

**BOARD OF ENVIRONMENTAL REVIEW
JUNE 9, 2023**

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**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

APRIL 7, 2023

Call to Order

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

Attendance

Board Members Present

By Zoom: Chairman Simpson; Board Members Stacy Aguirre, Julia Altemus, Lee Bruner, Jennifer Rankosky, and Joe Smith. Board member Jon Reiten joined the meeting later, due to technical difficulties.

Roll was called and a quorum was present.

Board Attorney Present

Terisa Oomens

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Sandy Moisey Scherer

DEQ Legal: Catherine Armstrong, Kirsten Bowers, Angie Colamaria, Sam King, Lee McKenna, Kurt Moser, Nicholas Whitaker, Jessica Wilkerson, Colson Williams

Public Policy: Moira Davin

Air, Energy & Mining: Emily Lodman, Bob Smith

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Aislinn Brown, Elena Hagen – Montana DOJ Agency Legal Services Bureau

Bill Mercer, Sarah Bordelon – Holland & Hart

Barbara Chillcott – WELC

Shiloh Hernandez, Amanda Galvan – Earthjustice

Robert Colter – Indian Law Resource Center

Kaden Keto – Jackson Murdo & Grant

Derf Johnson, Anne Hedges – MEIC

Ray Stout, Kootenai Valley Record

Owen P. Voigt, Legacy Mining

Luke Ployhar

Noelle Boyer

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the February 24, 2023, Meeting Minutes

Board member Smith moved to APPROVE the February 24, 2023, meeting minutes. Board member Altemus SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

B. Introduction of new Board members and Board Chair

Board members gave brief introductions.

II. BRIEFING ITEMS

The Board did not have any comments.

III. ACTION ITEMS

a. 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.

Chairman Simpson requested the parties give a brief statement to address the settlement agreement and the questions that were raised. Bill Mercer from Holland and Hart and Kirsten Bowers from DEQ provided updates. Discussion ensued.

Board member Bruner motioned to DIRECT the parties to update the Board at each Board meeting. Board member Reiten SECONDED. The motion passed unanimously.

The Board took a ten-minute break. Roll was called and a quorum was present. Board member Reiten introduced himself as he was not present at the beginning of the meeting. All meeting attendees were identified.

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

Chairman Simpson reviewed the case with Board members, clarifying matters before the Board today. He allowed legal counsel ten minutes each for oral argument.

Legal counsel giving oral argument were Kaden Keto from Jackson, Murdo & Grant; Sam King from DEQ; and Amanda Galvan from Earthjustice.

The Board engaged in discussion whether to approve or deny the remand.

Board member Aguirre motioned to DISMISS the petition for the contested case. Board member Reiten SECONDED. The motion passed unanimously.

The Board discussed whether to proceed with an informal or advisory role in the proceeding, and if in the affirmative, what that procedure ought to be.

Board member Aguirre motioned that the Board NOT CONTINUE with this matter as an action item. Board member Rankosky SECONDED. The motion passed unanimously.

IV. GENERAL PUBLIC COMMENT

No public comment was given.

V. BOARD COUNSEL UPDATE AND EXECUTIVE SESSION

The Board moved to Executive Session after Adjournment of the Board Meeting.

VII. ADJOURNMENT

Board member Altemus MOVED to adjourn the Board Meeting and move to Executive Session; Board member Reiten SECONDED. The motion PASSED unanimously. The meeting adjourned at 10:37 A.M.

Board of Environmental Review April 7, 2023, minutes approved:

/s/
DAVID SIMPSON
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE _____

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA
BEFORE HEARING EXAMINER CAITLIN BUZZAS**

IN THE MATTER OF:
THE NOTICE OF APPEAL AND
REQUEST FOR HEARING BY OREO'S
REFINING REGARDING SOLID WASTE
LICENSE EXPIRATION (LICENSE #574)

CASE NO. BER 2021-06 SWP
**PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING THE
DEPARTMENT OF
ENVIRONMENTAL QUALITY'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
OREO'S REFINING'S MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

Oreo's Refining was a sole proprietorship owned by Shelly Mitchell that is no longer in operation. (Dept. Ex. 20 (Mitchell Deposition Transcript (Depo. Tr.) at 14:10–19; Oral Argument Hearing (Hr'g) at 26:14–26:45).) Pursuant to the Montana Solid Waste Management Act (SWMA), Mont. Code Ann. tit. 75, ch. 10, pt. 2., the Montana Department of Environmental Quality (Department) issued a license to operate a solid waste management system to Oreo's Refining at 2206 Missoula Avenue, Missoula, MT 59802 on April 5, 2017. (Doc. 27.) Oreo's Refining was permitted to operate through June 2021. (Docs. 26–29, 33–37; Hr'g

at 01:06–01:21.) The Department did not renew Oreo’s Refining’s license upon its expiration on June 30, 2021. (Doc. 38.)

On July 29, 2021, Oreo’s Refining submitted its Request for Hearing to the Board of Environmental Review (Board), appealing the Department’s decision not to renew its license. (Doc. 1.) On July 7, 2022, the Department moved for summary judgment. (Docs. 21–43.) That same day, Oreo’s Refining filed a document that the undersigned takes as its Motion for Summary Judgment. (Docs. 44–71.) On July 28, 2022, the Department responded to Oreo’s motion. (Docs. 72–73.) Oreo’s never responded to the Department’s motion. On Oreo’s request, oral argument was heard on September 1, 2022. (Doc. 74.) The hearing was held by Zoom before Hearing Examiner Caitlin Buzzas. Ms. Mitchell appeared on behalf of Oreo’s Refining and Nicholas Whitaker represented the Department.

The undersigned has since taken over this matter as hearing examiner. The hearing examiner has listened to Ms. Mitchell’s testimony on behalf of Oreo’s Refining’s and the Department’s arguments, considered the briefs and affidavits in support of the motions, and examined the relevant exhibits submitted by the parties. Based upon the examination of the record, the Department’s motion for summary judgment should be granted, and Oreo’s Refining’s motion should be denied, for the reasons outlined below.

LEGAL STANDARDS

The Montana Administrative Procedure Act (MAPA), Mont. Code Ann. tit. 2, ch. 4, and the SWMA, Mont. Code Ann. tit. 75, ch. 10, govern this contested case. Summary judgment procedures may be used in contested cases under MAPA when the case satisfies the requirements of Mont. R. Civ. P. 56. *Matter of Peila*, 249 Mont. 272, 281, 815 P.2d 129, 144 (1991).

Summary judgment is appropriate “if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). “[T]he movant must demonstrate that, viewing the evidence in the light most favorable to the non-moving party, there exists no genuine issue of material fact.” *Roy v. Blackfoot Tel. Coop.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301. Upon determining “that no genuine issue of material fact exists, [the hearing examiner] must determine whether the moving party is entitled to judgment as a matter of law.” *Id.*

Each moving party bears the initial burden of establishing no material dispute of fact exists. *Tonner v. Cirian*, 2012 MT 314, ¶ 8, 367 Mont. 487, 291 P.3d 1182. To survive summary judgment, however, each nonmoving party “must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, raising a genuine issue of material fact.” *Peterson v. Eichhorn*, 2008

MT 250, ¶ 13, 344 Mont. 540, 189 P.3d 615. All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17, 296 Mont. 123, 988 P.2d 1221.

UNDISPUTED FACTS

There is no genuine dispute as to the following facts:

1. On February 24, 2017, Oreo's Refining submitted its initial Recycling Collection Facility Licensing Application to the Department's Permitting and Compliance Division, Solid Waste Section. (Doc. 26.)
2. The mailing address was a post office box, and the facility address was 2206 Missoula Avenue, Missoula, MT. *Id.*
3. License No. 574 was issued to Oreo's Refining on April 5, 2017. (Doc. 27.)
4. On March 29, 2018, Oreo's Refining submitted its renewal application, which indicated the facility address was still 2206 Missoula Avenue, Missoula, MT. (Docs. 28, Doc. 53.)
5. On June 19, 2018, the Department issued a License Renewal Certificate to License No. 574 Oreo's Refining located at 2206 Missoula Avenue, Missoula, MT, for the period of July 1, 2018, to June 30, 2019. (Doc. 29.)

6. On October 23, 2018, Oreo's Refining submitted an updated site plan indicating that as of November 1, 2018, it would no longer be accepting e-waste from the public, no longer operating at its current location, and would begin dismantling in an enclosed tow trailer. (Doc. 31.)

7. On March 28, 2019, the Department received Oreo's Refining's license renewal application that indicated its facility address was "Po Box 1195; Missoula, MT 59806 Mobile." (Docs. 33, 54, 55.)

8. On April 15, 2019, Oreo's Refining submitted an updated site plan indicating it would be accepting e-waste from the public and would continue to dismantle the e-waste in an enclosed tow trailer. (Doc. 32.)

9. On June 21, 2019, the Department issued a License Renewal Certificate for License No. 574 to Oreo's Refining located at 2206 Missoula Avenue, Missoula MT for the period July 1, 2019, to June 30, 2020. (Doc. 34.)

10. On March 10, 2020, Oreo's Refining submitted its license renewal application, which indicated its facility address was 2206 Missoula Avenue, Missoula, MT. (Docs. 35, 57, 58.)

11. The Department issued a License Renewal Certificate for License Number 576 to Oreo's Refining located at 2206 Missoula Avenue, Missoula MT for the period of July 1, 2020, to June 30, 2021. (Doc. 36.)

12. On May 17, 2021, Oreo's Refining submitted its license renewal application, which indicated its facility address was 2206 Missoula Avenue, Missoula, MT. (Docs. 37, 59, 60.)

13. On July 16, 2021, the Department sent Oreo's Refining, via Mitchell, a letter regarding the FY 2021 license expiration and requesting an updated address. (Docs. 38, 46.)

14. The Department notified Mitchel that it had attempted to conduct an inspection at 2206 Missoula Avenue in Missoula and learned that Oreo's Refining was not conducting business at that address. *Id.*

15. The letter informed Oreo's that it must submit a permanent address, and the Department would be withholding License No. 574 until a new address was submitted. *Id.*

CONCLUSIONS OF LAW

I. The Department's Motion for Summary Judgment.

1. Pursuant to Mont. Code Ann. § 75-10-204, the Department has promulgated administrative rules that govern the licenses to operate a solid waste management system. *See* Mont. R. Admin. tit. 17, ch. 50.

2. Pursuant to Mont. Code Ann. tit. 75, ch. 10, pt. 2 and Mont. Admin R. tit. 17, ch. 50, the Department has authority to issue licenses to recycling facilities.

3. The applicable statutes and administrative rules do not allow the Department to issue mobile licenses. In fact, several subparts of Mont. Admin. R. 17.50.508(1) require the license applicant to indicate location-specific information, including:

(b) legal and general description and ownership status of the proposed locations, including the land owner's name and address;

(c) documentation of ownership of the property or documentation demonstrating that the applicant has the right to operate a solid waste management system on the property;

(d) total acreage of proposed facility;

...

(f) name, address, and location of any public airports within five miles of the proposed facility;

(g) location of any lakes, rivers, streams, springs, or bogs, onsite or within two miles of the facility boundary;

(h) facility location in relation to the base floodplain of nearby drainages;

...

(o) vicinity map(s)...that delineate(s) the following within one mile of the facility boundaries:

(i) zoning and existing and allowed land use;

(ii) residences;

(iii) surface waters;

(iv) access roads;

(v) bridges;

(vi) railroads;

(vii) airports;

(viii) historic sites; and

(ix) other existing and proposed artificial or natural features relating to the project;

(p) site plan(s)...that delineate(s) the following within, or associated with, the facility:

(i) property ownership boundaries within one mile of the proposed licensed boundary;

(ii) proposed waste and licensed boundaries;

(iii) the location of existing and proposed[.]

4. Additionally, Mont. Code Ann. § 75-10-222(1) requires the department to notify the “local health officer in the county where the solid waste management system will be located...within 15 days after the department has received the application.”

5. The Department must receive approval of the local health officer before a license is considered valid. Mont. Code Ann. § 75-10-222(3).

6. Permitting a mobile solid waste management system would violate these statutory provisions because the local health officer and county could change depending on where the system is located.

7. As a matter of law, the Department correctly withheld Oreo’s Refining’s recycling collection facility license based on its inability to grant a license for a mobile location and Oreo’s Refining’s undisputed non-operation at the facility location for which it was licensed and for which it applied to be relicensed.

8. Summary judgment should be granted to the Department, and Oreo’s Refining’s appeal dismissed with prejudice.

II. Oreo's Refining's motion for summary judgment.

1. Oreo's Refining's motion for summary judgment presents no legal reason that would permit the Department to grant a mobile permit.
2. The sole issue properly before the Board is the Department's decision to withhold Oreo's Refining's collection facility license. Mont. Code Ann. § 75-10-224.
3. Oreo's Refining's claims that the Department violated its rights and that Department employees acted against Mitchell are not legally cognizable in this forum, as they do not fall under remedies provided by MAPA and the SWMA.
4. Admin. R. Mont. 17.50.514 does not apply to procedures under the SWMA. Therefore, Oreo's Refining's claim that the Department violated this provision is dismissed.
5. A Solid Waste Complaint (CVID #23466) filed against Oreo's Refining regarding storing or operating a business at an address on Hamilton Heights Road did not factor into the undersigned's decision. Therefore, any issues of disputed fact regarding that complaint are not material to the summary judgment decision.
6. Mitchell's desire and commitment to continue recycling e-waste is admirable, however the undersigned cannot grant any relief to her at this time. The

Department is bound by the statutes and administrative rules in place when Oreo's Refining's license expired, which do not allow it to issue mobile licenses.

ORDER

Based upon review and consideration of the entire record,

IT IS HEREBY ORDERED that the Department of Environmental Quality's Motion for Summary Judgment is GRANTED. Oreo's Refining's Motion for Summary Judgment is DENIED.

DATED this 26th day of January, 2023.

/s/ Aislinn W. Brown

AISLINN W. BROWN

Hearing Examiner

cc: Shelly Mitchell
Nicholas Whitaker

From: [Shelly Mitchell](#)
To: [Hagen, Elena](#)
Cc: [DEQ BER Secretary](#); [Whitaker, Nicholas](#); [Armstrong, Catherine](#)
Subject: [EXTERNAL] Oreo"s Refining, BER 2021-06 SWP -
Date: Friday, April 28, 2023 12:44:21 PM

To all whom it may concern,

Of course I am not going to agree with the ruling. I want to state my case in front of the Board of Environmental Review in person.

Sincerely
Shelly Mitchell

On Tue, Mar 7, 2023, 10:57 AM Hagen, Elena <EHagen2@mt.gov> wrote:

Good morning,

Attached is an Amended Order on Exceptions and Notice of Submittal in the above-referenced matter.

Thank you,

[Elena M. Hagen](#)

Paralegal/Investigator

Montana Department of Justice

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Montana Board of Environmental Review
5/12/23 at 3:37 PM
By: Sandy Moisey Scherer
Docket No: BER 2021-06 SWP

Attorney for Respondent DEQ

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

IN THE MATTER OF: THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY OREO'S REFINING REGARDING SOLID WASTE LICENSE EXPIRATION (LICENSE #574)	CASE NO. BER 2021-06 SWP DEQ'S RESPONSE TO OREO'S REFINING'S APRIL 28, 2023, EMAIL
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Respondent Montana Department of Environmental Quality ("DEQ") files this response to Respondent Oreo's Refining's April 28, 2023, email, in which Shelly Mitchell stated her general disagreement with the Hearing Examiner's Proposed Summary Judgment Order (Proposed Order). Because Oreo's Refining's has not set forth specific exception with the Proposed Order, and because the material facts are undisputed and DEQ is entitled to judgment as a matter of law, DEQ requests the Board of Environmental Review (Board) adopt the Hearing Examiner's Proposed Order as the final agency action and order of the Board.

Background

This matter is an appeal of DEQ's July 16, 2021, decision to withhold the renewal of Oreo's Refining's recycling collection facility license (License No. 574), based on the undisputed fact that Oreo's Refining was no longer operating at the Missoula County location for which its facility had been licensed. After DEQ sent a letter to Oreo's Refining explaining that it could not renew the license until Oreo's Refining provided, at a minimum, an updated address where it was conducting business, Oreo's Refining initiated the present appeal.

Since then, DEQ has devoted extensive time and resources to resolve Oreo's Refining licensing issue and otherwise assisting Oreo's Refining in making sure its activities comply with Montana law. DEQ has explained to Shelly Mitchell the actions her business can take without the need for a solid waste license from DEQ, and DEQ stands ready to promptly process a new license application should Oreo's Refining choose to submit one to the agency. Recycling licenses are issued free of charge by DEQ. ARM 17.50.410(6).

However, the parties have been unable to resolve Oreo's Refining's grievances, and, on January 26, 2023, following summary judgment motions and oral argument, the Hearing Examiner issued the Proposed Order, granting summary judgment to DEQ. Doc. 77.

On February 9, 2023, the Hearing Examiner issued an Order on Exceptions and Notice of Submittal, setting deadlines for filing exceptions to the Proposed Order and noticing this matter before the Board at its April meeting. Doc. 80.

On March 7, 2023, pursuant to request of the parties, the Hearing Examiner issued an Amended Order on Exceptions and Notice of Submittal, extending the filing deadlines for exceptions and responses, and noticing this matter before the Board at its June meeting. Doc. 83. The Amended Order on Exceptions stated, “If no party files exceptions this matter will be deemed submitted.” *Id.* at 2.

On April 28, 2023, Oreo’s Refining responded to the email transmitting the Amended Exceptions Order, stating, “Of course I am not going to agree with the ruling. I want to state my case in front of the Board of Environmental Review in person.” Doc. 84. Oreo’s Refining did not otherwise file exceptions to the Hearing Examiner’s Proposed Order.

Response

Oreo’s Refining’s two-sentence email response to the Hearing Examiner’s Amended Order on Exceptions states only general disagreement with the Proposed Order. It does not take issue with any specific finding or conclusion in the Proposed Order and, as such, does not provide notice to either the Board or DEQ as to what Oreo’s Refining intends to argue at the Board’s June meeting. Absent

specific exception to the Proposed Order, Oreo's Refining's April 28, 2023, email does not comply with § 2-4-621(3), MCA, or the Amended Order on Exceptions.

To the extent the Board is inclined to allow Oreo's Refining to present argument at the June meeting, such argument must be limited to those that (a) were presented to, and tied to the record before, the Hearing Examiner; and (b) are tied to specific exceptions to the findings and conclusions in the Proposed Order. The Board should not allow Oreo's Refining to submit evidence or otherwise present argument that is outside the record before the Hearing Examiner or that is untethered from the findings and conclusions in the Proposed Order presently before the Board.¹

Conclusion

For the foregoing reasons, DEQ requests that the Board adopt the Hearing Examiner's Proposed Order as the final agency action and order of the Board.

Respectfully submitted this 12th day of May, 2023.

DEPARTMENT OF
ENVIRONMENTAL QUALITY

BY: /s/ Nicholas Whitaker
Nicholas Whitaker

¹ DEQ reserves, and expressly does not waive, the right to assert failure to exhaust administrative remedies, as necessary, on judicial review. Section 2-4-702(1)(a), MCA (aggrieved party is required to exhaust "all administrative remedies available within the agency"); *Flowers v. Bd of Personnel Appeals*, 2020 MT 15, ¶ 13, 400 Mont. 238, 465 P.3d 210 (the fact that a proposed order later became a final order "did not obviate the requirement to file exceptions in order to completely exhaust the 'available' administrative remedies").

Certificate of Service

I hereby certify that on the 12th day of May 2023, I caused a true and accurate copy of the foregoing to be emailed to:

Hon. Aislinn Brown
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER,
CLARK FORK COALITION, IDAHO
CONSERVATION LEAGUE, IDAHO
RIVERS UNITED,

Plaintiffs,

vs.

MONTANA BOARD OF
ENVIRONMENTAL REVIEW, TECK
COAL LIMITED, and THE BOARD OF
COUNTY COMMISSIONERS OF
LINCOLN COUNTY

Defendants.

No. _____

**PETITION FOR JUDICIAL REVIEW
AND DECLARATORY JUDGMENT**

INTRODUCTION

1. Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, and Idaho Rivers United (Conservation Groups) petition for judicial review and seek declaratory relief from the Board of Environmental Review's Final Agency Action and Order (Final Order), Cause Nos. 2021-04 and 08 WQ (April 19, 2022). Attached as Exhibit 1.

2. In its Final Order, the Board acted arbitrarily and capriciously when it (1) erroneously determined that the administrative rule setting Lake Koocanusa's site-specific water column selenium rule was more stringent than the comparable federal guideline, and (2) exceeded its statutory authority by declaring the administrative rule invalid and by ordering new rulemaking as a remedy to its findings.

3. For decades, coal mines in Canada's Elk River Valley have leached harmful selenium into Lake Koocanusa—a 90-mile reservoir that stretches across the Montana-Canada border. Since 1986, selenium levels have more than quadrupled in the Elk River, contributing to more than 95 percent of the selenium pollution in Lake Koocanusa. The pollution in the lake is worsening as coal mining continues to expand.

4. Excessive selenium causes deformities and low reproductive rates in affected aquatic species, specifically threatening Lake Koocanusa's native West Slope Cutthroat Trout and the already endangered White Sturgeon populations in downstream waters of the Kootenai River in Montana and Idaho.

5. To protect Montana's water and its aquatic species from selenium pollution, the Board promulgated ARM 17.30.632(7)(a) on December 24, 2020, setting a site-specific selenium water quality standard of 0.8 µg/L for Lake Koocanusa.

6. The selenium standard, which was recommended by the Montana Department of Environmental Quality (DEQ) and later approved by the U.S. Environmental Protection Agency (EPA), was scientifically calculated to protect all aquatic species, including federally listed species from the harms of selenium pollution.

7. Approximately six months after the new administrative rule was adopted, Teck Coal Limited (Teck)—the Canadian mining company responsible for the selenium pollution in the Lake Koocanusa watershed—petitioned the Board to review the rule under Montana’s Stringency Statute. Section 75-5-203(4), MCA. The Lincoln County Board of Commissioners (Lincoln County) filed its own petition for review several months later.

8. The Board consolidated the petitions and, after a limited review process, issued a Final Order attempting to unlawfully reverse its earlier promulgation of Lake Koocanusa’s protective selenium rule and ordering remedies that exceed its statutory authority.

9. The Board’s Final Order, which was not based on new facts or science, has created confusion and regulatory disagreement over the validity of ARM 17.30.632(7)(a) and Lake Koocanusa’s selenium rule. This uncertainty threatens the Conservation Groups’ rights to enjoy uncontaminated water in Lake Koocanusa and the Kootenai River as set forth in the Clean Water Act (CWA) and the Montana Water Quality Act (MWQA).

10. To protect these rights, Conservation Groups bring this action for judicial review of the Board’s decision and seek declaratory relief to restore the validity of ARM 17.30.632(7)(a) and to clarify the Board’s statutory authority when conducting a stringency review, as defined in the plain language of § 75-5-203(4), MCA.

JURISDICTION AND VENUE

11. Conservation Groups bring this action pursuant to the Uniform Declaratory Judgments Act, §§ 27-8-201, 202, MCA, and *Johansen v. State, Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 26, 288 Mont. 39, 955 P.2d 653 (granting the district court jurisdiction to review a non-contested case agency decision to determine the “legal rights of the parties involved” and whether “the action of the [Board] is based upon any error of law, or is wholly unsupported by the evidence or clearly arbitrary and capricious.” (quoting *N. Fork Pres. Ass'n v. Dep't of State Lands*, 238 Mont. 451, 456, 778 P.2d 862, 866 (1989))).

12. Venue is proper in the First Judicial District, Lewis and Clark County under § 75-5-107, MCA, because the Board resides in Lewis and Clark County, Montana, and the activity that is the subject of this action occurred within the First Judicial District on Montana.

13. Conservation Groups exhausted all administrative remedies available prior to filing this complaint, including submission of administrative comments during the stringency review process, but the Board ignored their concerns.

14. Conservation Groups have standing to seek judicial review and declaratory relief because their members have long established, enduring connections to the water that will be adversely impacted by the Board's Final Order. Further, the Board's Final Order causes organizational harm to Conservation Groups by requiring the diversion of resources to address this issue in lieu of other issues important to their organizational mission. Additionally, the Board's Final Order injures Conservation Groups members' rights to enjoy uncontaminated water as set forth in the CWA and MWQA. These harms and injuries would be redressed by the requested remedies; therefore, Conservation Groups have standing to file this lawsuit.

PARTIES

15. Plaintiff Montana Environmental Information Center (MEIC) is a nonprofit organization founded in 1973 with approximately 10,000 members and supporters. MEIC is dedicated to the preservation and enhancement of the natural resources and natural environment of Montana, particularly the protection of water quality. MEIC is committed to assuring that state and federal officials comply with and fully uphold the laws of the United States and the State of Montana that are designed to protect the environment from pollution. MEIC and its members have intensive, long-standing recreational, aesthetic, scientific, professional, and spiritual interests in the responsible production and use of energy, and the land, air, and waters across the state. As a part of these efforts, MEIC participated in the stringency review process conducted by the Board. MEIC and its members have conservation, recreation, and cultural interests in protecting aquatic life in Montana waters that are affected by selenium pollution and specifically Lake Koocanusa and the Kootenai River. MEIC members live, work, and recreate in areas that are adversely impacted by selenium pollution in Montana. MEIC brings this action on its own behalf and on behalf of its adversely affected members.

16. Plaintiff Clark Fork Coalition is a non-profit organization based in Missoula, Montana, that works to protect and restore the Clark Fork River and its watershed. The organization was founded in 1985 in response to the environmental damage caused by historic mining activities in the Clark Fork River Basin, which is one of the largest river systems in Montana. The Clark Fork Coalition works on a variety of issues related to water quality, habitat restoration, and public access to the river. The organization engages in advocacy and education to promote policies and practices that support a healthy and thriving river ecosystems, and when appropriate, the Coalition will advocate on issues that are outside or adjacent to the boundaries of

the Clark Fork Basin, recognizing that the health of one watershed impacts the health of surrounding watersheds. The Coalition also works closely with community members, government agencies, and other organizations to coordinate restoration efforts and implement on-the-ground projects that improve the health of the river and its surrounding landscape. Through its work, the Clark Fork Coalition aims to ensure that the Clark Fork River remains a vital resource for current and future generations. The Clark Fork Coalition participated in the public commenting process and the establishment of the Lake Koocanusa selenium rule and the subsequent stringency review process. Clark Fork Coalition and its members have conservation and recreation interests in protecting aquatic life in Montana waters that are affected by selenium pollution. Clark Fork Coalition members live, work, and recreate in areas that are adversely impacted by selenium pollution in Montana. The Clark Fork Coalition brings this action on its own behalf and on behalf of its adversely affected members.

17. Plaintiff Idaho Conservation League (ICL) is an Idaho nonprofit founded in 1973 to protect state-wide conservation goals, with specific focus on clean water and landscape protection. As Idaho's largest state-based, non-profit conservation organization, ICL represents approximately 25,000 members and supporters, including members from all 44 of Idaho's counties. ICL staff work from four offices around the state (Boise, Ketchum, McCall, and Sandpoint) and its volunteer Board of Directors also geographically represents the state. While northern Idaho has always been in ICL's scope of work, ICL's north Idaho office in Sandpoint opened in 2008, providing the organization a local advocacy presence. While ICL's Sandpoint staff have consistently advocated for northern Idaho's lakes and rivers, in 2022, ICL established its first ever dedicated North Idaho Waterways Associate position, demonstrating the organization's commitment to the health of the Kootenai River and other north Idaho water

bodies. Members consistently cite concerns about clean water as a reason for their membership, reflecting their personal interests in protecting human health and the environment. The organization works to protect these values through public education, outreach, advocacy, and policy development. Through its work, ICL aims to ensure that North Idaho's waterways and upstream sources, remain a vital resource for current and future generations. Regarding selenium pollution specifically, ICL participated in the public commenting process associated with the establishment of the Lake Koocanusa selenium rule and the subsequent stringency review process. ICL and its members have conservation, recreation, and cultural interests in protecting aquatic life in downstream waters affected by selenium pollution. ICL members live, work, and recreate in the Lower Kootenai River Watershed, which is adversely impacted by selenium pollution. ICL brings this action on its own behalf and on behalf of its adversely affected members.

18. Plaintiff Idaho Rivers United is a statewide conservation organization committed to the conservation of rivers and wild fish. Founded in 1990 by a grassroots group of paddlers, anglers, and river conservationists, the organization represents those who live, fish, recreate, and otherwise depend on Idaho's rivers. For more than three decades, Idaho Rivers United has safeguarded imperiled wild steelhead and salmon, protected water quality, and defended and promoted the Wild & Scenic values of Idaho's rivers and upstream waterways. Idaho Rivers United submitted written comments during the public comment period and provided testimony at the public meeting associated with the stringency rule review process conducted by the Board. Idaho Rivers United and its members have conservation, recreation, and cultural interests in protecting aquatic life in downstream waters affected by selenium pollution. Idaho Rivers United members live, work, and recreate in areas that are adversely impacted by selenium pollution.

Idaho Rivers United brings this action on its own behalf and on behalf of its adversely affected members.

19. Defendant Montana Board of Environmental Review is an executive branch administrative board created under the authority of § 2-15-3502, MCA. The Board consists of seven members appointed by the governor, and the members must be representative of the geographic areas of the state. The Board is a quasi-judicial body that is attached to DEQ for administrative purposes. DEQ is responsible for the administration and enforcement of the MWQA and the administrative rules adopted under the MWQA. As of July 1, 2021, DEQ, not the Board, has sole rulemaking authority under the MWQA, subject to the provisions of §75-5-203, MCA.

20. Defendant Teck Coal Limited is a Canadian company that owns and operates coal mines upstream from Lake Koocanusa in Elk Valley, British Columbia. Teck petitioned the Board on June 30, 2021, for review of Lake Koocanusa's selenium standard. Teck's petition resulted in the Board's Final Order. As such, Teck is a "necessary party" to this action under MCA, § 27-8-301.

21. Defendant Board of County Commissioners of Lincoln County (Lincoln County) is the governing body of Lincoln County, a political subdivision of the State of Montana. Lincoln County petitioned the Board on October 14, 2021, for review of Lake Koocanusa's selenium standard. Lincoln County's petition resulted in the Board's Final Order. As such, Lincoln County is a "necessary party" to this action under MCA, § 27-8-301.

LEGAL BACKGROUND

I. THE CLEAN WATER ACT

22. Congress enacted the CWA with the goal of eliminating “the discharge of pollutants” into the waters of the United States. 33 U.S.C. § 1251(a)(1).

23. The objective of the law is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a).

24. To that end, the CWA provides for water quality standards. Water quality standards consist of the designated uses of the navigable waters, water quality criteria, and an antidegradation policy. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(i), 131.6.

25. Water quality standards are critical to ensuring the CWA’s objective of assuring that our waters “provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water.” 33 U.S.C. § 1251(a)(2).

26. Under the cooperative federalism structure of the CWA, states must designate uses, and establish and periodically revise water quality standards for all waterbodies. 33 U.S.C. § 1313(a), (c).

27. New or revised water quality standards established by a state must be submitted to and approved by EPA before taking effect. *Id.* § 1313(c)(2), (3).

28. Water quality criteria must be based on sound scientific analysis and must be sufficient to assure protection of designated uses. 40 C.F.R. § 131.11(b). Water quality standards must also ensure protection of downstream waters. *Id.* § 131.10(b).

II. THE MONTANA WATER QUALITY ACT

29. DEQ administers Montana’s water quality standards pursuant to the CWA and the MWQA. §§ 75-5-101–1126, MCA.

30. The MWQA, like the CWA, is intended to “protect[], maintain[], and improve[]” the waters of Montana and to “provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” *Id.* § 75-5-102(1), § 75-5-101(1), MCA.

31. Beyond assuring compliance with the CWA, the MWQA provides “additional and cumulative remedies to prevent, abate, and control the pollution of state waters.” *Id.* § 75-5-102(1).

32. Pursuant to the CWA and MWQA, Montana has established water quality standards for all waters within the state. *Id.* § 75-5-301; ARM 17.30.601–670.

III. MONTANA’S STRINGENCY STATUTE

33. Under Montana’s Stringency Statute, DEQ may not promulgate a water quality rule that is more stringent than the comparable federal standard or guideline, except as provided in § 75-5-203(2)-(5), MCA.

34. A person affected by a water quality rule may petition the Board to review the rule to determine whether the rule is more stringent than the comparable federal guideline. *Id.* 75-5-203(4)(a).

35. The Board’s authority under the Montana Stringency Statute is narrowly tailored and only allows the Board to review the rule and make a determination on whether the rule is more stringent than the comparable federal regulation or guideline.

36. If the Board determines that the rule is more stringent than the comparable federal regulation or guideline, the plain language of the Stringency Statute passes authority to DEQ to decide and implement one of two remedies; DEQ may choose to (1) revise the rule to conform to the federal regulations, or, alternatively, (2) make written findings that show how the standard

protects public health or the environment of the state, among other requirements provided under § 75-5-203(2)–(4), MCA.

FACTUAL BACKGROUND

37. Lake Koocanusa occupies a unique role in the Northern Rockies ecosystem. Framed by the Purcell and Salish Mountains and created by the construction of the Libby Dam on the Kootenai River, Lake Koocanusa supports a wide variety of fish and wildlife, including federally listed species.

38. For example, Lake Koocanusa hosts a large and stable population of Kokanee salmon, Kamloops (rainbow) trout, West slope cutthroat trout, burbot, and endangered bull trout, among other species. Below Libby Dam, the lake's downstream waters crucially support the habitat of the endangered White Sturgeon in the Kootenai River. The watershed is also home to abundant wildlife, including bald eagles, elk, Canada lynx, and grizzly bears.

39. Lake Koocanusa, with its crystal-clear water and mountainous landscape, is a popular recreation destination for fishing, hiking, boating, rock climbing, and camping. Its extensive, forested shoreline hosts public campgrounds, picnic areas, swimming beaches, boat ramps, and day-use facilities. The area draws visitors from both sides of the international border and provides opportunities for outdoor recreation-based businesses and lodging facilities.

40. Lake Koocanusa and the Kootenai River are contaminated with selenium pollution.

IV. SELENIUM CONTAMINATION IN THE LAKE KOOCANUSA WATERSHED

41. Teck owns four metallurgical coal mines in Canada's Elk River Valley—a main tributary of Lake Koocanusa.

42. Selenium enters surface and groundwater in the Elk River Valley from Teck's waste rock piles that are a byproduct of its open pit coal mining operations. The Elk River flows directly into Lake Koocanusa.

43. Selenium levels in the Elk River have more than quadrupled since 1986, continually increasing each year.

44. The Elk River contributes approximately ninety-five percent (95%) of the selenium pollution in Lake Koocanusa.

45. In 2012, DEQ designated Lake Koocanusa as an impaired water body under section 303(d) of the CWA due to selenium contamination from sources outside of Montana's borders, identifying that the lake's condition did not fully support aquatic life as a beneficial use.

46. Idaho has also listed the Kootenai River as impaired due to selenium pollution.

47. Selenium contamination harms aquatic life in Lake Koocanusa and its downstream waters primarily in its reproductive stage. The damage can lead to reduced production of viable eggs, reduced fish growth, mortality, or deformity, altered liver enzyme function, and winter stress syndrome. Selenium can also cause harm to people consuming fish that have accumulated high levels of selenium.

V. THE LAKE KOOCANUSA SELENIUM RULE

48. In response to this worsening selenium pollution in Lake Koocanusa, the governments of Montana and British Columbia, tribes, and scientists began a years-long

intensive scientific review process to develop a site-specific selenium rule for the reservoir that would protect its aquatic life and beneficial uses.

49. In 2010, DEQ and British Columbia Environmental Ministry began coordinated efforts to address regional transboundary water quality issues, including those in the Elk River. A 2013 British Columbia ministerial order was signed to recognize water quality impacts in Lake Koocanusa from past, current, and future mining activities in the Elk Valley, to remediate water quality effects, and to guide environmental management. This order led to the 2015 establishment of the bi-national Lake Koocanusa Monitoring and Research Working Group (Working Group).

50. The Working Group, comprised of U.S. and Canadian stakeholders, met twice a year and formed a Selenium Technical Subcommittee with top experts in selenium, which met almost 30 times to guide the data collection and standard development process.

51. In 2016, the EPA updated its federal selenium criteria guideline pursuant to section 304(a) of the CWA, which urged states and tribes to develop site-specific selenium standards, whenever possible, due to the local environmental factors that affect selenium accumulation in aquatic ecosystems. “Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016”, United States Environmental Protection Agency at K-2.

52. The 2016 Federal Selenium Guideline recognized that the national water column criterion elements concentrations of 3.1 µg/L for lotic (flowing) waters and 1.5 µg/L for lentic (still) waters provide a high probability of protection for most, but not all, aquatic systems.

53. The 2016 Federal Selenium Guideline recognizes that “for particular sites, the appropriateness of the national criterion can be resolved by site specific criteria when necessary, as recommended in Appendix K.”

54. Appendix K of the Federal Selenium Guideline recognizes that in certain circumstances, such as when “threatened or endangered fish species are present, states and tribes may need to derive alternative water column elements with a refined protection goal that account for site-specific bioaccumulation characteristics.”

55. Appendix K provides two EPA-approved approaches, the mechanistic modeling approach and the empirical bioaccumulation factor (BAF) approach, which states and tribes can use for calculating site-specific selenium standards.

56. Based on data collected through the years-long standard development process, DEQ determined that the generalized, national EPA selenium criteria for lentic water of 1.5 µg/L would not be protective of the aquatic life beneficial use for Lake Koocanusa.

57. In 2020, at the completion of a multi-year, coalition-led data collection effort, DEQ relied on the formulas in Appendix K of the 2016 Federal Selenium Guideline to calculate and propose a water column selenium standard of 0.8 µg/L for Lake Koocanusa.

58. DEQ’s proposed standard was the result of a comprehensive process between 2015 and 2020 that involved significant stakeholder collaboration and included more public meetings and external expertise than any process DEQ had previously undertaken. The process included seven large panel discussion public meetings in northwest Montana, as well as smaller meetings with local officials in the area.

59. Conservation Group members participated in the public rule adoption process and encouraged the Board to adopt the site-specific rule to protect their interests in clean water. In light of water quality and fish tissue data documenting increasing selenium levels in several species of fish in Lake Koocanusa, Conservation Groups and others commented on the need to protect aquatic life in Lake Koocanusa and downstream waters.

60. The Board carefully considered and adopted the 0.8 µg/L site-specific water column selenium rule for Lake Koocanusa in accordance with the MWQA, § 75-5-101, MCA *et seq.* The rule was formally adopted and codified in ARM 17.30.632(7)(a), on December 24, 2020.

61. In adopting ARM 17.30.632(7)(a), the Board determined that the standard was not more stringent than EPA's 2016 Federal Selenium Guideline because it was developed through EPA's federally recommended site-specific procedures set forth in Appendix K.

62. Appendix K is included in the EPA's 2016 Federal Selenium Guideline—the same guideline that the Board compared ARM 17.30.632(7)(a) to determine that the rule was not more stringent than the federal guideline addressing the same circumstance. Section 75-5-203(1), MCA.

63. In February of 2021, the EPA reviewed and approved the selenium standard set forth in ARM 17.30.632(7)(a), determining that the rule was based on sound scientific rationale, protective of designated uses, and compliant with the CWA.

VI. THE BOARD'S REVERSAL OF ITS STRINGENCY DETERMINATION

64. Just months following the Board's and EPA's approval of the Lake Koocanusa site-specific selenium rule, in June of 2021, Teck petitioned the Board pursuant to the Montana Stringency Statute to review the rule. Teck argued that, despite the Board's recent findings, the rule was more stringent than its comparable federal regulation or guideline. Teck argued that the Board should not consider EPA's site-specific modeling included in Appendix K of the 2016 Federal Selenium Guideline. Instead, the mining company wanted the Board to discard the EPA's Appendix K and only compare ARM 17.30.632(7)(a)'s 0.8 µg/L site-specific water column standard to the general selenium standard of 1.5 µg/L—which applies in non-site-specific cases.

65. Lincoln County filed a petition requesting the same on October 14, 2021. The Board accepted and consolidated Teck and Lincoln County's petitions for the sole question of stringency review under § 75-5-203(4), MCA.

66. At a public hearing held on January 31, 2022, DEQ testified in opposition of Teck and Lincoln County's petitions, reminding the Board that the selenium rule was promulgated in compliance with the EPA's 2016 Federal Selenium Guideline which specifically encourages the adoption of site-specific standards in accordance with the scientifically approved methods set forth in Appendix K. DEQ further pointed out that the selenium standard is fish tissue based, rather than water column based, and that the 0.8 µg/L water column standard was translated from the egg-ovary criteria of 15.1 µg/L, which is also in alignment with the 2016 Federal Selenium Guideline. DEQ urged the Board to reject the petitions based on either method of showing that the Selenium Rule was not more stringent than its federal counterpart.

67. EPA also weighed in with public comment during the Board’s stringency review process, stating that “[t]he state concluded 0.8 µg/L was necessary based on site-specific data from Lake Koocanusa to achieve EPA’s recommended fish tissue concentrations, or stated another way, that 1.5 µg/L would not protect the aquatic life use. Montana met the federal requirements and followed EPA’s guidance for deriving a site-specific water column element.” EPA further commented that “EPA approved ARM 17.30.632(7) and it remains in effect for CWA purposes unless and until EPA approves a new state submission consistent with the CWA and EPA’s WQS regulation.”

68. The Board’s limited stringency review process did not constitute a contested case hearing or an agency rulemaking under Montana Administrative Procedure Act (MAPA).

69. No new factual evidence or science was presented during the petition process.

70. On April 19, 2022, the Board issued its Final Order, finding that ARM 17.30.632(7)(a) is more stringent than the 2016 Federal Selenium Guideline—completely reversing its adoption of the selenium rule in December of 2020. Final Order, section IV, ¶ 2.

71. The Board based its decision solely on the generalized 1.5 µg/L numeric value of the water column criterion element for lentic aquatic systems and wholly discarded the rest of the 2016 Federal Selenium Guideline that allows for site-specific standards to be calculated under Appendix K.

72. The Board also erroneously determined that the initial rulemaking was defective because the public did not have an opportunity to comment on the Board’s initial stringency determination despite DEQ’s assurance that the Board received public comments in its initial stringency determination.

73. After the Board made its determination on stringency, it went a step further and declared ARM 17.30.632(7)(a) invalid and ordered new rulemaking to be conducted—actions that exceed the Board’s statutory authority under the Montana Stringency Statute, § 75-2-207, MCA. Final Order, section IV, ¶ 6.

74. Recognizing that the Board overstepped its statutory authority, DEQ filed a motion to alter or amend the Board’s Final Order, asking the Board to strike the clause that reads: “Because the Board’s rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated.”

75. The Board denied DEQ’s motion to alter or amend and carried on with its erroneous and unlawful ruling.

76. The Board ordered Teck and Lincoln County to draft a letter for the Board’s signature to be sent to the EPA, notifying the agency that ARM 17.30.632(7)(a) and, consequently, the 0.8 µg/L selenium rule for Lake Koocanusa was no longer valid—despite EPA’s prior approval under the CWA.

77. Answering the Board’s letter, EPA replied that the 0.8 µg/L standard had already been approved and would remain in effect.

78. DEQ has not initiated any new rulemaking as directed in the Board’s Final Order.

79. Instead, DEQ filed a Petition for Judicial Review and for Declaratory Judgment on January 9, 2023, in the First Judicial District, Cause No. CDV-2023-21, to seek “redress through this Court’s review and declaration that the Board exceeded its authority under § 75-5-203, MCA and erred as a matter of law in ordering that DEQ must initiate new rulemaking to have a valid and enforceable water column standard for Lake Koocanusa.”

80. Conservation Groups file this action seeking identical relief as DEQ in Cause No. CDV-2023-21 while also raising an additional claim that challenges the Board’s finding that the water column selenium standard in ARM 17.30.632(7)(a) is more stringent than the federal guideline. The Board’s Final Order was made in error and was not supported by any substantial evidence.

81. Conservation Groups are harmed by the Board’s arbitrary and capricious findings and by the Board’s actions that exceed its statutory authority as set forth below:

FIRST CLAIM
(THE BOARD’S FINAL ORDER IS ARBITRARY, CAPRICIOUS, UNLAWFUL, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE)

82. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

83. Agency decisions not classified as a contested case under MAPA are reviewed by district courts to determine whether the decision was “arbitrary, capricious, unlawful, or unsupported by substantial evidence.” *Johansen*, ¶ 19.

84. The court conducts this review “based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *N. Fork Pres. Ass’n*, 238 Mont. at 465, 778 P.2d at 871 (quoting *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378 (1989)).

85. The court will not “automatically defer to the agency ‘without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.’” *Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting *Marsh*, 490 U.S. at 378); *Clark Fork Coalition v. Mont. Dep’t of Env’t Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482.

86. The Board did not make a “reasoned decision” when it determined that ARM 17.30.632(7)(a) was more stringent than the comparable federal guideline. Final Order at 17, ¶ 13, section IV, ¶ 2.

87. The federal guideline that the Board was required to compare ARM 17.30.632(7)(a) to is EPA’s 2016 Federal Selenium Guideline, which sets a general, nationwide selenium standard at 1.5 µg/L and urges state and tribal governments to depart from that general standard “with a refined protection goal that account for site-specific bioaccumulation characteristics.” The 2016 Federal Selenium Guideline also includes Appendix K, which recognizes and encourages states and tribes to implement site-standards in areas where the general 1.5 µg/L standard falls short of protecting beneficial uses.

88. The Board’s finding is clear erroneous because ARM 17.30.632(7)(a) was created under the approved methods contained in the 2016 Federal Selenium Guideline. The rule’s 0.8 µg/L selenium standard cannot be more stringent than the Federal Selenium Guideline that was used to create it.

89. The Board’s Final Order considers no new fact or scientific evidence that would warrant a complete reversal of its findings, and, therefore, remains wholly unsupported by the facts contained in the record.

90. The Board, in making its erroneous finding, simply compared the numeric values between the rule’s 0.8 µg/L selenium standard and the 2016 Federal Selenium Guideline’s general, standardized federal recommendation, willfully ignoring the site specific modeling set forth under Appendix K of the 2016 Federal Selenium Guideline.

91. The Board erroneously and without substantial evidence determined that Appendix K modeling was not part of the 2016 Federal Selenium Guideline for comparison under the Selenium Statute.

92. The Board further erred when it found: “[a]lthough the EPA Site-Specific Models are not the comparable guideline, it is significant to note that the modeling conducted by DEQ to determine the Lake Numeric Standard used an input criterion more stringent than the federal guideline, thus, rendering the Lake Numerical Standard more stringent even under DEQ’s theory.” Final Order at 18. The 0.8 µg/L water column standard is not more stringent than the standards recommended in the 2016 Federal Selenium Guideline.

93. Further, the Board’s determination was arbitrary and capricious in that the Board failed to consider or cite to any new factual or scientific evidence that would support its decision. The result of the Board’s arbitrary and capricious decision is a wholly erroneous finding that the rule is more stringent than the 2016 Federal Selenium Guideline.

94. The Board’s Final Order is therefore arbitrary, capricious, and unlawful in its findings, and remains unsupported by any substantial evidence.

95. The Board’s erroneous findings in its Final Order causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

SECOND CLAIM
(VIOLATION OF § 75-5-203(4), MCA)

96. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

97. The plain language of §75-5-203(4)(a), MCA, grants the Board the authority to review a water quality rule and make a determination as to whether the rule is more stringent than the comparable federal guideline that addresses the same circumstances.

98. The Board reviewed ARM 17.30.632(7)(a) and determined that it was more stringent than the federal guideline.

99. Setting aside that the Board's determination was in error, the Board's next step—declaring ARM 17.30.632(7)(a) invalid—was outside the scope of its authority under plain language of §75-5-203, MCA.

100. Section 75-5-203, MCA, does not give the Board authority to invalidate a rule, even upon a finding that the rule is more stringent than the federal regulations or guidelines.

101. By invalidating ARM 17.30.632(7)(a), the Board exceeded its authority and violated the plain language of §75-5-203, MCA.

102. The Board's erroneous findings in its Final Order and its actions exceeding its statutory authority causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

THIRD CLAIM
(VIOLATION OF § 75-5-203(4), MCA)

103. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

104. Once the Board made its determination in its Final Order that ARM 17.30.632(7)(a) was more stringent than the comparable federal guideline, then DEQ, not the Board, shall comply by either revising the rule to conform to the federal guidelines or by making written finding as provided in the Stringency Statute. § 75-5-203, MCA.

105. The Board ignored DEQ's statutory authority to select the remedies under the plain language of § 75-5-203, MCA, and instead ordered new rulemaking to take place.

106. Setting aside the Board's erroneous conclusion that ARM is more stringent than federal guideline, the Board's next step—ordering new rulemaking—exceeded its authority under §75-5-203, MCA.

107. The Board's erroneous findings in its Final Order and its actions exceeding its statutory authority causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

REQUEST FOR RELIEF

THEREFORE, Conservation Groups respectfully request that this Court:

1. Declare that, based on the record, the Board's Final Agency Action and Order was unlawful, arbitrary and capricious, or unsupported by evidence, and, therefore, in error when it found that ARM 17.30.632(7)(a) was more stringent than the federal guideline;
2. Declare that the Board exceeded its statutory authority under § 75-5-203, MCA when it declared ARM 17.30.632(7)(a) invalid;
3. Declare that the Board exceeded its statutory authority under § 75-5-203, MCA by ordering new rulemaking instead of allowing DEQ to administer remedies under the statute, and;
4. Any other relief that the Court deems proper and just.

Respectfully submitted this 18th day of May, 2023.

/s/ Mary Cochenour
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TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: April 26, 2023

SUBJECT: Board of Environmental Review Case No. BER 2023-01 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA	
IN THE MATTER OF: HEARING REQUEST FOR EXPLORATION LICENSE #00680, BUTTE HIGHLANDS SITE; FIVE-YEAR BOND DETERMINATION	Case No. BER 2023-01 OC

On April 26, 2023, the BER received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Colson Williams Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901	Angela Colamaria Chief Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901
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Attachments

April 26, 2023

Electronically Filed with the
Montana Board of Environmental Review
4/26/23 at 3:29 PM
By: Sandy Moisey Scherer
Docket No: BER 2023-01 OC

VIA E-MAIL

Montana Department of Environmental Quality
ATTN: Sandy Moisey Scherer, Secretary
Board of Environmental Review
Metcalf Building
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
deqbersecretary@mt.gov

Re: Hearing Request for Exploration License #00680, Butte Highlands Site; Five-Year Bond Determination

Dear Ms. Moisey:

Pursuant to MCA 82-4-338(3)(b), the Independent Manager for Highland Mining, LLC, which is the managing member of Butte Highlands JV, LLC ("**BHJV**"), respectfully requests on behalf of BHJV a hearing before the Board of Environmental Review ("**Board**") regarding the Montana Department of Environmental Quality's ("**MDEQ**") March 30, 2023, final bond determination for the Butte Highlands Mine for Exploration License #00680 ("**License**").

On March 30, 2023, MDEQ informed BHJV that, following MDEQ's 5-year bond review process, BHJV's bond amount had increased by \$861,001 to a total bond amount of \$1,186,940. BHJV's previously deposited and current bond amount, in the form of Letters of Credit, is \$325,939. In correspondence to MDEQ on February 8, 2023, and March 20, 2023, BHJV requested a decrease in the proposed bond amount calculation totaling at least \$164,524, plus any additional reclamation cost allocated in MDEQ's proposed five-year bond calculation spreadsheet ("**Spreadsheet**") to infrastructure that BHJV identified as suitable for remaining at the Site for post-mining uses. Specifically, BHJV requested a decrease in the preliminary bond calculation for the Debris/Equipment Removal item from the \$631,296 shown in the Spreadsheet by \$131,619, to a total of \$499,667, along with a commensurate adjustment downward of the "DEQ Indirect-10%" and "DEQ Contingency - 15%" items at the bottom of the Spreadsheet, that would total an additional reduction of \$32,905 ($0.25 \times \$131,619$). BHJV's reasons in support of its reduction request were stated as follows:

1. BHJV and the Butte Highlands site assets are the subject of federal Securities and Exchange Commission ("**SEC**") litigation (the "**SEC Case**") in the Idaho federal district court.

These assets are planned for sale to a new owner and operator as part of resolving the SEC case. This sale has not yet occurred, but we are diligently pursuing this sale and hope to complete it in 2023.

2. Pending completion of that sale, no further operations are currently planned under the License other than care and maintenance and what otherwise may be needed for compliance with the License and other applicable permits for the site. We anticipate that a new owner will want to continue with further exploration and if warranted, mineral development at the site, working with MDEQ and other agencies to obtain, maintain and comply with required permits, including assumption of and compliance with reclamation and bonding obligations.

3. There is infrastructure at the Site that is suitable for post-mining rural land uses such as those present pre-mining, which include grazing, logging, recreation, wildlife habitat and similar uses. See April 2009 *Butte Highlands Project Exploration Amendment Underground Exploration Plan*, page 22; January 2015 MDEQ *Permitting and Compliance Division Record of Decision For Butte Highlands Joint Venture Mine, Operating Permit No. 00178*, page 19.

4. The Site will be available for the pre-mining uses described above after mining-related operations are complete regardless of whether BHJV or a new owner/operator owns or controls the private land and other BHJV assets at the Site.

5. Two modular trailers (offices/housing), two 50' x 80' x 30' buildings and 30' x 50' x 20' building (geologic core and other storage), and 20' x 20' x 10' shed on the private fee land at the Site, together with associated concrete foundations and pads, likewise remain in adequate condition to retain for post-mining uses.

6. The MDEQ estimated cost for reclamation of the infrastructure items described in paragraph 5 above in the Spreadsheet and a supporting Debris/Equipment Removal itemization document that MDEQ provided is \$131,619 in direct cost, and the Spreadsheet indirect and contingency costs allocable to this direct cost amount are an additional \$32,905 (0.25 x \$131,619).

7. Accordingly, BHJV requested a reduction of at least \$164,524 in the proposed bond amount (\$131,619 plus \$32,905 = \$164,524), plus any additional dollar amount that MDEQ may have allocated in the Spreadsheet to reclamation of any of the additional infrastructure items suitable for retention referenced in paragraph 3 above.

8. Based on the foregoing, BHJV believes that the appropriate amount of the bond increase should be no more than \$696,477, for a total bond amount of \$1,022,416.

Pursuant to MCA 82-4-338(3)(b), we are in the process of posting increased bonding with MDEQ in the form of a Letter of Credit in the amount of at least \$696,477, and up to \$861,001. As described in correspondence to MDEQ dated April 25, 2023, we requested a 30-day extension (to May 30, 2023) to post the requisite increased bond amount due to BHJV's bank needing additional time to process the Letter of Credit. MDEQ has now granted this extension, in an April 26, 2023 letter.

BHJV respectfully requests a hearing before the Board regarding the appropriate bond amount for the Butte Highlands Mine Exploration License #00680 and that the Board reduce MDEQ's final bond determination by at least \$164,524.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian Dickens', is written over a horizontal line.

Brian Dickens
Immigrant Concierge Services, LLC
Independent Manager, Highland Mining, LLC

Cc: Mark Odegard, MDEQ
Bob Maynard, Perkins Coie LLP

TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: May 3, 2023

SUBJECT: Board of Environmental Review Case No. BER 2023-02 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: FORMAL APPEAL
CHALLENGING THE DEPARTMENT OF
ENVIRONMENTAL QUALITY'S ("DEQ")
APPROVAL OF RIVERSIDE CONTRACTING'S
OPENCUT MINING PERMIT #3415 FOR THE
MARVIN REHBEIN SITE NEAR ARLEE IN
LAKE COUNTY, MONTANA

Case No. BER 2023-02 OC

On May 3, 2023, the BER received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Colson Williams
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Angela Colamaria
Chief Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments



FERGUSON & COPPES PLLC

A Natural Resource Law Firm

May 3, 2023

Department of Environmental Quality
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901
deqbersecretary@mt.gov

Electronically Filed with the
Montana Board of Environmental Review
5/3/23 at 4:56 PM
By: Sandy Moisey Scherer
Docket No: BER 2023-02 OC

To Montana Board of Environmental Review:

COMES NOW Friends of the Jocko and Jim Coefield, individually, and pursuant to Mont. Code Ann. § 82-4-427 hereby file this formal appeal challenging the Department of Environmental Quality's ("DEQ") approval of Riverside Contracting's Opencut Mining Permit #3415 for the Marvin Rehbein Site near Arlee in Lake County, Montana. Specifically, we submit this petition for appeal and request a hearing before the Board of Environmental Review ("BER") based on the following issues of law and fact.

STANDING, JURISDICTION AND VENUE

Friends of the Jocko ("FotJ") is a nonprofit organization formed by and comprised of residents of Arlee, including those owning property and residing within one-half mile of Riverside Contracting's proposed Rehbein gravel mine. FotJ is concerned with the public health, safety, and economic impacts of the proposed mine on community members and the effects on natural environment and private/public natural resources in proximity to the project area. FoTJ members, including Jim Coefield, live in close proximity to the proposed mine site and have interests that are or may be adversely affected by the DEQ's decision to approve Permit Application #3415.

Additionally, Friends of the Jocko and Jim Coefield are eligible to file for an administrative appeal pursuant to Mont. Code Ann. § 82-4-427(1)(b) because they both submitted comments to the DEQ on Opencut Permit #3415. Finally, the DEQ's approval of Opencut Permit #3415 is dated April 3, 2023. This written request, submitted on May 3, 2023, is therefore timely under the law.

FOTJ bring this appeal of DEQ's approval of Opencut Permit #3415 based on the following provisions of Montana law:

a person whose interests are or may be adversely affected by a final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying material under this part is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

Mont. Code Ann. § 82-4-427.

VIOLATIONS OF LAW

Inadequacy of Public Notice:

Due to the number of occupied dwelling units located within one-half mile of the permit boundary, Permit #3415 is to subsections (2) through (13). Mont. Code Ann. § 82-4-432(1)(b). The law clearly states that:

Operations subject to subsections (2) through (13) are those:
(ii) where 10 or more occupied dwelling units are within one-half mile of the permit boundary of the operation.

Here, DEQ has determined that the operation is subject to the additional review criteria because of the presence of 10 occupied dwellings. This triggers the notice requirements mandated in the Opencut Act. As part of its legal duty to provide public notice, Riverside was required to:

Within 15 days after the department sends notice of a complete application to the applicant . . . publish notice at least twice in a newspaper of general circulation in the locality of the proposed opencut operation. A map is not required in the notice if, in addition to the legal description of the proposed opencut operation, the notice provides an address for the map posted on the department's website and instructions for obtaining a paper copy of the map from an applicant. If the notice does not include a map, the applicant shall promptly provide a paper copy to a requestor.

Mont. Code Ann. § 82-4-432(5)&(6).

Additionally, the public notice requirements dictate that Riverside “post the notice in at least two prominent locations at the site of the proposed opencut operation, including near a public road if possible.” *Id.* at (6)(c). Finally, in relation to its public notice obligations, the DEQ is required to conduct a public meeting in the area of the proposed Opencut operation at the request of “at least 51% of the real property owners on which occupied dwelling units exist or 10 real property owners on which occupied dwelling units exist, whichever is greater, notified pursuant to this section.” Mont. Code Ann. § 82-4-432.

Here, the process in which the DEQ and Riverside Contracting engaged included several actionable deficiencies pertaining to the notice requirements. First, notice was never published in a local newspaper and no notice was posted at the site within 15 days after the department sent notice of having received a complete application to Riverside. The DEQ notified Riverside that its application was complete on April 7, 2022 and as of April 22, 2022, no notice had been posted, either in a local newspaper or at the site. While notice was eventually posted at the site after members of Friends of the Jocko alerted DEQ of this deficiency, this posting did not occur within 15 days as required by law.

Further, the manner in which the numbers were calculated did not account for leasehold interests of tribal trust lands, and several members who should have received notice did not in fact receive notice. To that end, DEQ states in the EA that it was not required to oversee the applicant's performance of its responsibilities. However, this position belies its legal authority as defined under the Opencut Act which clearly articulates that the DEQ "has the powers, duties, and functions to: (d) make investigations or inspections that are considered necessary to ensure compliance with any provision of this part." Mont. Code Ann. § 82-4-422, MCA.

Had actual notice been provided to all the proper individuals, those individuals could have requested the public meeting, which could have triggered the public meeting requirement that in turn would have further informed public comment and involvement in the process. Thus, by not following these notice provisions, DEQ and the Applicant not only violated the Opencut Act, but also thwarted citizen's rights to know and participate in state government actions that are enshrined in Montana's Constitution.

Inadequacy of Water Quality Analysis:

In relation to water quality, the relevant Administrative Rules of Montana provide that:

Standard Opencut mining operations with a permit boundary that is located less than 50 feet from the edge of the high water mark of surface water, including but not limited to perennial or intermittent streams (Pellew Creek), must follow the Stream/Waterway Worksheet and include specific, detailed design criteria in the application demonstrating that (a) a productive postmining land use can be achieved; and (b) defined channels can be reconnected to undisturbed drainages/waterways in a stable manner to ensure downstream flow is maintained.

Admin. R. Mont. 17.24.227(2).

While the DEQ determined Pellew Creek is not intermittent, this determination is incorrect and can be challenged via facts presented at hearing through hydrologic experts and reports. “‘Intermittent stream’ means a stream or reach of a stream that is below the local water table for at least some part of the year and obtains its flow from both ground water discharge and surface runoff.” Mont. Code Ann § 82-4-203(29). DEQ did not rely on the best scientific evidence in reaching its conclusion that Pellew Creek does not meet this definition and there is therefore not a rational connection between its determination and the scientific evidence. As a result of this error by DEQ, the applicant was not required to include the “detailed design criteria” of the Stream/Waterway Worksheet as required under the ARM. As a result, the public did not have the opportunity to review or comment on those design criteria.

Similarly, the Applicant’s Plan of Operation must provide “that waste will be buried on site in a manner that protects water quality and is compatible with the postmining land use” Mont. Code Ann. § 82-4-434(d). Friends of the Jocko and Jim Coefield can introduce evidence by and through hydrologic experts demonstrating that Riverside’s plan is inadequate to meet this threshold. DEQ conducted limited analysis of water quality protection and essentially denied that there is the potential for any impact due to the depth of the groundwater and the depth of the excavation.

Historical and Cultural Preservation:

Finally, in relation to historical and cultural preservation, the Opencut Act requires that the Applicant provide “Documentation of consultation with the state historic preservation office regarding possible archaeological or historical values on the affected land.” Mont. Code Ann. § 82-4-432(b)(vii). Additionally,

Riverside's Plan of Operation must provide that "archaeological and historical values on affected lands will be given legally required protection." Mont. Code Ann. § 82-4-434(2)(f). Further, Riverside is required to furnish a declaration that it "will comply with applicable federal, state, county, or local [including tribal] regulations, ordinances, and permits, licenses, and approvals for the operation." Mont. Code Ann. § 82-4-434(2)(j). To satisfy these requirements, Riverside is required to comply with the National Historic Preservation Act (NHPA), which requires meaningful consultation with and concurrence from the CSKT's Tribal Historic Preservation Office (THPO).

Here, Riverside failed to meet these requirements as per the February 24 comments of CSKT Tribal Historic Preservation Officer Kathryn McDonald. *See* Exhibit A. McDonald raises issue with three distinct points of Riverside's analysis. Riverside and the DEQ claim that the THPO was notified of the application and that there was "no response" from the THPO. In its Draft Environmental Assessment (DEA) the DEQ stated that it interpreted the THPO's lack of a response within 30 days to constitute the CSKT's THPO's "concurrence" with the project.

Tribal Historic Preservation Officer McDonald "strongly object[s] to the statement that there was "no response," and asserts that she regularly and repeatedly engaged on issues related to Riverside's permit.

Rather than having obtained the THPO's "concurrence" with the project, as is required under the NHPA, the DEQ received a written request from the THPO stating that "there needs to be an archaeological survey because of the [area's] Cultural Property designation." McDonald further stated that without a full archaeological investigation, including subsurface test pits, any archaeological

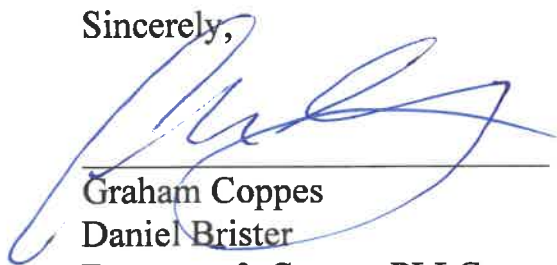
survey results are insufficient. She goes on to “urge” that test pits be dug “before any mining activities commence.”

Finally, the Cultural Clearance Request application Riverside submitted with the CSKT is deficient and is no longer in effect owing to the fact that the application contained no mention of Riverside’s planned asphalt plant. According to the CSKT’s Cultural Clearance Form, the permit is “only valid for the activity only described in the original application” and “[a]ny alterations to project plans invalidate this permit.” Despite this clear language, the THPO was never consulted with information that the gravel mine operation would also include an asphalt plant. Therefore, Riverside’s Cultural Clearance Permit is invalid and Riverside therefore lacks the necessary concurrence from the CSKT’s THPO to proceed with the project. Doing so would be in violation of the NHPA and, as a result, Mont. Code Ann. § 82-4-434(2)(j).

CONCLUSION

For the above stated reasons, Friends of The Jocko and Jim Coefield, individually, hereby petition the Board to accept this appeal and request an administrative hearing whereby evidence can be introduced to substantiate and prove the violations of law alleged herein.

Sincerely,



Graham Coppes

Daniel Brister

Ferguson & Coppes PLLC

Attorneys for Friends of the Jocko and Jim Coefield, individually

TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: May 30, 2023

SUBJECT: Board of Environmental Review Case No. BER 2023-03 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND
REQUEST FOR HEARING BY PROTECT THE
CLEARWATER REGARDING ISSUANCE OF
OPENCUT MINING PERMIT #3473

Case No. BER 2023-03 OC

On May 30, 2023, the BER received the attached request for hearing.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Colson Williams
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Angela Colamaria
Chief Legal Counsel
Department of Environmental Quality
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By: Sandy Moisey Scherer
Docket No: BER 2023-03 OC

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Attorneys for Petitioners

BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

**IN THE MATTER OF:
APPEAL AND REQUEST FOR
HEARING BY PROTECT THE
CLEARWATER REGARDING
ISSUANCE OF OPENCUT
MINING PERMIT #3473**

Cause No. BER 2023-03 OC

**NOTICE OF APPEAL AND
REQUEST FOR HEARING**

COMES NOW Protect the Clearwater, and Libby Langston, Gayla
Nicholson, Jeff Dickerson and Terry Martin Denning, individually, and pursuant to
Mont. Code Ann. § 82-4-427 hereby file this formal appeal challenging the

Department of Environmental Quality's ("DEQ") approval of LHC Inc.'s ("LHC") Opencut Mining Permit #3473 for the Clearwater State ("Clearwater") Site near Seeley Lake, Montana in Missoula County. Specifically, we submit this petition for appeal and request a hearing before the Board of Environmental Review ("BER") based on the following issues of law and fact.

I. STANDING, JURISDICTION AND VENUE

1. Protect the Clearwater ("PTC") is a nonprofit organization formed by and comprised of residents of the Elbow Lake and Larger Clearwater watershed area, including those owning property and residing within one-half mile of LHC Inc.'s proposed Clearwater gravel mine. PTC is concerned with the public health, safety, and economic impacts of the proposed mine on community members and the effects on natural environment and private/public natural resources in proximity to the project area. PTC members, including Libby Langston, Gayla Nicholson, Jeff Dickerson and Terry Martin Denning, live in close proximity to the proposed mine site and have interests that are or may be adversely affected by the DEQ's decision to approve Permit Application #3473.
2. Additionally, PTC and the above-named individuals are eligible to file for an administrative appeal pursuant to Mont. Code Ann. § 82-4-427(1)(b) because they both submitted comments to the DEQ on Opencut Permit #3473. Finally, the DEQ's approval of Opencut Permit #3473 is dated April 27, 2023. This written request, submitted on May 26, 2023, is therefore timely under the law.
3. PTC bring this appeal of DEQ's approval of Opencut Permit #3473 based on the following provisions of Montana law:
 - a person whose interests are or may be adversely affected by a final decision of the department to approve or

disapprove a permit application and accompanying material or a permit amendment application and accompanying material under this part is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

4. Jurisdiction is based on Mont. Code Ann. § 82-4-427.

II. COUNT ONE – INADEQUACY OF PUBLIC NOTICE

5. Due to the number of occupied dwelling units located within one-half mile of the permit boundary, Permit #3473 is subject to subsections (2) through (13). Mont. Code Ann. § 82-4-432(1)(b). The law clearly states that:

Operations subject to subsections (2) through (13) are those:
(ii) where 10 or more occupied dwelling units are within one-half mile of the permit boundary of the operation.

6. Here, DEQ has determined that the operation is NOT subject to the additional review criteria because of the Applicant's certification that there are not 10 occupied dwellings within the statutory range. This certification was made in error, is incorrect as a matter of fact, and thus has resulted in legal error. More specifically, LHC failed to file the correct permit application for its project, which should have been the Standard Open Cut Application, as described above. Instead, it submitted the Dryland Permit, eliminating statutory application of (2)-(13) of § 82-4-432, MCA.
7. If LHC had submitted the correct application it would have triggered the notice requirements mandated in the Opencut Act. As part of its legal duty to provide public notice, LHC should have been required to:

Within 15 days after the department sends notice of a complete application to the applicant . . . publish notice at least twice in a newspaper of general circulation in the

locality of the proposed opencut operation. A map is not required in the notice if, in addition to the legal description of the proposed opencut operation, the notice provides an address for the map posted on the department's website and instructions for obtaining a paper copy of the map from an applicant. If the notice does not include a map, the applicant shall promptly provide a paper copy to a requestor.

Mont. Code Ann. § 82-4-432(5)&(6).

8. Additionally, the public notice requirements that should be applicable to LHC's permit dictate that LHC should have "posted the notice in at least two prominent locations at the site of the proposed opencut operation, including near a public road if possible." *Id.* at (6)(c). Finally, in relation to its public notice obligations, the DEQ is required to conduct a public meeting in the area of the proposed Opencut operation at the request of "at least 51% of the real property owners on which occupied dwelling units exist or 10 real property owners on which occupied dwelling units exist, whichever is greater, notified pursuant to this section." Mont. Code Ann. § 82-4-432. Because of the improper notice, Petitioners were deprived of the opportunity to seek such a public meeting.
9. Here, the process in which the DEQ and LHC Contracting engaged included several actionable deficiencies pertaining to the notice requirements. First, the manner in which the numbers were calculated did not account for leasehold interests of DNRC trust lands, and several members who should have received notice did not in fact receive notice. To that end, DEQ states in the EA that it was not required to oversee the applicant's performance of its responsibilities. However, this position belies its legal authority as defined under the Opencut Act which clearly articulates that the DEQ "has the powers, duties, and functions to: (d) make investigations or

inspections that are considered necessary to ensure compliance with any provision of this part.” Mont. Code Ann. § 82-4-422, MCA. DEQ cannot delegate its duties to the applicant.

10. Had actual notice been provided to all the proper individuals, those individuals could have requested the public meeting, which could have triggered the public meeting requirement that in turn would have further informed public comment and involvement in the process. Thus, by not following these notice provisions, DEQ and the Applicant not only violated the OpenCut Act, but also thwarted citizen’s rights to know and participate in state government actions that are enshrined in Montana’s Constitution.

III. COUNT TWO – INADEQUACY OF WATER QUALITY ANALYSIS

11. In relation to water quality, the OpenCut Act has a threshold inquiry relating to the applicability of the Dryland permitting process. More specifically, § 82-4-432(1)(b), MCA states that “(b) Operations subject to subsections (2) through (13) are those: (i) that ***affect ground water or surface water, including intermittent or perennial streams***, or water conveyance facilities ...”
12. Here, LHC merely certified in its application that there is no “affect”, to ground or surface water, thereby alleviating itself of the obligations imposed by (2) through (13). LHC Inc. provided no hydrologic analysis which would or could support its conclusion. Thus, DEQ reliance on a lack of evidence constitutes an arbitrary and capricious decision.
13. PTC and the above-individuals are prepared to present hydrologic evidence to the BER that LHC cannot and did not meet the requisite threshold

requirements for application of its permit as a Dryland operation. This fundamental flaw resulted in it submitting and DNRC processing and analyzing the legally incorrect type of application. Said another way, LHC submitted and DEQ processed a Dryland Permit when LHC was required to submit and DEQ was required to analyze a Standard Opencut Permit, pursuant to the statutory mandates of § 82-4-432(1)(b), MCA.

14. Any post-hoc rationalizations that are included in DEQ's EA are insufficient to cure this lack of evidentiary presentation, because the public comment's which gave rise to DEQ's Final EA were only based on the Dryland permitting process and the lack of notice and thwarting of public participation described above, limited the ability of injured and aggrieved individuals to comment substantively on components of that EA.
15. Similarly, the Applicant's Plan of Operation must provide "that waste will be buried on site in a manner that protects water quality and is compatible with the postmining land use" Mont. Code Ann. § 82-4-434(d).
16. PTC and the above-named individuals can and will introduce evidence by and through hydrologic experts demonstrating that LHC's plan is inadequate to meet this threshold.
17. DEQ conducted limited analysis of water quality protection and essentially denied that there is the potential for any impact with little or no scientific evidence.
18. However, in spite of this, DEQ's own EA states "[d]uring the beginning stages of mining surface water may leave the site during a heavy storm event could carry sediment...." DEQ EA at pgs. 8-9.
19. Additionally, DEQ found that "[i]mpacts to water quality would be short term and would be negligible...." *Id.*

20. Therefore, DEQ erred both by relying on the Applicant's unsupported certifications that its project will not affect surface or ground water resources, and by failing to conduct its own reasonable inquiry into the facts and circumstances which could support such a conclusion.
21. Therefore, DEQ's acceptance of and conclusion that the Dryland Permitting process for this LHC's application is statutorily correct is arbitrary and capricious as a matter of law.

CONCLUSION AND REQUEST FOR RELIEF

22. For the above stated reasons, PTC and Libby Langston, Gayla Nicholson, Jeff Dickerson and Terry Martin Denning, individually, hereby petition the Board to accept this appeal and request an administrative hearing whereby evidence can be introduced to substantiate and prove the violations of law alleged herein.
23. Petitioners further request that upon the hearing of this matter, that Opencut Mining Permit 3473 be vacated as *void ab initio*.

Dated this 26th day of May, 2023.

/s/ Graham J. Coppes

Graham J. Coppes

Emily F. Wilmott

Ferguson & Coppes PLLC

Attorney for Protect the Clearwater and Libby Langston and Terry Martin Denning, individually.

/s/ David K. W. Wilson, Jr.

David K. W. Wilson, Jr.

Robert Farris-Olsen

Morrison, Sherwood, Wilson and Deola, PLLC

Attorney for Protect the Clearwater Gayla Nicholson and Jeff Dickerson, individually.