DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
FEBRUARY 16, 2024

AGENDA TABLE OF CONTENTS

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

DECEMBER 8, 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; Board Members Julia Altemus, Jennifer Rankosky, Jon Reiten, and Joe Smith.
Vice Chair Stacy Aguirre did not attend the meeting.

Roll was called and a quorum was present.

Board Attorney Present
Terisa Oomens

DEQ Personnel Present
Board Secretary: Sandy Moisey Scherer
Board Liaison: Deputy Director James Fehr
DEQ Communications: Moira Davin
DEQ Legal: Catherine Armstrong, Kirsten Bowers, Sarah Christopherson, Angie Colamaria, Sam King, Loryn Johnson, Jeremiah Langston, Kurt Moser, and Kaitlin Whitfield
DEQ Air, Energy and Mining: Emily Lodman
DEQ Water Quality: Andy Ulven, Katie Makarowski

Other Parties Present
Laurie Crutcher, Crutcher Court Reporting
Elena Hagen, Montana DOJ Agency Legal Services Bureau
Bill Mercer, Sarah Bordelon, and Sam Yemington - Holland & Hart
Vicki Marquis, Crowley Fleck

I. ADMINISTRATIVE MATERIALS

A. **Review and Approve Minutes**

A.1. **The Board will vote on adopting the October 20, 2023, Meeting Minutes.**

Board member Smith moved to APPROVE the October 20, 2023, meeting minutes. Board member Reiten SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

A.2. **Review and approve the proposed Board meeting schedule for 2024.**

Board member Altemus moved to APPROVE the proposed Board meeting schedule for 2024. Board member Smith SECONDED. The motion PASSED unanimously.

II. BRIEFING ITEMS

Chair Simpson and Board Counsel Oomens offered clarification regarding cases. Chair Simpson asked about the Westmoreland Rosebud Mining MPDES permit stipulation in BER 2022-06 WQ. Kirsten Bowers of DEQ and Bill Mercer of Holland and Hart provided an update to the Board.

The Board did not have any questions.

III. ACTION ITEMS

None.

IV. GENERAL PUBLIC COMMENTS

None.

V. GENERAL PUBLIC COMMENT

No public comment was given.

VI. BOARD CHAIR UPDATE

A.1. Chair Simpson mentioned that the agenda for today's meeting is brief. Cancelling today's meeting was considered but due to the recent Supreme Court decision summarized by Board Counsel Oomens, a decision was made to hold the meeting. Chair Simpson hoped all Board members had a chance to read the decision and he gave a brief description of the background information of the case. He would like to propose the February meeting be a two-day meeting (possibly February 15th and 16th), but he will flesh out an agenda within the next couple of weeks.

Item 1 for this meeting on February 15th would be a status conference on Westmoreland Rosebud Amendment 4 case regarding the Rosebud Mine layout, the mine plan, and specifically the Area B Amendment. This Board does not have any hands-on background in this case and there are two other cases that are potentially affected (Area F and Area B Amendment).

Item 2 for this meeting would be to go through three specific items being remanded to the Board by the Supreme Court, and to get the perspective of the parties on those issues. Chair Simpson would like to hear from the parties on their view of how the Supreme Court decisions affects those other two pending cases, and whether it will be necessary to back up on the status of those cases or make any adjustments going forward, to be sure that those cases eventually are resolved.

The meeting on February 16th would be the regular Board meeting, and Chair Simpson said the Moudy Pit case is expected to be before the Board. He asked for comments from the Board on the schedule being proposed, and the subject matter of the meetings.

Jeremiah Langston of DEQ mentioned that DEQ has filed a petition for rehearing of the Montana Supreme Court's decision on a very narrow issue regarding attorney fees. The Court will issue a remittitur, which is essential for the Board to obtain jurisdiction over AM4. He said that it is good for the Board to be thinking about the case and the attorney fee issue should not have any bearing on the Board proceedings.

Chair Simpson said he was not aware of DEQ's petition for rehearing on the issue of attorney fees but agreed that it should not have any bearing on whether the Board proceeds.

Sam Yemington of Holland and Hart echoed Mr. Langston's comments but wanted to put the Board on notice that they have a conflict with the February 15th date as there's an oral argument in Billings with Judge Davies. Mr. Yemington said there would be sufficient time to revisit scheduling with the judge and reset that oral argument to another date but emphasized that MEIC needs to be part of the conversation.

Chair Simpson said he is under the assumption that the Board could go ahead with the concept. The Board will be distributing documentation to the parties as to when the meeting will be, what the subject matter will be, and any specifics about specific information that the Board may request. There is a possibility that the Board could hear the Moudy Pit case on February 15th and have the status conference on this case on February 16th. He will discuss all this with Board Counsel Oomens in greater detail.

Board Counsel Oomens suggested that the Board wait until the remittitur is received from the Montana Supreme Court. When the remittitur is received is when the Board obtains jurisdiction. She also recommended waiting before deciding to pass a motion that the Board have a two-day meeting. Chair Simpson decided to defer his decision about having a two-day meeting until hearing from the Court. In the meantime, the Board will continue to prepare for the distribution of information.

Board member Altemus asked if there was any news of a replacement for Board member Bruner. Chair Simpson asked Board Secretary Moisey Scherer and she responded that she has not received any information.

VII. ADJOURNMENT

Board member Rankosky MOVED to adjourn the Board Meeting; Board member Smith SECONDED. The motion PASSED unanimously. The meeting was adjourned at 9:38 A.M.

Board of Environmental Review December 8, 2023, minutes approved:

/s/_____
DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

AARON PETTIS
Staff Attorney
Department of Environmental Quality
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Helena, MT 596020-0901
(406) 444-1422
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Attorney for Respondent
Montana Department of Environmental Quality

Electronically Filed with the
Montana Board of Environmental Review
1/11/24 at 5:02 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2023-05 PWS

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: REQUEST FOR HEARING ON ORDER OF REVOCATION OF CERTIFIED OPERATOR LICENSE NUMBER 9301	CASE NO. BER 2023-05 PWS **Notice of Dismissal**

The Department of Environmental Quality has received a notification from *pro se* petitioner Mr. Deveny indicating his desire to dismiss these proceedings. DEQ does not believe that the notification was filed with the Hearing Examiner and therefore files it herewith.

Construed liberally, Mr. Deveny's notification constitutes a voluntary notice of dismissal without an order pursuant to Rule 41(a)(1)(A), M.R.C.P.

Respectfully submitted this 11th day of January 2024.

BY: */s/ Aaron Pettis*
AARON PETTIS
Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2024, I caused a true and accurate copy of the foregoing document to be emailed to:

Sandy Moisey Scherer
Board Secretary
Board of Environmental Review
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
deqbersecretary@mt.gov

Terisa Oomens
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440
Terisa.Oomens@mt.gov
Ehagen2@mt.gov

William Deveny
P.O. Box 228
Hysham, MT 59038

**via USPS Mail*

BY:*/s/Catherine Armstrong*
Catherine Armstrong, Paralegal
DEPARTMENT OF ENVIRONMENTAL QUALITY

November 10, 2023

Aaron Pettis, Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 29620-0901
apettis@mt.gov

Dear Mr. Pettis,

I am writing this letter in regards to the appeal that I started concerning the revocation of my certified water operator license. At this time I am choosing to not continue with the appeal of my certified water operator license. After some thought and discussion with DEQ, the Mayor and the Head operator at the treatment plant, I have decided to accept the revocation of my certified water operator license. This was not an easy decision, but it is felt that it is the proper decision. My hope is that with continued training that I will at some point I will be allowed to reapply and retake the test for my certified water operator number. To reiterate, I am choosing to not pursue my appeal of revocation of my certified operator license and willingly accept the revocation of said license. Thank you for your understanding of my decision.

Sincerely,

William Deveny
Town Of Hysham

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: REQUEST FOR HEARING ON ORDER OF REVOCATION OF CERTIFIED OPERATOR LICENSE NUMBER 9301	CASE NO. BER 2023-05 PWS **ORDER OF DISMISSAL WITHOUT PREJUDICE**

On November 10, 2023, William Deveny (Deveny) sent a letter to counsel for the Department of Environmental Quality (DEQ) stating he was choosing to not pursue the appeal of revocation of his certified operator license and willingly accept the revocation of said license. On January 11, 2024, DEQ recognized this letter was not sent to the Hearing Examiner and filed a notice stating Deveny had voluntarily withdrawn his appeal. On January 16, 2024, the hearing assistant for the Hearing Examiner contacted Deveny to confirm he intended to dismiss his appeal. In accordance with Montana Code Annotated § 2-4-612(2) unless otherwise provided by statute, agencies are bound by common law and statutory rules of evidence. As no specific statute applies, under Montana Rule of Civil Procedure 41(a), a petitioner may voluntarily dismiss an appeal without prejudice.

IT IS THEREFORE ORDERED THAT this matter is dismissed without prejudice.

Dated this 16th day of January 2024.

_s/ *Terisa Oomens*_____
TERISA OOMENS
Hearing Examiner

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January 2024, I caused a true and accurate copy of the foregoing document to be emailed to:

Sandy Moisey Scherer
Board Secretary
Board of Environmental Review
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
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William Deveny
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Aaron Pettis, Legal Counsel
Angela Colamaria, Chief Legal Counsel
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/s/*Kayla Churchill*
KAYLA CHURCHILL
Hearing Assistant

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL BY THE RIPPLING WOODS HOMEOWNERS ASSOCIATION, *ET AL.*, REGARDING APPROVAL OF OPENCUT MINING PERMIT NO. 2949, MOUDY PIT SITE, RAVALLI COUNTY, MT	**Case Nos. BER 2019-10, -12, -14 through -20 OC** **FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDED DECISION**

This matter came before the Board of Environmental Review ("Board") for a hearing on the merits on June 19 and 20, 2023. John E. Bloomquist was present on behalf of Nancy Jacobsen, Gretchen Langton, Sarah Slater, Mark and Lisa Van Keulen, Kurt Vause, Jennifer and Randall Lint, Kathleen Meyer, Patrick McCarron, Anne Lambert, Brian Langton, and Annette McDonald (hereinafter, "Appellants"). Colson R. Williams was present on behalf of the Montana Department of Environmental Quality ("DEQ").

Charles Vandam was accepted and testified as an expert witness for Appellants in the areas of environmental risk assessment/project management and groundwater resources. Lee Philip Yelin was accepted and testified as an expert witness for Appellants in the area of water rights. Bryan Allison was accepted and testified as an expert witness for DEQ in the area of surface mine planning and reclamation. Kevin Krogstad was accepted and testified as an expert witness for DEQ in the areas of hydrology and hydrogeology. Appellants also presented the sworn testimony of five lay witnesses.

Appellants' Exhibits 1 through 49 (except Exhibits 25 through 27), Appellants' Demonstrative Exhibit 1, and DEQ's Exhibits A through AV were offered and admitted.

Based on the evidence submitted, the undersigned makes the following:

FINDINGS OF FACT
Factual and Procedural Background

1. On October 17, 2017, Wade Moudy submitted to DEQ's Opencut Mining Section a complete application for a permit to conduct open pit gravel mining operations on a 13.7-acre parcel near Victor in Ravalli County, Montana (the "Moudy Pit"). *See* App. Ex. 7.

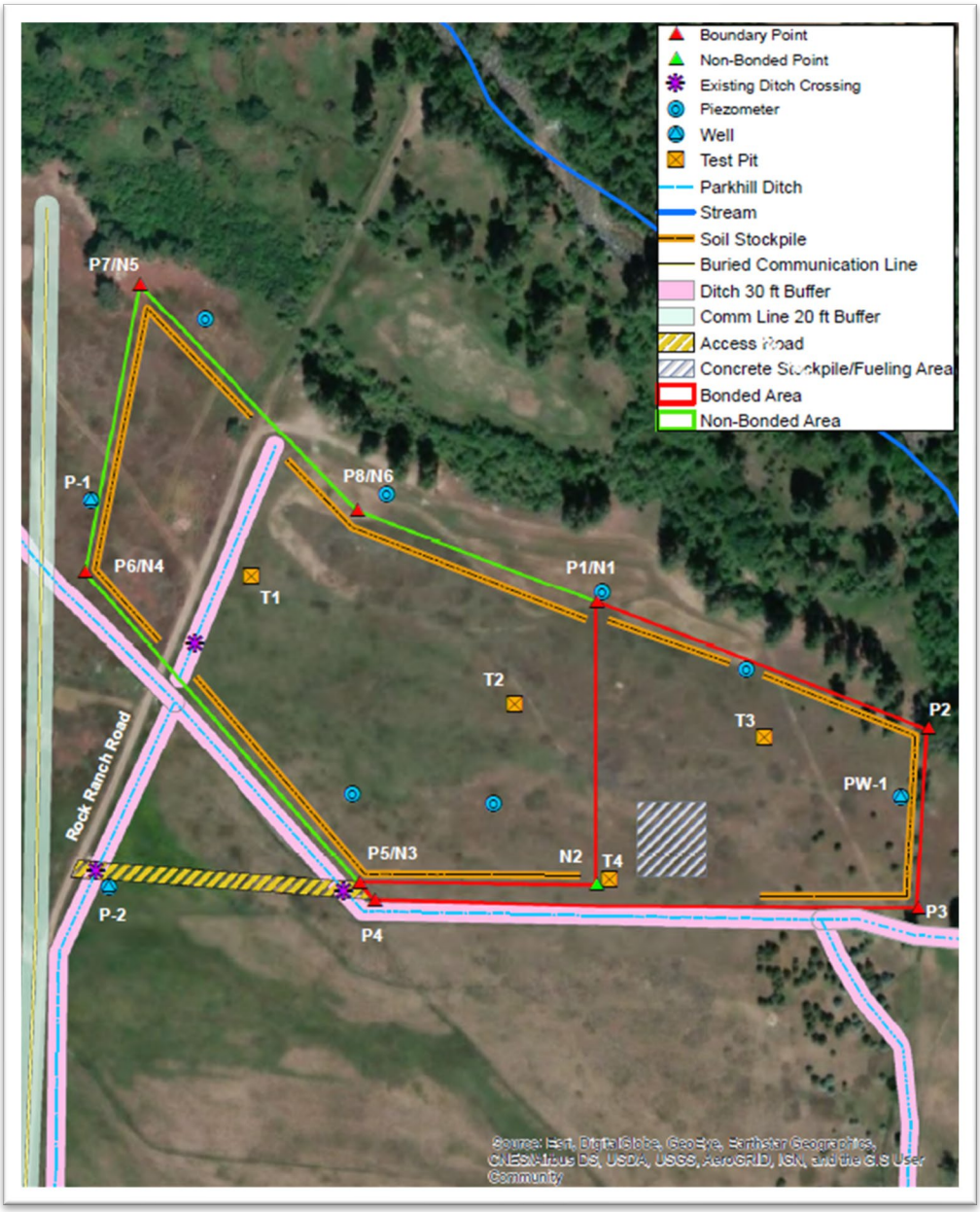
2. DEQ accepted public comment on the application in writing and at a public meeting held on December 12, 2017. *See generally* App. Ex. 6 (meeting transcript); App. Exs. 35-44 (written comments).

3. On December 21, 2017, March 16, 2018, April 25, 2019, August 14, 2019, and September 26, 2019, DEQ issued deficiency notices to Mr. Moudy, noting various problems with his permit application. *See* App. Ex. 8; DEQ Exs. Q, M, L, K, and J.

4. In connection with his permit application, Mr. Moudy submitted two Water Resources Assessments ("WRAs") completed by a company called Tetra Tech and dated February 5, 2019, and September 27, 2019. *See* App. Exs. 21 (2/5/19 WRA) and 32 (9/27/19 WRA, hereinafter simply "WRA"). The latter WRA replaced the former.

5. On October 30, 2019, DEQ's Opencut Mining Section deemed Mr. Moudy's permit application acceptable and issued Permit #2949. *See* App. Ex. 12.

6. The Moudy site is depicted below. The eastern portion of the property outlined in red is the bonded area where mining operations are to take place. Big Creek, a tributary of the Bitterroot River, runs north and east of the permit area and is shown in dark blue. The Parkhill Ditch, which carries water to downstream water rights holders, is depicted by a light blue dashed line surrounded by a pink buffer zone.



App. Ex. 12 at 001598. The Moudy site sits on an alluvial fan on a terrace elevated above Big Creek. *See* Testimony of Bryan Allison 6/20/23 at 18:32.

7. Appellants, each of whom owns real property in the vicinity of the Moudy Pit, separately appealed DEQ's decision to issue Permit #2949. Their appeals were consolidated. On February 21, 2020, Appellants filed a Statement of Issues on Appeal (hereinafter, "Statement of Issues"), describing their contentions and seeking, by way of relief, the revocation of Permit #2949. *See* Doc. 11.

8. The Statement of Issues addresses several concerns, such as impact to fish and water quality, for which no evidence or argument was offered at hearing. The Hearing Examiner considers those issues abandoned and addresses only those discussed at hearing. Furthermore, issues related to sedimentation in Big Creek were dismissed on summary judgment. *See* Doc. 67 at 22-23. At hearing, Appellants did not clearly identify a set of errors they contend that DEQ made. The Hearing Examiner therefore attempts, to the best of her ability, to characterize and group the evidence presented into various categories of Appellants' contentions.

Groundwater

9. The crux of most of Appellants' contentions is that the WRA relied on insufficient information to conclude that groundwater resources near the Moudy Pit would be adequately protected. *See, e.g.,* Testimony of Charles Vandam 6/19/23 at 1:10:50. Essentially, Appellants argue that because the Moudy Pit is near Big Creek (approximately 250 feet to the north) and area irrigation ditches (particularly the Parkhill

Ditch, just outside the site boundary to the west and south), DEQ should have required further study of potential impacts to both, but instead it gave Mr. Moudy "a pass." *See* Bloomquist closing argument 6/20/23 at 5:13:52.

10. The groundwater in the area of the Moudy Pit is generally shallow and slightly tilted downhill toward Big Creek. *See* Testimony of Charles Vandam 6/19/23 at 1:14:27; Testimony of Lee Yelin 6/19/23 at 2:16:08; Testimony of Bryan Allison 6/20/23 at 43:21 (suggesting that water table is artificially high due to historic irrigation in the area), 1:07:12; Testimony of Kevin Krogstad 6/20/23 at 2:49:03 (explaining that groundwater recharges at the western end, flows through the site, and discharges at the eastern end). Groundwater levels fluctuate substantially by season: they are closer to the ground surface in the spring and summer when irrigation occurs, and lower in the fall and winter. *See* Testimony of Lee Yelin 6/19/23 at 2:26:14.

11. In determining that groundwater resources would be adequately protected, DEQ relied on data primarily from the second WRA completed by Tetra Tech and submitted by Mr. Moudy, plus the agency's own expertise. *See generally* Testimony of Kevin Krogstad 6/20/23. Appellants did not collect any data at the site in relation to the Moudy Pit, *see* Testimony of Charles Vandam 6/19/23 at 1:25:46; Testimony of Lee Yelin 6/19/23 at 3:26:38 (last data collected at the Moudy site was in 2004 or 2005), and therefore also relied primarily on the WRA to reach their conclusions.

12. The Opencut Mining Section at DEQ publishes a Water Resource Assessment Requirements Guideline, *see* App. Ex. 17 (hereinafter, "WRA Guideline"),

and Groundwater Guideline, *see* App. Ex. 18, both of which reflect its understanding of the applicable statutes and regulations and are intended to help permit applicants adhere to those requirements. *See* Testimony of Kevin Krogstad 6/20/23 at 4:24:30.

Big Creek

13. Big Creek is over-appropriated (or "water-tight"), meaning that there are more water rights granted than the available flow. *See* Testimony of Lee Yelin 6/19/23 at 2:10:01; Testimony of Brian Langton 6/19/23 at 4:13:36; Testimony of Gretchen Langton 6/19/23 at 4:53:08.

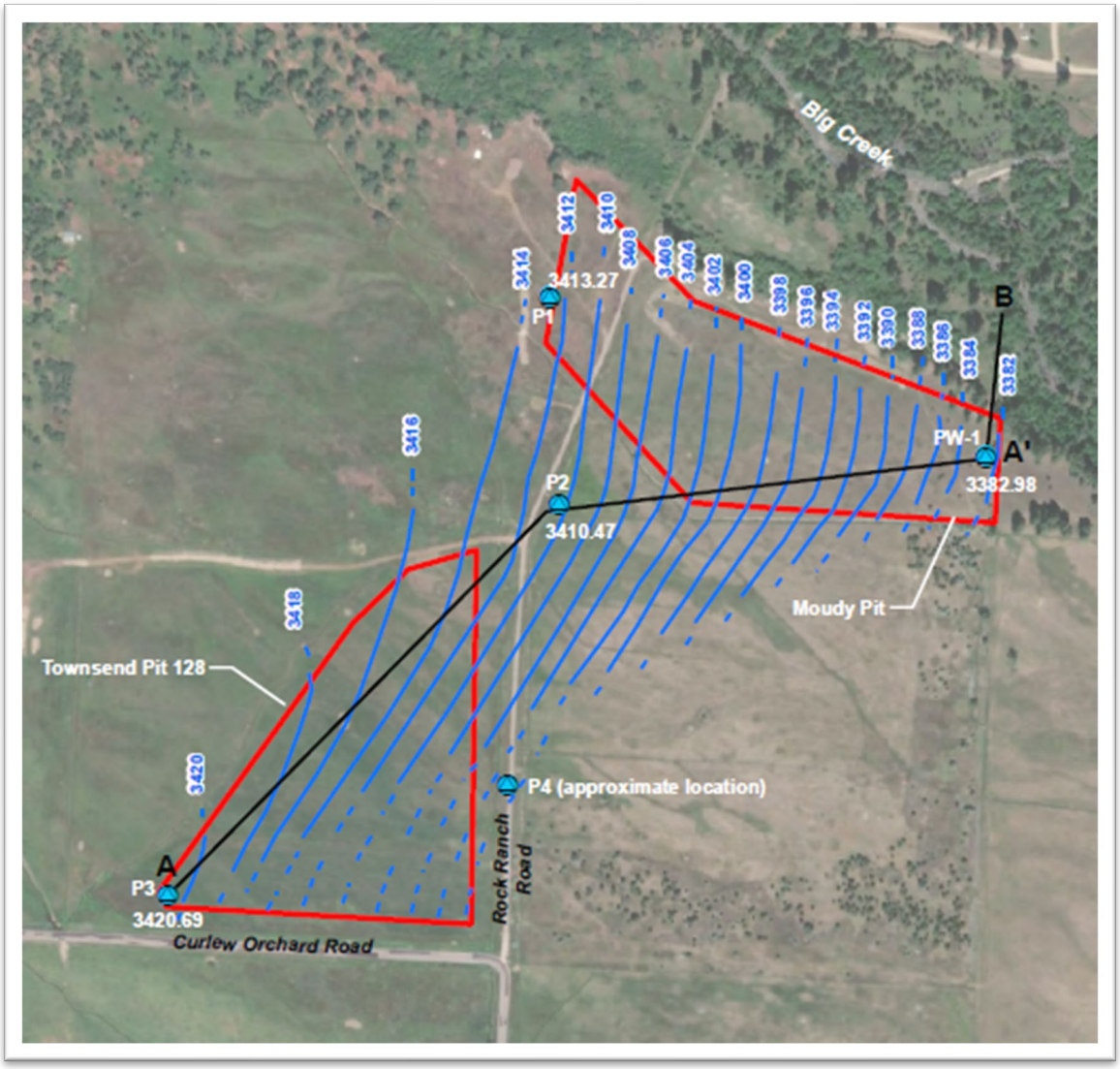
14. There was no dispute that Big Creek is a "gaining stream," at least during the spring and summer, meaning that it intersects with and is fed by groundwater. *See* Testimony of Lee Yelin 6/19/23 at 2:33:40.

15. The Moudy Pit is permitted to be dug twenty feet deep, which is eight feet below the level of Big Creek. *See* App. Ex. 12 at 001676; Testimony of Kevin Krogstad 6/20/23 at 4:22:09.

16. Because Big Creek is connected to the groundwater and shallower than the permitted depth of the Moudy Pit, Appellants contend that the Moudy Pit will induce water out of Big Creek and into itself, reducing the flow available for downstream water rights-holders. *See* Testimony of Lee Yelin 6/19/23 at 2:54:55.

17. In response, DEQ relies on Tetra Tech's conclusion in the WRA that groundwater flows east-southeast through the Moudy site, toward the Bitterroot River

and parallel to Big Creek, as shown in the figure below. *See* Testimony of Bryan Allison 6/20/23 at 43:42; Testimony of Kevin Krogstad 6/20/23 at 2:41:38, 5:04:44.



App. Ex. 12 at 001677.

18. Based on the groundwater flow direction, DEQ concluded that the Moudy Pit would not intercept groundwater going to Big Creek, and therefore, whether Big Creek intersects groundwater is irrelevant. *See* Testimony of Kevin Krogstad 6/20/23 at 4:18:04. In other words, DEQ predicted that Big Creek would not experience any

drawdown as a result of the Moudy Pit. *See* Testimony of Kevin Krogstad 6/20/23 at 3:54:02; DEQ Ex. AL at 5 ¶ 5(d).

19. The Hearing Examiner notes that Appellants' own evidence – a cross-section sketched by Mr. Vandam – shows no drop in the groundwater level following construction of the Moudy Pit at the test well labeled PW-1, which is located downgradient of the Moudy Pit and closest to Big Creek. *See* Demonstrative Exhibit 1 at Images 1 and 3 (*infra*); Testimony of Kevin Krogstad 6/20/23 at 2:46:39.

20. Appellants do not substantively address DEQ's position related to groundwater flow direction, but contend that the data supporting it are inadequate because Tetra Tech did not create maps showing seasonal changes in flow direction, and DEQ should have required monthly or at least quarterly monitoring. *See* Testimony of Charles Vandam 6/19/23 at 47:47; Testimony of Lee Yelin 6/19/23 at 2:25:56; App. Ex. 3 at 000027.

21. DEQ counters that seasonal potentiometric or piezometric maps (showing groundwater flow) are not standard practice where available data show that groundwater flow gradient or direction does not change significantly across seasons. *See* Testimony of Kevin Krogstad 6/20/23 at 4:00:30; DEQ Ex. AL at 4 ¶ 4(a), 10. Tetra Tech measured groundwater levels at the Moudy Pit site once a month for ten months between November 2018 and August 2019 (which Appellants appear to have overlooked). *See* App. Ex. 12 at 001668 (Table 2). Tetra Tech concluded that flow direction generally "was consistently between 112 and 114 degrees, and the gradient was 0.02 feet/foot." App. Ex. 12 at

001667. DEQ determined that this variation was small enough not to require further study. *See* Testimony of Kevin Krogstad 6/20/23 at 4:06:53.

22. Appellants do not address this point, but further contend that Tetra Tech's gradient map is insufficient because its contour lines do not extend past the site boundary to the north, to show groundwater flow closer to Big Creek, and that Tetra Tech and Mr. Moudy should have been required to monitor Big Creek flows. *See* Testimony of Charles Vandam 6/19/23 at 1:42:08.

23. DEQ asked Mr. Moudy and Tetra Tech not to extend contour lines past the mine site boundary because it did not have monitoring data there, but relied on its experts' inference that groundwater near Big Creek likely flowed in the same direction as groundwater within the site. *See* Testimony of Kevin Krogstad 6/20/23 at 2:43:24, 5:06:49. Appellants offered no evidence to the contrary.

24. Finally, the Hearing Examiner takes judicial notice that every water right with its source listed as Big Creek is a surface water right, not a groundwater right. *See* DNRC Water Rights Query System, accessed 12/13/23 at https://gis.dnrc.mt.gov/apps/WRQS/.

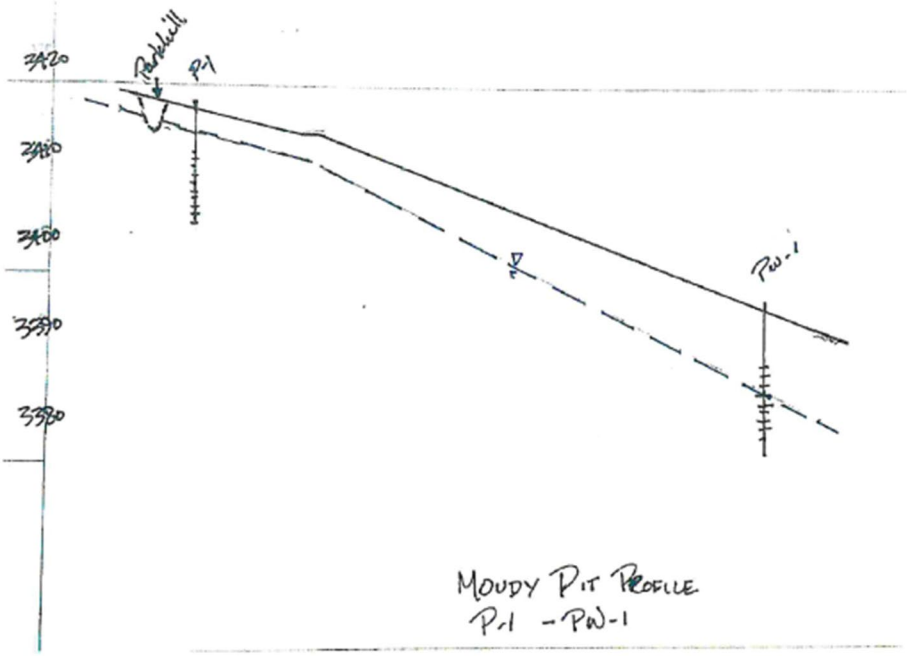
Parkhill Ditch

25. There is no dispute that the Parkhill Ditch is within 30 feet of the mining area. *See* Testimony of Charles Vandam 6/19/23 at 50:48. It is about three feet deep, *see* Testimony of Charles Vandam 6/19/23 at 1:31:32, and is not lined, *see* Testimony of Aimee McKinley 6/19/23 at 4:05:46; Testimony of Brian Langton 6/19/23 at 4:18:08.

26. The parties do dispute whether the Parkhill Ditch intersects groundwater. Appellants contend that the Parkhill Ditch intersects with and is fed by groundwater at least during high-flow times of the year (generally, spring and summer), and that it leaks water at any time the groundwater table drops. *See* Testimony of Charles Vandam 6/19/23 at 56:55; App. Ex. 5 at 001200 ¶ 3. The Parkhill Ditch's intersection with groundwater is depicted as follows:

Moudy Pit Profile Demonstrative Exhibit

Image 1: Profile of Permit Area with groundwater surface per Tt's WRA. Note the Parkhill Ditch has a wetted perimeter that controls seepage or loss to groundwater.

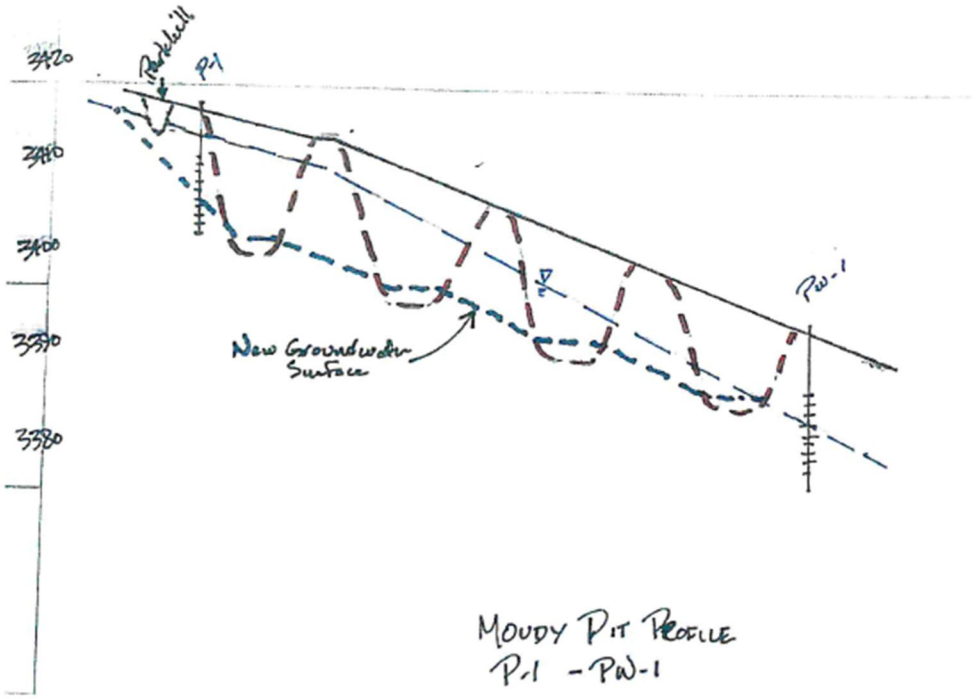


App. Demonstrative Ex. 1 at Image 1.

27. Appellants argue that construction of the Moudy Pit will cause the water table to drop as groundwater adjusts to fill the pits, thereby dropping the water table away

from the Parkhill Ditch. *See* Testimony of Charles Vandam 6/19/23 at 1:01:11. This scenario is depicted as follows:

Image 3: The groundwater surface adjusts to the open pits to find equilibrium. In this drawing, note that Parkhill Ditch no longer has a wetted perimeter and may have leakage and loss of flow.



App. Demonstrative Ex. at Image 3.

28. Therefore, Appellants argue that the WRA does not adequately consider how the Parkhill Ditch and other irrigation ditches may be impacted by the Moudy Pit. *See* Testimony of Charles Vandam 6/19/23 at 56:16; Testimony of Lee Yelin 6/19/23 at 2:16:08; Statement of Issues at ¶ 32.

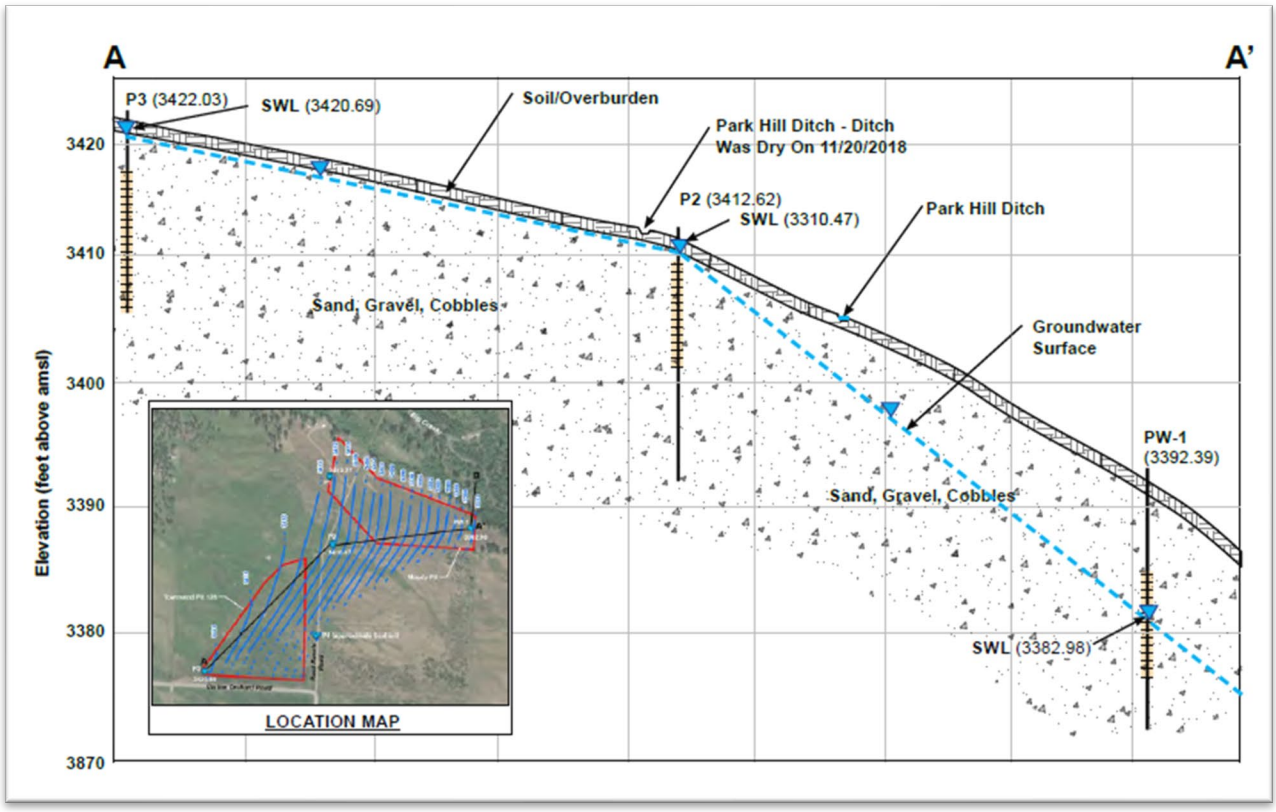
29. To support their position that the Parkhill Ditch intersects groundwater, Appellants rely on the opinion of their expert, Mr. Vandam, that Tetra Tech measured the depth to groundwater incorrectly. Mr. Vandam opined that Tetra Tech measured groundwater levels from the top of the well casing, instead of from ground level – a difference of approximately two to two-and-a-half feet. *See* Testimony of Charles Vandam 6/19/23 at 1:13:31. Mr. Vandam did not explain the basis for his opinion at hearing, but in his expert disclosure stated that it was based on the "[g]roundwater sampling forms included with the WRA," which "confirm" his opinion. App. Ex. 3 at 000029. Upon review by the Hearing Examiner of the Groundwater Sampling Logs included with the WRA, *see* App. Ex. 12 at 001702–001706, the basis for Mr. Vandam's opinion is not apparent. Mr. Vandam did not explain why he believes that the Tetra Tech technician who completed the Groundwater Sampling Logs would not have accounted for the distance between the top of the well casing and the ground.

30. DEQ concedes that there was "confusion" in earlier drafts of the WRA between elevation at measuring point and ground elevation, but that the error was "cleaned up" in later drafts. *See* Testimony of Kevin Krogstad 6/20/23 at 4:04:09.

31. Appellants provided anecdotal evidence that water levels in the Parkhill Ditch are lower since the Moudy Pit was constructed. Appellant Aimee McKinley testified from her position as Water Commissioner for the Big Creek Lakes Reservoir Association that she has had more trouble delivering lake shares through the Parkhill Ditch in the last two years, *see* Testimony of Aimee McKinley 6/19/23 at 3:45:54, but

also conceded that 2021 and 2022 were drier years generally, *see* Testimony of Aimee McKinley 6/19/23 at 4:06:16. Ms. McKinley was not qualified as an expert witness and the Hearing Examiner does not draw any conclusions about the cause of the lower flows on the basis of her testimony. Furthermore, only the evidence that was before DEQ at the time it issued Permit #2949 is properly considered, not evidence that was developed later.

32. DEQ's position is that the Parkhill Ditch (and other irrigation ditches in the area) do not intersect with the groundwater table, carry only surface water, and will continue to lose water to groundwater as they always have. *See* Testimony of Bryan Allison 6/20/23 at 1:54:55; Testimony of Kevin Krogstad 6/20/23 at 2:47:05, 3:50:12 (ditches are "inefficient conduits of water"). This scenario is depicted as follows:



App. Ex. 12 at 001675.

33. Because groundwater is moving below the ditch, DEQ contends that it does not matter, in terms of ditch operation, if the water table is six inches below the ground or six feet. *See* Testimony of Kevin Krogstad 6/20/23 at 4:52:24.

34. DEQ's conclusion that the Parkhill Ditch does not intersect groundwater is supported by other data:

> If the Parkhill Ditch were being supported by shallow groundwater, the monitoring data would show higher groundwater elevations throughout the irrigation season, particularly in wells P1 and P2, which are nearest the ditch. In fact, groundwater elevations in P1 steadily declined from March through August of 2019. In P2, groundwater elevations were more erratic, but generally declined through the same period.

DEQ Ex. AL at 16 (referring to monitoring data at App. Ex. 12 at 001668).

35. Thus, following construction of the Moudy Pit, DEQ predicts that the water table on the upgradient side of each pit or pond will lower and the downgradient side will raise as groundwater travels through the slanted site; these effects will remain within the boundaries of the permit site. *See* Testimony of Kevin Krogstad 6/20/23 at 2:48:54, 2:49:33.

36. Finally, the Hearing Examiner again takes judicial notice that every water right associated with the Parkhill Ditch is a surface water right, not a groundwater right. *See* DNRC Water Rights Query System, accessed 12/14/23 at https://gis.dnrc.mt.gov/apps/WRQS/.

Aquifer Test

37. An aquifer test assesses the transmissivity (amount of water) and conductivity (velocity of water) of the materials through which water moves in an aquifer, for the purpose of determining how far any drawdown of groundwater is expected to spread and the ability of the aquifer to recharge when stressed. *See* Testimony of Charles Vandam 6/19/23 at 1:19:20; Testimony of Kevin Krogstad 6/20/23 at 3:10:27.

38. DEQ's Opencut Mining Section does not have specific standards governing aquifer tests. *See* Testimony of Charles Vandam 6/19/23 at 1:17:22; Testimony of Kevin Krogstad 6/20/23 at 2:58:00.

39. Tetra Tech completed a 90-minute aquifer test by pumping water out of test well PW-1 at five gallons per minute, which drew the groundwater down by 6.1 feet. *See* App. Ex. 12 at 001668. Well PW-1 is 20 feet deep. *See* App. Ex. 12 at 001711.

40. Appellants contend that the aquifer test was insufficient because it was too short to truly stress the aquifer and too shallow to penetrate the entire thickness of the aquifer. *See* Statement of Issues at ¶ 12; Testimony of Lee Yelin 6/19/23 at 3:24:44. Therefore, they argue, the test did not give a thorough understanding of whether the shallow groundwater in the area is part of a perched aquifer above a deeper system, or part of a larger unconfined aquifer system. *See* Testimony of Charles Vandam 6/19/23 at 45:00; Testimony of Lee Yelin 6/19/23 at 2:25:08. Appellants contend that at least 24

hours of pumping and full penetration of the aquifer are required. *See* Testimony of Charles Vandam 6/19/23 at 1:17:40; Testimony of Lee Yelin 6/19/23 at 2:23:44.

41. In support, Appellants offered testimony that the hydraulic conductivity results of Tetra Tech's aquifer test were "orders of magnitude less" than what would usually be expected from a sand and gravel aquifer, but did not offer any comparative data into evidence. *See* Testimony of Charles Vandam 6/19/23 at 1:18:24.

42. DEQ responds that the aquifer tests to which Appellants compare Tetra Tech's test are generally designed to assess water supply, whereas here, the purpose of the test was simply to determine likely impacts of mining on the area around the Moudy Pit. *See* Testimony of Kevin Krogstad 6/20/23 at 2:57:07; DEQ Ex. AL at 6 ¶ 8(a). Because the test was not looking for a source of indefinite water supply, it only needed to go as deep as the proposed Moudy Pit – that is, twenty feet deep. *See* Testimony of Kevin Krogstad 6/20/23 at 3:08:09.

43. The test drew groundwater down to within one foot of the bottom of the test well, so Tetra Tech would have had to pump at a much lower rate in order to pump longer. *See* Testimony of Kevin Krogstad 6/20/23 at 2:55:22.

44. Furthermore, DEQ contends that if the test well were any deeper, it would have hit a clay layer, which would have changed the way groundwater moves and would therefore have obscured the results. *See* Testimony of Kevin Krogstad 6/20/23 at 3:08:45.

45. Appellants did not address these arguments related to conditions at the site.

46. DEQ elected not to require a larger scale test, which would have drawn down neighboring wells, in the absence of data indicating that the Moudy Pit was expected to impact the wells. *See* Testimony of Kevin Krogstad 6/20/23 at 3:12:55.

47. DEQ concluded that, given the conditions in the limited aquifer at the Moudy Pit site, Tetra Tech stressed the aquifer as much as it reasonably could. *See* Testimony of Kevin Krogstad 6/20/23 at 2:56:46, 3:05:08, 4:44:00.

Wetlands Delineation

48. Public comment raised the issue of potential wetlands at the Moudy site. *See* App. Ex. 6 at 001310:18-23 (unidentified speaker), 001365:12-17 (Jeff Langton); App. Exs. 35-37, 39, 43-44 (written comments).

49. In reviewing issues related to wetlands, DEQ relied on the National Wetlands Inventory (NWI), which shows whether any wetlands have been mapped or otherwise observed in an area. *See* Testimony of Bryan Allison 6/20/23 at 1:06:08.

50. The NWI shows a small wetland to the north of the Moudy site, but none within the site. *See* App. Ex. 12 at 001674. Tetra Tech concluded that, "None of the ditches within the mine permit boundary are listed as wetlands on the U.S. Fish and Wildlife Service – National Wetlands Inventory." App. Ex. 12 at 001667.

51. Appellants contend that DEQ's reliance on NWI to determine that there are no wetlands within the Moudy site is insufficient for two reasons.

52. First, on the basis of testimony from their expert, Lee Yelin, that there were wetlands present at the site when he last visited in 2014 or 2015. *See* Testimony of Lee

Yelin 6/19/23 at 3:27:38. However, Mr. Yelin stated that he did not know whether wetlands still existed at the site, and Appellants also presented evidence that, although the area has "been a bog," the nearby Townsend site began drying up and the trees along the southern edge of the site began dying "a couple years before all of this came to light." *See* Testimony of Nancy Jacobsen 6/19/23 at 4:28:27, 4:37:45.

53. Second, Appellants contend that DEQ's reliance on NWI is insufficient because groundwater at the site is shallow, and shallow groundwater – of less than a foot – is one of three indicators that should trigger a wetlands delineation. *See* Testimony of Charles Vandam 6/19/23 at 1:14:56 (the other two indicators being hydric soils and wetland-type vegetation). However, the Hearing Examiner has already found that Appellants failed to support Mr. Vandam's contention that groundwater was measured incorrectly and is actually within one foot of the ground surface. *See supra* ¶ 29.

54. Based on these factors, Appellants contend that DEQ should have required a wetlands delineation. *See* Testimony of Charles Vandam 6/19/23 at 1:39:38; Statement of Issues at ¶ 62.

55. DEQ suggested that any wetlands that exist or existed at the Moudy site are not natural, but a result of the artificially high water table caused by a history of flood irrigation. *See* Testimony of Bryan Allison 6/20/23 at 43:22, 1:58:35. Neither party addressed what impact, if any, the existence of artificially-induced (as opposed to naturally occurring) wetlands may have on the Moudy site or on DEQ's obligations.

56. DEQ also argues that, if a wetlands delineation is required, it is the responsibility of "another agency" to conduct it, and that it is an issue for the U.S. Army Corps of Engineers. *See* Testimony of Bryan Allison 6/20/23 at 1:06:09, 1:59:00. DEQ did not provide citation to authority to support this position and did not address whether DEQ could nevertheless require delineation as part of the permitting process.

Domestic Well Locations

57. Public comment raised the issue of identification and study of domestic water wells near the Moudy Pit. *See* App. Ex. 6 at 001355:15 (comment by Brian Langton that there are "about 10 wells" in the area); 001375:14-17 (comment by Jennifer Lint that her well was not identified); App. Ex. 35 at 003443; App. Ex. 38 at 003477; App Ex. 39 at 003479; App. Exs. 40-41; App. Ex. 42 at 003485; App. Ex. 44 at 003497.

58. The list of wells included in Mr. Moudy's application identifies only one well owned by someone (Rory McKinley) other than Mr. Moudy or his partner, Todd Townsend. *See* App. Ex. 12 at 001568. However, Tetra Tech's WRA includes a much more extensive list of 29 "Groundwater Wells within 1,000 ft and ½ mile buffers from Townsend and Moudy Project Areas," which includes depths and water levels. *See* App. Ex. 12 at 001681. Appellants did not address whether Tetra Tech's list is complete.

59. In compiling its list of wells, Tetra Tech relied on the online Ground Water Information Center (GWIC). GWIC provides inexact well locations, placing each well at the center of the relevant quarter-section of land, rather than at its actual location. *See* Testimony of Charles Vandam 6/19/23 at 41:32. The GWIC database is often out-of-date,

because it is not necessarily updated when properties change hands. *See* Testimony of Gretchen Langton 6/19/23 at 5:02:15; Testimony of Kevin Krogstad 6/20/23 at 3:33:15.

60. Tetra Tech attempted to "refine" the information from GWIC to overcome the system's weaknesses. *See* Testimony of Kevin Krogstad 6/20/23 at 3:26:39, 2:35:47. In its analysis within the body of the WRA, it explained:

> There are five wells within 1,000 feet of the Moudy permit area; the exact location of the wells is questionable. Some of the wells (GWIC IDs 58300 and 58301, 220582, and 57880 and 57881) are positioned by GWIC to be in the floodplain of Big Creek. There are no permanent structures in these shown locations and it is unlikely that the wells are correctly positioned. These wells are most likely associated with the houses that they provide domestic supply for and are probably located within a short distance of their associated structures. After adjusting for their most likely locations, all of the wells but the Leonard Hendrickson wells (GWIC IDs 58300 and 58301) will fall outside of the 1,000 foot buffer from the Moudy permit area.

App. Ex. 12 at 001670.

61. Neither GWIC ID 58301 nor GWIC ID 57881 appears on Tetra Tech's list of area wells. *See* App. Ex. 12 at 001681. GWIC ID 220582 belongs to Rory McKinley, who was the only well included by Mr. Moudy in his application. *See id.*

62. Appellants presented evidence that several wells are missing from the GWIC data. *See* Testimony of Charles Vandam 6/19/23 at 42:33; Testimony of Jennifer Lint 6/19/23 at 4:45:16 (well is within 1,000-foot buffer was never identified or assessed); Testimony of Gretchen Langton 6/19/23 at 4:55:00 (well was identified but not assessed). However, it is not clear whether they are referring to the list of wells in Mr. Moudy's application, to Tetra Tech's list in the WRA, or to Tetra Tech's analysis

because, for example, Jennifer Lint's well is clearly included on Tetra Tech's list. *See* App. Ex. 12 at 001681. Additionally, the basis for Appellants' contentions that their wells are within 1,000 feet of the mine site perimeter is not clear. Aimee McKinley testified that she measured the distance through a rangefinder, *see* Testimony of Aimee McKinely 6/19/23 at 3:37:50, but she did not give any additional detail, and no other witness stated the basis for their testimony.

63. Appellants contend that the purpose of identifying wells is to identify and protect individual water resources in the area of an opencut mine. *See* Testimony of Charles Vandam 6/19/23 at 44:01.

64. Thus, Appellants contend that DEQ erred in approving Permit #2949 without requiring full on-the-ground identification of all domestic water wells within 1,000 feet of mine site. *See* Testimony of Charles Vandam 6/19/23 at 43:12; Statement of Issues at ¶ 29. Although the deficiency letter dated March 16, 2018 required "ground truthing" to verify and map each well, *see* App. Ex. 8 at 001528, that requirement was later dropped.

65. DEQ responds that it reviews domestic well logs to characterize and protect the larger water resource, not individual wells. *See* Testimony of Bryan Allison 6/20/23 at 1:14:10.

66. However, well logs are uncontrolled and the quality of the data they provide may vary based on the training or experience of the people completing them. *See* Testimony of Kevin Krogstad 6/20/23 at 2:25:18. Thus, when available, a WRA

completed by a professional includes and exceeds the data available from well logs and is more specific to the mining site. *See* Testimony of Bryan Allison 6/20/23 at 42:51, 2:00:34; Testimony of Kevin Krogstad 6/20/23 at 3:29:22.

67. DEQ concluded that submission of the WRA eliminated the need for ground truthing. It found that the information obtained through GWIC and refined by Tetra Tech was consistent with the information it already had, so it did not need to require more accurate well location or ground truthing. *See* Testimony of Kevin Krogstad 6/20/23 at 3:30:40.

68. DEQ also relies on its lack of authority to require entry onto private land for the purpose of identifying or assessing wells. *See* Testimony of Bryan Allison 6/20/23 at 1:12:41; Testimony of Kevin Krogstad 6/20/23 at 2:34:40. Because DEQ ultimately did not require Mr. Moudy or Tetra Tech to attempt ground truthing, there is no evidence that the nearby landowners would not have cooperated with Mr. Moudy's or Tetra Tech's attempts, and that any coercive authority would have been required. The Hearing Examiner therefore does not find this argument persuasive.

Dewatering and Evaporation in a Closed Basin

69. The area where the Moudy Pit is located is a closed river basin. *See* Testimony of Lee Yelin 6/19/23 at 2:10:48; Mont. Code Ann. § 85-2-344 (designating temporary closure of Bitterroot River subbasin).

70. The Moudy Pit (and reclamation ponds planned to take its place once mining is complete) will result in some degree of evaporative loss to the system. *See*

App. Ex. 12 at 001667 (WRA noting that "[t]he pond surface will lose water to evaporation during the summer months but no other conveyance to or from the ponds is planned or expected"); Testimony of Charles Vandam 6/19/23 at 53:00, 1:21:02 (there will "obviously" be an evaporative loss when a piece of vegetated land is turned into a pit filled with open water); Testimony of Lee Yelin 6/19/23 at 2:30:30.

71. The WRA concludes: "No de-watering will occur or will be necessary to extract the sand and gravel reserves within the permit areas; and the year-round pond will not be used for any beneficial water use as regulated by the DNRC; therefore, no adverse effects on nearby surface water resources or groundwater well water rights are expected." App. Ex. 12 at 001670.

72. Appellants dispute this conclusion, with respect to flow levels in Big Creek and the Parkhill Ditch (*see supra*), and contend that DEQ erred in not requiring a water balance analysis and mitigation of water lost to evaporation. *See* Statement of Issues at ¶¶ 3, 14, 39; Testimony of Lee Yelin 6/19/23 at 2:11:06, 2:29:20, 2:38:36. They argue that any measurable impact to a water resource, however miniscule, is grounds to deny a water right application. *See* Testimony of Charles Vandam 6/19/23 at 52:27; Testimony of Lee Yelin 6/19/23 at 2:37:40.

73. Mr. Moudy has not applied for a water right. If he did, the application would not be handled by DEQ.

74. The parties employ different definitions of "de-watering" to reach opposite conclusions about whether it will occur.

75. By DEQ's definition, "de-watering" means pumping or otherwise removing water from the mining site in order to mine dry. *See* Testimony of Bryan Allison 6/20/23 at 44:18; Testimony of Kevin Krogstad 6/20/23 at 2:37:00. Permit #2949 prohibits de-watering under DEQ's definition. *See* App. Ex. 12 at 001575 § D2(2).

76. By Appellants' definition, however, "de-watering" means any lowering of groundwater or surface water, whether caused by intentional acts like pumping or intercepting water, or as a secondary result, like evaporative loss. *See* Testimony of Lee Yelin 6/19/23 at 3:28:16. The WRA does not account for (let alone prohibit) de-watering under Appellants' definition.

77. The parties completed separate calculations of expected evaporative losses.

78. Appellants' expert Lee Yelin calculated an annual loss between 26 and 40 acre-feet. *See* Testimony of Lee Yelin 6/19/23 at 2:32:29, 2:37:20. Appellants' expert Charles Vandam calculated evaporative loss of 30.8 inches per year. *See* App. Ex. 5 at 001199 § (1)(c). Both of Appellants' experts apparently only accounted for losses.

79. DEQ, on the other hand, calculated a net annual loss "less than 4.5 inches annually," DEQ Ex. AL at 13, or of four and a half acre-feet per year. *See* Testimony of Kevin Krogstad 6/20/23 at 4:48:41, 4:56:18 (explaining calculation). In completing its calculation, DEQ compared likely evaporation rates from open water versus an undisturbed site with high groundwater and vegetation; it accounted for myriad factors like shade and wind exposure, water temperature, and humidity; and it added back in the

precipitation captured by the pits/ponds. *See* Testimony of Kevin Krogstad 6/20/23 at 3:19:59; DEQ Ex. AL at 12-13.

80. DEQ concluded that it had enough information that it did not need to require a water balance analysis, which is more complex and expensive and would not have added to DEQ's understanding of the area. *See* Testimony of Kevin Krogstad 6/20/23 at 3:15:30.

Reclamation Plan and Bond

81. All opencut mining sites must be reclaimed following mining operations, meaning they must be returned to a condition where they can be used again for another purpose. *See* Testimony of Bryan Allison 6/20/23 at 1:49:50, 2:02:47 (comparing to "other states that don't have these laws"). Operators must provide a bond sufficient to reclaim the site.

82. The reclamation plan for the Moudy Pit is to construct a series of "scenic" ponds with sloped sides, "inlets" or "bays," and "[v]arious elevations submerged below the water surface to provide diverse aquatic habitats." *See* App. Ex. 12 at 001586 § E2(1), 001587 § E3(6)-(7).

83. The bond calculated and provided for the Moudy Pit does not include the cost of obtaining a beneficial water use permit from the Department of Natural Resources and Conservation (DNRC). *See* App. Ex. 12 at 001606.

84. Appellants contend that the reclamation plan for the Moudy Pit constitutes a beneficial use of water because it involves wildlife habitat and will result in evaporative

loss. *See* Testimony of Lee Yelin 6/19/23 at 2:41:46, 2:44:17; Statement of Issues at ¶ 52. They rely on their expert Lee Yelin, who worked for a decade as a water rights specialist for the DNRC, which administers beneficial use permits. *See* Testimony of Lee Yelin 6/19/23 at 1:55:10; App. Ex. 2 at 000005 (Yelin curriculum vitae). Mr. Yelin opined that "almost everything is a beneficial use." *See* Testimony of Lee Yelin 6/19/23 at 2:45:32.

85. However, Mr. Yelin also relies at least in part on his belief that Mr. Moudy has actually pumped water out of the pit, which is (undisputedly) a beneficial use requiring a permit. *See* Testimony of Lee Yelin 6/19/23 at 2:45:04, 3:03:14, 3:17:40. That is a compliance issue, not a permitting issue within the purview of this matter. *See* Testimony of Lee Yelin 6/19/23 at 3:03:44, 3:19:20.

86. Appellants contend that DEQ erred in approving Permit #2949 without requiring Mr. Moudy to first obtain a beneficial use permit from DNRC. *See* Statement of Issues at ¶ 57.

87. Relatedly, Appellants contend that calculation of Mr. Moudy's reclamation bond was incorrect because it did not include the costs of obtaining a beneficial use permit. *See* Statement of Issues at ¶ 60.

88. DEQ denies that the reclamation plan requires a beneficial use permit and contends that that even if it does, it is Mr. Moudy's responsibility to ensure that his project is appropriately permitted. *See* Testimony of Bryan Allison 6/20/23 at 1:41:21.

89. In denying that a beneficial use permit is required, DEQ relied on two guidance documents produced by DNRC. The first is an internal memorandum titled

"Gravel Pit Policy" and dated November 13, 2017. DEQ Ex. F. It states that, for pits requiring a permit from DEQ (that is, over 10,000 cubic yards):[1]

> If … the applicant is proposing a non-consumptive use (fishery, fish & wildlife, recreation), no water right is required from DNRC assuming the following items are met:
>
> 1. The pit must have been a result of open-cut mining operations and obtained a Reclamation Release form issued by DEQ showing that the mine has received an approval of a Phase II release on the entire permitted area and permit termination before we will recognize a gravel pit-pond as being officially created and OK via the DEQ mining process … -OR- is a result of open-cut mining operations prior to the Open Cut Mining Act of 1973.
> 2. No additional volume will be used, diverted, impounded, etc. over what already exists prior to the non-consumptive use commencing -AND- no significant redistribution of water or recontouring of the base within the pit is occurring.

DEQ Ex. F at 000520. The parties did not discuss whether these requirements were or will be met with respect to the Moudy Pit. The Gravel Pit Policy further states, "The pit itself is incidental to mining use, not the beneficial use…." DEQ Ex. F at 000521. And, where there is "de-watering" under DEQ's definition, such that the operator must apply for a beneficial use permit, "Evaporation will not be accounted for in the application." DEQ Ex. F at 000521.

90. The second guidance document is undated and titled, "Opencut Mining: Do you need a water right?" DEQ Ex. G. It was developed jointly by DNRC and DEQ and is

[1] The cubic footage of the expected pit-ponds is not in evidence and neither party specified at hearing the portion of the Gravel Pit Policy to which they referred. The Hearing Examiner notes that Mr. Moudy expects to remove 21,780 cubic feet of each soil and overburden from the mine site, *see* App. Ex. 12 at 001571 § C2(5)-(6), and infers that the cited section of the Gravel Pit Policy is the applicable one.

intended for public distribution to opencut permit applicants. *See* Testimony of Bryan Allison 6/20/23 at 54:02. It presents a decision tree, beginning with: "Are you using or do you plan to use water from your Opencut mine for a beneficial use (for example, gravel washing, stock, irrigation/lawn & garden, fish pond, etc.)? If NO: Stop here, you are not required to file a water right. If YES: Proceed to the next question." DEQ Ex. G. The last question of the decision tree is also relevant: "Will you use water beneficially during or after reclamation of the Opencut operation? If NO: No water right filing is required. If YES: You may be required to file a water right. There are many filing types; contact DNRC to discuss your project." DEQ Ex. G.

91. In his application, Mr. Moudy affirmed that he had consulted with DNRC regarding any water rights issues related to his project. App. Ex. 12 at 001562 ¶ 3, 001575 § D2(1)(e).

92. DEQ argues that it also consulted with DNRC on this permit based on the statements of a DNRC employee, Amy Groen, made at the public meeting for Permit #2949. *See* Testimony of Bryan Allison 6/20/23 at 1:42:33 (referencing App. Ex. 6 at 1297:14-1298:10). The Hearing Examiner does not read Ms. Groen's comments at that meeting to be anything more than general comments on a hypothetical situation. The Hearing Examiner does not rely on Ms. Groen's comments to prove any fact.

93. DNRC declined to weigh in formally on Appellants' request to determine whether a beneficial use permit would in fact be required for the reclamation plan of Permit #2949, because its opinion would affect the rights of a non-party – Mr. Moudy.

See Doc. 21 (DNRC's Order Denying Petition for Declaratory Ruling, issued July 15, 2020).

94. With respect to the bond required, DEQ contends that because no beneficial use permit is required, the cost of permitting need not be included. *See* DEQ Ex. AL at 17-18.

95. DEQ further contends that no reclamation bond calculation ever includes the cost of obtaining any type of permit, only the cost of physical reclamation – such as cutting slopes, moving dirt, removing high walls, replacing soils, and planting vegetation. *See* Testimony of Bryan Allison 6/20/23 at 1:52:42, 2:05:22. It argues that, if the cost of obtaining a beneficial use permit had to be included, there would be "no end" to other items that would also have to be included and "you could speculate forever." *See* Testimony of Bryan Allison 6/20/23 at 1:51:36.

Noise and Dust

96. Appellants contend that the noise and dust control at the site is insufficient.

97. Permit #2949 requires hauling water to the site for dust control purposes. *See* App. Ex. 12 at 001575 § D2(1)(a), 001585 at § D10(2), 001666.

98. Appellants contend that although there are supposed to be sprinklers or a water truck on-site, they have only seen them once. There is no other dust control on-site. *See* Testimony of Aimee McKinley 6/19/23 at 3:59:29.

99. To mitigate noise, Permit #2949 requires construction of berms along the perimeter and reduced operating hours of 7:00 a.m. to 7:00 p.m., Monday through Friday,

with maintenance work allowed on Saturdays from 8:00 a.m. to 5:00 p.m. *See* App. Ex. 12 at 001573 § C5(1)(d), 001585 at § D10(2); Testimony of Bryan Allison 6/20/23 at 1:02:30.

100. Appellants presented evidence that their once-peaceful community is now subject to near-constant banging, beeping, and crushing noises. *See* Testimony of Nancy Jacobsen 6/19/23 at 4:28:20; Testimony of Jennifer Lint 6/19/23 at 4:47:50; Testimony of Gretchen Langton 6/19/23 at 4:55:53. This noise is not only "annoying," *see* Testimony of Nancy Jacobsen 6/19/23 at 4:28:16, it disrupts the at-home massage therapy business of one Appellant, *see* Testimony of Gretchen Langton 6/19/23 at 4:55:35, and in the lay opinion of another Appellant, chased away wildlife she and her family used to watch from their backyard, *see* Testimony of Gretchen Langton 6/19/23 at 4:56:29.

101. Appellants presented further evidence that the berms are unsightly and ineffective, at least from the perspective of some of their houses. *See* Testimony of Aimee McKinley 6/19/23 at 4:03:07 (berms are "mountainous"); Testimony of Jennifer Lint 6/19/23 at 4:46:40, 4:48:37 (speculating that, because the berms run north-south and her house is situated north of the site, the berms actually serve to funnel noise to her house); Testimony of Gretchen Langton 6/19/23 at 4:56:12.

CONCLUSIONS OF LAW

102. This contested case is governed by Part 6 of the Montana Administrative Procedure Act ("MAPA"), Mont. Code Ann. §§ 2-4-601 to -631. *See* Mont. Code Ann. § 82-4-427(4) (2019).

103. The Board's role under MAPA is to "receive evidence from the parties, enter findings of fact based on the preponderance of the evidence presented and then enter conclusions of law based on those findings." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 22, 326 Mont. 502, 112 P.3d 964 (analyzing Mont. Code Ann. § 2-4-623).

104. Under MAPA, "[e]xcept as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence." Mont. R. Civ. P. § 2-4-612(2).

105. Montana's statutory rules of evidence provide that, "[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence." Mont. Code Ann. § 26-1-401. Furthermore, "a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting." Mont. Code Ann. § 26-1-402.

106. "Thus, as the party asserting the claim at issue, [Appellants] had the burden of presenting the evidence necessary to establish the facts essential to a determination that [DEQ's] decision violated the law." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 964; *see also Mont. Envtl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 18, ___ Mont. ___ (challenger bears the burden before the Board).

107. The fact that Appellants must prove to succeed is that DEQ failed to appropriately apply "the correct procedural and substantive requirements" of the applicable law. *See Westmoreland*, 2023 MT at ¶ 19; *Flathead Lakers Inc. v. Mont. Dep't of Nat. Res. & Conservation*, 2023 MT 85, ¶¶ 52-57, 412 Mont. 225. "The agency may be right in the end, but until the proper assessment is done, the Objectors were all prejudiced by the agency's failure to complete it." *Flathead Lakers*, 2023 MT at ¶ 57.

108. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." Mont. Code Ann. § 2-4-612(7). This applies when the application is before DEQ, as well as when the appeal is before the Board.

109. DEQ's obligations in this matter are controlled by the Opencut Mining Act, Mont. Code Ann. §§ 82-4-401 to -446 (2019).[2]

110. Under the Opencut Mining Act, DEQ must determine whether permit applications are (A) complete and (B) acceptable. *See* Mont. Code Ann. § 82-4-432(4)(a)-(b) (2019).

111. An application is complete if it includes the components listed in Mont. Code Ann. § 82-4-432(2) (2019), including "a plan of operation that contains information

[2] The 2021 Montana legislature made several relevant changes to the Opencut Mining Act, *see* H.B. 599, 67th Leg. (effective May 14, 2021), but neither those changes nor subsequent updates to agency rules, *see* Notice of Amendment and Adoption (Opencut Mining), Mont. Admin. Reg. 17-425 (Dept. Environmental Quality October 7, 2022), are retroactive to Mr. Moudy's application or permit. References herein to the Opencut Mining Act or regulations promulgated under it are, unless otherwise noted, to their 2019 versions and not to the current versions.

sufficient to initiate acceptability review by addressing the requirements of [Section] 82-4-434" and regulations promulgated thereunder. Mont. Code Ann. § 82-4-432(2)(c).

112. DEQ properly determined that Mr. Moudy's application was complete.

113. An application is acceptable if all required components are included and the plan of operation "satisfies the requirements of [Section] 82-4-434" and regulations promulgated thereunder. Mont. Code Ann. § 82-4-432(10)(a) (2019).

114. For the reasons that follow, DEQ properly determined that Mr. Moudy's application was acceptable.

Groundwater

115. Under the Opencut Mining Act, a plan of operation must provide "that surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation." Mont. Code Ann. § 82-4-434(2)(*l*) (2019).

Big Creek

116. Appellants contend that, because the Moudy Pit is permitted to be dug deeper than Big Creek, DEQ erred in issuing Permit #2949 because the Pit will induce water out of the Creek and into itself. Appellants did not carry their burden to overcome DEQ's evidence that Big Creek will not be impacted.

117. DEQ relied on evidence that the direction of groundwater flow precludes the possibility that the Moudy Pit will lower flows in Big Creek. Appellants did not substantively address this evidence.

118. Appellants argued that the WRA's conclusions regarding groundwater flow direction are not supported by sufficient data, but ignore that Tetra Tech measured groundwater at the Moudy site once a month for ten months. Appellants did not address any reason why these measurements were insufficient or unreliable.

119. Appellants did not set forth any reason why DEQ erred in concluding, based on the low variability in groundwater flow direction, that neither seasonal potentiometric maps nor monitoring of Big Creek itself were necessary in this circumstance.

120. Moreover, because Appellants hold only surface water rights in Big Creek, *see supra* ¶ 24, they cannot rely on groundwater to fill their water rights. Put differently, any change in groundwater levels will not affect their legal rights.

121. Judicial notice of this fact is proper because it is a "judicially cognizable fact" as required by Mont. Code Ann. § 2-5-612(6). A judicially cognizable fact is one "not subject to reasonable dispute in that it is … capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201(b)(2). The Hearing Examiner readily determined facts related to water rights by reference to the publicly available DNRC Water Rights Query System, a source "whose accuracy cannot reasonably be questioned."

122. Ordinarily, a "court may take judicial notice, whether requested or not." Mont. R. Evid. 201(c); *see Elendil v. Mont. Eighth Jud. Dist. Ct.*, 2023 Mont. LEXIS 698 at *7 (the court may take judicial notice *sua sponte*). However, under MAPA, "[p]arties

shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed" and "shall be afforded an opportunity to contest the material so noticed." Here, neither party offered evidence of the type of water rights held on Big Creek before or at hearing. Nevertheless, any party who is adversely affected has the opportunity to contest the judicial notice post-hearing by filing exceptions.

123. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of Big Creek under Mont. Code Ann. § 82-4-434(2)(*l*) (2019). Rather, the preponderance of the evidence shows that DEQ adequately considered the impact of the Moudy Pit on Big Creek.

Parkhill Ditch

124. Appellants contend that DEQ erred in issuing Permit #2949 because the Moudy Pit will cause the groundwater table to drop away from the Parkhill Ditch, and therefore the Ditch will lose water volume. They failed to present evidence sufficient to overcome DEQ's evidence that the Parkhill Ditch will not be impacted.

125. Appellants rely on their position that groundwater at the Moudy site is much shallower than the WRA indicated because the Tetra Tech technician who measured groundwater levels at the Moudy site did so incorrectly. They failed to support this argument. *See supra* ¶ 29.

126. DEQ's conclusion that the Parkhill Ditch does not intersect groundwater (and therefore, will not be impacted by construction of the Moudy Pit) is supported by

evidence of decreasing groundwater levels during irrigation season, which Appellants did not address.

127. Again, because Appellants hold only surface water rights, *see supra* ¶ 36, they cannot rely on groundwater to fill their water rights, and any impact on groundwater will not affect their legal rights. *See supra* ¶¶ 120-122.

128. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of the Parkhill Ditch under Mont. Code Ann. § 82-4-434(2)(*l*) (2019). Rather, the preponderance of the evidence shows that DEQ adequately considered the impact of the Moudy Pit on the Parkhill Ditch.

Aquifer Test

129. Appellants contend that DEQ erred in issuing Permit #2949 because the aquifer test conducted by Tetra Tech was too short and too shallow to give a complete picture of the aquifer under the Moudy site. They failed to present evidence sufficient to overcome DEQ's evidence that the test was sufficient, given the needs of the project and characteristics of the site.

130. DEQ is not bound by any particular standard for aquifer tests; the test must simply be sufficient to provide "appropriate protection" to surface water and groundwater at the site. *See* Mont. Code Ann. § 82-4-434(2)(*l*) (2019).

131. Appellants did not address DEQ's contention that the aquifer test standards to which they compare Tetra Tech's test are intended for assessing supply to potential water wells, and not for assessing potential impacts of a mining project.

132. Appellants did not address the factors that limited the aquifer test, such as the clay layer in the soil or that the test well was nearly completely drawn down during 90 minutes of pumping.

133. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protecting the aquifer under Mont. Code Ann. § 82-4-434(2)(*l*) (2019). Rather, the preponderance of the evidence shows that DEQ adequately considered the sufficiency of the aquifer test and the interpretation of its results combined with other available data.

Wetlands Delineation

134. Appellants contend that DEQ erred in issuing Permit #2949 because it relied on NWI to show no wetlands within the Moudy site and did not require a wetlands delineation. They failed to produce evidence sufficient to overcome DEQ's evidence that no wetlands existed at the site at the time of permitting. They also failed to persuade the Hearing Examiner that DEQ was required to further investigate the existence of wetlands.

135. The Opencut Section's Water Resource Assessment Requirements in effect at the time Permit #2949 was issued require applicants to "[d]etermine if wetlands exist near or within the proposed permit boundary and whether mining would impact them." App. Ex. 17 at 000167.

136. Public comment raised the issue that wetlands may exist at the Moudy site.

137. Identification of wetlands is a complex and closely regulated matter, and lay witness testimony cannot establish the existence of wetlands. *See, e.g., Klepper v. State*, 2014 Mont. Dist. LEXIS 38 at *10 (Jan. 2, 2014) (distinguishing between wetlands in a colloquial sense and official classification of wetlands).

138. Tetra Tech consulted NWI and determined, as reflected in the WRA upon which DEQ relied, that no wetlands existed within the Moudy site at the time of permitting.

139. Appellants did not present evidence that wetlands actually existed at the site at the time of permitting, only that they may have existed some time previously. In other words, Appellants raised nothing more than a suspicion that there may have once been wetlands at the Moudy Pit site.

140. DEQ was not required to take further action to "determine if wetlands exist" based on public comment alone, absent some other documented existence of wetlands at the Moudy site.

141. DEQ was also not required to take further action to "determine if wetlands exist" based on the presence of groundwater within a foot of the ground surface, because Appellants failed to support their contention that groundwater levels were measured incorrectly. *See supra* ¶ 29. Appellants also did not present evidence that either of the other two conditions triggering a wetlands delineation exists at the Moudy site.

142. DEQ maintains that "another agency" has the responsibility to require and/or complete a wetlands delineation if one is required, but it did not specify the agency, the parameters of its jurisdiction, or cite to any authority. It is not the Hearing Examiner's job to conduct legal research on DEQ's behalf, *see Johansen v. Dept. of Natural Resources & Conservation*, 1998 MT 51, ¶ 24, 955 P.2d 653, and so the Hearing Examiner does not rely on this argument.

143. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of wetlands under Mont. Code Ann. § 82-4-434(2)(*l*) (2019). Rather, the preponderance of the evidence shows that DEQ fulfilled its obligation to "determine" whether wetlands exist at the Moudy site.

Domestic Well Locations

144. Appellants contend that DEQ erred in issuing Permit #2949 without requiring ground truthing because Mr. Moudy's application and the WRA do not identify all wells within 1,000 feet of the permit boundary. They failed to produce evidence that well identification was incomplete, and failed to overcome DEQ's evidence that any failure is harmless error.

145. Pursuant to ARM 17.24.218(1)(g)(i) and (iii) (2019), a plan of operation must include "the depths, water levels, and uses of water wells in and within 1,000 feet of the permit area" and "copies of all available well logs."

146. DEQ's expert testified to his opinion that the purpose of these requirements was to protect the underlying water resource, not to protect individual wells. He

suggested that the separate requirements of a well inventory and well logs served the same purpose, such that both were supplanted by the completion of a water resources assessment.

147. However, the WRA Guideline and Groundwater Guideline in effect at the time Permit #2949 was issued require permit applications to include the "[r]esults of a field inventory conducted to physically locate each water well located within 1,000 feet of the proposed permit boundary." App. Ex. 17 at 000167; App. Ex. 18 at 002964.

148. The WRA Guideline also requires applicants to include a "[d]iscussion of the anticipated effect(s), if any, of the proposed opencut operations and subsequent pond on domestic water supply wells." App. Ex. 17 at 000168.

149. The existence of two separate requirements (well identification and well logs) in ARM 17.24.218(1)(g) (2019) and the interpretive documents issued by DEQ suggest that the purpose of the well-identification requirement is to ensure that individual wells are protected.

150. Although the Hearing Examiner agrees with Appellants that the purpose of the well-identification requirement is to protect individual wells, Appellants have failed to meet their burden to show that DEQ did not identify all wells within 1,000 feet of the Moudy Pit boundary line.

151. Appellants did not establish which wells are within 1,000 feet of the Moudy Pit. Some testified that their wells in particular are within 1,000 feet, but only one, Aimee McKinley, stated how she knew: by using a rangefinder. Nevertheless, even Ms.

McKinley did not explain what points she measured between, when she took the measurement, or how accurate her rangefinder is. It is within a lay witness's ability to take and testify to a measurement such as this one, but some foundation must be laid to show why the measurement is credible – particularly here, where it extends to something invisible in the real world, like a boundary line.

152. Furthermore, the evidence in the record is not clear as to whether Tetra Tech's list of wells (as opposed to its analysis contained in the body of the WRA) is complete. For instance, Jennifer Lint testified that her well was never identified, but it appears in Tetra Tech's list. On the other hand, several of the wells identified in Tetra Tech's analysis in the body of the WRA do not appear in its attached list of wells.

153. Ultimately, Appellants failed to establish (a) which wells are within 1,000 feet of the Moudy Pit and (b) were not included in the WRA accepted by DEQ. Thus, Appellants failed to meet their burden to prove that DEQ erred, and the Hearing Examiner does not reach the question of whether ground truthing was required.

154. Additionally, the Hearing Examiner notes that DEQ presented evidence that any drawdown of groundwater will remain local to the Moudy site. *See supra* ¶ 35. Appellants did not present evidence that any wells will be adversely affected by the Moudy Pit. Thus, they have not shown that the purpose of ARM 17.24.218(1)(g) (2019) is not being served, and any failure to identify wells appears to be harmless error.

155. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of individual wells under Mont. Code Ann. § 82-4-434(2)(*l*) (2019).

Dewatering and Evaporation in a Closed Basin

156. Appellants contend that DEQ erred in issuing Permit #2949 because it did not first require a water balance analysis or any mitigation of lost water. Their argument fails as a matter of law.

157. Mont. Code Ann. § 85-2-344(2) (2019) designates the Bitterroot River subbasin as a closed basin, meaning that no application for a permit to appropriate water may be granted until the basin closure terminates.

158. An application for a permit to appropriate water is administered by DNRC under the Water Use Act. *See* Mont. Code Ann. §§ 83-2-302, 102(11) (2019) (defining "department" to mean DNRC).

159. Mr. Moudy has not applied for a permit to appropriate water, and if he did, it would be administered by DNRC under the Water Use Act, not by DEQ under the Opencut Mining Act.

160. The Opencut Mining Act's requirement of consistency "with state law," Mont. Code Ann. § 82-4-434(2)(*l*) (2019), cannot serve to require DEQ to enforce a statute that another agency is explicitly charged with enforcing.

161. Therefore, the location of the Moudy Pit in a closed basin is irrelevant to Mr. Moudy's opencut application, and DEQ is not bound by the requirement applicable to closed basins that any loss of water, no matter how small, requires mitigation.

162. Instead, DEQ is bound by the requirement of Mont. Code Ann. § 82-4-434(2)(*l*) (2019) that it give surface water and groundwater "appropriate protection" from deterioration in quantity or quality caused by the mining operation.

163. The WRA Guideline in effect at the time Permit #2949 was issued requires a plan of operation to include "[a]n explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has a beneficial use." App. Ex. 17 at 000166.

164. As discussed, *see supra* ¶¶ 120, 127, Appellants failed to establish that the surface water rights carried in Big Creek and the Parkhill Ditch will be affected.

165. The question, therefore, is whether Mr. Moudy is required to replace another "adversely affected water source that has a beneficial use."

166. To the extent that groundwater may be "adversely affected" by evaporative losses, Appellants did not establish that the groundwater has a "beneficial use."

167. To show that DEQ's protection of water resources was inappropriate, Appellants must show that the amount of evaporation is unreasonable or excessive.

168. Appellants made no showing of what amount of evaporative loss would be appropriate versus inappropriate; their only contention was that *any* loss of water must be mitigated.

169. Moreover, DEQ relied on its calculation of net losses to conclude that evaporative loss will be relatively minor, as compared to Appellants' calculation of gross losses. The Hearing Examiner is not persuaded that DEQ erred in concluding that a small amount of evaporative loss is acceptable.

170. Appellants' argument that DEQ must require mitigation of any water lost to evaporation fails as a matter of law. Moreover, they have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to calculating or mitigating evaporative losses under Mont. Code Ann. § 82-4-434(2)(*l*) (2019). Rather, the preponderance of the evidence shows that DEQ fulfilled its obligation to appropriately consider expected evaporative losses.

Reclamation Plan and Bond

171. Appellants contend that DEQ erred in issuing Permit #2949 because the reclamation plan is a beneficial use of water for which no permit was issued, and because the cost of permitting is not included in the bond. Their argument fails as a matter of law.

172. Under the Opencut Mining Act, a plan of operation must provide "that the affected land will be reclaimed for one or more specified uses, including but not limited to agriculture, forest, pasture, orchard, cropland, residence, recreation, industry, habitat for wildlife, including food, cover, or water, or other reasonable, practical, and achievable uses." Mont. Code Ann. § 82-4-434(2)(a) (2019).

173. Additionally, under the Opencut Mining Act, "reclamation" is defined to mean "the reconditioning of affected land to make the area suitable for productive use,

including but not limited to forestry, agriculture, grazing, wildlife, recreation, or residential or industrial development." Mont. Code Ann. § 82-4-403(13) (2019).

174. And, under the Opencut Mining Act, before a permit may issue, operators must submit a surety bond in an "amount … determined by the department at the cost of reclamation of the affected land by the department." Mont. Code Ann. § 82-4-433(1) (2019).

175. Under the Water Use Act, a "beneficial use" is one "for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses." Mont. Code Ann. § 85-2-102(5)(a) (2019).

176. The Water Use Act is administered by DNRC. *See* Mont. Code Ann. § 85-1-101.

177. Only DNRC, and not DEQ or the Board, is authorized to determine whether a beneficial use permit is required. The requirements of the Opencut Mining Act that a reclamation plan be "achievable," Mont. Code Ann. § 82-4-434(2)(a) (2019), and that water be protected "consistent with state law," *id.* at (2)(*l*), cannot serve to shift enforcement of the Water Use Act from DNRC to DEQ.

178. Instead, ARM 17.24.218(1)(g)(v) (2019), which is promulgated under the Opencut Mining Act, requires applicants, "in the event that the proposed opencut operation involves or may result in the diversion, capture, or use of water, [to include]

acknowledgment that the operator consulted with the regional office of the Department of Natural Resources and Conservation, Water Resources Division."

179. Mr. Moudy's application for Permit #2949 includes the required acknowledgment.

180. No additional action is required of Mr. Moudy or of DEQ under the Opencut Mining Act, and DEQ's decision did not violate the law with respect to an acceptable reclamation plan under Mont. Code Ann. § 82-4-434(2)(a) (2019). Thus, Appellants' position fails as a matter of law.

181. Finally, because neither DEQ nor the Board can determine that a beneficial use permit is required, DEQ did not err in calculating the amount of the reclamation bond under Mont. Code Ann. § 82-4-433(1) (2019). The Hearing Examiner agrees with DEQ that inclusion of the cost of a permit would be unduly speculative.

Noise and Dust

182. Appellants contend that DEQ erred in issuing Permit #2949 because it does not provide for adequate noise and dust control. Appellants failed to carry their burden.

183. A plan of operation must provide "that noise and visual impacts on residential areas will be minimized to the degree practicable through berms, vegetation screens, and reasonable limits on hours of operation." Mont. Code Ann. § 82-4-434(2)(m) (2019) (emphasis added).

184. Additionally, DEQ "may reasonably limit hours to reduce adverse impacts on residential areas." ARM 17.24.218(1)(f) (2019).

185. The Opencut Mining Act does not require any particular result of DEQ's noise mitigation efforts, nor does it include any requirements specifically related to dust.

186. Because Permit #2949 requires trucking in water to the Moudy site for the purpose of dust control, any failure to do so is a problem for DEQ's enforcement apparatus, not its permitting department.

187. Moreover, because the Opencut Mining Act does not require any particular means of dust control, DEQ did not violate the law with respect to dust control.

188. In issuing Permit #2949, DEQ complied with the Opencut Mining Act with respect to noise control because it limited the hours of operation and required construction of berms. The Act requires only that impacts are "minimized to the degree practicable;" it does not limit the number of decibels emitted from the site or otherwise provide grounds to find that DEQ violated the law with respect to noise control under Mont. Code Ann. § 82-4-434(2)(m) (2019). Appellants provided no evidence that the noise could have been better limited in another "practicable" fashion.

189. Appellants' argument with respect to dust control fails as a matter of law, and they have not carried their burden to prove that DEQ's decision violated the law with respect to controlling noise "to the degree practicable" under Mont. Code Ann. § 82-4-434(2)(m) (2019). Rather, the preponderance of the evidence shows that DEQ fulfilled its obligation to appropriately consider impacts on their residential community.

RECOMMENDED DECISION

The Hearing Examiner recommends an order affirming DEQ's decision to issue Permit #2949 and dismissing this case.

DATED this 29th day of December 2023.

/s/ Liz Leman

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL BY THE RIPPLING WOODS HOMEOWNERS ASSOCIATION, ET AL., REGARDING APPROVAL OF OPENCUT MINING PERMIT NO. 2949, MOUDY PIT SITE, RAVALLI COUNTY, MT	**Case Nos. BER 2019-08 through 21 OC** **APPELLANTS' STATEMENT OF EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION/REQUEST FOR ORAL ARGUMENT**

I. INTRODUCTION

Pursuant to the Hearing Examiner's Order filed December 29, 2023, Appellants Jennifer and Randall Lint, Nancy Jacobsen, Sarah Slater, Mark and Lisa van Keulen, Gretchen Langton, Kurt Vause, Kathleen Meyer and Patrick McCarron, Annette McDonald, and Brian Langton (collectively "Appellants"), by and through their undersigned counsel, submit the following exceptions to the December 29, 2023, Findings of Fact, Conclusions of Law, and Recommended

Decision ("FOF/COL/RD"). As provided in the record of this matter, DEQ's approval of Opencut Mining Permit No. 2949, Moudy Pit Site, failed to comply with the regulatory guidance governing water resource assessments and groundwater assessments, failed to comply with DEQ rules on protection of water resources, and failed to comply with the statutory requirements of Opencut Mining Act wherein DEQ was required to protect area groundwater and surface water resources from impacts which may occur as a result of the proposed Moudy gravel pit. As required by statute, after review of the entire record of this matter, the Board of Environmental Review ("Board") should reject the FOF/COL/RD as failing to comply with the requirements of law and for failure of the proposed FOF to be based on competent substantial evidence. Further, because the proposed findings are clearly erroneous under Montana law governing contested case proceedings under the Montana Administrative Procedures Act ("MAPA"), the findings should be rejected by the Board. After rejection of the FOF/COL/RD, the Board should issue a Final Decision revoking DEQ's issuance of Opencut Mining Permit No. 2949.

II. GENERAL EXCEPTIONS

The administrative procedure employed in this matter was initiated by Appellants' appeals, collectively filed with DEQ, in November 2019, over four (4) years prior to the Hearing Examiner issuing the FOF/COL/RD. The administrative

procedure delay resulting from the handling of these appeals is in violation of the Appellants' constitutional rights to procedural due process and has resulted in substantive violations of Appellants' due process rights as required by law. In no manner can over a four-year delay of administrative relief constitute compliance with the due process safe guards implemented under MAPA.

In addition to these constitutional violations, the process employed in these appeals has violated the express provisions of MAPA by delay in the holding of the contested case hearing mandated by statute, and the statutory provisions governing the issuance of decisions. These express violations of MAPA have further denied Appellants their due process rights protected by law.

The FOF/COL/RD should also be rejected by the Board for the failure of the Hearing Examiner to comprehend the evidence presented; misunderstand or misapprehend the evidence; wholly ignore evidence; or, otherwise make findings which are contrary to the record presented. In this regard, as provided by statute under MAPA, the Board is required to review the entire record evidence presented by the Appellants. After review, the Board should recognize the FOF/COL/RD is contrary to the factual record presented by Appellants.

The FOF/COL/RD should also be rejected by the Board as the Hearing Examiner made clear error of law in both findings and conclusions of law contained within the proposed decision. The Hearing Examiner's taking of judicial

notice of Big Creek water rights was mistaken as a matter of law and the application of the statutory requirements governing Permit No. 2949, as provided under M.C.A. § 82-4-434(2)(l), also failed to apply the plain and clear meaning of the statutory directive that DEQ protect area ground and surface water resources. As also provided in the record, the FOF/COL/RD further erred as a matter of law in approving the DEQ approved reclamation plan and bond set for Permit No. 2949.

III. CATEGORICAL EXCEPTIONS

In addition to the legal errors made as outlined above, and as may be shown by the record, Appellants highlight for the Board the following categorical errors included under the FOF/COL/RD.

1. FOF No. 8 – The evidence presented by Appellants at the contested case hearing specifically and clearly set forth the errors made by DEQ in the underlying permit record. That the Hearing Examiner was unable or untrained to comprehend the error is not a failure of Appellants or the evidence presented. In fact, as offered by Appellants at the close of the contested case hearing, the record demonstrates proposed findings and conclusions were offered, but rejected to be received by the Hearing Examiner. *See*, Hearing Record Day 2 closing.

2. Impacts to Big Creek/Groundwater Resources/Area Wells – "Big Creek" is situated within 250 feet of the Moudy gravel pit site. Big Creek is habitat

for several fish species, including protected bull trout, and is relied upon by area ranches for irrigation and stock water. *See*, Day 1 Testimony of Gretchen Langton, Brian Langton, and Lee Yelin. *See also,* Exs. 4-6, 14-16, 35-44. Area groundwater at the Moudy site contributes to Big Creek flow. Groundwater in the area will be depleted by the Moudy operations. Surface water impacts to Big Creek will occur either through depletion of groundwater contributions to flow, or through inducement of creek flow itself due to Moudy mining gravel below the stream bed elevation. Water rights in Big Creek will be adversely affected. The Water Resources Assessments ("WRAs") submitted by Moudy's consultants failed to apply DEQ guidance which implements DEQ's regulatory and statutory requirements. *See*, Exs. 17-18, 21, 32; Testimony of Krogstad, DEQ Expert, Day 2, 4:25:20—4:28:00.

Each of these deficiencies and evidence of impacts was documented, explained, and chronicled in the testimony and evidence presented at hearing and in the record. *See*, Testimony of Charles Vandam, Expert Witness, Day 1, 5:30—1:21:50; Testimony of Lee Yelin, Expert Witness, Day 1, 1:49:10—2:56:30. Exs. 3 (Vandam Report), 4, 5, 8, 12, 17, 18, 21, 32, 49, Demonstrative Ex. 1.

Based on a review of the record evidence, the Board should modify or set aside FOF Nos. 13-24 and COL Nos. 116-123 (Big Creek); FOF Nos. 37-47 and COL Nos. 129-133 (Aquifer Test); FOF Nos. 9-12 and COL Nos. 115, 144-155

(Groundwater). As the Appellants' evidence established, and as the record demonstrates, DEQ failed to require the Applicant for Permit 2949 to accurately or properly assess groundwater resources, and impacts related to the Moudy application clearly failed to protect groundwater and surface water in Big Creek from impacts of mining as required by M.C.A. § 85-4-434(2)(1). At oral argument, Appellants will further outline each deficiency of the FOF/COL/RD, as demonstrated by the record.

3. Impacts to Parkhill Ditch and Area Water Rights – The Parkhill Ditch runs directly adjacent to the Moudy site on the west and south boundary. Portions of the ditch pass through the site. The ditch carries decreed water rights from Big Creek and storage water from Big Lakes Reservoir conveyed via Big Creek and diverted in the ditch. The Moudy Pit will excavate within less than 20 feet of the ditch. The ditch near the Moudy site is at about 3412 feet elevation. The Moudy site is authorized to mine to 3372 feet or approximately 40 feet below the bed of the ditch. The removal of gravel at the mine will cause the ditch to lose water due to the lowering of the area groundwater table. The WRA did not monitor the ditch nor assess impacts to the ditch or water rights served by the ditch. Monitoring reports provided by Moudy after construction of the pit confirm groundwater adjacent to the Parkhill ditch dropped by over 3½ feet after only 2 years of mining at the Moudy site at the far east end of the permitted boundary the furthest extent

away from the ditch. On site observations and testimony of the Big Lakes water commissioner document since mining commenced at the Moudy site, the Parkhill Ditch has suffered greater ditch loss, water is more difficult to deliver through the ditch, and shareholders of the association have had trouble receiving their water under either decreed water rights or lake share water.

Each of these impacts was described at hearing by Appellants' expert Charles Vandam and detailed by Appellants' expert Lee Yelin. *See*, Vandam Day 1, 49:00—53:40; 56:00—1:11:40; Yelin Day 1, 2:08:40—2:22:00, 2:48:30—2:56:30. These impacts were further documented for DEQ prior to review of the application as detailed by public comments. Ex. 6, 14-16; DEQ Deficiency Notices, Ex. 8. In addition, Water Commissioner Aimee McKinely testified to the impacts on the Parkhill Ditch and impacts to water users and water rights. McKinley Day 1, 3:37:20—3:54:50, Ex. 49. DEQ expert witness Kevin Krogstad confirmed the decline in water levels adjacent to the ditch immediately after the pit commenced excavation operations. Krogstad Day 2, 4:13:50—4:17:10.

Based upon the evidence at hearing, and after review of the record, the Board should modify or set aside FOF Nos. 25-36 and COL Nos. 124-128 (Parkhill Ditch). As the evidence supports, DEQ failed to protect water resources and water rights in the Parkhill Ditch as required by M.CA. § 85-4-434 (2)(l). At oral

argument, Appellants will further outline the deficiency of the FOF/COL/RD regarding impacts to area irrigation ditches and water rights.

4. Dewatering and Closed Basin Requirements – The Moudy site is in a legislatively closed basin due to the over appropriated nature of Big Creek and other basin water sources. As provided in the record, the water rights in the Parkhill Ditch and other water rights on Big Creek, will be adversely impacted by depletions caused by the Moudy site. As required by the WRA guidelines, water rights are to be protected or replaced with water to mitigate impacts. DEQ's approval of Permit 2949 failed to protect these resources consistent with the requirements of state law.

At the hearing, the impacts to Big Creek and the Parkhill Ditch were documented. *See*, Yelin Day 1, 2:10:30—2:22:00, 2:28:50—2:38:10; McKinley Day 1, 3:40:10—3:54:50. In addition, mechanisms and procedures to mitigate any impacts to Big Creek water rights, Parkhill Ditch rights, or other ditch water rights, were explained. Yelin Day 1, 2:38:30—2:39:30.

In spite of the clear requirements of state law, and in spite of the DEQ mandates to replace or mitigate impacts to water rights, the FOF/COL/RD erroneously found and concluded DEQ had complied with M.C.A. § 82-4-434(2)(l). Based on the evidence at hearing, and after review of the record, the Board should modify or set aside FOF Nos. 69-80 and COL Nos. 156-170

(Dewatering and Closed Basin). The Board should further set aside and reject any finding or conclusion based on the Hearing Examiner's "judicial notice" of the state water right database that only "surface water rights in Big Creek" are relevant, and that such users cannot rely on groundwater to fill their rights. *See*, e.g., COL Nos. 120-121. These findings and conclusions are not only factually in error based on the record, but legal error under Montana case law and statutory law which recognizes the protection of groundwater which contributes or is hydrologically related to surface water rights. At oral argument, Appellants will further detail the deficiencies of the FOF/COL/RD as related to state law on dewatering and closed basin statewide requirements.

5. Reclamation Plan and Bond – By law, DEQ is required to review and document a reclamation plan to govern post-mining land uses. In this instance, the reclamation plan proposed by Moudy, and approved by DEQ, was for the gravel pits to be used as "reclamation ponds." The ponds admittedly will be used for beneficial uses requiring a beneficial water use permit. Without a beneficial water use permit the reclamation plan will not be achievable as required by law. In addition, the bond set by DEQ failed to account for the need or cost of a beneficial water use permit, and mitigation water as required by law. At hearing, these requirements of state law were documented and provided to the Hearing Examiner

in the evidence presented by expert Lee Yelin. Day 1, 2:40:10—2:49:00; *see also* Record Proceedings on Summary Judgment Motions.

Based on the evidence at hearing, and after review of the record, the Board should modify or set aside FOF Nos. 81-95 and COL Nos. 171-181 (Reclamation Plan and Bond). At oral argument, Appellants will further detail the deficiencies of the FOF/COL/RD related to state law on reclamation plans, bonding, and the requirements for beneficial water use permits.

IV. CONCLUSION

The Board is required to review the entire record on this appeal in reviewing the exceptions to the FOF/COL/RD. Upon this review, the Board will be advised of the clear evidence in the record which supports Appellants' claims that DEQ failed to protect area ground and surface water sources from adverse impacts. After review, the Board should reject the FOF/COL/RD and enter an order that DEQ failed to comply with M.C.A. § 82-4-434(2)(l) in granting Permit No. 2949. Upon entry of such an order, the Permit should be revoked by the Board. **Appellants request oral argument on these exceptions.**

DATED this 15th day of January 2024.

PARSONS BEHLE & LATIMER

/s/ John E. Bloomquist
John E. Bloomquist
Betsy R. Story
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Statement of Exceptions to Findings of Fact, Conclusions of Law, and Recommended Decision/Request for Oral Argument was served via email, on this 15th day of January 2024, upon the following:

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Docket No: BER 2019-10 through 20 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL BY THE RIPPLING WOODS HOMEOWNERS ASSOCIATION, ET AL., REGARDING APPROVAL OF OPENCUT MINING PERMIT NO. 2949, MOUDY PIT SITE, RAVALLI COUNTY, MT	CASE NOS. BER 2019-10 OC BER 2019-12 OC BER 2019-14 OC BER 2019-15 OC BER 2019-16 OC BER 2019-17 OC BER 2019-18 OC BER 2019-19 OC BER 2019-20 OC **MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

COMES NOW, Respondent, the Montana Department of Environmental Quality ("DEQ"), by and through its undersigned counsel and pursuant to § 2-4-

621(3), MCA, and the Presiding Hearing Examiner's ("HE") December 29, 2023 Order on Exceptions, and respectfully takes exception to and seeks modification of Conclusions of Law ("COL") ¶¶ 149, 150, and 155 in the above matter.

INTRODUCTION

This case involves the appeal of The Rippling Woods Homeowners Association, et al (collectively, "Petitioners") from DEQ's decision to approve Opencut Mining Permit #2949, located in Ravalli County, Montana. The HE's Proposed Findings of Fact and Conclusions of Law ("Proposed FOFCOL") is based on a two-day hearing and extensive pre- and post-trial briefing. The Proposed FOFCOL concluded that DEQ did not violate the law in issuing Permit #2949.

While DEQ agrees with the HE's Proposed FOFCOL determining that DEQ did not violate the law in issuing Permit #2949, DEQ requests modification of COLs ¶¶ 149, 150, and 155 as they are inconsistent with DEQ's interpretation of its rules and inconsistent with governing law. As such, DEQ respectfully requests the Board of Environmental Review (the "BER") to modify these Conclusions of Law in its final Findings of Fact and Conclusions of Law.

ARGUMENT

I. The Requirements Under ARM 17.24.218(1)(g) (2019) are to Protect the Underlying Water Resource, not Domestic Wells.

While the HE correctly determined that DEQ did not violate

the law in issuing Permit #2949, the HE mistakenly determined that the requirements under ARM 17.24.218(1)(g) (2019) and Section 82-4-434(2)(*l*) (2019) exist to protect domestic wells. This is an incorrect determination under recent BER decisions.

DEQ is entitled to deference when interpreting its rules. *Upper Mo. Waterkeeper v. Mont. Dept of Envtl. Quality*, 2019 MT 81, ¶ 13 (citing *Lewis B & B Pawnbrokers Inc*., 1998 MT 302, ¶ 43; *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality*, 2008 MT 407, ¶ 20). A previous BER decision, *In the Matter of: Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties LLC, by David Weyer on Behalf of the Residents of Walden Meadows Subdivision* ("*Golden West 2018*"), determined that the purpose of ARM 17.24.218(1)(g) (2019) is to "get the data necessary to protect the water—sometimes data regarding "each well" (or all wells) is necessary (in the absence of a hydrologic study) and sometimes only data from some wells is necessary (if there is a hydrologic study)." BER 2018-05 OC at 11. This decision also determined that "the rule be flexible enough to allow for different or dynamic factual scenarios, as long as the ultimate purpose of the rule—protection of the water—is not compromised." *Id*.

Here, the HE correctly stated in COL ¶ 146 "DEQ's expert testified to his opinion that the purpose of these requirements was to protect the underlying water

resource, not to protect individual wells." However, the HE then reaches the wrong conclusion in ¶ 149. In COL ¶ 149, the HE incorrectly concludes that "the existence of two separate requirements (well identification and well logs) in ARM 17.24.218(1)(g) (2019) and the interpretive documents issued by DEQ suggest that the purpose of the well-identification requirement is to ensure that individual wells are protected." This is directly contradictory to DEQ's interpretation of its own rules as testified to by DEQ experts and controversial of the HE's statements in COL ¶ 146. In addition, it is contrary to what this board has previously held. *Golden West 2018*. As such, the BER should modify this COL ¶ 149 to read:

> "The existence of two separate requirements (well identification and well logs in ARM 17.24.218(1)(g) (2019) and the interpretive documents issued by DEQ show that the purpose of the well-identification requirement is to protect the underlying water resource."

Inserting language into a rule or statute that was omitted is contradictory to the rule of statutory construction in Section 1-2-101, MCA, which states "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted…"; *see also Golden West 2018* at 10. It should be noted for the BER that DEQ is charged with adopting "rules of practice, not inconsistent with statutory provisions…" Section 2-4-201, MCA. A rule includes "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the

organization, procedures, practice requirements of an agency." *Mont. Indep. Living Project v. State, DOT*, 2019 MT 298, ¶ 32, 398 Mont. 204, 454 P.3d 1216; *see also* Section 2-4-102(11)(a), MCA. Rulemaking is a quasi-legislative power intended to add substance to the acts of the Legislature to complete absent but necessary details and resolve unexpected problems. *Id*.

Here, the HE reaches another contradictory conclusion in COL ¶ 150. In COL ¶ 150 the HE states, "although the Hearing Examiner agrees with Appellants that the purpose of the well-identification requirement is to protect individual wells, Appellants have failed to meet their burden to show that DEQ did not identify all wells within 1,000 feet of the Moudy Pit boundary line." This COL is contradictory not only to the HE's statement in COL ¶ 146, but it is also contradictory to case law, DEQ's rules, and recent BER decisions. The BER has previously determined that ARM 17.24.218(1)(g) (2019) does not require *all* wells within 1,000 feet of a pit boundary to be identified. *Golden West 2018* at 9. The BER made that determination based on statutory construction under Section 1-2-101, MCA. If the BER does not remove COL ¶ 150 from its final Findings of Fact and Conclusions of Law, it will confuse what is required under ARM 17.24.218(1)(g) (2019). As read, ARM 17.24.218(1)(g) (2019) requires a plan to include "[t]he depths, water levels, and uses of water wells in and within 1,000 feet of the permit area." The word "all" does not appear in the rule. Upholding a COL

that reflects ARM 17.24.218(1)(g) (2019) requires *all* water wells be identified within 1,000 feet of the permit boundary violates Section 1-2-101, MCA and case law as the rule merely adds substance to an act of the Legislature to complete absent but necessary details. Additionally, upholding COL ¶ 150 does not give deference to DEQ in its interpretation of its own rules. As such, the BER should remove COL ¶ 150 from its final Findings of Fact and Conclusions of Law.

Finally, the BER should modify COL ¶ 155 in its final Findings of Fact and Conclusions of Law. COL ¶ 155 currently reads: "Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of individual wells under Mont. Code Ann. § 82-4-434(2)(*l*) (2019)." As discussed above, it is a violation of statutory construction to insert words into statute that were omitted. Section 1-2-101, MCA. To leave COL ¶ 155 as is would be inserting what has been omitted from Section 82-4-432(2)(*l*) (2019), MCA which states, "the department may not accept a plan of operation unless the plan provides: …(*l*) that surface and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation." Nowhere in Section 82-4-434(2)(*l*) (2019), MCA, is there a requirement for a plan of operation to include that individual wells be protected. As such, the HE's conclusion in COL ¶ 155 is not only a violation of statutory construction under Section 1-2-101, MCA,

but also of the BER's decision in *Golden West 2018*. As such, DEQ requests that COL ¶ 155 be modified to read:

> "155. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of the underlying water resource under Mont. Code Ann. § 82-4-434(2)(*l*) (2019)."

CONCLUSION

As shown above the BER should modify COLs ¶¶ 149 and 155 and remove COL ¶ 150. COLs ¶¶ 149 and 155 should be modified for the reasons provided above. Modifying COLs ¶¶ 149 and 155 will aid in consistency among BER decisions, re-address statutory construction, and re-affirm that DEQ's interpretation of its rules are given deference. If COLs ¶¶ 149 and 155 are not modified as DEQ suggests, it will create inconsistencies among BER decisions and muddy the water for future cases. As such, the BER should modify COL ¶ 149 to read the following:

> "149. The existence of two separate requirements (well identification and well logs in ARM 17.24.218(1)(g) (2019) and the interpretive documents issued by DEQ show that the purpose of the well-identification requirement is to protect the underlying water resource."

Additionally, COL ¶ 155 should be modified to read the following:

> "155. Appellants have not carried their burden to produce evidence showing that DEQ's decision violated the law with respect to protection of the underlying water resource under Mont. Code Ann. § 82-4-434(2)(l) (2019)."

Finally, COL ¶ 150 should be deleted in its entirety as it is a violation of Section 1-2-101, MCA and case law.

Dated this 16th day of January, 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Kaitlin Whitfield
KAITLIN WHITFIELD

Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January 2024, I caused a true and accurate copy of the foregoing to be emailed to:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
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IN THE MATTER OF: NOTICE OF APPEAL BY RIPPLING WOODS HOMEOWNERS ASSOCIATION, *ET AL.*, REGARDING APPROVAL OF OPENCUT MINING PERMIT NO. 2949, MOUDY PIT SITE, RAVALLI COUNTY, MT	**CASE NOS. BER 2019-10 OC** **BER 2019-12 OC** **BER 2019-14 OC** **BER 2019-15 OC** **BER 2019-16 OC** **BER 2019-17 OC** **BER 2019-18 OC** **BER 2019-19 OC** **BER 2019-20 OC**

DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO PETITIONERS' EXCEPTIONS

COMES NOW, the Department of Environmental Quality ("DEQ"), and files its Response to *Appellant's Statements of Exceptions to Findings of Fact, Conclusions of Law, and Recommended Decision/Request for Oral Argument*

("Petitioners' Exceptions Brief") filed January 15, 2024, in accordance with the Hearing Examiner's ("HE") Order on Exceptions issued on December 29, 2023.

INTRODUCTION

Petitioners assert that DEQ violated their constitutional rights, the Montana Administrative Procedure Act ("MAPA"), and the Opencut Mining Act. However, Petitioners do not cite to any specific legal authority for these assertions, instead, Petitioners merely state that the HE's Proposed Findings of Fact and Conclusions of Law ("Proposed FOFCOL") should be rejected because the HE was unable to "comprehend the evidence presented; misunderstand or misapprehend the evidence; wholly ignore evidence; or, otherwise make findings which are contrary to the record presented." *See* Petitioners' Exception Brief at 3. Then Petitioners assert that they will further explain their position at oral argument.

Petitioners' arguments that DEQ violated the Opencut Mining Act in issuing Permit #2949 fail as a matter of law. *See* § 82-4-401, et seq., MCA; *see also In the Matter of: Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties LLC, by David Weyer on Behalf of the Residents of Walden Meadows Subdivision ("Golden West 2018"); see also* § 2-4-601, et seq., MCA. Instead, the HE correctly determined that DEQ did not violate the law in issuing Opencut Mining Permit #2949 for the Moudy Pit Site in Ravalli County. In fact, both the HE's Proposed FOFCOL and the record show DEQ complied with § 82-4-

401, et seq., MCA and ARM 17.24.201 – 238.

ARGUMENT

I. The Board of Environmental Review Cannot Hear nor Decide Constitutional Arguments.

The BER cannot hear nor decide arguments arising under the Montana Constitution, jurisdiction of such lies exclusively with the courts. *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1022 (1992). Petitioners' arguments under their "General Exceptions" are based in constitutional law. As such, this BER is not able to decide nor hear those arguments.

While Petitioners' state "in addition to these constitutional violations, the process employed in these appeals has violated the express provisions of MAPA by delay in the holding of the contested case hearing mandated by statute, and the statutory provisions governing the issuance of decisions," they fail to cite to any provisions under MAPA that have been violated or to any law that supports such as assertion. *See* Petitioners' Exceptions Brief at 3. Regardless, the governing provisions of this contested case proceeding do not provide specific timelines for when cases must be heard. *See* § 2-4-601 to –631, MCA. Instead, it provides an agency or other reviewing entity, such as the BER, with flexibility and independence to create its own timelines. As such, their argument that MAPA was violated fails.

II. Petitioners Do Not Assert Any Specific Violations of Law.

Petitioners' assert that DEQ violated the Opencut Mining Act and MAPA when it issued Opencut mining Permit #2949, however, Petitioners do not cite to any specific portion of the Opencut Mining Act that was violated. A party "asserting the claim at issue, has the burden of presenting the evidence necessary to establish the facts essential to a determination that DEQ's decision violated the law." *See* Proposed FOFCOL ¶ 106, citing *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2008 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 964. [1]

Here, as the HE stated, "Appellants did not clearly identify a set of errors they contend that DEQ made." Instead, throughout the HE's Proposed FOFCOL she determined that the Petitioners did not carry their burden in presenting evidence that showed by a preponderance of the evidence the DEQ violated any portion of the Opencut Mining Act. For example, with respect to domestic well locations, the HE determined that Petitioners failed to produce evidence that the purpose of ARM 17.24.218(1)(g) (2019) is not being served. *See* Proposed FOCOL ¶ 154. This is the common theme throughout the HE's Proposed

[1] While Petitioners repeatedly argue that the Proposed FOFCOL is incorrect because the HE determined that they failed to establish that the surface water rights carried in Big Creek and the Parkhill Ditch will be affected, they fail to note that the Opencut Mining Act does not address nor provide DEQ with authority to regulate water rights. *See* § 82-4-401, et seq., MCA; see also HE's Proposed FOFCOL ¶¶ 158-159. Instead, an application for a permit to appropriate water is administered by DNRC under the Water Use Act. *Id*., citing §§ 83-2-302, 102(11) (2019) (defining "department" to mean DNRC). Here, there was no application for a permit to appropriate water, if there were, it would be administered by DNRC, not by DEQ under the Opencut Mining Act. *See* Proposed FOFCOL ¶ 159.

FOFCOL. In reviewing the record, the BER should come to the same conclusion. Because Petitioners could not carry their burden of proof in this MAPA contested case proceeding, the HE's proposed ruling that DEQ did not violate the law in issuing Opencut Mining Permit #2949 should be adopted by the BER.

III. The Board of Environmental Review is Limited to the Review of the Record.

When determining whether to adopt a HE's Proposed Ruling, the BER is limited to review of the record in front of it. Section 2-4-621, MCA. When reviewing the record, the BER may reject or modify the conclusions of law and interpretation of administrative rules. Section 2-4-621(3), MCA. However, the BER may not reject or modify the findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Id*.

Here, while Petitioners request that the BER reject 67 of 101 proposed findings of fact, this request should be rejected. The record clearly shows that the HE's determination that DEQ did not violate the Opencut Mining Act in issuing Permit #2949 is correct. Petitioners did not provide any evidence to support their claims addressed in their Notice of Appeal. *See* Proposed FOFCOL ¶ 8. On the contrary, DEQ produced substantial evidence to counter Petitioners claims. As

such, the HE's Proposed FOFCOL was based on substantial competent evidence. Additionally, because Petitioners did not provide the necessary evidence to establish their claims, they failed to meet their burden under MAPA. Essentially, Petitioners would like DEQ to do more than what is required by statute and rule. As explained in DEQ's Motion for Exceptions, requiring this is a violation of § 1-2-101, MCA.

Additionally, Petitioners request that the BER reject or modify 57 of 87 proposed conclusions of law. However, they do not suggest any modification language for these "incorrect" conclusions of law. Instead, they would merely like the BER to reject the HE's Proposed FOFCOL even though it is based on the evidence they presented at a two-day hearing. Merely because Petitioners did not get the result they prefer, does not make the HE's Proposed FOFCOL illegal or incorrect. In fact, the HE's Proposed FOFCOL thoroughly dissects the evidence presented and applies the applicable law. As explained in DEQ's Motion for Exceptions, the only proposed conclusions of law that should be modified are ¶¶ 149, 150, and 155.

IV. The Oral Argument in Front of the BER is not a Hearing De Novo.

If a decision is adverse to a party to the proceeding other than the agency itself, a decision may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file

exceptions and present briefs and oral argument to the officials who are to render the decision. Section 2-4-621(1), MCA.

Here, Petitioners have filed Exceptions to the HE's Proposed FOFCOL; however, they have merely stated throughout their brief that "at oral argument, Appellants will further outline each deficiency of the FOF/COL/RD, as demonstrated by the record." As described in Section 2-4-621(1), MCA, oral argument held by the BER is for the parties to present their briefs and exceptions, not to have a new trial in front of the BER. As such, the parties should be limited to presenting arguments addressed in their briefs on exceptions.

CONCLUSION

As described and outlined in DEQ's Brief for Exceptions, the HE in the above referenced matter did not err in determining that DEQ did not violate the law in issuing Opencut Permit #2949. Petitioners request to have the HE's Proposed FOFCOL rejected should not be adopted by the BER because the Petitioners did not provide by a preponderance of the evidence, at a two-day hearing, that DEQ's permitting decision was a violation of the law. Petitioners also have not shown through briefing exceptions that the HE's determination was incorrect or illegal. As such, the HE's determination that DEQ did not violate the law should be adopted by the BER.

Dated this 29th day of January 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Kaitlin Whitfield
KAITLIN WHITFIELD

Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2024, I caused a true and accurate copy of the foregoing to be emailed to:

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