DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
AUGUST 12, 2022

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BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

JUNE 10, 2022

Call to Order

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

Attendance

Board Members Present

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

Roll was called and a quorum was present.

Board Attorney Present

Michael Russell

DEQ Personnel Present

Board Liaison: James Fehr
Board Secretary: Sandy Moisey Scherer
DEQ Legal: Kirsten Bowers, Nicholas Whitaker, Sarah Christopherson, Jon Morgan, Kurt Moser, Loryn Johnson, Jeremiah Langston
Public Policy: Rebecca Harbage
Water Quality: Galen Steffens

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting
Aislinn Brown, Caitlin Buzzas, Elena Hagen - Montana DOJ Agency Legal Services Bureau
Sarah Bordelon, Sam Yemington (Holland and Hart) – Signal Peak Energy
Malcolm Gilbert, Amanda Galvan (Earth Justice) – MEIC
Derf Johnson - MEIC
Murray Warhank (Jackson Murdo & Grant) – Board of County Commissioners of Lincoln County, MT
Ray Stout, Kootenai Valley Record

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. **The Board will vote on adopting the April 8, 2022, Meeting Minutes and the May 23, 2022, Special Meeting Minutes**

Board member Smith MOVED to approve the April 8, 2022, meeting minutes and the May 23, 2022, special meeting minutes. Board member Simpson SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

A.5.a. 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. Ms. Bowers, legal counsel for DEQ, asked if the Board would like an update on stringency findings and if the Board would be addressing a pending motion in today's meeting or at the August meeting.

Chairman Ruffatto said the Board would not be deciding nor discussing the matter today, but asked DEQ to give a brief update.

Ms. Bowers said that DEQ is still finalizing its responses to comments on stringency findings and will give another update in August when DEQ finalizes the findings. In response to the Board's finding that the Lake Koocanusa water column standard is more stringent than comparable federal regulations or guidelines, DEQ began drafting findings as required in Mont. Code Ann. § 75-5-203(2) and (3) to support the more stringent standard. The statute provides that DEQ implement the remedy, which could be either revising the rule or making findings under the stringency statute. DEQ is complying with stringency provisions in the Water Quality Act by making the stringency findings based on evidence in the rulemaking record.

DEQ's proposed stringency findings were made available for public review and comment. DEQ held a public hearing on its proposed stringency findings on April 26, 2022, and took comments at the hearing and written comments through May 4, 2022. DEQ will respond to all substantive comments from the public on the stringency findings and the findings will be finalized June 14, 2022.

DEQ received nearly 150 comments and is still reviewing/responding to the comments. Comments overwhelmingly support DEQ's stringency findings and the Lake Koocanusa water column standard. The Lake Koocanusa water column standard is necessary to protect aquatic life from the toxic effects of selenium, and that the level of protection meets the protection goals defined for Lake Koocanusa. The standard is consistent with best available science for selenium toxicity and to protect the selenium sensitive aquatic life in the watershed. The standard to be imposed can mitigate harm to the environment and is achievable under current technology.

Egg ovary tissue through 2020 for the Montana portion of Lake Koocanusa show selenium levels above the 15.1 milligrams per kilogram in fish egg and ovary tissue. Downstream, the Kootenai River in Idaho has been listed as impaired due to selenium that is found in high levels in fish tissue. The Water Quality Act standard is set to protect those beneficial uses, prevent further impacts and protect downstream uses.

DEQ went through the process of reviewing permits and activities on and around Lake Koocanusa. DEQ determined that there are no point sources and no dischargers with selenium as a pollutant of concern. Land disturbing activities are better known to contribute to selenium in the watershed. Current treatment technology for those activities are best management practices such as prevention of stormwater from coming into contact with pollutants and measures that would minimize impervious surface area and retain runoff. Also, runoff can be treated through infiltration and riparian buffers, reducing erosion to protect surface waters from any direct site runoff that may contain pollutants.

Mines or industrial sites in the area would have to document potential pollutants in a storm water pollution prevention plan and provide adequate control measures to avoid impacts to water quality. This is what is currently required, and no owner operator or permittee is expected to incur substantially increased treatment costs.

There are currently no planned point source discharges to Lake Koocanusa with selenium as a pollutant of concern. Based on geology on the Montana side of the border, there is no naturally occurring source of selenium. DEQ believes that treatment technologies could remove 90 percent or more selenium but that depends on the level of concentration discharged. Selenium control would be done by best management practices required under general permits issued by DEQ, such as storm water discharges associated with construction activity, multi-sector general permits for storm water discharges associated with industrial activity, or general permits for sand and gravel operations.

Any written findings must reference pertinent, ascertainable, and peer reviewed scientific studies contained in the record for the basis of DEQ's conclusions. Written findings include information from the hearing record regarding costs to the regulated community that are directly attributable to the proposed standard, and there is no cost to the regulated community directly attributable to the Lake Koocanusa standard. The regulated community for purposes of this rule is within Montana's borders because this is a site-specific water column standard for Lake Koocanusa, Montana.

There is no evidence in the record to suggest that the standard would result in increased treatment costs for Montana regulated owners or operators of land disturbing activities or facilities that would discharge to Lake Koocanusa.

Board member Simpson asked if DEQ's determinations included the economic impact. Ms. Bowers said that the economic impact for Lake Koocanusa and lake impairment are yet to be finalized. Board member Simpson asked if there are any other water body specific standards nationwide for selenium that would compare with what DEQ is proposing. Ms. Bowers said possibly San Francisco Bay but she would provide more information at the August board meeting.

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 began discussion regarding the draft final order based upon decisions made during the prior meetings. The draft final order and a redline version with changes were reviewed.

Board member Altemus MOVED to approve the draft final order. Board member Simpson SECONDED. The motion PASSED 5-1, with Board member Lehnherr dissenting.

IV. NEW CONTESTED CASE

IV.a. **In the Matter of Luke Ployhar, for review of determination made by the Department of Environmental Quality on the Application for Exploration License #00860, BER 2022-03 HR.**

Board member Lehnherr MOVED to assign the case in entirety to Board Attorney Michael Russell as the Hearing Examiner. Board member Reiten SECONDED the motion. The motion PASSED unanimously.

V. BOARD COUNSEL UPDATE

Board Attorney Michael Russell addressed a question from a prior meeting regarding specificity of parties' exceptions to proposed findings of fact and conclusions of law. According to his research, Mr. Russell said that policies and procedures could be revised to include specificity requirements but would need to go through the rulemaking process as set forth in MAPA.

Board member Simpson asked if this item could be discussed in an upcoming Board meeting. Chairman Ruffatto asked Mr. Russell to add this item to the agenda for the next meeting.

VI. GENERAL PUBLIC COMMENT

No public comment was given.

VII. ADJOURNMENT

Chairman Ruffatto MOVED to adjourn the meeting; Board member Simpson SECONDED. The motion PASSED unanimously. The meeting adjourned at 9:40 AM.

Board of Environmental Review June 10, 2022, minutes approved:

/s/_____
STEVEN RUFFATTO
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Petitioner,

vs.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, and SIGNAL PEAK ENERGY, LLC,

Respondents.

Case No.: DV-56-2022-0000722-JR
Colette B. Davies

PETITION FOR REVIEW OF FINAL AGENCY ACTION

APPEAL OF CASE NO. BER 2016-07 SM, MONTANA BOARD OF ENVIRONMENTAL REVIEW

INTRODUCTION

1. It is a well-worn truism, demonstrated time and again, that water is the lifeblood of the West.

2. The Bull Mountains, a groundwater dependent ecosystem in central Montana, have been home to sustainable family ranching operations for generations. These operations are wholly dependent on the handful of wells and springs dispersed throughout the range.

3. The Bull Mountains Mine, a massive longwall coal mine operated by Signal Peak Energy, LLC (SPE) threatens the precious groundwater resources in the Bull Mountains. Cave-ins and land subsidence from the mine can fracture perched aquifers and cause springs and wells to go dry.

4. A third-party analysis found that all springs undermined by the Bull Mountains Mine that have been evaluated have been dewatered or contaminated.

5. SPE has an unfortunate history of hindering efforts to protect and replace precious water resources harmed by its operations. In one instance, SPE dug out and destroyed a critical stock reservoir with an excavator during summer watering season. Another time, SPE provided temporary replacement water that was contaminated with oil, polluting a stock water reservoir. On other occasions, SPE illegally pumped toxic mine waste into an area designated as a potential

replacement water source (for which the company paid a criminal fine of $1 million in 2022).

6. Worse, SPE has repeatedly failed to meet its legal obligations for monitoring and assessing impacts to springs, depriving the public and regulators of information necessary to identify impacts and to obtain replacement water.

7. The challenged decision in this case again focuses on SPE's legal obligation to protect and reclaim water resources impacted by its mine. SPE has sought to expand the mine by over 7,000 acres into the Bull Mountains through what is called Amendment 3 to its Permit (or "AM3").

8. In 2016 the Montana Board of Environmental Review (BER) overturned approval of the AM3 expansion by the Montana Department of Environmental Quality (DEQ). BER held that SPE and DEQ had failed to carry their burden under the Montana Strip and Underground Mine Reclamation Act (MSUMRA) to affirmatively demonstrate that the expansion would not cause undue harm (called "material damage") to water resources. In re Bull Mountains, No. BER 2013-07 SM (Mont. Bd. of Env't Rev. Jan. 14, 2016).

9. As part of its analysis, BER held that SPE and DEQ had failed to affirmatively demonstrate that replacement of impacted water resources could be accomplished, noting uncertainties with respect to the quantity, quality, and legal availability of the designated replacement water source, an aquifer located beneath

the mine (called the "deep underburden aquifer" or, for brevity, the "deep aquifer"). Id. at 85-87. BER emphasized: "[T]he mere possibility of mitigation is not sufficient to meet the standard" under MSUMRA. Id. at 85.

10. Central to BER's ruling was a report authored by SPE's own consultant (Dr. Michael Nicklin), which stated that replacement water needs for the AM3 expansion could substantially exceed 100 gallons per minute (gpm), that water quality in the deep aquifer could be worse than water quality in springs above the mine that could be impacted, and that obtaining a permit to pump water from the deep underburden aquifer to replace water resources above the mine could face legal hurdles. Id.

11. On remand, DEQ again approved the AM3 expansion over objections. Regarding replacement water for reclamation, DEQ simply failed to take a hard look at the concerns about water quantity, quality, and legal availability identified by BER.

12. DEQ recognized the danger the mine posed to water resources above the mine, designated the deep underburden aquifer as the source of replacement water, and stated without support that the deep aquifer could supply "any" quantity of replacement needs that "may become necessary." DEQ's analysis, it turns out, was a façade, lacking support and unable to withstand scrutiny.

13. Thus, DEQ admitted at hearing that it never assessed how much replacement water "may become necessary," and, stunningly, did not even have a "ballpark" sense of how much reclamation water would be needed. DEQ refused to consider SPE's prior report that replacement needs could substantially exceed 100 gpm, and SPE's own consultant testified that the deep aquifer could not supply 100 gpm without impacting existing users. And, the kicker, the report DEQ cited to support its assertion that the deep aquifer could supply "any" quantity of replacement water that "may become necessary" expressly declined to assess the capacity of the deep aquifer to supply replacement water.

14. Regarding the quality of the replacement water, DEQ acknowledged that sodium levels in the deep aquifer exceed maximum guidelines for livestock consumption, but then disregarded the problem altogether.

15. Finally, DEQ dismissed concerns about the legal availability of the deep aquifer by asserting that SPE could obtain unlimited "exempt" wells without being subject to limitations for "combined appropriations" under the Montana Water Use Act (MWUA). For support, DEQ cited a Department of Natural Resources guidance document that did not apply to coal mines, but only to housing developments.

16. Petitioner Montana Environmental Information Center (MEIC) appealed the decision to BER.

17. After over five years of litigation, including a derivative suit that SPE filed against ranchers impacted by the mine, a divided BER upheld DEQ's approval of the AM3 permit. The BER majority's final decision, however, was significantly flawed. First, the agency reversed the burden of proof that it had previously applied in In re Bull Mountains. Rather than require the applicant (SPE) and DEQ to demonstrate a likelihood that reclamation of water resources can be accomplished, BER required the public to demonstrate that reclamation cannot be accomplished. In so doing, BER inexplicably abandoned its prior position and turned the precautionary approach of MSUMRA on its head.

18. The BER majority then improperly granted deference to DEQ on issues of fact, ignored flaws in DEQ's analysis, refused to even address the legal basis of MEIC's claims, and improperly relied on undisclosed and inadmissible evidence from SPE.

19. BER's deeply flawed decision threatens both the survival of family ranching in the Bull Mountains, and the promise of MSUMRA that coal companies and DEQ demonstrate that reclamation can be accomplished—that is, that the land and water can be restored—before coal mining operations are permitted.

20. As elaborated below, BER's ruling is unlawful and should be reversed.

JURISDICTION AND VENUE

21. This Court has jurisdiction to review this final agency decision pursuant to the Montana Administrative Procedure Act (MAPA), Mont. Code Ann. § 2-4-702.

22. BER issued and emailed its final decision to MEIC on June 16, 2022. MEIC timely filed this petition within 30 days of service of that decision, as required by MAPA. Id. § 2-4-702(2).

23. MEIC exhausted all administrative remedies available prior to filing this petition. Id. § 2-4-702(1)(a).

24. Because MEIC seeks judicial review of a permitting decision under MSUMRA, Mont. Code. Ann. §§ 82-4-201 to -254, venue is proper in Yellowstone County, where the Bull Mountains Mine is located. Mont. Code Ann. § 2-4-702(2)(d).

25. SPE previously filed litigation in Yellowstone County against MEIC and Bull Mountains ranchers arising from this proceeding. Signal Peak Energy, LLC v. MEIC, No. DV 18-869 (Mont. 13th Jud. Dist. Ct.). In that case, this Court held that SPE had subpoenaed ranchers in the Bull Mountains for the improper purpose of harassing them. Signal Peak Energy, LLC v. MEIC, No. DV 18-869 (Mont. 13th Jud. Dist. Ct. Nov. 14, 2018). On appeal, the Montana Supreme Court

held that SPE's suit against MEIC and the ranchers was improperly filed in the first instance.

PARTIES

26. Petitioner MEIC is a nonprofit organization founded in 1973 with approximately 5,000 members and supporters. MEIC is dedicated to the preservation and enhancement of the natural resources and natural environment of Montana, particularly the protection of water quality. MEIC is committed to assuring that state and federal officials comply with and fully uphold the laws of the United States and the State of Montana that are designed to protect the environment from pollution. MEIC and its members have intensive, long-standing recreational, aesthetic, scientific, professional, and spiritual interests in the responsible production and use of energy, and the land, air, and waters across the state. MEIC members live, work, and recreate in areas that are adversely impacted by the Bull Mountains Mine. MEIC brings this action on its own behalf and on behalf of its adversely affected members.

27. Respondent DEQ is an agency of the State of Montana and is responsible for issuing coal mining permits under the MSUMRA, including the AM3 Amendment to SPE's permit.

28. Respondent BER is a quasi-judicial board that hears contested cases under MSUMRA and MAPA. BER issued the final decision upholding the permit at issue here.

29. SPE is the operator of the Bull Mountains Mine. SPE is owned by First Energy Corporation of Ohio, Wayne M. Boich, and Gunvor Group Ltd.

30. SPE has a long history of unlawful conduct at the Bull Mountains Mine, including violations of safety standards and intentional disposal of mine waste in mined out portions of the mine, to which SPE pled guilty and paid a $1 million criminal fine this year. Judgment, United States v. Signal Peak Energy, LLC, No. 21-CR-79 (Jan. 31, 2022).

31. A broad federal corruption investigation into SPE's management and operations in recent years led to convictions of mine officials and associates for embezzlement, tax evasion, bank fraud, money laundering, drug trafficking, and firearms violations.

LEGAL BACKGROUND

SMCRA and MSUMRA

32. This case turns on interpretation and application of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 to 1328; and MSUMRA, MCA §§ 82-4-201 to -254. Interpretation of these laws is governed by the goals they are intended to achieve.

33. Federally, coal mining is regulated under SMCRA. The purpose of the law is to "protect society and the environment from the adverse effects of surface coal mining" and to "assure that surface coal mining operations are conducted as to protect the environment." Id. § 1202(a), (d).

34. Reclamation is central to SMCRA. One of the law's most fundamental promises is that coal-mining may "not [be] conducted where reclamation as required by [SMCRA] is not feasible." Id. § 1202(c).

35. SMCRA establishes a system of cooperative-federalism in which states can assume responsibility for day-to-day regulation of coal mining operations, subject to federal oversight.

36. Under SMCRA, the U.S. Secretary of the Interior may grant a state regulatory authority over coal mining if the state establishes and demonstrates that it has the capacity to implement a program that meets minimum federal requirements. Id. § 1253(a)-(b). States are free to develop standards that exceed the minimum requirements of SMCRA. Id. § 1255(b). The State of Montana oversees an approved state regulatory program, though it remains subject to continuing federal oversight. See generally 30 C.F.R. Part 926.

37. As a safeguard against ineffective state regulation of coal mining operations, SMCRA contains important provisions for federal oversight and citizen

participation in permitting decisions and enforcement. 30 U.S.C. §§ 1254(a)-(b), 1267(a), 1270(a)(2), 1271(a)-(b), 1276(e).

38. Citizens are entitled to inspect permit applications, object to permit applications, administratively appeal permitting decisions, seek judicial review of administrative decisions, and bring citizen suits in state or federal court against state regulatory authorities and mine operators. Id. §§ 1257(e), 1263(b), 1264(c), (f), 1270(a), 1276(a)(2), (e).

39. Under Montana's delegated program, DEQ regulates coal mining pursuant to the provisions of MSUMRA, MCA §§ 82-4-201 to -254, and its implementing regulations ARM 17.24.301 to 1309. DEQ's regulation of coal mining is also subject to Montana's constitutional environmental protections. MCA § 82-4-202(1); Mont. Const. art. II, § 3, art. IX, §§ 1-3.

40. Reclamation of coal mining is also central to MSUMRA and the Constitution of Montana.

41. Montana recognizes the "inalienable" "right to a clean and healthful environment." Mont. Const. art. II, § 3. The existence of this right entails the corresponding duty of "[t]he state and each person [to] maintain and improve a clean and healthful environment in Montana for present and future generations." Id. art. IX, § 1(1).

42. To this end, the Constitution of Montana mandates "adequate remedies for the protection of the environmental life support system from degradation" and "adequate remedies to prevent unreasonable depletion and degradation of natural resources." Id. art. IX, § 1(3).

43. The Constitution of Montana mandates reclamation: "All lands disturbed by the taking of natural resources shall be reclaimed." Mont. Const. art. IX, § 2(1).

44. Under MSUMRA, it is the "declared policy of this state and its people to … demand effective reclamation of all lands disturbed by the taking of natural resources." Id. § 82-4-202(2)(e).

45. "'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." Id. § 82-4-203(43).

46. Reclamation includes reclamation of water resources. Thus, to complete "phase IV" reclamation, a mining company must, among other things, restore, reclaim, and protect "fish and wildlife habitat"; minimize disturbance to the hydrologic balance; and develop functioning alternative water sources to

"replace water supplies that have been adversely affected by mining and reclamation operations." ARM 17.24.1116(6)(d).

47. Replacement of water supplies requires the replacement water to be "in like quantity, quality, and duration." MCA § 82-4-253(3)(d).

48. In the permitting process, the permit applicant and DEQ must closely analyze possible impacts to water resources and provide detailed plans and assurances that water resources will not suffer undue damage and that any harm that does occur will be reclaimed. ARM 17.24.314(1)-(5). DEQ's principal analysis of the cumulative impacts of mining on water resources is the cumulative hydrologic impact assessment or "CHIA," as it is known. Id. 17.24.314(5).

49. DEQ must assess whether mining and reclamation operations will affect existing water users and must assure protection of water rights. Id. 17.24.314(1) (hydrologic reclamation plan "must provide protection of … rights of present users of surface and ground water"); id. 17.24.314(5); id. 17.24.405(6)(c); id. 17.24.301(68); MCA § 82-4-203(35).

50. DEQ must require the mine applicant to obtain sufficient bonding to complete all work set forth in the mine's reclamation plan. MCA § 82-4-223(2).

51. DEQ may not issue a permit unless and until the "applicant has demonstrated that reclamation can be accomplished." Id. 17.24.405(6)(a).

52. Under MSUMRA, the applicant has the burden of demonstrating compliance with all permitting requirements. MCA § 82-4-227(1).

53. A demonstration that reclamation is merely possible is not enough: "[T]he mere possibility of mitigation is not sufficient to meet the standard …." In re Bull Mountains, No. BER 2013-07 SM (Mont. Bd. of Env't Rev. Jan. 14, 2016).

54. In assessing whether the applicant has demonstrated that reclamation of water resources can be accomplished, DEQ may not rely on water resources that "may be disturbed by mining" for replacement water. ARM 17.24.304(1)(f)(iii).

MAPA

55. Under MSUMRA, an interested person may appeal a permitting decision to BER. MCA § 82-4-206(1). BER then conducts a contested case hearing pursuant to the Montana Administrative Procedure Act (MAPA). Id. § 82-4-206(2); ARM 17.24.425(1).

56. After BER issues a final written decision in a permit appeal, an interested person may seek judicial review. MCA § 2-4-702(1).

57. Under MAPA, a district court may "reverse or modify" a final decision if the substantial rights of the appellant have been prejudiced and the decision is "in violation of constitutional or statutory provisions"; "arbitrary or capricious"; "made upon unlawful procedure"; or "affected by other error or law." Id. § 2-4-704(2)(a). A court may also reverse or modify an agency decision if

"findings of fact, upon issues essential to the decision, were not made although requested." Id. § 2-4-704(2)(b).

58. Arbitrary and capricious review assesses whether an agency has taken a "hard look at the environmental impacts of a given project or proposal." Clark Fork Coal. v. DEQ, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482. A hard look requires the agency to "make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." Id. The agency must address "all relevant factors" and "cogently explain" why it exercised its discretion in a given manner. DeBuff v. DNRC, 2021 MT 68, ¶ 24, 403 Mont. 403, 482 P.3d 1183.

FACTUAL BACKGROUND

The Bull Mountains

59. The Bull Mountains, located between Billings and Roundup, form the eastern foothills of the Rocky Mountains, on the edge of the Great Plains. Their topography varies from uplands, rock outcrops, sandstone rims, and forested ravines to sagebrush and prairie grasslands. From the summit of Dunn Mountain, the highest point in the Bulls, an observer can see distant peaks of the Snowy, Prior, Big Horn, Crazy, and Beartooth Mountains. The following image is from Dunn Mountain looking southeast:

60. The Bull Mountains form the hydrologic divide between the Musselshell River to the north and the Yellowstone River to the south. The Bulls are the headwaters of various tributaries to both rivers, including Rehder Creek and Fattig Creek, which flow north to the Musselshell, and Pompey's Pillar Creek and Railroad Creek, which flow south to the Yellowstone.

61. The regional climate is semi-arid and water shortages are common. Most springs in the area are located at high elevations in the Bull Mountains where recharge occurs (that is, where water is added to aquifers, as from precipitation).

Wetlands formed by springs, ponds, and short stream reaches make up only a small fraction of the area of the Bull Mountains. The ecology of the Bull Mountains is dependent on these limited ground and surface water resources.

62. The Bull Mountains are home to a large variety of wildlife, including elk, deer, pronghorn antelope, coyotes, cottontails, various upland birds, songbirds, and raptors. Aquatic and semi-aquatic life, including turtles, frogs, and salamanders, are found in wetlands and groundwater-fed stream segments.

63. The major economic base of the region is agriculture, which is wholly dependent on available water supplies. Family ranches have long run livestock in the Bull Mountains and continue to do so today.

64. Coal has also been mined intermittently in the Bull Mountains, following boom-bust cycles.

The Bull Mountains Mine

65. The Bull Mountains Mine, proposed initially in 1989, has long been a source of controversy and a focal point of community opposition.

66. DEQ's predecessor, the Montana Department of State Lands (MDSL), initially permitted the mine to a company called Meridian Minerals in 1993.

67. When MDSL permitted the mine in 1993, it predicted that the mine would follow the same boom-bust pattern that occurred with prior coal mines in the Bull Mountains.

68. Meridian Minerals, however, did not conduct any substantial mining operations, and the permit was transferred to various corporate entities over the next 15 years.

69. During this period, multiple community organizations have opposed large-scale industrial coal mining in the Bull Mountains. People in the Bulls took a stand on principle to protect their land and livelihoods.

70. In 2008, SPE obtained the permit and began developing and operating the current mine.

71. Ranchers who have opposed SPE have suffered. Numerous families and ranching operations have been forced out of the Bull Mountains directly or indirectly by the mine. SPE has canceled ranchers' leases and harassed ranchers, and SPE's mine operations have fractured the landscape and dewatered springs and wells.

72. The Bull Mountains Mine is an underground mine that extracts coal from the Mammoth coal seam, an approximately 10-foot-thick seam that underlies a large portion of the Bull Mountains.

73. The rock layers or "strata" above the coal seam are called, collectively, the "overburden," and strata below the seam are the "underburden."

74. Perched aquifers (aquifers isolated from deeper aquifers by layers unsaturated, low permeability rock) in the Bull Mountains above the mine provide water for springs, short stream reaches, ponds, and shallow wells.

75. Water from the perched aquifers above the mine is some of the highest quality water available in the area.

76. Hundreds of feet beneath the Bull Mountains Mine, a geological unit contains some saturated sandstone deposits. This is called the "deep underburden aquifer" or, simply, the "deep aquifer."

77. SPE employs the long-wall mining technique, which removes the entire coal seam in advancing panels. To do this, the company uses a cutting machine or "shearer" to remove coal from the seam face through multiple passes. A series of hydraulic supports protect the machine. As the operation advances, the supports are removed allowing the overburden to collapse into the void where the coal was, causing surface subsidence.

78. The subsidence causes fractures and cracks that extend to the land surface hundreds of feet above the mine. Subsided hillsides in the Bull Mountains look like "torn corduroy," with "gaping gashes" and "cracks all over the land," according to undisputed testimony from the hearing. The following image is an example of subsidence in the Bull Mountains:

79. DEQ has recognized that the main hydrologic issue regarding subsidence at the Bull Mountains Mine is the potential for loss or diminution of quantity of groundwater or surface water, and impacts to wells, springs, ponds, and stream reaches from subsidence-related fracturing of the overburden.

The BER's Initial Ruling Against DEQ and SPE

80. DEQ initially approved the AM3 expansion in 2013, adding over 7,000 acres and approximately 176 million tons of coal reserves to the mine.

81. MEIC challenged the decision and in 2016 BER overturned the permit on the basis that DEQ and SPE had failed to meet their burden to affirmatively demonstrate that the expansion would not cause material damage outside the permit area. In re Bull Mountains, No. BER 2013-SM at 87.

82. In reaching this conclusion, BER rejected DEQ's arguments that any material damage to water resources could be mitigated by replacing the polluted water with water from the deep underburden aquifer. Id. at 85-87.

83. BER held that DEQ and SPE's proposal to use water from the deep aquifer was "illusory" in light of uncertainties about available water quantity, quality, and legal availability that SPE's own consultant (Dr. Michael Nicklin) had identified. Id. at 85.

84. In particular, BER noted Dr. Nicklin's statement that replacement water needs "exceed[] the typical demands at the mine public water supply" and that the "large overall number of springs, ponds, and identified stream reaches" above the mine have "flow rates [that] could substantially exceed 100 gpm [gallons per minute]." Id.

85. BER further noted Dr. Nicklin's concerns about "differences in water quality between native spring/stream sources" and the deep underburden aquifer and hurdles to obtain a beneficial use permit for replacement wells in the deep aquifer. Id.

86. Given these uncertainties, BER concluded that "the mere possibility of mitigation is not sufficient to meet the standard of [MSUMRA]." Id. at 85. BER emphasized that DEQ and SPE had not met their burden: "Here, at most, the record demonstrates that the proposed expansion of the Bull Mountain[s] Mine may (or may not) be designed to prevent material damage to the hydrologic balance outside the permit area or 50 years and there may (or may not) be water available to mitigate the operation's impacts to water quantity and water quality. This does not satisfy the legal standard of MSUMRA." Id. at 86.

87. Accordingly, BER remanded the matter to DEQ for a new analysis and new decision. Id.

The Current Permit Appeal

88. On remand, SPE submitted additional application materials, including an analysis of the deep underburden aquifer by SPE's consultant, Dr. Nicklin.

89. In this analysis, Dr. Nicklin prepared a computerized groundwater model for the deep underburden aquifer, but he never used it to assess the capacity of the deep aquifer to provide replacement water. Instead, he noted that it would

"serve as a useful tool" for assessing the capacity of the deep aquifer. But neither Dr. Nicklin, nor SPE, nor DEQ ever used this tool.

90. Similarly, in his subsequent analysis, Dr. Nicklin did not revise his projection that replacement water needs could substantially exceed 100 gpm. This was critical because Dr. Nicklin later admitted under oath that SPE had not demonstrated that the deep underburden could provide 100 gpm of replacement water without impacting existing water users.

91. MEIC submitted comments raising concerns that SPE had not affirmatively demonstrated sufficient quantity, quality, or legal availability of water in the deep underburden aquifer to reclaim water resources threatened by the AM3 expansion.

92. Despite MEIC's objections, in July 2016 DEQ again approved the AM3 expansion. In its CHIA, DEQ "designated" the deep underburden aquifer as "the replacement water source" for water resources impacted by the mine. While the permit application materials suggest that other, "less reliable" water sources could be potentially available to supply replacement water, it is undisputed that all such water sources—such as the mine pool (groundwater that collects in the mine after mining) and overburden groundwater (such as perched aquifers and alluvial groundwater)—will be disturbed by mining and may not therefore be relied upon. Moreover, SPE has surreptitiously and illegally disposed of toxic mine waste in

unmined portions of the mine, making any future mine pool unusable for replacement water.

93. Regarding the availability of replacement water to reclaim water resources, DEQ stated in its CHIA: "Based on the results of the investigation presented in the Bull Mountains Mine No. 1 Permit, Appendix 314-7, (Nicklin 2014) water quantity in the deeper underburden is sufficient to provide for the use at the OSW [office supply well] and any mitigation wells which may become necessary in the future" (emphasis added).

94. As noted above, the report of Dr. Nicklin cited in the CHIA, however, expressly did not assess whether the deep underburden aquifer had sufficient capacity to provide replacement water, much less any mitigation needs that may become necessary.

95. In fact, DEQ admitted that it never assessed what mitigation "needs … may become necessary" and that it had no idea how much mitigation water may become necessary in the future, stating that it never even calculated a "ballpark" estimate. DEQ entirely ignored Dr. Nicklin's prior estimate that replacement water needs could substantially exceed 100 gpm.

96. When pressed at hearing, DEQ's representative testified that replacement water needs would correspond to the flow volume from springs and wells listed in the CHIA. Consistent with Dr. Nicklin's calculation, the sum of

those replacement needs substantially exceeds 100 gpm, which SPE subsequently admitted the deep underburden aquifer could not supply without infringing on rights of other water users.

97. Regarding water quality, DEQ's CHIA recognized that the average or median concentrations of sodium in the groundwater from the deep aquifer would exceed maximum guidelines for livestock consumption. Neither the CHIA nor SPE's application materials, including the hydrologic reclamation plan and bond, contained any discussion of or funding for technology to remove sodium from replacement water from the deep underburden aquifer.

98. In response to MEIC's concerns about the legal availability of replacement water, DEQ stated that SPE could evade such concerns by using multiple exempt wells, which would not qualify as combined appropriations, pursuant to a 2016 guidance document issued by the Montana Department of Natural Resources and Conservation (DNRC). However, as a matter of law, the DNRC guidance and the law on which it relied only applied to housing developments, not coal mines.

99. Because DEQ's revised analysis failed to resolve the concerns raised in BER's prior ruling and in MEIC's comments, MEIC appealed DEQ's decision to BER, raising among other things a claim that DEQ and SPE had failed to

affirmatively demonstrate that reclamation of water resources can be accomplished, per ARM 17.24.406(6)(a).

The Contested Case Hearing and SPE's History of Unlawful Activity

100. The appeal resulted in a contested case hearing, at which MEIC, DEQ, and SPE submitted fact and expert testimony. The hearing uncovered a culture at SPE of consistently violating the design standards in its permit for over a decade.

101. Under MSUMRA, a coal mining permit contains detailed legally binding "design standards" which the permittee must follow to assure protection of environmental resources and compliance with the law. Any failure to follow design standards alone is a violation of MSUMRA. MCA § 82-4-254(1).

102. SPE's permit contains detailed design standards for (1) monitoring water resources and (2) assessing impacts of mining on water resources through statistical analysis and comparisons to "reference" springs outside the permit area. This rigorous analysis established objective standards for measuring impacts, as well as means of distinguishing between impacts from mining and impacts from climate.

103. On cross-examination at the hearing, DEQ's representative testified that SPE had received citations and was fined for violating the permit's design standards for monitoring water resources.

104. Worse, cross-examination further revealed that SPE had never complied with the permit's design standards for assessing and determining the impacts of mining to water resources. This discovery was critically important because at hearing DEQ and SPE attempted to discredit Dr. Nicklin's prior estimate of replacement water needs (substantially more than 100 gpm) on the basis that the impacts of mining to water resources had been minor or inconclusive. In fact, cross-examination revealed that SPE had been failing to lawfully monitor and assess impacts to water resources for over a decade. It is fundamental to the rule of law and equity that "a person may not take advantage of the person's own wrong." MCA § 1-3-208.

105. After the hearing but before BER's final decision, additional evidence came to light that SPE had for years unlawfully and criminally disposed of toxic mine processing waste by pumping it into mined-out portions of the mine. SPE's permit identifies the mined-out portions of the mine as a potential source of replacement water. For its criminal actions and for lying to regulators about worker safety violations, SPE agreed with federal prosecutors to pay a $1 million fine and accepted a term of probation.

106. At hearing, MEIC's witness, Mr. Jensen, testified that SPE's history of unlawful and criminal activity raises concerns about the coal company's willingness and ability to replace damaged water supplies. Mr. Jensen explained

that after SPE damaged one rancher's stock water supply, it provided replacement water contaminated with oil.

107. On another occasion, during this litigation, SPE tore out and bulldozed a rancher's stock water reservoir in July when watering needs were greatest. The reservoir was located on land leased from SPE. SPE later sent notice of its intent to cancel the lease. The following is an image of Signal Peak's action:

108. Mr. Jensen further testified that SPE's attempts to expand the Bull Mountains Mine were found unlawful twice by federal courts and once by the BER.

109. Mr. Jensen testified that he feared that SPE could not be trusted to repair harm to the Bull Mountains in light of multiple federal criminal investigations into SPE, which resulted in an assistant U.S. Attorney's describing the mine as a "den of thievery."

The Hearing Examiner's Proposed Order and BER's Final Decision

110. After the contested case hearing, BER's hearing examiner issued a proposed order. The proposed order found that MEIC had standing, but proposed granting a directed verdict to DEQ and SPE on the merits.

111. MEIC, DEQ, and SPE all filed exceptions. MEIC's objections challenged both the factual findings and conclusions of law of the proposed order.

112. MEIC noted that the proposed order failed entirely to address the rule at the center of MEIC's appeal (ARM 17.24.405(6)(a)), which requires the permit applicant to demonstrate that "reclamation can be accomplished."

113. MEIC also explained that the hearing examiner improperly reversed the burden of proof, by requiring MEIC to affirmatively demonstrate "barriers that would make getting the [replacement] water impossible."

114. The proposed order also improperly granted deference to DEQ.

115. MEIC explained that the proposed order's analysis of the quantity, quality, and legal availability of replacement water was legally erroneous.

116. MEIC also objected to multiple inadequacies of the proposed findings of fact. The proposed order failed to make any findings of fact related to SPE's admitted ongoing violations of the permit's design standards for monitoring water resources and assessing impacts to water resources. MEIC explained that by law, SPE and DEQ could not take advantage of SPE's unlawful actions (in failing to monitor and assess impacts pursuant to design standards) to assert that impacts of mining to water resources had been minor. MCA § 1-3-208.

117. MEIC further detailed how it was error for the proposed order to fail to address the only actual quantification of replacement water needs, which was the work of SPE's own consultant (Dr. Nicklin) who found that such needs could substantially exceed 100 gpm. This was critical evidence and a prejudicial failure because SPE and Dr. Nicklin admitted that they had not demonstrated that the deep aquifer could provide 100 gpm of replacement water.

118. MEIC then elaborated specific factual errors in the proposed order relating to the properties of the deep aquifer and historical impacts of mining to water resources.

119. BER subsequently reviewed the proposed order, and a divided BER ultimately upheld the directed verdict.

120. BER's final decision was erroneous and inconsistent.

121. The BER majority recognized that the proposed order erroneously deferred to DEQ, yet BER then improperly granted deference to DEQ.

122. BER, like the proposed order, refused to address the legal basis of MEIC's claim on the mistaken ground that reclamation does not include replacement of water resources.

123. BER stated that, to carry its burden of proof, MEIC did not have to demonstrate that reclamation of water resources would be impossible. And BER agreed that DEQ and the applicant (SPE) are required to demonstrate "more likely than not" that alternative water sources can supply sufficient replacement water.

124. But, inconsistently, BER then adopted the legal analysis of the proposed order, ruling against MEIC on the basis that MEIC had not demonstrated that it is not possible (i.e., it is impossible) to use the deep underburden aquifer for reclamation and replacement of damaged water resources. Thus, BER reasoned that MEIC had not made a sufficient showing because its expert (Mr. Hutson) had admitted that it is possible that the deep underburden aquifer could supply sufficient replacement water to reclaim water resources.

125. Continuing its inconsistent analysis, BER then held that MEIC bore the burden of proof, rejecting on-point judicial authority on the basis that, in the

instant case, BER was not issuing a directed verdict. Puzzlingly, BER then granted DEQ and SPE's motions for a directed verdict.

126. BER adopted the proposed order's analysis of water quantity, water quality, and legal availability. In so doing, BER refused to address SPE's own report that replacement water needs could exceed 100 gpm and the admission of SPE's consultant (Dr. Nicklin) that the company had not demonstrated that the deep underburden aquifer could satisfy such replacement water needs.

127. BER adopted the proposed order with respect to water quality, relying entirely on the prospect that SPE could install some treatment technology to remove salt from the excessively saline water of the deep aquifer to make it usable by livestock. In so doing, BER ignored the absence of any information about such technology in the permitting materials and the absence of any bonding to support water treatment. As such, BER relied on non-expert testimony of SPE's consultant, Dr. Nicklin, which was not part of the administrative record and never disclosed in discovery and was, therefore, not properly before BER.

128. BER also adopted the analysis of the proposed order with respect to legal availability of the deep underburden aquifer, relying entirely on unlimited use of exempt wells. In so doing, BER neglected to address DEQ's flawed reasoning, which relied on inapplicable DNRC guidance for housing developments to conclude that unlimited exempt wells in the same aquifer would not qualify as

combined appropriations. Based on this flawed reasoning, BER allowed DEQ to ignore impacts to existing water rights.

129. BER then refused to make findings of fact with respect to essential issues regarding: SPE's admitted violations of permit design standards; Dr. Nicklin's quantification of replacement water needs greater than 100 gpm; Dr. Nicklin's testimony that the deep aquifer could not supply 100 gpm; and DEQ's shifting and inconsistent statements with respect to replacement water.

130. BER then rejected MEIC's exceptions to specific findings of fact related to the nature and extent of the deep underburden aquifer. Thus, BER made unsupported findings that improperly exaggerated the nature of the deep underburden aquifer.

131. BER "found" that the water-bearing fluvial channels that constitute the deep underburden aquifer "are <u>likely many</u> miles wide," but the cited support stated only that the sandstone channels "<u>may be several</u>" miles wide. BER concluded that the difference between "may be several" and "are likely many" is semantic.

132. BER "found" that the deep aquifer is "continuous" and extends over an area "14 miles wide and 22 miles long." However, the record demonstrated and SPE's own consultant (Dr. Nicklin) admitted that the sandstone channels of the deep underburden unit are not continuous and do not extend over such a broad

area. Instead, they are discontinuous and are interspersed with other non-water bearing rock.

133. BER's erroneous analysis and decision—together with SPE's actions—threaten an end to family ranching in the Bull Mountains, where every water resource that has been undermined and evaluated has been dewatered or contaminated by mining and where SPE has already forced ranchers from the land. The following image shows a spring dewatered following undermining:

FIRST CLAIM FOR RELIEF
(Violation of MSUMRA and MAPA)

134. MEIC incorporates by reference all prior allegations.

135. BER's final decision imposed an inconsistent, arbitrary, and unlawful burden of proof.

136. Under MSUMRA and BER precedent, DEQ and the permit applicant have the burden of demonstrating compliance with all permitting requirements. MCA § 82-4-227(1).

137. Under ARM 17.24.405(6)(a), DEQ may not issue a permit unless and until "the applicant has demonstrated reclamation can be accomplished."

138. An applicant's demonstration that reclamation is possible is not enough. In re Bull Mountains, No. BER 2013-07 at 85.

139. BER's decision and analysis unlawfully required MEIC to demonstrate that reclamation of water resource would be impossible.

140. BER's various explanations for imposing the burden of proof on MEIC to demonstrate the impossibility of reclamation were inconsistent, arbitrary, and unlawful, prejudicing the substantial rights of MEIC. MCA § 82-4-227(1); ARM 17.24.405(6)(a); MCA § 2-4-704(2).

SECOND CLAIM FOR RELIEF
(Violation of MSUMRA and MAPA)

141. MEIC incorporates by reference all prior allegations.

142. BER's final decision improperly deferred to DEQ in its analysis and evaluation of evidence.

143. In a contested case, MAPA allows the presiding agency, here BER, to rely on its own expertise in evaluating evidence: "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." MCA § 2-4-612(7).

144. The contested case provisions of MAPA distinguish between parties and the agency before which the contested case proceeds. MCA § 2-4-102(2), (4), (8). Here, DEQ was a "party," not the presiding "agency," and therefore not entitled to deference.

145. By law BER is required to fairly evaluate the evidence, without deferring to DEQ.

146. Based on MCA § 2-4-612(7), BER purported to rely on DEQ's "experience, technical competence, and specialized knowledge" in evaluating the evidence.

147. BER's deference to DEQ in evaluating the evidence was arbitrary, based on an unlawful procedure, and unlawful, prejudicing the substantial rights of MEIC. Id. § 2-4-704(2); id. § 82-4-205(2).

THIRD CLAIM FOR RELIEF
(Violation of MSUMRA and MAPA)

148. MEIC incorporates by reference all prior allegations.

149. BER's and DEQ's analysis of reclamation water quantity was arbitrary, unlawful, based upon unlawful procedure, and unsupported by cogent analysis or substantial evidence; BER further refused to make findings of fact on essential issues related to reclamation of water quantity.

150. SPE and DEQ were required to affirmatively demonstrate and confirm that "reclamation can be accomplished." ARM 17.24.405(6)(a).

151. Reclamation requires making lands capable of supporting the same or better uses that existed prior to mining. MCA § 82-4-203(43). Reclamation includes restoring and reclaiming fish and wildlife habitat, minimizing disturbance to the hydrologic balance, and replacing damaged water supplies. ARM 17.24.1116(6)(d).

152. Replacement of water supplies requires the replacement water to be "in like quantity, quality, and duration." MCA § 82-4-253(3)(d).

153. BER arbitrarily reversed the burden of proof, requiring MEIC to prove that obtaining replacement water from the deep aquifer would be impossible.

154. BER further arbitrarily ignored DEQ's and SPE's inconsistent and unsupported statements and analysis about the capacity of the deep underburden aquifer to supply adequate replacement water.

155. BER and DEQ both arbitrarily failed to consider or address the only quantitative estimate of replacement water needs—substantially greater than 100

gpm—provided by SPE's own consultant Dr. Nicklin. BER also arbitrarily failed to consider or address the critical admission of SPE's consultant (Dr. Nicklin) that SPE had not demonstrated that the deep aquifer could supply 100 gpm without impacting existing users.

156. BER arbitrarily failed to consider or address DEQ's and SPE's admissions that SPE had continuously failed to comply with the design standards for monitoring water resources and assessing impacts of mining to water resources. BER arbitrarily allowed SPE to profit from its unlawful conduct by accepting SPE's assertions that impacts of mining on water resources had been minor and would therefore continue to be minor.

157. BER's and DEQ's analysis of reclamation water quantity was arbitrary, unlawful, based upon unlawful procedure, and unsupported by cogent analysis or substantial evidence; and BER further refused to make findings of fact on essential issues related to reclamation of water quantity, prejudicing the substantial rights of MEIC. Id. § 2-4-704(2); ARM 17.24.405(6)(a). MCA § 82-4-227(1).

FOURTH CLAIM FOR RELIEF
(Violation of MSUMRA, MAPA, Mont. R. Evid. 702, Mont. R. Civ. P. 37(c)(1))

158. MEIC incorporates by reference all prior allegations.

159. BER's and DEQ's analysis of reclamation water quality was arbitrary, unlawful, based upon unlawful procedure, and unsupported by cogent analysis or substantial evidence.

160. SPE and DEQ were required to affirmatively demonstrate and confirm based on record evidence compiled during the permitting process that "reclamation can be accomplished." ARM 17.24.405(6)(a).

161. Reclamation requires making lands capable of supporting the same or better uses than existed prior to mining. MCA § 82-4-203(43). Reclamation includes restoring and reclaiming fish and wildlife habitat, minimizing disturbance to the hydrologic balance, and replacing damaged water supplies. ARM 17.24.1116(6)(d).

162. Replacement of water supplies requires the replacement water to be "in like quantity, quality, and duration." MCA § 82-4-253(3)(d).

163. It is undisputed that median concentrations of sodium in threatened water supplies above the mine do not exceed maximum guidelines for livestock consumption, but that median concentrations in the deep underburden aquifer do exceed maximum guidelines for livestock consumption.

164. BER nevertheless concluded that the deep aquifer could replace damaged water supplies above the mine because of the possibility that such water

could be treated to remove sodium, relying on post hoc testimony from SPE's consultant Dr. Nicklin.

165. BER's conclusion regarding treatment was in error because Dr. Nicklin was not qualified as an expert, SPE failed to lawfully disclose any testimony from Dr. Nicklin regarding treatment, and because the administrative record and application materials contained neither discussion of treatment to remove sodium water from the deep underburden aquifer nor funding for removal of sodium from replacement.

166. BER's and DEQ's analysis of reclamation water quality was arbitrary, unlawful, based upon unlawful procedure, and unsupported by cogent analysis or substantial evidence, prejudicing the substantial rights of MEIC. Id. § 2-4-704(2); ARM 17.24.405(6)(a). MCA § 82-4-227(1); Mont. R. Evid. 702; Mont. R. Civ. P. 37(c)(1).

FIFTH CLAIM FOR RELIEF
(Violation of MSUMRA and MAPA)

167. MEIC incorporates by reference all prior allegations.

168. BER's and DEQ's analysis of the legal availability of replacement water was arbitrary, unlawful, based upon unlawful procedure, and unsupported by cogent analysis.

169. SPE and DEQ were required to affirmatively demonstrate and confirm that "reclamation can be accomplished." ARM 17.24.405(6)(a).

170. Reclamation requires making lands capable of supporting the same or better uses than existed prior to mining. MCA § 82-4-203(43). Reclamation includes restoring and reclaiming fish and wildlife habitat, minimizing disturbance to the hydrologic balance, and replacing damaged water supplies. ARM 17.24.1116(6)(d).

171. Replacement of water supplies requires the replacement water to be "in like quantity, quality, and duration." MCA § 82-4-253(3)(d).

172. In so doing, DEQ must assure protection of holders of water rights. ARM 17.24.314(1)(b); MCA § 82-4-203(32).

173. DEQ's analysis of and reliance on exempt wells and combined appropriations to determine that use of the deep underburden for replacement water to reclaim impacted water resources was erroneous, arbitrary, and unlawful.

174. BER's review of DEQ's analysis repeated DEQ's flaws, improperly reversed the burden of proof, and failed entirely to address DEQ's erroneous analysis of combined appropriations.

175. BER's and DEQ's analysis of the legal availability of replacement water was arbitrary, unlawful, based upon unlawful procedure, unsupported by cogent analysis, prejudicing the substantial rights of MEIC. MCA § 2-4-704(2); ARM 17.24.405(6)(a). MCA § 82-4-227(1)

SIXTH CLAIM FOR RELIEF
(Violation of MSUMRA and MAPA)

176. MEIC incorporates by reference all prior allegations.

177. BER failed entirely to address or make findings on issues essential to the decision, despite MEIC's repeated request for BER to do so.

178. BER refused to make findings regarding SPE's admitted violations of permit design standards, Dr. Nicklin's quantification of replacement water needs greater than 100 gpm, which the deep aquifer could not supply, and DEQ's shifting and inconsistent positions with respect to replacement water.

179. These issues were essential because they demonstrated that SPE's and DEQ's analyses of replacement water were unsupported, inconsistent, irrational, and premised on SPE's unlawful actions.

180. BER's failure to address or make findings on issues essential to the decision, despite MEIC's repeated request for BER to do so, was arbitrary and unlawful, prejudicing the substantial rights of MEIC. MCA § 2-4-704(2); ARM 17.24.405(6)(a).

SEVENTH CLAIM FOR RELIEF
(Violations of MSUMRA and MAPA)

181. MEIC incorporates by reference all prior allegations.

182. BER's factual findings regarding the deep underburden aquifer were unsupported.

183. BER's finding that the water-bearing fluvial channels that constitute the deep underburden aquifer "are likely many miles wide" is contradicted by the record, which only supported a finding that the sandstone channels "may be several" miles wide.

184. Contrary to BER's assertion, the difference between "may be" and "are likely" is not "semantic," but fundamental to the regulatory regime under MSUMRA.

185. BER's finding that the deep aquifer was "continuous" and extends over an area "14 miles wide and 22 miles long" was also contradicted by the record, including the testimony of SPE's own consultant, which demonstrate that the channel sandstones in the deep underburden aquifer are not continuous and that the geologic unit—not the sandstone channels—extends over an area 14 miles wide by 22 miles long.

186. BER's findings of fact regarding the deep underburden aquifer were unsupported and unlawful, prejudicing the substantial rights of MEIC. MCA § 2-4-704(2); id. § 82-4-227(1).

REQUEST FOR RELIEF

WHEREFORE, MEIC respectfully requests that this Court:

A. Declare that DEQ and BER violated MAPA, MSUMRA, Montana Rules of Evidence, and Montana Rules of Civil Procedure;

B. Reverse and vacate BER's June 16, 2022, decision;

C. Reverse and vacate DEQ's 2016 approval of the AM3 Amendment of SPE's permit;

D. Remand this matter to DEQ for further consideration in light of this Court's decision; and

E. Grant MEIC such additional relief as the Court may deem just and proper.

Respectfully submitted this 21st day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2022, a true and correct copy of the foregoing was emailed to:

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CERTIFICATE OF SERVICE

I, Shiloh Silvan Hernandez, hereby certify that I have served true and accurate copies of the foregoing Petition - Petition to the following on 07-21-2022:

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

IN THE MATTER OF: THE 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 §75-5-203, MCA – STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case Nos. BER 2021-04 WQ and BER 2021-08 WQ**

DEQ'S MOTION TO ALTER OR AMEND THE BOARD OF ENVIRONMENTAL REVIEW'S FINAL AGENCY ACTION AND ORDER ON THE ISSUE OF THE STRINGENCY OF ARM 17.30.632(7)(a) UNDER § 75-5-203, MONTANA CODE ANNOTATED

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, moves the Board of Environmental Review ("BER")

to alter or amend its Final Agency Action and Order ("Order") entered in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ on April 19, 2022. This motion is filed pursuant to Mont. R. Civ. P. 59(2)(e) and ARM 1.3.232 (Attorney General's Model Rules) on the grounds the BER erred as a matter of law in adopting Part IV.6 of the Order.

In support of its motion, DEQ submits herewith and incorporates herein by reference its *Brief in Support of Motion to Alter or Amend BER's Final Agency Action and Order on the Issue of the Stringency of ARM 17.30.632(7)(a) Under § 75-5-203, MCA* in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ. In making this motion, DEQ does not waive any other argument, objection, or exception to the Order that DEQ may raise in any administrative, judicial, or appellate review of Case Nos. BER 2021-04 WQ and BER 2021-08 WQ.

WHEREFORE, DEQ requests the BER alter or amend its Order pursuant to Mont. R. Civ. P. 59(2)(e) by striking Paragraph IV.6 of the Order.

Respectfully submitted the 17th day of May 2022.

/s/ *Kirsten H. Bowers*
KIRSTEN H. BOWERS
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2022, I caused a true and correct copy of the foregoing Motion to Alter or Amend the BER Final Agency Action and Order to be e-mailed to the following:

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

IN THE MATTER OF: THE 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 §75-5-203, MCA – STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case Nos. BER 2021-04 WQ and BER 2021-08 WQ**

DEQ'S BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND THE BOARD OF ENVIRONMENTAL REVIEW'S FINAL AGENCY ACTION AND ORDER ON THE ISSUE OF THE STRINGENCY OF ARM 17.30.632(7)(a) UNDER § 75-5-203, MONTANA CODE ANNOTATED

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, submits its Brief in Support of its Motion to Alter or

Amend the Board of Environmental Review's Final Agency Action and Order entered in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ on April 19, 2022.

Pursuant to Rule 59(2)(e), M. R. Civ. P, the Board of Environmental Review ("BER") should reconsider and alter or amend its Final Agency Action and Order ("Order") entered on April 19, 2022, in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ. Under the Attorney General's Model Rules, adopted by the BER, all motions and pleadings filed in administrative actions before the BER are served in accordance with the Montana Rules of Civil Procedure unless otherwise provided by law. *See* ARM 1.3.232 (Model Rule 27) and ARM 17.4.101. The Montana Supreme Court has held the Montana Rules of Civil Procedure serve as guidance even where they do not govern an administrative proceeding. *See Citizen's Awareness Network, Women's Voices for the Environment, and Clark Fork Coalition v. Montana Board of Environmental Review, Montana Department of Environmental Quality and the Thompson River Co-Gen, LLC*, 2010 MT 10, 355 Mont. 60; 227 P.3d 583.

The BER erred as a matter of law in adopting Paragraph IV.6 of the Order which provides: "Because the Board's rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated." *See* the Order, attached hereto as Exhibit A, at

page 20. Under § 75-5-203, MCA, the "stringency provisions" in the Montana Water Quality Act ("WQA"), the department (previously the board) may not adopt state regulations that are more stringent than comparable federal regulations or guidelines unless the department (previously the board) makes the written findings in §75-5-203(2) and (3), MCA after a public hearing and public comment. *See* § 75-5-203, MCA (amended by SB 233 adopted by the 67th Legislature and effective July 1, 2021).

The WQA's statutory stringency provisions provide remedies available to a petitioner seeking review under § 75-5-203(4), MCA. If, upon receipt of a petition and BER review, the BER finds a state WQA rule more stringent than comparable federal regulations or guidelines, the DEQ shall either revise the rule to conform to the federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* § 75-5-203(4), MCA. The statutory stringency provisions further provide a petition brought under § 75-5-203, MCA does not relieve the petitioner of the duty to comply with the challenged rule. *Id*.

The Petitions brought by Teck Coal Limited ("Teck") and the Board of County Commissioners of Lincoln County, Montana ("Lincoln County") sought review under the WQA's statutory stringency provisions. In response to the Petitions, the BER reviewed ARM 17.30.632(7)(a) and determined it is more

stringent than comparable federal regulations or guidelines. Upon the BER's determination, DEQ must implement the remedy provided at § 75-5-203(4), MCA by either revising the rule to conform to the federal regulations or guidelines or by making the written findings in § 75-5-203(2), MCA. *Id*. In this instance, DEQ began the process of making the written findings as prescribed in § 75-5-203(2).

The WQA's stringency provisions do not prohibit or invalidate rules that the BER determines are more stringent than comparable federal law but set forth specific remedies, which DEQ followed. *See* § 75-5-203(2) – (5), MCA. The plain language of the WQA stringency provisions provide, "A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule." *See* § 75-5-203(4), MCA. The BER exceeded its authority in fashioning a remedy that conflicts with the plain language of § 75-5-203, MCA. The BER should correct its error by striking Paragraph IV.6 on page 20 of its Order. DEQ expressly preserves and does not waive any other argument, objection, or exception to the Order that may be raised in any administrative, judicial, or appellate review of Case Nos. BER 2021-04 WQ and BER 2021-08 WQ.

Respectfully submitted this 17th day of May, 2022.

/s/ *Kirsten H. Bowers*
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2022, I caused a true and correct copy of the foregoing DEQ's Brief in Support of its Motion to Alter or Amend the BER Final Agency Action and Order to be e-mailed to the following:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: THE 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 § 75-5-203, MCA – STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	Case Nos. BER 2021-04 WQ and BER 2021-08 WQ

BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY'S RESPONSE TO DEQ'S MOTION TO ALTER OR AMEND THE BOARD OF ENVIRONMENTAL REVIEW'S FINAL AGENCY ACTION AND ORDER ON THE ISSUE OF THE STRINGENCY OF ARM 17.60.632(7)(a) UNDER § 75-5-203, MCA

The Board should deny DEQ's motion because it represents an attempt to reargue points that the Board has already rejected. The Montana Supreme Court has held that motions to alter or amend judgment are "not intended merely to re-

litigate old matters nor are such motions intended to allow the parties to present the case under new theories." *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631. Moreover, such motions should not "present arguments which the court has already considered and rejected." *Id.* That is, they are "not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Id.*

DEQ already presented the arguments it attempts to raise. First, it addresses the issue beginning at page 11 of its comments. It also engaged in a lengthy colloquy with Chairperson Ruffato during the Board's consideration of the record and public comments. Since the Board has already considered and addressed these arguments, it should not reconsider the matter pursuant to Mont. R. Civ. P. 59.

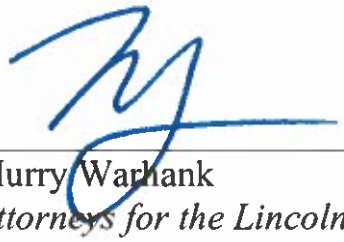
Even if Rule 59 did not bar DEQ's motion, it still would fail. Rule 59 only provides relief in situations in which a party can prove that the Court is advancing under a "manifest error" of law. *Id.* at ¶ 75. Here, DEQ does not claim that the Board's supposed error was manifest, so it cannot satisfy the standard enforced by the Montana Supreme Court. *Id.* It also fails to allege anything that would meet any of the other standards for a Rule 59 motion, such as newly discovered evidence.

DEQ's remedy is judicial review, not a Rule 59 motion. *Donovan v. Graff* (1991), 248 Mont. 21, 25, 808 P.2d 491, 494. *In re Marriage of Schoenthal*,

2005 MT 24, ¶ 14, 326 Mont. 15, 106 P.3d 1162, citing *Lussy v. Dye*, 215 Mont. 91, 93, 695 P.2d 465, 466 (1985) ("The proper avenue for seeking redress from an allegedly erroneous decision, solely on the basis that it is erroneous, is the appeal process"). The Court should therefore deny this motion or allow the time for decision to lapse. Mont. R. Civ. P. 59.

DATED this 31st day of May 2022.

JACKSON, MURDO & GRANT, P.C.



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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: THE 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 §75-5-203, MCA - STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	**CASE NO. BER 2021-04 WQ and BER 2021-08 WQ** **TECK COAL LIMITED'S RESPONSE OPPOSING DEQ'S MOTION TO ALTER OR AMEND THE BOARD'S FINAL AGENCY ACTION**

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I. INTRODUCTION AND BACKGROUND

On April 19, 2022, after extensive public participation followed by consideration and deliberations, the Board of Environmental Review ("Board" or "BER") issued its written Final Agency Action in this matter ordering that:

> Because the Board's rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated.

Board Order, p. 20 (April 19, 2022). As DEQ acknowledges, that provision of the Board's Final Agency Action provides the "remedy" that DEQ "must implement." DEQ Br., p. 4. The Board did not reach its decision hastily or without full consideration. In fact, the Board reached its decision after reviewing and considering public comments, written argument and hours of oral argument, specifically about the appropriate remedy. DEQ Comments, p. 6 (January 13, 2022); Teck Comments, pp. 25-26 (January 13, 2022); Lincoln County Comments, pp. 5-6 (January 13, 2022); ICL Comments, p. 8 (January 13, 2022); TSRA Comments, p. 1 (January 13, 2022); Board Transcript pp. 57-75 (February 25, 2022); Board Transcript, pp. 26-45 (April 8, 2022).

During Board deliberations, DEQ opposed the Board's decisions about the remedy, was given opportunity to, and did argue its position. Board Transcript pp. 60, 64, 71-72, 74 (February 25, 2022). The Board considered DEQ's repeated

arguments, as well as DEQ's apparent decision to not reinitiate rulemaking. Board Transcript pp. 57-75 (February 25, 2022); Board Transcript, pp. 26-45 (April 8, 2022). Ultimately, the Board rejected DEQ's arguments. Instead, the Board relied upon the statute and its legislative history to conclude that the rulemaking was unlawful; therefore, the rule was unlawful.

Now, rather than comply with the Board's conclusions about the Board's own rulemaking, DEQ chooses instead to remain opposed, arguing to amend the Board's Order. Unfortunately, DEQ offers nothing more than continued argument based on the exact same subsection of the exact same statute that the Board already considered.

DEQ's motion should be rejected as inappropriate because the rules of civil procedure do not apply to this matter and even if they did, DEQ's motion does not meet any of the legitimate bases for a motion to alter or amend. DEQ is simply asking this Board to reconsider an issue that it already spent many months deciding. The Board considered all of DEQ's arguments, including its statutory arguments based on subsection (4) of the statute. The Board rejected DEQ's arguments and reached the correct remedy, based on the statutory text and the legislative intent. The Board's decision is well supported by federal and state case law. Therefore, even if DEQ's motion is considered, it should be denied.

II. STANDARD OF REVIEW

A motion to alter or amend is "to afford an opportunity for relief in extraordinary circumstances." *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631. The Montana Supreme Court has set out four legitimate bases for a motion to alter or amend:

> (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law.

Lee v. USAA Cas. Ins. Co., 2001 MT 59, ¶ 75, 304 Mont. 356, 22 P.3d 631.

The Court also ruled when a motion to alter or amend is inappropriate, stating that a motion to alter or amend:

> (1) is not intended merely to re-litigate old matters nor are such motions intended to allow the parties to present the case under new theories; (2) should not present arguments which the court has already considered and rejected; (3) cannot be used to raise arguments which could, and should, have been made before judgment issued; and (4) is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances.

Lee v. USAA Cas. Ins. Co., 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631 *see also Hi-Tech Motors, Inc., v. Bombardier Motor Corp. of Am.*, 2005 MT 187, ¶ 34, 328 Mont. 66, 117 P.3d 159; *In re Johnson*, 2011 MT 255, ¶¶ 15-17, 362 Mont. 236, 262 P.3d 1105.

III. ARGUMENT

A. The Rule of Civil Procedure, Including Rule 59, Do Not Apply.

The Montana Rules of Civil Procedure govern "all civil actions and proceedings in the district courts of the state of Montana" and "do not govern an administrative proceeding." Mont. R. Civ. P. 1; *Citizens Awareness Network v. Mont. BER*, 2010 MT 10, ¶ 20. However, they "may still serve as guidance" during administrative proceedings. *Citizens*, ¶ 20. For example, in *Citizens*, the issue was whether the rules of civil procedure could be applied to a party's motion to amend its pleading in a **contested case**. *Id*. Similarly, in *Moen*, the Court determined that the rules of civil procedure, specifically regarding the use of a motion to quash, may serve as guidance for the Workers Compensation Court when considering **post-trial** motions. *Moen v. Peter Kiewit & Sons' Co.*, 201 Mont. 425, 434 (1982). Again, in *Williamson*, the Court noted that the rules of civil procedure may guide the Public Service Commission's determination of a motion to dismiss a complaint filed pursuant to statute that requires "a **formal hearing**." *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 33, n.5; Mont. Code Ann. § 69-3-321 (emphasis added).

All of those cases illustrate that the rules of civil procedure may serve as guidance for agencies making decisions during formal, contested cases. That makes sense because formal contested cases resemble the "civil actions and

proceedings in the district courts of the state of Montana" to which the rules of civil procedure do apply. Mont. R. Civ. P. 1. Therefore, a formal contested case that resembles a civil action may be guided by the rules of civil procedure.

In contrast, this matter is not a formal contested case and has not been governed by any process that resembles a civil action. On October 29, 2021, the Board "determined that it would consider the Petitions in a non-contested case format." BER, *Notice of Schedule for Implementation of Review*, p. 1. The "non-contested case format" meant that there was no formal pleading, no limitation on parties' participation, no discovery, no evidentiary hearing, and no pre- or post-hearing motions or other processes normally associated with contested cases that resemble "civil actions and proceedings in district court." Instead, this matter was open to all members of the public who wanted to participate, and it involved public comment, public hearing, unlimited submissions of proposed decision documents, Board deliberation and a Final Agency Action. The process used in this matter was not a contested case and did not resemble a civil action; therefore, it is not guided by the rules of civil procedure. Specifically, this matter included no "trial" or "judgment;" therefore, Rule 59, which is titled "New Trial; Altering or Amending a Judgment," does not apply. Mont. R. Civ. P. 59.

DEQ offers citation to ARM 1.3.232, the model rule governing service of papers, to support its motion. But that rule is a "General Provision" governing

only how "motions and pleadings must be served" on parties. It says nothing about whether the rules of civil procedure apply. The proffered rule cannot serve as the basis for any argument here because "service" of documents is not at issue.

DEQ's motion to alter or amend the judgment should be rejected without consideration because the rules of civil procedure do not apply, there is no "judgment" to alter or amend in this matter, and DEQ's citation to a general rule governing how papers are served on parties is not applicable.

B. DEQ's Motion is Inappropriate.

The Montana Supreme Court has expressly noted four circumstances when use of Rule 59(e) is inappropriate. Specifically, use of Rule 59(e):

> (1) is not intended merely to re-litigate old matters nor are such motions intended to allow the parties to present the case under new theories; (2) should not present arguments which the court has already considered and rejected; (3) cannot be used to raise arguments which could, and should, have been made before judgment issued; and (4) is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances.

Lee v. USAA Cas. Ins. Co., 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631.

Here, DEQ relies on the exact same subsection of the exact same statute that it argued during the ten-month process just completed by the Board. DEQ should not be allowed, under the pretense of a motion to alter or amend, to now theorize that because the statute compels compliance during the pendency of the petitions, it also compels continuing validity of a standard after its rulemaking has been found

unlawful. DEQ only seeks to re-litigate this matter based on the exact same subsection of the exact same statute it has already argued and the Board has already considered and rejected. To the extent that DEQ now raises a slightly nuanced argument, that argument could have and should have been raised during the Board's extensive review and consideration of the petitions over the last ten months. DEQ should not be allowed, through its motion, to have "a second bite at the apple" and continue arguing the same position. *Lee*, ¶ 76.

The Board heard and decided the matter against DEQ. DEQ's remedy lies elsewhere, not by continuing to argue before this Board. DEQ's motion satisfies all four of the instances where a motion to alter or amend is deemed "inappropriate" by the Montana Supreme Court; therefore, DEQ's motion should be rejected without further consideration.

C. This Matter Does Not Involve an "Extraordinary Circumstance" that Warrants a Motion to Alter or Amend.

Assuming, *arguendo*, that DEQ's motion bears considering (which it does not, as argued above), it presents no "extraordinary circumstance" that would warrant consideration of any alteration or amendment to the Board's Final Agency Action in this matter. *Lee*, ¶ 76 (holding that a motion to alter or amend is "to afford an opportunity for relief in extraordinary circumstances."). DEQ fails to argue that any "extraordinary circumstance" exists here. Instead, DEQ only points back to the stringency statute itself, which was argued by several parties and

considered at length by the Board during its deliberations. Board Transcript, p. 61 (February 25, 2022) (DEQ attorney Ms. Bowers pointing the Board to subsection (4) of the statute, the exact same subsection DEQ again raises in its motion to alter or amend); DEQ Brief, p. 3.

DEQ only asks the Board to reconsider the very same subsection of the very same statute that has already been considered. DEQ points to no change in the statute or change in case law interpreting the statute. To the extent that DEQ now raises a slightly nuanced argument based on that statutory text, DEQ could have and should have raised it during the nearly ten months that the Board considered this matter. Therefore, there is no "extraordinary circumstance" that warrants alteration or amendment of the Board's Final Agency Action.

As the Ninth Circuit held, Rule 59(e)[1] motions offer "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters. v. Estate of Bishop* (9th Cir. 2000), 229 F.3d 877, 890 (internal citation removed). DEQ offers no explanation for their requested "extraordinary remedy." DEQ continues to disagree with the Board, but fails to explain why such disagreement warrants the extraordinary remedy of altering or amending the order. Indeed, to be fair, such alteration or amendment would

[1] Because Montana Rule of Civil Procedure 59 is similar to the Federal Rule of Civil Procedure 59, federal case law is instructive. *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997).

require additional public notice, public participation, argument, deliberation and reconsideration by the Board – essentially a repeat of the process that the Board already completed, considering the very same subsection of the very same statute.

The Board would need to repeat its consideration and deliberations, not just of the portion of the Order DEQ seeks to have deleted, but also of the findings of fact (numbers 24-25) and conclusion of law (number 18) that support that portion of the Order. DEQ does not, and cannot, explain why it is necessary for the Board to take the extraordinary step of repeating its factual and legal deliberations and then revise its order.

In fact, no additional Board deliberations on the findings of fact, conclusions of law and order are needed because all final agency actions, including the Board's final action in this matter, may be appealed to district court. *Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 25, 288 Mont. 39, 955 P.2d 653 ("the courts have the inherent power to review [DNRC's or other agency's] decisions, whether or not they involve 'contested cases'"). DEQ does not and cannot explain why the normal remedy available to it (appeal to district court) is insufficient such that this Board should repeat its deliberations in order to revisit a statute it has already considered throughout the ten-month petition process.

D. DEQ has Not Presented a Legitimate Basis to Alter or Amend the Order.

Again assuming, *arguendo*, that DEQ's motion bears considering (which it does not, as argued above), DEQ presents no legitimate basis on which a judgment could be altered or amended. Of the four legitimate bases upon which a judgment may be altered or amended, the only one argued by DEQ is that the Board allegedly "erred as a matter of law" based on what DEQ asserts is a conflict between the remedy ordered and the statute at issue. DEQ Br., pp. 3, 4. DEQ is wrong based on the plain language of the statute as well as prevailing case law.

1. The Stringency Statute Does Not Support DEQ's Position.

The statute requires that a petition "does not relieve the petitioner of the duty to comply with the challenged rule." Mont. Code Ann. § 75-5-203(4). The specific words used ("petitioner" and "challenged") make clear that this provision applies during the pendency of the challenge, not afterward. Once the Board has ruled, the challenge is over – the rule is either upheld or it is not. The status of the rule moves from "challenged" to either lawful or unlawful based on the Board's Final Agency Action. Here, the Board issued a final decision on the challenged rule, concluding that the challenged rule and its rulemaking "fail to comply with the Stringency Statute," i.e.: **are unlawful**. Board Order, p. 20. Because the rulemaking was unlawful, the rule is unlawful. Nothing in the statute changes that

or allows DEQ to continue to enforce an unlawfully promulgated rule. Therefore, the rule remains invalid and unenforceable while the remedy is being enacted.[2]

Once the challenge has been decided adverse to the standard, the rule does not require continued compliance with the standard. Nor should it. When the Board finds that a standard is set in violation of the statute, the standard is unlawful. It is contrary to the concept of justice to require continued compliance with an unlawful standard. The statute does not support DEQ's argument.

Conversely, the statute requires rulemaking regardless of which remedy DEQ chooses. The statute and its Legislative history make clear that the written finding must be provided in the initial and all subsequent publications of the proposed rule. Mont. Code Ann. § 75-5-203(2); Mont. HB 521, 54th Leg. (1995). Even after a successful petition strikes down the standard, the statute directs that if DEQ intends to proceed with the standard and complete the required written finding, it must follow the process outlined in subsection (2) of the statute:

> …the department 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),…

[2] DEQ or others may argue that EPA still considers the rule enforceable for Clean Water Act purposes, despite the Board's Final Agency Action, but that argument also fails because EPA cannot lawfully approve or enforce a state rule that has been unlawfully promulgated. 40 C.F.R. 131.5(a)(6) (EPA must determine "[w]hether the State has followed applicable legal procedures for revising or adopting standards").

Mont. Code Ann. § 75-5-203(4). Subsection (2), in turn, requires:

> The department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department makes a written finding after a public hearing and public comment and based on evidence in the record…

Mont. Code Ann. § 75-5-203(2). By allowing DEQ to "adopt a rule" more stringent than the federal guideline "only if" the required written finding is made, subsection (2) requires that the rulemaking take place either after or in conjunction with the written finding, but not before. Completing the rulemaking before the written finding (as DEQ prefers to do here) ignores the specific statutory text "only if," which creates a condition (the written finding) that must be met *prior to* final adoption of a new rule.

Therefore, subsection (4), which DEQ agrees provides the remedy, requires the process spelled out in subsection (2), which in turn requires the written finding be made in conjunction with or before rulemaking. The written finding must be completed before the rule is adopted. The remedy provision requires additional rulemaking for both remedy options – adoption of the federal guideline or completion of the written finding. The statutory remedy provision therefore does not support DEQ's argument. If DEQ intends to continue pursuit of its proposed site-specific standard for selenium in Lake Koocanusa, it must reinitiate rulemaking in order to have a valid and enforceable standard.

2. Federal and State Case Law Support Invalidation of the Improper Rule Followed by Additional Rulemaking.

DEQ wrongly and improperly argues that the statute does "not prohibit or invalidate rules that the BER determines are more stringent than comparable federal law." Essentially, DEQ is advocating that in spite of a rule being held unlawful based on unlawful rulemaking, DEQ should be allowed to continue using and enforcing that rule. But DEQ's position is contrary to a basic sense of justice and against well-established law.

"Ordinarily when a regulation is not promulgated in compliance with the [Administrative Procedure Act], the regulation is invalid." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).[3] Further, "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." *Id*. (citing *Action on Smoking & Health v. Civil Aeronautics Bd.*, 230 U.S. App. D.C. 1, 713 F.2d 795, 797 (D.C. Cir. 1983).

Here, the Montana Administrative Procedure Act requires specific "written notice" of any agency's proposed action to adopt, amend or repeal any rule. Mont. Code Ann. § 2-4-302(1)(a). Here, that written notice was required to include a statement that the proposed standard was more stringent than the federal guideline

[3] Citing *Idaho Farm Bureau*, 58 F.3d at 1405; *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir. 1987), *amended by*, 819 F.2d 237 (9th Cir. 1987); *Buschmann*, 676 F.2d at 355-56; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980); and *Grier*, 46 Fed. Appx. at 439 n.2.

and a specific written finding supporting such a stringent standard. Mont. Code Ann. § 75-5-203. No such notice was provided, in violation of both the Administrative Procedure Act and the Water Quality Act. Therefore, just as in *Paulsen*, here too, the unlawfully promulgated standard is invalid and the previous standard is reinstated.

Compliance with rulemaking requirements is necessary to ensure appropriate public notice, provide for public participation, and establish "due process safeguards in agency rulemaking." Mont. Code Ann. § 2-4-101(2)(a) and (b). "Unless a rule is adopted in substantial compliance with these procedures [MAPA], the rule is not valid." *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948. Further, when the rulemaking process at issue is "in essence, a sham" causing the public, the Legislature and certain affected agencies to be "denied their right to participate effectively," the rulemaking and the rule are invalid. *Vainio*, ¶ 29 (citing *Rosebud County v. Dept. of Rev.*, 257 Mont. 306, 311, 849 P.2d 177, 180 (1993)); see also *Northwest Airlines v. State Tax Appeal Bd.*, 221 Mont. 441, 720 P.2d 676 (1986). Where the relevant statutes do not specify that MAPA governs, but there is "no other way to reconcile the [statute] and MAPA if MAPA is to have its intended effect," MAPA governs. *Vainio*, ¶ 34.

Here, there is no question that the MAPA rulemaking process was triggered when the Board initiated rulemaking in October 2020. But that rulemaking process

did not inform the public, or the legislative oversight committee (the Water Policy Interim Committee) or any other agency or interested person that the standard was being set at a level more stringent than the comparable federal guideline. Board Final Agency Action, Finding of Fact Nos. 3-5. Therefore, the public, the Legislature, and affected agencies and persons were "denied their right to participate effectively." Similarly, the remedy must comply with MAPA is MAPA "is to have its intended effect." *Vainio*, ¶ 36. Just as in *Vianio, Rosebud County, Northwest Airlines*, the failure to comply with MAPA, both during the original rulemaking and during the remedy, is fatal to the rule.

The Washington Supreme Court considered a similar situation when the Washington Department of Ecology set "new requirements or qualifications" related to water right applications, but without rulemaking. That court noted that the "remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action." *Hillis v. Dep't of Ecology* (1997), 131 Wash. 2d 373, 399-400, 932 P.2d 139, 152-153. Accordingly, "Ecology's decisions, made without rule making, must be invalidated." *Id*. Similarly, here, DEQ promulgated a water quality standard set more stringent than the federal guideline, but without rulemaking that included the proper finding to support such a stringent standard. The rulemaking is therefore unlawful.

The process DEQ has initiated to draft and solicit public comment on its written finding is not rulemaking. Just like in *Paulsen*, *Vianio, Rosebud County, Northwest Airlines*, and *Hillis* cited above, the lack of valid rulemaking or any rulemaking at all associated with DEQ's written finding results in an invalid rule.

The Board got this right and DEQ provides no argument that contradicts or outweighs the Board's decision. The rulemaking error is sufficient to invalidate the standard – regardless of the written finding currently being finalized by DEQ and regardless of DEQ's questionable interpretation of the stringency statute. The stringency statute requires compliance with, and cannot be read to contradict, MAPA. MAPA requires that the written finding be part of the formal MAPA rulemaking process; otherwise, the rule is invalid.[4] DEQ provides no reason, and none exists, for this Board to ignore fundamental case law about rulemaking in favor of DEQ's incorrect interpretation of the stringency statute.

[4] Although DEQ asserts that all the evidence required to support the written finding has been in the Board's original rulemaking record all along, no effort was taken to actually make the written finding during the original rulemaking, even though the error was raised. As pointed out during Board meetings and agreed to by a majority of the Board, the Board's rulemaking record "does not contain the evidence that would support all the findings required by the stringency statutes." Board Transcript, p. 105 (February 25, 2022); *see also* pp. 91-99; *see also* Board Transcript, pp. 45-49 (April 8, 2022). Nonetheless, immediately after the Board's decision on stringency, DEQ began drafting a written finding based on the deficient record. DEQ continues to refuse additional rulemaking to correct the previous rulemaking error, again leaving the State without a valid rule. Notably, the original rulemaking took just over two months, faster than briefing and deciding this motion to alter or amend filed by DEQ will likely take.

The Board's ordered remedy in this matter – that "[b]ecause the Board's rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated" – is aligned with prevailing case law. The Board committed no error of law, let alone any "manifest" error of law that could support alteration or amendment. The Board's ordered remedy is correct.

IV. CONCLUSION

DEQ's motion should be rejected without consideration because the rules of civil procedure do not apply to this matter and because DEQ only presents additional argument about the exact same subsection of the exact same statute that it argued throughout the previous ten-month deliberative process. DEQ presents nothing new that could not or should not have been considered before; instead, DEQ simply seeks to continue arguing the same position. The Board correctly rejected DEQ's arguments and fashioned a sound remedy that complies with the plain language of the statute, the legislative intent of the statute, and prevailing case law. DEQ's motion should not be considered, but if it is, it should be denied because the Board did not err when issuing its Final Agency Action in this matter.

DATED this 31st day of May, 2022.

/s/ Victoria A. Marquis

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ATTORNEYS FOR TECK COAL LIMITED

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of May, 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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ATTORNEY FOR DEQ

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

IN THE MATTER OF: THE 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 §75-5-203, MCA – STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case Nos. BER 2021-04 WQ and BER 2021-08 WQ**

DEQ'S REPLY BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND THE BOARD OF ENVIRONMENTAL REVIEW'S FINAL AGENCY ACTION AND ORDER ON THE ISSUE OF THE STRINGENCY OF ARM 17.30.632(7)(a) UNDER § 75-5-203, MONTANA CODE ANNOTATED

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, submits its Reply Brief in Support of its Motion to

Alter or Amend the Board of Environmental Review's Final Agency Action and Order entered in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ on April 19, 2022 ("Motion to Alter or Amend").

Pursuant to Rule 59(2)(e), M. R. Civ. P, DEQ requested the Board of Environmental Review ("BER") alter or amend its Final Agency Action and Order ("Order") entered on April 19, 2022 in Case Nos. BER 2021-04 WQ and BER 2021-08 WQ. DEQ's Motion to Alter or Amend requested the BER strike Paragraph IV.6 of the Order which provides: "Because the Board's rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated." Based on plain statutory language, the BER's interpretation and application of § 75-5-203(4), MCA is plainly erroneous and may be the basis of a motion to alter or amend. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶75, 304 Mont. 356, 22 P.3d 631, (one of the recognized grounds for a motion to alter or amend is to correct manifest errors of law or fact upon which the judgment was based).

The WQA's statutory stringency provisions provide remedies available to a petitioner seeking review under § 75-5-203(4), MCA. If, upon receipt of a petition and BER review, the BER finds a state rule more stringent than comparable federal regulations or guidelines, the DEQ shall either revise the rule to conform to the

federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* § 75-5-203(4), MCA (emphasis added). The statutory stringency provisions further provide a petition brought under § 75-5-203, MCA does not relieve the petitioner of the duty to comply with the challenged rule so a petition under § 75-5-203(4), MCA cannot be used to invalidate or make a rule adopted in accordance with the Title 2, chapter 4, part 3 of the Montana Administrative Procedure Act (MAPA) unenforceable. *Id.*

The Petitions brought by Teck Coal Limited ("Teck") and the Board of County Commissioners of Lincoln County, Montana ("Lincoln County") sought review under the WQA's statutory stringency provisions. In response to the Petitions, the BER reviewed ARM 17.30.632(7)(a) and determined it is more stringent than comparable federal regulations or guidelines. Upon the BER's determination, DEQ implemented the remedy provided at § 75-5-203(4), MCA by making the written findings in § 75-5-203(2), MCA. The BER had no authority to prohibit or invalidate ARM 17.30.632(7)(a) upon finding the Lake Koocanusa water column standard is more stringent than comparable federal law. Section 75-5-203(4), MCA sets forth specific remedies, which DEQ followed. *See* § 75-5-203(2) – (5), MCA.

The BER exceeded its authority in fashioning a remedy that conflicts with the plain language of § 75-5-203, MCA and a motion under Rule 59(2)(e), M. R. Civ. P is appropriate to correct this manifest legal error by striking Paragraph IV.6 on page 20 of the Order. Petitioners' arguments in response to DEQ's Motion to Alter or Amend may be summarized as follows:

1. DEQ's motion to alter or amend is inappropriate because it is attempting to reargue points already raised rather than ask the BER to correct an error of law.
2. The rules of civil procedure, including M.R.Civ.P. 59, do not apply to BER proceedings.

I. DEQ's Reply to Argument 1: DEQ's motion to alter or amend is appropriate to correct BER's incorrect interpretation and application of § 75-5-203(4), MCA which constitutes a manifest error of law upon which the BER Order was based.

Petitioners and DEQ agree the Montana Supreme Court recognizes four criteria for determining grounds that may be raised to support a motion to alter or amend: 1) to correct manifest errors of law or fact upon which the judgment was based; 2) to raise newly discovered or previously unavailable evidence; 3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or 4) to bring to the court's attention an intervening change in controlling law. *Lee v. USAA Cas. Ins. Co.*, 2001 MT at ¶75. Accordingly, DEQ's

motion to alter or amend is presented to address the first of these four areas; to correct a manifest error of law upon which the BER's Order was based.

Petitioners argue DEQ's motion should be disallowed as an impermissible motion for reconsideration because DEQ is rearguing issues it has already raised in the BER's determination of the stringency of ARM 17.30.632(7)(a) under § 75-5-203(4), MCA, but Petitioners' arguments ignore the history and procedural posture of the BER's stringency determination. DEQ could not have raised or argued issues related to the legality of Paragraph IV.6 of the Order until after the Order issued. The BER's materials for the April 8, 2022 meeting contained a proposed Findings of Fact and Conclusions of Law that did not contain Paragraph IV.6 of the final Order. The Proposed Findings of Fact and Conclusions of Law contained an Order that provided:

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

BER's Proposed Findings of Fact and Conclusions of Law at IV pages 19 – 20, contained in April 2, 2022 meeting materials available at https://deq.mt.gov/files/DEQAdmin/BER/Documents/2022%20Agendas/20220408/April%20Packet%20Materials.pdf. (accessed June 14, 2022).

The language in Paragraph IV.6 of the Order was inserted by the BER as an amendment to the Proposed Findings of Fact and Conclusions of Law during the April 8, 2022 BER meeting. *See* April 8, 2022 BER Meeting Transcript Stringency Review of Selenium Rule at page 44/line 1 through page 45/line 2. DEQ did not and could not have known the BER would ignore the plain language of § 75-5-203(4), MCA and insert language stating "the Board's rulemaking failed to comply with § 75-5-203, MCA" and "in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated" in the Order. This amended version of the Findings of Fact and Conclusions of Law contains the language that results in a manifest error of law. DEQ's motion to alter or amend provides the BER an opportunity to correct the error.

Under § 75-5-203(4), MCA the remedy upon a finding that a rule is more stringent than federal is up to DEQ not the BER. DEQ respected the BER's authority under § 75-5-203(4), MCA to determine the petitioned rule is more stringent than comparable federal regulations or guidelines and implemented the remedy by making the findings in §75-5-203(2) and (3), MCA, after public comment and hearing and based on evidence in the rulemaking record.

The language at issue in § 75-5-203(4), MCA states:

> If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this

> section by either revising the rule to conform to the federal regulations or guidelines or by making the written findings, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition.

§ 75-5-203(4), MCA.

The Order is in error because it ignores clear statutory language, violates the rules of statutory construction, and is contrary to Montana Supreme Court precedent. A decisionmaker is to "endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used. It is blackletter law that in the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to omit what has been inserted or insert what has been omitted. *Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation*, 2006 MT 72, ¶23, 331 Mont. 483, 489-490, 133 P3d 224, 228-229. See also § 1-4-101, MCA.

The stringency statute provides the remedy for a successful petitioner under § 75-5-203, MCA. Upon the BER's finding that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, the stringency statue provides DEQ implements the remedy and does so by either revising the rule to conform to the federal regulations or guidelines or by making the written findings, pursuant to §75-5-203(2) and (3), MCA. The language in the BER Order that

provides "[b]ecause the Board's rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated" omits DEQ's authority to implement the remedy and omits the fact that the remedy may involve a rule revision or the findings necessary to support a more stringent than federal standard.

The BER's order also violates the requirement that all statutory provisions are to be read in a manner that gives effect to all. § 1-4-101, MCA. The stringency statue does not invalidate rulemaking that was undertaken in accordance with the Montana Administrative Procedures Act and the BER's stringency determination under § 75-5-203, MCA is not a rulemaking[1]. The language in § 75-5-203(4), MCA provides "[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule." Clearly, the stringency statute is not intended to repeal a rule that has been adopted in accordance with MAPA.

A petition under §75-5-203, MCA may be brought when a petitioner believes a more stringent rule was adopted without the necessary findings. This may arise when the rulemaking agency was wrong in its conclusion that the rule was not more stringency than federal or when a comparable federal regulation is

[1] New rulemaking would require submittal of a new water quality standard to EPA for approval before it is effective for Clean Water Act purposes. 33 USC 1313(c)(2), 40 CFR 131.21.

adopted after the state's rulemaking. Teck's interpretation that the stringency findings must be made either concurrent with or before a rulemaking ignores the alternative form of the statutory remedy which allows the department to either revise the rule to conform to the federal regulations or guidelines or make the written findings. Under Teck's interpretation, the rulemaking agency could never make the written findings to address a more stringent than federal standard. *See* Teck's Response to DEQ Motion to Alter or Amend at 12. This interpretation is counter to the plain statutory language and fails to recognize Montana is not prohibited from adopting more stringent than federal standards under § 75-5-203, MCA, but a more stringent standard must be supported by the findings in § 75-5-203(2) and (3), MCA.

If Teck wanted to invalidate ARM 17.30.632(7)(a) they should have petitioned for rulemaking under § 2-4-315, MCA. ARM 17.30.632(7)(a) was adopted in substantial compliance with MAPA and remains the selenium water column standard for Lake Koocanusa under the Montana Water Quality Act and the federal Clean Water Act until a new water quality standard is adopted.

Upon BER's determination that ARM 17.30.632(7)(a) is more stringent than federal, DEQ made the findings in § 75-5-203(2) and (3), MCA. DEQ's interpretation is in accordance with §75-5-203(4), MCA, which grants DEQ the

authority to implement the remedy which may consist of rulemaking to adopt a rule that is consistent with comparable federal regulation or guidance or make the stringency findings necessary to support the more stringent standard. DEQ chose to make the findings in § 75-5-203(2)and (3), MCA in response to the BER's determination that the Lake K water column standard for selenium is more stringent than federal.

II. DEQ's Reply to Argument 2: The Rules of Civil Procedure Provide Guidance for BER Proceedings.

DEQ and the BER have adopted the Attorney General's model procedural rules and some of the Attorney General's model rules incorporate the Montana Rules of Civil Procedure in Title 25, chapter 20 of the Montana Code Annotated. For example, ARM 1.3.232, which is Model Rule 27, generally provides that all motions and pleadings will be served in accordance with the Montana Rules of Civil Procedure. *See* ARM 17.4.101. DEQ agrees with the Petitioners that the Montana Rules of Civil Procedure provide guidance for the BER. DEQ also agrees with the Petitioners that the Lake Koocanusa selenium petitions were not typical contested cases. However, the BER chose to adopt a Findings of Fact and Conclusions of Law and Order in a format like a final decision in a contested case. Despite Teck's argument that "there is no judgment," the BER should reconsider and correct its legal error by striking Paragraph IV.6 of the Order as it is outside

the BER's statutory authority and in conflict with the plain language of § 75-5-203, MCA. *See* Teck's Response to DEQ Motion to Alter or Amend at 6.

For the reasons stated above, the BER should strike Paragraph IV.6 on page 20 of the Order.

Respectfully submitted this 14th day of June, 2022.

/s/ *Kirsten H. Bowers*
KIRSTEN H. BOWERS
Staff Attorney
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2022, I caused a true and correct copy of the foregoing DEQ's Reply Brief in Support of its Motion to Alter or Amend the BER Final Agency Action and Order to be e-mailed to the following:

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By: */s/ Kirsten H. Bowers*
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Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Michael Russell, Board Attorney
Board of Environmental Review

FROM: Sandy Moisey Scherer, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: June 22, 2022

SUBJECT: Board of Environmental Review Case No. BER 2022-04 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY VALLEY GARDEN LAND & CATTLE LLC REGARDING ISSUANCE OF OPENCUT MINING PERMIT #674, AMENDMENT #3	Case No. BER 2022-04 OC

On June 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.

Lee McKenna 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

Attachment

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June 22, 2022

Board of Environmental Review
Attn: Sandy Scherer
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Helena, MT 59620

Re: Appeal of Opencut Mining Permit 674, Amendment 3.

Dear Ms. Scherer:

Please find enclosed Valley Garden Land and Cattle's appeal of Opencut Mining Permit 674, Amendment 3, pursuant to § 82-4-427, MCA. The appeal has also been emailed to the Board, and counsel for DEQ. Please provide a date stamp confirmation of filing.

Please do not hesitate to contact me with any questions. Thank you.

Sincerely,

David K. W. Wilson, Jr.

Cc: Valley Garden Land and Cattle

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BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY VALLEY GARDEN LAND & CATTLE LLC REGARDING ISSUANCE OF OPENCUT MINING PERMIT #674, AMENDMENT #3	Cause No. **BER 2022-04 OC** **NOTICE OF APPEAL AND REQUEST FOR HEARING**

Petitioner, Valley Garden Land & Cattle LLC ("Valley Garden"), through counsel, brings this action front of the Board of Environmental Review ("BER") challenging the Montana Department of Environmental Quality's ("DEQ") issuance of an Amendment to Open Cut Mining Permit to A. M. Welles, Inc., for expansion of an existing pit (known as "DSL Site") on Montana State Trust Lands between McAllister and Ennis, Madison County, Montana. (Opencut Permit #674, Amendment #3.) This appeal is brought pursuant to § 82-4-427, MCA, and § 2-4-601, et seq., MCA.

The Valley Garden property almost completely surrounds the DSL site, and the ranch has a grazing lease on some of the State Trust land at issue. Valley Garden challenges DEQ's actions as violations of the Montana Opencut Mining Act, §§ 82-4-401, et seq., MCA. Valley Garden also asks that the BER set aside the permit as being unlawful.

I. PARTIES, JURSIDICTION AND VENUE

1. Petitioner Valley Garden Land & Cattle LLC is a for profit corporation duly registered and licensed in the State of Montana.

2. DEQ is the agency of State government entrusted with regulating the open cut mining industry as well as protecting Montana's water quality, air quality and other environmental values. As a state agency, it is subject to the Opencut Act, MEPA as well as to certain constitutional duties related to the environment and public participation.

3. Jurisdiction is based on § 82-4-427, MCA.

II. FACTS

The Setting

4. Valley Garden Ranch Valley Garden Ranch is located on both sides of Highway 287 between McAllister and Ennis, Montana. The Madison River and its channels (including the Fletcher Channel) and tributaries essentially form the eastern boundary of the ranch. The ranch extends west to the Beaverhead-Deerlodge National Forest in the foothills of the Tobacco Root Mountains and its western boundary. The southern boundary of the ranch extends to the town of Ennis, Montana. The northern boundary of the ranch extends to the town of McAllister, Montana, and Ennis Lake (a lake on the Madison River). The ranch, first established in 1889, is covered by a conservation easement through the Montana Land Reliance. The conservation easement recognizes the

significance of the ranch's undeveloped open space and natural scenic qualities within its rural agricultural setting.

5. Rising in Yellowstone National Park, the Madison River is one of Montana premier rivers and is famous around the world for the quality of its fisheries. It is considered the best trout fishing in Montana, a "Blue Ribbon" trout stream. The Madison River valley is framed on the east by the Madison Range, and on the west by the Gravely Range and the Tobacco Root Mountains.

6. Approximately 6,000 feet North of the DSL site is Ennis Lake on the Madison River. When Ennis Lake freezes in the winter, a vast wetland is created south and upstream from the lake to the immediate (less than 500-feet) east of the DSL site. The following tributaries flow into Ennis Lake and the Madison River: Due east of the site one first encounters north flowing channel that is a tributary of the Madison, less than 1,000 from the mine permit site; then Moore Creek – 1,700 feet from the site; then the Fletcher Channel of the Madison River – 5,000 feet from the site; and the main stem of the Madison River – 7,100 feet from the site. All these waterways are part of this wetland complex that is so important for the health of the Madison River. Moore Creek, in this vicinity, is the location of a remote site incubator for the rare Arctic Grayling, managed by Montana Fish, Wildlife and Parks ("FWP"), and FWP annually releases Grayling at this site 1,700 feet from the mine. The Arctic Grayling is ranked "S1" in Montana because it is at extremely high risk of extirpation in the State due to its declining population numbers and range.

The Mine

7. The DSL site is so named as it is on State Trust lands, previously managed by the Department of State Lands ("DSL") before a government reorganization moved the state trust land responsibilities to the Department of Natural Resources and Conservation ("DNRC").

8. A.M. Welles, Inc. has been operating a gravel pit at the DSL site for more than thirty years. It is not known when the original aggregate license was issued by the State of Montana/DNRC, but Amendment 2 to Aggregate and Rock Mining Permit G 1273-00 was issued in 2000, expanding the operation's acreage from 19-acres to 40.

9. On February 4, 2022, the DNRC entered a license agreement with A.M. Welles, Inc. for Aggregate and Rock Mining Permit No. G-1273-94, 2022 Renewal (hereinafter, License) with an effective date of January 1, 2022, and termination date of December 31, 2023, to A.M. Welles, Inc. ("Operator") on approximately 63.2 acres located in the T5S, R1W, S16 W2 SW4. The License authorizes only sand and gravel operations, explicitly prohibits "indirectly related activities" such as batch plants, offices, or parking equipment and requires pre-approval of asphalt plants and other activities as "special conditions" of the License.

10. Currently, the mine occupies and operates on 40-acres of the 160-acre state land tract. The remainder of the tract is used by Valley Garden under a grazing lease. DNRC renewed Valley Garden's "Agricultural and Grazing Lease of State Lands" No. 2264 (Lease), dated April 28, 2022 for the term of 10 years from February 28, 2022 to February 29, 2032. The area under the Lease is approximately 140-acres of which 23 acres is the area of the proposed mine expansion.

11. On March 3, 2022, A.M. Welles, Inc. submitted to DEQ an "Application for Standard Opencut Mining Permit" for an amendment to an existing pre-2021 permit.

12. With the amendment, A.M. Welles intends to expand the operation from 40 to 63-acres, increasing its size by over 50%; extend the life of the mine until December 31, 2042; and add (i) an Asphalt Plant, (ii) a Wash Plant (including one unlined settling pond), (iii) an Asphalt Recycling plant (storing up to 5,000 CY of asphalt material to be recycled); (iv) a Concrete Recycling Plant; and (v) addition processing equipment, including Pug Mill, Crushing Equipment and Conveyors . The mining operation is described in the application as continuing to mine, screen, crush, wash, stockpile, and transport up to 300,000 cubic yards of sand and gravel over the life of the permit, which makes the mine itself uneconomic. A.M. Welles' application does not identify any DNRC-permitted water source, either surface or groundwater, for its production, operation or planned expansion. Instead, the permit and amendment simply identify its necessary water sources as "well."

Environmental Review

13. An environmental assessment (EA) was completed by DEQ and released to the public on or around May 24, 2022. The EA is intended to assess the application for the opencut permit and evaluate the environmental effects of the mine. The EA follows a "checklist" format and provides only a general, not a detailed site specific, evaluation of the proposed expansion.

14. The EA acknowledges that DEQ personnel did not inspect the site prior to completing the EA. The EA also acknowledged that the environmental review was limited by the "short

response times required by" the Open Cut Mining Act, and therefore the "Act does not allow sufficient time to prepare a more detailed impact statement."

15. Environmental and mining related issues that were not disclosed by the applicant, or evaluated, or insufficiently evaluated in the EA, include, but are not limited to:

a. The EA acknowledge that important surface and groundwater resources are present, and that the operation has the potential to violate water quality standards, and yet failed to fully evaluate the potential impacts from the operation to water quality before concluding that "DEQ does not anticipate an impact to surface water features and water quality, quantity and distribution management".

b. There is no analysis of potential impacts to water quality from runoff from the mine and recycling operations, or whether DEQ will require a stormwater or other wastewater permit.

c. There is no evaluation of what impacts a 50- or 100- or greater year rain event, such as recent storms elsewhere in the Greater Yellowstone Ecosystem, would have on the Madison River.

d. The EA neglects to evaluate the asphalt plant asphalt recycling and concrete recycling operation in the purpose and benefit discussion of the proposed action, even though Section D6 (1) of the application states that "asphalt is considered to have the potential to impact water quality".

e. The application and EA provided no analysis of how protection of shallow groundwater resources utilized by local residents and ranches, as well as

recharge to wetlands, the north flowing channel, Moore Creek and the Madison River system will be assured.

f. The applicant provided, and the EA relied upon, two deep wells installed by the Montana Bureau of Mines and Geology (MBMG) in 2010 to support hydrogeologic information and depth to groundwater calculations. However, use of such deep wells does not provide accurate information which represents the depth to shallow groundwater in the area. The wells are located near the southwest corner of the gravel pit. These wells do not represent depth to shallow groundwater which may be impacted by mining activity. The two wells are completed at a depth of 249 feet and 449 feet below ground surface. The screen is in the bottom 10 feet of each well. Overlying confining clay intervals prevent shallow groundwater from interacting with the deeper groundwater; thus, these two wells do not represent accurately the depth to groundwater.

g. The Amended Permit will allow operation until 2042. The EA fails to evaluate or discuss impacts from this extended time without reclamation, and in particular impacts from longer exposure of concrete and asphalt stockpiles to leaching and runoff.

h. The application and EA provide no analysis of the amount of water that will be required for the gravel pit itself, or wash plant operations, asphalt processing, pug mill operations, dust suppression, and water management.

i. The application and EA also fail to evaluate:

    i. Current source of water for the Operator;

ii. Exempt/permitted status of all water sources owned by Trust Lands and used by the Operator;

iii. Documentation identifying the currently used discharge rates and annual volumes form said water sources by the Operator;

Documentation of anticipated expansion impacts to existing water use flow rates and volumes.

j. The Amended Permit will allow operation until 2042. The EA fails to evaluate or discuss impacts from this extended time without reclamation, and in particular impacts from longer exposure of concrete and asphalt stockpiles to leaching and runoff.

k. The EA, permit application and all materials attached thereto are silent as to any permitted wells used by the A. M. Welles operation and/or owned by Montana Trust Lands. Further, the EA contains no evaluation of impacts to senior water users from the mine activities, contains no analysis of necessary or proposed flow rates or volumes for the currently unpermitted well location within the existing facility, and does not identify any flow rates or volumes of water used or discharged by the existing or proposed facility, that may affect surrounding water right holders, including Valley Garden. Finally, the Permit and the EA contain no analysis or well logs to determine the source aquifer, identify pumping capacity, or the age of the well.

16. The application did not include all the requisite information required at ARM 17.24.218 (1)(g), including:

a. Subsection (g)(i) provides that the applicant must provide information, including depths to groundwater, of wells within 1,000 feet of the site. The applicant included two deep monitoring wells installed by the Montana Bureau of Mines and Geology in 2010 located near the southwest corner of the gravel pit. Although these two wells are the only wells located within 1,000 feet of the permit area, they do not represent depth to shallow groundwater which may be impacted by mining activity. The wells are completed at depths of 249 feet and 449 feet below ground surface. It is completely incorrect to assume that water levels in these deep wells represent the water level in the shallow aquifer system.

b. Subsection (g)(iv) requires the applicant to provide estimated seasonal high and low water table levels in the permit area. However, the information provided from the two MBMG wells does not accurately provide this information.

c. Subsection (g)(v) requires that if the applicant is going to divert, capture or use water, it must disclose the source of those and legal right to those waters. The applicant did not provide flow rates or volume of water needed for the wash plant and opencut mining operations. Nor did the applicant provide water rights information or confirm if DNRC was contacted.

d. Subsections (h) requires detailed information on water management; the application did not contain the required information.

Public Participation

17. Under the Opencut Act, notice of an application must be provided by the applicant, as part of its application, to landowners within ½ mile of the permit area. *See generally* § 82-4-432, MCA.

18. Valley Garden is the only landowner meeting this criterion, as the owner of land surrounding the mining operation.

19. Valley Garden's corporate mailing address is **3000** Turtle Creek Boulevard, Dallas, TX 75219. *See* *https://biz.sosmt.gov/search/business*

20. The EA states that "the operator was required to conduct public notice per MCA requirements." In disclosing the address of surface landowners whom it provided notice to, however, the applicant listed Valley Garden at **300** Turtle Creek Boulevard, instead of **3000.** This violated the provisions of § 82-4-432 (2)(b)(vi) & (6) MCA.

21. Consequently, Valley Garden did not receive notice of the application or the DEQ MEPA process. It was only after DNRC contacted Valley Garden about changes to the its grazing lease due to the expansion of the mine that Valley Garden was able to determine that the DEQ process was ongoing. Valley Garden submitted comments to DEQ on May 20, 2022; on May 24, 2022, the EA was finalized, and the permit was issued. Neither the EA nor the permit reflect, nor respond to, the Valley Garden comments or concerns.

22. The notice to the public of the proposed action as published in a weekly newspaper publication, the Madisonian, on March 17 and March 24, 2022, failed to accurately state the full set of activities requested by A.M. Welles thereby denying the public a right of meaningful participation as required at § 82-4-432 (6) MCA.

23. Because Valley Garden did not receive the notice it was entitled to under the Opencut Act, it was not able to avail itself of the mandatory public hearing that would have been required had it been provided proper notice, by means of which it could have requested a public hearing.

24. Valley Garden has been harmed by DEQ's action in approving the mining permit at issue and has had to hire counsel to pursue this lawsuit in order to protect its interests.

III. COUNT ONE – VIOLATION OF OPEN CUT MINING AND RECLAMATION REQUIREMENTS

25. The preceding paragraphs are realleged as though set forth in full hereunder.

26. The Opencut Mining Act is intended to implement the constitutional environmental protections found at Article II, Section 3 and Article IX, Sections 1 & 2 of the Montana Constitution, including the duty to maintain and improve a clean and healthful environment the duty to effectively reclaim all mined lands.

27. In furtherance of those duties, the Regulations enacted pursuant to the Act requires an applicant submit detailed information on water resources and water quality protection, A.R.M, 17.24.218 (1) (g & h).

28. The application fails to meet these regulatory requirements, as set forth above.

29. Additionally, the application and reclamation plan do not provide sufficient and accurate information to meet the requirements of A.R.M. 17.24.219 and § 82-4-434, MCA, including that reclamation be concurrent with mining and completed within a specified time.

30. Finally, the application, and DEQ's approval of it, failed to comply with the MEPA requirements that are an integral component of DEQ's compliance with the Opencut Mining Act.[1]

31. Based on the deficiencies in the application and reclamation plan, DEQ had a clear legal duty to reject the application as incomplete under § 82-4-432 (4), MCA.

IV. COUNT TWO – VIOLATION OF OPENCUT MINING ACT, PUBLIC PARTICIPATION REQUIREMENTS

32. The preceding paragraphs are realleged as though set forth in full hereunder.

33. Article II, Section 8 guarantees to the public the right to "expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

34. Here, the application for the permit amendment was incomplete because the applicant failed to provide the proper address for the surrounding property owner, Valley Garden, and therefore failed to provide it with proper notice. § 82-4-432 (2)(b)(vi) and (6), MCA.

35. DEQ had a clear legal duty under § 82-4-432 (4), MCA, to verify the information in the application, and return an incomplete application to the applicant. *Kadillak v. Anaconda Company,* 184 Mont. 127 (1979). DEQ failed to perform this clear legal duty.

PRAYER FOR RELIEF

Valley Garden Land and Cattle LLC prays for the following relief:

1. That the BER find that DEQ violated its statutory requirements, acted in excess of its statutory authority and that its actions were clearly erroneous, arbitrary, capricious and unlawful.

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[1] Petitioners have filed a separate lawsuit, per the requirements of § 75-1-201, MCA, addressing among other things MEPA compliance. *Valley Garden Land and Cattle LLC v. DEQ,* Montana Fifth Judicial District, Madison County, Cause No. DV-29-2022-0000047-DK.

2. That the BER set aside the May 24, 2022, approval of Permit 674, Amendment 3 as unlawful, and *void ab initio.*
3. That the BER award Plaintiffs their attorney's fees pursuant to the Private Attorney General doctrine.
4. That the BER award Plaintiffs their costs.
5. That the BER grant such other and further relief as it deems equitable and appropriate.

Dated this 22nd day of June, 2022.

MORRISON SHERWOOD WILSON & DEOLA

David K. W. Wilson, Jr.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of June 2022, a true and correct copy of the foregoing document was duly served by *electronic mail* upon the following:

Board of Environmental Review
Attn: Sandy Scherer
P.O. Box 200901
Helena, MT 59620
ber@mt.gov
(Hand-delivered and emailed)

Lee McKenna
lee.mckenna@mt.gov

Catherine Armstrong
Catherine.armstrong@mt.gov

By _____

Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Michael Russell, Board Attorney
Board of Environmental Review

FROM: Sandy Moisey Scherer, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: June 27, 2022

SUBJECT: Board of Environmental Review Case No. BER 2022-05 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING ROSEBUD MINE AREA B AMENDMENT 5 PERMIT NUMBER C1984003B	Case No. BER 2022-05 SM

On June 27, 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.

Jeremiah Langston 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

Attachment

EARTHJUSTICE

June 27, 2022

Board of Environmental Review
Department of Environmental Quality
Metcalf Building
1520 East Sixth Avenue
PO Box 200901
Helena, Montana 59620-0901
deqbersecretary@mt.gov

Re: Appeal Rosebud Mine Area B Amendment 5 Permit Number C1984003B

NOTICE OF APPEAL AND REQUEST FOR HEARING

1. The Montana Environmental Information Center (MEIC) and Sierra Club (collectively, "Conservation Groups"), pursuant to Montana Code Annotated (MCA) § 82-4-206(1)-(2), and Administrative Rule of Montana (ARM) 17.24.425(1), hereby file this notice of appeal and request for a hearing regarding Montana Department of Environmental Quality's (DEQ) May 27, 2022, approval of the Area B Amendment 5 (AM5) for the Rosebud Strip Mine, in Colstrip, Montana. The Conservation Groups further request that the Board of Environmental Review hold a hearing on this appeal, pursuant to ARM 17.24.425(2) within 30 days of this appeal.

2. The Surface Mining Control and Reclamation Act (SMCRA) and the Montana Strip and Underground Mine Reclamation Act (MSUMRA) prohibit DEQ from issuing a strip-mining permit unless and until the applicant affirmatively demonstrates and DEQ confirms in writing based on record evidence that the cumulative hydrologic impacts from the mining operation will not cause material damage to the hydrologic balance outside the permit area. MCA § 82-4-227(3)(a); 30 U.S.C. § 1260(b)(3); ARM 17.24.405(6)(c). Material damage means "degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of

water are adversely affected, water quality standards are violated, or water rights are impacted." MCA § 82-4-203(31). DEQ is required to assess impacts over the time period that impacts are expected to occur.

3. To assure that the cumulative hydrologic impacts will not cause material damage, DEQ must prepare a cumulative hydrologic impact assessment, or "CHIA." ARM 17.24.314(5). The CHIA must be sufficient to make the material damage determination. Id. The CHIA must be based on baseline information related to hydrologic resources, including climatological data and other information needed to assess hydrologic impacts. Id. 17.24.304(1)(e), (h). The CHIA must assess "the cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface and ground water systems in the cumulative impact area." Id. 17.24.314(5). The cumulative hydrologic impacts include impacts of "all previous, existing, and anticipated mining on surface and groundwater systems." Id. 17.24.301(32). If the cumulative hydrologic impacts will cause material damage, that damage must be remedied prior to approval of any additional mining.

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

5. DEQ must further assure that reclamation can be accomplished. Id. 17.24.405(6)(a). Reclamation means restoring the land after mining so that it is "capable of supporting the uses that those lands were capable of supporting prior to any mining or to higher or better uses." MCA § 82-4-203(44). DEQ's assessment of the likelihood of Reclamation must consider, among other things, climatological characteristics of the area. Id. § 82-4-231(10)(q).

6. DEQ's CHIA for the AM5 expansion into Lee Coulee suffers from significant flaws that violate important provisions of MSUMRA.

7. DEQ's CHIA fails to assess the cumulative hydrologic impacts of all mining on the Lee Coulee alluvium, but erroneously considers the impacts of the AM5 expansion in isolation and expressly ignores impacts from existing operations from the Rosebud Mine and from the Big Sky Mine. In assessing material damage, DEQ erroneously isolates the impacts of the AM5 expansion on the Lee Coulee alluvium from pollution from the Rosebud Mine and the Big Sky Mine. DEQ asserts that AM5 will not be any worse than the impacts of the Big Sky Mine. But the material damage determination does not compare the individual impacts of mining operations. Instead, this analysis determines whether the total impact of all mining will cause material damage. The AM5 CHIA thus fails to lawfully assess cumulative hydrologic impacts or material damage.

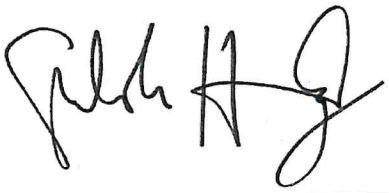
8. Further, DEQ fails to protect intermittent stream reaches in Lee Coulee from disturbance from strip-mining operations. DEQ denies protections of the Buffer Zone Rule, ARM 17.24.651(1), to the intermittent to perennial reach of Lee Coulee at wetland 4-2/2 on the basis that the reach does not contain alluvium, even though no such requirement exists in the Buffer Zone Rule. The CHIA and permit application acknowledge that this stream reach is sourced by groundwater and is therefore not ephemeral, but intermittent or perennial.

9. DEQ further refuses to assess the projected impacts of climate change on hydrology and other resources in the project area on the basis that the agency lacks legal authority to address probable climate impacts. MSUMRA, however, does not limit DEQ's ability to assess climate impacts. DEQ is required to assess the climatic conditions when assessing the cumulative hydrologic impacts and the requirements for reclamation. Evidence indicates that

climate change is projected to cause significant increases in temperature and evaporative deficit in the area, and reductions in soil moisture. These climatic effects will in turn require substantially more water for existing uses in the future (since more of the existing water will be baked out of the earth through heat and evaporation). The cumulative hydrologic impacts of the AM5 expansion—which will strip-mine an important shallow aquifer—will be more extreme because of worsening climatic conditions from climate change, which will have a dramatic impact on the likelihood of successful reclamation. DEQ's basis for ignoring the impacts of climate change when assessing mining's impacts to the hydrologic balance was erroneous, inconsistent, and arbitrary and capricious.

10. The Conservation Groups respectfully request that BER declare the AM5 permit unlawful and void ab initio and remand this matter to DEQ to reassess the permit application consistent with the requirements of MSUMRA.

Respectfully submitted this 27th day of June, 2022.



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