is prevented from draining into Lee Coulee (and from there into Rosebud Creek) by a groundwater drainage divide located south of AM4, *id.* at ¶ 17. Dr.

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<sup>4</sup> The Department decided that “[g]roundwater monitoring must be expanded in order to adequately determine the potential effects of mining to the hydrologic balance outside the permit area.” Pet’rs’ Ex. 1 at ¶ 23.

Nicklin's declaration also explains why AM4 will not interact with Section 15 of East Fork Armells Creek, noting that "any drawdown in water due to AM4 is highly localized, meaning that any significant drawdown will be limited to the immediate vicinity of AM4. No drawdown associated with AM4 mining will reach Section 15." *Id.* at ¶ 22.

Dr. Nicklin's declaration also explains that AM4 will not increase nitrate plus nitrite nitrogen in East Fork Armells Creek. Not a single sample of the surface water of East Fork Armells Creek collected upstream of the town of Colstrip has exhibited a nitrate plus nitrite concentration exceeding permissible limits; 12 samples downstream of Colstrip (taken between 1980 and 1990) have. Nicklin Decl. at ¶ 27. The downstream sample site "location is downgradient of Colstrip's wastewater treatment plant and also north of residential/commercial lawns of Colstrip which are common sources of nitrate plus nitrite nitrogen." *Id.* The data relied upon by Petitioners for the assertion that AM4 will increase total dissolved solids ("TDS")<sup>5</sup> in the alluvium between Areas A and B is also misguided. While there may be an increase of as much as 13% in TDS over average baseline levels, such an increase is within the natural variability of TDS in that reach. *Id.* at ¶ 31. Dr. Schafer's analysis confirms the view. *See* Schafer Dec. at ¶ 16. Finally, Dr. Nicklin also explains that AM4's impacts on the hydrologic balance will not interact with those of Area F. Figures E-5 and E-9 of Attachment E to the PHC

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<sup>5</sup> As explained in Mr. Noel's Declaration at ¶ 10, TDS and electrical conductivity ("EC") are related measurements:

EC means the ability of water to conduct an electrical current at 25° C. The EC of water is a function of the amount of total dissolved solids (TDS) in the water and is expressed as microSeimens/centimeter ( $\mu\text{S}/\text{cm}$ ) or microhos/centimeter ( $\mu\text{mhos}/\text{cm}$ ). Given the relationship between EC and TDS, correlations are commonly used to relate the two parameters.

show that the impacts of AM4 will be highly localized and will not reach Area F, and that water in each area flows to separate groundwater and surface water drainages. Nicklin Decl. at ¶ 48.

## ARGUMENT

### I. LEGAL STANDARD

Petitioners have framed the question at issue in their motion for summary judgment as follows: “whether—as a matter of law—the Department’s cumulative hydrologic impact assessment and the ‘information compiled by the department’ affirmatively demonstrated that the cumulative hydrologic impacts will not result in material damage to water resources outside the permit area.”<sup>6</sup> Pet’rs’ Br. at 47. This statement misallocates the parties’ respective burden on summary judgment and presents an improperly narrow scope of review that is inconsistent with the Montana Administrative Procedure Act (“MAPA”).

The Montana Supreme Court’s decision in *MEIC* is of critical importance to understanding the proper scope of the Board’s review in this case. In that case the Montana Supreme Court heard an appeal of the Department’s decision to issue an air permit. *MEIC*, ¶ 1. MEIC had challenged that decision before this Board, which upheld the air permit, and at the district court, which affirmed the Board’s decision. *Id.* at ¶¶ 7-8. At the Supreme Court MEIC raised two arguments of relevance to this case: First, MEIC argued that the Board had erred in concluding that MEIC bore the burden of proof in a contested case hearing. *Id.* at ¶¶ 10-12. As discussed *infra*, Section I.A.2, the Montana Supreme Court rejected MEIC’s argument and held that the party bringing the contested case bears the burden of proof. Second, MEIC argued that the Board had applied an improperly deferential standard of review. *Id.* ¶¶ 17-21. The Supreme

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<sup>6</sup> Respondent-Intervenors do not presently challenge Petitioners’ standing, but reserve the right to challenge their standing in any future proceedings before the Board.

Court agreed, holding that the “standards of clearly erroneous, arbitrary and capricious, and abuse of discretion are not available to an agency acting as a factfinder under the contested case provisions contained in part 6 of the MAPA.” *Id.* at ¶ 23. The Supreme Court remanded the matter to the District Court with instructions to remand it to the Board “for entry of new findings of fact and conclusions of law in conformity with part 6 of the MAPA.” *Id.* at ¶ 26. The Supreme Court continued: “In entering new findings of fact and conclusions of law, 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.* (emphasis added).

These two holdings, and the Supreme Court’s instructions regarding the Board’s obligations on remand, provide substantial guidance to the Board regarding how it should properly conduct a contested case hearing – and this guidance directly contradicts Petitioners’ assertion of the legal standards that apply here.

**A. Petitioners Have Not Demonstrated They Are Entitled to Summary Judgment.**

Petitioners acknowledge that the MAPA’s contested case provisions govern this dispute.<sup>7</sup> Mont. Code Ann. § 82-4-206; Mont. Admin. R. 17.24.425(2); *see also* Pet’rs’ Br. at 45. The Montana Supreme Court has held that, under these provisions, “all parties to such a proceeding 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). Contested case

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<sup>7</sup> “An applicant, permittee, or person with an interest that is more may be adversely affected may request a hearing before the board on any of the following decisions of the department by submitting a written request stating the reason for the request within 30 days after the department’s decision: (a) approval or denial of an application for a permit pursuant to 82-4-231.” Mont. Code Ann. § 82-4-206.

proceedings are thus intended by the Act as the primary *fact-finding* forum in the administrative review process.<sup>8</sup>

The fact-finding role remains paramount when the Board is holding contested case hearings to review the Department's permitting decisions. The Montana Supreme Court has held that the Board's role in a contested case proceeding is to "receive *evidence from the parties*, enter findings of fact based on the preponderance of the evidence presented and then enter conclusions of law based on those findings." *MEIC*, ¶ 22 (emphasis added); Mont. Code Ann. § 2-4-623.

Petitioners seek to short-circuit this Board's review by moving for summary judgment. Summary judgment is an "extreme remedy," *Richards v. Cnty. of Missoula*, 2009 MT 453, ¶ 16, 354 Mont. 334, 223 P.3d 878, and is appropriate only "when there are no material facts in dispute and the movant is entitled to judgment as a matter of law." *Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality*, 2008 MT 407, ¶ 19, 347 Mont. 197, 197 P.3d 482. The party moving for summary judgment bears the burden of establishing that no material dispute of fact exists, *Tonner v. Cirian*, 2012 MT 314, ¶ 8, 367 Mont. 487, 291 P.3d 1182, and "[o]nce the moving party has met that burden, the non-moving party need only submit evidence of sufficient facts to support a genuine issue of material fact to preclude summary judgment." *Id.* (internal citation and quotation marks omitted).<sup>9</sup>

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<sup>8</sup> Indeed, the Act actually authorizes the parties to stipulate to waive the contested case proceedings and petition for direct judicial review where the case does not involve an issue of material disputed fact. Mont. Code Ann. § 2-4-603(1)(1).

<sup>9</sup> In *In re Bull Mountain Mine*, No. BER 2013-07 SM (Jan. 14, 2016), this Board resolved a contested case involving the adequacy of a CHIA at the summary judgment phase. In that case the parties agreed that there were "no disputed issues of fact and that all relevant facts are those compiled in the administrative record" such that the matter was appropriate for summary (Continued...)

**1. As Movants, Petitioners Bear the Burden of Demonstrating Their Entitlement to Summary Judgment.**

The question of which party bears the burden of proof in contested cases subject to Mont. Admin. R. 17.24.425, as this one is, is directly answered in subsection (7) of that provision:

“The burden of proof at such hearing is on the party seeking to reverse the decision of the board.”<sup>10</sup> Despite this clear and unambiguous allocation of the burden of proof, Petitioners make much of the burdens Western Energy bore in its application for AM4 and the Department bore when it made its decision to approve AM4. *See, e.g.*, Pet’rs’ Br. at 16–19, 49, 53, 66.

Petitioners’ theory—that these burdens “extend” to the contested case, effectively reversing the general common law rule that the party moving for summary judgment bears the burden of proof and persuasion—should be familiar to the Board. Petitioner MEIC advanced this interpretation in *MEIC*, and was rebuffed by the Montana Supreme Court. The result should be no different here.

**2. Petitioners Bear the Burden of Proving That the Department Erred.**

In *MEIC*, Petitioner MEIC advanced the same argument attempted here. As summarized by the Montana Supreme Court, Petitioner MEIC argued that,

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judgment. *Id.* at 56, ¶ 64. As discussed *infra*, Section I.A.4, no such agreement exists in this case.

<sup>10</sup> Because Mont. Admin. R. 17.24.425 governs administrative review of numerous types of decisions (*see* Mont. Admin. R. 17.24.425(1)), the reference to the “decision of the board” in section (7) is ambiguous. In context it must be read generically to reference the *Department’s* decision in this case.

when [the applicant] applied for the air quality permit, [the applicant] had the burden of proving to the Department that all statutory and regulatory criteria for issuance of the permit were satisfied. From that premise, MEIC contend[ed] that [the applicant's] initial burden of proof in this regard extended to the contested case hearing before the Board and required [the applicant]—as well as the Department—to establish that the application met the permit criteria.

*Id.* at ¶ 12. The Montana Supreme Court rejected MEIC's argument. The Court held that "contested case hearings are bound by the common law and statutory rules of evidence unless otherwise provided by a specific statute." *Id.* at ¶ 13 (citing Mont. Code Ann. § 2-4-612(2)).

Finding no specific statutory instruction to the contrary, the Supreme Court analyzed the common law and general statutory evidentiary provisions and found that, "the party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.* at ¶ 14.

Applying that principle to the permit challenge brought by MEIC, the Supreme Court concluded:

If no challenge had been made or, as in this case, no evidence were presented at the contested case hearing establishing that issuance of the permit violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid. Thus, as the party asserting the claim at issue, MEIC had the burden of presenting evidence necessary to establish the facts essential to a determination that the Department's decision violated the law.

*Id.* at ¶ 16.

Petitioners in this case point to no specific statutory instruction that would relieve them of the burden to produce evidence in support of their claims in this matter. A recent survey of Montana Administrative law provided an example of what such a statutory instruction would entail:

The Montana Board of Personnel Appeals is an example of a MAPA agency that does not have to apply the common law and statutory rules of evidence because its authorizing/enabling legislation specifically provides: "In a hearing, the board is not bound by the rules of evidence prevailing in the courts."

William L. Corbett, *Montana Administrative Law Practice: 41 Years After the Enactment of the Montana Administrative Procedure Act*, 73 Mont. L. Rev. 339, 362 n.184 (2012) (citing Mont. Code Ann. § 39-3-406(2)). Petitioners have cited to no such specific statutory instruction here. Thus, the general rule applies and Petitioners have the burden of “presenting the evidence necessary to establish the facts essential to a determination that the Department’s decision” to approve AM4 violated the law. *See MEIC*, ¶ 16; Mont. Code Ann. §§ 26-1-401, -402.

**3. Petitioners Erroneously Conflate a Permittee’s Obligation to Affirmatively Demonstrate that the Operation has been “Designed to Prevent Material Damage” with a Burden of Proving the Department’s Decision is Correct.**

The language of the Montana provision at issue is instructive. Under the statute, an operator first “affirmatively demonstrates” that the mining operation is “designed to prevent material damage to the hydrologic balance outside the permit area.” § 82-4-227(3)(a). This Board has implemented the provision through Mont. Admin. R. 17.24.405(6)(c), which echoes the instruction that a permit is approved when, “on the basis of information set forth in the application or information otherwise available that is compiled by the department,” the application has affirmatively demonstrated and the department has confirmed, “the hydrologic consequences and cumulative impacts will not result in material damage to the hydrologic balance outside the permit area.” Mont. Admin. R. 17.24.405(6)(c). Only after the Department has confirmed compliance with these standards does the Department issue its “Findings and Notice of Decision.” *See* Mont. Admin. R. 17.24.405.

Contrary to Petitioners’ argument, these provisions do not suggest that the Department or permit applicant bears the burden of proof in a contested case hearing. Rather, the sensible construction of these provisions is that once the Department makes its decision and issues its

“Findings and Notice of Decision”<sup>11</sup> an entity challenging the permit decision shoulders the burden of demonstrating that the Department has erred. Particularly in a process that gives rise to the Department’s detailed “Findings and Notice of Decision,” requiring the Department to carry an additional burden beyond the existing decision would invert the ordinary process of agency decisionmaking: it would require that the agency prove a defense of a decision even before the challenger had carried some burden of persuasion that the agency’s findings and decisions were in error. In addition, while not free from ambiguity, it would appear that 17.24.425(7) expressly allocates the burden to the challenging party: it provides that “[t]he burden of proof at such hearing [i.e., a hearing before the Board on a challenge to a surface mining permit] is on the party seeking to reverse the decision of the board.” *Id.*

**4. Summary Judgment May Not Be Granted Because Material Disputes of Fact Exist.**

Summary judgment is not warranted when, as demonstrated in Section II *infra*, the parties dispute the interpretation and significance of key facts, including the underlying scientific analyses performed by the Department. The Board of Environmental Review is “acting [in its capacity] as a factfinder” and should enter findings “based on the evidence presented.” *See MEIC*, ¶¶ 23, 25. As discussed above, the Board’s primary purpose in a contested case hearing is to act as a factfinder. Summary judgment is proper only when there are no disputes of material facts. *See Pet’rs’ Br.* at 46-47 (quoting language from each case regarding the lack of disputed material facts).

Petitioners have frankly acknowledged disputes regarding material facts in discovery. Nevertheless, Petitioners appear to take the position that such disputes of fact are of no

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<sup>11</sup> In this case the Department titled the document that includes its findings and notice of decision, “Written Findings.”

consequence because they assert that the dispositive issue in the case is whether the Department's decision complied with the applicable statutory standard "as a matter of law." Pet'rs' Br. at 47. Claiming an issue is a matter of law, however, will not render it one. The statutory standard the Department was required to apply is a highly *factual* standard. The Department must develop written findings that "confirm" that "the hydrologic consequences and cumulative hydrological impacts will not result in material damage to the hydrologic balance outside the permit area." Mont. Admin. R. 17.24.405(6)(c). To reach its ultimate legal conclusions, the Department must apply its expertise to scientific evidence about baseline water quality and quantity and existing water uses, and then make predictive judgments about potential impacts on those baseline conditions using modeling and technical expertise. Indeed, where the question is whether the Department's cumulative hydrological impact assessment is "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," Mont. Admin. R. 17.24.314(5), it is difficult to conceive how to divorce the legal conclusions from their underlying factual findings.

*Bull Mountain*, No. BER-2013-07 SM, does not hold to the contrary. In that case both parties conceded that no material dispute of fact existed. See *Bull Mountain* at 3 ("The parties agreed the matter was capable of determination via summary judgment motions."). That is not the case here. The record makes it abundantly clear that there are genuine issues of disputed material facts in this case. The Statement of Disputed Facts identifies 11 disputed issues of material fact where testimony is necessary to explain the basis for the Department's scientific judgments. The parties disagree as to (i) whether DEQ properly excluded consideration of impacts from Area F in the CHIA for AM4; (ii) whether AM4 will impact Rosebud Creek and its

tributaries; (iii) whether AM4 will cause a violation of water quality standards for electrical conductivity in Rosebud Creek; (iv) whether ranches have been “destroyed” by the Rosebud Mine; (v) whether operations at the Rosebud Mine have caused dewatering of segments of East Fork Armells Creek; (vi) whether coal mining is the source of nitrogen that has allegedly impaired lower segments of East Fork Armells Creek; (vii) whether coal mining is the source of sulfates and chlorides that have allegedly impaired lower segments of East Fork Armells Creek; (viii) whether coal mining has caused violations of water quality standards due to alterations in littoral vegetative cover in the upper segment of East Fork Armells Creek; (ix) whether the 2014 aquatic life survey was properly conducted in accordance with DEQ standards; (x) whether the Rosebud coal seam is “saturated with water and functions as an aquifer”; (xi) whether spoils water from operations in AM4 will reach Rosebud Creek and cause a change in the classification of groundwater from Class I to Class II or Class III. This case would benefit from exposition to assist the Board in fulfilling its statutory function under the MAPA as a fact-finder to resolve these disputed issues of material facts.<sup>12</sup>

**B. Petitioners Mischaracterize the Board’s Scope of Review.**

Citing the Board’s recent decision in *Bull Mountain*, the Petitioners claim that “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.” Pet’rs’ Br. at 46 (quoting *Bull Mountain*, ¶ 66). This assertion actually narrows *Bull Mountain*’s already overly narrow scope of review. Respondent-Intervenors respectfully submit that the Board should take this opportunity to revisit its analysis in *Bull*

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<sup>12</sup> Intervenor-Respondents plan to propose a visit by the Board members to Rosebud Mine in order to provide a better understanding of the site and current conditions.

*Mountain* and analyze the scope of review mandated by the MAPA in this case. Even if the Board declines to address *Bull Mountain*, it should decline Petitioners' attempt to further narrow the scope of review on issues properly before the Board. Further, the Board should reject Petitioners' attempt to raise new issues in this contested case hearing and confine its analysis to issues that Petitioners proper raised before the Department in the permitting process.

**1. *Bull Mountain* Should Not Be Read to Limit the Scope of the Board's Review.**

In *Bull Mountain*, the parties had agreed to a summary judgment proceeding, and each of them contended that there were no genuine issues of material fact. Given this congruity between the parties, the Board concluded that in its review of the Department's approval "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." *Bull Mountain*, ¶ 66. Petitioners cite this statement, without fully considering its context, as a justification circumscribing the scope of the Board's review in this case and for obtaining summary judgment. *See* Pet'rs' Br. at 46-47. Read this way, the Board's decision in *Bull Mountain* cannot be reconciled with the Montana Supreme Court's instruction for contested cases in *MEIC* or the plain language of the MAPA. Respondent-Intervenors urge the Board to consider the scope of its review as applied to the Rosebud Mine in light of *MEIC* and the material disputes of fact in this case.

As Petitioners read *Bull Mountain*, MAPA and the controlling case interpreting contested case provisions, *MEIC*, was pitted against the substantive provisions of the MSUMRA and its implementing regulations. *See Bull Mountain*, ¶¶ 65-67. In Petitioners' view, authorizing the Department (consistent with MAPA) to present evidence and argument in defense of its

permitting decision, would undermine the permitting standards and procedures the Department must comply with when issuing the permit in the first instance. *Id.* ¶ 67.

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 decided differently. *MEIC* involved a challenge to an air quality permit; the statutory and regulatory standards for issuing an air quality permit include substantive environmental quality standards similar to those at issue in this case. *Compare* Mont. Code Ann. § 75-2-211 and Mont. Admin. R. 17.8.749 (air quality permit standards) *with* Mont. Code Ann. § 82-4-227(3(a) and Mont. Admin. R. 17.24.314 and .405 (mine plan permit standards). 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 did not supersede the Department’s (or permit applicant’s) statutory right under the MAPA to present evidence in a contested case hearing.

The Supreme Court’s remand instruction in that case does not suggest that the Board should forego its critical function of receiving evidence from the parties. 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, the Supreme Court remanded the case to the Board with instructions to apply the correct standard of review. The Court instructed that, in completing its 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.” *MEIC*, ¶ 26. In the context of the Supreme Court’s decision, in which the

Supreme Court emphasized the applicability of all of the MAPA, including the fact-finding role, it is clear that this instruction was for the remand proceedings *only*, and *not* applicable to other cases. Moreover, the reference to the “record” in that passage should be read to mean the record developed *by the Board* in the original contested case.

This remand instruction in *MEIC* was specific to the Board’s task on remand for that case. Nevertheless, in *Bull Mountain* language suggests that the Board adopted it as a general principle of law and used it as the basis of its restrictive rule, beginning its discussion of the standard of review with language that would suggest a departure from the MAPA proceedings entirely at odds with *MEIC*.<sup>13</sup> From this jumping off point, the Petitioners would then have the Board adopt a limitation overlooking the Supreme Court’s explicit instruction that *all* elements of MAPA part 6 apply in a contested hearing in the absence of specific statutory instruction to the contrary. Given the multiple flaws of Petitioners’ reasoning with respect to the “four corners” rule, the Board should take this opportunity to revisit its *Bull Mountain* decision and clarify that its scope of review is not so restricted as Petitioners argue.

## **2. In Any Event, the Board May Hear Explanatory Evidence.**

Even if the Board is content to abide by a rule restricting its review to the CHIA and other record documents, it should reject Petitioners’ invitation to narrow its evaluation even further. In *Bull Mountain*, the Board acknowledged the following caveat:

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<sup>13</sup> Intervenors respectfully note that some language adopted in the decision suggests an overly broad authority to delimit evidence: “[t]he Board may, in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate.” *See Bull Mountain*, ¶ 60. Of course, in context, this may well have been unnecessary to the decision since the parties had agreed that there were no disputed facts.

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*, ¶ 70; *see also Pac. Shores Subdivision Cal. Water Dist. 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"). Unlike the agency in *Bull Mountain*, Western Energy and the Department do not seek to raise new arguments or post-hoc rationalizations for agency action. *See id.*, ¶ 68. Granting Petitioners' motion for summary judgment would improperly deprive the Department and Respondent-Intervenors the opportunity to provide the explanatory evidence and argument contemplated by this caveat to the *Bull Mountain* approach.

Substantial portions of Petitioners' arguments call into question the Department's expert opinions. In discovery, Petitioners admitted that they lacked the technical expertise to understand many elements of the CHIA, *see Resp.-Int'vrs' Ex. 2* (Rule 30(b)(6) Deposition of Petitioners at 33:22, 34:22, 37:1, 39:13, 40:15, 67:13, 92:5, 132:17) and had not consulted with experts who had such expertise to obtain a better understanding of the CHIA (*id.* at 101:14, 161:19). Petitioners' motion for summary judgment, borne out of this lack of technical expertise, raises issues that can be resolved only with testimony from experts who are qualified to speak to the questions raised in the Motion. Extra-record evidence is necessary to (i) explain the underlying data and analysis that served as the basis for the agency's decision making, and

(ii) respond to extra-record evidence submitted by Petitioners. The Department and Respondent-Intervenors should be permitted, for instance, to provide expert testimony explaining the import of the potentiometric maps in the CHIA and why they demonstrate that Area B would not impact Area F. *E.g.*, Pet'rs' Ex. 2 at Figure 8-5. Likewise, limited extra-record evidence is necessary to rebut Petitioners' arguments which themselves are based on evidence that is not within the CHIA or Petitioners' comments.

The CHIA is a technical document. While it must be "sufficient . . . for purposes of a permit decision" (Mont. Admin. R. 17.24.314(5)), it need not provide the public with a primer on hydrology. The Department is entitled to use technical terms, charts, tables, graphs, and maps as appropriate to support the permit decision. To the extent this information prompts questions in the public, they are entitled to seek review in a contested hearing, during which the MAPA provides the right of "*all* parties to respond and present evidence and argument on *all* issues involved." Mont. Code Ann. § 2-4-612 (emphasis added).

### **3. Petitioners Cannot Raise New Issues in the Contested Case Hearing.**

In this case Petitioners try to have it both ways. While arguing vociferously that the Board's analysis should be confined to the CHIA, they nevertheless lead their argument with an issue that was not properly raised in the permit review process and rest several others on an argument regarding the scope of the CHIA that they raise for the first time at summary judgment, thus depriving the Department of an opportunity to explain its treatment of these issues in the CHIA or its response to comments. Petitioners failed to properly raise their concerns over the analysis of impacts from Area F and the scope of the CHIA during the permit review process and should be precluded from arguing them here.

An overriding goal of administrative law is providing the public an opportunity to participate and be heard in an agency's decision-making process, but that opportunity is not unlimited. Members of the public wishing to participate in an administrative review process bear the responsibility of identifying concerns in a timely fashion to allow the agency the opportunity to consider those concerns at the appropriate time. Petitioners have failed to meet this responsibility.

Petitioners raise new issues in their Motion that were not identified in their comments on the AM4 application. It is well-settled that commenters must “structure their participation so that it . . . alerts the agency to the [parties’] position and contentions’ in order to allow the agency to give the issue meaningful consideration.” *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 764, 124 S. Ct. 2204, 2213 (2004) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553, 98 S. Ct. 1197, 1216 (1978)); *see also Sims v. Apfel*, 530 U.S. 103, 112 120 S. Ct. 2080, 2086 (2000) (O’Connor, J., concurring) (noting in an analogous context that “[i]n most cases, an issue not presented to an administrative decision-maker cannot be argued for the first time in federal court”); *Universal Health Servs. Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004). “[T]here is a near absolute bar against raising new issues—factual or legal—on appeal in the administrative context.” *Nat’l Wildlife Fed’n v. EPA*, 351 U.S. App. D.C. 42, 50, 286 F.3d 554, 562 (2002). As the Supreme Court has noted, this is grounded in “[s]imple fairness . . . [which] requires as a general rule that 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.” *See United States v. L. A. Tucker Truck Lines, Inc.*, 73 S. Ct. 67, 69, 344 U.S. 33, 37 (1952). In the absence of such a rule, an agency would not have an opportunity to respond to comments, explain its rationale, and address public concerns.

The Interior Board of Land Appeals has applied this principal to an appeal challenging the sufficiency of a CHIA, holding that a challenger had waived its right to object to the sufficiency of a hydrologic assessment when it failed to raise issues during the comment process. *See Nat. Res. Def. Council, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 94 IBLA 269, 295 (1986).

Nonetheless, Petitioners seek to raise two new issues without having provided the Department the opportunity to address them during the comment process. *First*, Petitioners argue that the Department failed to assess the cumulative hydrologic impacts from potential future expansions in Areas F and G of the Rosebud Mine. Pet'rs' Br. at 49. While Petitioners assert that they raised the issue of Area B's impacts on Area F in a footnote to an exhibit in their Comments, this oblique reference was hardly sufficient to put DEQ on notice. *See Resp.-Int'vrs' Ex. 2 at 48:17-21 (Rule 30(b)(6) Deposition of Petitioners); see also Resp.-Int'vrs' Ex. 1 at 1 n.1.* Indeed the D.C. Circuit has held that “[t]he fact that, buried in hundreds of pages of technical comments . . . some mention is made of the . . . concept . . . is insufficient to preserve the issue for review on appeal. ‘Our cases . . . require complainants, before coming to court, to give the [agency] a *fair opportunity* to pass on a legal or factual argument.’” *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of the Interior*, 328 U.S. App. D.C. 271, 287, 134 F.3d 1095, 1111 (1998). The appropriate time to raise these issues was during the comment process. Petitioners’ failure to identify these issues during the comment period waives them for purposes of the contested case hearing before this Board, Petitioners’ vague references in footnotes notwithstanding.

*Second*, Petitioners argue for the first time in their Motion, and without having identified the issue in their Request for Hearing, that the Department’s CHIA should have analyzed the impacts from mining in the already-permitted sections of Area B directly, rather than as part of

the cumulative impacts to the extent such operations' impacts will interact with those from AM4. In their deposition, Petitioners specifically disavowed that this was their contention. Resp.- Int'vrs' Ex. 2 at 217-19 (Rule 30(b)(6) Deposition of Petitioners) (stating that Petitioners only intend to raise issues "as stated in [their] notice of appeal"). Nevertheless, they now rest several arguments on the theory that the definition of "operation" required the Department to prepare a CHIA for the entirety of Area B (or the entire Rosebud Mine), rather than analyzing impacts of mining outside of AM4 only to the extent they qualified as cumulative impacts by interacting with the impacts of AM4 within the cumulative impact area boundary. *See infra*, Section I.C.1-2. The Department's approach to the CHIA and interpretation of the term "operation" in the context of the AM4 application was apparent well before Petitioners submitted their comments and certainly by the time Petitioners made their Request for Hearing. Petitioners did not raise this issue in their comments, and for the same reasons articulated with respect to the Area F argument, they should be precluded from raising it here. Further, Petitioners did not identify this issue in their Request for Hearing and should therefore be precluded from raising it here. *See* Mont. Admin. R. 17.24.425 ("The request must contain the grounds upon which the requester contends the decision is in error.").

### **C. The Substantive Permit Standards**

The core of Petitioners' case is the theory that the Department's approval of AM4 did not meet the substantive standards established by statute and regulation. Accordingly, a short clarification of the approval standards is necessary.

Montana Code Section 82-4-227 establishes robust standards that each strip-mining permit or major revision to such permit must meet. Of relevance to this contested case hearing is the requirement that "the assessment of 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<sup>14</sup> to the hydrologic balance outside the permit area.” Mont. Code. Ann. § 82-4-227(3)(a). Petitioners focus on two elements of this requirement, the definitions of “all anticipated mining” and “operation,” in their attempt to argue that Department’s approval was insufficient.

**1. “All anticipated mining”**

In a new argument in this contested case hearing, Petitioners argue that the Department should have explicitly considered the proposed Area F of the Rosebud Mine in its CHIA. This overstates the breadth of the required scope of a CHIA. Section 82-4-227(3)(a) instructs the Department to analyze “probable cumulative impact.” Contrary to Petitioners’ claim, the statute does not require the Department to analyze “all anticipated mining” for its own sake. Pet’rs’ Br. at 49. Anticipated mining is relevant and included in the analysis only to the extent it would contribute to the probable cumulative impact of the action at issue. As discussed *infra*, Section II.A.1, if Area F is ultimately approved, its impacts on surface and groundwater would not interact with those of AM4 within the designated cumulative impact areas.

**2. “Operation”**

Petitioners argue that the definition of “operation” required the Department to analyze the impacts of all of Area B, or even the entire Rosebud Mine, in its CHIA for AM4. Pet’rs’ Br. at 55. However, reviewing the entire definition of “operation”—rather than just the four words

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<sup>14</sup> “Material damage” is defined as follows: “with respect to the protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality or 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 water use is affected, is material damage.” Mont. Code Ann. § 82-4-203(31).

quoted by the Petitioners—demonstrates that the Department properly defined the scope of the CHIA. “Operation” is defined as

(a) *all of the premises*, facilities, railroad loops, roads, and equipment *used in the process of producing and removing mineral from* and reclaiming *a designated strip-mine or underground-mine area*, including coal preparation plants; and (b) all activities, including excavation incident to operations, or prospecting for the purpose of determining the location, quality, or quantity of a natural mineral deposit.”

Mont. Code Ann. § 82-4-203(35) (emphasis added). The definition of “operation” is therefore geographically limited to a “designated strip-mine or underground-mine area.”<sup>15</sup>

The terms “designated strip-mine area,” “strip-mine area,” and “area” are not defined. Of course, common sense instructs that the area “designated” in a permit application is the area of the permit or permit amendment. “In the search for plain meaning, the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.” *Werre v. David*, 275 Mont. 376, 385, 913 P.2d 625, 631 (1996) (quoting *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445 (1986)) (internal quotation marks omitted). The word “area” is notably not capitalized or defined such that it should be interpreted as a term of art. To the contrary, nothing in the statute indicates that “designated strip-mine area” indicates that the phrase should be expanded beyond the area “designated” for surface mining in the permit application. Thus, the Board should abide by the natural interpretation of “operation”: the area for which regulatory permission is sought—in this case, AM4.

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<sup>15</sup> Petitioners did not address this element of the provision and therefore have waived the opportunity to present argument as to why it would be error for the Department to determine that the area encompassed within AM4 is a “designated strip-mine area.” *Cf.* M.R. App. P. 12(1)f (argument section of opening brief must content contentions with respect to issues, reasons therefor, and citations to the authorities relied upon).

Other areas within the mine, including Area B, were already duly permitted. Neither the Department nor Western Energy is required to re-permit these areas with every expansion of the mine and to do so would yield absurd repetition. (This is not to say that a cumulative hydrologic impact assessment is not required. Of course, as described below, mining activities within the other Areas were considered in the Department's CHIA. Pet'rs' Ex. 2 at 5-1 (CHIA). No analytical benefit would accrue from the paperwork exercise Petitioners seek, and the statute does not require it.

## **II. THE RECORD AND OTHER EVIDENCE DEMONSTRATE THAT PETITIONERS ARE NOT ENTITLED TO SUMMARY JUDGMENT.**

The MSUMRA prohibits the Department from approving a mining permit “unless the application affirmatively demonstrates that . . . the assessment of 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.” Mont. Code. Ann. § 82-4-227(3)(a). Petitioners take issue with alleged inadequacies in the Department's cumulative impact analysis and in the agency's material damage determination. The issues Petitioners raise involve disputes of material facts, precluding summary judgment. Moreover, the record in this case demonstrates that the preponderance of the evidence supports the Department's and Respondent-Intervenors' position. *See MEIC*, ¶ 22.

### **A. The Department's Cumulative Impacts Analysis Properly Considered All Relevant Factors.**

Petitioners criticize two elements of the cumulative impacts analysis in the CHIA. First, they argue that the Department allegedly failed to analyze the contributions of cumulative impacts from anticipated mining in Area F. Then they argue that the Department improperly applied and analyzed certain water quality standards. Neither of these arguments is persuasive.

As demonstrated below, Petitioners' arguments are based upon material disputes of *fact* for which summary judgment is not available. Moreover, upon review of the record, as properly interpreted by experts with knowledge of the matter, the preponderance of evidence demonstrates that the Department properly defined the scope of the CHIA and appropriately analyzed AM4's probable hydrologic impacts in light of the applicable water quality standards.

**1. The Department Properly Did Not Include a Discussion of Area F in the CHIA.**

In an argument that was never properly raised before the Department, *see supra*, at Section I.B.3, Petitioners argue that the CHIA is flawed because the Department “ignor[ed] anticipated mining, including in Area F.” Pet’rs’ Br. at 49. Assuming *arguendo* that this claim had been properly raised and were within the scope of this Board’s review (which it is not), the argument lacks merit because is premised on a mistake of fact: impacts from mining at AM4 will not interact with impacts of potential mining in Area F within the cumulative impact area designated in the CHIA.

As discussed above, *supra*, Section I.C.1, anticipated mining is relevant and included in a CHIA *only* to the extent it contributes to the probable cumulative impact of the action at issue. The assessment mandated by § 82-4-227(3)(a) is of “probable cumulative impact.” The analysis of “all anticipated mining” is secondary to and subservient to that primary analysis. Where no such cumulative impact will occur, there is no obligation to analyze “anticipated mining.” The regulatory definition of “cumulative hydrologic impact area” supports this position. That area—which defines the geographic extent of the CHIA—is defined to include “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.” Mont. Admin. R. 17.24.301(32) (emphasis added). Thus, it is the

*interaction*, if present, between mining areas that triggers the requirement to analyze cumulative impacts from anticipated mining operations.

Contrary to admissions in discovery, Petitioners now appear to claim that cumulative impacts of mining at AM4 and Area F would interact. Respondent-Intervenors dispute this factual contention. The CHIA demonstrates that AM4 and Area F are located several miles apart in separated drainages: AM4 occurs in the East Fork Armells Creek drainage and Area F, if approved, would take place in the West Fork Armells Creek drainage. Those drainages are separated within the Cumulative Impact Area and only intersect some 17 miles north of the Area B Permit area where no interaction of impacts from the two separate mine areas could be detected. *See* Nicklin Decl. at ¶ 50 (“[b]y the time the waters do join, the water will be dominated by contributions from other portions of each of the East Fork Armells Creek and West Fork Armells Creek drainages. Any potential changes associated with AM4, in the unlikely event they occur, will not be discernible.”). There is no surface water connection between the two within the cumulative impact area designated by the Department. *See id.*; Pet’rs’ Ex. 2 Figures 5-1 and 8-1 (CHIA) (defining the cumulative impact area and showing the confluence of West Fork Armells Creek and East Fork Armells Creek). In discovery Petitioners admitted that the confluence of West Fork Armells Creek and East Fork Armells Creek occurs well downstream of the cumulative impact area boundary and, critically, that they do not contest the Department’s determination of the cumulative impact boundary. Pet’rs’ Dep.at 68-69. By their admission in discovery, and contrary to their contention in summary judgment, mixing that occurs so far downstream is not relevant to the Department’s analysis and properly excluded from consideration in the CHIA.

Data and figures in the record demonstrate the absence of any interaction between the two areas for groundwater. Potentiometric maps included in the CHIA (*e.g.*, Pet’rs’ Ex. 2 at Fig. 8-5), and explained by expert Dr. Michael Nicklin, demonstrate that there is no groundwater connection between Area F and AM4. Nicklin Decl. at ¶ 48. Those figures demonstrate that the drawdown impacts of AM4 are highly localized and therefore will not directly impact Area F. *Id.* Upon questioning in deposition on behalf of Petitioners, the designated organizational deponent conceded that the Petitioners knew of no hydrological connection between the two areas. Resp.-Int’vrs’ Ex. 2 at 92:18 (Rule 30(b)(6) Deposition of Petitioners). Petitioners admit that there will be no interaction—and thus no cumulative impact—between AM4 and Area F. Thus, the Department properly excluded Area F from the CHIA.

**2. The Department Appropriately Considered Western Energy’s Compliance with EC Standards in the Rosebud Creek Tributaries.**

Petitioners allege, without foundation, that Western Energy cannot comply with EC standards for Rosebud Creek tributaries, and claim that the Department should have expanded its analysis in the CHIA to encompass the potential for EC violations.<sup>16</sup> Pet’rs’ Br. at 53-54. Petitioners’ argument fails on all counts.

Petitioners implicitly acknowledge that AM4 will not affect Rosebud Creek tributaries. *Id.* at 54. They cannot argue otherwise when the record demonstrates that AM4 will not affect Rosebud Creek and its tributaries. Pet’rs’ Ex. 2 at 9-5 (Cow Creek), 9-13 (Lee Coulee), 9-14 (Miller Coulee, Pony Creek, Rosebud Creek) and 9-16 (Spring Creek) (CHIA). Indeed, as

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<sup>16</sup> It is not clear whether Petitioners allege that such violations have already occurred. Petitioners made such claims before the Department, which determined in its Written Findings that Western Energy had obtained all required water quality permits and that there were no pending violations. Pet’rs’ Ex. 1 at 6, ¶¶ 15-17 (DEQ’s Written Findings), and at 8, ¶¶ 1-2 (Response to Comments). To the extent Petitioners contend otherwise, that is a material dispute of fact that precludes summary judgment.

explained by Dr. Nicklin, Area B, which includes AM4, was designed to prevent impacts to the Rosebud Creek tributaries through the use of sediment ponds that collect both point-source discharges and surface runoff. These sediment ponds are presently much larger than are needed to collect a 10 year 24-hour storm. Hence, there is very little risk of surface water runoff reaching Lee Coulee Creek and/or Rosebud Creek. Nicklin Decl. at ¶¶ 14-16. Groundwater from the AM4 spoils is prevented from reaching Rosebud Creek because mining occurs on the other side of a groundwater drainage divide from the Rosebud Creek drainage. *Id.* at 17. To the extent Petitioners now contend that AM4 itself will affect the Rosebud Creek tributaries, at best they raise a material dispute of fact that precludes summary judgment.

Petitioners nevertheless insist that the Department should have analyzed the alleged potential for these violations resulting from mining in already-permitted portions of Area B based on their misinterpretation of the term “operation” in Section 82-4-203(35). As discussed above, *supra*, Section I.C.2, the full definition of the term includes a geographic restriction that supports the Department’s decision to analyze the area designated in the permit application for AM4. Thus, Petitioners’ attempt to use AM4 to reopen past permitting decisions should be rejected.

Moreover, the basis for Petitioners’ claims of the potential for violations is faulty. Petitioners cite one sentence in a comment letter on a draft permit. As explained by Mr. Jesse Noel, the author of that comment letter, at that point in the permit process Western Energy had concerns about compliance with an EC limit that was significantly lower than natural background levels using the proposed Best Practicable Control Technology Currently Available (“BPCTCA”). Declaration of Jesse Noel at ¶¶ 13–15 (“Noel Decl.”) (Resp.-Int’vrs’ Ex. 8); *see also* Schafer Dec. at ¶¶ 17-18 (explaining the natural background EC levels in the area). At that

point in time Western Energy had not investigated other technologies that might enable compliance. Noel Decl. at ¶ 14. DEQ ultimately issued the permit (*id.* at 16), and Western Energy does and will continue to comply with all permit limits. To the extent Petitioners contend otherwise, they raise a material issue of disputed fact that precludes summary judgment.

**3. The Department Properly Analyzed the Potential for the Proposed Operations to Contribute to a Violation of Nitrogen Standards.**

Petitioners contend that the Department failed to assess whether cumulative hydrological impacts related to nitrogen allegedly released by operations in the AM4 area will cause material damage only because they ignore the extensive study and analysis the Department did on this issue. The Department spent several pages in the CHIA discussing its evaluation of nitrate levels in the area and the potential for material damage, ultimately concluding the AM4 operation is designed to prevent such damage. The Petitioners' argument relies on the contention that the Department should have applied a numerical nutrient standard that Montana regulation expressly says does not apply to most of the waters that could potentially be impacted by nitrogen coming from AM4, and on discounting without explanation the Department's analysis showing nitrogen pollution from mining operations is not a concern. In doing so, Petitioners seriously misstate the Department's conclusions in the CHIA and responses in discovery. At the very least, Petitioners' claims regarding the Department's analysis and conclusions in this area are factual disputes which cannot be decided on summary judgment.

The Department conducted a thorough examination of the potential for material damage to the cumulative hydrological balance outside the permit area, based in large part on information provided by Western Energy in its PHC, response to deficiency notices, and other correspondence. As a result of its analysis, the Department found that "the proposed action is

designed to prevent material damage to surface water resources from high nitrate concentrations.” Pet’rs’ Ex. 2 at 9-26 (CHIA); *see also id.* at 9-78 through 9-79 and figure 9-17.

The Department identified several reasons leading it to this conclusion. Although high nitrate levels had been found in lower East Fork Armells Creek in the past, especially in the 1980’s and early- to mid-1990’s, those concentrations were found “in areas actively used by livestock.” *Id.* at 9-26. The Department investigated findings of high nitrate and nitrite-nitrate nitrogen—sometimes at levels that exceeded the applicable human health standard of 10mg/L—at several monitoring wells on or near the Rosebud Mine, but concluded that those samples were not a cause for concern, either because the wells were within the permit area, the exceedances were considered anomalous, or the exceedances were found to likely be the result of sources other than mining, including cattle grazing, runoff from lawn fertilizer on the golf course, and discharges from the water treatment plant. *Id.* at 9-78 through 9-80.

The Department also addressed concerns related to nitrite-nitrate pollution in its response to comments, explaining that “[t]he lower portion of [East Fork Armells Creek] receives nitrogen-rich effluent from numerous sources including: runoff from the town of Colstrip, the water treatment plant, infiltration and runoff from the golf course (with fertilized and irrigated greens), agriculture, and grazing.” Pet’rs’ Ex. 1 at 9 (DEQ’s Written Findings). The primary causes of nitrogen pollution are not hard to find: urine and manure from livestock grazing near streams, wastewater treatment facilities, and residential and commercial lawns. *See* Nicklin Decl. at ¶¶ 27–28; Schafer Decl. at ¶ 13; Declaration of Wade Steere at ¶ 3 (“Steere Decl.”) (Resp.-Int’vrs’ Ex. 9). Where undisputed contributors to nitrogen pollution are present, DEQ did not err in concluding that mining activities conducted over a mile from East Fork Armells Creek would not contribute to a water quality standard violation.

Although the Department acknowledged that blasting at the mine might have been one cause of nitrate infiltration to East Fork Armells Creek in the past, it found that, based on “past observations in monitoring wells,” the more than mile-long distance between East Fork Armells and the new mine cuts under AM4 “should be sufficient to prevent (through dilution) high concentrations of nitrate from blasting from entering the stream via spoil recharge and ultimately alluvial contributions to baseflow.” Pet’rs’ Ex. 2 at 9-26 (CHIA).<sup>17</sup> Petitioners attack this analysis as “pure speculation.” Pet’rs’ Br. at 60. But the Department’s conclusion was supported by reasoned analysis and scientific data. Although it is theoretically possible for nitrate to enter East Fork Armells from Rosebud Mine if blasting is not conducted properly, the data do not support that theory in this case. Schafer Decl. at ¶ 12. Water quality monitoring results of effluent from the mine demonstrate that stormwater discharge is not contributing nitrogen and nitrate to East Fork Armells Creek. *Id.* Given the low rate of groundwater seepage within the mine spoil compared to the alluvium groundwater flow rates, it is highly unlikely that nitrogen from blasting in the spoils could cause either a violation of water quality standards or change the use of any stream or groundwater outside the permit area. Nicklin Decl. at ¶ 28. The Department’s analysis is not made “pure speculation” just because Petitioners disagree with it. At the very least, whether the Department’s analysis and conclusion was reasonable is a factual question unsuited for resolution on summary judgment.

Petitioners also contend that “[t]he Department unlawfully failed to assess potential violations of numeric water quality standards for nitrogen that protect aquatic life, as contrasted

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<sup>17</sup> In the one area in which the Department found there might be some potential for nitrate from blasting to enter waters outside the permit boundary in the Cumulative Impact Area, it has required ongoing monitoring to prevent any material damage. *See* Pet’rs’ Ex. 2 at 9-78 and 9-80 (CHIA).

with the more lenient standards for nitrogen that protect human health.” Pet’rs’ Br. at 55. This argument suffers from several serious flaws:

*First*, Petitioners mischaracterize the Department’s statements to fit their desire to find that East Fork Armells Creek is “not meeting applicable water quality standards for aquatic life,” due to nitrogen pollution from Rosebud Mine. *See* Pet’rs’ Br. at 57. Petitioners cite to the Department’s responses to interrogatories in support of this contention. In fact, the response Petitioners cite *specifically denies their contention*, explaining that, although the Department’s attainment record (based on data last collected in 2005) identified nitrate-nitrite from blasting at the mine as a potential cause of impairment *with a low level of confidence*, it did not *determine* that nitrate-nitrite as nitrogen was a cause. *See* Pet’rs’ Ex. 5 at 15. The Department Water Quality Standards Attainment Record for lower East Fork Armells Creek Petitioners cite supports the Department’s position, stating that “[d]ata from the 1970’s show that [nitrite plus nitrate] regularly exceeded criteria, although this was not the case in 2005.” Pet’rs’ Ex. 7 at 17.<sup>18</sup> Petitioners twice selectively quote the CHIA as saying that ““many of the highest [nitrate] values have been detected downstream of active mining.”” *See* Pet’rs’ Br. at 57. This is a highly misleading manipulation of the Department’s finding. The full text of the sentence, which Petitioners neglect to include, continues: “Many of the highest values have been detected downstream of active mining **and in areas actively used by livestock.**” Pet’rs’ Ex. 2 at 9-26 (CHIA) (emphasis added).

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<sup>18</sup> Note that this attainment record is for East Fork Armells Creek downstream of Colstrip, where it is affected by numerous other sources of nitrogen beyond mining.

*Second*, as a matter of law, the DEQ Circular DEQ-12A (“Circular 12A”) standards<sup>19</sup> do not apply to much of East Fork Armells Creek, including the upper reach, closest to Rosebud Mine, because those parts of East Fork Armells Creek are ephemeral. *See* Pet’rs’ Ex. 2 at 8-8 (CHIA); Pet’rs’ Ex. 6 at 5 (Water Quality Standards Attainment Record for segment MT42K002\_170 (Upper East Fork Armells)); Declaration of Penny Hunter at ¶¶ 16, 23, and 27 (“Hunter Decl.”) (Resp.-Int’vrs’ Ex. 10). Circular 12A states that its numeric standards only apply to “wadeable streams,” which are defined as perennial or intermittent streams. Resp.-Int’vrs’ Ex. 5 at 1-2. Petitioners misstate the Department’s position on this issue, claiming that the Department has admitted that all of East Fork Armells Creek is subject to the Circular 12A standards. *See* Pet’rs’ Br. at 56-57. In fact, the interrogatory response Petitioners cite says that only “[p]erennial and intermittent streams within the cumulative impact area are subject to the nutrient standard in DEQ Circular DEQ-12A,” and notes that East Fork Armells Creek has “intermittent or perennial stretches.” Pet’rs’ Ex. 5 at 16. But the Department has also determined that all of upper East Fork Armells Creek is ephemeral. *E.g.*, Pet’rs’ Exh. 6 at 5.

*Finally*, Petitioners’ contention that the Department failed to apply the numeric aquatic life nutrient standards is immaterial. Regardless of the applicability of the Circular 12A standards, the Department has, as discussed *supra*, Section II.A.3, determined that *mining* is not likely to contribute to a violation of any water quality standard related to nitrogen. The simple fact of a violation of a water quality standard in waters downstream from a mine does not indicate that the anticipated mining operations will cause material damage. By law, material damage is attributable to a proposed operation *only* if the Department finds or predicts a violation of a water quality standard that is the *result* of the mining operations’ anticipated

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<sup>19</sup> Adopted in 2014.

cumulative impacts. *See* Mont. Admin. R. 17.24.405(6)(c). As described above, the Department assessed the potential for nitrite, nitrate, and total nitrogen pollution from the mine to cause material damage outside the permit area and found that the mining operations were designed to prevent such material damage. Petitioners' assertion that the Department was required to obtain additional data before reaching that conclusion is false. *See* Pet'rs' Br. at 58-59. Where there is no data showing any impacts from total nitrogen on the waters in question, it would be unreasonable to force the Department to keep searching until it finds data that supports Petitioners' desired conclusion. Petitioners once again misconstrue the legal requirements, stating that 30 C.F.R. § 784.14 "provides that where information necessary to assess the probable cumulative impacts of the proposed operation and all anticipated mining are not provided . . . 'the permit shall not be approved . . .'" Pet'rs' Br. at 59. That provision, in fact, only applies to baseline data for certain constituents, not including nitrite, nitrate, or total nitrogen. 30 C.F.R. § 784.14(b)(2). Moreover, the Department *did* have the necessary information in this case; it just so happened that the necessary information showed a lack of evidence of any effect of mining on total nitrogen levels in the waters in question.

The fact that the Department did not explicitly compare its data to the Circular 12A numeric standard is irrelevant. As Petitioners recognize, the Department's "acknowledgment that the human health standard has been exceeded demonstrates that the aquatic life standard has also been exceeded." Pet'rs' Br. at 58. It is unclear what further analysis of the aquatic life numeric standard Petitioners require. Notwithstanding the occasional exceedances the Department found, it also found that they were not likely caused by mining and that the cumulative impacts of the proposed AM4 operations have been designed to prevent material damage. The Department therefore fulfilled its legal mandate with regard to examining the

potential for material damage from nutrients. Any contention by Petitioners to the contrary is, at best, a factual dispute that must be decided after a full hearing.

**B. The Department’s Material Damage Determinations Were Appropriate and Supported by the Record.**

After completing its analysis of cumulative hydrologic impacts, the Department determined that AM4 would not cause material damage (Pet’rs’ Ex. 1 at at 5-6, ¶ 12 (DEQ’s Written Findings)), *i.e.*, it would not result in “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 land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted.” Mont. Code Ann. § 82-4-203(31).

Petitioners take issue with that conclusion and identify four points of alleged material damage.

**1. The Department Properly Applied the “Affirmatively Demonstrates” Standard When Finding That EC Contributions Attributable to Area B or AM4 Would Not Materially Damage Rosebud Creek.**

Petitioners argue that the Department applied the incorrect standard of proof when analyzing whether EC contributions from AM4 would materially damage Rosebud Creek. Pet’rs’ Br. at 73-76. This argument fails for several reasons.

As a preliminary matter, the alleged EC contributions Petitioners reference result from mining in sections of Area B *other* than AM4. As discussed above, *supra*, Section I.C.2, the Department properly confined its CHIA to the operation for which a permit was sought, AM4, and any impacts from other mining that *interact* with the AM4 impacts. The record is clear that AM4 will not affect Rosebud Creek or its tributaries or interact with impacts from other mining that may affect Rosebud Creek and/or its tributaries. *Supra*, Section II.A.3.

Nevertheless, the Department properly analyzed the EC levels in Rosebud Creek and its tributaries, concluding that “as of 2013, there has not been a change in water quality in Rosebud

Creek that can be directly attributable to mining in Lee Coulee, Miller Coulee, Cow Creek, Pony Creek, Hay Coulee, or Spring Creek.” Pet’rs’ Ex. 2 at 9-15 (CHIA). Petitioners claim that this statement “reversed” the applicable standard of proof by “refus[ing] to find material damage unless there was an affirmative demonstration that that [sic] strip-mining would cause such damage.” Pet’rs’ Br. at 75 (emphasis omitted).

Petitioners misunderstand the Department. It explained that Rosebud Creek has been monitored at two stations, both upstream and downstream of the confluence with Lee Coulee, the tributary most affected by mining in Area B. Pet’rs’ Ex. 2 at 9-15 (CHIA). As explained by Dr. Schafer, drainages in this region gain salts as they reach the mainstem. Schafer Decl. at ¶ 17. Thus, the Department’s finding that salts increased in Rosebud Creek downstream of the confluence with Lee Coulee is not surprising and not indicative of material damage resulting from mining. The critical information supporting the Department’s material damage determination is that fact that the “concentration of TDS measured at the downstream station has not increased over time, and similarly no trend can be seen in the difference in concentration between the upstream and downstream stations.” Pet’rs’ Ex. at 9-15 (CHIA).<sup>20</sup> These data provide an affirmative demonstration that mining in Area B is *not* resulting in a “degradation or reduction . . . of the [EC] quality . . . of water outside the permit area.” Mont. Code Ann. § 82-4-203(31). To the extent Petitioners challenge the data relied upon by the Department, they raise a material issue of disputed fact that precludes summary judgment.

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<sup>20</sup> TDS and EC are related parameters, and experts frequently work with them together. *See supra*, note 5.

**2. The Department Properly Concluded that Previous Mining Has Not Dewatered East Fork Armells Creek and Future Mining Would Not Do So.**

Petitioners claim that the record “strongly suggests” that Western Energy has “dewatered an intermittent to perennial reach of East Fork Armells Creek in Section 15 by strip-mining the coal aquifer that provided baseflow to the stream, causing material damage.” Pet’rs’ Br. at 61. Petitioners further argue that DEQ should consider whether mining AM4 would further exacerbate the alleged dewatering. Neither of these claims is persuasive.

The Department evaluated evidence of possible dewatering and concluded that, without accurate information about the stream’s pre-mine flow, it was impossible to determine whether the mine had actually caused dewatering. Pet’rs’ Ex. 2 at 9-10 (CHIA). Petitioners obviously reach a different conclusion, but it was not error for the Department to examine the evidence and reach a conclusion other than the one Petitioners would prefer. Moreover, Respondent-Intervenors dispute Petitioners’ claim (based upon extra-record evidence) that Section 15 of East Fork Armells Creek was previously perennial. This is a material dispute of fact, and Respondent-Intervenors should be provided an opportunity to present expert evidence to rebut Petitioners’ claim. Dr. Nicklin would testify that he has reviewed Petitioners’ extra-record evidence and disputes the conclusion they draw from it. Nicklin Decl. at ¶ 23. For instance, Petitioners’ assertion is based on a 30-year-old PHC compiled shortly after years of above-average precipitation, which, as Dr. Nicklin explains, would be a contributing factor to intermittency. *Id.* According to Dr. Nicklin, the increased precipitation, coupled with water flow due to ponding in the vicinity of Section 15, both make it “unclear if the conditions described for Section 15 in [the study relied upon by Petitioners are] purely indicative of natural intermittent conditions.” *Id.*

Respondent-Intervenors also dispute Petitioners' claim that the stream is now dry. Pet'rs' Br. at 63. Ms. Hunter would testify that, in her expert opinion, the photograph Petitioners' submit as evidence that the stream is "dry" actually shows evidence that the stream likely was recently filled with water because the channel is muddy, indicating that the presence of water has precluded upland vegetation, and that cows were recently present to take advantage of the water. Hunter Decl. at ¶¶ 23-26. Indeed, the most recent observation demonstrates the presence of water in the area. Steere Decl. at ¶ 5 and accompanying photographs (showing water flow in Section 15); *see also* Nicklin Decl. Ex. A (attaching photographs from the September 2015 Benthic Survey showing surface water present in Section 15).

As to AM4, Petitioners acknowledge that the AM4 area is downstream from Section 15, but claim that additional analysis must be performed before they can be satisfied that AM4 will not dewater the upstream reach. Dr. Nicklin performed that analysis, which was included in the PHC Western Energy submitted in support of its application. He developed a regional groundwater model (Rosebud Mine model) which was used to evaluate the hydrologic impacts of AM4 on the surrounding areas. Nicklin Decl. at ¶ 7. He used it to characterize the Rosebud Mine area as a whole and applied it at a smaller scale to evaluate the localized impacts of AM4. *Id.*; *see also* Pet'rs' Ex. 8, Attachment D ("Rosebud Mine Groundwater Modeling Report"); Pet'rs' Ex. 8, Attachment E ("Area B-AM4 [Amendment Application 00184] Groundwater Model Report"). Thus, when the Department stated in the CHIA that "[r]egardless of the nature of the reaches in Section 15 . . . , the proposed permitting action will have no effect on the reach," Pet'rs' Ex. 2 at 9-10 (CHIA), the agency drew the conclusion from the analysis that Petitioners' claim was lacking. Based on this information, the Department reasonably concluded that AM4 is designed to prevent material damage to Section 15.

**3. The Department Properly Concluded that East Fork Armells Creek Meets and Will Continue to Meet Applicable Aquatic Life Standards.**

In arguing that the Department employed incorrect methods and standards for determining that cumulative hydrological impacts from mining in the AM4 area would not cause material damage to East Fork Armells Creek's support for aquatic life, Petitioners betray a misunderstanding of the record and the scientific process described in it. The CHIA, aquatic life survey, and other record documents in fact demonstrate that the Department followed appropriate procedures for evaluating East Fork Armells Creek's ability to support aquatic life and rationally concluded that aquatic life standards in East Fork Armells Creek were being met.

**a. Petitioners Misstate the Applicable Water Quality Standards for Aquatic Life in East Fork Armells Creek.**

Petitioners state that East Fork Armells Creek must support aquatic life in keeping with a C-3 designation. As a matter of law, that is incorrect. Upper East Fork Armells Creek, from its source to Colstrip, is wholly or largely ephemeral. *See* Pet'rs' Ex. 2, *e.g.*, at 8-8 and 9-6 (CHIA); Pet'rs' Ex. 6 at 5 (Water Quality Standards Attainment Record for segment MT42K002\_170 (Upper East Fork Armells)); Hunter Decl. at ¶¶ 27. Mont. Admin. R. 17.30.637(4) specifically exempts ephemeral streams from the specific water quality standards for C-3 waters contained in Mont. Admin. R. 17.30.629.

Regardless of East Fork Armells Creek's ephemerality, Montana has no numeric standards for three of the four constituents Petitioners argue violate water quality standards in that stream. *See* Pet'rs' Br. at 70. Chloride, sulfate, and salinity are not covered by numerical standards.<sup>21</sup> *See* DEQ Circular DEQ-7 at 6. Rather, they are governed by a narrative standard,

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<sup>21</sup> The standard for nitrogen is discussed *supra*, Section II.A.3.

which in the case of East Fork Armells Creek requires levels allowing the stream to provide a beneficial use for aquatic life. *See id.*; Pet’rs’ Ex. 2 at 9-8 (CHIA); Hunter Decl. at ¶ 27-28. On the basis of that narrative standard and study and analysis conducted by Western Energy and itself, the Department concluded that, “[b]ecause the stream still maintains its C-3 uses . . . the beneficial use of the stream is still maintained.” Pet’rs’ Ex. 2 at 9-8 (CHIA).

**b. The Aquatic Life Survey Was Properly Conducted.**

Petitioners are correct that, to inform its judgment regarding a stream’s compliance with narrative standards for aquatic life, “the Department collects samples and then compares them to regionally-defined reference conditions or various biological indices.” Pet’rs’ Br. at 67. That is exactly what occurred in this case. In a June 3, 2014 deficiency notice, the Department asked Western Energy to conduct an aquatic life survey of Upper East Fork Armells Creek, the primarily ephemeral stretch closest to Area B. *See, e.g.*, Pet’rs’ Ex. 2 (CHIA) at 9-8; Hunter Decl. at ¶ 5. Contrary to Petitioners’ apparent belief, Western Energy’s consultant, Ms. Hunter, conducted that study in accordance with the Department’s standard operating procedures.

Petitioners claim that “the Department expressly declined to employ its own approved standard operating procedures and methodologies . . . .” Pet’rs’ Br. at 68. It seems Petitioners are confused by an email message from the Department (Pet’rs’ Ex. 20) instructing Ms. Hunter to use the standard operating procedures *Petitioners themselves cite as governing* on the previous page of their brief, rather than another, inapplicable standard operating procedure document. *See* Pet’rs’ Br. at 67 (citing Pet’rs’ Ex. 34, “Sample Collection, Sorting, Taxonomic Identification, and Analysis of Benthic Macroinvertebrate Communities Standard Operating Procedure,” WQPBWQM-009); Pet’rs’ Ex. 20; Pet’rs’ Ex. 11 at 2 (“Survey protocols and taxonomic identification of the benthic community followed both MDEQ’s sampling and analysis protocols in *Sample Collection, Sorting, Taxonomic Identification, and Analysis of Benthic*

*Macroinvertebrate Communities Standard Operating Procedure . . . and USEPA’s Rapid Bioassessment Protocols for Use in Streams and Wadeable Rivers . . . .*”); Hunter Decl. at ¶ 35.<sup>22</sup>

Petitioners make much of the Department telling Ms. Hunter she did not need to apply metrics to the samples she took, but this in no way undermines the quality of the study. Analytical metrics applied or not applied to samples after the fact have no effect on the samples or data collected. Hunter Decl. at ¶ 38-39. Moreover, Ms. Hunter *did* calculate a numerical metric—the Hilsenhoff Biotic Index (“HBI”)—in her report, and the Department did compare the data she collected to “regionally-defined reference conditions,” as Petitioners state the Department is required to do. *See* Pet’rs’ Br. at 67; Pet’rs’ Ex. 2 at 9-8 (CHIA); Pet’rs’ Ex. 11 at 4; Hunter Decl. at ¶¶ 40-42.

**c. The Department Properly Analyzed the Results of the Aquatic Life Study.**

Petitioners’ claim that “the Department erroneously determined that the **mere presence** of some aquatic life was sufficient to demonstrate that East Fork Armells Creek was meeting water quality standards” is pure invention. Pet’rs’ Br. at 68-69 (emphasis in original).<sup>23</sup> The Department never made such a claim. Petitioners’ assertion is, in fact, belied by the passage they quote from the CHIA, explaining that the Department’s conclusion was based on the finding of a “diverse community of macroinvertebrates.” Pet’rs’ Ex. 2 at 9-8 (CHIA).

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<sup>22</sup> Ms. Hunter did modify the standard protocol slightly, only where the stream geometry made it impossible to sample the number of transects recommended by the protocol. *See* Pet’rs’ Ex. 11 at 2; Hunter Decl. at ¶ 36. This adjustment was unavoidable, clearly identified in her report, and did not affect the scientific accuracy of the survey. *See* Hunter Decl. at ¶¶ 36-39.

<sup>23</sup> Petitioners cite the Department’s interrogatory responses (Pet’rs’ Ex. 5 at 17) for its contention that the survey’s findings do not support the conclusion that water quality standards for aquatic life are being met; but the cited material does not in any way address or support Petitioners’ contention.

The CHIA explains that, coupled with studies conducted in earlier years, the survey shows that East Fork Armells Creek continues to support a diversity of aquatic life, as it did before mining. *See id.* at 9-7 to 9-8. The Department’s responses to comments in its Written Findings further explain that the results of the aquatic life survey “show that the aquatic environments in upper [East Fork Armells Creek] support a diverse assemblage of aquatic insects, and consist of taxa commonly found in eastern Montana prairie streams. The recent aquatic survey provides empirical evidence that Aquatic Life support is not adversely impacted by mining activity.” Pet’rs’ Ex. 1 at 9 (DEQ’s Written Findings).

Petitioners argue that the Department should compare survey results to “regionally-defined reference conditions,” and, as demonstrated by the Department’s response to comments, it did. Ms. Hunter has further explained that the aquatic life community she found in East Fork Armells Creek is similar to that found in other analogous streams in the region. Hunter Decl. at ¶ 16. Petitioners fail to obey their own exhortation to look at regionally-defined reference conditions in evaluating the HBI results from Ms. Hunter’s aquatic life survey. The HBI’s qualitative descriptors apply to conditions in Wisconsin, where the index was originally formulated. *Id.* at ¶ 41. Whereas the HBI scores found in the aquatic life survey might indicate “poor” or “very poor” conditions in Wisconsin, it does not mean that they indicate such conditions in eastern Montana. *See* Hunter Decl. at ¶¶ 41-42.<sup>24</sup> In the context of eastern Montana, the Department found that East Fork Armells Creek was supporting its beneficial use for aquatic life.

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<sup>24</sup> Petitioners imply that the aquatic life survey report states that East Fork Armells Creek suffers from “significant organic pollution” and “very significant organic pollution.” Pet’rs’ Br. at 73 (internal quotation marks omitted). In fact, those words never appear in the document, and the report does not say anything of the sort. This assertion appears to be Petitioners’ own extra-record conclusion based on the evidence before them. *See* Hunter Decl. at ¶ 43.

**d. Petitioners' Allegations of Error in the Department's Analysis of Cumulative Impacts on Water Quality Standards Are Flawed.**

Petitioners also make several mistakes of law and reasoning and misinterpretations of data in their contention that the Department failed to determine that the cumulative impact of operations in the AM4 area will not violate water quality standards in East Fork Armells Creek. As a preliminary matter, as discussed *supra*, Section II.B.3.a, there are no numeric water quality standards for the constituents in question and the Department determined that mining has not removed the stream's beneficial use supporting aquatic life.

Petitioners' reliance on the Department's Water Quality Standards Attainment Record for Lower East Fork Armells Creek, from Colstrip to the Mouth is misplaced. The Department has determined, based on reasoned analysis from data, that mining will not contribute to materially damaging amounts of the complained-of constituents—sulfate and chloride—in East Fork Armells Creek. Petitioners rely heavily on the Department's Water Quality Standards Attainment Record for Lower East Fork Armells Creek, from Colstrip to the Mouth to challenge this conclusion. Pet'rs' Ex. 7. *See, e.g.*, Pet'rs' Br. at 69-70, 73. There are at least two serious issues with relying on that attainment record. *First*, the attainment record relies on limited data last collected in 2005 and, before that, not since the 1970's. *See* Pet'rs' Ex. 7 at 17; Pet'rs' Ex.2 at 9-7 and 9-8 (CHIA); Hunter Decl. at ¶¶ 13-14. It is therefore reasonable for the CHIA to rely on data collected in the aquatic life survey in 2014, from the area of East Fork Armells Creek close to mining, rather than a single ten-year-old sample set from a reach far downstream from the mine. *Second*, because the attainment record is for the stretch of East Fork Armells Creek downstream of Colstrip, it addresses water that is subject to the influence of many factors beyond just mining. Water quality in that stretch is likely affected by, among other things, agriculture, cattle, the Colstrip Power Plant, the Colstrip water treatment facility, municipal runoff, and

runoff from the golf course. *See, e.g.*, Hunter Decl. at ¶ 14. A simple finding that this stretch of East Fork Armells Creek is impaired, therefore, determines nothing about the probability of mining causing material damage.

Petitioners' argument that the CHIA demonstrates that mining in the AM4 area will cause material damage to East Fork Armells Creek by introducing chloride to its waters suffers from all of the faults described above. *See* Pet'rs' Br. at 70-71. As discussed, there are no enforceable numeric water quality standards in Montana for chloride. The test for water quality with relation to chloride is whether the chloride concentration prevents a stream from supporting its beneficial uses. As discussed above, chloride in East Fork Armells Creek has not prevented it from supporting aquatic life. Petitioners' cite a single example of chloride in East Fork Armells Creek reaching concentrations they say are deemed harmful to aquatic life. *See* Pet'rs' Br. at 70-71. They neglect to mention that the same section of the CHIA noting that guideline concentration limit also stipulates that it, as with numeric guidelines for other constituents, "is not an enforceable standard, and it serves only as guidance for evaluating the suitability of pre- and postmine water quality for aquatic life use." Pet'rs' Ex. 2 at 2-4 (CHIA). In other words, an exceedance of such a guideline limit does not constitute a water quality standard violation or material damage.<sup>25</sup>

Just as importantly, petitioners make no attempt to differentiate between chloride introduced to East Fork Armells Creek by mining from that introduced from other sources. Petitioners argue that chloride has leached into East Fork Armells Creek from magnesium chloride used for dust suppression on roads. Pet'rs' Br. at 71; *see also* Pet'rs' Ex. 2 at 9-8

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<sup>25</sup> In fact, it is impracticable to set a scientific threshold of harm for sulfate and chloride since the presence of one (and other ions) in the water has been found, in many cases, to decrease the toxicity of the other constituent(s). Hunter Decl. at 32.

(CHIA). But even they acknowledge that the mining operation no longer uses magnesium chloride. Pet'rs' Br. at 71. *See also* Schafer Decl. at ¶ 5. So, even if there were some material damage due to past operations, the operation under consideration in this CHIA is designed to prevent material damage. Pet'rs' Ex. 2 at 9-8 (CHIA) (“The proposed mine plan is designed not to contribute additional chloride to the stream . . . .”); Schafer Decl. at ¶¶ 11, 16, 18; Nicklin Decl. at ¶ 26. Petitioners also acknowledge that chloride in East Fork Armells Creek may just as likely come from leaking ash ponds at the Colstrip Power Plant, which is outside Western Energy's control. Pet'rs' Br. at 71; Pet'rs' Ex. 2 at 9-8 (CHIA).

Petitioners assert that the CHIA documents “repeated exceedances of sulfate threshold for aquatic life in East Fork Armells Creek, with sulfate levels increasing in recent years.” Pet'rs' Br. at 71. This is not true. Once again, it is important to note that there are no numeric water quality standards for sulfate in Montana. Numeric thresholds are used simply to inform the Department's analysis of a stream's ability to support its beneficial uses. *E.g.*, Pet'rs' Ex. 2 at 2-4 (CHIA); Resp.-Int'vrs' Ex. 4 at 6 (DEQ Circular DEQ-7). The section of the CHIA petitioners cite states: “[e]ven in baseline samples, the sulfate threshold for aquatic life were exceeded. Macroinvertebrate communities in Eastern Montana are likely adapted to high sulfate water.” Pet'rs' Ex. 2 at 9-8 (CHIA) (emphasis added); *see also* Hunter Decl. at ¶ 28. In other words, even water with no influence from mining has sulfate concentrations above the guideline thresholds. As a result, sulfate exceedances downstream from the mine cannot be attributed to mining operations.<sup>26</sup> *See* Hunter Decl. at 8. Fig. 9-93 in the CHIA does not, contrary to

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<sup>26</sup> Petitioners make the same logical error in arguing that a presentation Ms. Hunter gave to the Department in 2015 demonstrates that “aquatic life criteria are not met.” *See* Pet'rs' Br. at 72; Pet'rs' Ex. 10. In fact, Ms. Hunter's presentation was describing conditions in Eastern Fork (Continued...)

Petitioners' assertion, contain data sufficient to show that there has been an increase in sulfate levels in East Fork Armells Creek over the life of the mine. *See* Nicklin Decl. at ¶ 41.

Finally, Petitioners again misconstrue the Department's discovery responses, this time to claim that "the Department's own hydrologists believed that the mine was causing material damage to East Fork Armells Creek due to excessive salinity, sulfate, and chloride pollution." Pet'rs' Br. at 71-72. This is patently false, as evidenced by the Department's ultimate conclusion that cumulative impact from operations under AM4 will not cause material damage to the hydrological balance in any waters outside the permit area. The cited documents indicate that Department hydrologists had concerns at one time that the mine might be causing material damage. The purpose of the Department's evaluation of the proposed operations is to settle those concerns, which the Department did to its satisfaction.

To the extent Petitioners contend that the Department's analysis of the potential for material damage resulting from violations of aquatic life standards or the introduction of chloride, sulfate, or other constituents into East Fork Armells Creek was insufficient or incorrect, they raise factual issues that can be settled only after full examination of the evidence in a hearing before this Board.

#### **4. The Department Properly Excluded Potential Migration from Spoils from the CHIA.**

Although Petitioners appear to fault the Department for "fail[ing] entirely to assess whether cumulative hydrologic impacts would violate water quality standards for highest quality Class I ground water in the Rosebud coal aquifer between Area B of the Rosebud Mine and the Big Sky Mine," they admit that both Western Energy and the Department carefully considered

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Armells Creek in the mid-late 1970's prior to any effects from mining. *See* Pet'rs' Ex. 10; Hunter Decl. at ¶¶ 44-47.

groundwater impacts associated with AM4. *See* Pet'rs' Br. at 76-78. Their only quibble with the analysis is with the wording of Department's material damage determination, in which they claim the Department addressed only the impacts to Class II and III groundwater, failing to address impacts to Class I groundwater. Petitioners' argument presents the false impression that Class I groundwater is a static resource. The record demonstrates precisely the opposite.

As explained by Dr. Nicklin, groundwater classification in the East Fork Armells Creek alluvium varies between Class I and Class III. Nicklin Decl. at ¶ 38. The CHIA focused primarily on Class II and Class III groundwater precisely because those are the most frequent classifications of groundwater in the Rosebud coal stratum. *Id.* at ¶39. By comparison—and as Petitioners' admit—only a few samples of the Rosebud coal stratum identified water as Class I. *Id.* Including these outlier samples, “the average classification of the alluvium between areas A and B is Class III.” *Id.* at ¶ 37. The Department's decision to primarily evaluate whether AM4 would affect that use, in context, makes sense.

Even still, as Dr. Nicklin explains in his declaration, the slight increase in TDS is not expected to have any impact on the groundwater classifications for any water, whether classified as Class I, II, or III. Nicklin Decl. at 38. Just as the groundwater classifications vary between Class I and Class III prior to mining, the groundwater classifications will vary between Class I and Class III after mining in AM4. Furthermore, Table 17 of the PHC demonstrates that the uses permitted by each classification overlap. Thus, even assuming there was a marginal change in classifications (which the Department and Dr. Nicklin conclude is not the case) the intended uses of water in the Rosebud coal stratum would not change. In summary, the classification range of alluvial groundwater will not change as a result of mining in the area of AM4. *Id.*

## CONCLUSION

For the foregoing reasons, this Board should deny Petitioners' motion for summary judgment and schedule a hearing to consider evidence and argument from all parties to this contested case, as required by Montana law.

Respectfully submitted,

Dated: July 22, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of July 2016, I caused a true and correct copy of the foregoing Respondent-Intervenors' Opposition to Petitioners' Motion for Summary Judgment, to be served on the following via electronic mail:

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