

**BOARD OF ENVIRONMENTAL REVIEW  
APRIL 8, 2022**

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In the Matter of: Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Review of ARM 17.30.632(7)(A) Pursuant to Mont. Code Ann. Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa, BER 2021-04 and 08 WQ.

III.b. BER 2020-01 OC pg 0027  
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**NEW CONTESTED CASE**

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**BOARD OF ENVIRONMENTAL REVIEW  
MEETING MINUTES**

**FEBRUARY 25, 2022**

**Call to Order**

Chairperson Ruffatto called the meeting to order at 9:00 a.m.

**Attendance**

**Board Members Present**

By Zoom: Chairman Steven Ruffatto; Board Members Joseph Smith, David Lehnherr, Jon Reiten, David Simpson, Julia Altemus, Stacy Aguirre

Roll was called and a quorum was present.

**Board Attorney(s) Present**

None

**DEQ Personnel Present**

Board Liaison: James Fehr

Board Secretary: Shawna Pieske, Sandy Moisey Scherer

DEQ Legal: Kirsten Bowers, Nicholas Whitaker, Catherine Armstrong, Aaron Pettis, Sarah Christopherson, Angela Colamaria, Kurt Moser, Loryn Johnson, Ed Hayes, Lee McKenna, Jeremiah Langston, Jon Morgan

Public Policy: Rebecca Harbage, Moira Davin

Water Quality: Jon Kenning, Myla Kelly, Lauren Sullivan

**Other Parties Present**

Laurie Crutcher, Crutcher Court Reporting

Catherine Laughner (BKBH) - Western Sugar Cooperative

Aislinn Brown, Caitlin Buzzas, Patrick Risken, Jeffrey Doud, Elena Hagen - Montana DOJ Agency Legal Services Bureau

Aaron Bolton, MTPR

Brian Balmer, US Fish and Wildlife Service

Vicki Marquis (Holland and Hart) – Teck Coal

Sarah Bordelon (Holland and Hart) – Western Energy Company and Signal Peak Energy

Sam Yemington (Holland and Hart)

Robert Cameron (Jackson Murdo and Grant)

Erin Sexton

Peggy Trenk, Treasure State Resources

Derf Johnson, MEIC

Shiloh Hernandez (Earth Justice) – MEIC

Murray Warhank (Jackson, Murdo & Grant) - Lincoln County Board of Commissioners

## **I. ADMINISTRATIVE MATERIALS**

### **A. Review and Approve Minutes**

#### **A.1. The Board will vote on adopting the December 10, 2021 Meeting Minutes**

Board member Smith MOVED to approve the December 10, 2021 meeting minutes. Board member Lehnherr SECONDED. The motion PASSED unanimously.

There was no board discussion and no public comment.

### **B. Informal and formal process for hearing appeals before the Board.**

Board member Simpson MOTIONED that for each new appeal the Board immediately issue an order that describes and compares the formal and informal procedures, and requires the parties to indicate if they wish to waive the formal procedure and proceed under an informal procedure. Board member Lehnherr SECONDED.

The Board engaged in discussion. The motion PASSED unanimously.

Ms. Colamaria asked that the Board include a detailed description of the two choices, formal versus informal processes, in any correspondence so the parties can make an informed decision. Chair Ruffatto indicated that a description regarding processes would be included in any correspondence so the parties would know what they are agreeing to. Ms. Colamaria asked that DEQ be given an opportunity to comment. Chair Ruffatto agreed to allow DEQ to comment.

### **C. Vice-Chair Appointment.**

Chair Ruffatto discussed the need to appoint a Vice-Chair for the Board and MOVED to appoint Board member Aguirre as Vice-Chair. Board member Lehnherr SECONDED. The motion PASSED unanimously.

### **D. Hearing Examiners.**

Chair Ruffatto discussed the turnover of Hearing Examiners at Agency Legal Services (ALS), and the number of Hearing Examiners for new cases will be reduced to two. The Hearing Examiners will be Rob Cameron of Jackson Murdo and Grant and Patrick Riskin of ALSB. The Board would not be appointing ALS broadly and current ALS Hearing Examiners will proceed with handling their cases.

## II. BRIEFING ITEMS

### A. CONTESTED CASE UPDATES

- II.A.1.b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.**

Chair Ruffatto provided an update to the Board as Board Counsel Orr was not present. Exceptions are being filed and this matter will be on the agenda for the next Board meeting.

- II.A.1.f. **In the Matter of the notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281, BER 2020-05 WQ.**

Chair Ruffatto MOVED to appoint Patrick Riskin with ALS as the Hearing Examiner for the entirety of the case. Board member Lehnherr SECONDED. The motion PASSED unanimously.

- II.A.1.e. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.**

Ms. Bordelon stated a notification had been received that a Hearing Examiner had assumed jurisdiction for this case. She asked if this Hearing Examiner would continue or if one of the new Hearing Examiners would take over, and whether the Board would formally appoint a Hearing Examiner pursuant to the applicable statute.

Chair Ruffatto MOVED that Michelle Dietrick of ALS be appointed Hearing Examiner for this case. Board member Lehnherr SECONDED. The motion PASSED unanimously.

## III. ACTION ITEMS

- III.a. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

The Board heard oral argument from the parties.

Board member Simpson MOTIONED to deny DEQ's petition for stay and for the Board to move forward with the decision based on the facts at the next Board meeting. Board member Lehnherr SECONDED. The motion PASSED six to one, with Board member Aguirre dissenting.

Chair Ruffatto MOTIONED that each party shall submit a short 5-page brief by March 18, 2022, regarding whether the AM4 District Court decision is binding upon the Board. Board member Reiten SECONDED. The motion PASSED unanimously.



III.b. **In the Matter of Adoption of New Rule I pertaining to Selenium Standards for Lake Kooicanusa, BER 2021-04 WQ.**

For question 1 regarding if the lake water column standard (.8 µg/L) (the “Standard”) was more stringent than the comparable federal guideline, Ms. Bowers, Ms. Kelly, and Ms. Marquis briefed the Board and answered questions.

Board member Lehnherh wanted to register a complaint about how the January 31st public hearing was held. Public hearings are not a place for debate but rather a place to present both sides. They are an opportunity to solicit public input, and everyone gets the same amount of time to speak. Unfortunately, the Hearing Officer allowed some people who had already spoken to speak for an additional length of time, which was highly inappropriate.

The Board engaged in discussion. Board member Simpson MOTIONED that the rule specifying the 0.8 µg/L is more stringent than the 1.5 µg/L guideline specified by the EPA. Board member Aguirre SECONDED. The motion PASSED five to two, with Board members Lehnherh and Reiten dissenting.

For question 2 regarding what the remedy/consequence of the failure to comply with the Stringency Statute is, Ms. Bowers, Ms. Kelly, and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Chair Ruffatto MOTIONED that DEQ is obligated to follow the statute and must initiate rulemaking. Board member Simpson SECONDED. Board member Lehnherh asked if the motion could be made more succinct. Chair Ruffatto WITHDREW his motion and Board member Simpson WITHDREW his second.

The Board engaged in discussion. Chair Ruffatto MOVED the remedy be for DEQ to comply with 75-5-203, MCA, and that it must do so by initiating rulemaking to adopt a rule consistent with the stringency statute because the Board’s rulemaking was invalid as to the 0.8 µg/L standard. The motion died due to lack of a second.

Chair Ruffatto MOVED the remedy be for DEQ to comply with 75-5-203, MCA. Board member Smith SECONDED. The motion PASSED unanimously.

For question 4 regarding Teck Coal Limited having standing, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Board member Simpson MOVED that Teck Coal has standing and Chair Ruffatto SECONDED. The motion PASSED five to two, with Board members Lehnherh and Reiten dissenting.

For question 5 regarding the initial notice of rulemaking with respect to the .8 lake standard failing to comply with the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Vice-Chair Aguirre MOTIONED that the initial notice of rulemaking with respect to the .8 lake standard failed to comply with the stringency statute. Board member Simpson SECONDED. The motion PASSED five to two, with Board members Lehnherh and Reiten dissenting.

For question 6 regarding whether the rulemaking record with respect to the .8 lake standard contains evidence that would support the findings required by the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Vice-Chair Aguirre MOTIONED that the rulemaking record with respect to the .8 lake standard does not contain the evidence required by the stringency statute to support the findings. Chair Ruffatto SECONDED.

Chair Ruffatto asked Vice-Chair Aguirre if she would consider amending her motion to include the phrase "all the findings." Vice-Chair Aguirre AMENDED her motion to include this language and Chair Ruffatto SECONDED. The motion PASSED five to two, with Board members Lehnherr and Reiten dissenting.

For question 7 regarding whether the Stringency Statute requires peer-reviewed scientific studies to support the findings required by the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

Board member Simpson MOTIONED that the stringency statute requires peer-reviewed scientific studies to support the findings. Vice-Chair Aguirre SECONDED. The motion PASSED unanimously.

#### **IV. NEW CONTESTED CASES**

**IV.a. In the Matter of: Appeal and Request for Hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2022-01 WQ.**

Chair Ruffatto recused himself regarding this matter. Vice-Chair Aguirre MOTIONED to assign the case in entirety to the Hearing Examiner. Board member Simpson SECONDED the motion. Vice-Chair Aguirre AMENDED her motion to assign the case to Hearing Examiner Rob Cameron. Board member Simpson SECONDED. The motion PASSED six to zero, with Chair Ruffatto abstaining.

#### **V. BOARD COUNSEL UPDATE**

No Board Counsel update was provided.

#### **VI. GENERAL PUBLIC COMMENT**

No public comment was given.

#### **VII. ADJOURNMENT**

Chair Ruffatto MOVED to adjourn the meeting; Board member Simpson SECONDED. The motion PASSED unanimously. The meeting adjourned at 5:02 PM.

Board of Environmental Review February 25, 2022, minutes approved:

/s/  
STEVEN RUFFATTO  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

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DATE

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

<b>IN THE MATTER OF: PETITIONS OF TECK COAL LIMITED AND THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, MONTANA, FOR REVIEW OF ARM 17.30.632(7)(A) PURSUANT TO MONT. CODE ANN. SECTION 75-5-203 – STRINGENCY REVIEW OF RULE PERTAINING TO SELENIUM STANDARD FOR LAKE KOOCANUSA</b>	<b>CAUSE NOS. BER 2021-04 and 08 WQ  (Proposed) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</b>
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**I. PROCEDURAL HISTORY**

On June 30, 2021, Teck Coal Limited (“Teck”) petitioned the Board of Environmental Review (“Board” or “BER”) under § 75-5-203, MCA (the “Stringency Statute”), to determine whether Administrative Rules of Montana (ARM) 17.30.632(7)(a) (the “Lake Numeric Standard”), which sets a water column standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline. On October 14, 2021, the Board of County Commissioners of Lincoln County (“Lincoln County”) filed a similar petition with the Board. The Board consolidated the two petitions (collectively, the “Petitions”) and determined, with Teck’s waiver, that the eight-month period provided in § 75-5-203(4)(a), MCA, would commence on October 14, 2021, the

date Lincoln County filed its petition. The rulemaking record that culminated in the promulgation of the Lake Numeric Standard (the “Record” or “RR”) was compiled and made available to the public and the Board on December 15, 2021.<sup>1</sup> The Board requested submission of written comments addressing the issues presented by the Petitions by January 13, 2022. The Board received comments from the Idaho Conservation League; the Confederated Salish and Kootenai Tribes, together with the Kootenai Tribe of Idaho (collectively, the “Tribes”); Lincoln County; the Montana Department of Environmental Quality (“DEQ” or the “Department”); the Montana Environmental Information Center together with the Clark Fork Coalition (collectively, “MEIC/CFC”); the U.S. Environmental Protection Agency (“EPA”); Montana Trout Unlimited; the Montana Mining Association; the Treasure State Resources Association of Montana; Wildsight; and Teck. The Board requested that responsive comments be submitted by January 21, 2022. The Board received responses from Teck, DEQ, EPA, and Lincoln County.

On January 31, 2022, the Board held a public hearing to receive oral comments on the Petitions. Oral comments were received from Montana Senator Mike Cuffe (Senate District 1); Teck; Lincoln County; Mr. John O’Connor from

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<sup>1</sup> The Record or “RR” can be found on the BER Website under the Selenium Rule Review “Record Supporting the Promulgation of ARM 17.30.632” <https://deq.mt.gov/files/DEQAdmin/BER/Documents/Record.pdf>

Bonnors Ferry, Idaho; Lincoln County Commissioner Jerry Bennett; Lincoln County Commissioner Josh Letcher; EPA; DEQ; the Tribes; the Idaho Conservation League; MEIC/CFC; Wildsight; Idaho Rivers United; Ms. Erin Sexton; Montana Trout Unlimited; Ms. Lexie Defremery from Bonner County, Idaho; Ms. Becca Rodack from Boundary County, Idaho; and the British Columbia and Montana chapters of the Back Country Hunters and Anglers. A transcript of the public hearing was made available to the Board. The Board requested proposed decision documents by February 11, 2022, and received proposed documents from DEQ, MEIC/CFC, and Teck.

After detailed consideration and analysis of the records, documents, transcripts, and comments; and the relevant rules, statutes, and other authorities; and after in-depth deliberations at its February 25 and April 8, 2022 meetings; the Board makes the following Findings of Fact and Conclusions of Law.

## **II. FINDINGS OF FACT**

1. The controlling statute is § 75-5-203, MCA, the Stringency Statute, which reads in relevant part, following its amendment in 2021:

**State regulations no more stringent than federal regulations or guidelines.** (1) Except as provided in subsections (2) through (5) .... the department [previously board] may not adopt a rule to implement 75-5-301, 75-5-302, 75-5-303, or 75-5-310 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. ...

(2) The department [previously board] may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department [previously board] makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference pertinent, ascertainable, and peer-reviewed scientific studies contained in the record that forms the basis for the department's [previously board's] conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department [previously board] shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition....

2. Upon request of DEQ, acting under its authority provided in §§ 75-5-201 and 75-5-301, MCA, the Board initiated rulemaking of the new selenium rules (ARM 17.30.632), including the Lake Numeric Standard, by publication in the Montana Administrative Register on October 9, 2020. RR 000044 (9/24/20 BER Mtg. Agenda); RR 001326-31 (10/09/20 Notice to Hold Hr'g on Prop. Amend. ARM 17.30.602 and ARM 17.30.632).

3. In conjunction with its request for rulemaking, DEQ advised the Board that the Lake Numeric Standard is not more stringent than the EPA recommended criteria because it was “developed using federally-recommended site-specific procedures.” RR 000001-2 (9/09/20 Mem. from Kirsten H. Bowers [DEQ Att’y] to BER). The Board’s initiation of rulemaking for the Lake Numeric Standard adopted DEQ’s conclusion asserting that “[t]he proposed Lake Koocanusa water column standard (30-day chronic) is no more stringent than the recommended EPA 304(a) criteria because it was developed using federally recommended site-specific procedures; therefore, it is more accurate than the *generally applicable national lentic (lake) number*.” RR 001330 (19 Mont. Admin. Reg., 1793 (Oct. 9, 2020)) (emphasis added). Thus, DEQ and the Board rejected the “generally applicable national lentic (lake) number” as the comparable federal guideline. The Board relied on DEQ’s conclusion regarding stringency throughout the rulemaking. RR 002333-2334, 2422, 2427 (12/11/20 BER Transcript); RR 002544-45 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.).

4. The Board finalized promulgation of the new selenium rules by publication in the Montana Administrative Register on December 24, 2020. RR 002482-2546 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.).



5. Regarding stringency of the Lake Numeric Standard compared to the federal guideline, the Board’s final promulgation stated that the Lake Numeric Standard was not more stringent than the federal guideline because “[t]he proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site-specific bioaccumulation modeling, following the site-specific procedures set forth by EPA in its current 304(a) guidance.” RR 002544-45 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.). Because the Board concluded that the Lake Numeric Standard was not more stringent than the federal guideline, it also concluded that it “is not required to make written findings required by 75-5-203(2), MCA.” *Id.*

6. The Petitions sought the Board’s review of the Lake Numeric Standard pursuant to the Stringency Statute to determine if it is more stringent than the comparable federal guideline that addresses the same circumstances and, if it is, whether the Stringency Statute’s requisite findings had been or could be made based on the Record and whether the rulemaking publications complied with the Stringency Statute.<sup>2</sup>

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<sup>2</sup> See Petition to Review ARM 17.30.632 For Compliance with MCA § 75-5-203 (“Teck Petition”), June 30, 2021, BER Mtg. Materials for Aug. 13, 2021, pg. 105, retrieved from <https://deq.mt.gov/files/DEQAdmin/BER/Documents/2021%20Agendas/BER-Packet-20210813.PDF> (on March 25, 2022); Petition to Review ARM 17.30.632

7. Teck is a company conducting coal mining operations in the Elk Valley area in British Columbia. Teck’s Elk Valley operations are subject to regulation by British Columbia pursuant to, among other laws, Ministerial Order No. M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517 issued to Teck by the B.C. Ministry of Environment under the B.C. Environmental Management Act. Permit 107517 includes selenium water quality compliance limits and site performance objectives for Teck’s discharges that eventually enter the Elk River, which is a tributary to Lake Koocanusa. RR 000087-88, 91-92, 94-99 (9/2020, DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (“DEQ Derivation Doc.”); *see also* Teck Petition, pp. 14-15.

8. Teck participated in collaborative efforts, initiated by Teck’s Canadian regulators, to consider whether British Columbia’s Water Quality Objective of 2.0 micrograms per liter is protective of Lake Koocanusa. DEQ participated in the collaborative efforts. Some of the information and data used, developed, and considered during that process, including information and data provided by Teck, are referenced and relied upon in the technical support documents that serve as the basis for the new rule, ARM 17.30.632. *Id.*

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For Compliance with MCA § 75-5-203 (“Lincoln County Petition”), Oct. 14, 2021, BER Mtg. Materials for Oct. 29, 2021, pg. 161, retrieved from [https://deq.mt.gov/files/DEQAdmin/BER/Documents/2021%20Agendas/20211029\\_Packet.pdf](https://deq.mt.gov/files/DEQAdmin/BER/Documents/2021%20Agendas/20211029_Packet.pdf) (on March 25, 2022).

9. Teck participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings, including the November 5, 2020 public hearing. RR 001269-73 (9/24/20 BER Transcript); RR 001465-71 (11/5/20 BER Transcript); RR 001894-2091 (11/23/20 Teck Comment Letter). Teck's comments included its assertion that the Lake Numeric Standard failed to comply with the Stringency Statute. *Id.*

10. On December 31, 2020, DEQ Director McGrath wrote to the International Joint Commission, which has authority to enforce the Boundary Waters Treaty, requesting action against transboundary pollution stemming from Elk River valley mining operations. Teck Petition, Ex. D.

11. On December 11, 2020, DEQ Director McGrath testified before the Board that “[b]y us adopting this standard today, what that does is continue to put the pressure on British Columbia to indeed adopt their own standard that is aligned with us.” RR 002402 (12/11/20 BER Transcript).

12. The Board of County Commissioners of Lincoln County is a political subdivision of the State of Montana. That portion of Lake Koocanusa located in the United States is within Lincoln County. Lincoln County Petition, p. 14.

13. Lincoln County participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments, and delivering

oral comments at public meetings. RR 001796-1801 (Lincoln County Comment Letter); RR 001439-1443 (11/5/20 BER Transcript).

14. When promulgating the Lake Numeric Standard, the Board “recognize[d] that the lake will probably be considered impaired for selenium.” RR 002505 (20 Mont. Admin. Reg. 2359 (12/24/20)).

15. When promulgating the Lake Numeric Standard, the Board noted that if Lake Koocanusa is listed as impaired for selenium, “then new projects would need to discharge at concentrations equal to or less than the proposed standard of 0.8 [micrograms per liter].” RR 002497 (20 Mont. Admin. Reg. 2351 (12/24/20)).

16. There is no federal standard for selenium, but there is a federal guideline. RR 000306 (2016 EPA Guideline, explaining the distinction between a CWA Section 304(a)(1) guideline, which “represents a non-regulatory, scientific assessment of ecological effects” and a water quality standard which is associated with a specific designated use and adopted by a state or tribe).

17. On July 13, 2016, EPA announced the release of final updated guidelines to states and tribes for selenium. 81 Fed. Reg. 45285-86 (7/13/16). “EPA’s recommended water quality criteria are scientifically derived numeric values that protect aquatic life or human health from the deleterious effects of pollutants in ambient water.” *Id.* For selenium in lentic water (still or slow-moving fresh water), EPA recommends a water column numeric value of 1.5 micrograms per

liter (the “EPA National Lake Numeric Guideline”); a fish whole body tissue numeric value of 8.5 mg/kg dw; a fish muscle tissue numeric value of 11.3 mg/kg dw; and a fish egg/ovary numeric value of 15.1 mg/kg dw. *Id.*; RR 000313 (EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016*, Table 1).

18. The 2016 EPA Guideline was “derived for the protection of 95% of species nation-wide,” specifically including white sturgeon in the Kootenai River, from impacts of selenium, including selenium released by “resource extraction activities.” RR 000090 (DEQ Derivation Doc.); RR 000320, 455-456 (2016 EPA Guideline). Appendix K to the 2016 EPA Guideline provides suggested models (the “EPA Site-Specific Models”) for use by states and tribes if they choose to deviate for specific sites from the generally applicable national guideline. RR 001035-78 (2016 EPA Guideline, Appendix K). The “site-specific procedures” referenced by DEQ and the Board (*see* Findings of Fact ¶¶3 and ¶5 *supra*) are the EPA Site-Specific Models. RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20); BER Hr’g Tr. (“Jan. 31 Hearing”) 30:1-8 (1/31/22).

19. The EPA Site-Specific Models consist of complicated mathematical formulas using assumptions and inputs determined by the user. The user has discretionary latitude in selecting the assumptions and inputs and changes in the

assumptions and inputs of course change the result. *Id.*; RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20)); RR 000078-119 (DEQ Derivation Doc.).

20. The new selenium rules provide “[n]umeric selenium standards,” including a “water column standard” for Lake Koocanusa of 0.8 micrograms per liter: the Lake Numeric Standard. ARM 17.30.632.

21. DEQ and EPA agree that the Lake Numeric Standard is a water quality standard for Montana Water Quality Act and federal Clean Water Act purposes. Jan. 31 Hearing 23:3-6, 31:24-25.

22. Using an EPA Site-Specific Model, the Lake Numeric Standard was supported by modeling scenarios that use a whole-body fish tissue threshold of 5.6 mg/kg dw, which is more stringent than the federally recommended level of 8.5 mg/kg dw. RR 000127 (DEQ Derivation Doc.). As stated by DEQ testimony to the Board, “the 5.6 was used as an input to come up with a water column value of .8.” RR 001251 (testimony of Myla Kelly, DEQ Manager of Water Quality Standards and Modeling Section, 9/24/20 Board Transcript). A model scenario using the federally recommended level of 8.5 mg/kg dw was also presented, but that scenario altered other model inputs (bioavailability and Kd percentile) to be more “conservative” (i.e., more stringent). RR 000125-27 (DEQ Derivation Doc.).

23. In its rationale for approval of the new selenium rule, EPA noted that the Lake Numeric Standard “is more stringent than the recommended water column

criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L).” Teck Petition, Exhibit B (EPA Letter to Board, EPA Rationale (February 25, 2021), p. 12 (pdf p. 15) n. 22; *see also* p. 2 (pdf p. 5), n. 6; p. 6 (pdf p. 9), n.11).

24. Concerned that “Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state’s competitive advantage while being ever vigilant in the protection of the public’s health, safety, and welfare,” the Montana Legislature enacted House Bill 521 in 1995, which was codified as the Stringency Statute. Mont. HB 521, 54<sup>th</sup> Leg. (1995).

25. In enacting House Bill 521, the Legislature intended that the agency promulgating a standard or requirement must “include as part of the initial publication and all subsequent publications a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.” *Id.*

26. The Legislature intended that the “written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board’s or department’s decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to public health or the environment and are achievable under current technology.” *Id.*

27. Based on the Board’s conclusion that the Lake Numeric Standard was not more stringent than the comparable federal guideline, the Board did not make the written findings required by § 75-5-203, MCA, when it promulgated the Lake Numeric Standard. RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20)) and it did not have reason to include in the Record evidence specifically to support such findings. *Id.* Whether the Record contains such evidence is questionable. Teck Comments pp. 16-24 (1/13/22).

28. Teck and the Lincoln County argue that the Stringency Statute requires peer-reviewed studies to support the findings required by the statute. Teck Petition p. 2; Lincoln County Petition p. 2. DEQ argues to the contrary. DEQ Comments p.11-13 (1/13/22).

### **III. CONCLUSIONS OF LAW**

1. This matter regards compliance with the Stringency Statute, not whether the Lake Numerical Standard is the appropriate standard.

2. The Board is an “agency:” an “entity or instrumentality of the executive branch of state government.” § 2-15-102(2), MCA.

3. Pursuant to § 2-15-3502(4), MCA, the Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in



controversies.” § 2-15-102(10), MCA. This includes “interpreting, applying, and enforcing existing rules and laws” and “evaluating and passing on facts.” *Id.*

4. One such issue that the law places within the Board’s authority is, upon petition, to review a rule pursuant to the Stringency Statute. Therefore, the Board has a statutory duty to consider the Petitions and issue final agency action on them. § 75-5-203(4)(a), MCA.

5. Prior to July 1, 2021, setting water quality standards—including the Lake Numeric Standard—was solely within the Board’s authority. § 75-5-301(2), MCA (2019); 2021 Mt. SB 233; § 75-5-301(2), MCA (2021). Pursuant to that authority, the Board created the Record and promulgated the Lake Numeric Standard. (*See* Findings of Fact ¶¶ 2-4 *supra*).

6. Administrative standing determinations made by quasi-judicial agencies (such as the Board) depend “on the language of the statute and regulations which confer standing before that agency.” *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71, 82. Administrative standing “may permissibly be less demanding than the criteria for judicial standing.” *Id.* In this case, the statute that confers standing requires that the person be “affected by” the Lake Numeric Standard. § 75-5-203(4)(a), MCA. The statute does not condition the amount or type of effect required. It simply requires that the person be “affected by” the Lake Numeric Standard. A “person” is defined in the Montana Water Quality Act to

include a “firm, corporation, partnership, individual, or other entity and includes persons resident in Canada.” § 75-5-103(26), MCA.

7. Teck’s Petition and the Record demonstrate that it is affected by the Lake Numeric Standard because its Canadian coal mining operations, monitoring data and other information, and the regulatory requirements placed upon it by provincial and Canadian authorities were used during rulemaking. The Lake Numeric Standard was aimed at Teck and was immediately used by DEQ in a manner adverse to Teck. *See Findings of Fact ¶¶ 7-11 supra.*

8. Lincoln County’s Petition and the Record demonstrate that it is affected by the Lake Numeric Standard because Lake Koocanusa is in Lincoln County and, as the Board recognized, an impairment listing of the lake is probable and would impact discharge limitations for new projects in Lincoln County. *See Findings of Fact ¶¶ 12-15 supra.*

9. The Lake Numeric Standard is a water quality standard subject to the Stringency Statute. *See Findings of Fact ¶¶ 21, 25 supra; ARM 17.30.632(7); § 75-5-302, MCA.*

10. The EPA National Lake Numeric Guideline is “comparable” to and “address[es] the same circumstances” as the Lake Numeric Standard because both are definitive numeric criteria, both address the same “particular parameter,” which is selenium, both address lentic/lake waters, and both aim to protect aquatic life

from the effects of selenium, including the release of selenium related to resource extraction. *See* Findings of Fact ¶¶ 16-18 *supra*; § 75-5-203(1), MCA; *Pennaco Energy v. Mont. Bd. of Env'tl. Review*, 2007 Mont. Dist. LEXIS 513, \*44 (affirmed *Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191).

11. In *Pennaco*, the Court held that the Stringency Statute is “triggered only when EPA has promulgated a federal regulation, guideline or criteria addressing the particular parameter involved” and since the parties agreed “there [were] no national numeric criteria for [the particular parameters involved],” the statute was not triggered. 2007 Mont. LEXIS at \*44 (Dist. Ct. reasoning upheld 347 Mont. at 428, 199 P.3d at 200). In the present case, the Stringency Statute is triggered by the EPA National Lake Numeric Guideline. *See* Findings of Fact ¶ 17 *supra*.

12. DEQ’s theory that the EPA National Lake Numeric Guideline is not the “comparable” guideline on the grounds that the Lake Numeric Standard is site-specific fails, not only because it is contrary to the plain statutory language, but also because this argument would render the Stringency Statute a nullity as to site-specific rules which is directly contrary to the express terms of the statute making it applicable to site-specific standards. § 75-5-203(1), MCA (specifically stating its applicability to standards set pursuant to § 75-5-310, MCA, which allows site specific standards). Also, this argument would be counter to the intent and purpose

of the stringency statute. *See* Findings of Fact ¶¶ 24-25 *supra*. Mont. HB 521, 54<sup>th</sup> Leg. (1995).

13. The Lake Numeric Standard is mathematically lower and thus more stringent than the comparable federal guideline (the EPA National Lake Numeric Guideline). *See* Findings of Fact ¶¶ 17, 20 *supra*. The Board erred when it determined that the Lake Numeric Standard is not more stringent than the comparable federal guideline. § 75-5-203(1), MCA.

14. While the EPA lacks authority under Montana’s Stringency Statute, its conclusion that the Lake Numeric Standard “is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L) [the EPA National Lake Numeric Guideline]” is confirming evidence that the comparable federal guideline is the EPA National Lake Numeric Guideline. *See* Findings of Fact ¶ 23 *supra*.

15. The EPA Site-Specific Models are not “comparable” to the Lake Numeric Standard because the Lake Numeric Standard is a definitive numeric water quality standard while the EPA Site-Specific Models consist of complicated mathematical formulas using assumptions and inputs determined by the user who has discretionary latitude in selecting the assumptions and inputs and changes in the assumptions and inputs change the result. *See* Findings of Fact ¶¶ 19-20 *supra*.

The Board erred when it treated the EPA Site-Specific Models as comparable to the Lake Numeric Standard. § 75-5-203(1), MCA.

16. Although the EPA Site-Specific Models are not the comparable guideline, it is significant to note that the modeling conducted by DEQ to determine the Lake Numerical Standard used an input criterion more stringent than the federal guideline, thus, rendering the Lake Numerical Standard more stringent even under DEQ's theory. *See Findings of Fact ¶ 22 supra.*

17. No written findings were provided by the Board for the Lake Numeric Standard. Written findings are required by the Stringency Statute under MCA §§ 75-5-203(2) and (3) when the standard is more stringent than the comparable federal guideline. Therefore, by not providing written findings the Board erred and the Lake Numeric Standard violates the Stringency Statute. *See Findings of Fact ¶¶ 26-27 supra.* § 75-5-203(1), MCA.

18. Because the initial publication of the new selenium rules failed to inform the public that the Lake Numeric Standard is more stringent than the federal guideline and failed to provide the written findings required by the Stringency Statute for public review and comment, the rulemaking for the Lake Numeric Standard violates the Stringency Statute. § 75-5-203, MCA; *See Findings of Fact ¶¶ 3, 25 supra.*

19. The Stringency Statute requires evidence in the rulemaking record supporting the required findings for a rule more stringent than the federal guideline. §§ 75-5-203(2) and (3), MCA. However, it is not necessary for the Board to determine now whether the Record contains the necessary evidence, because if DEQ determines to make the findings required by the Stringency Statute, DEQ must ensure that such evidence exists in the record. § 75-5-203, MCA; *See Findings of Fact ¶¶ 26-27 supra*.

20. The Stringency Statute expressly requires “peer-reviewed scientific studies” to support a more stringent than federal rule. § 75-5-203(3), MCA. The legislative history supports this reading of the statute. *See Minutes, MT. Senate, 54<sup>th</sup> Leg. Reg. Session, Comm. on Natural Resources, March 28, 1995, p. 5.*

#### **IV. ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that:

The Lake Numeric Standard is more stringent than the comparable federal guideline. The Board erred, as a matter of law, when it concluded the Lake Numeric Standard was not more stringent than the comparable federal guideline and that it did not need to make the written findings required by §§ 75-5-203(2) and (3), MCA. The Lake Numeric Standard and the rulemaking upon which it is based fail to comply with the Stringency Statute. §§ 75-5-203(1), (2) and (3),

MCA. The Stringency Statute sets forth the applicable remedy to be implemented by DEQ. § 75-5-203(4)(a), MCA.

DATED this \_\_\_\_\_ day of April, 2022.

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STEVEN RUFFATTO  
Chairman  
Board of Environmental Review

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

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**IN THE MATTER OF: THE NOTICE OF  
APPEAL BY DUANE MURRAY  
REGARDING THE NOTICE OF  
VIOLATIONS AND ADMINISTRATIVE  
COMPLIANCE AND PENALTY ORDER  
(DOCKET NO. SUB-18-01; ES#36-93-L1-78;  
FID 2568)**

**CASE NO. BER 2020-01  
SUB**

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

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**INTRODUCTION**

This case concerns an appeal Duane Murray filed regarding a Notice of Violation and Administrative Compliance and Penalty Order issued to him by the Montana Department of Environmental Quality (DEQ) for violations of the Sanitation in Subdivisions Act (Act), Mont. Code Ann. § 76-4-101 *et seq.* In the Order, DEQ determined that Mr. Murray's property was subject to a condition of approval limiting development to a single individual water supply system and a single individual wastewater (i.e., sewage) system, which could serve a maximum of two living units. DEQ further determined that Mr. Murray had exceeded this limit by connecting a water supply system to five living units (a multi-unit motel with an apartment and four rental cabins) and by constructing and using three



wastewater systems, one of which was a new multiple-user system because it served three rental cabins. Finally, DEQ concluded that Mr. Murray had violated the Act by constructing and using six unapproved permanent spaces for recreational vehicles.

DEQ ordered Mr. Murray to complete corrective actions to return the property to compliance. Specifically, DEQ ordered Mr. Murray to: (1) either comply with the conditions of the certificate of subdivision plat approval (COSA) or submit an application to rewrite the COSA; (2) pay a \$6,000 administrative penalty; and (3) if he chose to submit a COSA rewrite application, respond to all deficiency letters within 30 days. The Order advised Mr. Murray of his right to appeal to the Montana Board of Environmental Review (BER).

On July 2, 2020, Mr. Murray filed a notice of appeal of DEQ's Order. The case was initially assigned to Hearing Examiner Sarah Clerget. On September 9, 2020, Ms. Clerget issued a prehearing order containing the procedures for the contested case proceeding. In that order, Ms. Clerget informed the parties that "Failure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute." Ms. Clerget further informed the parties that all prehearing matters were to be conducted pursuant to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6 of the Montana Code Annotated; the

Montana Rules of Civil Procedure; the Montana Rules of Evidence; and the Administrative Rules of Montana.

On September 13, 2021, the undersigned substituted as hearing examiner over this matter. On September 30, 2021, DEQ filed a motion for summary judgment. Mr. Murray did not timely respond to DEQ's motion, and the Hearing Examiner has not received a response from him to date. Pursuant to the Court's prehearing order and Mont. R. Civ. P. 56(c)(3), therefore, the undersigned must assume the facts presented by DEQ in its summary judgment motion are uncontested.

On December 9, 2021, oral argument was held on the limited issue of how to interpret the COSA. When asked about his failure to respond to DEQ's motion for summary judgment, Mr. Murray indicated he did not intend to respond. Following the argument, the undersigned ordered—after Mr. Murray confirmed he had no objection—that DEQ submit as an exhibit the lot layout that was included in the subdivision application. On December 23, 2021, DEQ complied with that order.

DEQ's motion for summary judgment is now ripe for decision.

### **FINDINGS OF FACT**

Having reviewed the evidence submitted, the Hearing Examiner makes the following factual findings.

1. Mr. Murray failed to respond to DEQ's motion for summary judgment. Therefore, he has failed to establish a genuine dispute of material fact.

2. On December 17, 1993, DEQ's predecessor agency—the Montana Department of Health and Environmental Sciences—issued a COSA in File Number E.S. #36-93-L1-78, approving the South Hills Subdivision for purposes of the Sanitation in Subdivisions Act, Title 76, chapter 4.

3. The following conditions were set forth in the COSA:

THAT each individual water system will consist of a well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 16, Chapter 16, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Health and Environmental Sciences,

and

THAT each individual sewage treatment system will consist of a septic tank and subsurface drainfield of such size and description as will comply with Phillips County Septic System Regulations and Title 16, Chapter 16, Sub-Chapters 1, 3, and 6 ARM[.]

4. The lot layout for the South Hills Subdivision shows that each lot was proposed for approval with a single well and a single drainfield.

5. Mr. Murray owns Block 5 of the South Hills Subdivision in Malta, Phillips County, which he purchased in 1997.

6. Mr. Murray received a copy of the COSA when he purchased the property.

7. Mr. Murray's development on Lot 5 includes a 12-unit motel with an apartment (Main Building); three one-bedroom cabins he built around 2010 (First Three Cabins); another one-bedroom cabin he built around 2014 (Fourth Cabin); and six spaces for recreational vehicles he constructed in 2015 (Six RV Spaces).

8. The apartment in the Main Building contains two bedrooms, two bathrooms, and a kitchen.

9. Mr. Murray describes the apartment in the Main Building as "a living quarters."

10. Mr. Murray lived in the apartment in the Main Building for about a year.

11. Mr. Murray currently rents the apartment in the Main Building to a tenant who has lived there for around three years.

12. Mr. Murray connected the Main Building to an onsite well and to an onsite wastewater system (First Wastewater System).

13. The First Three Cabins each include one bedroom, one full bathroom, and a kitchen.

14. Mr. Murray has used the First Three Cabins as rental cabins, including one tenant who lived there for about a decade.

15. Mr. Murray connected the First Three Cabins to the same water supply system as the Main Building.

16. Mr. Murray connected the First Three Cabins to a separate wastewater system (Second Wastewater System).

17. There are no real differences between the Fourth Cabin and the First Three Cabins. Like the First Three Cabins, Mr. Murray has used the Fourth Cabin for long-term rentals.

18. A separate wastewater system (Third Wastewater System) serves the Fourth Cabin.

19. Mr. Murray installed the Third Wastewater System without DEQ approval or a county permit.

20. The Six RV Spaces have concrete pads, electrical pedestals, and connections for water and wastewater facilities.

21. Mr. Murray connected the Six RV Spaces to the same wastewater system as the Fourth Cabin, that is, the Third Wastewater System.

22. Mr. Murray connected the Six RV Spots to the same water supply system as the Main Building and the four cabins.

23. In 2014, Mr. Murray submitted to DEQ a subdivision rewrite application for his existing and proposed facilities.

24. During the course of the application process, Mr. Murray changed his mind several times about the types and configuration of facilities for which he sought approval.

25. DEQ was unable to approve the application, in part due to the frequent changes in the proposed facilities.

26. Over the course of two years and a half-dozen deficiency letters, Mr. Murray failed to address multiple deficiencies DEQ identified as necessary to be addressed before it could approve his rewrite application.

27. In September 2015, DEQ discussed with Mr. Murray the outstanding issues on the property and explained the necessity for DEQ approval. DEQ suggested working on the application in stages, starting with the water issues and then moving on to the wastewater issues.

28. In an email to Mr. Murray dated August 4, 2016, DEQ noted that his application had been pending since April 2014, that it had involved a number of different changes to the water and wastewater systems proposed for the lot, and that it was uncertain if Mr. Murray wanted to keep the onsite systems or whether he wanted to connect to the City of Malta.

29. In August 2019, DEQ offered Mr. Murray a Consent Order that required him to take corrective action but would substantially reduce the assessed administrative penalty, which Mr. Murray declined.

30. In June 2020, DEQ issued to Mr. Murray a Notice of Violation and Administrative Compliance and Penalty Order. DEQ concluded that the COSA prohibited any water or wastewater system on Lot 5 that served more than two

living units. By connecting the water supply system to the four cabins and the Main Building, DEQ found that Mr. Murray had violated the conditions of approval in the COSA. Likewise, DEQ found that Mr. Murray had installed three different wastewater systems, one of which was a multiple-user system, in violation of the COSA condition that the lot be served by a single individual water supply system. Finally, DEQ concluded that the Six RV Spaces deviated from the conditions of the COSA. Because none of the COSA deviations had been approved by DEQ, DEQ determined that Mr. Murray had violated Mont. Code Ann. § 76-4-130 for using a facility that deviates from the certificate of subdivision approval without prior DEQ review and approval.

31. DEQ assessed an administrative penalty of \$6,000 for these violations based on its penalty rules and penalty calculation process.

32. DEQ also required Mr. Murray to take corrective action to come into compliance with the Sanitation in Subdivisions Act, Title 76, chapter 4, by either reverting to the conditions of the COSA or by seeking approval for the existing deviations through a rewrite.

33. Mr. Murray does not dispute that a single water supply system serves all of the development on Lot 5 or that there are three separate wastewater systems on the lot, one serving the Main Building, one serving the First Three Cabins, and one serving the Fourth Cabin and Six RV Spaces.

34. Mr. Murray has never received approval for the facilities as presently configured, nor has he submitted a subdivision rewrite application addressing the present configuration of the property.

### **CONCLUSIONS OF LAW**

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

1. Montana Rule of Civil Procedure 56(c)(3) provides that summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.”

2. A party opposing summary judgment must “set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.” Mont. R. Civ. P. 56(e)(2).

3. Because Mr. Murray failed to respond to summary judgment or comply with the prehearing order’s requirement that he file a statement of disputed facts, no material facts are in dispute. *See* Prehearing Order, ¶ 11; Mont. R. Civ. P. 56(e)(2).



4. “The interpretation of an administrative rule is a question of law.”

*Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶ 25, 374 Mont. 364, 321 P.3d 819 (citation omitted).

5. “[I]n determining whether an agency correctly interpreted its own rules, procedures, or policies, the agency’s interpretation should be afforded great weight, and the reviewing court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.” *Id.* (Citation omitted).

6. DEQ regulates subdivision development, specifically proposed facilities for water, wastewater, storm water, and solid waste. Mont. Code Ann. § 76-4-104(2); Admin. R. Mont. 17.36.110.

7. Relevant to DEQ’s regulatory authority, “subdivision” means:

[A] division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision, any condominium, townhome, or townhouse, or any parcel, regardless of size, that provides two or more permanent spaces for recreational camping vehicles or mobile homes.

Mont. Code Ann. § 76-4-102(23).

8. DEQ approval of the water and wastewater facilities is required for a person to sell any lot within a subdivision, install any water or wastewater facilities, construct a building that requires water or wastewater facilities, occupy a

permanent building in the subdivision, or file a subdivision plat. Mont. Code Ann. §§ 76-4-12, -122.

9. DEQ is directed by statute to adopt rules that provide a basis for approving subdivisions for the various types of water and wastewater facilities. Mont. Code Ann. § 76-4-104(2). These rules must account for the type and construction of private water and wastewater facilities, the total development area, and the total number of proposed units and structures requiring water and wastewater facilities. *Id.*; Mont. Code Ann. § 76-4-104(6).

10. When a new subdivision is proposed, DEQ reviews the application to determine whether it complies with relevant statutory requirements and administrative rules and, if it does, DEQ approves the proposed subdivision by issuing a COSA. Mont. Code Ann. § 76-4-114; Admin. R. Mont. 17.36.110.

11. At the time the South Hills Subdivision was approved, a “lot layout[] specifying locations of proposed water systems and sewage treatment systems” was required to be submitted with the application for approval. Admin. R. Mont. 16.16.104(1)(c) (1992).

12. For wastewater systems, a person seeking DEQ approval must first submit certification from the local health department that the proposed systems will comply with local laws and regulations. Mont. Code Ann. § 76-4-104(6)(k); Admin. R. Mont. 17.36.110(2).

13. Once DEQ has approved a subdivision, the conditions set forth in the COSA govern development on the property, and any deviations must have prior approval by DEQ. Mont. Code Ann. § 76-4-130(1).

14. A person may seek DEQ approval for a deviation from the COSA through a subdivision rewrite that proposes changes to the COSA. Admin. R. Mont. 17.36.112. DEQ will then review the proposed rewrite to determine whether the changes comply with the law. *Id.*

15. If a person deviates from the conditions in the COSA without first receiving approval from DEQ, DEQ may initiate an enforcement action and assess administrative penalties for the violation. Mont. Code Ann. §§ 76-4-108, -109.

16. In 1993, when DEQ's predecessor agency approved the COSA that applies to Mr. Murray's property, "living unit" was defined as "the area under one roof occupied by a family. For example, a duplex is considered two living units." Admin. R. Mont. 16.16.101(9) (1992).

17. Applying Admin. R. Mont. 16.16.101(9) (1992), Mr. Murray has a total of at least 5 living units on his property: the Main Building, the First Three Cabins, and the Fourth Cabin.

## **The Water System**

18. In 1993, “individual water system” was defined as “any domestic water system which is not a public or multiple family system.” Admin. R. Mont. 16.16.101(7) (1992).

19. In 1993, “multiple family water supply system” was defined as “a non-public water supply system designed to provide water for human consumption to serve three through nine living units. The total people served may not exceed 24.” Admin. R. Mont. 16.16.101(15) (1992).

20. In 1993, “public water supply system” was defined as:

[A] system for the provision of water for human consumption from any community well, water hauler for cisterns, water bottling plant, water dispenser or other water that is designed to serve ten or more living units for at least 60 days out of the calendar years or 25 or more persons at least 60 days out of the calendar year.

Admin. R. Mont. 16.16.101(20) (1992).

21. Therefore, in 1993, an individual water system was a domestic water system that served one or two living units.

22. Because the COSA only refers to individual water systems, DEQ determined that it necessarily prohibits any water system that serves more than two living units. This interpretation is reasonable and entitled to deference. *See Mayer*, ¶ 25.

23. By using a multiple family water supply system, Mr. Murray deviated from the requirement in the COSA that Lot 5 be served by an individual water supply system.

### **The Wastewater Systems**

24. In 1993, “individual sewage system” was defined as “any sewage system which is not a public or multiple family system.” Admin. R. Mont. 16.16.101(8).

25. In 1993, “multiple family sewage system” was defined as “a non-public sanitary sewage system which serves or is intended to serve three through nine living units. The total people served may not exceed 24.” Admin. R. Mont. 16.16.101(14) (1992).

26. In 1993, “public sewage system” was defined as “a system for collection, transportation, treatment and disposal of sewage designed to serve either ten or more living units for at least 60 days out of the calendar year, or 25 or more persons at least 60 days out of the calendar year.” Admin. R. Mont. 16.16.101(19) (1992).

27. Therefore, in 1993, an individual sewage—or wastewater—system was a domestic system that served one or two living units.

28. Because it serves the First Three Cabins, each of which is a living unit, the Second Wastewater System is a multiple-user system.

29. Because the COSA only refers to individual wastewater treatment systems, DEQ determined that it necessarily prohibits any multiple-user systems. This interpretation is reasonable and entitled to deference. *See Mayer*, ¶ 25.

30. By using three separate wastewater systems, Mr. Murray deviated from the COSA requirement that Lot 5 be served by a single wastewater system; the lot layout shows just one proposed drainfield on Lot 5.

31. By using a multiple family wastewater system for the Second Wastewater System, Mr. Murray deviated from the COSA requirement that Lot 5 be served by an individual wastewater system.

### **The Six RV Spaces**

32. The Sanitation Act requires that any area providing permanent multiple spaces for recreational vehicles must be reviewed and approved by DEQ before any water or wastewater facilities for the spaces are installed. Mont. Code Ann. §§ 7-4-102(23), -121.

33. If a property already has a COSA, permanent multiple spaces for recreational vehicles must be reviewed and approved according to the subdivision rewrite provisions of Mont. Code Ann. § 76-4-130(1).

34. Permanent multiple spaces for recreational vehicles are not expressly permitted by the COSA, and Mr. Murray did not seek approval from DEQ for a

rewrite to permit the Six RV Spaces before he constructed them. Therefore, Mr. Murray's construction of the Six RV Spaces violated the COSA.

35. Each of Mr. Murray's violations of the COSA—constructing five living units on one water system, constructing a multiple-user wastewater system, constructing two more wastewater systems than the COSA allows, and constructing six RV spaces—is a violation of Mont. Code Ann. § 76-4-130(1).

36. DEQ therefore is entitled to judgment as a matter of law that Mr. Murray violated Mont. Code Ann. § 76-4-130(1).

37. Pursuant to Mont. Code Ann. § 76-4-109(2)(a), DEQ may assess an administrative penalty of up to \$250 for each day of violation of the Sanitation in Subdivisions Act.

38. DEQ's assessed administrative penalty in the amount of \$6,000 for Mr. Murray's violations of the Sanitation in Subdivisions Act complies with Mont. Code Ann. § 75-1-1001 and Admin. R. Mont. 17.4.301.

**RECOMMENDED DECISION**

DEQ's summary judgment motion should be granted.

DATED this 17th day of February, 2022.

/s/ Aislinn W. Brown

AISLINN W. BROWN

Hearing Examiner

Agency Legal Services Bureau

1712 Ninth Avenue

P.O. Box 201440

Helena, MT 59620-1440



## **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Sandy Moisey Scherer  
Secretary, Board of Environmental Review  
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1520 East Sixth Avenue  
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Helena, MT 59620-0901  
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Duane Murray  
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DATED: 2/17/22

/s/ Elena M. Hagen  
Elena M. Hagen, Paralegal

TO: LINDSEY SIMON  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

From: Duane Murray  
1568 US Highway 191 So  
Malta MT 59538

RE: Case #. BER 202-01 SUB  
IN THE MATTER OF: THE NOTICE OF APPEAL BY DUANE MURRAY REGARDING THE NOTICE OF  
VIOLATIONS AND ADMINISTRATIVE COMPLIANCE AND PENALTY ORDER (DOCKET NO. SUB-18-  
01; ES#36-93-L1-78; FID 2568)

Date: April 2, 2021

I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.

I should not have to be a lawyer, nor should I have to hire a lawyer to file an appeal with a state agency.

Duane Murray

## Signal Peak Energy – BER 2016-07 – Deliberation Outline

### 1. MEIC Exceptions

- a. Deference to DEQ: MEIC Exc. p. 2; DEQ Resp. pp. 2-3; SPE Resp. pp. none
- b. Failure to address “reclamation” claim: MEIC Exc. pp. 4-15 et seq.; DEQ Resp. pp. 14-16; SPE Resp. pp. 11-12, 19-24
- c. “Impossible” standard of proof: MEIC Exc. pp. 5-15 et seq.; DEQ Resp. p. 4; SPE Resp. pp. 11,17-18
- d. Burden of Proof: MEIC Exc. pp. 6-14; DEQ Resp. pp. 3-5; SPE Resp. pp. 1-5, 11-19; MEIC Supp. pp. 2-4; DEQ Supp. pp. 1-5; SPE Supp. pp. 1-5
- e. Water quantity analysis unsupported: MEIC Exc. pp. 14-17; DEQ Resp. pp. 23-35; SPE Resp. pp. 29-32,44-48
- f. Water quality analysis unsupported: MEIC Exc. pp. 17-20; DEQ Resp. pp. 5-8, 35-36; SPE Resp. pp. 49-51
- g. Lack of bonding for water treatment: MEIC Exc. pp. 19-20; DEQ Resp. pp. 7-8; SPE Resp. p. 23
- h. Legal availability analysis unsupported: MEIC Exc. pp. 20-23; DEQ Resp. pp. 8-13; SPE Resp. p. 52
- i. Failure to address proposed findings generally: MEIC Exc. pp. 23-25; DEQ Resp. pp. 16-19; SPE Resp. pp. 25-27
- j. Failure to address SPE’s design standards violations: MEIC Exc. pp. 25-26; DEQ Resp. pp. 19-23; SPE Resp. pp. 27-29

- k. Failure to address 2013 100gpm replacement water needs estimate: MEIC Exc. pp. 26-28; DEQ Resp. pp. 23-26; SPE Resp. pp. 29-33, 44-46
- l. Failure to address DEQ's admission that CHIA water assessment mistaken: MEIC Exc. pp. 16-17, 28-29; DEQ Resp. pp. 26-30; SPE Resp. pp. 29-33
- m. Finding 54 unsupported – Rosebud v. Bull Mountain Mine: MEIC Exc. p. 29; DEQ Resp. none; SPE Resp. p. 34
- n. Findings 77-82, 92 and 95 unsupported – see i, j, k, and l above: MEIC Exc. pp. 29-30; DEQ Resp. pp. 16-30; SPE Resp. pp. 34-42
- o. Finding 97 unsupported – “likely many miles” v. “may be several miles”: MEIC Exc. pp. 30-31; DEQ Resp. pp. 36-37; SPE Resp. pp. 42-43
- p. Finding 97 unsupported – continuity of formation: MEIC Exc. pp. 31-32; DEQ Resp. pp. 36-37; SPE Resp. pp. 42-43
- q. Finding 99 unsupported – the extent of DUA: MEIC Exc. p. 32; DEQ Resp. pp. 24-32; SPE Resp. p. 43
- r. Finding 114 unsupported – evidence of water quality impacts: MEIC Exc. pp. 32-33; DEQ Resp. pp. 5-7, 19-23, 35-36; SPE Resp. pp. 43-44
- s. Finding 123 unsupported – water quantity needs: MEIC Exc. pp. 33-34; DEQ Resp. pp. 23-35; SPE Resp. pp. 44-48
- t. Finding 130 unsupported – water rights evaluation: MEIC Exc. p. 34; DEQ Resp. pp. 8-13; SPE Resp. pp. 48-49
- u. Finding 143 unsupported – water treatment: MEIC Exc. p. 34-35; DEQ Resp. pp. 5-7; SPE Resp. pp. 49-51

- v. Finding 145 unsupported – legal barriers: MEIC Exc. p. 35; DEQ Resp. pp. 8-13; SPE Resp. p. 52

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- a. MEIC's exempt well permits argument: DEQ Exc. pp. 2-4, 6-9; MEIC Resp. pp. 2-5
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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

**IN THE MATTER OF: APPEAL  
AMENDMENT APPLICATION  
AM3, SIGNAL PEAK ENERGY  
LLC'S BULL MOUNTAIN MINE  
NO. 1, PERMIT NO. C1993017**

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**CASE NO. BER 2016-07 SM**

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

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## **INTRODUCTION**

This case has three parties: (1) the Department of Environmental Quality ("DEQ" or "the Department"); (2) the Petitioner, Montana Environmental Information Center ("MEIC" or "Petitioner"); and (3) the Respondent-Intervenors Signal Peak Energy, LLC ("Signal Peak" or "SPE").

This case concerns MEIC's appeal of DEQ's decision to approve a new amendment for AM3 under SPE's Bull Mountains Mine No. 1 permit C1993017 ("the permit").

## **PROCEDURAL HISTORY**

On October 5, 2012, Signal Peak sought approval for amendment to its mining and reclamation plan from the DEQ. Signal Peak sought to increase the amount of coal to its permitted area for its Bull Mountains No. 1 Mine. On September 13, 2013, DEQ notified SPE that the application was technically acceptable and on October 18, 2013, issued its approval of the permit and required a reclamation bond of \$11,194,411. Ord. on SJ at 3 (Nov. 13, 2019).

On November 18, 2013, MEIC, pursuant to Mont. Code Ann. § 82-4-206(1) and (2), as well as, Mont. Admin. R. 17.24.425(1), filed a notice of appeal and request for hearing before the Montana Board of Environmental Review (BER or Board). The Board appointed a hearing examiner for procedural purposes but retained substantive jurisdiction of the matter. In April and May of 2014, the



parties filed cross-motions for summary judgment and agreed that the matter could be decided on motions. The Board heard oral argument on the motions on July 31, 2015.

The Board ultimately granted summary judgment to MEIC on January 14, 2016. The Board remanded the matter to DEQ for proceedings consistent with the Consent Decree and Order (Consent Decree) filed on January 11, 2016. The Consent Decree expressly stated the Department's determination on the revised application "will be subject to a new challenge and review" under Montana Strip and Underground Mine Reclamation Act and Montana Administrative Procedure Act. Ord. on SJ at 3-4.

On remand, DEQ considered additional information, assessed the probable cumulative impacts of all anticipated coal mining on the hydrologic balance of the cumulative impact area, updated Appendix 314-5 to the Probable Hydrologic Consequences ("2016 PHC"), determined the application to be acceptable, notified the public regarding its acceptability determination, and received and responded to public comments, including comments from MEIC.

Based on its new written findings and public comment on the new permit, the Department issued its AM3 Permit written findings, Cumulative Hydrologic Impact Assessment ("CHIA"), responses to public comments, and a revised reclamation bond calculation of \$11,194,411 on July 12, 2016. Prior to this date,

no mining had occurred within the permit amendment area, and thus, at that time there were no existing impacts from subsidence. Ord. on SJ at 4.

On August 11, 2016, MEIC timely appealed the new permit to the Board pursuant to the Consent Decree (a “new challenge and review”). In its Notice of Appeal (NOA), MEIC stated that DEQ violated the law in approving the application in the following ways:

1. Signal Peak’s application and the Department’s CHIA “do not affirmatively demonstrate that there is sufficient high quality water [sic] available to replace spring and stream reaches that may be dewatered due to subsidence-related impacts.” (NOA ¶ 5)
2. Signal Peak’s reclamation plan does not provide “specific hydrologic reclamation plans for spring and stream reaches until specific water resources are impacted by longwall mining activities.” (NOA ¶ 6)
3. The bonding amount determined by the Department is improper because it “omits funding for multiple measures that the reclamation plan . . . identifies.” (NOA ¶ 7)

On February 1, 2019, MEIC filed a Motion for Summary Judgment and DEQ and SPE each filed Motions for Partial Summary Judgment. The Motions were all fully briefed in April 2019. Former hearing examiner Sarah Clerget scheduled the motions for oral argument in June 2019; it was later cancelled after a motion by MEIC pointing out that the jurisdiction originally conferred to the hearing examiner was for procedural purposes only. The matter was then brought before the BER as an action item at its May 2019 meeting. At its May meeting, the Board voted unanimously to “refer to our counsel, acting as hearing examiner, the pending summary judgment motions in the matter of Signal Peak Energy, Bull

Mountain Coal Mine No. 1, for the preparation of a proposed decision in accordance with MAPA, which then would be brought back to the Board for further proceedings.” Bd. Mtg. Tr. 37:21-38:3; 56:9-19 (May 31, 2019). Oral Argument was then reset and Hearing Examiner Clerget issued an Order on the parties pending motions in November 2019.

In her Order, Hearing Examiner Clerget dismissed Petitioner’s reclamation bonding claims on summary judgment. Ord. on SJ at 15-17, ¶ 2, 29-30, ¶ 1-4. Following that decision, the parties again sought clarification on Ms. Clerget’s jurisdiction. The matter was then brought before the BER as an action item at its December 2019 meeting, wherein the Board clarified that it intended to transfer its authority to the hearing examiner. The parties then proceeded with pretrial filings and on August 18, 2020, through August 21, 2020, former Hearing Examiner Clerget conducted a four-day virtual evidentiary hearing on the “central issue” of the physical and legal availability of the Deep Underburden Aquifer (DUA) to serve as a source of replacement water for beneficial uses in the vicinity of the Mine (i.e., seasonal livestock watering and domestic uses) lost or diminished by AM3. Tr. 4:5-9, 960:8-22; Ord. on SJ at 17, ¶ 3.

During the hearing, former Hearing Examiner Clerget reserved ruling on the Motions for Judgment on Partial Findings. Tr. 396:23 through 403:18.

The parties filed their Proposed Findings of Fact and Conclusions of Law on December 18, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer of this contested case. On March 31, 2021 the undersigned, Caitlin Buzzas, assumed jurisdiction.

### **LEGAL STANDARD**

The Montana Administrative Procedure Act (MAPA), Mont. Code Ann. § 2-4-101, et. seq., and the Montana Strip and Underground Mine Reclamation Act (MSUMRA), Mont. Code Ann. § 82-4-201, et. seq., govern this contested case.

The Department reviews an application for a mine permit revision as prescribed by the MSUMRA and its implementing rules to determine whether the proposed operation is lawful. Mont. Code Ann. §§ 82-4-201, et seq. A mine permit applicant must affirmatively demonstrate compliance with MSUMRA and its implementing rules. Mont. Code Ann. § 82-4-227(1). Additionally, Mont. Code Ann. § 82-4-253(3)(d), requires the operator of a mine to replace water supplies immediately and then on a more permanent basis “in like quantity, quality, and duration.”

Montana Administrative Rule ARM 17.24.304(1)(f)(iii) and Mont. Code Ann. § 82-4-222(1)(n) state that a mine permit application must include “a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water supplies diminished or otherwise adversely impacted

in quality or quantity by mining activities so as not to be suitable for the approved postmining land uses.” To approve a mine permit application DEQ must 1) confirm in writing that the proposed alternative water supplies could be developed to replace water supplies diminished or otherwise adversely impacted by mining activities in “like quality, quantity, and duration” and 2) consider whether the proposed replacement water could be obtained, legally or otherwise. Mont. Code Ann. § 82-4-227(3)(a); Admin. R. Mont. 17.24.304(1)(f)(iii); Ord. on SJ at 20, 27.

As the party asserting the claim at issue, MEIC has the burden of presenting the evidence necessary to establish the facts essential to a determination that the Departments decision violated the law. MEIC, 2005 MT 96, ¶ 16. The “facts essential” must be proved by a preponderance of the evidence. *Id.* ¶ 22. In this contested case MEIC has the burden of proving by a preponderance of the evidence that DEQ’s decision to issue the permit violated the law. *Id.* Ord. on SJ at 14.

## **FINDINGS OF FACT**

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

### **I. BACKGROUND AND PROCESS**

1. The Bull Mountain Mine No. 1 (the “Bull Mountain Mine”), which is the only active underground coal mine in Montana, is located in Musselshell and

Yellowstone counties, approximately 15 miles southeast of Roundup, Montana.

DEQ Ex. 5 at 3-1; Ord. on SJ at 8, ¶ 2.

2. AM3, which is depicted in Figure 3-2 of the Cumulative Hydrologic Impact Assessment ("CHIA") (DEQ Ex. 5 at 13-4) and in Figure 1 of the Written Findings (DEQ Ex. 4 at 2), is located at the hydrological divide between the Yellowstone River Basin and the Musselshell River Basin. DEQ Ex. 5 at 4-1; DEQ Ex. 4 at 2; Ord. on SJ at 8, ¶ 3.

3. The Bull Mountain Mine No. 1 was first permitted in 1993 to a company called Meridian Minerals. Ord. on SJ at 8.

4. DEQ then transferred the permit from Meridian Minerals to numerous entities after 1993. DEQ Ex. 5 at 3-2.

5. In 2008 Signal Peak sought to obtain Meridian Minerals' permit, and DEQ approved transfer of Meridian Minerals' permit to SPE. DEQ Ex. 5 at 3-2.

6. SPE operates the Bull Mountain Mine under Surface Mine Permit C1993017 (the "Permit"), first issued by DEQ in 1993. DEQ Ex. 5 at 3-2; Ord. on SJ at 3 and 8, ¶ 1.

7. The Mine targets the Mammoth coal seam, an approximately 8-foot to 12-foot-thick coal seam underlying the Mine. DEQ Ex. 5 at 9.2.4, Figure 4-4, Figure 9-8; Tr. 468:14-25, 469:1-24.

8. Strata above the Mammoth coal seam is referred to as the overburden, while strata below the Mammoth coal seam is referred to as the underburden. Tr. 469:22-25, 470:1-2.

9. The underground Bull Mountain Mine is located within lithologies depicted in Figure 4-4 of the AM3 CHIA, which is a stratigraphic column showing the “type of geologic material which occur beneath the surface of the earth” in the vicinity of the Bull Mountain Mine, including multiple coal layers, one of which is the Mammoth coal. DEQ Ex. 5 at 13-10; Tr. 468:14-470:20.

10. The overburden and the underburden consist of layers of rock including clinker, sandstone, silty sandstone, coal, siltstone, and claystone. Typically, these layers are thin and alternate between the various lithologies. DEQ Ex. 5 at 4-2, 13-10, Figure 4-4; Tr. 469:3-470:17.

11. The Mine conducts longwall mining, an underground mining method that removes the entire Mammoth coal seam in advancing panels, allowing overburden rocks to “flex downward, fracture (creating a fractured zone) and collapse or cave into the void (forming a caved zone),” causing the overburden above the removed coal seam to subside. DEQ Ex. 5 at 3-2, 9-8; Ord. on SJ at 9, ¶ 6.

12. Each longwall panel consists of a block of coal approximately 1,250 feet in width and 15,000 feet to 23,000 feet in length. DEQ Ex. 5 at 9-8.

13. As approved, AM3 will expand the mine from five longwall panels to fourteen longwall panels. DEQ Ex. 5 at 3-1.

14. As of July 2016, five of the fourteen permitted longwall panels – approximately 36% of the permitted coal reserves – had been mined and the overburden subsided. DEQ Ex. 5 at 9.2.4.2.

**a. Prior Permitting and Appeal**

15. The Order on the Parties' Cross-Motions for Summary Judgment at pages 3-4, the procedural history of pre-remand matters heretofore decided by the Board which culminated in *In re Signal Peak Energy*, BER-2013-07 SM, Findings of Fact, Conclusions of Law and Order, at 56 (Jan. 14, 2016), and the associated January 11, 2016 Consent Decree (FOFCOL and Orders collectively referred to as “Bull Mountain Mine Part I”) are incorporated by reference as if fully set forth herein.

16. *Bull Mountain Mine Part I* found a potential for material damage to the hydrologic balance outside the permit boundary resulting from the migration of gob water and granted summary judgment in favor of Petitioner, vacated AM3, and ordered SPE and the Department to reinstate the application and review process. *Bull Mountain Mine Part I* at 87-88; DEQ Ex. 4 at 5; Tr. 414:16-415:19; 426:1-3; Ord. on SJ at 3.



17. In *Bull Mountain I*, Petitioner did not challenge AM3 based on alleged uncertainties in the legal and physical availability of the Deep Underburden Aquifer. Tr. 415:4-19; 11/18/2013 Notice of Appeal; *Bull Mountain I* at 2.

18. On January 14, 2016, the Board finding potential for material damage to the hydrologic balance outside the permit boundary resulting from the long-term migration of gob water – granted summary judgment in favor of Petitioner, vacated AM3, and ordered Signal Peak and the Department reinstate the application and review process. *Bull Mountain I* at 87-88; DEQ Ex. 4 at 7; Tr. 414:16-25, 415:1-19, 426:1-3; MSJ Order at 3.

19. In vacating AM3, the Board noted uncertainties regarding the physical and legal availability of the DUA enunciated in Appendix 3M of Signal Peak's 2013 Groundwater Model. *Bull Mountain I* at 12-13, FOF ¶ 32; Tr. 433:21-25, 434:1-20, 537:5-6; MEIC Ex. 17 at Appendix 3M.

20. Pursuant to *Bull Mountain Mine Part I*, the Department reopened the AM3 application and reinstated the AM3 acceptability review process. DEQ Ex. 4, at 1, 5-6; *Bull Mountain Mine Part I* at 87-88; January 11, 2016 Consent Decree at 3-4, ¶ 1.

21. A timeline of the AM3 application review and approval process on remand is detailed in the Department's Written Findings. DEQ Ex. 4 at 6-8.

22. After remand from the Board in 2016, Signal Peak submitted (and the Department considered) additional information, including the 2016 Comprehensive Evaluation of Probable Hydrologic Consequences (“2016 PHC”), the 2015 Deep Underburden Groundwater Model Report, the 2016 Groundwater Model Report, and improved and refined monitoring data. DEQ Ex. 4 at 7; SPE Ex. 2; Ord. on SJ at 4; Tr. 416:11-22, 428:9-25, 429:1; 443:18-25, 444:1-18, 544:14-24.

23. The Department relied on multiple sources of information to support their decision to approve AM3 in 2016, including permit documents and other information compiled by DEQ. Tr. 543:2-13, 544:14-24.

24. Permit documents the Department relied on to make its findings related to the 2016 AM3 approval include, but are not limited to: (1) Appendix 314-5, the 2016 PHC (DEQ Ex. 9); (2) Appendix 314-6, the 2016 Groundwater Model Report (DEQ Ex. 10); (3) Appendix 314-7, the Deeper Underburden Model Report (DEQ Ex. 11); (4) Appendix 313-2, the Spring Mitigation Plan (DEQ Ex. 7); (5) Appendix 313-3, the Stream Reclamation Plan (DEQ Ex. 8); and (6) Permit Section 304 baseline data on hydrologic resources and geology. DEQ Ex. 4 at 7; Ord. on SJ at 3-4; Tr. 428:9-429:7; Tr. 488:20-489:10, 543:2-13.

25. Additional information the Department relied on to make its findings related to the 2016 AM3 approval included, without limitation: monitoring data from the Bull Mountain Mine annual hydrology reports, sources cited in the CHIA

including MBMG reports and DNRC and MBMG databases, and guidance on combined appropriations from DNRC. Tr. 467:9-12, 479:1-15, 482:4-19, 492:13-493:3, 494:7-19, 496:3-6, 497:8-22, 533:10-21. 538:20-539:1, 543:2-13, 544:14-19, DEQ Ex. 5, 11-1 through 11-2; DEQ Ex. 21.

26. Some of these sources that the Department relied on to make its findings related to the *2016* AM3 approval contained new or additional information that was not contained within sources that the Department relied on to make its findings related to the *2013* AM3 approval. Such new or additional information is contained within the 2016 PHC (DEQ Ex. 9), the 2016 Groundwater Model Report (DEQ Ex. 10), the 2015 Deep Underburden Groundwater Model Report (DEQ Ex. 11), and additional monitoring data. DEQ Ex. 4 at 5; DEQ Ex. 5 at 9-15; Ord. on SJ at 3-4; Tr. 416:11-22, 428:9-429:1, 443:18-444:18, 544:14-24.

27. The 2015 Deep Underburden Groundwater Model Report and the 2016 Groundwater Model Report are “mathematical representation[s] of groundwater movement” and “useful tool[s] for evaluating various aspects of groundwater, including water quantity and water quality issues.” Tr. 410:2-13.

28. “[G]roundwater modeling is a mathematical representation of groundwater movement beneath the earth,” and is “a useful tool for evaluating various aspects of groundwater, including water quantity and water quality issues.” Tr. 410:2-13.

29. The Department used the 2015 Deep Underburden Groundwater Model Report “to provide an understanding of the geologic and hydrologic characteristics of the deep underburden, as well as the ability to store and transmit water . . . [and] to confirm that impacts from mining in the deep underburden were expected to be extremely minimal.” Tr. 436:16-23; DEQ Ex. 5 at 9-25.

30. Neither Signal Peak nor the Department conducted hypothetical simulations of the 2015 Deep Underburden Groundwater Model. Tr. 868:24-25, 869:1-3.

31. The 2016 Groundwater Model Report “simulates the overburden, Mammoth coal, and underburden, primarily focusing on impacts to groundwater levels in the Mammoth coal, lower portions of the overburden . . . and the upper portion of the underburden” resulting from mining. Tr. at 432:16- 433:12; DEQ Ex. 5 at 9-15; DEQ Ex. 9 at 314-5-3, 314-5-58; DEQ Ex. 10, at 314-6-1, 314-6-28.

32. On May 24, 2016, the Department completed its review and determined the revised AM3 application acceptable. SPE Ex. 8; DEQ Ex. 4 at 5.

33. As approved, AM3 will add 7,161 acres to the permit area, expand the underground mine plan, and add approximately 176 million tons of coal to the permitted life-of-mine reserves. DEQ Ex. 4 at 1; DEQ Ex. 5 at 3-1; Ord. on SJ at 8-9, ¶ 5.

34. Following the Department's acceptability determination, Petitioner filed objections to the AM3 application, in part, based on alleged uncertainties in the physical (i.e., quality and quantity) and legal availability of the Deep Underburden (DUB) and the adequacy of reclamation bonding. SPE Ex. 9 at 2-3; DEQ Ex. 1; DEQ Ex. 2; DEQ Ex. 3; Ord. on SJ at 10-12, ¶¶ 11-14.

35. Petitioner's Objections (DEQ Ex. 1) included the comments of Mark A. Hutson, P.G. (DEQ Ex. 2), which as pertinent herein, raised concerns that it was "uncertain" whether SPE would have the ability to apply for and receive an exempt well permit from the Montana Department of Natural Resources ("DNRC"). DEQ Ex. 2 at 2.

36. Additionally, Petitioner's Objections contained a letter from the Western Environmental Law Center, which discussed the uncertainty of replacement water quantity and quality based on the 2013 AM3 application materials. DEQ Ex. 3 at 11-12, 24-35; Ord. on SJ at 10, ¶ 12. This letter from the Western Environmental Law Center predated the 2016 AM3 application. DEQ Ex. 3 at 1.

37. The Department considered and responded to Petitioner's objections and concluded that any springs potentially impacted by subsidence and requiring mitigation could be replaced by exempt wells because the springs' flow rates do

not exceed the exempt well 35 gallon per minute pumping limit. DEQ Ex. 6 at 5-6, ¶ 8; DEQ Ex. 21; Tr. 537:19-539:1, 542:2-7.

38. Based on information contained in the revised AM3 application and other information compiled by the Department, the Department prepared Written Findings including a Cumulative Hydrologic Impact Assessment or “CHIA”. DEQ Ex. 4; DEQ Ex. 5; Tr. 442:20-443:5.

39. The CHIA – part of the Department’s Written Findings – evaluated “the cumulative impacts of existing, previous, anticipated mining on the hydrologic balance in the cumulative impact area around the mine,” and “determine[d] for the purpose of the permit decision if the proposed operation is designed to prevent material damage to the hydrologic balance.” Tr. 442:2-19, 407:5-15; DEQ Ex. 5 at 2-10, 10-4.

40. The CHIA concluded that AM3 is designed to “minimize disturbance of the hydrologic balance on and off the mine plan area and to prevent material damage to the hydrologic balance outside the permit area.” DEQ Ex. 5 at 2.1; Tr. 442:13-19.

41. For the reasons stated in the CHIA and Written Findings, the Department approved AM3 in July 2016. DEQ Ex. 4 at [1], 17; DEQ Ex. 6, Appendix III; DEQ Ex. 5; Tr. 417:5-418:4, 441:17-443:4

**b. Current Appeal history**

42. On August 11, 2016, Petitioner challenged the Department's approval of AM3 and requested a contested case hearing before the Board pursuant to Mont. Code Ann. § 82-4-206(1)-(2) and ARM 17.24.425(1). SPE Ex. 9.

43. Petitioner's Notice of Appeal and Request for Hearing did not renew its original AM3 objections regarding the potential for material damage to the hydrologic balance outside the permit boundary (whether resulting from the migration of gob water or otherwise). *See generally* SPE Ex. 9.

44. The Board assigned the contested case proceeding to the Hearing Examiner, and, on September 30, 2016, the Hearing Examiner granted SPE's Motion to Intervene. Ord. on SJ at 3; January 17, 2017 Order on Motion to Intervene at 1.

45. Petitioner's reclamation bonding claim was dismissed for lack of evidence and failure to exhaust administrative remedies on summary judgment. Ord. on SJ at 15-17, 29-30 (citing *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶¶ 36; *Newville v. State Dept. of Family Service*, 267 Mont. 237, 257 (1994); *Durbin v. Ross*, 276 Mont. 463, 477 (1996); BER 2016-03 SM, Board Order, June 6, 2019, ¶¶ 15-17; BER 2016-03 SM, Order on Motion in Limine, March 15, 2018 at 5, 7-8).

46. Evidence and testimony was received on Petitioner's remaining claims following partial summary judgment: (a) that SPE's application and the Department's CHIA "do not affirmatively demonstrate that there is sufficient high quality water available to replace spring and stream reaches that may be dewatered due to subsidence-related impacts" and (b) that SPE's reclamation plan does not provide "specific hydrologic reclamation plans for spring and stream reaches until specific water resources are impacted by longwall mining activities." SPE Ex. 9 at 1-3, ¶¶ 1-6; Tr. 416:23-417:4; Ord. on SJ at 5, 12, ¶¶ 14-15.

47. The Hearing Examiner conducted a four-day virtual evidentiary hearing from August 18, 2020 to August 21, 2020 on the "central issue" of the physical and legal availability of replacement water. Tr. 4:5-9, 960:8-22; Ord. on SJ at 17.

48. Petitioner presented testimony from three witnesses at hearing: Mr. James Jensen (standing), Mr. Mark Hutson (qualified expert in geology, hydrogeology, and fluvial sedimentology), and Mr. Martin Van Oort (fact witness for exhibit authentication and relevance of 30(b)(6) deposition transcript). Tr. 11:18-19, 33:22, 89:22, 96:2-13, 365:15-24.

49. The Department presented testimony from one witness at hearing: Mr. Martin Van Oort (qualified expert in geology, surface and groundwater hydrology, and groundwater modeling). Tr. at 405:16-19, 412:21-25, 413:1-4.



50. Signal Peak presented testimony from two witnesses at hearing: Mr. Judd Stark (qualified expert in in coal mining, coal mine permitting, permit compliance, environmental monitoring, and reclamation) and Dr. Michael Nicklin (qualified expert in surface water and groundwater hydrology and groundwater modeling). Tr. 731:10-21, 808:11-18.

51. After the close of Petitioner's case-in-chief, the Department and Signal Peak moved for Judgement on Partial Findings (i.e., directed verdict) on Petitioner's claims. Tr. 396:23 through 403:18.

52. The Hearing Examiner reserved ruling on the Motions for Judgment on Partial Findings. Tr. 396:23 through 403:18.

## **II. CONTESTED CASE PROCEEDING**

### **a. Standing**

53. Petitioner relies on Mr. Jensen for associational standing. Tr. 11:18-19, 33:22.

54. Mr. Jensen lives in Helena, Montana, approximately 300 miles from the Rosebud Mine. Tr. 34:1-7, 63:23-25, 64:1.

55. Mr. Jensen has lived in Helena, Montana since 1985. Tr. 34:1-7, 36:1-3.

56. Mr. Jensen was employed as Petitioner's Executive Director. Tr. 34:1-7.

57. As Executive Director, Mr. Jensen has authorized Petitioner's litigation against coal companies and their federal and state regulators, including this litigation against Signal Peak and the Department. Tr. 46:1-25, 47:1-10.

58. Mr. Jensen understands Petitioner must establish associational standing to maintain each litigation against coal companies and their federal and state regulators. Tr. 47:17-21.

59. Mr. Jensen filed a standing declaration on behalf of Petitioner in this matter on January 25, 2019. *See generally* SPE Ex. 17; Tr. 65:20-25.

60. Mr. Jensen has a deep connection to the Bull Mountains and has been visiting them regularly for the last 35 years "[a]t least once every two years." Tr. 34:13 to 35:9; Tr. 37:18-17.

61. Mr. Jensen did not dispute that there are no public lands above the Mine. Tr. 65:1-4.

62. Mr. Jensen has never visited the Mine's underground workings or surface facilities. Tr. 52:5-13.

63. Mr. Jensen does not own or lease (and has never owned or leased) real property in the vicinity of the Mine. Tr. 64:21-25.

64. Mr. Jensen has not appropriated (and has never appropriated) surface water or groundwater rights in the vicinity of the Mine. Tr. 65:5-11.

## **b. Deep Underburden Aquifer Water Quantity And Quality**

65. “The main hydrologic issue regarding subsidence at [the Mine] is the potential for loss or diminution of the quantity of groundwater and surface water, and impacts to wells, springs, ponds, and stream reaches as a result of subsidence-related fracturing of overburden shales and sandstones.” Ord. on SJ at 9, 17-21; DEQ Ex. 5 at 9-8; Tr. 432:2-9.

66. The thirty-one springs identified in Table 314-3-1 provide water used for livestock watering. SPE Ex. 27 at Table 314-3-1; DEQ Ex. 7, at 313-2-2.

67. Table 314-3-1 lists 31 “springs potentially requiring mitigation following mining impacts.” SPE Ex. 27 at Table 314-3-1; Tr. 509:23-510:23, 747:18- 748:19, 804:17-805:3.

68. The thirty-one springs identified in Table 314-3-1 “have substantial and reliable flow/discharge or consistent/reliable pond levels and may be impacted by mining.” DEQ Ex. 7 at 313-2-1; SPE Ex. 27 at 314-3-1.

69. The Department concluded in the CHIA, thirty-three “springs . . . demonstrated regular seasonal or annual flow conditions with median flow rates greater than 0.5 gpm (Table 7-1 and Figure 6-3). Many of these springs provide a reliable source of water to support livestock . . . .” DEQ Ex. 5 at 7-4; *see* Tr. 448:1-16, 449:3-12 (discussing Table 7-1 and Figure 6-3 from the CHIA).

70. A network of eleven stations monitor “stream” water quantity and quality. DEQ Ex. 5 at 7.1.2.1, 7.1.3.1.

71. Most stream reaches are dry, except below spring issue points. DEQ Ex. 5 at 7.1.2.1.

72. The Spring Mitigation Plan requires Signal Peak to mitigate “all springs that have a history of beneficial use or are necessary to support postmine land uses, not just those listed in Table 314-3.1.” DEQ Ex. 7 at 313-2-2.

73. Signal Peak reports monitoring results to the Department on a semi-annual and annual basis. Tr. 721:14-722:1, 755:19-756:21; *see e.g.* SPE Ex. 36.

74. No springs identified in the CHIA that may be impacted by mining have median flow rates over 35 gallons per minute. MEIC Ex. 15, Table 314-3-1; DEQ Ex. 5 at 12-16, Table 7-1; Tr. 542:2-7.

75. As of July 2016, 9 springs had been undermined: 17415, 17115, 17145, 17165, 17185, 17315, 17515, 17255, and 17275. DEQ Ex. 5 at 9-9.

76. As of July 2016, 5 of the 31 springs listed in Table 314-3-1 (approximately 16%) had been undermined. DEQ Ex. 5 at 9.2.4.2; DEQ Ex. 9 at 57, ¶ 5.1.1; at 59, ¶ 5.2.1; SPE Ex. 27 at 314-3-1, Table 314-3-1.

77. The CHIA evaluated the undermined springs in detail and concluded: “As described in [CHIA] Section 9.2.4.2, impacts due to subsidence include diminution of spring flows at spring 17145, and increases in SC at spring 17275.

[SPE] has begun to implement remedial mitigation measures at spring 17145, and continues to monitor water quality and quantity to assess whether recently identified impacts are temporary in nature, or will require more permanent solutions.” DEQ Ex. 5 at 9-12; DEQ Ex. 9 at bates 187-222; Tr. 502:14-506:24, 889:1-24.

78. The CHIA concluded that Spring 17145 (Bull Spring) evidenced a diminution of flow potentially attributable to subsidence, and the Department required mitigation at this spring. The Department’s CHIA stated “This physical evidence, in conjunction with unexpected diminution of flows from Bull Spring suggests that Bull Spring may have been impacted by undermining. In accordance with permit obligations defined in Appendix 314-3, Spring Impact Detection and Mitigation, [SPE] initiated interim mitigation procedures to address the potential flow depletions. Continued monitoring of Bull Spring, and execution of the Interim Mitigation Plan proposed by [SPE] will inform whether permanent mitigation procedures will be necessary.” DEQ Ex. 5 at 9-10; DEQ Ex. 9 at 314- 5-40 and 314-5-58; Tr. 506:25-507:5, 651:2-12, 814:9-816:21.

79. As of the time of the AM3 approval in 2016, the Department had not required temporary or permanent mitigation at springs 17275, 17415, 17165, or 17185. DEQ Ex. 5 at 9-10; Tr. 506:25-507:5.

80. Temporary mitigation measures proposed for Spring 17145 (Bull Spring) prior to approval of AM3 included utilizing a nearby pond and hauling water. SPE Ex. 30; Tr. 164:6-18, 427:6-13, 828:13-829:5.

81. The temporary mitigation measures implemented for Spring 17145 (Bull Spring) did not require replacement water from the DUA. Tr. 427:14-17.

82. Other than the temporary mitigation measures implemented for Spring 17145 (Bull Spring), sourcing replacement water (from the DUB or otherwise) had not been required at the time of the AM3 approval in 2016. Tr. 427:14-17.

83. “Stream monitoring consists of the collection of water quality parameters and flow measurements at eleven established surface water monitoring stations within and outside of the permit area.” DEQ Ex. 5 at 6-1.

84. “In most years, streambeds are dry, except below spring issue points.” DEQ Ex. 5 at 7-3.

85. AM3 identifies the maximum extent of flowing stream reaches below springs that may be impacted by subsidence and may require mitigation. DEQ Ex. 8 at attached Figure 313-3-1.

86. Stream reach water quality shows “high variability in sampling results” and is generally higher in dissolved parameters in the summer when the ground is not frozen, and lower in dissolved solids in the winter. DEQ Ex. 5 at 7-5 through 7-6; Tr. 493:11-494:6.

87. The Stream Function Impact and Restoration Plan “describes the measures which will be taken to maintain and restore the function of streams during and after mining.” DEQ Ex. 8, Stream Function Impact and Restoration Plan at 313-3-1; Tr. 438:22-440:13.

88. These include “reestablishing stream flow, repairing fractures, and correcting changes to channel gradient to avoid excessive erosion.” DEQ Ex. 8 at 313-3-8; Tr. 439:16- 440:8.

89. The Stream Function Impact and Restoration Plan contemplated replacing flowing stream segments below springs using excess water from spring mitigation. DEQ Ex. 8 at 313-3-9; Tr. 373:14-374:3, 440:9-13, 598:13-20, 600:4-21.

90. The CHIA described this stream channel repair stating, “Subsidence associated with the northern end of longwall Panel 4 in March 2014 resulted in a change in topography which would have impounded the flow of the 17-drainage. In response to this subsidence, and with concurrence of DEQ, SPE reconstructed the 17-drainage channel downstream from the end of longwall Panel 4 to restore the natural drainage connectivity and ensure passage of stream flows to maintain the hydrologic balance.” DEQ Ex. 5 at 9-8.

91. The monitoring schedule of each monitoring station is reviewed on an annual basis in consideration of observations during the prior water year and anticipated future impacts. SPE Ex. 28 at 4, ¶ 2.2.

92. Inherent uncertainty exists regarding the effects of subsidence on springs and stream reaches; subsided springs and stream reaches may evidence a range of negative and positive qualitative and quantitative changes, such changes may be temporary or permanent, and such changes may or may not be attributable to mining. DEQ Ex. 7 at 6; DEQ Ex. 8 at 3.0; DEQ Ex. 9 at 74-75, ¶ 6.5.1; Tr. 181:7 through 190:24, 711:16:22, 825:22-25, 826:1-25.

93. Factors relevant to whether springs and stream reaches will be impacted by subsidence include (1) depth of mining from the ground surface; (2) thickness and type of strata between the springs and stream reaches and mined strata; (3) nature of subsidence; (4) percentage of watershed contributing to water resource; (5) land slope and topography; (6) local geologic anomalies associated with water resource; (7) the yield of the water resource, and (8) the proximity of the spring or stream reach to the subsidence. DEQ Ex. 9 at 74-75, ¶ 6.5.1; Tr. 511:2-25, 512:1-12.

94. Spring monitoring data evidences considerable natural variability in spring discharge (and the resultant downgradient stream reaches), and “[t]he exact



length of each perennial and intermittent reach is directly related to the amount of precipitation the local watershed has received.” DEQ Ex. 8 at 2.0.

95. Owing to the “inherent difficulties” and “complexities” of spring and stream reach impact assessment, it is “impracticable to meaningfully project the likelihood, or probability,” that a given spring or stream reach will be impacted by subsidence and require mitigation. DEQ Ex. 9 at 74, ¶ 6.5.1.

96. Notwithstanding, because springs and stream reaches are not directly disturbed by longwall mining operations, anticipated impacts “are much more limited” and “much less” pronounced than other mining methods. Tr. 437:16-25, 438:1-9, 439:3-24, 500:24-25, 501:1-25, 502:1-17.

97. The deep underburden consists of an outcropping of rocks belonging to the Tongue River member of the Fort Union Formation. MEIC Ex. 21 at 3.2.5. These outcroppings are observed in Fattig, Halfbreed, Razor, and Pompeys Pillar Creek drainages. DEQ Ex. 11 at p.3. This suggests that these massive sandstones represent large fluvial channels that are linear and continuous throughout the Bull Mountain area. MEIC Ex. 21 at 3.2.5; DEQ Ex. 11 at p.3. These sandstone formations are likely many miles wide and reflect a high sinuosity or continuous meandering of the paleostream. MEIC Ex. 21 at 3.2.5.

98. The DUA aquifer is a “confined” (i.e., pressurized) aquifer in the “massive” and “relatively deep sandstones” of the deep underburden

approximately 355-405 feet below the surface of the Mine. DEQ Ex. 5 at 9-24; DEQ Ex. 11 at 1-4.

99. The DUA extends over a broad area throughout the Bull Mountains area, approximate dimensions are about 14 miles wide and 22 miles long trending along the axis of the Bull Mountain syncline. DEQ Ex. 9 at 52, ¶ 3.6.2.2.

100. In 2009, Signal Peak installed the Office Supply Well (“OSW”), a public water supply well completed in the DUB. SPE Ex. 24 at 1.

101. The OSW, a public water supply well completed in the DUB with an average pumping rate of 6 gallons per minute, was permitted by the State of Montana in 2009. DEQ Ex. 9 at 51-52, ¶ 3.6.2.1; SPE Ex. 24 at 1, ¶ 1.0, at 1-5, ¶ 2.0.

102. On June 5, 2009, Signal Peak conducted a 24-hour OSW pump test (“OSW Pump Test”) to assess the hydraulic conductivity, transmissivity, and storativity of the DUB. SPE Ex. 24 at 2-3; Tr. 852:17-853:17.

103. Signal Peak reported the results of the OSW Pump Test (including lithologic logs, pump and recovery test results, water quality results, and monitoring well logs) in the Office Well Completion and Pump Test Report. SPE Ex. 24 at 1.

104. The OSW Pump Test Report projected a 3-foot drawdown in the nearest private well (approximately 4,200 feet from the OSW) if the OSW was

continuously pumped at a rate of six gallons per minute for twenty years. SPE Ex. 24 at 3.

105. Signal Peak installed DUB monitoring wells BMP-121, BMP-128, and BMP-129. SPE Ex. 24 at 1, ¶ 1.0; at 5-6, ¶ 3.0; Tr. 845:9-25, 846:1-20.

106. Since conducting the OSW Pump Test in July 2009, DUB monitoring well “BMP-121 has shown no water level effects from mining or pumping at the OSW.” DEQ Ex. 5 at 9-25, Figure 9-40 at 13-69; DEQ Ex. 9 at 314- 5-41; SPE Ex. 36 at 13; Tr. 237:3-240:14.

107. Since conducting the OSW Pump Test in July 2009, the OSW pump rate has averaged of four gallons per minute. Tr. 913:2-6.

108. DUB monitoring wells BMP-128 and BMP-129 – installed in 2014 – exhibited “excellent capacity” and stability. SPE Ex. 36 at 10-15, ¶ 3.5.3; Tr. 909:13-19.

109. Neither SPE nor the Department conducted hypothetical simulations of drawdown from replacement wells using the 2015 Deep Underburden Groundwater Model prior to the 2016 approval of AM3. Tr. 565:18-21, 566:5-23, 868:24-869:3.

110. Signal Peak subsequently developed the 2016 PHC, which assessed the probable hydrologic consequences of AM3. DEQ Ex. 9 at 18, ¶ 1.1, Tr. 428:9-18.

111. The 2016 PHC considered available information, including the OSW Pump Test Report, DUB well discharge rates, DUB well logs, and DUB domestic wells, to assess the hydraulic conductivity of the deep underburden. *See generally* DEQ Ex. 9; Tr. 909:8-19.

112. The 2016 PHC evaluated spring discharge rates in the vicinity of the Mine. DEQ Ex. 9 at 9, ¶ 3.4.5, Figure 16-1, Figure 16-2.

113. The 2016 PHC concluded that spring flow rates in the vicinity of the Mine are “highly variable over time” and “[a] majority of the springs [...] exhibited no flow from 2003 to 2015 or occasional flow, i.e. not enough to develop a meaningful hydrograph.” DEQ Ex. 9 at 39, ¶ 3.4.5.

114. The 2016 PHC concluded that “[t]here is presently no evidence of surface water quality impacts associated with mining.” DEQ Ex. 9 at 59, ¶ 5.2.1; Tr. 814:9-25, 815:1-25, 816:1-21, 866:23-25, 867:1-3.

115. The 2016 PHC assessed the deep underburden and DUA. DEQ Ex. 9 at 38, ¶ 3.3.4, at 51, ¶ 3.6.2, at 52, ¶ 3.6.2.2, at 78, ¶ 6.5.4.

116. The 2016 PHC considered and relied upon, in part, the 2009 Office Supply Well (“OSW”) Pump Test Report and the underlying 24-hour OSW pump test (“OSW Pump Test”) to assess the deep underburden and DUA. DEQ Ex. 9 at 38, ¶ 3.3.4, at 51, ¶ 3.6.2.1, at 58, ¶ 5.1.5.

117. The 2016 PHC evaluated the DUB's existing and designated groundwater uses. DEQ Ex. 9 at 93, Table 4C.

118. The 2016 PHC concluded that the DUB is an existing source of groundwater for purposes of private wells, public water supply wells, and livestock and wildlife watering. DEQ Ex. 9 at 93, Table 4C.

119. The Department considered available information, including the 2015 Deeper Underburden Groundwater Model Report, OSW Pump Test Report, MBMG Reports, drilling/well logs in the permit, and MBMG and DNRC records of wells and water rights in the DUB to assess the water bearing properties of the deep underburden. DEQ Ex. 5, CHIA; Hrg. Tr. Day 2, at 436:16-23; Hrg. Tr. Day 3, at 477:2-10, 479:11-480:21, 482:4-485:8, 489:5-491:4, 519:17-520:10, 521:5-9, 543:2-13.

120. Petitioner presented testimony from Mr. Hutson (qualified expert in geology, hydrogeology, and fluvial sedimentology) on the issue of DUB water quantity. Hrg. Tr. Day 1, at 96:2-13.

121. Mr. Hutson testified that the Department's conclusion that the DUB is a possible source of replacement water is flawed because the Department did not quantify the amount of water in the DUB or (2) quantify the anticipated impact on existing users if replacement water is sourced from the DUB. Hrg. Tr. Day 1, at 103:1-104:16.

122. Mr. Hutson testified that a “sandy layer” or “sandy zone” exists in the DUB, but questioned the continuity of the sands. Hrg. Tr. Day 2, at 277:14-279:7, 293:1-295:11, 306:2-307:6; Hrg. Tr. Day 1, at 200:13-201:24, Hrg. Tr. Day 4, at 940:9-23.

123. Mr. Hutson did not quantify or otherwise calculate the anticipated replacement water need resulting from AM3. Tr. 139:22-140:2, 207:5-8, 270:22-24.

124. Mr. Hutson based his opinion of the nature of continuity of the deeper underburden sands on general knowledge of the fluvial systems and the Fort Union Formation, and on literature review. Hrg. Tr. Day 2, 276:2-25, 277:1-6, 279:11-20.

125. Mr. Hutson agreed that the DUB “might produce enough water for mitigation purposes,” explaining “I think it could. It’s a possibility.” Hrg. Tr. Day 2, at 278:23-279:10.

126. Water quality impacts to the DUB as a result of AM3 are not anticipated due to the hydraulic separation between the DUB and the upper underburden and Mammoth coal. DEQ Ex. 5, CHIA at 9-25.

127. DUB baseline water quality is Class II and more consistent than other hydrostratigraphic units in the vicinity of the Mine. DEQ Ex. 5 at 7.2.5.

128. Historic and current surface and groundwater uses in the vicinity of the Mine include public water supply, private water supply, livestock, wildlife, irrigation, and industrial uses. DEQ Ex. 5 at 8.0.

129. Groundwater wells are primarily completed in the underburden, while springs are primary sourced from the overburden. DEQ Ex. 5 at 8.0, 8.5.

130. The Department identified and evaluated the surface water rights within the AM3 surface water Cumulative Impact Area. DEQ Ex. 5, CHIA at 8-1, Figure 8-2 at 13-24, Table 8-2 at 12-40; Hrg. Tr. Day 2, at 449:13-450:15.

131. Signal Peak owns nearly half of the surface water rights within the AM3 surface water Cumulative Impact Area. DEQ Ex. 5 at 8.5, Figure 8-2.

132. The majority of surface water rights within the Cumulative Impact Area are for livestock use. DEQ Ex. 5, CHIA at Table 8-2 at 12-40; Hrg. Tr. Day 2, at 450:7-15.

133. DUB baseline arsenic concentrations (representative of natural conditions) range from non-detect to 0.0679 mg/L. DEQ Ex. 5 at 7-15, 7.2.5, 9-25, 9.2.6.5; 9.2.6.7.1, Table 7-11 at 12-33; Hrg. Tr. Day 4 at 761:25, 762:1-17.

134. The maximum value of arsenic detected in the DUB (0.0679 mg/L) exceeds the CHIA's guidelines for livestock watering (0.01 mg/L). DEQ Ex. 5, CHIA at 7-15, Table 7-11 at 12-33; Hrg. Tr. Day 3, at 549:11-18; Hrg. Tr. Day 4, at 764:10-21.

135. “Arsenic occurs naturally at concentrations which can exceed human health standards in groundwater in the Fort Union Formation.” DEQ Ex. 5, CHIA at 9-29, 8-1; Hrg. Tr. Day 3, at 549:19-23.

136. Domestic wells completed in the DUA likely contain natural levels of arsenic over the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 8.2.

137. The OSW – a permitted public water supply well sourced from the DUA – has never exceeded of the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 9.2.6.5.

138. “The OSW, also completed in the deeper underburden, has shown no exceedances of the arsenic HHS and is permitted as a public water supply.” DEQ Ex. 5, CHIA at 9-25.

139. Mr. Hutson did not dispute that the OSW has never exceeded the human health standard for arsenic. Hrg. Tr. Day 1, at 226:6-11.

140. DUB baseline sodium concentrations (representative of natural conditions) range from 297 mg/L to 469 mg/L. DEQ Ex. 5 at Table 7-11.

141. DUB baseline median sodium concentration (356 mg/L) exceeds the CHIA’s recommended guidance for livestock watering (300 mg/L). DEQ Ex. 5 at Table 7-11; Tr. 548:13-25, 549:1-10.

142. The CHIA’s recommended guidelines for livestock watering “are not enforceable standards but are used by DEQ for guidance in evaluating suitability of



pre and postmine water quality for livestock use.” DEQ Ex. 5, CHIA at 2-4, 2-7; Hrg. Tr. Day 3, at 548:23-549:3.

143. Mr. Hutson did not know whether commercially available treatment systems exist for sodium. Hrg. Tr. Day 1, at 217:15-22 *compare to* Hrg. Tr. Day 4, at 874:1-10 (Dr. Nicklin noting that treatment systems are available for sodium).

144. Mr. Hutson is not an expert in water treatment and did not present testimony on water treatment, including the viability or availability of water treatment methods such as reverse osmosis treatment systems. Hrg. Tr. Day 1, at 215:10-20.

145. The Department identified no legal barriers precluding the the DUA as a source of replacement water. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 3, at 542:14-17.

**c. Legal and Physical Availability of the Deep Underburden Aquifer**

146. AM3 identifies the DUB as a possible source of replacement water for springs adversely and permanently impacted by subsidence. DEQ Ex. 7, Spring Mitigation Plan at 313-2-3 through 313-2-5; MSJ Order at 9, ¶ 8.

147. Based on the well logs, the approximate thickness of the DUB ranges from 45 feet to 80 feet. DEQ Ex. 11, DUB Report at 2; Hrg. Tr. Day 4, at 844:5- 9.

148. The DUB is “the first substantive water-bearing unit underlying the Mammoth coal” in the vicinity of the Bull Mountains. DEQ Ex. 11, DUB Report at 1, Figure 314-7-4; Hrg. Tr. Day 3, at 516:9-20.

149. The maximum flow rate of any particular DUB well (if required for permanent replacement water mitigation needs) is not anticipated to exceed 14.2 gallons per minute. DEQ Ex. 5, CHIA at 12-16, Table 7-1; SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1; MEIC Ex. 15 Table 314-3-1; Hrg. Tr. Day 4, at 856:8-22.

150. The Department concluded the likely amount of replacement water required for each potential mitigation site informs whether the DUB can legally serve as a source of replacement water. Tr. 543:14-20.

## **DISCUSSION**

### **I. LEGAL FRAMEWORK and BURDEN of PROOF**

The Board’s role in the contested case proceeding is to receive evidence from the parties and enter findings of fact based on the preponderance of the evidence presented and conclusions of law based on those findings. Mont. Code Ann. § 2-4-612. The Department reviews an application for a mine permit revision as prescribed by MSUMRA and its implementing rules to determine whether the proposed operation is lawful. Mont. Code Ann. §§ 82-4-201, et seq. A mine permit applicant must affirmatively demonstrate compliance with MSMURA and its

implementing rules. Mont. Code. Ann. § 82-4-227(1). A mine permit application must include “a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities.” Admin. R. Mont. 17.24.304(1)(f)(iii); Mont. Code Ann. § 82-4-222(1)(n). Additionally, the operator of a mine is required to replace water supplies immediately and then on a more permanent basis “in like quantity, quality, and duration.” Mont. Code Ann. § 82-4-253(3)(d).

The relevant analysis and the agency action at issue is contained within the four corners of the Written Findings and CHIA. In re Signal Peak Energy (Bull Mountain Mine No. 1), BER 2013-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) at 56, ¶ 66; 80-81, ¶ 124. The Department’s interpretation of the statutes and rules which it administers is entitled to deference. *Norfolk Holdings v. Dep’t of Revenue*, 249 Mont. 40, 44, 813 P.2d 460, 462 (1991) (citations omitted); *State Pers. Div. v. Dep’t of Pub. Health & Human Servs., Child Support Div.*, 202 MT 46, ¶ 63, 308 Mont. 365, 379, 43 P. 3d 305. Deference is due to the Department’s evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation. *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595 (citing § 2-4-612(7), MCA; *Johansen v. Dept. of Natural Res. and*

*Conservation*, 1998 MT 51, ¶ 29, 288 Mont. 39, 955 P.2d 653); *Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 27, 385 Mont. 33, 380 P.3d 787 (quoting § 2-4-612(7), MCA); *Safeway, Inc. v. Mont. Petroleum Release Compensation Bd.*, 281 Mont.189, 194, 931 P.2d 1327, 1330 (1997). The Board may also and otherwise utilize the agencies experience, technical competence, and specialized knowledge in the evaluation of evidence. Mont. Code Ann. § 2-4-612. As outlined in the Order Denying Request to Reclaim jurisdiction, the Board pursuant to its authority under MAPA, transferred jurisdiction to the undersigned hearing examiner. Therefore, the undersigned steps into the shoes of the Board and has jurisdiction to hear and make findings of fact and retain “broad discretion to assess and assign the relative weight and credibility of conflicting evidence presented.” *Smith v. TYAD, Inc.*, 2007 Mont. Dist. LEXIS 348, \*46-47 (citing *Tefft v. State*, 271 Mont. 82, 94, 894 P.2d 317, 325-26 (1995)).

The law has established the burden of proof as follows:

“[A]s the party asserting the claim at issue, MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Departments decision violated the law.” MEIC, 2005 MT 96, ¶ 16. The “facts essential” must be proved by a preponderance of the evidence. *Id.* ¶ 22. In this contested case hearing, therefore, MEIC has the burden of proving by a preponderance of the evidence that DEQ’s decision to issue the permit violated the law. *Id.*

Board Ord. COL ¶ 5 (June 6, 2019). Based on the law and as established in the prior hearing examiner's Order on Summary Judgment, the burden of proof lies

with MEIC to establish by a preponderance of the evidence that DEQ's decision to issue the AM3 permit to Signal Peak violated the law.

**a. Standing**

Under Mont. Code Ann. § 82-4-206(1) the Petitioner must have an interest that may be adversely affected by the Department's challenged decision to initiate and maintain a contested case. "An organization may assert standing either as an entity or by the associational standing of its members." *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.* 2014 MT 69, ¶ 27, 374 Mont. 229, 23, 328 P.3d 586, 593. Petitioner asserts associational standing based on the purported standing of its member and Executive Director Mr. Jensen. Tr. 11:18-19. 33:22.

To establish standing, a plaintiff must show (1) an "injury in fact," which is concrete and particularized, as well as actual or imminent; (2) the injury is caused by the defendant's conduct, such that it can be fairly traced to the challenged action; and (3) a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992); *Clark Fork-Pend Oreille Coal v. DEQ*, 1997 Mont. Dist. LEXIS 804, at \*7 (Feb. 19, 1997); *Conservation Cong. V. United States Forest Serv.*, 2019 WL 4464037, at \*5 (E.D. Cal. Sept. 18, 2019). Associations have standing if (1) at least one of their members has standing; (2) the interests of the lawsuit are germane to the purpose

of the organization; and (3) the members' individual participation is not required. *Park Ctny. Env'tl. Council v. DEQ*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

Montana Courts have generally allowed Plaintiffs standing where the injury is tied to an environmental impact. In *Heffernan v. Missoula City Council* the Montana Supreme Court held that neighbors' and the neighborhood associations' statements of specific personal and legal interest were sufficient to establish standing with regard to their challenge to a new subdivision. 2011 MT 91, 360 Mont, 207, 255 P.3d 80. Among other things, the neighbors' specific interests included that the wildlife in the neighborhood was an important value and that the development of a subdivision would erode property values and create soil issues and light pollution. *Id.* Therefore, standing was shown based on the injury of these environmental factors amongst other factors.

In *Clark Fork-Pend Oreille Coal v. DEQ*, the Court gave standing to Plaintiffs based on their "regular use" and enjoyment of the Blackfoot River for "recreational purposes." 1997 Mont. Dist. LEXIS 804, at \*7 (Feb. 19, 1997). The Court stated that: "Plaintiffs allege they regularly use and enjoy the Blackfoot River for recreational purposes. The procedural requirements of the MMRA (Metal Mine Reclamation Act) provide protection of the uses supported by the waters of the Blackfoot River. These elements are sufficient to grant standing." *Id.*

Here, Mr. Jensen is a member of MEIC, an organization that has interests in the environmental protection of the Bull Mountains. Tr. 34:5-7 and 37:8-11. Mr. Jensen has a deep connection to the Bull Mountains. Tr. 34:13 to 35:9. He has been visiting the Bull Mountains since the 1980's and intends to continue to visit the Bull Mountains regularly. *Id.*; and Tr. 37:21 to 38:12. Mr. Jensen regularly visits portions of the Bull Mountains that are being undermined by Signal Peak. Tr. 35:24-35. Mr. Jensen testified that the mining has caused "considerable subsidence" in the Bull Mountains. Tr. at 39:20 to 40:4 and Tr. at 80:18. The impacts of mining affect Mr. Jensen's use and enjoyment of the Bull Mountains. Mr. Jensen stated "he feels threatened" by the cracks caused by the mining. He worries about breaking an ankle and he "would never ride a horse up in that country." Tr. at 39:20 to 40:2. If the Board were to halt mining in the Bull Mountains, Mr. Jensen's concerns would be relieved at least in part. Tr. at 40:19 to 41:12.

MEIC has shown that Mr. Jensen has standing because, as he testified, his use and enjoyment of the Bull Mountains has been negatively impacted by the Mine. Mr. Jensen's "regular use" and enjoyment of the Bull Mountains for "recreational purposes" is sufficient to establish standing. Additionally, MEIC has standing because Mr. Jensen is a member of MEIC and protecting the Bull Mountains is germane to MEIC's goals of environmental protection.

## **b. Physical Availability of the Deep Underburden Aquifer**

The central issue in this matter is the availability of replacement water in terms of its quality, quantity, and legal availability. Montana Administrative Rules requires that an application for an underground coal mining permit take into account replacement water. Specifically, the application must include, “a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be suitable for the approved postmining land uses” ARM 17.24.304(1)(f)(iii).

Therefore, during the permitting process, Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227(1). Another way to state this is that MEIC is required to show that DEQ violated the rules by identifying a replacement water source that could not be used to replace springs and stream reaches that may be dewatered by AM3. Ord. on SJ 1-15, 29; ARM 11.24.304(1)(f)(iii).

### **i. Quality of water**

MEIC argues that the arsenic and sodium levels in the deep underburden aquifer make the quality of the water a reason why it could preclude its use as



replacement water. Ord. on SJ at 28. MEIC further claims that Signal Peak and the Departments failure to provide for the treatment of this water as part of a reclamation plan render the plan violative of MSUMRA requirements. *Id.*

Water quality impacts to the DUB as a result of AM3 are not anticipated due to the hydraulic separation between the DUB and the upper underburden and Mammoth coal. DEQ Ex. 5, at 7-15 and 9-25, Table 7-11 at 12-33; Hrg. Tr. Day 3, at 549:11-18; Hrg. Tr. Day 4, at 764:10-21; Hrg. Tr. 548:13-25, 549:1-10. Historic and current surface and groundwater uses in the vicinity of the Mine include public water supply, private water supply, livestock, wildlife, irrigation, and industrial uses. DEQ Ex. 5 at 8.0. While the Department stated that water quality impacts were not anticipated, arsenic and sodium is present in the DUB. For livestock, both the maximum value of arsenic and the median baseline of sodium concentrate detected in the DUB exceed the CHIA's guidelines for livestock watering. DEQ Ex. 5, at 7-15 and 9-25, Table 7-11 at 12-33; Hrg. Tr. Day 3, at 549:11-18; Hrg. Tr. Day 4, at 764:10-21; Hrg. Tr. 548:13-25, 549:1-10. Regarding water for human consumption, domestic wells completed in the DUA likely contain natural levels of arsenic over the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 8.2. However, the OSW – a permitted public water supply well sourced from the DUA – has never exceeded the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 9.2.6.5.

While it is shown that arsenic and sodium is present, it was not shown that this precludes the water in the underburden from being used as a replacement source. Signal Peak and DEQ dispute that fact that arsenic and sodium levels in the underburden will be above the requisite levels and state that even if they are elevated, a simple commercially-available filtration system would solve the problem. Ord. on SJ at 28-29.

Mr. Hutson stated that he is not an expert in water treatment and did not present testimony on water treatment, including the viability or availability of water treatment methods such as reverse osmosis treatment systems. Hrg. Tr. Day 1 at 215:10-20. Mr. Hutson did not know whether commercially available treatment systems exist for sodium. Hrg. Tr. Day 1 at 217:15-22. Mr. Hutson also did not dispute that the OSW has never exceeded the human health standard for arsenic. Hrg. Tr. Day 1 at 226:6-111. From the facts presented in testimony and in the record, MEIC did not show by a preponderance of the evidence that the amounts of arsenic and sodium impact the quality of the water to the degree that it prevents it from being used as replacement water.

ii. Quantity of Water

There is also uncertainty regarding the quantity of replacement water in the DUB. First, will it be needed? If so, how much will be needed? Are there barriers that would make getting the water impossible? Ord. on SJ at 22. Since these factors

are uncertain the Department has answered these questions in terms of cumulative hydrologic probabilities, as MSUMRA and the rules contemplate, stating that: (1) replacement water will likely not be needed; (2) if replacement water is needed, it likely will not be more than 35gpm or 10 acre-feet/year; and (3) there are likely no barriers that would prevent the replacement water from being used. Ord. on SJ at 22. MEIC, in turn, argues that replacement water will almost certainly be needed, and it could be needed in excess of 100 gpm. *Id.*

Mr. Hutson testified that the Department's conclusion that the DUB is a possible source of replacement water is flawed because the Department did not (1) quantify the amount of water in the DUB or (2) quantify the anticipated impact on existing users if replacement water is sourced from the DUB. Hrg. Tr. Day 1 at 103:1-104:16. Mr. Hutson agreed that the DUB "might produce enough water for mitigation purposes," explaining "I think it could. It's a possibility." Hrg. Tr. Day 2 at 278:23-279:10.

While it would certainly be helpful to know the quantity of the water with some certainty, the law determines the permitting requirements that the Department must follow. The applicable administrative rule requires an application for an underground coal mining permit to include "a description of alternative water supplies, not to disturbed by mining that could be developed to replace water supplies..."ARM 17.24.304(1)(f)(iii) (emphasis added).

The Department considered available information, including the 2015 Deeper Underburden Groundwater Model Report, OSW Pump Test Report, MBMG Reports, drilling/well logs in the permit, and MBMG and DNRC records of wells and water rights in the DUB to assess the water bearing properties of the deep underburden. DEQ Ex. 5, CHIA; Hrg. Tr. Day 2, at 436:16-23; Hrg. Tr. Day 3, at 477:2-10, 479:11-480:21, 482:4-485:8, 489:5-491:4, 519:17-520:10, 521:5-9, 543:2-13. The Department found that the maximum flow rate of any particular DUB well (if required for permanent replacement water mitigation needs) is not anticipated to exceed 14.2 gallons per minute. DEQ Ex. 5, CHIA at 12-16, Table 7-1; SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1; MEIC Ex. 15 Table 314-3-1; Hrg. Tr. Day 4, at 856:8-22. The Department concluded that “the deep underburden is extensive” and “it has the characteristics to serve existing and viable designated use, and to also provide mitigation water that may ultimately be needed in accordance with the mitigation measures defined in the permit.” DEQ Ex. 9, PHC at 315-5-62; Hrg. Tr. Day 4, at 817:2-19.

While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law. The Department is required by the administrative rules to describe “alternative water supplies” that “could be developed to replace water supplies” ARM 17.24.304(1)(f)(iii) (emphasis added). However, no evidence was shown to conclude that the “description of alternative

water supplies” required an exact or specific quantity. Nor was it shown that the quantity was that in such that the water could not be used at all making it unavailable.

## **II. LEGAL AVAILABILITY OF THE DEEP UNDERBURDEN AQUIFER**

MEIC argues that the Department failed to affirmatively demonstrate that there is sufficient water which is legally available in the deep underburden aquifer to replace impacted water resources above the mine. DEQ Prop. FOFCOL at 61. DEQ’s analysis of legal availability of replacement water is based on guidance from the DNRC that Signal Peak could use exempt wells to replace any impacted springs. Tr. at 541:2 to 542:2. However, MEIC argues that the provision in the DNRC guidance document applies to housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer from use.

AM3 identified the DUB as a possible source of replacement water for springs that are adversely and permanently impacted by subsidence. Ord. on SJ at 9, ¶ 8; DEQ Ex. 7, Spring Mitigation Plan at 313-2-3 through 313-2-5. Pumping water from the DUB, if necessary, will be done on a case-by-case basis and if multiple springs are impacted, they would be mitigated using multiple wells spaced

widely throughout the area. This could easily supply low flow rates that springs have. Hrg. Tr. Day 3 at 536:1-13. The Department concluded the likely amount of replacement water required for each potential mitigation site informs whether the DUB can legally serve as a source of replacement water. Tr. 543:14-20. The Department has the plans, tests, and reports to mitigate the impact on surface and underground water as shown in the Spring Mitigation Plan, The Stream Function Impact and Restoration Plan, the 2016 PHC, and the OSW Pump Test and Report.

Additionally, The Department identified no legal barriers precluding the DUA as a source of replacement water. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 3, at 542:14-17. In fact, the ability of the DUB to “furnish alternative water supplies for shallow wells and springs adversely affected by mining” has been recognized for many decades. MEIC Ex. 19, Thompson Report at 43; Hrg. Tr. Day 3, at 484:18-485:16. Further, Mr. Hutson did not testify to any legal barriers precluding the DUB as a source of replacement water. Hrg. Tr. Day 3, at 542:8-13. Specific and actualized legal barriers were not shown by a preponderance of the evidence. Therefore, MEIC did not meet its burden of proof to show that water sources in the DUB are legally unavailable.

## **CONCLUSIONS OF LAW**

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

1. The Department reviews an application for a mine permit revision as prescribed by the Montana Strip and Underground Mine Reclamation Act (“MSUMRA”) and its implementing rules to determine whether the proposed operation is lawful. Mont. Code Ann. §§ 82-4-201, *et seq.*; DEQ Ex. 5 at 1.0, 2.0.
2. DEQ may not approve the AM3 Amendment unless the applicant affirmatively demonstrate compliance with MSUMRA and its implementing rules. Mont. Code Ann. §§ 82-4-227(1).
3. MSUMRA and its implementing rules require a permittee replace water uses permanently contaminated, diminished, or interrupted by the Mine “in like quality, quantity, and duration.” Mont. Code Ann. § 82-4-253(3)(d); Ord. on SJ at 19.
4. Accordingly, a mine permit application must include, among other things, “a description of alternative water supplies, not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be sustainable for the approved postmining land uses.” Mont. Code Ann. § 82-4-222(1)(n); Admin. R. Mont. 17.24.304(1)(f)(iii); Ord. on SJ at 18-19.

5. The contested case provisions of the Montana Administrative Procedure Act (“MAPA”) and its implementing rules govern hearings before the Board. Mont. Code Ann. §§ 82-4-206(2); 2-4-101, *et seq.*

6. The relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA. *In re Signal Peak Energy (Bull Mountain Mine No. 1)*, BER 2013-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) at 56, ¶ 66; 80-81, ¶124.

7. In their role as the finder of fact, the Presiding Hearing Examiner retains “broad discretion to assess and assign the relative weight and credibility of conflicting evidence presented.” *Smith v. TYAD, Inc.*, 2007 Mont. Dist. LEXIS 348, \*46-47 (citing *Tefft v. State*, 271 Mont. 82, 94, 894 P.2d 317, 325-26 (1995))

8. Except as otherwise provided by statute, the common law and statutory rules of evidence govern a contested case proceeding. Mont. Code Ann. § 2-4-612(2).

9. In a contested case, "as the party asserting the claim at issue, MEIC had the burden of proof in presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." MEIC, 2005 MT 96, ¶ 16.

10. The "facts essential" must be proved by a preponderance of the evidence. *Id.* ¶ 22. MEIC thus has the burden of proving by a preponderance of



the evidence that DEQ's decision to issue the permit violated the law. *Id.*

11. MEIC's standing has been challenged in this case, and thus must prove it has standing.

12. A person with an interest that is or may be adversely affected may request a hearing before the Board on the approval of an application to revise a mine permit. Mont. Code Ann. § 82-4-206.

13. Petitioner must have an interest that may be adversely affected by the Department's challenged decision to initiate and maintain a contested case. Mont. Code Ann. § 82-4-206(1).

14. "An organization may assert standing either as an entity or by the associational standing of its members." *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 27, 374 Mont. 229, 236, 328 P.3d 586, 593.

15. Petitioner asserts associational standing based on the purported standing of its member and Executive Director Mr. Jensen. Tr. 11:18-19. 33:22.

16. "An association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when: (1) at least one member would have standing to sue in his or her own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the individual participation of each

allegedly injured party in the lawsuit.” *Cmty. Ass’n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 20, 396 Mont. 194, 207, 445 P.3d 1195, 1203, *reh’g denied* (Aug. 20, 2019) (citing *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 28, 360 Mont. 207, 255 P.3d 80).

17. MEIC has met its burden in regard to the standing of Mr. Jenson. FOF ¶ 53-64.

18. Next, MEIC must prove by a preponderance of the evidence that DEQ's decision to issue the permit violated the law by concluding that the DUB was a possible source of replacement water. Board Ord. COL ¶ 5 (June 6, 2019)

19. MSURMA and its implementing rules contemplate uncertainty; accordingly, certainty that the proposed alternative water supplies could be developed to replace water supplies diminished or otherwise adversely impacted by mining activities is not required. Ord. on SJ at 21 (“The best that can be hoped for with respect to a future hydrologic impact is to know, from the science – the available data combined with the best predictions by the best predictors – what is reasonably likely or potentially probable.”).

20. Montana Administrative Rules require that an application for an underground coal mining permit take into account replacement water. Specifically, the application must include, “a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water

supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be suitable for the approved postmining land uses” ARM 17.24.304(1)(f)(iii).

21. Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227 (1).

22. Signal Peak affirmatively demonstrated that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227 (1). FOF ¶¶ 65-151.

23. MEIC has failed to meet its burden by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment.

### **RECOMMENDED DECISION**

1. Based on the foregoing Findings of Fact and Conclusions of Law MEIC failed to meet their burden of proof to show that DEQ’s action in approving the AM3 permit amendment violated the law.

Therefore, IT IS ORDERED

- a. that Signal Peak and DEQ’s Motion for Directed Verdict is DENIED as to standing of MEIC's appeal and GRANTED as to the legal and physical availability of the deep underburden aquifer;

- b. Judgment is entered in favor of DEQ and Signal Peak, MEIC's appeal is DISMISSED, and DEQ's approval of the AM3 Permit is AFFIRMED.

DATED this 30<sup>th</sup> day of July, 2021.

/s/ Caitlin Buzzas

CAITLIN BUZZAS

Hearing Examiner

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## **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing  
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**BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017	<b>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS ON POINTS OF LAW TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>

Respondent, Montana Department of Environmental Quality (the "Department" or "DEQ") respectfully submits the following Exceptions on Points of Law to the Hearing Examiner's July 30, 2021, Proposed Findings of Fact and Conclusions of Law (the "Proposed Decision") pursuant to the Order on Exceptions and Notice of Submittal dated July 30, 2021 and § 2-4-621(3), MCA. While the Proposed Decision is in DEQ's favor, several

minor errors of law therein require correction by the Board of Environmental Review of the State of Montana (“BER”).

This matter concerns Signal Peak Energy (“SPE”) Bull Mountain Permit No. C1993017 Mine Amendment No. 3 (“AM3”). The Petitioner herein, Montana Environmental Information Center (“MEIC”) assumed but failed to sustain a burden of proof to show that the record before DEQ failed to affirmatively demonstrate the existence of water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted by AM3. Proposed Decision at 53-54, Conclusion of Law (“COL”) ¶¶ 20-23 citing § 82-4-227(1), MCA and ARM 17.24.304(1)(f)(iii).

#### Summary of and Bases for DEQ’s Exceptions

First, the Proposed Decision erroneously admitted and considered evidence and claims of legal error which were not raised in Petitioner’s permitting phase comments to DEQ and preserved in Petitioner’s Notice of Appeal. Petitioner’s untimely argument that so-called Montana Department of Natural Resources (“DNRC”) “Exempt Well Permits” are not legally available to mitigate water supplies that may be impacted by

coal mining (Proposed Decision at 48) was raised for the first time in Petitioner's post-hearing brief and entertained over DEQ's timely objection in DEQ's post-hearing rebuttal brief. The Proposed Decision erred in allowing Petitioner to raise new claims of agency legal error for the first time in Petitioner's post-hearing brief.

BER precedent clearly requires Petitioners to exhaust their administrative remedies before both DEQ and BER by raising claims in permitting phase comments and by preserving such claims in their Notice of Appeal. *In re Rosebud AM4 Amendment*, ("Rosebud AM4") BER 2016-03 SM, Board Order (June 6, 2019) at 4-6, see also *In re Signal Peak Energy Bull Mountain Mine No. 1*, ("*Signal Peak AM3 Part I*"), BER-2-13-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) at ¶¶ 56; 66; 124.

Such BER precedent is based upon the requirements of the Montana Surface and Underground Mine Reclamation Act ("MSUMRA"). Once DEQ provided public notice that DEQ had found the AM3 application acceptable, Petitioners were required to present any Objections to that decision to DEQ. § 82-4-231(8)(e), MCA. DEQ was then required to address any such Objections in its Written Findings, which also must include a Cumulative Hydrologic Impact Assessment



(“CHIA”) § 82-4-231(8)(f), MCA; ARM 17.24.405(5) and (6).

BER’s requirement that a Petitioner in an MSUMRA appeal exhaust their administrative remedies before BER in the contested stage of proceedings by preserving claims in Petitioners’ Notice of Appeal (*see Rosebud AM4*, BER 2016-03 SM at 4) is likewise consistent with MSUMRA. Section 82-4-231(9), MCA, requires that a Notice of Appeal of a DEQ MSUMRA decision “must contain the grounds upon which the requester contends that the decision is in error.” MAPA, § 2-6-602(d), MCA, similarly requires a person initiating a contested case proceeding to provide “a short and plain statement of the matters asserted.”

Second, the Proposed Decision mistakenly concludes that DEQ did not respond to Petitioner’s untimely claims that DEQ committed legal error in approving AM3 because DNRC Exempt Well Permits are not legally available to mitigate impacts to water supplies from coal mining operations. Proposed Decision at 48. The record instead reflects that DEQ first objected to and then responded to this untimely and incorrect legal contention in DEQ’s February 5, 2020, Response to MEIC’s Proposed Findings of Fact and Conclusions of Law (“FOFCOLs”).

Third, the Proposed Decision erroneously and apparently inadvertently reached legal conclusions which could arguably stand for the proposition that

the applicant SPE was required to affirmatively demonstrate, *in the contested case proceeding*, the legal and practical availability of replacement water sources to mitigate any water supplies impacted by mining. Proposed Decision, Conclusions of Law Nos. 21 and 22.

As the SJ Order explained, MSUMRA “prohibits DEQ from approving a permit unless the “applicant has affirmatively demonstrated” that the Administrative rules will be observed. Mont. Code Ann. § 82-4-227(1).” Id. at 19. Here, SPE was required to affirmatively demonstrate to DEQ, *during the permitting phase*, that alternative water supplies (not to be disturbed by mining) existed which “could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be sustainable for the approved postmining land uses.” ARM 17.24.304(1)(f)(iii); § 82-4-227(1), MCA.

On appeal, the burden shifted to Petitioners to show a more likely than not probability that such alternative water supplies could not be developed to replace any water supplies impacted by AM3, and that DEQ had thus violated the law in approving AM3. *See Rosebud AM4*, BER 2016-03-SM, Conclusions of Law Nos. 5-13 (explaining shift in burden of proof to Petitioners in the contested case phase). DEQ’s Proposed Conclusions of Law Nos. 3 and 4 (which were not adopted in their entirety by the Hearing

Examiner) accordingly reflected the shift in the burden of proof to Petitioners.

Lastly, the Proposed Decision mistakenly concludes that DEQ opposed MEIC's standing, while the record reflects that DEQ expressly took no position on this issue.

**First DEQ Exception on Point of Law:** *The Proposed Decision Erroneously Entertained Claims of Agency Legal Error Which Were Raised for the First Time in Petitioner's Post-Hearing Brief*

The "central issue" in this case is the physical and legal availability of the Deep Underburden Aquifer to serve as a source of replacement water for beneficial uses lost or diminished by AM3 mining operations. Proposed Decision at 6. As the November 13, 2019, Order on Cross Motions for Summary Judgment (the "SJ Order") explained, DEQ's decision on AM3 included a finding that

even if replacement water were necessary, it likely would not be needed in quantities greater than 35gpm or 10 acre-feet/year, for which an "exempt well permit" is available. Ex. DEQ 11; *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶¶12-13; ARM 36.12.101(13).

SJ Order at 20.

Petitioners failed to raise any claim that DNRC Exempt Well Permits were only available for housing developments at any point before DEQ in the permitting



phase, or in this contested case in their notice of appeal the BER, their discovery responses or their January 31, 2020, Pretrial Memo.<sup>1</sup> DEQ's Responses to MEIC's Proposed Conclusions of Law Nos. 76-81 timely interposed DEQ's objections to this newly raised legal argument on administrative exhaustion and Rule 37(c)(1) grounds.

Petitioner may not raise a new claim of agency legal error for the first time in their post-hearing brief. *Rosebud AM4 Amendment*, BER 2016-03 SM, Board Order (June 6, 2019) at 4-6; Conclusions of Law Nos. 13-17. 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 correct its own errors within its specific expertise before a court interferes." *Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, P22, 309 Mont. 207 (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. 37 (1952).

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<sup>1</sup> See DEQ Exs-1-3, MEIC June 13, 2016, Objections to AM3 with Exhibits A and B thereto, *passim*; DEQ Exs. 12-13, MEIC Discovery Responses, *passim*; DEQ Ex. 12, Hutson Expert Disclosure, *passim*; DEQ Ex. 14, Hutson Deposition, *passim*; DEQ Ex-22, MEIC Supplemental Discovery Responses, *passim*; MEIC January 31, 2020, Pretrial Memo, *passim*. Nor was the claim that DNRC Exempt Well Permits were not legally available for groundwater appropriations to mitigate any impacts to water supplies from AM3 raised in Petitioner's August 11, 2016, Notice of Appeal.

As BER explained in *Signal Peak AM3 Part I*, the BER's MSUMRA permitting rules

would be rendered a dead letter or hollow formality if, in a contested case proceeding, DEQ were permitted to present all new evidence, analysis, and argument to support its permitting decision that was never compiled in the record, articulated in its CHIA, or made available to the public. Mont. Code Ann. § 1-2-101 (laws should not be construed in a way that renders other provisions meaningless); *In re Signal Peak, supra* BER-2-13-07-SM at ¶ 67. P. 57, citing ARM 17.24.405(5) and (6).

MSUMRA and the Board's rules implementing MSUMRA would likewise be rendered meaningless if MEIC is to be allowed to raise claims of legal error to the Board which MEIC failed to raise in the permitting process before the Department.

**Relief Requested:** The BER should correct such errors of law in the Proposed Decision' pursuant to § 2-4-612(3), MCA by

i: deleting the following paragraph from Page 48 of the Proposed Decision:

However, MEIC argues that the provision in the DNRC guidance document applies to housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer

from use. . .

and

ii: adopting DEQ's Proposed Conclusion of Law No. 13 (discussed below) and adding it to the final BER decision.

**Second DEQ Exception on Point of Law:** *The Proposed Decision Erroneously Found that DEQ Failed to Respond to Petitioner's Untimely Claim of Agency Legal Error Regarding DEQ's Reliance on DNRC Exempt Well Permits to Mitigate any Impacts to Water Supplies by AM3.*

The Proposed Decision (and the underlying DEQ permitting record) thus contemplate that (if necessary) DNRC "exempt well permits" for up to 35 gpm or 10 acre-feet/year, were a legally available mitigation option for any water supplies impacted by AM3 mining operations. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; Proposed Decision Finding of Fact ("FOF") ¶¶ 37, citing DEQ Ex. 6, Written Findings at 5-6; *see also* Proposed Decision pp. 48-49 ("Discussion" section).

The Proposed Decision, however, finds in pertinent part as follows:

DEQ's analysis of legal availability of replacement water is based on guidance from the DNRC that Signal Peak could use exempt wells to replace any impacted springs. Tr. at 541:2 to 542:2. However, MEIC argues that the provision in the DNRC guidance document applies to



housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer from use.

Proposed Decision at 48 (emphasis supplied). The Proposed Decision is incorrect insofar as it finds that DEQ did not specifically address Petitioners arguments that the DNRC Exempt Well Guidance (DEQ Ex-21) “applies to housing developments and not coal mines. . .” Proposed Decision at 48.

DEQ’s Responses to MEIC’s FOFCOLs not only responded to but refuted Petitioner’s untimely and ultimately incorrect argument that Exempt Well Permits are only available for housing projects. *See* DEQ Response to MEIC Proposed FOF No. 101 and Responses to MEIC Proposed COLs Nos. 76-78 and 80-81.

As DEQ’s response to MEIC Proposed FOFCOL No. 101 explained, the DNRC Guidance states that it “is intended to provide *general guidance* in applying the Montana First Judicial Court’s recent Order on Petition for Judicial Review in *Clark Fork Coalition, et al. v. Tubbs et al.*” *Id.*, citing DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1. DEQ’s Response to MEIC Proposed FOFCOL No. 101 further explained:

While the *Clark Fork Coalition* decision addressed a challenge to DNRC's combined appropriation rule in the context of a housing subdivision, nothing in the DNRC Guidance states or implies that it is limited to housing subdivisions.

Mr. Van Oort explained that "exempt wells could be used, and that those wells would not be considered combined appropriations." Hrg. Tr. Day 3, at 541:21-23; *see also* DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating "One can still seek a water right for one or more 'exempt' wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA"). This conclusion was presented in DEQ's response to comments (DEQ Ex. 6) that at the time of the AM3 approval in 2016 DNRC was still issuing exempt well permits for wells such as would likely be used for mitigation. DEQ Ex. 6 at 5-6.

#### DEQ Response to MEIC's FOCOL No. 101. DEQ's Response to MEIC

Proposed FOFCOL No. 97 further elaborated as follows:

The Department considered and responded to Petitioner's objections and concluded that any springs potentially impacted by subsidence and requiring mitigation could be replaced by exempt wells because the springs' flow rates do not exceed the exempt well 35 gallon per minute pumping limit. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; DEQ Ex. 21, DNRC Combined Appropriation Guidance; Hrg. Tr. Day 3, at 537:19-539:1, 542:2-7; *see also* DEQ Proposed FOF at 15, ¶ 43 (explaining the same). In doing so, the Department responded to Petitioner's objections regarding the legal availability of the DUB to serve as a source of replacement water by pointing out that no legal barrier thereto existed. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr.



Day 2, at 417:5-418:4; Hrg. Tr. Day 4, at 712:13-713:9; MSJ Order at 10-12, ¶ 13; see also DEQ Proposed FOF at 15, ¶ 44 (explaining the same).

DEQ Response to MEIC FOFCOL No. 97. DEQ's Response to MEIC's

Conclusion of Law No. 79 further explained as follows:

The project at issue is not a subdivision and the record does not reflect that a combined appropriation is at issue herein. Mr. Van Oort explained that "exempt wells could be used, and that those wells would not be considered combined appropriations." Hrg. Tr. Day 3, at 541:21-23; *see also* DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating "One can still seek a water right for one or more 'exempt' wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA"). This conclusion was presented in DEQ's response to comments (DEQ Ex. 6) that at the time of the AM3 approval in 2016 DNRC was still issuing exempt well permits for wells such as would likely be used for mitigation. DEQ Ex. 6 at 5-6.

DEQ Response to MEIC FOFCOLS, Proposed Conclusion of Law No. 97.

Finally, as DEQ's Response to MEIC's Conclusion of Law No. 80 explained (and as the DNRC Exempt Well Guidance reflects), the statute itself most certainly does not limit Exempt Well Permits to household uses:

Further, except in circumstances not present herein "ground water may be appropriated by a person who has a possessory interest in the property where the water is to be put to beneficial use." Section 85-2-306(1)(a), MCA. A

“beneficial use” is in turn defined to mean: “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” Section 85-2-102(5)(a), MCA.

DEQ Response to MEIC FOFCOLs, Response to Conclusion of Law No. 80 (emphasis supplied). Accordingly, a DNRC Exempt Well Permit can be utilized to appropriate groundwater for any beneficial use, and not merely for household purposes as Petitioner untimely contends.

Following the contested case hearing, DEQ’s December 18, 2020, Proposed Findings of Fact and Conclusions of Law (“DEQ FOFCOLs”) accordingly proposed the following Conclusion of Law:

13. Petitioner also failed to present any evidence, affirmative or otherwise, that wells over 35 gpm – the limit for a DNRC “exempt” permit – would be needed for replacement sources. Mr. Hudson only provided hypothetical scenarios not supported by any analysis based on likely impacts. *Id.*, *passim*; see *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶¶12-13, 384 Mont. 503, 380 P.3d 771 (citing § 85-2-306(3)(a)(iii), MCA) and DEQ Ex. 21, DNRC Combined Appropriation Guidance (discussing “exempt” well permits) see also SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1 and MEIC Ex. 15 Table 314-3-1 (identifying springs potentially requiring mitigation following mining impacts); DEQ Ex. 5, CHIA at 12-16, Table 7-1 (showing springs with greater than 0.5 gpm median baseline flow rate, none of which exceed 35 gpm); DEQ Ex. 6, Appendix

III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; DEQ Ex. 11, DUB Report; ARM 17.24.304(1)(f)(iii); MSJ Order at 20.

DEQ FOFCOLs, Conclusion of Law No. 13. The Proposed Decision erroneously declined to adopt this conclusion of law.

**Relief Requested:** The BER should correct such errors of law in the Proposed Decision' pursuant to § 2-4-612(3), MCA by

i: deleting the following paragraph from Page 48 of the Proposed Decision:

However, MEIC argues that the provision in the DNRC guidance document applies to housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer from use. . .

and

ii: adopting DEQ's Proposed Conclusion of Law No. 13 and adding it to the final BER decision.

**DEQ's Third Exception on Point of Law:** *The Proposed Decision Fails to Properly Differentiate the Applicant's Burden of Proof in the Permitting Phase and the Petitioner's Burden of Proof in the Contested Case Phase.*

The Proposed Decision's Conclusions of Law Nos. 21 and 22 states that SPE



had a burden to demonstrate compliance with MSUMRA and that SPE met this burden. SPE most certainly assumed and sustained the burden to affirmatively demonstrate to DEQ that there exist alternative water sources which could be developed to mitigate any impacts to water supplies from AM3 *during the permitting phase*. ARM 17.24.304(1)(f)(iii); § 82-4-227(1), MCA).

As BER precedent makes clear, however, the burden shifts to the Petitioner who appeals a DEQ decision to demonstrate via the contested case process that DEQ violated the particular law at issue. *See Rosebud AM4*, BER 2016-03-SM, Conclusions of Law Nos. 5-13 (citations omitted) (explaining shift in burden of proof to Petition in contested case phase).

**Relief Requested:** BER should correct the Proposed Decision by deleting the Proposed Conclusions of Law Nos. 21 and 22, which read:

21. Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227 (1).

22. Signal Peak affirmatively demonstrated that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227 (1). FOF ¶¶ 65-151.

and substituting DEQ's Proposed Conclusions of Law Nos. 3 and 4, which read as follows:

3. During the permitting process before DEQ, SPE was required to "affirmatively demonstrate[]" (among other things) to DEQ pursuant to ARM 17.24.304(1)(f)(iii) that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3, in order for DEQ to approve the AM3 Amendment. Section 82-4-227(1), MCA.

4. During the contested case hearing before the BER, MEIC is required to show by a preponderance of the evidence before the BER that DEQ violated ARM 17.24.304(1)(f)(iii) by identifying a replacement water source that could not be used to replace springs and stream reaches that may be dewatered by AM3 (SPE Ex. 9, MEIC Notice of appeal at 2-3, ¶ 5) to meet its burden of proof. MSJ Order at 14-15, 29; *Mont. Env'tl. Info. Ctr.*, ¶ 16 (citing §§ 26-1-401 and -402, MCA); *Western Energy Appeal Amendment AM4*, BER 2016-03 SM, Findings of Fact, Conclusions of Law and Order (June 6, 2019) at 74, ¶ 5.

**DEQ's Fourth Exception on Point of Law:** *The Proposed Decision's Decretal Paragraph (a) Erroneously States that DEQ Opposed MEIC's Standing in this Case and Should be Corrected.*

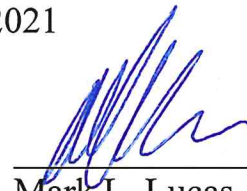
The Department made a case-specific decision to not contest MEIC's standing in this case, as is reflected in DEQ's Responses to MEIC's FOFCOLs ¶¶ 25-32 (Responses to MEIC Proposed Findings of Fact) and ¶¶ 7-10 (Responses to MEIC Proposed Conclusions of Law).

Decretal Paragraph (a) of the Proposed Decision, which denied SPE's directed verdict as to MEIC's standing, mistakenly states that DEQ opposed MEIC's standing. Id. at 54. The Department accordingly requests correction of the Proposed Decision to reflect DEQ's position herein.

### Conclusion

Based on all the foregoing, the Department respectfully requests BER to correct the errors of law in the Proposed Decision pursuant to § 2-4-621(3), MCA.

Respectfully submitted this 3<sup>rd</sup> day of September 2021



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

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MIN NO. 1, PERMIT NO. C1993017	<b>PETITIONER'S EXCEPTIONS TO HEARING EXAMINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>

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## INTRODUCTION

Petitioner Montana Environmental Information Center (MEIC) takes exception to the Proposed Findings of Fact and Conclusions of Law (Proposed Findings and Conclusions) prepared by the Hearing Examiner. First, the Proposed Conclusions of law suffer multiple systemic flaws. They fail entirely to address the legal basis of MEIC's claims—Administrative Rule of Montanan (ARM) 17.24.405(6)(a)—and they impose an unlawful and “impossible” burden of proof. Under any lawful burden of proof, the competent evidence presented at hearing demonstrates that the Department of Environmental Quality's (DEQ) analysis of replacement water quantity, quality, and legal availability was unlawful and irrational.

The Proposed Findings of Fact similarly suffer from systemic errors. They fail to lawfully address each of MEIC's proposed findings. They further neglect to address critical lines of evidence, including DEQ's and Signal Peak Energy's (SPE) decade-long, continuing violation of the design standards for assessing impacts to surface waters; SPE's admission that replacement water needs exceed 100 gallons per minute (gpm), which the chosen replacement water source cannot supply; and DEQ's admission that the analysis of replacement water in DEQ's permitting decision was plainly mistaken. These errors are fatal. In addition,



multiple proposed findings are unsupported by substantial, competent evidence or lawful procedure, as elaborated below.

## **ARGUMENT**

### **I. STANDARDS OF REVIEW**

Under the Montana Administrative Procedure Act (MAPA), a party adversely affected by a proposed decision may submit “exceptions and present briefs and oral argument to those who are to render the decision.” Mont. Code Ann. § 2-4-621(1). At this stage of the review process, DEQ is not afforded any measure of deference by the Montana Board of Environmental Review (Board). *MEIC v. DEQ (MEIC I)*, 2005 MT 96, ¶¶ 18-26, 326 Mont. 502, 112 P.3d 964 (rejecting argument in permit appeal that the Board should review DEQ’s decision “with deference”).

When a hearing examiner issues a proposed decision, the Board reviews both legal conclusions and findings of fact:

The agency may adopt the proposal for decision as the agency’s final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Mont. Code Ann. § 2-4-621(3).

Under the Montana Strip and Underground Mine Reclamation Act (MSUMRA), review of DEQ’s decision to issue a strip-mining permit is strictly limited to the analysis in the agency’s permitting documents. *In re Bull Mountains Mine*, No. BER 2013-07 SM, at 56-59 (Mont. Bd. of Env’tl. Rev. Jan. 14, 2016).

At the next stage, on judicial review, courts afford a degree of deference to agency decisions “that require scientific expertise or are highly technical in nature.” *DeBuff v. DNRC*, 2021 MT 68, ¶ 24, 403 Mont. 403, 482 P.3d 1183. This deference, however, is limited. Courts will conduct a “thorough and careful review of the administrative record” and will defer only to “consistent, rational, and well-supported agency decision-making.” *Id.* (quoting *MEIC v. DEQ (MEIC II)*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493)). “This requires that an agency cogently explain why it has exercised its discretion in a given manner.” *Id.* (cleaned up) (quoting *MEIC II*, ¶ 97). An agency’s “decision must be judged on the grounds and reasons set forth in the challenged” decision documents—“no other grounds should be considered.” *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regul.*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154.

## **II. EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW**

### **A. The Proposed Findings fail to address MEIC’s legal claims.**

The Proposed Findings and Conclusion arbitrarily fail to consider “all relevant factors.” *DeBuff*, ¶ 41. Failure to address an important element of a party’s

claim is grounds for reversing an agency's decision. *Id.* ¶¶ 42-44. An agency may not simply ignore a party's position. *Green v. Shalala*, 51 F.3d 96, 101 (7th Cir. 1995).

MEIC's central claim in this permit appeal is that DEQ and Respondent SPE failed to comply with ARM 17.24.405(6)(a), which provides:

The department may not approve an application submitted pursuant to ARM 17.24.401(1) unless *the application affirmatively demonstrates and the department's written findings confirm*, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

(a) the application is complete and accurate, that the applicant has complied with the Act and rules, and that *the applicant has demonstrated reclamation can be accomplished ....*

*Id.* (emphasis added); Notice of Appeal at 1-3 (Aug. 11, 2016); Pet'r's Proposed FOFCOL at 49, ¶ 42 (Dec. 18, 2020). The Proposed Findings and Conclusions, however, fail entirely to address this legal provision. *See generally* Proposed FOFCOL at 1-55. Instead of addressing the analytical mandate for the "applicant [to] demonstrate[] [that] reclamation can be accomplished," the Proposed Findings focus on the much less demanding provision for applicants to supply "baseline information" about water supplies that "could be developed." Proposed Findings at 7 (citing ARM 17.24.304(1)(f)(iii)); *see also id.* at 8, 38, 43, 46, 47, 50, 54. While "could" denotes mere possibility, "can" denotes the demonstrated ability to accomplish reclamation. This systemic failure to address MEIC's actual claim is

arbitrary and unlawful, undermining the Proposed Findings and Conclusions in their entirety.

**B. The Proposed Findings and Conclusions created and imposed an unlawful and impossible standard of proof.**

The Proposed Findings and Conclusions must be rejected because they would create what is literally an impossible legal standard: to succeed on their claim that SPE and DEQ had not met their burden to “affirmatively demonstrate[]” that “reclamation can be accomplished,” the Proposed Findings and Conclusions require MEIC to affirmatively demonstrate that replacement water “could *not* be used to replace” impacted water resources, i.e., that there are “barriers that would make getting [replacement] water impossible.” Proposed FOFCOL at 43, 45.

Aside from citations to a prior hearing examiner’s summary judgment ruling, which has no precedential value, the Proposed Findings cite no authority for this standard, which is akin to requiring a criminal defendant to prove their innocence. It is simply incorrect. By statute, the burden is on the permit applicant and regulatory authority to show that reclamation can be accomplished. Even if this burden shifts during administrative review—which MEIC disputes (as elaborated below)—the burden on the permit challenger is not to marshal evidence to demonstrate that reclamation is impossible, but rather to demonstrate that applicant’s evidence of reclamation was insufficient or that DEQ’s analysis was irrational.

A hypothetical example demonstrates the fundamental flaw of the burden imposed by the Proposed Findings and Conclusions. If an applicant submitted *no* evidence regarding reclamation, but DEQ nevertheless approved the permit, that would plainly violate ARM 17.24.405(6)(a), which requires the applicant to demonstrate that reclamation can be accomplished. Yet under the standard imposed by the Proposed Findings and Conclusions, a challenge to that decision would necessarily fail unless the challenger marshaled the detailed hydrologic and engineering evidence required to demonstrate that reclamation is “impossible.” This turns the precautionary approach of MSUMRA, which prohibits mining unless the applicant affirmatively demonstrates that environmental harm will not occur, on its head. *See* ARM 17.24.405(6); Mont. Code Ann. § 82-4-227(1). The plain language of MSUMRA and controlling precedent, including the Board’s prior ruling on this very matter, refute the burden of proof created by the Proposed Findings and Conclusions.

1. MSUMRA places the burden of proof on DEQ and SPE to show that reclamation of water resources can be accomplished.

The governing statute does not permit the standard of proof conceived by the Proposed Findings and Conclusions. MSUMRA establishes a precautionary approach to coal mining by which mining may not be permitted unless and until the mine applicant demonstrates that environmental harm will not occur. Thus,

MSUMA expressly places the burden of proof on the applicant to demonstrate compliance with the law. Mont. Code Ann. § 82-4-227(1) (“The applicant for a permit or major revision has the burden of establishing that the application is in compliance with this part and the rules adopted under it.”). The applicant and DEQ specifically carry the burden of “affirmatively demonstrat[ing]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a).<sup>1</sup> This is, in effect, a preponderance of the evidence standard. *See Steadman v. SEC*, 450 U.S. 91, 100-02 (1981) (adopting preponderance of evidence for adjudication under federal Administrative Procedure Act).

This is consistent with the leading academic publication on the federal Surface Mining Control and Reclamation Act (SMCRA), with which MSUMRA must comply.<sup>2</sup> McElfish & Beier, *Env’tl Law Instit*, Environmental Regulation of Coal Mining at 55 (1990) (“The burden is on the applicant to demonstrate that reclamation ... is feasible. An applicant must provide specific details of both the proposed mine operation and the reclamation activities. This forces the operator to identify potential environmental effects before mining begins.”); *id.* at 61 (“The

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<sup>1</sup> As noted above, the Proposed Findings ignore this provision, on which MEIC’s claim is based, entirely.

<sup>2</sup> State laws that are inconsistent with SMCRA are “superseded” by the federal standard. 30 U.S.C. § 1255(a); *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1242 (Alaska 1992).

applicant must bear the burden of demonstrating that the operation can avoid adverse consequences so that reclamation is feasible.”). Thus, it is the burden of the applicant and DEQ to demonstrate that “reclamation can be accomplished.” ARM 17.24.405(6)(a). It is emphatically not the burden of the public to demonstrate that reclamation is “impossible.” Proposed FOFCOL at 45. The Proposed Findings’ assertion, based on the prior summary judgment ruling, that these standards are equivalent is mistaken. Consider again the familiar criminal law analogy: the prosecution’s burden to prove guilt beyond a reasonable doubt is not equivalent to requiring the accused to prove their innocence.

The correct operation of this burden of proof in a permit appeal, as here, is demonstrated by this Board’s recent decision in *In re Bull Mountains*, No. BER 2013-07 SM. There DEQ and SPE argued that the mine would not cause material damage because any damaged water supplies could be replaced and reclaimed. *Id.* at 84. This Board rejected the argument because of uncertainties about the physical and legal availability of replacement water. *Id.* at 85 (finding argument for water replacement “illusory” because of “multiple physical and legal barriers to using the deep underburden aquifer as a source of mitigation water”). Thus, this Board explained that “the mere possibility of mitigation is not sufficient.” *Id.* Citing the “affirmatively demonstrates” language from ARM 17.24.405(6), the Board concluded that, in light of the burden of SPE and DEQ to prove that environmental

harm will not occur, a showing by SPE and DEQ that replacement water “may (or may not)” be available “does not satisfy the legal standard of MSUMRA.” *In re Bull Mountains*, No. BER 2013-07 at 86.

The Montana Supreme Court’s decisions under the analogous Montana Water Use Act (MWUA) demonstrate that the burden of proof established for a permit applicant *remains with the applicant* in a contested case challenging the permitting decision. Under the MWUA, like MSUMRA, an applicant for a permit has the burden of proving that certain environmental harms will not occur. Mont. Code Ann. § 85-2-311(1) (requiring that “applicant proves by a preponderance of the evidence that [certain] criteria are met”); *see* Mont. Code Ann. § 82-4-227(1). In *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 36, 369 Mont. 150, 296 P.3d 1154, the Court explained that the statutory burden of proof remains with the applicant to show that environmental harm will not occur and does not shift in a contested case over a permitting decision. Consistent with the Board’s analysis in *In re Bull Mountains*, the Court explained that the agency should “deny a permit where uncertainty exists” about potential environmental effects; thus, uncertainty is a basis for denying, not granting, a permit. *Bostwick*, ¶¶ 34-36. The Court repeated this analysis in *DeBuff*, ¶ 39, explaining that in a contested case challenging a water use permitting decision, the burden “remained” with the applicant to prove environmental harm would not result. So too here. Indeed, the



legislative history of SMCRA, on which MSUMRA is modeled, is explicit on this point: the “applicant is required to ... assume, if a public hearing is held [on a permit, i.e., a contested case], the burden of proving that the application is in compliance with State and Federal laws.” S. Rep. No. 95-128, at 80 (1977).

In sum, the Proposed Findings and Conclusions improperly flip the burden of proof by requiring MEIC to prove that reclamation would be “impossible.” This “impossible” standard is palpably unlawful.

2. The holding in *MEIC I* is not applicable to an MSUMRA permit appeal, as here, where by statute the burden rests on the applicant.

The Proposed Findings and Conclusions erroneously conclude that, contrary to the Montana Supreme Court’s teachings in *Bostwick* and *DeBuff*, the burden of proof shifted from SPE and DEQ to MEIC in the contested case proceeding. Proposed FOFCOL at 51, ¶ 9. This was premised on the Court’s analysis of a Clean Air Act permit in *MEIC I*. Proposed FOFCOL at 51, ¶ 9. *MEIC I*, however, is distinguishable and, even if it were relevant, *MEIC I* does not support the “impossible” burden of proof fashioned by the Proposed Findings and Conclusions.

In *MEIC I*, plaintiffs challenged DEQ’s issuance of an air quality permit for a proposed massive coal plant adjacent to the Bull Mountains Mine. *Id.* ¶¶ 1, 6. One issue was which party bore the burden of proof in a contested case before the

Board. *Id.* ¶ 10. The Court held that the burden rested with the plaintiffs. *Id.* ¶ 16. The Court grounded its decision on the fact that the statute at issue—Montana’s Clean Air Act program—did not contain a specific provision regarding the burden of proof. *Id.* ¶¶ 13-14. Absent a specific statutory provision in the Clean Air Act allocating the burden of proof, the Court relied on default statutory provisions that the burden of proof rested with the party that would be defeated if no evidence were produced. *Id.* ¶¶ 14-16.

*MEIC I* is not relevant here because unlike the Clean Air Act, MSUMRA has statutory and regulatory provisions that expressly place the burden of proof on the permit applicant and DEQ. Mont. Code Ann. § 82-4-227(1); ARM 17.24.405(6)(a). If the applicant and DEQ do not present an “affirmative[] demonstrate[ion]” that “reclamation can be accomplished” (equivalent to a preponderance of the evidence standard) the permit application is defeated. ARM 17.24.405(6)(a) (“The department may not approve ...”). As the Court explained in *Bostwick*, ¶¶ 34-36, and *DeBuff*, ¶ 39, this statutory burden remains with the permit applicant in a contested case challenging the permitting decision. And, as noted, it was the express design of Congress that this burden remain with the applicant in SMCRA/MSUMRA proceedings. S. Rep. No. 95-128, at 80. This Board applied the same approach in *In re Bull Mountains*. As such, the Clean Air Act burden at issue in *MEIC I* is not applicable to MSUMRA.

3. Alternatively, even if the burden shifts, it still only requires MEIC to defeat the evidence and analysis presented by DEQ and SPE.

Finally, even assuming *arguendo* that the Clean Air Act approach from *MEIC I* were applicable here, it would not justify the “impossible” standard applied in the Proposed Findings and Conclusions, by which the public is forced to prove that environmental harm will certainly occur. After allocating the burden of proof, the Court in *MEIC I* reviewed DEQ’s permitting decision. The issue was whether DEQ had lawfully determined that pollution from the proposed coal plant would not result in adverse impacts to visibility in certain protected areas. *MEIC I*, ¶¶ 27-28. The applicable rules prohibited DEQ from issuing a permit unless and until the applicant demonstrated that no adverse visibility impacts will occur. *Id.* ¶ 28. In issuing the permit, DEQ had deferred to federal agencies’ analysis of visibility impacts, rather than reaching its own independent determination. *Id.* ¶ 35. The Court held that this was error because DEQ was required to conduct its own independent evaluation of visibility. *Id.* ¶ 37. In remanding the case to the Board, the Court set forth the appropriate analysis:

Thus, on remand the Board shall enter findings of fact and conclusions of law determining whether, based on all the evidence presented, *Bull Mountain* [the permit applicant] *established that emissions from its proposed project will not cause or contribute to adverse impact on visibility in the [protected areas].*

*Id.* ¶ 38 (emphasis added).

Far from supporting the “impossible” standard applied in the Proposed Findings, *MEIC I* demonstrates three critical points. First, in reviewing a permitting decision by DEQ, if the agency’s legal analysis is mistaken or arbitrary, the permit will not stand, regardless of the substantive burden of proof. *Id.* ¶¶ 37-38.<sup>3</sup> Second, in a contested case over a permit where the permitting burden is originally on the applicant to show environmental harm will not occur, the Board reviews whether, in view of the evidence presented, the applicant has “established” certain adverse environmental impacts will not occur. *Id.* ¶ 38. Third, in no event is the burden on the public to affirmatively demonstrate that adverse environmental impacts will occur. *Id.* Thus, even applying the more stringent Clean Air Act standard articulated in *MEIC I*, the relevant inquiry is whether, based on the record compiled by DEQ, the applicant—SPE—“affirmatively demonstrate[d]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a). The “impossible” standard imposed in the Proposed Findings and Conclusions, in which the public is

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<sup>3</sup> This is the universal standard. If any agency’s permitting decision is premised on a mistaken or irrational analysis, it must be reversed. *E.g.*, *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶¶ 47-50, 347 Mont. 197, 197 P.3d 482 (reversing DEQ’s issuance of a Clean Water Act pollution discharge permit where the agency simply assumed that pollution would be perpetually treated without adequate supporting analysis or information). Even where the agency does not bear the burden of proof, as in the MWUA, failure by the agency to consider relevant factors or to cogently explain its decision is basis for overturning the permitting decision. *DeBuff*, ¶ 39.

required to demonstrate that reclamation is not possible, Proposed FOFCOL at 43-49, is mistaken as a matter of law.

**C. Under any lawful standard of review, DEQ’s analysis of water quantity was unsupported and irrational.**

The Proposed Findings and Conclusions recognize that neither DEQ nor SPE determined how much replacement water would be needed or how much replacement water was available in the deep aquifer. Proposed FOF COL at 46 (noting that “it would certainly be helpful to know the quantity of the water with some certainty”). Despite this omission, the Proposed Findings conclude that because reclamation remained possible and was not shown by MEIC to be impossible (there “could” be enough replacement water), DEQ had satisfied MSUMRA. This was error.

First, as noted, the Proposed Findings and Conclusions erroneously focus on the incorrect legal standards, addressing only the preliminary requirement for the applicant to collect “baseline information” about replacement water sources that “could be developed.” *Id.* at 46; ARM 17.24.304(1)(f)(iii). The Proposed Findings and Conclusions ignore the subsequent rigorous analytical requirement that DEQ and the SPE must “affirmatively demonstrate[]” that “reclamation can be

accomplished.” ARM 17.24.405(6)(a).<sup>4</sup> Second, as noted, the “impossible” standard, which requires the public to demonstrate that reclamation is “impossible,” is erroneous and without support in MSUMRA, MAPA, or Montana precedent. As this Board explained in *In re Bull Mountains*, the “mere possibility” that the deep aquifer can supply replacement water “is not sufficient,” No. BER 2013-07 SM at 85—it is not an “affirmativ[e] demonstrate[ion]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a).

Under a correct review that assesses DEQ’s analysis and SPE’s evidence, DEQ’s compete failure to take a hard look at the quantity of replacement water needs or the quantity of water available to meet those needs was unlawful. *DeBuff*, ¶¶ 41-44 (agency’s failure to consider important information affecting water availability was arbitrary and unlawful). Here, not only did DEQ fail to assess how much replacement water would probably be needed, DEQ “never even calculated a ballpark figure for how much water would need to be replaced.” Tr. at 575:25 to 576:3.<sup>5</sup> This oversight is significant because the only quantitative assessment of replacement water needs—prepared by SPE’s own expert, Dr. Nicklin—found that

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<sup>4</sup> Reclamation includes replacement of any damaged water resources. ARM 17.24.1116(6)(d).

<sup>5</sup> The Proposed Findings and Conclusions cite various permitting documents, Proposed FOFCOL at 47, but none of them contains a calculation of replacement water needs or available water in the deep aquifer. Tr. at 575:25 to 576:3.

such needs could “substantially exceed 100 gpm [gallons per minute].” MEIC Ex. 17 at 85.<sup>6</sup> SPE, itself, conceded that the record does not affirmatively demonstrate that the deep aquifer can supply 100 gpm in replacement water without impacting existing users.<sup>7</sup> Tr. at 877:12-20, 878:6 to 879:20. Indeed, it was on the basis of replacement water needs *potentially* exceeding 100 gpm that the Board previously found SPE’s water replacement plans legally insufficient. *In re Bull Mountains*, No. BER 2016-07 SM at 85-87, as the Proposed Findings and Conclusions recognize. Proposed FOFCOL at 11-12, ¶ 16-19. Given the central importance of the quantity of replacement water needed and available, it was irrational and arbitrary for DEQ to fail entirely to quantify how much replacement water would be needed and how much replacement water was available. *DeBuff*, ¶¶ 40-44.

Equally unlawful, DEQ admitted that the analysis contained in its primary permitting document (the cumulative hydrologic impact assessment or “CHIA”) was mistaken. In the CHIA, DEQ stated that “water quantity in the deeper underburden [is] sufficient to provide for use at the OSW [office supply well] and any mitigation wells which may become necessary in the future.” DEQ Ex. 5 at 70.

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<sup>6</sup> Because this figure did not include impacted wells, it is a significant underestimate. Tr. 322:5-18, 327:1-8, 882:23 to 883:4.

<sup>7</sup> Reclamation of water resources includes replacement of water sources impacted by mining or reclamation. ARM 17.24.1116(6)(d). As such, replacement water cannot impact existing water users.

DEQ, however, admitted that this was mistaken and that the agency never assessed whether the deep aquifer had sufficient quantity to meet “any” mitigation needs which “may become necessary.” Tr. at 574:22 to 575:5. While at hearing DEQ’s witness Mr. Van Oort equivocated and asserted that the agency had meant to write something different, Tr. at 573:15 to 575:8, the agency’s decision must stand or fall based on the analysis in the CHIA, as the Proposed Findings recognize. Proposed FOFCOL at 51, ¶ 6. An agency decision premised on an incorrect analysis is unlawful and irrational. *MEIC v. DEQ (MEIC III)*, 2020 MT 288, ¶¶ 22, 27-28, 402 Mont. 128, 476 P.3d 32.

**D. Under any lawful standard of review, DEQ’s analysis of water quality was unsupported and irrational.**

The Proposed Findings and Conclusions further err in accepting DEQ’s erroneous conclusion that replacement water of suitable quality is available in the deep aquifer. The proposed decision accurately finds that the deep aquifer’s “median sodium concentration (356 mg/L) exceeds the CHIA’s recommended guidance for livestock watering (300 mg/L)” and that “domestic wells completed in the [deep aquifer] likely contain natural levels of arsenic over the DEQ-7 HHS [health and human standard] for arsenic.” Proposed Findings at 35, ¶¶ 136, 141. There is no dispute that surface waters above the mine do not have sodium or arsenic levels that are harmful to livestock and humans. DEQ Ex. 5, tbls. 2-1, 2-3, 7-2, 7-3, 7-4. The Proposed Findings also accurately conclude that replacement



water must be “in like quality, quantity, and duration.” Proposed FOFCOL at 50, ¶ 3. Despite finding that the deep aquifer is not of like quality to threatened water resources above the mine but is, in fact, harmful to livestock and humans, the Proposed Findings and Conclusions perplexingly concluded that the deep aquifer could nevertheless serve as a suitable source of replacement water. *Id.* at 45. This was error.

First, the Proposed Findings and Conclusions cite arguments from the prior hearing examiner’s summary judgment decision in which SPE and DEQ “dispute the fact that arsenic and sodium levels in the underburden will be above the requisite levels.” Proposed FOFCOL at 45. Not only are second-hand allegations appearing in the summary judgment order not cognizable evidence, the Proposed Findings and Conclusions in fact find that the evidence presented at hearing refuted the arguments of SPE and DEQ and showed that sodium and arsenic in the deep aquifer exceed the standards set by DEQ itself. Proposed FOFCOL at 35, ¶¶ 136, 141.

Second, again citing the prior ruling on summary judgment, the Proposed Findings assert that “a simple commercially-available filtration system would solve the problem.” *Id.* at 45. But again, the summary judgment order is not evidence. Moreover, DEQ’s only witness, Mr. Van Oort, did not present any qualified testimony about treatment. Tr. at 554:9-23. SPE’s expert, Dr. Nicklin, testified

about treatment for sodium, but he also was never qualified as an expert in water treatment. Tr. at 873:8-24. More importantly, any testimony by Dr. Nicklin about water treatment systems for sodium was improper *post hoc* evidence that did not appear in any permitting documents.<sup>8</sup> *MTSUN*, ¶ 51 (*post hoc* arguments improper); *In re Bull Mountains*, No. BER 2013-07 SM at 56, *cited in* Proposed FOFCOL at 51, ¶ 6. Moreover, SPE never disclosed any testimony by Dr. Nicklin about treatment for sodium in either its expert disclosure or its responses to MEIC's discovery requests, and, as such, Dr. Nicklin's testimony about supposed treatment was inadmissible and may not be relied upon by the Board. Pet'r's MIL at 11 & Exs. 1-2 (Feb. 14, 2020); Pet'r's Reply in Supp. of MIL at 12-15 (Mar. 19, 2020); Mont. R. Civ. P. 37(c)(1). What's more, no permitting materials discuss water treatment and no bonding funds such treatment that will be required in perpetuity after the closure of the mine. *See generally* DEQ Ex. 7; DEQ Ex. 8; Tr. at 797:25 to 798:20. It is arbitrary and capricious for DEQ or the Board to assume perpetual treatment of replacement water from the deep aquifer in the absence of any information about such treatment system in the permit application and without any bond to support such necessary treatment. *Clark Fork Coal.*, ¶¶ 44-48; *Citizens Organized Against Longwalling v. Div. of Reclamation*, 535 N.E.2d 687, 696-99

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<sup>8</sup> The CHIA mentioned treatment systems for arsenic, but said nothing about treatment for excessive sodium. DEQ Ex. 5 at 42.

(Ohio App. 1987) (bare promise to replace damaged water insufficient). Every one of these flaws forecloses reliance on Dr. Nicklin's unsubstantiated mention of treatment for sodium.

In sum, the Proposed Findings and Conclusions' assessment of replacement water quality is in error. The evidence admitted at the hearing demonstrates that the chemical composition of the deep aquifer is not of like quality to the water resources above the mine and that it would be harmful to livestock and humans. There was no competent evidence about treatment of this noxious water and no description or bonding for perpetual treatment in the permit application. This does not constitute an affirmative demonstration that the deep aquifer can be used to replace and reclaim clean water resources damaged by the mine.

**E. Under any lawful standard of review, DEQ's analysis of the legal availability of replacement water was mistaken and irrational.**

This Board previously held that SPE's plans to replace waters impacted by its coal mine were illusory because neither SPE nor DEQ had addressed potential "legal barriers" that SPE's expert, Dr. Nicklin, had identified regarding use of the deep aquifer as a replacement water source. *In re Bull Mountains*, No. BER 2013-07 at 85. MSUMRA requires permit applicants and DEQ to assess the impacts of mining and reclamation operations on water rights, any "impact" to which is considered impermissible material damage. ARM 17.24.314(1), (5); Mont. Code Ann. § 82-4-203(32). Reclamation of water resources must be able to replace any

water supplies that are adversely affected by mining or reclamation. ARM 17.24.1116(6)(d)(iv). DEQ is prohibited from issuing a coal mining permit unless and until the applicant affirmatively demonstrates and DEQ confirms that “reclamation can be accomplished.” ARM 17.24.405(6)(a).

Here, DEQ’s assessment of impacts to water rights was based solely on its review of a guidance document from the Department of Natural Resources and Conservation (DNRC) about use of the exempt well loophole from the MWUA for housing developments (not coal mines). Tr. at 538:20 to 539:3, 541:2 to 542:2; DEQ Ex. 21 at 2. Based on its inexpert review of this guidance document related to housing developments, DEQ determined that any necessary replacement wells would be exempt wells and not combined appropriations and, therefore, not subject to any limitations under the MWUA. Tr. 541:2 to 542:2. DEQ’s analysis is legally erroneous because the law analyzed in the DNRC guidance document (House Bill 168) only applied to housing developments under Title 76 of the Montana Code, and only to housing developments in existence in 2014 or for which applications were submitted by 2014. DEQ Ex. 21; 2015 Mont. Laws ch. 221, § 1. The Proposed Findings and Conclusions recognize that DEQ and SPE “did not discuss this provision specifically” in their briefing. Proposed FOFCOL at 48. Nevertheless, the Proposed Findings and Conclusions conclude that SPE and DEQ

adequately addressed the issue of legal availability of replacement water. *Id.* at 49.

This was error.

An agency's permitting decision that is premised on an error of law is unlawful. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49. The Proposed Findings and Conclusions overlook this bedrock rule by focusing on the mistaken and unsupported "impossible" standard, by which a DEQ permitting decision is upheld, regardless of its correctness, unless the public affirmatively demonstrates that reclamation is impossible. Proposed FOFCOL at 45, 49. But as noted, the "impossible" standard has no basis in law or precedent. *See supra* Argument Part II.B. The Proposed Findings and Conclusions also incorrectly rely on DEQ's assertion in its response to public comments that replacement wells would not constitute "combined appropriations" and therefore would be exempt from MWUA limitations pursuant to House Bill 168. Proposed FOFCOL at 49 (citing DEQ Ex. 6 at 5-6 (citing H.B. 168 (reprinted at 2015 Mont. Laws ch. 221, § 1))). But as noted, by its own terms, House Bill 168 applies to housing developments under Title 76, not coal mines under Title 82. 2015 Mont. Laws ch. 221, § 1. This fundamental legal error renders DEQ's permitting decision incorrect and unlawful. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49.

Finally, the Proposed Findings and Conclusions assert that the deep aquifer's ability to supply replacement water "has been recognized for many decades,"

citing a Montana Bureau of Mines and Geology report from 1982. Proposed FOFCOL at 49 (citing MEIC Ex. 19 at 43). This citation, however, contains only one general sentence stating that aquifers below the mining operations “would also furnish alternative water supplies for shallow wells and springs adversely affected by mining.” MEIC Ex. 19 at 43. Not only is there no detailed analysis of any particular deep aquifer (regarding water quantity or quality), but the report contains absolutely no analysis of the relevant issue—the legal availability of water in the deep aquifer. It, therefore, provides no support to DEQ’s plainly erroneous analysis of the legal availability of replacement water in the deep aquifer.

### **III. EXCEPTIONS TO PROPOSED FINDINGS OF FACT**

The Proposed Findings of Fact similarly include both systemic and specific errors, which are addressed sequentially below.

#### **A. The Proposed Findings fail to respond to MEIC’s detailed proposed findings.**

The Board should reject the Proposed Findings of Fact, first, because they fail to satisfy the Board’s obligation to address all relevant factors and evidence in reaching its decision. Under MAPA, a proposed decision must respond to a party’s proposed findings of fact: “If, in accordance with agency rules, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding.” Mont. Code Ann. § 2-4-623(4). The Montana Supreme Court has explained, “It is, of course, the duty of PSC [the agency conducting the contested

case] to make explicit findings on material issues raised in the administrative proceedings[,] ... and the findings on material issues should be sufficient to permit a reviewing court to follow the reasoning process of the agency.” *Montana-Dakota Utils. Co. v. Mont. Dep’t of Pub. Serv. Regul.*, 223 Mont. 191, 196, 725 P.2d 548, 551 (1986) (citation omitted); *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 523, 594 P.2d 297, 310 (1979) (finding in appeal from MAPA contested case that the agency’s “lack of any specific findings in this disputed factual area” was error). Further, it is arbitrary for an agency to fail to address relevant factors in reaching a decision. *DeBuff*, ¶¶ 43-44.

While the Montana Supreme Court has not always required strict adherence to the requirement of Montana Code Annotated § 2-4-623(4) to rule on all proposed findings, *Ex rel. Mont. Wilderness Ass’n v. Bd. of Nat. Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982), an agency’s findings of fact must nevertheless address and grapple with contrary evidence. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995) (“An ALJ may not select and discuss only that evidence that favors his ultimate conclusion, but must articulate, at some minimum level, his analysis of the evidence to allow the appellate court to trace the path of his reasoning. An ALJ’s failure to consider an entire line of evidence falls below the minimal level of articulation required.” (internal citation omitted)); accord *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310.

Here, the Proposed Findings violate MAPA by failing to rule on any of MEIC's proposed findings of fact and also failing to address critical lines of evidence. The most important revelations of the hearing were the admissions by DEQ and SPE that the company has repeatedly and continually violated requirements for monitoring and assessing impacts of subsidence on surface waters for a decade. Pet'r's Proposed FOFCOL at 10, ¶ 36 to 14, ¶ 47. In short, SPE's existing mining permit contains meticulously detailed "design standards"<sup>9</sup> for assessing impacts of mining to water resources. SPE Ex. 25. These provisions are legally binding and enforceable. Mont. Code Ann. § 82-4-254(1). SPE's consultants admitted in open court that the company has *never* complied with these requirements and, worse, that this decade-long continuing violation occurred with the knowledge and acquiescence of DEQ. Tr. at 772:19-25, 773:8-10, 774:12-14, 786:7-17, 787:9-13, 893:23 to 894:3. This line of evidence was of capital importance because DEQ and SPE purported to base their (vague and equivocal) assumptions about replacement water needs on their assessments of the impacts of mining on existing water resources. Tr. at 649:3-13, 654:10-14, 866:21-867:3, 887:23 to 888:16, 888:22-25. Indeed, the Proposed Findings appear to rely heavily

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<sup>9</sup> The purpose of "design standards" is to "obviate[] the battle of the experts" over whether a mine is sufficiently protecting environmental values. McElfish & Beier, *supra* at 62-63. Failure to follow the design standard alone demonstrates a permit violation. *Id.* at 62.



on DEQ's decision to require water replacement for only one spring that had been undermined. Proposed FOFCOL at 23-25, ¶¶ 73-81. These findings have no value in light of SPE's and DEQ's ongoing unlawful failure to follow the permit's design standards for assessing impacts to water resources. It is fundamental to the rule of law that a party cannot "take advantage of its own wrong." *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 19, 307 Mont. 45, 36 P.3d 408 (quoting Mont. Code Ann. § 1-3-208). Worse, SPE's and DEQ's ongoing and knowing failure to comply with legally binding permit provisions requiring collection and preservation of data regarding mining impacts constituted spoliation. *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶¶ 27-31, 379 Mont. 314, 350 P.3d 52. It is arbitrary and unlawful for the Proposed Findings to fail entirely to address this critical line of evidence. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

It was also unlawful for the Proposed Findings to fail to address the *only* actual quantification of replacement water needs and the testimony of SPE's own expert that the deep aquifer could *not* supply that quantity of water. This Board in *In re Bull Mountains* held that SPE's arguments about using the deep aquifer to replace water polluted by the mine were mistaken because of, among other things, uncertainty that the aquifer could supply over 100 gpm in replacement water. No. BER 2013-07 SM at 84-87. This conclusion was based on a report by SPE's own

hydrologist, Dr. Nicklin. *Id.* at 85; MEIC Ex. 17 at 85. While this analysis was conducted in 2013 before the Board remanded the matter to DEQ for further analysis, SPE and Dr. Nicklin never developed another estimate of replacement water needs. Tr. at 857:9-13, 887:23 to 888:12. And DEQ “never even calculated a ballpark figure” of how much replacement water would be needed. Tr. at 575:25 to 576:3. Thus, the 100 gpm figure was the *only* estimate of replacement water needs. Moreover, this 100 gpm figure was a significant underestimate because it did not include replacement of impacted wells (it only assessed springs and streams). Tr. at 322:12-18, 327:1-8, 883:2-4. And critically, SPE’s expert, Dr. Nicklin, testified that the record did not affirmatively demonstrate that the deep aquifer could supply 100 gpm without impacting other users (which is prohibited). Tr. 877:11-19, 879:12-20. Accordingly, it is arbitrary and unlawful for the Proposed Findings to fail to address this line of evidence. Mont. Code Ann. § 2-4-623(4); *N. Plains Res.*

*Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.<sup>10</sup>

The final major line of evidence that the Proposed Findings failed entirely to address was DEQ’s admission that the CHIA’s assessment of reclamation water—the only analysis on which the permitting decision may stand<sup>11</sup>—was mistaken. In the CHIA, DEQ stated that “water quantity in the deeper underburden [is] sufficient to provide for use at the OSW [office supply well] and any mitigation wells which may become necessary in the future.” DEQ Ex. 5 at 70. DEQ, however, admitted that this was mistaken and that the agency never assessed whether the deep aquifer had sufficient quantity to meet “any” mitigation needs that “may become necessary,” as the CHIA asserted. Tr. at 573:15 to 575:1. As noted, SPE’s expert testified that the record did not demonstrate that the deep aquifer could supply 100 gpm of replacement water without affecting other water

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<sup>10</sup> The Proposed Findings further err in failing to address the evidence showing that DEQ’s only witness, Mr. Van Oort, did not conduct the spring impact analysis, did not know what method was used to assess impacts to springs, and did not even know what the permit required regarding assessment of spring impacts. Tr. at 622:22 to 623:3, 625:6-10, 630:19-23, 640:11-16, 642:3-13. This evidence forcefully demonstrated that DEQ’s purported analysis of impacts to springs was not reliable. The Proposed Findings’ failure to address this evidence was unlawful. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

<sup>11</sup> *MTSUN*, ¶ 51 (post hoc arguments improper); *In re Bull Mountains*, No. BER 2013-07 SM at 56, *cited in* Proposed FOFCOL at 51, ¶ 6.

users. Tr. 877:11-20, 879:12-20. A permitting decision may not rest on an erroneous analysis, particularly one of such central importance. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49. The failure of the Proposed Findings to assess this line of evidence was arbitrary and unlawful. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

**B. Numerous findings of fact are not supported by substantial, competent evidence or essential requirements of law.**

In addition to the foregoing systemic errors, the following findings are not supported by competent, substantial evidence or are procedurally improper or both<sup>12</sup>:

- Proposed Finding 54 refers to the “Rosebud Mine.” The cited testimony, however refers to the Bull Mountains Mine, which is the mine at issue in this case. Tr. 34:1-7, 63:23 to 64:1. As such, Proposed Finding 54 is not supported by substantial evidence.
- Proposed Findings 77 to 82 and Proposed Findings 92 and 95 refer to DEQ’s and SPE’s assessments of impacts of mining to water resources, without acknowledging DEQ’s and SPE’s continuing violation of the permit’s legally binding design standards for assessing

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<sup>12</sup> See Mont. Code Ann. § 2-4-621(3).

such impacts (which constitute spoliation and unlawful conduct) and without acknowledging DEQ's unreliable testimony regarding the agency's assessment of impacts to surface water resources. *See supra* Part III.A. The Proposed Findings cannot simply ignore, but must address, contrary evidence. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 384 (4th Cir. 1994) ("Conversely, when faced with evidence in the record contradicting his conclusion, an ALJ must affirmatively reject that contradictory evidence and explain his rationale for so doing."). This renders the Proposed Findings procedurally improper and unsupported by substantial competent evidence.

- Proposed Finding 97 states that fluvial sandstone channels in the underburden "are likely many miles wide and reflect a high sinuosity or continuous meandering of the paleostream." The cited evidence—MEIC Ex. 21 at 3.2.5—does not support this proposed finding. This report does not say that the channels are "likely" "many" miles wide, but rather that they "may be several miles wide." *Id.* Several means "more than one" or "more than two *but fewer than many*." Merriam-Webster Dictionary, [www.merriam-webster.com](http://www.merriam-webster.com) (definition of

“several”) (emphasis added). Proposed Finding 97 is not supported by substantial evidence.

- Proposed Finding 97 also states that the sandstone channels that comprise the deep aquifer are “continuous throughout the Bull Mountain[s] area” because of outcroppings of the unit in various creek drainages. The Proposed Findings cite MEIC Ex. 21 at 3.2.5 as support, but that document, an addendum to the permit, does not state that the channel sandstones are continuous. The only remaining support is a citation to DEQ Ex. 11 at 3, which does state that the outcrops suggest that the underburden unit is “continuous” throughout the area; however, as noted above, the author of the report, Dr. Nicklin, clarified at hearing that while the unit may be continuous, the sandstone channels themselves, which bear water, are not. Tr. at 907:7 to 908:23. Dr. Nicklin admitted that the underburden unit is “definitely not homogenous” and that the sandstone channels are “lenticular” and “pinch[] out.” *Id.* All reports on record and the testimony of Mr. Hutson, the only qualified expert in fluvial sedimentology, agreed that the sandstone channels in the deep aquifer are not continuous, but pinch out over short distances. SPE Ex. 18 at 298; MEIC Ex. 19 at 15; MEIC Ex. 20 at 6; MEIC Ex. 21 at 15; Tr. at

90:4 to 91:4, 96:11-12, 103:10-15, 304:12-22. In fact, MEIC Ex. 19, on which the Proposed Findings rely elsewhere, expressly states that “[a]lthough the sandstone units are prominently displayed in outcrop, most are lenticular and cannot be traced over large areas in the subsurface.” MEIC Ex. 19 at 15. As such, the statement in Proposed Finding 97 that the sandstone channels are continuous based on outcropping is not supported by substantial evidence.

- Proposed Finding 99 states that the “DUA [deep underburden aquifer] extends over a broad area throughout the Bull Mountains area, approximate dimensions are about 14 miles wide and 22 miles long trending along the axis of the Bull Mountain[s] syncline.” At hearing, however, the author of the cited report, Dr. Nicklin, clarified that these dimensions did not measure the extent of the *deep aquifer*, as stated in Proposed Finding 99, but only the “model grid.” Tr. at 907:7 to 908:23. The larger underburden layer, Dr. Nicklin explained, is “definitely not homogenous” but “lenticular” channels that “pinch out.” *Id.* Mr. Hutson made the same clarification. Tr. at 304:12-22. As such, Proposed Finding 99 is not supported by substantial evidence.
- Proposed Finding 114 notes that the 2016 Probable Hydrologic Consequences (PHC) report concluded that “[t]here is presently no

evidence of surface water quality impacts associated with mining.”

This proposed finding, however, fails to acknowledge DEQ’s and SPE’s continuing violation of the permit’s legally binding design standards for assessing such impacts. *See supra* Part III.A. DEQ’s and SPE’s action constitutes spoliation and unlawful conduct, from which neither may gain advantage. *See supra* Part III.A. Moreover, as the Proposed Findings recognize elsewhere, the CHIA rejected the PHC’s analysis and concluded that at least one spring, spring 17275, had experienced water quality impacts associated with mining. *See* Proposed FOFCOL at 23, ¶ 77. As such the Proposed Finding 114 is procedurally improper and unsupported by substantial competent evidence. *See*, 36 F.3d at 384.

- Proposed Finding 123 notes that Mr. Hutson “did not quantify or otherwise calculate the anticipated replacement water need.” While Mr. Hutson did not *independently* quantify replacement water needs, the undisputed evidence shows that he relied on Dr. Nicklin’s calculation that replacement water needs could substantially exceed 100 gpm. Tr. at 140:2-4 (“The only number that I’ve seen in the Nicklin modeling reports w[as] the 100-plus gallons of water—gallons per minute.”); MEIC Ex. 17 at 85. As noted, Dr. Nicklin never



revised this figure, and DEQ did not even develop a ballpark figure.

Tr. at 857:9-13, 887:23 to 888:12; Tr. at 575:25 to 576:3. The

Proposed Findings cannot ignore this undisputed evidence of substantial replacement water needs. *See*, 36 F.3d at 384.

- Proposed Finding 130 states that DEQ “identified and evaluated the surface water rights within the AM3 surface water Cumulative Impact Area.” While the cited evidence demonstrates that DEQ identified and listed the surface water rights, the evidence does not indicate anywhere that DEQ “evaluated” these surface water rights. In fact, DEQ testified that it did not evaluate any impacts to water rights based on its review of the DNRC guidance documents related to housing developments. Tr. 541:2 to 542:2. As such, the assertion in Proposed Finding 130 that DEQ “evaluated” surface water rights is not supported by substantial competent evidence.
- Proposed Finding 143 states that “Dr. Nicklin not[ed] that treatment systems are available for sodium.” This statement is not supported by substantial competent evidence and is procedurally improper because, as noted, Dr. Nicklin’s testimony about treatment for sodium was not supported by any particular expertise, was *post hoc*, undisclosed in

discovery, and without any detailed support or funding in the permit.

*See supra* Argument Part II.D.

- Proposed Finding 145 states that DEQ “identified no legal barriers precluding the [deep aquifer] as a source of replacement water.”

While it is true that based on a legally erroneous analysis, DEQ reached this conclusion, DEQ’s analysis was still erroneous, rendering its permitting decision unlawful. *See supra* Argument Part II.E.

## **CONCLUSION**

In sum, the Proposed Findings suffer multiple systemic and specific flaws with respect to both proposed conclusions and factual findings. The Board should reject the Proposed Findings and hold that DEQ’s permitting decision was unlawful or, alternatively, remand to the Hearing Examiner for resolution of the errors identified above.

Respectfully submitted this 15th day of September, 2021.

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**MONTANA BOARD OF ENVIRONMENTAL REVIEW**

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017	<b>INTERVENOR-RESPONDENT'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>
	<b>ORAL ARGUMENT REQUESTED</b>

## INTRODUCTION

After five years of litigation and a complex procedural history spanning five hearing examiners, this contested case is now before the Board of Environmental Review (the “Board”). The Hearing Examiner’s Proposed Findings of Facts and Conclusions of Law (“Proposed Order”) reach the correct result: Petitioner Montana Environmental Information Center (“MEIC”) failed to present sufficient evidence to overcome a M.R.C.P. 52 Motion for Judgment as a Matter of Law, much less the evidence necessary to prove any of its claims. Accordingly, the Board should adopt the Hearing Examiner’s Proposed Order and enter judgment in favor of Respondent Department of Environmental Quality (the “Department” or “DEQ”) and Intervenor-Respondent Signal Peak Energy, LLC (“Signal Peak” or “SPE”).

The Board’s review of the Proposed Order is constrained by law. While the Board has the discretion to “reject or modify the *conclusions of law and interpretation of administrative rules*” as it deems appropriate, the Board may *not* “reject or modify the *findings of fact* unless” the Board “first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” § 2-4-621(3), MCA.

Signal Peak does not take issue with any proposed Finding of Fact and therefore does not request the Board to undertake a review of the complete record. Signal Peak does, however, request the Board to exercise its discretion to modify certain Conclusions of Law and pieces of the “Discussion” section of the Proposed Order to resolve ambiguities in the proposed text. Therefore, Signal Peak submits this brief identifying exceptions to the Proposed Order pursuant to § 25-4-621, MCA, to assist the Board in developing its Final Decision.

### **ARGUMENT**

The Proposed Order reaches the correct result based upon the evidence presented – a directed verdict on the merits and judgment in favor of DEQ and Signal Peak. However, Signal Peak urges the Board to modify certain conclusions of law and pieces of the “discussion” section to resolve possible ambiguities in the Proposed Order.

First, Signal Peak incorporates by reference and adopts the Third Exception raised by DEQ. *See* DEQ’s Exceptions on Points of Law to Proposed Findings of Fact and Conclusions of Law at 14-16. Signal Peak joins in DEQ’s request that the Board revise the text of Conclusions of Law 21 and 22 to clarify that the applicant’s burden during the permitting phase ends when DEQ decides to issue the permit and that, in the contested case, the party alleging the violation of law bears the burden to prove error in DEQ’s decision. DEQ proposes substitute text

for Conclusions of Law 21 and 22. Signal Peak endorses that substitute text with the additional modification to Conclusion of Law 22 discussed below in Signal Peak Exception Two.

Second, the Proposed Order incorporates the Hearing Examiner's order on Signal Peak's Request for the Board to Reclaim Jurisdiction. Signal Peak maintains that the Hearing Examiner is not authorized to decide such a request and urges the Board to take appropriate action to clarify the delegation of authority to the Hearing Examiner by adding specific text to the Discussion addressing compliance with applicable law on the appointment of hearing examiners.

Third, Signal Peak agrees with the Hearing Examiner's ultimate conclusion in the Discussion on pages 45-48 that MEIC did not carry its burden to prove that DEQ erred in determining that Signal Peak properly identified a source of replacement water that could be used if necessary. However, one sentence of the Discussion appears inconsistent with the conclusions of law and should be omitted from the Final Decision or modified to resolve the inconsistency. Further, Signal Peak suggests revisions to Conclusion of Law 22 to better articulate the link between the conclusion of law expressed and the findings of fact upon which it rests.

Finally, Signal Peak proposes that the Board replace Conclusion of Law 23, which reaches the ultimate conclusion that MEIC did not carry its burden to prove



that DEQ violated the law in its approval of AM3, into two separate conclusions of law addressing each of MEIC's remaining claims identified in the Findings of Fact. Signal Peak further requests the Board to adopt conclusions of law on each of the remaining claims that identify, with reference to the Findings of Fact, the basis for the conclusion that MEIC failed to carry its burden to prove each claim.

**I. SIGNAL PEAK EXCEPTION ONE: HEARING EXAMINER JURISDICTION**

After the current Hearing Examiner assumed jurisdiction for this matter, Signal Peak filed a Request for the Board to Reclaim Jurisdiction on the grounds that the current examiner is disqualified by law due to flaws in her appointment. Signal Peak argued that the Hearing Examiner's assumption of jurisdiction raised two questions regarding compliance with § 2-4-611(1), MCA. *See Request for BER to Reclaim Jurisdiction of Contested Case Proceeding at 6-7 (May 27, 2021); Affidavit of John C. Martin, ¶¶ 14, 18-24 (June 9, 2021); Reply In Support of Request to Reclaim Jurisdiction (June 28, 2021).* First, that statute authorizes ***an agency***, such as the Board, to appoint hearing examiners: "An agency may appoint hearing examiners for the conduct of hearings in contested cases." The record at the time of Signal Peak's request did not demonstrate that the Board had appointed the current Hearing Examiner. Second, the statute requires that "[a] hearing examiner must be assigned ***with due regard to the expertise required for the***

*particular matter.*”<sup>1</sup> (Emphasis added.) Again, the record at the time of Signal Peak’s request did not demonstrate that the question of the Hearing Examiner’s expertise for the current contested case was considered.

Rather than referring Signal Peak’s request to the Board so, as required by § 2-4-611(4), MCA, “the agency” could “determine the matter as part of the record and decision in the case,” the Hearing Examiner issued an order purporting to resolve the issue. *See* Order Denying Request to Reclaim Jurisdiction (July 30, 2021) (“July Order”); *see also* Proposed Order, Discussion at pg. 39. The July Order asserts that the Hearing Examiner’s appointment was proper because six months before she assumed jurisdiction a previous hearing examiner requested the Board to clarify that “all contested cases before the Board are assigned to [Agency Legal Services] as a Hearing Examiner, and not me personally,” a clarification that was adopted via Board motion. July Order at 9. At the August 2021 Board meeting, the Board acknowledged that “assignments” of Hearing Examiners had “occurred without Board action.” BER Aug. 2021 Mtg., Tr. at 9:12-14. The Board stated its intent to “reword the briefing statements” to reflect the blanket assignment to Agency Legal Services made by the Board on October 9, 2020. *Id.*, Tr. 10:2-4.

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<sup>1</sup> While subsection (2) of the provision authorizes an agency to “request a hearing examiner from an agency legal assistance program,” it does not waive the particularity requirement of subsection (1) if the agency chooses to request assistance from Agency Legal Services.

Notwithstanding the Board's action on October 9, 2020, Signal Peak remains concerned that delegating to Agency Legal Services the task of assigning a Hearing Examiner to a specific case may violate the particularity requirement in § 2-4-611(4), MCA. Here, no party other than Signal Peak raised the issue. *See Petitioner's Response to Signal Peak Energy's Motion for the Board to Reclaim Jurisdiction*, attached as Exhibit A. Nevertheless, to avoid the risk of extensive additional process that might follow in the event a reviewing court does not agree that the Board's blanket assignment to Agency Legal Services referenced in the July Order satisfies the § 2-4-611(1), MCA, particularity requirement, and remands the case to the Board, Signal Peak requests that the Board take appropriate action to document compliance with all relevant statutory provisions related to the jurisdiction of the current hearing examiner.

**Requested Relief:** Signal Peak requests that the Board include the following language in its Final Decision:

On October 9, 2020, the Board confirmed its intent to appoint Agency Legal Services as the Hearing Examiner for this matter. When the individual who presided over the contested case hearing left Agency Legal Services, this contested case was assigned to another attorney within Agency Legal Services, and then, subsequently to Hearing Examiner Buzzas who reviewed the record and prepared the Proposed Order. Although the assignment to Hearing Examiner Buzzas occurred without Board action, the Board finds that her assignment, made subject to the Board's appointment of Agency Legal Services as the Hearing Examiner for this contested case, satisfied the requirements of § 2-4-611(4), MCA, because we find that Ms. Buzzas

had the requisite experience to complete the remaining tasks for this contested case at the time of her assignment.

## **II. SIGNAL PEAK EXCEPTION TWO: EVALUATION OF THE VOLUME OF REPLACEMENT WATER**

The Proposed Order reaches the correct result by rejecting MEIC's claim that DEQ violated § 82-4-227(1), MCA, in approving AM3 with the deep aquifer underburden as one of the sources of possible replacement water because MEIC did not carry its burden of proof to demonstrate error in the analysis presented by Signal Peak and confirmed by DEQ. *See* Proposed Conclusions of Law 22 and 23. This conclusion is amply supported by the evidence presented at hearing, as demonstrated by the cited Findings of Fact. However, one sentence of the Discussion appears inconsistent with the conclusions of law and should be omitted from the Final Decision. Further, Signal Peak suggests revisions to Conclusions of Law 21 and 22 to better articulate the link between the conclusions of law expressed and the findings of fact upon which they rest.

### **A. Discussion Text Page 47**

The Proposed Findings of Fact describe the detailed analysis undertaken by Signal Peak and reviewed by DEQ to evaluate the sufficiency the deep underburden aquifer as a source of replacement water, both in terms of quantity and quality. *See* Proposed Findings of Fact 65-119, 126-142, and 145-150. The Proposed Order summarizes the extensive analysis DEQ considered to "assess the water bearing properties of the deep underburden." *Id.* Yet the first sentence of

the final paragraph on page 47 of the Discussion could be read to indicate that DEQ had *no* information about the quantity of water in the deep underburden, and that the law requires no information: “While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law.” Discussion at 47. Such an interpretation of the sentence is belied by the Findings of Fact and the remainder of the Discussion. Indeed, the third sentence of that paragraph provides a more accurate statement of the law: “However, no evidence was shown to conclude that the ‘description of alternative water supplies’ *requires an exact or specific quantity.*” *Id.* at 47-48 (emphasis added). The sentence to which Signal Peak objects is overly broad and an incorrect statement of both the facts found and the interpretations of the law espoused in the Proposed Order.

**Requested Relief:** Signal Peak requests the Board to delete the first sentence of the final paragraph from the “Discussion” regarding the water quantity at page 47:

~~While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law.~~

In the alternative, Signal Peak requests that the Board modify the first sentence of the last paragraph on page 47 as follows:

While the exact quantity of water in the underburden is unknown (and could not be known), there was no evidence presented to show this violated the law.

## **B. Conclusions of Law 21 and 22**

As noted above, Signal Peak joins in DEQ's Third Exception seeking to revise the language of Conclusions of Law 21 and 22 to distinguish the applicant's burden during the permitting phase from the petitioner's burden of proof in the contested case. Conclusion of Law 22 correctly concludes that Signal Peak carried its burden in the permitting phase. Notwithstanding, Signal Peak suggests that the Board further revise Conclusion of Law 22 to summarize the Findings of Fact on which it is based, *i.e.*, the detailed physical investigations Signal Peak undertook to characterize the capacity of the deep underburden aquifer. Signal Peak's proposed revisions are intended to incorporate the Findings of Fact on which the Conclusion of Law is based into the text of the Conclusion of Law.

**Requested Relief:** Signal Peak requests that the Board adopt one of two alternative revisions to Conclusion of Law 22. If the Board accepts DEQ's proposal to replace Conclusions of Law 21 and 22 with DEQ's Proposed Conclusions of Law 3 and 4, Signal Peak requests the Board modify DEQ Proposed Conclusion of Law 3 by adding a final sentence as follows:

3. During the permitting process before DEQ, SPE was required to "affirmatively demonstrate[]" (among other things) to DEQ pursuant to ARM 17.24.304(1)(f)(iii) that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3, in order for DEQ to approve the AM3 Amendment. Section 82-4-227(1), MCA. **DEQ confirmed that Signal Peak satisfied this obligation by investigation into the geologic and**

**hydrologic properties of the deep underburden aquifer as compared to the anticipated probable replacement. FOF ¶¶ 65-150.**

If the Board rejects DEQ's proposed alternative language, Signal Peak requests the Board to modify Conclusions of Law 21 and 22 from the Proposed Order as follows:

**Conclusion of Law 21: In the permitting phase** Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227(1).

**Conclusion of Law 22: In the permitting phase** Signal Peak affirmatively demonstrated **with investigation into the geologic and hydrologic properties of the deep underburden aquifer as compared to the anticipated probable replacement needs, and DEQ confirmed,** that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227(1). FOF ¶¶ 65-150.

### **III. SIGNAL PEAK EXCEPTION THREE: CLARIFICATION OF CLAIMS ADDRESSED IN CONCLUSION OF LAW 23**

Conclusion of Law 23 concludes that MEIC did not carry its burden in this contested case to prove by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment. As drafted, Conclusion of Law 23 encompasses both of MEIC's remaining claims identified in Finding of Fact 46:

(a) that SPE's application and the Department's CHIA "do not affirmatively demonstrate that there is sufficient high quality water available to replace spring and stream reaches that may be dewatered due to subsidence-related impacts" and (b) that SPE's reclamation plan does not provide "specific hydrological reclamation plans for

spring and stream reaches until specific water resources are impacted by longwall mining activities.”

Conclusion of Law 23 does not clearly distinguish between the two claims or articulate a link between the facts found and the ultimate conclusion reached.

Addressing both claims in one conclusion of law has some merit because MEIC has used the terms “replacement” and “reclamation” interchangeably throughout the contested case, creating the impression that MEIC considers them part of the same claim. For example, although the Order on Summary Judgment understood MEIC’s Notice of Appeal and Request for Hearing to make two separate claims regarding reclamation and replacement, it acknowledged that MEIC’s argument “conflat[ed]” the two issues. Order on Summary Judgment at 28 n.9. The Order on Summary Judgment provided legal guidance to MEIC regarding the distinction between the two standards, explaining that a “permittee is required to ‘replace the water supply’” of an adversely affected user under 17.24.648 ARM, whereas if there is no such user, the “qualitative reclamation standard” of 17.24.634 ARM applies. *Id.* Notwithstanding that clarification, MEIC’s Pretrial Memorandum continued to use the terms “replacement” and “reclamation” interchangeably, and possibly as part of the same claim. *See* Petitioner’s Pretrial Memorandum, ¶¶ 4-7, 12, 16-22.

At hearing, MEIC continued mixing and matching “reclamation” and “replacement.” MEIC’s opening statement asserted that “the evidence will show



that . . . DEQ and Signal Peak Energy have still failed to affirmatively demonstrate that **reclamation** of water resources impacted by the Bull Mountain Mine can be accomplished.” Tr. 20:15-18 (emphasis added). Yet the testimony on “reclamation” that MEIC elicited from Mark Hutson, its sole expert witness, focused on the quantification of the water available in the deep underburden aquifer. *See* Proposed Findings of Fact 120-125. As explained in the Order on Summary Judgment, the **quantity** of water available in the deep underburden is relevant only for questions going to the **replacement** obligation, not the **qualitative reclamation** obligation. Mr. Hutson presented no opinion on the qualitative reclamation standard and disclaimed any intent to provide an opinion on mining regulations or DEQ’s obligation to assess mining impacts. Tr. 94:10-15; 268:8-18. Indeed, the only witness qualified as an expert in “reclamation” was presented by Signal Peak. Tr. 731:10-12 (Judd Stark).

Signal Peak requests that the Board provide the clarity in its Final Order that MEIC has failed to establish over five years of litigation on any of its claims by separating Conclusion of Law 23 into two separate conclusions of law addressing each of the claims identified in Finding of Fact 46. Signal Peak further requests that the Board adopt text for each conclusion of law that supports, with reference to the applicable Findings of Fact, the conclusion that MEIC failed to prove either claim by a preponderance of the evidence. Specifically, as to MEIC’s

“replacement water” claim, Signal Peak requests that the Board adopt a conclusion of law explaining that MEIC’s expert witness questioned but presented no evidence or opinion to refute the information developed by Signal Peak and confirmed by DEQ demonstrating that the deep underburden aquifer could be developed to replace water supplies that may be diminished or otherwise adversely affected by AM3. As to MEIC’s reclamation claim, Signal Peak requests that the Board adopt a conclusion of law explaining that MEIC presented no evidence to support its claim regarding reclamation.

**Relief Requested:** Signal Peak requests that the Board replace Conclusion of Law 23 with the following two conclusions of law:

**Proposed Conclusion of Law 23:** Because MEIC’s sole expert witness questioned but proffered no evidence or opinion rebutting Signal Peak’s and DEQ’s conclusion that the deep underburden aquifer “could” be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3 and conceded that the deep underburden aquifer “could” be used for that purpose, MEIC has failed to meet its burden to prove its claim by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment by failing to require provision for adequate replacement water. FOF ¶¶ 122-125, 139, 143-144.

**Proposed Conclusion of Law 24:** Because MEIC failed to present credible evidence challenging the sufficiency of Signal Peak’s reclamation plans, MEIC has failed to meet its burden to prove its claim by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment by failing to require adequate reclamation plans. FOF ¶¶ 70, 72, 73, 83-96, 120.

## CONCLUSION

For the foregoing reasons, Signal Peak respectfully requests the Board to adopt the Proposed Order with the modifications identified herein.

DATED: September 15, 2021.

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# **Exhibit A**

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

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017	<b>PETITIONER'S RESPONSE TO SIGNAL PEAK ENERGY'S MOTION FOR THE BOARD TO RECLAIM JURISDICTION</b>

**INTRODUCTION**

Respondent-Intervenor Signal Peak Energy's (Signal Peak) "request" for the Board of Environmental Review (Board) to "reclaim" jurisdiction is procedurally precluded and, on the substance, has no merit. Procedurally, Signal Peak is barred from arguing against the jurisdiction of the Hearing Examiner because the coal

company has twice successfully advocated for such jurisdiction, despite the two-tier review that this entails. Judicial estoppel prohibits such overt gamesmanship. This resolves the matter and no further analysis is required.

To the degree that the substance of the request warrants consideration, it cannot withstand scrutiny. First, Signal Peak's request bereft of any *statutory* basis for the Board to "reclaim" jurisdiction. Second, Signal Peak's ostensible desire to expedite resolution of this matter would not be advanced—but hindered—by its request because the Hearing Examiner, Caitlin Buzzas, has been working diligently on the matter for over two months and has nearly completed the proposed ruling (that the Board and Signal Peak previously requested). Third, the coal company's unfounded allegations regarding the expertise of Examiner Buzzas are both improper and false.

Finally, the affidavit filed by Signal Peak's attorney, John Martin, on June 9, 2021, is also procedurally improper, unsupported, and false. Moreover, in further demonstration of the coal company's inability to keep its story straight, Mr. Martin's attack on the Hearing Examiner's competence directly contradicts his own judicial admission at the status conference on June 2, 2021, in which he made "absolutely clear" that the coal company's position was not "based upon any level of competence" of the Hearing Examiner because "there is no question, your

Honor, but what you're a competent lawyer." Video of Status Conference, at 05:12 to 05:34 (June 2, 2021).

Signal Peak's request and Mr. Martin's affidavit have no merit and should be denied.

## **BACKGROUND**

Petitioner Montana Environmental Information Center (MEIC) filed this contested case in August 2016. Not. of Appeal (Aug. 11, 2016). The parties engaged in extensive discovery with minimal involvement of any hearing examiner. The discovery process ultimately resulted in Signal Peak suing MEIC and two of its members, in 2018, in an attempt to enforce subpoenas for internal communications and depositions. *See Signal Peak Energy, LLC, v. Mont. Env'tl. Info. Ctr.*, No. DV 18-869, at 1 (Mont. 13th Jud. Dist. Ct. Nov. 14, 2018) (attached as Exhibit 1). This derivative litigation appeared to be strategic litigation against public participation (SLAPP). *Id.* at 9 (noting indication that "Signal Peak is using litigation to retaliate against their [MEIC and their members'] opposition to Signal Peak's mining operations"). In November 2018, the district court ruled against Signal Peak, holding that the coal company's subpoenas violated the constitutional rights of MEIC and its members. *Id.* at 11-13. On appeal, in June 2020, the Montana Supreme Court dismissed Signal Peak's suit altogether, holding that the company improperly filed the suit in the first place without allowing the hearing



examiner to address the disputed subpoenas. *Signal Peak Energy, LLC, v. Mont. Env'tl. Info. Ctr.*, DA 19-299 (June 23, 2020) (attached as Exhibit 2). Thus, this contested case was substantially delayed by Signal Peak's improvidently filed SLAPP suit.

Meanwhile, on May 31, 2019, after the case was assigned to its third hearing examiner for pretrial matters (with no objection from Signal Peak), the Board addressed whether the merits of this case should be reviewed first by a hearing examiner, who would produce proposed findings and conclusions. BER Tr. at 33:17 to 34:15 (May 31, 2019).<sup>1</sup> Erstwhile Board Member Chris Tweeten, an experienced lawyer of administrative law, recommended "using our Hearing Examiner to make proposed decisions" as an "efficient way to handle these matters." *Id.* at 34:25 to 35:16. Mr. Tweeten explained that he "value[d] the input of Counsel with respect to how these arguments ought to be analyzed, as I think important advice for the Board in how to proceed." *Id.* at 35:17-22. He then moved the Board to refer the "pending summary judgment motions" to a hearing examiner to make a "proposed decision." *Id.* at 35:23 to 36:3; *id.* at 37:21 to 38:3.

Undersigned counsel for MEIC explained to the Board that granting jurisdiction to a hearing examiner to issue proposed rulings would result in a two-tiered review

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<sup>1</sup> This transcript is available at <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings>.

process, with two rounds of briefing. *Id.* at 40:20 to 41:14. Mr. Tweeten, however, maintained that “it’s useful for the Board members to have the viewpoint of our Counsel with respect to how contested matters ought to be resolved, and to receive that in the form of a proposed decision,” which is “most consistent with the statutes in MAPA that deal with receiving advice from a Hearing Examiner.” *Id.* at 47:15-23.

Counsel for Signal Peak in turn agreed with Mr. Tweeten’s proposal for the two-tiered review process, in which the hearing examiner would issue a proposed ruling: “[M]y view is akin to Mr. Tweeten’s.” *Id.* at 53:1-3 (statement of Signal Peak’s attorney, Mr. Martin). Signal Peak then went further and argued that given the technical legal issues involved in this case, the company believed it would be preferable for a hearing examiner to issue a proposed decision for the Board to review: “There are issues, technical legal issues, that you may actually benefit from having Ms. Clerget opine on. We have some res judicata issues in this case. They’re a bit thorny, I have to admit. And it might be useful for the Board’s purposes to have Ms. Clerget explain those issues and opine on them in the first instance.” *Id.* at 53:16-23. Signal Peak raised no concerns about the efficiency of the two-tiered review process. In response to Signal Peak’s urging, the Board voted to “assign the case to Sarah [the Hearing Examiner] *for its entirety*.” *Id.* at 56:9-19 (emphasis added).

After former Hearing Examiner Clerget issued a ruling on the pending summary judgment motions, MEIC stated that it believed that the Board was required to review that proposed ruling, given Mr. Tweeten's motion to refer only the "pending summary judgment motions" to the hearing examiner for a proposed decision. The Parties attended a status conference on this issue. At the status conference, Signal Peak again insisted that jurisdiction should remain with the hearing examiner to issue a proposed decision following a hearing, as the most efficient course. Audio Recording of Status Conference 10:25 to 11:26 (Nov. 26, 2019). At the ensuing Board meeting in December 2019, the Board clarified that it had intended to assign the case in its entirety to a hearing examiner, "through the final recommended decision or the FOFCOL [proposed findings of fact and conclusions of law]." BER Tr. at 23:21 to 24:20 (Dec. 13, 2020).<sup>2</sup> Erstwhile Member Dexter Busby, an environmental scientist, then moved to assign the entirety of the case to the hearing examiner, and the motion passed unanimously. *Id.* at 25:3 to 26:2.

Hearing Examiner Clerget presided over the ensuing hearing from August 18-21, 2020. The hearing was conducted via zoom and a video recording of the hearing was made. The Parties then submitted proposed findings and conclusions

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<sup>2</sup> This transcript is also available at <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings>.

on December 12, 2020. In January 2020, Ms. Clerget took a position with Respondent Department of Environmental Quality (DEQ). On January 21, 2021, Andrew Cziok briefly assumed jurisdiction as Hearing Examiner and provided notice to all Parties. On February 5, 2020, the Parties submitted responses to the proposed findings and conclusions. On March 31, 2021, Hearing Examiner Caitlin Buzzas assumed jurisdiction and provided notice to all parties. From the date Examiner Buzzas assumed jurisdiction, she has been working diligently toward preparation of the proposed findings and conclusions requested by the Board. Video of Status Conference, at 00:40 to 00:58 (June 2, 2021).

Nearly two months after Examiner Buzzas assumed jurisdiction, on May 27, 2021, one day before the submittal deadline for the Board's June 11, 2021 meeting,<sup>3</sup> Signal Peak filed its "request for the Board of Environmental Review to reclaim jurisdiction." This request cites no statutory authority for its unorthodox proposal and includes no supporting materials. The gist of the request is that it would be inefficient for Examiner Buzzas to begin reviewing the record from step one and redundant for a hearing examiner and the Board to both review the record, i.e., the two-tiered review process. Signal Peak now argues that this case does not

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<sup>3</sup> See Board Calendar, *available at* <http://deq.mt.gov/Portals/112/DEQAdmin/BER/Documents/BERCalendars/2021Calendar.pdf>.

involve technical issues that the Board would benefit from having the hearing examiner opine on. Finally, Signal Peak asserts that Examiner Buzzas does not appear to have applicable expertise, but the Board does. Signal Peak provides no evidence beyond its *ipse dixit* to support its assertions.

On June 2, 2021, Examiner Buzzas convened a status conference. At the status conference the Hearing Examiner informed the Parties that since her appointment nearly two months earlier, she has been working “quite diligently” on the proposed findings and conclusions and was “fairly close” to a proposed decision, which could be issued as soon as July (a matter of weeks). Video of Status Conference, at 00:40 to 00:58, 25:08-25:25 (June 2, 2021). Signal Peak stated that it appreciated the Hearing Examiner’s diligence but maintained that its concern was with the “two different layers of review,” which would entail two rounds of briefing. *Id.* at 03:10 to 03:48. Nevertheless, Signal Peak wanted to make “absolutely clear” that its position was not based on any concerns of “some sort of bias” or “based upon any level of competence” of the hearing examiner because “there is no question, your Honor, but what you’re a competent lawyer.” Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Noting the Hearing Examiner’s published work in the field of environmental law, Signal Peak wanted to be clear that the company did not “assert anything of that nature.” *Id.* at 05:30 to 05:50.

The following day, on June 3, 2021, Examiner Buzzas emailed the Parties and stated that MEIC would have until June 14, 2021, to file its response to Signal Peak's motion. On June 9, 2021, Signal Peak's counsel, Mr. Martin, filed a document entitled "2-4-211(4), MCA [sic] Affidavit of John C. Martin." The affidavit again requests the Board to "reclaim" jurisdiction in this case. Without any citation to evidence, Mr. Martin now asserts "[u]pon information and belief" that Examiner Buzzas lacks necessary expertise and that, accordingly, she should be disqualified pursuant to § 2-4-611(4), MCA.

## DISCUSSION

### **I. Signal Peak is judicially estopped from arguing that the Board should assume jurisdiction for the sake of efficiency.**

Judicial estoppel is intended to "prevent the use of inconsistent assertions and to prevent parties from playing fast and loose with the courts." *Nelson v. Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139.

Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

*Id.* (quoting 28 Am. Jur. 2d Estoppel and Waiver § 74 (2000)). Thus, judicial estoppel "binds a party to her judicial declarations, and precludes her from taking a position inconsistent with them in a subsequent action or proceeding." *Id.*, ¶ 22.

Here, the principal basis for Signal Peak’s request is, as articulated by Mr. Martin at the status conference, the “two different layers of review,” first by the Hearing Examiner and subsequent by the Board, which would entail two rounds of briefing. Video of Status Conference, at 03:10 to 03:48 (June 2, 2021). However, Signal Peak twice successfully argued that jurisdiction in this matter should be assigned to a hearing examiner, *despite* this two-tiered review process, including two rounds of briefing. BER Tr. at 33:17 to 34:15, 53:1-23 (May 31, 2019); Audio Recording of Status Conference 10:25 to 11:26 (Nov. 26, 2019) (insisting that jurisdiction remain with hearing examiner through preparation of proposed decision and admitting that Signal Peak previously opposed sending the matter directly to the Board). Thus, having twice prevailed on arguments that jurisdiction in this matter should be assigned to a hearing examiner despite the two-tiered review process contemplated by the Montana Administrative Procedure Act (MAPA), § 2-4-621(1)-(4), MCA, Signal Peak may not now be heard to argue that the Board should “reclaim” jurisdiction due to the supposed inefficiency of this two-tiered review process. *Nelson*, ¶¶ 20-22. The required “modicum of consistency” precludes the coal company from advancing this argument, which is fatal. *Id.*, ¶ 20 (quoting 28 Am. Jur. 2d Estoppel and Waiver § 74 (2000)).

## **II. The substance of Signal Peak’s motion has no merit.**

### **A. Signal Peak’s improper interlocutory motion is not supported by any law.**

Despite its repeated and successful prior arguments that the Board should assign jurisdiction of this matter to a hearing examiner, Signal Peak now requests that jurisdiction be returned to the Board because the company has ostensibly reevaluated the efficiencies of the process. Request for Board to Reclaim Jurisdiction at 4-7. But Signal Peak’s shifting predilections are no basis for an interlocutory request for the Board to reassume jurisdiction that the Board has repeatedly assigned to a hearing examiner. *Cf.* Mont. R. Civ. P. 59(e) (grounds for altering or amending a judgment); *Signal Perfection, Ltd. v. Rocky Mountain Bank-Billings*, 2009 MT 365, ¶ 13, 353 Mont. 237, 224 P.3d 604 (explaining that analogous motion to amend judgment is no basis for litigant taking second bite at the proverbial apple). Notably, Signal Peak cites no statutory basis for its unorthodox request. The coal company cites the provisions of MAPA that provide for the two-tiered review process that results when a case is assigned to a hearing examiner. *Id.* at 4-5 (citing §§ 2-4-621, 622, MCA). Those provisions, however, do not establish an interlocutory process for returning jurisdiction to the Board.

Signal Peak also cites § 2-4-611(1), MCA, which provides for the appointment of hearings examiners. However, beyond the company’s hypocritical grousing that “[i]t is unfair to the Parties and the Replacement Hearing Examiner



and contrary to § 2-4-611(1), MCA to proceed with two layers of review,” Request for Board to Reclaim Jurisdiction at 6-7, the company cites nothing in this provision that permits the Board to reconsider its prior decisions to confer jurisdiction on a hearing examiner. Section 2-4-611(1), MCA, allows the Board to assign cases to hearing examiners, as here, with “due regard to the expertise required.” However, Signal Peak’s counsel, Mr. Martin, made “absolutely clear” at the status conference that the coal company was not challenging Ms. Buzzas’s qualifications. Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Counsel’s statements, such as these, are binding. *E.g., Butynski v. Springfield Terminal R. Co.*, 592 F.3d 272, 277 (1st Cir. 2010).

Finally, in its conclusion, Signal Peak cites § 2-4-611(4), MCA, without explanation or elaboration. While this provision allows for disqualification of a hearing examiner for bias or disqualification by law, such allegations must be raised “not less than 10 days *before* the original date set for the hearing.” *Id.* (emphasis added). While Signal Peak likely intends to stretch the meaning of this statute to allow it to raise such claims at a later time *after* the hearing, the Board (like the Hearing Examiner) is not free to “insert what has been omitted or omit what has been inserted” in a statute. § 2-4-101, MCA. Because this provision limits such requests to the period prior to a hearing, § 2-4-611(4), MCA, is inapplicable. Moreover, Mr. Martin made clear at the status conference that Signal Peak was not

raising any arguments related to the bias or competence of Examiner Buzzas.

Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Signal Peak is bound by the assertions of its counsel. *Butynski*, 592 F.3d 277.

In sum, because Signal Peak cites no authority other than its own reevaluation of the efficiency of using a hearing examiner, its “request” for the Board to “reclaim” jurisdiction is without any legal basis and should, therefore, be denied. Such baseless motions practice taxes the resources of the Parties and the Board. *See* Mont. R. Civ. P. 1.

**B. Signal Peak’s arguments about efficiency have no merit, given the Hearing Examiner’s diligent review of this case and impending proposed ruling.**

In addition to the foregoing, Signal Peak’s newfound arguments about the supposed efficiency of returning jurisdiction to the Board after a hearing examiner has reviewed the record but prior to a proposed decision are untenable as a matter of fact. Signal Peak premises its argument on the supposed inefficiency of having a hearing examiner start at “square one” or “start from zero” in reviewing this case. Request for Board to Reclaim Jurisdiction at 3, 4, 5. Consequently, the coal company now argues that it will “expedite” the case resulting in a final order “issued in a timely fashion.” *Id.* at 5-6.<sup>4</sup> Notably, Signal Peak chose to delay for

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<sup>4</sup> It bears noting that much of the delay in resolution of this case resulted from Signal Peak’s improperly filed SLAPP suit filed against MEIC and its members.

nearly two months, before filing its “request” on the eve of the Board’s June 11, 2021.

At present, it is clear from Examiner Buzzas’s statements at the status conference that she has been working “quite diligently” on this matter and that a proposed order will likely be issued before the Board’s next meeting in August, in a matter of weeks. Video of Status Conference, at 00:40 to 00:58, 25:08-25:25 (June 2, 2021). As such, Signal Peak’s motion will, if anything, impede efficient resolution of this matter by wasting the months of effort Examiner Buzzas has already put into this case and requiring the Board’s seven members, five of whom were just recently appointed, to begin review of the voluminous record in this case. Signal Peak is requesting a monumental waste of resources. *See* Mont. R. Civ. P. 1 (rules must be construed to secure “just, speedy, and inexpensive determination of every action and proceeding”). Moreover, the redundancy that Signal Peak asserts “may” occur is only possible, not probable. *See* Request for Board to Reclaim Jurisdiction at 5; *cf.* at 6 (stating inaccurately that the Board would be “require[ed]” to review the entire record).<sup>5</sup> As Signal Peak knows, if the Board

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<sup>5</sup> Signal Peak asserts that the Hearing Examiner will somehow lack information “on the prior hearing examiner’s procedural and evidentiary rulings and without the ability to call forth additional information or argument from the parties.” Request for Board to Reclaim Jurisdiction at 3. But the Hearing Examiner does have access to all prior procedural and evidentiary rulings. And, regardless who is hearing examiner, no one can reopen the hearing record to “call forth additional

agrees with the Hearing Examiner's decision, it need not conduct a "review of the complete record." § 2-4-621(4), MCA. And, again, Signal Peak previously agreed with former Member Tweeten that it would be *more* efficient for a hearing examiner to review the record first and issue a proposed ruling. BER Tr. at 47:15-23, 53:1-23 (May 31, 2019). The coal company's shifting positions warrant skepticism.

Signal Peak further contradicts itself when it writes that "[t]his is not a case where the Board requires technical or other support from a Hearing Examiner to distill the scientific or legal questions at issue." Request for Board to Reclaim Jurisdiction at 7. But previously counsel for Signal Peak made the opposite argument: "There are issues, technical legal issues, that you may actually benefit from having Ms. Clerget [the Hearing Examiner] opine on. We have some res judicata issues in this case. They're a bit thorny, I have to admit. And it might be useful for the Board's purposes to have Ms. Clerget explain those issues and opine on them in the first instance." BER Tr. at 53:16-23 (May 31, 2019). Again, the coal company cannot have it both ways.

Finally, Signal Peak argues that the Board should now "reclaim" jurisdiction because of the Board's expertise as "hydrologists, environmental scientists, and

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information." Further, if the hearing examiner desires further oral argument, that option is available. As such, Signal Peak's argument has no merit.

mining lawyers.” Request for Board to Reclaim Jurisdiction at 7. But that was also the case in 2019 when Signal Peak took the opposite position, arguing that the Board should confer jurisdiction on a hearing examiner because it would be helpful to the Board. By law the Board must have members with expertise in hydrology and environmental sciences. § 2-5-3502(2), MCA. As such, this is no valid basis for Signal Peak’s ever-evolving arguments. *Nelson*, ¶¶ 20-22.

### **III. Signal Peak’s attorney’s unsupported attack on the Hearing Examiner’s expertise is both improper and false.**

Thirteen days after filing its “request” for the Board to “reclaim” jurisdiction and two workdays before the due date of MEIC’s response brief, Signal Peak’s attorney, Mr. Martin, filed an affidavit raising still more novel (and inconsistent) arguments for the Board to “reclaim” jurisdiction. Martin Aff. (June 9, 2021). This continued maneuvering is improper, unsupported, and without merit.

First, Mr. Martin asserts that the affidavit is premised on the disqualification provisions of § 2-4-611(4), MCA. Martin Aff., ¶ 26. But as noted, any affidavit under this provision “must be filed not less than 10 days before the original date set for the hearing.” § 2-4-611(4), MCA. The hearing is nearly a year past. As such, Mr. Martin’s affidavit is untimely and therefore procedurally barred by the plain language of the very statute it cites.

Second, Mr. Martin now asserts that Examiner Buzzas should be disqualified because she supposedly lacks “experience with underground mining,

the Montana Strip and Underground Mining and Reclamation Act, MAPA, the technical issues involved in this case, or the unwritten bases for evidentiary rulings<sup>[6]</sup> made by Ms. Clerget in the hearing.” Martin Aff., ¶ 25.<sup>7</sup> But Mr. Martin is once more at war with his own prior statements. At the status conference, Mr. Martin cited one of Examiner Buzzas’s publications in environmental law to support his “absolutely clear” assertion that that the coal company’s position was not “based upon any level of competence” of the hearing examiner because “there is no question, your Honor, but what you’re a competent lawyer.” Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Signal Peak is bound by Mr. Martin’s judicial admission and may not now shift its position with respect to Examiner Buzzas’s qualifications. *Butynski*, 592 F.3d 277; *Nelson*, ¶¶ 20-22.

Third, Mr. Martin provides absolutely zero evidence for his attacks on the qualifications of Examiner Buzzas, but only cites to his “information and belief.” Martin Aff., ¶ 24. Nor does he provide any evidence beyond vague “information and belief” that Board members “have extensive experience with the requirements

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<sup>6</sup> It is not clear what Signal Peak means by the “unwritten bases for evidentiary ruling.” There is a video recording of the hearing, so any asserted basis for the prior Hearing Examiner’s ruling will be apparent. It is not clear, however, that any such rulings are presently in dispute (Signal Peak cites nothing specific).

<sup>7</sup> Section 2-4-611(4) does not provide for disqualification for lack of expertise, and Signal Peak presents no argument that the Hearing Examiner is somehow disqualified “by law.” This is another basis for rejecting Mr. Martin’s arguments.

of MAPA and MSUMRA.” *Id.*, ¶ 25. Such unsubstantiated attacks on the competence of a Hearing Examiner, like any judicial officer, are improper. *Folsom v. City of Livingston*, 2016 MT 238, ¶¶ 37-40, 385 Mont. 20, 31, 381 P.3d 539, 548 (Shea, J., concurring).

Finally, even cursory review of the Board’s prior meetings and legal publications would demonstrate that, contrary to Mr. Martin’s unsubstantiated allegations, Examiner Buzzas is abundantly qualified to serve as a hearing examiner in this matter. In April the Montana Department of Justice Agency Legal Services Bureau notified the Board of the qualifications of its Hearing Examiners, detailing Examiner Buzzas’s extensive experience in “science and environmental policy,” her service on the Public Lands and Resources Law Review at the University of Montana School of Law, and her prior experience as a hearing administrator.<sup>8</sup> And Mr. Martin—when he previously admitted Examiner Buzzas’s qualifications—stated that he apparently read at least one of Examiner Buzzas’s scholarly publications on environmental law.<sup>9</sup> Video of Status Conference, at 05:12

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<sup>8</sup> Board of Environmental Review Agendas and Minutes, <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings> (follow “AGENDA ITEM I.B” for April 23, 2021, meeting).

<sup>9</sup> *E.g.*, Caitlin Buzzas, *Natural Resources Defense Counsel, Inc. v. Pritzker*, Public Land & Res. L. Rev., Vol. 8, Article 8 (2016), *available at* [https://scholarship.law.umt.edu/plrlr/vol0/iss7/8/?utm\\_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F8&utm\\_medium=PDF&utm\\_campaign=PDFC](https://scholarship.law.umt.edu/plrlr/vol0/iss7/8/?utm_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F8&utm_medium=PDF&utm_campaign=PDFC) overPages; Caitlin Buzzas, *EarthReports, Inc. v. FERC*, Public Land & Res. L.

to 05:34 (June 2, 2021). It is thus abundantly clear that Ms. Buzzas is a highly qualified hearing examiner. Mr. Martin's unsupported attacks have no merit and, indeed, are contradicted by his own prior statements.

### **CONCLUSION**

In sum, Signal Peak's "request" and Mr. Martin's affidavit have no merit and should be denied.

Respectfully submitted this 14th day of June, 2021.

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Rev., Vol. 8, Article 21 (2017), *available at*  
[https://scholarship.law.umt.edu/plrlr/vol0/iss7/21/?utm\\_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F21&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarship.law.umt.edu/plrlr/vol0/iss7/21/?utm_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F21&utm_medium=PDF&utm_campaign=PDFCoverPages).



## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was delivered  
via email to the following:

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Dated: June 14, 2021.

/s/ Shiloh Hernandez  
Shiloh Hernandez



1 Signal Peak's subpoenas broadly required Pfister and Charter to produce all  
2 communications, including electronic communications, that they have had with anyone  
3 or any entity about the impact that Signal Peak's underground mining or mining by any  
4 other company has had on their land's water resources. The subpoenas also require  
5 Pfister and Charter to submit to depositions. MEIC, Pfister, and Charter moved to  
6 quash the subpoenas on several grounds, including whether the subpoenas violated  
7 MEIC's, Pfister's and Charter's constitutional rights. The Board's Hearing Examiner,  
8 Sarah Clerget, questioned whether the Board had jurisdiction to decide the  
9 constitutional issues raised by the subpoenas. The parties agree that the constitutional  
10 issues must be decided in District Court. Each party has moved for summary judgment  
11 on whether Signal Peak's subpoenas violate the Defendants' constitutional rights.  
12  
13

## 14 DISCUSSION

### 15 I. Jurisdiction

16 In *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-36, 664 P.2d 316, 318  
17 (Mont. 1983), the Montana Supreme Court held that, "Constitutional questions are  
18 properly decided by a judicial body, not an administrative official, under the  
19 constitutional principle of separation of powers." Whether Signal Peak's subpoenas  
20 violate the Defendants' constitutional rights presents a constitutional question that must  
21 be decided by a court. This Court has both subject matter jurisdiction and personal  
22 jurisdiction to decide this question.  
23

### 24 II. Arguments

25 Defendants MEIC, Pfister, and Charter argue that Signal Peak's subpoenas  
26 violate their First Amendment rights to free speech, assembly, and to petition to redress  
27

1 governmental action under the United States Constitution, Pfister and Charter are  
2 MEIC members. They also own ranches that have been or may soon be adversely  
3 affected by Signal Peak's underground mining operations. They are particularly  
4 concerned about how underground mining will diminish the quantity and quality of the  
5 water they use for living and raising livestock. Pfister and Charter have been vocal  
6 opponents of underground mining for many years, even before Signal Peak took over  
7 mining operations near their property. They contend that Signal Peak's subpoenas  
8 seek irrelevant, inadmissible information and are designed to deter them from  
9 exercising their First Amendment rights.  
10

11 Signal Peak argues: (1) that its subpoenas are within the bounds of acceptable  
12 discovery; (2) that the subpoenas have not and will not discourage the defendants from  
13 exercising their First Amendment rights; and (3) Signal Peak needs the information to  
14 adequately address the issues MEIC now raises in its appeal before the Board. Signal  
15 Peak requests this Court to declare that the subpoenas issued to Pfister and Charter do  
16 not violate their or MEIC's rights under the United States or Montana Constitution.  
17

### 18 **III. The Scope of Proceedings Before the Board.**

19 The Board's review of DEQ's decision to issue a mining permit to Signal Peak is  
20 confined to the record developed before the DEQ. As the Board ruled in MEIC's first  
21 appeal of Signal Peak's mining permit, Signal Peak's initial permit application, Signal  
22 Peak is not entitled to supplement the record with evidence that was not before the  
23 DEQ when it decided to issue Signal Peak's mining permit:  
24

25 65. DEQ and SPE contend that DEQ should be permitted to  
26 support the adequacy of its CHIA and permitting decision with extra-  
27 record evidence, as well as with arguments and analyses that were never  
articulated in the CHIA. As support for its position, DEQ cites *Montana*



1 *Environmental Information Center v. DEQ*, 2005 MT 96, 326 Mont. 502,  
2 112 P.3d 964, and Mont. Code Ann. § 2-4-623(1).

3 66. Under MSUMRA, DEQ's CHIA alone "must be sufficient to  
4 determine, for purposes of a permit decision, whether the proposed  
5 operation has been designed to prevent material damage to the  
6 hydrologic balance outside the permit area." ARM 17.24.314(5). Thus,  
7 the only relevant analysis is that contained within the four corners of the  
8 CHIA and the only relevant facts are those concluded by the agency in the  
9 permitting process before the agency makes its permitting decision.

10 67. Further support for the Board's conclusion is found in ARM  
11 17.24.405(6), which requires DEQ issue written findings based on record  
12 evidence to support its permitting decision. The written findings must be  
13 shared with the interested public. *Id.* 17.24.405(5). These provisions,  
14 which require DEQ to provide specific reasons for its permitting decision  
15 (including those in the CHIA) based on evidence "compiled by the  
16 department," would be rendered a dead letter or hollow formality if, in a  
17 contested case proceeding, DEQ were permitted to present all new  
18 evidence, analysis, and argument to support its permitting decision that  
19 was never compiled in the record, articulated in its CHIA, or made  
20 available to the public. Mont. Code Ann. §1-2-101 (laws should not be  
21 construed in a way that renders other provisions meaningless); see also  
22 *NRDC v. OSM*, 89 I.B.L.A. 1, 29 (1985) ("The recitation of statutory  
23 findings is insufficient if the permit record does not affirmatively  
24 demonstrate that OSM [U.S. Office of Surface Mining] made a [CHIA] of  
25 all anticipated mining in the area and the proposed operation has been  
26 designed to prevent material damage to the hydrologic balance outside  
27 the permit area."); *Id.* At 32 (stating that only the regulatory authority's  
CHIA may satisfy the CHIA requirement).

28 68. Allowing DEQ to present new evidence, analysis, and  
29 argument to support its CHIA and permitting decision would also negate  
30 MSUMRA's goals of public participation. As noted, DEQ must provide the  
31 interested public with written findings based on record evidence  
32 demonstrating, among other things, that "cumulative hydrologic impacts  
33 will not result in material damage to the hydrologic balance outside the  
34 permit area." ARM 17.24.405(5), (6)(c). These provisions allow the public  
35 to oversee DEQ's permitting decision and decide, in turn, whether to  
36 pursue an appeal and contested case. *Id.* 17.24.425(1). The public's  
37 ability to rely on DEQ's express written findings and analysis supporting its  
38 permitting decision is for naught if at the contested case stage, the agency  
39 is permitted to present extra-record evidence and manufacture novel  
40 analysis and argument. See *Friends of the Wild Swan v. DNRC*, 2000 MT  
41 209, ¶ 35, 301 Mont. 1, 6 P.3d 972 ("The public is not benefited by  
42 reviewing an EIS [environmental impact statement] which does not



1 explicitly set forth the actual cumulative impacts analysis and the facts  
2 which form the basis for the analysis.”); cf. *NRDC*, 89 I.B.L.A. at 96-97  
3 (Frazier, Admin. J., concurring)(“Like an environmental impact statement  
4 (and for similar reasons), the [CHIA] must ‘explain fully its course of  
5 inquiry, analysis, and reasoning,’...” (quoting *Minn. Pub. Interest*  
6 *Research Group v. Butz*, 541 F.2d 1292, 1299-300 (9<sup>th</sup> Cir. 1976))). In  
effect, DEQ’s position would allow the agency to conceal its actual  
analysis and evidence until a member of the public makes the significant  
investment necessary to engage in extensive litigation in a contested case  
proceeding with the agency.

7  
8 69. The Board notes that while DEQ asserts the right to provide  
9 new evidence, analysis, and argument to support its CHIA, in response to  
10 MEIC’s discovery requests about the persistence and expected extent of  
11 groundwater pollution, DEQ repeatedly stated that the relevant  
12 information was limited to the administrative record existing at the time of  
13 the permitting decision and that DEQ was “unable” to provide any  
14 information about anticipated groundwater pollution impacts beyond that  
contained in the record documents. DEQ Discovery Resp. at 20-22. If, as  
DEQ asserted in its discovery responses, the only relevant evidence is  
that contained in the permitting record, then extra-record evidence and  
novel analyses are also not relevant to the determination of the validity of  
DEQ’s CHIA.

15 70. This is not to say that DEQ is limited in its permitting  
16 defense to presenting the administrative record to the Board and saying  
17 no more. DEQ’s counsel may surely present argument to explain and  
18 demonstrate that the evidence before the agency at the time of its  
19 permitting decision and the analysis within the CHIA satisfy applicable  
20 legal standards. **What the agency may not do is present newly  
21 developed evidence that was not before the agency at the time of its  
22 decision or analysis that was not contained within the CHIA.** See  
ARM. 17.24.314(5) (stating that the CHIA “must be sufficient” for the  
material damage determination); *Id.* 17.24.405(6)(c) (stating that the  
permitting decision must be based on findings “on the basis of information  
set forth in the application or information otherwise available that is  
compiled by the department”). (emphasis supplied)

23 *In Re Bull Mountain Mine No. 1*, No. BER 2013-07 SM at 56-59, (Jan. 14, 2016).

24 DEQ issued the mining permit that MEIC has appealed in this case on  
25 July 16, 2016. Signal Peak’s subpoenas were issued on March 30, 2018, over a  
26  
27

1 year and a half after the record DEQ relied upon in making its decision had been  
2 made.

#### 3 **IV. Constitutional Protections**

4 The First Amendment protects the rights of free speech, assembly, and to  
5 petition to redress governmental action. *NAACP v. Alabama*, 357 U.S. 449, 460-66  
6 (1958). Those same rights are also protected by Mont. Const. art. II, § 6 (freedom of  
7 assembly); Mont. Const. art. II, § 7 (freedom of speech, expression, and press); Mont.  
8 Const. art II, § 8 (right of participation). Montana's Constitution also expressly protects  
9 the right to privacy: "The right of individual privacy is essential to the well-being of a free  
10 society and shall not be infringed without the showing of a compelling state interest."  
11 Mont. Const. art. II, § 10.  
12

13  
14 MEIC, Pfister, and Charter assert that Signal Peak's subpoena violates their  
15 constitutional rights to free speech, assembly, and to advocate against DEQ's issuance  
16 of an underground mining permit to Signal Peak. They argue that the subpoenas  
17 served upon them by Signal Peak were triggered by MEIC's current appeal and are  
18 intended to discourage them from continuing to speak against Signal Peak's mining  
19 operations and from being MEIC members.  
20

21 To support their claims, Pfister, Charter, and Jim Jensen, MEIC's Executive  
22 Director, have submitted Declarations. Those Declarations sufficiently establish that  
23 Signal Peak's subpoenas have had and will continue to have a chilling effect on MEIC  
24 and its members by seeking their private communications, subjecting them to  
25 expensive and time-consuming litigation, and targeting them for advocating against  
26 Signal Peak's mining operations. The Court finds that the Declarations satisfy the  
27



1 Defendants' initial burden of establishing a *prima facie* case that the discovery  
2 requested by Signal Peak will have a chilling effect on the Defendants' Constitutional  
3 rights of free speech, assembly, to petition for redress of governmental action, and  
4 privacy. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9<sup>th</sup> Cir. 2010).

5  
6 The Pfister and Charter Declarations demonstrate that the documents and  
7 depositions sought by Signal Peaks subpoena: (1) would discourage Pfister and  
8 Charter from communicating with MEIC and other MEIC members about coal mining  
9 and the DEQ's oversight; (2) would deter them for speaking publicly against Signal  
10 Peak or other business interests that threaten to harm the environment; (3) would  
11 diminish their willingness to continue as MEIC members; (4) would likely subject them  
12 to retaliation and/or public hostility from pro-mining individuals and groups; and (5)  
13 would threaten their livelihood as ranchers.

14  
15 MEIC's Declaration demonstrates that Signal Peak's subpoenas: (1) will  
16 significantly impair MEIC's ability to attract and maintain members; (2) will decrease its  
17 ability to protect the environment from harmful energy development; (3) will chill open  
18 communication between MEIC and its members; and (4) will cause other MEIC  
19 members to refuse to speak publicly against Signal Peak's mining operations.

20  
21 It is well-established that, "Effective advocacy of both public and private points of  
22 view, particularly controversial ones, is undeniably enhanced by group association."  
23 *NAACP v. Alabama*, 357 U.S. 1, 15 (1976). Via the Fourteenth Amendment, the First  
24 Amendment applies to state action such as the discovery sought by Signal Peak's  
25 subpoena. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Perry*, 591 F.3d at 1159-60.  
26 Once a *prima facie* showing is made that such discovery "will result in (1) harassment,  
27

1 membership withdrawal, or discouragement of new members, or (2) other  
2 consequences which objectively suggest an impact on, or 'chilling of', the members'  
3 associational rights," then only a compelling state interest and the absence of any less  
4 restrictive means to obtain the information will suffice to justify infringing upon First  
5 Amendment rights. *Perry*, 591 F.3d at 1160-61.

7 **V. Compelling Interest and Unavailability.**

8 To prevail, Signal Peak must demonstrate a compelling need for the information  
9 it has subpoenaed and that the information is unavailable elsewhere. Signal Peak must  
10 show more than whether the information is discoverable under the Rule 26(b)(1),  
11 M.R.Civ.P. Rule 26(b)(1) only requires that the information sought be reasonably  
12 calculated to lead to the discovery of admissible evidence. To infringe upon  
13 constitutional rights, however, Signal Peak must demonstrate that the information  
14 sought through discovery is not only highly relevant, but that the information is not  
15 available from another source. *Id.* at 1161-62.

17 The Court finds that the information Signal Peak seeks to discover by subpoena  
18 is not discoverable under Rule 26(b)(1), is not highly relevant, and is available from  
19 another source. The Board's review of DEQ's decision to issue a mining permit to  
20 Signal Peak is confined to the record that existed when the DEQ made its decision.  
21 Through discovery, Signal Peak seeks to supplement that record with additional facts it  
22 hopes to learn through the subpoenas. In a previous ruling, however, the Board has  
23 made it quite clear that it will not permit Signal Peak or any other party to supplement  
24 the record on appeal. Signal Peak's subpoenas will not lead to the discovery of  
25 admissible evidence because the factual record has already been made.  
26  
27

1 Nor can the information Signal Peak now seeks to discover from Pfister and  
2 Charter be highly relevant or unavailable from another source. To the extent the DEQ  
3 considered or relied upon any information Pfister or Charter provided, it is already part  
4 of the record or in DEQ's possession. Signal Peak either already has this information  
5 or can readily obtain it from the DEQ. To the extent the DEQ did not rely upon any  
6 information from Pfister or Charter in making its decision, any information they might  
7 have is irrelevant.  
8

9 Finally, on December 6, 2017, in a Status Report filed with the Hearing  
10 Examiner, Signal Peak represented that all discovery had been completed except for  
11 expert depositions of Peter Mahrt, Mark Hudson, and Dr. Michael Nicklin. Depositions  
12 of Pfister and Charter were not mentioned. Yet, as set forth in Signal Peak's brief,  
13 Signal Peak has been acutely aware of Pfister's and Charter's pre-permit and post-  
14 permit opposition to Signal Peak's mining operations. If Signal Peak genuinely believed  
15 that Pfister or Charter had discoverable information that was highly relevant to MEIC's  
16 appeal, then Signal Peak would not have represented to the Hearing Examiner in  
17 December 2017 that only three expert depositions remained to be taken. The timing of  
18 Signal Peak's subpoenas and this lawsuit leads credence to the Defendants' claims  
19 that Signal Peak is using litigation to retaliate against their opposition to Signal Peak's  
20 mining operations.  
21  
22

23 **VI. State Constitutional Protections.**

24 Though the parties have focused their arguments on the constitutional  
25 protections guaranteed under the First Amendment, the Court finds that the  
26 Defendants' rights to privacy, freedom of speech and assembly, and participation under  
27



1 Montana's Constitution are impermissibly infringed by Signal Peak's subpoenas.

2 Montana's Constitution "affords citizens broader protection of their right to  
3 privacy" than the U.S. Constitution. *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d  
4 112, 121 (1997). Montana's Constitution expressly recognizes and protects the right to  
5 privacy. Mont. Const. art. II, § 10. As a result, the Montana Supreme Court has held  
6 that an individual's privacy shall not be infringed without the showing of a compelling  
7 state interest. *State v. Bullock*, 272 Mont. 361, 383, 901 P.2d 61, 75-76 (1995).

9 Under Montana's Constitution, the information subpoenaed by Signal Peak is  
10 within the Defendants' right to privacy if: (1) the person(s) claiming the right have a  
11 subjective or actual expectation of privacy; and (2) society is willing to recognize that  
12 subjective or actual expectation as reasonable. *Bullock*, 272 Mont. at 375, 901 P.2d at  
13 70 (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967)). First, the  
14 Court finds that the Defendants have an actual expectation of privacy in their  
15 communications with MEIC and its members because those communications occurred  
16 in private. *E.g.*, *State v. Solis*, 214 Mont. 310, 314, 693 P.2d 518, 520 (1984).

18 Second, society recognizes that Defendants' expectation of privacy is  
19 reasonable. Courts have routinely denied discovery requests that would have a chilling  
20 effect on an advocacy organization's ability to communicate with or retain members.  
21 *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (granting protective order  
22 against discovery of an advocacy organization's "internal campaign communications");  
23 *Lighthouse Res., Inc. v. Inslee*, No. 3:18-CV-05005-RJB, 2018 U.S. Dist. LEXIS 127064  
24 (W.D. Wash. July 30, 2018) (granting protective order against disclosure of advocacy  
25 organization's "internal documents" such as plans or policies communicated within the  
26  
27

1 organization); *Pebble Ltd. P'ship. v. EPA*, 310 F.R.D. 575.(D. Alaska 2015) (quashing  
2 subpoenas seeking discovery from organizations advocating in a federal agency  
3 determination under the Clean Water Act); *Muslim Cmty. Ass'n of Ann Arbor v. Pittsfield*  
4 *Township*, No. 12-CV-10803, 2014 U.S. Dist. LEXIS 184684 (E.D. Mich. July 2, 2014)  
5 (quashing a subpoena to depose a citizen who had advocated to a decision-making  
6 body against the subpoenaing party's interests). Under Montana's Constitution, the  
7 Defendants have a right to privacy for their internal communications. Signal Peak has  
8 failed to demonstrate a compelling interest for infringing upon that right or upon their  
9 rights to free speech, assembly, and participation.  
10

11 **VII. Signal Peak's Subpoenas are Unwarranted and Oppressive.**  
12

13 Signal Peak argues that the minimal impact its subpoenas will have on Pfister  
14 and Charter is outweighed by Signal Peak's right to discover the basis of any new  
15 information that MEIC might present on appeal. Signal Peak contends any new  
16 information MEIC presents is likely to come from Pfister or Charter given the location of  
17 their ranches and their outspoken opposition to Signal Peak's mining operations.  
18

19 As discussed earlier, the Board has already ruled that an appeal of DEQ's  
20 decision to issue Signal Peak a mining permit must be confined to the record before the  
21 DEQ when DEQ made its decision. Neither Signal Peak nor MEIC is permitted to  
22 supplement that record with new information on appeal. Signal Peak's concern that  
23 MEIC will supplement the record with new information from Pfister or Charter is  
24 misplaced.  
25

26 The Court also disagrees that Signal Peak's subpoenas will have little impact  
27 upon Pfister or Charter. Pfister and Charter are members of MEIC. They are not MEIC

1 officers, directors, or employees. They did not appeal DEQ's issuance of the mining  
2 permit to Signal Peak and MEIC is not calling them as witnesses. If Pfister or Charter  
3 provided any information that the DEQ relied upon as establishing relevant facts for its  
4 decision to issue Signal Peak's mining permit, that information is already part of the  
5 record. It is far from clear, however, whether the DEQ relied upon any information from  
6 Pfister or Charter. For example, the information about water flows for Bull Spring on  
7 Pfister's land was garnered from well monitoring data, not from Pfister.

9 It appears that Pfister and Charter contributed little or no relevant information  
10 that the DEQ relied upon in issuing Signal Peak a mining permit. The DEQ issued the  
11 mining permit despite their opposition. Nonetheless, Pfister and Charter find  
12 themselves in the cross hairs of Signal Peak's subpoenas. Those subpoenas seek all  
13 communications Pfister and Charter have ever had with any:  
14

15 ...person, partnership, corporation, association, or other legal entity or any  
16 political subdivision or agency of the state or federal government,  
17 concerning impacts to water resources located on your land, including  
18 springs, seeps, wells, and streams, that you claim have resulted from  
underground mining by Signal Peak Energy, LLC or any other mining  
company in the vicinity of the Bull Mountain Mine No. 1.

19 In equally broad language the subpoenas also seek all written or electronic  
20 evidence of impacts to water resources, including historical flow rates on Pfister's and  
21 Charter's land, that they believe resulted from underground mining by Signal Peak or  
22 any other mining company. But that's not all. Signal Peak's subpoenas also require  
23 Pfister and Charter each to submit to depositions that can last up to seven hours.  
24

25 In depositions, Signal Peak will likely question Pfister and Charter about every  
26 conversation they have had with their family, friends, acquaintances, MEIC members,  
27 MEIC employees, governmental employees, Signal Peak employees, employees of any



1 other mining companies, and employees of other businesses/professions that might  
2 have been related to their ranching operations, water resources, and opposition to  
3 underground mining. Such questioning will require Pfister and Charter to reveal their  
4 political associations and to identify others they know who oppose Signal Peak's mining  
5 operations, but do not wish to publicly express their view. Far from having minimal  
6 impacts, Signal Peak's subpoenas will eviscerate Pfister's and Charter's ability to have  
7 private conversations with other MEIC members. In addition, being subject to seven  
8 hours of deposition questioning is a significant burden, and, under these circumstances,  
9 constitutes an impermissible infringement on Pfister's and Charter's fundamental rights  
10 to free speech, assembly, to petition to redress governmental action, and privacy under  
11 the United States and Montana Constitutions.  
12

#### 13 CONCLUSION

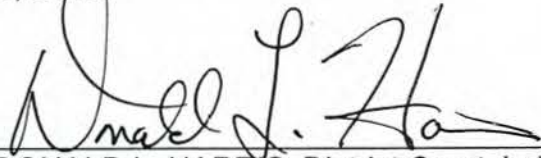
14  
15 For the reasons discussed above, the Court **GRANTS** the Defendants' Motion  
16 for Summary Judgment and **DENIES** Signal Peak's Motion for Summary Judgment.  
17

#### 18 ATTORNEYS FEES AND COSTS

19 On or before November 30, 2018, the Defendants' shall file a motion with a  
20 supporting brief and necessary affidavits setting forth the legal basis for and amount of  
21 the attorneys' fees and costs Defendants MEIC, Pfister and Charter are seeking to  
22 recover. Signal Peak shall have 14 days to file its response. The Defendants shall  
23 have 7 days to file a reply. If necessary, the Court will set a hearing on the Defendants'  
24 motion. With regard to the amount of fees and costs being sought, Signal Peak shall  
25 specifically identify those fees and costs to which it objects and those fees and costs to  
26 which it does not object. If Signal Peak objects to the amount of attorneys' fees and  
27

1 costs being sought by the Defendants, Signal Peak shall furnish the Defendants with all  
2 statements for attorneys' fees and costs it has received from the counsel it retained on  
3 this case for their fees and costs incurred during the same time period that the  
4 Defendants are seeking to recover attorneys' fees and costs. Signal Peak may redact  
5 from those statements all information protected from disclosure by the attorney/client  
6 privilege or work product doctrine. Unredacted copies, however, shall be provided to  
7 the Court and filed under seal. All such statements shall be furnished and filed on or  
8 before Signal Peak's response brief is due.  
9

10 DATED this 14<sup>th</sup> day of November, 2018.

11  
12  
13   
14 DONALD L. HARRIS, District Court Judge

15 cc: William W. Mercer/Samuel R. Yemington, Holland & Hart, P O Box 639, Billings, MT 59103  
16 John C. Martin, Holland & Hart, Holland & Hart, P O Box 68, Jackson, WY 83001  
17 Shiloh Hernandez, Western Environmental Law Center, 103 Reeder's Alley, Helena, MT 59601  
18 L. Randall Bishop, 601 E. Central Avenue, Missoula, MT 59801  
19 Sarah M. Clerget, Asst. Atty. General, P O Box 201440, Helena, MT 59620  
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ORIGINAL

FILED

06/23/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 19-0299

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 19-0299

SIGNAL PEAK ENERGY, LLC,

Plaintiff and Appellant,

v.

MONTANA ENVIRONMENTAL INFORMATION  
CENTER, STATE OF MONTANA BOARD OF  
ENVIRONMENTAL REVIEW, ELLEN PFISTER,  
and STEVE CHARTER,

Defendants and Appellees.

FILED

JUN 23 2020

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

ORDER

In this matter, Signal Peak, LLC (Signal Peak) has appealed from an order granting summary judgment to Defendants Montana Environmental Information Center (MEIC), State of Montana Board of Environmental Review (BER), Ellen Pfister (Pfister), and Steve Charter (Charter) (collectively, Defendants) on Signal Peak's complaint for declaratory relief concerning a discovery dispute that arose in a BER contested case. However, upon a review of the parties' briefing and the administrative record, we have concluded that procedural irregularities and unresolved administrative issues prohibit the Court from proceeding on the appeal, including reaching the merits of pending constitutional issues, and that the case must be remanded for further proceedings before the agency.

On August 11, 2016, MEIC filed a Notice of Appeal and Request for Hearing ("AM3 appeal") with BER challenging the Department of Environmental Quality's (DEQ) issuance of a coal mining permit to Signal Peak in 2013. Pfister and Charter had provided comments during the permitting process, are members of MEIC, and separately own surface lands located above the mining operations proposed by Signal Peak in its AM3 application. After a series of discovery disputes between the parties that required the

extension of discovery deadlines, the hearing examiner issued a scheduling order in the AM3 appeal that required remaining discovery to be completed by April 30, 2018.

On March 30, 2018, Signal Peak issued deposition notices and subpoenas duces tecum for Pfister and Charter, requiring they produce any written communications between them and entities or associations concerning impacts to water resources located on their surface lands. MEIC moved to quash the deposition notices and subpoenas on April 17, 2018, arguing that the depositions were inappropriate, unduly burdensome, overbroad by seeking information that had not been before the DEQ in the permitting process, improperly seeking privileged communications between MEIC and its members, and violative of Pfister's and Charter's constitutional rights to associate and petition the government for redress of grievances. Pfister and Charter joined MEIC's objections, and Signal Peak opposed the motion to quash.

The hearing examiner conducted a hearing on the motion on May 23, 2018, which essentially was a discussion between counsel for the parties and the examiner. Except for a later order simply staying the discovery deadlines pending resolution of the litigation that the parties would subsequently commence in the District Court, no written order was entered by the hearing examiner regarding the discovery issues and objections raised by the parties. The record captures only counsel's discussion with the hearing examiner about the requested depositions, particularly, the hearing examiner's concern about the constitutional issues raised within MEIC's motion to quash the depositions:

[A]s a preliminary matter, I have one issue that's burning for me that I want you all to address. . . based on Montana Supreme Court case law, and specifically there is the Jarussi case and there are several others that discuss the separation of powers issue between MAPA and agencies deciding constitutional issues. In my understanding, I have no jurisdiction to decide constitutional issues and my inclination, unless you folks can convince me otherwise, is that that is a question for the District Court to resolve;

So I guess what I need from you then, from potentially everybody, is a practical solution about how we're going to deal with this First Amendment problem and the jurisdiction piece of it;

[I]f we can fashion a solution here that [will] deal with the concerns without having to go to District Court, that would obviously be preferable. But if you're going to go to the District Court anyway *if the decision is anything other than a grant of the motion to quash*, then you might need to bring the First Amendment problems to District Court and you can deal with them anyway. *So practically, I need you all to tell me whether you want a decision from me on this or whether you want me to stay the underlying decision, or the underlying case while you go to District Court.* . . . I will give you all until next Friday. I'm not going to issue an order on this, so just orally I will give you until next Friday to provide me with supplemental briefing all at the same time. . . . *My inclination is to not address the First Amendment or to make a record as to why I'm not addressing it, why I don't think it has to be addressed, it can be avoided, and then to make the ruling on the burden and the other issues.* [(Emphasis added)].

The hearing examiner inquired whether MEIC would withdraw its constitutional challenges, apparently believing this would permit the examiner to enter an order on "the other issues," namely, the non-constitutional grounds raised for quashing the deposition and subpoenas, but MEIC declined, stating that the "First Amendment concerns here are paramount." MEIC did advance alternative, non-constitutional arguments that the subpoenas sought privileged communications, sought information not presented to DEQ that would be "reopening" the record, were retaliatory, and overly burdensome. In the discussion, Signal Peak and MEIC appeared to agree that the discovery requests could be modified to be less burdensome, but also appeared to view the constitutional issues as primary. The hearing examiner ordered supplemental filings and, on June 1, 2018, the date the supplemental submissions were due, Signal Peak filed a status report that concurred with MEIC that "the [h]earing [e]xaminer and the Board of Environmental Review lack jurisdiction to decide the constitutional issue that the [Defendants] advanced in [their] Motion to Quash," but contended the Defendants had "presented no legitimate ground for the putative deponents to avoid their obligations to respond to discovery."

As noted, no written order was entered by the hearing examiner on either the constitutional or non-constitutional issues raised by the Defendants' motion to quash, and

after careful review of the record, we can discern no oral ruling on these issues either. In its briefing to this Court, Signal Peak offers that the hearing examiner “implicitly declin[ed] to quash the subpoena on the other grounds raised by MEIC, not[ing] that the remaining constitutional issue could only be addressed by the judiciary, not by the executive branch,” but we are hard pressed to discern even an implicit ruling. Rather, it appears the hearing examiner was focused on resolution of the “jurisdiction piece of it,” that is, the constitutional issues that the agency did not have jurisdiction to resolve, and directed the parties to proceed to the courts for a decision on those issues. Despite expressing an inclination, the hearing examiner never did “make the ruling on the burden and the other issues.” If Signal Peak’s assessment of an implicit ruling was correct, Signal Peak would have been the prevailing party before the hearing examiner, and yet it was Signal Peak, not MEIC, that initiated litigation by filing a Complaint for Declaratory Judgment before the District Court seeking a declaration that “complying with discovery would not infringe the Defendants’ constitutional rights and order the Parties to abide by applicable rules and respond to discovery.” More importantly, no one in this matter seemed to recognize that resolution of the non-constitutional objections to the discovery by the hearing examiner was a prerequisite to reaching the constitutional objections. A ruling that the depositions were improper on these non-constitutional grounds may well have mooted the constitutional objections.

At a minimum, the hearing examiner was presented with arguments concerning: the legality of additional discovery at this stage of the proceeding; the scope and burden of the requested subpoenas and depositions; the potentially privileged communications that would be encompassed by requests for communications between Pfister, Charter, and the associations; and the standing of MEIC to file a motion to quash on behalf of its members. As a consequence of the failure to resolve these non-constitutional discovery issues, this Court has been presented with arguments about administrative procedure for which there is no final ruling from the agency, or any ruling at all, that provides the agency’s decision and rationale, including its interpretation of governing statutes and regulations. For

example, the parties argue at length about the scope of review for BER proceedings, with Signal Peak contending that “the BER is *not* ‘confined to the record’ relied on by DEQ, but must receive evidence on any issue raised in the permitting process,” citing Admin. R. M. 1.3.217-221 and 1.3.230 (2020), and *MEIC v. DEQ*, 2005 MT 96, ¶¶ 13, 22-25, 326 Mont. 502, 112 P.3d 964. Defendants respond that “the only relevant analysis [for a permit appeal] is that contained within the four corners of the [technical review]. . . . BER is unambiguous that extra-record evidence is not allowed,” citing § 82-4-227(3)(c), MCA, Admin. R. M. 17.24.405(6), and an administrative decision in *In re Bull Mountains*, No. BER 2013-07 SM, 56-57 (Mont. BER, Jan. 14, 2016). The District Court decided these administrative issues without the benefit of an agency decision or rationale about the agency’s application of its regulations, and then proceeded to decide the constitutional issues.

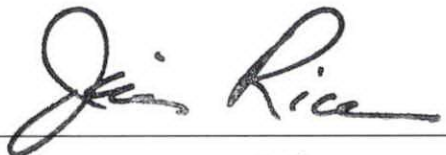




While it is correct that the agency cannot resolve constitutional issues, *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983), the administrative scope of review issue presented here, as well as the discovery issues that lie within the hearing examiner’s discretionary governance, such as whether requested depositions are overly burdensome, must first be addressed and resolved by the agency before judicial review of any constitutional questions can be undertaken. Otherwise, the parties are seeking an advisory opinion from the courts on constitutional questions that may never be ripe or dispositive. “We have repeatedly recognized that courts should avoid constitutional issues whenever it is possible to decide a case without reaching constitutional considerations.” *In re G.M.*, 2008 MT 200, ¶ 25, 344 Mont. 87, 186 P.3d 229 (internal citation omitted). Further, “[t]he well-settled principle undergirding the exhaustion doctrine is that ‘no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’” *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 (internal citation omitted). Consequently, it is necessary to remand this matter for completion of the necessary administrative process by the agency. Therefore,

IT IS ORDERED that this appeal is DISMISSED WITHOUT PREJUDICE. The judgment of the District Court is VACATED.

IT IS FURTHER ORDERED that this matter is REMANDED to BER for further proceedings consistent with this order.

The Clerk is directed to provide a copy of this Order to counsel of record, to the Thirteenth Judicial District Court, and BER.

DATED this 23<sup>rd</sup> day of June, 2020.

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

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC’S BULL MOUNTAIN MIN NO. 1, PERMIT NO. C1993017	<b>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY’S RESPONSE TO PETITIONERS’ EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>

Respondent, Montana Department of Environmental Quality (the “Department” or “DEQ”), by and through its undersigned counsel and pursuant to § 2-4-621(3), MCA, responds as follows to the September 15, 2021 Exceptions of Petitioner the Montana Environmental Information Center (“MEIC”) to the Hearing Examiner’s July 30, 2021, Proposed Findings of Fact and Conclusions of Law (“MEIC’s Exceptions”). For the reasons set forth herein, the Board of Environmental Review of the State of Montana (“BER”) should reject MEIC’s Exceptions.

## 1. DEQ Is Entitled to Deference.<sup>1</sup>

MEIC's Exceptions argue that DEQ is not entitled to deference and point to *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2005 MT 96, ¶¶ 18-26) to support that argument. First, *MEIC v. DEQ* in no way supports the argument that DEQ is not entitled to deference with respect to legal and technical matters within the agency's jurisdiction and expertise. There, the Court ruled that DEQ had inappropriately deferred to the opinion of certain federal land managers rather than making its own determination. *MEIC v. DEQ*, 2005 MT 96 at ¶¶ P36-P38. Here, DEQ conducted its own analysis, as the AM3 Written Findings and Cumulative Hydrologic Impact Assessment ("CHIA") demonstrate.

The Department's interpretation of the statutes and rules which it administers is entitled to deference. *Norfolk Holdings v. Dep't of Revenue*, 249 Mont. 40, 44, 813 P.2d 460, 462 (1991) (citations omitted); *State Pers. Div. v. Dep't of Pub. Health & Human Servs., Child Support Div.*, 2002 MT 46, ¶ 63, 308 Mont. 365, 379, 43 P.3d 305 (citations omitted). Deference to the Department's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation is likewise appropriate. *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595 (citing § 2-4-612(7), MCA;

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<sup>1</sup> See MEIC Exceptions at 2.



*Johansen v. Dept. of Natural Res. and Conservation*, 1998 MT 51, ¶ 29, 288 Mont. 39, 955 P.2d 653); *Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 27, 385 Mont. 33, 380 P.3d 787 (quoting § 2-4-612(7), MCA); *Safeway, Inc. v. Mont. Petroleum Release Compensation Bd.*, 281 Mont.189, 194, 931 P.2d 1327, 1330 (1997).

## 2. MEIC Bears the Burden of Proof in this Contested Case.

MEIC's self-described "central claim" is that DEQ and the applicant Signal Peak Energy bear a burden in this contested appeal of affirmatively demonstrating compliance with the Montana Strip and Underground Reclamation Act ("MSUMRA").<sup>2</sup> This central claim of MEIC has already been rejected on summary judgment. Order on Cross Motions for Summary Judgment ("MSJ Order") at 14-15 citing *In re Western Energy Co.* BER 2016-03 SM, Board Order, at 74, Conclusion of Law ¶ 5; *Mont. Env'tl. Info. Ctr. V. Mont. Dep't of Env'tl. Quality*, 2005 MT 96, ¶16. 326 Mont. 502, 507.

MEIC's arguments that DEQ bears the burden of proof before BER<sup>3</sup> are thus contrary to statutory rules of evidence, BER and Montana Supreme Court precedent and the law of the case. As the Summary Judgment ruling herein explained:

DEQ is entitled to judgment as a matter of law that the

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<sup>2</sup> See MEIC Exceptions at 4-11.

<sup>3</sup> See MEIC Exceptions at 13.

burden of proof lies with MEIC to establish by a preponderance of the evidence that DEQ's decision to issue AM3 permit to Signal Peak violated the law. [...] In order to meet its burden at a hearing, MEIC must show that DEQ violated the law by identifying [a] replacement water source that could not be used.

MSJ Order at 14-25, 29. The Board's rules likewise make clear that burden of proof in a contested case appealing a DEQ MSUMRA decision lies with the petitioner. ARM 17.24.425(7).

MEIC must prove, by a preponderance of the evidence, that developing replacement sources identified in the application is "obviously impossible" in violation of ARM 17.24.304(1)(f)(iii). MSJ Order at 20, 27 ("In other words, if there is no way to gain physical or legal access to the water, then it could not be available.").

The law of this case as to the burden of proof is fully consistent with Montana Supreme Court precedent and statutory rules of evidence. *MEIC v. DEQ*, 2005 MT 96, at ¶ 16. citing §§ 26-1-401 and -402, MCA. In the permitting process before the Department, applicant Signal Peak had (and met) the burden of affirmatively demonstrating compliance with all applicable provisions of MSUMRA. § 82-4-227(1), (3)(a) MCA; ARM 17.24.405(6)(c). That burden shifted on appeal to MEIC in this contested case before the BER. *MEIC v. DEQ*, 2005 MT 96 at ¶ 16. Since MEIC indisputably failed to meet this burden, MEIC's alternative argument that it

actually did meet its burden of proof must be rejected.<sup>4</sup>

3. MEIC's Claim that No Permitting Materials Discuss Water Quality Treatment is Belied by the Record.

MEIC's contention that "no permitting materials discuss water treatment" is manifestly incorrect.<sup>5</sup> *See* DEQ Ex. 5, CHIA at 7-15, explaining that

The minimum values for TDS, sodium, and sulfate, the median value for hardness, and the maximum values for iron and manganese exceeded aesthetic guidelines from the WHO and EPA (Table 2-2). In most locations treatment would likely be desired to make the deeper underburden groundwater more palatable.”).

The permit unconditionally requires Signal Peak Energy, LLC (alternately “Signal Peak” or “SPE”) to provide treatment needed for any replacement water. DEQ Ex. 5, CHIA at 9-25; 8-1; Day 4 Hrg. Tr. to 715:6-716:12; DEQ Ex. 6, Written Findings, Appdx III, Response to Comments at 7 (“If any springs with water rights are impacted to the point that the use of the water is adversely affected, SPE has committed to mitigation plans to provide replacement water of suitable quantity and quality for the use.”); DEQ Exh. 27, Spring Impact Mitigation Plan at 314-3-2 (“Permanent Mitigation measures will be employed to compensate for Permanent Impacts resulting in decreases in water quality or adverse impacts to water quality that

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<sup>4</sup> *See* MEIC Exceptions at 12-14.

<sup>5</sup> *See* MEIC Exceptions at 19.

preclude consumptive livestock and wildlife use in the manner possible prior to mining impacts.”). Having failed to dispute any of this at trial (*see* Hrg. Tr. at Day 1, 217:1-14, 218:9-219:20), MEIC cannot now be heard now to claim otherwise. *See also* DEQ Proposed Finding of Fact ¶ 18.<sup>6</sup>

4. MEIC Cannot Raise Factual Arguments Masquerading as Exceptions to Conclusions of Law.

MEIC was required to file any exceptions from any of the Hearing Examiner’s proposed findings of fact pursuant to § 2-4-621(3), MCA.<sup>7</sup> MEIC’s Exceptions contained in pages 3 through 24 thereof consist entirely of “Exceptions to Conclusions of Law”<sup>8</sup> wherein MEIC excoriates DEQ’s AM3 decision as “unsupported and irrational”<sup>9</sup> and “mistaken and irrational.”<sup>10</sup>

MEIC supports these arguments based upon contentions that the respective hydrologists for DEQ and Signal Peak insufficiently assessed the availability of

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<sup>6</sup> MEIC’s Exceptions at 17 further claim that “There is no dispute that surface waters above the mine do not have sodium or arsenic levels that are harmful to livestock and humans. DEQ Ex. 5, tbls. 2-1, 2-3, 7-2, 7-3, 7-4” but these tables all clearly show that in streams, ponds, and springs, sodium does exceed the recommended guidelines for livestock watering for sodium, and arsenic exceeds guidelines and the human health standard. See Table 7-2: Max Sodium=488, Max Total Arsenic=0.142; Table 7-3: Max Dissolved Arsenic=0.0133, Max Total Arsenic=0.02; Table 7-4: Max Sodium=888, Max Total Arsenic=0.033.

<sup>7</sup> *See* MEIC Exceptions, *passim*.

<sup>8</sup> MEIC Exceptions at 3 (“**II. EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW**”).

<sup>9</sup> MEIC Exceptions at 14; 17.

<sup>10</sup> MEIC Exceptions at 20.

replacement water to mitigate water supply impacts from AM3,<sup>11</sup> overlooked water quality data,<sup>12</sup> and that DEQ expert was not qualified to testify regarding widely utilized and generally available water treatment systems.<sup>13</sup>

MEIC cannot offer its own view of “what the evidence admitted at the hearing demonstrates<sup>14</sup>” and whether or not DEQ offered “competent evidence about treatment<sup>15</sup>” for replacement water without taking exceptions to the proposed decisions factual findings. These are manifestly all factual questions which are indispensable to the proposed decision’s legal conclusions which, in turn, apply such facts to governing law.

5. MEIC Is Not Permitted to Raise Bonding Claims Which Were Rejected at Summary Judgment.

MEIC’s Exceptions impermissibly attempt to resuscitate its claims, already dismissed for lack of expert support on summary judgment, regarding the sufficiency of Signal Peak’s AM3 bond.<sup>16</sup> *See* MSJ Order at 15-17, 29-30. The Board should

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<sup>11</sup> MEIC Exceptions at 14-17.

<sup>12</sup> MEIC Exceptions at 18.

<sup>13</sup> MEIC Exceptions at 18-19. To the contrary, Mr. Van Oort testified that he was familiar with methods of water treatment. Hrg. Tr. Day 3 at 548:3-8, 551:3-10, 553:9-554:25, 669:7-8. Mr. Van Oort testified that water treatment methods were available which could be used. Hrg. Tr. Day 3 at 555:3-12, 668:22-669:4. MEIC’s expert Mr. Hutson also agreed “that water from the deep underburden could be treated.” Hrg. Tr. Day 1, at 215:10-12.

<sup>14</sup> MEIC Exceptions at 20.

<sup>15</sup> MEIC Exceptions at 20.

<sup>16</sup> MEIC Exceptions at 19.

reject such arguments based on the law of the case.

6. MEIC's Untimely Legal Argument That DNRC Exempt Well Permits Are Only Available for Subdivisions Should Not Be Entertained and is in any Event Incorrect.

MEIC also offers an untimely argument (raised first on its Proposed FOFCOLs) that Montana Department of Natural Resources and Conservation ("DNRC") Exempt Well Permits are not legally available for coal mines. MEIC now offers this argument in its Exceptions.<sup>17</sup> As threshold matter, MEIC is precluded from raising such arguments (which need to be raised during the permitting process before DEQ) for the first time in post-hearing briefs. *In re Western Energy*. BER 2016-03 SM, Board Order, June 6, 2019, ¶¶ 15-17; *In re Western Energy* BER 2016-03 SM, Order on Motion in Limine, March 15, 2018 at 5, 7-8; *In re Bull Mountains AM3 Part I*, Findings of Fact, Conclusions of Law, and Order, Jan. 14, 2016, BER 2013-07 SM at ¶¶ 56, 66, 124. Nor was this argument raised not at any point in MEIC's notice of appeal the BER, discovery responses or their January 31, 2020 Pretrial Memo.

As the Summary Judgment Order explained, DEQ's decision on AM3 included a finding that "even if replacement water were necessary, it likely would not be needed in quantities greater than 35gpm or 10 acre-feet/year, for which an 'exempt well permit' is available." DEQ Ex-6 at 6; *see also Clark Fork Coalition v. Tubbs*, 2016

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<sup>17</sup> MEIC Exceptions at 21.

MT 229, ¶¶12-13; ARM 36.12.101(13).” MSJ Order at 20.

MEIC assumed and failed to meet a burden on appeal to show that DEQ was incorrect in finding that replacement water (even if it were necessary) could be obtained with an exempt well permit (which it inarguably can). One way to meet this burden, as the MSJ Order explained, would have been to show that replacement water was not legally available. MSJ Order at 20.

The Proposed Decision (and the underlying DEQ permitting record) both contemplate that (if necessary) DNRC “exempt well permits” for up to 35 gpm or 10 acre-feet/year, are a legally available mitigation option for any water supplies impacted by AM3 mining operations. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; Proposed Decision Finding of Fact (“FOF”) ¶¶ 37, citing DEQ Ex. 6, Written Findings at 5-6; see also Proposed Decision pp. 48-49 (“Discussion”).

Following the contested case hearing, DEQ’s December 18, 2020 Proposed Findings of Fact and Conclusions of Law (“DEQ FOFCOLs”) accordingly proposed the following Conclusion of Law:

13. Petitioner also failed to present any evidence, affirmative or otherwise, that wells over 35 gpm – the limit for a DNRC “exempt” permit – would be needed for replacement sources. Mr. Hudson only provided hypothetical scenarios not supported by any analysis based on likely impacts. *Id.*, *passim*; see *Clark Fork Coalition v.*

*Tubbs*, 2016 MT 229, ¶¶12-13, 384 Mont. 503, 380 P.3d 771 (citing § 85-2-306(3)(a)(iii), MCA) and DEQ Ex. 21, DNRC Combined Appropriation Guidance (discussing “exempt” well permits) see also SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1 and MEIC Ex. 15 Table 314-3-1 (identifying springs potentially requiring mitigation following mining impacts); DEQ Ex. 5, CHIA at 12-16, Table 7-1 (showing springs with greater than 0.5 gpm median baseline flow rate, none of which exceed 35 gpm); DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; DEQ Ex. 11, DUB Report; ARM 17.24.304(1)(f)(iii); MSJ Order at 20.

DEQ FOFCOLs, Conclusion of Law No. 13. As DEQ’s Exceptions to the proposed decision explain, the Hearing Examiner was manifestly incorrect insofar as she found that DEQ did not specifically address MEIC’s arguments (raised for the first time in its post-hearing brief and addressed over DEQ’s objection) that the DNRC Exempt Well Guidance (DEQ Ex. 21) “applies to housing developments and not coal mines. . .” July 31, 2021 Proposed Findings of Fact and Conclusions of Law at 48.

As DEQ’s Proposed Conclusion of Law No. 13 explained, so-called “exempt well permits” for appropriations not exceeding 35 gpm are legally available as a means for SPE to secure replacement water to mitigate any impacts to water supplies from AM3 mining operations. *See id.*, citing *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶¶12-13, 384 Mont. 503, citing § 85-2-306(3)(a)(iii), MCA; DEQ Ex. 21, DNRC Combined Appropriation Guidance



(discussing “exempt” well permits).

Nothing in § 85-2-306(3)(a)(iii), MCA, the *Clark Fork Coalition* case or DNRC’s Guidance expresses or suggests the notion that exempt well permits are only available for housing developments, because no such limitation exists. See also Hrg. Tr. Day 3, at 541:21-23; DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating “One can still seek a water right for one or more ‘exempt’ wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA”). DEQ Response to MEIC Proposed FOF No. 101.

As DEQ’s Response to MEIC’s Proposed COL No. 80 pointed out, the DNRC Guidance explains that the *Clark Fork Coalition* case did not include any challenge to “the validity of the permit exception provided for in § 85-2-306(3), MCA, for wells not to exceed 35 gallons per minute (GPM) and 10 acre-feet (AF) per year.” DEQ Ex. 21, DNRC Combined Appropriation at 1.

While the *Clark Fork Coalition* case is instructive as to DNRC Exempt Well Permits in general, as DEQ’s Response to MEIC Proposed COL No. 80 explained, the exemption from the requirement to obtain a beneficial use permit to appropriate water in Montana is not limited to the subdivisions or other “combined appropriations” or to domestic uses in general:

Further, except in circumstances not present herein “ground water may be appropriated by a person who has a possessory interest in the property where the water is to be put to beneficial use.” Section 85-2-306(1)(a), MCA. A “beneficial use” is in turn defined to mean: “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” Section 85-2-102(5)(a), MCA. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring (outside a stream depletion zone) for up to 35 gallons a minute or less not to exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit. Section 85-2-306(3)(a)(iii), MCA. Section 76-4-125, MCA, and § 76-3-604, MCA, apply to subdivisions as an extra layer of regulatory control over a separate (in part) DEQ permitting program for subdivisions and does not otherwise restrict the right to appropriate water for beneficial uses which are not subdivisions such as the project at issue.

DEQ Response to MEIC Proposed FOFCOL No. 80, p. 323 (emphasis supplied). A “beneficial use” for an a DNRC Exempt Well Permit can thus be obtained and utilized for *any use* that benefits the appropriator, other persons, or the public, including, without limitation, agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Section 85-2-102(5)(a), MCA.

As DEQ’s Response to MEIC Proposed FOFCOL No. 81 further noted

Mr. Van Oort explained that “exempt wells could be used, and that those wells would not be considered combined appropriations.” Hrg. Tr. Day 3, at 541:21-23; *see also* DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating “One can still seek a water right for one or more ‘exempt’ wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA”). This conclusion was presented in DEQ’s response to comments (DEQ Ex. 6) that at the time of the AM3 approval in 2016 DNRC was still issuing exempt well permits for wells such as would likely be used for mitigation. DEQ Ex. 6 at 5-6. As Mr. Van Oort explained “DEQ staff attorneys” were involved in reaching this conclusion and preparing DEQ’s response to comments (DEQ Ex. 6). Hrg. Tr. Day 4, at 713:4-5.

DEQ Response to MEIC Proposed COL No. 81.

Thus, even if BER were to reach the merits of MEIC’s untimely claim that DNRC Exempt Well Permits are not legally available for groundwater appropriations to mitigate impacts to water supplies from coal mining operations, that argument is plainly contrary to law and must be rejected.

The record further reflects that the DEQ’s determination of the availability of DNRC exempt well permits for replacement water (if needed) for AM3 was not reached based upon the “inexpert” legal opinion of Mr. Van Oort but (as noted above) upon a collaborative effort between DEQ technical staff, management, and attorneys. *See* DEQ February 5, 2021 Responses to MEIC’s Proposed FOFOCLs, ¶ 100, citing Hrg. Tr. Day 4, at 712:13-713:9.

7. The Board Should Reject MEIC's Attempt to Conflate Reclamation of Mined Lands With Mitigation of Water Supplies.

MEIC's untimely claim<sup>18</sup> that "Reclamation of water resources must be able to replace any water supplies that are adversely affected by mining or reclamation<sup>19</sup>" confuses mitigation of water supplies with reclamation of mined lands, is contrary to MSUMRA, and must be rejected. Reclamation is work done to restore the land to condition which supports post-mine land uses § 82-4-203(44), which defines "Reclamation" as follows:

"Reclamation" means backfilling, subsidence stabilization, water control, grading, highwall reduction, topsoiling, planting, revegetation, and other work conducted on lands affected by strip mining or underground mining under a plan approved by the department to make those lands capable of supporting the uses that those lands were capable of supporting prior to any mining or to higher or better uses.

§ 82-4-203(44), MCA. By definition, reclamation refers to "work conducted on lands." Id.

Mitigation of water supplies impacted by mining, however, is addressed by entirely different requirements of MSUMRA. *See* § 82-4-253, MCA (requiring short-term and long-term mitigation for impacted water supplies). ARM 17.24.304(1)(f)(iii)

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<sup>18</sup> This claim that the provision of replacement water sources is an aspect of reclamation was raised in neither MEIC's permitting phase comments or in its Notice of Appeal. *See* SPE Ex. 9, MEIC Notice of Appeal, *passim*; DEQ Exs. 1-3, MEIC Comments, *passim*.

<sup>19</sup> MEIC Exceptions at 4; 20.

requires the identification of replacement water sources which could be used to mitigate water supplies impacted by mining.

MSUMRA in turn prohibits DEQ from approving a permit unless the “applicant has affirmatively demonstrated” that the Board’s rules will be observed. Section 82-4-227(1), MCA. Here, the Department found, as the record evidence reflects, that the AM3 Amendment application contained a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as to not be suitable for the approved postmining land uses. DEQ Ex. 5, CHIA at 9-10, 9-11, 9-25; DEQ Ex. 4, Written Findings at 12; Hrg. Tr. Day 2, at 424:7-425:6; Hrg. Tr. Day 3, at 513:11-25, 521:10-17, 542:14-17, 544:14-546:12; see also Hrg. Tr. Day 3, at 516:9-518:20 (discussing the Department’s evaluation of the quality and quantity of each identified source of replacement water); see also DEQ Proposed FOF at 16, 45 ¶¶ 47, 176-178 (explaining the same).

By definition and by way of contrast, reclamation, as noted, refers to “work conducted on lands.” § 82-4-203(44), MCA. Consequently, reclamation of mined lands and mitigation of impacted water supplies are separate legal requirements under MSUMRA, and the record reflects that DEQ appropriately determined that the replacement water sources identified in the application could be developed. ARM

17.24.304(1)(f)(iii).

8. It is Well Settled that Proposed Findings of Fact and Conclusions of Law to Which an Tribunal in a Contested Case Does not Respond are Deemed Denied.

The case involved a four-day trial which was almost entirely focused on disputed matters of expert fact, founded upon tens of thousands of pages of scientific information, data and reports, after which all parties submitted proposed findings of fact and conclusions of law. MEIC contends that the Hearing Examiner was required to respond (apparently paragraph by paragraph) to each and every finding and conclusion proposed by MEIC.<sup>20</sup>

In support its argument that the Hearing Examiner was required to respond to each and every paragraph contained in MEIC's Proposed Findings of Fact (which totaled 63 pages), MEIC cites to §2-4-623(4), MCA, which reads:

If, in accordance with agency rules, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding.

The Montana Supreme Court has long embraced the well-worn axiom that all proposed findings of fact and conclusions of law which are not addressed in a judicial decision are deemed denied. *See Jackson v. Jackson*, 2017 MT 78N, ¶ 10, 388 Mont.

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<sup>20</sup> MEIC Exceptions at 22-24. It is noteworthy that it took the Department all of 324 pages to respond to all of MEIC's Proposed Findings of Fact and Conclusions of Law. See February 2, 2021 DEQ Response to Petitioners Proposed Findings of Fact and Conclusions of Law, *passim*.

553, 393. The Montana Supreme Court has in fact never<sup>21</sup> required strict compliance with §2-4-623(4), MCA, as the case cited by MEIC explains

Appellants contend that the findings are in violation of section 2-4-623(4), MCA, because all parties here submitted proposed findings of fact and conclusions of law and the Board did not explicitly rule on each finding and each conclusion. This argument exalts form over substance. We do not construe the statutes so narrowly or technically. To do so would place an onerous burden on the Board, especially when it is remembered that usually these types of hearings involve multiple parties representing various interests and each party normally submits its own findings and conclusions. The findings and conclusions here implicitly rule on the findings and conclusions submitted by the parties and we find them to be sufficient in this case.

Moreover we have previously held that section 2-4-623(4), MCA, does not require a separate, express ruling on each required finding as long as the agency's decision and order in such proposed findings are clear, *Montana Consumer Counsel v. Public Service Commission and Montana Power Co.* (1975), 168 Mont. 180, 541 P.2d 770.

*State ex rel. Montana Wilderness Ass'n v. Board of Natural Resources & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749.

Consequently, no error can be assigned to the recommended decision for not responding to each and every factual contention and proposed legal conclusion offered by MEIC (or any party). Nor does the fact that the Hearing Examiner could not

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<sup>21</sup> MEIC Exceptions at 24.

respond in detail to each of MEIC’s proposed findings of fact (a task which took two full-time DEQ attorneys who appeared at trial at least 200 hours between them) mean that the Hearing Examiner failed to “address and grapple with contrary evidence. . .”<sup>22</sup> The proposed decision most certainly “make[s] explicit findings on material issues raised in the administrative proceedings . . .”<sup>23</sup> and those findings utterly reject MEIC’s contentions herein, and with good reason.

By way of example and not of limitation, as DEQ’s Proposed Finding of Fact ¶ 60 explained, the testimony of MEIC’s expert Mr. Hutson was conspicuously characterized by its absence on nearly every issue of disputed material fact at trial

Mr. Hutson – Petitioner’s sole expert witness – did not testify that (1) the DUB could not be used as a source for replacement water; (2) Signal Peak could not drill and permit a DUB well; (3) the identified replacement water resources (whether the DUB or otherwise) could not support the anticipated mitigation needs; or (4) the DUB could not be treated. Hrg. Tr. Days 1-2, at 75:13 through 397:1; Hrg. Tr. Day 4, at 956:9-21; *compare to* Hrg. Tr. Day 4, at 723:17-21 (Mr. Van Oort testifying that the DUB could be used as a source for replacement water).

DEQ Proposed FOFCOLs, ¶ 60.

Having assumed the burden of proof on appeal MEIC was required to first

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<sup>22</sup> MEIC Exceptions at 24.

<sup>23</sup> MEIC Exceptions at 23, citing *Montana-Dakota Utils. Co. v. Mont. Dep’t of Pub. Serv. Regul.*, 223 Mont. 191, 196, 725 P.2d 548, 551 (1986) and *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 523, 594 P.2d 297, 310 (1979)



affirmatively present reliable and credible scientific evidence in support of its claims, and then to further “address grapple with . . . “the “contrary evidence”<sup>24</sup> presented by DEQ and Signal Peak. MEIC did neither in this case. MEIC was further required, as noted, to address and grapple with the Hearing Examiner’s proposed findings of fact by taking any exceptions thereto pursuant to § 2-4-621(3), MCA.

MEIC instead asks the Board to conclude *as a matter of law* that the proposed decision lacks sufficient findings on material issues to permit judicial review and lacks any specific findings on disputed factual areas.<sup>25</sup> As previously explained, exceptions which are in fact exceptions to factual findings must be taken in the first instance to be heard. to § 2-4-621(3), MCA. Once again, MEIC failed to do so in this case.

9. Even if MEIC’s Untimely Claims that SPE Violated Certain Superseded Reporting and Monitoring Provisions in its Permit Could be Entertained Such Claims are Demonstrably False in Any Event.

MEIC raised yet another new claim at trial (which was neither preserved in its permitting comments to DEQ, raised in its Notice of Appeal, nor disclosed at any point via discovery or in MEIC’s pretrial memo) that DEQ knowingly permitted Signal Peak to violate certain impact reporting and monitoring provisions required by its permit and now reiterates those claims in its Exceptions.<sup>26</sup> The undisputed record, however,

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<sup>24</sup> MEIC Exceptions at 24.

<sup>25</sup> Id.

<sup>26</sup> MEIC Exceptions at 24-26.

reflects that the subject permit provisions were superseded by later permit revisions and are no longer an operative or effective permit term. See DEQ February 5, 2021 Responses to Findings of Fact ¶¶ 36-47.

DEQ's objection to such untimely violation/spoliation claims was properly sustained by the then Hearing Examiner at hearing. Hrg. Tr. Day 2, at 422:8-19.<sup>27</sup> Such allegations of violation/spoliation were properly rejected because they were not raised in MEIC's public comments, notice of appeal, or identified in discovery. MEIC is also limited to the issues it raises in its public comments and notice of appeal. MSJ Order at 17, citing *In re Western Energy*, at 76-78, Conclusions of Law ¶¶ 15-17; Order on Motion in Limine, March 15, 2018 at 5, 7-8).

MEIC is further circumscribed to the evidence and contentions which it disclosed via discovery. See May 25, 2017 Order on Motion to Compel Discovery, at 2-3; M. R. Civ. P. 37(c)(1). The exclusionary provisions of M. R. Civ. P. 37(c)(1) are self-executing. *Doherty v. Fannie Mae*, 2014 MT 56, ¶ 15, 374 Mont. 151, 319 P.3d 1279; *Eggar v. Burlington N. R.R. Co.*, 1991 U.S. Dist. LEXIS 19240, \*39, 1991 WL 315487, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322.

Even if MEIC's mischaracterizations were taken as truth, they would fail to

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<sup>27</sup> MEIC nevertheless asserted its violation/spoliation claims as proposed findings of fact, to which DEQ was constrained to respond in its February 5, 2021 Responses to Findings of Fact ¶¶ 36-47.

meet the very definition of spoliation. The Montana Supreme Court has defined “evidence spoliation” as “the material alteration, destruction, or failure to preserve evidence for use by an adversary in pending or future litigation.” *Montana State Univ.-Bozeman v. Montana First Judicial Dist. Court*, 2018 MT 220, ¶¶ 22, 392 Mont. 458, 426 P.3d 541.

The data of concern was never collected, nor was it required to be collected. The testimony elicited by MEIC on this point neither establishes that SPE Ex. 25 is an operative permit condition nor that DEQ took SPE Ex. 25 into consideration in connection with the AM3 Amendment. Hrg. Tr. Day 3, 622:12-625:4; Hrg. Tr. Day 4, 786:18-787:8. As that testimony explains, SPE Ex. 25, entitled “Supporting Documentation for Spring Impact Analysis,” was a legacy description of a what are now previously applicable requirements which have been superseded, and by the progression of mining such that their use was impossible.

As the title of SPE Ex. 25 clearly states, this appendix supported an analysis required by another permit section. DEQ Ex. 27, Appendix 314-3, Spring Impact Detection Mitigation Plans, describes the Spring Impact Detection method in use as of the time of DEQ’s approval of AM3 and does not refer to Appendix 313-4 (SPE Ex. 25). Hrg. Tr. Day 4, at 803:3-19; *see* DEQ Proposed FOF at 20, ¶ 63.

The foregoing undisputed portions of the record establish that SPE Ex. 25 was

neither an operative part of the subject permit nor constituted a factor in DEQ's analysis during the permitting phase and thus SPE Ex. 25 neither supports MEIC's contentions of violation/spoliation nor has any relevance to this case.

The testimony adduced by MEIC on cross examination explained why the use of these statistical method was discontinued:

I would say that, in this situation, we've since seen so much natural variability that it is difficult to find a suitable pair, and therefore it makes more sense to look at this more comprehensively in looking at a number of sites that have been not be affected, comparing them to those that are overlying mine areas, which is essentially the reference described in the MQAP.

. . .

I know that there has been some discussion of regression, and that it has not seemed very useful given the body and variability of historical data. Therefore, it is not considered -- it is not used frequently, no. I mean, it's not used on an annual reporting basis to do regression in the manner in which you're implying.

. . .

In the context of that appendix, the regression analyses are not valid for at least a couple of the sites which I have cursorily reviewed the data for. I did not compare each and every one, but now that this has been raised, you know, I did look at the data to see if this is valid . . . .

Hrg. Tr. Day 4, at 794:18-24; 797:1-6; 799:20-800:3.

Petitioner has administrative and judicial remedies under federal and state law

if they wish to contend that DEQ failed to act on violations of MSUMRA. See §§ 82-4-253(1), (2) and (4), MCA (explaining state law remedies); 33 U.S.C. § 1270 (providing for citizen suits under federal law where a state fails to enforce its own program); 33 U.S.C. § 1271 and 30 C.F.R. §§ 810.2(b) and 816.100 (providing an alternative federal administrative remedy to hold DEQ and Signal Peak accountable via the Office of Surface Mining, Reclamation and Enforcement for any permit violations). Petitioner has declined to avail itself of any such remedies.

The jurisdiction of this Board over an alleged violation of a coal mining permit, by contrast, is limited to review of administrative orders issued by DEQ under the Board's contested case authority derived from § 82-4-253(2)(a), MCA. The Board should accordingly decline to issue either findings of fact or conclusions of law regarding Petitioner's untimely allegations that Signal Peak has violated its permit, or that DEQ has countenanced such actions or omissions.

10. The Proposed Decision Properly Rejected MEIC's Contentions Which Were Based Upon a Superseded Portion of the Pre-Remand AM3 Application.

MEIC's Exceptions argue that the proposed decision's Findings of Fact unlawfully rejected MEIC's arguments that a 2013 groundwater model which was part of Signal Peak's prior permit application.<sup>28</sup> See MEIC Ex. 17. The record however

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<sup>28</sup> Hrg. Tr. Day 2, 433:21-434:20, 443:18-444:11; Hrg. Tr. Day 3, at 536:14-537:16; *see also* DEQ Proposed FOF at 12-13, ¶ 33 (explaining the same).

reflects that this 2013 groundwater model was superseded and replaced on remand with a “new, more accurate” 2016 Groundwater Model Report. DEQ Ex. 10 SPE Ex. 2, Hrg. Tr. Day 2, at 428:9-18, 434:18-20, 443:18-444:5; Hrg. Tr. Day 3, at 536:14-537:16.

DEQ Ex. 10, the 2016 Groundwater Model Report “simulates the overburden, Mammoth coal, and underburden, primarily focusing on impacts to groundwater levels in the Mammoth coal, lower portions of the overburden . . . and the upper portion of the underburden” resulting from mining. Hrg. Tr. Day 2, at 432:16-433:12; DEQ Ex. 5, CHIA at 9-15; DEQ Ex. 9, PHC at 314-5-3, 314-5-58; DEQ Ex. 10, 2016 Groundwater Model Report at 314-6-1, 314-6-28 *see also* DEQ Proposed FOF at 13, ¶ 34 (explaining the same).

The 2016 PHC assessed the probable hydrologic consequences of mining, including AM3. Hrg. Tr. Day 2, at 428:9-18; DEQ Ex 9, PHC at ES-1; *see also* DEQ Proposed FOF at 13, ¶ 35 (explaining the same). The 2016 PHC concluded that “the deep underburden is extensive” and “has the characteristics to serve existing and viable designated use, and to also provide mitigation water that may ultimately be needed in accordance with the mitigation measures defined in the permit.” DEQ Ex. 9, PHC at 315-5-62; Hrg. Tr. Day 4, at 817:2-19; *see also* DEQ Proposed FOF at 13, ¶ 36 (explaining the same). The 2016 PHC concluded, “[b]ased upon the assessment

performed, the deep Underburden aquifer is capable of meeting existing demands, as well as any potential mitigation needs, if they are required.” DEQ Ex. 9, PHC at 314-5-41; *see also* DEQ Proposed FOF at 13, ¶ 37 (explaining the same).

With respect to replacement water, SPE and the Department “[did] far more to answer the specific concerns about replacement water on remand than was done in the original permit.” MSJ Order at 21, n.7; DEQ Ex. 5, CHIA; DEQ Ex. 11, DUB Report; *see also* DEQ Proposed FOF at 13-14, ¶ 38 (explaining the same). MEIC failed to present credible and reliable scientific evidence to the contrary.

MEIC mistakenly relies upon MEIC Ex. 17 in support of its argument that up to 100 gpm would be required to replace water supplies adversely impacted by AM3<sup>29</sup> despite the fact that MEIC Ex. 17 was not part of the application at issue or the analysis associated therewith<sup>30</sup>. DEQ accordingly maintains its Mont. R. Evid. 401 and 403 objections to the introduction of such evidence.

MEIC Ex. 17 is a superseded document from the 2013 AM3 application, which was not part of the 2016 permit application because it was replaced by “new, more accurate” information. SPE Ex. 2, January 20, 2016 5th Round Acceptability

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<sup>29</sup> MEIC’s Exceptions at 27 claim that the 100 gpm estimate from the superseded groundwater model is actually an underestimate, but the record reflects otherwise. Mr Van Oort testified that only one (1) well was expected to need mitigation and would be of limited quantity compared to springs. Hrg. Tr. Day 3 at 578:3-22. Dr. Nicklin also testified well replacement needs would be minimal. Hrg. Tr. Day 4 at 885:20-886:14.

<sup>30</sup> DEQ Proposed Findings of Fact at ¶¶ 8-13, 20-25 and 32-22 describe the sources that the Department relied on to make its findings related to the **2016** AM3 approval, which is the agency action at issue.

Deficiency Response at 1; Hrg. Tr. Day 2, at 428:9-429:7, 433:21-434:20, 443:18-444:11; Hrg. Tr. Day 3, at 536:14-537:16; see DEQ Proposed FOF at 12-13, ¶ 33 (explaining the same).

As Mr. Van Oort explained at trial, the methods used to evaluate spring flows for this 2013 document were found to be inaccurate based on additional observations from 2013-2016, and further evaluation of impacts to springs already undermined indicated it was unlikely a large number of springs would require mitigation. Hrg. Tr. Day 3, at 525:17-526:16, 533:7-535:15. Dr. Nicklin—the author of MEIC Ex. 17—also explained that the 2013 report was “no longer valid” at the time of the 2016 AM3 review and approval. Hrg. Tr. Day 4, at 810:24-811:12. MEIC, for its part, never offered any evidence to the contrary.

11. DEQ Never Admitted that the Analysis in the CHIA was “Mistaken.”

MEIC’s next claims that DEQ’s CHIA stated that water quantity in the deeper underburden aquifer is sufficient to provide for any *possible* mitigation wells which may become necessary in the future,<sup>31</sup> while DEQ’s expert Mr. Van Oort explained on the stand that what he meant when he wrote that section of the CHIA was that water quantity in the deeper underburden is sufficient to provide for any *probable* mitigation needs which may be required.

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<sup>31</sup> MEIC Exceptions at 28, citing DEQ Ex. 5, CHIA at 70.



According to MEIC, DEQ can only rely on the wording of the CHIA to support its analysis<sup>32</sup>, and therefore DEQ must be found to be in error. <sup>33</sup> This argument fails on both legal and factual bases. As Mr. Van Oort explained during trial, the CHIA must be considered in the context of SPE and DEQ's responsibility to evaluate the probable hydrologic consequences of mining. Hrg. Tr. Day 3, at 535:17-25, 574:12-575:8, 714:3-19; *see also* Hrg. Tr. Day 3, at 574:12-575:8 (Question: "Now, Martin, when you wrote that, you meant that the deep underburden model report showed that there was enough water in the DUB to meet any possible mitigation in the future." Answer: "I would have meant any probable mitigation, because that is the standard of review which DEQ uses."); Hrg. Tr. Day 4, at 714:3-19.

The only mitigation wells which "may become necessary" are those where impacts to springs are probable. Hrg. Tr. Day 3, at 577:23-578:2; *see* DEQ Ex. 5, CHIA at 2-1 and 2-10 (explaining that the Department made an assessment of the probable cumulative impact and explaining that the CHIA is based on the PHC).

DEQ is not permitted to approve a coal mine permit application unless the application "affirmatively demonstrates and the department's written findings confirm,

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<sup>32</sup> MEIC Exceptions at 28.

<sup>33</sup> MEIC's Exceptions at 28, n.10 also argue that "Mr. Van Oort, did not conduct the spring impact analysis, did not know what method was used to assess impacts to springs, and did not even know what the permit required regarding assessment of spring impacts. Tr. at 622:22 to 623:3, 625:6-10, 630:19-23, 640:11-16, 642:3-13." Mr. Van Oort stated he "didn't perform" an evaluation that assessed any possible mitigation needs, which was corrected in Mr. Van Oort's errata filing on October 13, 2020 in this case. Hrg. Tr. Day 3, at 574:22-575:1; Errata of Martin Van Oort, October 13, 2020.

on the basis of information set forth in the application or information otherwise available that is compiled by the department” that project complies with MSUMRA. § 82-4-227(1), MCA; ARM 17.24.405(6)(a)-(m) (emphasis supplied). MEIC is consequently incorrect in its argument that the CHIA is “the only analysis on which the permitting decision may stand . . .<sup>34</sup>”

What “may” happen or is “possible” is not the standard of scientific certainty required by MSUMRA in order for DEQ to issue a permit. Section 82-4-222(1)(m), MCA requires that an application for mining must contain a plan that includes “a determination of the probable hydrologic consequences of coal mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime and quantity and quality of water in surface water and ground water systems . . .” (emphasis supplied); *see also* ARM 17.24.314(3) (addressing probable hydrologic consequences determination).

ARM 17.24.301(93), in turn, defines “probable hydrologic consequences” in pertinent part as “the projected results of proposed strip or underground mining operations that may reasonably be expected to alter, interrupt, or otherwise affect the hydrologic balance.” The Summary Judgment Order likewise explained in detail that

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<sup>34</sup> MEIC Exceptions at 28.

MSUMRA addresses “probable” rather than possible or certain hydrologic consequences. MSJ Order at 20.

As Mr. Van Oort stated in his testimony, the Deep Underburden Report (DEQ Ex. 11) contained some of the background investigations and information DEQ used to reach the conclusion contained in the CHIA with regard to the availability of sufficient replacement water. Hrg. Tr. Day 3, at 567:17-21, 571:2-15, 572:19-573:7. DEQ performs an independent in-depth analysis for the CHIA that “generally takes a few months of work, at least,” and is not limited to relying upon permit documents. Hrg. Tr. Day 2, at 443:12-14; Hrg. Tr. Day 4, at 653:5-6. The Department considered extensive available information to assess the water bearing properties of the deep underburden aquifer. DEQ Ex. 5, CHIA; Hrg. Tr. Day 2, at 436:16-23; Hrg. Tr. Day 3, at 477:2-10, 479:11-480:21, 482:4-485:8, 489:5-491:4, 519:17-520:10, 521:5-9, 543:2-13; *see also* DEQ Proposed FOF at 42, ¶ 157 (explaining the same).

As Mr. Van Oort explained, this analysis was not a quantitative analysis but rather another form of valid scientific analysis known as a qualitative analysis. Hrg. Tr. Day 3, at 521:25-523:8. Mr. Van Oort testified: “I was able to conclude without calculating specific numbers that there was ample water supply for the proposed and expected mitigation measures.” Hrg. Tr. Day 3, at 523:6-8. Having assessed the probable hydrologic impacts of AM3, DEQ is simply not required to assess every one

of the multitudinous “possible” hydrologic consequences of mining. § 82-4-222(1)(m), MCA; ARM 17.24.301(93); MSJ Order at 20.

12. There is No Legal or Scientific Requirement for DEQ to Calculate the Total Amount of Water in an Aquifer in Order to Determine Whether Such Aquifer Contains Sufficient Water for Replacement Purposes.

MEIC argues- without citation to any law, rule, or supporting expert testimony, that DEQ was required to calculate the water contained in the entire deep underburden aquifer in order to find that it contained sufficient water for replacement purposes.<sup>35</sup> MEIC’s expert Mr. Hutson did not himself calculate or quantify the amount of water contained in the deep underburden aquifer (Hrg. Tr. Day 2, at 269:15-18). In fact, Mr. Hutson has (in his decades as a hydrologist) never quantified or otherwise calculated the capacity of a groundwater aquifer. Hrg. Tr. Day 2, at 269:15-18.

As the transcript (Hrg. Tr. Day 3 at 575:9-577:9) shows, Mr. Van Oort explained that while DEQ did not calculate the total quantity for all possible mitigations, DEQ did evaluate the quantity of water which may be needed for individual springs which could require mitigation, and that information was presented in the CHIA Table 7-1.

MEIC’s argument assumes that a quantitative analysis is the only scientific analysis that can be used to evaluate the available in an aquifer, which is not the case.

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<sup>35</sup> MEIC Exceptions at 27.

Hrg. Tr. Day 3, at 523:6-8, 646:12-21. MEIC also mischaracterizes Mr. Van Oort's testimony found on pages 575-577 of the hearing transcript to imply that Mr. Van Oort made no evaluation of how much water would be needed to be replaced, when what Mr. Van Oort evaluated was the individual quantity of water needed for individual springs, not the "total quantity for mitigation which would be needed." Hrg. Tr. Day 3, at 575:9-577:9.

As Mr. Van Oort explained, "The amount of water needed total over the area is not relevant. What is really relevant is the amount of water needed at any given well which would be drilled." Hrg. Tr. Day 3, at 543:14-20; DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6; see also DEQ Proposed FOF at 37, ¶ 135 (explaining the same).

Further, Mr. Van Oort consistently explained that he used a qualitative analysis to determine whether replacement water was available for probable mitigation needs throughout his testimony. Hrg. Tr. Day 3, at 521:25-523:8; 641:22-642:2, 645:24-646:21; 647:7-9; 648:5-8; see also Hrg. Tr. Day 4, at 844:24-845:3, 852:6-11 (Dr. Nicklin referring to a qualitative analysis). Mr. Van Oort explained that a qualitative analysis "is an evaluation of the various parameters which are involved in a situation and reviewing those parameters in light of your specialized knowledge, particularly mine in hydrology, as to how aquifers behave and how the dimensions and hydrologic

characteristics of aquifers supply water to wells.” Hrg. Tr. Day 3, at 522:21-523:3.

Mr. Van Oort then testified as follows: “based upon my knowledge of the aquifer and its characteristics and the wells which could be completed in that aquifer, I was able to conclude without calculating specific numbers that there was ample water supply for the proposed and expected mitigation measures.” Hrg. Tr. Day 3, at 523:4-8.

Both Mr. Van Oort and Signal Peak’s expert Dr. Nicklin explained that calculating a total was of limited usefulness because replacing all springs was not a probable hydrologic consequence of the operation of AM3. Hrg. Tr. Day 3 at 535:17-25, Day 4 at 866:16-22. MEIC’s hydrologist Mr. Hudson, who has never calculated or quantified the amount of water in an aquifer (and did not do so in this case), apparently also finds quantitative analyses of aquifers to also be of limited utility, if any. Hrg. Tr. Day 2, at 269:15-18.

13. The BER Never Previously Found Signal Peak’s Plan for Replacement Water to be “Legally Insufficient,” Nor Does the Proposed Decision Say So.

MEIC’s contentions that BER in the case above (BER 2016-07 SM at 85-87) prior to this remand found that Signal Peak’s plan for replacement water was legally insufficient and that the proposed decision so states<sup>36</sup> are belied by the plain wording of both decisions.

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<sup>36</sup> MEIC Exceptions at 16, citing July 30, 2021 Proposed FOFCOLs at 11-12, ¶ 16-19.

To take these misrepresentations in reverse order, first the proposed decision at pages 11-12 and ¶¶ 16-19 states that the BER found potential for material damage outside the permit boundary. In fact, proposed decision FOF 17 specifically says the first Bull Mountain Mine case did not challenge DEQ's replacement water analysis, while the proposed decision's FOF 19 says BER simply "noted uncertainty" in the availability of replacement water based on Appendix 3M (which is part of MEIC Ex. 17 in this case).

Second, the Board remanded the prior AM3 Amendment to DEQ following MEIC's successful appeal. *In re Signal Peak Energy (Bull Mountain Mine No. 1)*, BER-2-13-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) (hereinafter "*Bull Mountain Mine Part I*"). As that BER Decision explained "MEIC appealed DEQ's approval of the mine expansion on two bases: first, DEQ's material damage assessment and determination 'employed the incorrect legal standard'; and second, the record before the agency did not 'affirmatively demonstrate' that the 'mine expansion was designed to prevent material damage to the hydrologic balance.'" *Bull Mountain Mine Part I* at p. 2; p. 52, ¶ 47.

Thus, the Board's evidentiary ruling in *Bull Mountain Mine Part I* was that the record did not affirmatively demonstrate that the proposed operation was designed to prevent material damage to the hydrologic balance outside the permit area. *Id.* at pp.

76-87, ¶¶ 113-136. The availability of replacement water was thus not raised in MEIC’s appeal in *Bull Mountain Mine Part I*, where the Board’s decision which straightforwardly stated

Here, DEQ's approval of SPE's application committed two errors. First, DEQ[‘s] material damage determination failed to consider whether the mine expansion would lead to violations of water quality standards. Second, the record evidence did not affirmatively demonstrate that the mine expansion is designed to prevent material damage to the hydrologic balance outside the permit area.

*Id.*, at p. 87, ¶ 136.

MEIC appealed the *Bull Mountain Mine Part I* permit on material damage and legal standard grounds, and the Board agreed with MEIC. In so ruling, the Board rejected “DEQ's final argument . . . that even if the polluted gob water migrates beyond the mine permit boundary, any polluted water could be replaced by water from the deep underburden aquifer.” *Id.*, at p. 84, ¶ 130. It was only in connection with rejecting this DEQ argument that BER raised concerns about the availability of replacement water (which was itself not an issue before the Board) in dicta.

The Board’s concerns about “unanswered” legal and physical availability questions in *Bull Mountain Mine Part I*, were, as noted, based on the prior groundwater model, as the Board explained “the proposed mitigation with water from the deep underburden aquifer is illusory, as SPE admitted repeatedly in the record.



The Groundwater Model admits that there are multiple physical and legal barriers to the use of the deep underburden aquifer as a source of mitigation water . . . .” *Bull Mountain Mine Part I*, at p. 85, ¶ 132. As the Board further explained:

Thus, the PHC concluded that further investigation was required to determine whether the deep underburden aquifer would be suitable to meet all potential mitigation needs. PHC at 314-5-35, -42, -66. The mere possibility of mitigation is not sufficient to meet the standard of Mont. Code Ann. § 82-4-227(3)(c), and ARM 17.24.405(6)(c).

*Bull Mountain Mine Part I*, at p. 85, ¶ 132. The statute and rule cited to above address material damage from mining operations and not the availability of replacement water.

The Board plainly decided *Bull Mountain Mine Part I* on material damage grounds. *See id.* (citing § 82-4-227(3)(c), MCA; ARM 17.24.405(6)(c)). *Bull Mountain Mine Part I* in no way addressed the Board’s rule regarding the applicant’s burden to demonstrate that replacement water supplies “could” be developed. *See* ARM 17.24.304(1)(f)(iii).

14. The Proposed Decision Did Not Find that the Water in the Deep Underburden Aquifer is Harmful to Livestock or to Humans.

Contrary to the plain language thereof, MEIC’s Exceptions claim that the proposed decision found the water in the deep underburden aquifer “is, in fact, harmful to livestock and humans . . . .”<sup>37</sup> The proposed decision makes no such findings, and

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<sup>37</sup> MEIC Exceptions at 18.

instead FOF 177 and 178 state the deep underburden aquifer is marginally suitable for and is widely used for these purposes in the area.

14. The Proposed Decision's Finding of Fact No. 97 Should Be Clarified.

MEIC's Exceptions correctly note that the proposed decision's Finding of Fact No. 97 slightly modify the language of the cited sources and should be modified accordingly.<sup>38</sup> DEQ Proposed Findings of Fact Nos. 3, 5-7, and 120-124, which more accurately describe the geology based on multiple sources, read as follows:

3. The underground Bull Mountain Mine is located within lithologies depicted in Figure 4-4 of the AM3 CHIA, which is a stratigraphic column showing the "type of geologic material which occur beneath the surface of the earth" in the vicinity of the Bull Mountain Mine, including multiple coal layers, one of which is the Mammoth coal. DEQ Ex. 5, CHIA at 13-10; Hrg. Tr. Day 3, at 468:14-470:20.

5. Strata existing above the Mammoth coal seam is referred to as the overburden, while strata existing below the Mammoth coal seam is referred to as the underburden. DEQ Ex. 5, CHIA at 4-2; Hrg. Tr. Day 3, 469:25-470:2.

6. The overburden and the underburden consist of layers of rock including clinker, sandstone, silty sandstone, coal, siltstone, and claystone. Typically, these layers are thin and alternate between the various lithologies. DEQ Ex. 5, CHIA at 4-2, 13-10, Figure 4-4; Hrg. Tr. Day 3, at 469:3-470:17.

120. The [deep underburden aquifer] DUB is a massive fluvial sandstone formation likely many miles wide and 50

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<sup>38</sup> MEIC Exceptions at 30.

feet thick, which exists approximately 350 to 400 feet below the Mammoth coal and between the Dougherty and Roundup coal seams. DEQ Ex. 11, DUB Report at 2-4, Figure 314-7-2; MEIC Ex. 21, Addendum 5 at 304(1)f-7; DEQ Ex. 5, CHIA at 9-24; Hrg. Tr. Day 3, at 473:3-21, 488:20-491:4; Hrg. Tr. Day 4, at 907:8-908:19; MSJ Order at 9, ¶ 7.

121. “Numerous studies (Connor, 1988; Shurr, 1972; Woolsey et al., 1917; Flores, 1981) indicate that massive, sandstones are common in the Tongue River member (including the rocks below the Mammoth coal), and that they represent large fluvial channels. ... Although linear in overall dimension, these channel sandstones still may be several miles wide, which reflects the high sinuosity or meandering of the paleostream.” MEIC Ex. 21, SMP C1993017 Hydrologic & Geologic Description, at 304(1)f-7.

122. The approximate dimensions of the DUB are 14 miles by 22 miles. DEQ Ex. 9, PHC at 314-5-35; Hrg. Tr. Day 4, at 843:14-25.

123. Based on the well logs, the approximate thickness of the DUB ranges from 45 feet to 80 feet. DEQ Ex. 11, DUB Report at 2; Hrg. Tr. Day 4, at 844:5-9.

124. The DUB is “the first substantive water-bearing unit underlying the Mammoth coal” in the vicinity of the Bull Mountains. DEQ Ex. 11, DUB Report at 1, Figure 314-7-4; Hrg. Tr. Day 3, at 516:9-20.

DEQ December 18, 2020 Proposed FOFCOLs, ¶¶ 3, 5-7, and 120-124. DEQ’s proposed FOFCOLs ¶¶ 3, 5-7, and 120-124 be substituted for the proposed decision’s FOF 97.

### Conclusion

Based on all the foregoing, the Board should reject MEIC's Exceptions, modify the proposed decision as requested in DEQ's Exceptions (and herein), and otherwise affirm, ratify and adopt the proposed decision as final agency action.

Dated: October 27, 2021  
Freedom, New Hampshire

Respectfully submitted,

*Mark Lucas*

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of October 2021, a true and correct copy of the foregoing was served by electronic mail to the persons addressed below as follows:

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

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017	<b>PETITIONER'S RESPONSE TO RESPONDENTS' EXCEPTIONS</b>

## INTRODUCTION

The Exceptions of Respondent Department of Environmental Quality (DEQ) and Intervenor-Respondent Signal Peak Energy, LLC (Signal Peak) focus on (1) arguments about administrative issue exhaustion and (2) the proper burden of proof. Both issues were recently resolved against DEQ in *Montana Environmental Information Center v. Montana Department of Environmental Quality (MEIC v. DEQ)*, No. DV 19-34 (Mont. 16th Jud. Dist. Ct. Oct. 28, 2021) (attached as Exhibit 1). That case clarified that issue exhaustion does not apply to permit appeals under the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and that the burden of proof rests with the permitting agency and the applicant—not the public. *Id.* slip op. at 17, 28. This is not only fatal to Respondents’ Exceptions, but it also vitiates the “impossible” standard employed in the Hearing Examiner’s Proposed Findings and Conclusions, undermining the cornerstone of the Proposed Findings and Conclusions and mandating their rejection.

In addition to their central arguments, DEQ and Signal Peak raise several sundry quibbles about the Hearing Examiner’s qualifications and the Hearing Examiner’s Proposed Findings that DEQ failed to address various issues (such as controlling law and water quantity), but none of them has merit.

## RESPONSE TO DEQ'S EXCEPTIONS

### I. DEQ'S ISSUE EXHAUSTION ARGUMENT IS LEGALLY AND FACTUALLY MISTAKEN.

DEQ's argument (DEQ Exceptions at 6-9) that administrative issue exhaustion bars Petitioner Montana Environmental Information Center's (MEIC) claims against DEQ's use of the exempt well loophole<sup>1</sup> is unfounded in law or fact. As a matter of law, the Court in *MEIC v. DEQ* expressly rejected DEQ's spurious contention that MSUMRA somehow requires the public to identify flaws in DEQ's analysis *before* seeing the agency's analysis: "[I]ssue exhaustion does not apply to administrative review of permits under MSUMRA." No. 19-34, slip op. at 17. The court's detailed analysis of the issue rejected each ground proffered by DEQ. *Id.* at 13-17. The *MEIC v. DEQ* court's decision is binding on the Board, which conclusively resolves the matter. Mont. Code Ann. § 2-4-704(2) (empowering courts to review and reverse the Board's decisions).

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<sup>1</sup> The "exempt well loophole" is an interpretation of the exempt well provision of the Montana Water Use Act (MWUA) that allows use of that provision to drill unlimited wells exempt from the water rights permitting process, so long as the wells are not physically connected. *See Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 11, 384 Mont. 503, 380 P.3d 771. The Montana Supreme Court invalidated that interpretation in 2016, *id.* ¶ 35, but the Montana Legislature grandfathered that interpretation for certain subdivisions in 2015. 2015 Mont. Laws Chapter 221 § 1 (House Bill 168).



As a matter of fact, DEQ's argument is also mistaken because MEIC expressly raised the exempt well issue in its comments and DEQ responded to MEIC's comments (albeit erroneously). MEIC's comments stated:

[I]t is uncertain whether the applicant will have the ability to apply for and receive an exempt well permit from the Montana DNRC [Department of Natural Resources and Conservation]. The issue is currently being considered by the Montana Supreme Court, following a district court ruling that is unfavorable to applicants for exempt well permits. No alternative sources of mitigation water are identified.

DEQ Pretrial Ex. 2 at 7. DEQ then addressed this point (albeit erroneously) in its response to comments. DEQ Pretrial Ex. 6 at 5-6. There, DEQ argued that any and all wells associated with water replacement from the deep aquifer would be considered exempt and would not be considered combined appropriations (the "exempt well loophole") under "HB [House Bill] 168, passed during the 2015 Montana legislature." DEQ Pretrial Ex. 6 at 5-6. As the court recently explained in *MEIC v. DEQ*, even if issue exhaustion were applicable to permit appeals under MSUMRA (it is not), it still would not apply to issues raised in public comments and addressed by DEQ. No. 19-34, slip op. at 16-17 (issue exhaustion does not apply where public raises issue, even in general terms, and agency actually addresses the issue).

It is true that MEIC's comments on Signal Peak's application did not expressly state that the provisions of House Bill 168, which apply to subdivisions under Title 76 of the Montana Code, do not apply to coal mines permitted under

Title 82. But that is because in *June* 2016 when MEIC submitted its public comments, it had no way of knowing that in *July* 2016 DEQ would cite House Bill 168 in its response to MEIC’s comments to justify its permitting decision.

*Compare* DEQ Pretrial Ex. 2 at 2, 7, *with* DEQ Pretrial Ex. 4 at 1-8 (providing date and timeline), *and* DEQ Pretrial Ex. 6 at 5-6. DEQ’s proposed catch-22—in which the agency can respond to public comments (e.g., MEIC’s concerns about exempt wells) by raising novel arguments not previously articulated (e.g., the grandfathering provision for exempt wells for subdivisions in House Bill 168) that are then insulated from legal scrutiny by issue exhaustion—must be rejected. As the court noted in *MEIC v. DEQ*, the public is not “limit[ed] ... to issues raised *before* DEQ lays its card on the table.” No. 19-34, slip op. at 15.

DEQ’s issue exhaustion argument has no merit and must be rejected.

## **II. THE HEARING EXAMINER CORRECTLY FOUND THAT DEQ FAILED ENTIRELY TO DISCUSS THE LAW ON WHICH ITS ANALYSIS OF EXEMPT WELLS WAS BASED.**

DEQ also misses the mark with its related complaint (DEQ Exceptions at 9-14) about the Hearing Examiner’s Proposed Finding that DEQ “did not discuss” MEIC’s argument that the provisions of House Bill 168 (on which the DNRC guidance about exempt wells and combined appropriations was based) “appl[y] to housing developments and not coal mines permitted under ... Title 82.” Proposed FOFCOL at 48; *see also* 2015 Mont. Laws Chapter 221 § 1 (reprinting H.B. 168).

While MEIC’s proposed Findings and Conclusions quoted at length and analyzed in detail the language of House Bill 168, which applies to subdivision applications under Title 76, in its response to MEIC’s Proposed Findings, DEQ *failed entirely* to cite, quote, or discuss *any* language from House Bill 168. *See* DEQ Resp. to Pet’r’s Proposed FOFCOL at 313-19 (Feb. 5, 2021). Instead, implicitly acknowledging that the language of House Bill 168 does not support its position, DEQ repeated a stock response that referred to various second- and third-hand accounts of the text of the law, but neither addressed the text of the law itself nor attempted to defend the analysis of the agency’s own response to comments, which, as noted above, purported to interpret House Bill 168. *Id.*; DEQ Pretrial Ex. 6 at 5-6. As such, the Hearing Examiner’s Proposed Finding that DEQ “did not discuss this provision [H.B. 168] specifically” was correct. DEQ’s argument to the contrary is mistaken. Ultimately, the *text* of House Bill 168 demonstrates that it does not apply to coal mines, which renders the analyses of both DEQ and the Hearing Examiner’s Proposed Findings and Conclusions incorrect and arbitrary. *See* Pet’r’s Exceptions at 20-23 (Sept. 15, 2021).

### **III. DEQ’S ATTEMPT TO REVERSE THE STATUTORY BURDEN OF PROOF IS LEGALLY MISTAKEN.<sup>2</sup>**

DEQ is further mistaken in its continued effort (DEQ Exceptions at 14-16) to rewrite the express text of MSUMRA, which places the burden of proof on the mine applicant and the agency to demonstrate that environmental harm will not occur and that reclamation can be accomplished. Mont. Code Ann. § 82-4-227(1), (3); ARM 17.24.405(6)(a), (c).

As explained in detail in MEIC’s Exceptions, the Hearing Examiner’s Proposed Findings and Conclusions are mistaken as a matter of law in imposing an “impossible” burden of proof on MEIC. Pet’r’s Exceptions at 5-13. More importantly, the Court in *MEIC v. DEQ* recently reversed the mistaken authority (*In re Rosebud Strip Mine*, No. BER 2016-03 SM (Mont. Bd. of Env’tl. Rev. June 6, 2019)) on which DEQ now attempts to rely and on which the Hearing Examiner’s Proposed Findings and Conclusions relied to set forth their incorrect burden of proof.

The Court in *MEIC v. DEQ* explained that, “[w]here, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in

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<sup>2</sup> Signal Peak’s Exceptions adopt DEQ’s argument on this point. SPE Exceptions at 3-4. Because DEQ’s misconception of the burden of proof is mistaken, Signal Peak’s adoption of the agency’s position is also mistaken.

administrative review of the permit.” No. 19-34, slip op. at 27. This allocation of the burden of proof “is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana’s right to a clean and healthful environment, which imposes ‘anticipatory and preventive’ protections.” *MEIC v. DEQ*, No. 19-34, slip op. at 26 (quoting *Park Cnty Env’tl. Council v. DEQ*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288). Thus, contrary to DEQ’s argument, MSUMRA does not place the burden of proof—“impossible” or otherwise—on MEIC. That burden rests with DEQ and Signal Peak. For this reason, DEQ’s argument fails, and, more importantly, the Hearing Examiner’s Proposed Findings are incorrect as a matter of law.<sup>3</sup>

## **RESPONSE TO SPE’S EXCEPTIONS**

### **I. SIGNAL PEAK’S ARGUMENT ABOUT THE APPOINTMENT OF THE HEARING EXAMINER IS DISINGENUOUS AND SHOULD BE REJECTED.**

Signal Peak’s first exception continues the coal company’s unsightly maneuvering with respect to the Hearing Examiner, Ms. Buzzas. After arguing at length that the Hearing Examiner was unqualified and unlawfully assigned to this case in what was apparently a brazen attempt at intimidation, *e.g.*, Aff. of John Martin, ¶¶ 22, 24 (June 9, 2021), Signal Peak now asks the Board to sanction the

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<sup>3</sup> DEQ also raises an exception regarding its decision not to challenge MEIC’s standing. DEQ Exceptions at 16-17. MEIC takes no position on this exception.

Hearing Examiner's assignment. In particular, the coal company asks the Board to find that the Hearing Examiner "had the requisite experience to complete the remaining tasks for this contested case at the time of her assignment." SPE Exceptions at 7-8. However, Signal Peak fails to square this request with the sworn statement of its counsel that the Hearing Examiner lacked the necessary experience:

Upon information and belief, *Ms. Buzzas does not have experience with underground mining, the Montana Strip and Underground Mining and Reclamation Act, MAPA, the technical factual issues involved in the case, or the unwritten bases for evidentiary rulings made by Ms. Clerget in the hearing.*

Aff. of John Martin, ¶ 24 (June 9, 2021) (emphasis added). Signal Peak's counsel further swore that the "Board did not appoint Ms. Buzzas in compliance with § 2-4-611(1), MCA, and ARM 1.3.218." *Id.* ¶ 22. It is not clear what changed between June 9, 2021, and the present, aside from the Hearing Examiner's issuance of Proposed Findings favorable to Signal Peak.<sup>4</sup>

It, thus, appears that this is just one more disingenuous tactical maneuver by a company that has repeatedly flouted the law for its own gain, and which undermines the credibility of Signal Peak. *See, e.g., Offer of Proof, United States v. Signal Peak Energy, LLC*, No. CR 21-79-BLG-SPW-TJC at 3 (D. Mont. Oct. 5, 2021) ("From approximately 2013 until 2018 Signal Peak Energy, LLC, an

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<sup>4</sup> Counsel for Signal Peak has not disavowed the earlier sworn statement.

operator of a coal mine located outside of Roundup, Montana which is subject to the Mine Safety and Health Act, habitually violated mandatory health and safety standards applicable to the operation of the mine. These violations consisted of both standards regarding environmental safety and worker safety. These violations occurred with the full knowledge, direction, and participation of the most senior management of the mine during that period, including the President and CEO, the Vice President of Surface Operations, the Vice President of Underground Operations, and the Safety Manager.”) (Attached as Exhibit 2); Findings and Recommendation of U.S. Magistrate Judge, *United States v. Signal Peak Energy, LLC*, CR 21-79-BLG-SPW-TJC at 2 (D. Mont. Oct. 7, 2021) (recommending that Signal Peak “be adjudged guilty of the charges in Counts I-IV of the Information and that sentence be imposed”) (Attached as Exhibit 3); Order Adopting Findings, *United States v. Signal Peak Energy, LLC*, No. CR 21-79-BLG-SPW-TJC at 1-2 (D. Mont. Oct. 22, 2021) (adopting recommendation) (Attached as Exhibit 4).

The credibility of Signal Peak is vitiated by its disingenuous tactical maneuvers in this proceeding and its criminal actions at the Bull Mountain Mine. The Montana Supreme Court does not indulge litigants that play “fast and loose” with the legal system. *Nelson v. Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139. The Board should not grant Signal Peak’s request.

## **II. SIGNAL PEAK’S EFFORT TO OVERTURN THE HEARING EXAMINER’S FINDINGS OF FACT THAT DEQ FAILED ENTIRELY TO QUANTIFY REPLACEMENT WATER SHOULD BE REJECTED.**

Signal Peak’s efforts (SPE Exceptions at 8-9) to have the Board reject and modify the Hearing Examiner’s Proposed Finding that the “quantity of water in the underburden is unknown” are unsupported and should be rejected.

The Board may only reject or modify findings of fact if it “first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” Mont. Code Ann. § 2-4-621(3). A reviewing body will “look at a finding or a conclusion in its true light, regardless of the label that the district court may have placed on it.” *Tri-Tron Int’l v. Velto*, 525 F.2d 432, 435 (9th Cir. 1975); *accord Christie v. DEQ*, 2009 MT 364, ¶ 32, 35 Mont. 227, 220 P.3d 405.

Here, the Hearing Examiner’s statement that “the quantity of water in the underburden is unknown,” Proposed Findings at 47, is a finding of fact. The Board may not reject or modify this finding of fact without reviewing the record and concluding that the finding is not based on substantial evidence. Mont. Code Ann. § 2-4-621(3). Signal Peak fails to identify any specific evidence from the record to support rejecting or modifying this finding that the “quantity of water in the underburden is unknown.” *See* SPE Exceptions at 8-9. Signal Peak makes a



generic reference to Proposed Findings of Fact ¶¶ 65-150, but does not identify any finding that quantifies water in the deep aquifer. *See* SPE Exceptions at 8. And there is no such finding. *See* Proposed FOFCOL ¶¶ 65-150. Nor does Signal Peak provide any evidentiary support, but only its *ipse dixit*, for its proposed modification: “While the *exact* quantity of water in the underburden is unknown (*and could not be known*), there was no evidence presented to show this violated the law.” SPE Exceptions at 9 (emphasis in original). Without identifying evidence to reject the Hearing Examiner’s Proposed Finding or any evidence to support its proposed modification, Signal Peak’s request must be rejected.

Indeed, not only is Signal Peak’s request unsupported, but the evidence refutes it. The record abundantly demonstrates that DEQ and Signal Peak failed to quantify the deep aquifer—though they had the tools to do so—and also failed to quantify replacement water needs. At hearing, Signal Peak’s counsel asked its expert, Dr. Nicklin, if he had an opinion of the quantities of water that the deep aquifer could provide, but he did not: “[Q.] Based on your understanding of its [the deep aquifer] characteristics, did you form an opinion as to what types of quantities of water it could supply? A. I did not actually quantify that in a simulation run.” Hrg. Tr. at 857:9-13. Dr. Nicklin noted, however, that his groundwater model for the deep aquifer could quantify the water available in the deep aquifer: “Q. Did you have an estimate of about how many wells of the equivalent size of the office

supply well it [the deep aquifer] might be able to support? A. I do not have an estimate, per se. *That could be done with the quantitative tool* [the groundwater model].” Hrg. Tr. at 858:7-11 (emphasis added). While Dr. Nicklin testified that he did not know how much water the deep aquifer could supply, he did testify that it could *not* supply greater than 100 gallons per minute without impacting other users, which is the amount Dr. Nicklin himself projected may be required for reclamation. Hrg. Tr. at 879:12-20; MEIC Pretrial Ex. 17 at 85. DEQ was even worse—the agency “never even calculated a ballpark figure for how much water would need to be replaced.” Tr. at 575:25 to 576:3.

In sum, Signal Peak has failed to support in a legally sufficient manner its proposed rejection and modification of the Hearing Examiner’s Proposed Finding that the “quantity of water in the underburden is unknown.” Signal Peak’s failure further underscores the insufficiency of evidence presented by the coal company and DEQ to “demonstrate[] that reclamation can be accomplished,” ARM 17.24.405(6)(a), which is one of the fundamental errors of DEQ’s permitting decision. *See* MEIC Exceptions at 14-17.

## **CONCLUSION**

The Exceptions of DEQ and Signal Peak are without merit and should be rejected. Further, because the “impossible” standard of proof imposed by the Proposed Findings is unlawful, as recently explained by the court in *MEIC v. DEQ*,

the Proposed Findings should also be rejected and this matter remanded to DEQ or, alternatively, to the Hearing Examiner for resolution of these errors.

Respectfully submitted this 5th day of November, 2021.

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## CERTIFICATE OF SERVICE

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/s/ Shiloh Hernandez  
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**MONTANA SIXTEENTH JUDICIAL DISTRICT, ROSEBUD COUNTY**

<b>MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB,</b>  <b>Petitioners,</b>  <b>vs.</b>  <b>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,</b>  <b>Respondents.</b>	<b>Cause No.: DV 19-34</b>  <b>Judge Katherine M. Bidegaray</b>          <b>ORDER ON PETITION</b>
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**I. INTRODUCTION**

Pursuant to the Montana Administrative Procedure Act ("MAPA"), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club ("Conservation Groups") petitioned this Court, contending that the approval by the Montana Board of Environmental Review ("BER") of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of Environmental Quality ("DEQ") to review the AM4 permit application consistent with applicable laws.

The Conservation Groups assert that the BER committed procedural error by (1) erroneously applying administrative issue exhaustion to the Conservation Groups' permit appeal; (2) employing an unlawful double standard, limiting the Conservation Groups to evidence and issues raised in public comments prior to the permitting decision, while permitting DEQ and the permit applicant Westmoreland Rosebud Mining ("WRM") to present post-decisional evidence and argument; (3) allowing unqualified witnesses to present expert testimony on behalf of DEQ; and (4) by unlawfully reversing the burden of proof.

Substantively, the Conservation Groups assert that the BER unlawfully upheld a permit that relied upon evidence that the BER and DEQ both found unreliable, and which allowed WRM to cause material damage to a stream, the East Fork Armells Creek, in violation of applicable legal standards.

Following the parties' submission of briefs, this matter came on for hearing before the Court on December 16, 2020. Having considered the briefs and the parties' well-presented arguments, the Court is prepared to rule.

## **II. LEGAL FRAMEWORK**

Resolution of this case involves consideration of the administrative record in conjunction with the rather complex legal framework, including the burden of proof. This case involves application of two federal laws—the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and Clean Water Act, 33 U.S.C. §§ 1251-1387—and two state laws—the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201 to -254, MCA, and Montana Water Quality Act, §§ 75-5-101 to -1126, MCA.

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

The federal Surface Mining Control and Reclamation Act ("SMCRA") and the state Montana Strip and Underground Mine Reclamation Act ("MSUMRA") regulate coal mining through a system of "cooperative federalism" that allows states to develop and administer regulatory programs that meet minimum federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 U.S.C. § 1253(a). MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The fundamental purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a); *In re Bull Mountains*, No. BER 2016-03, at 59-63 (Mont. Bd. Of Env'tl. Rev. Jan. 14, 2016) (detailing SMCRA's background) (in record at BER:141, Ex. 1). In enacting SMCRA, Congress stressed that citizen participation is essential for effective regulation of coal mining: "The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, at 59 (1977).

Citing to Article II, § 3 and Article IX of the Montana Constitution, MSUMRA's stated intent is to "maintain and improve the state's clean and healthful environment for present and future generations" and to "protect the environmental life-support system from degradation." § 82-4-202(2)(a)(b), MCA. In *Park County Env'tl. Council v. Dep't of Env'tl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (decided December 8, 2020), the Montana Supreme Court explained that Montana laws that implement Montana's constitutional right to a clean and healthful environment must be interpreted consistently with that fundamental constitutional right, which was "intended ... to contain the strongest



environmental protection provision found in any state." *Id.*, ¶ 61 (quoting *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality (MEIC I)*, 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.3d 1236). The *Park County* Court also underscored that the right to a clean and healthful environment contains a precautionary principle: it is "anticipatory and preventive" and "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." *Id.*, ¶ 61 (quoting *MEIC I*, ¶ 77).

Under MSUMRA, DEQ is forbidden from issuing a mining permit unless and until the applicant "affirmatively demonstrates" and DEQ issues "written findings" that "confirm, based on information set forth in the application or information otherwise available that is compiled by [DEQ] that ... cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); § 82-4-227(3)(a), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). "Material damage" is defined as:

degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses 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.

§ 82-4-203(31), MCA. MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the "applicant." § 82-4-227 (1), (3), MCA; ARM 17.24.405(6)(c).

DEQ's analysis occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA," which assesses the "cumulative hydrologic impacts" from "all previous, existing, and anticipated mining" and determines, in light of these cumulative

impacts, whether the “proposed operation has been designed to prevent material damage.” ARM 17.24.301(32), .314(5). “Anticipated mining” is defined to “include[], at a minimum ... all operations with pending applications.” *Id.* 17.24.301(32).

Within 30 days of DEQ’s permit decision, “any person ... adversely affected may submit a request for a hearing on the reasons for the final decision.” *Id.* 17.24.425(1). DEQ’s “reasons for the final decision” are only available to the public *after* the public comment period on the permit application. *Id.* 17.24.404(3), .405(6). Failure to submit public comments “in no way vitiates” or limits the right of an affected person to request a hearing. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). The requested hearing occurs before the BER pursuant to the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)-(2), MCA; §§ 2-4-601 to -631, MCA.

#### **B. The Clean Water Act and the Montana Water Quality Act.**

As noted, MSUMRA defines “material damage” (the key standard in this case) to include any “[v]iolation of a water quality standard” or “advers[e] [e]ffect[s]” to any “beneficial uses of water.” § 82-4-203(31), MCA. Water quality standards are set by the federal Clean Water Act (“CWA”) and the state Montana Water Quality Act (“MWQA”). These laws likewise establish a “system of cooperative federalism” in which states implement programs that meet minimum federal standards. *Mont. Env’tl. Info. Ctr. v. Mont. Dept’ of Env’tl. Quality (MEIC III)*, 2019 MT 213, ¶¶ 29, 397 Mont. 161, 451 P.3d 493. Water quality standards are “[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. § 130.2(d). “Montana’s water quality standards are set forth in [ARM] 17.30.601 through 17.30.670 ....” *MEIC III*, ¶ 33.

A water body that “is failing to achieve compliance with applicable water quality standards” is called an “[i]mpaired water body.” § 75-5-103(14), MCA. When a water body reaches its “[i]loading capacity” for a pollutant, additional pollution will result in a “violation of water quality standards.” *Id.*; § 75-5-103(18), MCA.

Under MSUMRA, a CHIA that fails to address “applicable water quality standards” in assessing material damage is unlawful. *In re Bull Mountains*, at 64.

### **III. BACKGROUND AND PRIOR PROCEEDINGS<sup>1</sup>**

#### **A. The Rosebud Mine and East Fork Armells Creek**

The Rosebud Mine is a 25,752-acre coal strip-mine located near Colstrip. BER:152 at 9. It has five permit areas, Areas A, B, C, D, and E. *Id.* at 10. East Fork Armells Creek (“EFAC”) is a prairie stream, whose headwaters are surrounded by the mine. *Id.* at 18. EFAC is outside the permit area. *Id.* The mine “dominates the potential anthropogenic pollutant sources in” the EFAC headwaters. *Id.* at 20.

Narrative water quality standards for EFAC require the stream “to be maintained suitable for ... growth and propagation of non-salmonid [i.e., warm water] fishes and associated aquatic life.” ARM 17.30.629(1); BER:152 at 18. Since 2006, DEQ has designated and identified EFAC as an impaired water body, failing to achieve water quality standards for supporting the growth and propagation of aquatic life. BER:152 at 24; BER:95, Exs. DEQ-9, DEQ-10. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment, identified coal mining as an unconfirmed source of the excessive salt, and found that a

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<sup>1</sup> Throughout this Order, citations to the administrative record will use the following format: for documents, “BER:[docket entry number] at [page],” and for exhibits, “BER:[folder number], Ex.[exhibit number in folder], at [page].”

"40% increase in TDS in the alluvial aquifer upstream of Colstrip appears to be directly associated with mining activity." BER:152 at 28; BER:95 Ex. DEQ-9 at 7; BER:95, Ex. DEQ-10 at 19. DEQ has not completed a plan "to correct the water quality violations" in EFAC. BER:152 at 25.

#### **B. The AM4 expansion of Area B of the Rosebud Mine**

In 2009, WRM applied for the AM4 amendment to its Area B permit. BER:152 at 13. The existing Area B permit covers 6,182 acres. *Id.* at 10. AM4 adds 12.1 million tons of coal from 306 acres to Area B. *Id.* After six years of back and forth with WRM, in July 2015, DEQ allowed 26 days for public comment on WRM's voluminous application. *Id.* at 14. The Conservation Groups submitted comments, addressing, *inter alia*, the existing impairment of EFAC and impacts of increased salinity and harm to aquatic life. BER:95, Ex. DEQ-4 at 2-7. The comments included and incorporated a letter raising concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500-acre expansion for which WRM had applied in 2011. BER:95, Ex. DEQ-4 at 1; BER:95, Ex. DEQ-4L at 17. The comments also raised concerns about WRM's apparent dewatering of an intermittent reach of EFAC. BER:95, Ex. DEQ-4 at 2-3.

#### **C. DEQ's Cumulative Hydrologic Impact Assessment**

After the close of the public comment, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. BER:152 at 14-15. DEQ responded to the Conservation Groups' concerns about salinity, stating that "the 13% increase in TDS [salinity] ... in EFAC" would not adversely affect aquatic life or violate water quality standards. BER:95, Ex. DEQ-1 at 11. Regarding aquatic life, DEQ asserted that a survey of macroinvertebrates in EFAC by WRM proved the stream "currently meets

the narrative [water quality] standard of providing a beneficial use for aquatic life.” BER:95, Ex. DEQ-1A at 9-8; BER:95, Ex. DEQ 1 at 8-9. Regarding dewatering, DEQ stated it could not determine whether mining had dewatered a portion of EFAC, so “material damage to this section cannot be determined.” BER:95, Ex. DEQ-1 at 9; BER:95, Ex. DEQ 1-A at 9-10.

DEQ’s CHIA did not directly address the Conservation Groups’ concerns about anticipated mining in Area F. However, the CHIA included a legal definition of “anticipated mining” that is inconsistent with applicable regulations. Whereas the regulations define “anticipated mining” to include “operations with *pending applications*,” ARM 17.24.301(32) (emphasis added), the CHIA narrowed the definition to “*permitted operations*.” BER:95, Ex. DEQ-1A at 5-1 (emphasis added). Based on this narrow definition, DEQ excluded Area F (the application for which was *pending*, but not *permitted*) from analysis. BER:100, Exs. 19-22.

The Conservation Groups timely sought administrative review, claiming DEQ’s analysis in the CHIA failed to adequately assess material damage to EFAC in light of the stream’s status as an impaired water body. BER:1 at 3-4. The Conservation Groups also challenged the CHIA’s unlawfully narrowed definition of “anticipated mining” and its reversal of the burden of proof regarding material damage. *Id.* at 2-3; BER:97 at 2. WRM intervened and the case went to a contested case hearing before the BER’s hearing examiner. BER:4, 115-18.

#### **D. Motions in Limine**

Prior to the hearing, DEQ and WRM objected to a number of the Conservation Groups’ claims based on “administrative issue exhaustion” (or “waiver”), contending that

the claims were not raised in their public comments. BER:73; BER:74. The Conservation Groups opposed the motions, contending that issue exhaustion does not apply to administrative review of permitting decisions under MSUMRA and that because they were not allowed to review any draft of DEQ's CHIA prior to submitting comments, they could not have been expected to foresee DEQ's legal errors in the CHIA. BER:84 at 3-15. The BER, however, applied issue exhaustion and, accordingly, dismissed multiple claims, including claims related to anticipated mining and dewatering. BER:152 at 77. The BER also barred the Conservation Groups from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments. *E.g.*, BER:152 at 77 ((precluding references to dissolved oxygen (which affects aquatic life) and chloride (which also affect aquatic life))).

The Conservation Groups complain here that, while the BER strictly limited the Conservation Groups to issues and evidence identified in their comments, the BER expansively permitted DEQ and WRM to present post-decisional evidence that was not included or evaluated in DEQ's CHIA or permitting record. *E.g.*, BER:152 at 37-39, 64 (relying on "probabilistic" and "statistical" analysis proffered by WRM in contested case); *cf.* BER:118 at 33:4-20 (parties stipulating that statistical analysis was not in permit record).

The Conservation Groups, for their part, moved in limine to prevent DEQ's hydrologist, Emily Hinz, Ph.D., from presenting testimony about aquatic life in EFAC. BER:76 at 5-7. The parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. However, based on Montana Rule of Evidence 703, the BER permitted and later relied upon opinion testimony

by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50; BER:116 at 215:18 to 219:4.

#### **E. The BER's Final Order**

The BER upheld the AM4 permit. BER:152 at 85-86. Regarding the burden of proof, the BER held, over dissent,<sup>2</sup> that the Conservation Groups failed to demonstrate that material damage would likely result. BER:152 at 84 (Conservation Groups "failed to present evidence necessary to establish the existence of any water quality standard violations"); *accord id.* at 72, 76.

Regarding water quality standards, the BER recognized that DEQ's CHIA "must assess whether the action at issue will cause a violation of water quality standards." BER:152 at 75. The BER further recognized that under the "relevant water quality standard," EFAC must be "maintained to support ... growth and propagation of ... aquatic life." *Id.* at 18, *quoting* ARM 17.30.629(1). DEQ testified it does not use analysis of aquatic macroinvertebrates to assess this water quality standard because, as the BER found, such analysis "does not provide an accepted or reliable indicator of aquatic life support." *Id.* at 46-47. The BER nevertheless relied on DEQ's survey of macroinvertebrates to conclude that DEQ's CHIA adequately assessed the narrative water quality standard for growth and propagation of aquatic life. *Id.* at 85.

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<sup>2</sup> One BER member objected that the BER was impermissibly placing the burden on the Conservation Groups to prove that material damage *would occur*, given MSUMRA's provision placing the burden on WRM and DEQ to prove that material damage *would not occur*. BER:151 at 204:18-22 ("[I] don't think we can flip and require the Petitioner to prove with certainty that damage will occur ...."); *accord* at 214:18-23; *cf. Park Cnty.*, ¶ 61 (explaining that state constitution "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked," *quoting* MEIC I, ¶ 77).

Regarding salinity, the BER found that EFAC is impaired and not meeting water quality standards for growth and propagation of aquatic life due to excessive salinity (that is, existing salinity concentrations are adversely affecting growth and propagation of aquatic life in EFAC). *Id.* at 28. The BER further found that existing mining operations are expected to increase salinity cumulatively in EFAC by 13%. *Id.* at 39 (noting “anticipated 13% increase in the concentration of TDS [salinity] in EFAC”); BER:95, Ex. DEQ-1 at 11 (noting “the 13% increase in TDS ... in EFAC”); DEQ-1A at 9-9 (noting that “[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L”). However, adopting an argument of DEQ that did not appear in the CHIA, the BER concluded it should consider salinity pollution from AM4 in isolation from the predicted cumulative salinity increase of 13% from other mining operations. *Id.* 63-64. The BER then reasoned that because AM4—viewed in isolation—would only extend the *duration* of elevated salinity concentrations (up to “tens to hundreds of years”) but would not, on its own, increase the salinity *concentration*, it would not cause material damage. *Id.* at 62-72.

The Conservation Groups timely appealed the BER’s decision.

#### IV. STANDARD OF REVIEW

Under MAPA, a district court may “reverse or modify” an agency decision in a contested case if “(a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions ... (iii) made upon unlawful procedure ... [or] (vi) arbitrary and capricious,” resulting in prejudice to the substantial rights of a party. § 2-4-704(2), MCA.



DEQ and WMR dispute that the arbitrary and capricious standard applies to judicial review of contested cases under MAPA. DEQ Br. at 3; WMR Br. at 2 n.3. The Montana Supreme Court, however, recently clarified that it does. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶¶ 35-37, 401 Mont. 85, 473 P.3d 963. Legal conclusions are reviewed for correctness, not abuse of discretion. *Id.*, ¶ 35; *cf.* DEQ Br. at 3 (citing *Harris v. Bauer*, 230 Mont. 207, 212, 749 P.2d 1068 (1988)); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990) (abrogating "abuse of discretion" standard for review of conclusions of law); *see also N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51.

"[I]nternally inconsistent analysis signals arbitrary and capricious action." *MEIC v. DEQ (MEIC III)*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *NPCA v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015)). "Montana courts do not defer to incorrect or unlawful agency decisions ...." *Id.*, ¶ 22.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. Cnty. of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted). In reviewing agency decisions that impact the environment, the Montana Supreme Court "remain[s] mindful that Montanans have a constitutional right to a clean and healthful environment." *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality (MEIC IV)*, 2020 MT 288, ¶ 26, 402 Mont. 128, 476 P.3d 32 (quoting *Upper Mo. Waterkeeper v. Mont. Dep't of Env'tl. Quality*, 2019 MT 81, ¶ 41, 395 Mont. 263, 438 P.3d 792). Montana

courts afford "much less" deference to agency interpretations of statutes. *MEIC III*, ¶ 24 n.9.

## V. DISCUSSION

### A. Whether the BER erred by applying administrative issue exhaustion to preclude consideration of issues raised by the Conservation Groups.

In support of the BER on this issue, DEQ and WRM contend that issue exhaustion at the permit appeal stage is required by the *text* of MSUMRA, "rules, and the BER's *Signal Peak [Bull Mountains]* ruling." DEQ Br. at 8; *see also* WRM Br. at 7. A review of statutory text, however, does not support this contention. DEQ cites only one statutory provision—§ 82-4-231(8)(e)-(f), MCA, DEQ Br. at 8, 9, 11—but that provision says nothing about issue exhaustion. Instead, it provides that, after DEQ deems an application acceptable, it must provide public notice and a brief comment period during which an interested person "*may* file a written objection." § 82-4-231(8)(e), MCA (emphasis added). DEQ must then prepare written findings. *Id.* § 82-4-231(8)(f). There is no textual issue exhaustion requirement. DEQ also cites ARM 17.24.405(5)-(6), but these provisions are also devoid of any express written issue exhaustion requirement. Similarly, the *In re Bull Mountains* decision, also cited by DEQ, says nothing about administrative issue exhaustion.

The Court finds relevant here the *text* of § 82-4-206(1), MCA, which provides the sole requirements for seeking administrative review of a permit decision under MSUMRA; namely, (1) that the person seeking administrative review be adversely affected (undisputed here); and (2) that the request be timely (also, undisputed here). *Accord* ARM 17.24.425(1). Notably, the relevant *texts* do not impose *any* exhaustion requirement. The

Court further notes that the U.S. Department of Interior explained that the parallel federal provision for public comment on permit applications "in no way" limits the rights of affected members of the public from seeking administrative review. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 16-17 (Dep't of Interior July 30, 1998) (in record as BER:141, Ex. 4). These interpretations of the parallel federal provisions are compelling because Montana, like other states with approved regulatory programs under SMCRA, must "interpret, administer, enforce, and maintain [them] in accordance with the Act [SMCRA], this chapter [SMCRA's federal implementing regulations], and the provisions of the approved State program." 30 C.F.R. § 733.11.<sup>3</sup>

Based on the absence of any exhaustion requirement in MSUMRA and its implementing regulations, and because MSUMRA must protect and encourage public participation to the same degree as SMCRA, 30 U.S.C. § 1253(a), the Court concludes that the BER erred in engrafting an extra-statutory exhaustion requirement onto MSUMRA.<sup>4</sup> See also S. Rep. No. 95-128, at 59 (1977) (expressing congressional intent that public play a significant role in administration of SMCRA).

Similarly, MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review. *Citizens Awareness Network v. BER*, 2010 MT 10, ¶¶ 23-30, 355 Mont. 60, 227 P.3d 583. See

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<sup>3</sup> DEQ attempts to minimize the importance of this on-point federal authority, by noting the cooperative-federalism structure of SMCRA and MSUMRA. DEQ Br. at 8, n.8. However, as noted, because MSUMRA is a delegated program under SMCRA, it must be "in accordance with" and "consistent with" SMCRA and its implementing "rules and regulations." 30 U.S.C. § 1253(a)(1), (7); 30 C.F.R. § 733.11. Thus, MSUMRA may not be interpreted to be less protective of public participation than SMCRA.

§ 2-4-702(1)(b), MCA (issue exhaustion applies *after* contested case). Simply stated, the Court finds no authority for DEQ's and WRM's proposal to limit the public to issues raised *before* DEQ lays its cards on the table. See *Vote Solar*, ¶ 49 (exhaustion does not require party to identify error before it occurs).

This conclusion is buttressed by the Montana Constitution's rights to know and to participate, which entitle the public to review government analyses *before* objecting to government decisions. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32-46, 312 Mont. 257, 60 P.3d 381; Mont. Const. art. II, §§ 8-9. As the *Bryan* Court noted, for these rights to be more than a "paper tiger," the public must have a "reasonable opportunity to know the claims of the opposing party [the government] and to meet them." *Bryan*, ¶¶ 44, 46.

Here, DEQ seeks to impute sufficient knowledge of the deficiencies which the Conservation Groups later complained of, asserting that WRM as part of its AM4 application submitted a Probable Hydrologic Consequences ("PHC") report, which should have tipped off the Conservation Groups as to the deficiencies that it complains of in DEQ's CHIA. DEQ misses the point. It is agency action (or inaction) that is at the heart of the review sought by the Conservation Groups. Under MSUMRA, the public only sees *DEQ's CHIA* when *the agency* approves or denies the permit, well *after* the comment period on WMR's application had closed. ARM 17.24.404(3)(a), 17.24.405(5)-(6). Administrative review thus is the first opportunity the public must contest *DEQ's* "reasons for the final decision." ARM 17.24.425(1). Application of issue exhaustion to limit the Conservation Groups to issues raised in comments made *before* ever seeing DEQ's CHIA and "final decision" would render public participation a "hollow right" and violate applicable statutory and constitutional rights. *Bryan*, ¶ 44.

In reaching the contrary conclusion, the BER cited one authority, its prior ruling in *In re Bull Mountains*. BER:103 at 5; BER:152 at 77. That decision is inapposite because it never addressed issue exhaustion in any respect. See *In re Bull Mountains*, at 56-59.

Even if it were applicable, issue exhaustion would not bar the Conservation Groups' claims here for two reasons. First, the Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering EFAC. See BER:95, Ex. DEQ-4L at 17 (noting that "Area B [i.e., AM4] and Area F" "will have cumulatively significant impacts on ... surface waters"); BER:95, Ex. DEQ-4 at 2-3 (noting dewatering); see also Conservation Groups' Br., at Argument I.B. WRM criticizes the precision with which the Conservation Groups' comments discussed Area F and dewatering. WRM Br. at 15. Nevertheless, at the very least, DEQ was alerted "in general terms" that these issues would be "fully sifted" in the ensuing administrative review and "the groups' theories for challenging the permit would not be confined to those presented in the original affidavit." See *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010); *Citizens Awareness Network*, ¶ 23.

Second, the record shows that DEQ also had actual knowledge of these issues. Discovery revealed that DEQ debated analyzing cumulative impacts from Area F but declined to do so based on an incorrect definition of "anticipated mining." BER:100, Ex. 19 (defining "anticipated mining" incorrectly as "approved—but not mined" and noting "proposed Area F and additional mining in Area A—not included" as a result); *id.* Exs. 20-22 (discussions resulting in exclusion of anticipated mining based on incorrect definition); BER:95, Ex. DEQ-1A at 5-1 (erroneous definition of "anticipated mining"); *cf.* ARM 17.24.301(32) (correct definition). DEQ also had actual knowledge of the Conservation

Groups' concerns about dewatering EFAC because it addressed them in the CHIA and response to comments. BER:95, Ex. DEQ-1 at 9-10 (stating DEQ could not determine whether mining had dewatered the stream and concluding "material damage to this section cannot be made"); *id.* Ex. DEQ 1-A at 9-10. Because the Conservation Groups raised these issues and DEQ knew about and addressed them (albeit erroneously), issue exhaustion does not apply. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011) (explaining that there is "no need" for public to raise issue that agency already had knowledge of); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue."); see also *State v. Baze*, 2011 MT 52, ¶ 11, 359 Mont. 411, 251 P.3d 122 (related doctrine of waiver inapplicable where parties raised and district court addressed issue).

In sum, issue exhaustion does not apply to administrative review of permits under MSUMRA. The BER erroneously required the Conservation Groups to exhaust issues which arose only upon publication of DEQ's analysis after the close of the public comment period. Further, even if issue exhaustion applied, DEQ's actual knowledge of the Conservation Groups' concerns foreclosed its application. The BER erred in dismissing the Conservation Groups' claims concerning DEQ's erroneous definition of "anticipated mining" and dewatering EFAC based on issue exhaustion. Moreover, the error was prejudicial because it precluded a merits-based ruling on the Conservation Groups' claims. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (explaining that "the required demonstration of prejudice is not a particularly onerous requirement").

**B. Whether the Conservation Groups' brief met the requirements of § 2-4-621(1), MCA.**

Under MAPA, after a hearing examiner issues proposed findings and conclusions, each party that is adversely affected must be given an “opportunity ... to file exceptions and present briefs and oral arguments to the officials [here, the BER] who are to render the decision.” § 2-4-621(1), MCA. Accordingly, after issuance of the proposed findings and conclusions, the BER issued an order stating: “Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before May 10, 2019.” BER:135 at 2.

In response, each party filed a brief objecting to portions of the proposed findings and conclusions. BER:139; BER:140; BER:141. WRM and DEQ captioned their briefs “Exceptions,” BER:139; BER:140. The Conservation Groups captioned their brief “Objections.” BER:141. The Conservation Groups' brief, like those of WRM and DEQ, identified specific portions of the proposed findings to which the Conservation Groups' objected. *E.g.*, BER:141 at 7, 12, 24, 31, 47, 48, 52, 53. Previously, the Conservation Groups had submitted 55 pages of proposed findings, and 76 pages of objections to the proposed findings of DEQ and WRM. BER:123; BER:131.

Citing *Flowers v. BER of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, WRM—now for the first time before this Court<sup>5</sup>—contends that the Conservation Groups' brief failed to meet the requirements of § 2-4-621(1), MCA, because it was denominated “objections” rather than “exceptions.” WRM Br. at 6. WRM's argument is without merit. The Montana Supreme Court has long refused to interpret

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<sup>5</sup> Notably, WRM did not raise this issue before the BER, though it had the opportunity to do so.

MAPA in such a hyper-technical fashion. *State ex rel. Mont. Wilderness Ass'n v. Bd. of Natural Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982) (refusing to "exalt form over substance" and not requiring agency to rule on each proposed finding offered by parties as provided in § 2-4-623(4), MCA); see also § 1-3-219, MCA. Thus, the Court "encourages a liberal interpretation of procedural rules governing judicial review of an administrative BER" and has "avoid[ed] an over-technical approach" to MAPA to "allow[] the parties to have their day in court." *In re Young v. Great Falls*, 194 Mont. 513, 516, 632 P.2d 1111, 1113 (1981). And the Montana Supreme Court has long-ago held "it is the substance of a document that controls, not its caption." *Carr v. Bett*, 1998 MT 266, P1, 291 Mont. 326, 329, 970 P.2d 1017, 1018, 1998 Mont. LEXIS 243, \*1, 55 Mont. St. Rep. 1098, *quoting* *Miller v. Herbert*, 272 Mont. 132, 135-36, 900 P.2d 273, 275 (1995).

Here, contrary to WRM's argument, the Conservation Groups' brief objecting to the proposed findings and conclusions identified and cited specific findings and conclusions to which it objected and provided detailed analysis explaining the asserted errors. BER:141 at 7, 12, 23, 31, 47, 48, 52, 53. Thus, caption notwithstanding,<sup>6</sup> the Conservation Groups' brief was no different than those filed by WRM and DEQ. While it is true that the Conservation Groups' objections challenged the legal conclusions of the proposed ruling rather than the factual findings, *see generally* BER:141; BER:151 at 99, there is no requirement that parties challenge proposed factual findings. *Cf.* § 2-4-621(3), MCA (providing that BER may reject proposed legal conclusions *or* proposed factual findings). WRM is also mistaken in its suggestion that MAPA requires objections to

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<sup>6</sup> "Exceptions" and "objections" are synonymous. See Black's Law Dictionary at 603 (8th ed. 2007).



include "modifying language for each exception." WRM Br. at 6. MAPA contains no such requirement. § 2-4-621(1), MCA. Nor did the BER's order on exceptions. BER:135 at 2.

Finally, *Flowers* is not to the contrary. There, *Flowers* did *not* file exceptions and the Court therefore held that,

*Flowers* did *not* pursue to their conclusion "all administrative remedies available" before seeking judicial review. Art, ¶ 17; § 2-4-702(1)(a), MCA. *Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision.* That her recommendation became a final order of the BER twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the "available" administrative remedies.

*Flowers*, ¶ 13 (emphasis added). Here, unlike in *Flowers*, the Conservation Groups filed extensive exceptions (denominated "objections") to the hearing examiner's proposed findings and conclusions. BER:141. Nothing more was required.

**C. Whether the BER erred by permitting DEQ and WRM to present post-decisional evidence and analysis.**

Under MSUMRA, DEQ's permitting decisions must be based on "information set forth in the application or information otherwise available that is compiled by [DEQ]." ARM 17.24.405(6); § 82-4-227(3), MCA. Under these provisions, "[t]he relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA." BER:152 at 76; *In re Bull Mountains*, at 56-59 ("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."). This is consistent with the bedrock rule of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983)); accord *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154 (explaining that an

agency's "decision must be judged on the grounds and reasons set forth in the challenge order(s); no other grounds should be considered"); *Kiely Constr., L.L.C. v. Red Lodge*, 2002 MT 241, ¶¶ 92-97, 312 Mont. 52, 57 P.3d 836 ("after-the-fact opinions" cannot support decisions).

Here, over objection by the Conservation Groups, the BER admitted and then relied heavily on testimony by WRM's expert William Schafer, Ph.D., about a post-decisional "statistical" and "probabilistic" analysis in which he concluded that the projected 13% salinity increase in EFAC "would not be statistically significantly measurable." BER:152 at 38; *id.* at 37, 39, 64 (relying on "statistical" analysis); see also *id.* at 84 (incorporating prior discussion including "statistical" analysis). However, all parties stipulated and the BER's hearing examiner agreed that this "probabilistic" analysis was post-decisional and not included in the information "compiled" by DEQ to support its decision. BER:118 at 33:4-20.

WRM now argues that the BER's admission of *post hoc* testimony from Dr. Schafer was harmless, asserting that it was not "relevant to the BER's directed verdict." WRM Br. at 16. WRM is mistaken, placing form over substance. While the BER framed its ruling as granting a "directed verdict," BER:152 at 85, the BER's analysis shows that this was a misnomer. A directed verdict is only appropriate if there is no weighing of evidence, and all evidence and inferences are viewed in the light most favorable to the non-moving party. *Massee v. Thompson*, 2004 MT 121, ¶ 25, 321 Mont. 210, 90 P.3d 394. The BER, however, rejected the Conservation Groups' expert testimony and, instead, credited testimony of witnesses from DEQ and WRM (some of whom denied any expertise). *E.g.*, BER:152 at 34-36, 51-53, 67, 72.

Thus, contrary to WRM's assertion, the fact that the BER denominated its ruling as a "directed verdict" does not establish that its erroneous admission of *post hoc* testimony from Dr. Schafer was harmless. To the contrary, the record indicates that the BER relied on Dr. Schafer's *post hoc* "statistical" analysis to discount the significance of the projected 13% increase in salinity in base flow in EFAC from the cumulative impacts of mining. BER:152 at 64-65; *see also id.* at 37-38. Because this testimony was crucial to the BER's decision, it was prejudicial and not harmless. *In re Thompson*, 270 Mont. 419, 430-35, 893 P.2d 301, 307-310 (1995) (improper admission of crucial expert testimony warranted reversal of agency decision); *see also Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (finding improper admission of "critical evidence" prejudicial).

Similarly, regarding salinity, the CHIA's material damage assessment and determination were premised on a projected 13% cumulative increase in salinity in EFAC. BER:95, Ex. DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%"); BER:95, Ex. DEQ-1 at 11 (evaluating material damage with respect to "the 13% increase in TDS ... in EFAC"). However, at hearing, DEQ made the *post hoc* argument, which the BER accepted, that its material damage assessment was based not on the 13% cumulative increase in salinity predicted in the CHIA, but on the additional salinity from the AM4 expansion considered in isolation (which the BER found would extend the duration of elevated salinity by decades or centuries, without itself increasing the salt concentration at any one time). BER:152 at 63-65; *see also infra* Part V.G (discussing the claim of substantive error of "extended duration").

The Court finds that the BER's decision to admit and rely on post-decisional evidence and analysis from DEQ and WRM violates ARM 17.24.405(6)(c) and the BER's

own rule that “[w]hat the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA.” *In re Bull Mountains*, at 59; BER:152 at 76 (relevant analysis is in “four corners” of CHIA); *see also MEIC III*, ¶ 26 (inconsistent rulings are arbitrary). As the BER itself previously cautioned: “The public’s ability to rely on DEQ’s express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture novel analysis and argument.” *In re Bull Mountains*, at 49.

In sum, the Court finds unlawful the BER’s decision to allow DEQ and WRM to present post-decisional evidence and analysis. The BER’s decision is at the same time impermissibly arbitrary and capricious because, as noted above, the BER simultaneously limited the Conservation Groups to evidence and argument contained in their *pre-decisional* comments. *See supra* Part III.D. This decision created an uneven playing field, which was plainly prejudicial. *Organized Vill. of Kake*, 795 F.3d at 969.

**D. Whether the BER erroneously allowed DEQ’s hydrology expert to present expert testimony about aquatic life.**

The Conservation Groups moved *in limine* to exclude expert testimony about aquatic life by Dr. Hinz, who is a hydrologist, on the basis that she has no expertise in aquatic life or aquatic biology. BER:76 at 5-7. At hearing, the parties and the BER’s hearing examiner “all agree[d] that she’s [Dr. Hinz] not an expert in aquatic life of any kind.” BER:117 at 86:20-21. The BER, however, permitted and relied on testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50.

Contested cases before BER are subject to “common law and statutory rules of evidence.” § 2-4-612(2), MCA. If a witness lacks expertise in a given field, she may not

give expert testimony in that field, even if she possesses expertise in another field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, 356 Mont. 468, 237 P.3d 37; Mont. R. Evid. 702.<sup>7</sup> Admission of improper expert testimony in a contested case constitutes reversible error. *In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995).

The apparent basis of the BER's decision was that Dr. Hinz's testimony was permissible under Montana Rule of Evidence 703. See BER:116 at 215:18 to 219:4. As clear from arguments advanced at hearing before this Court, both DEQ and WMR now rely on Rule 703 in defending BER's decision. However, Rule 703 merely addresses the "bases" on which expert opinion testimony may rest. Mont. R. Evid. 703. Rule 703 does not expand Rule 702, and it does not permit an expert to give testimony that is beyond her field of expertise, as Dr. Hinz did here with respect to aquatic life. *State v. Hardman*, 2012 MT 70, ¶¶ 27-28, 364 Mont. 361, 276 P.3d 839; *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984.

WRM asserts that the admission of Dr. Hinz's testimony about aquatic life was harmless. WRM Br. at 16. However, Dr. Hinz was DEQ's only witness who offered testimony about aquatic life in EFAC, and the BER's finding and decision regarding aquatic life relied almost exclusively on Dr. Hinz's testimony. BER:152 at 44-50, 85. The BER relied on Dr. Hinz's testimony to discount the testimony of the Conservation Groups' aquatic life expert Mr. Sullivan. BER:152 at 51-52. The BER's analysis of aquatic life cited only one other expert—WRM's expert Ms. Hunter—but conceded that, while Ms. Hunter sampled aquatic life in EFAC, she was not requested to analyze aquatic life health in the

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<sup>7</sup> *Accord, e.g., Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002).

stream, BER:152 at 45. And, in fact, DEQ directed Ms. Hunter to “collect, *but not analyze*” aquatic life in the stream. BER:152 at 46 (emphasis added).<sup>8</sup> Thus, Dr. Hinz’s testimony was critical to the BER’s findings and conclusions with respect to aquatic life and, therefore, its admission was prejudicial and not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18.

In sum, the BER’s admission and reliance on opinion testimony by Dr. Hinz about aquatic life in EFAC—an area admittedly beyond her field of expertise—was reversible error. *Russette*, ¶¶ 13-14; *Weber*, ¶¶ 36-39; *In re Thompson*, 270 Mont. at 429-30, 435, 893 P.2d at 307, 310.

**E. Whether the BER imposed a burden of proof that erroneously required the Conservation Groups to prove that the mine would cause material damage.**

MSUMRA places the “burden” of demonstrating that material damage will *not occur* on the permit applicant and the regulatory authority, here WRM and DEQ. § 82-4-227(1), (3)(a), MCA; ARM 17.24.405(6)(c). Where a statute imposes the burden to show the “lack of adverse impact” on a permit applicant, as here, that burden remains with the applicant throughout administrative review of the permit. *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154; *accord* S. Rep. No. 95-128, at 80 (1977) (legislative history of SMCRA stating that permit applicant retains burden of showing lack of environmental effects in contested hearing) (in record at BER:141, Ex. 2).

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<sup>8</sup> Indeed, as explained at the hearing, DEQ management seems to have arbitrarily prevented *anyone* with expertise in aquatic life from reviewing data on aquatic life in EFAC. See BER:117 at 183:25 to 184:8 (DEQ explaining that it instructed its expert in aquatic life, David Feldman, from analyzing data from EFAC); BER 100, Ex. MEIC 15; see also BER:152 at 46 (DEQ also prohibited WRM’s aquatic life expert from analyzing data).

Here, in violation of the statutory text of MSUMRA, a divided BER placed the burden on the Conservation Groups to “present evidence necessary to establish the existence of any water quality standard violations.” BER:152 at 84. Elsewhere, the BER stated the burden differently but maintained that the Conservation Groups had to show “more-likely-than-not” that material damage would or “could” occur. *Id.* at 72 (concluding “burden of proof ... falls to Conservation Groups to present a more-likely-than-not probability that a water quality standard could be violated by the proposed action”); *id.* at 76 (concluding Conservation Groups “have the burden to show, by a preponderance ... that DEQ had information available to it at the time of issuing the permit that indicated that the project is not designed” to prevent material damage).

As the dissenting BER member aptly explained, this “burden of proof ... impermissibly read out of the statute the agency’s regulation,” BER:151 at 214:18-23; that is, the BER ignored its own requirement that the applicant “affirmatively demonstrates” and DEQ “confirm[s]” that the “cumulative hydrologic impacts will not result in material damage.” ARM 17.24.405(6)(c); § 82-4-227(1), (3)(a), MCA (“The applicant ... has the burden” of establishing compliance with MSUMRA’s requirements); BER:151 at 204:5-25. This allocation of the burden of proof is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana’s right to a clean and healthful environment, which imposes “anticipatory and preventive” protections. *Park Cnty.*, ¶ 61. It is, thus, not the responsibility of the public to demonstrate that environmental harm will occur, but, instead, the duty of the applicant (WRM) and the agency (DEQ) to demonstrate that environmental harm will not occur.

The BER based its erroneous allocation of the burden on *Montana Environmental Information Center v. Montana Department of Environmental Quality (MEIC II)*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, a case on which both DEQ and WMR rely here.<sup>9</sup> However, as the Conservation Groups point out, that case is inapposite because, unlike MSUMRA, the Clean Air Act of Montana, at issue there, has no provision allocating the burden of proof to the permit applicant. Compare *MEIC* (2005), ¶ 13, with § 82-4-227(1), (3)(a), MCA.

Further, even in *MEIC II*, the Supreme Court did not burden the public with affirmatively demonstrating that environmental harm would occur. Instead, there, after the Supreme Court stated that the Clean Air Act permit challengers had the general burden of proof, the Court emphasized that the challengers did not have to prove that environmental harm would occur—as WRM contends and the BER held, here. Instead, the Supreme Court explained that, during the contested case, the dispositive question was whether the permit *applicant* had “established” that environmental *harm would not occur*.

Thus, on remand the BER shall enter [findings and conclusions] determining whether, based on the evidence presented, Bull Mountain [the permit applicant] established that emissions from its proposed project will not cause or contribute to [environmental harms] ....

*MEIC II*, ¶ 38; accord *id.*, ¶ 36.

Thus, in any event, WRM's and the BER's asserted requirement that the Conservation Groups affirmatively demonstrate that material damage *would* occur was

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<sup>9</sup> WRM also cites the Court to ARM 17.24.425(7), but that provision refers to cases where a party seeks to “reverse the decision of the BER,” not, as here, where the Conservation Groups sought to reverse DEQ's permit. Further, to the degree that the provision is ambiguous, the clear statutory test of § 82-4-227(1), MCA, which places the burden on the applicant, controls.



error. Where, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in administrative review of the permit. *Bostwick*, ¶ 36; § 82-4-227(1), (3); ARM 17.24.405(6)(c). The BER's decision to the contrary was error.

Reversal of the burden of proof was plainly prejudicial error. See *Organized Vill. of Kake*, 795 F.3d at 969 ("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). Further, here, the Conservation Groups' presented testimony that WRM and DEQ had failed to demonstrate that material damage would not occur. BER:115 at 297:6-15 (aquatic life survey does not show that water quality standard is met); *id.* at 298:1-8 (same). This Court cannot conclude that the BER's reversal of the burden of proof had "no bearing on the procedure used or the substance of the decision reached." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1019-20 (9th Cir. 2013).

**F. Whether the BER arbitrarily approved and relied on DEQ's and WRM's assessment of aquatic life health.**

The BER properly recognized that, to confirm that the cumulative hydrologic impacts will not result in material damage (which, as noted, includes any violation of a water quality standard), DEQ must assess applicable water quality standards. BER:152 at 75; *In re Bull Mountains*, at 87; ARM 17.24.405(6); §§ 82-4-203(31), 227(3)(a), MCA. The BER further recognized that the narrative water quality standard for EFAC requires that the creek "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life." ARM 17.30.629 (1); BER:152 at 18.

However, as confirmed by the record of the BER's decision, the BER *relied* on WRM's survey of macroinvertebrates to conclude that the CHIA adequately assessed the

water quality standard for growth and propagation of aquatic life. *Id.* at 85. The problem with this analysis is that it is demonstrably inconsistent with DEQ's explanation and the BER's finding that "analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support" for assessing water quality standards in eastern Montana streams. *Id.* at 46 (emphasis added); *see also id.* at 47-48. It was irrational and arbitrary for the DEQ and the BER to *rely* on an analysis that both entities expressly found to be *unacceptable* and *unreliable* for assessing applicable water quality standards. *MEIC III*, ¶ 26 ("an internally inconsistent analysis signals arbitrary and capricious action"); § 2-4-704(2)(vi), MCA. While agencies have a degree of discretion in determining what evidence to rely upon, an agency may not rely on evidence that the agency itself deems inadequate. *E.g., Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1077 (D. Idaho 2011) ("If an agency fails to make a reasoned decision based on an evaluation of the evidence, the Court must conclude that the agency has acted arbitrarily and capriciously."; *MEIC IV*, ¶ 26 (Court declined to defer to agency analysis that was not a "reasoned decision" because it "sidestep[ed]" environmental protections).

WRM misapprehends the gravamen of the Conservation Groups' challenge, which is *not* to the BER's factual findings with respect to DEQ's assessment of water quality standards for aquatic life support. *Cf.* WRM Br. at 18. The Conservation Groups' argument is that it was inconsistent and arbitrary (i.e., unlawful) for the BER to *rely* on a metric that the BER and DEQ both find *unreliable* to assess water quality standards for aquatic life support.

Both WRM and DEQ argue a distinction between the CWA and MSUMRA in their attempt to excuse DEQ's assessment of water quality standards for aquatic life support. See, e.g., WRM Br. at 18, and arguments at hearing. The argument fails because MSUMRA adopts and incorporates "water quality standards" from the CWA as criteria for assessing material damage. § 82-4-203(31), MCA; see also Conservation Groups' Reply to DEQ, at Argument Part V. Thus, DEQ's CHIA purported to assess the narrative *water quality standard* for growth and propagation of aquatic life by relying on the (admittedly unreliable) macroinvertebrate survey: "the survey demonstrated that a diverse community of macroinvertebrates was using the stream reach. *Therefore*, the reach currently meets the *narrative [water quality] standard of providing a beneficial use for aquatic life*." BER:95, Ex. DEQ-1A at 9-8 (emphasis added); ARM 17.30.629(1) (narrative standard—stream must "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life"). The BER, similarly, used the assessment of macroinvertebrates to support its conclusion about water quality standards in EFAC. BER:152 at 48-49. Accordingly, DEQ's and WRM's effort to excuse the BER's inconsistent and arbitrary assessment of water quality standards for aquatic life fails.

Finally, WRM's harmless error argument also fails. Despite generalized assertions about "multiple lines of evidence," the unreliable macroinvertebrate survey was the *only* specific evidence on which the BER and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life. BER:152 at 82 (citing macroinvertebrate survey (the "ARCADIS report")); *id.* at 48-50 (basing analysis on Dr. Hinz's inexpert assessment of macroinvertebrate survey—but citing no other specific evidence); BER:95, Ex. DEQ-1A at 9-8 (basing

assessment of narrative water quality standard for aquatic life exclusively on macroinvertebrate survey). As such, the BER's arbitrary and capricious reliance on DEQ's inexpert analysis of this unreliable survey was prejudicial, not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18; *Organized Vill. of Kake*, 795 F.3d at 969.

**G. Whether the BER arbitrarily concluded that adding more salt to a stream impaired for salt will not cause additional impairment.**

The BER found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of aquatic life due to, among other things, excessive salinity pollution. BER:152 at 24-25. WRM disputes that EFAC is impaired—i.e., not meeting water quality standards—due to salinity. WRM Br. at 20-22. However, the record indicates that DEQ's official CWA assessment concluded: "Salinity/TDS/chlorides will remain a cause of impairment." BER:95, Ex. 10 at 17. While, as the BER noted, DEQ's level of *certainty* in this conclusion was low and not confirmed, BER:95, Ex. 10 at 17, *cited in* BER:152 at 28, it nevertheless remains DEQ's official impairment determination with respect to EFAC.

The BER further found that existing mining operations will cause a 13% increase in salinity in EFAC, and AM4 will extend the duration of these increased salinity levels for up to "tens to hundreds of years." *Id.* at 32, 39, 63, 68-69 n.4.<sup>10</sup> The BER nevertheless determined that this increased salinity would not result in a violation of water quality standards for growth and propagation of aquatic life or adversely affect that beneficial use

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<sup>10</sup> *Accord* BER:95, Ex. DEQ-1 at 11 (DEQ findings noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (DEQ CHIA noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L").

of EFAC. *Id.* at 61-72. The BER's determination was reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining. BER:152 at 63-65 (stating that "AM4 specifically ... is all this case concerns" and declining to consider cumulative salinity pollution from the total mine operation). However, as pointed out by the Conservation Groups, MSUMRA requires DEQ and the BER to analyze the impacts of a proposed mining operation in light of the "*cumulative* hydrologic impacts" of *all* past, existing, and anticipated mining. § 82-4-227(3)(a), MCA (emphasis added); ARM 17.24.301(31)-(32), .405(6)(c). "Cumulative" means "increasing by successive additions." Merriam-Webster Dictionary, [www.merriam-webster.com](http://www.merriam-webster.com). Thus, if pollution from "successive" mining operations will cause violations of water quality standards, DEQ must remedy those violations *before* permitting more mining. See 48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (material damage must be considered in light of "cumulative" impacts from "any preceding operations"). As the Supreme Court of Alaska explained in interpreting its SMCRA program, regulators must

consider the probable cumulative impact of all anticipated activities which will be part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review. If [the regulatory authority] determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.

*Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992).

Thus, the BER's conclusion, reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining, was error. If a stream, like EFAC, is not meeting water quality standards due to excessive pollution—that is, it is beyond its loading capacity, § 75-5-103(14), MCA—release of additional amounts of pollution that increase the concentration of that pollution will violate water quality

standards. *Id.*; § 75-5-103(18), MCA; accord *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into stream impaired by copper would violate water quality standards). Similarly, if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life. See § 82-4-203(31), MCA (adversely affecting beneficial uses or violating water quality standards is material damage). To conclude otherwise is unreasonable and arbitrary.

WRM attempts further reliance on Dr. Schafer's "statistical" analysis to assert that the projected increase in salinity would not be "statistically significant." WRM Br. at 22. However, as noted, Dr. Schafer's *post hoc* "statistical" analysis was not properly before the BER. See *supra*, Part V.C. In any event, Dr. Schafer's "statistical" argument (which the BER adopted) misses the point. As noted above, if the creek is impaired and, therefore, not meeting water quality standards, it cannot be maintained that a greater-than 10% increase in salt in the creek will not result in a further violation of water quality standards. ARM 17.24.405(6)(c) ((applicant and DEQ must demonstrate that material damage (i.e., a violation of a water quality standard) "will not result")); § 75-5-103(18), MCA (when water body has reached its loading capacity for a pollutant—as EFAC has for salinity—additional pollution causes a "violation of water quality standards"); *Friends of Pinto Creek*, 504 F.3d at 1011-12 (adding more pollution to impaired stream will cause or contribute to violation of water quality standard).

To the point here, violations of water quality standards are measured on a *daily* basis—each additional day of elevated pollution levels is an additional violation. § 75-5-

611(9)(a), MCA; *Id.*; § 82-4-254(1)(a), MCA. Thus, extending the 13% increase in salinity in already-impaired EFAC for decades or centuries would result in additional violations. Plainly, this is not a demonstration that AM4 "will *not* result in" a "violation of water quality standards." ARM 17.24.405(6)(c); § 82-4-203(31), MCA (emphasis added); *Id.*; § 82-4-202(2)(a)-(b), MCA (MSUMRA purpose is environmental protection and implementation of the Montana Constitution's right to a clean and healthful environment); *Park Cnty.*, ¶ 61; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715 (statutory goal paramount).

Thus, the BER's conclusion that the cumulative impacts of AM4 will not result in material damage was arbitrary and capricious. It was, therefore, unlawful.

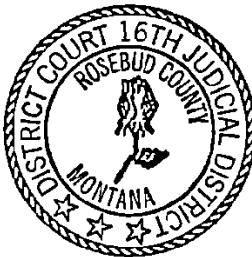
**H. DEQ's and WRM's Motion to Strike was granted.**

DEQ and WRM moved to strike two exhibits proffered by the Conservation Groups during briefing, purportedly containing admissions by DEQ and DEQ's former counsel, which contradict an argument DEQ presented to this Court in its answer brief. In an order filed separately, the Court granted DEQ's and WRM's Motion to Strike. The Court has not relied upon the challenged exhibits in reaching its decision.

**VI. CONCLUSION**

For the foregoing reasons, this Court reverses the BER and remands to DEQ to review the AM4 permit application consistent with this decision and applicable laws.

DATED this 27<sup>th</sup> day of October, 2021.



*Katherine M. Bidegaray*  
Katherine M. Bidegaray  
District Court Judge

**Certificate of Service**

I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail

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**ATTORNEYS FOR PLAINTIFF  
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

<b>UNITED STATES OF AMERICA,</b>  <b>Plaintiff,</b>  <b>vs.</b>  <b>SIGNAL PEAK ENERGY, LLC,</b>  <b>Defendant.</b>	<b>CR 21-79-BLG-SPW-TJC</b>  <b>OFFER OF PROOF</b>
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The United States of America, represented by Colin M. Rubich, Assistant United States Attorney for the District of Montana, files its Offer of Proof in anticipation of the Change of Plea hearing scheduled for October 7, 2021.

## **THE CHARGE**

The defendant, Signal Peak Energy, LLC, is charged by Information with willful violation of a mandatory health and safety standard, in violation of 30 U.S.C. § 820(d) – Counts I-IV.

## **PLEA AGREEMENT**

The defendant will plead guilty to Counts I-IV of the Information. The United States presented any and all formal plea offers to the defendant in writing. The plea agreement entered into by the parties and filed with the court represents, in the government's view, the most favorable offer extended to the defendant. *See Missouri v. Frye*, 566 U.S. 134, 145-46 (2012).

## **ELEMENTS OF THE CHARGE TO WHICH HE WILL PLEAD**

In order for the defendant to be found guilty of willful violation of a mandatory health and safety standard, as charged in Counts I-IV of the Information, the United States must prove each of the following elements beyond a reasonable doubt:

**First**, the defendant is an operator of a coal or other mine which is subject to the Mine Safety and Health Act,

**Second**, the defendant violated a mandatory health or safety standard or an order of withdrawal at that mine, and

**Third**, the violation was willful.

## **PENALTY**

Counts I-IV each carry a maximum possible punishment of a \$250,000 fine and a \$100 special assessment.

## **ANTICIPATED EVIDENCE**

If this case were tried in United States District Court, the United States would prove the following:

From approximately 2013 until 2018 Signal Peak Energy, LLC, an operator of a coal mine located outside of Roundup, Montana which is subject to the Mine Safety and Health Act, habitually violated mandatory health and safety standards applicable to the operation of the mine. These violations consisted of both standards regarding environmental safety and worker safety. These violations occurred with the full knowledge, direction, and participation of the most senior management of the mine during that period, including the President and CEO, the Vice President of Surface Operations, the Vice President of Underground Operations, and the Safety Manager.

In the Summer months of 2013, as a part of these habitual violations, senior managers of Signal Peak Energy, LLC directed mine employees to improperly dispose of mine waste by pumping the waste into abandoned sections of the mine. This waste, known colloquially as “slurry,” consisted of wastewater, industrial

chemicals used in the mining process, and unprocessed soil containing heavy metals including arsenic and lead over groundwater tolerances.

Mine employees pumped this slurry into the abandoned section of the mine for up to approximately two weeks. Several employees later stated that they pumped this slurry into this abandoned section of the mine until the section was full and could hold no additional mine waste. Disposing mine waste in this manner legally required approval of both the Mine Health and Safety Administration (MSHA) and the Environmental Protection Agency (EPA) which Signal Peak Energy did not obtain. As such, by disposing of the mine waste in this manner without approval, Signal Peak willfully violated a mandatory safety standard applicable to the mine.

A similar incident occurred in the Spring of 2015. On this occasion, agents of Signal Peak Energy, LLC commissioned the drilling of two bore holes into the ground that led to another abandoned section of the mine. Senior managers of Signal Peak Energy, LLC directed mine employees to pump more “slurry” mine waste into the abandoned section through the bore holes. This “slurry” had the same basic composition as the “slurry” improperly disposed of in 2013. Estimates vary, but this pumping occurred for up to six weeks. In this case, the pumping was discontinued after a witness discovered that seals between the

abandoned mine works and the operating mine had been breached, causing flooding in areas of the operating mine. Signal Peak Energy, LLC obtained a permit to inject water in the ground via these bore holes but this permit did not allow for the disposal of this “slurry” mine waste. As such, by once again disposing of the mine waste in this manner without approval, Signal Peak was willfully violating a mandatory safety standard applicable to the mine.

On January 3, 2018, John Doe 1, an employee of Signal Peak Energy LLC, was on duty and working at the mine. As a part of his duties, John Doe 1 was moving large equipment utilized in the mining process. During this process, some of this equipment fell onto John Doe 1’s hand and crushed one of his fingers. John Doe 1 met with the Safety Manager who began driving him to the hospital for medical treatment. On the way, John Doe 1 had telephonic communication with the Vice President of Underground Operations. The Vice President of Underground Operations pressured John Doe 1 not to report the injury as work related and stated that he would make it worth John Doe 1’s while. The Safety Manager witnessed this but did not intervene. The Safety Manager then dropped John Doe 1 off at the hospital rather than accompanying him inside pursuant to mine policy.

John Doe 1 then falsely stated that the injury had occurred at home and was not work related. Doctors eventually amputated a portion of the crushed finger. Sometime later when John Doe 1 returned to work at the mine, the Vice President of Underground Operations approached John Doe 1 and gave him an envelope containing approximately \$2000.00. As a result of these activities, Signal Peak Energy, LLC did not report this injury to MSHA as it was mandated to do. This was also a willful violation of a mandatory health and safety standard.

On May 5, 2018, John Doe 2, an employee of Signal Peak Energy LLC, was on duty and working at the mine. While working in the underground portion of the mine, rock sluffed off the wall and fell onto John Doe 2's head causing a severe laceration. The shift foreman immediately called the Safety Manager. The Safety Manager met John Doe 2 and drove John Doe 2 to away from the mine with the stated intention to take John Doe 2 to the hospital. The Safety Manager then drove John Doe 2 home instead of to the hospital. John Doe 2 then waited until the next morning to seek medical attention. When John Doe 2 did finally get medical care, John Doe 2 falsely stated the injury had been caused by a shelf falling on his head in the garage of his private home. Doctors sealed the laceration with several large staples. John Doe 2 returned to his work for his next scheduled shift, but was unable to complete the shift or several of the following

shifts due to his injuries; his lost time was charged against his vacation leave without his approval. After these events, Signal Peak Energy, LLC once again did not report the injury to MSHA as it was mandated to do. This was yet another willful violation of a mandatory health and safety standard.

DATED this 5th day of October, 2021.

LEIF M. JOHNSON  
Acting United States Attorney

/s/ Colin M. Rubich  
COLIN M. RUBICH  
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNAL PEAK ENERGY LLC,

Defendant.

CR 21-79-BLG-SPW-TJC

**FINDINGS AND  
RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

The Defendant, by consent, appeared before me under Fed. R. Crim. P. 11 and entered a plea of guilty to Counts I-IV of the Information which charges the crime of violation of mine health or safety standard, in violation of 30 U.S.C. § 820(d).

After examining the Defendant under oath, the Court determined:

1. That the Defendant is fully competent and capable of entering an informed and voluntary plea to the criminal offenses charged against it;
2. That the Defendant is aware of the nature of the charges against it and the consequences of pleading guilty to the charges;
3. That the Defendant fully understands its pertinent constitutional rights and the extent to which it is waiving those rights by pleading guilty to the criminal offenses charged against it; and



4. That the Defendant's plea of guilty to the criminal offenses charged against it is knowingly and voluntarily entered, and is supported by independent factual grounds sufficient to prove each of the essential elements of the offenses charged.

The Court further concludes that the Defendant had adequate time to review the Plea Agreement with counsel, that Defendant fully understands each and every provision of the agreement and that all of the statements in the Plea Agreement are true.

Therefore, I recommend that the Defendant be adjudged guilty of the charges in Counts I-IV of the Information and that sentence be imposed.

Objections to these Findings and Recommendation are waived unless filed and served within fourteen (14) days after the filing of the Findings and Recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Crim. P 59(b)(2).

DATED this 7th day of October, 2021.



---

TIMOTHY J. CAVAN  
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNAL PEAK ENERGY LLC,

Defendant.

CR 21-79-BLG-SPW-TJC

**ORDER ADOPTING FINDINGS  
AND RECOMMENDATIONS**

Attorney, John Sullivan, for and on behalf of the Defendant, Signal Peak Energy, LLC, appeared before U.S. Magistrate Judge Timothy J. Cavan in open court on October 7, 2021 for purposes of an initial appearance, arraignment and change of plea hearing. United States Magistrate Judge Timothy J. Cavan entered Findings and Recommendation in this matter on October 7, 2021 (Doc. 10). No objections having been filed within fourteen days thereof,

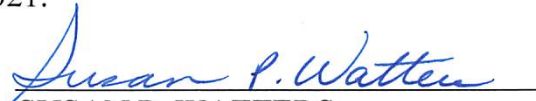
IT IS HEREBY ORDERED that Judge Cavan's Findings and Recommendations (Doc. 10) are ADOPTED IN FULL.

On October 7, 2021, this Court referred the above-captioned case to Magistrate Judge Timothy J. Cavan for all further proceedings, including

sentencing (Doc. 11). Judge Cavan has set this case for sentencing on January 31, 2022 at 9:00 a.m.

The clerk shall promptly notify counsel and the probation office of the entry of this Order.

DATED this 22<sup>nd</sup> day of October, 2021.

  
SUSAN P. WATTERS  
United States District Judge

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
APPEAL AMENDMENT	)	CASE NO. BER 2016-07 SM
APPLICATION AM3, SIGNAL	)	
PEAK ENERGY LLC'S BULL	)	
MOUNTAIN MINE NO. 1, PERMIT	)	
NO. C1993017	)	

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**SIGNAL PEAK ENERGY, LLC'S RESPONSE TO MONTANA  
ENVIRONMENTAL INFORMATION CENTER'S EXCEPTIONS TO THE  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## **RESERVATION OF RIGHTS**

The Hearing Examiner's Proposed Findings of Fact and Conclusions of Law ("Proposed FOFCOLs") adopt and apply the well-established evidentiary standards for contested case proceedings before the Board of Environmental Review (the "Board"). On October 28, eight days before the deadline to file this pleading, a Montana district court overturned a prior Board order issued in an unrelated contested case proceeding,<sup>1</sup> and, in doing so, rejected the Board's evidentiary standards for contested case proceedings. *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, No. DV 19-34 (Mont. 16th Judicial Dist.) (Order dated Oct. 28, 2021). The overturned order (the "Rosebud Mine Order") is cited in the Proposed FOFCOLs as a basis (among others) for the Hearing Examiner's conclusion that Petitioner Montana Environmental Information Center ("Petitioner"), as the party challenging the agency decision, bore the evidentiary burden to prove its claims. Proposed FOFCOLs at 39.<sup>2</sup>

The district court decision overturning the Rosebud Mine Order does not change the outcome of this contested case proceeding. First, the district court

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<sup>1</sup> The district court overturned the Board's June 6, 2019 order upholding an amendment to a mining permit at the Rosebud Mine, a matter wholly unrelated to this contested case proceeding or the Bull Mountain Mine at issue here.

<sup>2</sup> Signal Peak requested an extension of time to file this brief to allow for briefing on this issue. Signal Peak would be please to provide specific briefing on the impact the district court decision on this matter at the Board's request.

decision was not issued by the judicial district in which the Bull Mountain Mine is located; as such, the district court decision is not binding authority and can only be considered by the Board for its persuasive value, if any. Second, the district court decision materially contradicts and grossly mischaracterizes the Montana Supreme Court precedent upon which the Board and Hearing Examiner have properly relied in apportioning the parties' respective evidentiary burdens in this and prior contested case proceedings. Because the district court decision cannot and does not overturn Montana Supreme Court precedent – namely, *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2005 MT 96 (“MEIC”) which resolved the question of the evidentiary burden of proof in contested case proceedings nearly two decades ago – the district court decision must be disregarded by the Board as a legally flawed outlier.

Respondent-Intervenor Signal Peak Energy, LLC (“Signal Peak”) submits that the appropriate course of action is for the Board to resolve this matter in accordance with the evidentiary standards that have guided this matter and others before the Board for decades – i.e., Petitioner, as the party challenging the Department of Environmental Quality’s (the “Department”) decision, bore the burden to prove its claim by a preponderance of the evidence – by adopting the Hearing Examiner’s Proposed FOFCOLs. Alternatively, should the Board choose to substitute the evidentiary standards enunciated last week by the district court,

Signal Peak submits that the Hearing Examiner’s unchallenged Conclusion of Law 22 is dispositive.<sup>3</sup> Conclusion of Law 22, which Petitioner has not challenged, states that “Signal Peak affirmatively demonstrated that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227(1).” COL ¶ 22. The Hearing Examiner identifies 85 discreet findings of fact – the vast majority of which are not challenged by Petitioner – supporting Conclusion of Law 22. *Id.* (citing FOF ¶¶ 65-151). Conclusion of Law 22, together with the supporting factual findings, demonstrates that Signal Peak met its evidentiary burden under the district court’s newfound standard.<sup>4</sup>

Should the Board apply the district court’s standard and determine that Conclusion of Law 22 and the 85 discreet findings of fact cited in support are not a sufficient basis to uphold the agency’s decision, due process and justice require the Board reinitiate this contested case. From the outset, this case has been litigated by the parties with the clear understanding and directive that Petitioner bore the evidentiary burden to prove its claim. See for example MSJ Order at 14-15. Thus, Signal Peak’s entire litigation strategy from discovery through summary judgment,

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<sup>3</sup> The District Court held that a mine permit applicant bears the evidentiary burden in a contested case proceeding to affirmatively demonstrate compliance with the governing law.

<sup>4</sup> Conclusion of Law 22 is discussed further below in Conclusions of Law, Section A.4.

its evidentiary presentation at hearing, and its post-hearing briefing have been premised on the Board and Hearing Examiner's directives that Petitioner, as the party challenging the Department's decision, bore the burden to prove its claim. Had Signal Peak known it bore the evidentiary burden to disprove Petitioner's claim, its litigation strategy would have been entirely different.<sup>5</sup> For these reasons, rejecting Conclusion of Law 22 and resolving the case under a new burden of proof in the final hour of this contested case proceeding would impermissibly prejudice Signal Peak's due process rights. To avoid this prejudice, the Board would must either (1) resolve this matter in accordance with the evidentiary standard enunciated in the Proposed FOFCOLs or (2) reinstate the contested case with instructions that the parties to relitigate the claim under the new evidentiary standard.

Lastly, Signal Peak notes that today the Department filed a motion in the district court case indicating its intention to appeal the decision. The Board may choose to stay this litigation to determine whether the Supreme Court will reverse the district court's novel and unsupported interpretation of the parties' respective evidentiary burdens. Reserving judgment on the Proposed FOFCOLs pending a

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<sup>5</sup> For example, had Signal Peak bore the burden of proof from the outset, it would have insisted on presenting evidence first at hearing (as is customary for the party bearing the evidentiary burden in civil litigation), rather than limiting its evidence and testimony to matters strictly responsive to Petitioner's case-in-chief.

ruling by the Montana Supreme Court on the Rosebud Mine Order will both conserve the resources of the parties and the Board and best ensure that the Board's ultimate resolution of this matter is consistent with the law.

### **INTRODUCTION**

The Montana Strip and Underground Mine Reclamation Act ("MSUMRA") and its implementing rules require that water uses adversely and permanently impacted by mining activities be replaced by the permittee. Mont. Code Ann. § 82-4-253(3)(d); ARM 17.24.648; ARM 17.24.903(2). As such, a mine permit application must include a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water uses adversely impacted by mining activities. ARM 17.24.304(1)(f)(iii). Signal Peak's application to amend Permit No. C1993017 ("AM3") identified four such sources of replacement water: (1) the mine pool, (2) overburden aquifers, (3) rainfall and snowmelt, and (4) the deep underburden aquifer<sup>6</sup> ("DUA"). FOF ¶ 146; Discussion at 48; Order on Motions for Summary Judgment at 9 (Nov. 14, 2019) ("MSJ Order"). Petitioner objected to the designation of the DUA on the basis that physical and legal barriers precluded the DUA as a source of replacement water. FOF ¶¶ 34-36.

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<sup>6</sup> The Proposed FOFCOL's interchangeably refer to the deep underburden aquifer as either the "DUB" or the "DUA." For consistency and clarity, Signal Peak refers to the deep underburden aquifer herein as the DUA.

Consistent with clear statutory and regulatory directive and binding precedent, Petitioner bore the burden to demonstrate at hearing, by a preponderance of the evidence, that physical and legal barriers precluded the DUA as a source of replacement water. COL ¶¶ 9-10; see also MSJ Order at 29 (“In order to meet its burden at a hearing, MEIC must show that DEQ violated the law by identifying [a] replacement water source that could not be used.”) (emphasis in original). Because MSUMRA and its implementing rules contemplate uncertainty, the introduction of some uncertainty by Petitioner as to the physical and/or legal availability of the DUA was not enough. COL ¶ 19. Rather, Petitioner needed to prove, by a preponderance of the evidence, that physical and/or legal barriers precluded the sourcing of replacement water from the DUA. COL ¶ 9.

By any measure, Petitioner failed to carry its evidentiary burden. Petitioner offered no evidence whatsoever of legal barriers prohibiting the DUA from serving as a source of replacement water, and Petitioner’s lone expert witness agreed that the DUA *could* be physically sourced for replacement water. Discussion at 43-49. As such, the Hearing Examiner’s Proposed FOFCOLs correctly concluded that Petitioner failed to prove by a preponderance of the evidence that legal and/or physical barriers precluded the DUA as a replacement water source. COL ¶ 23; Recommended Decision at ¶ 1.

Faced with defeat, Petitioner's Exceptions to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law ("Exceptions") reimagine Petitioner's claim, flout the former Hearing Examiner's past rulings and controlling law, and take considerable liberties with the factual and legal posture of this and past contested cases before the Board. Notably, Petitioner's Exceptions (1) resist its well-settled burden of proof, (2) disavow the controlling regulation, (3) reargue motions rejected at hearing, and, most alarmingly, (4) assert novel claims attacking the hydrologic monitoring and impact detection protocols that Petitioner neither raised nor preserved in the administrative process and contested case proceeding.

Petitioner's efforts to recast its claim at this late hour, coupled with Petitioner's blatant disregard of binding precedent and the former Hearing Examiner's controlling rulings, distracts from the inquiry and prejudices the Department and Signal Peak. Notwithstanding, because no physical or legal barriers preclude the DUA as a possible source of replacement water, and because the Hearing Examiner's Proposed FOFCOLs are supported by law and fact, Petitioner's Exceptions must be rejected and the Proposed FOFCOLs upheld.

#### **LAW OF THE CASE**

As a threshold matter, the former Hearing Examiner granted partial summary judgment in favor of the Department and Signal Peak and denied



summary judgment in favor of Petitioner on November 13, 2019. MSJ Order at 29-30. In doing so, the former Hearing Examiner denied Petitioner's bonding claim both because Petitioner did not and would not proffer an expert on bonding and therefore could not sustain its burden of proof on its claim challenging the sufficiency of the bond required by the Department, and because Petitioner did not raised the sufficiency of the bond in its comments, and was therefore forestalled from raising the issue on appeal. MSJ Order at 15-17, 29-30.

In the order on summary judgment, the former Hearing Examiner established certain facts and law relevant to Petitioner's remaining claim: the availability of the DUA to serve as a replacement water source. *Id.* at 17-29. Petitioner objects to the Proposed FOFCOLs' reliance on facts and law developed on summary judgment on the basis that such facts and law have "no precedential value." Exceptions at 5. Petitioner is wrong. With respect to factual findings, the facts established on summary judgment are binding and must be treated as established for the entire contested case proceeding. Mont. R. Civ. P. 56(d)(1). With respect to legal conclusions, "the law of the case doctrine expresses generally the courts' reluctance to reopen issues that have been settled during the course of litigation" and is "applicable to the prior rulings of a trial court in the same case." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶¶ 29-31.

## STANDARD OF REVIEW

Petitioner misstates the Board's standard of review.<sup>7</sup> MSUMRA contested case proceedings before the Board are governed by the contested case provisions of the Montana Administrative Procedure Act ("MAPA"). Mont. Code Ann. § 82-4-206(2). MAPA statutorily limits the Board's authority to modify or reject the Hearing Examiner's proposed findings of fact and conclusions of law. Mont. Code Ann. § 2-4-621(3). The Board's modification or rejection of the Hearing Examiner's Proposed FOFCOLs in violation of Mont. Code Ann. § 2-4-621(3) constitutes an abuse of discretion pursuant to Mont. Stat. Ann. § 2-4-704(2)(a)(vi). *Ulrich v. State ex rel. Board of Funeral Serv.*, 1998 MT 196, ¶ 14.

Findings of fact are reviewed to determine if they are supported by competent substantial evidence. Mont. Code Ann. § 2-4-621(3). The Board may *not* reject or modify the proposed findings of fact unless the Board first determines from a review of the complete record and states with particularity that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential elements of law.

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<sup>7</sup> Petitioner correctly states that the Board's review of the Hearing Examiner's Proposed FOFCOLs is controlled by Mont. Code Ann. § 2-4-621(3). Exceptions at 3. However, Petitioner curiously includes the standard for judicial review. *Id.* Judicial review of a contested case is governed by Mont. Code Ann. §§ 2-4-701 through 711, and judicial review only occurs, if at all, after the Board issues a final decision on the Hearing Examiner's Proposed FOFCOLs.

*Id.* The Board’s reversal of the findings of fact proposed by a hearing examiner will not pass muster on judicial review unless the Board determines as a matter of law that the Hearing Examiner’s proposed findings of fact are not supported by substantial evidence. *Moran v. Shotgun Willies*, 889 P.2d 1185, 1187 (1995).

The Board’s inquiry is not whether there is evidence to support findings different from those made by the Hearing Examiner, but whether substantial credible evidence supports the Hearing Examiner’s findings. *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26. Substantial evidence, while sounding weighty, is anything but. “Substantial evidence [...] consists of more [than] a mere scintilla of evidence but may be less than a preponderance,” *id.*, and “[e]vidence will be considered substantial even if it is contradicted by other evidence, somewhat less than a preponderance, or inherently weak.” *Narum v. Liberty Northwest Ins. Corp.*, 2009 MT 127, ¶ 25; *Kratovil v. Liberty Northwest Ins. Corp.*, 2008 MT 443, ¶ 13. The Board must evaluate the record evidence “in the light most favorable to the **prevailing** party” – i.e., the Department and Signal Peak. *Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶ 12 (emphasis added).

Conclusions of law are reviewed for correctness. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474 (1990). The Board may **not** summarily reject or modify the Hearing Examiner’s proposed conclusions of law; rather, the Board must (1) particularize which findings of fact supported the modified or rejected

conclusion of law and (2) justify modifying or rejecting those particular factual findings based upon a lack of substantial evidence. Mont. Code Ann. § 2-4-621(3); *Ulrich*, ¶¶ 29, 40-42. Again, the Board must evaluate the record evidence “in the light most favorable to the *prevailing* party” – i.e., the Department and Signal Peak. *Welu*, ¶ 12 (emphasis added).

### **CONCLUSIONS OF LAW**

Petitioner seemingly takes exception to *all* of the Hearing Examiner’s proposed conclusions of law on the basis that the Hearing Examiner applied the wrong evidentiary burden of proof.<sup>8</sup> First, Petitioner complains that the Hearing Examiner applied the incorrect administrative rule, thereby impermissibly shifting the evidentiary burden at hearing from the Department and Signal Peak to Petitioner. Exceptions at 3-5. Second, Petitioner argues that – regardless of the applicable administrative rule – the burden of proof in a contested case proceeding *always* rests with the Department and Signal Peak, and that the Hearing Examiner “imposed an unlawful and impossible standard of proof” by requiring Petitioner prove its claim. *Id.* at 5-23. Petitioner is wrong on both accounts. As discussed

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<sup>8</sup> Frustratingly, Petitioner’s Exceptions do not identify the specific conclusions of law to which Petitioner wishes to lodge objections. Rather, Petitioner’s Exceptions – by broadly challenging the controlling administrative rule and the evidentiary burden of proof – necessarily implicate *all* of the Hearing Examiner’s conclusions of law. The Board has held that such blanket exceptions are improper. Rosebud Mine Order, Transcript of Oral Argument at 95-106 (May 31, 2019).

below, the Hearing Examiner correctly resolved Petitioner's claim under ARM 17.24.304(1)(f)(iii) – the *only* MSUMRA rule specific to the designation of replacement water sources. Moreover, because the Rosebud Mine Order (together with the binding statutes, rules, and case law cited therein) unequivocally held that the evidentiary burden in a contested case proceeding rests with the challenging party to prove that the challenged decision violated the law, the Hearing Examiner correctly required Petitioner to prove, by a preponderance of the evidence, that the Department's designation of the DUA as a potential replacement water source violated ARM 17.24.304(1)(f)(iii). As such, the Hearing Examiner's proposed conclusions of law are lawful and correct.

**A. The Hearing Examiner correctly concluded that Petitioner had the burden to prove its claim.**

**1. The recent district court decision does not change the law on which the Rosebud Mine Order was premised, which requires the party bringing a contested case to bear the burden of proof.**

As noted above in the Reservation of Rights, a Montana district court recently reversed an unrelated Board order holding that the party bringing the contested case bears the burden of proof. Dist. Ct. slip op. at 25-28 (holding that MSUMRA's substantive application requirements carry over into the contested case proceeding, thereby placing the evidentiary burden of proof on the applicant in the contested case proceeding). However, that decision is not binding in this matter, and its precedential authority is limited to its ability persuade. See

Reservation of Rights. The district court’s decision is entirely unpersuasive because it uncritically adopts the petitioners’ (who include Petitioner in this matter) proposed decision almost verbatim, and petitioners’ proposed decision rests on gross misinterpretations of statute, regulation, and Supreme Court precedent.

Notably, the district court dismissed Montana Supreme Court precedent directly on point. *Id.* at 27. In *MEIC*, the Supreme Court was presented with precisely the question Petitioner raises here (and which was raised before the district court) – whether substantive permit application requirements “extend[] to the contested case hearing before the Board and require[] [the applicant]—as well as the Department—to establish that the application met the permit criteria.”

*MEIC*, ¶ 12. The Supreme Court determined the answer is “no” because MAPA provides 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 § 2-4-612(2), MCA). The district court asserts that there was no such “specific statute” at issue in the *MEIC* matter, but that MSUMRA includes one. Dist. Ct. slip op. at 27. This is a misreading of both the case and the law.

The substantive application requirement of MSUMRA that the district court (and Petitioner) cites as evidence of a “specific statute” governing burden of proof for contested cases is almost a word-for-word copy of the regulation upon which

petitioners based their argument in *MEIC*.<sup>9</sup> Petitioner cannot evade the controlling authority of *MEIC* because when presented with functionally equivalent language, the Supreme Court held that it ***did not*** change the traditional burden of proof from Montana law that the party bringing the claim bears the burden of proof. *Id.*, ¶¶ 14-16, citing Mont. Code Ann. §§ 26-1-401 and -402. Notably, the statutory provisions providing for review of permitting decisions under MAPA’s contested case provisions – the most likely place where some sort of burden shifting instruction would be found – are almost identical in MSUMRA and the Clean Air Act of Montana.<sup>10</sup> Both are silent regarding burden of proof, indicating that the traditional rules apply.

Indeed, MSURMA’s implementing regulations specifically provide that the party bringing the contested case bears the burden of proof. The district court once again misinterpreted this regulation. ARM 17.24.425(7) provides that “The burden of proof ***at such hearing*** is on the party seeking to reverse the decision of the

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<sup>9</sup> Compare Mont. Code Ann. § 82-4-227(1) (“An application for a . . . strip-mining . . . permit or major revision may not be approved by the department unless, . . . the applicant has affirmatively demonstrated that the requirements of this part and rules will be observed . . .”) with ARM 17.8.749(3) (“A Montana air quality permit may not be issued . . . unless the applicant demonstrates that the facility or emitting unit can be expected to operate in compliance with the Clean Air Act of Montana and rules adopted under the Act . . .”).

<sup>10</sup> Compare Mont. Code Ann. § 82-4-206(2) (“The contested case provisions of [MAPA] apply to a hearing before the board under subsection (1).”) with Mont. Code Ann. § 75-2-211(10), MCA (“The contested case provisions of [MAPA] apply to a hearing before the board under this subsection.”).

board.” The district court claimed that this provision, by using the term “decision of the board” must apply to “cases where a party seeks to ‘reverse a decision of the BER’”. Dist. Ct. slip op. at 27, n.9. This interpretation cannot be correct because a case in which a party seeks to reverse the Board’s decision is subject to MAPA’s separate judicial review provisions at Mont. Code Ann. § 2-4-704.

ARM 17.24.425, in contrast, provides the detailed procedures governing “Administrative Review” before the board. Subsections (1) through (6) address how to initiate such action and how the Board will administer the case. Subsection (7)’s reference to “such hearing” can only refer to the contested case hearing before the Board.

Finally, the district court rested its decision in large part on a blatant misreading of another Montana Supreme Court case, *Bostwick Props. Inc. v. Dep’t of Natural Res. & Conservation*, 2013 MT 48. The District Court (and Petitioner) argues that this case stands for the proposition that “[w]here a statute imposes the burden to show the ‘lack of adverse impact’ on a permit applicant, . . . , that burden remains with the applicant throughout administrative review of the permit.” Dist. Ct. slip op. at 25. This interpretation is drawn solely from the fact that Bostwick was the permit applicant and bore the burden of proof in that case. But the key point that the district court (and Petitioner) omit is that Bostwick was the party



who brought the contested case. *Bostwick*, ¶ 1. It is that fact, not the fact that Bostwick was the applicant, that led to Bostwick bearing the burden of proof.

The district court's holding on burden of proof is simply contrary to the law. The Board cannot follow both the district court decision on the one hand and *MEIC v. DEQ*, MAPA, and ARM 17.24.425(7) on the other, because they directly conflict. Faced with this conflict, the Board should follow the Supreme Court's controlling precedent and decline to treat the district court's legally flawed opinion as persuasive. Thus, the burden of proof should properly be applied to Petitioner as the party who brought this contested case.

**2. Petitioner had the burden to prove, by a preponderance of the evidence, that the Department's designation of the Deep Underburden Aquifer violated ARM 17.24.304(1)(f)(iii).**

Consistent with clear statutory and regulatory directive and controlling Supreme Court precedent and then-binding Board precedent, Petitioner had the burden at hearing to prove its claim.<sup>11</sup> Mont. Code Ann. § 26-1-401; *MEIC*, ¶¶ 16, 22; *Western Energy Appeal Amendment AM4*, BER 2016-03 SM, Board Ord., COL ¶ 5 (June 6, 2019) ("Rosebud Mine Order"); MSJ Order at 15 ("the burden of proof lies with MEIC to establish by a preponderance of the evidence that DEQ's

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<sup>11</sup> To be certain, both the burden of proof (i.e., duty to present evidence to the trier of fact) and the burden of persuasion (i.e., duty to convince the trier of fact that the preponderance of the evidence standard has been met) statutorily rest with the party who would be defeated if no evidence were given on either side (i.e., Petitioner). Mont. Code Ann. §§ 26-1-401 and 402.

decision to issue the AM3 permit to Signal Peak violated the law”). In order to prevail on their claim, Petitioner was required to show at hearing, by a preponderance of the evidence, that the DUA could not be sourced for replacement water in violation of ARM 17.24.304(1)(f)(iii). MSJ Order at 29; COL ¶¶ 9-10. Because MSUMRA and its implementing rules contemplate uncertainty, the introduction of some uncertainty by Petitioner as to the viability of the DUA was not enough; rather, Petitioner needed to prove, by a preponderance of the evidence, that obvious legal and/or physical barriers precluded the DUA as a source of replacement water.<sup>12</sup> COL ¶¶ 18-19; *MEIC*, ¶ 22; MSJ Ord. at 14-15, 27.

**3. The Hearing Examiner did not impose an “impossible” burden of proof.**

Petitioner would have the Board believe that the Hearing Examiner imposed an “impossible” burden of proof. Exceptions at 5-10. Petitioner is wrong again. As correctly enunciated by the Hearing Examiner, the burden of proof rested with Petitioner to demonstrate, *by a preponderance of the evidence*, that Department violated the law by designating the DUA as a potential replacement water source. COL ¶¶ 9, 23; Discussion at 37-40; Mont. Code Ann. § 26-1-403(1). The

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<sup>12</sup> Moreover, as a matter of law, Petitioner could not sustain its burden of proof on technical claims for which they offered no expert testimony, and failure by Petitioner to present prima facie evidence at hearing subjected Petitioner’s claim to summary dismissal. Proposed FOFCOLs at 54; MSJ Order at 14-15, 27; Mont. R. Civ. P. 52(c); Rosebud Mine Order at COL ¶ 44.

requirement that Petitioner prove its claim *by a preponderance of the evidence* is decidedly not an impossible standard, but rather, a “relatively modest standard” whereby Petitioner needed only to prove that it is “more probable than not” that legal and/or physical barriers precluded the DUA as a potential replacement water source. *Hohenlohe v. State*, 2010 MT 203, ¶ 33. Applied to the controlling rule, Petitioner had the burden at hearing to demonstrate by a more-likely-than-not probability that legal and/or physical barriers preclude the DUA as source of replacement water in violation of ARM 17.24.304(1)(f)(iii). This is decidedly not an impossible standard.

**4. Even if the burden of proof is allocated to Respondents, it is uncontested that Signal Peak carried the burden.**

Petitioners claim that the appropriate question in this contested case is whether “the applicant—SPE—‘affirmatively demonstrate[d]’ that ‘reclamation can be accomplished.’” Exceptions at 13. As discussed above, Proposed Conclusion of Law 22 concluded that Signal Peak met that standard as to the claim at issue in the case: “Signal Peak affirmatively demonstrated that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227(1). FOF ¶¶ 65-151.” Petitioner does not take specific exception with Conclusion of Law 22 or challenge the vast majority of the 85 discreet proposed Findings of Fact on which Conclusion of Law 22 rests. Nor does Petitioner’s blanket objection regarding

burden of proof apply to this Conclusion of Law. The plain language of Conclusion of Law 22 speaks to the showing *Signal Peak* made, and Petitioners have not disputed the Hearing Examiner's conclusion that Signal Peak made this showing. Thus, even if Signal Peak bore the evidentiary burden of proof to affirmatively disprove Petitioner's claim, it is uncontested that Signal Peak carried the burden.

**B. The Hearing Examiner correctly concluded that Petitioner failed to prove its claim.**

**1. The Hearing Examiner correctly resolved Petitioner's claim under ARM 17.24.304(1)(f)(iii).**

MSUMRA and its implementing rules require that water uses adversely and permanently impacted by mining activities be replaced by the permittee in like quality, quantity, and duration.<sup>13</sup> Mont. Code Ann. § 82-4-253(3)(d); ARM 17.24.648; ARM 17.24.903(2). As such, a permit application must include a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water uses adversely and permanently impacted by mining activities. ARM 17.24.304(1)(f)(iii). The AM3 application identified the DUA as one such source of replacement water. DEQ Ex. 5 at 8.0, 8.5; DEQ Ex. 7 at 2-6;

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<sup>13</sup> All legitimate existing water uses adversely and permanently impacted by mining activities must be replaced (i.e., mitigated) with replacement water in like quantity, quality, and duration. Mont. Code Ann. § 82-4-253(3)(d); ARM 17.24.648; ARM 17.24.903(2). Domestic and agricultural uses are implicated by AM3.

MSJ Order at 9. Petitioner objected to the designation of the DUA on the basis that physical (i.e., quality and quantity) and legal (i.e., statutory and regulatory) barriers precluded the DUA as a source of replacement water. FOF ¶¶ 34-36.

Because the “central issue” in this contested case proceeding is whether obvious physical and/or legal barriers preclude the sourcing of replacement water from the DUA (FOF ¶47; Discussion at 43; MSJ Order at 17), the applicable rule – and the *only* rule specific to the designation of replacement water sources – is ARM 17.24.304(1)(f)(iii):

(1) The following environmental resources information must also be included as part of an application for a strip or underground mining permit:

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(iii) a description of alternative water supplies, not to be disturbed by mining, that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be suitable for the approved postmining land uses.

MSJ Order at 18-19. As Petitioner now admits, ARM 17.24.304(1)(f)(iii) is a “much less demanding provision” only requiring permit applicants “supply ‘baseline information’ about water supplies that ‘could be developed’” to replace water uses diminished or otherwise adversely impacted by mining activities.<sup>14</sup>

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<sup>14</sup> Petitioner’s concession that the Department and Signal Peak complied with ARM 17.24.304(1)(f)(iii) is an astonishing development after five years of litigating the question.

Exceptions at 4. Based on the evidence presented at hearing, the Hearing Examiner concluded that Signal Peak's designation the DUA as a potential source of replacement water (and the Department's approval of the same) did not violate ARM 17.24.304(1)(f)(iii).

Petitioner now wishes to recast its claim (and simultaneously disclaim its evidentiary burden) under a different administrative rule. Pet's Obj. to Proposed *AM3* FOFCOLs at 4. Petitioner's argument is unavailing. The rule Petitioner would now have control – ARM 17.24.405(6)(a) – is a catchall procedural rule that broadly prohibits the Department from approving a permit application if *reclamation* cannot be accomplished. The rule does not establish an independent permit application requirement. Subchapter 4 of MSUMRA's implementing rules – where ARM 17.24.405(6)(a) is housed – prescribes the Department's procedures for processing a permit application. In contrast, the substantive permit application requirements are housed in Subchapter 3.<sup>15</sup>

As the former Hearing Examiner cautioned Petitioner on summary judgment, MSUMRA's qualitative *reclamation* standards differ from and must not be conflated with its quantitative *mitigation* standards.<sup>16</sup> MSJ Order at 28 n.9.

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<sup>15</sup> Compare ARM 17.24.301, et seq. with ARM 17.24.401, et seq.

<sup>16</sup> Petitioner often confuses *mitigation* and *reclamation* and improperly uses the terms interchangeably. MSUMRA and its implementing rules are replete with statutory and regulatory directives specific to reclamation, on the one hand, and mitigation, on the other hand. See, e.g., Mont. Code Ann. §§ 82-4-231 through

Because MSUMRA contemplates the provision of replacement water only in the context of *mitigation*, the questions Petitioners present in this contested regarding the physical and legal availability of the DUA as a source of replacement water are governed by the mitigation provisions (see Mont. Code Ann. § 82-4-253(3)(d), ARM 17.24.648, and ARM 17.24.903(2)); MSUMRA's qualitative *reclamation* standards are inapposite and ARM 17.24.405(6)(a) is not implicated.

**2. Even if ARM 17.24.405(6)(a) applied, Petitioner failed to prove a violation of the rule because the Hearing Examiner's established facts demonstrate compliance with the rule.**

Setting aside the clear inapplicability of ARM 17.24.405(6)(a), Petitioner failed to prove a violation of its preferred rule. As discussed above, the applicable statutory and regulatory provisions, as well as Supreme Court precedent interpreting the burden of proof have clearly held that the evidentiary burden in a contested case proceeding rests with Petitioner to prove, by a preponderance of the evidence, that the Department violated the law. Substituting ARM 17.24.405(6)(a) for ARM 17.24.304(1)(f)(iii) does not abrogate or otherwise shift this burden. Applied here, Petitioner had the burden to prove, by a preponderance of the evidence, a violation of ARM 17.24.405(6)(a). Petitioner made no such demonstration at hearing. Instead, Petitioner's Exceptions maintain that the burden

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240; *see also* ARM 17.24.313. ARM 17.24.304(1)(f)(iii) ensures that alternative water supplies are available to *mitigate* impacts to water uses as required by MSUMRA's general performance standards.

rested with the Department and Signal Peak to prove compliance with ARM 17.24.405(6)(a) in the contested case, and, in the absence of such demonstration, that Petitioner should prevail on its claim. Exceptions at 3-5. This is not the standard established by the Board. Because Petitioner failed to prove that the Department violated ARM 17.24.405(6)(a) by designating the DUA as a potential replacement water source, it is of no consequence that this rule did not guide the Hearing Examiner's Proposed FOFCOLs.

Moreover, Petitioners' attempt to resurrect their bonding claim, which was resolved against them at summary judgment, as part of this "reclamation" argument is wholly improper. Making no reference to the Order on Summary Judgment, Petitioners assert as a fact that the bond required by the Department is insufficient. Exceptions at 19. The only fact regarding bonding that has been established in this case is that Petitioners did not have and did not intend to present an expert on bonding. MSJ Order at 15-17. On the basis of this fact, the previous Hearing Examiner determined that, as matter of law, Petitioner could not carry its burden to prove its bonding claims. *Id.* Petitioners' Exceptions do not assert a challenge to the previous Hearing Examiner's ruling on this point, so any discussion of bonding is improper at this stage.

Lastly, it cannot be lost that the facts of this contested case proceeding have been established, and, absent exigent circumstances described below, the



established facts cannot be modified or rejected by the Board. Mont. Code Ann. § 2-4-621(3). As detailed in the Hearing Examiner’s proposed findings of fact, Signal Peak’s application affirmatively demonstrated that no physical or legal barriers preclude the DUA as a source of replacement water. Discussion at 43; COL ¶¶ 21-22 (citing FOF ¶¶ 65-151). Petitioner’s post-hearing efforts to substitute 17.24.405(6)(a) for ARM 17.24.304(1)(f)(iii) do not change these facts. Because the Hearing Examiner’s proposed findings of fact resoundingly resolve all questions regarding the physical and legal availability of the DUA in favor the of the Department and Signal Peak, Petitioner’s claim fails regardless of the applicable administrative rule or the evidentiary burden.

### **FINDINGS OF FACT**

Petitioner takes exception – both generally and specifically – to the Hearing Examiner’s proposed findings of fact on the basis of “systemic and specific errors” and requests the Board reject the same. Exceptions at 23-35. The Board’s authority to reject the Hearing Examiner’s proposed findings of fact is statutorily narrow. The Board may not reject a proposed finding of fact unless the Board first determines from a review of the complete record that the proposed finding of fact was not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). The Board’s inquiry (after reviewing the complete record) “is not whether there is evidence to support findings different from those made by the [Hearing

Examiner], but whether substantial credible evidence supports the [Hearing Examiner's] findings.” *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶26. This is a low standard. “Substantial evidence [...] consists of more [than] a mere scintilla of evidence but may be less than a preponderance,” *id.*, and “[e]vidence will be considered substantial even if it is contradicted by other evidence, somewhat less than a preponderance, or inherently weak.” *Narum*, ¶ 25; *Kratovil*, ¶ 13. For purposes of this inquiry, the Board must evaluate the record evidence “in the light most favorable to the *prevailing* party” – i.e., the Department and Signal Peak. *Welu*, ¶ 12 (emphasis added). Because the Hearing Examiner’s proposed findings of fact are supported by substantial evidence, the Board may not modify or reject the proposed findings of fact.

**A. Petitioner’s blanket objections to the Hearing Examiner’s proposed findings of fact must be rejected as improper.**

Petitioner broadly complains that the Hearing Examiner’s 150 discreet findings of fact and thirteen pages of discussion and analysis did not adequately respond to Petitioner’s lines of evidence regarding (1) the spring monitoring and impact detection protocols, (2) the quantification of the replacement water needs, and (3) the Department’s conclusions contained in the Cumulative Hydrologic Impact Assessment (“CHIA”). Exceptions at 23-29. Petitioner’s blanket objections are improper under Mont. Code Ann. § 2-4-621, and the Board has previously rejected Petitioner’s efforts to lodge blanket objections to proposed

findings of fact. Rosebud Mine Order, Transcript of Oral Argument at 95-106 (May 31, 2019). For the same reasons espoused by the Board in the Rosebud Mine Order, Petitioner's blanket objections to the Hearing Examiner's proposed findings of fact must be rejected as improper.

**B. The Hearing Examiner's proposed findings of fact adequately responded to Petitioner's claim and the evidence presented at hearing.**

Setting aside the Petitioner's improper blanket objections, the Hearing Examiner's proposed findings of fact adequately responded to Petitioner's lines of evidence presented at hearing. A hearing examiner's proposed findings of fact need only include "a statement of the reasons for the decision and of each issue of fact or law necessary to the proposed decision," Mont. Code Ann. § 2-4-621(2), and the Board's final order need only include "a concise and explicit statement of the underlying facts supporting the findings." Mont. Code Ann. § 2-4-623.

Petitioner admits that the requirement to respond to the parties' proposed findings of fact is not strictly construed by Montana courts. Exceptions at 24. As enunciated by the Montana Supreme Court, the decision-maker's proposed findings of fact are adequate if, when "viewed as a whole, it will be seen that the findings are adequately factually supported. It would be an unnecessary and idle act to remand for correction of any technical deficiency where the record discloses an underlying factual basis for each finding. The law does not require idle acts."

*State ex rel. Montana Wilderness Ass'n v. Board of Natural Resources & Conservation*, 200 Mont. 11, 40 (1982).

Here, each of the Hearing Examiner's 150 discreet proposed findings of fact are supported by pinpoint citations to the administrative record. FOF at ¶¶1-150. Moreover, the Hearing Examiner provided an additional thirteen pages of discussion and analysis further clarifying and supporting the Proposed FOFCOLs. Discussion at 37-49. The Proposed FOFCOLs – when viewed as a whole – confirm that the proposed findings of fact are adequately supported by the record in compliance with Montana Code Ann. § 2-4-621. Notwithstanding, Petitioner's blanket objections to the Hearing Examiner's proposed findings are addressed in turn:

- **The Spring Monitoring and Impact Detection Protocols**

Petitioner complains that the Hearing Examiner's proposed findings of fact fail to resolve Petitioner's allegation that the Department and Signal Peak have “repeatedly and continually violated requirements for monitoring and assessing impacts of subsidence on surface waters for a decade.” Exceptions at 25-26. Specifically, Petitioner asserts that Signal Peak “violated” decades-old historic provisions of the permit without recognition that those provisions conflict with and have been superseded by the currently approved monitoring plan. Petitioner's argument fails for two reasons: (1) first, Petitioner failed to preserve the claim in

the administrative process, thereby waiving the claim, and (2) second, the Hearing Examiner resolved the issue *twice* against Petitioners during the evidentiary hearing.

As a threshold matter, Petitioner’s public comments and *Notice of Appeal and Request for Hearing* did not allege violations of the spring monitoring and impact detection protocols. DEQ Ex. 1; DEQ Ex. 2; DEQ Ex. 3; SPE Ex. 9. Petitioner’s discovery responses and pretrial contentions were equally silent on these points and, notably, contained no reference whatsoever to the Monitoring Quality Assurance Plan (SPE Ex. 28) or the outdated and superseded hydrologic monitoring and impact detection protocols (SPE Ex. 25). DEQ Ex. 12; DEQ Ex. 13; DEQ Ex. 16; DEQ Ex. 22; SPE Ex. 11; SPE Ex. 12; SPE Ex. 13; SPE Ex. 14; SPE Ex. 15; SPE Ex. 16; *Pet’s Pretrial Memorandum* at 2-6; see also Tr. 119:4-8 (counsel for Petitioner representing that its “prehearing statement is for all intents and purposes our current complaint.”). As such, Petitioner did not preserve this claim as a matter of law. *Flowers v. Montana Bd. of Personnel Appeals*, 2020 MT 150, ¶ 13 (MAPA requires that a party “fully participate” in the administrative process and “pursue to their conclusion ‘all administrative remedies available’”); Mont. R. Civ. P. 37.

Petitioner first alleged violations of the spring monitoring and impact detection protocols on the second day of the evidentiary hearing, and the Hearing

Examiner twice considered and denied Petitioner's request for a spoliation ruling on spring monitoring and subsidence impacts.<sup>17</sup> Tr. 418:16 through 422:19; 642:22 through 644:24. Such trial-type decisions are afforded considerable deference. *Knowles v. State*, 2009 MT 415, ¶ 22; *KB Enters., LLC v. Montana Human Rights Comm'n*, 2019 MT 131, ¶ 6; *State v. Spottedbear*, 2016 MT 243, ¶ 9; *State v. Derbyshire*, 2009 MT 27, ¶ 19. Because the record reflects that the Hearing Examiner twice considered and denied Petitioner's request for a spoliation ruling during the hearing on this issue, and because the proposed findings of fact impliedly reject Petitioner's argument that the outdated and superseded Spring Impact Detection and Mitigation Plan (SPE Ex. 25) controls monitoring protocols at the mine, the omission of specific findings of fact and discussion in the FOFCOLs regarding Petitioner's untimely allegations of spring monitoring violations is lawful.

- **The Quantification of the Replacement Water Needs**

Petitioner next complains that the Hearing Examiner's proposed findings of fact omit findings regarding the quantification of the anticipated replacement water

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<sup>17</sup> The Hearing Examiner's Proposed FOFCOLs – by relying repeatedly on the current Spring Mitigation Plan (DEQ Ex. 7), the Spring Impact Detection and Mitigation Plan (SPE Ex. 27), and the Monitoring Quality Assurance Plan (SPE Ex. 28) – impliedly rejected Petitioner's argument that the outdated and superseded Spring Impact Detection and Mitigation Plan (SPE Ex. 25) controls. FOF ¶¶ 24; 66-68; 72; 91-92; Discussion at 48.

needs. Exceptions at 26-28. Petitioner is again mistaken. First, as discussed above, the burden of production and persuasion rested with Petitioner, and the proposed findings of fact specifically address Petitioner's complete lack of evidence on this point. FOF ¶123 ("Mr. Hutson did not quantify or otherwise calculate the anticipated replacement water need resulting from AM3."). Second, the proposed findings of fact specifically acknowledge the Department's quantification of anticipated replacement water needs. FOF ¶¶ 119 ("The Department considered available information, including the 2015 Deeper Underburden Groundwater Model Report, OSW Pump Test Report, MBMG reports, drilling/well logs in the permit, and MBMG and DNRC records of wells and water rights in the DUB to assess the water bearing properties of the deep underburden."); 149 ("The maximum flow rate of any particular DUB well (if required for permanent replacement water mitigation needs) is not anticipated to exceed 14.2 gallons per minute."). Lastly, the Hearing Examiner's Proposed FOFCOLs provide extensive discussion – with pinpoint citations to the supporting record evidence – on the same:

There is also uncertainty regarding the quantity of replacement water in the DUB. First, will it be needed? If so, how much will be needed? Are there barriers that would make getting the water impossible? Ord. on SJ at 22. Since these factors are uncertain the Department has answered these questions in terms of cumulative hydrologic probabilities, as MSUMRA and the rules contemplate, stating that: (1) replacement water will likely not be needed; (2) if replacement water is needed, it likely will not be more than 35gpm or

10 acre-feet/year; and (3) there are likely no barriers that would prevent the replacement water from being used. Ord. on SJ at 22. MEIC, in turn, argues that replacement water will almost certainly be needed, and it could be needed in excess of 100 gpm. *Id.*

Mr. Hutson testified that the Department's conclusion that the DUB is a possible source of replacement water is flawed because the Department did not (1) quantify the amount of water in the DUB or (2) quantify the anticipated impact on existing users if replacement water is sourced from the DUB. Hrg. Tr. Day 1 at 103:1-104:16. Mr. Hutson agreed that the DUB "might produce enough water for mitigation purposes," explaining "I think it could. It's a possibility." Hrg. Tr. Day 2 at 278:23-279:10.

While it would certainly be helpful to know the quantity of the water with some certainty, the law determines the permitting requirements that the Department must follow. The applicable administrative rule requires an application for an underground coal mining permit to include "a description of alternative water supplies, not to be disturbed by mining that could be developed to replace water supplies..." ARM 17.24.304(1)(f)(iii) (emphasis added).

The Department considered available information, including the 2015 Deeper Underburden Groundwater Model Report, OSW Pump Test Report, MBMG Reports, drilling/well logs in the permit, and MBMG and DNRC records of wells and water rights in the DUB to assess the water bearing properties of the deep underburden. DEQ Ex. 5, CHIA; Hrg. Tr. Day 2, at 436:16-23; Hrg. Tr. Day 3, at 477:2-10, 479:11-480:21, 482:4-485:8, 489:5-491:4, 519:17-520:10, 521:5-9, 543:2-13. The Department found that the maximum flow rate of any particular DUB well (if required for permanent replacement water mitigation needs) is not anticipated to exceed 14.2 gallons per minute. DEQ Ex. 5, CHIA at 12-16, Table 7-1; SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1; MEIC Ex. 15 Table 314-3-1; Hrg. Tr. Day 4, at 856:8-22. The Department concluded that "the deep underburden is extensive" and "it has the characteristics to serve existing and viable designated use, and to also provide mitigation water that may ultimately be needed in accordance with the mitigation measures defined in the permit." DEQ Ex. 9, PHC at 315-5-62; Hrg. Tr. Day 4, at 817:2-19.



While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law. The Department is required by the administrative rules to describe “alternative water supplies” that “could be developed to replace water supplies” ARM 17.24.304(1)(f)(iii) (emphasis added). However, no evidence was shown to conclude that the “description of alternative water supplies” required an exact or specific quantity. Nor was it shown that the quantity was that in such that the water could not be used at all making it unavailable.

Discussion at 45-48. When viewed “as a whole,” the Proposed FOFCOLs adequately address the quantification of anticipated replacement water needs in the context of sourcing replacement water from the DUA. *Montana Wilderness Ass’n*, 200 Mont. 11 at 40.

- **The Cumulative Hydrologic Impact Assessment**

Lastly, Petitioner complains that the Hearing Examiner’s proposed findings of fact do not address purported inconsistencies and/or inaccuracies in the CHIA regarding the sufficiency of the DUA to satisfy existing uses and anticipated mitigation needs. Exceptions at 28-29. Petitioner is wrong. First, *this was Petitioner’s claim in this contested case proceeding*. FOF ¶¶ 42-46. As such, the entirety of the Proposed FOFCOLs respond to this question. Second, the CHIA and the proposed findings of fact are not inconsistent on the question of the physical availability of the DUA to serve as a replacement water source. As acknowledged by Petitioner, the CHIA concluded that “water in the deeper underburden [is] sufficient to provide for use at the OSW and any mitigation wells

which may become necessary in the future.” Exceptions at 28. Petitioner’s exception amounts to a semantic quibble with the Department using the word “any” when the Department’s witness testified that the Department intended that sentence to refer to “any probable mitigation needs” rather than “any possible mitigation needs.” Tr. 573:8-575:8. The sentence in the CHIA is not inconsistent with the Department’s intention, and the full context of the document demonstrates how the Department reached this conclusion.

As discussed above, the proposed findings of fact specifically address the physical availability of the DUA to support existing uses and anticipated mitigation needs in detail and conclude that the DUA has sufficient capacity to serve as a source of replacement water for anticipated impacts. FOF at ¶¶ 65-150; Discussion at 45-48; Recommended Decision at 54-55. Petitioner did not lodge objections on the vast majority of these findings which, by law, are now established for purposes of this contested case proceeding. Exceptions at 29-35 (lodging specific exceptions to 16 of the 150 proposed findings of fact); *Flowers*, ¶ 13.

**C. Substantial evidence supports the Hearing Examiner’s proposed findings of fact to which Petitioner takes specific exception.**

Petitioner lodges specific exceptions to the Hearing Examiner’s proposed findings of fact nos. 54, 77 through 82, 92, 95, 97, 99, 114, 123, 130, 143, and 145. Exceptions at 29-35. Petitioner’s specific exceptions are addressed individually and in turn:

- **Finding of Fact No. 54**

Finding of Fact No. 54 states that “*Mr. Jensen lives in Helena, Montana, approximately 300 miles from the Rosebud Mine.*” Petitioner objects to the reference to the Rosebud Mine. Signal Peak does not object to the modification of Finding of Fact No. 54 to instead reference the Bull Mountain Mine. Notably, modifying Finding of Fact No. 54 to instead reference the Bull Mountain Mine does not materially change the fact that Petitioner’s Executive Director Mr. Jensen – the individual purportedly impacted by *AM3* and Petitioner’s basis for standing in this contested case proceeding – lives hundreds of miles from the mine implicated by this contested case proceeding.

- **Findings of Fact No. 77**

Finding of Fact No. 77 states that “*The CHIA evaluated the undermined springs in detail and concluded: ‘As described in [CHIA] Section 9.2.4.2, impacts due to subsidence include diminution of spring flows at spring 17145, and increases in SC at spring 17275. [SPE] has begun to implement remedial mitigation measures at spring 17145, and continues to monitor water quality and quantity to assess whether recently identified impacts are temporary in nature, or will require more permanent solutions.’*” Finding of Fact No. 77 is supported by substantial evidence. DEQ Ex. 5 at 9-12; DEQ Ex. 9 187-222; Tr. 502:14-506:24, 889:1-24. Petitioner objects on the basis that Finding of Fact No. 77 does not

acknowledge purported violations of the superseded and outdated spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 77.

As a threshold matter, Petitioner's public comments and *Notice of Appeal and Request for Hearing* did not allege violations of the spring monitoring and impact detection protocols. DEQ Ex. 1; DEQ Ex. 2; DEQ Ex. 3; SPE Ex. 9. Petitioner's discovery responses and pretrial contentions were equally silent on these points and, notably, contained no references whatsoever to the Monitoring Quality Assurance Plan (SPE Ex. 28) or the outdated and superseded hydrologic monitoring and impact detection protocols (SPE Ex. 25). DEQ Ex. 12; DEQ Ex. 13; DEQ Ex. 16; DEQ Ex. 22; SPE Ex. 11; SPE Ex. 12; SPE Ex. 13; SPE Ex. 14; SPE Ex. 15; SPE Ex. 16; *Pet's Pretrial Memorandum* at 2-6; see also Tr. 119:4-8. As such, Petitioner did not preserve this claim as a matter of law. *Flowers*, ¶ 13; Mont. R. Civ. P. 37.

The Department approved Signal Peak's current Monitoring Quality Assurance Plan (the "MQAP") in 2012, approximately four years before Petitioner initiated this challenge. Tr. 749:1 through 752:2; SPE Ex. 28. The MQAP replaced and superseded the water monitoring and impact detection protocols referenced by Petitioner. Tr. 722:2 through 723:5; 733:25 through 746:18. The

MQAP prescribes the qualitative and quantitative hydrologic monitoring protocols and reporting requirements designed to detect impacts to subsided water resources. DEQ Ex. 5 at 6.0; see generally SPE Ex. 28; Tr. 722:2-25, 723:1-5, 750:20-25, 751:1-23. The MQAP integrates operational and post-mining planning, data collection, and reporting activities and specifies how quality assurance and quality control measures are applied and is consistent with the Department's interdepartmental requirements for the collection and reporting. Tr. 722:2 through 723:5; 733:25 through 746:18; SPE Ex. 28 at 1.0. An objective of the MQAP is to detect impacts to springs and stream reaches occurring as a result of mining and reclamation activities. DEQ Ex. 5 at 6.0; SPE Ex. 28 at 1, ¶ 1.0, at 2, ¶¶ 2.0-2.1; Tr. 749:1-24, 754:4-25, 755:1-3. To accomplish this objective, the MQAP prescribes monitoring site locations, hydrogeologic units monitored, sampling frequency, and parameters. DEQ Ex. 5 at 6.0; see generally SPE Ex. 28; Tr. 736:3-15, 752:4-25, 753:1-11. A network of surface water and groundwater stations are monitored to evaluate and detect quantitative and qualitative impacts to subsided springs and stream reaches. DEQ Ex. 5 at 6.1, 6.2, 9.2.4.2, 9.2.4.3; see generally SPE Ex. 28; Tr. 753:12-25, 754:1. The monitoring schedule of each monitoring station is reviewed on an annual basis in consideration of observations during the prior water year and anticipated future impacts. SPE Ex. 28 at 4, ¶ 2.2. As mining approaches monitoring stations, the frequency of monitoring increases as necessary

to ensure that impacts to springs and stream reaches are timely detected and mitigated. DEQ Ex. 5 at 9.2.4.2; Tr. 755:4-15. Signal Peak reports monitoring results to the Department on a semi-annual and annual basis. SPE Ex. 28 at 41, ¶ 13.0; see generally SPE Ex. 36; Tr. 721:14-25, 722:1, 755:20-25, 756:1-21.

Notably, neither Petitioner's comments (DEQ Ex. 1) nor its *Notice of Appeal and Request for Hearing* (SPE Ex. 9) challenged the Department's use of and reliance on the MQAP (SPE Ex. 28) or alleged violations of the same. Petitioner first alleged violations of the outdated and superseded spring monitoring and impact detection protocols (SPE Ex. 25) on the second day of the evidentiary hearing, and the Hearing Examiner twice considered and denied Petitioner's request for a spoliation ruling on the same. Tr. 418:16 through 422:19; 642:22 through 644:24. Such trial-type decisions are afforded considerable deference. *Knowles v. State*, 2009 MT 415, ¶ 22; *KB Enters., LLC v. Montana Human Rights Comm'n*, 2019 MT 131, ¶ 6; *State v. Spottedbear*, 2016 MT 243, ¶ 9; *State v. Derbyshire*, 2009 MT 27, ¶ 19.

- **Finding of Fact No. 78**

Finding of Fact No. 78 states that “*The CHIA concluded that Spring 17145 (Bull Spring) evidenced a diminution of flow potentially attributable to subsidence, and the Department required mitigation at this spring. The Department's CHIA stated “This physical evidence, in conjunction with unexpected diminution of flows*

*from Bull Spring suggests that Bull Spring may have been impacted by undermining. In accordance with permit obligations defined in Appendix 314-3, Spring Impact Detection and Mitigation, [SPE] initiated interim mitigation procedures to address the potential flow depletions. Continued monitoring of Bull Spring, and execution of the Interim Mitigation Plan proposed by [SPE] will inform whether permanent mitigation measures will be necessary.”* Finding of Fact No. 78 is supported by substantial evidence. DEQ Ex. 5 at 9-10; DEQ Ex. 9 at 314-5-40 and 314-5-58; Tr. 506:25-507:5, 651:2-12, 814:9-816:21. Petitioner objects on the basis that Finding of Fact No. 78 does not acknowledge purported violations of the spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 78. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 79**

Finding of Fact No. 79 states that “*As of the time the AM3 approval in 2016, the Department had not required temporary or permanent mitigation of springs 17275, 17415, 17165, or 17185.*” Finding of Fact No. 79 is supported by substantial evidence. DEQ Ex. 5 at 9-10; Tr. 506:25-507:5. Petitioner objects on the basis that Finding of Fact No. 79 does not acknowledge purported violations of

the spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 79. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 80**

Finding of Fact No. 80 states that “*Temporary mitigation measures proposed for Spring 17145 (Bull Spring) prior to approval of AM3 included utilizing a nearby bond and hauling water.*” Finding of Fact No. 80 is supported by substantial evidence. SPE Ex. 30; Tr. 164:6-18, 427:6-13, 828:13-829:5.

Petitioner objects on the basis that Finding of Fact No. 80 does not acknowledge purported violations of the spring monitoring and impact detection protocols.

Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 80. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 81**

Finding of Fact No. 81 states that “*The temporary mitigation measures implemented for Spring 17145 (Bull Spring) did not require replacement water.*”

Finding of Fact No. 81 is supported by substantial evidence. Tr. 427:14-17.



Petitioner objects on the basis that Finding of Fact No. 81 does not acknowledge purported violations of the spring monitoring and impact detection protocols.

Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 81. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 82**

Finding of Fact No. 82 states that “*Other than the temporary mitigation measures implemented for Spring 17145 (Bull Spring), sourcing replacement water (from the DUB or otherwise) had not been required as the time of the AM3 approval in 2016.*” Finding of Fact No. 82 is supported by substantial evidence.

Tr. 427:14-17. Petitioner objects on the basis that Finding of Fact No. 82 does not acknowledge purported violations of the spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 82. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 92**

Finding of Fact No. 92 states that “*Inherent uncertainty exists regarding the effects of subsidence on springs and stream reaches; subsided springs and stream*

*reaches may evidence a range of negative and positive qualitative and quantitative changes, such changes may be temporary or permanent, and such changes may or may not be attributable to mining.”* Finding of Fact No. 92 is supported by substantial evidence. DEQ Ex. 7 at 6; DEQ Ex. 8 at 3.0; DEQ Ex. 9 at 74-75, ¶ 6.5.1; Tr. 181:7 through 190:24, 711:16:22, 825:22-25, 826:1-25. Petitioner objects on the basis that Finding of Fact No. 92 does not acknowledge purported violations of the spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 92. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 95**

Finding of Fact No. 95 states that “*Owing to the ‘inherent difficulties’ and ‘complexities’ of spring and stream reach impact assessment, it is ‘impracticable to meaningfully project the likelihood, or probability,’ that a given spring or stream reach will be impacted by subsidence and require mitigation.*” Finding of Fact No. 95 is supported by substantial evidence. DEQ Ex. 9 at 74, ¶ 6.5.1. Petitioner objects on the basis that Finding of Fact No. 95 does not acknowledge purported violations of the spring monitoring and impact detection protocols. Petitioner identifies no record evidence (much less the wealth of evidence

necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 95. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 97**

Finding of Fact No. 97 states that “*The deep underburden consists of an outcropping of rocks belonging to the Tongue River member of the Fort Union Formation. MEIC Ex. 21 at 3.2.5. These outcroppings are observed in Fattig, Halfbreed, Razor, and Pompey’s Pillar Creek drainages. DEQ Ex. 11 at p.3. This suggests that these massive sandstones represent large fluvial channels that are linear and continuous throughout the Bull Mountain area. MEIC Ex. 21 at 3.2.5; DEQ Ex. 11 at p.3. These sandstone formations are likely many miles wide and reflect a high sinuosity or continuous meandering of the paleostream. MEIC Ex. 21 at 3.2.5.*” Petitioner objects on the basis that Finding of Fact No. 97 states that the massive sandstone formations that comprise the DUA are likely many miles wide and continuous. Finding of Fact No. 97 is supported by substantial evidence. MEIC Ex. 21 at 3.2.5; DEQ Ex. 9 at 3.3.4, 3.4.4, and 3.6.2.2; DEQ Ex. 11 at 2-4, ¶ 2.0, at 4-5, ¶ 3.0, at 6-8, ¶ 4.0, at 8-12, ¶ 5.0, at 13-14, ¶ 6.0, and Figure 314-7-3; Tr. 199:11-21, 200:17-25, 201:1-24, 473:3-21, 488:20-25, 489:1-25, 490:1-25, 491:1-4 836:10-25, 837:1-2, 841:20-25, 842:1-24; 907:8-25, 908:1-19. Petitioner – by simply identifying competing expert testimony on the issue – fails to overcome

the substantial evidence standard necessary to justify a modification or rejection of Finding of Fact No. 97.

- **Finding of Fact No. 99**

Finding of Fact No. 99 states that “*The DUA extends over a broad area throughout the Bull Mountains area, approximate dimensions are about 14 miles wide and 22 miles long trending along the axis of the Bull Mountain syncline.*”

Petitioner objects on the basis that Finding of Fact No. 99 states that the massive sandstone formations that comprise the DUA are likely many miles wide and continuous. Finding of Fact No. 99 is supported by substantial evidence. MEIC Ex. 21 at 3.2.5; DEQ Ex. 9 at 3.3.4, 3.4.4, and 3.6.2.2; DEQ Ex. 11 at 2-4, ¶ 2.0, at 4-5, ¶ 3.0, at 6-8, ¶ 4.0, at 8-12, ¶ 5.0, at 13-14, ¶ 6.0, and Figure 314-7-3; Tr. 199:11-21, 200:17-25, 201:1-24, 473:3-21, 488:20-25, 489:1-25, 490:1-25, 491:1-4 836:10-25, 837:1-2, 841:20-25, 842:1-24; 907:8-25, 908:1-19. Petitioner – by simply identifying competing expert testimony on the issue – fails to overcome the substantial evidence standard necessary to justify a modification or rejection of Finding of Fact No. 99.

- **Finding of Fact No. 114**

Finding of Fact No. 114 states that “*The 2016 PHC concluded that ‘[t]here is presently no evidence of surface water quality impacts associated with mining.’*”

Finding of Fact No. 114 is supported by substantial evidence. DEQ Ex. 9 at 59, ¶

5.2.1; Tr. 814:9-25, 815:1-25, 816:1-21, 866:23-25, 867:1-3. Petitioner objects on the basis that Finding of Fact No. 114 omits that the CHIA (DEQ Ex. 5) concluded that Spring 17275 evidenced water quality impacts potentially attributable to mining. Petitioner identifies no additional record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 114. As Petitioner acknowledges, the CHIA's conclusions regarding Spring 17275 are found elsewhere in the Hearing Examiner's Proposed FOFCOLs. Proposed FOFCOLs at 23, ¶ 77. Petitioner further objects on the basis that Finding of Fact No. 114 does not acknowledge purported violations of the spring monitoring and impact detection protocols. Signal Peak incorporates by reference its response in support of Finding of Fact No. 77.

- **Finding of Fact No. 123**

Finding of Fact No. 123 states that “*Mr. Hutson did not quantify or otherwise calculate the anticipated replacement water need resulting from AM3.*” Finding of Fact No. 123 is supported by substantial evidence. Tr. 200:13-201:24, 277:14-279:7, 293:1-295:11, 306:2-307:6; 940:9-23. Petitioner objects on the basis that Finding of Fact No. 123 omits that Mr. Hutson relied on the 100 gallons per minute figure from Appendix 3M of the 2013 Groundwater Model (MEIC Ex. 17). Exceptions at 33. Petitioner identifies no additional record evidence (much

less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 123. Specifically, Petitioner identifies no evidence at all that Finding of Fact No. 123 is an inaccurate summary of Mr. Hutson's testimony.

The 2013 Groundwater Model Report (and the 100 gallons per minute figure) do not appear in the AM3 application materials, and the Department did not rely on the 2013 Groundwater Model Report (or the 100 gallons per minute figure) for purposes of reviewing and approving AM3. FOF ¶¶ 22-26; Tr. 813:12-25, 814:1-8. The 2015 Deep Underburden Groundwater Model Report (together with the underlying 2015 Deep Underburden Groundwater Model) were developed to assist in the assessment and understanding of the DUA. DEQ Ex. 11 at 2-5. The 2015 Deep Underburden Groundwater Model Report (together with the underlying 2015 Deep Underburden Groundwater Model) investigated the geology and hydrogeology of the deep underburden and DUA. DEQ Ex. 11 at 2-4; Figure 314-7-3; Tr. 198:9-11, 199:11-21, 200:17-25, 201:1-24, 202:5-25, 203:1-25, 204:1-17, 836:10-25, 837:1-2, 841:20-25, 842:1-25, 843:1-13. The Hearing Examiner held on summary judgment that the DUA "is extremely large and may be capable of sustaining pumping in excess of 100 [gallons per minute] without affecting any other water user." MSJ Order at 25-26.

The 2016 Groundwater Model Report (and underlying 2016 Groundwater Model) updated and superseded the 2013 Groundwater Model Report (and underlying 2013 Groundwater Model) cited by Petitioner. DEQ Ex. 10 at 7, ¶ 1.1. On remand, Signal Peak did not resubmit (and the Department did not reconsider) the 2013 Groundwater Model Report; instead, Signal Peak submitted (and the Department considered) the “new, more accurate” 2016 Groundwater Model Report (DEQ Ex. 10) and the underlying 2016 Groundwater Model. Tr. 434:18-20, 443:18-25, 444:1-5, 536:14-25, 537:1-14.

With regard to spring flow rate, the 2016 PHC evaluated spring discharge rates in the vicinity of the Mine. DEQ Ex. 9 at 9, ¶ 3.4.5, Figure 16-1, Figure 16-2. The 2016 PHC concluded that “[f]low and water quality in the ephemeral streams and water storage in ponds is dominated by precipitation and runoff vents and not mining related activities” and “[d]ata collected to date do not indicate any mine related impacts to flow or water quality for these ephemeral streams or ponds that either overlie or are adjacent to mining activity.” DEQ Ex. 9 at 12. The 2016 PHC further concluded that spring flow rates in the vicinity of the Mine are “highly variable over time” and “[a] majority of the springs [...] exhibited no flow from 2003 to 2015 or occasional flow, i.e. not enough to develop a meaningful hydrograph.” DEQ Ex. 9 at 39, ¶ 3.4.5.

With respect to anticipated spring mitigation needs, Table 314-3-1 lists the 31 springs with flow rates greater than 0.5 gallons per minute that may require mitigation if adversely impacted by subsidence. DEQ Ex. 5 at 7.1, 7.1.2.3, 9.2.4.2, 9.2.4.3, Figure 6-3, Figure 8-2, Table 7-1, Table 8-2; SPE Ex. 27 at 314-3-1, Table 314-3-1; Tr. 448:1-16, 449:3-25, 450:1-15; 509:12-25, 510:1-23, 536:1-13, 747:18-25, 748:1-19, 804:17-25, 805:1-3. The 31 springs identified in Table 314-3-1 may require mitigation if adversely impacted by subsidence. SPE Ex. 27 at 314-3-1, Table 314-3-1. None of the 31 springs identified in Table 314-3-1 have an average flow rate exceeding 35 gallons per minute. SPE Ex. 27 at Table 314-3-1; Tr. 542:2-7. The 31 springs identified in Table 314-3-1 are monitored for potential, temporary, and permanent impacts not attributable to seasonal variability and local conditions. SPE Ex. 27 at 314-3-1. If adverse impacts to springs are detected, mitigation may be implemented as specified in Appendix 313-2 (Spring Mitigation Plan). SPE Ex. 27 at Table 314-3-1; DEQ Ex. 7; Tr. 437:9-25, 438:1-9.

Petitioner's objections to AM3 did not dispute the 2016 PHC's conclusions regarding spring flow rates, including, without limitation, that spring flow rates are highly variable over time and springs often exhibit no flow. DEQ Ex. 1.

Petitioner's *Notice of Appeal and Request for Hearing* did not dispute the analysis and/or the conclusions regarding spring flow rates, including, without limitation, that spring flow rates are highly variable over time and springs often exhibit no



flow. SPE Ex. 9. Petitioner's sole witness Mr. Hutson has never quantified or otherwise calculated spring flow rates or the capacity of the DUA. Tr. 139:22-25, 140:1-2, 207:5-8, 269:15-18, 270:22-24. Mr. Hutson did not quantify or otherwise calculate the anticipated replacement water need resulting from AM3. Tr. 139:22-25, 140:1-2, 207:5-8, 269:15-18, 270:22-24.

Notwithstanding, "Since 2009, ten springs have been undermined by longwall mining. There is the possibility that one spring, 17145 [Bull Spring], has been affected by long-wall mining." DEQ Ex. 9 at 9. As of July 2016, no springs had been permanently impacted, and, accordingly, permanent spring mitigation strategies (including tapping the DUA) had not been required. DEQ Ex. 5 at 9.2.4.2, 9.2.4.3. If no springs are adversely impacted, mitigation strategies will not be implemented, and replacement water will not be required. Tr. 858:7-22. Even if all springs are lost (which is highly improbable if not impossible), no more than two DUA wells with flow rates comparable to the OSW (6 gallons per minute) would be necessary to support replacement water mitigation needs. Discussion at 48-49 ("Pumping water from the DUB, if necessary, will be done on a case-by-case basis and if multiple springs are impacted, they would be mitigated using multiple wells spaced widely throughout the area. This could easily supply low flow rates that springs have."); see also Tr. 858:7-22.

- **Finding of Fact No. 130**

Finding of Fact No. 130 states that “*The Department identified and evaluated the surface water rights within the AM3 surface water Cumulative Impact Area.*” Finding of Fact No. 130 is supported by substantial evidence. DEQ Ex. 5 at 8-1, Figure 8-2 at 13-24, Table 8-2 at 12-40; Tr. 449:13-450:15. Petitioner objects on the basis that Finding of Fact No. 130 finds that the Department *evaluated* surface water rights within the AM3 surface water Cumulative Impact Area. Petitioner identifies no additional record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 130. Indeed, the testimony Petitioner cites as evidence that the Department “did not evaluate any impacts to water rights” (Exceptions at 34) relates to the Department’s consideration of guidance on whether and when multiple exempt wells should be considered together as a “combined appropriation.” This testimony has nothing to do with the depth of the Department’s analysis of impacts of hypothetical mitigation wells on existing water rights.

- **Finding of Fact No. 143**

Finding of Fact No. 143 states that “*Mr. Hutson did not know whether commercially available treatment systems exist for sodium.*” Finding of Fact No. 143 is supported by substantial evidence. Tr. at 217:15-22; 874:1-10. Petitioner objects on the basis that Finding of Fact No. 143 relies, in part, on Dr. Nicklin’s

purportedly inexperienced and undisclosed testimony on the viability and availability of water treatment. Petitioner identifies no additional record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 130. Specifically, Petitioner identifies no evidence at all that Finding of Fact No. 143 is an inaccurate statement of Mr. Hutson's testimony.

As discussed above, the burden of production and persuasion at hearing rested with Petitioner, and the proposed findings of fact specifically address Petitioner's complete lack of evidence on water treatment systems. FOF ¶143 ("Mr. Hutson did not know whether commercially available treatment systems exist for sodium."); FOF ¶144 ("Mr. Hutson is not an expert in water treatment and did not present testimony on water treatment, including the viability or availability of water treatment methods such as reverse osmosis treatment systems."). Notwithstanding, the Hearing Examiner's Proposed FOFCOLs provide extensive discussion – with citations to the supporting record evidence – regarding the anticipated need and availability of water treatment systems:

MEIC argues that the arsenic and sodium levels in the deep underburden aquifer make the quality of the water a reason why it could preclude its use as replacement water. Ord. on SJ at 28. MEIC further claims that Signal Peak and the Departments failure to provide for the treatment of this water as part of a reclamation plan render the plan violative of MSUMRA requirements. *Id.*

Water quality impacts to the DUB as a result of AM3 are not anticipated due to the hydraulic separation between the DUB and the upper underburden and Mammoth coal. DEQ Ex. 5, at 7-15 and 9-25, Table 7-11 at 12-33; Hrg. Tr. Day 3, at 549:11-18; Hrg. Tr. Day 4, at 764:10-21; Hrg. Tr. 548:13-25, 549:1-10. Historic and current surface and groundwater uses in the vicinity of the Mine include public water supply, private water supply, livestock, wildlife, irrigation, and industrial uses. DEQ Ex. 5 at 8.0. While the Department stated that water quality impacts were not anticipated, arsenic and sodium is present in the DUB. For livestock, both the maximum value of arsenic and the median baseline of sodium concentrate detected in the DUB exceed the CHIA's guidelines for livestock watering. DEQ Ex. 5, at 7-15 and 9-25, Table 7-11 at 12-33; Hrg. Tr. Day 3, at 549:11-18; Hrg. Tr. Day 4, at 764:10-21; Hrg. Tr. 548:13-25, 549:1-10. Regarding water for human consumption, domestic wells completed in the DUA likely contain natural levels of arsenic over the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 8.2. However, the OSW – a permitted public water supply well sourced from the DUA – has never exceeded the DEQ-7 HHS standard for arsenic. DEQ Ex. 5 at 9.2.6.5.

While it is shown that arsenic and sodium is present, it was not shown that this precludes the water in the underburden from being used as a replacement source. Signal Peak and DEQ dispute that fact that arsenic and sodium levels in the underburden will be above the requisite levels and state that even if they are elevated, a simple commercially-available filtration system would solve the problem. Ord. on SJ at 28-29.

Mr. Hutson stated that he is not an expert in water treatment and did not present testimony on water treatment, including the viability or availability of water treatment methods such as reverse osmosis treatment systems. Hrg. Tr. Day 1 at 215:10-20. Mr. Hutson did not know whether commercially available treatment systems exist for sodium. Hrg. Tr. Day 1 at 217:15-22. Mr. Hutson also did not dispute that the OSW has never exceeded the human health standard for arsenic. Hrg. Tr. Day 1 at 226:6-111. From the facts presented in testimony and in the record, MEIC did not show by a preponderance of the evidence that the amounts of arsenic and sodium impact the quality of the water to the degree that it prevents it from being used as replacement water.

Discussion at 43-45.

- **Finding of Fact No. 145**

Finding of Fact No. 145 states that “*The Department identified no legal barriers precluding the DUA as a source of replacement water.*” Finding of Fact No. 145 is supported by substantial evidence. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Tr. 542:14-17. Petitioner objects on the basis that Finding of Fact No. 145 is premised “on a legally erroneous analysis” but does not dispute the accuracy of Finding of Fact 145 regarding the Department’s conclusion. Exceptions at 35. Petitioner identifies no additional record evidence (much less the wealth of evidence necessary to overcome the substantial evidence standard) justifying modification or rejection of Finding of Fact No. 145.

### **CONCLUSION**

For the reasons stated herein, Signal Peak respectfully request the Board adopt the Hearing Examiner’s proposed Findings of Fact and Conclusions of Law, reject Petitioner’s Exceptions, and uphold the Department’s approval of *AM3* as correct and lawful.

DATED this 5th day of November, 2021.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on November 5, 2021, the original or a copy of the foregoing was delivered or transmitted to the persons named below as follows:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
APPEAL AMENDMENT	)	CASE NO. BER 2016-07 SM
APPLICATION AM3, SIGNAL	)	
PEAK ENERGY LLC'S BULL	)	
MOUNTAIN MINE NO. 1, PERMIT	)	
NO. C1993017	)	

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**SIGNAL PEAK ENERGY, LLC'S SUPPLEMENTAL BRIEF**

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## INTRODUCTION

At its February 2022 meeting, the Board of Environmental Review (“Board”) denied the Department of Environmental Quality’s (“DEQ’s”) Motion to Stay this litigation pending the resolution of DEQ’s appeal of a Montana district court decision in *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, No. DV-19-34 (Mont. 16th Judicial Dist.) (“AM4 District Court Decision”). Noting conflicting positions,<sup>1</sup> the Board ordered supplemental briefing on whether the AM4 District Court Decision binds the Board in this matter.

Signal Peak reiterates the position espoused its response to MEIC’s exceptions filed shortly after the district court decision. First, the AM4 District Court Decision was not issued by the judicial district in which Signal Peak’s Bull Mountain Mine is located and is therefore not binding on the Board. Second, the Board can and should disregard the AM4 District Court Decision as a legally flawed outlier.

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<sup>1</sup> Signal Peak and DEQ took the position that the AM4 District Court Decision is not binding on the Board. Tr. at 44-45. Montana Environmental Information Center’s (“MEIC”) position at hearing was unclear (Tr. at 76-77), but in its opposition to the Motion to Stay it perplexingly appeared to argue that AM4 District Court Decision is not binding for purposes of the motion to stay but is binding for the merits adjudication. Compare MEIC’s Response to DEQ’s Motion for Indefinite Stay at 7, (“The fact that DEQ recently lost a somewhat related case, *on legal grounds not directly at issue here, does not in any way justify paralyzing this case indefinitely.*”) (emphasis added), 10-11 (“Such an immoderate stay is particularly unwarranted because the *MEIC v. DEQ AM4* case does not even address the central issue remaining in this case.”) and n.2 (asserting that burden of proof issue addressed in the AM4 District Court Decision is “not the same burden of proof at issue in this case”) with *id.* at 16 (“. . . unless and until the Montana Supreme Court issues a different ruling, the District Court’s ruling is binding on this tribunal”).

**I. A Montana District Court’s Ability to Bind Action Outside of the District is Limited.**

Montana district courts may not bind each other. In *Murray v. Motl*, 2015 MT 216, ¶ 16, the Montana Supreme Court considered whether the decision of one district court could “effectively operate” to bind another court. The Supreme Court answered in the negative: one district’s decision “would not bind” the other district and would only amount to “an advisory opinion.” *Id.*, ¶ 7.

Federal administrative law expands on what this principle means for administrative agencies subject to multiple judicial jurisdictions, such as the Board. It is well settled that one federal circuit’s decision generally does not bind an agency’s interpretation of the law in other circuits. See *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1331 (D.C. Cir. 1989) (“And, of course, an unfavorable ruling in one circuit would not prevent the [agency] from continuing to follow its interpretation of the statute in other cases nationwide.”) (citing *United States v. Mendoza*, 464 U.S. 154, 160–63 (1984)); see also *City and Cnty of S.F. v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (noting that nationwide injunctions are “exceptional” because “broad injunctions may stymie novel legal challenges and robust debate”) (citing *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting)).

The same reasoning holds here. As counsel for MEIC acknowledged at the hearing, the AM4 District Court Decision did not address DEQ’s decision to issue

the AM3 permit, challenged here. *See* Tr. at 77. The Board is therefore free to “continu[e] to follow its interpretation” of the applicable law in this matter.

## **II. The Board Can and Should Disregard the AM4 District Court Decision.**

### **A. An Agency Has a Right to Appeal Before Completing a District Court Remand.**

The Montana Supreme Court has repeatedly affirmed that an agency can appeal an adverse decision *before* it completes the remand ordered by the district court. *See Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n*, 2010 MT 2, ¶ 18 (“To force the PSC to recalculate the rate in accordance with the District Court’s specific instructions before allowing it to appeal would undermine the PSC’s right to appeal under § 2-4-711, MCA.”); *Grenz v. Mont. Dept. of Nat. Res.*, 2011 MT 17, ¶ 2 (“We conclude, like we did in *Whitehall Wind*, that to require the Department to recalculate the value of Grenz’s improvements before allowing it to appeal would undermine the Department’s right to appeal under § 2-4-711, MCA.”); *Mays v. Sam’s Inc.*, 2019 MT 219, ¶ 9 (same). Indeed, the Supreme Court has noted that to require an agency to implement a district court’s remand instructions while the case was pending appeal could be wasteful: “as a matter of judicial economy, a reversal by this Court could well revise the instructions upon remand that were entered by the District Court.” *Mays*, ¶ 9.

The Supreme Court’s caution in *Mays* is even more warranted here, where the question is not whether to implement the specific remand instructions of the

District Court,<sup>2</sup> but to extend the District Court’s holdings to a different case in a different judicial district. The principle behind an agency’s right to appeal an adverse decision before undertaking remand amply supports declining to extend the AM4 District Court Decision pending resolution of DEQ’s appeal.

**B. The Non-Acquiescence Doctrine Supports the Board’s Right to Decline to Apply a Flawed District Court Decision.**

Federal courts have recognized the doctrine of agency non-acquiescence – that an agency “need not always acquiesce to an adverse ruling.” *Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 707 (D.C. Cir. 2017). This doctrine may apply to support an agency’s decision to decline to follow a judicial decision even within the same district. *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585 (E.D. Cal. 1991) (quoting *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (“Administrative agencies are not free to refuse to follow circuit precedent in cases originating *within* the circuit, unless the Board has a good faith intention of seeking review of the particular proceeding by the Supreme Court.”) (emphasis added)).

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<sup>2</sup> The Board is not faced with implementing remand instructions from the AM4 District Court Decision because the District Court violated the Montana Administrative Procedure Act (“MAPA”) by purporting to remand the matter to DEQ, rather than the Board, as required. AM4 District Court Decision at 34. *See* Mont. Code Ann. § 2-4-704(2) (a reviewing court “may affirm” the decision of the agency – i.e., the Board – on review, or “remand the case for further proceedings”).

The AM4 District Court Decision has already been appealed and is likely to be reversed due to its pervasive mistakes of law. In addition to the errors identified by the Department in its Motion to Stay, the District Court, among other things, flagrantly violated MAPA and Montana Supreme Court precedent by: applying the wrong standard of review; considering the Board's findings of facts, despite lacking jurisdiction to address them due to MEIC's failure to challenge them before the Board; and substituting its judgment for that of the Board on the facts without following the procedure MAPA prescribes in order to reverse an agency's findings of fact. AM4 District Court Decision at 11–12, 28–34. Given the likelihood of reversal, the non-acquiescence doctrine supports a Board decision not to extend the holdings of the AM4 District Court Decision.

### **CONCLUSION**

The AM4 District Court Decision is not binding on this matter because it was issued in a different judicial district. Moreover, the decision is deeply flawed and unlikely to be upheld on appeal. Montana Supreme Court precedent and the agency non-acquiescence doctrine support a Board decision not to extend the holdings of the AM4 District Court Decision to out-of-district cases pending resolution of these issues by the Montana Supreme Court.

DATED this 18th day of March 2022.

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

IN THE MATTER OF:	Case No. BER 2016-07 SM
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017	<b>PETITIONER'S BRIEF ON THE BINDING NATURE OF MEIC v. DEQ, NO. DV 19-34 (16TH JUD. DIST. CT.)</b>

**INTRODUCTION**

On March 9, 2022, the Board of Environmental Review (Board) issued an order requesting briefing "limited to 5 pages" on whether the merits decision of the District Court in *MEIC v. DEQ*, No. DV 19-34 (Mont. 16th Jud. Dist. Ct. Oct. 28,



2021), “is binding on the Board in this matter.” That decision is binding on the Board in this matter.

## **DISCUSSION**

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 178 (1803). This fundamental precept of American government is a cornerstone of Montana law: “Under the Montana Constitution, courts are vested with the exclusive power to construe and interpret acts of the Legislature, as well as provisions of the Constitution ....” *State v. Walker*, 2001 MT 170, ¶ 7, 306 Mont. 159, 30 P.3d 1099. This separation of functions is carried forward in the judicial review provisions of the Montana Administrative Procedure Act (MAPA), which allow Montana’s district courts to review, remand, reverse, or modify agency decisions found by the court to be unlawful. Mont. Code Ann. § 2-4-704(2). On remand, an agency “is bound by findings and conclusions from the reviewing court.” 3 Admin. L. & Prac. § 8:31 (3d ed.).

Here, the District Court’s detailed decision in *MEIC v. DEQ* reversed the decision of the Board pursuant to the judicial review provisions of MAPA and the Montana Strip and Underground Mine Reclamation Act (MSUMRA). No. DV 19-34, slip op. at 34. By the operation of the judicial review provisions of MAPA and MSUMRA and consistent with the separation of powers, that decision is binding

on the Board in that case regarding the AM4 expansion of the Rosebud Mine.

Mont. Code Ann. § 2-4-704(2); 3 Admin. L. & Prac. § 8:31 (3d ed.).

The decision of the District Court in *MEIC v. DEQ* is also binding on the Board in the instant case involving the Bull Mountains Mine by operation of the doctrine of collateral estoppel. “Collateral estoppel bars litigants from reopening all questions essential to the judgment which were determined by a prior judgment.” *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 18, 331 Mont. 281, 130 P.3d 1267. Collateral estoppel applies when four elements are met: (1) “the identical issue raised was previously decided in a prior adjudication”; (2) “a final judgment on the merits was issued in the prior adjudication”; (3) “the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication”; and (4) “the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.” *Id.* ¶ 18. A ruling “that has not been entered as a final judgment because of the pendency or future availability of an appeal may nevertheless have full collateral estoppel effect.” *Id.* ¶ 20. As such, a ruling subject to later appeal may have a binding and preclusive effect if it is “adequately deliberated,” the parties were “fully heard,” and the decision is supported “with a reasoned opinion.” *Id.* ¶ 22.

Here, collateral estoppel binds the Board to the decision in *MEIC v. DEQ*, which has a preclusive effect on the issues common to both cases. At the outset, the Board was a party to *MEIC v. DEQ* and had a full and fair opportunity to litigate the issues in that case. The District Court’s decision qualifies as a “final judgment on the merits” because it was adequately deliberated, supported by a well-reasoned opinion, and all parties were fully heard on the issues at stake. *See generally MEIC v. DEQ*, No. DV 19-34, slip op. at 1-34; *Baltrusch*, ¶ 22. This is the case even though it is subject to appeal. *Baltrusch*, ¶¶ 22-30. Finally, while the factual issues in the two cases differ, collateral estoppel still applies to all common issues of law between the two cases. *See, e.g., MEIC v. DEQ*, 2016 MT 9, ¶ 24, 382 Mont. 102, 365 P.3d 454. Those legal issues have now been resolved and are not subject to reopening for further dispute.

## CONCLUSION

For these reasons, *MEIC v. DEQ*, No. DV 19-34 (Mont. 16th Jud. Dist. Ct. Oct. 28, 2021), is binding on the Board in this matter.

Respectfully submitted this 18th day of March, 2022.

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

<b>IN THE MATTER OF: APPEAL AMENDMENT AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017</b>	<b>CASE NO. BER 2016-07 SM DEQ'S BRIEF ON WHETHER THE DISTRICT COURT'S AM4 DECISION IS BINDING PRECEDENT IN AM3</b>
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**INTRODUCTION**

The Montana Board of Environmental Review (“BER”) should find the decision from the Montana Sixteenth Judicial District, Rosebud County,<sup>1</sup> concerning the Rosebud Mine’s fourth amendment to its surface mining permit (“AM4 decision”) is not binding on this Signal Peak Energy, LLC’s Bull Mountains Mine permit (“AM3”) proceeding for two reasons. First, Petitioner Montana Environmental Information Center (“MEIC”) has already distinguished

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<sup>1</sup> By comparison, any appeal of this AM3 proceeding before the BER would occur in either the 14th Judicial District Court, Musselshell County, or the 13<sup>th</sup> Judicial District Court, Yellowstone County, where the mine is located. *See* Mont. Code Ann. § 2-4-702(2)(d).

the AM4 decision from this AM3 proceeding and under the doctrine of judicial estoppel, it should be precluded from arguing otherwise here. Second, only the Montana Supreme Court may issue binding precedent and thus, the district court's AM4 decision is not binding precedent for this proceeding.

### **ARGUMENT**

#### **I. Under the doctrine of judicial estoppel, MEIC is prevented from arguing the district court's AM4 decision is controlling here.**

“Judicial estoppel is a doctrine that seeks to prevent a litigant from asserting an inconsistent, conflicting, or contrary position to one that she has previously asserted *in the same* or in a previous proceeding.” *J.L.G. v. M.F.D.*, 2014 MT 114, ¶ 21, 375 Mont. 16, 324 P.3d 355 (emphasis added). The elements of judicial estoppel are:

- 1) the estopped party must have knowledge of the facts at the time the original position is taken;
- 2) the party must have succeeded in maintaining the original position;
- 3) the position presently taken must be actually inconsistent with the original position; and
- 4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party.

*Id.*, ¶ 22. MEIC satisfies these requirements.

On the first element, MEIC had knowledge of the facts at the time its original position was taken. Both the hearing examiner's proposed findings of fact and conclusions of law and the district court's AM4 decision were issued prior to

the Montana Department of Environmental Quality’s (“DEQ”) request for stay.

Thus, the comparative issues in the AM4 and AM3 proceedings were well known to MEIC when it took its original position on DEQ’s motion for stay.

On the second element, as evidenced by BER denying DEQ’s motion to stay, *see* Doc. 207 at 1,<sup>2</sup> MEIC was successful in maintaining its original position.

On the third element, if MEIC argues the AM4 decision is controlling here, that position is inconsistent with its original position. MEIC previously argued the burden of proof issue in AM3 is different than AM4 because the relevant standards are distinguishable. Doc. 25 at 11, n.2. MEIC also asserted a “stay is particularly unwarranted because the *MEIC v. DEQ AM4* case does not even address the central issue remaining in this case—whether Signal Peak demonstrated that ‘reclamation can be accomplished’ pursuant to ARM 17.24.405(6)(a).” Doc. 205 at 11. *see also id.* at 2–3, 9 (providing further argument on how the issues and standards in AM3 and AM4 are distinct). Because MEIC has argued these cases are distinguishable, it would now be inconsistent for it to argue the AM4 decision is controlling in this proceeding, satisfying the third element of judicial estoppel.<sup>3</sup>

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<sup>2</sup> Citations to BER filings refer to the corresponding document number provided in the docket index for this appeal.

<sup>3</sup> By comparison, DEQ’s argument here is consistent with its prior filings wherein it argued, despite the overlap of issues, that the AM4 decision is not binding on this proceeding. Doc. 201 at 5. As discussed below, the Montana Supreme Court’s decision in AM4 will be binding in AM3 whereas the district court’s AM4 decision is not binding on the BER.



Finally, on the fourth element, a change in MEIC's position on the comparative issues and standards in AM4 and AM3 would injure DEQ because DEQ has been deprived of a stay. Said differently, the BER was persuaded by MEIC's representation that the AM4 decision is not applicable here in denying DEQ's motion for stay, which is sufficient to satisfy this criterion. *See, e.g., Simpson v. Simpson*, 2013 MT 22, ¶ 29, 368 Mont. 315, 294 P.3d 1212 (finding judicial estoppel applied because a party "succeeded in persuading the court to enforce the terms of the Stipulation on several occasions and may not thereafter take an inconsistent position."); *accord Fiedler v. Fiedler*, 266 Mont. 133, 140, 879 P.2d 675, 680 (1994). Had DEQ's motion for stay been granted, the parties would currently be waiting for the Montana Supreme Court's decision on the AM4 decision, which would have provided binding precedent here.

## **II. The district court's AM4 decision is not binding precedent on the BER.**

The AM4 decision is not binding precedent because it was not issued by the Montana Supreme Court. *See Binding Precedent*, Black's Law Dictionary (11th ed., 2019) ("A precedent that a court must follow. For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction."); *accord State v. Whitehorn*, 2002 MT 54, ¶ 14, 309 Mont. 63, 50 P.3d 121.

In *Bordas v. Virginia City Ranches Association*, 2004 MT 342, 324 Mont. 263, 102 P.3d 1219, the Montana Supreme Court demonstrated that it is the only

Montana court that may issue binding precedent. In that case, a district court, located in Madison County, “relied upon a prior Madison County case which it found to be factually similar to the case at hand” and “this case was never appealed after the District Court made its ruling.” *Id.*, ¶ 20. Despite both decisions being issued in the same district and the same county, the Montana Supreme Court did not find this prior decision was binding in any way on its ability to exercise appellate jurisdiction. *Id.* Here too, the Montana Supreme Court will have the opportunity to review the issues in the AM4 decision and its decision will eventually become binding precedent.

In its prior filing, MEIC cites § 2-4-704(2), MCA, for the proposition that the AM4 decision binds this proceeding. Doc. 205 at 16. The opposite is true because, under this statute, the district court’s authority is limited to 1) affirming the decision of the agency; 2) remanding the case for future proceedings; or 3) reversing or modifying the decision. Nothing in this statute allows the district court to impact agency decisions that are not before it and thus, the AM4 decision cannot have the reach of impacting this AM3 proceeding.

### **CONCLUSION**

Because MEIC is estopped from distinguishing the issues and standards in AM3 and AM4 and only the Montana Supreme Court may issue binding precedent, the BER should find that the AM4 decision is not controlling here.

Respectfully submitted this 18<sup>th</sup> day of March, 2022.

/s/ Jeremiah Langston

JEREMIAH LANGSTON

*Counsel for Respondent Montana  
Department of Environmental Quality*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of March 2022, a true and correct copy of the foregoing was served by electronic mail to the persons addressed below as follows:

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FILED

02/08/2022

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA  
Case Number DV 22-0067

KATHERINE M. BIDEGARAY  
District Judge, Department 2  
Seventh Judicial District  
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DATE January 28, 2022  
CLERK OF DISTRICT COURT  
By: [Signature]

**MONTANA SIXTEENTH JUDICIAL DISTRICT COURT**  
**ROSEBUD COUNTY**

MONTANA ENVIRONMENTAL  
INFORMATION CENTER, and  
SIERRA CLUB,

Petitioners,

vs.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW,  
WESTERN ENERGY CO.,  
NATURAL RESOURCE  
PARTNERS, L.P.,  
INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL  
400, and NORTHERN CHEYENNE  
COAL MINERS ASSOCIATION,

Respondents.

Cause No.: DV 19-34

Judge Katherine M. Bidegaray

**ORDER ON REMEDY AND STAY**

**I. PROCEDURAL AND FACTUAL BACKGROUND**

Pursuant to the Montana Administrative Procedures Act (MAPA), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club (Conservation Groups) petitioned the Court contending that the approval by the Montana Board of Environmental Review (BER) of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of

Case No. DV 19-34  
File No. 0406 107

Environmental Quality (DEQ) to review the AM4 permit application consistent with applicable laws. By Order dated October 27, 2021, this Court “reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws.” Order on Petition at 34. This Court held that BER committed four procedural errors: (1) unlawfully engrafting an issue exhaustion requirement onto MSUMRA; (2) unlawfully allowing Respondents to submit *post hoc* evidence and argument; (3) allowing an unqualified witness to provide key expert testimony; and (4) unlawfully reversing the burden of proof. *Id.* at 13-28. This Court further held that BER and DEQ committed two critical substantive errors: (1) arbitrarily and capriciously assessing water quality standards regarding the growth and propagation of aquatic life; and (2) arbitrarily and capriciously determining that releasing additional salt for decades to centuries into a stream that is already impaired for excessive salt will not worsen the impairment. *Id.* at 31-37.

Thereafter, Respondents DEQ and Westmoreland Rosebud Mining, LLC (WRM) (together, “Respondents”) sought leave to allow WRM to continue strip-mining operations in the AM4 Area of the Rosebud Mine, notwithstanding this Court’s reversal of the permit approval that authorized the AM4 mining. In addition, DEQ and WRM request the Court to stay its decision pending anticipated but yet-unfiled appeals. The principal justifications offered for these requests, supported by briefs and declarations, are (1) the burden to DEQ of complying at this juncture with

its legal obligations and (2) alleged threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant.

The Conservation Groups have opposed Respondent's motions, also supported by briefs and declarations, arguing that the standard judicial remedy for an unlawfully issued permit is reversal and vacatur of the permit and further arguing that, because vacatur is an equitable remedy, the Court may defer vacatur.

The Court notes that there is no substantial dispute of fact that DEQ has (1) determined the receiving stream, East Fork Armells Creek (EFAC), to be impaired and not meeting water quality standards for over a decade; and (2) failed to prepare a remedial plan. *Id.* at 6-7.<sup>1</sup> Nor is it disputed that in fall 2020 and again in spring 2021, one of the two Colstrip units was shut down for two and one-half months. Declaration of David Schlissel ¶ 7 (attached as Exhibit 2 to Conservation Groups' Response). The Conservation Groups argue that, because hydroelectric and solar energy is abundant and energy demand is low in spring, it is possible to shut down one of the two units during this "shoulder" season without negatively affecting energy supplies or energy costs. *Id.* ¶¶ 7, 14, 19.

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<sup>1</sup> Of further note, since this case was filed, WRM has violated water pollution limitations 67 times. Declaration of Anne Hedges ¶ 9, attached as Exhibit 1 to Conservation Groups' Combined Response to DEQ's and WRM's Motions for Stay and Motions on Remedy (hereafter Conservation Groups' Response).

Specifically, the Conservation Groups request that this Court defer vacatur of the AM4 permit until April 1, 2022, which the Conservation Groups argue will allay Respondents' proffered concerns, while assuring that the environmental protections of the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Constitution are honored. Additionally, the Conservation Groups argue that Respondents' stay motions should be denied because they are untimely, and they fail to meet the legal standard for a stay in that: they demonstrate no likelihood of success on appeal; DEQ and WRM will suffer no irreparable harm from a remedy that defers vacatur until April 2022; and a stay would harm the Conservation Groups and the public.

Having considered the parties' arguments and affidavits, the Court is prepared to rule.

## II. LEGAL FRAMEWORK

### Vacatur

The Montana Supreme Court has recently affirmed that “[t]he judiciary’s standard remedy for permits or authorizations improperly issued without required procedures is to set them aside.” *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288.<sup>2</sup> The *Park County* Court explained that, where

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<sup>2</sup> *Accord, e.g., Mont. Envtl. Info. Ctr. v. DEQ (MEIC II)*, 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 (“[W]e conclude the 2017 Permit was not validly issued and must be vacated.”); *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51 (reversing approval of



an agency fails to conduct an adequate “environmental review,” vacatur is essential to ensure that “the government will not take actions jeopardizing ... Montana’s natural environment without first thoroughly understanding the risks involved.” *Id.* ¶¶ 74-77. Thus, it is only in “limited circumstances” when courts decline to vacate unlawful permits. *Id.* ¶ 55.

Setting aside (or “vacatur”) of an unlawful permit is an “equitable remedy.” *Id.* ¶ 89. Accordingly, in appropriate circumstances, a court may in equity defer vacatur to allow the orderly winding down of unlawfully permitted activities. *Northern Cheyenne Tribe*, ¶ 47 (vacating permit but allowing permittee to “continue operating under its current permits” for “90 days”).

### Stay

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936), *followed in Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13-14, 645 P.2d 1350, 1352-53 (1982). A motion for a stay pending appeal must

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water permit and “declar[ing] Fidelity’s [the applicant’s] permits void”); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 58-59, 356 Mont. 41, 230 P.3d 808 (affirming district court decision to “void [a] preliminary plat” that was approved “unlawfully” by county commission); *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979) (“Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands.”); *see also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (“Although not without exception, *vacatur* of an unlawful agency action normally accompanies remand.”).

be filed first in district court. Mont. R. App. P. 22(1)(a). While Montana Rule of Appellate Procedure 22(1)(a) does not establish a standard for district courts to evaluate motions for stays pending appeal, the decision ultimately rests with the district court's discretion and requires a "weigh[ing] [of] competing interests." *Landis*, 299 U.S. at 254-55 (decision calls "calls for the exercise of judgment"); *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218 (district court order on motion for stay reviewed for abuse of discretion).

Consistent with the need to assess competing interests, the U.S. Supreme Court considers the following four factors in evaluating a motion for a stay pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); see also *Flying T Ranch*, ¶ 16 (requiring party seeking stay to "make out a clear case of hardship or inequity" (quoting *Henry*, 198 Mont. at 13, 645 P.3d at 1353)).<sup>3</sup> "A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion." *N.*

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<sup>3</sup> Montana Rule of Appellate Procedure 22(2)(a)(i) provides that a motion for a stay from the Montana Supreme Court must demonstrate "good cause." A showing of "good cause" inherently requires an evaluation of competing interests, as in *Nken*, *Landis*, *Flying T Ranch*, and *Henry*.

*Plains Res. Council v. U.S. Army Corps of Eng'rs (Northern Plains)*, 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020); *Flying T Ranch*, ¶ 16. A party's failure to satisfy any prong of the standard "dooms the motion." *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at \*4 (C.D. Cal. Mar. 17, 2015).

### III. DISCUSSION

#### A. Appropriate Remedy

This Court previously reversed the BER's affirmance of the AM4 permit for the Rosebud strip-mine. The practical and legal effect of this determination is that WRM does not have a valid permit to mine in compliance with, and as required by, MSUMRA. Nevertheless, WRM contends that this Court lacks authority to grant effective relief that would stop its strip-mining operations in the AM4 Area, i.e., vacatur of WRM's unlawful permit. WRM Br. on Remedy at 5-7 (Nov. 8, 2021). WRM's argument, however, is refuted by case law, MSUMRA, and the Montana Administrative Procedure Act (MAPA). The touchstone here is that this Court has broad authority to grant effective relief to remedy unlawful agency action, including reversing and vacating DEQ's permitting decision. Clearly Montana courts possess equitable authority to vacate or "set aside" unlawfully issued permits, which is the "standard remedy for permits or authorizations improperly issued." *Park Cnty.*, ¶¶ 55, 89. What is more, a statutory denial of the judicial authority to set aside unlawful action that may harm the environment would violate Montana's

constitutional mandate to the Legislature to “provide adequate remedies for the protection of the environmental life support system from degradation.” Mont. Const. art. IX, § 1(3); *Park Cnty.*, ¶ 89.

However, the Court at this juncture need not consider whether the relevant laws unconstitutionally preclude effective remedies. MSUMRA and MAPA plainly authorize a reviewing court to vacate an unlawfully issued permit. As this Court explained, MSUMRA is required to meet the minimum standards of the federal Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1253(a)(1), *cited in* Order on Petition at 14 n.3. SMCRA provides that on judicial review of any action by a regulatory authority, including permitting, a “court may affirm, *vacate*, or modify any order or decision or may remand the proceedings ... for such further action as it may direct.” 30 U.S.C. § 1276(b) (emphasis added). “States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act [SMCRA], this chapter and the provisions of the approved State program.” 30 C.F.R. § 733.11.

This broad authority of judicial review is mirrored at the state level in MSUMRA and MAPA. MSUMRA provides that permit appeals are subject to the provisions of MAPA. § 82-4-206(1)-(2), MCA. MAPA, like SMCRA, provides reviewing courts broad authority review to “affirm,” “remand,” “reverse,” or

“modify” an agency decision. § 2-4-704(2), MCA.<sup>4</sup> Here, the final agency action subject to judicial review was the BER decision, which “Affirmed” the “AM4 Permit.” BER:152 at 85-86. Reversal of BER’s approval of the permit is equivalent to vacatur of the permit. The contrary conclusion advanced by WRM would violate *Park County*, the Montana Constitution, MSUMRA, and SMCRA.

Finally, WRM argues that § 2-4-711, MCA, somehow prevents a court from vacating an unlawful agency permitting decision. WRM Br. on Remedy at 6-7. In fact, that statute cuts sharply *against* WRM’s argument and provides in relevant part that “if appeal is taken from a judgment of the district court reversing or modifying an agency decision” (as here) “the agency decision *shall be stayed* pending final determination of the appeal unless the supreme court orders otherwise.” § 2-4-711(2), MCA (emphasis added). Far from requiring a district court to allow unlawfully permitted activities to continue, this provision—like the above-cited provisions of SMCRA and MAPA—provides that an unlawful action must be stopped pending appeal. *In re Investigative Records of Columbus Police Dep’t*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) (“The word ‘may’ is commonly understood to be permissive or discretionary. In contrast ‘shall’ is understood to be compelling or mandatory.” (internal citations omitted)); *see also* Merriam-Webster Dictionary,

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<sup>4</sup> WRM states incorrectly that MAPA only permits courts to “affirm” or “remand” agency decisions, ignoring the express authority to “reverse” or “modify.” WRM Br. on Remedy at 6.

www.merriam-webster.com (defining to “stay” as “to stop going forward: PAUSE” or “to stop doing something: CEASE”). Simply stated, WRM’s contention that these provisions somehow straitjacket the district court’s ability to stop unlawful action is without merit.

*Deferred Vacatur*

That said, deferred vacatur of the AM4 permit until April 1, 2022, is the appropriate remedy. As explained in *Park County*, requiring DEQ to conduct the necessary “environmental review”—here the required analysis of cumulative impacts to water resources under the MSUMRA—before mining has occurred is necessary to secure Montanans’ right to a clean and healthful environment, which mandates “anticipatory and preventative” action. *Id.* ¶¶ 72-78; Mont. Const. arts. II, § 3, IX, § 1(1) (“The state ... shall maintain and improve a clean and healthful environment in Montana for present and future generations.”); *Mont. Wilderness Ass’n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) (“[T]he public interest is best served when the law is followed.”).

Here, the impacts of mining on water resources adjacent to the mine—principally East Fork Armells Creek (EFAC)—have already been severe. As the record shows and this Court explained, the stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of salinity in the

stream substantially. Order on Petition at 6-7. This is precisely the harm MSUMRA is intended to prevent. *See* ARM 17.24.405(6)(c) (prohibiting issuance of a permit unless applicant demonstrates and DEQ confirms that “cumulative hydrologic impacts will not result in material damage”); § 82-4-203(32), MCA, (defining “material damage” to include any “[v]iolation of a water quality standard”); *Northern Plains*, 460 F. Supp. 3d at 1039-40 (vacatur appropriate to avoid harm underlying statute is designed to prevent). As demonstrated by the wall of decisions from *Kadillak*, 184 Mont. at 144, 602 P.2d at 157, to *Park County*, ¶¶ 55, 89, this is precisely the situation in which vacatur of an unlawful permitting decision is warranted. *See supra* note 1 (collecting cases).

While WRM and DEQ raise several complaints in opposition to vacatur, to the degree that any have merit, they can be resolved by deferring vacatur until April 1, 2022. The Montana Supreme Court addressed an analogous situation in *Northern Cheyenne Tribe*, where DEQ had issued unlawful discharge permits to a company that extracted coal-bed methane. *Id.* ¶¶ 4, 10, 46. The Court “declare[d]” the unlawfully issued permits “void.” *Id.* ¶ 47. However, to avoid unnecessary disruption, the Court granted DEQ 90 days to reevaluate the permits, “during which time Fidelity [the company] may continue operating under its current permits.” *Id.* ¶ 47; *see also Northern Plains*, 460 F. Supp. 3d at 1040 (finding that narrowed vacatur “strikes a reasonable balance” between competing concerns).

Here, WRM claims that ,if it is required to cease operations in the AM4 Area, it might not be able to supply sufficient coal to the Colstrip Power Plant, which could in turn “jeopardize” electricity supplies during the winter period of high energy demand. WRM Br. on Remedy at 10-11. WRM’s hypothetical concerns about coal and electricity supply are highly speculative, given AM4 constitutes less than 10% of the mine’s permitted reserves, which are distributed between four active mine areas. Schlissel Decl. ¶ 9; *cf.* WRM Br. on Remedy, Ex. A (Declaration of Russell Batie) ¶ 4 (stating only 30% of mine production from AM4, 70% from other areas). Even assuming WRM’s worst-case scenario were accurate, however, if vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, “it is still extremely unlikely that energy supplies or energy costs in ... Montana or the Pacific Northwest would be negatively affected.” Schlissel Decl. ¶ 19. This is because coal stockpiles at the mine and power plant, identified by WRM and plant operator Talen Montana, LLC, are sufficient to keep at least one of the two Colstrip units operating for four months (the maximum time need to move WRM’s equipment), which is sufficient to meet reduced spring electricity demands. *Id.* Indeed, in both 2021 and 2020, one of the two Colstrip units was shut down for two-and-one-half months during spring and fall shoulder seasons. *Id.* ¶ 7.



Deferred vacatur would also alleviate WRM's complaints about safety hazards caused if "operations in the AM4 Area suddenly cease." WRM Br. on Remedy at 11-12. Five months from the issuance of this Court's Order reversing BER's approval of the AM4 permit are certainly sufficient time for WRM to wind down operations in the AM4 Area, detonate set explosives, and remove exposed coal and blasted overburden. Batie Decl. ¶ 6 (two to four months to move equipment and preform preliminary work). So too with respect to WRM's investments in drilling and blasting. *See* WRM Br. on Remedy at 12. Five months is enough time to allow WRM wind down its operations in the AM4 Area without investing in additional, unnecessary drilling or blasting in AM4. Batie Decl. ¶ 6. In sum, deferred vacatur until April 1, 2022, will uphold the law, protect the environment, and avoid any negative impacts to power supplies.

*Cognizable harm*

DEQ's concerns about the costs associated with complying with its legal obligations, set forth in this Court's earlier Order, are not cognizable "harm". DEQ Br. in Supp. of Stay at 6-10 (Nov. 5, 2021). Agencies cannot complain about the burden of following the law. *Northern Plains* is illustrative. There the Court held that the nationwide permitting process used to approve dredge and fill activities associated with certain oil and gas pipelines violated the Endangered Species Act (ESA). 460 F. Supp. 3d at 1034-35. The agency sought a stay pending appeal,

“complain[ing] that, absent a stay, [the agency] will be burdened by having to process an increased number of individual permit applications.” *Id.* at 1045, 1048 (noting thousands of pending pipeline preconstruction notices). The Court discounted the agency’s complaints because they “resulted from the agency’s failure to follow the law in the first instance.” *Id.* (quoting *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014)). So too here; DEQ’s reticence to comply with the law is no basis for denying vacatur or staying this Court’s decision.<sup>5</sup>

Finally, WRM’s complaints about losing its investment in operations in the AM4 Area do not change the analysis. First, as noted, deferring vacatur until spring strikes a “reasonable balance” that will provide WRM time to wind down operations in AM4 and move its operations to one of its other approved permit areas. *See Northern Plains*, 460 F. Supp. 3d at 1040; *Northern Cheyenne Tribe*, ¶ 47. Further, the “cost of compliance” with the law, including some “lost profits and industrial inconvenience” are the “nature of doing business” and do not overcome the weighty interests of the rule of law and environmental protection. *Northern Plains*, 460 F. Supp. 3d at 1041 (quoting *Standing Rock Sioux v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)); *Park Cnty.*, ¶¶ 81-82 (explaining that a

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<sup>5</sup> DEQ could have avoided these costs, if, for example, agency management had not prohibited agency and industry experts from reviewing and analyzing the relevant data regarding water quality standards. Order on Petition at 25 n.8; *see Northern Plains*, 460 F. Supp. 3d at 1045 (agency cannot complain of “self-inflicted” harm (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (2020))).

company's right to conduct mining activities is restricted by requirement of a lawful permit and that "some administrative delay" does not infringe property rights). This is especially the case where, as here, the cessation of operations is temporary, and may end when DEQ, in compliance with the law, completes the remand process. *Park Cnty.*, ¶ 82; *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (holding "irreparable environmental injuries outweigh the temporary delay" of economic gains from project).

In sum, the "standard remedy" of vacatur should apply here to assure environmental and constitutional protections and uphold the rule of law. *Park Cnty.*, ¶ 55. And, like *Northern Cheyenne Tribe*, ¶ 47, this Court defers vacatur until April 1, 2022, to strike a reasonable balance, allow WRM to wind down operations in AM4, and avoid or mitigate potential negative impacts.

## **B. Whether Stay Is Warranted**

### *Consideration of merits*

The Court notes that the gravamen of Respondents' arguments is a rehash of arguments rejected by the Court in its previous Order on Petition. Moreover, the Court notes that where a district court's decision rests on alternative grounds, as here, a party cannot demonstrate a strong likelihood of success on the merits without addressing *each* basis to the Court's holding. *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 ("Failure to challenge each of the alternative bases for

a district court's ruling results in affirmance."); *MEIC II*, ¶ 27 (finding single issue sufficient to affirm vacatur of unlawful permit and "declin[ing] to address the other issues" raised by appellants); *Life Spine, Inc. v. Aegis Spine, Inc.*, No. 19 CV 7092, 2021 WL 1750173, at \*1-2 (N.D. Ill. May 4, 2021) (denying stay motion that failed to address alternative grounds).

Similarly, a party cannot make a "strong showing" of success on the merits by simply "rehash[ing]" unsuccessful summary judgment arguments. *Friends of Wild Swan v. U.S. Forest Serv.*, No. CV 11-125-M-DWM, 2014 WL 12672270, at \*2 (D. Mont. June 20, 2014); *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at \*3 (N.D. Cal. June 27, 2019); *Roman Catholic Archbishop of Wash. v. Sibelius*, No. 13-1441, 2013 WL 12333208, at \*3 (D.D.C. Dec. 23, 2013); *Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am.*, 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009). Thus, Respondents' motions fail because, in addition to being premature, neither addresses *each* of six grounds on which this Court reversed BER's decision. *Compare* DEQ Br. in Supp. of Stay at 11-13 (addressing one ground), *and* WRM Br. on Remedy at 14-17 (addressing only three of six grounds<sup>6</sup>), *with* Order on Petition at 13-34. This alone is fatal. Equally fatal, the arguments which Respondents raise (addressed below in reverse order) merely

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<sup>6</sup> WRM also argues about this Court's ruling related to Montana Code Annotated § 2-4-621, WRM Br. on Remedy at 3, but while this Court rejected WRM's argument on that point, it was not one of the Court's six bases for reversing BER. Order on Petition at 13-34.

repeat arguments rejected in this Court's Order on Petition. *See, e.g., Friends of Wild Swan*, 2014 WL 12672270, at \*2.

Regarding this Court's substantive rulings on BER's and DEQ's arbitrary analysis of water quality standards (Order on Petition at 28-34), WRM argues that the Court incorrectly applied the "arbitrary and capricious standard," which, WRM suggests, is not permitted by MAPA. WRM Br. on Remedy at 17. WRM is plainly mistaken. MAPA expressly permits a court to reverse an agency decision that is "arbitrary or capricious." § 2-4-704(2)(a)(vi), MCA. Because Respondents must show a strong likelihood of success with respect to *each* of the Court's alternative rulings, *English*, ¶ 47; *MEIC II*, ¶ 27, this is fatal, and the Court need go no further. Nevertheless, Respondents' remaining arguments also miss the mark.

WRM continues to assert its argument that the Conservation Groups' brief in response to the Hearing Examiner's proposed order, which was captioned "objections," was flawed because it was not captioned "exceptions." WRM Br. on Remedy at 16. WRM merely rehashes its already rejected arguments about *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, and § 2-4-621, MCA. *Compare* WRM Br. on Remedy at 16, *with* Order on Petition at 18-20 (rejecting both arguments). WRM's argument is premised on a misstatement of the law. WRM contends that under § 2-4-621(1), MCA, parties "*must* 'file exceptions and present briefs and oral arguments.'" WRM Br. on Remedy at 16

(emphasis added). In fact, the law contains no such mandate, but states only that parties must be “afforded” the “opportunity ... to file exceptions and present briefs and oral arguments.” § 2-4-621(1), MCA. The statute does not support WRM’s argument that the exceptions a party files are not “exceptions” unless they are captioned as “exceptions.” As this Court noted, “unlike in *Flowers*, the Conservation Groups filed extensive exceptions.” Order on Petition at 20; *Flowers*, ¶ 15. That the Conservation Groups captioned their exceptions as “objections” does not make them not be “exceptions.” As such, *Flowers* is plainly inapposite.

WRM also rehashes its administrative issue exhaustion argument and fails to address any of the numerous authorities addressed in this Court’s ruling. Compare WRM Br. on Remedy at 15-16, with Order on Petition at 13-17. This constitutes a failure to make a “strong showing” of likely success on the merits. *Nken*, 556 U.S. at 426. Moreover, contrary to WRM’s argument, Conservation Groups argued repeatedly that the claims that BER barred on issue exhaustion grounds arose after the close of the public comment period. BER:84 at 5-7 (motions *in limine* briefing); BER:94 at 1:25:50 to 1:26:02 (motions *in limine* hearing); BER:151 at 59:19 to 61:24, 66:1-20 (hearing before the Board).<sup>7</sup> Again, the Court finds that WRM’s issue exhaustion argument has no merit.

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<sup>7</sup> Conservation Groups also raised the same arguments at the pretrial conference, but the Hearing Examiner failed to properly record that hearing, causing the record to be lost. BER:151 at 66:24 to 67:12.

Likewise, DEQ's and WRM's argument<sup>8</sup> about the burden of proof is simply a rehash of their argument relying on *Montana Environmental Information Center v. DEQ (MEIC I)*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964,<sup>9</sup> which this Court already rejected. Order on Petition at 25-28. Notably, Respondents fail to address Montana Supreme Court case law holding that an applicant's (here, WRM's) *statutory* burden to show the lack of adverse environmental impacts does not shift in a contested case. *Id.* at 25 (citing *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154). When, as here with MSUMRA (but unlike the Clean Air Act, which was at issue in *MEIC I*), the *statutory* burden is placed on a permit applicant, it does not shift in a contested case because, consistent with the rules of evidence, "the applicant would be defeated if neither side produced evidence." *In re Royston*, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991) (rejecting burden-shifting argument); § 82-4-227(1), (3)(a), MCA, (placing "burden" of proof on "applicant"); ARM 17.24.405(6)(c) (*applicant* must "affirmatively demonstrate[]" that "material damage" "will not result"). Nor do Respondents address the SMCRA legislative history confirming that the permit applicant bears the burden of proof on a permit appeal. S. Rep. No. 95-128 at 80 (1977), *cited in* Order on Petition at 25.

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<sup>8</sup> WRM presents the same rehash of rejected arguments regarding the burden of proof as DEQ. WRM Br. on Remedy at 14-15.

<sup>9</sup> DEQ also cites ARM 17.24.625, DEQ Br. in Supp. of Stay at 13, but that provision addresses "seismograph measurements," which is wholly inapposite.

Finally, *MEIC I* does not refute but confirms the reasoning of this Court's ruling. *MEIC I* did not hold (as BER did here) that in the contested case the public was required to demonstrate adverse environmental impacts. *MEIC I*, ¶¶ 36, 38. Instead, there, the Court explained that the question for BER was whether "Bull Mountain [the applicant] established that emissions from the proposed project will not cause or contribute to" adverse environmental impacts. *Id.*, ¶ 38. Thus, as this Court held, *MEIC I* does not support BER's decision requiring the Conservation Groups to "establish the existence of water quality standard violations." Order on Petition at 26-28 (quoting BER:152 at 84). Accordingly, Respondents' rehashed burden of proof argument does not constitute a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426.

In sum, Respondents' failure to show a strong likelihood of success on each of the six bases of this Courts' decision "dooms the[ir] motion[s]." *In re Silva*, 2015 WL 1259774, at \*4

#### Costs of complying

A party seeking a stay must demonstrate that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Here, if, as Conservation Groups request, vacatur is deferred until April 1, 2022, Respondents' concerns about coal and energy supplies will be assuaged. *See supra* Part III.A. Thus, there is no probability Respondents would suffer irreparable harm.



As noted, DEQ's concerns about the costs of complying with its legal obligations do not constitute irreparable harm. *Northern Plains*, 460 F. Supp. 3d at 1045; *Rodriguez*, 715 F.3d at 1146. Likewise, a temporary delay in economic activity does not constitute irreparable harm. *Park Cnty.*, ¶¶ 81-82; *Northern Plains*, 460 F. Supp. 3d at 1041; *League of Wilderness Defs.*, 752 F.3d at 766; *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1202.

Conversely, a stay would cause substantial injury to the environment, Conservation Groups, and the rule of law. As this Court earlier noted, the waters that the AM4 and the Rosebud Mine impact are impaired for salinity, and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment. Order on Petition at 6-7, 28-34. DEQ has known of this impairment for over a decade but taken no action to remedy it. *Id.* at 7. Such long-term environmental harm is irreparable. See *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").<sup>10</sup> This ongoing pollution, along with WRM's repeated violation of

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<sup>10</sup> DEQ admits that the harm from strip-mining is irreparable. See Declaration of Martin Van Oort ¶¶ 11, 17 (explaining impacts of strip-mining are "irreversible" and "not possible to revert" to pre-mining state).

pollution limits, also irreparably harms the Conservation Groups and their members. Hedges Decl. ¶¶ 4-11. Allowing strip-mining to continue despite DEQ's failure to take a hard look at the environmental consequences of the AM4 expansion would violate Montana's constitutional protections and the rule of law. *Park Cnty.*, ¶¶ 72-73; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1038 (“[T]he public interest is best served when the law is followed.”); Mont. Const. arts. II, § 3, IX, § 1(1).<sup>11</sup> Thus the equities and the public interest do not support a stay.

#### IV.CONCLUSION

For the forgoing reasons, the standard judicial remedy, vacatur, is appropriate here; however, to strike an appropriate balance between competing interests, this Court will defer vacatur of the AM4 permit until April 1, 2022. The Court further concludes that Respondents have not demonstrated that a stay pending appeal is warranted.

Accordingly, it is HEREBY ORDERED:

1. WRM's motion on remedy is DENIED;
  2. WRM's and DEQ's motions for a stay pending appeal are DENIED;
- and

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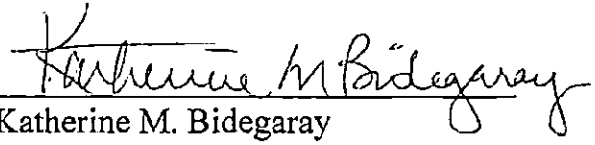
<sup>11</sup> Respondents' insinuation that Conservation Groups' decision not to seek preliminary relief somehow limits their ability to obtain relief now is without merit. The Montana Supreme Court has repeatedly approved vacatur in the absence of preliminary relief. *See supra* note 2 (collecting cases).

3. The AM4 Permit is VACATED, however vacatur is DEFERRED  
until April 1, 2022.

DATED this 27<sup>th</sup> day of January, 2022.



Signed:

  
Katherine M. Bidegaray  
District Court Judge

Cc: Shilon Hernandez  
Derf Johnson  
Walton Morris, Jr.  
Roger Sullivan  
John Martin  
Samuel Yemington  
Victoria Marquis  
Nicholas Whitaker  
Amy Christensen

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CLERK OF DISTRICT COURT  
By: [Signature]  
Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA  
Case Number: DA 22-0067

**MONTANA SIXTEENTH JUDICIAL DISTRICT, ROSEBUD COUNTY**

MONTANA ENVIRONMENTAL  
INFORMATION CENTER, and SIERRA  
CLUB,

Petitioners,

vs.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW, WESTERN  
ENERGY CO., NATURAL RESOURCE  
PARTNERS, L.P., INTERNATIONAL  
UNION OF OPERATING ENGINEERS,  
LOCAL 400, and NORTHERN  
CHEYENNE COAL MINERS  
ASSOCIATION,

Respondents.

Cause No.: DV 19-34

Judge Katherine M. Bidegaray

**ORDER ON PETITION**

**I. INTRODUCTION**

Pursuant to the Montana Administrative Procedure Act ("MAPA"), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club ("Conservation Groups") petitioned this Court, contending that the approval by the Montana Board of Environmental Review ("BER") of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of Environmental Quality ("DEQ") to review the AM4 permit application consistent with applicable laws.

The Conservation Groups assert that the BER committed procedural error by (1) erroneously applying administrative issue exhaustion to the Conservation Groups' permit appeal; (2) employing an unlawful double standard, limiting the Conservation Groups to evidence and issues raised in public comments prior to the permitting decision, while permitting DEQ and the permit applicant Westmoreland Rosebud Mining ("WRM") to present post-decisional evidence and argument; (3) allowing unqualified witnesses to present expert testimony on behalf of DEQ; and (4) by unlawfully reversing the burden of proof.

Substantively, the Conservation Groups assert that the BER unlawfully upheld a permit that relied upon evidence that the BER and DEQ both found unreliable, and which allowed WRM to cause material damage to a stream, the East Fork Armells Creek, in violation of applicable legal standards.

Following the parties' submission of briefs, this matter came on for hearing before the Court on December 16, 2020. Having considered the briefs and the parties' well-presented arguments, the Court is prepared to rule.

## **II. LEGAL FRAMEWORK**

Resolution of this case involves consideration of the administrative record in conjunction with the rather complex legal framework, including the burden of proof. This case involves application of two federal laws—the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and Clean Water Act, 33 U.S.C. §§ 1251-1387—and two state laws—the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201 to -254, MCA, and Montana Water Quality Act, §§ 75-5-101 to -1126, MCA.

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

The federal Surface Mining Control and Reclamation Act ("SMCRA") and the state Montana Strip and Underground Mine Reclamation Act ("MSUMRA") regulate coal mining through a system of "cooperative federalism" that allows states to develop and administer regulatory programs that meet minimum federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 U.S.C. § 1253(a). MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The fundamental purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a); *In re Bull Mountains*, No. BER 2016-03, at 59-63 (Mont. Bd. Of Env'tl. Rev. Jan. 14, 2016) (detailing SMCRA's background) (in record at BER:141, Ex. 1). In enacting SMCRA, Congress stressed that citizen participation is essential for effective regulation of coal mining: "The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, at 59 (1977).

Citing to Article II, § 3 and Article IX of the Montana Constitution, MSUMRA's stated intent is to "maintain and improve the state's clean and healthful environment for present and future generations" and to "protect the environmental life-support system from degradation." § 82-4-202(2)(a)(b), MCA. In *Park County Env'tl. Council v. Dep't of Env'tl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (decided December 8, 2020), the Montana Supreme Court explained that Montana laws that implement Montana's constitutional right to a clean and healthful environment must be interpreted consistently with that fundamental constitutional right, which was "intended ... to contain the strongest

environmental protection provision found in any state." *Id.*, ¶ 61 (quoting *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality (MEIC I)*, 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.3d 1236). The *Park County* Court also underscored that the right to a clean and healthful environment contains a precautionary principle: it is "anticipatory and preventive" and "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." *Id.*, ¶ 61 (quoting *MEIC I*, ¶ 77).

Under MSUMRA, DEQ is forbidden from issuing a mining permit unless and until the applicant "affirmatively demonstrates" and DEQ issues "written findings" that "confirm, based on information set forth in the application or information otherwise available that is compiled by [DEQ] that ... cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); § 82-4-227(3)(a), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). "Material damage" is defined as:

degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses 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.

§ 82-4-203(31), MCA. MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the "applicant." § 82-4-227 (1), (3), MCA; ARM 17.24.405(6)(c).

DEQ's analysis occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA," which assesses the "cumulative hydrologic impacts" from "all previous, existing, and anticipated mining" and determines, in light of these cumulative

impacts, whether the “proposed operation has been designed to prevent material damage.” ARM 17.24.301(32), .314(5). “Anticipated mining” is defined to “include[], at a minimum ... all operations with pending applications.” *Id.* 17.24.301(32).

Within 30 days of DEQ’s permit decision, “any person ... adversely affected may submit a request for a hearing on the reasons for the final decision.” *Id.* 17.24.425(1). DEQ’s “reasons for the final decision” are only available to the public *after* the public comment period on the permit application. *Id.* 17.24.404(3), .405(6). Failure to submit public comments “in no way vitiates” or limits the right of an affected person to request a hearing. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). The requested hearing occurs before the BER pursuant to the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)-(2), MCA; §§ 2-4-601 to -631, MCA.

#### **B. The Clean Water Act and the Montana Water Quality Act.**

As noted, MSUMRA defines “material damage” (the key standard in this case) to include any “[v]iolation of a water quality standard” or “advers[e] [e]ffect[s]” to any “beneficial uses of water.” § 82-4-203(31), MCA. Water quality standards are set by the federal Clean Water Act (“CWA”) and the state Montana Water Quality Act (“MWQA”). These laws likewise establish a “system of cooperative federalism” in which states implement programs that meet minimum federal standards. *Mont. Env’tl. Info. Ctr. v. Mont. Dept’ of Env’tl. Quality (MEIC III)*, 2019 MT 213, ¶ 29, 397 Mont. 161, 451 P.3d 493. Water quality standards are “[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. § 130.2(d). “Montana’s water quality standards are set forth in [ARM] 17.30.601 through 17.30.670 ....” *MEIC III*, ¶ 33.



A water body that “is failing to achieve compliance with applicable water quality standards” is called an “[i]mpaired water body.” § 75-5-103(14), MCA. When a water body reaches its “[l]oading capacity” for a pollutant, additional pollution will result in a “violation of water quality standards.” *Id.*; § 75-5-103(18), MCA.

Under MSUMRA, a CHIA that fails to address “applicable water quality standards” in assessing material damage is unlawful. *In re Bull Mountains*, at 64.

### **III. BACKGROUND AND PRIOR PROCEEDINGS<sup>1</sup>**

#### **A. The Rosebud Mine and East Fork Armells Creek**

The Rosebud Mine is a 25,752-acre coal strip-mine located near Colstrip. BER:152 at 9. It has five permit areas, Areas A, B, C, D, and E. *Id.* at 10. East Fork Armells Creek (“EFAC”) is a prairie stream, whose headwaters are surrounded by the mine. *Id.* at 18. EFAC is outside the permit area. *Id.* The mine “dominates the potential anthropogenic pollutant sources in” the EFAC headwaters. *Id.* at 20.

Narrative water quality standards for EFAC require the stream “to be maintained suitable for ... growth and propagation of non-salmonid [i.e., warm water] fishes and associated aquatic life.” ARM 17.30.629(1); BER:152 at 18. Since 2006, DEQ has designated and identified EFAC as an impaired water body, failing to achieve water quality standards for supporting the growth and propagation of aquatic life. BER:152 at 24; BER:95, Exs. DEQ-9, DEQ-10. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment, identified coal mining as an unconfirmed source of the excessive salt, and found that a

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<sup>1</sup> Throughout this Order, citations to the administrative record will use the following format: for documents, “BER:[docket entry number] at [page],” and for exhibits, “BER:[folder number], Ex.[exhibit number in folder], at [page].”

"40% increase in TDS in the alluvial aquifer upstream of Colstrip appears to be directly associated with mining activity." BER:152 at 28; BER:95 Ex. DEQ-9 at 7; BER:95, Ex. DEQ-10 at 19. DEQ has not completed a plan "to correct the water quality violations" in EFAC. BER:152 at 25.

#### **B. The AM4 expansion of Area B of the Rosebud Mine**

In 2009, WRM applied for the AM4 amendment to its Area B permit. BER:152 at 13. The existing Area B permit covers 6,182 acres. *Id.* at 10. AM4 adds 12.1 million tons of coal from 306 acres to Area B. *Id.* After six years of back and forth with WRM, in July 2015, DEQ allowed 26 days for public comment on WRM's voluminous application. *Id.* at 14. The Conservation Groups submitted comments, addressing, *inter alia*, the existing impairment of EFAC and impacts of increased salinity and harm to aquatic life. BER:95, Ex. DEQ-4 at 2-7. The comments included and incorporated a letter raising concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500-acre expansion for which WRM had applied in 2011. BER:95, Ex. DEQ-4 at 1; BER:95, Ex. DEQ-4L at 17. The comments also raised concerns about WRM's apparent dewatering of an intermittent reach of EFAC. BER:95, Ex. DEQ-4 at 2-3.

#### **C. DEQ's Cumulative Hydrologic Impact Assessment**

After the close of the public comment, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. BER:152 at 14-15. DEQ responded to the Conservation Groups' concerns about salinity, stating that "the 13% increase in TDS [salinity] ... in EFAC" would not adversely affect aquatic life or violate water quality standards. BER:95, Ex. DEQ-1 at 11. Regarding aquatic life, DEQ asserted that a survey of macroinvertebrates in EFAC by WRM proved the stream "currently meets

the narrative [water quality] standard of providing a beneficial use for aquatic life.” BER:95, Ex. DEQ-1A at 9-8; BER:95, Ex. DEQ 1 at 8-9. Regarding dewatering, DEQ stated it could not determine whether mining had dewatered a portion of EFAC, so “material damage to this section cannot be determined.” BER:95, Ex. DEQ-1 at 9; BER:95, Ex. DEQ 1-A at 9-10.

DEQ’s CHIA did not directly address the Conservation Groups’ concerns about anticipated mining in Area F. However, the CHIA included a legal definition of “anticipated mining” that is inconsistent with applicable regulations. Whereas the regulations define “anticipated mining” to include “operations with *pending applications*,” ARM 17.24.301(32) (emphasis added), the CHIA narrowed the definition to “*permitted operations*.” BER:95, Ex. DEQ-1A at 5-1 (emphasis added). Based on this narrow definition, DEQ excluded Area F (the application for which was *pending*, but not *permitted*) from analysis. BER:100, Exs. 19-22.

The Conservation Groups timely sought administrative review, claiming DEQ’s analysis in the CHIA failed to adequately assess material damage to EFAC in light of the stream’s status as an impaired water body. BER:1 at 3-4. The Conservation Groups also challenged the CHIA’s unlawfully narrowed definition of “anticipated mining” and its reversal of the burden of proof regarding material damage. *Id.* at 2-3; BER:97 at 2. WRM intervened and the case went to a contested case hearing before the BER’s hearing examiner. BER:4, 115-18.

#### **D. Motions in Limine**

Prior to the hearing, DEQ and WRM objected to a number of the Conservation Groups’ claims based on “administrative issue exhaustion” (or “waiver”), contending that

the claims were not raised in their public comments. BER:73; BER:74. The Conservation Groups opposed the motions, contending that issue exhaustion does not apply to administrative review of permitting decisions under MSUMRA and that because they were not allowed to review any draft of DEQ's CHIA prior to submitting comments, they could not have been expected to foresee DEQ's legal errors in the CHIA. BER:84 at 3-15. The BER, however, applied issue exhaustion and, accordingly, dismissed multiple claims, including claims related to anticipated mining and dewatering. BER:152 at 77. The BER also barred the Conservation Groups from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments. *E.g.*, BER:152 at 77 ((precluding references to dissolved oxygen (which affects aquatic life) and chloride (which also affect aquatic life))).

The Conservation Groups complain here that, while the BER strictly limited the Conservation Groups to issues and evidence identified in their comments, the BER expansively permitted DEQ and WRM to present post-decisional evidence that was not included or evaluated in DEQ's CHIA or permitting record. *E.g.*, BER:152 at 37-39, 64 (relying on "probabilistic" and "statistical" analysis proffered by WRM in contested case); *cf.* BER:118 at 33:4-20 (parties stipulating that statistical analysis was not in permit record).

The Conservation Groups, for their part, moved in limine to prevent DEQ's hydrologist, Emily Hinz, Ph.D., from presenting testimony about aquatic life in EFAC. BER:76 at 5-7. The parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. However, based on Montana Rule of Evidence 703, the BER permitted and later relied upon opinion testimony

by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50; BER:116 at 215:18 to 219:4.

#### **E. The BER's Final Order**

The BER upheld the AM4 permit. BER:152 at 85-86. Regarding the burden of proof, the BER held, over dissent,<sup>2</sup> that the Conservation Groups failed to demonstrate that material damage would likely result. BER:152 at 84 (Conservation Groups "failed to present evidence necessary to establish the existence of any water quality standard violations"); *accord id.* at 72, 76.

Regarding water quality standards, the BER recognized that DEQ's CHIA "must assess whether the action at issue will cause a violation of water quality standards." BER:152 at 75. The BER further recognized that under the "relevant water quality standard," EFAC must be "maintained to support ... growth and propagation of ... aquatic life." *Id.* at 18, *quoting* ARM 17.30.629(1). DEQ testified it does not use analysis of aquatic macroinvertebrates to assess this water quality standard because, as the BER found, such analysis "does not provide an accepted or reliable indicator of aquatic life support." *Id.* at 46-47. The BER nevertheless relied on DEQ's survey of macroinvertebrates to conclude that DEQ's CHIA adequately assessed the narrative water quality standard for growth and propagation of aquatic life. *Id.* at 85.

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<sup>2</sup> One BER member objected that the BER was impermissibly placing the burden on the Conservation Groups to prove that material damage *would occur*, given MSUMRA's provision placing the burden on WRM and DEQ to prove that material damage *would not occur*. BER:151 at 204:18-22 ("[I] don't think we can flip and require the Petitioner to prove with certainty that damage will occur ...."); *accord* at 214:18-23; *cf. Park Cnty.*, ¶ 61 (explaining that state constitution "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked," *quoting* MEIC I, ¶ 77).

Regarding salinity, the BER found that EFAC is impaired and not meeting water quality standards for growth and propagation of aquatic life due to excessive salinity (that is, existing salinity concentrations are adversely affecting growth and propagation of aquatic life in EFAC). *Id.* at 28. The BER further found that existing mining operations are expected to increase salinity cumulatively in EFAC by 13%. *Id.* at 39 (noting “anticipated 13% increase in the concentration of TDS [salinity] in EFAC”); BER:95, Ex. DEQ-1 at 11 (noting “the 13% increase in TDS ... in EFAC”); DEQ-1A at 9-9 (noting that “[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L”). However, adopting an argument of DEQ that did not appear in the CHIA, the BER concluded it should consider salinity pollution from AM4 in isolation from the predicted cumulative salinity increase of 13% from other mining operations. *Id.* 63-64. The BER then reasoned that because AM4—viewed in isolation—would only extend the *duration* of elevated salinity concentrations (up to “tens to hundreds of years”) but would not, on its own, increase the salinity *concentration*, it would not cause material damage. *Id.* at 62-72.

The Conservation Groups timely appealed the BER’s decision.

#### **IV. STANDARD OF REVIEW**

Under MAPA, a district court may “reverse or modify” an agency decision in a contested case if “(a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions ... (iii) made upon unlawful procedure ... [or] (vi) arbitrary and capricious,” resulting in prejudice to the substantial rights of a party. § 2-4-704(2), MCA.

DEQ and WMR dispute that the arbitrary and capricious standard applies to judicial review of contested cases under MAPA. DEQ Br. at 3; WMR Br. at 2 n.3. The Montana Supreme Court, however, recently clarified that it does. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶¶ 35-37, 401 Mont. 85, 473 P.3d 963. Legal conclusions are reviewed for correctness, not abuse of discretion. *Id.*, ¶ 35; *cf.* DEQ Br. at 3 (citing *Harris v. Bauer*, 230 Mont. 207, 212, 749 P.2d 1068 (1988)); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990) (abrogating "abuse of discretion" standard for review of conclusions of law); *see also N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51.

"[I]nternally inconsistent analysis signals arbitrary and capricious action." *MEIC v. DEQ (MEIC III)*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *NPCA v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015)). "Montana courts do not defer to incorrect or unlawful agency decisions ...." *Id.*, ¶ 22.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. Cnty. of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted). In reviewing agency decisions that impact the environment, the Montana Supreme Court "remain[s] mindful that Montanans have a constitutional right to a clean and healthful environment." *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality (MEIC IV)*, 2020 MT 288, ¶ 26, 402 Mont. 128, 476 P.3d 32 (quoting *Upper Mo. Waterkeeper v. Mont. Dep't of Env'tl. Quality*, 2019 MT 81, ¶ 41, 395 Mont. 263, 438 P.3d 792). Montana

courts afford “much less” deference to agency interpretations of statutes. *MEIC III*, ¶ 24 n.9.

## V. DISCUSSION

### **A. Whether the BER erred by applying administrative issue exhaustion to preclude consideration of issues raised by the Conservation Groups.**

In support of the BER on this issue, DEQ and WRM contend that issue exhaustion at the permit appeal stage is required by the *text* of MSUMRA, “rules, and the BER’s *Signal Peak [Bull Mountains]* ruling.” DEQ Br. at 8; *see also* WRM Br. at 7. A review of statutory text, however, does not support this contention. DEQ cites only one statutory provision—§ 82-4-231(8)(e)-(f), MCA, DEQ Br. at 8, 9, 11—but that provision says nothing about issue exhaustion. Instead, it provides that, after DEQ deems an application acceptable, it must provide public notice and a brief comment period during which an interested person “*may* file a written objection.” § 82-4-231(8)(e), MCA (emphasis added). DEQ must then prepare written findings. *Id.* § 82-4-231(8)(f). There is no textual issue exhaustion requirement. DEQ also cites ARM 17.24.405(5)-(6), but these provisions are also devoid of any express written issue exhaustion requirement. Similarly, the *In re Bull Mountains* decision, also cited by DEQ, says nothing about administrative issue exhaustion.

The Court finds relevant here the *text* of § 82-4-206(1), MCA, which provides the sole requirements for seeking administrative review of a permit decision under MSUMRA; namely, (1) that the person seeking administrative review be adversely affected (undisputed here); and (2) that the request be timely (also, undisputed here). *Accord* ARM 17.24.425(1). Notably, the relevant *texts* do not impose *any* exhaustion requirement. The



Court further notes that the U.S. Department of Interior explained that the parallel federal provision for public comment on permit applications "in no way" limits the rights of affected members of the public from seeking administrative review. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 16-17 (Dep't of Interior July 30, 1998) (in record as BER:141, Ex. 4). These interpretations of the parallel federal provisions are compelling because Montana, like other states with approved regulatory programs under SMCRA, must "interpret, administer, enforce, and maintain [them] in accordance with the Act [SMCRA], this chapter [SMCRA's federal implementing regulations], and the provisions of the approved State program." 30 C.F.R. § 733.11.<sup>3</sup>

Based on the absence of any exhaustion requirement in MSUMRA and its implementing regulations, and because MSUMRA must protect and encourage public participation to the same degree as SMCRA, 30 U.S.C. § 1253(a), the Court concludes that the BER erred in engrafting an extra-statutory exhaustion requirement onto MSUMRA.<sup>4</sup> See also S. Rep. No. 95-128, at 59 (1977) (expressing congressional intent that public play a significant role in administration of SMCRA).

Similarly, MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review. *Citizens Awareness Network v. BER*, 2010 MT 10, ¶¶ 23-30, 355 Mont. 60, 227 P.3d 583. See

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<sup>3</sup> DEQ attempts to minimize the importance of this on-point federal authority, by noting the cooperative-federalism structure of SMCRA and MSUMRA. DEQ Br. at 8, n.8. However, as noted, because MSUMRA is a delegated program under SMCRA, it must be "in accordance with" and "consistent with" SMCRA and its implementing "rules and regulations." 30 U.S.C. § 1253(a)(1), (7); 30 C.F.R. § 733.11. Thus, MSUMRA may not be interpreted to be less protective of public participation than SMCRA.

§ 2-4-702(1)(b), MCA (issue exhaustion applies *after* contested case). Simply stated, the Court finds no authority for DEQ's and WRM's proposal to limit the public to issues raised *before* DEQ lays its cards on the table. See *Vote Solar*, ¶ 49 (exhaustion does not require party to identify error before it occurs).

This conclusion is buttressed by the Montana Constitution's rights to know and to participate, which entitle the public to review government analyses *before* objecting to government decisions. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32-46, 312 Mont. 257, 60 P.3d 381; Mont. Const. art. II, §§ 8-9. As the *Bryan* Court noted, for these rights to be more than a "paper tiger," the public must have a "reasonable opportunity to know the claims of the opposing party [the government] and to meet them." *Bryan*, ¶¶ 44, 46.

Here, DEQ seeks to impute sufficient knowledge of the deficiencies which the Conservation Groups later complained of, asserting that WRM as part of its AM4 application submitted a Probable Hydrologic Consequences ("PHC") report, which should have tipped off the Conservation Groups as to the deficiencies that it complains of in DEQ's CHIA. DEQ misses the point. It is agency action (or inaction) that is at the heart of the review sought by the Conservation Groups. Under MSUMRA, the public only sees *DEQ's CHIA* when *the agency* approves or denies the permit, well *after* the comment period on WMR's application had closed. ARM 17.24.404(3)(a), 17.24.405(5)-(6). Administrative review thus is the first opportunity the public must contest *DEQ's* "reasons for the final decision." ARM 17.24.425(1). Application of issue exhaustion to limit the Conservation Groups to issues raised in comments made *before* ever seeing DEQ's CHIA and "final decision" would render public participation a "hollow right" and violate applicable statutory and constitutional rights. *Bryan*, ¶ 44.

In reaching the contrary conclusion, the BER cited one authority, its prior ruling in *In re Bull Mountains*. BER:103 at 5; BER:152 at 77. That decision is inapposite because it never addressed issue exhaustion in any respect. See *In re Bull Mountains*, at 56-59.

Even if it were applicable, issue exhaustion would not bar the Conservation Groups' claims here for two reasons. First, the Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering EFAC. See BER:95, Ex. DEQ-4L at 17 (noting that "Area B [i.e., AM4] and Area F" "will have cumulatively significant impacts on ... surface waters"); BER:95, Ex. DEQ-4 at 2-3 (noting dewatering); see also Conservation Groups' Br., at Argument I.B. WRM criticizes the precision with which the Conservation Groups' comments discussed Area F and dewatering. WRM Br. at 15. Nevertheless, at the very least, DEQ was alerted "in general terms" that these issues would be "fully sifted" in the ensuing administrative review and "the groups' theories for challenging the permit would not be confined to those presented in the original affidavit." See *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010); *Citizens Awareness Network*, ¶ 23.

Second, the record shows that DEQ also had actual knowledge of these issues. Discovery revealed that DEQ debated analyzing cumulative impacts from Area F but declined to do so based on an incorrect definition of "anticipated mining." BER:100, Ex. 19 (defining "anticipated mining" incorrectly as "approved—but not mined" and noting "proposed Area F and additional mining in Area A—not included" as a result); *id.* Exs. 20-22 (discussions resulting in exclusion of anticipated mining based on incorrect definition); BER:95, Ex. DEQ-1A at 5-1 (erroneous definition of "anticipated mining"); *cf.* ARM 17.24.301(32) (correct definition). DEQ also had actual knowledge of the Conservation

Groups' concerns about dewatering EFAC because it addressed them in the CHIA and response to comments. BER:95, Ex. DEQ-1 at 9-10 (stating DEQ could not determine whether mining had dewatered the stream and concluding "material damage to this section cannot be made"); *id.* Ex. DEQ 1-A at 9-10. Because the Conservation Groups raised these issues and DEQ knew about and addressed them (albeit erroneously), issue exhaustion does not apply. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011) (explaining that there is "no need" for public to raise issue that agency already had knowledge of); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue."); *see also State v. Baze*, 2011 MT 52, ¶ 11, 359 Mont. 411, 251 P.3d 122 (related doctrine of waiver inapplicable where parties raised and district court addressed issue).

In sum, issue exhaustion does not apply to administrative review of permits under MSUMRA. The BER erroneously required the Conservation Groups to exhaust issues which arose only upon publication of DEQ's analysis after the close of the public comment period. Further, even if issue exhaustion applied, DEQ's actual knowledge of the Conservation Groups' concerns foreclosed its application. The BER erred in dismissing the Conservation Groups' claims concerning DEQ's erroneous definition of "anticipated mining" and dewatering EFAC based on issue exhaustion. Moreover, the error was prejudicial because it precluded a merits-based ruling on the Conservation Groups' claims. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (explaining that "the required demonstration of prejudice is not a particularly onerous requirement").

**B. Whether the Conservation Groups' brief met the requirements of § 2-4-621(1), MCA.**

Under MAPA, after a hearing examiner issues proposed findings and conclusions, each party that is adversely affected must be given an "opportunity ... to file exceptions and present briefs and oral arguments to the officials [here, the BER] who are to render the decision." § 2-4-621(1), MCA. Accordingly, after issuance of the proposed findings and conclusions, the BER issued an order stating: "Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before May 10, 2019." BER:135 at 2.

In response, each party filed a brief objecting to portions of the proposed findings and conclusions. BER:139; BER:140; BER:141. WRM and DEQ captioned their briefs "Exceptions," BER:139; BER:140. The Conservation Groups captioned their brief "Objections." BER:141. The Conservation Groups' brief, like those of WRM and DEQ, identified specific portions of the proposed findings to which the Conservation Groups' objected. *E.g.*, BER:141 at 7, 12, 24, 31, 47, 48, 52, 53. Previously, the Conservation Groups had submitted 55 pages of proposed findings, and 76 pages of objections to the proposed findings of DEQ and WRM. BER:123; BER:131.

Citing *Flowers v. BER of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, WRM—now for the first time before this Court<sup>5</sup>—contends that the Conservation Groups' brief failed to meet the requirements of § 2-4-621(1), MCA, because it was denominated "objections" rather than "exceptions." WRM Br. at 6. WRM's argument is without merit. The Montana Supreme Court has long refused to interpret

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<sup>5</sup> Notably, WRM did not raise this issue before the BER, though it had the opportunity to do so.

MAPA in such a hyper-technical fashion. *State ex rel. Mont. Wilderness Ass'n v. Bd. of Natural Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982) (refusing to "exalt form over substance" and not requiring agency to rule on each proposed finding offered by parties as provided in § 2-4-623(4), MCA); see also § 1-3-219, MCA. Thus, the Court "encourages a liberal interpretation of procedural rules governing judicial review of an administrative BER" and has "avoid[ed] an over-technical approach" to MAPA to "allow[] the parties to have their day in court." *In re Young v. Great Falls*, 194 Mont. 513, 516, 632 P.2d 1111, 1113 (1981). And the Montana Supreme Court has long-ago held "it is the substance of a document that controls, not its caption." *Carr v. Bett*, 1998 MT 266, P1, 291 Mont. 326, 329, 970 P.2d 1017, 1018, 1998 Mont. LEXIS 243, \*1, 55 Mont. St. Rep. 1098, *quoting* *Miller v. Herbert*, 272 Mont. 132, 135-36, 900 P.2d 273, 275 (1995).

Here, contrary to WRM's argument, the Conservation Groups' brief objecting to the proposed findings and conclusions identified and cited specific findings and conclusions to which it objected and provided detailed analysis explaining the asserted errors. BER:141 at 7, 12, 23, 31, 47, 48, 52, 53. Thus, caption notwithstanding,<sup>6</sup> the Conservation Groups' brief was no different than those filed by WRM and DEQ. While it is true that the Conservation Groups' objections challenged the legal conclusions of the proposed ruling rather than the factual findings, see *generally* BER:141; BER:151 at 99, there is no requirement that parties challenge proposed factual findings. Cf. § 2-4-621(3), MCA (providing that BER may reject proposed legal conclusions *or* proposed factual findings). WRM is also mistaken in its suggestion that MAPA requires objections to

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<sup>6</sup> "Exceptions" and "objections" are synonymous. See Black's Law Dictionary at 603 (8th ed. 2007).

include "modifying language for each exception." WRM Br. at 6. MAPA contains no such requirement. § 2-4-621(1), MCA. Nor did the BER's order on exceptions. BER:135 at 2.

Finally, *Flowers* is not to the contrary. There, *Flowers* did *not* file exceptions and the Court therefore held that,

*Flowers* did *not* pursue to their conclusion "all administrative remedies available" before seeking judicial review. *Art*, ¶ 17; § 2-4-702(1)(a), MCA. *Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision.* That her recommendation became a final order of the BER twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the "available" administrative remedies.

*Flowers*, ¶ 13 (emphasis added). Here, unlike in *Flowers*, the Conservation Groups filed extensive exceptions (denominated "objections") to the hearing examiner's proposed findings and conclusions. BER:141. Nothing more was required.

**C. Whether the BER erred by permitting DEQ and WRM to present post-decisional evidence and analysis.**

Under MSUMRA, DEQ's permitting decisions must be based on "information set forth in the application or information otherwise available that is compiled by [DEQ]." ARM 17.24.405(6); § 82-4-227(3), MCA. Under these provisions, "[t]he relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA." BER:152 at 76; *In re Bull Mountains*, at 56-59 ("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."). This is consistent with the bedrock rule of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983)); accord *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154 (explaining that an

agency's "decision must be judged on the grounds and reasons set forth in the challenge order(s); no other grounds should be considered"); *Kiely Constr., L.L.C. v. Red Lodge*, 2002 MT 241, ¶¶ 92-97, 312 Mont. 52, 57 P.3d 836 ("after-the-fact opinions" cannot support decisions).

Here, over objection by the Conservation Groups, the BER admitted and then relied heavily on testimony by WRM's expert William Schafer, Ph.D., about a post-decisional "statistical" and "probabilistic" analysis in which he concluded that the projected 13% salinity increase in EFAC "would not be statistically significantly measurable." BER:152 at 38; *id.* at 37, 39, 64 (relying on "statistical" analysis); see also *id.* at 84 (incorporating prior discussion including "statistical" analysis). However, all parties stipulated and the BER's hearing examiner agreed that this "probabilistic" analysis was post-decisional and not included in the information "compiled" by DEQ to support its decision. BER:118 at 33:4-20.

WRM now argues that the BER's admission of *post hoc* testimony from Dr. Schafer was harmless, asserting that it was not "relevant to the BER's directed verdict." WRM Br. at 16. WRM is mistaken, placing form over substance. While the BER framed its ruling as granting a "directed verdict," BER:152 at 85, the BER's analysis shows that this was a misnomer. A directed verdict is only appropriate if there is no weighing of evidence, and all evidence and inferences are viewed in the light most favorable to the non-moving party. *Massee v. Thompson*, 2004 MT 121, ¶ 25, 321 Mont. 210, 90 P.3d 394. The BER, however, rejected the Conservation Groups' expert testimony and, instead, credited testimony of witnesses from DEQ and WRM (some of whom denied any expertise). *E.g.*, BER:152 at 34-36, 51-53, 67, 72.



Thus, contrary to WRM's assertion, the fact that the BER denominated its ruling as a "directed verdict" does not establish that its erroneous admission of *post hoc* testimony from Dr. Schafer was harmless. To the contrary, the record indicates that the BER relied on Dr. Schafer's *post hoc* "statistical" analysis to discount the significance of the projected 13% increase in salinity in base flow in EFAC from the cumulative impacts of mining. BER:152 at 64-65; *see also id.* at 37-38. Because this testimony was crucial to the BER's decision, it was prejudicial and not harmless. *In re Thompson*, 270 Mont. 419, 430-35, 893 P.2d 301, 307-310 (1995) (improper admission of crucial expert testimony warranted reversal of agency decision); *see also Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (finding improper admission of "critical evidence" prejudicial).

Similarly, regarding salinity, the CHIA's material damage assessment and determination were premised on a projected 13% cumulative increase in salinity in EFAC. BER:95, Ex. DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%"); BER:95, Ex. DEQ-1 at 11 (evaluating material damage with respect to "the 13% increase in TDS ... in EFAC"). However, at hearing, DEQ made the *post hoc* argument, which the BER accepted, that its material damage assessment was based not on the 13% cumulative increase in salinity predicted in the CHIA, but on the additional salinity from the AM4 expansion considered in isolation (which the BER found would extend the duration of elevated salinity by decades or centuries, without itself increasing the salt concentration at any one time). BER:152 at 63-65; *see also infra* Part V.G (discussing the claim of substantive error of "extended duration").

The Court finds that the BER's decision to admit and rely on post-decisional evidence and analysis from DEQ and WRM violates ARM 17.24.405(6)(c) and the BER's

own rule that “[w]hat the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA.” *In re Bull Mountains*, at 59; BER:152 at 76 (relevant analysis is in “four corners” of CHIA); see also *MEIC III*, ¶ 26 (inconsistent rulings are arbitrary). As the BER itself previously cautioned: “The public’s ability to rely on DEQ’s express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture novel analysis and argument.” *In re Bull Mountains*, at 49.

In sum, the Court finds unlawful the BER’s decision to allow DEQ and WRM to present post-decisional evidence and analysis. The BER’s decision is at the same time impermissibly arbitrary and capricious because, as noted above, the BER simultaneously limited the Conservation Groups to evidence and argument contained in their *pre-decisional* comments. See *supra* Part III.D. This decision created an uneven playing field, which was plainly prejudicial. *Organized Vill. of Kake*, 795 F.3d at 969.

**D. Whether the BER erroneously allowed DEQ’s hydrology expert to present expert testimony about aquatic life.**

The Conservation Groups moved *in limine* to exclude expert testimony about aquatic life by Dr. Hinz, who is a hydrologist, on the basis that she has no expertise in aquatic life or aquatic biology. BER:76 at 5-7. At hearing, the parties and the BER’s hearing examiner “all agree[d] that she’s [Dr. Hinz] not an expert in aquatic life of any kind.” BER:117 at 86:20-21. The BER, however, permitted and relied on testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50.

Contested cases before BER are subject to “common law and statutory rules of evidence.” § 2-4-612(2), MCA. If a witness lacks expertise in a given field, she may not

give expert testimony in that field, even if she possesses expertise in another field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, 356 Mont. 468, 237 P.3d 37; Mont. R. Evid. 702.<sup>7</sup> Admission of improper expert testimony in a contested case constitutes reversible error. *In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995).

The apparent basis of the BER's decision was that Dr. Hinz's testimony was permissible under Montana Rule of Evidence 703. See BER:116 at 215:18 to 219:4. As clear from arguments advanced at hearing before this Court, both DEQ and WMR now rely on Rule 703 in defending BER's decision. However, Rule 703 merely addresses the "bases" on which expert opinion testimony may rest. Mont. R. Evid. 703. Rule 703 does not expand Rule 702, and it does not permit an expert to give testimony that is beyond her field of expertise, as Dr. Hinz did here with respect to aquatic life. *State v. Hardman*, 2012 MT 70, ¶¶ 27-28, 364 Mont. 361, 276 P.3d 839; *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984.

WRM asserts that the admission of Dr. Hinz's testimony about aquatic life was harmless. WRM Br. at 16. However, Dr. Hinz was DEQ's only witness who offered testimony about aquatic life in EFAC, and the BER's finding and decision regarding aquatic life relied almost exclusively on Dr. Hinz's testimony. BER:152 at 44-50, 85. The BER relied on Dr. Hinz's testimony to discount the testimony of the Conservation Groups' aquatic life expert Mr. Sullivan. BER:152 at 51-52. The BER's analysis of aquatic life cited only one other expert—WRM's expert Ms. Hunter—but conceded that, while Ms. Hunter sampled aquatic life in EFAC, she was not requested to analyze aquatic life health in the

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<sup>7</sup> Accord, e.g., *Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002).

stream, BER:152 at 45. And, in fact, DEQ directed Ms. Hunter to “collect, *but not analyze*” aquatic life in the stream. BER:152 at 46 (emphasis added).<sup>8</sup> Thus, Dr. Hinz’s testimony was critical to the BER’s findings and conclusions with respect to aquatic life and, therefore, its admission was prejudicial and not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18.

In sum, the BER’s admission and reliance on opinion testimony by Dr. Hinz about aquatic life in EFAC—an area admittedly beyond her field of expertise—was reversible error. *Russette*, ¶¶ 13-14; *Weber*, ¶¶ 36-39; *In re Thompson*, 270 Mont. at 429-30, 435, 893 P.2d at 307, 310.

**E. Whether the BER imposed a burden of proof that erroneously required the Conservation Groups to prove that the mine would cause material damage.**

MSUMRA places the “burden” of demonstrating that material damage will *not occur* on the permit applicant and the regulatory authority, here WRM and DEQ. § 82-4-227(1), (3)(a), MCA; ARM 17.24.405(6)(c). Where a statute imposes the burden to show the “lack of adverse impact” on a permit applicant, as here, that burden remains with the applicant throughout administrative review of the permit. *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154; *accord* S. Rep. No. 95-128, at 80 (1977) (legislative history of SMCRA stating that permit applicant retains burden of showing lack of environmental effects in contested hearing) (in record at BER:141, Ex. 2).

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<sup>8</sup> Indeed, as explained at the hearing, DEQ management seems to have arbitrarily prevented *anyone* with expertise in aquatic life from reviewing data on aquatic life in EFAC. See BER:117 at 183:25 to 184:8 (DEQ explaining that it instructed its expert in aquatic life, David Feldman, from analyzing data from EFAC); BER 100, Ex. MEIC 15; see *also* BER:152 at 46 (DEQ also prohibited WRM’s aquatic life expert from analyzing data).

Here, in violation of the statutory text of MSUMRA, a divided BER placed the burden on the Conservation Groups to “present evidence necessary to establish the existence of any water quality standard violations.” BER:152 at 84. Elsewhere, the BER stated the burden differently but maintained that the Conservation Groups had to show “more-likely-than-not” that material damage would or “could” occur. *Id.* at 72 (concluding “burden of proof ... falls to Conservation Groups to present a more-likely-than-not probability that a water quality standard could be violated by the proposed action”); *id.* at 76 (concluding Conservation Groups “have the burden to show, by a preponderance ... that DEQ had information available to it at the time of issuing the permit that indicated that the project is not designed” to prevent material damage).

As the dissenting BER member aptly explained, this “burden of proof ... impermissibly read out of the statute the agency’s regulation,” BER:151 at 214:18-23; that is, the BER ignored its own requirement that the applicant “affirmatively demonstrates” and DEQ “confirm[s]” that the “cumulative hydrologic impacts will not result in material damage.” ARM 17.24.405(6)(c); § 82-4-227(1), (3)(a), MCA (“The applicant ... has the burden” of establishing compliance with MSUMRA’s requirements); BER:151 at 204:5-25. This allocation of the burden of proof is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana’s right to a clean and healthful environment, which imposes “anticipatory and preventive” protections. *Park Cnty.*, ¶ 61. It is, thus, not the responsibility of the public to demonstrate that environmental harm will occur, but, instead, the duty of the applicant (WRM) and the agency (DEQ) to demonstrate that environmental harm will not occur.

The BER based its erroneous allocation of the burden on *Montana Environmental Information Center v. Montana Department of Environmental Quality (MEIC II)*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, a case on which both DEQ and WMR rely here.<sup>9</sup> However, as the Conservation Groups point out, that case is inapposite because, unlike MSUMRA, the Clean Air Act of Montana, at issue there, has no provision allocating the burden of proof to the permit applicant. *Compare MEIC* (2005), ¶ 13, with § 82-4-227(1), (3)(a), MCA.

Further, even in *MEIC II*, the Supreme Court did not burden the public with affirmatively demonstrating that environmental harm would occur. Instead, there, after the Supreme Court stated that the Clean Air Act permit challengers had the general burden of proof, the Court emphasized that the challengers did not have to prove that environmental harm would occur—as WRM contends and the BER held, here. Instead, the Supreme Court explained that, during the contested case, the dispositive question was whether the permit *applicant* had “established” that environmental *harm would not occur*.

Thus, on remand the BER shall enter [findings and conclusions] determining whether, based on the evidence presented, Bull Mountain [the permit applicant] established that emissions from its proposed project will not cause or contribute to [environmental harms] ....

*MEIC II*, ¶ 38; *accord id.*, ¶ 36.

Thus, in any event, WRM's and the BER's asserted requirement that the Conservation Groups affirmatively demonstrate that material damage *would* occur was

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<sup>9</sup> WRM also cites the Court to ARM 17.24.425(7), but that provision refers to cases where a party seeks to “reverse the decision of the BER,” not, as here, where the Conservation Groups sought to reverse DEQ's permit. Further, to the degree that the provision is ambiguous, the clear statutory test of § 82-4-227(1), MCA, which places the burden on the applicant, controls.

error. Where, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in administrative review of the permit. *Bostwick*, ¶ 36; § 82-4-227(1), (3); ARM 17.24.405(6)(c). The BER's decision to the contrary was error.

Reversal of the burden of proof was plainly prejudicial error. See *Organized Vill. of Kake*, 795 F.3d at 969 ("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). Further, here, the Conservation Groups' presented testimony that WRM and DEQ had failed to demonstrate that material damage would not occur. BER:115 at 297:6-15 (aquatic life survey does not show that water quality standard is met); *id.* at 298:1-8 (same). This Court cannot conclude that the BER's reversal of the burden of proof had "no bearing on the procedure used or the substance of the decision reached." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1019-20 (9th Cir. 2013).

**F. Whether the BER arbitrarily approved and relied on DEQ's and WRM's assessment of aquatic life health.**

The BER properly recognized that, to confirm that the cumulative hydrologic impacts will not result in material damage (which, as noted, includes any violation of a water quality standard), DEQ must assess applicable water quality standards. BER:152 at 75; *In re Bull Mountains*, at 87; ARM 17.24.405(6); §§ 82-4-203(31), 227(3)(a), MCA. The BER further recognized that the narrative water quality standard for EFAC requires that the creek "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life." ARM 17.30.629 (1); BER:152 at 18.

However, as confirmed by the record of the BER's decision, the BER *relied* on WRM's survey of macroinvertebrates to conclude that the CHIA adequately assessed the

water quality standard for growth and propagation of aquatic life. *Id.* at 85. The problem with this analysis is that it is demonstrably inconsistent with DEQ's explanation and the BER's finding that "analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support" for assessing water quality standards in eastern Montana streams. *Id.* at 46 (emphasis added); *see also id.* at 47-48. It was irrational and arbitrary for the DEQ and the BER to *rely* on an analysis that both entities expressly found to be *unacceptable* and *unreliable* for assessing applicable water quality standards. *MEIC III*, ¶ 26 ("an internally inconsistent analysis signals arbitrary and capricious action"); § 2-4-704(2)(vi), MCA. While agencies have a degree of discretion in determining what evidence to rely upon, an agency may not rely on evidence that the agency itself deems inadequate. *E.g., Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1077 (D. Idaho 2011) ("If an agency fails to make a reasoned decision based on an evaluation of the evidence, the Court must conclude that the agency has acted arbitrarily and capriciously."; *MEIC IV*, ¶ 26 (Court declined to defer to agency analysis that was not a "reasoned decision" because it "sidestep[ed]" environmental protections).

WRM misapprehends the gravamen of the Conservation Groups' challenge, which is *not* to the BER's factual findings with respect to DEQ's assessment of water quality standards for aquatic life support. *Cf.* WRM Br. at 18. The Conservation Groups' argument is that it was inconsistent and arbitrary (i.e., unlawful) for the BER to *rely* on a metric that the BER and DEQ both find *unreliable* to assess water quality standards for aquatic life support.



Both WRM and DEQ argue a distinction between the CWA and MSUMRA in their attempt to excuse DEQ's assessment of water quality standards for aquatic life support. See, e.g., WRM Br. at 18, and arguments at hearing. The argument fails because MSUMRA adopts and incorporates "water quality standards" from the CWA as criteria for assessing material damage. § 82-4-203(31), MCA; see also Conservation Groups' Reply to DEQ, at Argument Part V. Thus, DEQ's CHIA purported to assess the narrative *water quality standard* for growth and propagation of aquatic life by relying on the (admittedly unreliable) macroinvertebrate survey: "the survey demonstrated that a diverse community of macroinvertebrates was using the stream reach. *Therefore*, the reach currently meets the *narrative [water quality] standard of providing a beneficial use for aquatic life.*" BER:95, Ex. DEQ-1A at 9-8 (emphasis added); ARM 17.30.629(1) (narrative standard—stream must "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life"). The BER, similarly, used the assessment of macroinvertebrates to support its conclusion about water quality standards in EFAC. BER:152 at 48-49. Accordingly, DEQ's and WRM's effort to excuse the BER's inconsistent and arbitrary assessment of water quality standards for aquatic life fails.

Finally, WRM's harmless error argument also fails. Despite generalized assertions about "multiple lines of evidence," the unreliable macroinvertebrate survey was the *only* specific evidence on which the BER and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life. BER:152 at 82 (citing macroinvertebrate survey (the "ARCADIS report")); *id.* at 48-50 (basing analysis on Dr. Hinz's inexperienced assessment of macroinvertebrate survey—but citing no other specific evidence); BER:95, Ex. DEQ-1A at 9-8 (basing

assessment of narrative water quality standard for aquatic life exclusively on macroinvertebrate survey). As such, the BER's arbitrary and capricious reliance on DEQ's inexpert analysis of this unreliable survey was prejudicial, not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18; *Organized Vill. of Kake*, 795 F.3d at 969.

**G. Whether the BER arbitrarily concluded that adding more salt to a stream impaired for salt will not cause additional impairment.**

The BER found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of aquatic life due to, among other things, excessive salinity pollution. BER:152 at 24-25. WRM disputes that EFAC is impaired—i.e., not meeting water quality standards—due to salinity. WRM Br. at 20-22. However, the record indicates that DEQ's official CWA assessment concluded: "Salinity/TDS/chlorides will remain a cause of impairment." BER:95, Ex. 10 at 17. While, as the BER noted, DEQ's level of *certainty* in this conclusion was low and not confirmed, BER:95, Ex. 10 at 17, *cited in* BER:152 at 28, it nevertheless remains DEQ's official impairment determination with respect to EFAC.

The BER further found that existing mining operations will cause a 13% increase in salinity in EFAC, and AM4 will extend the duration of these increased salinity levels for up to "tens to hundreds of years." *Id.* at 32, 39, 63, 68-69 n.4.<sup>10</sup> The BER nevertheless determined that this increased salinity would not result in a violation of water quality standards for growth and propagation of aquatic life or adversely affect that beneficial use

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<sup>10</sup> *Accord* BER:95, Ex. DEQ-1 at 11 (DEQ findings noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (DEQ CHIA noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L").

of EFAC. *Id.* at 61-72. The BER's determination was reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining. BER:152 at 63-65 (stating that "AM4 specifically ... is all this case concerns" and declining to consider cumulative salinity pollution from the total mine operation). However, as pointed out by the Conservation Groups, MSUMRA requires DEQ and the BER to analyze the impacts of a proposed mining operation in light of the "*cumulative* hydrologic impacts" of *all* past, existing, and anticipated mining. § 82-4-227(3)(a), MCA (emphasis added); ARM 17.24.301(31)-(32), .405(6)(c). "Cumulative" means "increasing by successive additions." Merriam-Webster Dictionary, [www.merriam-webster.com](http://www.merriam-webster.com). Thus, if pollution from "successive" mining operations will cause violations of water quality standards, DEQ must remedy those violations *before* permitting more mining. See 48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (material damage must be considered in light of "cumulative" impacts from "any preceding operations"). As the Supreme Court of Alaska explained in interpreting its SMCRA program, regulators must

consider the probable cumulative impact of all anticipated activities which will be part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review. If [the regulatory authority] determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.

*Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992).

Thus, the BER's conclusion, reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining, was error. If a stream, like EFAC, is not meeting water quality standards due to excessive pollution—that is, it is beyond its loading capacity, § 75-5-103(14), MCA—release of additional amounts of pollution that increase the concentration of that pollution will violate water quality

standards. *Id.*; § 75-5-103(18), MCA; accord *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into stream impaired by copper would violate water quality standards). Similarly, if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life. See § 82-4-203(31), MCA (adversely affecting beneficial uses or violating water quality standards is material damage). To conclude otherwise is unreasonable and arbitrary.

WRM attempts further reliance on Dr. Schafer's "statistical" analysis to assert that the projected increase in salinity would not be "statistically significant." WRM Br. at 22. However, as noted, Dr. Schafer's *post hoc* "statistical" analysis was not properly before the BER. See *supra*, Part V.C. In any event, Dr. Schafer's "statistical" argument (which the BER adopted) misses the point. As noted above, if the creek is impaired and, therefore, not meeting water quality standards, it cannot be maintained that a greater-than 10% increase in salt in the creek will not result in a further violation of water quality standards. ARM 17.24.405(6)(c) ((applicant and DEQ must demonstrate that material damage (i.e., a violation of a water quality standard) "will not result")); § 75-5-103(18), MCA (when water body has reached its loading capacity for a pollutant—as EFAC has for salinity—additional pollution causes a "violation of water quality standards"); *Friends of Pinto Creek*, 504 F.3d at 1011-12 (adding more pollution to impaired stream will cause or contribute to violation of water quality standard).

To the point here, violations of water quality standards are measured on a *daily* basis—each additional day of elevated pollution levels is an additional violation. § 75-5-

611(9)(a), MCA; *Id.*; § 82-4-254(1)(a), MCA. Thus, extending the 13% increase in salinity in already-impaired EFAC for decades or centuries would result in additional violations. Plainly, this is not a demonstration that AM4 "will *not* result in" a "violation of water quality standards." ARM 17.24.405(6)(c); § 82-4-203(31), MCA (emphasis added); *Id.*; § 82-4-202(2)(a)-(b), MCA (MSUMRA purpose is environmental protection and implementation of the Montana Constitution's right to a clean and healthful environment); *Park Cnty.*, ¶ 61; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715 (statutory goal paramount).

Thus, the BER's conclusion that the cumulative impacts of AM4 will not result in material damage was arbitrary and capricious. It was, therefore, unlawful.

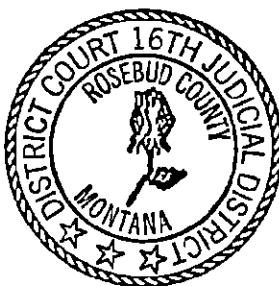
#### H. DEQ's and WRM's Motion to Strike was granted.

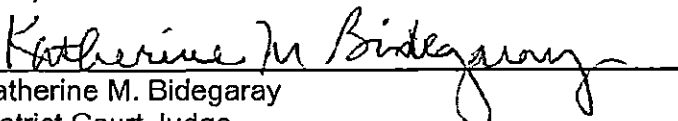
DEQ and WRM moved to strike two exhibits proffered by the Conservation Groups during briefing, purportedly containing admissions by DEQ and DEQ's former counsel, which contradict an argument DEQ presented to this Court in its answer brief. In an order filed separately, the Court granted DEQ's and WRM's Motion to Strike. The Court has not relied upon the challenged exhibits in reaching its decision.

### VI. CONCLUSION

For the foregoing reasons, this Court reverses the BER and remands to DEQ to review the AM4 permit application consistent with this decision and applicable laws.

DATED this 27<sup>th</sup> day of October, 2021.



  
Katherine M. Bidegaray  
District Court Judge

#### Certificate of Service

I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail on \_\_\_\_\_  
By \_\_\_\_\_

Clerk/Deputy Clerk



Jeremiah Langston  
Sarah E. Christopherson  
Staff Attorneys  
Department of Environmental Quality  
Legal Unit, Metcalf Building  
P.O. Box 200901  
1520 East Sixth Avenue  
Helena, MT 59620-0901  
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Jeremiah.Langston2@mt.gov  
Sarah.Christopherson@mt.gov

*Attorneys for Respondent*  
*Montana Department of Environmental Quality*

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

<b>IN THE MATTER OF: APPEAL AMENDMENT AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017</b>	<b>CASE NO. BER 2016-07 SM  NOTICE OF TEMPORARY STAY</b>
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The Montana Department of Environmental Quality hereby notifies the Montana Board of Environmental Review of the Montana Supreme Court's March 30, 2022 Order (Order) concerning appellate motions made regarding the Montana 16th Judicial District Court's Order on Petition for Judicial Review, dated October 28, 2021, for the Rosebud Mine AM4 surface mining permit (AM4 Decision). In part, the Montana Supreme Court ordered a temporary stay of briefing appeals of

the AM4 Decision and ordered a temporary stay of vacatur of the AM4 permit.

The Order is attached as Exhibit A to this notice.

DATED this 1st day of April 2022.

BY: /s/Sarah E. Christopherson  
SARAH E. CHRISTOPHERSON

*Attorney for DEQ*



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of April 2022, a true and correct copy of the foregoing was served by electronic mail to the persons addressed below as follows:

<p>Sandy Moisey Scherer Secretary, BER 1520 East Sixth Ave. P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov</p> <p>John Martin Holland &amp; Hart LLP 645 S. Cache Street, Suite 100 P.O. Box 68 Jackson, WY 83001-0068 jcmartin@hollandhart.com</p> <p>Samuel R. Yemington Holland &amp; Hart LLP 2515 Warren Avenue, Suite 450 P.O. Box 1347 Cheyenne, WY 82003-1347 sryemington@hollandhart.com</p> <p>Sarah Bordelon Holland &amp; Hart LLP 5441 Kietzke Lane Reno, NV 89511 scbordelon@hollandhart.com</p>	<p>Steven Wade John Tietz Browning, Kalecyzc, Berry &amp; Hoven, P.C. 800 N. Last Chance Gulch, Suite 101 Helena, MT steve@bkbh.com john@bkbh.com</p> <p>Shiloh Hernandez Earthjustice 313 East Main Street P.O. Box 4743 Bozeman, MT 59772-4743 shernandez@earthjustice.org cpepino@earthjustice.org</p> <p>Darf Johnson Montana Environmental Information Center P.O. Box 1184 Helena, MT 59624 djohnson@meic.org</p> <p><u>BY: /s/Catherine Armstrong</u> Catherine Armstrong, Paralegal Dept. of Environmental Quality</p>
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ORIGINAL

FILED

03/30/2022

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 22-0064

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064, DA 22-0067, and DA 22-0068

MONTANA ENVIRONMENTAL  
INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

WESTERN ENERGY CO., NATURAL  
RESOURCE PARTNERS, L.P.,  
INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 400, and NORTHERN  
CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors and Appellants.

FILED

MAR 30 2022

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

MONTANA ENVIRONMENTAL  
INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Respondent and Appellant,

ORDER

MONTANA ENVIRONMENTAL  
INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Respondents,

Exhibit 169

and

WESTERN ENERGY CO., NATURAL  
RESOURCE PARTNERS, L.P.,  
INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 400, and NORTHERN  
CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors and Appellants.

---

Before the Court are three appeals from Orders issued in Cause No. DV-2019-34 in the Sixteenth Judicial District Court, Rosebud County.

On October 29, 2021, the District Court issued an Order on Petition (“Merits Order”) that reversed the approval of a mining permit, referred to as the “AM4” permit, by the Montana Board of Environmental Review, and remanded the matter to the Montana Department of Environmental Quality (DEQ) to review the AM4 permit application consistent with the District Court’s rulings.

Shortly after the court issued the Merits Order, both DEQ and Respondent-Intervenors Western Energy Co., Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miner’s Association (collectively “Westmoreland”) moved the District Court for clarification of the Merits Order and to stay the Merits Order pending appeal, pursuant to M. R. App. P. 22(1). As the prevailing parties, Plaintiffs and Appellees Montana Environmental Information Center and Sierra Club (collectively “MEIC”) moved the District Court for attorney fees and costs from DEQ. Upon completion of briefing on the motion for clarification, the District Court issued its Order on Remedy and Stay (“Stay Order”) on January 28, 2022, in which it clarified that the Merits Order was a vacatur of the AM4 permit, and denied staying the vacatur pending appeal, but delaying the vacatur until April 1, 2022, to “allow [Westmoreland] to wind down operations in AM4, and avoid or mitigate potential negative impacts.” Pursuant to stipulation of the parties, the District Court stayed the briefing

schedule of MEIC's motion for attorney fees and costs while MEIC and DEQ negotiated a settlement of the amount of attorney fees and costs that DEQ will owe if MEIC prevails on appeal.

On February 4, 2022, Westmoreland filed its first Notice of Appeal in what is this Court's Cause No. DA 22-0064. Therein, Westmoreland stated it was appealing from the Stay Order pursuant to M. R. App. P. 6(1), 6(3)(e), and 6(3)(h).

On February 8, 2022, DEQ filed its Notice of Appeal in what is this Court's Cause No. DA 22-0067. Therein, DEQ stated it was appealing from both the Merits Order and the Stay Order pursuant to M. R. App. P. 6(3)(e).

Also on February 8, 2022, Westmoreland filed its second Notice of Appeal in what is this Court's Cause No. DA 22-0068. In that Notice, Westmoreland stated it was appealing from the Merits Order, the Stay Order, and "all previous orders and rulings excepted or objected to which led up to and resulted in judgment," pursuant to M. R. App. P. 6(1).

In each of the appeals, the respective Appellants filed motions for relief under Rule 22(2) to stay the vacatur of the AM4 permit pending resolution of the appeals. In DA 22-0068, Westmoreland also filed a motion to suspend the appellate rules under Rule 29. MEIC opposed these motions, and in its responsive briefs asserted that each of these appeals should be dismissed because they are premature.

When a district court denies a request for a stay under Rule 22(1), a stay from this Court may be sought under Rule 22(2). The party must "demonstrate good cause for the relief requested, supported by affidavit." M. R. App. P. 22(2)(a)(i). However, Rule 22 motions for relief are brought to this Court upon appeal of a final judgment. The Merits Order is not a final judgment because the District Court has not yet ruled on MEIC's motion for attorney fees and costs, *see* M. R. App. P. 4(1)(a), and thus, the appeals are premature.

However, if the Appellants must wait until resolution of the fee issue between DEQ and MEIC to file their appeals, any potential relief by way of a Rule 22(2) motion for stay pending appeal may come too late. Under the District Court's orders, the permit will be

vacated on April 1, 2022. This Court may stay an appeal pending resolution of an unresolved issue by the district court. *State v. Collins*, No. DA 21-0527, Order (Mont. Jan. 4, 2022); *In re Marriage of Johnson*, 252 Mont. 258, 260, 828 P.2d 388, 390 (1992). The Court deems it appropriate to maintain the status quo pending consideration of Appellants' Rule 22(2) motion for stay pending appeal, following entry of a final judgment by the District Court. Therefore,

IT IS ORDERED that the appeals in Cause Nos. DA 22-0064, DA 22-0067, and DA 22-0068 are STAYED pending entry of final judgment by the District Court. Briefing in the appeals is also stayed and will be resumed upon entry of a final judgment, in accordance with the schedule set forth in the Rules of Appellate Procedure.

IT IS FURTHER ORDERED that this case is REMANDED to the District Court for resolution of attorney costs and fees and entry of final judgment within 45 DAYS of this Order.

IT IS FURTHER ORDERED that Appellants shall notify the Court of entry of final judgment within 5 DAYS of entry, at which time the stay of the appeals entered herein shall be VACATED without further order of this Court, and the appeals shall proceed in accordance with the Rules of Appellate Procedure.

IT IS FURTHER ORDERED that Appellees are granted 30 DAYS following entry of final judgment to submit their Responses to Appellants' Rule 22 motions for a stay, previously filed herein, pursuant to Rule 22(2)(b), and to include reference to any further developments relevant to the stay request. Appellants are granted 14 DAYS following Appellees' Responses to submit reply briefs on the motion for a stay pending appeal, not to exceed 10 pages in text. M. R. App. P. 22(2)(a)(iv).

IT IS FURTHER ORDERED that vacatur of the AM4 permit is STAYED pending this Court's resolution of Appellants' Rule 22 motions.

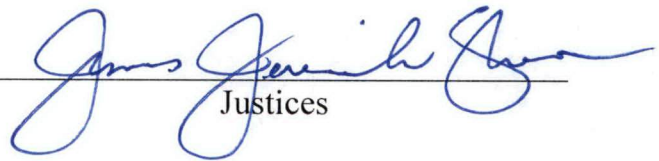
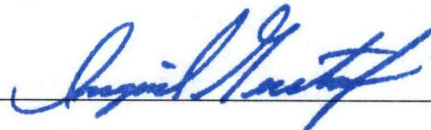
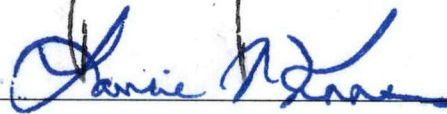
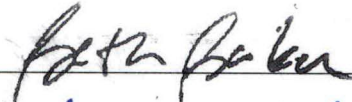
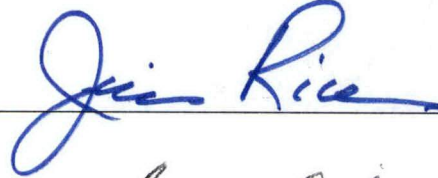
Consideration of consolidation of the appeals or other procedural requirements will be undertaken following entry of final judgment.

////

Dated this <sup>4<sup>th</sup></sup>30 day of March, 2022.



Chief Justice



Justices

TO: Katherine Orr, Board Attorney  
Board of Environmental Review

FROM: Sandy Moisey Scherer, Board Secretary  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: March 23, 2022

SUBJECT: Board of Environmental Review Case No. BER 2022-02 HW

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA	
IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY HARRY RICHARDS, LINCOLN COUNTY, MT	Case No. BER 2022-02 HW

On March 22, 2022 the BER received the attached request for hearing.

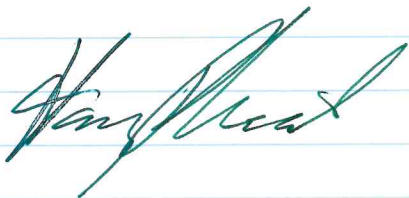
Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Nicholas Whitaker Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901	Angela Colamaria Chief Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901
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Attachment

3-16-2022

I, Harry Richards PO Box 478 Trego MT 59934, Requesting  
a true and honest and ethical hearing that is Not bias in  
any shape form or matter including but not limited to  
any and all prejudice that may have been influenced upon  
DEQ, its staff, workers, or any outside person of any kind,  
this is including any discriminative issues that one may have  
as well

A handwritten signature in blue ink, appearing to read "Harry Richards", written in a cursive style.