DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
APRIL 19, 2024

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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

FEBRUARY 16, 2024

Call to Order

Chair Simpson called the meeting to order at 9:03 a.m.

Attendance

Board Members Present
By Zoom: Chair Dave Simpson; Vice Chair Stacy Aguirre; Board Members Jennifer Rankosky, Jon Reiten, and Joe Smith.

Board member Julia Altemus was not present.

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: Kirsten Bowers, Sarah Christopherson, Sam King, Loryn Johnson, Jeremiah Langston, Kurt Moser, Aaron Pettis, and Kaitlin Whitfield
DEQ Air, Energy and Mining: Kevin Krogstad, Emily Lodman, and Madeline VerWey
DEQ Enforcement: Marley Held-Wilson

Other Parties Present
Laurie Crutcher, Crutcher Court Reporting
Aislinn Brown, Elena Hagen, Liz Leman – Montana DOJ Agency Legal Services Bureau
Sarah Bordelon – Holland & Hart
Todd Briggs, Robert Smith - Westmoreland
Vicki Marquis – Crowley Fleck
John Bloomquist, Marlena Reichert – Parsons Behle & Latimer
Nancy Jacobsen
Jennifer Lint
Frank Tabish

I. ADMINISTRATIVE MATERIALS

A. **Review and Approve Minutes**

A.1. **The Board will vote on adopting the December 8, 2023, Meeting Minutes.**

Board member Smith moved to APPROVE the December 8, 2023, meeting minutes. Board member Rankosky SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

Chair Simpson and Board Counsel Oomens offered clarification regarding cases. Chair Simpson asked for an update in BER 2022-05 WQ (Westmoreland Rosebud Mining MPDES permit). Sarah Christopherson of DEQ and Sarah Bordelon of Holland and Hart provided an update to the Board. Chair Simpson asked about the Peabody Big Sky Mine drainages on that side of the divide. Counsel for the parties will follow up regarding data that may have been collected and provide an update to the Board at the next meeting.

The Board did not have any questions.

III. ACTION ITEMS

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

Chair Simpson asked if the parties were present. Aaron Pettis of DEQ was present and Mr. Deveny was absent. Mr. Pettis provided a review of the case for the Board.

Vice Chair Aguirre moved to ADOPT the Hearing Examiner's Order of Dismissal Without Prejudice, and issue a Final Agency Action dismissing this matter. Board member Reiten SECONDED. The motion PASSED unanimously.

b. **In the Matter of the 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, BER 2019-08 through 21 OC**

Chair Simpson asked if the parties were present. John Bloomquist from Parsons Behle & Latimer and Kaitlin Whitfield from DEQ presented oral argument before the Board.

Discussion ensued.

Vice Chair Aguirre moved to ADOPT the Hearing Examiner's Findings of Facts with DEQ's exceptions added to MODIFY Conclusions of Law ¶¶149 and 155 and REJECT ¶150, for the Conclusions of Law. Chair Simpson SECONDED.

Discussion ensued and the motion PASSED unanimously.

IV. GENERAL PUBLIC COMMENTS

None.

V. BOARD CHAIR UPDATE

A. Chair Simpson gave a short update. He was thankful that today's meeting was virtual rather than in person, due to bad weather and roads. Chair Simpson provided a short update about the Selenium case and said he was working on developing a bill for the Board's responsibilities for the upcoming Legislative Session. He asked Board Secretary Sandy Moisey Scherer about the next meeting in April, as she had mentioned previously about a possible schedule conflict. She was able to work things out for the next meeting (April 19th), so there is no need to reschedule.

Board Counsel Oomens said she is hopeful to have the remand for BER 2016-03 SM shortly, so it can be discussed at the Board meeting in April. Chair Simpson said that, with enough lead time, we might be able to schedule something in the way of a status conference.

Board Counsel Oomens asked if there was news of a replacement for the attorney for the Board. Board Secretary Sandy Moisey Scherer said she had not heard anything yet from the Governor's Office.

VI. ADJOURNMENT

Vice Chair Aguirre MOVED to adjourn the Board Meeting; Board member Smith SECONDED. The motion PASSED unanimously. The meeting was adjourned at 10:41 A.M.

Board of Environmental Review February 16, 2024, minutes approved:

_/s/_____
DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

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Attorneys for The Western Sugar Cooperative

Electronically Filed with the
Montana Board of Environmental Review
3/22/24 at 9:29 AM
By: *Sandy Moisey Scherer*
Docket No: BER 2020-05 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY THE WESTERN SUGAR COOPERATIVE REGARDING ITS MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. MT0000281	**CASE NO. BER 2020-05 WQ** **JOINT MOTION FOR REMAND AND STIPULATION FOR DISMISSAL OF PROCEEDINGS**

The Montana Department of Environmental Quality ("DEQ"), by counsel, and Appellant The Western Sugar Cooperative ("Western Sugar"), by counsel, (collectively, "the Parties") after consultation, submit this Joint Motion for

Remand and Stipulation for Dismissal of Proceedings. The Parties have negotiated and reached an agreement to settle this matter without further litigation. *See* Exhibit A ("Settlement Agreement"). As a result of this remand, Western Sugar's previous discharge permit, MPDES Permit No. MT0000281, issued in 2009 and subsequently modified in 2009 and 2014, remains administratively extended and effective, subject to enforcement action FID 2362, DEQ Docket No. WQ-24-03. Accordingly, the Parties jointly request that the Board remand this matter to DEQ for further consideration, in accordance with the terms of the Settlement Agreement, attached hereto as Exhibit A, and stipulate to dismiss these proceedings, without prejudice.

DATED this 22nd day of March, 2024.

/s/ Victoria A. Marquis
Victoria A. Marquis
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/s/ Kurt R. Moser
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Attorney for Montana Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2024, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

Sandy Moisey Scherer BER Secretary Board of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 DEQBERSecretary@mt.gov	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
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Tatiana Davila, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 Tatiana.davila@mt.gov	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail

BY:*/s/ Catherine Armstrong*____
Catherine Armstrong
Department of Environmental Quality

SETTLEMENT AGREEMENT

This Settlement Agreement is made effective as of the date of the final signature (the "Effective Date"), by and between the Montana Department of Environmental Quality ("DEQ") and The Western Sugar Cooperative ("WSC"), collectively referred to herein as (the "Parties"), for the Board of Environmental Review's ("BER") issuance of an order in Case No. BER 2020-05 WQ, granting the Parties' motion for remand and the stipulated dismissal of proceedings without prejudice.

WHEREAS on May 15, 2014, WSC submitted a renewal application for MPDES Permit No. MT0000281 (the "Permit").

WHEREAS on July 7, 2014, DEQ issued a letter informing WSC that the renewal application for the Permit was complete and whereby the 2009 issued Permit, including its subsequent modification in 2009 and 2014, was administratively continued pursuant to ARM 17.30.1313.

WHEREAS on July 19, 2019, DEQ issued a tentative determination to renew the Permit, a draft Permit, and provided public notice of the tentative determination.

WHEREAS on October 29, 2020, DEQ issued its final determination on the Permit and on November 4, 2020, it provided a copy of the final Permit and responses to comments received by DEQ, including responses to comments submitted by WSC.

WHEREAS on November 23, 2020, WSC timely appealed DEQ's final determination on the Permit raising several issues, not all of which are specifically addressed in this Settlement Agreement.

WHEREAS on February 4, 2021, DEQ issued a letter to WSC noting that the final determination on the Permit was wholly stayed during the pendency of the appeal and the 2009 issued Permit, including its subsequent modification in 2009 and 2014, remained fully effective and enforceable.

WHEREAS WSC's facility has three wastewater streams regulated by the Permit: (1) beet flume topsoil (BFT) wash water, (2) boiler ash scrubber and flume water, and (3) cooling tower blowdown comprised of condensate/condenser waters.

WHEREAS in addition to two direct surface water discharges (Outfalls 001 and 002), the facility uses the following ponds to handle the wastewater streams: a series of depressions located on the historic PCC pile; the ash ponds; the mud fingers, a mud ditch and aerated mud pond (collectively, the "mud ponds"); and two aerated condenser ponds.

WHEREAS WSC processes sugar beets and generates wastewater for approximately six months out of each calendar year, during campaigns that extend from approximately September to February. The 2023-2024 campaign is currently underway and is estimated to end in February 2024.

WHEREAS as announced in *Maui*[1] and used in *Cottonwood,*[2] a wastewater discharge to groundwater may be regulated as a surface water discharge if the groundwater discharge is determined to be the functional equivalent of a direct surface water discharge. To make such a determination, a Functional Equivalent Analysis is performed. "[C]ontext imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether pollutants that arrive at navigable waters after traveling through groundwater are "from" a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge. The difficulty with this approach, we recognize, is that it does not, on its own, clearly explain how to deal with middle instances. But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case."[3]

WHEREAS no portion of the Permit issued on October 29, 2020, and timely appealed by WSC, has ever become effective.

WHEREAS the Permit issued on October 29, 2020, is hereby withdrawn by DEQ.

WHEREAS permit review and processing for WSC's pending renewal application will be conducted commensurate with the terms of this Settlement Agreement and all applicable laws and regulations.

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[1] *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1476, 206 L. Ed. 2d 640 (2020).
[2] *Cottonwood Env'l L. Ctr. v. Big Sky Water & Sewer Dist.,* No. CV-20-28-BU-BMM, 2022 WL 504013, at *2 (D. Mont. Feb. 18, 2022).
[3] *Cnty. of Maui,* 140 S. Ct. at 1476-77.

WHEREAS during the pendency of DEQ's permit review, the previous version of the Permit will remain fully effective and enforceable, subject to enforcement action FID 2362, DEQ Docket No. WQ-24-03, until a renewed version of the Permit is issued by DEQ, and any appeal proceedings, as applicable, have concluded.

WHEREAS the Parties wish to resolve BER Case No. 2020-05 WQ and accordingly, the Parties will jointly request that the BER remand this matter to DEQ for further consideration, in accordance with the terms of the Settlement Agreement, and stipulate to dismiss these proceedings, without prejudice.

NOW THEREFORE, in consideration of the mutual promises set forth herein, DEQ and WSC agree as follows:

1. Within 60 days after Effective Date of this Settlement Agreement, WSC will submit to DEQ designs for:
    a. Fate and Transport Studies of the ash pond, aeration pond, and mud ponds. The purpose of the Fate and Transport Studies is to inform the Functional Equivalent Analysis.
    b. Combined and/or Individual Mixing Zone Studies for the ash pond, aeration pond, and mud ponds (collectively, the "Designs").

2. Within 30 days after the receipt of the Designs, DEQ will review the Designs and request additional information if and as needed.

3. Within 60 days after receipt of the request information, DEQ will provide its decision and input on the Designs.

4. The Designs require DEQ approval and WSC will need such approval prior to commencement of the 2024-2025 campaign, ideally by June 2024, to enable planning and preparation. Therefore, the Parties agree to act diligently and reasonably in order to meet settlement deadlines and allow initiation of the Fate & Transport and the Mixing Zone Studies beginning in September 2024.

5. By May 1, 2026, WSC will supplement its May 15, 2014, Renewal Application for the Permit by submitting the following to DEQ, which will be informed by and include data gathered during two full campaigns (the 2024-2025 campaign and the 2025-2026 campaign) as well as limited data (primarily flow data) gathered during a portion of the 2023-2024 campaign):

    a. A water balance for each of the three wastewater streams that accounts for the wastewater anticipated during an average campaign and that illustrates

how, and which ponds will be used to manage wastewater, and provides flow estimates for discharges through Outfalls 001 and 002 as well as infiltration and flow estimates for the ash pond, aeration pond, and mud ponds. WSC must also describe how it will manage wastewater during campaigns that result in above average, but reasonably expected wastewater generation.

b. The results of the Fate & Transport Studies and WSC's own interpretation of a Functional Equivalent Analysis.
c. Requests for mixing zones, along with the results of the Mixing Zone Studies. Requests may include: (1) individual mixing zones for individual outfalls; (2) overlapping mixing zones for multiple outfalls; (3) combined mixing zones for multiple outfalls; (4) or a combination of any or all of the above.
d. Additional supplemental information, as considered appropriate by WSC.
e. Based on WSC's interpretation of applicable effluent limits, a proposed compliance schedule, as needed, for Outfalls 001 and 002.
f. The supplement may include a request (with supporting data) for Yellowstone River intake credits and limits that consider net discharge conditions for DEQ's consideration.
g. The supplement may include a request, with accompanying application materials, for a separate Montana Groundwater Pollution Control System (MGWPCS) permit for discharges to groundwater.
h. The supplement will describe how Outfalls 001 and 002 will be operated in compliance with applicable TBELs as described in EPA's *Development Document for Effluent Limitations Guidelines and Standards of Performance for New Sources, Beet Sugar Processing Subcategory of the Sugar Processing Point Source Category (January 1974).*

6. DEQ will review the supplement and request additional information, if and as needed, by July 1, 2026.

7. DEQ will issue a new tentative determination, accompanied by a draft permit and public notice on or before December 1, 2026.

8. In 2013, when WSC stopped slurrying the lime waste and stopped routine disposal of lime slurry onto the PCC pile, the facility's water balance and impacts to groundwater flow, direction, volume, and quality fundamentally changed; therefore, groundwater data gathered during and immediately after the pre-2013 campaigns is likely not representative of current conditions.

9. Nothing in this Settlement Agreement prevents WSC from proposing to continue use of the PCC ponds. However, WSC will endeavor to provide a proposal for wastewater treatment and discharge in the supplement that does not include discharges to the PCC ponds. Should such proposal be unreasonable or unworkable for WSC, WSC shall include a fate & transport study and mixing zone study, as appropriate, for the PCC ponds that considers the impact of wastewater infiltration through the PCC pile.

10. The groundwater flow direction is generally to the northeast.

11. Effluent from the facility is not hydrologically connected to and does not enter the Grey Eagle Ditch.

12. The Functional Equivalent Analysis is only required for the ash pond, the aeration pond, and the mud ponds. Functional Equivalent Analyses will be completed for each of the following TBEL parameters: BOD_5, TSS, Fecal Coliform, Temperature, and pH. The Functional Equivalent Analysis will be used to determine if effluent from the ash pond, the aeration pond, and the mud ponds is/are the functional equivalent of a direct discharge of effluent to the Yegen Drain and whether and which parameter(s) should be regulated accordingly.

13. All seven of the *Maui* factors will be considered in the Functional Equivalent Analyses. Other factors may also be considered.

14. Characteristics of the indirect discharge to surface water via groundwater will be compared to the characteristics of a direct discharge to surface water. For example, if discharges to groundwater from the aerated condenser ponds are hydrologically connected to the Yegen Drain, then when determining if the discharge is the functional equivalent of a direct surface water discharge, the characteristics of any discharge that reaches the Yegen Drain indirectly via groundwater must be compared to the characteristics of a direct surface water discharge at Outfall 001. Similarly, if discharges to groundwater from the mud ponds are hydrologically connected to the Yegen Drain, then when determining if the discharge is the functional equivalent of a direct surface water discharge, the characteristics of any discharge that reaches the Yegen Drain indirectly via groundwater must be compared to the characteristics of the effluent that is first discharged to the mud ponds.

15. The Parties acknowledge that, in general, discharge to groundwaters might be hydrologically connected to surface water but might or might not be the functional

equivalent of a direct surface water discharge based on an analysis of the *Maui* factors.

16. Provided WSC's supplement demonstrates compliance with the mixing zone rules at Title 17, Chapter 30, Subchapter 5, ARM, and if DEQ determines that allowing a requested mixing zone(s) for any parameter will not threaten or impair any existing beneficial uses, DEQ may grant a mixing zone that extends beyond the property boundaries.

17. If approved, groundwater mixing zones for the WSC ponds may intersect and overlap provided that compliance with the groundwater quality standards is met at the end of each mixing zone and that no beneficial uses of groundwater within the mixing zone are impaired as a result of the mixing zone.

18. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings; the obligations contained in the Settlement Agreement may be modified or amended by written agreement executed by the Parties.

19. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully executed agreement.

20. The Parties do not create, and do not intend to create any third-party beneficiaries to this Settlement Agreement.

21. On or before March 22, 2024, the Parties shall file a joint motion for remand and stipulation for dismissal of proceedings with the BER, which will include an executed copy of this Settlement Agreement as Exhibit A.

22. By signing this Settlement Agreement, neither of the Parties waives any arguments, defenses, or claims that were or could have been raised in Case No. BER 2020-05 WQ.

23. Each of the Parties is responsible for its attorneys' fees and costs associated with Case No. BER 2020-05 WQ.

DocuSigned by: [signature] Christopher Dorrington, Director Montana Department of Environmental Quality March 20, 2024	[signature] Rodney D. Perry, President & CEO The Western Sugar Cooperative March 20, 2024

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY THE WESTERN SUGAR COOPERATIVE REGARDING ITS MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. MT0000281	CASE NO. BER 2020-05 WQ **ORDER GRANTING JOINT MOTION FOR REMAND AND DISMISSAL**

On March 22, 2024, the Montana Department of Environmental Quality ("DEQ") and The Western Sugar Cooperative ("Western Sugar") (collectively "the Parties") filed a joint motion for remand and dismissal of these proceedings. The motion is based on the fact that DEQ and Western Sugar entered into a Settlement Agreement, attached to the joint motion as "Exhibit A," under which DEQ has withdrawn the October 29, 2020 renewal of MPDES Permit No. MT0000281 and the Parties jointly request that the Board of Environmental Review remand this matter to DEQ for further consideration, in accordance with the terms of the Settlement Agreement, and stipulate to dismiss these proceedings without prejudice.

There being good cause, IT IS HEREBY ORDERED MPDES Permit No. MT0000281 is remanded to DEQ for renewal in accordance with the terms of the Settlement Agreement. As a result of the remand and the agreed upon withdrawal of DEQ's October 29, 2020, renewal of Permit No. MT0000281, the previous version of MPDES Permit No. MT0000281 continues to remain in effect, subject to separate enforcement action FID 2362, DEQ Docket No. WQ-24-03, pending the contemplated permit renewal.

IT IS FURTHER ORDERED that this contested case proceeding is dismissed without prejudice.

DATED this 22nd day of March, 2024

/s/ Rob Cameron
Rob Cameron
Hearing Examiner

Cc: Victoria Marquis / Kurt Shanahan
Kurt Moser
BER Secretary
Tatiana Davila-DEQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY PROTECT THE CLEARWATER REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3473	Cause No. BER 2023-03 OC **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

INTRODUCTION

This matter comes before the Board of Environmental Review (BER) at the request of Protect the Clearwater (Clearwater) who objects to the issuance of dryland opencut mining permit #3473 (Permit) by the Department of Environmental Quality (DEQ) to LHC, Inc. (LHC). On May 26, 2023, Clearwater filed its Notice of Appeal and Request for Hearing in this matter in front of BER. DEQ Ex. I. On June 9, 2023, BER assigned this matter to this Hearing Examiner. Prehearing Order at 1. On December 1, 2023, Clearwater and DEQ each filed a Motion for Summary Judgment. On December 22, 2023, Clearwater and DEQ each filed a response. On January 12, 2024, Clearwater and DEQ each filed a reply. LHC has not participated in the summary judgment briefing.

Clearwater argues that DEQ erred in issuing LHC's Permit because the dryland permit requirements were not met; water will in some way be affected, the dwelling unit threshold was never checked, and the required public notice was not made. Clearwater Motion at 3. DEQ argues it did not err by issuing the Permit as all dryland permit requirements were met. DEQ Motion at 3. The question in front of this Hearing Examiner is whether DEQ erred by issuing LHC's dryland Permit.

For the reasons set forth below, Clearwater's Motion for Summary Judgment should be denied and DEQ's Motion for Summary Judgment should be granted.

LEGAL STANDARDS

Summary judgment procedures may be used in contested cases under MAPA when the criteria of Mont. R. Civ. P. 56 are satisfied. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c). The moving party has the burden of establishing that there is no genuine issue of material fact. *Sprunk v. First Bank Sys.*, 252 Mont. 463, 465, 830 P.2d 130, 104 (1992). If the movant meets the initial burden, the party opposing summary judgment must present substantial evidence raising a genuine issue of material fact precluding summary judgment or that the moving party is nonetheless not entitled to judgment as a matter of law. *Speer v. State*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016.

The party challenging DEQ's decision to approve the permit bears the burden of presenting the evidence necessary to establish, by a preponderance of the evidence, 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.

FINDINGS OF UNDISPUTED FACT

There is no genuine dispute as to the following facts:

1. On March 27, 2023, DEQ received LHC's application for a Dryland Opencut Mining Permit to operate a gravel pit south of Salmon Lake. DEQ Ex. A at 002, 004.

2. LHC published notice of the proposed mining Permit in the Missoulian newspaper (Clearwater Brief at 6) and mailed notice to owners of record within one half mile of the proposed Permit boundary (DEQ Ex. D at 67:1-3).

3. LHC observed the site (DEQ Ex. D at 72:1-14) and dug test pits 14 feet deep (DEQ Ex. D at 51:22-25).

4. In its Permit application, LHC certified that the proposed mining would not affect ground or surface water, that it gave public notice of the proposed mining, and that there were not 10 or more occupied dwelling units within one half of a mile of the proposed Permit boundary. DEQ Ex. A at 4.

5. On March 28, 2023, DEQ determined LHC's Permit application was complete and began its acceptability review. DEQ Ex. B.

6. Public comment on the proposed Permit was accepted. DEQ Ex. G.

7. On April 10, 2023, DEQ notified LHC of several deficiencies in its Permit application, including requesting a cover letter from LHC verifying that fewer than 10 occupied dwelling units were within one half of a mile of the proposed Permit boundary. DEQ Ex. C at 2.

8. On April 13, 2023, LHC updated its Permit application to address the deficiencies. DEQ Ex. D at 30:2-9; DEQ Ex. O.

9. On April 27, 2023, DEQ issued an approval of LHC's Permit. DEQ Ex. A at 001.

10. Also on April 27, 2023, DEQ issued an environmental assessment (EA) of the proposed Permit area. DEQ Ex. E.

CONCLUSIONS OF LAW

1. Clearwater and DEQ each submitted motions for summary judgment and LHC did not respond to either motion.

2. There are no genuine disputed material facts.

3. Pursuant to § 82-4-432(1)(b) and (c), Dryland Opencut Mining Permits apply to proposed mining operations that do not:

> (i) affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities; or
>
> (ii) have 10 or more occupied dwelling units within one-half mile of the permit boundary of the operation.

4. Upon receiving an Opencut Mining Permit application, DEQ shall evaluate the permit application to determine if the requirements of the Opencut Mining Act are satisfied. Admin. R. Mont. 17.24.212.

Affect on Groundwater

5. As the party with the ultimate burden of proof, Clearwater must prove that DEQ erred in granting the Permit because it would affect surface or groundwater.

6. Pursuant to § 82-4-432(1)(b)(i), to qualify for a dryland permit, the proposed opencut mining operation cannot affect ground water or surface water.

7. The definition of "affect" is not found in Title 82 or the associated administrative rules and the parties disagree on how the term should be defined.

8. Montana's courts interpret statutes to "ascertain and carry out the Legislature's intent." *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 14, 397 Mont. 328, 417 P.3d 1100. The legislature's intent is determined by first looking at the plain language of the statute at issue. *Id*. If the meaning of a statute cannot be determined by the plain language alone, the court "resort[s] to other canons of statutory construction." *Id*.

9. The common definition of "affect" is to "to influence in some way." Black's Law Dictionary (9th ed. 2009) at 65.

10. The plain language of the statute is clear. To qualify for a dryland permit, the proposed opencut mining operation cannot influence ground water or surface water.

11. DEQ was required to evaluate the Permit application to determine if the proposed mine will influence ground water or surface water. Admin. R. Mont. 17.24.212; §§ 82-4-432(1)(b)(i) and (14).

12. The first requirement is that DEQ evaluate the Permit application.

13. Field verification is not required under the statute, but DEQ appeared to complete some field verification when it visited the proposed mining site and took photos from a drone. DEQ Ex. D at 34:19-35:1, 50:6-7.

14. In addition, DEQ reviewed GWIC well logs, the landowner consultation form, soil test pit data, zoning compliance form, reclamation bond spreadsheet, mapped surface waters and wetlands, and verified the Permit boundary was at least fifty feet away from the high-water mark of surface waters pursuant to ARM 17.24.227(1)(b). DEQ Ex. D at 29:17-20, 30:18-25, 31:1-2, 33:3-25, 34:1-3, 34:5-9, 34:19-25, 35:1, 40:20-25, 41:1-7, 45:19-25, 46:1-3, 46:12-21, 49:3-5, 49:24-25, 50:1-7.

15. DEQ reviewed the required data and, additionally, performed a field verification. Therefore, DEQ did evaluate the Permit application.

16. The second requirement is that DEQ determine if the proposed mine will influence ground water or surface water.

17. DEQ conducted an EA, even though it was not required to do so under the Opencut Mining Act.

18. The EA states:

> Petroleum products would likely be present onsite as fuel. Lubricant, asphalt production, etc. The Opencut Act does not directly have any control over these products or how they are stored, but the operator would be subject to all federal, state, etc. laws regarding storage, water quality, etc.
>
> ***
>
> Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface.

DEQ Ex. E at 8 (emphasis added).

19. The EA notes that DEQ does not have control over petroleum products, but that LHC is still subject to federal law regarding water quality. DEQ Ex. E at 8.

20. Affects are based on the proposed mining operation. Mont. Code Ann. § 82-4-432(1)(b)(i).

21. An anticipated violation of federal law by allowing petroleum products to infiltrate into the subsurface is not a proposed mining action and, therefore, cannot amount to affecting ground water.

22. Clearwater has not demonstrated an affect to groundwater.

23. The EA also notes "surface water that may leave the site during a heavy storm could carry sediment" but "the depression caused by mining activities would likely cause runoff to drain internally into the site." DEQ Ex. E at 8 (emphasis added).

24. Clearwater hasn't demonstrated that any runoff would leave the mining site, nor that a small amount of runoff carrying sediment that leaves the mining site will affect surface water.

25. In addition, the EA only discusses fugitive dust or dust of any kind in regards to air quality, and does not draw or support any conclusions with regard to dust landing on or affecting surface water. DEQ Ex. E at 9.

26. Lastly, The EA states: "any impacts to the surface water would be short-term and would be negligible as a result of the proposed action." DEQ Ex. E at 9.

27. Synonyms of "negligible" are "beneath notice," "de minimus," "imperceptible," "inconsequential," "insignificant," and "irrelevant". Burton's Legal Thesaurus, 6th Edition.

28. Negligible impacts would not affect surface water.

29. The EA does not anticipate an impact on surface water; in fact, it does the opposite. The EA acknowledges the possibility that there may not be any impacts to the surface water, but if there are any impacts, they would not affect the surface water.

30. Clearwater has not demonstrated an affect to surface water.

31. As the party with the ultimate burden of proof, Clearwater fails to meet its burden to show that DEQ erred in granting the Permit based on the Permit affecting groundwater or surface water.

Notice

32. As the party with the ultimate burden of proof, Clearwater must prove that DEQ erred in granting the permit because proper notice was not given.

33. Pursuant to § 82-4-432(14)(a)(x), to provide public notice, the applicant shall publish notice at least twice in a newspaper of general circulation in the locality of the proposed opencut operation.

34. Notice was published in the Missoulian, a newspaper distributed throughout Missoula County, Montana. DEQ Response Brief at 8.

35. The Hearing Examiner takes judicial notice that Seeley Lake, Elbow Lake, and Clearwater are within Missoula County. *See* Montana Cadastral, accessed 2/22/24 at svc.mt.gov/msl/mtcadastral.

36. The statute does not require notice be published in the closest newspaper to the project. The statute requires notice be published in a newspaper of general circulation in the locality; which LHC did.

37. In addition, the purpose of the published notice is to ensure the public is aware of the proposed Permit and allowed to participate in the Permit review process. *See Johnston v. Hardin*, 55 Mont. 574, 580 (1919).

38. All but one of the petitioners participated in the public comment. Clearwater Response Brief at 4.

39. Petitioners were aware of the Permit, despite the published noticed not being in their desired newspaper.

40. Clearwater has failed to present evidence necessary to establish that notice was insufficient.

41. As the party with the ultimate burden of proof, Clearwater fails to meet its burden to show that DEQ erred in granting the permit for a lack of notice.

10 Occupied Dwellings

42. As the party with the ultimate burden of proof, Clearwater must prove that DEQ erred in granting the permit because more than ten occupied dwellings were within one half of a mile of the proposed Permit boundary.

43. Pursuant to § 82-4-432(14)(a)(ix), the applicant must certify in its Permit application that there are fewer than ten occupied dwelling units within one half of a mile of the proposed Permit boundary.

44. LHC included in its Permit application a certification that fewer than ten occupied dwelling units were within one half of a mile of the Permit boundary, meeting the statutory requirement. § 82-4-422. DEQ Ex. A at 004.

45. Under Mont. Code Ann. § 82-4-422(1)(d), DEQ has discretion to make investigations or inspections that are considered necessary to ensure compliance with any provision of the Opencut Mining Act.

46. Just because § 82-4-432(14)(a)(ix) requires a party to certify information as correct, does not mean DEQ cannot initiate an investigation under § 82-4-422(1)(d) if it considers it necessary.

47. DEQ exercised this discretion when it issued the deficiency letter requesting LHC submit a cover letter confirming its findings and clearly stating the Permit met the dryland permit requirements. DEQ Exhibit C, page 2.

48. LHC then submitted a cover letter confirming its findings. DEQ Exhibit O.

49. Pursuant to §§ 82-4-432(1)(b) and (c), a dryland opencut mining permit cannot have ten or more occupied dwelling units within one half of a mile of the proposed Permit boundary.

50. Pursuant to § 82-4-403(7), an occupied dwelling unit is a structure with permanent water and sewer facilities that is used as a home, residence, or sleeping place by at least one person who maintains a household that is lived in as a primary residence.

51. The statute does not require ownership of the property. Therefore, leasehold interests adjacent to the proposed mining boundary may contain occupied dwelling units.

52. LHC determined occupied dwelling units based on land ownership adjacent to the proposed mining boundary area. DEQ Ex. B, *Hrg. Trans.*, 76:20-77:6.

53. DEQ relied on LHC's certification and verification that there were not ten or more occupied dwelling units, however those were determined, within one half of a mile of the proposed mining boundary.

54. Clearwater presented one leaseholder within one half of a mile of the proposed mining boundary who uses his property as a primary residence. DEQ Ex. B, *Hrg. Trans.*, 150:23-151:1.

55. Even if LHC did not consider occupied dwelling units on leaseholds, Clearwater has not presented any evidence that LHC's lack of consideration caused its certification to be incorrect.

56. As the party with the ultimate burden of proof, Clearwater fails to meet its burden to show that DEQ erred in granting the permit because there were more than 10 occupied dwelling units within one half of a mile of the Permit boundary.

RECOMMENDED DECISION

Clearwater's Motion for Summary Judgment should be DENIED.

DEQ's Motion for Summary Judgment should be GRANTED.

Clearwater's Motion in Limine should be DENIED as moot.

DATED this 8th day of March 2024.

/s/ Terisa Oomens
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Docket No: BER 2023-03 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY PROTECT THE CLEARWATER REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3473	Cause No. BER 2023-03 OC **PETITIONERS' EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Comes now, Petitioners, and submit to the Board of Environmental Review ("Board") their Exceptions to the Hearing Examiner's March 8, 2024 Proposed Findings of Fact and Conclusions of Law.

INTRODUCTION

This case arises from a challenge to a new opencut mining permit issued on public land immediately adjacent to the Clearwater River, Elbow Lake, and the Blackfoot-Clearwater Game

Range. The appellants own homes immediately adjacent to the mine and draw their drinking water from shallow groundwater wells in close proximity. When appellants were first notified of the mine, they hired a hydro-geologist to research the application, DEQ's analysis and the mine site. This independent study verified what they feared: the rushed and truncated process produced a dearth of evidence to support the "high and dry" categorization which allowed this mine to move forward quickly on greased skids.

Unfortunately, this problem was exacerbated by the Hearing Examiner on appeal. The Hearing Examiner rendered her final decision in this matter without taking any evidence, or hearing from any witnesses. Instead, she found that the basic facts of the permit application itself were sufficient to support a finding that DEQ is entitled to summary judgment as to the validity of the permit it issued. As a result, substantial witness testimony of DEQ employees and hydrologic experts was not considered, even though it was presented to the Hearing Examiner via transcripts from a District Court hearing on a preliminary injunction. The Hearing Examiner relied on that District Court testimony when it supported her conclusions and denied its existence when it did not. Appellants share that some of that testimony with the Board now, as it highlights the errors in the findings and conclusions made.

Generally, the Findings and Conclusions lack factual support and legal analysis. However, of greater concern is that the Hearing Examiner disregarded sworn witness testimony which undermines her decision. Had she reviewed what DEQ's staff actually said about their own work and what outside scientist perceived about the reliance on the same, all of which was in front of her on the cross motions for summary judgment, this case would have a different posture. Thus, these exceptions provide the Board the opportunity to correct these errors before they are reversed by the Missoula County District Court. More specifically, the Board should

reverse the Hearing Examiner's Findings and Conclusions and based on the following undisputed facts, grant summary judgment in favor of Protect the Clearwater.

ARGUMENT

1. Exceptions to Findings of Fact

Overall, the Hearing Examiner's recitation of facts is cursory and incomplete, and fails to acknowledge or evaluate significant information in the record before her, as set forth above. The Hearing Examiner ignored substantial competent evidence that existed in the record before her showing that neither the applicant nor DEQ had shown that the gravel mining operation would not have an affect on ground and surface water, and therefore that a "dryland" permit was justified. Below, Petitioners highlight specific facts in the record that rebut or address issues in specific findings.

Findings of Fact #s 3 and 4.

As part of the application process, LHC certified that there would be no impact on surface or groundwater. *See*, Ex. A, DEQ 004. In its investigation LHC did not conduct any groundwater studies. *See,* Ex. B[1], *Hrg. Trans.* 71:19-73:22. Instead, its manager Frank Tabish visited the site and did not observe surface or groundwater and relied exclusively on analysis from the State. *Id*. He did nothing to analyze whether the mine would "affect groundwater" before certifying the same. *Id.*

LHC did dig a few test pits to a depth of 14 feet but admitted that mining would be 20 feet deep. *See,* Ex. B, *Hrg. Trans.* 51:22-52:15. No test pits were dug to the actual depth of the

[1] Excerpts from the Preliminary Injunction hearing before the District Court were in front of the Hearing Examiner, and therefore proper evidence for the BER to review on summary judgment.

mining. *Id.* The purpose of the test pits is to determine how much soil will be salvaged for reclamation, not to determine the affect on water. *Id.*, *Hrg. Trans.* 55:22-56:7.

Findings of Fact # 8.

The undisputed evidence establishes that DEQ did not verify if/how the Applicant met the Occupied Dwelling Unit notification requirements in this case. No testimony or exhibit, submitted by Defendant DEQ or LHC indicates the number of occupied dwellings within 1/2 mile of the proposed gravel pit. Order on Preliminary Injunction, FOF 32, 1st Judicial Dist. (Order dtd. 10/8/23). Thus, there is no evidence which supports Finding of Fact 8. In addition, LHC and DEQ both admit that they did not count lessees of state trust lands with homes and drinking water wells within the immediate area. *Id.* FOF 37. Accordingly, there was no factual basis for LHC to certify that the number of occupied dwellings within 1/2 mile of the proposed gravel pit was fewer than 10 and DEQ admits that it relies wholly on the applicant's certification and does not independently verify this information, in contradiction of its statutory mandates. *Id.* FOF 45.

The Hearing Examiner's Order provides no analysis which supports the position that DEQ may, as a matter of law, rely wholly on the unverified promises of an applicant. This constitutes reversible error.

Findings of Fact # 9.

The record before the hearing examiner shows that DEQ had insufficient information before it to approve LHC's permit. The permit application was reviewed by DEQ employee Ruby Hopkins. *See*, Ex. E, *Hopkins Depo.* 8:15-21.

In her evaluation, Ms. Hopkins relied on information from the Groundwater Information

Center (GWIC) database. *See,* Ex. B, *Hr. Trans.* 46:12-21. This information includes data on when a well was dug, the types of soils encountered and a statement of water level. *See*, Ex. F, *Krogstad Depo.* 8:6-18. DEQ admits that the data is "not necessarily accurate." *Id.*, *Krogstad Depo.* 8:6-11. The GWIC data also oftentimes does not represent when groundwater is first intersected, but rather when there is a sufficient source for the need. *Id.*, *Krogstad Depo.* 17:22-18:23. The GWIC data is also unreliable because the depth to water depends on the time of year the well was drilled. *Id.*, *Krogstad Depo.* at 16:9-17:2. Similarly, well logs, even with their inaccuracies, present only a snapshot in time. Said another way, a well log does not establish the seasonal high fluctuations of groundwater or changes in groundwater over time because it is only relevant to the date and time in which it was drilled. David Donohue Testimony, TR 101:17-19. Furthermore, none of the well logs in the GWIC are within the permit areas. *Id.*, *Krogstad Depo.* 12:11-16**.**

Ms. Hopkins also visited the site and took and reviewed aerial photographs via a drone. *See*, Ex. E, *Hopkins Depo.* 51:24-52:7. Yet, no one from DEQ or any other state agency field verified the location of the wells, or the static water level in the wells. *See*, Ex. F, *Krogstad Depo.* 18:24-20:7. Field verification is important to determine the groundwater gradient, flow patterns, recharge, and actual location of groundwater. *Id.*, *Krogstad Depo.* 20:12-22:12. DEQ also did not perform any hydrologic evaluations or contract with anyone to perform a hydrologic or hydrogeologic assessment. *See*, Ex. B., *Hrg. Trans.* 51:12-17.

At the hearing, PTC called David Donahue, a professional hydrogeologist to opine about the lack of data. He ultimately concluded that neither DEQ nor LHC's actions, and their reliance on offsite unverified data, was sufficient to "certify" that there would be no impact to water. *Hrg. Trans.* 100:2-6. With respect to the wells, LHC and DEQ looked at 25 surrounding wells. The

data for those wells was created by the individuals who drilled the wells and entered into the Groundwater Information Center (GWIC). That well data ostensibly includes where water is first encountered, but not always. That information is not verified at the time of entry, and neither DEQ nor LHC field verified it here. *Hrg. Trans.* 102: 2-6. There is a significant amount of uncertainty in the data that goes into the GWIC database. *Hrg. Trans.*101:11-22.

More significantly, the well log data indicates that this area is typified by significant heterogeneity in aquifer characteristics, meaning there is significant variation in the depth and location of groundwater resources near the mine. So, relying on unverified well logs outside the project site is inherently unreliable. *Hrg. Trans.*112: 16-21. This unreliability was further highlighted by the diversity of information in the well logs. There was significant variability between surface elevations, depth to groundwater, static water level within the wells located from GWIC database and it has not been field verified, and neither have the locations of the wells. Accordingly, for LHC to be able to "certify" that groundwater would not be affected by the mining operation, it would need to conduct on-site evaluations and not simply rely on well log data. *Hrg. Trans.*117:23-118:5.

Further, without knowing the depth to groundwater, LHC's project created substantial environmental risks. Namely, the diesel, gasoline and heavy hydrocarbon fuels being used by different vehicles and as a part of the mining and production processes could contaminate the groundwater. Mr. Donohue testified that the hydrocarbons used in asphalt production could similarly negatively impact groundwater. DEQ did not look at the water quality impacts of these chemicals infiltrating the groundwater. *Hrg. Trans.*105: 7-106:9. But if this water carries the toxic hydrocarbon fuels or materials into the groundwater, which generally could flow towards nearby domestic wells, *Hrg. Trans.* 106:10-18, and potentially towards the Clearwater River and Elbow Lake. *Hrg. Trans.* 119:3-6.

Based on the foregoing, Mr. Donahue's ultimate opinion was that a Dryland permit was inappropriate for this site because there is no reliable evidence in the record which supports the scientific conclusion that the Clearwater mine will not have some "[a]ffect" on ground or surface water – i.e. there would *not* be no affect. *Hrg. Trans*. 117:5-13. And no professional hydrologist or hydrogeologist would rely on data that was as uncertain as that relied on by LHC and DEQ. *Hrg. Trans* 117:14-20. He further concluded that DEQ did not take any relevant steps to determine the impact of the mine on ground or surface water in any scientifically defensible manner. *Hrg. Trans.* 118: 6-11.

Findings of Fact # 10.

DEQ described the project details in its EA, Ex. A, DEQ 125-54, as follows:

a. The Applicant proposes to mine, screen, crush, stockpile, and transport material from a 21.2-acre site located approximately 3.25 north of the Clearwater Junction, MT. *Id.*, DEQ 128.

b. Typical opencut excavating/hauling equipment includes a backhoe, bulldozer, dump/haul truck, excavator, loader, scraper, and skidsteer. Typical opencut processing equipment includes an asphalt plant, crusher, pug mill, screen, and conveyor. Processing equipment may be stationary or mobile (moves with highwall as mining progresses across the site. Equipment could also be moved on and off the site as needed by the Applicant. *Id.*, DEQ 129.

c. As this is a Dryland site, it is unknown whether water would be used on site or what the source of water would be. *Id.*, DEQ 129.

d. The site is situated on a stream terrace that is derived from alluvium and an irreversible and irretrievable removal of opencut materials from the site would occur. *Id.*, DEQ 131.

e. Petroleum products would likely be present onsite as fuel, lubricant, asphalt production, etc. The Opencut Act does not directly have any control over these products or how they are stored. *Id.*, Thus, the record is devoid of this information. DEQ 132.

f. Although Dryland Opencut applications do not specify site topography or drainage patterns during or after mining, the depression caused by mining activities **would likely cause runoff to drain internally into the site. Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface**. *Id.* (Emphasis added).

g. Fugitive dust from point source mining activities could be generated from mining, conveying, screening, and crushing. Fugitive dust from non-point source mining activities could be generated from the pit floor, soil stockpiles, equipment used onsite and gravel roads used for access. Dust consisting of particulate matter (PM), and particulate matter with an aerodynamic diameter of less than 10 microns (PM_{10}), and particulate matter with an aerodynamic diameter of less than 2.5 microns ($PM_{2.5}$) could be generated from mining of sand and gravel as well as crushing and screening of material. *Id.*, DEQ 133. This matter travels through the air and settles on Elbow Lake, and the Clearwater River. *See,* Ex. D, FOFCOL, Findings of Fact, ¶ 83.

h. There would be a temporary alteration of aesthetics while mining is underway. More specifically, in relation to water quality, DEQ states that "[d]uring the beginning stages of mining surface water may leave the site during a heavy storm event could carry sediment...." *See,* Ex. A, DEQ 132.

i. Additionally, DEQ found that "[i]mpacts to water quality would be short term and would be negligible. . . ." *Id..*, DEQ 133.

2. <u>Conclusions of Law</u>

Affect on Groundwater

Petitioners will first identify specific Conclusions of Law they dispute, and then more generally discuss the legal issues here.

Conclusion of Law # 1.

The statement that "LHC did not respond to either motion" is incorrect. It filed a Combined Response Brief to Motions for Summary Judgment on December 22, 2023. Included with LHC's Brief were affidavits of LHC employees. Petitioners filed a Reply Brief specifically addressing LHC's brief on December 01, 2023. The fact that the Hearing Examiner apparently did not know of or review these briefs of the parties raises the question of whether she even reviewed the whole record and pleadings here.

Conclusion of Law #5.

The question of burden of proof in this matter is much more nuanced than the Hearing Examiner has set forth.

In the recent decision in *MEIC v. Westmoreland,* 2023 MT 224, 414 Mont. 80, 2023 Mont. LEXIS 1177, the Court addressed this very issue.

> Thus, Conservation Groups were required to show before the Board **that DEQ's decision violated the law,** by methods including evidence or argument sufficient to show that DEQ's **conclusion**—**that Westmoreland's application had produced enough evidence to bear its burden of proving that the proposal was designed to prevent material damage**—was in **error.** *See MEIC 2005*, ¶ 16.

Id., ¶ 21 (Emphasis added).

Here, likewise, it was Petitioners' burden to show that DEQ's decision to approve the Permit violated the law – by showing that DEQ's determination that *LHC's application had produced enough evidence* to bear its burden to show that the mine would not "affect" ground or surface water was in error. As discussed in more detail below, Petitioners established that neither

LHC nor DEQ had sufficient information to demonstrate that the gravel mine would not affect ground or surface water. It was *not* Petitioners' responsibility to show that the mine *would* affect ground or surface water.

Conclusions of Law #s 9, 10, and 11.

The Hearing Examiner appears to agree with the District Court (District Court FOF/COL ¶¶ 14 and 15) that "affect" means "to influence" ground or surface water and has not adopted the definition pushed by DEQ that "affect" means to "to intersect." To that end, Frank Tabish LHC's project manager testified that that he relied "exclusively on analysis from the EAs" to determine that the property qualified for a dryland permit, and that there was no affect on surface or ground water. He further admitted that neither he, nor LHC did "anything" to analyze whether the mine would "affect" groundwater before he certified the same. Thus, LHC relied on the State without confirming its conclusions with a methodology. FOF 53.

Conclusions of Law # 13.

Petitioners dispute the Hearing Examiner's assertion that "field verification is not required", set forth seemingly to show that here, DEQ's site inspection went beyond the requirements of the Opencut Act. While the Act does not specifically require an inspection or field verification, it does require rigorous overview of the application process by DEQ:

> **82-4-422. Powers, duties, and functions.** (1) The department **has the** powers, **duties**, and functions to:
>
> (a) issue permits when, on the basis of the information set forth in the application and an evaluation of the proposed opencut operations, the department finds that the requirements of this part and rules adopted to implement this part will be observed;
>
> . . . .
>
> (d) make investigations or inspections that are considered necessary **to ensure compliance with any provision of this part**; and
>
> (e) enforce and administer the provisions of this part and issue orders necessary to implement the provisions of this part.

(Emphasis added.)

Under this provision, DEQ has a duty to verify that the application is complete and meets the requirements of the law, something the agency did not do here, as will be discussed in more detail below.

Conclusion of Law # 14.

The Hearing Examiner's statements in Conclusion of Law # 14 are taken entirely from DEQ's witness Ruby Hopkins' testimony at the District Court hearing. Ms. Hopkins acknowledged she is not a trained hydrologist. *Hrg. Trans* 46:4-6. She admitted that the best indicator of depth to groundwater at the site would be a well on the site. *Hrg. Trans* 47: 3-6. DEQ did not perform any independent hydrologic evaluation of the depth to groundwater or whether there would be any intersection with the ground or surface water. *Hrg. Trans* 51:12-17; 54:5-8.

LHC's witness Frank Tabish testified that he is not a hydrologist. *Hrg. Trans* 70: 11-12. LHC did not conduct any hydrological studies before certifying that the mine would not affect ground or surface water. *Hrg. Trans* 71:19-25.

At the hearing, PTC called David Donahue, a professional hydrogeologist to opine about the lack of data. He ultimately concluded that neither DEQ nor LHC's actions, and their reliance on offsite unverified data, was sufficient to "certify" that there would be no impact to water. *Hrg. Trans.* 100:2-6. With respect to the wells, LHC and DEQ looked at 25 surrounding wells. The data for those wells was created by the individuals who drilled the wells and entered into the Groundwater Information Center (GWIC). That well data ostensibly includes where water is first encountered. But that information is not verified at the time of entry, and neither DEQ nor LHC

field verified it here. *Hrg. Trans.* 102: 2-6. There is a significant amount of uncertainty in the data that goes into the GWIC database. *Hrg. Trans.*101:11-22.

More significantly, the well log data indicates that this area is typified by significant heterogeneity in aquifer characteristics, meaning there is significant variation in the depth and location of groundwater resources near the mine. So, relying on unverified well logs outside the project site is inherently unreliable. *Hrg. Trans.*112: 16-21. This unreliability was further highlighted by the diversity of information in the well logs. There was significant variability between surface elevations, depth to groundwater, static water level within the wells located from GWIC database and it has not been field verified, and neither have the locations of the wells.. Accordingly, for LHC to be able to "certify" that groundwater would not be affected by the mining operation, it would need to conduct on-site evaluations and not simply rely on well log data. *Hrg. Trans.*117:23-118:5.

Further, without knowing the depth to groundwater, LHC's project created substantial risks to groundwater. Namely, the diesel, gasoline and heavy hydrocarbon fuels being used by different vehicles and as a part of the mining and production processes could contaminate the groundwater. Mr. Donohue testified that the hydrocarbons used in asphalt production could similarly negatively impact groundwater. DEQ did not look at the water quality impacts of these chemicals infiltrating the groundwater. *Hrg. Trans.*105: 7-106:9. But if this water carries the toxic hydrocarbon fuels or materials into the groundwater, which generally could flow towards nearby domestic wells, *Hrg. Trans.* 106:10-18, and potentially towards the Clearwater River and Elbow Lake. *Hrg. Trans.* 119:3-6.

Based on the foregoing, Mr. Donahue's ultimate opinion was that a Dryland permit was inappropriate for this site because there is no reliable evidence in the record which supports the scientific conclusion that the Clearwater mine will not have some "[a]ffect" on ground or surface

water – i.e. there would *not* be no affect. *Hrg. Trans*. 117:5-13. And no professional hydrologist or hydrogeologist would rely on data that was as uncertain as that relied on by LHC and DEQ. *Hrg. Trans.* 117:14-20. He further concluded that DEQ did not take any relevant steps to determine the impact of the mine on ground or surface water in any scientifically defensible manner. *Hrg. Trans.* 118: 6-11.

Conclusion of Law 15.

As noted above, the evidence shows that while DEQ's Ruby Hopkins visited the site, that visit did not constitute a "field verification", not did DEQ "evaluate" the permit. Her actions did not "ensure compliance", in that they did not ensure there would be no impact on ground or surface water.

Conclusion of Law 17. The hearing examiner's assertion that even though DEQ conducted an EA, it was not required to do so "under the Opencut Mining Act" is a serious misstatement and misunderstanding of the law. Yes, the Opencut Act, like other permitting acts, does not explicitly require MEPA review. That is because MEPA review applies to all state permitting actions. *See* A.R.M. 17.4.603 (1); A.R.M. 17.4.607. In particular, A.R.M. 17.4.607 (5) lists "categorical exclusions", actions not subject to MEPA. The list does not include "permits under the Opencut Mining Act."

Conclusions of Law 18-21. It appears that the hearing examiner in this section of the opinion is reacting to Mr. Donohue's testimony about the possibility of petroleum products from the mining operation and related equipment infiltrating into the groundwater. *See Hrg. Trans.* 105: 7-106:9; 106:10-18; and119:3-6. The hearing examiner states that DEQ claims in the EA that it "does not have control over petroleum products" (COL 19) and that "affects" must be based on mining operations (COL 20). With that, she concludes that "an anticipated violation of federal law by allowing petroleum products to infiltrate into the subsurface is not a proposed

mining action and, therefore, cannot amount to affecting ground water." (COL 21) Putting aside the fact, as noted above, that there were several indicia in the evidence that this project may "affect" ground or surface water, the hearing examiner's conclusion ignores the requirement of the Act.

The Act does not differentiate between impacts that occur from a federally regulated product, and those from a non-regulated contaminant. Rather the Act simply notes that there cannot be an "impact". So to the extent there will be petroleum products or other chemicals likely infiltrating the ground and/or surface water there will be an "impact." These impacts are also due to the "mining"; but for the mine and the heavy equipment being operated as part of the mining operation, these impacts would not occur. The definition of an "Opencut Operation" further belies the Hearing Officer's conclusion. An Opencut operation means activities including, mine site preparate, removing overburden, mining materials, *processing of* material, and transporting materials. Section 82-4-403(8), MCA. So to the extent the contamination arises from any of these activities or those "conducted for the primary purpose of sale or utilization of materials" constitutes a mining activity. *Id.* Thus, the Hearing Officer's conclusion # 20 is unfounded.

Moreover, the Hearing Officer ignored the basic requirement of the Act: LHC must show, and DEQ must verify, that there will be *no* affect on ground or surface water. As District Judge Larson noted, the evidence showed that neither LHC nor DEQ "know the answer" to the question of whether there would be an affect. District Court FOF/COL, ¶ COL 15.

Conclusion of Law # 22. The hearing examiner here concludes that Clearwater "has not demonstrated an affect to groundwater." Again, the hearing examiner completely misconstrues the proper burden here. Clearwater does not need to demonstrate that there *will* be an affect.

Rather, Clearwater needs to demonstrate that LHC and DEQ did not demonstrate that there *will not* be an effect.

Conclusions of Law #s 23 and 24. Putting aside the improper shifting of the burden to Clearwater, the hearing examiner's conclusions here are belied by the evidence in the record set forth above, in particular the testimony of David Donohue, Clearwater's expert.

Conclusions of Law # 25. While the EA does not "support any conclusion with regard to dust landing on or affecting surface water", in direct testimony at the District Court hearing, Jon Watson testified about observing dust landing not only on his home, but also on Elbow Lake. *Hrg. Trans.*, 146:16-17.

Conclusions of Law #s 26-29. The hearing examiner's conclusion that a negligible affect is not an affect is belied by the plain meaning of the definition of "affect" she previously adopted, to "influence in some way." In that light, the statement that "the EA acknowledge that there may not be any impacts to the surface water, but if there are any impacts, they would not affect the surface water" is nonsensical.

Conclusions of Law #s 30-31. Again, the hearing examiner misinterprets the standard of review. PTC does not need to demonstrate that there will be an affect to surface or groundwater. Rather, they need to show that DEQ's finding that there would not be an affect was not supported by facts.

The Montana Supreme Court addressed the appropriate standard of review in *Mont. Envt'l Info. Ctr. v. Westmoreland Rosebud Mining LLC*, 2023 MT 224, 414 Mont. 80, ___ P.3d ___. There, the court explained that under Part 6 of MAPA, the challenging party bore the burden to show that DEQ's decision "violated the law, by methods including evidence or argument sufficient to show that DEQ's conclusion . . . was in error." *Id.*, ¶ 21; *MEIC v.* DEQ, 2005 MT 96, 326 Mont. 502, 112 P.3d 964 (*MEIC 2005*). In other words, whether the decision –

based on the record before the permit was issued – was unlawful or erroneous. So, under *Westmoreland*, the burden is on the party appealing the permit to establish that DEQ acted unlawfully. *Westmoreland,* ¶ 19, *MEIC 2005*, ¶ 14. However, that burden is only to demonstrate that an application did *not* have enough information to satisfy the statutory requirements. *Westmoreland*, ¶ 21.

Additional Argument as to the Legality of DEQ's Conclusion that the Mine Would not Affect Surface or Ground water.

1. *The Opencut Act requires DEQ to independently verify that the information submitted with permit application is correct and meets the Applicant's burden of proof.*

Throughout this proceeding, DEQ has hidden behind the law's requirement that the applicant "certify" the facts in the application and ignores its own duties under the Act. DEQ says practically nothing about the plain language of § 82-4-422(1)(d), MCA, which commands that DEQ fulfill its "duties" to make investigations or inspections that are necessary to "ensure compliance" the Opencut Act. This is not discretionary as suggested by DEQ and apparently endorsed by the Hearing Examiner. Admin. R. Mont. 17.24.212(1)(2023) provides that "DEQ **shall evaluate the application to determine if the requirements of the [Opencut Act] and [the implementing regulations] are satisfied**." (Emphasis added.) And the only way an application is acceptable is if materials and information provided to the Department "**demonstrate that the proposed opencut operation complies with the requirements of [the Opencut Act].**" *Id.*, 17.24.212(4, emphasis added. The only way to give effect to these regulations is to require DEQ than do more than simply sign off on an application.

Quite plainly, the Opencut Act demands that DEQ *only* "issue permits *when*, on the basis of the information set forth in the application *and* an evaluation of the proposed opencut operations, *the department finds* that the requirements of this part and rules adopted to

implement this part will be observed." § 82-4-422(1)(a), MCA (emphasis added). As if speaking to the Department here, the Legislature further instructed DEQ that it had the affirmative duty to investigate facts and apply sound scientific reasoning. This level of inquiry is necessary to give meaning to the Opencut Act's expressed purpose.

Although DEQ wants out from under this obligation due its lack of human resources, funding, or both, those issues are not before the Board. If DEQ does not have the resources to adequately review permit applications, then those permit applications must be denied.

2. *A broad definition of "affect" is consistent with the plain language of the Opencut Act.*

DEQ's attention to HB 599, and the hearing examiner's adoption of its argument, is a red herring. While the law was amended in 2021, no amendments were made to the policy and purpose of the law. The Opencut Act states the Legislature's intent in passing the law:

> (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Opencut Mining Act. **It is the legislature's intent** that the requirements of this part provide adequate remedies for the **protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources**.
>
> (2) **it is the purpose of this part**:
>
> (a) **to preserve natural resources**;
> (b) to aid in the protection of wildlife **and aquatic resources**;
> € to safeguard and reclaim through effective means and methods all agricultural, recreational, home, and industrial sites subjected to or that may be affected by opencut operations;
> (d) to protect and perpetuate the taxable value of property through reclamatio€(e) to protect scenic, scientific, historic, or other unique areas; and
> (f) **to promote the health, safety, and general welfare of the people of this state.**

(Emphasis added)

Bringing DEQ's error into sharper focus, the statute does *not* mention DEQ's staffing shortages. In contrast, the purpose statement focuses on preserving and protecting the environment. As DEQ notes, "Montana's courts interpret statutes to 'ascertain and carry out the

Legislature's intent.'" *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Publ. Lands*, 2018 MT 120, ¶ 14, 391 Mont. 328, 417 P.3d 1100. The Legislature's intent is determined by first looking at the plain language of the statute at issue. *Id.*, ¶ 14; Br. in Resp. at 11.

These statutory directives are the overarching lens by which all other statutory provisions must be viewed. *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 65, 403 Mont. 225, 481 P.3d 198 (J. McKinnon dissent) ("Our constitutional right to a clean and healthful environment and protections . . . . should not perilously hang on whether the Court can find protections in alternative statutory schemes when indeed the pertinent legislation itself speaks to an overarching purpose of protecting Montana's environment.")

Here, that exercise properly led Judge Larson to reach the conclusion that "'affect' means to "have an influence" or to "cause a change." Cambridge Dictionary, https://dictionary.cambridge.org/ us/dictionary/english/affect (last accessed July 24, 2023); see also, Merriam-Webster, https://www.merriam-webster.com/dictionary/affect (last accessed July 24, 2023) ("to act on and cause a change in", or to "influence"). The hearing examiner essentially adopted the same definition. COL #s 9 and 10. Adopting this definition, then, means that a pit must merely have "an influence" on groundwater or surface water, and not that it "intersects" it. (Exhibit I, Conclusions of Law, ¶¶12-16, pp. 30-32.)

Judge Larson's interpretation is also consistent with the principal that statutes intended to protect the public health, safety, and welfare, such as this one, are liberally construed "with a view towards the accomplishment of its highly beneficent objectives". *State ex rel. Florence-Carlton Sch. Dist. v. Bd. of Cty. Comm'rs*, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978). In Montana, this liberal construction is particularly appropriate because of the constitutional protections afforded the environment, the "highly beneficent objective". Not only do Montanans' have a fundamental right to a clean and healthful environment, *N. Plains Res. Council, Inc. v.*

Mont. Bd. of Land Comm'rs, 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169, but the legislature has an affirmative duty to protect environmental life support systems – including water, Mont. Const. Art. IX. Where, as here, an agency is faced with uncertainty about whether or not there will be an affect, it must reject the application. *See Bostwick Props., Inc. v. Mont. Dep't of Natural Resources & Conservation,* 2013 MT 48, ¶ 34, 369 Mont. 150, 296 P.3d 1154: "(P)ast DNRC cases and Montana law support DNRC's decision to deny a permit where uncertainty exists regarding any hydrological connection."

Petitioners' broad interpretation of "affect" is, therefore, appropriate. In light of the definition adopted by the hearing examiner, and in light of these statutory and constitutional imperatives, the hearing examiner's conclusion that there would not be any affect, and therefore DEQ was correct in issuing the permit, is wrong as a matter of law.

Ten Occupied Dwelling Units.

Addressing the Hearing Examiner's COL 42-56, concerning "occupied dwelling units", Petitioners respond as follows: For many of the same reasons highlighted above, the Hearing Officer misconstrued the obligations of DEQ when evaluating a permit and committed reversible error when she held that "Even if LHC did not consider occupied dwelling units on leaseholds,Clearwater has not presented any evidence that LHC's lack of consideration caused its certification to be incorrect." FOF 55.

As explained, DEQ is obligated to ensure compliance with § 82-4-432, MCA, through investigations. There is no legal basis for DEQ's assertion that it may rely wholly on an applicant's promise DEQ admits it did just that with respect to the occupied dwelling units. Yet, the Hearing Examiner faults Protect the Clearwater for the fact that DEQ has no idea whether the nearby residents occupy their homes full time or have water or sewer hookups. Nor does LHC. As the Hearing Officer noted, LHC determined "occupied dwelling units based on land

ownership adjacent to the proposed mining activity." (COL # 52). But land ownership is not determinative of whether a residence is an "occupied dwelling." (COL # 51). These two conclusions of law demonstrate the error by the Hearings Officer. In essence, she noted that land ownership is not relevant to the question of "occupied dwelling", but that it was acceptable for LHC to certify that there were not ten "occupied dwellings" based solely on land ownership. These statements are irreconcilable.

The Hearing officer then makes the same burden shifting argument: that PTC has the obligation to show that ten occupied dwelling units are within one-half mile of the pit. As noted, though, *Westmoreland* and the recent BER Case, *In re Bull Mountains*, No. BER 2013-07 SM, do not require PTC to establish that the elements were not met, but to show that LHC did not meet its burden establishing that ten occupied dwelling units were not present. In other words, LHC had to demonstrate to DEQ that there were not ten occupied dwelling units in the area, and PTC's burden here is to show that LHC did not meet its obligation. The Hearing Examiner, in COL #56 flips this burden on its head, and as such, the conclusion is incorrect as a matter of law.

Exacerbating this problem was that in the deficiency letter, DEQ only asked LHC to "certify" its promise - nothing more. And it conducted no investigation. Thus, DEQ did not meet its obligations under Admin. R. Mont. 17.24.212(1)(2023) to "**evaluate the application to determine if the requirements of the [Opencut Act] and [the implementing regulations] are satisfied."** (Emphasis Added.)

CONCLUSION

In conclusion, the Petitioners respectfully request that the Board of Environmental Review reject and reverse the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law and order summary judgment be granted in favor of Protect the Clearwater for the reasons stated above.

Respectfully submitted this 22nd day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I have served true and accurate copies of the foregoing to the following:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY PROTECT THE CLEARWATER REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3473	CASE NO. BER 2023-03 OC **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") March 8, 2024 Order on Exceptions, and respectfully takes exception to and seeks modification of Conclusions of Law ("COL") ¶¶ 9, 10, 11, 15, 16, 29, and 55 and removal of COL

¶ 52 in the above-captioned matter.

INTRODUCTION

This case involves an appeal made by Petitioners Protect the Clearwater, and Libby Langston, Gayla Nicholson, Jeff Dickerson and Terry Martin Denning, individually (collectively, "Petitioners") of DEQ's decision to approve LHC, Inc.'s ("LHC") Opencut Mining Permit #3473 ("Permit"), located in Missoula County, Montana, near Clearwater Junction. The HE's Proposed Findings of Fact and Conclusions of Law ("Proposed FOFCOL") is based on summary judgment motions filed by DEQ and the Petitioners. The Proposed FOFCOL concluded that DEQ complied with the law in issuing the Permit and that Petitioners failed to satisfy their burden of proof.

The Permit is a dryland opencut mining permit, issued pursuant to provisions that were added to the Opencut Mining Act during the 2021 Legislative Session via House Bill 599. *See* 2021 Mont. Laws 2231–42, Ch. 545; *see also* DEQ MSJ Ex. N, HB 599. Although "dryland" is not a defined term under the Opencut Mining Act, this type of permit is commonly referred to as such because of its nature. A dryland permit is appropriate under § 82-4-432(1)(c) and (14), MCA, in part, if operations will not affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities. Section 82-4-432(1)(b)(i), MCA. If water or conveyance facilities will be affected, the proposed

operation is subject to a standard permit, which necessitates a different DEQ review timeframe and application requirements. *See* § 82-4-432, MCA.

The intent of HB 599 was "to streamline the permitting process whenever we are in rural areas in high and dry locations[,]" Hr'g on HB 599 before the Mont. H. Nat. Resources Comm., 67th Reg. Sess., 18:16:07–20 (Feb. 26, 2021) ("H. Comm. Hr'g").[1] A proponent of HB 599 echoed this intended purpose, stating "the goal of this bill is to make very low impact gravel pits an easier application process." Hr'g on HB 599 before the Mont. S. Nat. Resources Comm., 67th Reg. Sess., 18:16:07–20 (Feb. 26, 2021) ("S. Comm. Hr'g").[2]

While DEQ agrees with the HE's ultimate determination that DEQ properly issued the Permit, DEQ requests modification of COLs ¶¶ 9, 10, 11, 15, 16, 29, and 55 and removal of COL ¶ 52 as they are inconsistent with governing law, inconsistent with legislative intent, or inconsistent with evidence in the record. As such, DEQ respectfully requests that the Board of Environmental Review (the "BER") modify these Conclusions in its final Findings of Fact and Conclusions of Law.

STANDARD OF REVIEW

[1] https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41379?agendaId=202936

[2] https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41418?agendaId=206278

The BER is limited to review of the record in front of it. Section 2-4-621, MCA. While the BER may reject or modify the conclusions of law proposed by the HE in the above matter, it 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 its 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. Section 2-4-621(3), MCA.

ARGUMENT

I. DEQ's interpretation of "affect" to mean opencut operations intersecting or touching surface and ground water is consistent with the plain language of § 82-4-432(1)(b), MCA.

In COL ¶ 9 of the Proposed FOFCOL, the HE defines "affect" as "to influence in some way" according to Black's Law Dictionary. However, by considering other factors necessary when interpreting legislative intent, DEQ defines affect to mean "intersect" or "touch." *See* DEQ MSJ Ex. D, *Hr'g Tr.*, 30:10-14; 31:3-9. COL ¶ 9 as well as other conclusions in the Proposed FOFCOL that implement the HE's definition of "affect" must be modified.

Simply because a term exists in the dictionary does not mean its plain meaning is clear in statute. For example, in a related district court case concerning a temporary restraining order and preliminary injunction of operations under this

Permit, the district court cited two other dictionaries to define "affect."[3] *See Protect the Clearwater v. Mont. Dept. of Envtl. Quality*, No. DV 23-776, Findings of Fact, Conclusions of Law, and Order, 31 (¶ 14) (Mont. 4th Jud. Dist. Ct. Aug. 08, 2023). There, the district court defined affect as "to 'have an influence' or to 'cause a change.'" *Id.* It also stated that "If the proposed project "affects" ground water or surface water *in any way*, then it must apply for the standard opencut permit." *Id.* at 30 (¶ 11) (emphasis added). As evidenced here, the same word may have slightly varying definitions in different dictionaries. Other factors must be considered to determine the plain meaning of "affect".

First, a court cannot insert language that has been omitted from statutory language when determining its meaning. Section 1-2-101, MCA. That is precisely

[3] On July 11, 2023, one of the petitioners in this case, Protect the Clearwater ("PTC"), filed an Application for Emergency Ex Parte Temporary Restraining Order and Preliminary Injunction in the Fourth Judicial District Court, Missoula County. The temporary restraining order was granted on July 17, 2023, which is the same day DEQ became aware of PTC's filing. On July 21, 2023, PTC, DEQ, and LHC, participated in a four-hour evidentiary show cause hearing. On August 8, 2023, the district court granted the preliminary injunction which prohibits operations under the Permit "during the pendency of both the administrative matter pending before the Board of Environmental Review (Case No. BER 2023-03 OC) and any subsequent petition for judicial review pursuant to § 2-4-701, MCA et seq. and/or until the [Montana Environmental Policy Act ("MEPA")] case currently before this Court reaches a judgement in herein." *Protect the Clearwater v. Mont. Dept. of Envtl. Quality*, No. DV 23-776, Findings of Fact, Conclusions of Law, and Order, 48 (Mont. 4th Jud. Dist. Ct. Aug. 08, 2023)) ("Order"). This Order was provided to the HE during summary judgment by both Petitioners and DEQ and is accessible as part of the record. The district court's Order is currently on appeal to the Montana Supreme Court. That appeal has been fully briefed as of March 21, 2023, and parties are awaiting a decision. In an order denying PTC's request for a stay of this BER matter, Hearing Examiner Oomens held the district court and Montana Supreme Court's determinations on the "likelihood of success on the merits" element for the preliminary injunction are not binding on the merits of this contested case before the BER. Order on Motion to Stay, 4 (Oct. 20, 2023).

what the district court did in its Order referenced above when it added "in any way" to its interpretation of "affect". The same is true for the HE's definition of "in some way". For that reason alone, the proposed interpretation of the term "affect" cannot stand.

Second, context matters when determining the meaning of statutory language. *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Publ. Lands*, 2018 MT 120, ¶ 14, 391 Mont. 328, 417 P.3d 1100. Here, whether water will be affected is a qualifier that determines which type of permit—dryland or standard—is appropriate under the Opencut Mining Act. To give a broader meaning to "affect" than "intersect" or "touch", which is how DEQ interprets the term, would implicate additional review for applicants and DEQ, eliminating the distinction made between dryland and standard permits. This is another—a third—factor courts consider when determining the plain meaning of statutory language: statutes must be interpreted as a whole, giving meaning and effect to all provisions, if possible. Section 1-2-101, MCA.

The danger in interpreting "affect" in a broader sense than intersect or touch as the HE's proposed decision does is highlighted by the referenced district court Order. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S.

19, 31 (2001) (citation and quotation marks omitted). If "affect" is read broadly, it would be impossible to obtain a dryland permit because all opencut permits marginally "affect" surface and ground water. For instance, virtually all dryland operations generate a small amount of sediment that ends up in surface water, meeting the district court's definition—and possibly the HE's definition—of "affect". In its Order on the preliminary injunction matter, the district court implied that blowing dust from the project onto surface water—based on a lay witness' testimony—would meet the definition of "affect" and preclude a project from being deemed a dryland permit. Order at 32 (¶ 17). Therefore, such an interpretation reads dryland permits out of statute violating § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."). The plain text and structure of § 82-4-432, MCA establishes that "affect"—as it concerns dryland permits—means opencut operations intersecting or touching surface and ground water.

II. Legislative intent supports DEQ's interpretation of the word "affect."

If the BER determines "affect" is an ambiguous term given the varying definitions of "affect" in multiple dictionaries as cited by the district court and the HE, the BER would benefit from and should look to the legislative history for clarification. *Swanson v. Consumer Direct*, 2017 MT 57, ¶ 16, 387 Mont. 37, 391 P.3d 79 ("When the legislative intent cannot be readily derived from the plain

language, we review the legislative history and abide by the intentions reflected therein.") (citation omitted). If the plain language of a statute is ambiguous, then Montana courts use other canons of construction to determine legislative intent. *Mont. Fish, Wildlife & Parks*, ¶ 14. For example, a court may look "to the legislative history of the statute[;]" and give "great deference and respect . . . to the interpretations given the statute by the officers and agencies charged with its administration." *Mont. Contractors' Ass'n v. Dep't of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986) (citations omitted). As detailed by DEQ in its Brief in Support of Motion for Summary Judgment and in its Reply to Petitioners' Response to DEQ's Motion for Summary Judgment, legislative history shows the legislature intended for "affect" to mean intercept. DEQ MSJ Br. at 24-26; DEQ MSJ Reply Br. at 9-10.

Specifically, the initial two drafts of HB 599 defined standard permits as operations "that intercept ground water or surface water, including intermittent or perennial streams." *See* Version 2 of HB 599 at 3(1)(b)(i)[4]; *see also* S. Comm. Hr'g at 15:21-10 (a proponent of the bill stated requirements for standard permits would apply to projects that "intercept" groundwater). Prior to HB 599 going to second reading on the Senate floor, the bill was amended to include water conveyance facilities and "intercept" was changed to "affect." *See* Version 3 of HB

[4] https://leg.mt.gov/bills/2021/HB0599/HB0599_2.pdf

599 at § 4(1)(b)(i) (defining standard permits to mean operations that "AFFECT ground water or surface water, including intermittent or perennial streams, OR WATER CONVEYANCE FACILITIES").[5] The purpose of the change was to ensure that water conveyance facilities—like irrigation pipelines—were provided the same protections as ground and surface water. Second Reading of HB 599, S. Floor Sess., 67th Reg. Sess., 13:32:45 (Apr. 13, 2021) (Senator Brown stating "we amended this bill to [include a project as a standard permit] if it affects any water conveyance facility") ("Senate Second Reading").[6] Thus, affect was added to the bill to ensure projects that affect water conveyance facilities are addressed by standard permits, but the Legislature did not intend this amendment to increase applicability of standard permits to anything beyond projects that intercept ground or surface water. *See* S. Comm. Hr'g at 15:21:10 (a proponent of the bill stated requirements for standard permits would apply to projects that "intercept groundwater").

To the extent the BER finds the definition of "affect" in § 82-4-432(1)(b)(i), MCA, to be ambiguous, *see Mont. Contractors' Ass'n*, 220 Mont. at 395, 715 P.2d at 1058, it should find the legislative history of HB 599 supports DEQ's interpretation of affect to mean intersect or touch.

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[5] https://leg.mt.gov/bills/2021/HB0599/HB0599_3.pdf
[6] https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41151?agendaId=216370#info_

III. DEQ Proposed FOFCOL language

i. Conclusions of Law ¶¶ 9, 10, and 11

Considering the arguments above, DEQ proposes that COLs 9, 10, and 11 be deleted in their entirety and replaced with the following[7]:

9. While a common definition of "affect" is "to influence in some way", Black's Law Dictionary (9th ed. 2009) at 65, dictionary definitions of the term can vary. *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/affect (last accessed March 20, 2024) ("to act on and cause a change in", or to "influence"). Dictionary definitions also ignore the practical impact on the Opencut Mining Act when defining "affect" in this way.

10. Courts must "interpret the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature." *Mont. Fish, Wildlife & Parks*, ¶ 14. Additionally, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

11. If "affect" means "to influence in some way" pursuant to Black's Law Dictionary, the distinction made between dryland permits under § 82-4-432(1)(c) and (14), MCA, and standard permits under § 82-4-432(1)(b) and (2)-(13), MCA, would be eliminated as there are endless possibilities for affecting ground and surface water. Therefore, given its context, the term cannot have a broad meaning.

12. Instead, an analysis of the plain language shows "affect" means "intercept" or "touch". *See* DEQ MSJ Ex. D, *Hrg. Trans.*, 30:10-14; 31:3-9; *Mont. Contractors' Ass'n v. Dep't of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986).

[7] If the BER adopts these changes in full—or even in part—the numbering of the COLs will need to be updated.

However, if the BER does not agree with DEQ's interpretation of "affect" and believes it to be ambiguous, newly-drafted COL 12 above could be replaced with the following COLs:

12. Because of varying definitions of "affect" and the statutory context, the term is ambiguous and it is appropriate to review the legislative history of § 82-4-432(1)(b)(i), MCA. *Swanson v. Consumer Direct*, 2017 MT 57, ¶ 16, 387 Mont. 37, 391 P.3d 79 ("When the legislative intent cannot be readily derived from the plain language, we review the legislative history " and abide by the intentions reflected therein."); *Mont. Contractors' Ass'n v. Dep't of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986) ("Legislative intent can be determined in a number of ways" including "the Court can look to the legislative history of the statute.") (citations omitted).

13. Section 82-4-432(1)(b)(i), MCA, was added to the Opencut Mining Act during the 2021 Legislative Session by House Bill 599 (HB 599). 2021 Mont. Laws 2231–42, ch. 545.

14. The initial two drafts of HB 599 defined standard permits as operations "that intercept ground water or surface water, including intermittent or perennial streams." *See* Version 2 of HB 599 at 3(1)(b)(i); *see also* S. Comm. Hr'g at 15:21-10 (a proponent of the bill stated requirements for standard permits would apply to projects that "intercept" groundwater).

15. Prior to HB 599 going to second reading on the Senate floor, the bill was amended to include water conveyance facilities and "intercept" was changed to "affect." *See* Version 3 of HB 599 at § 4(1)(b)(i) (defining standard permits to mean operations that "AFFECT ground water or surface water, including intermittent or perennial streams, OR WATER CONVEYANCE FACILITIES"). The purpose of the change was to ensure that water conveyance facilities—like irrigation pipelines—were provided the same protections as ground and surface water. Second Reading of HB 599, S. Floor Sess., 67th Reg. Sess., 13:32:45 (Apr. 13, 2021) (Senator Brown stating "we amended this bill to [include a project as a standard permit] if it affects any water conveyance facility") ("Senate Second Reading").

16. Thus, affect was added to the bill to ensure projects that affect water conveyance facilities are addressed by standard permits, but the Legislature did not intend this amendment to increase applicability of standard permits to anything beyond projects that intercept ground or surface water. *See* S. Comm. Hr'g at 15:21:10 (a proponent of the bill stated requirements for standard permits would apply to projects that "intercept groundwater").

17. As evidenced by relevant legislative history, "affect" as used in § 82-4-432(1)(b)(i), MCA, means "intercept." This is consistent with DEQ's interpretation of the term as "intersect" or "touch". *See* DEQ MSJ Ex. D, *Hrg. Trans.*, 30:10-14; 31:3-9; *see also Mont. Contractors' Ass'n*, 220 Mont. At 395, 715 P.2d at 1058 ("[G]reat deference and respect must be shown to the interpretations given the statute by the officers and agencies charged with its administration.") (citations omitted).

ii. Conclusion of Law ¶ 16

Also based on the arguments above, DEQ proposes that COL ¶ 16 be amended by deleting language in strikeout and adding underlined language as follows:

> The second requirement is that DEQ determine if the proposed mine will ~~influence~~ affect ground water or surface water.

IV. The Opencut Mining Act does not require field verification of proposed opencut sites to evaluate a permit.

The HE correctly determined in COL ¶ 13, "Field verification is not required under the statute." Section 82-4-432, MCA, governs what is required from an applicant for DEQ to assess and approve an opencut mining permit. While this section requires DEQ to evaluate the information provided to it by the applicant, it

does not require DEQ to field verify information contained within a permit application. *Id*.

While the HE correctly determined that field verification is not required under statute in COL ¶ 13, the statement made in COL ¶ 15 confuses things by saying "DEQ reviewed the required data and, additionally, performed a field verification. Therefore, DEQ did evaluate the Permit application." This could be interpreted as placing an additional requirement of field verification on DEQ which is not contained in statute, and is in violation of § 1-2-101, MCA, which states that a court must not "insert what has been omitted" when interpreting a statute. Instead of the current language, COL ¶ 15 should be modified to read:

> DEQ reviewed the required data, and although not required by statute, performed a field verification. As such, DEQ did more than what is required in evaluating the Permit application.

Modifying COL ¶ 15 will aid in the BER keeping the requirements of DEQ under the Opencut Mining Act clear and succinct.

V. The Opencut Mining Act does not regulate impacts to water.

Section 82-4-401, MCA, *et seq*., governs what is required under the Opencut Mining Act. Section 75-1-101, MCA, *et seq*., governs what is required under the Montana Environmental Policy and Procedure Act ("MEPA"). The BER has jurisdiction over matters that arise under the Opencut Mining Act, but not under MEPA. Section 75-1-107, MCA; *see also Brisendine v. Dep't of Commerce*, 253

Mont. 361, 366, 833 P.2d 1019, 1022 (1992).

While the Opencut Mining Act does not regulate impacts to water quality and quantity, MEPA requires an evaluation of impacts to water. Section 75-1-208, MCA. Simultaneous to granting the Permit, DEQ issued an environmental assessment ("EA") pursuant to MEPA. DEQ SMJ Ex. E; DEQ MSJ Ex. D, *Hr'g Tr.*, 39:7–13. It is important to note that DEQ cannot deny a permit based on its evaluation of impacts to water under MEPA. Section 75-1-104, MCA. While the process of permitting a site under the Opencut Mining Act is conducted concurrently with the process of writing an EA pursuant to MEPA, they are separate processes. *See* §§ 82-4-401, MCA, *et seq.*; *see also* §§ 75-1-101, MCA, *et seq*.

Here, COL ¶ 29 states: "The EA does not anticipate an impact on surface water; in fact, it does the opposite. The EA acknowledges the possibility that there may not be any impacts to the surface water, but if there are any impacts, they would not affect the surface water." While the HE's conclusion is not incorrect, it is confusing. As stated above, the Opencut Mining Act does not regulate impacts to water quality or quantity, regardless of the permit type. As explained by DEQ during the show cause hearing in district court, the EA states "surface water may leave the site, during a heavy storm event could carry sediment – this refers to precipitation on or around the site." DEQ MSJ Ex. D, *Hr'g. Tr.*, 36:4-7. At the

same hearing, DEQ further explained that no dryland permits could be issued if DEQ had to consider rainfall as surface water because rain falls on every site in Montana. *Id*. at 12-25. As such, COL ¶ 29 should be modified to read:

> The EA does not anticipate an impact on surface water, but if there were any impacts, this does not necessitate an affect on surface water because the standards are different. Impacts in an EA are assessed pursuant to the Montana Environmental Policy Act, §§ 75-1-101, MCA, *et seq.*, while affects are assessed pursuant to the Opencut Mining Act, §§ 82-4-401, MCA, *et seq*.

Modifying COL ¶ 29 will aid in clarifying what is required of applicants and DEQ under the Opencut Mining Act.

VI. The record does not show that LHC excluded leaseholds from its consideration of occupied dwelling units.

An application for a dryland opencut mining permit requires certification from the applicant that fewer than 10 occupied dwelling units exist within one-half mile of the proposed opencut permit boundary. Section 82-4-432(14)(ix), MCA. An occupied dwelling unit is defined by the Opencut Mining Act as a structure with permanent water and sewer facilities that is used as a primary sleeping place by at least one person who maintains a household that is lived in as a primary residence. Section 82-4-403(7), MCA.

Here, the HE determined in COL ¶ 52 that "LHC determined occupied dwelling units based on land ownership adjacent to the proposed mining boundary area." The HE cites to the District Court Hearing Transcript at 76:20-77:6 to arrive

at this COL. However, that is not what was said during the show cause hearing at the cited pages. Instead, Mr. Tabish, a witness for LHC, stated "We looked – we separated the private ownership from the leased site. We – I guess, my first observation was none of the privately owned sites had Bull Lake addresses.[8] We – at several opportunities checked to see if there was anyone to talk to, consulted with Kristen Baker Hickinson, the local DNRC contact, and determined that there were no full-time residents present." DEQ MSJ Ex. D, *Hr'g. Tr.* 76:20-77:6. This statement does not say LHC determined occupied dwelling units based on property ownership.

Land ownership is not relevant when determining occupied dwelling units pursuant to § 82-4-432(9)(a)(ii), MCA. At the show cause hearing, Mr. Tabish explained that landowners of the privately-owned properties did not have Elbow Lake addresses, meaning it was likely the owners did not reside in this location year-round, which is one of the requirements for an occupied dwelling unit. Section 82-4-403(7), MCA (the structure must be "used as a home, residence, or sleeping place by at least one person who maintains a household *that is lived in as a primary residence*.") (emphasis added). Because there are DNRC-leased properties in the area, Mr. Tabish went to a DNRC employee to determine if those leased properties had year-round residents. It would not make sense for Mr. Tabish

[8] While the District Court Transcript says "Bull Lake," it should say Elbow Lake.

to discuss a privately-owned property with DNRC as they would not know whether it was used as a primary residence. Regardless, Mr. Tabish never said he excluded leased properties from his occupied dwelling unit determination. Therefore, COL ¶ 55 should be modified.

Currently, COL ¶ 55 reads "Even if LHC did not consider occupied dwelling units on leaseholds, Clearwater has not presented any evidence that LHC's lack of consideration caused its certification to be incorrect." Because the record does not support that LHC did not consider leased properties in its occupied dwelling unit determination, COL ¶ 55 should read:

> Even if LHC had not considered leaseholds in its occupied dwelling units determination, Clearwater has not presented any evidence that LHC's certification was incorrect.

Because COL ¶ 52 is incorrect and misstates evidence in the record, DEQ requests that the BER remove COL ¶ 52 and modify COL ¶ 55. In doing so, the BER will remain consistent with the Opencut Mining Act and the evidence in the record.

CONCLUSION

Although DEQ agrees with the HE's ultimate determination that DEQ complied with the Opencut Mining Act in issuing Permit #3473, dicta contained within the Proposed FOFCOL may impact future permitting processes and should be modified or removed to remain consistent with the requirements of the Opencut

Mining Act. DEQ requests modification of COLs ¶¶ 9, 10, 11, 15, 16, 29, and 55 and removal of COL ¶ 52 as they are inconsistent with governing law, inconsistent with legislative intent, or inconsistent with evidence in the record. As such, DEQ respectfully requests that the BER modify these Conclusions in its final Findings of Fact and Conclusions of Law.

Dated this 22nd day of March 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Kaitlin Whitfield
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Docket No: BER 2023-03 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY PROTECT THE CLEARWATER REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3473	Cause No. BER 2023-03 OC **PETITIONERS' RESPONSE TO DEQ'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

COMES NOW, Petitioners, Protect the Clearwater (PTC), through counsel and submit their response to the Department of Environmental Quality's (DEQ's) exceptions to the Hearing Examiner's (HE's) findings of fact and conclusions of law.

INTRODUCTION

Even though it prevailed on its Motion for Summary Judgment. Montana DEQ takes exception with four conclusions reached by the Hearing Examiner. Its arguments highlight the

error both in its legal interpretations as an agency and the error of the Hearing Examiner in granting summary judgment to DEQ in the first place.

Most egregiously, DEQ attempts to convince this Board that the word "affect" does not mean "affect" in the context of the Opencut Act. Instead, DEQ argues that it means something totally different – to "intersect" or to "touch." It does this without citation to any authority. In doing so DEQ not only defies the foundational concept of statutory interpretation – i.e. read the plain language definition first – but it also shines light on the impropriety of the dryland permit to this site in the first place. DEQ admits in its exceptions to the Board that there will be an "affect" to the adjacent Clearwater River and Elbow Lake. Thus, the Hearing Examiner erred by concluding that a Dryland Permit was legally correct in this case. Said another way, because the Hearing Examiner found that the Applicant had the burden to prove that no surface or ground water would be affected in any way by this mine, she erred in finding the same because no evidence supports such a conclusion.

Next, DEQ takes exception with the Hearing Examiner's conclusion that DEQ is required to verify all information submitted by an applicant for an Opencut mine. It does so because it is well aware - and admits as much – that here it did nothing to verify that this site met the requisite criteria. In the case at hand, this issue is twofold: (1) DEQ admits it did not verify whether the occupied dwelling unit threshold was met; and (2) DEQ did not verify or analyze in any defensible way whether ground or surface waters would be affected by this permit. In arguing to the contrary, DEQ again turns a blind eye to the expressed language of the statute it is entrusted to administer. In pursuit of its no-regulation-agenda, it argues for an interpretation of the law that again contradicts the plain language of the statute and writes out of law requirements imposed upon it as an agency.

Similarly, DEQ boldly proclaims that "the Opencut Mining Act does not regulate impacts to water." It should be clear to this Board that this fallacy underlies DEQ's entire administration of the Opencut Act and its start-to-finish error in relation to its analysis and processing of the application at hand. The legislature could not have been clearer when it proclaimed that DEQ is bound to administer the Opencut Act in a manner that ensures protections for not just water quality, but the entire "environmental life support system." § 82-4-402 (1), MCA. Its arguments to the contrary showcase DEQ's flagrant violations of law in issuing this permit and therefore underscore how the Hearing Examiner erred in rendering her decision to the contrary.

For these reasons and as more fully explained below, this Board should deny DEQ's exceptions and reverse the Hearing Examiner's determination in her Final Order.

I. As used in the Opencut Act, the Hearing Examiner correctly concluded the plain language meaning of "affect" but failed to apply that definition to the record.

In reaching her conclusion as to the meaning of the word "affect" the HE joined Judge Larson of the 4th judicial district in defining "affect" as "to influence in some way." While Judge Larson relied on Webster's dictionary to reach this conclusion, the HE relied on Black's Law Dictionary. Both dictionaries provide the same result: "affect" means "to influence in some/any way."[1] Both the HE and the District Court recognize that which DEQ does not - Montana law requires judicial bodies to give meaning to ordinary, but statutorily undefined,

[1] These definitions are also consistent with case law across the country. *Carroll v. Israelson*, 169 So. 3d 239, 243 (Fla. Dist. Ct. App. 2015) ("A common definition of "affect" is "to have an effect on." Webster's New World Collegiate Dictionary 23 (4th ed. 2002)."); *Bauer v. AGA Serv. Co.*, 25 F.4th 587, 591 (8th Cir. 2022) ("To affect something means "to produce an effect upon." *Affect*, *Merriam-Webster's Collegiate Dictionary*."); *Old Dominion Freight Line, Inc. v. TDFuel, LLC*, 973 N.W.2d 867 (Iowa Ct. App. 2021) (""Affect" is broadly defined, meaning "to act upon; influence; [or] change." *Affect*, Black's Law [*6] Dictionary (abr. 6th ed. 1991)."); *State v. Castillo*, 313 Or. App. 699, 705, 495 P.3d 191, 194 (2021) (""To affect" means "to act upon" or "to produce an effect." *Webster's Third New Int'l Dictionary* 35 (unabridged ed 2002).")

words in accord with their common usage. *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806.

In contrast to this established precedent, DEQ argues with no citation to authority that "simply because a term exists in the dictionary does not mean its plain meaning is clear in statute." DEQ Exceptions at 4. However, that is exactly what the Court held in *State v. Madsen.* More specifically the Court stated:

> A court's function is to determine legislative intent, and where that can be determined from the plain meaning of the words used, the plain meaning controls and a court need not go further or apply other means of interpretation. Statutory terms must be interpreted reasonably and logically, and given the natural and popular meaning in which they are usually understood.
>
> The Legislature need not define every term it employs in a statute. If a term is one of common usage and is readily understood, a court should presume that a reasonable person of average intelligence can understand it. The failure to include definitions of all terms does not automatically make a statute vague as long as the meaning is clear and provides a defendant with adequate notice of the proscribed conduct.

Id. at ¶¶ 8-9 (citations omitted). Flatly, DEQ asks this Board to disregard these baseline principles of law, arguing again without citation that "[o]ther factors must be considered to determine the plain meaning of 'affect'" DEQ Br. at 5. DEQ argues these other factors provide "context" which this Board should consider. As detailed above, that is the opposite of what the Montana Supreme Court instructs.

Yet, DEQ argues "context matters" because "[i]f 'affect' is read broadly, it would be impossible to obtain a dryland permit because all opencut permits marginally 'affect' surface and ground water." DEQ Br. at 7. But there is nothing in the record, or argued by DEQ, that demonstrates that broadness was not intentional so as to encompass project like this one. Indeed, "broad meanings do not necessarily create ambiguity," *Bauer*, 25 F.4th at 592, instead, they are "used for that very reason – [their] breadth – to achieve a broad purpose." *City of Cerritos v.*

State of Cal., 239 Cal. App. 4th 1020, 1054-55, 191 Cal. Rptr. 3d 611, 638 (2015). As will be explained in more detail below, this is the exact intent of the Opencut Act – to "protect the environmental life support system from degradation."

While no context is needed or appropriate to interpret the plain meaning of the word affect, if context is to be ascertained, this Board need look no further than the expressed intent of the legislature as stated in the Act. The fact that such a reading precludes a mine from being sited on the banks of a river or stream directly furthers the legislative intent, not undermines it. The legislature has proclaimed that if – as here – a mine will spread dust into a nearby river or send contaminated water into ground or surface water systems, DEQ cannot grant a Dryland permit. This is the exact opposite situation of where a dryland permit is appropriate.

Simply put, the word "affect" as used in the Opencut Act needs no interpretation because it is plainly stated and its ordinary meaning can be ascertained. Thus, DEQ's entire argument in relation to the legislative intent should be disregarded as it is wholly irrelevant. This is especially true where it admits – as it does here – that the mine in question will in fact have an effect on nearby surface waters. Exceptions at pg. 7. DEQ's argument that the Hearing Examiner and the District Court's conclusions and interpretations relating to this word "reads dryland permits out of statute" is disingenuous, at best. What these correct definitions do is place this type of permit exactly where the legislature intended – "high and dry" and far away from surface waters. If the Board does want to look at legislative history, such an examination supports the Hearing Examiner and the District Court, not DEQ.[2] Rep Steve Gunderson said

[2] While the term "dryland" is not used specifically in statute, it used colloquially due to the bill sponsor's intent that such permits only be applied for and granted in those areas in Montana far away from water sources. Or, as the Rep Steve Gunderson said himself "the legislation was only meant to affect gravel pit operations in "high and dry" areas — those that were far away from other landowners, higher up in elevation, and without water contact." Rep. Steve Gunderson, R-Libby, who sponsored HB 599 in 2021, has argued that DEQ misinterpreted his bill, cutting regulations further than intended. https://missoulacurrent.com/missoula-county-considers-gravel-pit-expansion-in-residential-zone/

himself "the legislation was only meant to affect gravel pit operations in 'high and dry' areas — those that were far away from other landowners, higher up in elevation, and without water contact." Gunderson, R-Libby, who sponsored HB 599 in 2021, has further argued that DEQ misinterpreted his bill, cutting regulations further than intended.[3] Gunderson has repeatedly argued that his legislation was only intended for "rural" operations and ones that do not impact water or residences in any way.

Ultimately, even without this critical insight, there is no legitimate argument that the word "affect" is ambiguous. As a result, the HE correctly applied the law on this issue and reached the correct conclusion as to the meaning of term. However, she failed to apply the meaning of that term in the context of the administrative record in this case and thus, erred in finding that DEQ was entitled to judgment as a matter of law. As stated in PTC's exceptions and motion for summary judgment, it is the party entitled to judgment as a matter of law and this Board should reverse the hearing Examiners conclusions to the contrary.

II. DEQ is mandated, as a matter of law, to independently verify all information submitted in support of an opencut permit to confirm compliance with the law.

The Opencut Act requires DEQ to independently verify each and every piece of information and data submitted to it be an applicant for an Opencut permit. There is no basis in law for DEQ's unsupported assertion that it is allowed to rely on the certifications and promises of an applicant for any component of the permitting process.

DEQ continues here the argument it blindly put forth in its motion for summary judgment: "Section 82-4-432(14)(a)(ix), MCA, *requires* DEQ to rely on certification from the operator…" Br. at 17. Now, it states "While this section requires DEQ to evaluate the information provided to it by the applicant, it does not require DEQ to field verify information

[3] https://missoulacurrent.com/missoula-county-considers-gravel-pit-expansion-in-residential-zone/

contained within a permit application. DEQ exceptions at 13. Whether it is field verification or technological verification is irrelevant, so long as DEQ confirms that the information purported is in fact true, correct, and scientifically defensible. The record before this Board illustrates quite clearly that this did not happen and thus the Hearing Examiner's Findings and Conclusions must be reversed.

To this end, the Opencut Act unambiguously commands that DEQ fulfill its "duty" to make investigations or inspections necessary to ensure compliance with any provision of this part. § 82-4-422(d), MCA. Similarly, the Opencut Act demands that DEQ only "issue permits **when**, on the basis of the information set forth in the application **and** an evaluation of the proposed opencut operations, **the department finds** that the requirements of this part and rules adopted to implement this part will be observed." § 82-4-422, MCA. DEQ must also review the application and information and "determine" whether the proposed opencut operation will not affect water. Admin. R. Mont. 17.24.212. Thus, DEQ's affirmative obligations have two parts. First, it must investigate and inspect any and all aspects of the permit application, including the site, to ensure compliance with the law. Second, it can only issue a permit, when it finds on the basis of its own independent agency evaluation, that the requirements for a given permit are met.

Requiring DEQ to undertake an actual investigation is in line with the Opencut Mining Act's purpose "to protect. . . aquatic resources,". § 82-4-402(2)(b), MCA, and its constitutional obligations to ensure a clean and healthful environment while providing adequate remedies for the protection of the environmental life support system. Mont Const. art. II, § 3; Mont. Const. art. IX, § 1. The only way to effectuate these purposes and ensure DEQ meets its constitutional obligations is to require DEQ to investigate. *See e.g., Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 71, 402 Mont. 168, 477 P.3d 288, 306. So that's what the Opencut Mining Act requires. Any other reading would fail "to provide adequate remedies for

advance environmental review and protection before governmental approval of activities with potential for significant environmental degradation," and run afoul of Montana's Constitutional protections. *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 47, 403 Mont. 225, 481 P.3d 198.

Thus, DEQ's arguments here that the HE's COL ¶ 13 "could be interpretated as placing an additional requirement" on DEQ is without merit. Whether verification happens in the field or on the computer relates to DEQ's "duty" to make investigations. When that duty necessitates field verification – as described in PTC's expert report and testimony – DEQ is absolutely required to do so. This Board should reject DEQ's assertions to the contrary that it has no obligation to fact check any information submitted by applicants.

III. The plain language of the Opencut Act mandates that DEQ only grant a permit where the applicant meets the Act's burden of proof that the environment will be protected.

DEQ's arguments to this board evidence a fundamental disagreement about the scope of its obligations under the Opencut Act. DEQ states that "the Opencut act does not regulate impacts to water quality and quantity." Exceptions at 13. As described above, this position is at odds with the plain language of the Opencut Act and its stated intent. In contrast to DEQ's arguments, the Opencut Act lays out a clear obligation on DEQ to protect natural resources, protect wildlife and protect aquatic resources in every mining permit it issues.§ 82-4-402, MCA. Said another way, if DEQ cannot carry out its legal obligations to ensure permit criteria are met in the time given by the legislature, then it must – as a matter of law – deny the permit.

This balancing of statutory obligations is found directly at the forefront of the Opencut Act. First and foremost, the Opencut Act states the legislature's intent in passing the law:

> (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Opencut Mining Act. It is the legislature's intent that the requirements of this part provide

adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) it is the purpose of this part:
(a) to preserve natural resources;
(b) to aid in the protection of wildlife and aquatic resources;
(c) to safeguard and reclaim through effective means and methods all agricultural, recreational, home, and industrial sites subjected to or that may be affected by opencut operations;
(d) to protect and perpetuate the taxable value of property through reclamation;
(e) to protect scenic, scientific, historic, or other unique areas; and
(f) to promote the health, safety, and general welfare of the people of this state.

Section 82-4-402, MCA. Notably, the statute omits to mention any purpose of guaranteeing citizens a mining permit, as DEQ suggests. Thus, an ambiguity in the statute must be read to effectuate and carry out the legislature's stated policies, purposes, and intents, not an unenumerated entitlement to mine.

In relation to water quality, the legislature proclaimed directly that the "purpose" of the Opencut act includes "protection of … aquatic resources". *Id.* Thus, DEQ's argument that the Act does not regulate water quality is absurd. As discussed above, the law is crystal clear that if there will be any affect to water from a gravel mine, a dryland permit cannot be issued. DEQ's manufactured strawman that all dryland permits will cease to exist is unmoored from reality. Regardless of rainfall, there are innumerable sites around Montana where a dryland permit could be issued – most obviously areas far away from streams, rivers, or lakes and areas without shallow groundwater.

As a result, both DEQ and the Hearing Examiner misapply the law in finding that a dryland permit is appropriate where DEQ admits there will be an impact to nearby surface water as a result of fugitive dust and where neither it, nor the applicant put forth meaningful scientific analysis which could support a conclusion that groundwater will also not be affected by the proposed mine.

IV. DEQ, like the HE, misconstrues the burdens in this matter. PTC was not obligated to demonstrate that 10 occupied dwellings were in the area, but only that LHC and DEQ did not adequately verify there were not 10 occupied dwelling units.

The question of burden of proof in this matter is much more nuanced than the Hearing Examiner and DEQ set forth.

In the recent decision in *Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC,* the Court addressed this very issue.

> Thus, Conservation Groups were required to show before the Board **that DEQ's decision violated the law,** by methods including evidence or argument sufficient to show that DEQ's **conclusion—that Westmoreland's application had produced enough evidence to bear its burden of proving that the proposal was designed to prevent material damage**—was in **error.**

MEIC v. Westmoreland, 2023 MT 224, ¶ 21, 414 Mont. 80, __ P.3d __ (emphasis added.)

Here, likewise, it was Petitioners' burden to show that DEQ's decision to approve the Permit violated the law – by showing that DEQ's determination that *LHC's application had produced enough evidence* to bear its burden to show that the mine would not affect ground or surface water was in error.

For many of the same reasons highlighted above, the DEQ's arguments regarding occupied dwellings misconstrue the obligations of DEQ when evaluating a permit. As explained, its obligation is to ensure compliance with § 82-4-432, MCA, through investigations. DEQ did not do that with respect to the occupied dwelling units. DEQ has no idea whether the nearby residents occupy their homes full time, or have water or sewer hookups.

Nevertheless, DEQ criticizes the order and makes same burden shifting argument: that PTC has the obligation to show that ten occupied dwelling units are within one-half mile of the pit. As noted, though, *Westmoreland* and the recent BER Case, *In re Bull Mountains*, No. BER 2013-07 SM, do not require PTC to establish that the elements were not met, but to show that LHC did not meet its burden establishing that ten occupied dwelling units were not present. In

other words, LHC had to demonstrate to DEQ that there were not ten occupied dwelling units in the area and DEQ had to investigate that claim. So, PTC's burden, here, is simply to show that LHC and DEQ did not meet their obligations. DEQ's argument flips this burden on its head, and as such, is wrong.

CONCLUSION

For the reasons above, the Board should reject DEQ's exceptions and should reverse the Hearing Examiner's final order.

Respectfully submitted this 5th day of April, 2024.

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By: /s/ Graham J. Coppes
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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY PROTECT THE CLEARWATER REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3473	CASE NO. BER 2023-03 OC **MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO PETITONERS 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") March 8, 2024 Order on Exceptions and responds to Petitioners Exceptions to HE's Findings.

INTRODUCTION

This case comes before the Board of Environmental Review ("BER") after the HE determined that DEQ properly issued dryland opencut mining Permit #3473 ("Permit") to LHC, Inc. in April 2023. The Proposed Findings of Fact and Conclusions of Law ("Proposed FOFCOL") is the HE's decision made on summary judgment motions that were filed by DEQ and Petitioners. There was no contested case hearing/trial.

Both Petitioners and DEQ have filed exceptions to the Proposed FOFCOL. Petitioners argue that the HE failed to consider evidence presented by them and was incorrect in her legal determinations. DEQ is now responding to those arguments. However, DEQ's requests for modification regarding the Proposed FOFCOL lie within its Exceptions Brief.

ARGUMENT

I. Petitioners' Exceptions to Findings of Fact

If the BER believes that changing a finding of fact as proposed by Petitioners is necessary, it must first review the entire record of this case. To reject or modify a finding of fact requires a determination based on "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."

Section 2-4-621(3), MCA.

Petitioners believe the findings of fact should have included additional information as presented by them during summary judgment briefing. However, they do not dispute that the findings of fact as proposed by the HE are actually incorrect. Regardless, Petitioners failed to dispute these findings during summary judgment and should not now get a second bite at the apple. Specifically, the HE's June 15, 2023 Prehearing Order states "Failure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute." Prehearing Order at 11. Because Petitioners did not do so, the material facts in this case are not in dispute and the HE's proposed findings of fact should not be modified by the BER. Even if the BER believes Petitioners should be afforded another chance to argue the facts of this case, much of what they present in their exceptions brief is mischaracterized as detailed below.

a. Findings of Fact ¶¶ 3 and 4

Petitioners allege LHC manager Frank Tabish testified that he did nothing to analyze whether the mine would affect ground or surface water, and that he relied on "the State['s]" analysis for that determination. This statement is incorrect for a number of reasons. The analysis Mr. Tabish referred to during his testimony cited by Petitioners is the Environmental Assessment ("EA") authored by the Department of Natural Resources and Conservation. DEQ Motion for Summary

Judgment ("MSJ") Ex. D, Dist. Ct. Hr. Tr. at 70:17-24. To be clear, Mr. Tabish was not referring to DEQ as the "State" in this context and did not rely on DEQ's analysis when he submitted the Permit application. This would have been impossible as DEQ's EA was published the same day the Permit was approved. DEQ MSJ Ex. A, Permit at 001; DEQ MSJ Ex. E, EA at 1; DEQ MSJ Ex. F, Depo. Tr. of Ruby Hopkins at 13:11-16[1]. Additionally, Petitioners fail to acknowledge that while Mr. Tabish answered counsel for Petitioners' question of whether he completed a hydrologic study in the negative, he stated LHC "did go through the usual and customary accepted means" to determine groundwater would not be affected. DEQ MSJ Ex. D, Dist. Ct. Hr. Tr. at 71:19-25. Mr. Tabish was not asked what those means were, though he also testified that he considered "the position of the wells, the conditions of the site, verified distances, those sorts of things." *Id.* at 72:12-14. Though they did not attach one to their application, LHC also considered the methodology and requirements of DEQ's depth-to-groundwater worksheet. *Id.* at 64:21-65:16; 70:20-24. Overall, LHC did more to analyze whether water would be affected by operations within the Permit area than what Petitioners have presented in their briefing.

Regardless of what Mr. Tabish did or did not do to analyze whether Permit

[1] DEQ will cite to exhibits admitted during summary judgment briefing before the HE to support its assertions in this brief. BER members have access these documents as part of the record in this case.

operations would affect ground or surface water, DEQ performed its own analysis of available information and agreed with LHC's certification that ground and surface water would not be affected. As noted in proposed conclusions of law 13, 14, and 15, DEQ's reclamation specialist, Ruby Hopkins, who reviewed the Permit application visited the site, flew it with a drone, and reviewed GWIC well logs, soil test pit data, and the reclamation bond spreadsheet among other things. Proposed FOFCOL at 5-6 (¶¶ 13-15). Ms. Hopkins' conclusions are best summarized in DEQ's EA:

> Prior to submitting the application, the Applicant was required to provide three test holes. The applicant did not encounter ground water or surface water in these test holes which were dug to 14 feet below ground surface. The Applicant has submitted a bond for a highwall that is a maximum of 20 feet high, which typically correlates to the depth of planned mining. The site is located on a terrace that sits at an elevation of approximately 3,950 feet while Elbow Lake (Clearwater River) is situated about 100 feet lower in elevation at roughly 3,850 feet. Based on static water level of wells located in the surrounding area as well as the difference in elevation between the proposed site and that of Elbow Lake, disturbance would occur above groundwater. There are no defined modern surface water channels within the proposed project area, although there are abandoned channels both within the permit area and to the east across Highway 83, likely from before the Clearwater incised into its current position. Elbow Lake (Clearwater River) is located 1,250 horizontal feet to the west at its closest point.

DEQ MSJ Ex. E, EA at 8.

As further explained by Ms. Hopkins during the district court show cause

hearing[2], while the 14-foot test holes were not deep enough to show that groundwater was not present at 20 feet below ground surface (i.e., the expected depth of mining), it was helpful information to consider as it shows no groundwater at least 14 feet below ground surface.[3] DEQ Ex. D, Dist. Ct. Hr. Tr. at 52:8-15; 55:22-56:15. She also explained that based on static water level of wells located in the surrounding area as well as the difference in elevation between the Permit area and that of Elbow Lake, groundwater elevations appear to be consistent and confirm that disturbance would occur above groundwater. DEQ Ex. D, Dist. Ct. Hr. Tr. at 46:12-21. Additionally, any nearby surface water was at least 50 feet away from the edge of the high-water mark as required by ARM 17.24.227(1)(b). DEQ Ex. D, Dist. Ct. Hr. Tr. at 30:18-31-2.

b. Finding of Fact ¶ 8

Petitioners assert there is no evidence which supports FOF ¶ 8. *See* Petitioners' Exceptions to Proposed FOFCOL at 3. Additionally, Petitioners allege that the Proposed FOFCOL provides no analysis that DEQ may rely wholly on the verification of an applicant. *Id*. However, both assertions are contrary to the

[2] As explained in DEQ's Exceptions Brief filed with the BER on March 22, 2024, Petitioner Protect the Clearwater filed an application for and was granted a preliminary injunction by the Fourth Judicial District Court, Missoula County in August 2023. This halted Permit operations. The parties participated in a show cause hearing on July 21, 2023, where they presented evidence regarding the issues in this case.

[3] As stated by Petitioners in their Exceptions Brief, pursuant to § 82-4-432(14)(a)(vi), MCA, the purpose of digging test pits is "to confirm how much soil there is on-site that will be salvaged for reclamation when the opencut operation is finished." DEQ Ex. D, Dist. Ct. Hr. Tr. at 55:22–56:4. It is not to confirm presence or absence of groundwater.

evidence in the record. As such, Petitioners assertions there is no evidence to support FOF ¶ 8 is incorrect and should not be considered by the BER and FOF ¶ 8 should remain unchanged. This is further explained below in Section II(d).

c. Finding of Fact ¶ 9

In their briefing on FOF ¶ 9, Petitioners make arguments about the value and reliability of Groundwater Information Center ("GWIC") data by characterizing what DEQ's expert witness and hydrologist Kevin Krogstad stated during a deposition. In doing so, Petitioners inaccurately allege that the Opencut Mining Act requires certain information or verification to determine whether ground and surface water would be affected.

While Petitioners' expert is of the opinion that DEQ did not have enough information to make this determination, DEQ's witnesses believe the opposite is true. Specifically, Petitioners assert GWIC is not reliable unless well locations are field verified. Not only is field verification not required under the Opencut Mining Act, but as Mr. Krogstad explained in his deposition, it is not necessary in order to make a reliable technical determination regarding depth to groundwater. Specifically, Mr. Krogstad testified that GWIC well locations may not be plotted with exact precision because they are typically plotted at the center of a parcel. DEQ MSJ Ex. K, Depo. Tr. of Kevin Krogstad at 9:19-10:11. This does not mean the information they present is unreliable. For characterization of a moderately

sized area such as the Permit and surrounding area, this is adequate precision.

d. Finding of Fact ¶ 10

Like the other findings of fact, Petitioners do not appear to dispute the HE's Proposed FOF ¶ 10. They merely insert details that are contained in DEQ's EA. *See* Petitioners Exceptions to Proposed FOFCOL at 7.

While Petitioners do not take issue with the HE's Proposed FOF ¶ 10, DEQ would like to note for the BER that the purpose of this contested case proceeding is to determine whether the Permit was legally issued under the Opencut Mining Act. It is not to determine the EA's compliance with the Montana Environmental Policy Act ("MEPA"). Sections 2-4-601, *et seq*., MCA; *see also* § 2-4-702, MCA.

II. Petitioners' Exceptions to Conclusions of Law

a. The burden of proof in this case lies with Petitioners to prove by a preponderance of the evidence that DEQ's decision to issue the Permit was unlawful.[4]

Throughout Petitioners' Exceptions to HE's Findings, they allege the HE misinterpreted Supreme Court precedent on what the appropriate burden of proof is in a contested case before the BER. However, there is more than one way Petitioners may satisfy their burden of proof, which depends on the specific argument made. In a recent Montana Supreme Court decision, *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Entl. Quality*, 2023 MT 224, 414 Mont. 80, 2023 Mont.

[4] *See* Petitioners' briefing on conclusions of law 5, 22-24, 30-31.

LEXIS 1177 ("MEIC 2023"), the Court determined who carries the burden of proof in a contested case proceeding under the Montana Administrative Procedure Act, §§ 2-4-101 through -711, MCA. Specifically, the Court held that the challenger of a coal mining permit under the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), §§ 82-4-201 through -254, MCA, had the burden of proving its claim that unlawful material damage would occur as a result of mining. *MEIC 2023*,¶ 18. While the applicant had the initial burden during the permitting process, that burden of proof shifted when the permit was challenged. *Id.*, ¶ 18.

Just as the coal company bore the burden of proof before DEQ to show material damage would not occur, an opencut permit applicant has the initial burden of proving ground and surface water will not be affected, for example. *MEIC 2023*, ¶ 18. Having succeeded in this showing before DEQ, the applicant need not re-prove the factual elements of its case a second time before the BER. *Id.* As accurately stated by the HE, Petitioners must now prove their claim(s) by a preponderance of the evidence. Proposed FOFCOL at 2 (citing *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 964); *see also MEIC 2023* at ¶ 22 (in a contested case proceeding, the challenger "has the burden of proving by a preponderance of the evidence that DEQ's decision to issue the permit violated the law."). Preponderance of the evidence is a

standard that requires showing "proof sufficient to support a conclusion that the asserted existence, non-existence, occurrence, or non-occurrence of the subject fact or factual occurrence was, is, or will be more probable than not, i.e., more likely than not." *Kipfinger v. Great Falls Obstetrical & Gynecological Assoc.*, 2023 MT 44 at 16 (citations omitted). Therefore, merely sewing doubt in DEQ's decision is not enough to satisfy Petitioners' burden.

With respect to their claim regarding § 82-4-432(1)(b)(i), MCA, Petitioners argue all they need to do is show that LHC's application did not contain enough evidence to support the determination that operations would not affect ground or surface water—not that they were required to show ground or surface water would be affected. Petitioners are correct that this more nuanced argument and associated burden of proof is applicable here as they made this argument in their Brief in Support of Motion for Summary Judgment ("Petitioners' MSJ"). Petitioners' MSJ at 10-14. That said, the Montana Supreme Court has asserted that a petitioner may meet their burden "by methods *including evidence* or argument sufficient to show that DEQ's conclusion . . . was in error." *MEIC 2023*, ¶ 21 (emphasis added). As that passage suggests, there may be instances in which petitioners have to present evidence to meet their burden of persuasion. Because Petitioners' have made these factual and scientific claims, they must show by a preponderance of the evidence, that DEQ's factual and scientific conclusion that ground and surface water will not

be affected by operations under the Permit is incorrect and therefore a violation of the law. However, as stated above, there is no issue of material fact in this case in part because Petitioners did not dispute the facts during summary judgment. The HE correctly found that Petitioners had not presented sufficient evidence to meet its burden of proof on these factual and scientific claims. Specifically, the HE explained that DEQ performed an analysis that confirmed any disturbance would occur above the depth to groundwater. *See* Proposed FOFCOL at 5-6 (¶¶ 13-15). Additionally, the nearest surface water is a pond located about 670 feet from the Permit boundary. DEQ MSJ Ex. E, EA at 8. As relied upon by the HE, there is ample evidence in the record that shows ground and surface water will not be affected. Simply because Petitioners had an expert witness with a differing opinion does not in itself mean DEQ's determination was not supported.

Despite their protests, Petitioners have also argued water will in fact be affected. Petitioners' MSJ at 12-14 ("DEQ's analysis in fact revealed that ground and surface water would be affected. . . . In other words, water would be affected. . . . [T]here will be an impact on surface or groundwater, and the Permit was not acceptable . . . ."). With respect to this claim, Petitioners undoubtedly have the burden to show that ground or surface water will be affected by Permit operations as that is precisely what they have alleged. Assumingly, Petitioners attempt to do this by pointing to testimony given before the district court at the show cause

hearing saying that dust has already and will continue to be blown onto Elbow Lake if operations resume. Petitioners' MSJ at 12-13. However, this is not enough to satisfy their burden of proof. The subject testimony came from a non-qualified expert who alleges he saw dust from the Permit area on a surface water 1,250 feet away. DEQ MSJ Ex. L, FOFCOL at 24 (¶ 83); DEQ MSJ Ex. E, EA at 8. Assuming so much is true, Petitioners' qualified expert in hydrology, David Donohue, testified he has not taken any samples from the Permit area nor performed any independent analyses that would show surface waters like Elbow Lake (or groundwater, for that matter) have been or will be affected. DEQ MSJ Ex. P, Depo. Tr. of David Donohue at 20:24-23:3; 46:18-47:2. Mr. Donohue is not aware of any evidence that shows ground or surface water, or conveyance facilities will be affected by mining. *See* DEQ MSJ Ex. P, Depo. Tr. of David Donohue at 46:18-21, 55:14-23; DEQ MSJ Ex. D, Dist. Ct. Hrg. Tr., 123:12-15. Clearly, Petitioners have not satisfied their burden of proof in showing that ground or surface water will be affected and therefore the HE's proposed findings on this issue are supported by evidence in the record.

Petitioners have also alleged that DEQ's interpretation of "affect" as it appears in § 82-4-432(1)(b)(i), MCA, is incorrect. Petitioners' MSJ at 11. Petitioners have the burden to show DEQ's interpretation is not only incorrect, but that such made a material difference in DEQ's decision-making. Here, the HE

agreed with Petitioners' broad interpretation of the term and still determined they had not satisfied their burden of proof on the substantive issue as explained above. *See* Proposed FOFCOL at 5 (¶¶ 9-11). Specifically, DEQ conducted its own analysis of whether ground and surface water would be affected. So even if the BER adopts a different definition of "affect" than what DEQ believes is correct, DEQ still performed the necessary analysis and concluded ground and surface water would not be affected. Therefore, Petitioners fail on this allegation as well.

b. "Affect" under § 82-4-432(1)(b)(i), MCA, means "intersect" or "touch" groundwater and surface water.[5]

As briefly mentioned above, Petitioners argue that DEQ's interpretation of the term "affect" in § 82-4-432(1)(b)(i), MCA, is too narrow. Because the HE agreed with their interpretation, Petitioners do not brief the issue as an exception. They do take issue with conclusions of law ¶¶ 25-29 arguing the HE's definition of "affect" was not accurately implemented when DEQ's EA is considered. These topics are addressed in DEQ's Exceptions Brief and are incorporated herein, which proposes modification to some of these conclusions of law. Specifically, impacts considered under MEPA are not equivalent to "affect" under the Opencut Mining Act. Additionally, "affect" means "intersect" or "touch". At issue is language contained within DEQ's EA: "DEQ does not anticipate an impact to surface water

[5] *See* Petitioners' briefing on conclusions of law 9, 10, 11, 14, 17-21, and 23-29.

or groundwater quality or quantity and distribution management." DEQ MSJ Ex. E, EA at 8. It then explained that "During the beginning stages of mining, surface water that may leave the site during a heavy storm event could carry sediment. . . . Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface." If these possible impacts acknowledged pursuant to MEPA are equivalent to "affect[s]" under the Opencut Mining Act as Petitioners allege, it would be impossible to obtain a dryland permit because all opencut permits marginally "affect" surface and ground water as "precipitation falls on every single general site in Montana." *See* DEQ MSJ Ex. D, Dist. Ct. Hrg. Tr., 36:21-22.

Similarly, if the fact that petroleum products will be stored in the Permit area is an "affect", DEQ would not be able to issue dryland permits. Regardless, Petitioners have not shown the storage of petroleum products will affect waters. They have hardly alleged it, stating Mr. Donohue testified "about the *possibility* of petroleum products from the mining operation and related equipment infiltrating into groundwater" and "this project *may* 'affect' ground or surface water". Petitioners' Exceptions to Proposed FOFCOL at 13-14 (emphasis added). As explained above, this is another way Petitioners failed to satisfy their burden of proof. The HE was correct to draw a distinction in conclusions of law ¶¶ 17-21 between what is regulated under the Opencut Mining Act and a broader look at

impacts pursuant to MEPA, which is not at issue here as the BER has no jurisdiction over such claims. *See Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1022 (1992).

c. Field verification is not required under the Opencut Mining Act.[6]

Petitioners allege that while field verification is not specifically required by the Opencut Mining Act, rigorous overview of the application process by DEQ is required under § 82-4-422, MCA. *See* Petitioners Exceptions to Proposed FOFCOL at 10. Petitioners cite specifically to § 82-4-422(1)(d), MCA, which gives DEQ the discretion to "make investigations or inspections that are considered necessary to ensure compliance with any provision of this part." *See* Proposed FOFCOL at 9 (¶ 45). Nowhere in the statute is "rigorous overview" stated. However, DEQ did review and evaluate the Permit as concluded by the HE in the Proposed FOFCOL.

While Petitioners argue that Ms. Hopkins' findings are not reliable because she is not a trained hydrologist, she is a scientist. *See* Petitioners Exceptions to Proposed FOFCOL at 11. Petitioners' main gripe with the HE's Proposed FOFCOL is the facts relied on by the HE. However, this proceeding comes before the BER on an order for summary judgment. As such, there is no genuine issue of material fact and the HE was correct in granting summary judgment for DEQ as

[6] *See* Petitioners' briefing on conclusions of law 13, 14, and 15.

shown above.

As determined by the HE, DEQ did more than what is required of it under the Opencut Mining Act. Ms. Hopkins reviewed the Permit application to ensure compliance with the Opencut Mining Act and determined ground and surface water would not be affected. *See* Proposed FOFCOL at 6 (¶15). As detailed above, Ms. Hopkins' review included GWIC well logs, mapped surface waters and wetlands, and verification that the Permit boundary was at least fifty feet from the high-water mark of surface waters. *Id.*; *see also* DEQ MSJ Ex. D 29:17-20, 30:18-25, 31:1-2, 33:3-25, 34:1-3, 34:5-9, 34:19-24, 35:1, 40:20-25, 41:1-7; 45:19-25, 46:1-3, 46:12-21, 49:3-5, 49:24-25, 50:1-7. Additionally, Ms. Hopkins independently determined by looking at both GWIC data and the elevations of various surface waters that groundwater is roughly 100 feet below ground surface and roughly 80 feet below the maximum mining depth. *See* DEQ MSJ Ex. D, Dist. Ct. Hrg. Trans. at 33:3-9. Petitioners' dislike of the HE's weighing of the evidence does not constitute reversable error as they request.

d. The Opencut Mining Act requires certification from the applicant that fewer than ten ODUs exist within one-half mile of the proposed opencut boundary.[7]

One requirement for qualification of a dryland application under the Opencut Mining Act is certification from the applicant that fewer than ten ODUs

[7] *See* Petitioners' briefing on conclusions of law ¶¶ 42-56.

exist within one-half mile of the permit boundary. Section 82-4-432(14)(a)(ix), MCA. Petitioners allege that there is no legal basis for DEQ's assertion that it may rely on the applicant's certification of ODUs. *See* Petitioners Exceptions to Proposed FOFCOL at 19. Additionally, Petitioners allege that the HE shifted the burden by requiring the Petitioners to show that ten ODUs exist within one half-mile of the site. *Id*., at 20.

As shown above, Petitioners misinterpret the Montana Supreme Court's ruling in *MEIC* 2023. Petitioners have claimed that (1) DEQ erred in accepting certification from the applicant because the certification was incorrect, and (2) "due to the number of occupied dwelling units located within one-half mile of the permit boundary, Permit #3473 is subject to subsections (2) through (13)" of § 82-4-432, MCA. *See* Petitioners Notice of Appeal at 3. As such, Petitioners bear the burden of persuasion as to each fact essential to the claim that ten ODUs exist within one-half mile of the proposed opencut boundary and that LHC's certification was incorrect. *MEIC* 2023, ¶ 15.

Here, Petitioners failed to show that more than ten ODUs exist within one-half mile of the proposed opencut operation. *See* Proposed FOFCOL at 11 (¶¶ 55-56). While Petitioners were able to show that one leaseholder uses his Elbow Lake residence as his primary residence, one ODU does not equal ten ODUs. *See* Proposed FOFCOL at 11 (¶ 54). Because Petitioners cannot show that ten ODUs

exist within one-half mile of the proposed opencut boundary, they most certainly cannot show that LHC's certification of such is incorrect.

Petitioners also allege that DEQ needed to verify LHC's ODU findings under § 82-4-422(1)(d), MCA. Section 82-4-422(1)(d), MCA, states that DEQ "has the powers, duties, and functions to . . . make investigations or inspections that are *considered necessary* to ensure compliance with any provision of this part." Section 82-4-422(1)(d), MCA (emphasis added). However, as determined by the HE in conclusion of law ¶ 45, § 82-4-422(1)(d), MCA, provides DEQ with the discretion to take further action. *See* Proposed FOFCOL at 9 (¶ 45). Regardless, DEQ did investigate further when it required follow-up from LHC through a deficiency letter upon which LHC responded explaining how it complied with the ODU requirement. *See* DEQ MSJ Ex. C, Deficiency Letter at 2, ¶ 5; *see also* DEQ MSJ Ex. O, Deficiency Response, ¶ 5.

Further, the specific provision in § 82-4-432(14)(a)(ix), MCA, concerned with ODUs (compared to the general provision cited by Petitioners) states that a dryland permit application must contain a certification that there are fewer than ten ODUs within one-half mile of the permit boundary. *See* § 1-2-102, MCA ("When a general and particular provision [of a statue] are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."). As correctly identified by the HE, DEQ is entitled to rely on

an applicant's certification of ODUs. Proposed FOFCOL at 9 (¶¶ 43-44). To require more would ignore the fact that the term "certification" was used. *See* § 1-2-101, MCA ("In 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. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.").

Because Petitioners failed to present any evidence to support their claims that (1) ten ODUs exist within one-half mile of the proposed opencut operation and (2) LHC's certification of ODUs was made in error, the HE's determination that DEQ properly relied on LHC's certification must stand.

CONCLUSION

For the reasons stated above, the HE's conclusion that DEQ properly issued the Permit is correct and supported by evidence in the record. Additionally, as explained in DEQ's Exceptions Brief, the BER should adopt the modifications of COLs ¶¶ 9, 10, 11, 15, 16, 29, and 55 and remove COL ¶ 52 as requested by DEQ to remain consistent with the requirements of DEQ under the Opencut Mining Act.

Dated this 5th day of April, 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/Kaitlin Whitfield
Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2024, I caused a true and accurate copy of the foregoing document to be emailed to:

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

DEQ Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: March 13, 2024

SUBJECT: Board of Environmental Review Case No. BER 2024-01 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING ON TMC INC., PERMIT NO. 3462/BLACK PIT	Case No. BER 2024-01 OC

On March 13, 2024, the BER received the attached request for hearing.

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

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

Attachments

Electronically Filed with the
Montana Board of Environmental Review
3/13/24 at 2:52 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2024-01 OC

March 13, 2024
Gary L. Bilotti
77 Little Bear Road West
Gallatin Gateway, MT 59730

Sandy Moisey Scherer

Board Secretary

Board of Environmental Review

1520 East 6 th. Avenue

Helena, MT 59601

Re: TMC INC. 3462/Black Pit

Please consider this letter as a request of the highest level of importance. We are requesting that the BER review and reject the TMC INC. 3462/Black gravel pit permit for numerous reasons, as follows:

1. The hydrology report submitted by TMC was both incomplete and it contains information gathered from a different pit location. This information can be found on page twelve of TMC's application.

2. The DEQ asked TMC four times to present appropriate and accurate hydrology information. They failed to do so on four occasions.

3. The DEQ then issued a permit WITHOUT this important information.
4. Most every effected "neighbor" (of this proposed pit), has grave concerns about the water table, loss of healthy air quality, water quality, water availability and noise pollution.

5. The truck traffic from this pit will adversely affect an already congested, accident prone Hwy 191. At the current rate of traffic, (15,000 vehicles per day, MDT figures), slow egress and ingress truck traffic will endanger the flow of traffic, in a 70 MPH zone.

6. This pit will cause further loss of wildlife habitat for Deer, Elk and waterfowl.

7. We as citizens of Montana are guaranteed the right to live in an "environmentally "safe atmosphere. It has been proven time and time again that gravel pits have an adverse effect on all aspects of a safe environment and the health of those neighbors in proximity.

We thank you for your consideration of this most important issue. We look forward to a favorable outcome for ALL citizens affected by this unnecessary gravel pit.

"/S/ Gary Bilotti and Daryl Monroe-Bilotti"

77 Little Bear Road West

Gallatin Gateway, MT 59730

Pages 2

Cc: To file

Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: March 29, 2024

SUBJECT: Board of Environmental Review Case No. BER 2024-02 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL OF DEQ OPENCUT MINING PERMIT #3462, DECISION (3/1/24) AND ENVIRONMENTAL ASSESSMENT	Case No. BER 2024-02 OC

On March 29, 2024, the BER received the attached request for hearing.

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

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

Attachments

To: Montana Board of Environmental Review

From: Theresa Seth

3/29/2024

Electronically Filed with the
Montana Board of Environmental Review
3/29/24 at 2:13 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2024-02 OC

RE: APPEAL of DEQ Opencut Mining Permit #3462, Decision (3/1/24) and Environmental Assessment

I am appealing the Montana DEQ decision to issue permit #3462 – an opencut gravel mining permit also referred to as the Black Open Cut Permit (south of Gallatin Gateway MT).

My Request: I urge the Board to rescind permit #3462 and require ground water monitoring as outlined in the Depth to Ground water memo in the permit to minimize the risk of intercepting groundwater during mining operations.

STANDING

I have standing to appeal this decision and permit. I commented at every public comment opportunity including verbal comments at the public meeting (July 25, 2023) and written comments submitted on 2/24/24, 1/22/2024, 12/7/2023, 7/25/2023 and 7/1/2023. I commented on my concerns related to groundwater and the protection of the integrity of the aquifer that feeds the domestic wells for residences immediately south of the permit area in particular.

The permit process required notification of residences within ½ mile of the permit boundary. The property that I own and occupy is within the Bear Creek Properties West subdivision. The line chosen by TMC (permittee) to cease notification of affected owners is the line that separates my subdivision from the properties that are considered "affected" in the permit. My property is approximately ½-3/4 of a mile upgradient (due south) from the permit boundary so my neighbors and I will be directly affected by the mining operation. My property and the properties in our subdivision will be adversely affected by the final decision of the Department to approve the permit application.

REASONS FOR MY APPEAL

1) **As permitted, the mining operation is very likely to intercept groundwater and the potential for dewatering domestic wells in the immediate vicinity is unacceptable and completely avoidable.**

The permit indicates a maximum mining depth of 60' and a minimum mining depth of 35' with a three foot buffer between groundwater and mining. Maximum mining depth will occur in the southeastern part of the mine, with the minimum mine depth occurring in the northwest portion of the site. Mining depth will shallow northwest across the property. Figure 5 (page 89 of the permit) in the permit shows the approximate mining depth throughout the permit area. The

figure also shows four monitoring wells outside the perimeter of the permit boundary on or near each corner. The groundwater elevation memo which is part of the permit describes ground water monitoring including timing and results.

The Opencut Mining Permit incudes instructions on appropriate groundwater monitoring (Appendix A). This Appendix, "Determining Depth to Groundwater" form which is part of the permit, which the permitee is required to complete states *"This document provides direction for Operators regarding methods to establish depth to seasonal high groundwater levels within the proposed permit boundary, as required by ARM 17.24.218(1)(g)."*

APPENDIX A (Permit)- GROUNDWATER OBSERVATION WELL INSTALLATION AND MEASURING PROCEDURES provides instruction for determining depth to groundwater.

The DEQ instructions indicate: *"Observation wells* ***must be installed before or during the time when groundwater levels are highest.*** *This is typically during spring runoff and/or during the irrigation period, but may also occur at some other time during the year. Observation measurements must be made weekly or more frequently during the appropriate periods of suspected high groundwater.* ***Observation measurements must be made at a minimum of once a week for a minimum of four weeks when groundwater is at its highest to accurately***

determine high groundwater level. More complex sites must include at least two weeks of observation measurements prior to and two weeks of observation measurements after the groundwater peak. Failure to meet these criteria would likely result in the Opencut Section rejecting the results.“

Instructions also indicate “The Opencut Section may refuse to accept seasonal high groundwater data when the total precipitation for the previous year, defined as May 1 of the previous year to April 30 of the current year, if April 1 snowpack equivalent, measured at the nearest officially recognized observation station, is more than 25 percent below the 30-year historical average.”

> **My Concern*:*** I include this section because given the lack of snow pack it is possible that 2024 will be an unacceptable sample year which is relevant if the permit decision is modified to require additional monitoring.

The instructions further indicate, “The observation wells must be installed in locations representative of typical groundwater conditions at the site. At least two of the wells should be in low lying areas of the site **and the wells should be spread out to represent conditions across the site**. Larger sites or sites with highly variable conditions and/or topography may require the installation of additional wells.”

The permittee response to the groundwater related requirements was the preparation of a memo "RE: Groundwater Elevation – TMC Inc., Black Site", last edited 1/30/24 and prepared by Morrison Mairle.

The memo describes when monitoring occurred and the location of the wells used. "*A groundwater elevation record exists for the four wells at the Black site. The Site map shows well locations (Appendix C). The wells include two existing wells, one at the house and an irrigation well in the southwest corner of the property. Two other wells, drilled by Bridger Drilling on September 14, 2023, are in the Northeast and Southwest corners of the proposed permit area. All four wells are located outside of the permit boundary. The groundwater measurement record begins August 11, 2023****, in the house well*** *and* ***begins September 21, 2023, in the other three wells****. The below table contains groundwater measurements collected at the Black Site."* (page 4)

From the Morrison Mairle memo in the permit, "Measurements in the other three wells located on the Black property began a month after measurements at the house. High water elevation in these wells may be up to two feet higher in elevation than measured."(Page 6)

My Concern: The monitoring submitted does not meet the requirements in timing or duration for groundwater as required by the DEQ form quoted in

prior paragraphs. The readings were not made weekly during high water for a period of four weeks as required. Readings occurred in 3 of the sites on September 21, which is 4 or more weeks after "highwater" according to the memo prepared by Morrison Mairle.

The readings were taken after highwater and the number of readings over time is insufficient. High water was estimated not measured in the three sites on the permit perimeter.

Per the instructions from DEQ, the monitoring wells should be spread out to represent conditions across the site. There are no monitoring wells within the perimeter of the site, which does not meet the requirement to represent conditions across the site. The reason this is crucial is described below.

"The Morrison Mairle memo summarizes with *"Depth to groundwater measured on site ranges from 69.7 feet to 15.12 feet in the four wells. Depth to groundwater in the northeast well (328688) and the southwest well (328689) are almost identical throughout the measurement period. The shallow depth to groundwater at the house well is due in part to it being located downgradient of the mine site and being located at the base of the terrace. The depth to water in the southeast*

corner of the permit is greatest as shown from measurements collected in well 99166"(page 5)

My concern: The memo indicates that the other two monitoring wells [on NE and SW corners of permit boundary] show groundwater at approximately 46 feet. Figure 5 (pg. 89 of the permit) shows the location of wells and the planned mining progression. You can see that with the current monitoring sites, the permittee has no idea within the permit area where water levels change because there is no monitoring within the permit area.

The memo also relies on long term monitoring from two other gravel pits within 5 or so miles to justify conclusions.

My concern: Those sites do not represent the complexities of the Black site.

The most prominent complexity with the Black site is the number of residences immediately adjacent that rely on this same aquifer for drinking water from domestic wells. If ground water is intersected it is not that easy to stop the flow especially considering the pit is an 130 acre open pit. Gravity flows downhill and water flows to where there is less pressure which would be an open pit 60 feet deep at the deepest part. There are 30

"affected" properties listed in the permit. The 30 properties listed are on all sides of the pit but a majority are upgradient. In addition, the Bear Creek Properties West subdivision, ½ mile south to approximately 1 mile south, includes 62 lots with approximately 62 domestic wells. A few lots are not developed but those often include wells. Some domestic wells are deeper than 60 feet but many are not. The wells on these properties must not be compromised. DNRC indicated that if wells were dried up due to the mining, then they could assist homeowners. It is unreasonable to wait for our wells to be compromised when additional monitoring now, in advance of mining, could inform TMC of the ground water levels during highwater to avoid compromising the upgradient wells immediately adjacent and including the subdivision I occupy.

The current proposal extends the mining depth to 60 feet and reduces the buffer to 3 feet. The solution for intercepting water is to back fill 3 feet of material. This is a completely reactive plan to groundwater interception. Mining that occurs outside of highwater won't intercept water but during highwater we can look forward to a large pond along highway 191.

The potential loss of domestic water and economic impact to nearby homeowners of redrilling wells can be avoided easily by taking the time to

monitor groundwater in advance, which would be consistent with the DEQ instruction page for “Depth to Groundwater Determination”. This memo indicates that adhering to the memo is required and yet DEQ did not require groundwater monitoring consistent with the memo. The consideration and protection of our wells is protected by the Montana Water Rights Act, as well as our Montana constitution. The constitutional guarantee for a healthful environment would extend to our domestic water supply because drinking water is a requirement for healthful living.

This conflict can be remedied very easily by requiring advance groundwater monitoring, as required by the DEQ instructions to inform mining operations where groundwater levels change within the permit area. This would reduce the risk of intercepting groundwater. In addition, the original mining proposal submitted by TMC in July indicated a maximum depth of 40 feet with a 10-foot buffer between mining and ground water. That proposal significantly reduces the likelihood of mining activity intercepting groundwater. If TMC reverted to the original mining depth and buffer the possibility of ground water interception would be minimal.

2. The requirements of the MEPA have not been met.

My Concern: The Environmental Assessment (EA) that was prepared to determine whether an Environmental Impact Statement (EIS) is needed completely whitewashed potential effects. The crux of an EA is to determine the need for an Environmental Impact Statement (EIS). The EA is useless in determining the need for an Environmental Impact Statement because no real analysis was competed due to lack of date and time. Almost all conclusions are tied to "information available at the time of analysis". The agency did not collect or require data necessary to disclose effects. The EA is completely insufficient for determining the need for an EIS. I included some examples of inaccurate and completely false conclusions. Even without data, minimal knowledge of the site and proposal would support that these statements are inaccurate.

Significance factor #2 is to determine the probability an impact will occur or reasonable assurances of keeping with the potential severity.

My concern: DEQ and other agencies lack authority to require mitigation of impacts so then there is no reasonable assurance that potential severity is minimized related to wildlife, groundwater, visuals etc.

Significance Factor #5 – has to do with the importance to the state and society of each environmental resources or value that would be affected.

My Concern: The EA indicates "no impact" to quality and quantity of water. At a minimum this declaration is false because the potential for intersecting the ground water aquifer is high without additional monitoring data. The EA includes the barest of information about water resources. Therefore, it omits necessary information about waters' interaction, and fails to consider the impact of mining to the proposed depth.

While the permit does not propose development of groundwater there is a high probability of intersecting groundwater and directly compromising nearby wells. The permit addresses this concern by saying if water is intersected, then they will cover it with 3 feet of material, which is unlikely to retore the integrity of the aquifer especially if the breach occurs in low water times of year. Once the aquifer is breached it is not that easily closed off. Since there is no monitoring within the perimeter, the gradient for groundwater depth is unknown. The integrity of the groundwater aquifer is especially "significant" to community members with domestic wells nearby.

Significance Factor #7 has to do with potential conflict with state, local and federal laws and requirements.

My concern: The EA does not demonstrate consideration of whether these laws and regulations would be met. In particular the Montana Water Rights Act may

be violated since there is not enough data to ensure groundwater used by nearby domestic wells remains unaffected.

In the analysis of severity factors on page 46 (EA) the DEQ states viewshed aesthetics would not be impacted. The EA states that the disturbance would not dominate the landscape.

My concern: A photo of the current view from homes or Highway 191 and a gravel pit berm is evidence that the disturbance would absolutely dominate the landscape. The level of significance of effects in the EA cannot be accurately determined with false statements like "no impact" for visuals.

The following statements are from the *Assessment of Significance Table 2.* (EA, page 52)

Factor 21 – private property impacts – no anticipated impacts.

My concern: This is highly disputable! I have discussed private property impacts previously in this appeal. Impacts related to noise, dust, traffic are disclosed as "no impact" in the determination of significance but in the analysis of the EA impacts to nearby residences is discussed. Again the conclusion that an EIS is not needed is based on inaccurate conclusions.

Factor 22. Other appropriate social and economic circumstances – no anticipated impacts.

My concern: Given the proximity, duration, frequency and the probability the activity will occur without mitigation this statement of impacts is very inadequate in determining level of or even acknowledging impacts. It is simply a false statement to say a 40 year mining operation over 129 acres and 60 feet deep is not going to have impacts to adjacent private property. Further, private property includes water rights, the likelihood that the project has a high probability of compromising nearby wells is certainly an impact.

My MEPA concern: The EA ignores potential impacts by relying on "based on data available at the time" instead of gathering data or requiring the permittee to provide data. The level of significance of impacts was ignored and mis-stated by concluding "no impact" throughout the EA and in the Assessment of Significance Table starting on page 39 of the EA. Under a number of "significance factors" stating "no impact" is simply false and are not helpful in determining whether to prepare an EIS. DEQ is not looking out for the citizens of Montana under MEPA review related to open cut mining and therefore the constitutional guarantees for a clean and healthful environment are not being met. I realize that even if an EIS was prepared the permit would be authorized, however, DEQ has not been diligent or truthful in the disclosure of possible effects which is required under MEPA.

My Request: I urge the Board to rescind permit #3462 and require ground water monitoring as outlined in the Depth to Ground water memo in the permit to minimize the risk of intercepting groundwater during mining operations.

Respectfully Submitted:

/s/ Theresa Seth

133 Low Bench Road Gallatin Gateway MT 59730

tseth455@gmail.com

March 18, 2024

Sent via email to Ken@tmc-belgrade.com

Ken Stoeber
c/o TMC, Inc.
22540 Frontage Road
Belgrade, MT 59714

RE: Opencut Permit OC#3462 Black Site Environmental Review Errata

Dear Ken,

Thank you for bringing to the Montana Department of Environmental Quality's (DEQ) attention an inconsistency in the Environmental Assessment (EA) that was written, per the requirements of the Montana Environmental Policy Act, to identify, analyze, and disclose impacts that could result from the issuance of Opencut Permit OC#3462 to TMC, Inc. for the Black site.

Section 7. Historical and Archeological Sites (p. 22) and the *Need for Further Analysis and Significance of Potential Impacts* section (p. 41) both state that a Class III cultural resources study was conducted at the Black site. Those sections should have included the language in the attached errata.

While the statements about a Class III cultural resources study in the published EA document should have read differently, DEQ's determination that there would be no impacts to historical, cultural, and archeological sites still remains the same.

Sincerely,

Whitney Bausch
Opencut Mining Section Supervisor
Department of Environmental Quality
P.O. Box 200901, Helena, Montana 59620-0901
Phone: (406) 444-3403
Email: wbausch2@mt.gov

Cc: Pat Eller, Morrison Maierle
OC#3462 Stakeholders List

Errata to the Environmental Assessment for the TMC, Inc. Black Site, Opencut Permit OC#3462

This document captures information about minor clarifications to the Environmental Assessment (EA) issued on March 1, 2024. The EA was updated accordingly on March 18, 2024.

- Section 7. *Historical and Archeological Sites* (p. 22) stated that a Class III cultural resources study was conducted at the Black site. This section should have stated the following:

  "A cultural resource file search was conducted by the State Historic Preservation Office (SHPO) and no resources were identified within the proposed permit boundary. As long as there is no disturbance or alteration to structures over fifty years of age, SHPO has determined that there is a low likelihood that cultural properties would be impacted and does not recommend a cultural resource inventory."

- The *Need for Further Analysis and Significance of Potential Impacts* section (p. 41) stated that a Class III cultural resources study was conducted at the Black site. This section should have stated the following:

  "Unique, endangered, fragile, or limited environmental resources have been evaluated. There are no unique or known endangered fragile resources in the project area. A cultural resource file search was conducted by SHPO and no further requirements were provided. However, should structures over fifty years of age need to be altered or if cultural materials are inadvertently discovered during this project, SHPO asks that their office be contacted, and the site investigated."

DEQ
Montana Department of Environmental Quality

Air, Energy & Mining Division

TMC, Inc.

STANDARD OPENCUT MINING PERMIT

OC#3462

BLACK SITE

Gallatin Gateway, MT

March 2024
Environmental Assessment

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PROJECT OVERVIEW

COMPANY NAME:	TMC, Inc.
EA DATE:	March, 2024
SITE NAME:	Black
OPENCUT#:	3462
PERMITTED ACREAGE:	129.8
NON-BONDED ACREAGE:	0
RECLAMATION DATE:	December 2044
POSTMINING LAND USE(s):	Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells
CUBIC YARDS MINED	6,000,000
AMENDMENT #:	Not applicable
Application Received Date:	May 23, 2023

Location

Lat/Long: 45.57278, -111.20358
County: Gallatin
Distance to nearest Town or Major Intersection 1 mile south of Gallatin Gateway, Montana
PROPERTY OWNERSHIP: FEDERAL ☐ STATE ☐ PRIVATE ☒

Compliance with the Montana Environmental Policy Act

Under the Montana Environmental Policy Act (MEPA), Montana agencies are required to prepare an environmental review for state actions that may have an impact on the human environment. The proposed action is considered to be a state action that may have an impact on the human environment and, therefore, the Department of Environmental Quality (DEQ) must prepare an environmental review. This Environmental Assessment (EA) will examine the proposed action and alternatives to the proposed action and disclose potential impacts that may result from the proposed and alternative actions. DEQ will determine the need for additional environmental review based on consideration of the criteria set forth in Administrative Rules of Montana (ARM) 17.4.608. DEQ may not withhold, deny, or impose conditions on the Permit based on the information contained in this Environmental Assessment (§ 75-1-201(4), MCA).

Proposed Action

DEQ would issue Opencut Permit OC#3462 (Permit) to TMC, Inc. (Applicant) if DEQ has determined that the Applicant has met the criteria set forth in Section 82-4-432, Montana Code Annotated (MCA). If approved, the Permit to conduct opencut activities would be granted until December 31, 2044.

Purpose and Need

DEQ's purpose and need in conducting this environmental review is to act upon TMC, Inc.'s application for a Permit to conduct opencut activities in compliance with the Opencut Mining Act for a site located on private land. The application for permit OC#3462 (Application) was received by DEQ on May 23, 2023. Pursuant to Section 82-4-432, MCA, the Applicant has revised and resolved outstanding deficiencies regarding its application.

The Applicant's purpose and need in proposing this action is to obtain a gravel source for future operating needs.

TABLE 1: SUMMARY OF ACTIVITIES PROPOSED IN APPLICATION

Table 1. Summary of Proposed Activities in Application	
General Overview	The Applicant proposes to permit a new Standard opencut operation to mine, screen, crush, stockpile, and transport 6,000,000 cubic yards of gravel, sand, clay, and borrow material from a 129.8-acre site located approximately 1 mile south of Gallatin Gateway, Montana. The site would be located on private property. The gravel, sand, clay, and borrow material would be mined to a maximum depth of 60 feet. Mining depth would vary across the site, dictated by the depth to groundwater. The Applicant would maintain a 3-foot buffer above the high water table. A conveyor, screen, and crushing equipment would be used on site during the operation. The equipment would be located on the northeastern corner of the site for most of the life of the operation. Final reclamation would be complete by December 31, 2044. The existing irrigation equipment located near the approach on the eastern side of the Permit area will stay in place and will be utilized to irrigate the south portion of the site. Upon commencement of mining in the southern portion of the site, TMC, Inc. will remove and replace the irrigation mainline at the direction of the landowner. At the conclusion of mining, the site would be reclaimed to Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells. The proposed site would be eligible for Phase I Release after ripping/deep-tilling and disking areas within the proposed Permit area that are affected by compaction, restoring slopes to 3:1 or flatter, replacing salvaged soil and overburden, and seeding the site. The site would be eligible for Phase II Release after two full growing seasons have passed and after the site is reclaimed to Phase I Release requirements, and vegetation is well-established for pastureland/rangeland areas. Cropland only requires one successful harvest to meet Phase II reclamation requirements. The Applicant may file to extend the final reclamation date at any time if the Applicant wishes to continue to mine the site and DEQ would apply the applicable permitting processes to the application at that time.
Proposed Dimensions	
Facilities and surface disturbances	Opencut disturbance would be permitted to occur on the entire 129.8 acres.
Length of highwall (ft)	Highwall would be permitted and bonded to be a maximum of 3,000 linear feet.

Height of highwall (ft)	Highwall would be permitted and bonded to be a maximum of 60 feet high.
Current disturbance onsite	The site is currently being used for agriculture purposes.
Existing permitted access road length (lf)	No access road would be permitted for this site.
Total Permitted Acreage	The site would be permitted for 129.8 acres.
Total Bonded Acreage	The site would be bonded for 129.8 acres.
Specific Proposed Activities	
Duration and Timing	**Start Date**: Start date is defined as the date on which DEQ issues the opencut Permit (§§ 82-4-432(10)(c), (14)(d), MCA). **Final Reclamation Date**: December 2044 Final reclamation date is defined as the date that the Applicant identifies in the application for a Permit. The Applicant has proposed specific hours of operation, so this environmental review is analyzing the effects of operations taking place from: Monday through Friday: 6 AM to 7 AM Truck loading, hauling, and maintenance 7 AM to 7 PM All operations Saturday: 8 AM to 5 PM Truck loading, hauling, and maintenance Occasionally a project would require night time operations. These nighttime would be short duration (less than 60 days) and operations after 7 PM would only include truck loading, hauling and maintenance. Upon final reclamation, the site would be reclaimed to Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells. Phase I and Phase II reclamation requirements would be required to be met prior to the December 2044 reclamation date stated in the application. The Applicant may file to extend the final reclamation date if the Applicant wishes to continue to mine the site and DEQ would apply the applicable permitting processes to the application at that time.
Equipment	Typical opencut excavating/hauling equipment includes a backhoe, bulldozer, dump/haul truck, excavator, loader, scraper, and backhoe. Typical opencut processing equipment includes a conveyor, screen, and crushing equipment. Processing equipment would be set up in the northeast corner of the site.

Location and analysis area	**Location**: 45.57278, -111.20358 **Distance from nearest town/city**: Site would be located 1 mile south of Gallatin Gateway, Montana **Analysis Area**: The area being analyzed as part of this environmental review includes the immediate project area as well as neighboring lands surrounding the analysis area, as appropriate for the impacts being considered. Refer to maps below (Figures 1 and 2).
Personnel on-site	Personnel would include those hired by the Applicant, contractors, representatives and others allowed onsite.
Structures	Existing structures within the Permit boundary include fences, irrigation equipment and an irrigation mainline. The Applicant plans to construct a scale and scale house/office. The landowners houses and buildings are located outside the permitted boundary.
Project water source	Water that would be used for the proposed project would be obtained from a well located within the northeast corner of the Permit boundary.
Supplemental lighting	To comply with federal Mine Safety and Health Administration (MSHA) regulations, artificial light sources would be used on site during periods of operations when little or no sunlight is available. The Applicant did not state whether they will use lights in active work areas.
Air quality	The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to air quality.
Water quality	The Applicant would maintain a 10-foot easement from the irrigation ditch to the east and south of the Permit boundary. The Applicant would seed and revegetate berms around the perimeter of the site to avoid sedimentation of any water that left the site. The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to water quality.
Erosion control and sediment transport	The Applicant would seed and revegetate all soil and overburden stockpiles, including berms around the perimeter of the site, to prevent sediment runoff. The overall geomorphology of the excavation would create a bowl toward the center of the site, so most precipitation would drain inwards and not leave the site. Upon reclamation, to reduce erosion the Applicant would create horizontal contours that would be oriented to trap moisture and break water flow. The Applicant would also seed/harrow along contours. The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to erosion control and sediment transport.
Solid waste	The Applicant would periodically place reject fines back into the mine area as operations progress through the life of the Permit. Reject fines are natural or crushed rock that is generally ¼ inch or smaller. The Applicant would not stockpile more than 10,000 cubic yards of reject fines.

	The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to solid waste.
Cultural resources	The Applicant has not proposed any actions that would reduce any potential impacts to cultural resources. The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to cultural resources.
Aesthetics	The Applicant has proposed the following measures to reduce aesthetic impacts: Establishing vegetated sight and sound berms as shown on the Site Map (Figure 2). The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to aesthetics.
Hazardous substances	Per the Site Map, fueling would occur onsite. The Applicant has not proposed any mitigations to prevent fuel spills or procedures for cleaning any spilled fuel. The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to hazardous substances.
Weed Control	Noxious weeds would be required to be controlled on site at all times throughout the life of the Permit. The Applicant would be required to follow the Gallatin County Weed District permit. The Applicant is required to comply with the applicable local, county, state, and federal requirements pertaining to weed control.
Operation Requirements	The proposed opencut operation would be required to comply with the Opencut Mining Act, § 82-4-401, et seq., MCA ("the Opencut Mining Act"), and the rules adopted under the Opencut Mining Act governing permitted opencut operations. The activities proposed by the Applicant may be subject to additional regulatory oversight and operating conditions at federal, state, county, and/or local levels. DEQ has not assessed whether or not the proposed activities examined in this EA necessarily meet operational or regulatory requirements beyond those set forth in the Opencut Mining Act and the rules adopted under the Opencut Mining Act.
Reclamation Plans	Upon commencement of mining, 18 inches of soil and 18 inches of overburden would be stockpiled in locations across the site that would be protected from loss. Stripping of soil and overburden would occur prior to disturbance of the area. Upon final reclamation, 18 inches of soil and 18 inches of overburden (for a total of 36 inches) would be replaced in areas that have been affected by mining and mining related activities. The site would be reclaimed to Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells. A DEQ approved seed mix would be selected for reclamation.

	The proposed site would be eligible for Phase I Release after 1) the ground is graded, shaped and sloped to 3:1 or flatter, 2) the soil has been replaced, 3) the soil has been tilled to relieve compaction, and 4) the area has been seeded. The proposed site would be eligible for Phase II Release after two full growing seasons have passed since the site was reclaimed to Phase I Release standards, and after vegetation is well established. Phase I and Phase II reclamation requirements would be required to be met prior to the December 2044 reclamation date stated in the application. The Applicant may also file to extend the final reclamation date if the Applicant wishes to continue to mine the site and DEQ would apply the applicable permitting processes to the application at that time.
Cumulative Impact Considerations	
General setting	The site would be located on relatively flat cropland. The site gently slopes down from east to west and ends along the edge of an alluvial bench. A narrow depression runs from the northwest corner of the site to the southeast. This swale was excavated by previous landowners and the material removed was used to level the existing fields. The site is surrounded by cropland and other agriculture. A residential neighborhood is located adjacent to thesouthern Permit boundary.
Past actions	The nearest opencut site would be located approximately 1.6 miles to the southeast, just north of Little Bear Rd. Additionally, there is an opencut site located approximately 2.5 miles to the north and another opencut site is located approximately 5.7 miles north/northwest. Opencut operations would occur at a site where no past opencut operations have been permitted.
Present actions	DEQ is not currently considering any other applications for opencut mining Permits in the immediate area. The current uses onsite are agricultural.
Related future actions	Future actions are unknown at this time. The Applicant has the ability to submit to DEQ an application to amend the Permit for the site at any time, which DEQ would review pursuant to the Opencut Mining Act and rules adopted under the Opencut Mining Act at that time.

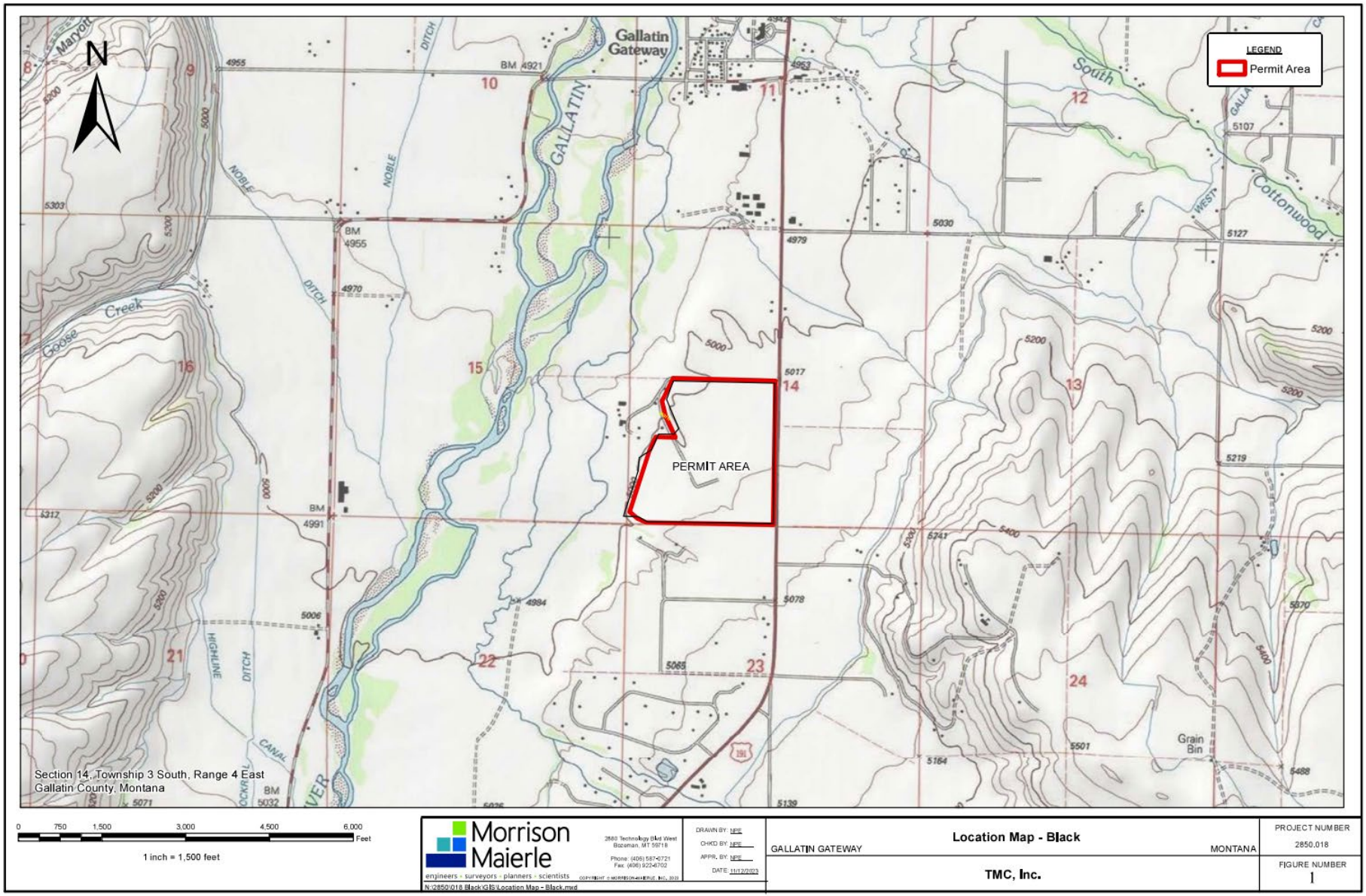

Figure 1: Location Map

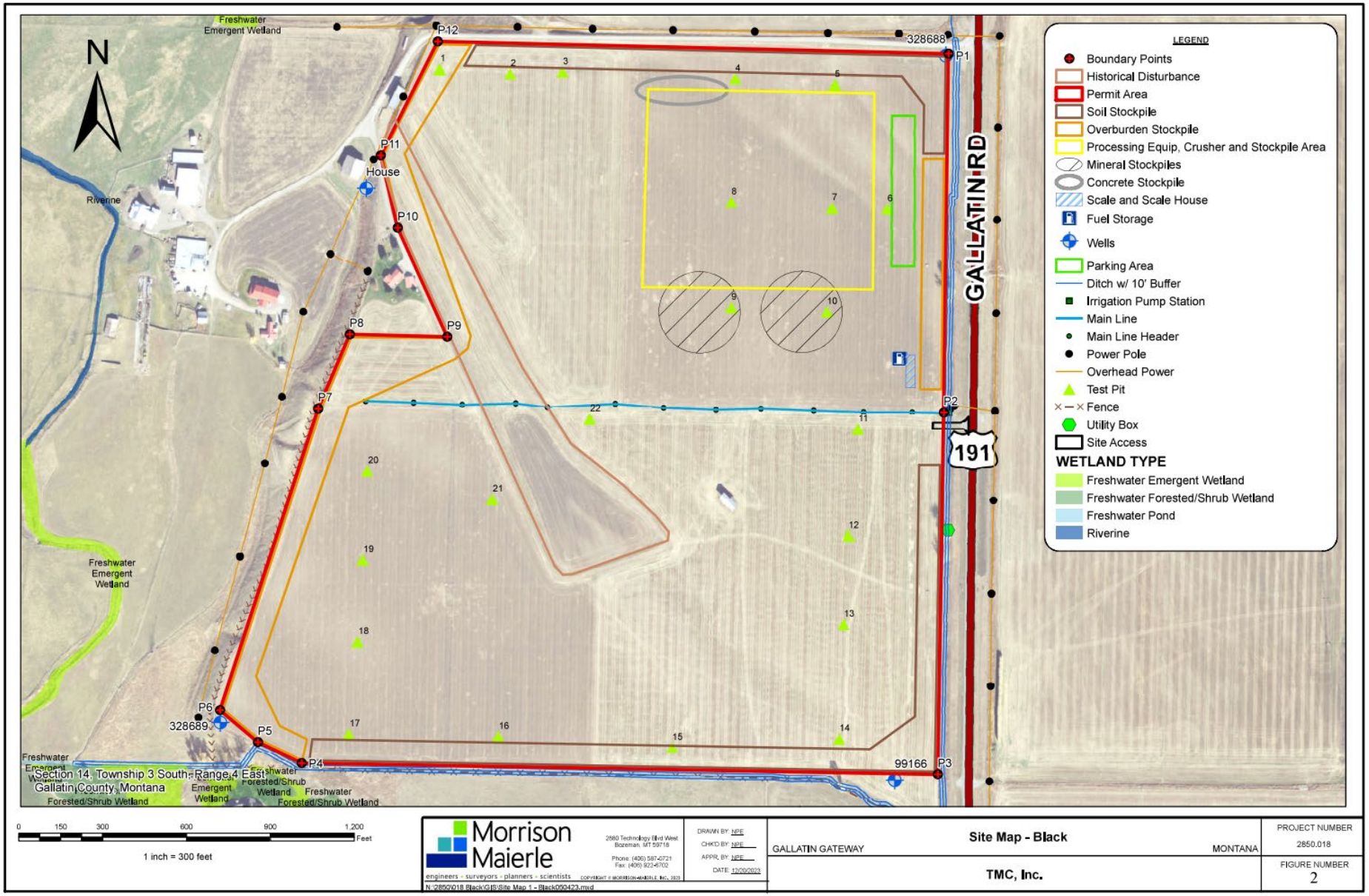

Figure 2: Site Map

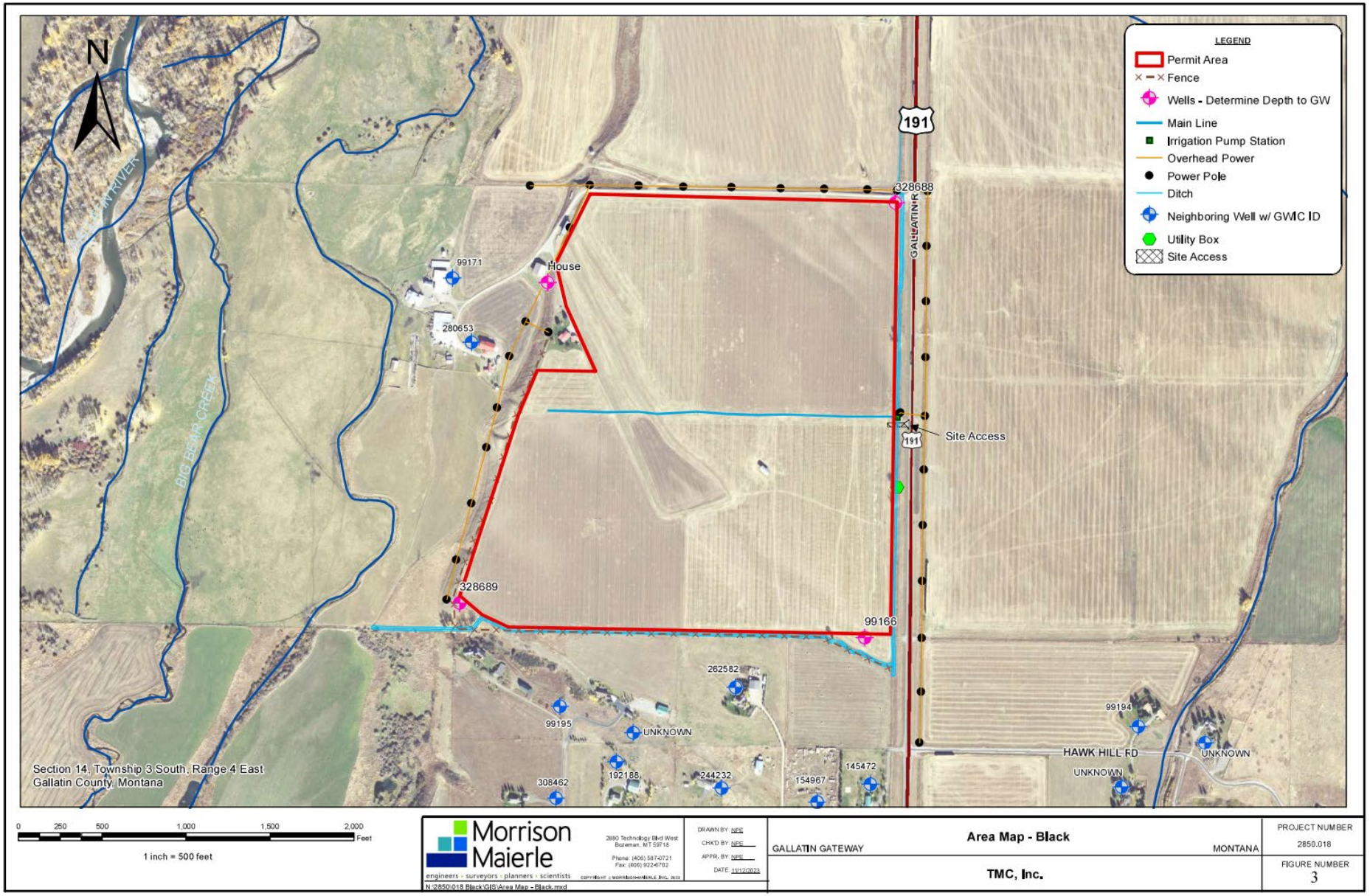

Figure 3: Area Map

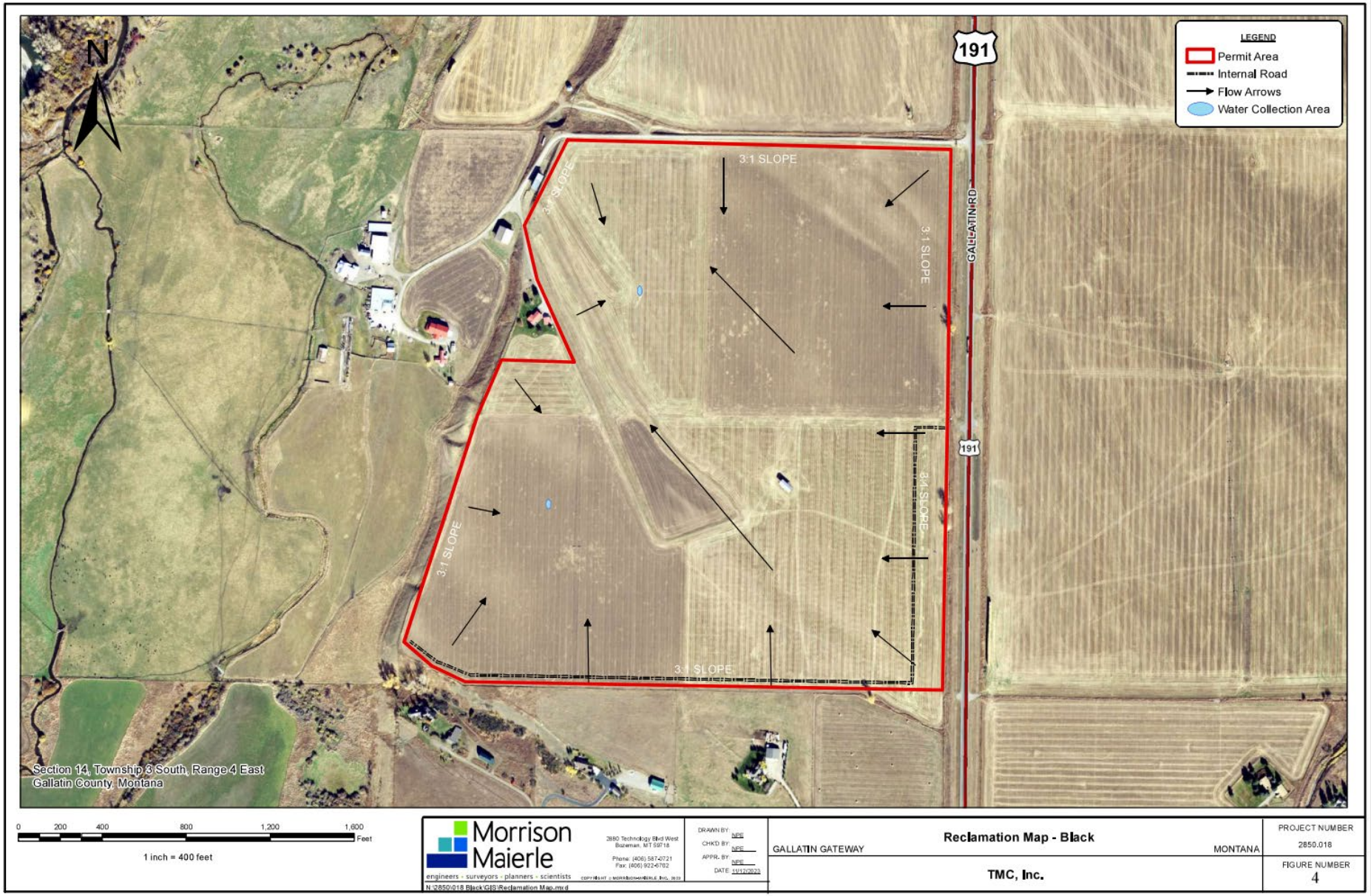

Figure 4: Reclamation Map

SUMMARY OF POTENTIAL IMPACTS

The impact analysis will identify and estimate whether the impacts are direct or secondary impacts. Direct impacts occur at the same time and place as the action that causes the impact. Secondary impacts are a further impact to the human environment that may be stimulated, or induced by, or otherwise result from a direct impact of the action (ARM 17.4.603(18)). Where impacts would occur, the impacts will be described.

Cumulative impacts are the collective impacts on the human environment within the borders of Montana that could result from the Proposed Action when considered in conjunction with other past and present actions related to the Proposed Action by location and generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures. The projects identified in Table 1 were analyzed as part of the cumulative impacts assessment for each resource.

1. Geology and Soil Quality, Stability, and Moisture

Are soils present, which are fragile, erosive, susceptible to compaction, or unstable? Are there unusual or unstable geologic features? Are there special reclamation considerations?

The Applicant proposes to mine 6,000,000 cubic yards of material from a 129.8-acre site located on private land, approximately 1 mile south of Gallatin Gateway, Montana. The site is situated at the edge of an alluvial bench on relatively level ground that has historically been used as cropland.

The proposed mine site is located within the Gallatin Valley intermontane basin; a wide valley between mountain ranges formed 17 million years ago through basin and range extension. The bedrock underlying the proposed mine site is composed of mainly schist and gneiss. The overlying surficial geology is mapped as Quaternary alluvial fan deposit.

The onsite soils mapped by the Natural Resources Conservation Service (NRCS) consist predominately of loams (Turner loam, 0 to 4 percent slopes, Amsterdam silt loam, 0 to 4 percent slopes, and Hyalite-Beaverton complex, 0 to 4 percent slopes). This area receives approximately 15 to 19 inches of precipitation per year and is located at approximately 5,030 feet above mean sea level. As part of reclamation, the Applicant would replace 18 inches of soil and 18 inches of overburden (for 36 inches total) as stated in the Application.

The Applicant would seed and revegetate all soil and overburden stockpiles, including berms around the perimeter of the site, to prevent sediment runoff. The overall geomorphology of the excavation would create a bowl towards the center of the site, so most precipitation would drain inwards and not leave the site. Upon reclamation, the Applicant would implement equipment tracking, oriented to trap moisture and break water flow, and would seed/harrow along contours. All available soils on site would be salvaged for reclamation. At the first seasonal opportunity, the Applicant would be required to shape and seed any soil stockpiles that would remain in place for two years or greater with an approved perennial seed mix. Vegetation of the berms would prevent erosion of soil.

Direct Impacts:

An irreversible and irretrievable removal of opencut materials from the site would occur, up 6,000,000 cubic yards, as stated in the Permit. The Applicant has proposed that 18 inches of overburden and 18 inches of soil would be salvaged for final reclamation across the 129.8-acre site. Salvaging, stockpiling, and resoiling activities would disrupt developed soil horizons, but this would not impair the capacity of the soils to support final reclamation of the site. Prior to vegetation being established on berms, stockpiles would be susceptible to erosion. There are no unusual or fragile topographic, geologic, soil, or special reclamation considerations that would prevent reclamation success, nor are there any such features of statewide or societal importance present. Much of the site has been disturbed by farming and other activities in the past.

The information provided above is based on the information that DEQ had available at the time of completing this EA. Available information was obtained from the Application, site inspections, analysis of aerial photography, topographic maps, geologic maps, soil maps, and other research tools listed in the reference section below. Based on this information, DEQ does not anticipate a detrimental impact to geology and soil quality, stability and moisture once reclamation is achieved. No unusual or unstable geologic features are present, and no fragile or particularly erosive or unstable soils are present.

Secondary Impacts:

The proposed activities could allow for the establishment of weeds. The Applicant would be required to comply with the Gallatin County Weed permit.

Cumulative Impacts:

Erosion would add to cumulative impacts associated with potential erosion on existing roads, farmed surfaces, and other historical disturbances in the proposed project area.

2. Water Quality, Quantity, and Distribution

Are important surface or groundwater resources present? Is there potential for violation of ambient water quality standards, drinking water maximum contaminant levels, or degradation of water quality?

The greater project area receives a mean annual precipitation of 15 to 19 inches (NRCS, 2023). The Gallatin River is located approximately 0.5 miles to the west of the Black site. A private irrigation ditch runs alongside the eastern and southern boundaries of the site. The Applicant would not disturb the unnamed ditch and would maintain a 10-foot setback from the bank of the unnamed ditch. A perennial stream runs approximately 480 feet to the west of the site, flowing from the south to north.

The proposed Black site is located above an unconfined alluvial aquifer composed of alluvial sand, gravel, silt, and clay. The seasonal high water table level in the southeast corner is estimated to be 67.7 feet below current ground surface. Depth to groundwater decreases across the site, with the shallowest depth being the northwest corner. The Applicant would adjust mining depth accordingly to maintain a 3-foot separation between the maximum depth of mining and the high water table. This information was obtained from the application and review of well logs obtained from the Opencut Mining Web Mapping Application (WMA). The Applicant has stated that TMC, Inc. would maintain a 3-foot buffer above the water table. If groundwater is ever encountered, TMC, Inc. would backfill to ensure that a minimum of 3 feet of material is maintained above the seasonal high water table. The Applicant is required to obtain any other necessary permits related to groundwater as required by state, local and federal law.

The Montana Department of Environmental Quality Water Quality Division may require the Applicant to obtain various permits. The Montana Pollutant Discharge Elimination System (MPDES) Permit regulates wastewater discharges by limiting the quantities of pollutants to be discharged. Additionally, any mining facility that has potential to discharge industrial storm water to "state waters" is required to apply for the Multi-Sector General Permit (MSGP).

The Gallatin River is located roughly 2,500 feet from the site across pasture and other highly vegetated fields. Due to this distance, it is unlikely that surface water from the site would discharge to the Gallatin River. However, in the occurrence of a significant precipitation event the Black site may have the potential to discharge surface water to the area surrounding the site.

In the site's current agricultural use, the landowners have irrigation, stock, and domestic water rights. These water rights do not have a mining purpose and therefore cannot be used for mining without the approval of a water right change form by the Montana Department of Natural Resources and Conservation (DNRC). Alternatively, a new mining water right could be filed as a groundwater certificate if not exceeding 35 gallons per minute (GPM) or 10 acre-feet (AF) and as approved by DNRC.

The Montana Bureau of Mines and Geology conducted a hydrologic investigation of the Four Corners area in 2020. This investigation found that the increase in more efficient irrigation methods were responsible for the most significant groundwater level declines. Less efficient methods such as flood irrigation provide the most groundwater recharge. However, in 2010, flood irrigation made up only 10% of the irrigated land in the Four Corners area. In contrast, the development of sprinkler and pivot irrigated fields to industrial or residential uses has a very small impact on groundwater levels. "Overall, groundwater-level declines were more sensitive to the removal of irrigation recharge than to urban development and subsequent domestic water withdrawals." (Michalek and Sutherland, 2020 p. 44). The proposed site is currently used for agricultural purposes and is irrigated using sprinklers, not flood irrigation.

The unconfined aquifer in the Four Corners area has a high transmissivity, meaning water table drawdown from a pumping well is broad and shallow. High transmissivity in combination with a high recharge rate (Michalek and Sutherland, 2020) indicates that a change in groundwater usage would likely have a small potential impact on the overall hydrologic system.

The Applicant would utilize water from the well located in the northeast corner of the Permit area. Water would be used on site for operation of a crusher and within the scale house/office. Water would be taken from the well and stored in a water truck and in temporary water storage tanks that would move within the site as needed.

During operations, soil would be bermed along the northern Permit boundary, along US Route 191, and along the southern boundary, creating a visual/noise buffer. The Applicant will also berm overburden along the western Permit boundary and along US Route 191 for overburden storage, creating a visual/noise buffer. The site would likely contain and infiltrate precipitation and/or allow precipitation to flow through the site as it has in the past until final reclamation when the land surface would be resoiled, revegetated and graded to slopes of 3:1 or flatter.

All available soils on site would be salvaged for reclamation. At the first seasonal opportunity, the Applicant would be required to shape and seed any soil stockpiles, including the berms along the

perimeters, that would remain in place for two years with an approved perennial seed mix. Vegetation of the berms would prevent any water that leaves the site from carrying sediment.

The Applicant proposes to mine the site, by creating a depression. This depression would cause runoff to drain internally into the site. Precipitation and surface water runoff are not expected to leave the site and would generally be expected to infiltrate into the subsurface. The nearest surface water includes the perennial stream approximately 480 feet to the west and the unnamed private irrigation ditch that runs along the eastern and southern boundaries of the site. To regulate storm water discharges and minimize pollutant loading from this site, the Applicant should seek appropriate coverage under the Multi-Sector General Permit (MSGP) for stormwater discharges.

The Applicant is required to comply with all applicable federal, state, county, or local regulations, ordinances, and permits, licenses, and approvals for the operation of the site, which could include seeking appropriate coverage under the MSGP for stormwater discharge.

The information provided above is based on the information that DEQ had available to it at the time of completing this EA. Sources include the Application, analysis of aerial photography, topographic maps, site inspections, and others.

Direct Impacts:

The site topography would be changed due to opencut mining activities. During the beginning stages of mining prior to vegetation being established on the perimeter berms, surface water that may leave the site during a heavy storm event could carry sediment. Fuel could be spilled during refueling activities or in the event of a fuel tank leak, at which point, fuel could discharge to groundwater. Any impacts would last through the life of the Permit, unless otherwise noted. The Applicant is required to have any other required permit(s) in place to ensure protections of the site so that it can be reclaimed to the productive postmining land use of Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells.

Secondary Impacts:

No secondary impacts to water quality, quantity and distribution would be expected. The Opencut Mining Act does not regulate water quality or quantity. However, Applicants are required to comply with all laws relating to water, such as the Federal Clean Water Act and the Montana Clean Water Act, and to obtain all required permits. It is anticipated that the proposed opencut operation would not result in any secondary impacts to water quality and water quantity.

Cumulative Impacts:

Erosion would add to cumulative impacts associated with potential erosion on existing roads, farmed surfaces, and other historical disturbances in the proposed project area.

3. Air Quality

Will pollutants or particulate be produced? Is the project influenced by air quality regulations or zones (Class I airshed)?

The closest Class I airshed to the proposed project site is over 32 miles to the southeast (Yellowstone National Park). This project would not be expected to impact this type of airshed due to the distance

between the proposed Permit boundary and the National Park and due to the relatively low level of air emissions anticipated from the site.

Nonmetallic mineral processing sites can consist of portable asphalt plants, rock crushers, screens, conveyor belts, and portable generator sets. The proposed permitting action would allow for the mining, screening, crushing, stockpiling, and transportation of material from the site.

Public comments submitted to DEQ regarding the application for a Permit to mine the Black site have indicated concern regarding fugitive dust and silica dust exposure.

The Opencut Mining Act does not regulate air quality, however, Applicants are separately required to comply with all laws relating to air, such as the Federal Clean Air Act, National Ambient Air Quality Standards set by the Environmental Protection Agency (EPA), and the Clean Air Act of Montana. In addition, the Administrative Rules of Montana (ARM 17.8.308) require that the Applicant would need to take reasonable precautions to control airborne particulate matter.

MSHA periodically collects respirable dust samples using a Continuous Personal Dust Monitor (CPDM) from occupations known to have a high-risk of exposures to silica. To protect exposure to mine workers, the current (March 2024) MSHA permissible exposure limit (PEL) for respirable crystalline silica is 100 $\mu g/m^3$ over an 8-hour period.

Silica is one of the most abundant minerals in the earth's crust. It is naturally released into the environment through the weathering of quartz bearing rocks, volcanic activity, and biogenic processes. Many industries such as construction, mining, stone cutting, and porcelain manufacturing use silica laden materials. During the blasting, cutting, crushing, etc. of materials containing silica, respirable particles (10 microns or less in diameter or PM10) can be created. These respirable particles, some of which are made of crystalline silica, are considered an occupational hazard due to the associated health risks (silicosis, lung cancer) that can develop over years of exposure. However, "due to improved industrial hygiene standards and more stringent regulatory standards and guidelines, silicosis mortality trends in the United States show a marked decline over the past 50 years" (ATSDR 2019).

Although silica dust is considered an occupational hazard, "health problems from crystalline or amorphous silica are extremely rare in the general public; health problems occur to workers breathing in silica dust" (ATSDR 2020). Exposure to crystalline silica is limited when dust suppression methods are implemented. Dust suppression methods would be required to comply with the reasonable precautions standards required by ARM 17.8.308 and 17.8.1806.

The Applicant is required to complete an Air Quality Registration Notification Form through the DEQ Air Quality Bureau if the applicant uses a portable facility. This form is required for all sites that use equipment to crush, grind, or screen nonmetallic minerals, and ARM 17.24.1806 requires Applicants of portable facilities to install, operate, and maintain equipment to provide maximum air pollution control and employ dust suppression.

Direct Impacts:

Mechanized equipment would produce some exhaust fumes from the combustion of diesel fuel. These pollutants would include a release of carbon monoxide (CO), oxides of nitrogen (NOx), and often a ppm level of unburned fuel present as various volatile organic compounds (VOCs). Fugitive dust from point source mining activities and odor could be generated from mining, conveying, screening, and crushing.

Fugitive dust from non-point source mining activities could be generated from the pit floor, soil stockpiles, equipment used onsite and gravel roads used for access. Dust consisting of particulate matter (PM), and particulate matter with an aerodynamic diameter of less than 10 microns (PM10), and particulate matter with an aerodynamic diameter of less than 2.5 microns (PM2.5) could be generated from the mining of sand and gravel as well as crushing and screening of material. Dust would also be produced while driving on/off site. As described above for PM species, the combustion of diesel fuel also will form PM, PM10, and PM2.5 and be released along with the CO and NOx species.

Dust impacts from mining activities would be mitigated by the revegetation of soil stockpiles as required by the Application. Emissions from the operation of standard mining equipment used onsite could also temporarily impact air quality. The Applicant would be expected to maintain compliance with the Clean Air Act of Montana regarding the need to take reasonable precautions to control airborne particulate matter.

Secondary Impacts:

No secondary impacts to air quality would be expected.

Cumulative Impacts:

Impacts to air quality would add to cumulative impacts associated with nearby highway travel and other agricultural activities in the project area.

4. Vegetation Cover, Quantity, and Quality

There are no known rare or sensitive plants or cover types present within the proposed Permit boundary. No known fragile or unique resources or values, or resources of statewide or societal importance, are present within the proposed Permit boundary.

Onsite vegetation consists of alfalfa, wheat, other grasses, and forbs. These grasses provide approximately 80-90% of the groundcover as estimated from aerial photography and observations made during the June 29, 2023 site inspection. Existing vegetation would be removed as 18 inches of soil and 18 inches of overburden is stripped and salvaged. The site would need to be replanted with the DEQ approved non-native grazing/pasture seed mix specified in the Application. The post mining land use for this site would be Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells.

Weed control is a condition of an Opencut Permit and the applicant would be required to control the spread of noxious weeds. The Applicant would also be required to follow any weed control requirements set forth by the Gallatin County Weed Board.

Direct Impacts:

Based on information included in the Application, site inspections, and analysis of aerial photography in the DEQ Opencut Web Mapping Application (WMA), DEQ does not anticipate an impact to rare plant vegetation cover, quantity, and quality. The Applicant would be required to control weeds throughout the project area during the life of the Permit and revegetate the site using the DEQ approved seed mix specified in the Application prior to final release of the site and Permit termination.

Secondary Impacts:
Land disturbance at the site may result in propagation of noxious weeds. Noxious weeds would be required to be controlled throughout the life of the Permit. Final release of the site and Permit termination would not occur if noxious weeds were not adequately controlled at the site. Soil stockpiles that would remain in place for two years or more are required to be seeded at the first seasonal availability. Any surface disturbances would be reclaimed and seeded with an appropriate seed mix. If the Permit were approved, weed control during and after mining would be a requirement.

Cumulative Impacts:
Propagation of noxious weeds would add to the other noxious weed issues in the surrounding area.

5. Terrestrial, Avian, and Aquatic Life and Habitats

Is there substantial use of the area by important wildlife, birds or fish?

Although the Permit area would be used primarily for opencut operations, based on available information, it also likely could support individual members of populations of Black bear, Coyotes, Deer, Elk, Fox, Moose, Raptors, Rodents, Song birds, Upland birds, Waterfowl, and others. Population numbers for species listed in this section are not known. Common wildlife may utilize the project area and may be temporarily displaced while machinery and equipment are operating.

The 2021 Gallatin County Growth Policy identified the Wildlife Resource Value of this area as having a Higher Value for Wildlife. Areas labeled as Higher Value for Wildlife are “areas that may have some native habitat and where there is higher wildlife use. This includes areas in the northern portion of Gallatin County and along the US 191 corridor near Big Sky.”

The Department contacted the Montana Department of Fish, Wildlife, and Parks Department for information regarding elk habitat. The Bozeman area Wildlife Biologist confirmed that the site is located within elk wintering habitat. Commencement of operations would result in the loss of 129.8 acres of elk wintering habitat.

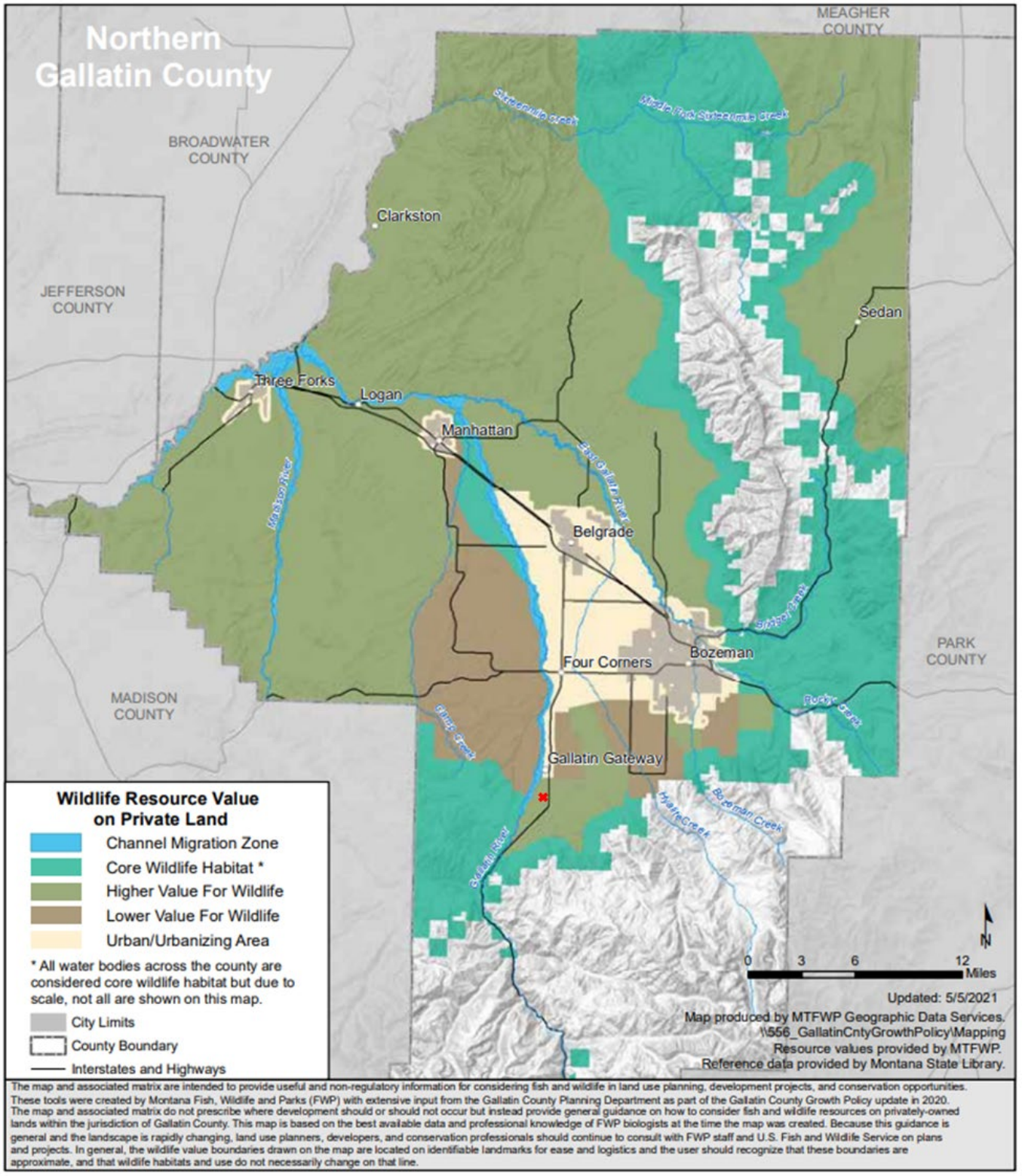

Figure 5: Map of the Wildlife Resource Value on Private Land from the Gallatin County Growth Policy adopted September 21, 2021. The red 'X' indicates the approximate location of the TMC, Inc. Black site.

The proposed Permit boundary is located within hunting district (HD) 301. Montana Fish, Wildlife & Parks (FWP) has noted an upward trend in elk population in HDs 301 and 309 from 2004 to 2023 as seen in Figures 6 and 7 below. The Montana FWP Elk Population Status Maps labels HDs 301 and 309 as "above goal range" and HD 304 as "within goal range." As a result, Montana FWP has proposed to extend the shoulder season and introduce a new Elk B license in HD 301 as well as introducing a weapons-restricted exclusion zone in HD 309 for the 2024 license year. Elk counts in HD 301 have averaged 822 elk and FWP has a goal to stabilize the count between 400 and 600 elk and reduce game damage complaints.

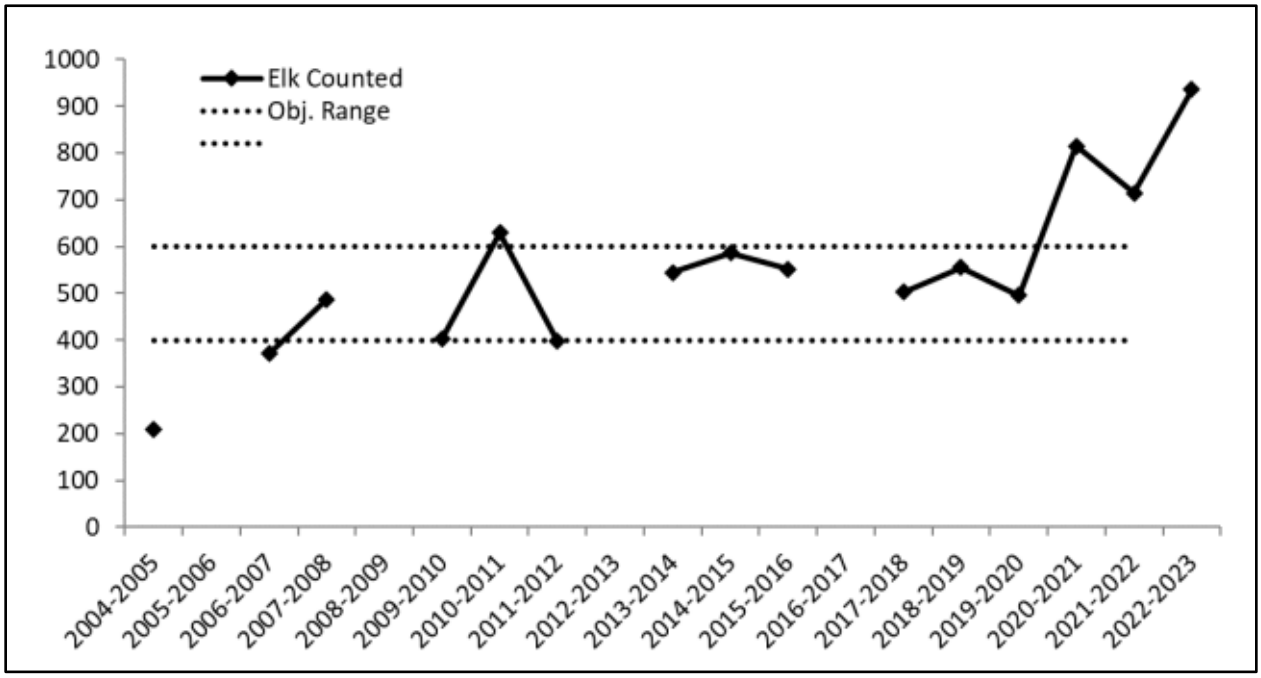

Figure 6. Elk counts from 2004-2005 to 2023 with the boundary of Hunting District (HD) 309 and 301. (Montana Department of Fish, Wildlife, and Parks. Season Change Supporting Information; Elk Region 3.*).*

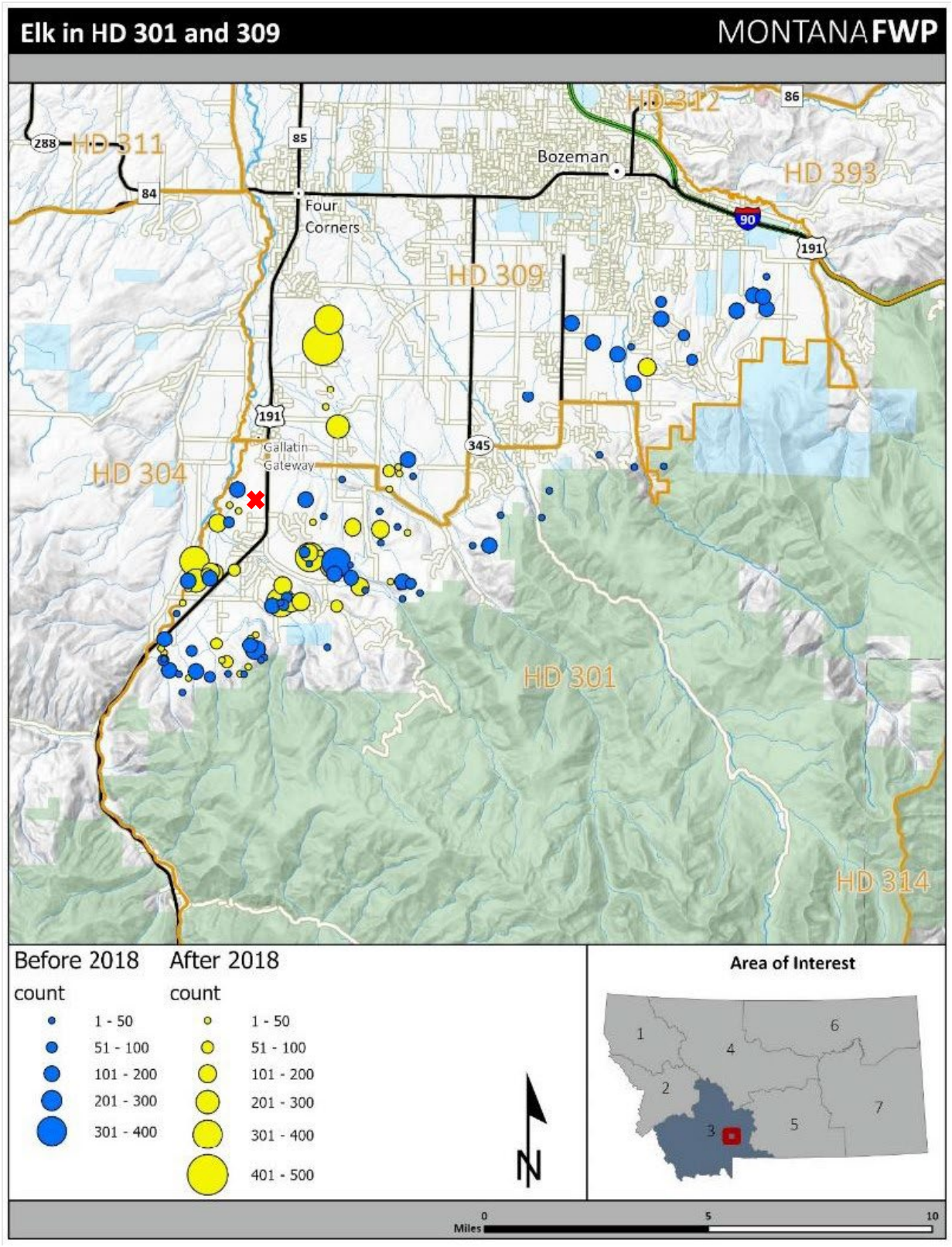

Figure 7: Winter elk counts and locations from 2004-2005 to 2023 with the boundary of Hunting District (HD) 309 and 301 (orange line). Elk circles in blue occurred from 2005-2018 (no group size exceeded 400) and in yellow from 2019-2023 (Montana Department of Fish, Wildlife, and Parks. Season Change Supporting Information; Elk Region 3.*). The red 'X' indicates the approximate location of the TMC, Inc. Black site.*

The *US 191 Corridor Study* published in 2020 and prepared by Robert Peccia and Associates for the Montana Department of Transportation (MDT) states that 1,077 vehicle crashes were reported on the US 191 study corridor between January 1, 2009 and December 31, 2018. Of these crashes, 24% were with wild animals; 96% of these caused property damage and two crashes caused serious human injury.

Elk have been categorized as "avoiders." Avoiders are "currently known to recognize moving vehicles as threats and respond by avoiding the road" (Jacobson et al. 2016). Avoiders have the tendency to cross roads only at low traffic areas, resulting in a reduction in vehicle collisions when traffic volume is high. The Arizona Game and Fish Department, Research Branch found that elk-vehicle collisions in Arizona occur more frequently on lower traffic volume weekdays than on higher traffic volume weekend days (Dodd et al. 2005). Increased truck traffic may have the potential to impact elk, as well as deer and other animal road crossings and behavior.

Direct Impacts:

The proposed mine could displace some individual members of species during operation of the proposed project, and it is likely that the site could be re-inhabited following reclamation to the permitted post mining land uses, with slopes restored to 3:1 or flatter as listed in the Application. Any displaced animals could find other suitable habitat nearby and return to the project area shortly after the project conclusion. Although some wildlife and wildlife habitat would be impacted until the project disturbance is reclaimed, non-developed land exists around the proposed site that could be used by the temporarily displaced animals. Habitat fragmentation from the proposed project is limited as the Gallatin River corridor to the west of the site would remain intact and undisturbed.

Secondary Impacts:

No secondary impacts to terrestrial, avian and aquatic life and habitats stimulated or induced by the direct impacts analyzed above would be expected.

Cumulative Impacts:

The proposed project would add to the cumulative impacts of habitat fragmentation from previous and ongoing development in the area.

6. Unique, Endangered, Fragile, or Limited Environmental Resources

Are any federally listed threatened or endangered species or identified habitats present? Any wetlands? Species of special concern?

The proposed project is not in core, general or connectivity sage grouse habitat, as designated by the Sage Grouse Habitat Conservation Program (Program) at: http://sagegrouse.mt.gov. Impacts to sage grouse would not be expected.

The Montana Natural Heritage Program (MNHP) lists the following species of concern in the vicinity of the site: Veery, Great Blue Heron, Bobolink, Cassin's Finch, Evening Grosbeak, Grizzly bear, Lewis's Woodpecker, and Alberta Snowfly.

The MNHP also identified the following important Animal Habitat: Bat Roost (Non-Cave).

Direct Impacts:
The Sage Grouse Habitat Conservation Program has stated that the proposed project would not occur in core, general or connectivity sage grouse habitat. Therefore, impacts to sage grouse would not occur.

The project area would be located near an agricultural area surrounded by residential homes between US Route 191 and the Gallatin River. While potential habitat for some individuals of the threatened and endangered species listed above may exist, the surrounding area is comprised of intermixed urban and open habitat. Even if habitat fragmentation did occur, the disturbance area would be relatively small, and large areas of similar or identical habitat surround the site.

Secondary Impacts:
No secondary impacts to sage grouse or sage grouse habitat would be expected as this site is not in sage grouse habitat. No secondary impacts to unique, endangered, fragile, or limited environmental resources that could be stimulated or induced by the direct impacts analyzed above would be expected.

Cumulative Impacts:
No cumulative impacts to unique, endangered, fragile, or limited environmental resources would be expected.

7. Historical and Archaeological Sites

Are any historical, archaeological, or paleontological resources present?

The Montana State Historic Preservation Office (SHPO) was notified of the Application and a Class III cultural resource study was conducted. SHPO did not identify any cultural resources within the search locale. Additionally, no cultural resources were observed during the June 29, 2023, site inspections.

Direct Impacts:
No sites were identified by SHPO, as the site has been continuously farmed for several decades. The Applicant would be required to follow any applicable laws and regulations regarding historic and archaeological sites.

Secondary Impacts:
No secondary impacts to historical and archaeological sites are anticipated.

Cumulative Impacts:
No cumulative impacts to historical and archeological sites would be expected.

8. Aesthetics

The site is located in an agricultural area interspersed with residential homes. The proposed mining activities would occur entirely on private land. The project area is expected to be visible from US Route 191. There are nearby residences as inferred from aerial photography and witnessed during a site inspection performed by DEQ. Residences are located near the southern border of the Permit boundary and the landowners reside immediately adjacent to the western Permit boundary. The Applicant would place a berm between the opencut activities and residences as well as around the entire border of the

Permit boundary as described in the Application. The nearest residence appears to be located approximately 190 feet to the south of the proposed Permit boundary.

The Opencut Mining Act does not regulate hours of operation, but the Applicant has included the following hours of operation in the Application. These hours of operation would be enforced by DEQ:

Monday through Friday: 6 AM to 7 AM Truck loading, hauling, and maintenance
7 AM to 7 PM All operations
Saturday: 8 AM to 5 PM Truck loading, hauling, and maintenance

Occasionally a project would require night time operations. These night time operations would be short duration (less than 60 days) and operations after 7 PM would only include truck loading, hauling and maintenance.

If the Applicant would be operating during times of little or no sunlight, artificial light sources may be used on site to comply with federal MSHA regulations. MSHA periodically conducts comprehensive noise and dust sampling using personal noise dosimeters and Continuous Personal Dust Monitors (CPDM).

Noise is defined as unwanted and objectionable sound. Sound levels are usually measured and expressed in decibels (dB), which are logarithmic units that can be used to conveniently compare wide ranges of sound intensities. The A-weighted decibel (dBA) scale of frequency sensitivity accounts for the sensitivity of the human ear, which is less sensitive to low frequencies, and correlates well with human perceptions of the annoying aspects of noise. On the logarithmic decibel scale, a 70 dBA sound level is approximately twice as loud as a 60 dBA sound level and four times as loud as a 50 dBA sound level. (PG&E Cressey-Gallo 115 kV Power Line Project Initial Study).

Typical Sound Levels Measured in the Environment		
Examples of Common, Easily Recognized Sounds	Decibels (dBA, at 50 feet)	Subjective Evaluations
Near Jet Engine	140	Deafening
Threshold of Pain (Discomfort)	130	
Threshold of Feeling - Hard Rock Band	120	
Accelerating Motorcycle (at a few feet away)	110	
Loud Horn (at 10 feet away)	100	Very Loud
Noisy Urban Street	90	
Noisy Factory	85	
School Cafeteria with Untreated Surfaces	80	Loud
Near Freeway Auto Traffic	60	Moderate
Average Office	50	
Soft Radio Music in Apartment	40	Faint
Average Residence Without Stereo Playing	30	

Average Whisper	20	Very Faint
Rustle of Leaves in Wind	10	
Human Breathing	5	
Threshold of Audibility	0	
Note: Continuous exposure above 85 dBA is likely to degrade the hearing of most people. Range of speech is 50 to 70 dBA.		
Source: U.S. Department of Housing and Urban Development, The Noise Guidebook, 1985.		

Source: PG&E Cressey-Gallo 115 kV Power Line Project Initial Study

Typical Construction Equipment Noise Levels						
Equipment Description	Acoustical Usage Factor (%)	Specified Lmax at 50 feet (dBA)	Specified Lmax at 100 feet (dBA)	Specified Lmax at 1,000 feet (dBA)	Specified Lmax at 2,000 feet (dBA)	Specified Lmax at 4,000 feet (dBA)
All Other Equipment > 5 horsepower	50	85	76	56	50	44
Auger Drill Rig	20	85	72	52	46	40
Backhoe	40	80	70	50	44	38
Crane	16	85	71	51	45	39
Dump Truck	40	84	74	54	48	42
Grader	40	85	75	55	49	43
Pickup Truck	40	55	45	25	19	13
Tractor	40	84	74	54	48	42
Notes: dBA = A-weighted decibels; Leq = equivalent sound pressure level Equation to calculate Lmax at 1,000, 2,000 and 4,000 feet is as follows: Leq(h) = Lmax + 10*log(A.U.F.) – 20*log(D/Do) where: Lmax = Maximum noise emission level of equipment based on work cycle at D/Do (decibel). A.U.F. = Acoustical usage factor, which accounts for the percent time that equipment is in use over the time period of interest (1 hour). D = Distance from the equipment to the receptor (feet). Do = Reference distance (generally, 50 feet) at which the Lmax was measured for the equipment of interest (feet). Source: FHA 2006						

Source: PG&E Cressey-Gallo 115 kV Power Line Project Initial Study

MSHA PEL noise dose for sand and gravel workers.

Job title	Number of recorded doses	Worker range of MSHA PEL dose, %	Outside cab range of of MSHA PEL dose, %
FEL operator	17	0.19-51.83	27.21-244.31
Laborer/utility man	7	16.81-63.05	ND[2]
Dredge operator/trainee (CR[1])	7	2.32-10.74	ND
Plant operator (CR)	6	1.72-10.45	ND
Plant man	6	28.79-90.02	ND
Crane operator	6	3.06-26.36	48.20-109.81
Haul truck operator	5	10.32-50.27	63.12-121.99
Boat pilot	4	8.58-43.58	ND
Crusher operator	3	3.66-41.20	ND
Technician	3	0.83-15.39	ND
Shopman/maintenance man	3	5.95-38.56	ND
Belt picker	2	23.71-89.96	ND
Dredge oiler	2	8.67-11.27	ND
Water truck operator	2	14.6-59.13	ND
Deck hand	1	4.74	ND
Scale man	1	1.67	ND

[1]CR = Control room
[2]ND = Not determined

Figure 8: Data from noise surveys collected from nine sand and gravel operations. Data was collected using personal noise dosimeters and sound level meters. The sampling pool included three surface pits, five dredges, and eight processing plants. The worker range of MSHA permissible exposure limit (PEL) dose % over the course of a full 8-hour shift. Bauer, E. R. and Spencer, E. R. (2008). Snapshot of Noise and Worker Exposures in Sand and Gravel Operations.

Sound level measurement at sand and gravel sites surveyed.

Area	Equipment	Location	Leq range, dB(A)[1]
	Crane, operators cab	Inside	76-85
	Crane, engine room	Inside	102-107
	Office, tool room, misc. rooms	Inside	64-89
	Diesel motor	Inside	103
Dredge	Barge area	Outside	64-102
	Control room	Inside	66-76
	Control room	Outside	69-84
	Suction pump drive motors	Outside	83-96
	Hydraulic pump room	Inside	98
	Electrical room	Inside	92
	Pilothouse	Inside	67-74
	Deck	Outside	75-100
Towboat	Auxiliary rooms	Inside	76-83
	Engine room	Inside	110
	Crane, operators cab	Inside	82-88
	Crane, engine room	Inside	92-107
	Crushers	Area	81-112
	Control rooms	Inside	56-79
	Control rooms	Outside	73-83
Plant	Screens	Area	77-108
	Cyclones	Area	81-88
	Belts, drives, transfers	Area	62-95
	Sand classifiers	Area	76-89
	Misc. buildings, trailers	Inside	51-89
	Scale house	Inside	51-72
	Sand screws	Area	81-88
	Plant area noise	Ground level	61-97

[1]Measured with a 3-dB exchange rate.

Figure 9: Summary of all the sound levels measured in all the processing facilities included in the study. Bauer, E. R. and Spencer, E. R. (2008). Snapshot of Noise and Worker Exposures in Sand and Gravel Operations.

Sound profile plot for entire plant.

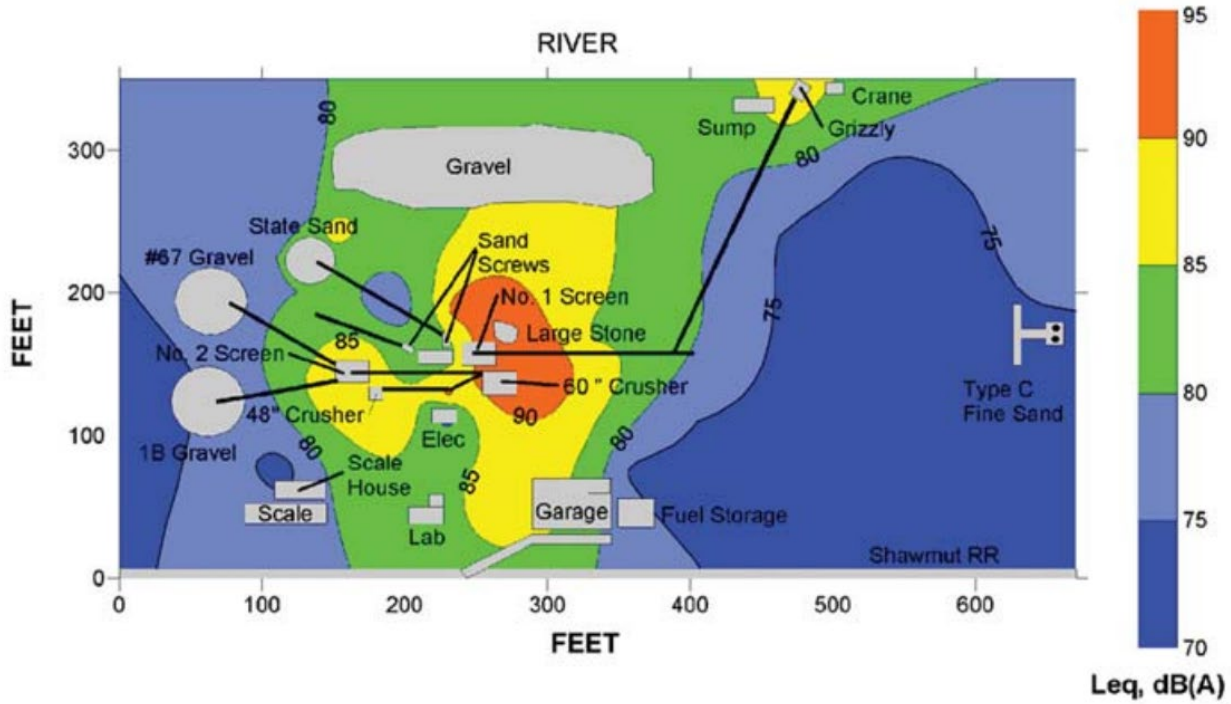

Figure 10: Sound levels across the entire sand and gravel plant. The large gravel stockpile to the north provides a buffer to the decibel range of 90-85 dB(A). Thus, reducing the range immediately behind it to 85-80 dB(A). Bauer, E. R. and Spencer, E. R. (2008). Snapshot of Noise and Worker Exposures in Sand and Gravel Operations.

Direct Impacts:

There would be an alteration of aesthetics while mining is underway. Nearby residences would incur visual and noise impacts during operation of the mine. The berm created by the salvage of soil material and overburden along all boundaries of the Permit area would reduce visual and noise impacts for residences near the operation.

Noise associated with the project may be heard by receptors located in an area where sound related to the project has not been fully diminished by distance, berms or another sound dampening feature. The tables above (entitled: Typical Sound Levels Measured in the Environment and Typical Construction Equipment Noise Levels) show the noise potentially experienced by receptors in the vicinity of the proposed project. The further a receptor is from the proposed project in distance, the less the receptor is impacted by the noise. Those receptors in the immediate vicinity of the proposed project would experience a higher noise impact than those who are further from the proposed project. The Applicant would be required to comply with any and all federal, state, county and local laws and ordinances limiting the exposure of noise to workers and surrounding neighbors. Noise is typically regulated at the local and/or county level through zoning. Nearby residents could have noise impacts up to 50 dBA or moderate noise impacts at the high end of the spectrum of impacts.

This project would be reclaimed by 2044. Impacts to aesthetics and noise would continue through the life of the Permit.

Secondary Impacts:
No secondary impacts to aesthetics are anticipated.

Cumulative Impacts:
Impacts to aesthetics would add to impacts from nearby agricultural, industrial, private, and highway activities.

9. Demands on Environmental Resources of Land, Water, Air, or Energy

Will the project use resources that are limited in the area? Are there other activities nearby that will affect the project?

The proposed opencut operation would mine natural deposits from the site. No unusual demands on land, water, air, or energy are anticipated from the proposed opencut operation. Examples of unusual demands, which are not anticipated from this proposed opencut operation, would be rerouting creeks, rebuilding of roads, or relocated specific utilities.

The proposed project would use water supplied from an onsite source. The Applicant would reroute a privately owned irrigation mainline upon the start of mining in the southern portion of the permit boundary. The irrigation mainline would be replaced at the direction of the landowner. The site would be reclaimed to the postmining land use stated in the Permit with slopes restored to 3:1 or flatter as stated in the Permit.

The Applicant is required to comply with all applicable federal, state, county, and local regulations and ordinances, permits, licenses, and approvals for the operation of the site.

Direct Impacts:
Based on the analysis of available data and certifications made by the Applicant, DEQ does not foresee any unusual demands on land, water, air, or energy from this opencut operation. Therefore, no direct impacts would be anticipated.

Secondary Impacts:
No secondary impacts to demands on environmental resources of land, water, air, or energy would be anticipated.

Cumulative Impacts:
No cumulative impacts to demands on environmental resources of land, water, air, or energy would be expected as there are no adjacent/nearby opencut operations.

10. Impacts on Other Environmental Resources

Are there other activities nearby that will affect the project?

The site is currently being utilized as cropland. The surrounding land is comprised of cropland and rangeland as well as residences immediately to the south. The landowner resides adjacent to the western Permit boundary. The Gallatin River is located roughly 2,500 feet to the west.

DEQ searched the Opencut WMA and the following websites or databases for nearby activities that may affect the project, three MDT projects were identified:

- Montana DNRC
- Montana DEQ
- MDT
- Gallatin County
- United States Department of Interior, Bureau of Land Management (BLM)
- United States Forest Service (USFS)

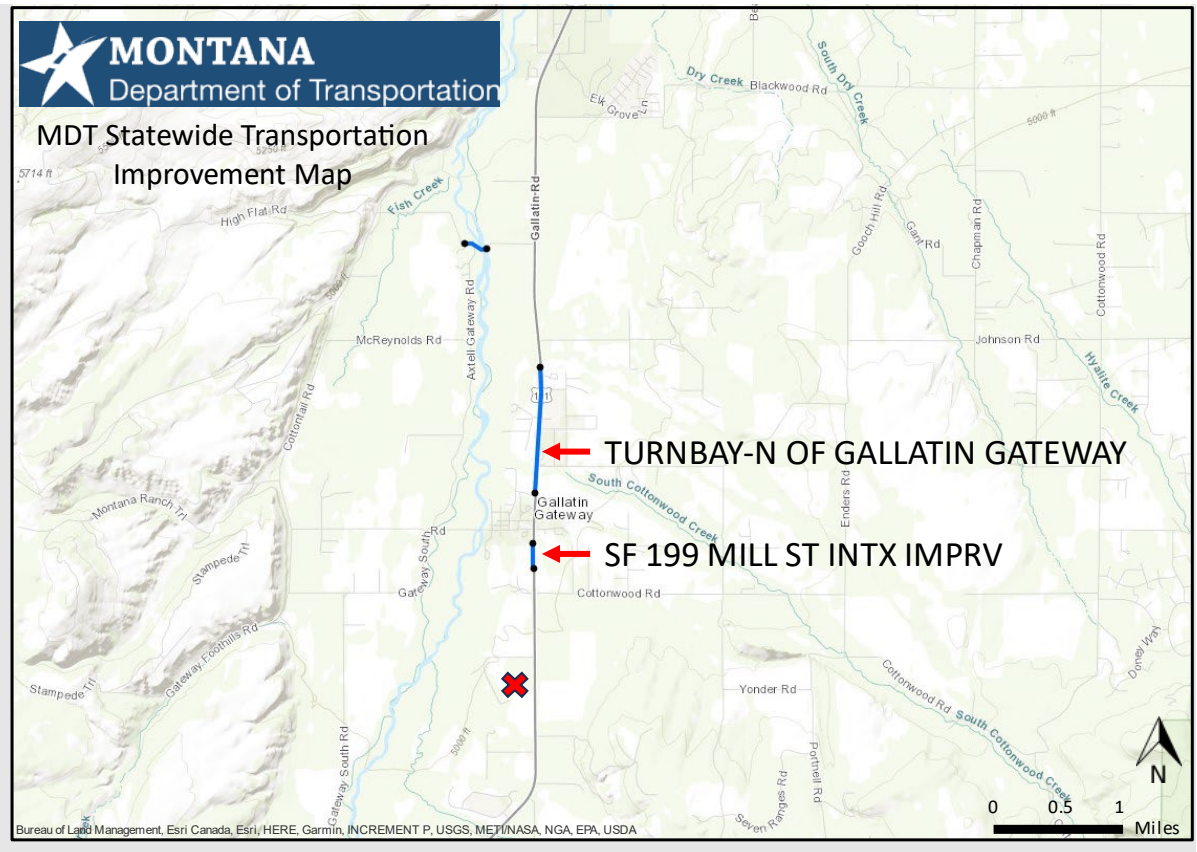

Figure 11: Proposed projects by MDT that may affect traffic associated with the project. Proposed site location marked by the red 'X.'

Turnbay-N of Gallatin Gateway: The project scope consists of – Reconstruction – Without Added Capacity. Construction of the project is proposed to begin 2024.

SF 199 Mill ST INTX IMPRV: The project scope consists of placing a new traffic signal as well as sidewalk/pedestrian improvements on Mill Street. Funding for the project is currently identified for Federal Fiscal Year 2026 with a tentative start of 2026.

All above listed MDT projects have the potential to affect traffic around the proposed Black site location.

Direct Impacts:
Based on the analysis of available data and on the certifications made by the Applicant, DEQ does not foresee any impacts on other environmental resources from this opencut operation. Therefore, no direct impacts are anticipated.

Secondary Impacts:
No secondary impacts to other environmental resources are anticipated as a result of the proposed project.

Cumulative Impacts:
No cumulative impacts to other environmental resources would be expected.

11. Human Health and Safety

Will this project add to health and safety risks in the area?

As observed in aerial photography of the area surrounding the proposed site and based on the Applicant Certification of Surface Landowners & Occupied Dwelling Units for a Standard Permit form submitted by the Applicant, there are 22 residences within a ½-mile of the proposed Permit boundary. An occupied dwelling unit is defined by 82-4-403(7), MCA, as "a structure with permanent water and sewer facilities that is used as a home, residence, or sleeping place by at least one person who maintains a household that is lived in as a primary residence".

Public comments submitted to DEQ have indicated concerns about the proposed Permit and its impacts to increased traffic on US Route 191, water quality, and air quality (dust). There are additional safety concerns over haul trucks entering and exiting the site. Property owners have voiced concerns about the trucks sharing the roads with other vehicles and school buses. For additional discussion on traffic impacts, refer to section 15, Demands for Government Services, of this EA.

Public comments submitted to DEQ have indicated concerns about the proposed Permit and its impacts to water quality, specifically groundwater sourced from wells in the surrounding area. For additional discussion on water quality and required mitigations, refer to section 2, Water Quality, Quantity, and Distribution, of this EA.

Public comments submitted to DEQ have indicated concerns regarding dust and air quality degradation impacts to those living adjacent to the site. Comments received by DEQ indicated that there are residents who are particularly sensitive to air quality degradation. For discussion on air quality impacts and required mitigations, refer to Section 3, Air Quality, of this EA.

The Opencut Mining Act does not regulate any of the above listed concerns. The applicant would be required to adhere to all applicable state and federal safety laws. Industrial work such as the work proposed by the Applicant is inherently dangerous. The Occupational Safety and Health Administration (OSHA) has developed rules and guidelines to reduce the risks associated with this type of labor. Few, if any, members of the public would be in the general project proximity during mining operations.

Direct Impacts:
Increases in operation-related traffic would likely occur. Wear and tear to local roads would be expected. Mechanized equipment would produce some exhaust fumes. The daily traffic that would be leaving the site could vary. The location of the proposed site was chosen by the Applicant because of the location of the resources and to provide materials for their commercial enterprise.

Secondary Impacts:
Fugitive dust that leaves the site and is not dispersed by air movement could be deposited in the area in close proximity to the site, which could cause irritation with varying degrees of severity to receptors who come into contact with that dust.

Dust impacts from mining activities would be mitigated by the revegetation of soil stockpiles as required by the Application. The Applicant has stated in its application that water would be used to control dust on site (use of water is a potential reasonable precaution for the control of dust). ARM 17.8.308 would require the Applicant to take reasonable precautions to control airborne particulate matter.

Cumulative Impacts:
Truck traffic from the proposed project would contribute to the cumulative impacts to traffic due to increases in Gallatin County population and regional tourism.

12. Industrial, Commercial, and Agricultural Activities and Production

Will the project add to or alter these activities?

The acreage listed in the proposal would be taken out of agricultural, farming, and other unknown uses by the landowner. This proposed project area has not been mined or used to store mine waste. Upon completion of mining, the land would be reclaimed to the post mining land uses of Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells. Slopes would be restored to 3:1 or flatter.

Direct Impacts:
The acreage (129.8) listed in the Permit would be taken out of agricultural, farming, and other unknown uses as soil stripping and operations progress across the site. If the entire site were permitted and established for mining and mine-related activities, all existing activities would cease, but would be restored to the permitted postmining land use when the site is reclaimed.

Secondary Impacts:
Secondary impacts to industrial, commercial, and agricultural activities and production would be expected. Opencut materials would be available for use or sale to other entities.

Cumulative Impacts:
This project would add to the impacts on land use from previous and continuing development in the greater project area, however all disturbance related to this project would be reclaimed at the conclusion of the project. Final reclamation would be required to be completed by December 31, 2044. Impacts on the industrial, commercial, and agricultural activities and production in the area would occur for the total duration of operations.

13. Quantity and Distribution of Employment

Will the project create, move, or eliminate jobs? If so, estimated number.

Existing employees would likely be utilized for this operation, but it is unknown if this mine site would require the Applicant to hire additional employees. It is not anticipated that this project would create, move, or eliminate jobs.

Direct Impacts:

New employment opportunities would be limited. No lasting positive or negative impacts to existing employment would be expected from this project.

Secondary Impacts:

No secondary impacts to quantity and distribution of employment are anticipated as a result of the proposed work.

Cumulative Impacts:

No cumulative impacts to the quantity and distribution of employment would be expected.

14. Local and State Tax Base and Tax Revenues

Will the project create or eliminate tax revenue?

Local, state and federal governments would be responsible for appraising the property, setting tax rates, collecting taxes, etc., from the companies, employees, or landowners benefitting from this operation. Some positive, yet limited, benefit to the local and state economy could result from this project as the tax base on the land would change from agricultural to industrial. However, minimal tax revenue from income or expenses would be expected from this project. The impact to local and state tax base and tax revenue would occur for the total duration of operations and would not be significant. Following reclamation, it is assumed the tax base would revert to pre-mine levels.

Direct Impacts:

The tax base for this land use type would change from agricultural and farming to industrial. There would most likely be an increase in tax revenue for the proposed tax base change. Additionally, the proposed project would have a limited increase in tax revenue related to the payroll taxes from new and/or existing employees residing and/or working in the area.

Secondary Impacts:

No secondary impacts to local and state tax base and tax revenues would be expected.

Cumulative Impacts:

No cumulative impacts to local and state tax base and tax revenues would be expected.

15. Demand for Government Services

The proposed operation would remove 6,000,000 cubic yards of material from the 129.8-acre site over the life of the Permit. The Opencut Mining Act does not regulate local haul roads and/or site access and it would be up to the local zoning ordinance to regulate impacts that would occur to roads. Occasional

increases in construction-related traffic may occur. Local roads may be improved. Traffic load would depend on site activity and is unknown at this time.

US 191 is part of the National Highway System (NHS) and is NHS-Non-Interstate. The National Network is the system of roadways important to the Nation's economy, defense, and mobility. US 191 is officially designated to accommodate commercial freight-hauling vehicles authorized by the Surface Transportation Assistance Act (STAA) of 1982 (P.L. 97-424) and specified in the U.S. Code of Federal Regulations (23 CFR 658). The STAA requires States to allow conventional truck-trailer combinations on the Interstate System and certain portions of the Federal-aid Primary System. Conventional combinations are tractors with one semitrailer up to 48 feet in length or with one 28-foot semitrailer and one 28-foot trailer and can be up to 102 inches wide. As a result, MDT cannot restrict truck traffic on this highway system.

The Applicant would be required by MDT to obtain an Approach Permit for their proposed site access. In order to obtain an Approach Permit, the Applicant must also conduct their own Traffic Impact Study and submit that to the MDT.

Direct Impacts:

Occasional increases in operation-related traffic would likely occur. Wear and tear to local roads may occur. The daily traffic that would be leaving the site could vary Local roads may be improved, depending on Gallatin County requirements. The location of the proposed site was chosen by the Applicant because of the location of the resources and to provide materials for their commercial enterprise. There may be direct impacts to demand for government services depending on the utilized access route to the site.

Secondary Impacts:

No secondary impacts to government services are anticipated as a result of the proposed opencut operation.

Cumulative Impacts:

Truck traffic from the proposed project would contribute to the cumulative impacts to wear and tear on local roads due to increases in Gallatin County population and regional tourism.

16. Locally Adopted Environmental Plans and Goals

Are there State, County, City, USFS, BLM, Tribal, etc. zoning or management plans in effect?

The proposed operation would occur within Gallatin County. The Applicant submitted zoning compliance forms completed by Gallatin County for the proposed project that indicate opencut operations can occur within the Permit boundary. The site zoning status is described in the Permit on the zoning forms as not zoned. Zoning at this time does not restrict opencut operations. The opencut operation would be required to comply with zoning regulations.

DEQ is aware of the following policies and plans:

- Gallatin County Growth Policy (Gallatin County, 2021)
- Gallatin Gateway Community Plan (Gallatin County, 2011)
- Gallatin Gateway Situation Assessment (Gallatin County Planning Department, 2023)
- US 191 Corridor Study: Four Corners to Beaver Creek (MDT, 2020)

- Elk Management Plan (FWP, 2005)

None of the above listed plans would impact the issuance of an opencut mining permit as long as the Application complies with the Opencut Mining Act. The Applicant would be required to comply with all laws and to obtain all required permits, licenses, or approvals for operation.

Direct Impacts:
DEQ is not aware of any other locally-adopted environmental plans or goals that would impact this proposed project or the project area. Impacts from or to locally-adopted environmental plans and goals would not be expected as a result of this project.

Secondary Impacts:
No secondary impacts to locally-adopted environmental plans and goals are anticipated as a result of the proposed work.

Cumulative Impacts:
No cumulative impacts to locally adopted environmental plans and goals would be expected.

17. Access to and Quality of Recreational and Wilderness Activities

Are wilderness or recreational areas nearby or accessed through this tract? Is there recreational potential within the tract?

The proposed project would not limit access to wilderness or recreational areas nearby. The proposed activities would occur on private land.

Direct Impacts:
Based on the information provided by the Applicant and DEQ's review of an aerial photo of the surrounding area, DEQ does not anticipate that any wilderness or recreational areas would be impacted by the proposed operation. Access to wilderness or recreation areas is not an issue at this site.

Secondary Impacts:
No secondary impacts to wilderness or recreational areas are anticipated.

Cumulative Impacts:
No cumulative impacts to access to, and quality of, recreational and wilderness activities would be expected.

18. Density and Distribution of Population and Housing

Will the project add to the population and require additional housing?

As observed on an aerial photo of the surrounding area and based on the Applicant Certification of Surface Landowners & Occupied Dwelling Units for A Standard Permit form submitted by the Applicant, there are 22 residences within a ½-mile of the proposed Permit boundary. Gallatin County has a population of 118,960 as of the 2020 census (United States Census Bureau). The proposed project may add to the local population or housing.

Direct Impacts:
This commercial pit was proposed by the Applicant in this area because of the location of the resource, and to provide materials for local projects. The proposed project may add to the population or require additional housing. Therefore, it is unknown if impacts to density and distribution of population and housing would occur. It is unlikely this site would add to the population significantly.

Secondary Impacts:
No secondary impacts to density and distribution of population and housing are anticipated as a result of the proposed opencut operation.

Cumulative Impacts:
The potential increase in density and distribution of population and housing may add to the current influx of residents to Gallatin County.

19. Social Structures and Mores

Is some disruption of native or traditional lifestyles or communities possible?

DEQ is not aware of any native cultural concerns that would be affected by the proposed activity. Based on the information provided by the Applicant, it is not anticipated that this project would disrupt native or traditional lifestyles or communities.

Direct Impacts:
No direct impacts to social structures and mores are anticipated as a result of the proposed opencut operations.

Secondary Impacts:
No secondary impacts to social structures and mores are anticipated as a result of the proposed opencut operations.

Cumulative Impacts:
No cumulative impacts to social structures and mores would be expected.

20. Cultural Uniqueness and Diversity

Will the action cause a shift in some unique quality of the area?

Based on the information provided by the Applicant, DEQ is not aware of any unique qualities of the area that would be affected by the proposed activity. The site is currently located on land in agricultural use and several opencut sites exist in the surrounding area. The nearest opencut site would be located approximately 1.6 miles to the southeast, just north of Little Bear Rd. Additionally, there is an opencut site located approximately 2.5 miles to the north and another opencut site is located approximately 5.7 miles north/northwest.

It is not anticipated that this project would cause a shift in some unique quality of the area.

Direct Impacts:
No impacts to cultural uniqueness and diversity are anticipated from this project.

Secondary Impacts:
No secondary impacts to cultural uniqueness and diversity are anticipated as a result of the proposed work.

Cumulative Impacts:
No cumulative impacts to cultural uniqueness and diversity would be expected.

21. Private Property Impacts

Are we regulating the use of private property under a regulatory statute adopted pursuant to the police power of the state? (Property management, grants of financial assistance, and the exercise of the power of eminent domain are not within this category.) If not, no further analysis is required. Does the proposed regulatory action restrict the use of the regulated person's private property? If not, no further analysis is required. Does the agency have legal discretion to impose or not impose the proposed restriction or discretion as to how the restriction will be imposed? If not, no further analysis is required. If so, the agency must determine if there are alternatives that would reduce, minimize or eliminate the restriction on the use of private property, and analyze such alternatives.

The proposed project would take place on private land that is not owned by the Applicant. DEQ's approval of Opencut Permit #3462 with conditions would affect the landowner's real property. DEQ has determined, however, that the Permit conditions are reasonably necessary to ensure compliance with applicable requirements under the Opencut Mining Act and demonstrate compliance with those requirements or have been agreed to by the Applicant. Further, if the application is complete, DEQ must take action on the Opencut Permit pursuant to 82-4-422, MCA. DEQ, therefore, does not have discretion to take alternative action that would have less impact on private property. Therefore, DEQ's approval of Opencut Permit #3462 would not have private property-taking or damaging implications.

22. Other Appropriate Social and Economic Circumstances

Due to the nature and scope of the proposed opencut mining activities, no further direct or secondary impacts would be anticipated from this project.

23. Greenhouse Gas Analysis

This analysis area for this resource area is limited to the activities regulated by the issuance of the opencut permit which is construction, operation, and reclamation of the gravel pit. Issuance of the opencut Permit would authorize use of various equipment and vehicles to mine and process material and reclaim the site. Vehicles would also be used to transport material from the site. Typical opencut excavating, mining, and hauling equipment includes bulldozers, dump trucks, haul trucks, excavators, loaders, scrapers, and backhoes. Processing equipment at this site would include a conveyer, a screen, and a crusher.

Based on information provided by the Applicant, vehicles and equipment on site would use diesel fuel. For this site, the Applicant estimates that between approximately 30 and 70 gallons of diesel fuel would be utilized per 1,000 cubic yards of material mined and transported. The estimated diesel fuel usage for

the on-site equipment is similar to that of equipment at other similarly sized gravel pits. The Applicant has proposed to mine up to 6,000,000 cubic yards of material in total.

The amount of diesel fuel utilized at this site may be impacted by a number of factors including demand for sand and gravel resources over time, seasonal weather impediments, and equipment malfunctions. To account for these factors DEQ has calculated the range of emissions using a factor of +/-10% of the Applicant's estimate.

For the purpose of this analysis, DEQ has defined greenhouse gas emissions as the following gas species: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and many species of fluorinated compounds. The range of fluorinated compounds includes numerous chemicals which are used in many household and industrial products. Other pollutants can have some properties that also are similar to those mentioned above, but the EPA has clearly identified the species above as the primary GHGs. Water vapor is also technically a greenhouse gas, but its properties are controlled by the temperature and pressure within the atmosphere, and it is not considered an anthropogenic species.

The combustion of diesel fuel at the site would release GHGs primarily being carbon dioxide (CO_2), nitrous oxide (N_2O) and much smaller concentrations of uncombusted fuel components including methane (CH_4) and other volatile organic compounds (VOCs).

DEQ has calculated GHG emissions using ~~an EPA tool,~~ The EPA Simplified GHG Calculator version May 2023, for the purpose of totaling GHG emissions. This tool totals carbon dioxide (CO_2), nitrous oxide (N_2O), and methane (CH_4) and reports the total as CO_2 equivalent (CO_2e) in metric tons CO_2e. The calculations in this tool are widely accepted to represent reliable calculation approaches for developing a GHG inventory.

Direct Impacts:

Operation of diesel-fueled vehicles throughout the life of the proposed project would produce exhaust fumes containing GHGs.

Applicant estimates that between approximately 30 and 70 gallons of diesel fuel would be utilized per 1,000 cubic yards of material mined and transported. The Applicant has proposed to mine up to 6,000,000 cubic yards of material in total. To account for variability due to the factors described above, DEQ has calculated the range of emissions using a factor of +/-10% of the Applicant's estimate. Using the Environmental Protection Agency's (EPA) simplified GHG Emissions Calculator for mobile sources, between 275.7 and 786.2 kilograms of CO_2e would be produced per 1,000 cubic yards of material mined and transported. Mining up to 6,000,000 cubic yards of material would produce between 1,654 and 4,717 metric tons of CO_2e ($MTCO_2e$).

Secondary Impacts:

GHG emissions contribute to changes in atmospheric radiative forcing, resulting in climate change impacts. GHGs act to contain solar energy loss by trapping longer wave radiation emitted from the Earth's surface and act as a positive radiative forcing component (BLM 2021). The impacts of climate change throughout the Northern Great Plains include changes in flooding and drought, rising temperatures, and the spread of invasive species (BLM 2021).

Cumulative Impacts:

Montana recently used the EPA State Inventory Tool (SIT) to develop a greenhouse gas inventory in conjunction with preparation of a possible grant application for the Community Planning Reduction Grant (CPRG) program. This tool was developed by EPA to help states develop their own greenhouse gas inventories, and this relies upon data already collected by the federal government through various agencies. The inventory specifically deals with carbon dioxide, methane, and nitrous oxide and reports the total as CO_2e. The SIT consists of eleven Excel based modules with pre-populated data that can be used as default settings or in some cases, allows states to input their own data when the state believes their own data provides a higher level of quality and accuracy. Once each of the eleven modules is filled out, the data from each module is exported into a final "synthesis" module which summarizes all of the data into a single file. Within the synthesis file, several worksheets display the output data in a number of formats such as emissions by sector, emissions by type of greenhouse gas etc.

DEQ has determined the use of the default data provides a reasonable representation of the greenhouse gas inventory for the various sectors of the state, and an estimated annual greenhouse gas inventory by year. The SIT data is currently only updated through year 2020, as it takes several years to validate and make new data available within revised modules.

Future GHG emissions from operations such as this site would be represented within the module Carbon Dioxide Emissions from Fossil Fuel Combustion, and emissions from the Transportation Sector within the Commercial and Industrial sectors. At present, the Industrial Sector accounts for 5.4 million metric tons of CO_2e ($MMTCO_2e$) and the Transportation Sector accounts for 7.9 million $MMTCO_2e$ annually[1]. The estimated emissions of 1,654 and 4,717 $MTCO_2e$ over the life of the project will contribute between 0.0124% and 0.0355% of Montana's annual emissions from the Industrial and Transportation sectors.

DEQ received a comment noting that the agency should account for GHG and climate impacts as a result of loss of surface vegetation and the vegetation's expected absorption of GHGs. The field above the proposed project is currently planted with alfalfa. Due to yearly tilling and agricultural crop production, DEQ does not expect the loss of vegetation to impact GHG emissions.

GHG emissions that would be emitted as a result of the proposed activities would add to GHG emissions from other sources. The current agricultural utilization[1] or No Action Alternative of the site also produces GHGs.

PROPOSED ACTION ALTERNATIVES

In addition to the proposed action, DEQ also considered the "no action" alternative. The "no action" alternative would deny the approval of Opencut Permit #3462. The Applicant would lack the authority to conduct opencut operations at the site. Any potential impacts that would be authorized under Opencut Permit #3462 would not occur. However, DEQ does not consider the "no action" alternative to be appropriate because the application submitted by the Applicant for an Opencut Permit has demonstrated compliance with the Opencut Mining Act and all applicable rules and regulations as required for approval. The "no action" alternative forms the baseline from which the impacts of the proposed action can be measured.

[1] Calculated by DEQ using the EPA SIT Tool.

CONSULTATION

DEQ engaged in internal and external efforts to identify substantive issues and/or concerns related to the proposed project. Internal scoping consisted of internal review of the environmental assessment document by DEQ staff and a site visit on June 29, 2023.

External scoping efforts also included queries to the following websites/ databases/ personnel:

- Montana State Historic Preservation Office (SHPO)
- Montana DNRC
- Montana DEQ
    - Air Quality Bureau, Water Quality Division
- Montana Department of Transportation
- Montana Department of Fish, Wildlife and Parks
- Gallatin County
- Gallatin Local Water Quality District
- United States Geological Society – Stream Stats (USGS)
- Montana Natural Heritage Program (MTNHP)
- Montana Cadastral Mapping Program
- Montana Groundwater Information Center (GWIC)
- Montana Bureau of Mines and Geology (MBMG)
- Montana Department of Health and Human Services (DPHHS)
- United States Census Bureau
- United States Department of the Interior Bureau of Land Management (BLM)
- United States Environmental Protection Agency (EPA)

PUBLIC INVOLVEMENT

DEQ has received, reviewed, and considered public comment on this Application since first receiving the application on May 23, 2023. DEQ held a public meeting in Gallatin Gateway, MT on July 25, 2023 to provide information and answer questions about the Application.

OTHER GOVERNMENTAL AGENCIES WITH JURISDICTION

The proposed project would be located on private land. All applicable state and federal rules must be adhered to, which, at some level, may also include other state, or federal agency jurisdiction.

This environmental review analyzes the proposed project submitted by the Applicant. The project would be negligible and would be fully reclaimed to the permitted postmining land uses at the conclusion of the project and thus would not contribute to the long-term cumulative effects of mining in the area.

NEED FOR FURTHER ANALYSIS AND SIGNIFICANCE OF POTENTIAL IMPACTS

When determining whether the preparation of an environmental impact statement is needed, DEQ is required to consider the seven significance criteria set forth in ARM 17.4.608, which are as follows:

1. The severity, duration, geographic extent, and frequency of the occurrence of the impact;

2. The probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
3. Growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
4. The quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources and values;
5. The importance to the state and to society of each environmental resource or value that would be affected;
6. Any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
7. Potential conflict with local, state, or federal laws, requirements, or formal plans.

The severity, duration, geographic extent and frequency of the occurrence of the impacts associated with the proposed mining activities would be limited. The proposed action would result in the disturbance of about 129.8 acres at the site. The Applicant is proposing to conduct opencut operations at the site as explained in the Permit to extract gravel, sand, clay, and borrow material. The site would be reclaimed to the permitted postmining land use of Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells by December 31, 2044. The land proposed to be disturbed has been disturbed in the past by agriculture use, grazing and other activities and does not appear to contain unique, endangered, fragile, or limited environmental resources. The surface disturbance would be reclaimed within 2 years of completion of the mining activities as stated in the Permit and prior to the reclamation date of December 31, 2044.

The Applicant is proposing to place the bulk of their facility equipment in the northeast corner of the site. Impacts to local topography and the viewshed of nearby residents and visitors would be altered.

As discussed in this EA, DEQ has not identified any significant impacts associated with the proposed mining activities for any environmental resource. DEQ does not believe that the proposed mining activities by the Applicant would have any growth-inducing or growth-inhibiting aspects, or contribution to cumulative impacts. The proposed mine site does not appear to contain known unique or fragile resources. There would be impacts to geology through removal of rock product, although limited to the Permit area. The site would be reclaimed to provide stability of adjacent undisturbed areas.

Impacts to soil would occur through soil salvage, which would disrupt the soil horizon. Where possible soil would be salvaged and replaced during reclamation, then seeded with a DEQ approved seed mix as identified in the Application.

Storm water would be controlled through Best Management Practices (BMPs) under a MSGP for Storm Water Discharges Associated with Industrial Activity (if applicable).

The Applicant has installed two monitoring wells, one at the northeast corner and one at the southwest corner of the site. The Applicant has used the water levels in these wells in addition to the water levels in preexisting wells in the southeast and northwest corners to determine that a 3-foot buffer from the water table would be maintained. If groundwater is ever encountered, TMC, Inc. would cease mining and immediately backfill to ensure that a minimum of 3 feet of material is maintained above the seasonal high water table.

The Opencut Mining Act does not require the mitigation of impacts to air quality. ARM 17.8.308 requires that the Applicant take reasonable precautions to control airborne particulate matter. The DEQ Air Quality Bureau may have additional mitigation requirements if the Applicant is using a portable facility registered with DEQ.

Impacts to vegetation would occur as soil is stripped and salvaged at the site. Weed control would occur throughout the life of the project and meet Gallatin County Weed Board standards.

Impacts to terrestrial, avian, and habitats would occur throughout the life of the Permit. These impacts would be reduced through final reclamation of the site to Cropland/Farmland, Rangeland and/or Pasture, with an internal road (Length 3,500 ft, Width 12 ft), and monitoring wells. Additionally, the Applicant is responsible for obtaining other necessary permits to conduct opencut operations.

Unique, endangered, fragile, or limited environmental resources have been evaluated. There are no unique or known endangered fragile resources in the project area. A Class III Inventory of the site was conducted by SHPO and no further requirements were provided.

There would be impacts to viewshed aesthetics as the mining disturbance would be viewable from US Route 191 and the residences below the southern Permit boundary. The Applicant would berm along the entire Permit boundary to reduce visual and noise impacts. While viewshed aesthetics would be impacted by the proposed operations, the visual disturbance would not dominate the landscape. Over time, disturbances to the viewshed would be less noticeable as revegetation and reclamation occurred.

Demands on the environmental resources of land, water, air, or energy would not be significant. The impacts from the proposed action would be reclaimed at the end of the opencut operations.

Impacts to human health and safety would not be significant as access roads would be closed to the public and because the site is on private land. The public is not allowed on the mine site. Truck traffic from the proposed project would contribute to the cumulative impacts to traffic due to increases in Gallatin County population and regional tourism. Operations at the site would release GHGs into the atmosphere.

As discussed in this EA, DEQ has not identified any significant impacts associated with the proposed activities on any environmental resource.

Issuance of a Standard Opencut Mining Permit to the Applicant does not set any precedent that commits DEQ to future actions with significant impacts or a decision in principle about such future actions. If the Applicant submits another operating Permit, amendment, or revision application to conduct additional mining, DEQ is not committed to issuing those authorizations. DEQ would conduct an environmental review for any subsequent authorizations sought by the Applicant that require environmental review. DEQ would make a permitting decision based on the criteria set forth in the Opencut Mining Act.

Issuance of the Permit to the Applicant does not set a precedent for DEQ's review of other applications for Permits, including the level of environmental review. The level of environmental review decision is made based on case-specific consideration of the criteria set forth in ARM 17.4.608.

Finally, DEQ does not believe that the proposed mining activities by the Applicant would have any growth-inducing or growth-inhibiting aspects that would conflict with any local, state, or federal laws, requirements, or formal plans.

Based on a consideration of the criteria set forth in ARM 17.4.608, the proposed operation is not predicted to significantly impact the quality of the human environment. Therefore, preparation of an EA is the appropriate level of environmental review for MEPA.

TABLE 2: ASSESSMENT OF SIGNIFICANCE

Table 2: Assessment of Significance (ARM 17.4.608)

Affected Resource and Section Reference	Potential Impact	Severity[1], Extent[2], Duration[3], Frequency[4], Uniqueness and Fragility (U/F)	Probability impact will occur[5]	Cumulative impacts	Measures to reduce impact as proposed by applicant	Significance (yes/no)
1. Geology and Soil Quality, Stability, and Moisture	A. Disruption of soil horizons B. Erosion and/or loss of soil	**A. S**-High: Of the 129.8 acres of ground that would be disturbed, all disturbance disrupts soil horizons. **E**-Small: Total surface disturbance susceptible to disruption of soil horizons would be 129.8 acres. **D**- The site would be fully reclaimed by December of 2044. Natural soil horizons would take many years to redevelop. **F**-Indefinitely until horizons are re-established. **U/F**-Not unique or particularly fragile. **B. S**-High: Of the 129.8 acres of ground that would be disturbed, all disturbance would be susceptible to erosion. **E**-Small: Total surface disturbance susceptible to erosion would be 129.8 acres. **D**- The site would be fully reclaimed by December of 2044. **F**-During occasional storm events. **U/F**-Not unique or particularly fragile.	A. Certain B. Potential	A. Disturbance of soil horizons would not result in any cumulative impacts. B. Erosion would add to cumulative impacts associated with potential erosion on existing roads, farmed surfaces, and other historical disturbances in the proposed project area.	A. The Applicant has not proposed any mitigations to prevent disruption of soil horizons. B. Establishing vegetation capable of sustaining the designated postmining land use, seeding and vegetating soil stockpiles.	No
2. Water Quality, Quantity, and Distribution	A. Erosion of soil/discharge to surrounding area B. Water contamination through fuel spills	**A. S**-High: Of the 129.8 acres of ground that would be disturbed, all disturbance could potentially contribute to erosion of soil in the event of a heavy storm event. **E**-Small: The total area susceptible to water impacts would be the 129.8-acre Permit and areas beyond the Permit where contaminants could be transported before being diluted. **D**-The site would be fully reclaimed by December of 2044. **F-** Erosion would occur during occasional heavy storm events. **U/F**-Not unique or particularly fragile. **B. S**- Low: Of the 129.8 acres of ground that would be disturbed, only a small portion of that disturbance would have the potential for fuel spills. The Applicant would have a contained fueling area as shown on the site map. **E**-Small: The total area susceptible to water impacts would be the 129.8-acre Permit and areas beyond the Permit where contaminants could be transported before being diluted. **D**-The site would be fully reclaimed by December of 2044. **F-**Fuel spills could occur daily during mining and reclamation activities. **U/F**-Not unique or particularly fragile.	A. Possible B. Possible	A. Erosion would add to cumulative impacts associated with potential erosion on existing roads, and farmed surfaces in the proposed project area. B. No cumulative impacts due to fuel spills.	A. Establishing vegetation capable of sustaining the designated postmining land use, seeding and vegetating soil stockpiles. B. The Applicant has not proposed any mitigations. The Applicant would be required to comply with all applicable laws relating to fuel storage and spill reporting.	No
3. Air Quality	Increased equipment exhaust and dust from activities onsite.	**S**-High: All areas within the 129.8-acre Permit, and some areas outside of the Permit area would be susceptible to the impacts of equipment exhaust and dust. **E**-Small: Air quality impacts would occur over the entire 129.8- acre Permit area and areas beyond the Permit where contaminants could be transported before being diluted. **D**- The site would be fully reclaimed by December of 2044. **F**- Daily during mining and reclamation activities. **U/F**-Not unique or particularly fragile.	Certain	Impacts to air quality would add to cumulative impacts associated with nearby highway travel and other agricultural, industrial, and commercial activities in the project area.	Applicant would be required to follow all applicable laws relating to air quality. The Applicant's applicable equipment would be required to be registered through the DEQ Air Quality Bureau.	No

Table 2: Assessment of Significance (ARM 17.4.608)

Affected Resource and Section Reference	Potential Impact	Severity[1], Extent[2], Duration[3], Frequency[4], Uniqueness and Fragility (U/F)	Probability impact will occur[5]	Cumulative impacts	Measures to reduce impact as proposed by applicant	Significance (yes/no)
4. Vegetation Cover, Quantity, and Quality	Propagation of noxious weeds	**S**-High: Of the 129.8 acres of ground that would be disturbed, all disturbances and some of the surrounding area would be susceptible to weeds. **E**-Small: Total surface disturbance of 129.8 acres are within an area with other similar vegetation. **D**-The site would be fully reclaimed by December of 2044. **F**-Continually until reclamation is completed. **U/F**-Not unique or particularly fragile.	Possible	Propagation of noxious weeds would add to other noxious weed issues in the surrounding area. The proposed project and subsequent reclamation could cause a change in species composition in the vicinity. These impacts would add to impacts to vegetation from grazing or other uses by the landowner.	The Applicant would be required to control weeds during mining and reclamation and follow any weed control requirements established by Gallatin County.	No
5. Terrestrial, Avian, and Aquatic Life and Habitats	Displacement of animals and habitat fragmentation	**S**-High: Of the 129.8 acres of ground that would be disturbed, animals could be displaced from all disturbed areas. **E**-Small: Total surface disturbance of 129.8 acres are within an area with other similar habitat. **D**-The site would be fully reclaimed by December of 2044. **F**-Continually until reclamation is completed. **U/F**-Not unique or particularly fragile.	Certain	Impacts to terrestrial, avian, and aquatic life and habitats would occur from opencut operations and other commercial and residential activities in the area. These impacts would add to impacts to terrestrial, avian and aquatic life and habitats from opencut activities occurring on the site.	The Applicant has not proposed any measures to mitigate impacts to terrestrial, avian and aquatic life and habitats.	No
6. Unique, Endangered, Fragile, or Limited Environmental Resources	Displacement of animals and habitat fragmentation	**S**-High: Of the 129.8 acres of ground that would be disturbed, animals could be displaced from all disturbed areas. **E**-Small: Total surface disturbance of 129.8 acres is within an area with other similar habitat. **D**-The site would be fully reclaimed by December of 2044. **F**-Continually until reclamation is completed. **U/F**-Not unique or particularly fragile.	Possible	Impacts to unique, endangered, fragile, or limited environmental resources would occur from opencut operations and other commercial and residential activities in the area.	The Applicant has not proposed any measures to mitigate impacts to terrestrial, avian and aquatic life and habitats.	No
7. Historical and Archaeological Sites	No anticipated impacts	N/A	N/A	N/A	N/A	No
8. Aesthetics	Increase in ambient noise and alteration of viewshed	**S**-High: Most disturbed surfaces would be visible and audible to receptors in the vicinity of the proposed project. **E**-Small: Total disturbance would be 129.8 acres and located within an area with mixed land uses, including other mines. Noise may be heard by receptors located in an area where sound related to the project has not been fully diminished by distance or another sound dampening feature. **D**-Mining and reclamation activities would be finished by December of 2044. **F**-Continually until reclamation is completed. **U/F**-Not unique or particularly fragile.	Certain	Impacts to aesthetics would add to impacts from nearby agricultural, industrial, commercial, and highway activities.	Precautions by the Applicant to reduce noise would occur as described in the Permit through berming.	No
9. Demands on Environmental Resources of Land, Water, Air, or Energy	No anticipated impacts	N/A	N/A	N/A	N/A	No
10. Impacts on Other	No anticipated impacts	N/A	N/A	N/A	N/A	No

Table 2: Assessment of Significance (ARM 17.4.608)						
Affected Resource and Section Reference	**Potential Impact**	**Severity[1], Extent[2], Duration[3], Frequency[4], Uniqueness and Fragility (U/F)**	**Probability impact will occur[5]**	**Cumulative impacts**	**Measures to reduce impact as proposed by applicant**	**Significance (yes/no)**
Environmental Resources						
11. Human Health and Safety	A. Increase in traffic B. Irritation to receptors by dust, exhaust, and emissions	**A.** **S**-Low: The proposed project would add a relatively small amount of traffic to nearby roads when compared to traffic already using those roads. **E**-Small: The total increase in traffic would not significantly add to traffic already travelling on nearby roads. **D**-Continually until December of 2044. **F**-Daily until final reclamation in December of 2044 **U/F**-Not unique or particularly fragile. **B.** **S**-High: All areas within the 129.8-acre Permit, and some areas outside of the Permit area would be susceptible to the impacts of equipment exhaust, emissions. and dust. **E**-Small: Air quality impacts would occur over the entire 129.8-acre Permit area and areas beyond the Permit where contaminants could be transported before being diluted. **D**-Daily until final reclamation in December of 2044. **F** – Continually until December of 2044. **U/F** – Not unique or particularly fragile.	A. Certain B. Possible	The proposed project would add to traffic impacts from nearby industrial, agricultural, commercial, and highway travel.	The Applicant has not proposed any measures within the Application to mitigate impacts to human health and safety. The Applicant is required to mitigate dust and air quality impacts as discussed in Section 3 and is required to follow all laws.	No
12. Industrial, Commercial, and Agricultural Activities and Production	A. Reduction of cropland/pasture B. Opencut materials would be available for use/sale	**A.** **S**-High: Of the 129.8 acres of ground that would be disturbed, all disturbance would be removed from existing cropland/pasture. **E**-Small: The disturbance would occur within an area with other nearby Cropland/Pasture. **D**-Final reclamation would be complete in December of 2044. **F**-Continually until December of 2044. **U/F**-Not unique or particularly fragile. **B.** **S**-High: Of the 129.8 acres of ground that would be disturbed, most would be utilized to mine opencut materials and make them available for use/sale. **E**-Small: The amount of material to be mined is a small quantity in the context of state-wide opencut resources available on the market. **D**-Final reclamation would be complete in December of 2044. **F**-Continually until December of 2044. **U/F**-Not unique or particularly fragile.	A. Certain B. Certain	A. The loss of cropland/pasture from the proposed project would reduce available area for cropland/pasture use. B. Material mined from the proposed site would be available for use and sale in competition with other producers.	The Applicant has not proposed measures to mitigate impacts to industrial, commercial, and agricultural activities and production.	No
13. Quantity and Distribution of Employment	No anticipated impacts	N/A	N/A	N/A	N/A	No
14. Local and State Tax Base and Tax Revenues	A. The tax base on the land would change from agricultural to industrial.	**A.** **S**-Low: Of the 129.8 acres to be permitted, all would be considered industrial. **E**-Small: All 129.8 acres would be considered industrial, but it is a small area compared to the surrounding agricultural land. **D**-Final reclamation would be complete in December of 2044. **F**-Ongoing until December of 2044.	A. Certain B. Possible	No cumulative impacts to local and state tax base and tax revenues would be expected.	The Applicant has not proposed measures to mitigate impacts to industrial, commercial, and agricultural activities and production.	No

Table 2: Assessment of Significance (ARM 17.4.608)						
Affected Resource and Section Reference	**Potential Impact**	**Severity[1], Extent[2], Duration[3], Frequency[4], Uniqueness and Fragility (U/F)**	**Probability impact will occur[5]**	**Cumulative impacts**	**Measures to reduce impact as proposed by applicant**	**Significance (yes/no)**
	B. Increase in payroll taxes	**U/F**-Not unique or particularly fragile. **B. S**-Low: It is unlikely that this proposed site would require sufficient employees to cause a noticeable increase in payroll tax revenue. **E**-Small: The site is relatively small, and it is unknown how many employees would be required to work the site. **D**-Final reclamation would be complete in December of 2044. **F**-Ongoing until December of 2044. **U/F**-Not unique or particularly fragile.				
15. Demand for Government Services	Road degradation due to increased traffic from the site to deliver opencut materials.	**S**-Low: The proposed project would add a relatively small amount of traffic to nearby roads when compared to traffic already using those roads. **E**-Small: The total increase in traffic would not significantly add to traffic already travelling on nearby roads. **D**-Continually until December of 2044. **F**-Daily until final reclamation in December of 2044. **U/F**-Not unique or particularly fragile.	Certain	Truck traffic from the proposed project would contribute to the cumulative impacts on local roads due to increases in Gallatin County population and regional tourism.	The Applicant has not proposed any measures to mitigate impacts to the demand for government services.	No
16. Locally Adopted Environmental Plans and Goals	No anticipated impacts	N/A	N/A	N/A	N/A	No
17. Access to and Quality of Recreational and Wilderness Activities	No anticipated impacts	N/A	N/A	N/A	N/A	No
18. Density and Distribution of Population and Housing	May add to population or require additional housing.	**S**-Low: It is unlikely that this proposed site would require sufficient employees to cause a noticeable increase in housing demand. **E**-Small: The site is relatively small and it is unknown how many employees would be required to work the site. **D**-Final reclamation would be complete in December of 2044. **F**-Ongoing until December of 2044. **U/F**-Not unique or particularly fragile.	Possible	The potential increase in density and distribution of population and housing may add to the current influx of residents to Gallatin County.	The Applicant has not proposed any measures to mitigate impacts to density and distribution of housing.	No
19. Social Structures and Mores	No anticipated impacts	N/A	N/A	N/A	N/A	No
20. Cultural Uniqueness and Diversity	No anticipated impacts	N/A	N/A	N/A	N/A	No
21. Private Property Impacts	No anticipated impacts	N/A	N/A	N/A	N/A	No

Table 2: Assessment of Significance (ARM 17.4.608)						
Affected Resource and Section Reference	**Potential Impact**	**Severity[1], Extent[2], Duration[3], Frequency[4], Uniqueness and Fragility (U/F)**	**Probability impact will occur[5]**	**Cumulative impacts**	**Measures to reduce impact as proposed by applicant**	**Significance (yes/no)**
22. Other Appropriate Social and Economic Circumstances	No anticipated impacts	N/A	N/A	N/A	N/A	N/A
23. Greenhouse Gas Analysis	A. Emission of GHGs B. Changes in atmospheric radiative forcing	**A.** **S**-High: All vehicles and equipment that utilize diesel fuel within the 129.8-acre Permit, and some areas outside of the Permit area would emit GHGs. **E**-Small: GHG emissions would occur over the entire 129.8-acre Permit area and areas beyond the Permit where contaminants are emitted before being diluted into the atmosphere. **D**- The site would be fully reclaimed by December of 2044. **F**- Daily during mining and reclamation activities. **U/F**-Not unique or particularly fragile. **B.** **S**-Low: GHGs would dissipate and be spread throughout the broader atmosphere instead of remaining densely clustered around the source. **E**-Large: GHGs would dissipate into the broader atmosphere. **D**- The site would be fully reclaimed by December of 2044. **F**- Daily during mining and reclamation activities. **U/F**-Not unique or particularly fragile.	A. Certain B. Probable	GHGs from this site would add to emissions from nearby highway travel and other agricultural, industrial, and commercial activities in the project area.	Use of a conveyer to move material throughout site instead of transporting material using heavy equipment.	No

1. Severity (**S**) describes the density at which the impact may occur. Levels used are low, medium, high.
2. Extent (**E**) describes the land area over which the impact may occur. Levels used are small, medium, and large.
3. Duration (**D**) describes the time period over which the impact may occur. Descriptors used are discrete time increments (day, month, year, and season).
4. Frequency (**F**) describes how often the impact may occur.
5. Probability describes how likely it is that the impact may occur without mitigation. Levels used are: impossible, unlikely, possible, probable, certain.

PREPARATION AND APPROVAL

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Appendix A

Montana Department of Justice
ATTORNEY GENERAL'S GUIDELINES
Revised January 2011

INTRODUCTION

The 54th Legislature enacted the Private Property Assessment Act, Chapter 462, Laws of Montana (1995), which is in Title 2, Chapter 10, Part 1 of the Montana Code Annotated. The law required the Attorney General to develop guidelines, including a checklist, to assist state agencies in identifying and evaluating proposed agency actions that may result in the taking or damaging of private property. The intent was to establish an orderly and consistent internal management process for state agencies to evaluate their proposed actions under the "Takings Clauses" of the United States and Montana Constitutions, as those clauses are interpreted and applied by the United States and Montana Supreme Courts. In addition to these Guidelines with checklist questions, there are three related documents: Takings—Selected Supreme Court Opinions, Private Property Assessment Act Checklist, and Checklist Flowchart.

The Attorney General's Guidelines and Checklist were issued in September, 1995. In the years since then, numerous opinions of the United States Supreme Court and the Montana Supreme Court have analyzed takings issues. This revision of the Guidelines and Checklist is intended to be in compliance with the principles discussed in the Court decisions, and to be of assistance to state agencies in determining when a proposed action may have takings implications.

The Private Property Assessment Act applies to proposed agency actions, (such as an administrative rule, policy, or permit condition or denial), pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitutions. The Act defines "private property" to mean real property, including water rights. The term "private property" does not mean personal property, contract rights, government grants, loans or guarantees, business expectations, or an interest in a license. The Act does not apply to proposed eminent domain proceedings. The Act does not apply to a broad range of state regulation of commercial activities including banking, insurance and securities, utilities regulation, occupational licensing rules, and industrial safety standards. The Act did not expand or diminish the constitutional provisions nor create any right, claim, or cause of action.

Montana Department of Justice
TAKINGS – SELECTED SUPREME COURT OPINIONS

UNITED STATES SUPREME COURT:

Andrus v. Allard, 444 U.S. 51 (1979) (prohibition of the sale of lawfully acquired property is not a taking).

Dolan v. City of Tigard, 512 U.S. 374 (1994) (conditioning approval of building permit on the dedication of a portion of private land to public access is a taking unless there is rough proportionality between the exaction and the impact of the proposed development).

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (the Takings Clause requires compensation for the period of time that the government denies the owner all use of the property, even if the taking is not permanent).

Hodel v. Irving, 481 U.S. 704 (1987) (abolition of the right to pass one's property to one's heirs is a taking).

Kelo v. City of New London, 545 U.S. 469 (2005) (condemnation case discussing the meaning of "public use").

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) (restriction on amount of coal that may be mined in order to prevent surface subsidence was proper exercise of police powers to guard health, safety, and general welfare of the public and did not make profitable mining impossible).

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (whether a law substantially advances legitimate governmental interests is a due process test, not a takings test).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (minor but permanent physical occupation of private property is a taking).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (restriction that denies property owner all economically viable use of land is a taking).

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (conditioning building permit on granting of public access across the property does not serve public purposes related to the building permit requirement and is a taking).

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (case describing significant factors for analysis of regulatory takings).

MONTANA SUPREME COURT:

Adams v. Department of Highways, 230 Mont. 393, 753 P.2d 846 (1988) (in the absence of a physical taking, landowners along a street were not entitled to compensation after the doubling of traffic with an increase in noise, fumes, and dust because of road improvements; residential value of property had decreased but commercial value had increased).

Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (requirement that subdivision dedicate land for public parks and playgrounds was valid). The United States Supreme Court has criticized this case for stating a standard that is too lax to protect adequately private property rights. Dolan v. City of Tigard, 512 U.S. 374, 389 (1994).

Buhmann v. State, 2008 MT 465, 348 Mont. 205, 201 P.3d 70 (takings clauses of United States and Montana Constitutions are coextensive; "or damaging" language of Montana's takings clause applies to consequential damages of a physical condemnation).

Germann v. Stephens, 2006 MT 130, 332 Mont. 303, 137 P.3d 545 (takings claim failed because owner of motel did not have a protected property interest in operating a bar or casino).

In re Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992). (water rights and other property rights are subject to the reasonable exercise of the police power of the state to regulate for the health, safety, and general welfare of the public).

Kafka v. Montana Department of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (passage of Initiative barring fee-shooting of game farm animals was not a taking).

Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982) (property owners may recover in inverse condemnation suit where property across the street was taken by condemnation to enlarge existing street, which greatly increased traffic, noise, and dirt and reduced value of residential property 20-30 percent).

Knight v. City of Missoula, 252 Mont. 232, 827 P.2d 1270 (1992) (property owners may recover in inverse condemnation suit where actual physical damage is caused to their properties by a new public road).

Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993) (annexation of real property may have diminished its value but did not require compensation).

Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903) (owner entitled to compensation because adjacent street was excavated to a depth of 7 feet, impairing his access).

Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098 (suit challenging denial of application to build recreational vehicle park did not state an inverse condemnation claim because the owner had not alleged denial of all economically beneficial use of the property).

McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991) (owner was not entitled to compensation after adoption of more stringent septic regulations reduced the value of owner's riverfront property by 2/3's; the new rules did not deprive the owner of economically viable use for residential development).

Rauser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632 (1977) (property owner may recover in inverse condemnation suit where construction of irrigation project flooded owner's land).

Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009 (passage of Initiative prohibiting cyanide leaching in mines that were not yet operating was not a compensable taking of property rights).

Western Energy Co. v. Genie Land Co., 227 Mont. 74, 737 P.2d 478 (1987) (unexpired leasehold interest in mineral estate is property interest; statute requiring

consent of surface owner to strip mine coal effectively deprived owner of coal of the right to mine).

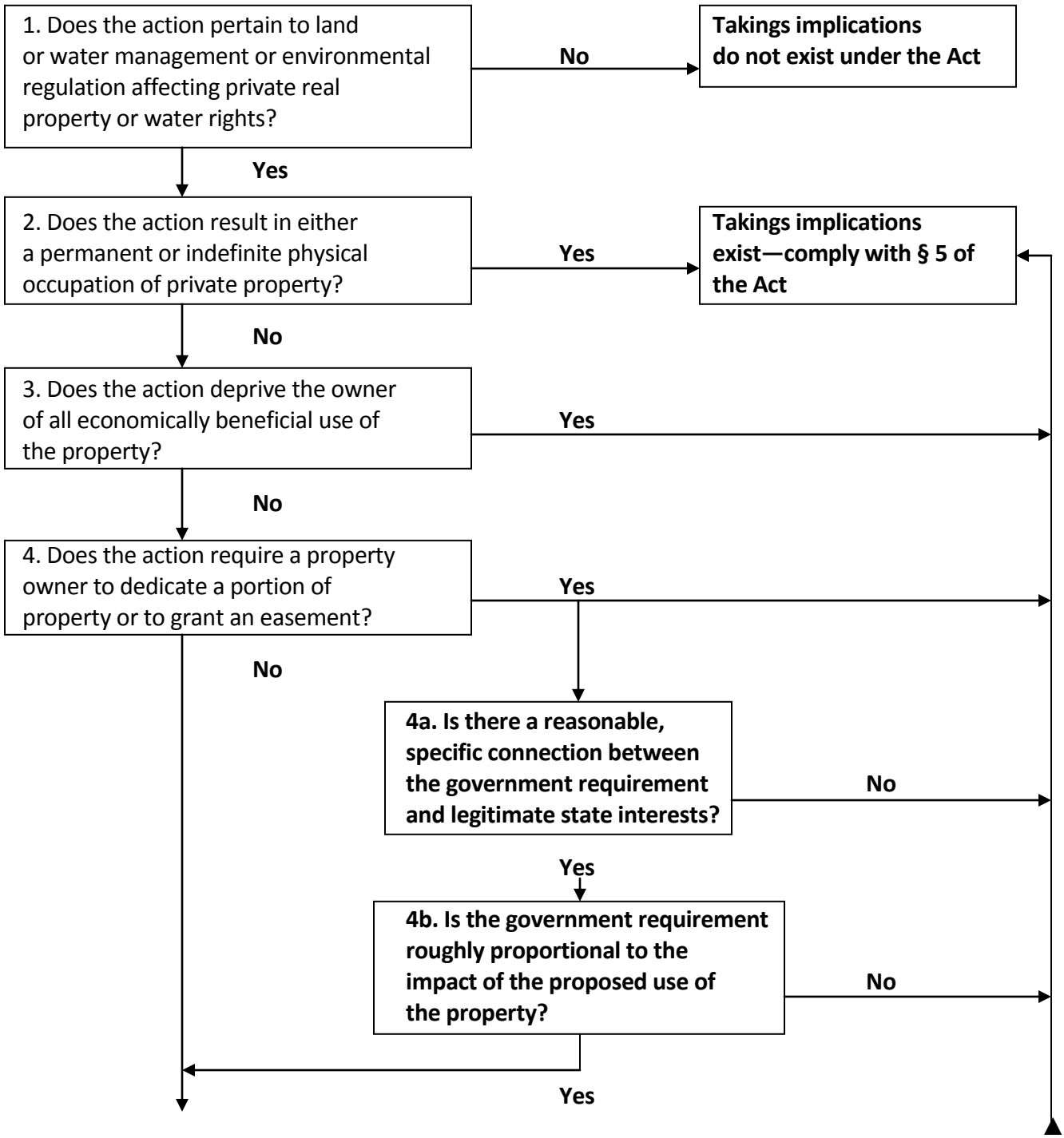
Yellowstone Valley Electric Cooperative, Inc. v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980) (acts conducted in the reasonable exercise of the police power for the public's health, safety, and general welfare do not constitute a taking unless there is an appropriation of property).

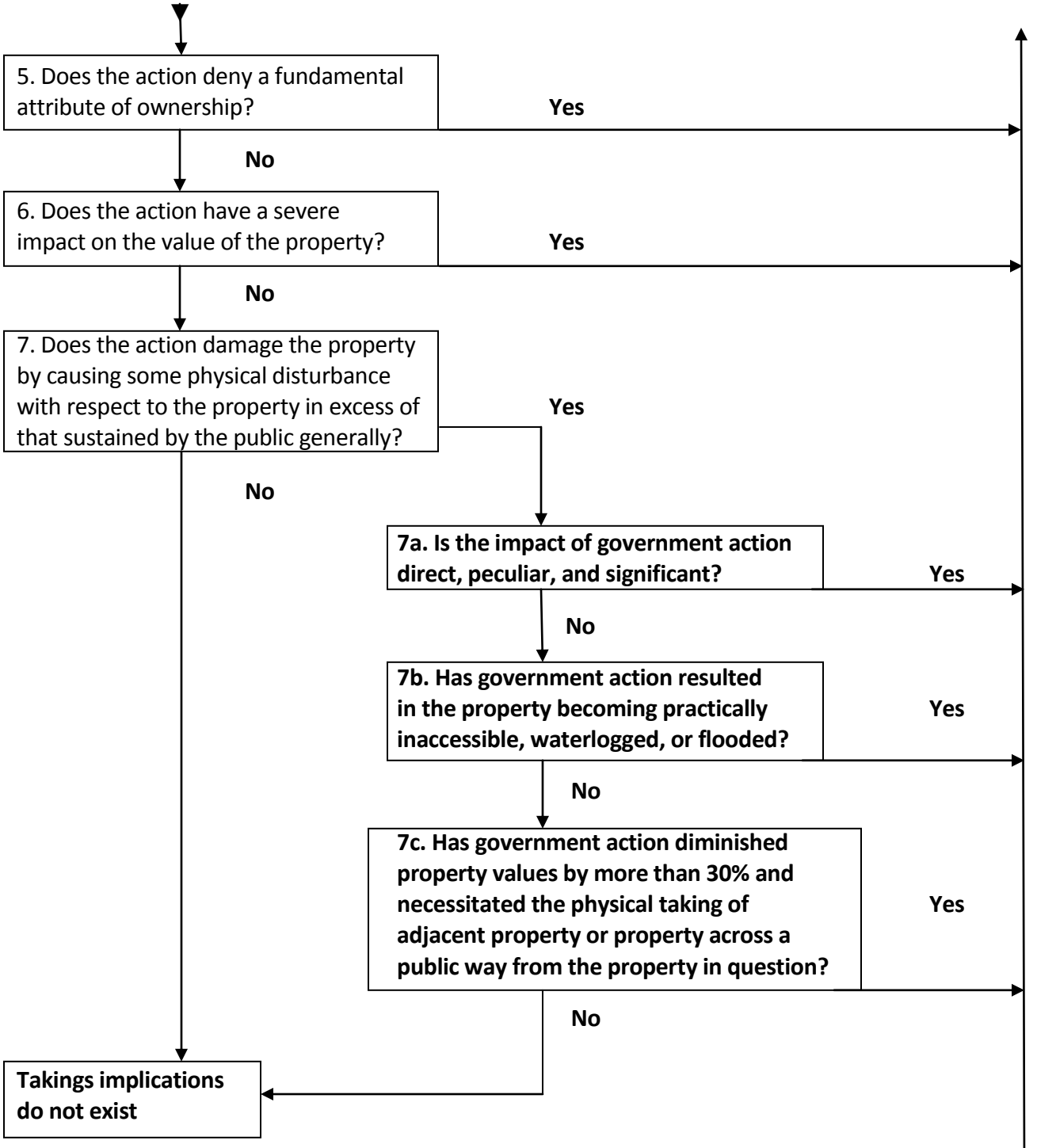
Montana Department of Justice

CHECKLIST FLOWCHART

Does the proposed agency action have takings implications under the Private Property Assessment Act?

START HERE:




5. Does the action deny a fundamental attribute of ownership?
Yes
No
6. Does the action have a severe impact on the value of the property?
Yes
No
7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally?
Yes
No
7a. Is the impact of government action direct, peculiar, and significant?
Yes
No
7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
Yes
No
7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?
Yes
No
Takings implications do not exist

Montana Department of Justice

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

YES	NO	
X		1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
	X	2. Does the action result in either a permanent or indefinite physical occupation of private property?
	X	3. Does the action deprive the owner of all economically beneficial use of the property?
	X	4. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is **NO**, skip questions 4a and 4b and continue with question 5.]
		4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?
		4b. Is the government requirement roughly proportional to the impact of the proposed use of the property?
	X	5. Does the action deny a fundamental attribute of ownership?
	X	6. Does the action have a severe impact on the value of the property?
	X	7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is **NO**, do not answer questions 7a-7c.]

_____ _____ 7a. Is the impact of government action direct, peculiar, and significant?

_____ _____ 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?

_____ _____ 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implications exist if **YES** is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 5, 6, 7a, 7b, 7c; or if **NO** is checked in response to questions 4a or 4b.

If taking or damaging implications exist, the agency must comply with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

I. GENERAL GUIDELINES

A. Overview

The Takings Clause of the Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." Under the Fourteenth Amendment this limitation upon the power of the federal government is applied to the states. Similarly, Article II, Section 29, of the Montana Constitution provides: "Private property shall not be taken or damaged for public use without just compensation . . . ." Although the Montana Constitution contains the "or damaged" language that is absent from the Fifth Amendment, the Montana Supreme Court has ruled that the protections of the two clauses are coextensive. The Takings Clauses do not prohibit the taking of private property, but they do place a condition on the exercise of the power of the government by requiring compensation.

The Takings Clauses are intended to bar the government from forcing some people (whose property is taken) to bear burdens that, in fairness and justice, should be borne by the public as a whole (whose taxes would be used to pay just compensation). However, no single formula exists for determining whether economic injuries caused by government action constitute a taking of private property.

Under Montana's Private Property Assessment Act, state agencies should consider and follow obligations imposed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article II, Section 29, of the Montana Constitution, as construed by the United States Supreme Court and the Montana Supreme Court, when considering and implementing an action with taking or damaging implications in order to avoid unanticipated and undue burdens on the state treasury. Mont. Code Ann. § 2-10-104(2).

Court decisions interpreting and applying the Takings Clauses of the United States and Montana Constitutions to specific factual situations provide guidance for evaluating whether a proposed government agency action may involve a taking of private property requiring the payment of just compensation. Although the language of the Montana Constitution is broader than the federal language, the Montana Supreme Court usually looks to the decisions of federal courts for guidance in considering takings claims. The courts have yet to answer many questions concerning the law of takings. The questions they have answered do not always provide a clear, consistent framework for analyzing takings issues that may arise. Each case must be examined on its own facts in light of the standards that have been developed by the courts. The purpose of these guidelines is to identify those legal standards and to provide state agencies with a framework for analyzing their actions on a case-by-case basis.

Adding to the difficulty involved in analyzing the question, "Is there a taking of property?" is the concept of "property." The constitutions of the United States and of the State of Montana do not define what is meant by the term "property." Besides the physical dimension of property (its

size, shape, and location), property has a functional dimension (the owner's use and disposition of the property), and a temporal dimension (the duration of the owner's interest in the property or of the government's interference with it). Many courts have described "property" as a "bundle" of expectations or rights, such as the rights to possess, exclude others, use, derive income from, and dispose of the property. Government actions may adversely affect one or more "strands" in the "bundle" of rights without there being a taking requiring the payment of compensation.

The rights associated with the concept of property are not absolute. Various laws limit property rights. For example, sometimes a use of property that endangers public health, morals, or safety is considered a nuisance under state law. The government may prohibit a use of property that is a nuisance without paying compensation, because the "right" to create a nuisance is not a component part of the "bundle of rights" that an owner of property enjoys.

When the government obtains title to land, the requirement for the government to pay compensation is clear. The law is firmly established that when the government seeks to use private property for a government building, a highway, or some other public purpose, it may acquire the property by use of its power of eminent domain. The process whereby the government acquires the property and the owner is paid compensation is often called condemnation.

The law is also clear that when the government physically occupies private land on a permanent basis, it is liable to pay just compensation to the owner. Sometimes this occurs because of a mistake, such as when a public road is built on private land as a result of a surveying error. Inverse condemnation is the process by which a landowner recovers just compensation for property that the government has taken without first instituting condemnation proceedings. The Private Property Assessment Act does not apply to condemnation and inverse condemnation proceedings, which obviously involve a taking. Instead, the Act pertains to regulatory actions by state agencies that might result in the taking of private real property, including water rights.

The government has the authority and responsibility to protect the public health, safety, and welfare. Often this is referred to as the "police power" of the state. Pursuant to this power, the government may regulate the use of private property for the public good. Normally, land use regulations such as zoning ordinances, setback requirements, building codes, sanitary requirements, and other environmental regulations substantially advance legitimate public interests and do not deprive owners of all beneficial use of their property. Such regulations are applicable to all similarly situated property and produce a widespread public benefit in which the property regulated also participates. The government may also establish conditions or requirements that must be satisfied in return for government permission to use private property in certain ways. Commonly required conditions include the payment of fees and the obtaining of permits.

To require compensation for all government actions that adversely affect property rights and values would effectively compel the government to regulate by purchase. The courts have not interpreted the Takings Clauses of the United States and Montana Constitutions to require compensation because of the effect on private property of typical land use regulations. Nevertheless, at some point the government regulations attempting to adjust private rights and public benefits may go too far and constitute a taking of private property.

B. Two Categorical Rules

The courts have identified two categories of government action that will be deemed takings. The right to the exclusive possession of property is one of the most fundamental property interests. Thus, government action that requires an owner to allow another to occupy any part of an owner's private property is a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (law requiring apartment building owners to allow installation of cable TV equipment was a taking). Even small physical takings are covered. In Loretto the cable TV equipment occupied only about 1½ cubic feet of the owner's property. 458 U.S. at 438 n.16. This categorical rule also applies to government action creating a public easement. A permanent physical occupation has occurred where individuals are given a permanent and continuous right to pass to and fro, so that the real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises. Nollan v. California Coastal Commission, 483 U.S. 825, 832 (1987).

The second categorical rule is that government action that deprives the owners of all economically feasible use of their real property is a taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In Lucas the owner had paid nearly one million dollars for two residential lots in a beachfront community on an island, intending to build single family homes. Two years later the state adopted an act that barred the owner from building any permanent structures on the land. The state trial court had found that the state law in question had deprived the owner of the lots "of any reasonable economic use of the lots." The Supreme Court found that the owner had suffered a taking. The Court referred to the denial of "all economically beneficial or productive use of land" (505 U.S. at 1015), the denial of "economically viable use" (505 U.S. at 1016), and "deprivation of all economically feasible use" (505 U.S. at 1016 n.7). Typically, this situation may arise when the government action requires a parcel of land to be left substantially in its natural condition, or prohibits development for a temporary but indefinite period. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). By comparison, a government action that deprives property of its most beneficial use, but not other uses, is not necessarily a taking. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

In Goldblatt a company had mined sand and gravel on its 38-acre tract in the town for more than 30 years, creating a 20-acre lake with an average depth of 25 feet. Meanwhile, the town had grown around the site and become densely populated. As a safety measure, the town prohibited the excavation of sand and gravel below the groundwater level. The Court ruled this was a valid exercise of the town's police powers, even though the practical effect was to make further mining on the site impossible. The record before the Court did not show that the town's ordinance had destroyed all the value of the land.

Unfortunately, the United States Supreme Court has not explained what the property interest is against which the loss of value is to be measured. In some cases the Court evaluated the economic impact of a regulation with respect to the property as a whole. Since economically viable use of the property remained available, even though it was not the owner's desired use, there was no taking. Cf. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) (owner of subsurface coal required to leave some coal in the ground to prevent surface subsidence); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (denial of permission to build skyscraper above owner's existing train station). In another opinion the Court noted the existence of uncertainty concerning the calculation of the loss of value. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

C. Land-Use Exaction

An exception to the two categorical rules is a land-use exaction—a government demand that a landowner grant an easement allowing public use of a portion of the property as a condition of obtaining a development permit. Such exactions are allowed where the benefit conferred by the government is sufficiently related to the property and roughly proportional to the impact of the proposed development. For example, as a condition for permission to develop a subdivision the government may require easements for public roads and bike trails and the dedication of undeveloped land for parks and open spaces. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); but see Dolan v. City of Tigard, 512 U.S. 374, 389 (1994) (criticizing Billings Properties for stating a standard that is too lax to protect adequately private property rights).

The owner of a house on waterfront property may not be required to grant a public easement across his property as a condition to replacing an existing house with a new dwelling, because the connection between the permit to build and the government interest in access to the beach is insufficient. However, the owner could be required to observe certain size and height restrictions so that the new construction would not block the public's view of the water. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). Similarly, it is lawful to require a property owner who applies for a permit to expand the size of a store and parking lot to leave undeveloped a vegetated strip in a flood plain. There is a connection between the proposed development and the government interest in flood control. But the government goes too far if it also requires the vegetated strip in the flood plain to be open to the public. Dolan v. City of Tigard, 512 U.S. 374 (1994).

D. Fact-Specific Balancing

When the regulation does not involve a permanent physical invasion of the property or the destruction of all economically beneficial use or a land-use exaction, the courts engage in an ad hoc, fact-specific balancing of the public interest and private loss to assess whether the regulation forces some property owners to bear burdens that should, in fairness and justice, be borne by the public as a whole. Although there is no set formula, the courts often examine the following factors to assess the severity of the burden imposed by the government: (1) the character of the government action, (2) the extent to which the action has interfered with reasonable investment-back expectations of the owner; and (3) the magnitude of the economic impact of the regulation on the owner.

1. Character Of Government Action

The character of the government action focuses on the severity of the burden the government imposes on property rights. At one extreme, if the government action involves a permanent physical occupation of the property or the denial of all economically viable use of the land, there is a taking and further analysis is unnecessary. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). If a regulation abolishes one or more "strands" composing the "bundle" of rights embodied in the concept of "property," a taking may have occurred, but further analysis is usually required. However, barring the inheritance of certain interests in land was a taking. Hodel v. Irving, 481 U.S. 704 (1987). In contrast, a law barring the sale of eagle feathers did not amount to a taking. Andrus v. Allard, 444 U.S. 51 (1979). Similarly, a law barring the shooting of game farm animals was not a taking. Kafka v. Montana Department of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8. At the other extreme, if the government action involves the traditional exercise of police powers to promote the public health, safety, and welfare, it is unlikely that the regulation has taken private property. Similarly, if the government regulation simply enforces established principles of nuisance law, there is no taking.

2. Reasonable Investment-Backed Expectations

The extent to which the regulation has interfered with the reasonable investment-backed expectations of the property owner is an objective test. For example, if the owner purchased land in order to subdivide it and after the property was being developed new government regulations barred further development, then the impact of the government action on the investment-backed expectations of the owner would be obvious. In contrast, if existing government regulations restrict land uses and the owner purchased the property with the intention of developing it in a manner already limited by the government, the owner's expectations would not be reasonable. For highly regulated activities, such as mining, the owner of mineral rights does not have a reasonable expectation that a mine can be developed without compliance with government regulations. Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

3. Economic Impact

The magnitude of the economic impact on the value of the property reflects the severity of the burden imposed on private property rights by the government regulation. The economic impact is measured by the change in the fair market value of the property caused by the government regulation. This compares the value that was taken from the property with the value that remains in the property. The focus is on the owner's loss, not the government's gain. However, a substantial reduction in the value of a property or a denial of its most profitable use is not necessarily a taking requiring compensation.

II. CHECKLIST QUESTIONS

Agency staff should use the following questions, and the checklist and flowchart in assessing the impact of a proposed agency action on private property as required by Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105. A thorough assessment requires a careful review of all of the issues identified in these materials. Court decisions concerning takings questions arise in the context of specific facts. Although these materials are based upon court decisions, slight differences in the facts may lead to different conclusions regarding whether a taking is involved. If the application of the checklist to a particular proposed agency action is not clear, agency legal staff should be consulted.

1. **Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?**

   The Private Property Assessment Act does not apply to the great number and variety of state agency actions outside of this context, such as personal property, worker safety regulations, workers' compensation, or insurance and securities regulation.

2. **Does the action result in either a permanent or indefinite physical occupation of private property?**

   Regulation that results in a permanent or indefinite physical occupation of all or a portion of private real property will constitute a taking.

3. **Does the action deprive the owner of all economically beneficial use of the property?**

   Regulation that requires a parcel of private land to be kept in its natural state may constitute a taking.

4. **In the case of a land-use exaction, does the action require a property owner to dedicate a portion of property or to grant an easement? If so, there is a taking unless both of the following questions are answered affirmatively: (a) is there a reasonable, specific connection between the government requirement and legitimate state interests and, (b) is the government requirement roughly proportional to the impact of the proposed use of the property?**

   Sometimes the developer of property is required, as a condition to obtaining permits, to set aside a portion of the land for such public uses as roads, utilities, and recreation. When the government requires that property be made available for certain purposes, there must be a reasonable, specific connection to legitimate state interests. In addition, the nature and extent of the government's requirements must be roughly proportional to the impact of the proposed development and specifically designed to prevent or compensate for adverse effects of the proposed development. A precise mathematical calculation is not required. Nevertheless, the agency must make an individualized determination that the requirements imposed by the government are related in both nature and extent to the impact of the proposed use of the property. Regulations such as those requiring subdivision developers to dedicate a certain percentage of areas to public streets and open spaces are normally allowed because there is a specific connection between the requirements and the legitimate public interest in the prevention of excessive congestion and because such requirements are roughly proportional to the impact of the development. Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994).

5. **Does the action deny a fundamental attribute of ownership?**

   This question is related to the metaphor that conceives of property as consisting of a "bundle" of rights. Among the fundamental attributes of ownership are the rights to possession, to exclude others, to use, and to dispose of, the property. The denial of a single strand in the bundle does not always amount to a taking of property for which compensation is required. In the interest of flood control, government may prohibit a property owner from developing land in a flood plain, but government may not require the owner, without compensation, to grant the public access to the flood plain. Dolan v. City of Tigard, 512 U.S. 374 (1994).

6. **Does the action have a severe impact on the value of the property?**

   The purpose of this question is to evaluate whether the proposed government action goes too far in the regulation of the use of property so that a taking requiring compensation has occurred. Although a reduction in property value alone is not a taking, a severe reduction in value may indicate that, in fairness, the economic injuries caused by the government action should be compensated by the government. No clear, concise test exists to separate a compensable regulatory taking from those government actions that do not constitute compensable takings. Nevertheless, the Courts have identified three

factors of particular significance: (1) the character of the government action; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations of the owner; and (3) the magnitude of the economic impact of the regulation on the property owner. Applying these factors, government action prohibiting the erection of a skyscraper over a historic building was not a taking. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Although the enactment of septic regulations diminished the value of certain property, there was no taking because the regulation was substantially related to the legitimate government interest of protecting the health, safety, and general welfare of the public and did not deny owners economically viable use of their land. McElwain v. County of Flathead, 248 Mont. 231, 811 P.2d 1267 (1991).

The annexation of land to a municipality was allowed without compensation as a legitimate exercise of government powers, even though the value of the property was diminished. Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993).

7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally?

The Takings Clause of the Montana Constitution contains "or damaged" language that applies to consequential damages to property affected by condemnation or inverse condemnation. The "or damaged" language does not apply to regulatory takings. Buhmann v. State, 2008 MT 465, ¶¶ 60-74, 348 Mont. 205, 201 P.3d 70. However, where the government action results in a permanent or indefinite physical occupation of all or a portion of private real property or deprives the owner of all economically beneficial use of the property, the "or damaged" language should be considered. To constitute damage, the impact of government action on property must be direct, peculiar, and significant. Thus, land that becomes waterlogged because of the effect of an adjacent government irrigation project on the ground water table is damaged and compensation is required. Rauser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632 (1977). Construction that lowers the grade of a city street by seven feet, thus denying homeowners fronting the street with easy access to the street, damages their property. Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903). In contrast, landowners on a street subjected to increased traffic because of bridge construction have not suffered damage under the takings clause of the Montana Constitution. Although the value of the property for residential use has decreased, the value for commercial use has increased. Adams v. Department of Highways, 230 Mont. 393, 753 P.2d 846 (1988). However, if government road construction requires the physical taking of some property and other property adjacent to the road is diminished in value for its permitted use by 30% or more because of increased traffic or drainage problems, the remaining homeowners may be entitled to compensation for damage. Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982).

CONCLUSION

If the use of the guidelines, questions, checklist, and flowchart indicates that a proposed agency action has taking or damaging implications, the agency must prepare an impact assessment in accordance with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105. Agencies should develop internal procedures to ensure that agency legal staff are consulted during this process.

DEQ Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Terisa Oomens, Board Attorney
Board of Environmental Review

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

DATE: April 1, 2024

SUBJECT: Board of Environmental Review Case No. BER 2024-03 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY GATEWAY CONSERVATION ALLIANCE REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3462	Case No. BER 2024-03 OC

On March 29, 2024, the BER received the attached request for hearing.

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

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

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Attorneys for Petitioner
Gateway Conservation Alliance

Electronically Filed with the
Montana Board of Environmental Review
3/29/24 at 4:30 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2024-03 OC

BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY GATEWAY CONSERVATION ALLIACNE REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3462	Cause No. **NOTICE OF APPEAL AND REQUEST FOR HEARING**

Petitioner, Gateway Conservation Alliance ("GCA") through counsel, brings this action front of the Board of Environmental Review ("BER") challenging the Montana Department of Environmental Quality's ("DEQ") issuance of an Open Cut Mining Permit to TMC, Inc., for a new gravel pit located in Gallatin County, Montana (the "Black Pit") (Opencut Permit #3462.) This appeal is brought pursuant to § 82-4-427, MCA, and § 2-4-

601, et seq., MCA. GCA challenges DEQ's actions as violations of the Montana Opencut Mining Act, §§ 82-4-401, et seq., MCA and regulation thereunder. GCA also asks that the BER set aside the permit as being unlawful.

I. PARTIES, JURSIDICTION AND VENUE

1. Petitioner GCA is a not-for-profit corporation duly registered and licensed in the State of Montana.

2. DEQ is the agency of State government entrusted with regulating the open cut mining industry as well as protecting Montana's water quality, air quality and other environmental values. As a state agency, it is subject to the Opencut Act, MEPA as well as to certain constitutional duties related to the environment and public participation.

3. Jurisdiction is based on § 82-4-427, MCA.

II. FACTS

The Setting

4. The Black Site is located along one of Montana's pristine rivers – the Gallatin. The Gallatin River is a blue ribbon trout stream that originates in Yellowstone Park and flows north through Gallatin Gateway until it reaches the confluence with the Jefferson and Madison Rivers to form the Missouri River. Its beauty was captured in the movie a River Runs Through It, which highlighted the crystal clear water and incredible fishing opportunities.

5. The Gallatin River is about one-half mile from the Black Site, and an unnamed perennial stream runs about 480 feet west of the site and flows northward into the Gallatin River.

6. The proposed Black Site is located above an unconfined alluvial aquifer composed of alluvial sand, gravel, silt and clay. According to DEQ, the water table has a variable depth. According to DEQ, the seasonal high water table level in the southeast corner is roughly 68 feet, with depth to groundwater decreasing across the site to the northwest. These elevations, however, are not based on reliable data and are contradicted by well log data from the Black Site itself.

7. Based on the well log data from the Black Site, seasonal high depth to groundwater ranges from 69.7 feet to 15.12 feet, with two wells having seasonal highs of between 45-50 feet. Adjacent well data further supports the shallow depth to groundwater with well data indicating it may be as shallow as 9 feet below the surface. And two nearby wells that are regularly monitored show seasonal or yearly fluctuations of 14 to 27 feet. Simply put, groundwater is close to the surface.

8. The area is also replete with wildlife, including bear, coyotes, deer, elk, fox, moose, raptors, rodents, song bird, upland bird, and waterfowl. As a result, the 2021 Gallatin County Growth Policy identified the area as having a Higher Value for wildlife. Directly across highway, Highway 191, from the proposed site is the one the largest conservation easements in Montana, the Flying D Ranch Conservation easement, which provides habitat for those same animals.

9. The proposed Black Site is also the northernmost wildlife crossing as Elk and other animals traverse Highway 191 from east to west.

The Mine

10. The Black Site is a new proposed opencut mine stretching over 129.8 acres directly adjacent to Highway 191.

11. TMC, Inc., plans to operate the Black Pit for twenty years, or until December 31, 2044, and to remove 6,000,000 cubic yards of clay, gravel, and sand. On site, TMC, Inc., will operate a crusher and conveyor.

12. TMC, Inc., first applied for the Opencut Permit in May 2023, with DEQ considering the application "complete" on May 26, 2023. The proposed depth of the pit was 40'.

13. The original application was replete with errors, including the wrong pit location. On the face of the application, it was clear that TMC, Inc., had simply copied from an earlier Opencut application for its nearby *Morgan Pit*. The application also described groundwater contours as above land.

14. In response to the application, GCA submitted comments highlighting the facial errors and highlighted significant errors regarding the depth to groundwater and potential impacts to water quality and quantity.

15. Specifically, GCA explained that the depth to groundwater calculation was incorrect. In the application, TMC, Inc., stated that the depth to the seasonal high (and seasonal low) groundwater was 50 feet below ground surface (bgs). It based

this calculation on nearby groundwater well logs, and historic groundwater elevation contours. This reliance was misplaced.

16. The historic groundwater elevation contours were prepared using data from 1995, based on wells outside the permit boundaries. No wells were on the Black Site or in close proximity. The contours interval is 50 feet, which exceeded the pit depth, and provided no data on whether water would be encountered 40 ft bgs.

17. The historic depth to groundwater data was equally flawed. The application references well logs, but those were not included in the application. However, six wells near the site were completed from 1880 to 2014, with well depths ranging from 19 to 120 feet bgs. Those wells indicated that static water levels were from 9-81 feet. Those levels, though, were generally based on a single reading at a single point in time. They do not represent seasonal or annual fluctuations.

18. Two of the six wells, though, have recorded long term water level data from April 2007 through March 2023. They indicate that the static water level for those wells fluctuates from 14 to 21 feet. That fluctuation suggests that the water level at the Black Site will also fluctuate, and likely not at 50 feet bgs.

19. DEQ apparently agreed with GCA's comments and issued a deficiency notice on August 9, 2023. In the deficiency notice, DEQ required corrections to the identified location of the Black Site (as opposed to the Morgan Pit), and that "The information provided to confirm groundwater levels is not adequate."

20. In response to the deficiency notice, TMC, Inc., submitted a revised application on October 12, 2023. The new application changed the depth to groundwater,

increasing it by nearly 20 feet to 69.7 feet bgs as the seasonal high water table, and the seasonal low at 70.60 feet bgs. It also increased the depth of mining to 59 feet.

21. TMC's amended application continued to be deficient. The depth to groundwater continued to be inaccurate, and the application failed to provide the required information justifying its revised seasonal water levels. As part of the application, TMC was required to provide documents and information supporting its change.

22. Prior to submitting the amendment, TMC drilled two new wells to determine groundwater information. But the application did not include the well logs to support the change in depth to groundwater, and only one measurement was utilized to determine the water levels.

23. The one measurement was taken in September, 2023, which is the opposite of when seasonal high groundwater levels are typically found. Rather, those are found in the spring and summer, so the applicant's data was not representative of the seasonal high groundwater at all. Additionally, relying on only one data point did not account for the seasonal or annual fluctuations in the Gallatin valley. Nor did the application address the other area wells with shallow ground water readings.

24. The amended application also failed to evaluate the location of wetlands to the south of the proposed permit boundary that are within 1,000 feet of the amended application.

25. After reviewing the amended application, DEQ issued another deficiency notice on October 26, 2023. The deficiency notice noted the failure of TMC to account

for the adjacent wetlands and the unnamed perennial stream, as well as additional animals in the area.

26. DEQ then noted that the application was deficient because "DEQ cannot verify if the provided static water levels are accurate." To remedy this deficiency, DEQ required additional monitoring of the new wells and that TMC submit additional information, such as well log reports for the wells that TMC relied upon, an additional observation pipe to determine depth, and proof that the mining depth would maintain a 10 foot minimum buffer distance between the mine pit and ground water level. DEQ also acknowledged that the depth to groundwater changes across the site.

27. On November 30, 2023, TMC submitted its second amended application, which suffered from practically the same deficiencies that DEQ identified in the October 26, 2023 deficiency notice. As a result, DEQ issued its third deficiency notice on December 18, 2023. The deficiency notice again highlighted the lack of information related to the depth to groundwater, and required TMC to submit additional information.

28. TMC then submitted its third amended application on January 16, 2024. This application amended the depth of the mining to indicate that there would be at least 3 or 5 feet of separation between the mine floor and the groundwater. It also adjusted the seasonal high depth to groundwater to two feet higher than before. These changes, though, were not sufficient and on January 30, 2024, DEQ issued its fourth deficiency notice.

29. In the fourth deficiency notice, DEQ noted that the depth to groundwater was between 15.12 feet bgs and 69.7 feet bgs, but accepted TMC's assurance that August was the seasonal high water month, and only required a rephrasing of the depth to groundwater analysis.

30. TMC then submitted its fourth, and final, amended application on February 9, 2024.

31. The fourth amended application continued to contain the same errors as the previous iterations. Namely, the applicant's failure to provide data supporting their assertions that the seasonal high water table was at 69.7 feet, and their refusal to address the surrounding wells showing seasonal high water as shallow as 9 feet bgs. Specifically, the applicant's reliance on wells from miles away was inappropriate and not reliable for the Black Site.

32. The fourth amended application also relied on a computer-generated contour map. That information was not reliable because the distance between elevation data points was nearly one-half mile, and outside the area to be mined. The reliability of the data was questionable at best.

33. TMC also did not submit the required documentation to support its depth to groundwater analysis, and did not fully evaluate the depth to groundwater. The application continued to ignore the potential 14-to-27-foot seasonal fluctuations in groundwater levels.

34. As part of the application, TMC also submitted a groundwater elevation memo that was fraught with errors. For example:

a. The memo noted that on-site and local groundwater elevation data provide sufficient information to estimate high groundwater elevation, but the specific data used by TMC does not represent seasonal high groundwater, and does not accurately present the depth to shallow groundwater.

b. The memo identifies a shallow 15.12 foot depth to groundwater well that was measured on August 11, 2023, and represents the seasonal high groundwater. That well, though, was not used to perform depth to shallow groundwater estimate in the application. The applicant only relied on those wells that it found helpful.

c. The memo stated that groundwater elevation data collected at the Black site is representative of the seasonal high groundwater elevation and water levels in the aquifer. But the applicant provided no data to support seasonal fluctuations or yearly variations.

d. The memo stated that a maximum mining depth of 60 feet would allow for separation of groundwater and the mine floor during seasonal high groundwater elevation. This statement is not supported by independently recorded data.

35. In all, the fourth amended application suffered from essentially the same deficiencies that DEQ identified in its first and second deficiency letters, which TMC had not resolved through its amendments.

36. DEQ's second deficiency highlighted the major error that was not remedied in the fourth amendment. For example, DEQ highlighted the well log for the GWIC ID 328688 which has a static water level of 51.2 feet, and the well log for GWIC ID 328689 which had a static water level of 51.8 feet. DEQ noted it was unsure how a mine with a maximum mining depth of 59 feet could maintain a buffer between the water table and the mine depth. The final application put in topographic lines indicating the mine depth would be roughly 45-50 feet at these wells, but without information on the seasonal fluctuations or yearly variations, the applicant could not demonstrate that those levels would be above the water table.

37. The same is true with the shallowest mining which occurs at a depth of 35 feet. That depth is within roughly 200 feet of a well where the groundwater level was 15 ft bgs. Again, demonstrating that the mining activities will likely intersect groundwater.

38. Despite these problems, DEQ issued Opencut Permit #3462 on March 1, 2024.

39. An environmental assessment (EA) was completed by DEQ and released to the public on or around March 1, 2024. The public did not have an opportunity to comment directly on the EA prior to its release.

40. Environmental, mining and reclamation related issues that are apparent from the EA, application and permit, include, but are not limited to:

    a. The EA acknowledges that important surface and groundwater resources are present, and that the operation has the potential to violate water quality standards.

b. The EA acknowledges that the Applicant has *no mitigation measures* to prevent fuel spills or procedures for cleaning any spilled fuel.

c. The EA acknowledges that if fuel spilled, it would discharge into groundwater with impacts lasting through the life of the permit.

d. There is no evaluation of what impacts a 50- or 100-year, or greater, rain event, such as recent storms occurring elsewhere in the Greater Yellowstone Ecosystem, would have on the Gallatin River and associated fluvial and alluvial environment.

e. The application and EA provided no analysis of how protection of shallow groundwater resources utilized by local residents and ranches, as well as recharge to wetlands, the north flowing perennial stream, and the Gallatin River system will be assured.

f. The application and EA provide no analysis of the amount of water that will be required for the gravel pit itself, or wash plant operations, dust suppression, and water management.

41. The application did not include all the requisite information required at ARM 17.24.218(1)(f)(i), which requires that the applicant must provide the estimated seasonal high and seasonal low water table levels in the permit area. The information provided by the applicant does not accurately provide this information.

42. The application also violates 82-4-401 et seq., because it is not designed to preserve natural resources or protect wildlife and aquatic resources.

III. COUNT ONE – VIOLATION OF OPENCUT MINING ACT'S PROHIBITION ON DEGREDATION AND REQUIRED PROTECTION OF THE ENVIRONMENTAL LIFE SUPPORT SYSTEM

43. The preceding paragraphs are realleged as though set forth in full hereunder.

44. The Opencut Mining Act is intended to implement the constitutional environmental protections found at Article II, Section 3 and Article IX, Sections 1 & 2 of the Montana Constitution, including the duty to maintain and improve a clean and healthful environment and the duty to effectively reclaim all mined lands. § 82-4-402, MCA.

45. More specifically, the Opencut Act states that "It is the legislature's intent that the requirements of this part provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Code Ann. § 82-4-402

46. In this case, there is no analysis or evidence that relates to how precipitation or surface water.

47. For the reasons described above and as described in the accompanying EA, this permit violates the Opencut Act because it is does not provide adequate remedies for the protection of the environmental life support system from degradation nor does it provide adequate remedies to prevent degradation of natural resources.

COUNT TWO – VIOLATION OF OPENCUT MINING ACT'S REQUIREMENT THAT SEASONAL HIGH AND SEASON LOW GROUND WATER BE PROVEN

48. In furtherance of the above constitutional duties, the Opencut Act and its promulgated regulations enacted pursuant to the Act requires an applicant submit detailed information on water resources and water quality protection, §§ 82-4-432 and 433, MCA. And A.R.M, 17.24.218 (1)(f).

49. The application fails to meet these regulatory requirements, as set forth above.

50. As required by § 82-4-432(1)(b)(i), MCA, the Applicant failed to identify with sufficient evidence necessary to meet its burden of proof and DEQ violated the law by accepting the same Section C1 of the Application and the depth to groundwater analysis contained therein.

51. TMC asserts that it will "cease mining at or above the high water table", but it has failed to meet its burden of proof regarding the same and thus DEQ violated the Opencut Act by accepting this deficient information. Simply put, the Applicant cannot cease mining above the high water table if it does not know where that is.

52. Based on the deficiencies in the application and reclamation plan under § 82-4-432 (4), MCA., and DEQ's unlawful decision approving the permit, the BER should reverse and set aside Opencut Permit #3462.

COUNT THREE – VIOLATION OF OPENCUT MINING ACT'S PLAN OF OPERATION REQUIREMENTS

53. The Opencut Act required that "waste will be buried on site in a manner that protects water quality and is compatible with the postmining land use or will be

disposed of off site in accordance with state laws and rules"; Mont. Code Ann. § 82-4-434(d).

54. By failing to identify the magnitude of groundwater fluctuation, the seasonal elevation, and the distance between the bottom of mining and water levels throughout the year, the Applicant failed to meet its burden of proving that it will protect water quality on the site.

55. In its EA DEQ identifies the following:

a. The proposed Black site is located above an unconfined alluvial aquifer composed of alluvial sand, gravel silt, and clay.

b. That fuel spilled during refueling activities or in the event of a fuel tank leak would discharge to groundwater.

c. The nearest surface water includes the perennial stream approximately 480 feet to the west and the unnamed private irrigation ditch that runs along the eastern and southern boundaries of the site. To regulate storm water discharges and minimize pollutant loading from this site, the Applicant should seek appropriate coverage under the Mul-Sector General Permit (MSGP) for stormwater discharges.

56. However, in violation of the Opencut Act, none of these pieces of information or evidence are provided for in the Plan of Operation. There simply is no evidence in the record about how the Applicant will protect water quality by way of the waste it will generate on site.

COUNT FOUR – VIOLATION OF OPENCUT MINING ACT'S REQUIREMENT THAT DEQ CONFIRM AND VERIFY ALL DATA SUBMITTED BY THE APPLICANT

57. The department has the powers, duties, and functions to: (a) issue permits when, on the basis of the information set forth in the application and an evaluation of the proposed opencut operations, the department finds that the requirements of this part and rules adopted to implement this part will be observed." § 82-4-422, MCA

58. Here, DEQ violated the Opencut Act, as described above, by failing to itself verify that the requirements of the Act were met.

59. DEQ has no authority to rely solely on the statements of an Applicant that have not been first verified for accuracy and truth by DEQ staff.

60. The BER should reverse DEQ's decision and void this permit for failure to adhere to and meet its internal agency obligations under the law.

PRAYER FOR RELIEF

Gateway Conservation Alliance prays for the following relief:

1. That the BER find that DEQ violated its statutory requirements, acted in excess of its statutory authority and that its actions were clearly erroneous, arbitrary, capricious and unlawful.
2. That the BER set aside the March 1, 2024, approval of Permit 3462 as unlawful, and *void ab initio*.
3. That the BER award Petitioner its attorney's fees pursuant to the Private Attorney General doctrine.

4. That the BER award Petitioner its costs.

5. That the BER grant such other and further relief as it deems equitable and appropriate.

Dated this 29th day of March 2024.

FERGUSON & COPPES, PLLC
A Natural Resource Law Firm

/s/ Graham J. Coppes
By: Graham J. Coppes
Emily F. Wilmott
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David K. W. Wilson, Jr.
Rob Farris-Olsen
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of March, 2024 a true and correct copy of the foregoing document was duly served by *electronic mail* upon the following:

Board of Environmental Review
Attn: Sandy Scherer
P.O. Box 200901
Helena, MT 59620
deqbersecretary@mt.gov

/s/ Taylor Haas
Taylor Haas, Legal Assistant
Ferguson and Coppes, PLLC
A Natural Resource Law Firm

April 9, 2024

To: Board of Environmental Review Members

From: Chairman Dave Simpson

Re: Board of Environmental Review Powers, Authorities and Responsibilities

At the December meeting the board voted to initiate an investigation into current law regarding powers, authorities and responsibilities of the BER. The purpose was to support a decision whether or not to propose a bill in the 2025 legislature to address and clarify the matter. After reviewing the legislative history of the BER and applicable sections of the MCA, I have concluded that the authorities and functions of quasi-judicial boards are adequately addressed in **Title 2, General Administration**, and hence, there is no need for additional clarifying language.

Here are the highlights of that research:

- The Board of Environmental Review was created in 1995 as part of SB 234, which consolidated the environmental regulation functions of the then departments of Health and Environmental Sciences, Natural Resources and Conservation, and State Lands into the new Department of Environmental Quality.
- As stated at both the Senate and House committee hearings, the new BER was to be a “public board” established to provide an “appeal process” and “oversight” of department decisions and rulemaking.
- The BER was designated as a quasi-judicial board, the establishment of which requires members with specific backgrounds:

> **2-15-3502. Board of environmental review.** (1) There is a board of environmental review.
>
> (2) The board consists of seven members appointed by the governor. The members must be representative of the geographic areas of the state. One member must have expertise or background in hydrology. One member must have expertise or background in local government planning. One member must have expertise or background in one of the environmental sciences. One member must have expertise or background as a county health officer or as a medical doctor.
>
> (3) A vacancy occurring on the board must be filled by the governor in the same manner and from the same representative area as the original appointment.
>
> (4) The board is designated as a quasi-judicial board for purposes of **2-15-124***.
>
> (5) The board is attached to the department of environmental quality for administrative purposes only as provided in **2-15-121**.
>
> *2-15-124 describes procedures for board appointments and process.

- In 2021, SB 233 transferred the quasi-legislative responsibility under the various environmental statutes, i.e. rulemaking, from the board to the department. Other powers, authorities and responsibilities of the board were unaffected.
- The key definitions are found at **2-15-102 MCA:**

  "Agency" means an office, position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the executive branch of state government.

  "Function" means a duty, power, or program, exercised by or assigned to an agency, whether or not specifically provided for by law.

  "Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes but is not limited to the functions of:

  (a) interpreting, applying, and enforcing existing rules and laws;
  (b) granting or denying privileges, rights, or benefits;
  (c) issuing, suspending, or revoking licenses, permits, and certificates;
  (d) determining rights and interests of adverse parties;
  (e) evaluating and passing on facts;
  (f) awarding compensation;
  (g) fixing prices;
  (h) ordering action or abatement of action;
  (i) adopting procedural rules;
  (j) holding hearings; and
  (k) any other act necessary to the performance of a quasi-judicial function.

These are general definitions applicable to all quasi-judicial boards, including the BER.

- Montana law includes the following requirement with respect to public participation in an agency meeting:

  2-3-103(c) The agenda must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter.

Our standard BER meeting agenda includes this public comment item and this is one avenue by which an issue of department oversight might come to the board for consideration. An issue involving regulatory conflict, lack of clarity, or other potential problem area might also arise from contested case matters brought before the board. A third potential trigger might be a point of publicized environmental controversy or public concern, or a matter brought before the board by one of its members. In any case, the board can proceed with a hearing on any such matter only after a vote of approval by a majority if its members, and then only at a subsequent meeting after public notice.

BER has a clear regulatory oversight role in addition to its responsibility to hear and decide administrative appeals under MAPA. This position is supported by legislative intent, the functions of a quasi-judicial board as defined under **2-15-102 MCA,** and

perhaps most importantly, the public participation requirement of **2-3-103(c) MCA**. The specified makeup of the board also argues for a public oversight function, and access to the board provides a pathway for public participation in department matters.

- The DEQ administers regulatory programs under Title 75 – Environmental Quality, Title 76 – Land Resources, and 82 – Minerals, Oil and Gas. Board responsibilities are referenced in nine programs, and in no two instances is the role of the board described by identical language. In some cases, the direct board responsibility is quite narrow. These include Public Water Supplies, Waste and Litter, Major Facility Siting, and Sanitation (subdivisions). The most comprehensive board authority is prescribed in the Clean Air Act:

  75-2-111. Powers of board. The board shall, subject to the provisions of **75-2-207***:

  (1) hold hearings relating to any aspect of or matter in the administration of this chapter at a place designated by the board. The board may compel the attendance of witnesses and the production of evidence at hearings. The board shall designate an attorney to assist in conducting hearings and shall appoint a reporter who must be present at all hearings and take full stenographic notes of all proceedings, transcripts of which will be available to the public at cost.

  (2) issue orders necessary to effectuate the purposes of this chapter;

  (3) have the power to issue orders under and in accordance with 42 U.S.C. 7419.**

  *75-2-207 prohibits regulations more stringent than federal unless properly justified.

  **42 USC 7419 is a federal requirement specific to non-ferrous smelters.

Similar but less detailed language is found in programs regulating water quality, coal and uranium mine reclamation, metal mine reclamation and open cut mine reclamation.

Amending all of these environmental statutes to incorporate identical language would require a complex and lengthy bill, and in my view is not necessary, given the overarching powers of quasi-judicial boards to hold hearings and issue orders.

In conclusion, it is my opinion that its designation as a quasi-judicial board (**2-15-3502(5))**, its makeup comprised of members of diverse backgrounds (**2-15-3502(2))**, the definition(s) of quasi-judicial function (**2-15-102)** and public participation requirements **(2-3-103(c)** combine to implement the legislative intent that the BER provide public oversight of department administration of environmental statutes through properly noticed public hearings and orders. Hence, in my view there is no immediate need to propose legislation to clarify powers of the board.

The attached sheets list the code sections consulted in preparing this memorandum.

MCA Sections consulted to investigate BER responsibilities and authorities:

MONTANA CODE ANNOTATED

TITLE 2: GENERAL ADMINISTRATION

Chapter 3. Public Participation in Government Operations

2-3-103. Public Participation

Chapter 15. EXECUTIVE BRANCH OFFICERS AND AGENCIES

2-15-102. Definitions.

2-15-121. Allocation for administrative purposes only.

2-15-124. Quasi-judicial boards.

2-15-3502. Board of environmental review.

TITLE 75 – ENVIRONMENTAL PROTECTION

Chapter 1: POLICY

Part 1: General Provisions

75-1-103. Policy.

Chapter 2: AIR QUALITY

Part 1: General Responsibilities and Administration

75-2-111. Powers of board

Chapter 5: WATER QUALITY

Part 2: Administrative Agencies

75-5-202. Board hearings

75-5-203. State regulations no more stringent than federal regulations or guidelines.

Chapter 6: PUBLIC WATER SUPPLY SYSTEMS

75-6-111. Appeal from rule or standard -- injunction to require compliance.

75-6-108. Department to prescribe fees -- opportunity for appeal.

Chapter 10: WASTE AND LITTER CONTROL

75-10-223. Refusal by local health officer -- appeal to board.

Chapter 20: MAJOR FACILITY SITING

Part 2: Certification Proceedings

75-20-223. Board review of department decisions.

TITLE 76. LAND REOURCES AND USE

CHAPTER 4. STATE REGULATION OF SUBDIVISIONS

Part 1. Sanitation in Subdivisions

76-4-108. Enforcement.

TITLE 82 – MINERALS, OIL, AND GAS

CHAPTER 4: RECLAMATION

Part 2: Coal and Uranium Mine reclamation

82-4-205. Administration by department and board.

Part 3: Metal Mine Reclamation

82-4-353. *(Temporary)* **Administrative remedies -- notice -- appeals -- parties.**

Part 4: Opencut Mining Reclamation

82-4-422. Powers, duties, and functions.