DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
APRIL 7, 2023

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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

FEBRUARY 24, 2023

Call to Order

Vice Chair Aguirre called the meeting to order at 9:00 a.m.

Attendance

Board Members Present
By Zoom: Vice Chair Stacy Aguirre; Board Members Julia Altemus, David Simpson, and Joe Smith.

Roll was called and a quorum was present.

Board Attorney Present
Aislinn Brown

DEQ Personnel Present
Board Liaison: James Fehr
Board Secretary: Sandy Moisey Scherer
Director: Chris Dorrington
DEQ Legal: Catherine Armstrong, Kirsten Bowers, Loryn Johnson, Sam King, Kurt Moser, Nicholas Whitaker, Jessica Wilkerson, Colson Williams
Public Policy: Moira Davin, Rebecca Harbage
Water Quality: Katie Makarowski, Christy Meredith
Air, Energy & Mining: Adam Bradley
Enforcement: Chad Anderson
Subdivisions: Rachel Clark

Other Parties Present
Laurie Crutcher, Crutcher Court Reporting
Aislinn Brown, Elena Hagen – Montana DOJ Agency Legal Services Bureau
Samuel Yemington, Holland & Hart
Barbara Chillcott, WELC
Shiloh Hernandez, Earthjustice
Todd Briggs
Ray Stout, Kootenai Valley Record

I. ADMINISTRATIVE MATERIALS

A. **Review and Approve Minutes**

A.1. **The Board will vote on adopting the December 9, 2022, Meeting Minutes**

Board member Simpson moved to APPROVE the December 9, 2022, meeting minutes. Board member Smith SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

B. **Introduction of new Board members and Board Attorney, and election of officers**

Aislinn Brown was introduced as Board Counsel.

C. **Change of Date for April Board meeting**

Vice Chair Aguirre motioned to MOVE the next Board meeting date to April 7th at 9:00 a.m. Board member Altemus SECONDED. The motion PASSED unanimously.

II. BRIEFING ITEMS

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.**

Vice Chair Aguirre moved that the Board TAKE no further action at this time. Board member Simpson SECONDED. Discussion ensued.

Vice Chair Aguirre amended her motion that the Board TAKE no further action in response to the letter from the EPA at this time. Board member Simpson SECONDED. The motion passed unanimously.

b. **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.**

Vice Chair Aguirre moved to RECESS this meeting and MOVE to executive committee discussion to discuss legal strategy with regard to the litigation. Board member Simpson SECONDED. The motion passed unanimously.

Recess was taken at 9:20 a.m. and the meeting reconvened at 10:05 a.m. Roll was called and a quorum was present.

Vice Chair Aguirre asked Sandy Moisey Scherer, Board Secretary, to identify who was on the call. Those present were Aislinn Brown, DEQ Deputy Director James Fehr, Laurie Crutcher, Barbara Chillcott, Catherine Armstrong, Chad Anderson, Colson Williams, Elena Hagen, Jessica Wilkerson, Katie Makarowski, Kirsten Bowers, Kurt Moser, Loryn Johnson, Ray Stout, Sam King, Samuel Yemington, Todd Briggs, and Nicholas Whitaker.

Board member Simpson moved that the Board CONTINUE with this litigation and respond accordingly, represented by Aislinn Brown of ALS. Vice Chair Aguirre SECONDED. The motion passed unanimously.

c. **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.**

Vice Chair Aguirre moved to APPOINT Agency Legal Services to be the Hearing Examiner in this matter. Board member Simpson SECONDED. The motion passed unanimously.

d. **In the Matter of: Appeal and Request for Hearing by Westmoreland Rosebud Mining LLC Regarding Issuance of MPDES Permit No. MT0032042, Colstrip, MT, BER 2022-6 WQ.**

Vice Chair Aguirre motioned to APPROVE the Stipulation, and as part of that approval, that Montana DEQ and Westmoreland provide updates to the board on the process, and also specifically addressing the administrative questions that have been put forth in this meeting. Board member Altemus SECONDED. Discussion ensued.

Vice Chair Aguirre amended her motion to APPROVE the Stipulation as presented, and asked that the parties present at the April 7th meeting to answer the questions discussed today in this meeting, and at the April 7th meeting the Board will establish some kind of update to the schedule from there.

Board Counsel Brown advised Vice Chair Aguirre that since there was a motion already on the table, the motion would need to be withdrawn before another motion could be made. Vice Chair Aguirre WITHDREW her amended motion.

Board member Simpson motioned to APPROVE both the Stipulation and Final Action, and REQUESTED the parties at the April meeting address the questions of defining the receiving waters, and management of discharges prior to development of the new rule. The motion died for lack of a second.

Vice Chair Aguirre moved that the Board APPROVE the Stipulation and Final Action as presented. Board member Altemus SECONDED. The motion passed unanimously.

Vice Chair Aguirre moved to DIRECT Board Attorney Brown to draft an Order to the parties with the questions raised by Board member Simpson, and asked that the parties respond to that order at the April 7th Board meeting, and then at that meeting the Board will determine what kind of update schedule the parties will be providing to the Board on this project. Board member Simpson SECONDED. The motion passed unanimously.

IV. NEW CONTESTED CASE

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

Board Member Smith MOVED to assign the case to ALS for the totality of the case. Vice Chair Aguirre SECONDED. The motion PASSED unanimously.

V. BOARD COUNSEL UPDATE

No update was provided.

Sandy Moisey Scherer, Board Secretary, asked for clarification regarding the five cases that were assigned to Rob Cameron at the last meeting. In the December meeting, five cases were assigned to Rob Cameron but the case numbers were not specified. DEQ has asked the Board Secretary for clarification.

Board Attorney Brown said that the following cases have been assigned to Rob Cameron as Hearing Examiner:

BER 2020-05 WQ – Western Sugar
BER 2022-02 HW – Harry Richards
BER 2022-04 OC – Valley Garden Land & Cattle
BER 2022-05 SM – Rosebud
BER 2022-06 WQ – Rosebud
BER 2022-07 WQ – CHS

VI. GENERAL PUBLIC COMMENT

No public comment was given.

VII. ADJOURNMENT

Board member Altemus MOVED to adjourn the meeting; Board member Smith SECONDED. The motion PASSED unanimously. The meeting adjourned at 10:56 A.M.

Board of Environmental Review February 24, 2023, minutes approved:

/s/_____

_____
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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

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 µS/cm Maximum Daily limit of 500 µS/cm
Alternate Effluent Limitation:	Maximum Daily limit of 500 µS/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 24TH day of February 2023.

Stacy Aguirre
Vice-Chair
BOARD OF ENVIRONMENTAL REVIEW

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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 **ORDER FOR PARTIES TO PROVIDE INFORMATION**

Pursuant the motion made and adopted at the Board of Environmental Review's February 24, 2023 meeting, the parties are Ordered to address the following questions at the Board's April 7, 2023 meeting:

1. How are the receiving waters defined within each drainage? Is it the point of discharge into the ephemeral drainageway, first point of downstream beneficial use, or first downstream point of perennial or intermittent flow?
2. If the receiving waters is defined as the point of discharge, as a practical matter, how do you anticipate collecting statistically valid samples where flow may occur as rarely as once or twice a year, if that, and only in response to snowmelt or rainfall events that render overland vehicle travel difficult if not impossible?

3. What is the applicability of Mont. Code Ann. § 75-5-103(12)(b) to these ephemeral drainageways, and why?

4. How will management of discharges be implemented prior to development of the new rule? Would discharges in compliance with Admin. R. Mont. 17.30.670(4) be permissible?

DATED this 2ND day of MARCH 2023.

Stacy Aguirre
STACY AGUIRRE
Vice Chair

Cc: Kirsten Bowers
William Mercer
Sarah Bordelon

Kirsten H. Bowers
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Attorneys For Westmoreland
Rosebud Mining LLC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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 **Responses to BER Order for Parties to Provide Information**

DEQ and Westmoreland submit the following response to the Board of Environmental Review ("BER") pursuant to its March 2, 2023 Order:

1. How are the receiving waters defined within each drainage? Is it the point of discharge into the ephemeral drainageway, first point of downstream beneficial use, or first downstream point of perennial or intermittent flow?

RESPONSE 1: The designated beneficial uses for state waters must be maintained and protected by Montana Pollutant Discharge Elimination System ("MPDES") Permit No. MT0032042 ("the Permit"). The hydrologic condition of the receiving water is determined at the point of discharge from the Facility.

The Permit authorizes discharges to state surface waters from a proposed surface coal mine known as Rosebud Coal Mine Area B AM5 ("the Facility"). The Facility will cause surface disturbance in the Lee Coulee and Richard Coulee drainages. Mine drainage at the Facility will be routed through sediment traps and ponds to allow sediment to settle, reducing sediment and other pollutant loading to receiving waters. Each point where discharge leaves the Facility is an outfall in the Permit. Each outfall is associated with a sediment pond that is designed to contain at least the capacity of a 10-year, 24-hour precipitation event.

The eighteen outfalls authorized in the Permit discharge to Lee Coulee, Fossil Fork of Lee Coulee, unnamed tributaries to Fossil Fork of Lee Coulee, and unnamed tributaries to Richard Coulee. The receiving waters at the points of discharge from the Facility are hydrologically ephemeral as defined in ARM 17.30.602(10) ("a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table"). The receiving waters are in the Rosebud hydrological unit of the Middle

Yellowstone watershed. The receiving waters fall under the Water-Use Classifications for the Yellowstone River drainage from the Billings water supply intake to the North Dakota state line. *See* ARM 17.30.611(1)(c). This water-use classification is C-3 and the beneficial uses for C-3 waters (bathing, swimming, and recreation, growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers, marginal suitability for drinking, culinary and food processing purposes, agriculture, and industrial water supply) are to be maintained and protected by the Permit.

Discharges to C-3 waters must comply with applicable numeric and narrative water quality standards including the standards in ARM 17.30.629, the numeric water quality criteria in Circular DEQ-7, the general treatment standards in ARM 17.30.635, and the general prohibitions in ARM 17.30.637. Because the Permit authorizes discharges to ephemeral streams ARM 17.30.637(4) is applicable and prescribes standards designed to protect the uses of hydrologically ephemeral streams. Pursuant to ARM 17.30.637(4), the specific water quality standards for C-3 waters in ARM 17.30.629(2) do not apply to ephemeral streams. All outfalls authorized under the Permit discharge to receiving waters within the Rosebud Creek drainage and must meet the standards in ARM 17.30.670(4) for electrical conductivity (EC) and sodium adsorption ratio (SAR) unless a site-specific standard for EC and SAR is developed based on the nonanthropogenic

condition of the receiving water. *See* the Permit Fact Sheet for MPDES No. MT0032042.

2. If the receiving waters is defined as the point of discharge, as a practical matter, how do you anticipate collecting statistically valid samples where flow may occur as rarely as once or twice a year, if that, and only in response to snowmelt or rainfall events that render overland vehicle travel difficult if not impossible?

RESPONSE 2: DEQ and Westmoreland agree to compile historic data and obtain any additional data necessary to determine the nonanthropogenic condition of EC and SAR in the receiving waters. DEQ will evaluate and review the existing ambient water quality data and additional data collection, under the terms of the stipulation, is only required if DEQ determines that historic water quality data is insufficient for determining the nonanthropogenic water quality in the receiving water. Westmoreland and DEQ will develop a sampling analysis plan (SAP) to fill any data gaps and Westmoreland will obtain additional data in accordance with the SAP. The SAP will identify sampling locations and a sampling schedule that considers the accessibility of sampling locations.

3. What is the applicability of Mont. Code Ann. § 75-5-103(12)(b) to these ephemeral drainageways, and why?

RESPONSE 3: § 75-5-103(12)(b), MCA pertains to the definition of "high quality waters" and exceptions to that definition. "High quality waters" include "all

state waters, except: (a) ground water classified as of January 1, 1995, within the "III" or "IV" classifications established by the department's classification rules; and (b) surface waters that: (i) are not capable of supporting any one of the designated uses for their classification; or (ii) have zero flow or surface expression for more than 270 days during most years. *See* § 75-5-103(12), MCA. Degradation of "high quality waters" is prohibited and the quality of high-quality state water is maintained and protected by the State's nondegradation policy. *See* § 75-5-303, MCA.

The Permit authorizes a new or increased source and the discharge from Outfalls 001 – 018 is subject to nondegradation review. Based on available data, the receiving waters for discharges from Outfalls 001 through 018 are hydrologically ephemeral and do not meet the definition of high-quality water as they have zero flow or surface expression for more than 270 days in most years. These waters are afforded Tier 1 protection under Montana's nondegradation policy meaning existing and anticipated uses and water quality necessary to protect those uses must be maintained. *See* § 75-5-303(1), MCA and ARM 17.30.705(2)(a). The Permit includes effluent limitations and conditions intended to ensure that applicable water quality standards are met at the point of discharge, that mine effluent will not impair receiving waters, and that existing and anticipated uses of the receiving waters will be maintained and protected.

4. How will management of discharges be implemented prior to development of the new rule? Would discharges in compliance with Admin. R. Mont. 17.30.670-(4) be permissible?

RESPONSE 4: Per the proposed stipulation, entered as the Final Agency Action in this matter by the Board on February 24, 2023, Westmoreland agrees 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. See Final Agency Action at ¶ 25. Westmoreland will be responsible for wastewater management to ensure discharges do not occur while the nonanthropogenic standard is being developed.

If Westmoreland discharges effluent that meets ARM 17.30.670(4)[1] it would comply with the stayed effluent limitations of the Permit. If Westmoreland demonstrates the Facility can meet the water quality standards in ARM 17.30.670(4), completion of a nonanthropogenic standard would be unnecessary and DEQ and Westmoreland may either propose an amendment to the Stipulation

[1] Under ARM 17.30.670(4) - 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.

or move the Board to terminate the Stipulation and request a new Prehearing Order. *See* Final Agency Action at ¶ 21(g).

Respectfully submitted this 24th day of March 2023.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

By:*/s/Kirsten Bowers*
KIRSTEN H. BOWERS

WESTMORELAND ROSEBUD MINING LLC

By: */s/William Mercer*
WILLIAM W. MERCER
HOLLAND & HART LLP

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March 2023, I caused a true and accurate copy of the foregoing to be emailed to:

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Attorney for the Department

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET**

The Montana Department of Environmental Quality (DEQ), by and through its attorney of record, respectfully submits this motion for removal of Mr. Luke Ployhar's Application for Review of Determination of Requirement of Environmental Impact Statement, filed May 27, 2021, from the contested case docket, pursuant to the provisions contained in §§ 75-1-201(9) and 75-1-201(5)(a)(1) of the Montana Environmental Policy Act.

Mr. Ployhar has been contacted regarding this Motion, through his attorney of record, and he opposes the motion.

The Intervenors, through their attorney of record, have been contacted regarding this Motion and they do not oppose.

DATED this 2nd day of November 2022.

/s/ Jessica Wilkerson
JESSICA WILKERSON
Department of Environmental Quality

Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of November 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **BRIEF IN SUPPORT OF MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET**

The Montana Department of Environmental Quality (DEQ) files this brief in support of its Motion to Remove from the Contested Case Docket, pursuant to the authority granted to the Board of Environmental Review (BER) in § 75-1-201(9), Montana Code Annotated (MCA) and § 75-1-201(5)(a)(i), MCA.

BACKGROUND

This proceeding arises out of Luke Ployhar's application to DEQ for a mineral exploration license, #00860, under the Metal Mine Reclamation Act - (MMRA), §§ 82-3-301, MCA, *et. seq.* On October 4, 2021, DEQ deemed

Ployhar's application complete pursuant to § 82-4-332(2), MCA, and Administrative Rules of Montana (ARM) 17.24.103, and submitted to the public for review and comment during a 44-day public comment period. On February 2, 2022, after receiving public comments, DEQ issued its Final Environmental Assessment (EA), determining that an Environmental Impact Statement (EIS) needed to be conducted before DEQ could issue an exploration license for the proposed activity.

On May 27, 2021, Ployhar filed an Application for Review of Determination of Requirement of Environmental Impact Statement (Application for Review) with the BER pursuant to § 75-1-201(9), MCA. Doc. 1. Congruent with the requirements of § 75-1-201(9), MCA, Ployhar requested that the "BER review the [EIS] determination and recommend DEQ retract its requirement of an EIS." *Id.,* at 3-4.

On June 10, 2022, the BER voted to appoint a hearing examiner to preside over the Application for Review and on July 21, 2022, the Hearing Examiner to the BER issued an Initial Procedural Order providing for the procedural requirements of a contested case. Doc.12. The Stipulated Scheduling Order, filed by the parties on August 29, 2022, and issued by the Hearing Examiner on September 2, 2022, further provides for a contested case. Doc.13 and 14.

Upon further review of the applicable provisions provided in the Montana Environmental Policy Act (MEPA), DEQ believes that Ployhar's Application for Review should not be treated as a request for a contested case and placed on the Contested Case Docket. The review of DEQ's significance determination under § 75-1-201(9), MCA, should undergo informal review by the BER.

RELEVANT LAW

Title 75, chapter 1, MCA, generally addresses environmental policy and protection in the State of Montana. Section 75-1-201(1)(b)(iv), MCA, requires DEQ to prepare an EIS for major state actions significantly affecting the quality of the human environment in Montana. The Director of DEQ is required to endorse, in writing, any determination of significance made under § 75-1-201(1)(b)(iv), MCA.

Section 75-1-201(5)(a)(1), MCA, provides, "[a] challenge to an agency action under this part may only be brought against a final agency action and may only be brought in district court or in federal court, whichever is appropriate." The statute never references a Montana Administrative Procedure Act (MAPA) contested case or provides for that type of administrative review.

Section 75-1-201(9), MCA, provides an opportunity for the BER to review and issue an advisory recommendation on DEQ's significance determination requiring preparation of an EIS. Specifically, it provides that "[a] project sponsor

may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue."

ARGUMENT

Ployhar's Application for Review should not be on the contested case docket before the BER. For contested case review, the legislature needed to have affirmatively required compliance with the contested case provisions contained in the MAPA to overcome the provision that a challenge to a final agency decision under MEPA may only be brought in state or federal court contained in § 75-1-201(5)(a)(i), MCA. Ployhar is only requesting review of DEQ's EIS determination under MEPA § 75-1-201(9), MCA, Doc. 1, at 3-4, *not* for a contested case proceeding under the MMRA. Under the MMRA, had DEQ actually denied Ployhar's exploration license, Ployhar could submit a written request to the BER within 30 days of receipt of notice for a contested case hearing pursuant to MAPA. § 82-4-353(2), MCA. DEQ has not denied Ployhar's exploration license and there is no provision for contested case review available under MEPA.[1]

[1] Of particular note, § 2-4-702, MCA of MAPA provides that before pursuing any petition on judicial review, a person must "exhaust[] *all* administrative remedies available within the agency *and* [be a person] aggrieved by a final written decision in a contested case." (Emphasis added). Thus, unless and until DEQ actually denies Ployhar's exploration license pursuant to the MMRA, there can be no exhaustion of administrative remedies, a necessary condition precedent before a contested case proceeding can occur. Further, the time in which to request a contested case hearing under the MMRA for denial of an exploration license is 30 days. § 82-4-353(2). DEQ issued its Final

Moreover, under MEPA, Courts in Montana have long recognized that MAPA does not apply, such that DEQ's environmental review of Ployhar's proposed exploration license is therefore not subject to a contested case proceeding. *Pompeys Pillar Historical Assn. v. Mont. Dep't. of Envtl. Quality,* 2002 MT 352, ¶ 21, 313 Mont. 401, 61 P. 3d 148. This limitation comports with the interplay between administrative review and judicial review in environmental law cases.

One of MAPA's primary purposes is to "establish general uniformity and due process safeguards in agency rulemaking, legislative review of rules, and contested case proceedings." § 2-4-101, MCA. A contested case under MAPA is defined as "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party **is required by law** to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing." § 2-4-102(4), MCA (emphasis added). A trial-type hearing, however, does not apply to every situation where a person's interest is adversely affected by an agency action; such a hearing is required only in a "contested case." *Johansen v. Department of Natural Resources & Conservation* (1998), 1998 MT 51, ¶ 20, 288 Mont. 39, 955 P.2d 653.

EA on February 2, 2022, and Ployhar submitted his request for review on May 27, 2022. Even assuming his request was for a contested case hearing, his request would be untimely.

In *Johansen,* the Department of Natural Resources and Conservation (DNRC) cancelled Victor Johansen's lease of agricultural land for failing to make timely lease payments. *Id*. at ¶ 8. Johansen argued to the DNRC, in part, that he was entitled to a contested case hearing pursuant to MAPA. *Id*. at ¶ 9. DNRC responded by stating that Johansen had no statutory right to a contested case hearing. *Id*. at ¶ 10. Johansen filed a petition for judicial review with the district court. *Id*. at ¶ 14. The district court dismissed the petition, holding that DNRC's action was not a contested case proceeding. *Id*. Therefore, the district court determined it did not have jurisdiction under MAPA to review DNRC's decision. *Id.*

On appeal, Johansen argued that the Montana Supreme Court should order the DNRC to grant him a full contested case hearing prior to canceling his lease. *Johansen* at ¶ 17. The Montana Supreme Court agreed with the district court's determination that Johansen was not entitled to a contested case hearing. *Id*. at ¶ 19. The focus of the Montana Supreme Court's inquiry was whether the DNRC was "required by law" to afford Johansen a trial-type hearing prior to canceling his lease under the statutory provisions governing the lease of agricultural land. *Id*. at ¶¶ 23-24.

The Montana Supreme Court determined that the statutory provision provided for in § 77-6-506(2), MCA, providing for the termination of a lease for

failure to make a rental payment did not contain a provision requiring DNRC to hold a hearing prior to canceling his lease. *Id*. at ¶ 22. This conclusion was in contrast to statutory provisions providing for an administrative hearing when a lease is cancelled for failing to properly manage agricultural lands, for violating rules regarding subleasing of land, for failing to seek approval before changing a grazing lease to an agricultural lease, and for various causes such as fraud, misrepresentation, or using land for purposes other than those authorized by the lease. *Id.*

Analogous to the statutory provision providing for the termination of a lease for failure to make a rental payment, MEPA does not provide for a contested case hearing regarding an agency's determination of significance requiring the preparation of an EIS under § 75-1-201(a)(b)(iv), MCA. Section 75-1-201(9), MCA, allows a project sponsor to request the BER to review DEQ's significance determination and for the BER, at its discretion, to submit an advisory recommendation to DEQ regarding the issue. That provision does not entitle the project sponsor to a contested case hearing under MAPA.

Indeed, the authorization of the BER to submit an "advisory opinion" in its "discretion" is contrary to the purpose of conducting a contested case hearing. As previously addressed, the purpose of a contested case hearing is to conclusively determine the legal rights, duties, or privileges of a party. §2-4-102(4), MCA.

The BER's attention is directed to §§ 75-5-611(4), 75-20-406(2), 76-4-126, 82-4-206, 82-4-353(3), 82-4-427(4), MCA. These are examples of statutes administered by DEQ containing express language entitling a regulated entity to a trial-type hearing under the contested case provisions of MAPA. It is this express language that is missing in § 75-1-201(9), MCA, or any other provision of MEPA. "That is certain what is made certain." § 1-3-229, MCA.

Moreover, MEPA explicitly identifies the limited extent to which the BER may review DEQ's determination to conduct an EIS. Section 75-1-209, MCA, states that the "project sponsor may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue." § 75-1-209, MCA. Absent, however, is any language in MEPA specifically conferring on the BER any authority to conduct a contested case proceeding on this environmental review.

Conflating the issuance of an advisory opinion in response to DEQ's environmental review with the contested case proceedings available for the issuance or denial of an exploration license under the MMRA would result in significant procedural and jurisdictional issues. *Pompeys Pillar* is instructive on this point. In *Pompeys Pillar*, DEQ conducted an initial and supplemental EA in response to United Harvest's air quality permit application. *Pompeys Pillar*, ¶ 6.

The historical association appealed the permit to an administrative law judge on the grounds that DEQ erred in its preparation of the EA. *Id.*, ¶7. DEQ and United Harvest sought to dismiss the case before the Administrative Law Judge (ALJ), asserting it was not a contested case hearing and thus, the ALJ lacked jurisdiction to address the challenge. *Id.* The ALJ denied the motion and concluded DEQ erred in issuing the permit without conducting an EIS. *Id.*, ¶¶ 7-8. United Harvest and DEQ filed exceptions to the ALJ findings with the BER. *Id.*, ¶ 9. The BER ordered DEQ to prepare a supplemental EA addressing "noise impacts" and, after submission of the supplemental EA, affirmed DEQ's decision to issue the air quality permit, concluding DEQ did not err in conducting its EA without an EIS. *Id.*

When the Association petitioned the District Court to review the BER's decision however, DEQ moved to dismiss the petition on the grounds that the District Court lacked subject matter jurisdiction to entertain the challenge because the challenge before the administrative arbiters did not contain any air quality issues, but rather, concerned DEQ's environmental review under MEPA, which can only be brought in District Court. *Id.*, ¶10. The District Court agreed, dismissing the Association's petition for lack of subject matter jurisdiction. *Id.*, ¶ 11. On appeal, the Montana Supreme Court affirmed, stating that because "MEPA requires a party to bring a compliance challenge before a 'court' or 'district court,'

the administrative law judge and [BER] did not have jurisdiction to hear the Association's challenge. As such, the District Court did not have jurisdiction to review the Board's determination." *Id.*, ¶ 21.

Here, like *Pompey's Pillar*, Ployhar's challenge is not under the MMRA, but in response to DEQ's determination of significance, requiring that an EIS be conducted prior to Ployhar moving further towards an exploration license. Any MEPA challenge *must* be brought in state or federal court. § 75-1-201(5)(a)(1), MCA. While the Legislature has conferred on the BER the authority to conduct an informal review of DEQ's environmental review under § 75-1-201(9), MCA, the BER lacks jurisdiction to conduct a contested case hearing on this issue. Accordingly, rather than proceed as such, which will undoubtedly result in needless time and expense to the parties and the BER, the BER should remove this proceeding from the contested case docket.

Specifically, Environmental review does not implicate an applicant's "legal rights, duties, or privileges" under § 2-4-102, MCA, as MEPA "does not demand that an agency make a particular substantive decision." *Ravalli Co. Fish & Game Ass'n, Inc. v. Dep't of State* Lands, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). Rather, MEPA imposes obligations on the *State* in order to meet its constitutional obligations. *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 81, 402 Mont. 168, 477 P.3d 288. This environmental

review, mandating only informed decision making, does not place a cognizable burden on Ployhar's private property interests which could be subject to a contested case proceeding. *Id.* The Application for Review should be not treated as a contested case.

CONCLUSION

DEQ believes that the BER should remove this issue from the contested case docket and should proceed to informal review. Discovery and the testimony of witnesses at a hearing, as required by the Stipulated Scheduling Order, would inappropriately extend the contested case proceedings under MAPA to the BER's review of DEQ's significance determination under § 75-1-201(9), MCA. In addition, assessing this case under MAPA would require the use of additional resources not necessary for an informal review or for the advisory recommendation that may be issued at the discretion of the BER.

Ployhar's Application for Review does not request review of a final agency decision. Moreover, it is asking for review of a DEQ decision made under MEPA, for which review must be accomplished in District Court. In this instance, MEPA provides an avenue for the BER to issue an advisory recommendation about DEQ's significance determination regarding the necessity of an EIS without citing to MAPA's contested case provisions. Moreover, this review does not fit the

definition of a contested case under MAPA because no legal rights, duties, or privileges of a party are being reviewed for conclusive determination.

DATED this 2nd day of November 2022.

/s/ Jessica Wilkerson
JESSICA WILKERSON
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CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of November 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties of their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **LUKE PLOYHAR'S RESPONSE TO MOTION TO REMOVE FROM CONTESTED CASE DOCKET AND MOTION FOR STATUS CONFERENCE**

Luke Ployhar, by and through counsel, Jackson, Murdo & Grant, P.C., hereby submits this response to the Montana Department of Environmental Quality's Motion to Remove from the Contested Case Docket and Intervenor-Respondents' Motion for Status Conference, with included brief.

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BACKGROUND

Luke Ployhar ("Ployhar") accepts and adopts the first three paragraphs of Background set forth by the Department of Environmental Quality ("DEQ").

ARGUMENT

Ployhar disagrees his Application for Review should be removed from the contested case docket, because DEQ and the Intervenor Respondents waived their right to request removal from the contested case docket, and because the BER and its Hearing Examiner have the authority and latitude to set forth the terms of the Mont. Code Ann. § 75-1-201(9) (hereinafter "MEPA 201(9)") review.

1. **DEQ and Intervenor-Respondents waived their right to remove the MEPA 201(9) review from the contested case docket.**

DEQ's Motion to Remove should be denied because DEQ waived its right to remove this matter from the contested case docket when it submitted its August 8, 2022 Stipulated Proposed Scheduling Order to BER in response to BER's Initial Procedural Order, and subsequently engaged in the contested case proceedings for months. If DEQ wished to remove this matter from the contested case docket, it should have made its Motion prior to stipulating to a scheduling order and thereby agreeing and submitting itself to the contested case proceeding. Instead, it sat and waited close to three months to request removal. In addition, the Intervenor-

Respondents similarly waived their right to request removal, as said request for removal should have been included in their Motion to Intervene.

To allow removal now would only prejudice Ployhar both temporally for the wasted time in the contested case procedure and financially for his having to engage in a proceeding for months that DEQ only now decides to protest and start anew. Accordingly, by their filing and failure to request removal from the matter in a timely manner, DEQ and Intervenor-Respondents waived their right to request removal from the contested case proceeding, and BER should deny their Motions.

2. The MAPA contested case procedure is the appropriate procedure for the MEPA 201(9) review.

Ployhar's Application for Review should not be removed from the contested case docket because BER and its appointed Hearing Examiner have the authority and latitude to set forth the terms of their Mont. Code Ann. § 75-1-201(9) review, and the contested case procedure is appropriate for said review. MEPA 201(9) provides, in pertinent part:

> "(9) A project sponsor may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. . ."

Unfortunately, upon review of MEPA 201(9), its surrounding statutes, its attendant regulations (ARM 17.4.601 *et seq.*), and nonexistent case law, it appears there are

no procedures governing this "review" procedure, nor standards governing the "advisory recommendation." This absence gives rise to DEQ's and Intervenor-Respondents' disagreement with BER's decision to govern the review pursuant to MAPA's contested case rules. However, such disagreement is unfounded.

Absent specific rules governing MEPA 201(9) review, BER is permitted to set its own procedures and develop its schedule. Doing so, Ployhar contends BER should adopt and set rules and procedures using applicable and familiar procedures. Reviewing the administrative Model Rules governing the BER and DEQ, ARM 17.4.101(1) provides that both the BER and DEQ must specifically adopt and incorporate the Attorney General's Organizational and Procedural Rules Required by the Montana Administrative Procedure Act, specifically adopting those rules governing contested cases. ARM 17.4.101(1). Accordingly, it is appropriate to utilize the rules governing MAPA contested cases, as they are 1) familiar to the agency and BER, and 2) are specifically adopted by both. DEQ's and BER's required adoption of the contested case procedure and no other procedure readily available supports Ployhar's contention the rules governing contested cases are appropriate in the present MEPA 201(9) review.

In addition to being statutorily incorporated into BER's administration, the contested case procedure is the most practically appropriate procedure for MEPA

201(9) review. First, the procedure is well-established, clear, and one the BER and DEQ are familiar with. This will prevent later disputes as to how the MEPA 201(9) review should proceed as it progresses. Second, the contested case procedure, like the Rules of Civil Procedure, is designed to provide the fact finder, the BER, with the most evidence to make its tasked decision. Though there is arguably a distinction between the final order in a contested case (ARM 1.3.224) and an advisory recommendation required by MEPA 201(9), the BER should be no less interested in obtaining as much information as possible to make the required recommendation. With its discovery, deposition, and hearing procedures, the contested case procedure will provide BER with the most possible information to make its advisory recommendation under MEPA 201(9).

Finally, there is no provision or rule preventing the utilization of the contested case rules to govern the MEPA 201(9) review. DEQ and the Intervenor-Respondents repeatedly cite the definition of a contested case to argue the present review should not be deemed a "contested case." However, both fail to recognize or appreciate that the present review can remain a MEPA 201(9) review while utilizing the contested case procedure. For these reasons, the contested case procedure is the most appropriate procedure for this MEPA 201(9) review.

In addition to arguing a "contested case" proceeding is not contemplated by MEPA 201(9), DEQ spends considerable time and effort distinguishing MEPA 201(9) from contested case proceedings themselves, citing cases with no relation to MEPA 201(9) and a contested case question. However, with all of its distinguishing and contrasting, DEQ fails to state exactly what MEPA 201(9) review *should* entail, and fails to give good reason why the contested case procedure is inappropriate as a guide for the present review. Instead, tellingly, DEQ states only what the MEPA 201(9) review *should not* entail, such as discovery, depositions, and other provisions provided under the MAPA procedure. This shows DEQ's motivation behind its Motion, which is to avoid those discovery provisions available to Ployhar under the current procedure.

If DEQ truly believed MEPA 201(9) review required some separate procedure and the contested case procedure is inappropriate, DEQ would have proposed a procedure that should apply. Instead, by omitting any proposed procedure, DEQ implicitly admits BER has the authority to set forth its own rules and terms of said review. Accordingly, absent an alternative proposal from DEQ or Intervenor-Respondents, and for the above reasons, the contested case procedure is the most appropriate procedure for this matter, and the parties' Motions should be denied.

CONCLUSION AND RECOMMENDATION

The MEPA 201(9) review should utilize the contested case procedure set forth by BER in its Initial Procedural Order because the procedure is statutorily adopted by BER, it is fair to all parties involved, and will provide BER with the most information to provide an advisory recommendation. Just because a contested case is not explicitly required by MEPA 201(9), does not mean the BER cannot utilize the contested case procedure in governing the present review. For these reasons, the BER should deny DEQ's and Intervenor-Respondents' Motions.

However, if BER wishes to assuage DEQ's concern that using the contested case procedure would create jurisdictional issues or issues on appeal, Ployhar recommends BER issue a separate Procedural Order explicitly stating this MEPA 201(9) review is *utilizing* the contested case rules set forth in ARM 1.3.211 through 1.3.226 for the present review proceeding, and the advisory recommendation (or lack thereof) shall take the place of the contested case final order provided in ARM 1.3.226.

DATED this 16th day of November, 2022.

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #00860	CASE NO. BER 2022-03 HR **INTERVENORS' RESPONSE TO DEQ'S MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET**

INTRODUCTION

Intervenors Fort Belknap Indian Community (FBIC), Montana Environmental Information Center (MEIC), Earthworks, and Montana Trout

Unlimited (MTU) (together, "Conservation Groups") file this brief in response to the Department of Environmental Quality's (DEQ) Motion to Remove from the Contested Case Docket and supporting brief (filed November 2, 2022) ("DEQ's Br."). FBIC and the Conservation Groups agree with DEQ that the Board has authority only to undertake an informal review of DEQ's decision to require an EIS, as contemplated by the applicable statute, and lacks authority to undertake the contested case proceeding currently contemplated in this matter.[1]

FACTUAL BACKGROUND

The subject litigation is Luke Ployhar's proposal to explore for gold at the former Zortman mine in the Little Rocky Mountains of north-central Montana, adjacent to the Fort Belknap Reservation. Ployhar's proposed project would introduce new mining activity at the former Zortman mine area. As detailed by DEQ in its brief, on February 2, 2022, DEQ issued a final EA related to Ployhar's exploration application determining that, upon review of the relevant material, an EIS, not an EA, was the appropriate level of environmental review required for the project. *See* DEQ Br. at 2. As a result of comments submitted to the agency related to potentially significant impacts—many from concerned and impacted tribal members as well as Tribal Historic Preservation Officers—DEQ determined that an EIS is necessary to evaluate the impacts of Ployhar's proposed project to social structures and mores. *Id.*

[1] Once the matter is removed from the contested case docket, FBIC and the Conservation Groups intend to move the Board to exercise its discretion to dismiss this action without issuing an advisory opinion, as contemplated by Mont. Code Ann. § 75-1-201(9).

In response, Ployhar filed an Application for Review of DEQ's decision before the Board of Environmental Review on May 27, 2022. Ployhar invokes Mont. Code Ann. § 75-1-201(9) requesting a recommendation from the Board that DEQ withdraw its requirement for an EIS. App. for Review at 3, 10–11 (filed May 27, 2022). Ployhar's petition does not specify or request any specific procedures, including contested case procedures under MAPA, for the Board to adopt in its consideration of his application. *Id.*

After receiving Ployhar's petition, the Board voted on June 10, 2022, to appoint a hearing examiner to preside over the Application for review. On July 21, 2022, the Hearing Examiner issued various documents, including an initial, and later amended, procedural order, providing for the procedural requirements of a contested case under the Montana Administrative Procedure Act (MAPA). *See* DEQ Br. at 2.

LEGAL AUTHORITY

FBIC and the Conservation Groups agree with DEQ's discussion of the relevant law. *See* DEQ. Br. at 3–4. Of particular note—and as discussed in more detail below—are the MEPA provision under which Ployhar seeks relief in this proceeding, Mont. Code Ann. § 75-1-201(9) (authorizing the Board to issue an "advisory recommendation" regarding DEQ's significance determination "at its discretion"); the MEPA provision for challenging an agency action, *id.* § 75-1-201(5)(a)(1) (requiring challenges to agency actions to be brought in *court*); and the contested case provision in MAPA, *id.* § 2-4-102(4) (providing for a trial-like hearing when an agency is required to make a "determination of legal rights, duties, or

privileges of a party"). These statutory provisions and interpreting case law make clear the inapplicability of a contested case proceeding in this matter.

ARGUMENT

A contested case proceeding is an unsuitable procedure for Ployhar's Application for Review before the Board. Ployhar seeks to challenge issues regarding DEQ's environmental analysis under MEPA in this administrative proceeding. While MEPA provides an opportunity for the Board to informally review DEQ's EIS determination, Mont. Code Ann. § 75-1-201(9)—the mechanism that Ployhar invokes here—that informal opportunity was not designed to allow an applicant to (A) to utilize MAPA's contested case procedures or (B) otherwise authorize the Board to offer any binding legal determination on DEQ's decision to require an EIS.

A. MAPA's Contested Case Procedures Are Inapplicable.

At the outset, the inapplicability of MAPA's contested case procedures here is evident from the absence of any language in MEPA requiring such a proceeding in this circumstance. As explained by DEQ, when the Legislature intends for MAPA's trial-type proceedings to apply, it includes express language invoking those procedures in the statute. *See* DEQ Br. at 8 (citing Mont. Code Ann. §§ 75-5-611(4); 75-20-406(2); 76-4-126; 82-4-206; 82-4-353(3); 82-4-427(4)). The provision invoked by Ployhar under MEPA that provides the basis for the Board's review here, Mont. Code Ann. § 75-1-201(9)—in stark contrast to the statutes DEQ cites—contains no language or reference to MAPA or its contested case proceedings. The imposition of these procedures here would effectively rewrite MEPA's provisions to include a

process that the Legislature did not intend to apply. *See* Mont. Code Ann. § 1-2-101 (a judge's role is not to "insert what has been omitted").

Moreover, applying the MAPA contested case provisions in this matter is improper because the Board is not authorized to determine any legal rights in this proceeding, which is required for MAPA's contested case procedures to apply. The Montana Supreme Court has clarified that the "statutory requirement of a trial-type hearing [under MAPA] does not apply to every situation where a person's interest is adversely affected by agency action. Rather, such a hearing is required *only* in 'contested cases.'" *Johansen v. State, Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 20, 288 Mont. 39, 955 P.2d 653 (emphasis added). Under the plain language of MAPA, a contested case must necessarily involve "a determination of legal rights, duties, or privileges of a party." Mont. Code Ann. § 2-4-102(4).

Here, MEPA's authorization of the Board to submit an "*advisory*" opinion at its discretion does not authorize the use of the MAPA contested case procedures because the Board's review has no bearing on Ployhar's "legal rights, duties, or privileges" under MEPA. *See id.* (emphasis added). Indeed, the Legislature expressly *limited* the Board's authority to make any decision determinative of Ployhar's rights by authorizing *only* an "advisory" opinion. Mont. Code Ann. § 75-1-201(9). In that regard, the Legislature's decision not to include MAPA contested case procedures makes practical sense, given that Mont. Code Ann. § 75-1-201(9) does not contemplate a resolution of a legal right, but instead only authorizes the Board to issue an advisory decision. A full trial-type proceeding, then, would not

only require the needless preparation and review of irrelevant material, but would also forestall any ultimate resolution of the legal sufficiency of DEQ's underlying decision which, as discussed *supra* must be determined by a court. Mont. Code Ann. § 75-1-201(5)(a)(1).

In light of the Board's expressly limited authority to issue only an advisory opinion, a full trial-type proceeding, including the examination of witnesses and comprehensive discovery, would result in a needless waste of time and resources for all of the parties.

B. The Board Lacks Jurisdiction to Consider a Legal Challenge to DEQ's EIS Determination.

Even setting aside the facial inapplicability of MAPA's contested case procedures, Ployhar's request for Board review of DEQ's decision also cannot be used to circumvent MEPA's clear mandate that an applicant may only bring a challenge to an agency action in court. Mont. Code Ann. § 75-1-201(5)(a)(1) ("[A] challenge to an agency action … may only be brought *in district court or in federal court*." (emphasis added)); *see also Pompeys Pillar Hist. Ass'n v. Mont. Dep't of Env't Quality*, 2002 MT 352, ¶ 20, 313 Mont. 401, 61 P.3d 148 (affirming same and noting that the Legislature amended MEPA in 2001 to clarify this review process). Although the statute does not provide detailed instructions on the appropriate procedure for the Board's review under the provision invoked by Ployhar, it is nonetheless clear from the Legislature's use of the words "review" and "advisory

recommendation" that a legal challenge to DEQ's significance decision cannot be undertaken by or before the Board. *Id.* [2]

By imposing MAPA's contested case procedures in this matter—including authorizing discovery, testimony by witnesses, and dispositive merits-briefing—the Hearing Examiner has effectively endorsed the Board's review of the legal sufficiency of DEQ's decision. In other words, the use of such contested case procedures improperly transforms the informal and advisory review process contemplated and authorized by MEPA, Mont. Code Ann. § 75-1-201(9), into a purported legal challenge to an agency action, in violation of the statute, *id.* at § 75-1-201(5)(a)(1); *see also Bell v. Dep't of Licensing*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979) (an agency can only exercise the powers explicitly conferred by the legislature).

Because the Board has no jurisdiction to make a binding legal determination related to DEQ's decision to require an EIS, the Board should reject the Hearing Examiner's erroneous selection of MAPA's contested case procedures in this matter.

CONCLUSION

For the foregoing reasons, FBIC and the Conservation Groups agree with DEQ that the Board should remove this issue from the contested case docket, *see* DEQ Br. at 11., and further request that the Board proceed with the informal

[2] It is FBIC's and the Conservation Groups' position that the Board should, at most, review DEQ's EA and comments submitted by interested parties to form its recommendation on Ployhar's application for review. DEQ's administrative rules related to comments on draft environmental assessments may provide guidance on this procedure. *See* Admin. R. Mont. 17.4.610.

review contemplated by MEPA by directing the Hearing Examiner to vacate all deadlines contemplated by the current scheduling order in this matter and issue a new order limited to establishing a process and deadlines for the parties to submit written comments related to DEQ's EIS determination for the Board's consideration.

Respectfully submitted this 21st day of November, 2022.

/s/ Amanda D. Galvan

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Docket No: BER 2022-03 HR

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **REPLY BRIEF IN SUPPORT OF MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET**

The Montana Department of Environmental Quality (DEQ), by and through undersigned counsel, submits this reply brief in support of its Motion to Remove from the Contested Case Docket[1] as follows.

ARGUMENT

I. DEQ and Intervenors Cannot Waive Subject-Matter Jurisdiction.

As stated in DEQ's opening brief, the BER's authority in this case is limited to a discretionary review of DEQ's significance determination requiring

[1] DEQ responds to Intervenors' Response by adopting and incorporating Intervenors' arguments made therein.

preparation of an EIS and submittal of an advisory recommendation, as stated in § 75-1-201(9). The BER may not, however, subject the parties to a contested case procedure to challenge a MEPA decision under MAPA, because any MEPA compliance challenge must be before a state or federal district court. *Pompeys Pillar Hist. Ass'n v. Mont. Dep't of Env't Quality*, 2002 MT 352, ¶ 21, 313 Mont. 401, 61 P.3d 148. Under the plain language of § 75-2-201, MCA, the BER therefore lacks subject-matter jurisdiction to adjudicate DEQ's MEPA decision to prepare an EIS.

Ployhar does not dispute the substantive language of § 75-1-201, MCA, but instead argues, without citation to any legal authority, that DEQ and Intervenors waived their right to request removal.[2] Ployhar Resp. Br., at 2-3. Subject matter jurisdiction, however, is *never* waived, and may be raised at any time; a party cannot waive or consent to jurisdiction when there is no basis for jurisdiction in law. *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867; *see also In re Marriage of Miller*, 259 Mont. 424, 426-27, 856 P.2d 1378, 1380 (1993) ("subject matter jurisdiction may be raised at any stage of a judicial proceeding by a party or *sua sponte* by the court."). Here, the jurisdiction to adjudicate MEPA

[2] Confusingly, Ployhar claims that Intervenors waived their right to challenge subject matter jurisdiction because their "request for removal should have been included in their Motion to Intervene." Br. at 3. In addition to the fact that subject-matter jurisdiction cannot be waived, as a practical matter, it defies logic to suggest Intervenors were required to request removal before they were made a party to the proceeding.

challenges must be brought in state or federal court, not the BER. Section 75-1-201(5)(a)(1), MCA. Thus, regardless of when DEQ and Intervenors raised the jurisdictional issue (even though neither DEQ, the Intervenors, nor Ployhar actually requested a contested case proceeding), it cannot be subject to waiver.

Ployhar further asserts that permitting removal from the contested case docket now would subject Ployhar to prejudice from cost and wasted time. Resp. Br. at 3. This argument likewise fails. First, whether Ployhar would indeed be subject to prejudice is not a consideration for jurisdiction, as subject-matter jurisdiction is not a non-jurisdictional procedural defect that contemplates equitable relief, but a threshold requirement. *See Alto Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 28, 389 Mont. 435, 406 P.3d 937.

Second, Ployhar's self-serving complaints of prejudice are disingenuous as a practical matter. DEQ's environmental review does not demand a substantive decision implicating an applicant's legal rights, duties, or privileges necessary for a contested case review. Section 2-4-102, MCA; *Ravalli Co. Fish & Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). As such, merely because Ployhar claims that any proposed project should be subject to an EA rather than an EIS, and any subsequent challenge to that decision, has no bearing on Ployhar's rights or privileges, let alone any perceived prejudice stemming therefrom.

Finally, this case is in its infancy. No discovery has commenced, no exhaustive motions practice occurred, nor any hearings scheduled. Ployhar's grievances of wasted time and expenses thus ring hollow. More perplexing, rather than address the clear jurisdictional issue now at this early juncture, Ployhar nevertheless remains committed to an exhaustive and yet futile contested case proceeding in which he undoubtedly will be burdened by extensive time and cost. Notwithstanding the clear jurisdictional limits to the BER's authority, the most timely and cost-effective procedure for *all* participants is to remove this proceeding from the contested case docket now.

The statutory authority is clear that the BER has the discretion to conduct an informal assessment of DEQ's environmental review under § 75-1-201(9), MCA. Any MEPA challenge, however, remains singularly in the purview of a district court or federal court. Section 75-1-201(5)(a)(1), MCA. The BER should therefore remove this proceeding from the contested case docket for informal review.

II. The Contested Case Procedures Do Not Apply to § 75-1-201(9), MCA.

In the alternative, Ployhar asserts that the contested case procedure as set forth in MAPA should nevertheless apply to this proceeding. Br. at 4. Ployhar argues that this procedure should apply because DEQ fails to provide for an

alternative, and is, in his terms, the most "practically appropriate." *Id.* Ployhar's arguments lack merit and should be disregarded.

First, Ployhar's desire to read new language into § 75-1-201(9), MCA, conflicts with longstanding rules of statutory interpretation. When interpreting a statute, it must be construed according to its plain meaning; if the language is clear and unambiguous then no further interpretation is required. *In re Estate of Engellant*, 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218. Moreover, in interpreting a statute, the court (or in this case, the BER), may merely "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted." Section 1-2-101, MCA; *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771.

Here, § 75-1-201(9), MCA provides, in pertinent part, that a "project sponsor may request a *review of the significance determination* or recommendation made under subjection (8) by the appropriate board, if any." (Emphasis added). The statute explicitly and simply lays out the procedure to be followed: submission of the significance determination to the BER for review—nothing more. Had the legislature intended for MAPA contested case procedure to apply to this discretionary review, it would have stated as much. *Compare, e.g.,* §§ 75-5-611(4); 75-20-406(2); 75-4-126; 82-4-206; 82-4-353(3); 82-4-427(4). Because it

did not, the BER is not permitted to read into the statute a review process that plainly does not exist.

Ployhar further suggests that these contested case procedures have already been adopted by the BER, and thus should be utilized in the MEPA review process. Br. at 4 (citing ARM 17.4.101(1)). Br. at 4. The BER, however, is a quasi-judicial administrative body and creature of statute with only those powers specifically conferred by the legislature. Section 2-15-3502, MCA; 1995 Mont. Laws ch. 418, § 21; *Bell v. Dep't of Licensing*, 182 Mont. 21, 22-23, 594 P.2d 331 (1979).[3] The procedural rules Ployhar seeks to invoke for the BER's judicial function, found in MAPA §§ 2-4-601 through 2-4-631, are limited to "contested cases," not the discretionary and advisory "review" contemplated for in § 75-1-201(9), MCA. The BER thus lacks the authority to impart this contested case procedure on this proceeding.

Likewise, "[i]t is axiomatic in Montana law that administrative regulations cannot change a statute" and "[r]ules adopted by administrative agencies which conflict with statutory requirements or exceed authority provided by statute are invalid." *Mont. Indep. Living Project v. State, DOT*, 2019 MT 298, ¶ 31, 398

[3] Theoretically, even if it *could* adopt new procedural rules for this proceeding to mirror those in MAPA contested case proceedings, the BER would need to first undergo formal rulemaking procedures as outlined in relevant statutes and administrative rules, *and* such rules would have to be consistent with the statutory provisions. *See* § 2-4-201, MCA (requiring each agency "adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available."); *see also* § 2-4-302, MCA.

Mont. 204, 454 P.3d 1216. Engrafting new or different procedural requirements onto § 75-1-201(9), MCA, which plainly considers only a review of the relevant environmental assessment documents, contradicts the statute and exceeds the authority conferred on the BER by the legislature. The BER should therefore deny Ployhar's request.

Finally, as a matter of policy, utilizing a contested case procedure would be entirely nonsensical in this context. Ployhar suggests that DEQ has some alternative motivation and therefore is concerned about engaging in discovery; in actuality, Ployhar fails to understand the environmental review process. MEPA review is designed to ensure the legislature fulfills its constitutional mandates, and that it has taken a "hard look" at the environmental impacts of the proposed project. *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶¶ 68, 70, 402 Mont. 168, 477 P.3d 288. MEPA is thus essentially procedural in nature and does not demand an outcome. *Id.*, ¶ 66. Any permitting decision, however (which has yet to be made here), and thus any restrictions on Ployhar's mining operations, stem from the MMRA, not MEPA. *Id.*, ¶ 81. Thus, the discretionary review the BER may engage with respect to § 75-1-201(9), MCA, is entirely geared toward assessing whether DEQ has engaged in the appropriate level of environmental review of the project. While the BER may provide, if it so chooses, an advisory opinion as to DEQ's level of environmental review, it cannot

adjudicate any legal right of Ployhar, or grant him any relief, because MEPA does not concern Ployhar's legal rights. *Park Cnty.*, ¶ 71.

Conversely, the MAPA contested case procedure is specifically used in order for the BER to engage in a fact-finding mission to resolve the "legal rights, duties, or privileges of a party." Section 2-4-102(4), MCA. The MAPA contested case procedure thus cannot be divorced from the ultimate objective to make a binding legal decision as to Ployhar's legal rights and privileges. As such, it is wholly irrelevant, and a waste of the parties' and the BER's time and resources, to engage in a contested case procedure for what is to be a simple process designed to ensure the government has sufficient information about the environmental magnitude of the proposed project before it occurs.

Because the MAPA contested case procedure is not legally appropriate or practically reasonable for this MEPA review, the BER should deny Ployhar's request.

CONCLUSION

Despite the fact that Ployhar originally sought only an advisory review of DEQ's decision to engage in an EIS for the proposed project, consistent with the plain language of § 75-1-201(9), MCA, Ployhar now argues that the Hearing Examiner correctly placed this proceeding on a contested case hearing track. But MEPA challenges are only subject to the jurisdiction of courts, not the BER, and

neither DEQ nor Intervenors can waive a threshold jurisdictional requirement. Moreover, § 75-1-201(9), MCA, does contemplate the simple procedure for review of DEQ's significance determination. The BER cannot read into the statute new contested case requirements which presently do not exist, exceed its authority by mandating this procedure which was not contemplated by the legislature, or engraft additional or different procedural requirements than those confined in this statute.

For these reasons, and the reasons set forth in DEQ's opening brief and Intervenors' response brief, the BER should remove this case from the contested case docket, vacate the scheduling order, and provide a new procedural order for submission of DEQ's significance determination as set forth in § 75-1-201(9), MCA.

DATED this 30th day of November 2022.

/s/ Jessica Wilkerson
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Department of Environmental Quality

Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of November 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties of their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #00860	**CASE NO. BER 2022-03 HR**

ORDER GRANTING MOTION TO REMOVE

This matter comes before the Board of Environmental Review (the "Board") on the motions (1) of the Montana Department of Environmental Quality (DEQ) to Remove From the Contested Case Docket and (2) of Intervenor-Respondents Fort Belknap Indian Community (FBIC), Montana Environmental Information Center (MEIC), Earthworks, and Montana Trout Unlimited (MTU) for a Status Conference.

I. PROCEDURAL HISTORY

On May 27, 2022, Luke Ployhar applied to the Board for review of the DEQ's decision to require an Environmental Impact Statement (EIS) in connection with his application for Exploration License #00860 (Doc. 1, hereinafter "Application"). The Board appointed a hearing examiner to preside over this matter. On October 18, 2022, Intervenor-Respondents' Motion to Intervene was granted (Doc. 22).

On November 2, 2022, DEQ filed its Motion to Remove From the Contested Case Docket (Doc. 24) and accompanying Brief (Doc. 25, hereinafter "Motion to Remove"). On the same day, the Intervenor-Respondents filed their Motion for Status Conference

"at which all parties and the hearing examiner may discuss the appropriate and efficient procedure for resolving this matter." (Doc. 26). On November 16, 2022, Mr. Ployhar filed his Response to both motions (Doc. 28, hereinafter "Response"). No replies have been filed, and both motions are ripe for decision. Because the Motion to Remove is granted, no status conference is necessary and the Intervenor-Respondents' motion is denied. This matter is remanded to the Board.

II. BACKGROUND

The Montana Environmental Policy Act (MEPA), Mont. Code Ann. §§ 75-1-101 through -324, requires state agencies to conduct environmental review of proposed state actions (including some licensure of private actors). First, an interdisciplinary environmental assessment (EA) is required to determine whether the action may "significantly" affect the "quality of the human environment." ARM 17.4.607(3). The agency must prepare a more detailed environmental impact statement (EIS) if the EA indicates that one is necessary, or if "the proposed action is a major action of state government *significantly* affecting the quality of the human environment." ARM 17.4.607(1) (emphasis added). In deciding whether an EIS is necessary, "the significance of impacts associated with a proposed action" is the touchstone, ARM 17.4.608(1), and the director of DEQ must "endorse in writing" any significance determination, *see* Mont. Code Ann. § 75-1-201(8).

On October 4, 2021, DEQ deemed Mr. Ployhar's application for a metal mining exploration license to be complete according to the requirements of Mont. Code Ann. § 82-4-332. *See* Application at 1 ¶ 2. Pursuant to MEPA, DEQ prepared and issued an

EA on February 2, 2022. *See* Application at 1 ¶ 3. The EA concluded that an EIS was necessary because the evidence presented to DEQ "raises substantial questions regarding whether significant impacts would occur to historical, archaeological, social, and cultural resources as a result of this proposed action." Doc. 5 (Final Environmental Assessment) at 31. More specifically, the EA questions the impact of Mr. Ployhar's project on Site 224PH3197, also identified as the "Little Rocky Mountains," a traditional cultural property (TCP) deemed eligible in 1997 for placement on the National Register of Historic Places (NRHP). Doc. 5 at 15-16. Because the possibility of "treating" or avoiding adverse impacts "is beyond the scope of this EA," and because "[i]mpacts, should they occur, could be long term and significant," the EA concluded that "further analysis in an EIS is required." Doc. 5 at 20.

Mr. Ployhar filed his Application pursuant to Mont. Code Ann. § 75-1-201(9), which provides:

> A project sponsor may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

He argues that DEQ erred in requiring an EIS. First, because DEQ did not determine that the proposed project would in fact have a significant adverse impact, only that it had a potential adverse impact, and that an EIS is therefore not automatically required. *See* Application at 4-6. Second, because DEQ neither analyzed how the project could cause the Little Rocky Mountains site to lose eligibility for placement on the National Registry of Historic Places nor the likelihood of that outcome. *See* Application at 6-7. Third,

because DEQ relied on comments from tribal historical preservation officers, which were "fabricated, and not connected to the proposed action." Application at 8. In the event that an EIS is required, Mr. Ployhar requests that the Board adopt an EIS and Supplemental EIS (SEIS) completed in 1996 and 2001, respectively. *See* Application at 9-10.

III. DISCUSSION

In its Motion to Remove, DEQ argues that Mr. Ployhar's Application should not be treated as a contested case under the Montana Administrative Procedure Act (MAPA), Mont. Code Ann. §§ 2-4-601 through -631, but is instead subject only to informal review by the Board. Mont. Code Ann. § 75-1-204 provides that MAPA applies solely "[i]n adopting rules prescribing fees" under MEPA. On the other hand, Mont. Code Ann. § 75-1-201(5)(a) provides that,

> A challenge to an agency action under [MEPA] may only be brought against a final agency action and may only be brought in district court or federal court, whichever is appropriate.

DEQ further contends that, had it actually denied Mr. Ployhar's application, he would have a right to appeal the final agency action in a contested case proceeding within 30 days of the denial. *See* Motion to Remove at 4; Mont. Code Ann. § 82-4-353(2)-(3). Here, there is no final agency action, and Mr. Ployhar's Application was filed more than 30 days after the Final Environmental Assessment was issued. *See* Motion to Remove at 4-5 n.1.

Mr. Ployhar disagrees with the DEQ's position. First, because the DEQ waived "its right to remove this matter from the contested case docket" by agreeing to a scheduling order issued under MAPA, and the Intervenor-Respondents waived their right

by failing to include a request for removal in their Motion to Intervene. *See* Response at 2-3. Second, because removal at this stage would be prejudicial to him "both temporally for the wasted time in the contested case procedure and financially for his having to engage in a proceeding for months that DEQ only now decides to protest and start anew." Response at 3. And third, because, absent some other prescribed procedure, the Board "is permitted to set its own procedures and develop its schedule," and the procedure for contested cases is "the most practically appropriate." Response at 4-5.

The Hearing Examiner agrees with DEQ's position. Read together, Mont. Code Ann. §§ 75-1-201(5)(a)(i) and (9) suggest that MAPA proceedings are almost *never* appropriate under MEPA (with the exception of fee-setting, a type of rulemaking, *see* Mont. Code Ann. § 75-1-204). Rather, a determination of significance may be reviewed by the Board for its "advisory recommendation," and any final agency action may be appealed to a court. There is no provision for a contested case proceeding under MAPA, wherein "a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." Mont. Code Ann. § 2-4-102(4). Under Mont. Code Ann. § 75-1-201(9), the Board is neither required to render a decision nor does its decision finally determine any party's rights, duties, or privileges. By definition, the Board's "advisory recommendation" under Mont. Code Ann. § 75-1-201(9) is not a contested case. *See also Pompey's Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality*, 2002 MT 352, ¶ 21, 313 Mont. 401, 61 P.3d 148 (challenges to environmental review under MEPA are not "contested cases" subject to administrative proceedings.)

Mr. Ployhar argues that the DEQ and Intervenor-Respondents have waived their "right" to have this matter removed from the contested case docket. However, MEPA's restriction of administrative proceedings is functionally a limitation on subject-matter jurisdiction. *See Mont. River Action Network v. Mont. Dep't of Natural Res. & Conservation*, 2008 Mont. Dist. LEXIS 676, *17-*18 (Mont. 1st Jud. Dist. Ct., Nov. 7, 2008). Subject-matter jurisdiction "cannot be waived nor conferred by consent of a party where there is no basis for jurisdiction under the law." *See, e.g., In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378 (1993). This Hearing Examiner is without authority under law to render a decision on the merits of Mr. Ployhar's Application, and it must be remanded to the Board for its consideration under Mont. Code Ann. § 75-1-201(9).

Mr. Ployhar further contends that removal from the contested case docket at this juncture would be prejudicial to him and his wasted time and expense. Because the Hearing Examiner cannot enter a decision in this matter, the prejudice to Mr. Ployhar caused by its remand is unfortunately immaterial.

Finally, Mr. Ployhar insists that the Board may utilize MAPA procedures, even if this matter is not, strictly speaking, a contested case. Be that as it may, this matter has no place before a Hearing Examiner. The Hearing Examiner's role is to hold a hearing and determine the rights of parties – not to decide whether it is inclined to issue an "advisory recommendation." The Board may choose to use contested case procedures, or it may not, at its discretion. In either event, that is for the Board, and not the Hearing Examiner, to decide.

Because this Hearing Examiner is without authority to decide the merits of this matter, a status conference would serve no purpose, and Intervenor-Respondents' motion is denied.

IV. ORDER

For the reasons above stated, IT IS HEREBY ORDERED:

1. The Motion to Remove is GRANTED.

2. The Motion for Status Conference is DENIED.

3. Mr. Ployhar's Application is remanded to the Board for its consideration and review pursuant to Mont. Code Ann. § 75-1-201(9).

DATED this 24th day of February 2023.

/s/ Liz Leman
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DATED: February 24, 2023

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **DEQ'S AND INTERVENOR-RESPONDENT'S JOINT COMBINED MOTION FOR PARTIAL RECONSIDERATION OF ORDER OF REMOVAL PURSUANT TO RULE 60(b)(1) AND 60(d)(1), M. R. Civ. P., AND FOR CLARIFICATION**

Respondent Montana Department of Environmental Quality ("DEQ") and Intervenor-Respondents Fort Belknap Indian Community, Montana Environmental Information Center, Earthworks, and Montana Trout Unlimited ("Intervenors") submit this Joint Combined Motion for Partial Reconsideration of the Hearing Examiner's February 24, 2024, Order granting DEQ's Motion to Remove from the contested case docket (Dkt. 39) pursuant to Rule 60(b)(1) and 60(d)(1), M. R. Civ. P., and Motion for Clarification. A brief in support of DEQ's and Intervenors' Combined Motion is submitted herewith.

As explained more fully in the accompanying brief, in the February 24, 2023 Order granting removal of this matter from the contested case docket (Dkt. 39) the Hearing Examiner erred as a matter of law in determining that the BER has the "discretion" to utilize MAPA contested case procedures for its informal review under § 75-1-201(9), and further failed to acknowledge or consider the briefing submitted by DEQ and Intervenors on this issue. Additionally, because the Hearing Examiner denied Intervenors' request for a status conference, the Order is ambiguous as to how the BER intends to proceed with this review. DEQ and Intervenors therefore request clarification as to (1) how the BER intends to proceed with this matter, and (2) if the matter is scheduled as an Action Item at the April BER meeting, what the BER expects of the parties and counsel so that they may adequately prepare in advance.

Counsel for Petitioner Luke Ployhar has been contacted regarding the Combined Motion and Ployhar opposes.

DATED this 8th day of March 2023

/s/ Jessica Wilkerson
Jessica Wilkerson
Department of Environmental Quality
Attorney for the Department

/s/ Amanda D. Galvan
Amanda D. Galvan
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/s/ Daniel D. Belcourt
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I hereby certify that this 8th day of March, 2023, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **DEQ'S AND INTERVENOR-RESPONDENT'S BRIEF IN SUPPORT OF JOINT COMBINED MOTION FOR PARTIAL RECONSIDERATION OF ORDER OF REMOVAL PURSUANT TO RULE 60(b)(1) AND 60(d)(1), M. R. Civ. P., AND FOR CLARIFICATION**

Respondent Montana Department of Environmental Quality ("DEQ") and Intervenor-Respondents Fort Belknap Indian Community, Montana Environmental Information Center, Earthworks, and Montana Trout Unlimited (collectively "Intervenors") submit this brief in support of their combined motion for reconsideration and partial relief from the Order granting their Motion to Remove pursuant to Rule 60(b)(1) and 60(d)(1), M. R. Civ. P., and motion for clarification.

INTRODUCTION AND RELEVANT BACKGROUND

This proceeding arises out of Petitioner Luke Ployhar's ("Ployhar") May 27, 2022, Application for Review of DEQ's determination to require an Environmental Impact Statement associated with Exploration License #00860 pursuant to § 75-1-201(9), MCA (Dkt. 1). On June 10, 2022, the Board of Environmental Review voted to appoint a hearing examiner—Michael Russell—to preside over this matter and ordered that the hearing and prehearing matters be conducted pursuant to the Montana Administrative Procedures Act ("MAPA") contested case proceeding under Title 2, Ch. 4, Part 6 of the Montana Code Annotated ("MCA"). *See* Initial Procedural Order (Dkt. 12). On September 16, 2022, Intervenors filed a Motion to Intervene (Dkt. 15), which the Hearing Examiner granted on October 18, 2022 (Dkt. 22).

Shortly thereafter, on November 2, 2022, DEQ filed a Motion (Dkt. 24) and Brief in Support (Dkt. 25) to remove the case from the MAPA contested case

docket. Also on November 2, Intervenors filed a Motion for a Status Conference (Dkt. 26), asserting that a MAPA contested case proceeding is inappropriate for this case and requesting a status conference with the Hearing Examiner to discuss the appropriate procedure for resolving this matter (*Id.* at 2-3). Ployhar filed a response to DEQ's Motion on November 16 (Dkt. 28), asserting that (1) DEQ and Intervenors waived their right to remove the case from the MAPA contested case docket (*Id.* at 2), and (2) alternatively, even if removal was warranted, utilizing MAPA contested case procedures is nevertheless appropriate because "BER is permitted to set its own procedures and develop its schedule" (*Id.* at 2-3).

On November 21, 2022, Intervenors filed a response to DEQ's Motion (Dkt. 29), attached here as Ex. A, specifically rebutting Ployhar's argument that a MAPA contested case procedure was appropriate because "when the Legislature intends for MAPA's trial-type proceedings to apply, it includes express language invoking those procedures in the statute," and § 75-1-201(9) contains no such language. *Id.* at 4. Intervenors further correctly pointed out that utilizing such procedures "improperly transforms the informal and advisory review process" under § 75-1-201(9) into a legal challenge to an agency action, beyond the bounds of the BER's authority conferred by the legislature. *Id.* at 7 (citing *Bell v. Dep't of Licensing*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979) (an agency can only exercise the powers explicitly conferred by the legislature).

And on November 30, 2022, DEQ filed its reply brief (Dkt. 30), attached here as Ex. B, arguing, like Intervenors, that the MAPA contested case procedures do not apply to § 75-1-201(9) because (1) the statute does explicitly provide for contested case procedures to apply (*Id.* at 5-6); (2) the BER's judicial function is limited to "contested cases" and not the discretionary and advisory "review" process such that the BER has not been granted by the legislature the authority to impart such procedures into a non-contested case proceeding (*Id.* at 6); and (3) as a matter of policy, it is entirely nonsensical to utilize contested case procedures, which contemplate the adjudication of a binding legal decision as to a party's legal rights and privileges, when here there *is* no adjudication of rights or privileges (*Id.* at 7-8). Because the issues had been fully briefed, DEQ filed a Notice of Submittal on December 5, 2022 (Dkt. 31), attached here as Ex. C. On January 30, 2023, the Parties were provided Notice of Change in Hearing Examiner, following the BER's appointment of Liz Leman in place of Michael Russell (Dkt. 36).

On February 24, 2023, the new Hearing Examiner issued her Order granting DEQ's Motion to Remove from the contested case docket (Dkt. 39). In so ordering, the Hearing Examiner agreed with DEQ and Intervenors that "by definition, the [BER's] 'advisory recommendation' under Mont. Code Ann. § 75-1-201(9) is not a contested case," and under this statute, "[t]here is no provision for a contested case proceeding under MAPA[.]"*Id.* at 5.

The Hearing Examiner, however, failed to consider the arguments raised by both DEQ and Intervenors in response to Ployhar's claim that the BER may nevertheless utilize MAPA contested case procedures in this advisory and discretionary MEPA review process. Indeed, the Hearing Examiner mistakenly claims that following Ployhar's response to DEQ's and Intervenors' motions, "[n]o replies have been filed, and both motions are ripe for decision." *Id.* at 2. As to the issue regarding the procedure to be used, the Hearing Examiner ultimately determined that her "role is to hold a hearing and determine the rights of the parties" and that the BER "may choose to use contested case procedures, or it may not, at its discretion. In either event, that is for the [BER], and not the Hearing Examiner, to decide." *Id*. at 6. The Hearing Examiner thus concluded that a status conference "would serve no purpose," (*Id.* at 7) denying Intervenors' motion, and remanding Ployhar's Application for review to the BER.

Adding to the uncertainty, in serving the Hearing Examiner's Order upon the parties, the BER's Paralegal stated that her "understanding of next steps will be for this matter to be put before the [BER] at their next scheduled meeting in April to determine the appropriateness of DEQ's decision to require an EIS. If my understanding is incorrect, please advise so I can appropriately reflect on the next BER meeting agenda." Email, February 24, 2024, DEQ BER Secretary Hagen to Counsel, attached here as Ex. D.

The Hearing Examiner erred as a matter of law in finding that the BER has discretion to utilize contested case procedures in conducting its discretionary and advisory review of DEQ's decision to require an EIS and failed to consider the reply and response briefs submitted by DEQ and Intervenors stating as much. DEQ and Intervenors therefore request the BER reconsider the Hearing Examiner's Order under Rule 60(b)(1) or 60(d)(1), M. R. Civ. P., and correct this error before erroneously deciding to use such procedures. And to avoid the risk of wasted time, confusion, and unpreparedness in the event that review of the EIS is placed on the BER's April meeting, DEQ and Intervenors further request clarification as to what processes or procedures the BER intends to engage for its review, either by Order or status conference, at the earliest convenience of the BER and the parties and well in advance of this meeting.

LEGAL STANDARDS

Rule 60(b)(1), M. R. Civ. P. (Grounds for Relief from a Final Judgment, Order, or Proceeding) provides, in pertinent part that "the court may relieve a party . . . from a final judgment, order or proceeding" due to "mistake, inadvertence, surprise, or excusable neglect." Motions under Rule 60(b)(1) may be made in the instance of judicial errors affecting the substantial rights of the parties and must be made "no more than a year after the entry of the judgment or order or the date of

the proceeding." *Thomas v. Thomas*, 189 Mont. 547, 550, 617 P.2d 133, 135 (1980); Rule 60(c)(1), M. R. Civ. P.

Rule 60(d)(1) (Other Powers to Grant Relief) provides that the court, under Rule 60, may "[e]ntertain an independent action to relieve a party from a judgment, order, or proceeding." The term "independent action" in Rule 60(d) refers to an "independent cause of action 'in equity to obtain a relief from judgment' . . . reserved for those unusual circumstances where a case of injustice is deemed sufficiently gross to demand disturbing a final judgment." *Tucker v. Tucker*, 2014 MT 115, ¶ 18, 375 Mont. 24, 326 P.3d 413 (citations omitted).

ARGUMENT

I. Partial Relief from the Hearing Examiner's Order Regarding the BER's Discretion to Utilize MAPA Contested Case Procedures is Appropriate under Rule 60(b)(1), M. R. Civ. P.

Rule 60(b)(1) permits relief from a final order or judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), M. R. Civ. P. The "mistake provision provides for reconsideration only where (1) a party has made an excusable litigation mistake, or (2) where the court has made a substantive mistake of law or fact in the judgment or order." *Cashner v. Freedom Stores*, 98 F.3d 572, 577 (10th Cir. 1999).

Here, the Hearing Examiner made a substantive mistake of fact *and* law in the Order. First, the Hearing Examiner mistakenly noted that, as a factual matter,

neither Intervenors nor DEQ filed further briefing after Ployhar's response to DEQ's Motion to Remove. Order, Dkt. 39, at 2. Second, without considering DEQ's and Intervenor's argument on the issue as to why a contested case procedure cannot exist in the absence of a contested case, the Hearing Examiner substantively erred as a matter of law in concluding that the BER has the "discretion" to "use contested case procedures," if it so desires. *Id.* at 6. But as DEQ and Intervenors explicitly laid out in briefing, the BER is only granted that authority as explicitly contemplated for in statute. Tellingly, the review available under § 75-1-201(9) does not provide for the use of contested case procedures because it is not a contested case. *Compare* § 75-1-201(9) (permitting "review of the significance determination or recommendation . . . by the appropriate board") *with* MAPA, Title 2, Ch. 4, MCA (defining the functions and procedures of the hearing examiner and the board in contested case proceedings).

Highlighting the contradictory nature of the Hearing Examiner's Order, she states that because this case is not a contested case, "this matter has no place before a Hearing Examiner. The Hearing Examiner's role is to hold a hearing and determine the rights of parties – not to decide whether it is inclined to issue an 'advisory recommendation.'" Order, Dkt. 39, at 6. But if a hearing examiner and a hearing are inappropriate, then by extension, the contested case procedures are

likewise inapplicable. The BER cannot exercise MAPA authority that the Hearing Examiner does not have.

Although the Hearing Examiner correctly remanded this matter back to the BER, the BER does not have discretion to utilize contested case procedures. As such, because this portion of the Hearing Examiner's Order is based on a mistake of fact and law, and risks subjecting the parties to this process wholly inappropriate here, DEQ requests an Order from the BER correcting this mistake, acknowledging and considering DEQ's and Intervenor's arguments timely raised in their reply briefs, and providing a corrected Order outlining the basic process for informal review to which the BER is limited: a simple, discretionary review of DEQ's significance determination in its EIS. Section 75-1-201(9), MCA.

II. Alternatively, Partial Relief from the Order is Appropriate under Rule 60(d)(1) Because there is No Other Adequate Remedy at Law.

If the BER concludes that Rule 60(b)(1) is inappropriate to grant DEQ and Intervenors relief from the portion of the Hearing Examiner's Order regarding the BER's discretion to utilize contested case proceedings, the BER should nevertheless find that DEQ and Intervenors are entitled to relief under Rule 60(d)(1), M. R. Civ. P.

Rule 60(d)(1) states that Rule 60 does not limit a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding."

Rule 60(d)(1), M. R. Civ. P. This subsection "is not an affirmative grant of power but merely allows continuation of whatever power the court would have had to entertain an independent action if the rule had not been adopted." 11 Wright & Miller, Federal Practice and Procedure § 2868 (3d ed. Apr. 2021 update) (citations omitted). To demonstrate relief under the rule, a movant must affirmatively demonstrate why the relief it seeks falls within the established doctrine for an independent action in equity. *Barrett v. Secretary of Health & Human Services*, 840 F.2d 1259, 1263 (6th Cir. 1987). The "indispensable elements" of the independent action are:

> (1) A judgment which ought not, in equity and good conscience, to be enforced;
> (2) a good defense to the alleged cause of action on which the judgment is founded;
> (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense;
> (4) the absence of fault or negligence on the part of the defendant; and
> (5) the absence of any adequate remedy at law.

Id. (citations omitted).

The first two elements are satisfied because DEQ's and Intervenor's defense against the Hearing Examiner's conclusion to the contrary, raised in their reply and response briefs (which were erroneously not considered), makes clear that the BER has no such discretion or legal authority to use these procedures specifically reserved only for contested cases. Nor, as a matter of equity or good conscience,

should contested case procedures be used in this case. To do so would subject the parties (and the BER) to an exhaustive, expensive, and arbitrary fact-finding exercise that is academic in nature, does not affect any legal rights of the parties, and which will result in a determination by the BER that has no binding legal effect. *Cf. Arnone v. City of Bozeman*, 2016 MT 184, ¶ 10, 384 Mont. 250, 376 P.3d 786 (explaining that an advisory opinion is one which has no effect on the legal rights of the parties and upon which the court's judgment cannot effectively operate). The third and fourth elements are also satisfied. The Hearing Examiner mistakenly failed to consider these arguments which directly refute her opposite conclusion. And DEQ and Intervenors timely filed these reply and response briefs, such that the Hearing Examiner's failure to consider them was no fault of DEQ or Intervenors.

And finally, the fifth element is satisfied because there is no other adequate remedy at law. If the BER ultimately decides to subject the parties to this futile exercise, DEQ cannot raise the issue on appeal. Because there is no adjudication of the parties' rights or legal interests (unlike a MAPA contested case) there is thus no appealable issue as to the BER's advisory recommendation. *See* Order, Dkt. 39, at 5 ("There is no provision [under § 75-1-201(5)(a)(i) and (9)] for a contested case proceeding under MAPA wherein 'a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for

hearing."). Stated differently, there is no availability for further review by a court as to this issue, and therefore there is no other adequate remedy at law. *Barrett*, 840 F.2d at 1263.

The BER has the authority to correct the mistake of law made by the Hearing Examiner in its Order under Rule 60(d)(1). DEQ and Intervenors thus request that it do so and issue an order that it has no discretion to utilize a MAPA contested case procedure in this matter.

III. The BER Should Provide the Parties with a Status Conference or Subsequent Order Clarifying Next Steps in the Review Process.

Finally, irrespective of *what* process the BER decides to employ for this advisory review (if any), the Hearing Examiner's Order is completely silent about whether the BER should order a status conference or issue an order clarifying next steps in this review. Instead, the Hearing Examiner determined that a status conference would "serve no purpose," (Dkt. 39, at 7) remanding the matter to the BER. Now, however, the parties have no guidance on how the BER intends to proceed. And adding to this uncertainty, the BER's secretary noted in an email to counsel that her "understanding of next steps will be for this matter to be put before the [BER] at their next scheduled meeting in April to determine the appropriateness of DEQ's decision to require an EIS." Ex. D.

Before this matter is added to the next BER meeting, DEQ and Intervenors respectfully ask for clarification to the Hearing Examiner's Order as to (1) how the BER intends to proceed with this matter, including scheduling a status conference with the BER or the Hearing Examiner and/or specifying what process or procedures BER intends to use, and (2) if the matter is scheduled as an Action Item at the April meeting, what the BER expects of the parties and counsel so that they may adequately prepare any witnesses for evidentiary purposes, and/or oral argument regarding the legal issues concerning DEQ's EIS determination.

CONCLUSION

For the reasons stated herein, under Rule 60(b)(1) or 60(d)(1), M. R. Civ. P., DEQ and Intervenors respectfully request the BER to reconsider that portion of the Hearing Examiner's Order concluding that the BER has discretion to utilize MAPA contested case procedures, and to unequivocally confirm that the BER's review is limited only to the "significance determination" itself under § 75-1-201(9), MCA, and may not utilize contested case procedures in its review of this significance determination. DEQ and Intervenors further request clarification as to whether the BER intends to review the significance determination and details related to the process BER will utilize for this review well in advance of the April BER meeting.

DATED this 8th day of March 2023

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Department of Environmental Quality
Attorney for the Department

/s/ Amanda D. Galvan
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I hereby certify that this 8th day of March, 2023, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF:
LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #00860

CASE NO. BER 2022-03 HR

INTERVENORS' RESPONSE TO DEQ'S MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET

INTRODUCTION

Intervenors Fort Belknap Indian Community (FBIC), Montana Environmental Information Center (MEIC), Earthworks, and Montana Trout

EXHIBIT A

098

Unlimited (MTU) (together, "Conservation Groups") file this brief in response to the Department of Environmental Quality's (DEQ) Motion to Remove from the Contested Case Docket and supporting brief (filed November 2, 2022) ("DEQ's Br."). FBIC and the Conservation Groups agree with DEQ that the Board has authority only to undertake an informal review of DEQ's decision to require an EIS, as contemplated by the applicable statute, and lacks authority to undertake the contested case proceeding currently contemplated in this matter.[1]

FACTUAL BACKGROUND

The subject litigation is Luke Ployhar's proposal to explore for gold at the former Zortman mine in the Little Rocky Mountains of north-central Montana, adjacent to the Fort Belknap Reservation. Ployhar's proposed project would introduce new mining activity at the former Zortman mine area. As detailed by DEQ in its brief, on February 2, 2022, DEQ issued a final EA related to Ployhar's exploration application determining that, upon review of the relevant material, an EIS, not an EA, was the appropriate level of environmental review required for the project. *See* DEQ Br. at 2. As a result of comments submitted to the agency related to potentially significant impacts—many from concerned and impacted tribal members as well as Tribal Historic Preservation Officers—DEQ determined that an EIS is necessary to evaluate the impacts of Ployhar's proposed project to social structures and mores. *Id.*

[1] Once the matter is removed from the contested case docket, FBIC and the Conservation Groups intend to move the Board to exercise its discretion to dismiss this action without issuing an advisory opinion, as contemplated by Mont. Code Ann. § 75-1-201(9).

In response, Ployhar filed an Application for Review of DEQ's decision before the Board of Environmental Review on May 27, 2022. Ployhar invokes Mont. Code Ann. § 75-1-201(9) requesting a recommendation from the Board that DEQ withdraw its requirement for an EIS. App. for Review at 3, 10–11 (filed May 27, 2022). Ployhar's petition does not specify or request any specific procedures, including contested case procedures under MAPA, for the Board to adopt in its consideration of his application. *Id.*

After receiving Ployhar's petition, the Board voted on June 10, 2022, to appoint a hearing examiner to preside over the Application for review. On July 21, 2022, the Hearing Examiner issued various documents, including an initial, and later amended, procedural order, providing for the procedural requirements of a contested case under the Montana Administrative Procedure Act (MAPA). *See* DEQ Br. at 2.

LEGAL AUTHORITY

FBIC and the Conservation Groups agree with DEQ's discussion of the relevant law. *See* DEQ. Br. at 3–4. Of particular note—and as discussed in more detail below—are the MEPA provision under which Ployhar seeks relief in this proceeding, Mont. Code Ann. § 75-1-201(9) (authorizing the Board to issue an "advisory recommendation" regarding DEQ's significance determination "at its discretion"); the MEPA provision for challenging an agency action, *id.* § 75-1-201(5)(a)(1) (requiring challenges to agency actions to be brought in *court*); and the contested case provision in MAPA, *id.* § 2-4-102(4) (providing for a trial-like hearing when an agency is required to make a "determination of legal rights, duties, or

privileges of a party"). These statutory provisions and interpreting case law make clear the inapplicability of a contested case proceeding in this matter.

ARGUMENT

A contested case proceeding is an unsuitable procedure for Ployhar's Application for Review before the Board. Ployhar seeks to challenge issues regarding DEQ's environmental analysis under MEPA in this administrative proceeding. While MEPA provides an opportunity for the Board to informally review DEQ's EIS determination, Mont. Code Ann. § 75-1-201(9)—the mechanism that Ployhar invokes here—that informal opportunity was not designed to allow an applicant to (A) to utilize MAPA's contested case procedures or (B) otherwise authorize the Board to offer any binding legal determination on DEQ's decision to require an EIS.

A. MAPA's Contested Case Procedures Are Inapplicable.

At the outset, the inapplicability of MAPA's contested case procedures here is evident from the absence of any language in MEPA requiring such a proceeding in this circumstance. As explained by DEQ, when the Legislature intends for MAPA's trial-type proceedings to apply, it includes express language invoking those procedures in the statute. *See* DEQ Br. at 8 (citing Mont. Code Ann. §§ 75-5-611(4); 75-20-406(2); 76-4-126; 82-4-206; 82-4-353(3); 82-4-427(4)). The provision invoked by Ployhar under MEPA that provides the basis for the Board's review here, Mont. Code Ann. § 75-1-201(9)—in stark contrast to the statutes DEQ cites—contains no language or reference to MAPA or its contested case proceedings. The imposition of these procedures here would effectively rewrite MEPA's provisions to include a

process that the Legislature did not intend to apply. *See* Mont. Code Ann. § 1-2-101 (a judge's role is not to "insert what has been omitted").

Moreover, applying the MAPA contested case provisions in this matter is improper because the Board is not authorized to determine any legal rights in this proceeding, which is required for MAPA's contested case procedures to apply. The Montana Supreme Court has clarified that the "statutory requirement of a trial-type hearing [under MAPA] does not apply to every situation where a person's interest is adversely affected by agency action. Rather, such a hearing is required *only* in 'contested cases.'" *Johansen v. State, Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 20, 288 Mont. 39, 955 P.2d 653 (emphasis added). Under the plain language of MAPA, a contested case must necessarily involve "a determination of legal rights, duties, or privileges of a party." Mont. Code Ann. § 2-4-102(4).

Here, MEPA's authorization of the Board to submit an "*advisory*" opinion at its discretion does not authorize the use of the MAPA contested case procedures because the Board's review has no bearing on Ployhar's "legal rights, duties, or privileges" under MEPA. *See id.* (emphasis added). Indeed, the Legislature expressly *limited* the Board's authority to make any decision determinative of Ployhar's rights by authorizing *only* an "advisory" opinion. Mont. Code Ann. § 75-1-201(9). In that regard, the Legislature's decision not to include MAPA contested case procedures makes practical sense, given that Mont. Code Ann. § 75-1-201(9) does not contemplate a resolution of a legal right, but instead only authorizes the Board to issue an advisory decision. A full trial-type proceeding, then, would not

only require the needless preparation and review of irrelevant material, but would also forestall any ultimate resolution of the legal sufficiency of DEQ's underlying decision which, as discussed *supra* must be determined by a court. Mont. Code Ann. § 75-1-201(5)(a)(1).

In light of the Board's expressly limited authority to issue only an advisory opinion, a full trial-type proceeding, including the examination of witnesses and comprehensive discovery, would result in a needless waste of time and resources for all of the parties.

B. The Board Lacks Jurisdiction to Consider a Legal Challenge to DEQ's EIS Determination.

Even setting aside the facial inapplicability of MAPA's contested case procedures, Ployhar's request for Board review of DEQ's decision also cannot be used to circumvent MEPA's clear mandate that an applicant may only bring a challenge to an agency action in court. Mont. Code Ann. § 75-1-201(5)(a)(1) ("[A] challenge to an agency action … may only be brought *in district court or in federal court*." (emphasis added)); *see also Pompeys Pillar Hist. Ass'n v. Mont. Dep't of Env't Quality*, 2002 MT 352, ¶ 20, 313 Mont. 401, 61 P.3d 148 (affirming same and noting that the Legislature amended MEPA in 2001 to clarify this review process). Although the statute does not provide detailed instructions on the appropriate procedure for the Board's review under the provision invoked by Ployhar, it is nonetheless clear from the Legislature's use of the words "review" and "advisory

recommendation" that a legal challenge to DEQ's significance decision cannot be undertaken by or before the Board. *Id.* [2]

By imposing MAPA's contested case procedures in this matter—including authorizing discovery, testimony by witnesses, and dispositive merits-briefing—the Hearing Examiner has effectively endorsed the Board's review of the legal sufficiency of DEQ's decision. In other words, the use of such contested case procedures improperly transforms the informal and advisory review process contemplated and authorized by MEPA, Mont. Code Ann. § 75-1-201(9), into a purported legal challenge to an agency action, in violation of the statute, *id.* at § 75-1-201(5)(a)(1); *see also Bell v. Dep't of Licensing*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979) (an agency can only exercise the powers explicitly conferred by the legislature).

Because the Board has no jurisdiction to make a binding legal determination related to DEQ's decision to require an EIS, the Board should reject the Hearing Examiner's erroneous selection of MAPA's contested case procedures in this matter.

CONCLUSION

For the foregoing reasons, FBIC and the Conservation Groups agree with DEQ that the Board should remove this issue from the contested case docket, *see* DEQ Br. at 11., and further request that the Board proceed with the informal

[2] It is FBIC's and the Conservation Groups' position that the Board should, at most, review DEQ's EA and comments submitted by interested parties to form its recommendation on Ployhar's application for review. DEQ's administrative rules related to comments on draft environmental assessments may provide guidance on this procedure. *See* Admin. R. Mont. 17.4.610.

review contemplated by MEPA by directing the Hearing Examiner to vacate all deadlines contemplated by the current scheduling order in this matter and issue a new order limited to establishing a process and deadlines for the parties to submit written comments related to DEQ's EIS determination for the Board's consideration.

Respectfully submitted this 21st day of November, 2022.

/s/ Amanda D. Galvan

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **REPLY BRIEF IN SUPPORT OF MOTION TO REMOVE FROM THE CONTESTED CASE DOCKET**

The Montana Department of Environmental Quality (DEQ), by and through undersigned counsel, submits this reply brief in support of its Motion to Remove from the Contested Case Docket[1] as follows.

ARGUMENT

I. DEQ and Intervenors Cannot Waive Subject-Matter Jurisdiction.

As stated in DEQ's opening brief, the BER's authority in this case is limited to a discretionary review of DEQ's significance determination requiring

[1] DEQ responds to Intervenors' Response by adopting and incorporating Intervenors' arguments made therein.

preparation of an EIS and submittal of an advisory recommendation, as stated in § 75-1-201(9). The BER may not, however, subject the parties to a contested case procedure to challenge a MEPA decision under MAPA, because any MEPA compliance challenge must be before a state or federal district court. *Pompeys Pillar Hist. Ass'n v. Mont. Dep't of Env't Quality*, 2002 MT 352, ¶ 21, 313 Mont. 401, 61 P.3d 148. Under the plain language of § 75-2-201, MCA, the BER therefore lacks subject-matter jurisdiction to adjudicate DEQ's MEPA decision to prepare an EIS.

Ployhar does not dispute the substantive language of § 75-1-201, MCA, but instead argues, without citation to any legal authority, that DEQ and Intervenors waived their right to request removal.[2] Ployhar Resp. Br., at 2-3. Subject matter jurisdiction, however, is *never* waived, and may be raised at any time; a party cannot waive or consent to jurisdiction when there is no basis for jurisdiction in law. *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867; *see also In re Marriage of Miller*, 259 Mont. 424, 426-27, 856 P.2d 1378, 1380 (1993) ("subject matter jurisdiction may be raised at any stage of a judicial proceeding by a party or *sua sponte* by the court."). Here, the jurisdiction to adjudicate MEPA

[2] Confusingly, Ployhar claims that Intervenors waived their right to challenge subject matter jurisdiction because their "request for removal should have been included in their Motion to Intervene." Br. at 3. In addition to the fact that subject-matter jurisdiction cannot be waived, as a practical matter, it defies logic to suggest Intervenors were required to request removal before they were made a party to the proceeding.

challenges must be brought in state or federal court, not the BER. Section 75-1-201(5)(a)(1), MCA. Thus, regardless of when DEQ and Intervenors raised the jurisdictional issue (even though neither DEQ, the Intervenors, nor Ployhar actually requested a contested case proceeding), it cannot be subject to waiver.

Ployhar further asserts that permitting removal from the contested case docket now would subject Ployhar to prejudice from cost and wasted time. Resp. Br. at 3. This argument likewise fails. First, whether Ployhar would indeed be subject to prejudice is not a consideration for jurisdiction, as subject-matter jurisdiction is not a non-jurisdictional procedural defect that contemplates equitable relief, but a threshold requirement. *See Alto Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 28, 389 Mont. 435, 406 P.3d 937.

Second, Ployhar's self-serving complaints of prejudice are disingenuous as a practical matter. DEQ's environmental review does not demand a substantive decision implicating an applicant's legal rights, duties, or privileges necessary for a contested case review. Section 2-4-102, MCA; *Ravalli Co. Fish & Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). As such, merely because Ployhar claims that any proposed project should be subject to an EA rather than an EIS, and any subsequent challenge to that decision, has no bearing on Ployhar's rights or privileges, let alone any perceived prejudice stemming therefrom.

Finally, this case is in its infancy. No discovery has commenced, no exhaustive motions practice occurred, nor any hearings scheduled. Ployhar's grievances of wasted time and expenses thus ring hollow. More perplexing, rather than address the clear jurisdictional issue now at this early juncture, Ployhar nevertheless remains committed to an exhaustive and yet futile contested case proceeding in which he undoubtedly will be burdened by extensive time and cost. Notwithstanding the clear jurisdictional limits to the BER's authority, the most timely and cost-effective procedure for *all* participants is to remove this proceeding from the contested case docket now.

The statutory authority is clear that the BER has the discretion to conduct an informal assessment of DEQ's environmental review under § 75-1-201(9), MCA. Any MEPA challenge, however, remains singularly in the purview of a district court or federal court. Section 75-1-201(5)(a)(1), MCA. The BER should therefore remove this proceeding from the contested case docket for informal review.

II. The Contested Case Procedures Do Not Apply to § 75-1-201(9), MCA.

In the alternative, Ployhar asserts that the contested case procedure as set forth in MAPA should nevertheless apply to this proceeding. Br. at 4. Ployhar argues that this procedure should apply because DEQ fails to provide for an

alternative, and is, in his terms, the most "practically appropriate." *Id.* Ployhar's arguments lack merit and should be disregarded.

First, Ployhar's desire to read new language into § 75-1-201(9), MCA, conflicts with longstanding rules of statutory interpretation. When interpreting a statute, it must be construed according to its plain meaning; if the language is clear and unambiguous then no further interpretation is required. *In re Estate of Engellant*, 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218. Moreover, in interpreting a statute, the court (or in this case, the BER), may merely "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted." Section 1-2-101, MCA; *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771.

Here, § 75-1-201(9), MCA provides, in pertinent part, that a "project sponsor may request a *review of the significance determination* or recommendation made under subjection (8) by the appropriate board, if any." (Emphasis added). The statute explicitly and simply lays out the procedure to be followed: submission of the significance determination to the BER for review—nothing more. Had the legislature intended for MAPA contested case procedure to apply to this discretionary review, it would have stated as much. *Compare, e.g.,* §§ 75-5-611(4); 75-20-406(2); 75-4-126; 82-4-206; 82-4-353(3); 82-4-427(4). Because it

did not, the BER is not permitted to read into the statute a review process that plainly does not exist.

Ployhar further suggests that these contested case procedures have already been adopted by the BER, and thus should be utilized in the MEPA review process. Br. at 4 (citing ARM 17.4.101(1)). Br. at 4. The BER, however, is a quasi-judicial administrative body and creature of statute with only those powers specifically conferred by the legislature. Section 2-15-3502, MCA; 1995 Mont. Laws ch. 418, § 21; *Bell v. Dep't of Licensing*, 182 Mont. 21, 22-23, 594 P.2d 331 (1979).[3] The procedural rules Ployhar seeks to invoke for the BER's judicial function, found in MAPA §§ 2-4-601 through 2-4-631, are limited to "contested cases," not the discretionary and advisory "review" contemplated for in § 75-1-201(9), MCA. The BER thus lacks the authority to impart this contested case procedure on this proceeding.

Likewise, "[i]t is axiomatic in Montana law that administrative regulations cannot change a statute" and "[r]ules adopted by administrative agencies which conflict with statutory requirements or exceed authority provided by statute are invalid." *Mont. Indep. Living Project v. State, DOT*, 2019 MT 298, ¶ 31, 398

[3] Theoretically, even if it *could* adopt new procedural rules for this proceeding to mirror those in MAPA contested case proceedings, the BER would need to first undergo formal rulemaking procedures as outlined in relevant statutes and administrative rules, *and* such rules would have to be consistent with the statutory provisions. *See* § 2-4-201, MCA (requiring each agency "adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available."); *see also* § 2-4-302, MCA.

Mont. 204, 454 P.3d 1216. Engrafting new or different procedural requirements onto § 75-1-201(9), MCA, which plainly considers only a review of the relevant environmental assessment documents, contradicts the statute and exceeds the authority conferred on the BER by the legislature. The BER should therefore deny Ployhar's request.

Finally, as a matter of policy, utilizing a contested case procedure would be entirely nonsensical in this context. Ployhar suggests that DEQ has some alternative motivation and therefore is concerned about engaging in discovery; in actuality, Ployhar fails to understand the environmental review process. MEPA review is designed to ensure the legislature fulfills its constitutional mandates, and that it has taken a "hard look" at the environmental impacts of the proposed project. *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶¶ 68, 70, 402 Mont. 168, 477 P.3d 288. MEPA is thus essentially procedural in nature and does not demand an outcome. *Id.*, ¶ 66. Any permitting decision, however (which has yet to be made here), and thus any restrictions on Ployhar's mining operations, stem from the MMRA, not MEPA. *Id.*, ¶ 81. Thus, the discretionary review the BER may engage with respect to § 75-1-201(9), MCA, is entirely geared toward assessing whether DEQ has engaged in the appropriate level of environmental review of the project. While the BER may provide, if it so chooses, an advisory opinion as to DEQ's level of environmental review, it cannot

adjudicate any legal right of Ployhar, or grant him any relief, because MEPA does not concern Ployhar's legal rights. *Park Cnty.*, ¶ 71.

Conversely, the MAPA contested case procedure is specifically used in order for the BER to engage in a fact-finding mission to resolve the "legal rights, duties, or privileges of a party." Section 2-4-102(4), MCA. The MAPA contested case procedure thus cannot be divorced from the ultimate objective to make a binding legal decision as to Ployhar's legal rights and privileges. As such, it is wholly irrelevant, and a waste of the parties' and the BER's time and resources, to engage in a contested case procedure for what is to be a simple process designed to ensure the government has sufficient information about the environmental magnitude of the proposed project before it occurs.

Because the MAPA contested case procedure is not legally appropriate or practically reasonable for this MEPA review, the BER should deny Ployhar's request.

CONCLUSION

Despite the fact that Ployhar originally sought only an advisory review of DEQ's decision to engage in an EIS for the proposed project, consistent with the plain language of § 75-1-201(9), MCA, Ployhar now argues that the Hearing Examiner correctly placed this proceeding on a contested case hearing track. But MEPA challenges are only subject to the jurisdiction of courts, not the BER, and

neither DEQ nor Intervenors can waive a threshold jurisdictional requirement. Moreover, § 75-1-201(9), MCA, does contemplate the simple procedure for review of DEQ's significance determination. The BER cannot read into the statute new contested case requirements which presently do not exist, exceed its authority by mandating this procedure which was not contemplated by the legislature, or engraft additional or different procedural requirements than those confined in this statute.

For these reasons, and the reasons set forth in DEQ's opening brief and Intervenors' response brief, the BER should remove this case from the contested case docket, vacate the scheduling order, and provide a new procedural order for submission of DEQ's significance determination as set forth in § 75-1-201(9), MCA.

DATED this 30th day of November 2022.

/s/ Jessica Wilkerson
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Department of Environmental Quality

Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of November 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties of their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #008680	Case No. BER 2022-03 HR **NOTICE OF SUBMITTAL**

PLEASE TAKE NOTICE that DEQ's Motion to Remove from the Contested Case Docket has been fully briefed and is ripe for ruling.

DATED this 5th day of December 2022.

/s/ Jessica Wilkerson
JESSICA WILKERSON
Department of Environmental Quality

Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that this 5th day of December 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties of their counsel of record as set forth below:

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Subject:	In the Matter of Luke Ployhar, Case No. BER 2022-03 HR - Order Granting Motion to Remove
Date:	Friday, February 24, 2023 3:35:43 PM
Attachments:	38 - 2023-02-24 Order Granting Motion to Remove FINAL.pdf

Good afternoon,

Attached is an Order Granting Motion to Remove in the above-referenced matter. My understanding of next steps will be for this matter to be put before the Board at their next scheduled meeting in April to determine the appropriateness of DEQ's decision to require an EIS. If my understanding is incorrect, please advise so I can appropriately reflect on the next BER meeting agenda.

Thank you,

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
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IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #00860	**CASE NO. BER 2022-03 HR**

ORDER DENYING RECONSIDERATION AND CLARIFICATION

This matter comes before the Board of Environmental Review ("BER") on the "joint combined" motions of the Department of Environmental Quality ("DEQ") and the Intervenor-Respondents for Partial Reconsideration of Order of Removal and for Clarification ("Motion"). For the reasons stated below, the Motion is denied.

BACKGROUND

On May 27, 2022, Luke Ployhar applied to the BER for review of the DEQ's decision to require an Environmental Impact Statement ("EIS") in connection with his application for an exploratory mining license. The BER appointed a hearing examiner to hear the matter as a contested case under the Montana Administrative Procedure Act ("MAPA"). On October 18, 2022, Intervenor-Respondents were permitted to intervene.

On November 2, 2022, DEQ filed its Motion to Remove from the Contested Case Docket ("Motion to Remove"), asserting that contested case proceedings under MAPA are inappropriate in this matter. On the same day, Intervenor-Respondents moved for a status conference. On November 16, 2022, Mr. Ployhar responded in opposition to both

motions. On November 21, 2022, the Intervenor-Respondents responded in support of DEQ's Motion to Remove, and on November 30, 2022, DEQ replied to Mr. Ployhar in support of its Motion to Remove. Through inadvertence and error, the latter two pleadings (Intervenor-Respondents' response and DEQ's reply) were not added to the Hearing Examiner's pleadings file.

On February 24, 2023, the Hearing Examiner issued an Order Granting DEQ's Motion to Remove and denying the request for a status conference as unnecessary ("Order"). The Hearing Examiner agreed with DEQ and the Intervenor-Respondents that she was without jurisdiction to hear this matter and remanded it to the BER for consideration at its next meeting.

On March 8, 2023, DEQ and the Intervenor-Respondents filed their Motion, seeking reconsideration of a statement made on page 6 of the Order ("The Board may choose to use contested case procedures, or it may not, at its discretion") and clarification of the procedure moving forward. Although the movants note that Mr. Ployhar opposes this Motion, because the Motion is denied and in the interest of time, the Hearing Examiner issues this order without waiting for Mr. Ployhar's response.

LEGAL STANDARD

DEQ and the Intervenor-Defendants file their Motion under Mont. R. Civ. P. 60(b)(1) or alternately, Mont. R. Civ. P. 60(d)(1).

Mont. R. Civ. P. 60(b)(1) permits a court to "relieve a party… from a final judgment, order, or proceeding" due to "mistake, inadvertence, surprise, or excusable neglect." A court may correct its own error affecting the "substantial rights" of the parties

within one year after issuance of the original order. *See Thomas v. Thomas*, 189 Mont. 547, 550-51, 617 P.2d 133 (1980).

Mont R. Civ. P. 60(d)(1) enables the court to "entertain an independent action to relieve a party from a judgment, order, or proceeding" In that context, an "independent action" is interpreted to mean an independent cause of action filed in equity in "unusual circumstances where a case of injustice is deemed sufficiently gross to demand disturbing a final judgment." *Tucker v. Tucker*, 2014 MT 115, ¶ 18, 375 Mont. 24, 326 P.3d 413.

DISCUSSION

At the outset, the party to which the Motion is addressed is not clear. DEQ and the Intervenor-Respondents repeatedly refer to what the BER should do to correct the Hearing Examiner's alleged error, but a motion for reconsideration is typically heard by the judge who issued the underlying order. To the extent that the Hearing Examiner's input is sought, it is explained below.

The Hearing Examiner regrets that the Intervenor-Respondents' response brief and DEQ's reply were mistakenly not included in the pleadings file before the February 24 Order issued. Upon review of both in the course of deciding this Motion, neither filing causes the Hearing Examiner to reconsider her Order in any meaningful regard.

The request for reconsideration is denied, because the Hearing Examiner issued no "final judgment, order, or proceeding" that affected any party's "substantial right" with regard to the procedure to be used upon remand to the BER. The portion of the Order that DEQ and the Intervenor-Respondents protest is, at most, dicta. The overall holding of the

Order is that the Hearing Examiner has no authority to decide this matter as a contested case; likewise, the Hearing Examiner has no authority to dictate the manner in which the BER decides this matter on its informal review. DEQ and the Intervenor-Respondents requested removal of this matter from the contested case docket – and therefore, the end of the Hearing Examiner's appointment – and that is what they got. This matter is now before the BER for its discretionary, advisory recommendation pursuant to Mont. Code Ann. § 75-1-201(9). *See* Order at 7 ¶ 3.

The request for clarification of procedures is also denied. The procedure governing BER's consideration of this matter is up to the BER, and not to the Hearing Examiner, who is appointed by the Board, but not part of or counsel to it. Accordingly, it is not for the Hearing Examiner to prescribe any next steps. To the extent that contested case-style procedures are inappropriate in this matter (as distinguished from a contested case-style outcome, which the Hearing Examiner has already agreed is inappropriate), that argument is properly made to the BER and not to the Hearing Examiner.

In the interest of clarity going forward, however, the Hearing Examiner restates the portion of the Order (at 6) to which DEQ and the Intervenor-Respondents most strenuously object. As issued, those sentences (Order at 6) read: "The Board may choose to use contested case procedures, or it may not, at its discretion. In either event, that is for the Board, and not the Hearing Examiner, to decide." A clarified or corrected version may read: "The Board will set its own procedures for its review of this matter, in accordance with Mont. Code Ann. § 75-1-201(9)."

As stated in the February 24 Order and the paralegal's email attached as Exhibit D to the Motion, this matter is set for a status and scheduling conference at the BER's next meeting on April 7, 2023. Any argument or questions that the parties have about the proper procedure may be addressed at that time and before the BER.

ORDER

For the reasons above stated, IT IS HEREBY ORDERED that the DEQ and Intervenor-Respondents' Joint Combined Motion for Partial Reconsideration of Order of Removal and for Clarification is DENIED.

DATED this 10th day of March 2023.

/s/ Liz Leman
LIZ LEMAN
Hearing Examiner
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CERTIFICATE OF SERVICE

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

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DATED: March 10, 2023

/s/ *Elena M. Hagen*
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