STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

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TO: The Montana Board of Environmental Review

FROM: Sarah Clerget, Board Attorney

RE: Review of a hearing examiner's proposed decision

DATE: January 24, 2018

The purpose of this memo is to assist BER when reviewing a hearing examiner's proposed decision in a contested case proceeding.

The record before the Board consists of a written record and an opportunity for the parties to make oral arguments to the Board. Pursuant to the contested cases provisions of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. § 2-4-601 *et. seq.*, As the hearing examiner in this case, I issued an *Order on Cross Motions for Summary Judgment* on November 30, 2017. On December 20, 2017, Wagoner filed a request for clarification, on December 28, 2017, the DEQ filed a response and I issued a Notice of Scheduling Conference that same day. On January 3, 2018, Wagoner filed a reply brief in support of the request for clarification. I then held a telephonic status conference on January 4, 2018 to discuss the motion for clarification and scheduling relating to the filing of exceptions to the order, and issued an Order on the Motion to Clarify on January 11, 2018.

Wagoner filed exceptions to the Order on January 22, 2018, and DEQ filed a Response to those exceptions. All four documents—the Order on Cross Motions for Summary Judgment, Order on the Motion to Clarify, exceptions, and reply—are included the Board's materials for the February 9 meeting.

In addition to the written materials, the parties can make oral arguments to the Board at the February 9 meeting.

Based on the written record and the oral arguments before it, the Board must decide, by seconded motion, what to do with my Order on Cross Motions for Summary Judgment. The options available to the Board, and the law underlying those options, are described in detail in my similar memo on the *Payne Logging* case, which also appears in the Board's

materials for the February 9 meeting. The law and options are the same for this case as for *Payne Logging*, and indeed every case in which the Board reviews a proposed decision from a hearing examiner.

Whatever the Board decides to do with the Order on Cross Motions for Summary Judgment, this case will remain open as the issue of penalties will remain before the Board/hearing examiner. Based on the motions from the parties, the issue of penalties has not yet been put before the Board for a decision.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In The Matter Of: APPEAL VIOLATIONS OF THE OPENCUT MINING ACT BY WAGONER FAMILY PARTNERSHIP, D/B/A WAGONER'S SAND AND GRAVEL, AT RIVER GRAVEL PIT, FLATHEAD COUNTY, MONTANA (OPENCUT NO. 1798; FID 2512)	CASE NO. BER 2017-02 OC

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter concerns DEQ's January 6, 2017, Notice of Violation and Administrative Compliance and Penalty Order issued under § 82-4-441, Mont. Code Ann. This Notice asserted one violation against Wagoner: "***Violation 1: Conducting opencut mining operations without a permit.***" Namely, that "Wagoner violated ARM 17.24.225(1) by failing to comply with the provisions of the Permit by failing to complete reclamation by December 2015." *Id.*, ¶28.[1]

On July 5, 2017, Respondent/Operator Wagoner Family Partnership d/b/a Wagoner's Sand and Gravel (Wagoner) moved for summary judgment. Department of Environmental Quality (DEQ or the Department) filed its response on August 9, 2017,

[1] DEQ has since withdrawn a second basis for this violation (Ex. Resp-O, at 6, ¶ 29). *See* DEQ Br., at 2, 8-10 (Aug. 9, 2017).

together with a cross-motion for partial summary judgment. Wagoner timely filed a combined response and reply brief on August 16, 2017; DEQ timely filed its reply on August 30, 2017. Neither party requested oral argument and the matter is ripe for decision.

Upon consideration of the briefing and the law, and for the reasons set forth below, the cross motions for summary judgment are each granted in part and denied in part.

FINDINGS OF FACT

1. In 1973, Wagoner began operating a gravel mine along or within the Flathead River.[2] DEQ SUF, ¶1; Resp. SUF, ¶¶1-2. The original "contract for mining" later became an "Open Cut Mining Permit," Permit No. 1798. *Id.*, ¶3.

2. The original reclamation plan included a variety of steps for returning the mined area to a state of being "functionally sound for the river channel and to leave it aesthetically pleasing." Ex. DEQ-F (Reclamation Plan, Section ii (July 7, 1973).[3]

[2] This Finding of Fact is made only to provide a general geographic point of reference. The parties briefed the matter of the ownership and location of Wagoner's operations relative to being "alongside" or "within the bed and between the banks" of the Flathead River. To the extent there is some dispute as to the location of the operation (*e.g.* Resp. Reply, at 3, ¶1, n.1), it is not material to the issues in this case and summary judgment can, and should, be decided without addressing the merits of these arguments.

[3] Both parties used alphabetical designations on their respective exhibits; to avoid confusion, exhibits submitted by Wagoner, as the Respondent, are referred to herein as "Ex. Resp-__" and the Department's exhibits are referred to as "Ex. DEQ-__."

3. An amendment to Permit No. 1798 was approved in 2000, Amendment #3, which stated that the "estimated date of final reclamation is December, 2015." Ex. Resp-A.

4. The record indicates that this is the third or fourth Amendment to Permit No. 1798 (Ex. Resp-A.), but neither party provided facts regarding how prior permit amendments were approved, or how far in advance of any prior "estimated dates of final reclamation" (if any) Wagoner applied for those permit amendments.

5. On December 31, 2015, Wagoner submitted to DEQ an application to amend Permit No. 1798 to extend the mining operations and add additional acreage. Resp. SUF, ¶8; Ex. Resp-L, at 2, ¶8. That application was received by DEQ on January 4, 2016. DEQ SUF, ¶6; Ex. Resp-O, at 3, ¶15. Wagoner does not claim now or in the amendment application that the site was reclaimed by December 31, 2015. *See e.g.* Resp. Reply, at 12 (Aug. 16, 2017).

6. On January 11, 2016, DEQ returned the application to Wagoner because it was "so incomplete as to prohibit meaningful review and was submitted on altered forms." Ex. Resp-B (herein, Non-Compliance letter). DEQ told Wagoner that the reclamation date of December 2015 had expired and Wagoner was in violation of the Opencut Mining Act for "failing to reclaim the site in accordance with the plan of operation and date set forth in the permit." *Id.*

7. DEQ sent this Non-Compliance letter pursuant to, and quoting, § 82-4-434(4), Mont. Code Ann.,[4] instructing Wagoner that, per that statute, within 30 days Wagoner "must (1) either submit a complete application to amend your permit … or (2) you must cease mining and reclaim the site …." Ex. Resp-B.

8. Under the first option, to submit a completed amendment application, DEQ required the following:

> A. The operator shall submit to the Department within 30 days of the date of this letter a **complete** application to amend Permit No. 1798 on form supplied by the Department in accordance with the above described "non-compliance" items. Note that a completed application is an application that contains all the requirements of the "Operator Application Checklist" and has been deemed "**complete**" by the Department. If a complete application or plan for reclamation is not received within 30-days, the Operator can expect the Department to send a "formal" violation letter and refer the matter to the Enforcement Division for further action.
> B. If the Department identifies deficiencies in the submitted amendment application, all deficiencies must be addressed and the corrected application submitted to the Department by the deadlines stated in the deficiency letter.

Ex. Resp-B, at 1-2 (emphasis in original). The "non-compliance" item was identified as: "Expiration of Reclamation Date." *Id.*, at 1.

9. The second option, to cease operations and reclaim the site, required reclamation to be complete by June 6, 2016, with vegetative success achieved by August 30, 2018. Ex. Resp-B, at 2, ¶C.

10. The Non-Compliance letter also warned that if these steps were "not undertaken with diligence, and completed in their entirety," the matter would be sent to

[4] Unless noted otherwise, all further statutory references are to the Montana Code Annotated (2017).

the Enforcement Division "which has authority to issue administrative orders requiring corrective action and/or assessing administrative penalties, and to file judicial actions for injunctions or civil penalties." Ex. Resp-B, at 2.

11. Wagoner elected the first option and on February 10, 2016, its consultant, Samdahl Consulting Services LLC, wrote to DEQ explaining that Wagoner sought an amendment to continue its mining operations. Ex. Resp-C; *see also* Ex. Resp-L, at 2, ¶10. Samdahl further explained that current weather conditions prohibited Wagoner from doing the proper and necessary field work to submit the application and requested a 60-day extension. Ex. Resp-C. That same day, DEQ extended the deadline for submitting a completed amendment application to March 14, 2016. Ex. Resp-D.

12. On March 14, 2016, Wagoner sent DEQ a letter contesting the allegation that it was out of compliance and challenging the application of the administrative regulations at issue. Ex. Resp-E.

13. DEQ responded to Wagoner on April 8, 2016. Ex. Resp-F. DEQ reaffirmed and reiterated its position as stated in the January Non-Compliance letter (Ex. Resp-B). After addressing the particular arguments made by Wagoner, DEQ gave Wagoner another 30 days (*i.e.*, to May 8) to submit a completed application to amend the permit. Ex. Resp-F, at 2.

14. On April 26, 2016, Samdahl submitted an amendment application on behalf of Wagoner. Ex. DEQ-I. Samdahl's cover letter noted that, due to the unique characteristics of the mining location, some issues were encountered in answering or

providing some information required by the application form. Namely, (1) calculation of the expiration date since there is no predictable end to the gravel replenishment; (2) issues with calculation of acreage had led to difficulties with parts of the pre-prepared Plan of Operations form and bonding spreadsheet, as well as preparation of related maps and submission of a "Riverbank Location Map"; (3) reclamation questions with regard to soil and revegetation requirements and related issues with weeds based on the unique area being mined; and (4) issues with the bond calculation spreadsheet in light of the other issues identified in the letter and requesting to use Wagoner's current bond. *Id.*

15. DEQ sent a letter on May 3, 2016, notifying Wagoner that its amendment application was incomplete and required the following supporting documents:

> Reclamation Map
> Weed Board notification of Opencut Operation (signed by the Operator)
> Reclamation Bond Spreadsheet
> Reclamation Bond (updated to match the amount in the spreadsheet)

Ex. Resp-G. Even though Wagoner's cover letter (Ex. DEQ-I) discussed issues that seem to relate directly to these deficiencies, DEQ's form letter (Ex. Resp-G) did not address the substance of those issues. DEQ extended the deadline for submission of the requested documents until June 3, warning that if they were not received the matter would be referred to the Enforcement Division. *Id.*, at 2.

16. Wagoner's response to DEQ's May 3 letter is not provided, but on May 23, 2016, DEQ apparently received at least the Weed Board Notification of Opencut Operation form, signed by Rud Knudsen as the operator, and a completed Reclamation

Bond Spreadsheet. Ex. DEQ-L, at 46-47 (*see* footer, "Received via electronic FTS 05/23/2016"); *see also* Ex. DEQ-H, Ex. Resp-O, at 4, ¶20.

17. On June 2, 2016, DEQ sent another letter notifying Wagoner its application was incomplete and required a Zoning Compliance Form (a new deficiency not identified in DEQ's May 3 letter) and a Reclamation Bond. Ex. Resp-H. DEQ extended the deadline for submission of these requested documents until July 3. *Id.*, at 2. In 2016, July 3 fell on a Sunday, followed by the July 4 holiday on a Monday.

18. Again, Wagoner's response to DEQ's June 2 letter was not submitted with the briefing, but on July 6, 2016, DEQ wrote to Wagoner stating the Zoning Compliance Form was missing, this time adding that Wagoner could either submit the form *or* change its plan of operation to reflect that no acreage was being added by the amendment. Ex. Resp-I.

19. Wagoner's response to this letter was also not provided, but DEQ acknowledges an application was re-submitted on July 10 or 11, 2016. Ex. Resp-K, at 1; Ex. Resp-O, at 4, ¶20. On July 12, 2016, DEQ sent Wagoner another letter repeating the incomplete items from its July 6 letter. Ex. Resp-J. Here, though, DEQ added excerpts from Wagoner's application illustrating the apparent discrepancy triggering questions about the Zoning Compliance Form. *Id.*, at 2. DEQ again extended the deadline to submit a complete application, this time to August 11, 2016. *Id.*

20. It is not clear from the record whether Wagoner responded to DEQ's July 12 letter. On August 16, 2016, DEQ issued a Violation Letter on the basis that Wagoner's

Permit had, in essence, expired by operation of law on December 31, 2015, that DEQ's April 8, 2016 letter notified Wagoner that the reclamation date had expired but instructed Wagoner to either submit a completed application to amend the permit or reclaim the site within 30 days, and that as of August 16, DEQ had not received a completed application and the site had not been reclaimed.[5] Ex. Resp-K. DEQ acknowledged receiving an application on July 10, 2016 to increase the acreage of the mine site, but noted that the application was incomplete and no amendment had been issued. *Id.*, at 1.

21. On August 24, 2016, DEQ received an amendment application indicating Wagoner sought to add 3.2 acres. Ex. Resp-L, at 1-28 (*see* footer, "Received via electronic FTS 08/24/2016"); *see also* Ex. Resp-O, at 4, ¶20.

22. On August 29, 2016, DEQ again wrote to Wagoner regarding the amendment application and stating that the Zoning Compliance Form was still needed. Ex. Resp-M. DEQ instructed Wagoner to "[s]ubmit a revised, original form ensuring the most current form is used." *Id.*, at 2. This time, however, DEQ did not extend the deadline; instead, DEQ informed Wagoner that the matter had been referred to Enforcement. *Id.*

23. Wagoner re-submitted its application, or some portion thereof, on September 6, 2016. Ex. Resp-O, at 4, ¶20. DEQ apparently responded by letter

[5] DEQ also alleged that it had observed active mining operations at the site on August 9, 2016. As noted above, *supra* at n.1, DEQ has since withdrawn these allegations as a basis for the violation.

on September 7, 2016, informing Wagoner that the application was still incomplete and had been referred to Enforcement. *Id.*, at ¶21.

24. Then on September 21, 2016, Wagoner submitted a Zoning Compliance form, with the certification of an official (Rachel Ezell) on behalf of the Local Governing Body (Flathead County). Ex. DEQ-L, at 50. Flathead County certified, by the form, that Wagoner's mine "[s]ite is **zoned** and local zoning regulations **do not require** a local license or permit for the proposed Opencut operations." *Id.*

25. On September 22, 2016, DEQ notified Wagoner by letter that its amendment application had been reviewed and was found to be complete. Ex. Resp-N.

26. Wagoner was five days beyond the last deadline for correcting its amendment (August 11, 2016) when DEQ issued its Violation Letter on August 16, 2017. Ex. Resp. K. Wagoner took another 37 days, including another deficiency letter, before it submitted, and DEQ accepted, a completed amendment application (September 22, 2016). Ex. Resp. N. Wagoner was therefore 42 days beyond any extension deadline when it submitted its complete application to DEQ.

27. DEQ stated it had 45 days to identify any deficiencies in the application; if any were found Wagoner would be notified and given a chance to respond; however, "[i]f no deficiencies are identified you will receive the approved permit." *Id.*; *accord* Ex. Resp-F, at 2. DEQ also notified Wagoner that it could not continue opencut operations "until an approved permit is issued." Ex. Resp-N.[6]

[6] DEQ's "Note" cites a non-existent, or perhaps incomplete, code section: "Under

28. Although none of DEQ's correspondence throughout 2016, including either the January Non-Compliance letter (Ex. Resp-A)[7] or the August Violation Letter (Ex. Resp-K), instructed Wagoner to cease its mining operations, Wagoner did stop mining in response to the August 16, 2016 letter. Ex. Resp-L, at 2, ¶13.

29. It is judicially noted that 45 days from September 22, 2016—the period within which DEQ stated it was statutorily required to identify any deficiencies in the complete application (Ex. Resp-F, at 2; Ex. Resp-N)—was Sunday, November 6, 2016.

30. On January 6, 2017, DEQ instituted an enforcement action, pursuant to § 82-4-441, by issuing Wagoner a Notice of Violation and Administrative Compliance and Penalty Order. Ex. Resp-O (herein, NOV), at 1, ¶3.

31. The NOV states Wagoner violated the Opencut Mining Act by conducting opencut operations without a permit. Ex. Resp-O, at 5:12. As support, DEQ asserted the following:

> 25. As of December 20, 2016, the Department has not approved the Amendment, and therefore the Final Reclamation Date, which determines the term of the permit, has not been extended.
> 26. Wagoner failed to complete reclamation by December 2015 as required by the Plan and failed to obtain an amendment extending the final reclamation date. Pursuant to Section 82-4-434(5), MCA, the Final Reclamation Date is December 2015. Therefore, the term of the permit also expired in December 2015.
> * * *
> 28. Wagoner violated ARM 17.24.225(1) by failing to comply with the provisions of the Permit by failing to complete reclamation by December 2015.

MCA 82-4-4, …" Ex. Resp-N.

[7] DEQ also characterized as a Non-Compliance letter the April 8 letter (Ex. Resp-F), reaffirming the original, January 11, Non-Compliance letter. Ex. Resp-K.

Id., at 5, ¶¶25-26, 28.

32. The "Opencut Mining Plan of Operation and Application"[8] states that "the Operator must submit an amendment application to extend the term of the permit (final reclamation date). Such an application **should be** submitted well in advance of the reclamation date to allow time for processing and approval of the amendment." Ex. DEQ-L at 22 (emphasis added).

33. The NOV also assessed, pursuant to § 82-4-441(2), administrative penalties calculated at $25,080. Ex. Resp-O, at 6, ¶¶30-31.

34. DEQ calculated penalties from May 8 through September 22, 2016. Ex. Resp-O (*see* attached Penalty Calculation Worksheet, at 2, "III. Days of Violation"). DEQ noted that although reclamation was not completed by December 31, 2015 as required by the Permit, it had

> provided Wagoner the opportunity to avoid a formal enforcement action if Wagoner submitted a complete application to amend the permit to the Department by May 8, 2016. Wagoner didn't submit a complete application until September 22, 2016, a total of 137 days later.

Id.

35. Wagoner timely filed a *Notice of Appeal and Request for Hearing* regarding the NOV on February 2, 2017.

8 The version provided by DEQ appears to be dated August 23, 2016. It is unclear from the record whether any prior application forms from DEQ contained the language cited.

36. On March 17, 2017, DEQ "approve[d] the Operator's amendment application into the permit for all purposes." Ex. Resp-P, ¶1.

37. Although neither Party addressed the matter, it is judicially noted that March 17, 2017 is 176 days from September 22, 2016, or 131 days after DEQ's stated 45-day deadline for notifying an applicant whether the application is acceptable. Exs. Resp-N, Resp-F, at 2; *accord* § 82-4-432(11)(c).

CONCLUSIONS OF LAW

A. Legal Authority

1. This matter is governed by the Opencut Mining Act (the Act), Mont. Code Ann., Title 82, chapter 4, part 4, and by the Montana Administrative Procedure Act (MAPA), Contested Cases, Mont. Code Ann., Title 2, chapter 4, part 6, as well as by Montana Administrative Rule 17.4.101 which incorporates the Attorney General's Model Rules for contested cases, Admin. R. Mont. 1.3.211 through 1.3.225.

2. "The Montana Rules of Civil Procedure do not apply to administrative hearings." *Citizens Awareness Network v. Mont. Bd. of Envt'l. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583. However, "they may still serve as guidance for the agency and the parties." *Id.*

3. Under MAPA contested case, "all parties must be afforded an opportunity for hearing after reasonable notice." § 2-4-601(1). However, an evidentiary hearing is not required when there are no material facts in dispute. *In re Peila*, 249 Mont. 272, 281, 815 P.2d 139, 144-45 (1991). Where material facts are not in dispute, and a party has

had reasonable opportunity to be heard, summary judgment is appropriate in a MAPA contested case. *Id*.

4. In determining these cross-motions, the Board of Environmental Review (Board) must determine whether each "moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3)." *Sullivan v. Cherewick*, 2017 MT 38, ¶ 9, 368 Mont. 350, 391 P.3d 62 (internal citation omitted). "Once the moving party has met its burden, the opposing party must present material and substantial evidence to raise a genuine issue of material fact." *Id.* A party opposing summary judgment is entitled to all reasonable inferences from the offered evidence, but cannot rely on conclusory statements, speculative assertions or mere denials. *Id*.

5. The fact that both parties have moved for summary judgment does not establish the absence of genuine issues of material fact. When there are cross-motions for summary judgment, each party's motion must be evaluated on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *Asurion Servs., LLC v. Mont. Ins. Guar. Ass'n*, 2017 MT 140, ¶ 5, 387 Mont. 483, 396 P.3d 140 (citing *Hajenga v. Schwein*, 2007 MT 80, ¶ 18, 336 Mont. 507, 155 P.3d 1241); *Steadele v. Colony Ins. Co.*, 2011 MT 208, ¶ 14, 361 Mont. 459, 260 P.3d 145.

6. Only disputes over facts that might affect the outcome of the proceeding under governing law are "material" and will properly preclude entry of summary

judgment. "A material fact is one that involves the elements of the cause of action or defense to the extent that it requires resolution by the trier of fact." *Hopkins v. Superior Metal Workings Systems*, 2009 MT 48, ¶5, 349 Mont. 292, 203 P.3d 803. At the summary judgment stage, the decision-maker's function is not to weigh evidence or determine the truth of the matter but, rather to determine whether there is a genuine issue of fact to be determined in the hearing.

7. The Parties have received reasonable notice of their cross-motions for summary judgment and respective dispositive arguments. They have each had a reasonable opportunity to respond and be heard.

B. Permit and Reclamation Ending "Within a Specified Length of Time"

8. Under the Act, a permit is required to conduct opencut mining operations, a permit requires (and incorporates) a plan of OPERATION, and a plan of operation must provide that the affected land will be reclaimed and that reclamation will be complete within a specified length of time. §§ 82-4-431(1), 82-4-432(2)(c), 82-4-434(2), (10), (3)(a), (k).

9. With regard to the statutory requirement that reclamation be completed "within a specified length of time," *Id.*, § 82-4-434(3)(k), the implementing regulations require the plan of operations to have a reclamation schedule that includes "a reasonable estimate of the month and year by which phase II reclamation will be completed …. Final reclamation must be completed by the date given." Admin. R. Mont. 17.24.219(1)(i)(ii).

10. The date of final reclamation stated in a permit (by way of the estimate in the plan of operation) defines the permit's expiration—*i.e.*, the term of the permit—since, by definition, reclamation occurs *after* mining operations.

11. Wagoner contends, as an initial matter, that its Permit did not expire because the date of final reclamation stated therein was merely an estimated month and year, rather than a specific time frame: "The estimated date of final reclamation is December, 2015." Ex. Resp-A. Wagoner argues the implementing regulation requiring a month-year *estimate* contradicts the statutory requirement for a *specific* time.

12. Wagoner's position ignores the final sentence of the provision at issue: "Final reclamation must be completed by the date given." Admin. R. Mont. 17.24.219(1)(i)(ii). A reasonable reading of the Rule is that the month and year estimated will be treated as the final date. Further, there is nothing contradictory about setting, by rule, that the statutory "length of time" requirement will be specified down to the month and year, rather than a specific day. DEQ has reasonably construed the date estimated in the operator's favor as meaning the last date of the month. *See e.g.*, Ex. Resp-K.

13. The "reasonable estimate" language of the Rule is also consistent with the imprecise nature of some elements in a reclamation plan. For example, revegetation requirements demand that reseeding be protected "through two consecutive growing seasons or until the vegetation is established, whichever is longer[.]" Admin. R. Mont. 17.24.219(1)(h)(ii)(C); *see also id.*, (1)(i)(ii) (citing requirements of (1)(h)). The

successful establishment of vegetation is more amenable to a reasonable estimate rather than the precision Wagoner argues for.

14. Further, requiring a "reasonable estimate" is consistent with the standard for issuing an amendment to extend the time for reclamation. Under § 82-4-434(5)(b)(ii)(B), an extension of time for reclamation may be approved if "it is highly improbable that reclamation will be successful unless the existing plan of operation is replaced or amended." *Id.* It is not inconsistent to use the "reasonable estimate" as a touchstone in assessing whether completion within a current period is "highly improbable."

15. The Rule, Admin. R. Mont. 17.24.219(1)(i), is not in conflict with the statute, § 82-4-434(3)(k), and DEQ reasonably concluded December 31, 2015 was the final date for reclamation under Wagoner's Permit.

C. Timeliness of Wagoner's Amendment Application and Violation

16. The Act provides that, "[a]t **any time** during the term of the permit, the operator may for good reason submit to the department a new plan of operation or amendments to the existing plan, including extensions of time for reclamation." § 82-4-434(5) (emphasis added).

17. DEQ contends that the amendment application had to be submitted sufficiently prior to a permit's expiration so that it could be reviewed and approved before that date. However, DEQ cites no such requirement in the Opencut Mining Act or the associated Administrative Rules. It is true that the application (Ex. DEQ-L, at 22)

indicates that an Operator **should** submit an amendment application well in advance of the reclamation date, but does not **require** that. The language is "should," not "must," and there is no statutory or rule citation to give such a recommendation any ultimate authority. The practical wisdom of making an earlier application aside, to accept DEQ's argument inserts into § 82-4-432(11) requirements that do not exist, and does not give effect to the language of § 82-4-424(5) allowing amendments at "**any time** during the term of the permit[.]" § 1-2-101.

18. Here, December 31, 2015 was during the term of Permit No. 1798, albeit the last day of the term, and thus Wagoner's last-minute amendment application was timely. Ex. Resp-L, at 2, ¶8; DEQ Reply, at 15.

19. An amendment to the existing plan of operation must comply with the same requirements as an initial plan of operation. § 82-4-434(5)(b). Once adopted, a plan of operation becomes part of the permit. *Id.*, (2). An amendment, and thus an amended plan of operation, becomes effective upon written notification from the Department that it has been approved, and "[o]nce approved, an amendment becomes part of the original permit." Admin. R. Mont. 17.24.213(4).

20. The eventual approval of an amendment application does not, alone, however, moot or "cure" violations which may have occurred while the application was pending. Such a reading of the law leads to an absurd result where filing an amendment application that is later approved essentially sanctions misconduct in the interim. § 1-3-233; *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507, 510 (1980) (citing *Keller v.*

Smith, 170 Mont. 399, 553 P.2d 1002, 1007 (1976)). This interpretation not only ignores that an amendment is not effective until it is approved in writing, Admin. R. Mont. 17.24.213(4), but it could also negate the deterrent power of § 82-4-441 and its administrative penalty provisions.

21. Nevertheless, it is an equally absurd result to require an operator to complete reclamation, and pursue an administrative penalty for not doing so, when the operator has a pending amendment application which, if approved, would enable it to keep mining. *See e.g.* DEQ Reply, at 11 (remarking on "the absurdity of a scenario where DEQ would order an operator who was seeking a permit amendment to reclaim the site"); *see also* § 1-3-233; *McClanathan*, 606 P.2d at 510 (citing *Keller*, 533 P.2d at 1007). It is also inappropriate for DEQ to penalize an Operator for an aspirational suggestion ("should" versus "must") in the application that is not a requirement of statute or administrative rule.

22. The parties argue that the facts of this case fall in both absurd scenarios—DEQ the former, Wagoner the later. Yet, there must be some harmonious reading of the statutory scheme which gives effect to the statute inviting an operator to amend any time during the term of the permit, § 82-4-434(5), and to the statutes requiring reclamation and imposing penalties for failure to do so, §§ 82-4-434(2), (4), 82-4-441(1), (5), Admin. R. Mont. 17.24.225(1). *See Case v. Mahoney*, 2000 MT 324, ¶ 12, 303 Mont. 8, 15 P.3d 884 (citing *Butte v. Indus. Accident Board*, 52 Mont. 75, 156 P. 130, 131 (1916); *Stadler v. Helena*, 46 Mont. 128, 127 P. 454, 457 (1912)).

23. To find that harmony, one persistent theme of Wagoner's motion must be dispensed with at the outset: that DEQ had to first tell it to stop mining before pursuing the instant action. The authority to bring an enforcement action and seek administrative penalties, such as the instant case, found in § 82-4-441(5) is independent of the authority for a cessation of mining action under § 82-4-434(4).

24. If an operator does not reclaim within the time specified, DEQ has two statutory options under the Act. First, it can, after 30 days' written notice,

> order the operator to cease mining and, if the operator does not cease, may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action to enjoin further operation and may sue for damages for breach of the conditions of the permit, for payment of the performance bond, or both.

§ 82-4-434(4).

25. DEQ's other statutory options are found in its administrative enforcement authority. § 82-4-441. There, DEQ must only have "reason to believe that a person is in violation of this part, a rule adopted or an order issued under this part, or a term or condition of a permit issued under this part, …." *Id.*, (1). DEQ must first issue a violation letter that describes the alleged violation, the facts on which the violation is based, and must recommend corrective actions. *Id.* If it has "credible information" that a violation is occurring, DEQ may then also issue an order requiring "necessary corrective action within a reasonable period of time, may assess an administrative penalty … or both." *Id.*, (5)(a). Assessing penalties is unique to an administrative enforcement action.

Id., (4). That Section 441 is a distinct, independent enforcement option is also supported by subsection (7), and the last sentence of subsection (1). *Id.*, (1), (7).

26. When Wagoner had not reclaimed by the date in its permit, but *had* submitted an amendment application (though incomplete), DEQ elected not to issue a reclamation order under Section 434(4). DEQ also elected, in a reasonable exercise of its discretion, to not immediately pursue an administrative action while Wagoner worked to submit a completed application. *See e.g.* Ex. Resp-B, at 1-2 (giving Wagoner option to avoid such action by submitting and diligently pursuing amendment). And therein lies the harmonious reading of the Act's enforcement and amendment provisions: When an operator is pursuing an application for amendment, DEQ can elect not to use Section 434(4) to order reclamation, but instead await a completed application; when extensions to complete the application have proven ineffective or if an application is not forthcoming, DEQ can then exercise its discretion to pursue an administrative action under Section 441.

27. In this case, Wagoner's initial amendment application was timely, but incomplete. DEQ's first response was to remind Wagoner that it could seek a reclamation order (under Section 434(4)), and give Wagoner two options—reclaim the site within 30 days, or submit a completed amendment within 30 days and address any deficiencies by the deadline in that notice. Ex. Resp-B. Wagoner elected to work on its application; Wagoner continued to update and correct its application and DEQ continued to extend the deadline for those corrections while also warning at each turn that it may

pursue enforcement if Wagoner did not respond. This went on until the last extension of the deadline to August 11, 2016.

28. Then came DEQ's August 16, 2016 Violation Letter. Ex. Resp-K. This letter to Wagoner complied with the requirements of § 82-4-441(1): It described the alleged violation at issue by reference to DEQ's earlier Non-Compliance letter of April 8, 2016, informing Wagoner that the "conditions set forth in DEQ's January 11, 2016 Non-Compliance letter remain in full effect." Ex. Resp-F. The facts supporting the alleged violation were Wagoner having not yet submitted a completed application and having no approved amendment; these same facts subsume the corrective actions necessary to return to compliance. *Id.*

29. DEQ's attempt to pursue penalties from May 8 through September 22, 2016 ignores the terms of its original offer to Wagoner (Ex. Resp-B). DEQ told Wagoner that the matter would be forwarded to the Enforcement Division ***if*** Wagoner failed to undertake the amendment process with diligence and complete it in its entirety. Ex. Resp-B, at 2. There is no evidence that through August 11, 2016 (Ex. Resp-J), Wagoner ignored or otherwise unreasonably delayed the application process; rather, the evidence establishes that up to that point, Wagoner timely responded to each deficiency letter DEQ issued. If anything, some of the correspondence from DEQ was unresponsive to Wagoner's substantive questions—for example, providing essentially a form letter in response to Wagoner's specific questions in its letter of April 26, 2016.

30. Regardless of how effective either party's communication was, the fact remains that DEQ repeatedly extended the deadline for submission, and it cannot fault Wagoner for failing to complete the application during this time. *See* Ex. Resp-B at 2 (if application is deficient, "all deficiencies must be addressed and the corrected application submitted to the Department *by the deadlines stated in the deficiency letter*" (emphasis supplied)).

31. However, by the time the Violation Letter was issued on August 16, Wagoner was five days beyond the last deadline for correcting its amendment application. Ex. Resp-J. DEQ instructed Wagoner that the corrective action needed to return to compliance was a completed amendment application (Ex. Resp-K). It would be another 37 days, including another deficiency letter (Ex. Resp-M), until Wagoner finally submitted and DEQ accepted a completed amendment application on September 22, 2016 (Ex. Resp-N).

32. While the period between August 11 and September 22, 2016 may have been at issue, there is no dispute that Wagoner ceased mining operations in response to the August 16, 2016 Violation Letter. Ex. Resp-L, ¶13. Further, DEQ waited another three and a half months to initiate this administrative enforcement action. *Compare* Ex. Resp-N (notice that application is complete as of Sept. 22, 2016) *with* Ex. Resp-O (initiating enforcement action on Jan. 6, 2017). There is no explanation in the record, and no justification is offered by DEQ, for why it did not timely pursue enforcement if it had credible information that a violation was occurring as far back as August 11.

33. Further, the NOV asserts as support for the alleged violation that, "[a]s of December 20, 2016, the Department has not approved the Amendment, and therefore the Final Reclamation Date, which determines the term of the permit, has not been extended." Ex. Resp-O, ¶25. This point does not support DEQ's position; by the time DEQ initiated this action in 2017, the 45-day deadline for assessing Wagoner's application had already lapsed on November 6, 2016, with no action by DEQ. *Compare* Ex. Resp-N (Sept. 22, 2016) and § 82-4-432(11)(c) (notice of whether application is acceptable shall be issued within 45 days; and, per subsection (10)(c), if application is acceptable, then "the department shall issue a permit to the operator…") *with* Ex. Resp-O (Jan. 6, 2017). The undersigned can discern no basis on which DEQ's delay in acting on the amendment application can be attributed to or held against Wagoner. In fact, DEQ would not notify Wagoner that its amendment application was approved until 131 days later. Ex. Resp-P.

D. Attorneys Fees

34. Wagoner seeks attorney fees against counsel for DEQ, Edward Hayes, under § 37-61-421, based on DEQ's withdrawal of the second basis for violation stated in the NOV—namely that Wagoner was operating without a permit in violation of § 82-4-431(1). *See supra*, at nn. 1, 5.

35. Wagoner's counsel contends DEQ did not follow the procedural requirements for issuing a penalty order in the first instance and DEQ only withdrew the claim after Wagoner spent thousands of dollars researching and briefing the matter.

Counsel for DEQ responds that the alleged procedural infirmities were not conceded, but rather explained in DEQ's response brief and that the second basis was withdrawn based on the equities of this particular case. DEQ's attorney further asserts that there is no jurisdiction to award fees under § 37-61-421.

36. First, Wagoner is correct in assessing that DEQ prudently withdrew the second basis for violation. However, DEQ's withdrawal did not go as far as Wagoner asserts; that is, DEQ did not concede it had followed an incorrect procedure. That procedural issue was not presented to the undersigned for decision, but it is sufficient to note that DEQ disputes Wagoner's characterization of its motivations.

37. Further, jurisdictional questions aside, Mr. Hayes' actions in this matter, as DEQ's attorney, are not (either in scope or character) the sort of conduct which resulted in unreasonable multiplication of these proceedings so as to justify holding him individually liable under this statute. *See e.g. Estate of Bayers*, 2001 MT 49, 21 P.3d 3 (party was playing semantics with discovery answers, thus forcing further unnecessary inquiry, briefs, hearings, etc.); *Tigart v. Thompson*, 244 Mont. 156, 796 P.2d 582 (1990) (repeated refusal to produce statement of insured in auto accident resulting in post-trial briefing and second trial; conduct was "tactical" and at odds with letter and spirit of discovery); *Rocky Mt. Enters. v. Pierce Flooring*, 286 Mont. 282, 951 P.2d 1326 (1997) (attempts to admit inadmissible evidence and repeated violations of pretrial rulings multiplied trial time and warranted fees); *Kuhnke v. Fisher*, 227 Mont. 62, 740 P.2d 625 (1987) (repeated improper statements to jury). Rather, Mr. Hayes withdrew the second

alleged basis after reflection and based on equity; such conduct did not unreasonably multiply this case. Measured assessment of a case in the face of a dispositive motion is all that Wagoner has presented in support of its request and thus it has not established a basis for sanctioning Mr. Hayes under § 37-61-421.

E. Conclusion

38. While it is true that Wagoner submitted a completed application for amendment 42 days after DEQ's last extended deadline (August 11, 2016, to September 22, 2016), Wagoner was not mining during this period. DEQ was then also 131 days late in approving Wagoner's amendment application (November 6, 2016, to March 17, 2017). Based on equity, it is not reasonable to punish Wagoner for a delay that was approximately one third as long as DEQ's. It is also unreasonable to require Wagoner to complete reclamation while an amendment (which was ultimately approved) was pending. If DEQ wishes Operators to complete the amendment application process before the final date of a permit, such a requirement must be stated explicitly in statute or rule—a mere statement in the application that it "should be" done in insufficient.

PROPOSED ORDER

1. DEQ's motion for summary judgment should be GRANTED in part and DENIED in part as follows:

   a. DEQ is entitled to summary judgment that Wagoner violated the provisions of its permit (Opencut No. 1798; FID 2512), for 42 days, from August 11, 2016, until September 22, 2016.

b. The amount or appropriateness of any penalty to be assessed for this violation should remain before the Board.

2. Wagoner's motion for summary judgment should be GRANTED in part and DENIED in part as follows:

a. The Notice of Violation of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, At River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), should be WITHDRAWN except for the 42 days from August 11, 2016, until September 22, 2016.

3. Wagoner's appeal should be GRANTED in part and DENIED in part as set forth above.

DATED this 30th day of November, 2017.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Cross-Motions for Summary Judgment to be mailed to:

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DATED: November 30, 2017

/s/ Aleisha Solem
Aleisha Solem, Paralegal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In The Matter Of: APPEAL VIOLATIONS OF THE OPENCUT MINING ACT BY WAGONER FAMILY PARTNERSHIP, D/B/A WAGONER'S SAND AND GRAVEL, AT RIVER GRAVEL PIT, FLATHEAD COUNTY, MONTANA (OPENCUT NO. 1798; FID 2512)	CASE NO. BER 2017-02 OC

ORDER ON MOTION TO CLARIFY

On November 30, 2017, the undersigned issued an *Order on Cross Motions for Summary Judgment* (Order). In the Order, the undersigned granted in part and denied in part the Department of Environmental Quality's (DEQ) Motion for Summary Judgment and the Motion for Summary Judgment by Wagoner Family Partnership d/b/a Wagoner's Sand and Gravel (Wagoner). On December 20, 2017, Wagoner, through its counsel, filed a request for clarification of that Order. DEQ filed a response on December 28, 2017, and the undersigned issued a Notice of telephonic scheduling conference the same day. Wagoner filed a reply brief in support of the request for clarification on January 3, 2018. On January 4, 2018, the undersigned held a telephonic status conference to discuss the motion for clarification and scheduling relating to the filing of exceptions to the order.

As explained further during the status conference, the undersigned found in the Order that Wagoner was in violation of its permit for 42 days from August 11, 2016 until September 22, 2016 because, during that period, it did not have a completed application pending before DEQ and it had not completed reclamation. The undersigned did not assess a penalty for the violation, as the Motions for Summary Judgment did not put that question before the undersigned. The issue of penalties therefore remains before the Board at this time. The undersigned hereby certifies that pursuant to (or by analogy to) Mont. R. Civ. Pro. 54(b)(1) the Order shall be considered a final judgment on the violation portion of this case, and is therefore ripe for consideration by the BER once all exceptions are fully briefed. After receiving a final decision from the BER on the violation portion of this case, the undersigned will set another status conference to address the remaining issue of penalties.

Based on the above clarification, it is HEREBY ORDERED:

1. The parties may file exceptions to the Order by or before **January 22, 2018**.

2. Parties may file reply briefs to any exceptions filed by or before **January 29, 2018**.

3. This matter will be included as an action item on the **February 9, 2018**, agenda of the Board of Environmental Review. As this is an action item, the parties are entitled to be heard, either in writing, in person, or both. If a party chooses to submit a written statement, it must be filed by **February 1, 2018, at 5:00 p.m.**

DATED this 11th day of January, 2018.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Motion to Clarify to be mailed to:

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DATED: 1/11/18 */s/ Aleisha Solem*
Aleisha Solem, Paralegal

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Attorneys for Operator

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

VIOLATIONS OF THE OPENCUT MINING ACT BY WAGONER FAMILY PARTNERSHIP, D/B/A WAGONER'S SAND AND GRAVEL, AT RIVER GRAVEL PIT, FLATHEAD COUNTY, MONTANA (OPENCUT NO. 1798; FID 2512)	**Docket No. BER 2017-02 OC** **OPERATOR'S EXCEPTIONS TO HEARING EXAMINER'S ORDERS**

I. INTRODUCTION.

COMES NOW the Operator, Wagoner Family Partnership d/b/a Wagoner's Sand and Gravel (hereinafter referred to as "Wagoner"), and pursuant to Admin. R. Mont. § 1.3.223, submits the enclosed exceptions to the Hearing Examiner's November 30, 2017 "Order on Cross Motions for Summary Judgment" and "Proposed Order" and January 11, 2018 "Order on Motion to Clarify."

II. EXCEPTIONS.

A. Operator's exceptions to November 30, 2017 "Order on Cross Motions for Summary Judgment" and "Proposed Order."

1. The fact that DEQ approved the Operator's amendment mining permit should make the issue of penalties for failing to timely reclaim the site moot.

The Hearings Examiner stated, in Paragraph 20 of her Conclusions of Law that "the eventual approval of an amendment application does not, alone, however, moot or 'cure' violations which may have occurred while the application was pending." Given the equitable principles at play in this case, however, it does not make sense to maintain a violation for failing to reclaim a mining site when there is an application to continue mining pending, which was ultimately approved. Accordingly, the fact that the Operator was granted an amendment to continue mining renders any violation with respect to failure to reclaim the site a moot point. *Mountain West Bank, N.A. v. Cherrad, LLC*, 2013 MT 99, ¶ 30, 369 Mont. 492, 301 P.3d 796, stating "a matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." (Citations omitted).

2. It is the Operator's position that Mont. Code Ann. § 82-4-434 is not independent of Mont. Code Ann. § 82-4-441; both statutes must operate in harmony the one with the other.

In Paragraphs 22-25, the Hearings Examiner indicated that regardless of DEQ's failure to follow the cease and desist requirements of Mont. Code Ann. § 82-4-434, it can still assess penalties under Mont. Code Ann. § 82-4-441. However, this does not make sense. Mont. Code Ann. § 82-4-441(5) allows DEQ to require corrective action for a violation, or assess penalties, or both. This statute follows Mont. Code Ann. § 82-4-434(4) – an order to cease and desist is required first, in order to give the operator an opportunity to correct the issues and stop mining. If the Operator fails to comply with an order under Mont. Code Ann. § 82-4-434, then DEQ can

proceed to penalties under Mont. Code Ann. § 82-4-441. Because DEQ did not follow the proper statutory procedures before issuing a violation notice, it does not have standing or authority to assess penalties against the Operator.

3. Wagoner should have been given sufficient time to reclaim the site if in fact DEQ was going to require reclamation (which it never did).

In Paragraph 31 of the Hearing Examiner's Conclusions of Law, and in Paragraph 1(a) of the Hearing Examiner's "Proposed Order," the Hearing Examiner stated that "DEQ is entitled to summary judgment that Wagoner violated the provision of its permit (Opencut No. 1798; FID 2512), for 42 days, from August 11, 2016, until September 22, 2016.' The Examiner's basis for this ruling is that there was a 42-day period from when DEQ notified the Operator that their application was incomplete and would be turned over to enforcement, and the time that DEQ actually notified the Operator that their permit application was in fact complete.

However, it seems that if DEQ was going to turn the reclamation issue over to enforcement, then it should have given the Operator some time from August 11, 2016 to reclaim the site. For example, when DEQ submitted its January 11, 2016 list of options to the Operator, it stated that one of the options was to complete the reclamation by June 6, 2016. In other words, DEQ gave the Operator six months to reclaim the site after providing notice that its application was not complete. Yet, in August 2016, it did not give any additional time to reclaim. Instead, it said it was turning the matter over to enforcement. If DEQ had previously granted a six-month period of time in which to reclaim the site in January, then it should have done the same in August. Had such an extension been granted, there would be no violation.

4. Equity dictates there was no violation.

In Paragraph 38, under the Hearing Examiner's Conclusion, the Hearing Examiner stated "Based on equity, it is not reasonable to punish Wagoner for a delay that was approximately one

third as long as DEQ's. It is also unreasonable to require Wagoner to complete reclamation while an amendment (which was ultimately approved) was pending." If the Hearing Examiner concludes that it would be unreasonable to complete reclamation while an amendment was pending, then it would be disingenuous to rule there was a violation for failure to reclaim the site while the application was pending. Alternatively, any issue of penalties would become moot.

5. General exception.

Operator takes exception to the Hearing Examiner's finding of summary judgment in DEQ's favor. The Hearings Examiner stated it was unreasonable to punish the Operator and then stated there was a violation. In summary, there does not appear to be a violation that is subject to any penalties, and as such, the matter should be completely resolved.

DATED this 22nd day of January, 2018.

GANGLE LAW FIRM, PC.
Attorneys for Operator

By: /s/Cory R. Gangle
Cory R. Gangle, Esq.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this 22nd day of January, 2018:

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MONTANA BOARD OF ENVIRONMENTAL REVIEW

VIOLATIONS OF THE OPENCUT MINING ACT BY WAGONER FAMILY PARTNERSHIP, D/B/A WAGONER'S SAND AND GRAVEL, AT RIVER GRAVEL PIT, FLATHEAD COUNTY, MONTANA (OPEN CUT NO. 1798; FID 2512)	**Case No. BER 2017-02 OC** **RESPONDENT MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO WAGONER'S EXCEPTIONS TO HEARING EXAMINER'S RULING ON PARTIAL SUMMARY JUDGMENT**

COMES NOW the Montana Department of Environmental Quality (Department), by and through its undersigned counsel, pursuant to ARM 1.3.223, and responds in opposition to the January 22, 2018 Exceptions to Hearing Examiner's Order (Exceptions) filed by Petitioner Wagoner Family Partnership, D/B/A/ Wagoner's Sand and Gravel (Wagoner). The Department respectfully submits that the Presiding Hearing Examiner's November 27, 2017 Order on Cross Motions for Summary Judgment (Summary Judgment Order) was correct in all respects. Accordingly, Wagoner's Exceptions should be rejected and the Summary Judgment Order should be adopted as the Board of Environmental Review's (Board) final order.

Wagoner's Exceptions involve purely legal arguments which the Presiding Hearing Examiner rejected in favor of the Department's interpretation of the Opencut Mining Act (the

"Act"). The Department is charged with administering the Act, and its interpretation of the Act is entitled to deference. *Norfolk Holdings v. Dep't of Revenue*, 249 Mont. 40, 44 (1991); *Montana Power Co. v. Cremer*, 182 Mont. 277, 280 (1979). Wagoner's Exceptions, by contrast, disregard the plain meaning of the law while offering nothing but absurd results which absolve Wagoner from all responsibility. The Board should accordingly reject Wagoner's arguments and ratify and adopt the Hearing Examiner's Summary Judgment Order in its entirety.

Summary of the Case

The material facts of this case are undisputed. Wagoner's opencut mining permit required Wagoner to complete reclamation prior to the end of December 2015. Wagoner failed to reclaim the site, but submitted an application on December 31, 2015 to amend its opencut mining permit to extend the date for completion of final reclamation. The permit amendment application was incomplete. The Department granted Wagoner extensions of time within which to file a complete application. The last extension of the deadline was to August 11, 2016. Wagoner did not file a complete permit amendment application until September 22, 2016. The Department approved the permit application amendment to extend the date for completion of final reclamation on March 17, 2017.

The Department issued an administrative order to Wagoner, which Wagoner has appealed to the Board. Wagoner moved for summary judgment, and the Department cross-moved for partial summary judgment as to liability only (not penalties) for Wagoner's violation of its permit, the Opencut Mining Act (Act), and the Board's rules implementing the Act. The Hearing Examiner ruled that Wagoner was in violation of its permit for 42 days from August 11, 2016 until September 22, 2016 because, during that period, it did not have a completed amendment

application pending before DEQ and it had not completed reclamation. Summary Judgment Ruling at 9, ¶ 26; 25-26, ¶¶ 1-2.

Argument

1. Wagoner's First Exception, Which Contends that the Issuance of a Permit Amendment Constitutes a Pardon for Prior Permit Violations, Is Based Upon a Misreading of the Law and Must Be Rejected.

The Summary Judgment Order included an unremarkable and commonsense ruling that the eventual approval of an application to amend an opencut permit does not, standing alone, render the violations which occurred during the pendency of the amendment application moot or "cure[d]." Summary Judgment Order at 17, ¶ 20. As the Presiding Hearing Examiner explained, "[s]uch a reading of the law leads to an absurd result where filing an amendment application that is later approved essentially sanctions misconduct in the interim." Summary Judgment Order at 17-18, ¶ 20 (internal citations omitted). The Hearing Examiner also determined that such a reading of law would also be in in contravention of ARM 17 .24.213(4) (stating that a permit amendment is effective only upon approval and issuance) and also negate the deterrent power of Section 82-4-441 and its administrative penalty provisions.

Wagoner asserts that Hearing Examiner's ruling leads to an equally absurd result requiring an operator to complete reclamation while a pending permit amendment application to extend the date of final reclamation is pending. Wagoner's assertion, however, is factually inaccurate. The Hearing Examiner determined that a violation of the permit occurred between August 11 and September 22, 2016. This period of time bridges the expiration of the last deadline the Department gave Wagoner for submitting a complete application and the date Wagoner submitted a complete permit amendment application. Wagoner did not submit a

complete permit application until September 22, 2016. Thus, there was not a permit application pending before the Department until after that date.

Moreover, the law plainly requires opencut operators to comply with the terms of their permits, including reclamation conditions. ARM 17.24.225(1); ARM 17.24.219(1)(i)(ii). Even in the differing context of citizens suits to enforce environmental permits, it is well-settled "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *See, e,g, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2001); *see also Atlantic States Legal Foundation, Inc.* v. *Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Resources Defense Council, Inc.* v. *Texaco Rfg. and Mktg., Inc.*, 2 F.3d 493, 503-504 (3d Cir. 1993); *Atlantic States Legal Foundation, Inc.* v. *Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *Atlantic States Legal Foundation, Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990). The Board should consequently reject Wagoner's First Exception as inconsistent with the plain language of the Act.

2. Wagoner's Second Exception, Which Contends That DEQ Must In All Cases Issue a Cease and Desist Order Under 82-4-434 Before it Can Take an Enforcement Action Under 82-4-441—Is Also Based Upon a Misreading of the Law and Must Also Be Rejected.

The Presiding Examiner correctly rejected Wagoner's argument that, in circumstances such as those present in the case at bar, the Department must first issue a cease mining order (pursuant to § 82-4-434(4), MCA), as a prerequisite to issuing an administrative order (pursuant to § 82-4-441(5), MCA). Summary Judgment Ruling at 19, ¶ 23. Wagoner's arguments are at odds with the Act, binding precepts of statutory interpretation, and any sensible agency implementation of the Act.

The intent of the Act is to provide adequate remedies for the protection of the environment and to prevent the unreasonable degradation of natural resources. Section 82-4-402(1), MCA. The Act provides the Department with a variety of remedies for its enforcement. Section 82-4-422(1)(e), MCA. When an operator fails to either effect timely reclamation of a mining site or amend its permit to extend its mining operations, the Department can proceed with either an administrative order pursuant to Section 82-4-441, MCA (for the violation of any term or condition of a permit), or a cease mining order pursuant to Section 82-4-443(4), MCA. *See* Summary Judgment Order at 19, ¶ 26.

When the Department issues an administrative order pursuant to Section 82-4-441(5)(a), MCA (which may include both penalties and compliance directives), the burden lies on the violator to appeal such order to the Board or such order becomes final and enforceable. Section 82-4-441(5)(b), MCA; *see also Montana Environmental Information Center v. Montana Dept. of Environmental Quality*, 2004 ML 682, 42, 2004 Mont. Dist. LEXIS 3151, *20-23 (Mont. Dist. Ct. Mar. 30, 2004). But, when the Department issues a cease mining order pursuant to Section 82-4-434(4), MCA, the burden lies on the Department to institute an action in District Court to enforce the cease mining order and to impose penalties for permit violations.

In this case, the Department reasonably exercised its discretion to issue an administrative order instead of a cease mining order in the light of Wagoner's stated intent to continue operating. As the Presiding Examiner's Summary Judgment Ruling explains:

> When Wagoner had not reclaimed by the date in its permit, but had submitted an amendment application (though incomplete), DEQ elected not to issue a reclamation order under Section 434(4). DEQ also elected, in a reasonable exercise of its discretion, to not immediately pursue an administrative action while Wagoner worked to submit a completed application. See e.g. Ex. Resp-B, at 1-2 (giving Wagoner option to avoid such action by submitting and diligently pursuing amendment). And therein lies the harmonious

> reading of the Act's enforcement and amendment provisions: When an operator is pursuing an application for amendment, DEQ can elect not to use Section 434(4) to order reclamation, but instead await a completed application; when extensions to complete the application have proven ineffective or if an application is not forthcoming, DEQ can then exercise its discretion to pursue an administrative action under Section 441. Summary Judgment Ruling at 20, ¶ 26.[1]

The Hearing Examiner's Summary Judgment Order properly construed the plain meaning of the statute and harmonized Sections 82-4-434(4), MCA and 82-4-441(5), MCA. In so doing, the Summary Judgment Ruling acknowledged that, under the circumstances of a case like this, the Department has separate and independent authority to either issue an administrative order or to pursue a cease mining order.

Wagoner apparently is arguing that the Department must comply with Section 82-4-434, MCA, before it can take enforcement action under Section 82-4-441, MCA, because Section 82-4-434, MCA, precedes Section 82-4-441, MCA, in the Act. Wagoner cites no rule of statutory construction or case law to support its positionThe Board should accordingly reject Wagoner's Second Exception as inconsistent with the plain language of the Act.

3. Wagoner's Third Exception, Which Contends that Wagoner Should Have Been Given Sufficient Time to Reclaim the Site, Was Not Raised Below, Is Contradicted by the Undisputed Facts of This Case, and Must Be Rejected.

Wagoner's Exceptions argue, for the first time in this case, that Wagoner should have been given sufficient time after August 11, 2016 to reclaim the subject mine site. A party cannot, however, raise an argument for the first time in an exception to the Hearing Examiner's ruling, because doing so deprives both the Department and the Hearing Examiner from

[1] Had the Department elected to pursue the alternative enforcement approach outlined by § 82-4-434(4), MCA, Wagoner would be out of business, and parties would be before the District Court litigating the propriety of the Department's abatement and reclamation orders and the appropriate civil penalty and/or injunctive relief to be imposed.

considering and responding to the newly-raised argument. The doctrine of exhaustion of administrative remedies is a well-settled principle in administrative law. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 (1938). The purpose of the exhaustion doctrine is to allow a government agency "to make a factual record and to correct its own errors within its specific expertise before a court interferes." *Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 22, 309 Mont. 207, 214 (2002).

An agency decision may not be reversed "unless the administrative body not only has erred but has erred against objection made at the appropriate time under its practice." *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Wagoner's failure to exhaust all of its administrative remedies is fatal to its untimely defenses in this case. See *Hedden-Empire Ltd. Partnership v. Department of Revenue*, 243 Mont. 206, 208 (1990); *Harris v. Bauer*, 230 Mont. 207, 214 (1988) (court will not entertain issues which were not raised before agency and via administrative appeal of agency action) A similar rule applies (absent extraordinary circumstances not present or alleged in this case) at common law, where issues raised for the first time on appeal will not be reviewed. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 53, 303 Mont. 274, 292 (2000).

The facts of this case, which Wagoner failed to dispute, contradict Wagoner's untimely contentions in any event. In its Exception, Wagoner asserts that the Department notified Wagoner on August 11, 2016 that its application was incomplete and that the Department should have given Wagoner a reasonable time to compete reclamation by that date. However, Wagoner is incorrect in asserting that DEQ notified Wagoner that its application was incomplete. Rather, as found by the Hearing Examiner, August 11, 2016 is the date the last extension of time given to Wagoner to submit a complete application expired.

As the Summary Judgment Order explains, Wagoner filed a timely but incomplete application to extend the reclamation date of its permit on December 31, 2015. *See* Summary Judgment Order at 3, ¶ 5. By letter dated January 11, 2016, the Department provided Wagoner with the option of either submitting a complete application to amend its permit to extend the reclamation date or to cease mining and reclaim the site by June 6, 2016, with vegetative success achieved by August 30, 2018. *See id.* at 4, ¶ 7; 9. By letter dated February 10, 2016, Wagoner advised the Department that it had elected to continue to pursue an amendment application. *See id.* 5, ¶ 11.

If Wagoner sincerely believed that the Department should have provided Wagoner with additional time to reclaim the site, then Wagoner should have raised that argument below. Wagoner failed to do so, and the record instead reflects: (a) that the Department provided Wagoner with a five-month extension to reclaim the site, and (b) that Wagoner elected instead to pursue an amendment to extend the reclamation date. The Department did not require reclamation, and Wagoner did not elect to pursue reclamation. Wagoner's untimely arguments about what the Department should have done if the Department *had* required reclamation present sheer hypothetical scenarios regarding how the Department should have exercised its enforcement discretion if either the Department or Wagoner elected a course of action which neither party elected. Rather than wrestle with hypothetical scenarios which are contrary to the record and which were not presented below, the Board should instead decline to entertain such arguments as untimely, and find that Wagoner waived such arguments and failed to exhaust its administrative remedies with respect to such arguments.

4. Wagoner's Fourth Exception, Which Contends That Wagoner Should be Absolved for Its Violations of the Act on Equitable Grounds, Ignores the Hearing Examiner's Clarification of Her Order and Is Beyond the Board's Authority to Grant in Any Event.

Citing to Paragraph 38 of the Summary Judgment Order, Wagoner asserts that the Hearing Examiner concluded that it "would be unreasonable to require Wagoner to complete reclamation while an amendment (which was ultimately approved) was pending." Based on this conclusion, Wagoner asserts that it would be disingenuous to rule there was a violation for failure to reclaim the site while the application was pending.

Wagoner's equitable argument, however, ignores the Order on Motion to Clarify issued by the Hearing Examiner on January 11, 2018. The Order on Motion to Clarify was issued in response to a request for clarification of the order submitted by Wagoner dated December 20, 2017. In its request for clarification, Wagoner cited to Paragraph 38, in part, to support its contention that the body of the Summary Judgment Order resolved the case in Wagoner's favor.

In the Order on Motion to Clarify, the Hearing Examiner made the following clarification:

> As explained further during the status conference, the undersigned found in the Order that Wagoner was in violation of its permit for 42 days from August 11, 2016 until September 22, 2016 because, during that period, it did not have a **complete application** pending before DEQ and it had not completed reclamation. Order on Motion to Clarify, p. 2 (Emphasis added.)

In light of this clarification, the Hearings Examiner concluded in Paragraph 38 that it would be unreasonable to require Wagoner to reclaim the site while a **complete** permit amendment application (which was ultimately approved) was pending. Thus, this conclusion does not negate the Wagoner's violation, which occurred between August 11, 2016 (the last extended deadline for Wagoner to submit a complete application and September 22, 2016 (the date Wagoner submitted a complete application).

Furthermore, nothing in the Act or elsewhere authorizes the Board to make findings as to whether or not violations have occurred based upon the imposition of equitable remedies. The

Department and the Board can, however, apply equitable principles in connection with the assessment of a penalty in the context of a penalty calculation. Section 82-4-1001(1)(g). MCA; ARM 17.4.308(1) (permitting the consideration of "other matters as justice may require to increase or decrease the total penalty."). Here, the Department has only sought (and obtained) relief in the form of a partial summary judgment ruling as to whether Wagoner did in fact violate the Act. *See* Summary Judgment Ruling at 25-26, Decretal Paragraphs 1-3. The amount of the penalty to be assessed for Wagoner's violation remains before the Board. *See id.* at 26, ¶ 3. Wagoner's equitable arguments (such as they are) are simply premature at this time. Otherwise, the Board should decline to address such arguments for the reasons set forth above.

5. Wagoner's "General Exception," which Mischaracterizes the Summary Judgment Ruling as Finding that It Would Unreasonable to Impose Any Penalty Whatsoever Upon Wagoner, Must Also Be Rejected.

Wagoner also takes general exception to the Summary Judgment Order, asserting that the Hearing Examiner stated that it was unreasonable to punish Wagoner while at the same time stating that there was no violation. Wagoner's general exception, however, overlooks the Hearing Examiner's ruling on Wagoner's Motion to Clarify. As indicated in the discussion of the previous exception, the Hearing Examiner clarified that Wagoner was "in violation of its permit for 42 days from August 11, 2016 until September 22, 2016 because, during that period, it did not have a completed application pending before DEQ and it had not completed reclamation."

The Board should accordingly reject Wagoner's General Exception.

Conclusion

Based on all the foregoing, the Board should reject Wagoner's Exceptions and adopt the Hearing Examiner's Summary Judgment Order.

Dated: January 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 29th day of January, 2018, he caused the original or copy of the Respondent Montana Department of Environmental Quality's Response to Wagoner's Exceptions to Hearing Examiner's Ruling on Partial Summary Judgment in BER 2017-02 OC to be mailed by electronic mail, addressed as follows:

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