

**BOARD OF ENVIRONMENTAL REVIEW  
FEBRUARY 24, 2023**

**AGENDA TABLE OF CONTENTS**

**AGENDA**

**ADMINISTRATIVE ITEMS**

I.A.1. DECEMBER 9, 2022, MEETING MINUTES pg 001

I.B. INTRODUCTION OF NEW BOARD MEMBERS AND BOARD ATTORNEY,  
AND ELECTION OF OFFICERS

**BRIEFING ITEMS**

II.A.1. CONTESTED CASE UPDATES

II.A.2. NON-ENFORCEMENT CASE UPDATES

II.A.3. CONTESTED CASES NOT ASSIGNED TO A HEARING EXAMINER

**ACTION ITEMS**

III.a. BER 2021-04 and 08 WQ pg 005

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

III.b CDV 2023-21 pg 006

Montana Department of Environmental Quality v. Montana Board of Environmental Review, Teck Coal Limited, and the Board of County Commissioners of Lincoln County, Case No. CDV 2023-21

III.c. BER 2019-06 WQ

In the Matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.

III.d. BER 2022-06 WQ pg 049

In the Matter of: Appeal and Request for Hearing by Westmoreland Rosebud Mining LLC Regarding Issuance of MPDES Permit No. MT0032042, Colstrip, MT, BER 2022-06 WQ.

**NEW CONTESTED CASE**

IV. a. BER 2022-08 OC pg 073

In the Matter of: Denial of Opencut Mine Permit #3115 for FirstMark Materials – Oscar's Site

**BOARD OF ENVIRONMENTAL REVIEW  
MEETING MINUTES**

**DECEMBER 9, 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; Vice Chair Stacy Aguirre; Board Members Julia Altemus, David Lehnherr, Jon Reiten, David Simpson, and Joe 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

Director: Chris Dorrington

DEQ Legal: Catherine Armstrong, Kirsten Bowers, Loryn Johnson, Kurt Moser, Nicholas Whitaker, Jessica Wilkerson, Jeremiah Langston, Ed Hayes

Public Policy: Moira Davin, Rebecca Harbage, Nick Danielson

Water Quality: Lauren Sweeney, Lindsey Krywaruchka, Katie Makarowski

Air, Energy & Mining: Emily Lodman

Enforcement: Heidi Barnes, Sarah Ogden

Subdivisions: Rachel Clark

**Other Parties Present**

Laurie Crutcher, Crutcher Court Reporting

Elena Hagen - Montana DOJ Agency Legal Services Bureau

Vicki Marquis (Crowley Fleck) – Teck Coal, CHS

Ray Stout

Brian Balmer, USFWS

Jennifer Eckstrom

Corey Bullock, CBC News

Brad Smith, ICL

Haley Williams

Amanda Eggert, Montana Free Press

Grace Judge

Barbara Chillcott, WELC

Tonya Fish, EPA

Lynsey Gaudisio, Confederated Salish and Kootenai Tribes

Sam Yemington (Holland and Hart)

MEIC Official

Derf Johnson, MEIC

Francesca Fionda, The Narwal

Hayden Blackford

Stephen Pfeiffer

Peggy Trenk, Treasure State Resources Association

Emily Qiu, Mary Cochenour – Earthjustice

Sean

Chelsea Colwyn

Andy Janes

Adank

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

**I. ADMINISTRATIVE MATERIALS**

**A. Review and Approve Minutes**

**A.1. The Board will vote on adopting the October 14, 2022, Meeting Minutes**

Board member Reiten moved to APPROVE the October 14, 2022, meeting minutes. Board member Smith SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

**B. Consider informal procedure process**

Chairman Ruffatto moved that an informal order will be ISSUED only when the Chair or some member of the Board believes that informal procedures may be likely or more likely to be agreed to. Board member Simpson SECONDED. The motion PASSED unanimously.

**C. Hearing Examiner Assignments**

Chairman Ruffatto said that due to employee turnover at ALS, the Board has lost two Hearing Examiners since the last meeting. Also, Board Attorney Michael Russell has taken another position with the Attorney General's Office and will be unable to handle Hearing Examiner matters for the Board. Michelle Dietrich and Liz Leman of ALS will be available to handle Hearing Examiner matters, as well as Rob Cameron of Jackson Murdo and Grant. Rob Cameron's contract with the Board will expire after one year, which is in January.

Chairman Ruffatto moved that the Board approve the EXTENSION of the contract for Rob Cameron. Board member Reiten SECONDED. The motion PASSED unanimously.

Chairman Ruffatto moved to ASSIGN Liz Leman of ALS to the Rippling Woods case in place of Caitlin Buzzas. Vice Chair Aguirre SECONDED. The motion PASSED unanimously.

Chairman Ruffatto moved to ASSIGN Michelle Dietrich of ALS to the Ployhar and Oreo's Refining cases in place of Caitlin Buzzas. Board member Lehnerr SECONDED. The motion passed unanimously.

Chairman Ruffatto moved that the five remaining cases assigned to Michael Russell be ASSIGNED to Rob Cameron. Board member Reiten SECONDED. The motion PASSED unanimously.

**D. Review and discuss 2023 Board meeting calendar**

Chairman Ruffatto discussed the 2023 Board meeting calendar. Board member Altemus stated that this was her last meeting and said that three Board members will not be members after this meeting. She recused herself from this vote.

Board member Smith moved to APPROVE the 2023 Board meeting calendar. Vice Chair Aguirre SECONDED. The motion PASSED unanimously.

## II. BRIEFING ITEMS

Board Attorney Russell updated the Board regarding current cases. The Board did not have any comments.

## III. ACTION ITEMS

- 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.**

The Board considered the draft reasoned decision stating the basis for the Board’s denial of DEQ’s motion to alter or amend. Board member Altemus moved to APPROVE the decision. Vice Chair Aguirre SECONDED. The motion PASSED 5-2, with Board members Lehnherr and Reiten dissenting.

The Board considered a draft letter to EPA transmitting the Board’s Final Agency Action. Vice Chair Aguirre moved to ACCEPT the draft letters as presented for submittal to EPA. Board member Altemus SECONDED.

Board member Simpson moved to AMEND the motion to revise the sentence in the first paragraph under “Background on the lake water column standard” to read “In both the initial publication and in response to comments, the Board asserted that the lake water column standard using EPA approved methods, and hence was not set more stringent than the federal guideline, and that the stringency statute therefore did not apply.” Vice Chair Aguirre SECONDED.

After further discussion, Board member Simpson moved to WITHDRAW his motion. Vice Chair Aguirre WITHDREW her second.

The motion PASSED 5-2, with Board members Lehnherr and Reiten dissenting.

## IV. NEW CONTESTED CASE

- a. **In the Matter of: Renewal of MPDES Permit No. MT0000264, Issued September 30, 2022, to CHS, Inc., for Discharges from the Laurel Refinery, BER 2022-07 WQ.**

Board Member Simpson MOVED to assign the case in entirety to a Hearing Examiner. Board member Lehnherr SECONDED. The motion PASSED unanimously.

Chairman Ruffatto moved to ASSIGN Rob Cameron to this case. Board member Smith seconded. The motion PASSED unanimously.

## V. BOARD COUNSEL UPDATE

No update was provided.



**VI. GENERAL PUBLIC COMMENT**

No public comment was given.

Chairman Ruffatto thanked those Board members who would not be returning after this meeting for their service and hard work. He also stated that he was resigning from the Board, and this would be his last meeting.

**VII. ADJOURNMENT**

Chairman Ruffatto MOVED to adjourn the meeting; Board member Altemus SECONDED. The motion PASSED unanimously. The meeting adjourned at 9:54 AM.

Board of Environmental Review December 9, 2022, minutes approved:

/s/ \_\_\_\_\_  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
DATE



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

1595 Wynkoop Street  
Denver, CO 80202-1129  
Phone 800-227-8917  
[www.epa.gov/region8](http://www.epa.gov/region8)

Ref: 8WD-CWQ

Stacy Aguirre, Vice Chair  
Board of Environmental Review  
Montana Department of Environmental Quality  
Metcalf Building, 1520 East 6th Avenue  
P.O. Box 200901  
Helena, Montana 59620-0901

Re: Montana's Lake Koocanusa and Kootenai River Selenium Water Quality Standards

Dear Vice Chair Aguirre:

On December 27, 2022, the United States Environmental Protection Agency (EPA) Region 8 received the Montana Board of Environmental Review (Board)'s letter regarding Montana's December 2020 Submittal and EPA's 2021 Approval of Lake Koocanusa and Kootenai River Selenium Water Quality Standards. EPA is aware that on January 9, 2023, the Montana Department of Environmental Quality filed a Petition for Judicial Review and for Declaratory Judgment with the Montana First Judicial District Court, Lewis & Clark County, regarding the Board's actions associated with this matter. The Clean Water Act (CWA) is based in part on principles of cooperative federalism and a policy "to recognize, preserve, and protect the primary responsibilities and rights of States" (33 U.S.C. § 1251(b)). Therefore, EPA will not begin considering the Board's request until EPA is notified by the State that the ongoing legal processes have concluded.

EPA approved ARM 17.30.632(7)(a) on February 25, 2021, and consistent with the CWA and EPA's water quality standards regulations, it remains in effect for CWA purposes. If you have any questions, please contact Tonya Fish on my staff at [fish.tonya@epa.gov](mailto:fish.tonya@epa.gov).

Sincerely,

KC Becker  
Regional Administrator

cc: Lindsey Krywaruchka, Water Quality Division Administrator, Montana DEQ  
Katie Makarowski, Water Quality Standards and Modeling Section Supervisor, Montana DEQ

Kirsten H. Bowers  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 444-4222  
kbowers@mt.gov

*Attorney for Petitioner, Montana  
Department of Environmental Quality*

**FILED**

JAN 09 2023

ANGIE SPARKS, Clerk of District Court  
By [Signature] Deputy Clerk

MONTANA FIRST JUDICIAL DISTRICT COURT,  
LEWIS & CLARK COUNTY

<p>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY</p> <p>Petitioner,</p> <p>v.</p> <p>MONTANA BOARD OF ENVIRONMENTAL REVIEW, TECK COAL LIMITED, and THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY</p> <p>Respondents</p>	<p>Case No. <u>CDV 2023-21</u></p> <p>KATHY SEELEY</p> <p><i>Email</i></p> <p>PETITION FOR JUDICIAL REVIEW AND FOR DECLARATORY JUDGMENT</p>
---	---

200

Petitioner, Montana Department of Environmental Quality ("DEQ"),  
through counsel, hereby petitions for judicial review of the Final Agency Action  
and Order of the Board of Environmental Review ("Board") in the Matter Of:

Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana for Review of Administrative Rule of Montana (ARM) 17.30.632(7)(a) Pursuant to § 75-5-203, Montana Code Annotated (MCA) – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa (“the Board Order”) and the Board’s denial of DEQ’s Motion to Alter or Amend the Board Order. The Board Order is attached hereto as Exhibit 1, and the Board’s Order Denying DEQ’s Motion to Alter or Amend the Board Order is attached hereto as Exhibit 2.

## 1. INTRODUCTION

1. The Board reviewed and reconsidered its prior stringency determination under § 75-5-203, MCA in an informal proceeding that was neither a contested case nor a rulemaking under the Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4 (MCA).

2. After the Board’s stringency review, the Board Order was issued reversing the Board’s previous determination that the site-specific selenium criterion for Lake Koocanusa of 0.8 micrograms per liter (µg/L) was consistent with, and not more stringent than, EPA’s current recommended selenium criterion guidelines for freshwater bodies because it was developed using federally recommended site-specific procedures.

3. On May 17, 2022, DEQ moved to alter or amend the Board Order by striking language in Part IV, Paragraph 6 of the order that 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.”

4. Under the plain language of § 75-5-203(4), MCA, upon receipt of a petition to review a rule, the Board has authority to determine whether the rule is more stringent than federal.

5. Section 75-5-203(4), MCA provides if the Board 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.

6. Upon finding ARM 17.30.632(7)(a) more stringent than comparable federal regulations or guidelines, the Board did not instruct DEQ to follow one of the two statutory remedies, but instead fashioned a remedy that conflicts with the plain language of § 75-5-203, MCA by pronouncing, in order for ARM 17.30.632(7)(a) to be valid and enforceable, new rulemaking must be initiated.

7. The Montana Uniform Declaratory Judgments Act (UDJA) provides that any person whose rights, status, or other legal relations are affected by a statute may have determined any question of construction or validity arising under

the statute and obtain a declaration of rights, status, or other legal relations thereunder. § 27-8-202, MCA.

8. DEQ seeks this Court's review and declaration that the Board misinterpreted § 75-5-203, MCA and erred as a matter of law in ordering DEQ to initiate rulemaking to have a valid and enforceable water column standard for Lake Koocanusa.

## II. PARTIES

9. DEQ is a State of Montana executive branch agency created and existing under authority of § 2-15-3501, MCA. DEQ administers and enforces the Montana Water Quality Act (MWQA), the administrative rules adopted under the MWQA, and, as of July 1, 2021, DEQ has sole rulemaking authority under the MWQA, subject to the provisions of § 75-5-203, MCA.

10. The Board is an executive branch board, created and existing under authority of § 2-15-3502, MCA, attached to DEQ for administrative purposes.

11. Teck Coal Limited (Teck) is a Canadian company that owns and operates a coal mine in the Elk Valley of British Columbia. On June 30, 2021, Teck petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance. Teck is not registered to conduct business in the State of

Montana and Teck is not directly regulated by ARM 17.30.632(7)(a), a site-specific water quality standard that applies to Lake Koocanusa within the State of Montana. Teck is a necessary party to this action as it claims an interest which would be affected by the declaration. § 27-8-301, MCA.

12. The Board of County Commissioners of Lincoln County (Lincoln County) is a political subdivision of the State of Montana. The Lake Koocanusa water column standard, codified at ARM 17.30.632(7)(a), applies to surface waters within Lincoln County, Montana. On October 14, 2021, Lincoln County petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance. Lincoln County is a necessary party to this action as it claims an interest which would be affected by the declaration. § 27-8-301, MCA.

### III. JURISDICTION AND VENUE

13. This Court has jurisdiction to declare rights, status, and other legal relations. § 27-8-201, MCA.

14. This Court also has jurisdiction to review an informal agency decision to determine the legal rights of the parties and to determine whether “the action of the [Board] is based upon any error of law, or is wholly unsupported by the

evidence or clearly arbitrary and capricious.” *Johansen v. Department of Natural Resources and Conservation*, 1998 MT 51, ¶ 26, 955 P.2d 653, 659, 288 Mont. 39.

15. Venue is proper in the First Judicial District, Lewis and Clark County, because the challenged action is the Board’s review and decision under § 75-5-203, MCA, which took place at the Montana Department of Environmental Quality Metcalf Building, 1520 East Sixth Avenue, Helena, Lewis and Clark County, Montana and via videoconference on the Zoom platform. § 75-5-107, MCA.

#### IV. FACTS

16. On December 11, 2020, the Board adopted site specific selenium standards for Lake Koocanusa and the Kootenai River in accordance with the MWQA, § 75-5-101, MCA *et seq.*, and the MAPA §§ 2-4-301 – 315, MCA.

17. At the time of the December 2020 adoption of selenium standards for Lake Koocanusa and the Kootenai River, the Board determined the site-specific selenium criterion for the Lake Koocanusa water column of 0.8 micrograms per liter (µg/L), codified at ARM 17.30.632(7)(a), was consistent with the United States Environmental Protection Agency’s (“EPA”) current recommended selenium criterion guidelines for freshwater bodies because it was developed using federally recommended site-specific procedures and, therefore, met the MWQA’s stringency requirement at § 75-5-203, MCA.



18. The applicable federal criteria and guidelines recognize that the federal selenium criterion for lentic (still) freshwater of 1.5 µg/L is not protective in all cases and provides guidance for states and tribes to develop site specific selenium criteria.

19. In Lake Koocanusa, the egg/ovary fish tissue standard has been exceeded at water column levels below 1.5 µg/L, suggesting Lake Koocanusa would be under protected by a water column standard of 1.5 µg/L.

20. ARM 17.30.632(7)(a) was developed in accordance with applicable federal guidelines and was based on a translation of federal fish tissue criteria to develop a water column standard that is protective of aquatic life in Lake Koocanusa, Montana.

21. On February 25, 2021, EPA approved ARM 17.30.632(7)(a) and determined Montana followed EPA's guidance for deriving a site-specific water column criterion for Lake Koocanusa.

22. On June 30, 2021, Teck, and on October 14, 2021, Lincoln County petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance.

23. The only question presented to the Board by the Teck and Lincoln County Petitions was whether ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines that address the same circumstance.

24. In a special meeting, held October 29, 2021, the Board voted to accept the petitions presented by Teck and Lincoln County (“the Petitions”), to consolidate the petitions so that the stringency review under § 75-5-203(4), MCA was initiated on October 14, 2021 (the date of the Lincoln County petition), and to review and reconsider the Board’s prior stringency determination under § 75-5-203, MCA in an informal proceeding that was neither a contested case nor a rulemaking under MAPA.

25. The Board received written comments, written responses to comments, and testimony on the Petitions from a variety of public and private entities including representatives of the Petitioners, DEQ, EPA, Tribal First Nations, Montana State Senator Cuffe, Public Interest Groups, and Private Citizens from Canada, Montana, and Idaho.

26. In its February 25, 2022 regularly scheduled meeting, and in response to the Petitions, the Board reversed its December 2020 stringency determination and found the Lake Koocanusa water column standard more stringent than comparable federal regulations or guidelines.

27. In response to the Board's Stringency determination, DEQ began drafting the findings required in § 75-5-203(2) and (3) to support a more stringent than federal standard.

28. DEQ's proposed stringency findings were made available for public review and comment on April 4, 2022.

29. On April 19, 2022, the Board issued the Board Order, which determined ARM 17.30.632(7)(a) is more stringent than comparable Federal regulations or guidelines.

30. DEQ held a public hearing on the proposed stringency findings on April 26, 2022, received comments at the hearing and took written comments on the proposed findings through May 4, 2022.

31. DEQ received nearly 150 comments from the public, the majority of which supported DEQ's stringency findings and the Lake Koocanusa water column standard for selenium.

32. DEQ responded to substantive comments from the public on its stringency findings and the findings were finalized on June 14, 2022.

33. As required by § 75-5-203(4), MCA, DEQ made the written findings, as provided under § 75-5-203(2), MCA, after a public hearing and public comment and based on evidence in the record that:

- a) The Lake Koocanusa water column standard is necessary to protect aquatic life from the toxic effects of selenium; and
- b) The Lake Koocanusa water column standard can mitigate harm to the environment by protecting beneficial uses, preventing impacts to state surface water and aquatic life, and protecting downstream uses and the standard is achievable under current technology including best management practices (BMPs) that prevent storm water from coming into contact with pollutants, minimize impervious surface area and retain runoff where it can be treated through infiltration, and measures that provide riparian buffers and reduce erosion to protect surface water from direct site runoff that may contain pollutants. There are no current or planned point source dischargers to Lake Koocanusa, within Montana, with selenium as a pollutant of concern. Based on evidence in the record there is no significant geological source of selenium in Montana contributing to selenium concentrations in Lake Koocanusa and the two main anthropogenic activities that cause selenium mobilization to the aquatic environment (mining and irrigation of selenium-rich soil) do not occur around Lake Koocanusa in Montana.

34. As required by § 75-5-203(3), MCA, DEQ's written findings reference pertinent, ascertainable, and peer-reviewed scientific studies contained in

the record that contain the basis for DEQ's conclusions. DEQ's findings reference EPA's 304(a) selenium guidance (2016) and scientific studies by Jenni et al. (2017), Presser and Luoma (2010), Presser and Naftz (2020), and a peer-reviewed database and interactive spreadsheets by Jenni and Schmidt (2020).

35. As required by § 75-5-203(3), MCA, DEQ's 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 evidence in the record to suggest ARM 17.30.632(7)(a), a site-specific standard applicable to Lake Koocanusa, Montana, will result in increased treatment costs for Montana regulated owners or operators of land disturbing activities or facilities that discharge to Lake Koocanusa.

36. DEQ implemented the remedy available to a successful petitioner under § 75-5-203, MCA, which provides DEQ will either make the written findings to support the more stringent standard or revise the rule to conform to the federal standard. *See* 75-5-203(4), MCA.

37. DEQ acknowledged the Board's authority to reconsider and reverse its previous stringency determination and made the findings required in § 75-5-203(2) and (3), MCA, after a public hearing and public comment and based on evidence in the record in compliance with § 75-5-203(4), MCA.

38. The Board acted outside the express authority delegated by the legislature and in conflict with the plain language of § 75-5-203, MCA by directing DEQ to initiate new rulemaking in order to have a valid and enforceable lake water column standard.

39. Under the plain language of § 75-5-203, MCA, DEQ has authority to implement the remedy when a state standard is determined more stringent than comparable federal regulation or guidance by either revising the state rule to conform to the federal regulations or guidelines or by making the written findings necessary to support a more stringent than federal standard. *See* § 75-5-203(4), MCA.

40. On May 17, 2022, DEQ filed a motion to alter or amend the Board Order by striking the portion of the Board Order that 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* Paragraph IV(6) of the Board Order.

41. In its October 14, 2022 regularly scheduled meeting, the Board denied DEQ’s motion to alter or amend the Board Order and further moved to direct the Board’s attorney, working with the Board Chair, to draft a reasoned decision supporting the Board’s denial of DEQ’s motion to alter or amend the Board Order.

42. The Board adopted the Board Chair's and Board Attorney's proposed written Order Denying DEQ's Motion to Alter or Amend the Board Order at its December 9, 2022 meeting.

43. During the October 14, 2022 Board meeting, the Board also granted a motion by Teck and Lincoln County to submit the Board Order to EPA requesting that EPA vacate its approval of ARM 17.30.632(7)(a) as a water quality standard for federal Clean Water Act purposes and the Board further moved to request that Lincoln County and Teck jointly draft the letter submitting the Board Order to EPA.

44. The Board adopted the Teck and Lincoln County proposed letter submitting the Board Order to EPA with some revisions proposed by the Board Chair at its December 9, 2022 meeting.

45. As the agency charged with administration and enforcement of the MWQA; and, as of July 1, 2021, as the agency with sole rulemaking authority under the MWQA, subject to the provisions of §75-5-203, MCA, DEQ has standing to seek review of the Board Order and the Board's denial of DEQ's motion to alter or amend the Board Order.

46. The Board Order and the Board's denial of DEQ's motion to alter or amend the Board Order are based on clear legal error because the Board acted outside its statutory authority by fashioning a remedy that conflicts with the plain

language of § 75-5-203, MCA, causing injury to DEQ's administration and enforcement of the MWQA by casting doubt on the validity of ARM 17.30.632(7)(a).

47. DEQ seeks redress through this Court's review and declaration that the Board exceeded its authority under § 75-5-203, MCA and erred as a matter of law in ordering that DEQ must initiate new rulemaking to have a valid and enforceable water column standard for Lake Koocanusa.

#### REQUEST FOR RELIEF

THEREFORE, DEQ respectfully requests that the Court:

1. Pursuant to Title 27, chapter 8, MCA:
  - a. Declare the Board misinterpreted the plain language of § 75-5-203, MCA by ignoring the alternative remedies in 75-5-203(4), MCA which provide, if the Board finds a state rule more stringent than comparable federal regulations or guidelines, 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.
  - b. Declare the Board misinterpreted the plain language of § 75-5-203, MCA by invalidating ARM 17.30.632(7)(a) upon finding the Lake Koocanusa water column standard more stringent than comparable federal regulations or guidelines under § 75-5-203, MCA.



2. Award such other and further relief as the Court may deem just and proper pursuant to § 27-8-313, MCA.

Dated this 9th day of January, 2023.

STATE OF MONTANA  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

By: /s/Kirsten Bowers  
KIRSTEN H. BOWERS  
Attorney  
Mont. Dept. of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
(406) 444-4222

# EXHIBIT 1

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

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

**I. PROCEDURAL HISTORY**

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

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

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

---

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

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

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

## **II. FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

---

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



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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Pursuant to § 2-15-3502(4), MCA, the Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.” Section 2-15-102(10), MCA. This includes “interpreting,

applying, and enforcing existing rules and laws” and “evaluating and passing on facts.” *Id.*

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **IV. ORDER**

Based on the Board’s full consideration of the foregoing Findings of Fact and Conclusions of Law, and the supporting record, as well as arguments submitted, IT IS ORDERED that:

1. Teck and Lincoln County each has standing to bring its Petition.
2. The Lake Numeric Standard is more stringent than the comparable federal guideline.
3. 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.

4. The Lake Numeric Standard and the rulemaking upon which it is based fail to comply with the Stringency Statute. Sections 75-5-203(1), (2) and (3), MCA.

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

6. 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.

7. That this is the Final Agency Decision of the Board.

DATED this 19th day of April, 2022.

/s/ Steven Ruffatto

STEVEN RUFFATTO

Chairman

Board of Environmental Review

# EXHIBIT 2

**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**

**ORDER DENYING DEQ'S  
MOTION TO ALTER OR  
AMEND**

This matter comes before the Board of Environmental Review (“Board”) on the Montana Department of Environmental Quality’s (“DEQ”) Motion to Alter or Amend (“Motion”) the Board of Environmental Review’s Final Agency Action and Order dated April 19, 2022 (“Order”). DEQ’s Motion requests that the Order be amended by striking Paragraph IV.6, which reads: “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.”

DEQ accepts the Board’s determination that the “Lake Water Column Standard” for Lake Kooacanusa (ARM 17.30.632(7)(a)) is more stringent than the comparable Federal guideline, thus acknowledging that the Lake Water Column Standard violates Subsection (1) of Section 75-5-203, Montana Code Annotated.

**ORDER DENYING DEQ’S MOTION TO ALTER OR AMEND**

Page 1 of 6



(“Stringency Statute”). Although the Lake Water Column Standard violates the Stringency Statute, DEQ argues that the standard is nevertheless valid.

For the reasons stated below, DEQ’s Motion is denied.

The principles at stake here are the rule of law and the imperative that administrative agencies carry out the Legislature’s intent. Whether any particular site-specific lake water column selenium standard for Lake Koocanusa is justified presents a separate question to be resolved through a valid rulemaking process.

DEQ fails to acknowledge or address a fundamental principle of administrative law – a rule promulgated in violation of its enabling statute is invalid from its inception. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 230 U.S. App. D.C. 1, 713 F.2d 795, 797 (D.C. Cir. 1983); *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771; *Northwest Airlines v. State Tax Appeal Bd.*, 221 Mont. 441, 445, 720 P.2d 676 (1986); *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948; *Rosebud County v. Dept. of Rev.*, 257 Mont. 306, 310-11, 849 P.2d 441, 720 P.2d 676 (1993). This principle is codified in the Montana Administrative Procedure Act (“MAPA”) at Section 2-4-305(6), MCA (“adoption.... of a rule is not valid or effective unless it is.... consistent and not in conflict with the statute”). Moreover, the legislature did not intend the Stringency Statute to be read in isolation. To the contrary, the Montana Legislature’s

statement of intent for the Stringency Statute expressly states that its provisions are “in addition to all requirements imposed by existing law and rules.” 1995 Bill Text MT H.B. 521.

As the Board fully explained in its Order, the Lake Water Column Standard was promulgated in clear and direct violation of Subsection (1) of the Stringency Statute. DEQ does not challenge this conclusion. Thus, based on the fundamental principle of administrative law described above, the standard was invalid and unenforceable by operation of law from its inception. In order to promulgate a valid site-specific water column selenium standard for Lake Koocanusa, rulemaking in compliance with MAPA and the Montana Water Quality Act, including the Stringency Statute, is required. Section 2-4-305, MCA; Section 75-5-203, MCA.

In its effort to avoid new rulemaking in compliance with MAPA and the Stringency Statute, DEQ relies on the Stringency Statute’s language stating that “[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule.” Section 75-5-203(4), MCA. This reliance is misplaced. The clear and plain meaning of this language is that the “petition” does not relieve

the petitioner of the duty to comply. It does not address the effect of a determination that a rule was promulgated in violation of the Stringency Statute.<sup>1</sup>

DEQ's argument that the Stringency Statute allows it to make the required finding after the rule has been adopted in violation of Subsection (1) of the statute fails based on the very language relied on by DEQ. Subsection (4)(a) provides that one remedy is to make the required finding "as provided under subsection (2)." Subsection (2) states that a rule more stringent than the comparable federal guideline may be "adopted" "only if" the department makes the required finding. This clearly places a **precondition on the adoption** of such a rule and thus precludes DEQ's position that the finding can be made **after adoption**.

A primary purpose of the rulemaking provisions of MAPA and the Stringency Statute is to ensure that the public generally and interested parties in particular are fully and accurately informed so that they can meaningfully and effectively participate in the rulemaking process. Section 2-4-101(2); 1995 Bill Text MT H.B. 521. In the present case, the publication initiating rulemaking misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guideline. See Order, p. 5. Also, in response to comments in the rulemaking process concerning the Stringency Statute, the

---

<sup>1</sup> This matter does not present, and the Board need not address, the effect of a determination that a validly adopted rule is more stringent than a subsequently established comparable federal regulation or guideline under Subsection (4) (b) of the Stringency Statute.

Board again misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guidelines and thus that the finding called for by the Stringency Statute was not required. See Order, p. 6. Although the public was seriously misinformed during the rulemaking process, DEQ has attempted to rectify the deficiencies by making the required Stringency Statute finding without undertaking a new rulemaking process. These facts are similar to the facts in *Rosebud County v. Dep't of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993).

In the *Rosebud County* case, the Montana Department of Revenue (“DOR”) adopted an amended “rule” without compliance with MAPA and an attempt by DOR to cure the deficiency after the fact by then conducting a rulemaking proceeding was held to be “in essence, a sham” in which interested parties “were denied their right to participate effectively in the governmental process.” *Id.*, at 311. The course of action undertaken by DEQ in this case is subject to the same criticisms. DEQ’s attempt to justify the Lake Water Column Standard after the fact amounts to “*post hoc* rationalization” which has been repeatedly condemned by the courts in rulemaking proceedings. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d at 799.

Because the Board has considered and ruled on the merits of DEQ’s Motion, it need not address the arguments regarding the alleged procedural deficiencies of

the Motion. However, the Board's consideration of DEQ's Motion on its merits may not be construed as precedent for considering such motions in other cases.

For the reasons stated above, DEQ's Motion is hereby DENIED.

DATED this 9<sup>th</sup> day of December, 2022.

/s/Steven Ruffatto

STEVEN RUFFATTO

Board Chair

Board of Environmental Review

William W. Mercer  
Sarah C. Bordelon  
HOLLAND & HART LLP  
401 North 31st Street Suite 1500  
P.O. Box 639  
Billings, Montana 59103-0639  
Telephone: (406) 252-2166  
Fax: (406) 252-1669  
wwmercer@hollandhart.com  
scbordelon@hollandhart.com

ATTORNEYS FOR  
WESTMORELAND  
ROSEBUD MINING LLC

Kirsten H. Bowers  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 444-4222  
E-mail: kbowers@mt.gov

ATTORNEY FOR THE  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

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

<b>IN THE MATTER OF:</b>  <b>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ROSEBUD MINING LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0032042</b>	<b>CAUSE NO. BER 2022-06 WQ</b>  <b>STIPULATION FOR FINAL AGENCY DECISION</b>
---	---

Appellant Westmoreland Rosebud Mining LLC (“Westmoreland”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), hereby stipulate and agree as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana

Pollutant Discharge Elimination System (“MPDES”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. DEQ has statutory authority to administer Montana’s water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and Admin. R. Mont. 17.30, subchapter 13.

3. Westmoreland is a limited liability company registered to do business in Montana.

4. Westmoreland owns the Rosebud Mine, which is an existing surface coal mine located adjacent to Colstrip, Montana.

5. Areas A, B, C, and D of the Rosebud Mine are covered by MPDES Permit No. MT0023965.

6. Westmoreland plans to expand Area B of the Rosebud Mine through amendment AM5, which is located south of and adjacent to Area B.

7. On March 11, 2020, Westmoreland submitted an application for a new MPDES permit to cover proposed Area B AM5. The receiving waters associated with the Rosebud Mine Area B AM5 MPDES permit are Lee Coulee, Fossil Fork of Lee Coulee, unnamed tributaries to Fossil Fork of Lee Coulee, and unnamed tributaries to Richard Coulee (collectively, the “Receiving Waters”).

8. DEQ released a Draft MPDES Permit for the Rosebud Mine Area B AM5 (the “Draft Permit”) on or around May 31, 2022.

9. In Westmoreland’s comments on the Draft Permit, it argued that proposed numeric effluent limitations for electrical conductivity (“EC”) and sodium absorption ratio (“SAR”) are inappropriate limitations that fail to consider the naturally occurring EC and SAR levels or the ephemeral nature of the Receiving Waters.

10. On August 12, 2022, DEQ issued MPDES Permit No. MT0032042 (the “Permit”) for Area B AM5.

11. The Permit included EC limitations for all 18 outfalls as follows:

Final Effluent Limitations:      Average Monthly limit of 500  $\mu$ S/cm  
Maximum Daily limit of 500  $\mu$ S/cm

Alternate Effluent Limitation:   Maximum Daily limit of 500  $\mu$ S/cm

12. The Permit included SAR limitations for all 18 outfalls as follows:

Final Effluent Limitations:      Average Monthly limits of 3.0 (from 3/2 through 10/31) and 5.0 (from 11/1 through 3/1)  
Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)

Alternate Effluent Limitations:   Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)



13. On August 17, 2022, in accordance with Admin. R. Mont. 17.30.1362, DEQ issued a minor modification to the Permit to remove erroneously included text at Permit Part 3.1.2. On September 16, DEQ issued a second minor modification to the Permit to correct additional typographical errors in the Permit. These minor modifications did not change the EC or SAR effluent limitations and do not affect this Appeal.

14. On September 9, 2022, Westmoreland timely filed with the Board a Notice of Appeal and Request for Hearing, appealing only the EC and SAR effluent limitations for all 18 outfalls. *See* Notice of Appeal (Sept. 9, 2022).

15. On October 4, 2022, pursuant to Admin. R. Mont. 17.30.1379, DEQ noted that all provisions of the Permit were fully effective and enforceable, except for the EC and SAR effluent limitations, which were stayed.

16. Admin. R. Mont. 17.30.670(4) provides “[f]or all tributaries and other surface waters in the Rosebud Creek, Tongue, Powder, and Little Powder river watersheds, the monthly average numeric water quality standard for EC is 500 [μS/cm] and no sample may exceed an EC value of 500 [μS/cm]. The monthly average numeric water quality standard for SAR from March 2 through October 31 is 3.0 and no sample may exceed an SAR value of 4.5. The monthly average numeric water quality standard for SAR from November 1 through March 1 is 5.0

and no sample may exceed an SAR value of 7.5.” The Receiving Waters are tributaries to Rosebud Creek.

17. As outlined in DEQ’s white paper titled A Review of the Rationale for EC and SAR Standards, “[w]hen the natural EC values exceed the proposed EC standards, the provisions of 75-5-306, MCA would apply” directing that “[i]t is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements” are met. DEQ “will determine the natural condition of the stream at any given point in time through monitoring, interpretation of historic data, and modeling to ensure that water quality is not diminished.” Rationale, Sec. 6.0, p. 15. Neither DEQ nor Westmoreland has yet determined the natural condition of EC or SAR in the Receiving Waters for purposes of surface water quality regulation.

18. The Receiving Waters meet the definition of hydrologically ephemeral streams where they receive discharges from the Rosebud Mine. *See* Admin. R. Mont. 17.30.602(10), 2022 Fact Sheet, pages 4 – 7, 20.

19. The Reasonable Potential Analysis for EC and SAR provided in the 2022 Fact Sheet did not account for the natural condition of EC and SAR in the Receiving Waters. *See* 2022 Fact Sheet at p. 21.

20. DEQ and Westmoreland agree that the Permit effluent limitations for EC and SAR should account for the nonanthropogenic condition of the Receiving

Waters and agree to undertake the process of compiling and obtaining data necessary to determine the nonanthropogenic condition of EC and SAR in the Receiving Waters.

21. DEQ agrees to develop a nonanthropogenic standard for EC and SAR in the Receiving Waters pursuant to § 75-5-222(1), MCA and applicable guidance and reference materials. Westmoreland will consult and collaborate with DEQ in development of the nonanthropogenic standard for EC and SAR in the Receiving Waters, according to the following schedule:

- a. Within 60 days of the Board's approval of this Stipulation, DEQ will provide a Quality Assurance Project Plan (QAPP) to Westmoreland describing analytical methods and approaches for developing EC and SAR nonanthropogenic standards for the Receiving Waters;
- b. Westmoreland will have no less than 14 days to review the QAPP and provide comments to DEQ. DEQ will consider Westmoreland's comments in the final QAPP;
- c. Within 30 days of finalizing the QAPP, Westmoreland and DEQ will compile all existing water quality data that meets the QAPP to establish the nonanthropogenic EC and SAR levels in the Receiving Waters;
- d. DEQ will evaluate and review the compiled existing ambient water quality data and, within 30 days of receiving the data, DEQ will make

a written determination whether ambient EC and SAR concentrations in the Receiving Waters exceed the applicable water quality criteria in ARM 17.30.670(4);

e. If DEQ determines that additional data are required to conclude ambient EC and SAR concentrations in the Receiving Waters exceed the criteria in ARM 17.30.670(4), or to properly develop nonanthropogenic standards for EC and SAR for the Receiving Waters, Westmoreland and DEQ shall develop a sampling analysis plan (SAP) to fill the data gaps within 45 days of DEQ's determination that additional data is required. Westmoreland will be responsible for obtaining additional data in accordance with the SAP. The SAP must identify the analytical lab or labs, the detection limits, sampling locations, and a sampling schedule that is acceptable to DEQ;

f. Within 30 days of determining whether ambient EC and SAR concentrations in the Receiving Waters are greater than the applicable water quality criteria in ARM 17.30.670(4), DEQ will determine whether nonanthropogenic sources alone cause the EC and SAR concentrations in the Receiving Waters to exceed the standards in ARM 17.30.670(4);

g. DEQ and Westmoreland will consult to discuss the extent to which existing water quality of the receiving water is above the water

quality standards in ARM 17.30.670(4), whether the data is sufficient to proceed with development of a nonanthropogenic standard for EC and SAR, and whether development of the nonanthropogenic water quality standard through rulemaking is feasible. If the Parties decide that DEQ should not proceed with rulemaking, they will either propose an amendment to the Stipulation or move the Board to terminate the Stipulation and request a new Prehearing Order;

h. Throughout the nonanthropogenic water quality standard development process, Westmoreland and DEQ will protect existing beneficial uses in the Receiving Waters and affected downstream waterbodies;

i. Within 90 days after all data is analyzed, including any additional data collected by Westmoreland under Paragraph 21(e), DEQ will recommend new water quality standard(s) that protect the highest attainable beneficial use of the Receiving Waters and downstream waterbodies and initiate rulemaking pursuant to the Montana Water Quality Act (MWQA) and the Montana Administrative Procedures Act (MAPA); and

j. Effluent limitations based on the new water quality standard(s) for the Receiving Waters will be implemented in MPDES Permit No. MT0032042.

22. Westmoreland agrees to supply existing data that meets the QAPP and obtain new data in accordance with the SAP to support the study contemplated in Paragraph 21, as reasonably requested by DEQ.

23. Once DEQ adopts new water quality standard(s) for the Receiving Waters and develops appropriate effluent limitations for EC and SAR, DEQ will incorporate effluent limitations in the Permit for EC and SAR based on the nonanthropogenic condition of the Receiving Waters.

24. The Parties agree that the rulemaking contemplated in Paragraph 21 and the incorporation of appropriate effluent limitations for EC and SAR in the Permit will be subject to public notice and comment provisions in the MWQA, administrative rules adopted under the MWQA including Admin. R. Mont. 17.30.1372, MAPA, and the review and approval of the United States Environmental Protection Agency (EPA).

25. DEQ and Westmoreland agree that, until DEQ adopts new water quality standard(s) based on the nonanthropogenic condition of the Receiving Waters and appropriate effluent limitations for EC and SAR are incorporated in the Permit, Westmoreland will not discharge to the Receiving Waters and will protect existing beneficial uses in the Receiving Waters and in downstream water bodies.

26. Neither DEQ nor Westmoreland waives the right to assert any obligations, challenges, or defenses in the future based on the nonanthropogenic condition of EC or SAR in the Receiving Waters.

27. Westmoreland does not admit that Admin. R. Mont. 17.30.670(4) governs the discharges to the Receiving Waters in terms of EC and SAR and Westmoreland maintains that the provisions of Mont. Code Ann. § 75-5-306 govern.

28. The singular issue identified in Westmoreland's Notice of Appeal and Request for Hearing may be completely resolved under the terms of this Stipulation.

29. The Board will maintain jurisdiction of the matter until appropriate effluent limitations for EC and SAR are incorporated into the Permit, after which Westmoreland will move to dismiss this contested case in its entirety with prejudice.

30. Nothing in this Stipulation shall prohibit DEQ or Westmoreland from exercising any rights or authority under the MWQA.

31. The Parties request the Board approve this Stipulation as the final agency decision concerning Westmoreland's Notice of Appeal, pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403(2).

32. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

33. Westmoreland's Notice of Appeal has been fully and finally compromised and settled by agreement of the Parties and the Parties stipulate to and respectfully request the Board's entry of a final agency decision approving this Stipulation.

34. The Parties shall each pay their own attorney fees and costs.

35. The Board's Decision as to Westmoreland's Notice of Appeal shall represent the Final Agency Decision.

36. This Stipulation may only be modified or amended by written agreement executed by the Parties and approved by the Board.

This Stipulation is hereby entered by the Board, the Board agrees to retain jurisdiction as described above, and orders the Parties to proceed in compliance with the terms described herein.

DATED this \_\_\_\_\_ day of February 2023.

---

Rob Cameron  
Hearing Examiner  
Jackson, Murdo & Grant, P.C.  
203 N. Ewing  
Helena, MT 59601



The Parties, by their respective counsel, hereby consent to the terms and conditions of the Stipulation as set forth above and consent to the entry thereof.

/s/William W. Mercer

William W. Mercer  
Holland & Hart LLP  
401 North 31st Street, Suite 1500  
P.O. Box 639  
Billings, Montana 59103-0639  
Telephone: (406) 252-2166  
E-mail: wwmerc@hollandhart.com

ATTORNEY FOR WESTMORELAND  
ROSEBUD MINING LLC

/s/Kirsten H. Bowers

Kirsten H. Bowers  
Staff Attorney  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 444-4222  
E-mail: kbowers@mt.gov

ATTORNEY FOR THE  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of February 2023, I caused a true and accurate copy of the foregoing to be emailed to:

Sandy Moisey-Scherer  
Board Secretary  
Board of Environmental Review  
1520 E. 6<sup>th</sup> Ave.  
P.O. Box 200901  
Helena, MT 59620-0901  
deqbersecretary@mt.gov

Rob Cameron  
Hearing Examiner  
Jackson, Murdo & Grant, P.C.  
203 N. Ewing  
Helena, MT 59601  
rcameron@jmgattorneys.com  
asnedeker@jmgattorneys.com  
Ehagen2@mt.gov

By: /s/Catherine Armstrong  
Catherine Armstrong, Paralegal  
Dept. of Environmental Quality

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

<b>IN THE MATTER OF:</b>  <b>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ROSEBUD MINING LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0032042</b>	<b>CAUSE NO. BER 2022-06 WQ</b>  <b>FINAL AGENCY DECISION</b>
---	---

Appellant Westmoreland Rosebud Mining LLC (“Westmoreland”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), hereby stipulate and agree as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana Pollutant Discharge Elimination System (“MPDES”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. DEQ has statutory authority to administer Montana’s water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and Admin. R. Mont. 17.30, subchapter 13.

3. Westmoreland is a limited liability company registered to do business in Montana.

4. Westmoreland owns the Rosebud Mine, which is an existing surface coal mine located adjacent to Colstrip, Montana.

5. Areas A, B, C, and D of the Rosebud Mine are covered by MPDES Permit No. MT0023965.

6. Westmoreland plans to expand Area B of the Rosebud Mine through amendment AM5, which is located south of and adjacent to Area B.

7. On March 11, 2020, Westmoreland submitted an application for a new MPDES permit to cover proposed Area B AM5. The receiving waters associated with the Rosebud Mine Area B AM5 MPDES permit are Lee Coulee, Fossil Fork of Lee Coulee, unnamed tributaries to Fossil Fork of Lee Coulee, and unnamed tributaries to Richard Coulee (collectively, the “Receiving Waters”).

8. DEQ released a Draft MPDES Permit for the Rosebud Mine Area B AM5 (the “Draft Permit”) on or around May 31, 2022.

9. In Westmoreland’s comments on the Draft Permit, it argued that proposed numeric effluent limitations for electrical conductivity (“EC”) and sodium absorption ratio (“SAR”) are inappropriate limitations that fail to consider the naturally occurring EC and SAR levels or the ephemeral nature of the Receiving Waters.

10. On August 12, 2022, DEQ issued MPDES Permit No. MT0032042 (the “Permit”) for Area B AM5.

11. The Permit included EC limitations for all 18 outfalls as follows:

Final Effluent Limitations: Average Monthly limit of 500  $\mu$ S/cm  
Maximum Daily limit of 500  $\mu$ S/cm

Alternate Effluent Limitation: Maximum Daily limit of 500  $\mu$ S/cm

12. The Permit included SAR limitations for all 18 outfalls as follows:

Final Effluent Limitations: Average Monthly limits of 3.0 (from 3/2 through 10/31) and 5.0 (from 11/1 through 3/1)  
Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)

Alternate Effluent Limitations: Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)

13. On August 17, 2022, in accordance with Admin. R. Mont. 17.30.1362, DEQ issued a minor modification to the Permit to remove erroneously included text at Permit Part 3.1.2. On September 16, DEQ issued a second minor modification to the Permit to correct additional typographical errors in the Permit. These minor modifications did not change the EC or SAR effluent limitations and do not affect this Appeal.

14. On September 9, 2022, Westmoreland timely filed with the Board a Notice of Appeal and Request for Hearing, appealing only the EC and SAR effluent limitations for all 18 outfalls. *See* Notice of Appeal (Sept. 9, 2022).

15. On October 4, 2022, pursuant to Admin. R. Mont. 17.30.1379, DEQ noted that all provisions of the Permit were fully effective and enforceable, except for the EC and SAR effluent limitations, which were stayed.

16. Admin. R. Mont. 17.30.670(4) provides “[f]or all tributaries and other surface waters in the Rosebud Creek, Tongue, Powder, and Little Powder River watersheds, the monthly average numeric water quality standard for EC is 500 [μS/cm] and no sample may exceed an EC value of 500 [μS/cm]. The monthly average numeric water quality standard for SAR from March 2 through October 31 is 3.0 and no sample may exceed an SAR value of 4.5. The monthly average numeric water quality standard for SAR from November 1 through March 1 is 5.0 and no sample may exceed an SAR value of 7.5.” The Receiving Waters are tributaries to Rosebud Creek.

17. As outlined in DEQ’s white paper titled A Review of the Rationale for EC and SAR Standards, “[w]hen the natural EC values exceed the proposed EC standards, the provisions of 75-5-306, MCA would apply” directing that “[i]t is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements” are met.

DEQ “will determine the natural condition of the stream at any given point in time through monitoring, interpretation of historic data, and modeling to ensure that water quality is not diminished.” Rationale, Sec. 6.0, p. 15. Neither DEQ nor Westmoreland has yet determined the natural condition of EC or SAR in the Receiving Waters for purposes of surface water quality regulation.

18. The Receiving Waters meet the definition of hydrologically ephemeral streams where they receive discharges from the Rosebud Mine. *See* Admin. R. Mont. 17.30.602(10), 2022 Fact Sheet, pages 4 – 7, 20.

19. The Reasonable Potential Analysis for EC and SAR provided in the 2022 Fact Sheet did not account for the natural condition of EC and SAR in the Receiving Waters. *See* 2022 Fact Sheet at p. 21.

20. DEQ and Westmoreland agree that the Permit effluent limitations for EC and SAR should account for the nonanthropogenic condition of the Receiving Waters and agree to undertake the process of compiling and obtaining data necessary to determine the nonanthropogenic condition of EC and SAR in the Receiving Waters.

21. DEQ agrees to develop a nonanthropogenic standard for EC and SAR in the Receiving Waters pursuant to § 75-5-222(1), MCA and applicable guidance and reference materials. Westmoreland will consult and collaborate with DEQ in

development of the nonanthropogenic standard for EC and SAR in the Receiving Waters, according to the following schedule:

- a. Within 60 days of the Board's approval of this Stipulation, DEQ will provide a Quality Assurance Project Plan (QAPP) to Westmoreland describing analytical methods and approaches for developing EC and SAR nonanthropogenic standards for the Receiving Waters;
- b. Westmoreland will have no less than 14 days to review the QAPP and provide comments to DEQ. DEQ will consider Westmoreland's comments in the final QAPP;
- c. Within 30 days of finalizing the QAPP, Westmoreland and DEQ will compile all existing water quality data that meets the QAPP to establish the nonanthropogenic EC and SAR levels in the Receiving Waters;
- d. DEQ will evaluate and review the compiled existing ambient water quality data and, within 30 days of receiving the data, DEQ will make a written determination whether ambient EC and SAR concentrations in the Receiving Waters exceed the applicable water quality criteria in ARM 17.30.670(4);
- e. If DEQ determines that additional data are required to conclude ambient EC and SAR concentrations in the Receiving Waters exceed the criteria in ARM 17.30.670(4), or to properly develop nonanthropogenic



standards for EC and SAR for the Receiving Waters, Westmoreland and DEQ shall develop a sampling analysis plan (SAP) to fill the data gaps within 45 days of DEQ's determination that additional data is required. Westmoreland will be responsible for obtaining additional data in accordance with the SAP. The SAP must identify the analytical lab or labs, the detection limits, sampling locations, and a sampling schedule that is acceptable to DEQ;

f. Within 30 days of determining whether ambient EC and SAR concentrations in the Receiving Waters are greater than the applicable water quality criteria in ARM 17.30.670(4), DEQ will determine whether nonanthropogenic sources alone cause the EC and SAR concentrations in the Receiving Waters to exceed the standards in ARM 17.30.670(4);

g. DEQ and Westmoreland will consult to discuss the extent to which existing water quality of the receiving water is above the water quality standards in ARM 17.30.670(4), whether the data is sufficient to proceed with development of a nonanthropogenic standard for EC and SAR, and whether development of the nonanthropogenic water quality standard through rulemaking is feasible. If the Parties decide that DEQ should not proceed with rulemaking, they will either propose an amendment to the

Stipulation or move the Board to terminate the Stipulation and request a new Prehearing Order;

h. Throughout the nonanthropogenic water quality standard development process, Westmoreland and DEQ will protect existing beneficial uses in the Receiving Waters and affected downstream waterbodies;

i. Within 90 days after all data is analyzed, including any additional data collected by Westmoreland under Paragraph 21(e), DEQ will recommend new water quality standard(s) that protect the highest attainable beneficial use of the Receiving Waters and downstream waterbodies and initiate rulemaking pursuant to the Montana Water Quality Act (MWQA) and the Montana Administrative Procedures Act (MAPA); and

j. Effluent limitations based on the new water quality standard(s) for the Receiving Waters will be implemented in MPDES Permit No. MT0032042.

22. Westmoreland agrees to supply existing data that meets the QAPP and obtain new data in accordance with the SAP to support the study contemplated in Paragraph 21, as reasonably requested by DEQ.

23. Once DEQ adopts new water quality standard(s) for the Receiving Waters and develops appropriate effluent limitations for EC and SAR, DEQ will

incorporate effluent limitations in the Permit for EC and SAR based on the nonanthropogenic condition of the Receiving Waters.

24. The Parties agree that the rulemaking contemplated in Paragraph 21 and the incorporation of appropriate effluent limitations for EC and SAR in the Permit will be subject to public notice and comment provisions in the MWQA, administrative rules adopted under the MWQA including Admin. R. Mont. 17.30.1372, MAPA, and the review and approval of the United States Environmental Protection Agency (EPA).

25. DEQ and Westmoreland agree that, until DEQ adopts new water quality standard(s) based on the nonanthropogenic condition of the Receiving Waters and appropriate effluent limitations for EC and SAR are incorporated in the Permit, Westmoreland will not discharge to the Receiving Waters and will protect existing beneficial uses in the Receiving Waters and in downstream water bodies.

26. Neither DEQ nor Westmoreland waives the right to assert any obligations, challenges, or defenses in the future based on the nonanthropogenic condition of EC or SAR in the Receiving Waters.

27. Westmoreland does not admit that Admin. R. Mont. 17.30.670(4) governs the discharges to the Receiving Waters in terms of EC and SAR and Westmoreland maintains that the provisions of Mont. Code Ann. § 75-5-306 govern.

28. The singular issue identified in Westmoreland's Notice of Appeal and Request for Hearing may be completely resolved under the terms of this Stipulation.

29. The Board will maintain jurisdiction of the matter until appropriate effluent limitations for EC and SAR are incorporated into the Permit, after which Westmoreland will move to dismiss this contested case in its entirety with prejudice.

30. Nothing in this Stipulation shall prohibit DEQ or Westmoreland from exercising any rights or authority under the MWQA.

31. The Parties request the Board approve this Stipulation as the final agency decision concerning Westmoreland's Notice of Appeal, pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403(2).

32. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

33. Westmoreland's Notice of Appeal has been fully and finally compromised and settled by agreement of the Parties and the Parties stipulate to and respectfully request the Board's entry of a final agency decision approving this Stipulation.

34. The Parties shall each pay their own attorney fees and costs.

35. The Board's Decision as to Westmoreland's Notice of Appeal shall represent the Final Agency Decision.

36. This Stipulation may only be modified or amended by written agreement executed by the Parties and approved by the Board.

This Final Agency Decision is hereby entered by the Board, the Board agrees to retain jurisdiction as described above, and orders the Parties to proceed in compliance with the terms described herein.

DATED this \_\_\_\_\_ day of February 2023.

---

Chairman  
BOARD OF ENVIRONMENTAL REVIEW

TO: Michael Russell, Board Attorney  
Board of Environmental Review

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

DATE: December 21, 2022

SUBJECT: Board of Environmental Review Case No. BER 2022-08 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: DENIAL OF OPENCUT  
MINE PERMIT #3115 FOR FIRSTMARK  
MATERIALS – OSCAR’S SITE

Case No. BER 2022-08 OC

On December 21, 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

Attachments

Tim Filz  
CHRISTENSEN FULTON & FILZ, PLLC  
19 36<sup>th</sup> St. West, #3  
Billings, MT 59102  
406-248-3100  
filz@cfflawfirm.net

Electronically Filed with the  
Montana Board of  
Environmental Review  
12/21/22 at 4:00 PM  
By: Sandy Moisey Scherer  
Docket No: BER 2022-08 OC

*Attorneys for MC Property Holdings, as agent under power of attorney for  
FirstMark Materials, LLC*

Michael Tennant  
Victoria A. Marquis  
CROWLEY FLECK PLLP  
500 Transwestern Plaza II  
P. O. Box 2529  
Billings, MT 59103-2529  
406-252-3441  
mtennant@crowleyfleck.com  
vmarquis@crowleyfleck.com

*Attorneys for Croell, Inc.*

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

IN THE MATTER OF:

DENIAL OF OPENCUT MINE  
PERMIT #3115 FOR FIRSTMARK  
MATERIALS – OSCAR’S SITE

Case No.: BER 2022-08 OC

**NOTICE OF APPEAL AND  
REQUEST FOR HEARING**

Pursuant to Montana Code Annotated § 82-4-427(1)(a), FirstMark Materials, LLC (“FirstMark Materials”) and Croell, Inc. (“Croell”) appeal the Department of

Environmental Quality's ("DEQ" or the "Department") denial of Opencut Mine Permit #3115 to FirstMark Materials for Oscar's Site (the "Oscar's Site Permit") and request a hearing before the Board of Environmental Review ("Board").

## **I. BACKGROUND**

An operator who requires a permit pursuant to Montana's Opencut Mining Act must submit an application to the Department that complies with subsections (2) through (13) of Montana Code Annotated 82-4-432. Among the statutory requirements, the applicant must provide a "statement that the applicant has the legal right to mine the designated materials in the lands described," a "bond or security," and a "written agreement between the landowner and the operator authorizing the operator access to the site to perform reclamation" in certain circumstances. §§ 82-4-432(2)(a)(v), (b)(i), and (b)(v), MCA.

Within five working days of receipt of an application, "the department shall" notify the applicant as to whether or not the application is complete. § 82-4-432(4)(a)(i), MCA. "An application is complete if it contains the items listed in subsection (1) and (2)" of Montana Code Annotated 82-4-432. *Id.* If the application is not complete, "the department shall notify the applicant in writing and include a detailed identification of information necessary to make the application complete." *Id.*

After a complete application is received by the Department, the Department



must review the application to determine whether the application is acceptable, which includes review of the applicant's plan of operation. § 82-4-432(10), MCA. If the Department determines that the application is not acceptable, "the department shall notify the applicant in writing and include a detailed identification of all deficiencies." *Id.* Within "10 working days of receipt of the applicant's response to the identified deficiencies, the department shall review the responses and notify the applicant as to whether or not the application is acceptable." *Id.*

If, after the public hearing, the Department determines that "substantial issues [have] not [been] adequately satisfied in the proposed plan of operation," the Department may subject the application to an "extended review." § 82-4-439(1), MCA (2019). The Department must provide notice of the extended review to the applicant and "must include a detailed explanation of the deficiencies." § 82-4-439(2)(a), MCA (2019). The applicant then has an opportunity to cure the deficiencies and "[w]ithin 30 days of receipt of the applicant's response to the identified deficiencies, the department shall review the response and notify the applicant as to whether or not the application is acceptable." § 82-4-439(2)(b), MCA (2019). If the application remains unacceptable, "the department shall [again] notify the applicant in writing and include a detailed identification of the deficiencies." § 82-4-439(2)(b), MCA (2019).

On April 19 and 20, 2019, FirstMark Materials applied to DEQ for an

opencut mining permit to mine gravel at Oscar's Site. On April 25, 2019 the application was deemed complete. Public notice was given, and a public hearing was held on June 20, 2019. After the public hearing, the Department subjected the application to an extended review. § 82-4-439(2)(l), MCA (2019). In total, the Department issued six deficiency notices<sup>1</sup> and FirstMark Materials responded to each one.

Regarding the identity of the operator, the Department's Fourth Deficiency Notice dated January 14, 2022 requested "proof that the original applicant, FirstMark Materials, is pursuing an opencut permit for the Oscar site" and "documentation that FirstMark Materials is registered to conduct business in Montana." **Exhibit A.** On April 19, 2022, the requested information was provided to the Department, apparently resolving the issue because the Department proceeded to technical and scientific review and did not raise the operator issue again in either the [Fifth] Deficiency Notice dated July 14, 2022 or the [Sixth] Deficiency Notice dated September 1, 2022. **Exhibits B and C.**

Prior to receipt of FirstMark Material's response to the [Sixth] Deficiency Letter, on November 22, 2022, the Department issued a letter (the "November 22 Denial Letter") purportedly denying the application, stating it was "fatally

---

<sup>1</sup> Two of the deficiency letters were noted as the "Fourth Deficiency Notice," one dated January 14, 2022 and one dated July 14, 2022. Therefore, although the most recent notice is termed the "Fifth Deficiency Notice" dated September 1, 2022, it is actually the sixth deficiency notice.

deficient” due to a “substantial change of the applicant.” **Exhibit D.**

## **II. PARTIES AND JURISDICTION**

The Board is a quasi-judicial board consisting of seven members appointed by the Governor, attached to the Department for administrative purposes. § 2-15-3502, MCA. The Board has authority to conduct hearings required pursuant to the Opencut Mining Act. § 82-4-422(3), MCA.

“[A] person whose interests are or may be adversely affected by a final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying material under this part is entitled to a hearing before the board” if requested within 30 days of the Department’s decision. § 82-4-427(1), MCA.

FirstMark Materials is a domestic limited liability company formed and existing in good standing in Montana. FirstMark Materials is and remains the operator for the Oscar’s Site Permit. FirstMark Materials has submitted application materials, responses to deficiency notices, posted a bond for the Oscar’s Site Permit, is the lessee of the Oscar’s site, and is continuing to seek the issuance of the permit from the Department. Therefore, FirstMark Materials has an interest that has been adversely impacted by the Department’s purported denial of the pending Oscar’s Site Permit.

MC Property Holdings, LLC, has executed all documents pertaining to

FirstMark Materials pursuant to its authority under a power of attorney and Christensen Fulton & Filz, PLLC's representation of FirstMark Materials is likewise derived from the authority granted to MC Property Holdings, LLC.

Croell is a general for-profit corporation formed in Iowa, registered and in good standing to do business in Montana. Croell has contractual rights to acquire the Oscar's Site Permit anticipated to be issued to FirstMark Materials. If and when the Oscar's Site Permit is issued to FirstMark Materials, the parties will then apply to the Department for assignment of the Oscar's Site Permit to Croell, in compliance with, and as allowed by Administrative Rules of Montana 17.24.224. Therefore, Croell has an interest that has been adversely affected by the Department's purported denial of the pending Oscar's Site Permit.

Pursuant to the Opencut Mining Act, both FirstMark Materials and Croell may appeal the Department's decision and request a hearing before the Board.

### **III. CLAIM FOR RELIEF**

#### **The Department's Improper Denial of the Oscar's Site Permit**

The Department improperly denied the pending application for the Oscar's Site Permit based on mistakes of fact about the relationship among FirstMark Materials, the landowner, and Croell. The Department wrongly denied the permit application by failing to provide notice that the application was not complete pursuant to section 82-4-432(4), MCA, a deficiency notice pursuant to section 82-4-432(10), MCA, or a deficiency notice pursuant to section 82-4-439(2), MCA.

#### IV. RELIEF REQUESTED

THEREFORE, Croell respectfully requests that the Board:

1. Declare the Department's November 22, 2022 Denial Letter null and void.
2. Remand this matter back to the Department with instructions to rescind its November 22, 2022 Denial Letter and to process the application for the Oscar's Site Permit in accordance with the Opencut Mining Act.
3. Grant FirstMark Materials and Croell further relief as required or justified.

Dated this 21<sup>st</sup> day of December 2022.

/s/ Michael Tennant  
CROWLEY FLECK PLLP  
P. O. Box 2529  
Billings, MT 59103-2529

*Attorneys for Croell, Inc.*

/s/ Tim Filz  
CHRISTENSEN FULTON & FILZ, PLLC  
P. O. Box 339  
Billings, MT 59102

*Attorneys for MC Property Holdings, as agent  
under power of attorney for FirstMark Materials*

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 21st day of December 2022:

<input type="checkbox"/> U.S. Mail	Sandy Moisey Scherer, Board Secretary
<input type="checkbox"/> FedEx	Board of Environmental Review
<input type="checkbox"/> Hand-Delivery	1520 E. Sixth Avenue
<input checked="" type="checkbox"/> Email	P.O. Box 200901
<input type="checkbox"/> Sharefile	Helena, MT 59620-0901
	deqbersecretary@mt.gov

<input type="checkbox"/> U.S. Mail	Michael Russel, Board Attorney
<input type="checkbox"/> FedEx	Board of Environmental Review
<input type="checkbox"/> Hand-Delivery	Agency Legal Services Bureau
<input checked="" type="checkbox"/> Email	1712 Ninth Avenue
<input type="checkbox"/> Sharefile	P.O. Box 201440
	Helena, MT 59620-1440
	michael.russel@mt.gov
	ehagen2@mt.gov

<input type="checkbox"/> U.S. Mail	Lee McKenna, Attorney Specialist
<input type="checkbox"/> FedEx	Montana Department of Environmental
<input type="checkbox"/> Hand-Delivery	Quality
<input checked="" type="checkbox"/> Email	1520 East Sixth Avenue
<input type="checkbox"/> Sharefile	P.O. Box 200901
	Helena, MT 59620
	lee.mckenna@mt.gov

<input type="checkbox"/> U.S. Mail	Tim Filz
<input type="checkbox"/> FedEx	Christensen Fulton & Filz, PLLC
<input type="checkbox"/> Hand-Delivery	19 36 <sup>th</sup> St West #3
<input checked="" type="checkbox"/> Email	Billings, MT 59102
<input type="checkbox"/> Sharefile	filz@cflawfirm.net

/s/ Michael Tennant  
CROWLEY FLECK PLLP



January 14, 2022

Sent via email to [rayh@cmgconstruction.com](mailto:rayh@cmgconstruction.com)

FirstMark Materials  
6513 Trade Center Avenue  
Billings MT 59101

RE: Fourth Deficiency Notice  
Application for Opencut Mining Permit  
Oscar's Site, Opencut #3115  
Yellowstone County

To Whom It May Concern:

On December 22, 2021, the Department of Environmental Quality (DEQ) received your response to its August 11, 2021 Deficiency Notice on the Opencut Mining Permit application for the above referenced site.

On June 20, 2019, DEQ conducted a public meeting for the above referenced permit application pursuant to the Opencut Mining Act, § 82-4-432, MCA. Public comments received at the meeting indicated that substantial issues were not adequately satisfied by the proposed Plan of Operation. Specifically:

- Dec 22*
1. The proposed Plan of Operation does not provide for the appropriate protection of water quality and quantity of the shallow ground water resources that nearby residents use for drinking water and domestic needs, MCA 82-4-434(2)(1)(2019). The Hydrologic Assessment Report identified potential impacts to water resources from the proposed opencut operations.
    - Nitrate levels at one sample location are 54.6 mg/l, exceeding the safe drinking water standard by 5 times. The application does not adequately address potential impacts of the high nitrate levels on postmine pond water quality if operations were to occur.
    - Hydrocarbons have been detected during water sampling and it is unknown where the hydrocarbons originate, or their potential impact to groundwater and surface water discharges if Opencut operations were to occur.
    - Fueling is planned to occur onsite and no protection of the shallow groundwater aquifer has been proposed.
    - The proposed Plan of Operation is inconsistent with the plan analyzed for impacts in the Hydrologic Assessment Report, making it unclear how Opencut activities would occur at this site and therefore unclear how the Operator would protect water quality and quantity. The Hydrologic Assessment Report analyzes impacts from a mining method and mining extent that differs from the Plan of Operation.
    - Page 41 and 47 of the Hydrologic Assessment Report identifies two wells that may be negatively affected. ARM 17.24.218(1)(h)(ii)(B) states that the plan of operation must include a water quality protection and management section that includes an explanation of proposed measures to protect the water rights of other parties or to replace an



adversely affected water source that has a beneficial use. No definite explanation/mitigation was described within the plan to describe how the adversely affected wells would be mitigated or replaced.

- The area is known to have seasonal changes in groundwater levels and presumably surface water quantity in the drainage ditch. Samples and water levels were only taken in the winter, and therefore the Hydrologic Assessment Report did not analyze for seasonal variation in the impacts to water rights.
2. The application displays two boundaries, a proposed permit boundary and a non-bonded boundary. The Plan of Operation does not propose to mine the proposed non-bonded area, as it is required to have a U.S. Army Corps of Engineers ("USACE") permit, prior to any disturbance occurring. Opencut will not allow non-bonded area to be permitted if Opencut operations cannot occur within it.

As a result of these substantial issues, DEQ subjected the application to extended review in accordance with § 82-4-439, MCA.

The Department has completed its extended review of the application in accordance with requirements of §§ 82-4-432 and 434, MCA. In accordance with § 82-4-432(10)(a), this letter serves as notice to you that DEQ has determined that the application is not acceptable. A detailed identification of deficiencies that keep further review from occurring is provided below.

Pursuant to ARM 17.24.222 and this Deficiency Letter, please submit revised application materials addressing the deficiencies identified below to the DEQ Opencut Mining Section in Helena as one package. Submit complete versions of any forms you revise; do not resubmit the whole application package. For example, if you make changes to the *Plan of Operation and Application*, resubmit that entire form. Do not resubmit unchanged documents attached to it. The contents of an application constitute legal documents and become part of the permit; therefore, all required certifications and approvals must be signed and dated.

If you do not submit application materials within one year from the date of this deficiency letter, DEQ may notify you that the application will be abandoned and void unless the requested information is provided within 30 days of DEQ's notification. MCA 82-4-432(4)(c)(i) and (ii).

Opencut Section forms are available at: <https://deq.mt.gov/mining/Programs/opencut>.

### **Opencut Mining Plan of Operation and Application**

**General Deficiency – Required Information to Proceed with Review:** The Department of Environmental Quality - Opencut Section (DEQ) is in receipt of the application resubmitted by Firstmark Materials in reply to the DEQ deficiency letter sent on August 11, 2021. Thank you for the response.

As part of its review, DEQ researched the status of Firstmark Materials via the Montana Secretary of State website. DEQ discovered that Firstmark Materials is no longer in good standing with the Montana Secretary of State to conduct business in Montana.



Additionally, as communicated by DEQ in past deficiency letters (Deficiency # 17 for August 11, 2021 deficiency letter, and deficiency #36 for August 28, 2019 deficiency letter), Firstmark Materials must submit a bond for DEQ to proceed with processing the Firstmark Materials application. Even with the latest submittal, Firstmark Materials has not submitted the required bond. DEQ cannot proceed with the processing of the application unless a valid bond, under the correct company name (Firstmark Materials), is submitted.

Therefore, prior to further technical and scientific review of the resubmitted application received on December 22, 2021, DEQ is requiring that Firstmark Materials:

- Provide proof that the original applicant, FirstMark Materials, is pursuing an opencut permit for the Oscar site and provide documentation that Firstmark Materials is registered to conduct business In Montana; and
  - Submit an acceptable bond, signed by a designated official of Firstmark Materials, in the amount of \$1,756,934.00 to DEQ. The bond must meet the requirements of § 82-4-433, Montana Code Annotated (MCA).
- Or
- Withdraw the permit application.

Please be advised that a significant change to the application, such as a change in applicant is not approvable by DEQ under the original application submittal. To be further considered for a permit, the substitution of a different applicant requires withdrawal of the pending permit application and submittal of a new application under current law. The Opencut Act was significantly amended in May, 2021 by HB 599. New permit application forms are available on the DEQ website: <https://deq.mt.gov/mining/Programs/opencut>.

The DEQ strongly recommends that you use the above-listed deficiencies as a checklist to confirm that your revised application materials are complete and acceptable prior to resubmittal.

If you have any questions, contact the Opencut Section at (406) 444-4970.

Sincerely,



JJ Conner

Environmental Science Specialist  
Opencut Mining Section  
Department of Environmental Quality  
PO Box 200901, Helena, MT 59620-0901  
Phone: (406) 444-4979; Fax: (406) 444-4988  
[jconner@mt.gov](mailto:jconner@mt.gov)

C: Interested Parties

July 14, 2022

Sent via email to [rayh@cmgconstruction.com](mailto:rayh@cmgconstruction.com)

FirstMark Materials  
6513 Trade Center Avenue  
Billings MT 59101

RE: Fourth Deficiency Notice  
Application for Opencut Mining Permit  
Oscar's Site, Opencut #3115  
Yellowstone County

To Whom It May Concern:

On May 16, 2022, the Department of Environmental Quality (DEQ) received your response to its January 14, 2022 Deficiency Notice on the Opencut Mining Permit application for the above referenced site.

On June 20, 2019, DEQ conducted a public meeting for the above referenced permit application pursuant to the Opencut Mining Act, § 82-4-432, MCA. Public comments received at the meeting indicated that substantial issues were not adequately satisfied by the proposed Plan of Operation. Specifically:

1. The proposed Plan of Operation does not provide for the appropriate protection of water quality and quantity of the shallow ground water resources that nearby residents use for drinking water and domestic needs, MCA 82-4-434(2)(1)(2019). The Hydrologic Assessment Report identified potential impacts to water resources from the proposed opencut operations.
  - Nitrate levels at one sample location are 54.6 mg/l, exceeding the safe drinking water standard by 5 times. The application does not adequately address potential impacts of the high nitrate levels on postmine pond water quality if operations were to occur.
  - Hydrocarbons have been detected during water sampling and it is unknown where the hydrocarbons originate, or their potential impact to groundwater and surface water discharges if Opencut operations were to occur.
  - Fueling is planned to occur onsite and no protection of the shallow groundwater aquifer has been proposed.
  - The proposed Plan of Operation is inconsistent with the plan analyzed for impacts in the Hydrologic Assessment Report, making it unclear how Opencut activities would occur at this site and therefore unclear how the Operator would protect water quality and quantity. The Hydrologic Assessment Report analyzes impacts from a mining method and mining extent that differs from the Plan of Operation.
  - Page 41 and 47 of the Hydrologic Assessment Report identifies two wells that may be negatively affected. ARM 17.24.218(1)(h)(ii)(B) states that the plan of operation must include a water quality protection and management section that includes an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has a beneficial use. No definite explanation/mitigation was described within the plan to describe how the adversely affected wells would be mitigated or replaced.

- The area is known to have seasonal changes in groundwater levels and presumably surface water quantity in the drainage ditch. Samples and water levels were only taken in the winter, and therefore the Hydrologic Assessment Report did not analyze for seasonal variation in the impacts to water rights.
- 2. The application displays two boundaries, a proposed permit boundary and a non-bonded boundary. The Plan of Operation does not propose to mine the proposed non-bonded area, as it is required to have a U.S. Army Corps of Engineers ("USACE") permit, prior to any disturbance occurring. Opencut will not allow non-bonded area to be permitted if Opencut operations cannot occur within it.

As a result of these substantial issues, DEQ subjected the application to extended review in accordance with § 82-4-439, MCA.

The Department has completed its extended review of the application in accordance with requirements of §§ 82-4-432 and 434, MCA. In accordance with § 82-4-432(10)(a), this letter serves as notice to you that DEQ has determined that the application is not acceptable. A detailed identification of deficiencies that keep further review from occurring is provided below.

Pursuant to ARM 17.24.222 and this Deficiency Letter, please submit revised application materials addressing the deficiencies identified below to the DEQ Opencut Mining Section in Helena as one package. Submit complete versions of any forms you revise; do not resubmit the whole application package. For example, if you make changes to the *Plan of Operation and Application*, resubmit that entire form. Do not resubmit unchanged documents attached to it. The contents of an application constitute legal documents and become part of the permit; therefore, all required certifications and approvals must be signed and dated.

If you do not submit application materials within one year from the date of this deficiency letter, DEQ may notify you that the application will be abandoned and void unless the requested information is provided within 30 days of DEQ's notification. MCA 82-4-432(4)(c)(i) and (ii).

Opencut Section forms are available at: <http://deq.mt.gov/Mining/opencut>.

### Opencut Mining Plan of Operation and Application

**Note:** The *italicized* deficiencies below are repeated from the Deficiency Notice dated August 11, 2021, because they were not addressed in the most recent submittal. The repeated deficiencies may contain clarification and/or additional information below them. Any deficiency items with a strike-through have been addressed. Correct the items that have not been crossed out.

1. ***41-10:*** *According to the U.S. Army Corps of Engineers ("USACE") letter dated March 28, 2019, the areas currently designated as non-bonded may contain "Waters of the US" and cannot be disturbed until a USACE permit is obtained. The USACE's March 28, 2019 letter specifies the areas that can and cannot be impacted by Opencut Operations prior to obtaining their permit. MCA 82-4-434(2)(l)(2019).*

*Therefore, either:*

- a. Obtain the Army corps of Engineers (USACE) permit prior to resubmittal of the application and prior to this site being permitted; or
- b. ~~Remove the non-bonded area from the proposed permit area, submit revised boundaries, and revise all other affected application materials for consistency (Reclamation Bond Spreadsheet, Boundary Coordinate Table, Water Resource~~

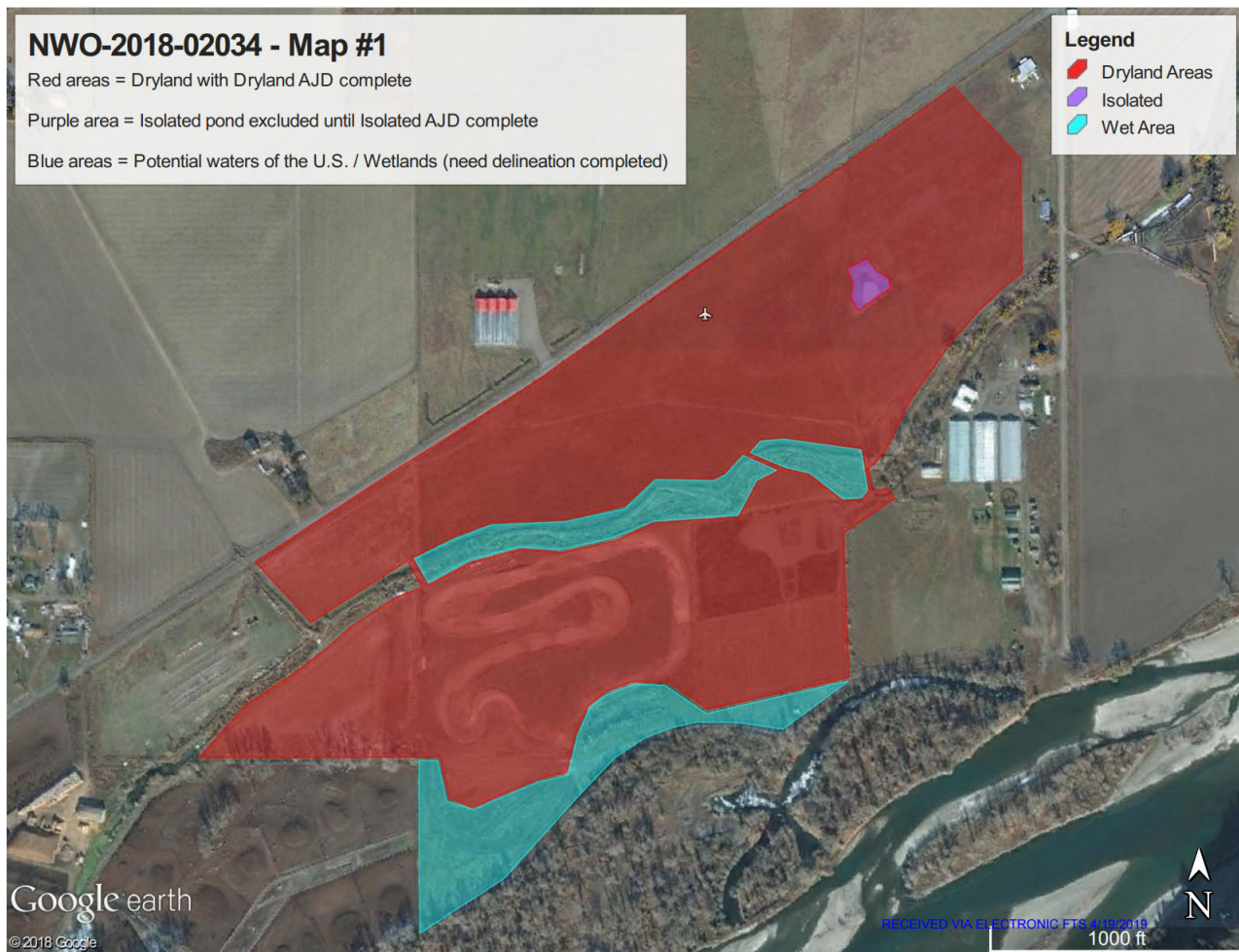


~~Assessment, etc.).~~

**Update:** Several areas as outlined in the March 28, 2019 letter from the USACE (NOW- 2018-02034-Map #1) are not approved to be disturbed by the USACE prior to obtaining their permit. Provide the USACE permit or remove those areas from the proposed permit area and update all applicable sections of the application.

**Update:** The remaining above deficiency was not addressed.

The areas shown in teal on the below snip of the Army Corps of Engineers map are not approved to be disturbed. The proposed permit includes disturbance and mining of those areas and the permit cannot be approved until they are either approved by the Army Corps of Engineers to be disturbed and/or removed from the permit boundary. If the areas in teal are removed from the permit boundary, ensure all corresponding sections of the application are updated (i.e. maps, hydrologic assessment report, etc.).



2. **E2-2:** Postmining land uses include fishery and recreation. These uses are not described in the application by the operator, and including them may complicate bond calculation and release by requiring bonding for unplanned land uses which may require additional construction or design. Additionally, the appropriate water rights may be required before release of the site to ensure the postmining land uses can be met. Therefore, either provide design details within the application and display them on the reclamation map for the postmining land uses of fishery and recreation or uncheck the boxes and pursue those improvements after the site is released.

## Maps

**Map(s) Note:** If changes are made to the application that affects the map(s), submit a revised map(s). The map's date must be revised prior to resubmittal to reflect that the map has been changed. Map requirements can be found at ARM 17.24.221 (1-7) and in the Map Guideline at <http://deq.mt.gov/Mining/opencut>.

3. **Reclamation Map:** Refer to deficiency A1-10 above and revise the reclamation map if/as applicable.
4. **Zoning:** It has come to DEQ's attention that zoning changes may have occurred on one or more of the three parcels (listed below) that comprise the proposed permit boundary. Therefore, provide written documentation from Yellowstone County stating whether zoning regulations, ordinances, or other restrictions do or do not prohibit the opencut operation within any portion of the proposed permit boundary. If zoning changes have occurred, it will be necessary to submit a revised zoning form and make all other necessary changes throughout the application that affect the mining and reclamation plan (i.e. permit boundary, water resource assessment, application, maps, etc.).

Parcel A: an approximately 59-acre parcel at the northeast end of the project, described as S34t, T01S, R25E, RRAC NE4 and FRAC LT 1 & 2 OF RD.

Parcel B: an approximately 25-acre parcel on the west end of the project site, described as S34, T01S, R25E, COS 1299, PARCEL 1, and

Parcel C: an approximately 127-acre parcel on the south end of the project site, described as S34, T01S, R25E, FRAC LTS 1 & 2 & FRAC SE4NENE4 (LESS COS 3036 01).

5. **Water Resource Assessment:** If changes are made to this application that affect the Water Resource Assessment, the Operator must resubmit the entire WRA, as the existing WRA would be replaced in its entirety with the new WRA upon receipt by Opencut.

## Bond

**Bond Note:** For the purposes of calculating the correct bond amount in the Reclamation Bond Spreadsheet, it may be in the Operator's best interest to wait until all of the other remaining deficiencies, identified in this Notice, are resolved before addressing the deficiencies identified below. If the acreage, dollar amount, or other bond parameters change, submit a revised Bond or an additional Bond. The Opencut Section requires the original paper Bond to be submitted before the Permit can be issued.

6. **Surety Bond #RF9186341:** Address the following deficiency(s):
  - a. The Surety Name on the Bond does not match the NAIC Federal Registry. Please either submit a new Bond with the correct Surety Name or submit a Change Name Rider for the Surety Company.

**Update:** This is a new deficiency.

The DEQ strongly recommends that you use the above-listed deficiencies as a checklist to confirm that your revised application materials are complete and acceptable prior to resubmittal.

If you have any questions, contact the Opencut Section at (406) 444-4970. Sincerely,

A handwritten signature in blue ink, appearing to read "JJ Conner".

JJ Conner  
Environmental Science Specialist Opencut  
Mining Section  
Department of Environmental Quality  
PO Box 200901, Helena, MT 59620-0901  
Phone: (406) 444-4979; Fax: (406) 444-4988  
[jconner@mt.gov](mailto:jconner@mt.gov)

C: Interested Parties

September 1, 2022

Sent via email to [rayh@cmgconstruction.com](mailto:rayh@cmgconstruction.com)

FirstMark Materials  
6513 Trade Center Avenue  
Billings MT 59101

RE: Fifth Deficiency Notice  
Application for Opencut Mining Permit  
Oscar's Site, Opencut #3115  
Yellowstone County

To Whom It May Concern:

On August 2, 2022, the Department of Environmental Quality (DEQ) received your response to its July 14, 2022 Deficiency Notice on the Opencut Mining Permit application for the above referenced site.

On June 20, 2019, DEQ conducted a public meeting for the above referenced permit application pursuant to the Opencut Mining Act, § 82-4-432, MCA. Public comments received at the meeting indicated that substantial issues were not adequately satisfied by the proposed Plan of Operation. Specifically:

1. The proposed Plan of Operation does not provide for the appropriate protection of water quality and quantity of the shallow ground water resources that nearby residents use for drinking water and domestic needs, MCA 82-4-434(2)(1)(2019). The Hydrologic Assessment Report identified potential impacts to water resources from the proposed opencut operations.
  - Nitrate levels at one sample location are 54.6 mg/l, exceeding the safe drinking water standard by 5 times. The application does not adequately address potential impacts of the high nitrate levels on postmine pond water quality if operations were to occur.
  - Hydrocarbons have been detected during water sampling and it is unknown where the hydrocarbons originate, or their potential impact to groundwater and surface water discharges if Opencut operations were to occur.
  - Fueling is planned to occur onsite and no protection of the shallow groundwater aquifer has been proposed.
  - The proposed Plan of Operation is inconsistent with the plan analyzed for impacts in the Hydrologic Assessment Report, making it unclear how Opencut activities would occur at this site and therefore unclear how the Operator would protect water quality and quantity. The Hydrologic Assessment Report analyzes impacts from a mining method and mining extent that differs from the Plan of Operation.
  - Page 41 and 47 of the Hydrologic Assessment Report identifies two wells that may be negatively affected. ARM 17.24.218(1)(h)(ii)(B) states that the plan of operation must include a water quality protection and management section that includes an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has a beneficial use. No definite explanation/mitigation was described within the plan to describe how the adversely affected wells would be mitigated or replaced.
  - The area is known to have seasonal changes in groundwater levels and presumably surface water quantity in the drainage ditch. Samples and water levels were only taken in the winter, and therefore the Hydrologic Assessment Report did not analyze for seasonal variation in the impacts to water rights.

2. The application displays two boundaries, a proposed permit boundary and a non-bonded boundary. The Plan of Operation does not propose to mine the proposed non-bonded area, as it is required to have a U.S. Army Corps of Engineers ("USACE") permit, prior to any disturbance occurring. Opencut will not allow non-bonded area to be permitted if Opencut operations cannot occur within it.

As a result of these substantial issues, DEQ subjected the application to extended review in accordance with § 82-4-439, MCA.

The Department has completed its extended review of the application in accordance with requirements of §§ 82-4-432 and 434, MCA. In accordance with § 82-4-432(10)(a), this letter serves as notice to you that DEQ has determined that the application is not acceptable. A detailed identification of deficiencies that keep further review from occurring is provided below.

Pursuant to ARM 17.24.222 and this Deficiency Letter, please submit revised application materials addressing the deficiencies identified below to the DEQ Opencut Mining Section in Helena as one package. Submit complete versions of any forms you revise; do not resubmit the whole application package. For example, if you make changes to the *Plan of Operation and Application*, resubmit that entire form. Do not resubmit unchanged documents attached to it. The contents of an application constitute legal documents and become part of the permit; therefore, all required certifications and approvals must be signed and dated.

If you do not submit application materials within one year from the date of this deficiency letter, DEQ may notify you that the application will be abandoned and void unless the requested information is provided within 30 days of DEQ's notification. MCA 82-4-432(4)(c)(i) and (ii).

Opencut Section forms are available at: <http://deq.mt.gov/Mining/opencut>.

### **Opencut Mining Plan of Operation and Application**

**Note:** Only a bond correction was submitted on August 2, 2022. No other deficiencies were addressed. The below deficiencies are repeated from the July 14, 2022, deficiency letter. In the future, please ensure you address all deficiencies and submit a complete reply to Opencut.

The *italicized* deficiencies below are repeated from the Deficiency Notice dated **August 11, 2021**, because they were not addressed in the most recent submittal. The repeated deficiencies may contain clarification and/or additional information below them. Any deficiency items with a strike-through have been addressed. Correct the items that have not been crossed out.

1. ***~~41-10:~~*** *According to the U.S. Army Corps of Engineers ("USACE") letter dated March 28, 2019, the areas currently designated as non-bonded may contain "Waters of the US" and cannot be disturbed until a USACE permit is obtained. The USACE's March 28, 2019 letter specifies the areas that can and cannot be impacted by Opencut Operations prior to obtaining their permit. MCA 82-4-434(2)(l)(2019).*

*Therefore, either:*

- a. Obtain the Army corps of Engineers (USACE) permit prior to resubmittal of the application and prior to this site being permitted; or
- b. ~~Remove the non-bonded area from the proposed permit area, submit revised boundaries, and revise all other affected application materials for consistency (Reclamation Bond Spreadsheet, Boundary Coordinate Table, Water Resource Assessment, etc.).~~

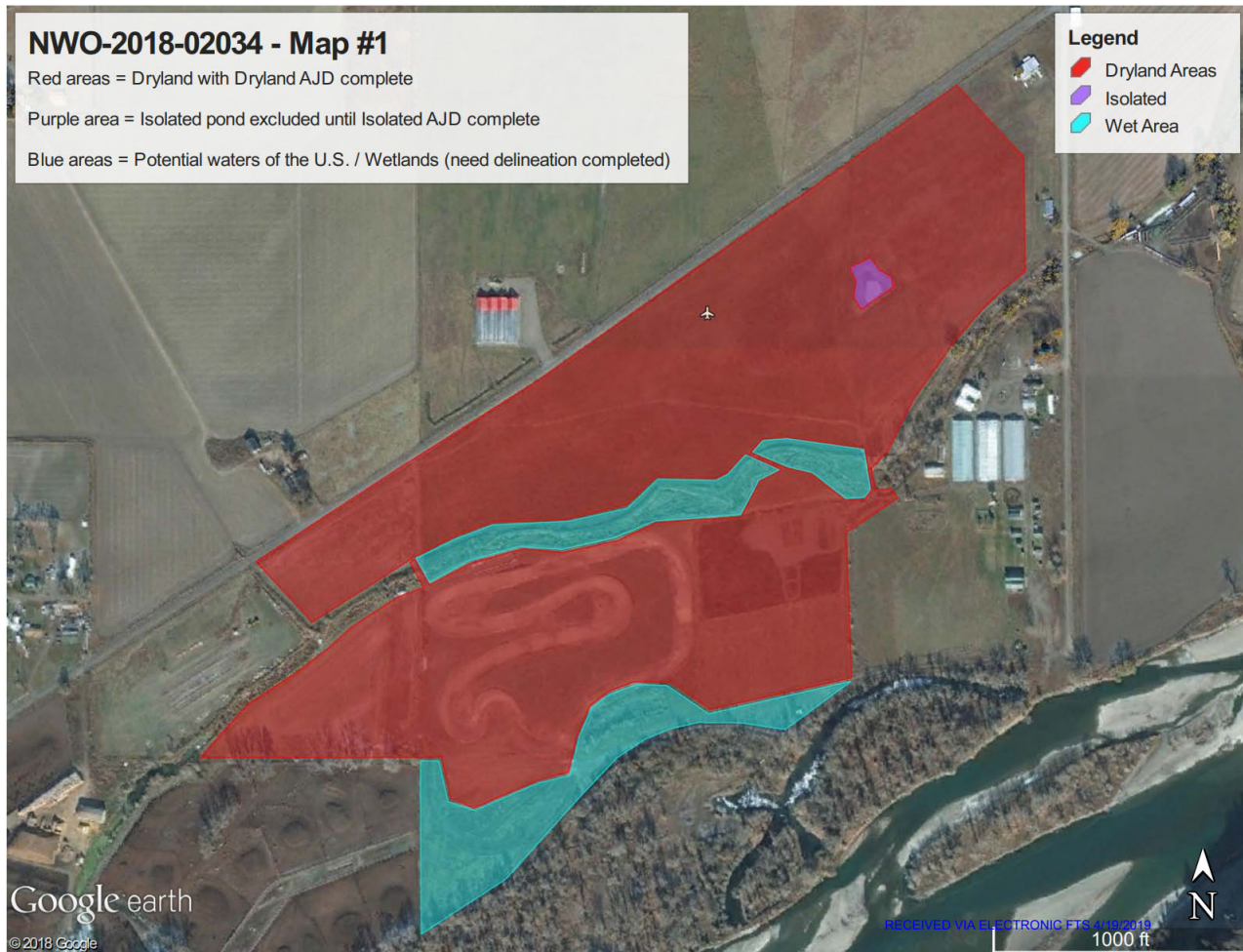
**Update:** Several areas as outlined in the March 28, 2019 letter from the USACE (NOW- 2018-02034-Map #1) are not approved to be disturbed by the USACE prior to obtaining their permit. Provide the USACE permit or remove those areas from the proposed permit area and update all



*applicable sections of the application.*

**Update:** The remaining above deficiency was not addressed.

The areas shown in teal on the below snip of the Army Corps of Engineers map are not approved to be disturbed. The proposed permit includes disturbance and mining of those areas and the permit cannot be approved until they are either approved by the Army Corps of Engineers to be disturbed and/or removed from the permit boundary. If the areas in teal are removed from the permit boundary, ensure all corresponding sections of the application are updated (i.e. maps, hydrologic assessment report, etc.).



2. **E2-2:** Postmining land uses include fishery and recreation. These uses are not described in the application by the operator, and including them may complicate bond calculation and release by requiring bonding for unplanned land uses which may require additional construction or design. Additionally, the appropriate water rights may be required before release of the site to ensure the postmining land uses can be met. Therefore, either provide design details within the application and display them on the reclamation map for the postmining land uses of fishery and recreation or uncheck the boxes and pursue those improvements after the site is released.

## Maps

**Map(s) Note:** If changes are made to the application that affects the map(s), submit a revised map(s). The map's date must be revised prior to resubmittal to reflect that the map has been changed. Map requirements can be found at ARM 17.24.221 (1-7) and in the Map Guideline at

<http://deq.mt.gov/Mining/opencut>.

3. **Reclamation Map:** Refer to deficiency A1-10 above and revise the reclamation map if/as applicable.
4. **Zoning:** It has come to DEQ's attention that zoning changes may have occurred on one or more of the three parcels (listed below) that comprise the proposed permit boundary. Therefore, provide written documentation from Yellowstone County stating whether zoning regulations, ordinances, or other restrictions do or do not prohibit the opencut operation within any portion of the proposed permit boundary. If zoning changes have occurred, it will be necessary to submit a revised zoning form and make all other necessary changes throughout the application that affect the mining and reclamation plan (i.e. permit boundary, water resource assessment, application, maps, etc.).

Parcel A: an approximately 59-acre parcel at the northeast end of the project, described as S34t, T01S, R25E, RRAC NE4 and FRAC LT 1 & 2 OF RD.

Parcel B: an approximately 25-acre parcel on the west end of the project site, described as S34, T01S, R25E, COS 1299, PARCEL 1, and

Parcel C: an approximately 127-acre parcel on the south end of the project site, described as S34, T01S, R25E, FRAC LTS 1 & 2 & FRAC SE4NENE4 (LESS COS 3036 01).

5. **Water Resource Assessment:** If changes are made to this application that affect the Water Resource Assessment, the Operator must resubmit the entire WRA, as the existing WRA would be replaced in its entirety with the new WRA upon receipt by Opencut.

## **Bond**

**Bond Note:** For the purposes of calculating the correct bond amount in the Reclamation Bond Spreadsheet, it may be in the Operator's best interest to wait until all of the other remaining deficiencies, identified in this Notice, are resolved before addressing the deficiencies identified below. If the acreage, dollar amount, or other bond parameters change, submit a revised Bond or an additional Bond. The Opencut Section requires the original paper Bond to be submitted before the Permit can be issued.

6. **Surety Bond #RF9186341:** *Address the following deficiency(s):*
  - a. *The Surety Name on the Bond does not match the NAIC Federal Registry. Please either submit a new Bond with the correct Surety Name or submit a Change Name Rider for the Surety Company.*

**Update:** ~~This is a new deficiency.~~

**Update:** The Operator Name is missing from the Surety Rider form. Submit a new Rider or Surety form.

The DEQ strongly recommends that you use the above-listed deficiencies as a checklist to confirm that your revised application materials are complete and acceptable prior to resubmittal.

If you have any questions, contact the Opencut Section at (406) 444-4970. Sincerely,

A handwritten signature in blue ink, appearing to read "JJ Conner".

JJ Conner  
Environmental Science Specialist Opencut  
Mining Section  
Department of Environmental Quality  
PO Box 200901, Helena, MT 59620-0901  
Phone: (406) 444-4979; Fax: (406) 444-4988  
[jconner@mt.gov](mailto:jconner@mt.gov)

C: Interested Parties

November 22, 2022

Sent via email to [rayh@firstmarkmaterials.com](mailto:rayh@firstmarkmaterials.com)

FirstMark Materials  
Kevin McGovern  
6513 Trade Center Avenue  
Billings, MT 59101

RE: FirstMark Materials – Oscar’s Site – OC#3115 Denial of Application due to Change of Applicant

To Whom It May Concern:

Through information in emails, letters and other documents received by the Department of Environmental Quality (DEQ), DEQ has determined that the Oscar’s site permit application (OC#3115) has had a substantial change of the applicant from FirstMark Materials to Croell, Inc. Neither the Opencut Mining Act nor the Administrative Rules of Montana allow for a change of applicant during the application review process, thereby making the application submitted to DEQ fatally deficient. The following points are evidence for a substantial change of the applicant:

- FirstMark Materials does not appear on a gravel lease with the current landowner. The most recent gravel lease dated November 10, 2021, grants Croell Inc. the exclusive lease for the Oscar’s site.
- The Landowner Consultation Form submitted to DEQ on January 2, 2019 does not accurately reflect the current gravel lease described above, which was signed by the landowner while the Oscar’s site permit application has been pending. Therefore, the landowner consultation requirement outlined in Montana Code Annotated (MCA) 82-4-432(2)(b)(iv) and (v) has not satisfied.
- It does not appear that FirstMark Materials has ever held a gravel lease for this site from the landowner.
  - Gravel lease held by CMG Construction, LLC on December 1, 2017.
  - Gravel lease held by MC Property Holdings, LLC on November 10, 2021.
  - Gravel lease held by Croell Inc. as of November 11, 2021.
- An email to DEQ’s Opencut Mining Section included a July 20, 2022 reply from Kevin McGovern to a consultant stating that further charges to address application deficiencies, “...are Croell’s responsibility”.
- The surety company for the existing bond submitted for the Oscar’s site permit application informed DEQ that Croell Inc. is pursuing the pending permit Application:
  - “Croell acquired the rights to that certain Opencut Mining Plan of Operation and Application (the “Oscar’s Site Application”) submitted by FirstMark Materials, LLC [“FM Materials”], with respect to the proposed opencut mining permit (which is expected to be Permit No. 3115) (the “Oscar’s Site Permit”), for the proposed mining operation to be conducted at the location commonly known as Oscar’s site, in Yellowstone County, Montana.” - First Addendum to General Indemnity Agreement Commercial Surety, dated May 5, 2022, p. 7, RECITALS, A.
- Email forwarded to DEQ from Yellowstone County with an attached letter dated November 10, 2022 stated that “FirstMark Materials, through Croell and its agent, have requested...”

The above evidence identifies that Croell Inc., not FirstMark Materials is pursuing the Oscar's site permit. Therefore, the Oscar's site permit application submitted by FirstMark Materials is disapproved. If Croell Inc. wishes to pursue a permit for the Oscar's site, Croell Inc. must submit a new permit application under current law.

Sincerely,

A handwritten signature in blue ink, appearing to read "JJ Conner".

JJ Conner, Unit Coordinator  
Opencut Mining Section  
Department of Environmental Quality  
P.O. Box 200901, Helena, MT 59620-0901  
Phone: (406) 444-4979; Fax: (406) 444-4988  
Email: [jconner@mt.gov](mailto:jconner@mt.gov)

Cc: Mark Carlstrom [mgcbiz10@hotmail.com](mailto:mgcbiz10@hotmail.com)  
Kevin McGovern [kevinm@k2civilinc.com](mailto:kevinm@k2civilinc.com)  
Interested Parties