

**BOARD OF ENVIRONMENTAL REVIEW
OCTOBER 20, 2023**

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**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

AUGUST 11, 2023

Call to Order

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

Attendance

Board Members Present

By Zoom: Chair Dave Simpson; Vice Chair Stacy Aguirre; Board Members Jennifer Rankosky, Jon Reiten, and Joe Smith. Board members Julia Altemus and Lee Bruner were not able to attend due to scheduling conflicts.

Roll was called and a quorum was present.

Board Attorney Present

Terisa Oomens

DEQ Personnel Present

Board Secretary: Sandy Moisey Scherer

DEQ Legal: Catherine Armstrong, Angie Colamaria, Loryn Johnson, Aaron Pettis, and Nick Whitaker

Public Policy: Moira Davin, Mae Vader

Water Quality: Rachel Clark

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Elena Hagen, Montana DOJ Agency Legal Services Bureau

Bill Mercer, Holland & Hart

Vicki Marquis, Crowley Fleck

Andy Mefford, PCI Montana

Terry Martin-Denning

Ray Stout, Kootenai Valley Record

Jason Mohr, MT Legislative Services

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the June 9, 2023, Meeting Minutes.

Vice Chair Aguirre moved to APPROVE the June 9, 2023, meeting minutes. Board member Reiten SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

- a. Chair Simpson and Board Counsel Oomens offered clarification regarding some cases. The Board did not have any questions.

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.

Chair Simpson asked representatives for DEQ and Westmoreland to provide a status update. Bill Mercer of Holland & Hart said that Kirsten Bowers of DEQ had provided an update and DEQ will finalize the quality assurance project plan by the end of this month. Westmoreland has provided comments and will be reviewing what DEQ has completed by the end of the month.

b. In the Matter of Westmoreland Resources, Inc.'s Appeal of Final MPDES Permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.

Chair Simpson asked representatives for DEQ and Westmoreland to provide a status update. Bill Mercer of Holland & Hart and Angie Colamaria of DEQ provided an update. In addition, the permit for this mine is coming up for renewal. There has been an initial conversation about proposing additional time frames and an additional calendar pursuant to a stipulation, but nothing has been settled as to what those dates might look like. An additional proposal may be forthcoming at the next meeting. There may be another permit appeal based upon what the final terms are, and the Settlement Agreement may need to be updated.

Chair Simpson said he has concerns as this case has been going on for years and asked the parties to keep moving towards a conclusion. He requested a status report from the parties for the next meeting.

- c. **In the Matter of: Request for Hearing by Harry Richards, Lincoln County, MT, Case No. BER 2022-02 HW.**

Chair Simpson said he had not received a request for any oral argument regarding the Hearing Examiner's Findings of Fact, Conclusions of Law and Summary Judgment Order in this case. He asked if the parties were on the call.

Nick Whitaker of DEQ said that documents had been filed earlier this week by DEQ, asking that this item not be addressed at this meeting and time be allowed for Exceptions. The Hearing Examiner has issued an order setting out the Exceptions deadline. Chair Simpson said that this matter will be addressed at the October meeting, to give all parties time for filing of Exceptions to the Hearing Examiner's proposed order as required in statute.

- d. **In the Matter of: Denial of Opencut Mine Permit #3115 for FirstMark Materials – Oscar's Site, BER 2022-08 OC.**

Chair Simpson asked questions regarding the Settlement Stipulation, and Vicki Marquis of Crowley Fleck gave a short overview. Angie Colamaria also commented on behalf of DEQ.

Vice Chair Aguirre motioned that the Settlement Agreement and adoption of the Hearing Examiner's Motion for Dismissal with Prejudice be APPROVED. Board member Smith SECONDED. The motion PASSED unanimously.

IV. NEW CONTESTED CASES

- a. **In the Matter of: Appeal and Request for Hearing by The Dairy Subdivision, Missoula County EQ #23-1751, BER 2023-04 SUB.**

- b. **In the Matter of: Request for Hearing on Order of Revocation of Certified Operator License Number 9301, BER 2023-05 PWS.**

Board Member Reiten moved to ASSIGN these two new contested cases in entirety to a Hearing Examiner at Agency Legal Services. Board member Smith SECONDED.

Discussion ensued.

Board member Reiten amended his motion to ASSIGN these two new contested cases in entirety to a Hearing Examiner at Agency Legal Services, and that the Hearing Examiner or Examiners be directed to make available to the parties the informal procedures that were established by the Board. Board member Rankosky SECONDED. The motion PASSED unanimously.

V. BOARD COUNSEL UPDATE

No update was provided.

VI. GENERAL PUBLIC COMMENT

No public comment was given.

Chair Simpson mentioned that the Board had considered making this meeting an in-person meeting. After consultation with Board Counsel, Chair Simpson said he changed his mind about having an in-person meeting as it did not make sense to have everyone travel long distances for a relatively short meeting. It may make sense to schedule the October Board meeting in Helena in person but again, that is dependent upon the agenda. The decision about the next meeting will be made a couple of weeks before the meeting.

Also, in discussions with the Department on budget matters, Chair Simpson said he did an analysis of cases that are in progress, with hours billed and projected hours going forward. It is incumbent on the Board to try to keep cases moving. He asked Board Counsel to provide guidance as to how to tighten up the criteria for awarding extensions going forward as a topic for the next meeting.

Angie Colamaria of DEQ asked if there would be an opportunity for the parties that regularly appear before the Board to have a chance to comment on the discussion. Chair Simpson agreed to allow comment.

Vice Chair Aguirre clarified that the Board was not setting a policy but looking for guidance. Board member Reiten said that generic examples of how things have been handled in the past may be of interest to the Board.

VII. ADJOURNMENT

Board member Smith MOVED to adjourn the Board Meeting; Board member Reiten SECONDED. The motion PASSED unanimously. The meeting was adjourned at 10:02 A.M.

Board of Environmental Review August 11, 2023, minutes approved:

/s/
DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE

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Electronically Filed with the
Montana Board of Environmental Review
6/5/23 at 8:11 AM
By: Sandy Moisey Scherer
Docket No: BER 2022-02 HW

*Attorney for Respondent Montana
Department of Environmental Quality*

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

IN THE MATTER OF: REQUEST FOR HEARING BY HARRY RICHARDS, LINCOLN COUNTY, MT	CAUSE NO.: BER 2022-02 HW DEQ's MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT
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Respondent Montana Department of Environmental Quality (DEQ), by and through counsel, moves for summary judgment against Petitioner Harry Richards pursuant to M. R. Civ. P. 56(b), for the reasons set forth herein. DEQ's Motion is supported by the following brief in support, DEQ's Statement of Undisputed Facts, and the evidence submitted in DEQ's Appendix of Exhibits.

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INTRODUCTION

This case is straightforward, and the material facts are not in dispute. In what appears to be part of an ongoing dispute with his neighbors, Richards dumped used oil¹ on a portion of an easement road running across the property occupied by Richards and his brother near Trego in rural Lincoln County, Montana. Richards admitted as much in 2019 when questioned by DEQ Enforcement Specialist Margarite Juarez Thomas.

Confirmation sampling of soils from the easement road by DEQ showed the presence of elevated levels of extractable petroleum hydrocarbons (EPH) and heavy metals in the soil samples, indicating a significant level of petroleum contamination present in the soil and consistent with disposal of used oil. Richards, as the person who dumped the used oil and as the person in control of the real property when the used oil was dumped, has the obligation to clean up the used oil and resulting contamination. He has not done so and has refused to do so. On March 7, 2022, DEQ issued an administrative order to compel cleanup and impose administrative penalties.

Richards appealed the Order but has hardly participated in his own appeal. Instead, Richards has opted to send several inflammatory letters to both DEQ and

¹ As used in this motion and brief, the term “used oil” refers to the statutory definition of the term at § 75-10-403, MCA, which means “any oil that has been refined from crude oil or any synthetic oil, either of which has been used and as a result of that use is contaminated by physical or chemical impurities.”

the BER's Hearing Examiner. Richards has offered up only partial responses to DEQ's requests for information and clarification related to the statements in his letters. Richards has not produced any documents to DEQ, he has not sought any discovery from DEQ, and he has not responded to DEQ's subsequent attempts to obtain full and complete discovery responses from him.

As such, the material facts related to DEQ's order are not in dispute, and DEQ moves for summary judgment as a matter of law.

SUMMARY OF UNDISPUTED FACTS

Richards appeals DEQ's Notice of Violation and Administrative Compliance and Penalty Order, Docket No. HW-22-01 ("Order") issued to Richards on March 7, 2022, for a violation of the Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA ("Hazardous Waste Act"). DEQ SUF ¶ 1.

On or about September 23, 2019, DEQ received a citizen complaint alleging that Richards had dumped used oil and other waste automotive fluids on an easement road known as Butcher Creek Road outside of Trego, Lincoln County, Montana ("Site"). DEQ SUF ¶ 2. One of the complainants stated that Richards had dumped a 55-gallon barrel of transmission fluid on the road. *Id.*

Transmission fluid falls under the definition of "used oil" in the Montana Hazardous Waste Act. Richards did not and does not have a permit from DEQ to dispose of used oil at the Site. DEQ SUF ¶ 3.

DEQ Enforcement Specialist Margarite Juarez Thomas first visited the Site on October 16, 2019, accompanied by deputies from the Lincoln County Sheriffs Department (LCSD). DEQ SUF ¶ 4. During her initial visit, Juarez Thomas observed staining and petroleum odor on the easement road. DEQ SUF ¶ 5. Following the initial investigation, Richards came out and spoke with Juarez Thomas and the LCSD deputies. *Id.* Juarez Thomas handed Richards her card and hand delivered a violation letter addressed to Harry Puryer, which Richards accepted. *Id.* Richards admitted that he had dumped the fluids on the road. *Id.*

Over the following months, DEQ sent two violation letters to Richards, each requesting cleanup and proper disposal of the spilled material, but Richards did not comply. DEQ SUF ¶¶ 7-9.

On July 31, 2020, Juarez Thomas and DEQ Enforcement Specialist John Rasmann conducted a site visit, accompanied by the LCSD. DEQ SUF ¶ 11. During the site visit, Juarez Thomas and Rasmann observed soil staining on the road and detected an odor of petroleum when the soil was disturbed. *Id.* DEQ collected two soil samples in areas with dark soil and petroleum odor along the easement road to be lab analyzed for extractable petroleum hydrocarbons (EPH), volatile petroleum hydrocarbons (VPH), and Resource Conservation and Recovery Act (RCRA) metals. DEQ SUF ¶ 12.

Analytical results of the soil samples revealed levels of EPH which exceeded

DEQ's Risk Based Screening Levels (RBSLs), indicating that a significant level of petroleum contamination was still present in the soil. DEQ SUF ¶ 13. Heavy metals, including barium, arsenic, chromium, and lead were present in the samples, but were below RBSLs. *Id.*

On September 30, 2020, Juarez Thomas sent a letter to Richards informing him of the soil sample results and providing copies of her July 31, 2020, Field Investigation report and Photo Log. DEQ SUF ¶ 14. The letter requested that Richards contact DEQ by October 15, 2020, to discuss a cleanup plan. *Id.* On October 10, 2023, Juarez Thomas received a call from Richards, who stated he could not perform the cleanup and that DEQ should "leave him alone." DEQ SUF ¶ 15.

On March 7, 2020, DEQ issued the Order at issue in this appeal. DEQ SUF ¶ 16. In the Order, DEQ asserted that Richards violated § 75-10-422, MCA, by disposing of used oil without a permit from DEQ or in a manner not authorized by law. DEQ SUF ¶ 17. Pursuant to § 75-10-416, MCA, DEQ ordered Richards to hire a qualified environmental consultant to complete assessment and remedial actions at the Site, including proper disposal of the used oil and contaminated soil. *Id.* DEQ also imposed an administrative penalty of \$9,630 against Richards. DEQ SUF ¶ 18.

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PROCEDURAL HISTORY

Richards appealed DEQ's Order on March 23, 2023, but has since largely declined to participate in his own appeal. Richards did not exchange initial disclosures with DEQ, as was required by the September 27, 2022, Scheduling Order. DEQ SUF ¶ 19. Richards waited until after the close of the original discovery deadline to respond to DEQ's first discovery requests, and then provided only partial, incomplete, and generally evasive responses. DEQ SUF ¶ 20. On April 7, 2023, DEQ sent a letter to Richards requesting he supplement his responses with full and complete answers, but that letter has gone unanswered. DEQ SUF ¶¶ 21-22. As such, Richards has not produced or disclosed to DEQ any evidence to indicate DEQ's issuance of the March 7, 2022, Order was improper. DEQ SUF ¶ 23.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2020 MT 288, ¶ 15, 402 Mont. 128, 476 P.3d 32.

ARGUMENT

- 1. Richards violated § 75-10-422, MCA, by dumping used oil on the easement road at the Site and refusing to clean it up.**

Pursuant to § 75-20-422, MCA, "[i]t is unlawful to dispose of used oil or

hazardous waste without a permit or, if a permit is not required under this part or rules adopted under this part, by any other means not authorized by law.”

Pursuant to 40 CFR 262.11, which is incorporated by reference at ARM 17.53.601, and 40 CFR Part 279, which is incorporated by reference at ARM 17.53.1401, a person who generates used oil or otherwise decides to dispose of used oil must make an accurate determination as to whether that used oil is hazardous to ensure wastes are properly managed according to applicable regulations.

Pursuant to 40 CFR 279.81, which is incorporated by reference at ARM 17.53.1401, disposal of used oil must be in accordance with, if hazardous, hazardous waste management requirements of 40 CFR 260 through 266, 270, and 124; or, if nonhazardous, solid waste management requirements. Under either the relevant hazardous waste management requirements or the relevant solid waste management requirements, it is unlawful to dispose of used oil by dumping it on the ground. Pursuant to § 75-10-416, MCA, DEQ “may issue a cleanup order to any person who has discharged, deposited, or spilled any used oil . . . into or onto any land or water in an unlawful or unapproved manner...”

Here, the undisputed evidence establishes that Richards dumped used oil on the easement road at the Site, in violation of § 75-10-422, MCA. DEQ observed soil staining and a petroleum odor at the Site on each of its site visits, and

confirmation sampling of soils from the easement road by DEQ showed the presence of elevated levels of extractable petroleum hydrocarbons (EPH) and heavy metals in the soil samples, indicating a significant level of petroleum contamination present in the soil and consistent with disposal of used oil.

Moreover, when initially questioned by DEQ Enforcement Specialist Margarite Juarez Thomas, Richards admitted to dumping used oil on the easement road.

Richards, as the person who dumped the used oil and as the person in control of the real property when the used oil was dumped, has the obligation to clean up the used oil and resulting contamination.² Richards did not determine whether the used oil was hazardous prior to dumping it on the ground at the Site, and he has not performed the required clean up actions to remove and lawfully dispose of the used oil and contaminated soil that continues to be present at the Site. DEQ's issuance of an administrative order to address Richards' violation of the Hazardous Waste Act was proper.

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² DEQ notes that Paragraph 6 of the Order references an incorrect address number for the location on Butcher Creek Road where Richards dumped the used oil in violation of the Hazardous Waste Act. The "1576 Butcher Creek Road" address noted in the Order is associated with Harry Puryer, a neighboring landowner on Butcher Creek Road but unconnected to this matter. Exh. 10, Declaration of Margarite Juarez Thomas (June 1, 2023) ("Juarez Thomas Decl."), ¶ 21 (noting that the 1576 Butcher Creek Road address was associated with this matter at the time of initial complaint intake); Exh. 11, Declaration of John Rasmann (June 1, 2023) ("Rasmann Decl."), ¶ 14 (same). As confirmed by the GPS coordinates associated with the soil samples taken by DEQ on July 31, 2020, the correct address number for the location of Richards' violation of the Hazardous Waste Act is 1888 Butcher Creek Road. *Id.* Because the location of the violation is not in dispute and is confirmed by the GPS coordinates taken by DEQ at the time of soil sampling, the inadvertent reference to an incorrect address number for Butcher Creek Road does not affect the validity of DEQ's March 7, 2022, Order or Richards' obligation to clean up the contamination he caused.

2. Richards has not produced any evidence to indicate DEQ’s issuance of the March 7, 2022, Order was improper.

Despite seeking review of DEQ’s March 7, 2022, Order, Richards has largely declined to participate in these proceedings. For the most part, the extent of Richards’ participation in these proceedings has been to submit inflammatory letters to DEQ and the Hearing Examiner. *See, e.g.*, Docs. 1, 4, 9-3, 11, 13; *see also*, Doc. 5 (letter from Hearing Examiner to Richards requesting that Richards stop using profanity in his communications).

Richards did not exchange initial disclosures with DEQ, as was required by the September 27, 2022, Scheduling Order. Richards waited until after the close of the original discovery deadline to respond to DEQ’s first discovery requests, and then provided only partial, incomplete, and generally evasive responses. DEQ’s letter to Richards requesting he supplement his responses with full and complete answers has gone unanswered. As such, Richards has not produced or disclosed any evidence to indicate DEQ’s issuance of the March 7, 2022, Order was improper. Absent such evidence, summary judgment in favor of DEQ is appropriate. *Cox v. Magers*, 2018 MT 21, ¶ 15, 390 Mont. 224, 411 P.3d 1271 (while self-represented litigants are given some latitude, “[i]t is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules”).

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CONCLUSION

For the reasons stated, DEQ requests the BER grant DEQ's Motion for Summary Judgment and enter a final order affirming DEQ's issuance of the March 7, 2022, Order.

DATED this 2nd day of June, 2023.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

By: /s/ Nicholas A. Whitaker
NICHOLAS A. WHITAKER
Staff Attorney
Attorney for Respondent DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June 2023, a true and accurate copy of the foregoing document for BER 2022-02 HW was delivered addressed as follows:

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Electronically Filed with the
Montana Board of Environmental Review
6/5/23 at 8:11 AM
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Docket No: BER 2022-02 HW

*Attorney for Respondent Montana
Department of Environmental Quality*

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

IN THE MATTER OF: REQUEST FOR HEARING BY HARRY RICHARDS, LINCOLN COUNTY, MT	CAUSE NO.: BER 2022-02 HW DEQ'S STATEMENT OF UNDISPUTED FACTS
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In accordance with Paragraph 6 of the Prehearing Order, the Department of Environmental Quality (DEQ) provides this Statement of Undisputed Facts in support of its Motion for Summary Judgment. The accompanying Appendix of Exhibits provides the supporting authority cited herein.

STATEMENT OF UNDISPUTED FACTS

1. This matter is an appeal by Harry Richards of DEQ's Notice of Violation and Administrative Compliance and Penalty Order, Docket No. HW-22-

01 (“Order”) issued to Richards on March 7, 2022, for a violation of the Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA (“Hazardous Waste Act”). **Exh. 1** (Order); **Exh. 11**, Declaration of John Rasmann (June 1, 2023) (“Rasmann Decl.”), ¶ 12.

2. On or about September 23, 2019, DEQ received a citizen complaint alleging that Richards had dumped used oil and other waste automotive fluids on an easement road known as Butcher Creek Road outside of Trego, Lincoln County, Montana (“Site”). One of the complainants stated that Richards had dumped a 55-gallon barrel of transmission fluid on the road. **Exh. 10**, Declaration of Margarite Juarez Thomas (June 1, 2023) (“Juarez Thomas Decl.”), ¶ 7.

3. Transmission fluid falls under the definition of “used oil” in the Montana Hazardous Waste Act. Richards did not and does not have a permit from DEQ to dispose of used oil at the Site. **Exh. 10**, Juarez Thomas Decl. ¶ 10.

4. On October 16, 2019, Deputy Bo Pitman of the Lincoln County Sheriff’s Department (LCSD) and a second deputy accompanied DEQ Enforcement Specialist Margarite Juarez Thomas to the Site. Deputy Pitman explained to Juarez Thomas that he had interviewed an employee at a local automotive shop who admitted to providing Richards with barrels of used oil and waste automotive fluids. **Exh. 10**, Juarez Thomas Decl. ¶ 9.

5. During the site visit, Juarez Thomas observed staining and petroleum odor on the easement road. Following the initial investigation, Richards came out and spoke with Juarez Thomas and the LCSD deputies. Juarez Thomas handed Richards her card and hand delivered a violation letter addressed to Harry Puryer, which Richards accepted. Richards admitted that he had dumped the fluids on the road. **Exh. 10**, Juarez Thomas Decl. ¶ 9; **Exh. 2** (Juarez Thomas October 16, 2019, Field Investigation Report and Photolog).

6. On or about October 30, 2019, Juarez Thomas received a phone call from Richards stating that he should not have accepted the violation letter in the field. He would not provide Juarez Thomas with corrected contact information. **Exh. 10**, Juarez Thomas Decl. ¶ 10.

7. On October 31, 2019, Juarez Thomas re-sent the violation letter to Richards, via certified mail, using updated contact information that Deputy Pitman had provided. The violation letter notified Richards of the violations and provided the appropriate citations for the violations of the Hazardous Waste Act, the Montana Solid Waste Management Act (“Solid Waste Act”), Title 75, chapter 10, part 2, MCA, and Montana Water Quality Act, Title 75, chapter 5, parts 1-3, MCA. The letter requested cleanup and proper disposal of the spilled materials by November 15, 2019. **Exh. 3** (October 31, 2019, violation letter); **Exh. 10**, Juarez Thomas Decl. ¶ 11.

8. On November 21, 2019, Juarez Thomas received a letter from Richards stating that he was unable to clean up the road due to frozen ground and that the 19th Judicial District Court prohibited him from interfering with the easement road, which would be required to clean up the spilled materials. The November 21, 2019, letter requested additional information regarding state waters that may have been polluted by his actions. **Exh. 4** (November 21, 2019, letter from Richards); **Exh. 10**, Juarez Thomas Decl. ¶ 12.

9. On January 7, 2020, Juarez Thomas sent a second violation letter to Richards. The violation letter notified Richards of the violations and provided the appropriate citations for the violations of the Hazardous Waste Act, Solid Waste Act and Water Quality Act. The letter clarified that the Montana Groundwater Information System documented the presence of a well with a shallow static water level of 9 feet within the same Township, Section and Range. The letter also stated that the court decision did not prevent repair and maintenance of the road in a manner that did not interfere with the easement. The letter requested cleanup and proper disposal of the spilled materials by April 30, 2020. **Exh. 5** (January 7, 2020, violation letter); **Exh. 10**, Juarez Thomas Decl. ¶ 13.

10. On July 24, 2020, a search warrant was authorized for DEQ by the Montana First District Court, Lewis and Clark County, to visit the area and document violations of environmental laws and confirm the presence of soil

contamination by taking soil samples for laboratory analysis. **Exh. 10**, Juarez Thomas Decl. ¶ 14.

11. On July 31, 2020, Juarez Thomas and DEQ Enforcement Specialist John Rasmann conducted a site visit, accompanied by the LCSD. During the site visit, Juarez Thomas and Rasmann observed soil staining on the road and detected an odor of petroleum when the soil was disturbed. **Exh. 10**, Juarez Thomas Decl. ¶ 15; **Exh. 11**, Rasmann Decl. ¶ 8; **Exh. 6** (Juarez Thomas July 31, 2020, Field Investigation Report and Photolog).

12. At the July 31, 2020, site visit, DEQ collected two soil samples in areas with dark soil and petroleum odor along the easement road. The soil samples were collected entirely within the boundary of the easement. These soil samples were sent by chain-of-custody protocol to Energy Laboratories to be analyzed for extractable petroleum hydrocarbons (EPH), volatile petroleum hydrocarbons (VPH), and Resource Conservation and Recovery Act (RCRA) metals. **Exh. 10**, Juarez Thomas Decl. ¶ 16; **Exh. 11**, Rasmann Decl. ¶ 9; **Exh. 7** (Chain of Custody Record).

13. Analytical results of the soil samples revealed levels of EPH which exceeded DEQ's Risk Based Screening Levels (RBSLs), indicating that a significant level of petroleum contamination was still present in the soil. Heavy metals, including barium, arsenic, chromium, and lead were present in the samples,

but were below RBSLs. **Exh. 8** (Analytical Report); **Exh. 10**, Juarez Thomas Decl. ¶ 17; **Exh. 11**, Rasmann Decl. ¶ 10.

14. On September 30, 2020, Juarez Thomas sent a letter to Richards informing him of the soil sample results and providing copies of her July 31, 2020, Field Investigation report and Photo Log. The letter requested that Richards contact DEQ by October 15, 2020, to discuss a cleanup plan. **Exh. 9** (September 30, 2020, violation letter); **Exh. 10**, Juarez Thomas Decl. ¶ 18.

15. On October 10, 2020, Juarez Thomas received a call from Richards stating he could not perform cleanup actions on the easement road due to the 19th Judicial District Court decision. Richards told Juarez Thomas that DEQ should “leave him alone.” No additional response had been received from Richards until the present appeal. **Exh. 10**, Juarez Thomas Decl. ¶ 19.

16. On March 7, 2022, DEQ issued the Order at issue in this appeal. DEQ prepared and issued this Order after Richards refused to clean up the contamination as requested by DEQ’s three violation letters. **Exh. 1** (Order); **Exh. 11**, Rasmann Decl. ¶ 12.

17. As stated in the Order, DEQ asserted that Richards violated § 75-10-422, MCA, by disposing of used oil without a permit from DEQ or in a manner not authorized by law. **Exh. 1**, ¶ 20. Pursuant to the authority granted by § 75-10-416, MCA, DEQ ordered Richards to hire a qualified environmental consultant to

complete assessment and remedial actions at the Site, including proper disposal of the used oil and contaminated soil. **Exh. 1**, ¶ 22.

18. Enclosed with the Order was a penalty calculation Rasmann prepared for Richards' violation of the Hazardous Waste Act. In preparing this penalty calculation, Rasmann followed the penalty factors outlined in § 75-1-1001, MCA, and DEQ's penalty calculation procedures at ARM 17.4.301 through 17.4.308. Following these penalty factors, Rasmann calculated a total penalty of \$9,630. **Exh. 1** (Order); **Exh. 11**, Rasmann Decl. ¶ 13.

19. Throughout the present contested case, Richards has largely declined to participate in the proceedings or comply with the Hearing Examiner's scheduling orders. For example, Richards did not exchange initial disclosures with DEQ, as was required by the September 27, 2022, Scheduling Order. **Exh. 12**, Declaration of Nicholas Whitaker (June 2, 2023) ("Whitaker Decl."), ¶ 6.

20. Richards waited until after the close of the original discovery deadline to respond to DEQ's first discovery requests, and then provided only partial, incomplete, and generally evasive responses. **Exh. 12**, Whitaker Decl. ¶¶ 7-10.

21. On April 7, 2023, DEQ sent a letter to Richards requesting that he provide full responses to several incomplete and nonresponsive answers to DEQ's first combined discovery requests. **Exh. 13** (April 7, 2023, letter to Richards); **Exh. 12**, Whitaker Decl. ¶ 12.

22. Richards has not responded to DEQ's April 7, 2023, letter. **Exh. 12**, Whitaker Decl. ¶ 13.

23. Richards has not otherwise provided any documentation or other evidence to DEQ to support his appeal in this matter. **Exh. 12**, Whitaker Decl. ¶14.

DATED this 2nd day of June, 2023.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

By: /s/ Nicholas A. Whitaker
NICHOLAS A. WHITAKER
Staff Attorney
Attorney for Respondent DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2023, a true and accurate copy of the foregoing document for BER 2022-02 HW was delivered addressed as follows:

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DEPARTMENT OF
ENVIRONMENTAL QUALITY

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

IN THE MATTER OF: REQUEST FOR HEARING BY HARRY RICHARDS, LINCOLN COUNTY, MT	CASE NO. BER 2022-02 HW FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SUMMARY JUDGMENT ORDER
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Procedural Background

On March 7, 2022, the Montana Department of Environmental Quality (“DEQ”) issued a Notice of Violation and Administrative Compliance and Penalty Order, Docket No. HW-22-01 to Harry Richards (“Richards”) alleging, *inter alia*, Richards violated Section 75-10-422, MCA, by disposing of used oil without a permit from the DEQ or in a manner not authorized by law, and in short, ordering cleanup. Richards responded by letter dated March 16, 2022, requesting a hearing.

On September 27, 2022, a Scheduling Order was issued, containing a due date of February 24, 2023, for dispositive motions. The Scheduling Order expressly provided that “[r]esponse and reply briefs shall be filed pursuant to the timelines provided by Mont. R. Civ. P. 56(c)(1).” DEQ served Richards with discovery requests. Richards’ responses were untimely and incomplete, served after the close of discovery. Consequently, DEQ moved to extend the discovery deadline to April 28, 2023, and the dispositive motions deadline to June 2, 2023. The DEQ’s motion was granted March 24, 2023.

On June 2, 2023, DEQ filed its Motion for Summary Judgment and Brief in Support and supporting documents. Richards’ response was due on or about June 26, 2023. Mont. R. Civ. P. 56(c)(1). To date, Richards has not filed a response to DEQ’s Motion.

On July 11, 2023, DEQ filed a Notice of Issue.

Based on careful review of the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. This matter is an appeal by Harry Richards of DEQ’s Notice of Violation and Administrative Compliance and Penalty Order, Docket No. HW-22-01 (“Order”) issued to Richards on March 7, 2022, for a violation of the Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA (“Hazardous Waste Act”).

Exh. 1 (Order); Exh. 11, Declaration of John Rasmann (June 1, 2023) (“Rasmann Decl.”), ¶ 12.

2. On or about September 23, 2019, DEQ received a citizen complaint alleging that Richards had dumped used oil and other waste automotive fluids on an easement road known as Butcher Creek Road outside of Trego, Lincoln County, Montana (“Site”). One of the complainants stated that Richards had dumped a 55-gallon barrel of transmission fluid on the road. Exh. 10, Declaration of Margarite Juarez Thomas (June 1, 2023) (“Juarez Thomas Decl.”), ¶ 7.

3. Transmission fluid falls under the definition of “used oil” in the Montana Hazardous Waste Act. Richards did not and does not have a permit from DEQ to dispose of used oil at the Site. Exh. 10, Juarez Thomas Decl. ¶ 10.

4. On October 16, 2019, Deputy Bo Pitman of the Lincoln County Sheriff’s Department (LCSD) and a second deputy accompanied DEQ Enforcement Specialist Margarite Juarez Thomas to the Site. Deputy Pitman explained to Juarez Thomas that he had interviewed an employee at a local automotive shop who admitted to providing Richards with barrels of used oil and waste automotive fluids. Exh. 10, Juarez Thomas Decl. ¶ 9.

5. During the site visit, Juarez Thomas observed staining and petroleum odor on the easement road. Following the initial investigation, Richards came out and spoke with Juarez Thomas and the LCSD deputies. Juarez Thomas handed

Richards her card and hand delivered a violation letter addressed to Harry Puryer, which Richards accepted. According to Juarez Thomas, *Richards admitted that he had dumped the fluids on the road.* Exh. 10, Juarez Thomas Decl. ¶ 9; Exh. 2 (Juarez Thomas October 16, 2019, Field Investigation Report and Photolog).

6. Although Richards did not file a summary judgment response brief, Richards did write a letter dated August 10, 2022, in which he stated, “I never admitted to me dumping the oil on the road and besides if and that is if I did people oil their road every day during the year to control dust . . .” Richards letter (Aug. 10, 2022). Although Richards claims he never admitted dumping the oil, it is significant that he certainly does not deny it.

7. Drawing every reasonable inference in favor of Richards, as we must as Richards is the non-moving party, the only logical interpretation of the August 10 letter is that Richards believes application of oil is a common practice and “the law has singled [him] out” for harassment for dumping used oil.

8. On or about October 30, 2019, Juarez Thomas received a phone call from Richards stating that he should not have accepted the violation letter in the field. He would not provide Juarez Thomas with corrected contact information. Exh. 10, Juarez Thomas Decl. ¶ 10.

9. On October 31, 2019, Juarez Thomas re-sent the violation letter to Richards, via certified mail, using updated contact information that Deputy Pitman

had provided. The violation letter notified Richards of the violations and provided the appropriate citations for the violations of the Hazardous Waste Act, the Montana Solid Waste Management Act (“Solid Waste Act”), Title 75, chapter 10, part 2, MCA, and Montana Water Quality Act, Title 75, chapter 5, parts 1-3, MCA. The letter requested cleanup and proper disposal of the spilled materials by November 15, 2019. Exh. 3 (October 31, 2019, violation letter); Exh. 10, Juarez Thomas Decl. ¶ 11.

10. On November 21, 2019, Juarez Thomas received a letter from Richards stating that he was unable to clean up the road due to frozen ground and that the 19th Judicial District Court prohibited him from interfering with the easement road, which would be required to clean up the spilled materials. The November 21, 2019, letter requested additional information regarding state waters that may have been polluted by his actions. Exh. 4 (November 21, 2019, letter from Richards); Exh. 10, Juarez Thomas Decl. ¶ 12.

11. On January 7, 2020, Juarez Thomas sent a second violation letter to Richards. The violation letter notified Richards of the violations and provided the appropriate citations for the violations of the Hazardous Waste Act, Solid Waste Act and Water Quality Act. The letter clarified that the Montana Groundwater Information System documented the presence of a well with a shallow static water level of 9 feet within the same Township, Section and Range. The letter also stated

that the court decision did not prevent repair and maintenance of the road in a manner that did not interfere with the easement. The letter requested cleanup and proper disposal of the spilled materials by April 30, 2020. Exh. 5 (January 7, 2020, violation letter); Exh. 10, Juarez Thomas Decl. ¶ 13.

12. On July 24, 2020, a search warrant was authorized for DEQ by the Montana First District Court, Lewis and Clark County, to visit the area and document violations of environmental laws and confirm the presence of soil contamination by taking soil samples for laboratory analysis. Exh. 10, Juarez Thomas Decl. ¶ 14.

13. On July 31, 2020, Juarez Thomas and DEQ Enforcement Specialist John Rasmann conducted a site visit, accompanied by the LCSD. During the site visit, Juarez Thomas and Rasmann observed soil staining on the road and detected an odor of petroleum when the soil was disturbed. Exh. 10, Juarez Thomas Decl. ¶ 15; Exh. 11, Rasmann Decl. ¶ 8; Exh. 6 (Juarez Thomas July 31, 2020, Field Investigation Report and Photolog).

14. At the July 31, 2020, site visit, DEQ collected two soil samples in areas with dark soil and petroleum odor along the easement road. The soil samples were collected entirely within the boundary of the easement. These soil samples were sent by chain-of-custody protocol to Energy Laboratories to be analyzed for extractable petroleum hydrocarbons (EPH), volatile petroleum hydrocarbons

(VPH), and Resource Conservation and Recovery Act (RCRA) metals. Exh. 10, Juarez Thomas Decl. ¶ 16; Exh. 11, Rasmann Decl. ¶ 9; Exh. 7 (Chain of Custody Record).

15. Analytical results of the soil samples revealed levels of EPH which exceeded DEQ's Risk Based Screening Levels (RBSLs), indicating that a significant level of petroleum contamination was still present in the soil. Heavy metals, including barium, arsenic, chromium, and lead were present in the samples, but were below RBSLs. Exh. 8 (Analytical Report); Exh. 10, Juarez Thomas Decl. ¶ 17; Exh. 11, Rasmann Decl. ¶ 10.

16. On September 30, 2020, Juarez Thomas sent a letter to Richards informing him of the soil sample results and providing copies of her July 31, 2020, Field Investigation report and Photo Log. The letter requested that Richards contact DEQ by October 15, 2020, to discuss a cleanup plan. Exh. 9 (September 30, 2020, violation letter); Exh. 10, Juarez Thomas Decl. ¶ 18.

17. On October 10, 2020, Juarez Thomas received a call from Richards stating he could not perform cleanup actions on the easement road due to the 19th Judicial District Court decision. Richards told Juarez Thomas that DEQ should "leave him alone." No additional response had been received from Richards until the present appeal. Exh. 10, Juarez Thomas Decl. ¶ 19.

18. On March 7, 2022, DEQ issued the Order at issue in this appeal. DEQ prepared and issued this Order after Richards refused to clean up the contamination as requested by DEQ's three violation letters. Exh. 1 (Order); Exh. 11, Rasmann Decl. ¶ 12.

19. As stated in the Order, DEQ asserted that Richards violated § 75-10-422, MCA, by disposing of used oil without a permit from DEQ or in a manner not authorized by law. Exh. 1, ¶ 20. Pursuant to the authority granted by § 75-10-416, MCA, DEQ ordered Richards to hire a qualified environmental consultant to complete assessment and remedial actions at the Site, including proper disposal of the used oil and contaminated soil. Exh. 1, ¶ 22.

20. Enclosed with the Order was a penalty calculation Rasmann prepared for Richards' violation of the Hazardous Waste Act. In preparing this penalty calculation, Rasmann followed the penalty factors outlined in § 75-1-1001, MCA, and DEQ's penalty calculation procedures at ARM 17.4.301 through 17.4.308. Following these penalty factors, Rasmann calculated a total penalty of \$9,630. Exh. 1 (Order); Exh. 11, Rasmann Decl. ¶ 13.

21. Throughout the present contested case, Richards has largely declined to participate in the proceedings or comply with the Hearing Examiner's scheduling orders. For example, Richards did not exchange initial disclosures with

DEQ, as was required by the September 27, 2022, Scheduling Order. Exh. 12, Declaration of Nicholas Whitaker (June 2, 2023) (“Whitaker Decl.”), ¶ 6.

22. Richards waited until after the close of the original discovery deadline to respond to DEQ’s first discovery requests, and then provided only partial, incomplete, and generally evasive responses. Exh. 12, Whitaker Decl. ¶¶ 7-10.

23. On April 7, 2023, DEQ sent a letter to Richards requesting that he provide full responses to several incomplete and nonresponsive answers to DEQ’s first combined discovery requests. Exh. 13 (April 7, 2023, letter to Richards); Exh. 12, Whitaker Decl. ¶ 12.

24. Richards has not responded to DEQ’s April 7, 2023, letter. Exh. 12, Whitaker Decl. ¶ 13.

25. Richards has not otherwise provided any documentation or other evidence to DEQ to support his appeal in this matter. Exh. 12, Whitaker Decl. ¶14.

26. Based on an independent review of the record, the Hearing Examiner specifically finds that each of the foregoing facts is undisputed, and thus finds a lack of any genuine issue of material fact.

* * *

From the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. Summary judgment may be granted only if the moving party can show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *First Nat'l Props. v. Joel D. Hillstead Tr.*, 2020 MT 211, ¶ 19, 401 Mont. 59, 472 P.3d 134 (citing Mont. R. Civ. P. 56; *Flathead Bank of Bigfork v. Masonry by Muller, Inc.*, 2016 MT 269, ¶ 5, 385 Mont. 214, 383 P.3d 215).

2. Summary judgment is an extreme remedy which should not replace a contested case hearing on the merits where there are material factual disputes. The party moving for summary judgment has the initial burden of establishing the absence of genuine issues of material fact. If the moving party meets its initial burden, then the burden then shifts to the party opposing summary judgment to show, by more than mere denial or speculation, that there are genuine issues of material fact to be resolved. All reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the non-moving party. *Lee v. Great Divide Ins.*, 2008 MT 80, ¶ 10, 342 Mont. 147, 182 P.3d 41.

3. A party opposing a motion for summary judgment must file a response, and any opposing affidavits, within 21 days after the motion is served or a responsive pleading is due, whichever is later. Mont. R. Civ. P. 56(c)(1)(B).

4. Richards failed to file a response to DEQ's Motion within the time set forth in Mont. R. Civ. P. 56(c)(1)(B).

5. While Richards' failure to file a response brief means that DEQ's motion is deemed well taken for purposes of Uniform District Court Rule 2(b), this does not relieve the Hearing Examiner of the duty to engage in a Rule 56 analysis when presented with a motion for summary judgment. *See Chapman v. Maxwell*, 2014 MT 35, ¶ 11, 374 Mont. 12, 322 P.3d 1029.

6. As indicated above, the Hearing Examiner found, based on the entire record, no genuine issues of material fact exist; thus, the issue is whether DEQ is entitled to judgment as a matter of law.

Summary Judgment Standard

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2020 MT 288, ¶ 15, 402 Mont. 128, 476 P.3d 32.

2. While a party's failure to file a response brief means that the adjudicator may deem the motion well take, "this does not relieve the [adjudicator] of the duty to engage in a Rule 56 analysis when presented with a motion for

summary judgment. *Chapman v. Maxwell*, 2014 MT 35, ¶ 11, 374 Mont. 12, 322 P.3d 1029.

3. Pursuant to § 75-20-422, MCA, “[i]t is unlawful to dispose of used oil or hazardous waste without a permit or, if a permit is not required under this part or rules adopted under this part, by any other means not authorized by law.”

4. Pursuant to 40 CFR 262.11, which is incorporated by reference at ARM 17.53.601, and 40 CFR Part 279, which is incorporated by reference at ARM 17.53.1401, a person who generates used oil or otherwise decides to dispose of used oil must make an accurate determination as to whether that used oil is hazardous to ensure wastes are properly managed according to applicable regulations.

5. Pursuant to 40 CFR 279.81, which is incorporated by reference at ARM 17.53.1401, disposal of used oil must be in accordance with, if hazardous, hazardous waste management requirements of 40 CFR 260 through 266, 270, and 124; or, if nonhazardous, solid waste management requirements.

6. Under either the relevant hazardous waste management requirements or the relevant solid waste management requirements, it is unlawful to dispose of used oil by dumping it on the ground.

7. Pursuant to § 75-10-416, MCA, DEQ “may issue a cleanup order to any person who has discharged, deposited, or spilled any used oil . . . into or onto

any land or water in an unlawful or unapproved manner...”

8. Here, the undisputed evidence establishes that Richards dumped used oil on the easement road at the Site, in violation of § 75-10-422, MCA. DEQ observed soil staining and a petroleum odor at the Site on each of its site visits, and confirmation sampling of soils from the easement road by DEQ showed the presence of elevated levels of extractable petroleum hydrocarbons (EPH) and heavy metals in the soil samples, indicating a significant level of petroleum contamination present in the soil and consistent with disposal of used oil. Moreover, when initially questioned by DEQ Enforcement Specialist Margarite Juarez Thomas, Richards admitted to dumping used oil on the easement road.

9. Richards, as the person who dumped the used oil and as the person in control of the real property when the used oil was dumped, has the obligation to clean up the used oil and resulting contamination. Richards did not determine whether the used oil was hazardous prior to dumping it on the ground at the Site, and he has not performed the required clean up actions to remove and lawfully dispose of the used oil and contaminated soil that continues to be present at the Site.

10. DEQ’s issuance of an administrative order to address Richards’ violation of the Hazardous Waste Act was proper.

11. Richards has not submitted any evidence or argument in response to

DEQ's Motion for Summary Judgment, which the undersigned concludes to be an admission that DEQ's motion is well taken.

12. Because there is no genuine issue of fact and DEQ is entitled to judgment as a matter of law, DEQ's motion for summary judgment should be granted.

RECOMMENDED DECISION

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.

DATED this 24th day of July, 2023.

/s/ Rob Cameron
Rob Cameron
Hearing Examiner

cc: Nicholas Whitaker
Harry Richards (via U.S. Mail)

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9/21/23 at 12:56 PM
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**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

**JOINT STIPULATION AND
MOTION TO DISMISS**

Highland Mining, LLC and the Department of Environmental Quality
("DEQ") jointly move to dismiss this hearing request. Highland Mining, LLC

initiated this hearing request to challenge DEQ's bond determination, specifically the bond amount required for removal of certain buildings and infrastructure that Highland Mining, LLC asserted would have post-mining value and therefore should not be included in the bond calculation.

Highland Mining, LLC and DEQ have since reached agreement on a reclamation schedule that allows Highland Mining, LLC to request, and for DEQ to review and, as appropriate, approve in writing, retention or deferral of reclamation of such items in accordance with ARM 17.24.107. Highland Mining, LLC and DEQ further stipulate as follows:

1. Highland Mining, LLC will provide to DEQ the bond amount in issue, \$164,524, within sixty (60) days after the date of dismissal, in the form of a Letter of Credit or other form acceptable to DEQ.
2. Highland Mining, LLC reserves any and all rights to future release of bonding upon future DEQ approval of completion of reclamation, retention of infrastructure, or other basis in accordance with ARM 17.24.107 or other applicable rules.
3. Highland Mining, LLC and DEQ each will bear their own attorney fees and costs in relation to this proceeding.

Having resolved their differences regarding the reclamation bond amount and having stipulated to the three provisions above, Highland Mining, LLC and DEQ jointly move for dismissal of this matter.

Dated this 21st day of September 2023.

/s/ Victoria A. Marquis

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Attorneys for Highland Mining, LLC

/s/ Jessica Wilkerson

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Attorney for DEQ

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 21st day of September 2023:

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/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

**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

**ORDER OF DISMISSAL WITH
PREJUDICE**

On September 21, 2023, the parties in this matter filed a Joint Stipulation. In accordance with the Joint Stipulation, Petitioners in this matter, Highland Mining, LLC, also moved for dismissal of this appeal with prejudice.

IT IS THEREFORE ORDERED THAT this matter is dismissed with prejudice.

Dated this 27th day of September 2023.

/s/ Terisa Oomens
TERISA OOMENS
Hearing Examiner