DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
AUGUST 23, 2024

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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

JUNE 21, 2024

Call to Order

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

Attendance

Board Members Present
By Zoom: Chair Dave Simpson; Vice Chair Stacy Aguirre; Board Members Julia Altemus, Amanda Knuteson, Jon Reiten, and Joe Smith.

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: Mae Vader
DEQ Enforcement: Chad Anderson
DEQ Legal: Catherine Armstrong, Sarah Christopherson, Loryn Johnson, Sam King, Jeremiah Langston, Kurt Moser, Aaron Pettis, and Abby Sherwood
DEQ Air, Energy and Mining: Zach Ashauer, Whitney Bausch, Ruby Hopkins, Emily Lodman, Sonja Nowakowski, Anne Spezia, Madeline VerWey
DEQ Water: Joe Vanderwall

Other Parties Present
Laurie Crutcher, Crutcher Court Reporting
Elena Hagen, Montana DOJ Agency Legal Services Bureau
Samuel Yemington, Holland & Hart
Frank Tabish, LHC MT
Russell Batie, Todd Briggs, Bob Smith - Westmoreland
David Smith, MT Contractors Association
Ken Stoeber, TMC-Belgrade
Barbara Chillcott, Western Environmental Law Center
Cale Fisher, Riverside Contracting
Roger Noble
Representative Steve Gunderson

I. ADMINISTRATIVE MATERIALS

A. **Review and Approve Minutes**

A.1. **The Board will vote on adopting the April 19, 2024, Meeting Minutes.**

Board member Altemus moved to APPROVE the April 19, 2024, meeting minutes. Board member Smith SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

The Board did not have any questions.

III. ACTION ITEMS

a. **In the Matter of Sidney Sugars Incorporated Appeal of Montana Pollutant Discharge Elimination System Permit No. MT0000248, BER 2021-07 WQ.**

Chair Simpson asked if the parties were present. Jeremiah Langston of DEQ was present and briefed the Board.

Discussion ensued.

Vice Chair Aguirre moved to ADOPT the Hearing Examiner's Order on Unopposed Motion to Dismiss Appeal. Board member Reiten SECONDED.

The motion PASSED unanimously.

b. **In the Matter of: Renewal of MPDES Permit No. MT0000264, Issued September 30, 2022, to CHS, Inc., for Discharges from the Laurel Refinery, BER 2022-07 WQ.**

Chair Simpson asked if the parties were present. Kurt Moser of DEQ was in attendance, and he briefed the Board about the stipulation and motion. Chair Simpson mentioned there was an intervenor in the case and asked if legal counsel for the intervenor was present. Ms. Chillcott of the Western Environmental Law Center said that they are not opposed to the settlement as agreed to between CHS and DEQ.

Discussion ensued.

Vice Chair Aguirre moved to ADOPT the recommendation and issue a final agency decision on the agreement and stipulation. Board member Altemus SECONDED.

The motion PASSED unanimously.

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

Chair Simpson asked if the parties were present. Board Counsel Oomens and Aaron Pettis of DEQ were in attendance and briefed the Board.

Discussion ensued.

Board member Reiten moved to adopt the Hearing Examiner's Order of Dismissal Without Prejudice and issue a Final Agency Decision dismissing this appeal. Board member Smith SECONDED.

The motion PASSED unanimously.

IV. GENERAL PUBLIC COMMENT

None.

V. BOARD CHAIR UPDATE

a. Open cut informational items and status of open cut hearing.

Chair Simpson provided an update and indicated that DEQ declined to participate in an open cut public hearing. Chair Simpson polled the Board members regarding the need for a public hearing. Representative Gunderson offered comment regarding HB 599 per Chair Simpson's request.

Discussion ensued.

Vice Chair Aguirre motioned NOT to proceed with a public request for a hearing. Board member Altemus SECONDED.

Discussion ensued.

The motion passed 5-1, with Board member Knuteson dissenting.

Chair Simpson polled the Board members regarding the Dryland Permit rules. Discussion ensued and no motion was offered.

b. General Board business, procedural matters, and questions from Board Members.

None.

VII. ADJOURNMENT

Board member Smith MOVED to adjourn the Board Meeting; Board member Altemus SECONDED. The motion PASSED unanimously. The meeting was adjourned at 11:12 A.M.

Board of Environmental Review June 21, 2024, minutes approved:

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

_____
DATE

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Electronically Filed with the
Montana Board of Environmental Review
6/28/24 at 11:02 AM
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. BER 2024-01 through -03 OC **MOTION TO LIMIT EVIDENCE**

Petitioners file this Motion to Limit Evidence in this matter. This Motion is accompanied by a Brief.

Respectfully submitted this 28th day of June, 2024.

/ / / /

MORRISON SHERWOOD WILSON & DEOLA

/s/ David K. Wilson
David K. W. Wilson, Jr.
Robert Farris-Olsen

CERTIFICATE OF SERVICE

I hereby certify that on June 28th, 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 GATEWAY CONSERVATION ALLIACNE REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3462	Cause No. BER 2024-01 through -03 OC **BRIEF IN SUPPORT OF MOTION TO LIMIT EVIDENCE**

I. INTRODUCTION

Petitioners Gateway Conservation Alliance (GCA) bring this motion for the purpose of asking the Board of Environmental Review (BER) to establish the ground rules for this contested case proceeding, and limiting the scope of review to only evidence that is relevant to the DEQ decision to issue Opencut Mining Permit #3462 (Permit) for the Black site

south of Gallatin Gateway, Gallatin County, Montana. The mine is operated by Intervenor TMC.

In summary, because Petitioners are challenging a final agency action, made on March 1, 2024, case law and the Rules of Evidence limit the scope of the evidence that can be considered by the BER. More specifically, under Montana law, to be admissible in this matter all evidence must have been relied on or a part of the decision-making process which was consummated by DEQ on March 1, 2024. In contrast, any *post-hoc* evidence must fall under one of the few exceptions to the rule that evidence in actions challenging administrative agency decisions is limited to the record before the agency at the time the decision was made.

As the Board is aware, this same issue is before hearing examiners in three other cases: *In the Matter of: Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473; In the Matter of: Appeal and Request for Hearing By Valley Garden Land and Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3; and In the Matter of: Appeal and Request for Hearing by Friends of the Jocko Regarding Issuance of Opencut Mining Permit #3415.* In the former case, the Hearing Examiner recommended summary judgment in DEQ's favor, without addressing the motion in limine. Upon the BER's reversal of her decision, the motion was put back in front of the Hearing Examiner. The Hearing Examiner's decision in that case will be discussed below.

In the latter cases, argument was recently held on the motions in limine, but no decisions have been made yet. In all of those prior cases, DEQ has taken the position that the issuance of the permit is the final agency action, yet they are entitled to a trial *de novo*, and that the agency may put into evidence anything needed to defend its position, even if those documents and/or evidence were created months if not years after the decision being challenged. Because this has become such a significant issue in interpreting DEQ's decision making under the Opencut Act, and the scope of the BER's review, this motion is made in hopes that the BER can set precedent that would clarify for future appellants the rules of the road for administrative appeals of active gravel mining permits.

I. FACTUAL BACKGROUND

Petitioners incorporate by reference Statement of Facts ¶¶ 1-37 from their Preliminary Hearing Statement.

II. ARGUMENT

A. The BER's scope of review is limited to the administrative record as it existed on the date the Permit was issued.

This is an appeal of an Opencut Mining Permit. Such appeals are subject to the following requirements.

> (1) (a) Subject to subsections (1)(b) and (1)(c), a person whose interests are or may be adversely affected by a **final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying materia**l under this part is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

§ 82-4-427(1), MCA, emphasis added.

The Montana Administrative Procedures Act (MAPA) contested case provisions, in turn, set forth the rules for contested case hearings, including the taking of evidence. § 2-4- 612, MCA. The statute goes on to state that any hearing under this part is subject to the MAPA contested case provisions. § 82-4-427(4), MCA. Contested case hearings are subject to the Rules of Evidence. § 2-4-612 (2), MCA. Moreover, as the Prehearing Order makes clear, the proceeding is also subject to the Rules of Civil Procedure and the Uniform District Court Rules. In an administrative review case, like here, those rules – subject to exceptions - dictate that only information that is part of the administrative record is relevant and, therefore, admissible. *In re Bull Mountain Mine,* No. BER-2013-07 SM (Jan. 14, 2016)

Both the BER and the Montana Supreme Court have limited the scope of the admissible evidence at a BER hearing. In *In re Bull Mountain Mine,* No. BER-2013-07 SM (Jan. 14, 2016), the BER determined that Montana law requires DEQ's permitting decision to be

supportable before the Board *without reference* to information that was not available to and relied upon by DEQ at *the time of the permitting decision*. *See also, Montana Envtl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, ("*Westmoreland"*) 2023 MT 224, ¶ 46, 414 Mont. 80, 545 P.3d 623.

The BER was correct in *Bull Mountain*: post-decisional evidentiary support - not considered at the time a permit was issued - is not relevant to an administrative hearing set to adjudicate whether a final permitting decision was legally proper at the time it was made. Thus, GCA brings this motion to limit evidence in the case at hand by traditional rules concerning administrative record review cases, and the Rules of Evidence. The preliminary pretrial disclosures of both DEQ and TMC indicate that one or both may call witnesses to provide post-decisional evidence, and who may rely on evidence that was created after the permitting decision. DEQ's past actions in other gravel mine cases cited above demonstrate that they will seek to provide additional *post-hoc* information in this case. In each of these cases, not only is DEQ trying to present evidence it never considered before issuing the permit, but in at least one instance, the Applicant is trying to introduce expert hydrologic testimony and evidence by and through witnesses, who it also never hired or consulted with before or during the permitting process. This is the exact type of inequity and irrelevance that the long history of administrative law has deemed must be excluded.

The basic principle underlying limitations on administrative record review comes from the seminal environmental case of *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), *overruled on unrelated ground, Califano v. Sanders,* 430 U.S. 99 (1977). There, plaintiffs challenged a decision by the Secretary of Transportation to construct a six-lane interstate through a public park. Specifically, they challenged the Secretary's decision to approve the highway without formal findings. At the District Court, the government introduced post- decision affidavits to explain the decision, which indicated that the Secretary's decision was supportable. *Citizens to Preserve Overton Park,* 401 U.S. at 409. The

District Court and Appeals Court upheld the use of the litigation affidavits. The Supreme Court reversed. Its discussion is germane, and worth reviewing at length:

> Here, unlike the situation in *Thorpe*, there has been a change in circumstances - - additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. Moreover, there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.
>
> That administrative record is not, however, before us. **The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely "*post hoc*" rationalizations, which have traditionally been found to be an inadequate basis for review**. And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act
>
> Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. **That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.** But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action**. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made.**

Id., 401 U.S. at 419-420 (emphasis added) (citations and quotations omitted).

The primary lesson that emerge from *Overton Park* is that post-decision litigation affidavits constitute *post hoc* rationalizations that are not a proper basis for review. Obviously, the same would apply to post-decision testimony by the agency, or by other individuals not involved in the decision.

Two years after *Overton Park*, the Supreme Court reaffirmed this rule. In *Camp v. Pitts*, 411 U.S. 138, 143 (1973), the Court explained that an agency's action must "**stand or fall on the propriety of that finding,** judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [Agency's] decision must be vacated and the

matter remanded" for further consideration. *Id.* (Emphasis added) There are, of course, exceptions to this rule, but they are narrow. In *Lands Council v.U.S. Forest Service,* 395 F.3d 1019 (9th Cir. 2004), the Court spelled out the narrow exceptions to the rule:

> We have, however, crafted **narrow exceptions** to this general rule. In limited circumstances, district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine **"whether the agency has considered all relevant factors and has explained its decision,"** (2) if "the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter," or (4) "when plaintiffs make a showing of agency bad faith." These limited exceptions operate to identify and plug holes in the administrative record. Though widely accepted, **these exceptions are narrowly construed and applied.**

Id. at 1030 (citations omitted) (emphasis added).

Similarly, the Montana Supreme Court narrowly construes these exceptions. *Richards v. County of Missoula,* 2012 MT 236, ¶¶ 23-24, 366 Mont. 416, 288 P.3d 175. In *Richards* the Court explained, the exceptions are not meant to allow a decision-maker to "re-evaluate the decision" or to introduce deposition testimony explaining a decision-makers thought process. *Richards*, ¶¶ 23-24,*see also*, *Kiely Construction v. City of Red Lodge,* 2002 MT 241, ¶ 97, 312 Mont. 52, 57 P.3d 836 ("Nor were the after-the-fact opinions of individual council members as to the reasons for the denial relevant.") Rather, as explained in Justice Nelson's concurring opinion in *Richards*, the use of extra-record evidence is limited to three purposes: (1) for background information; (2) for ascertaining whether the agency considered all the relevant factors; or (3) "for ascertaining whether the agency fully explicated its course of conduct or grounds of decision." *Richards*, ¶ 39 *citing Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 66, 360 Mont. 207, 255 P.3d 80 (J. Nelson concurring). "Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record." *Id*.

Most recently, in *Westmoreland* the Montana Supreme Court clarified, for cases in front of the BER, that post-decisional testimony is only appropriate if it is drawn from information contained

"or otherwise compiled by DEQ during the permit approval process." *Id.*, ¶ 50. Meaning, that an expert cannot rely on evidence that did not exist in the permit application or compiled by DEQ while evaluating the permit and witnesses who were not involved in crafting the permit may not testify about subject-matter, reports, or data that DEQ did not itself consider and review. This narrow ruling, thus, prohibits any post- decisional testimony based on post-decisional information gathering. *Id.*

In *Westmoreland* , a coal mining company applied for an expansion of its permit at the Rosebud mine in Colstrip Montana. "Pursuant to MSUMRA, DEQ approval of the permit is conditioned on DEQ's determination that the proposed mining activity is 'designed to prevent material damage' to the hydrologic balance outside the permit area." *Id.* at ¶ 3. When DEQ deemed Westmoreland's application—which contained a lengthy Probable Hydrological Consequences (PHC) report and addendum—to be acceptable, it solicited public objections to the proposed permit. Conservation Groups filed objections on August 3, 2015. DEQ subsequently responded to these comments and issued its written findings and Cumulative Hydrologic Impact Assessment (CHIA) in December 2015. *Id.* at ¶ 6.

Conservation Groups challenged the decision to the Board. MSUMRA provides that a contested case on a DEQ permit decision will be held pursuant to the procedures provided for by MAPA. Section 82-4-206(2), MCA. After lengthy discovery, a Board hearing examiner held a four-day hearing in which Conservation Groups, DEQ, and Westmoreland presented evidence and argument. *Id.* at ¶ 7.

At the hearing. Westmoreland presented evidence from multiple experts (Dr. Schafer and Dr. Nicklin). Both experts had worked on the permit application (and PHC) but offered testimony on materials and information that was not submitted in the permitting process. *Id.* at ¶ 41. Conservation Groups filed a motion *in limine* and lodged a standing objection at the hearing seeking to bar expert

testimony by Westmoreland or DEQ's witnesses that would bolster such conclusions with evidence or reasoning beyond that contained in the CHIA. "The hearing examiner's Proposed Findings of Fact and Conclusions of Law concluded as a matter of law that '[t]he only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision.' However, its findings of fact—incorporated into its final conclusions of law on material damage—cited to Schafer's testimony regarding his statistical analysis…" *Id.* at ¶ 44.

Pursuant to § 2-4-701, MCA Conservation Groups appealed. On judicial review, "the District Court determined that allowing DEQ and Westmoreland to present post-decisional evidence and analyses simultaneously limiting Conservation Groups to evidence and argument contained in their pre-decisional comments 'created an uneven playing field' and was plainly prejudicial." *Id.* at 48. Ultimately the district Court reversed the BER and Westmoreland and DEQ appeal to the Montana Supreme Court.

On the ultimate appeal, the Montana Supreme Court held that it must defer to the BER's interpretation of its own regulations as defined and interpreted in *In re Bull Mountain. Id.* at ¶ 46. Ultimately the Court held that "Bull Mountain's interpretation of Admin. R. M.17.24.405(6) (2004) and 17.24.314(5) (2012) as requiring DEQ's permitting decision to be supportable before the Board ***without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision*** is reasonable." *Id.*, (emphasis added).

The Court ultimately reversed the District Court but only "to the extent that the Court determined it was reversible error to admit Schaefer's report and testimony as proper rebuttal, given that his opinion was drawn from information contained in the CHIA or otherwise compiled by DEQ during the permitting process." *Id.*, ¶ 50.

From *Westmoreland*, the following rules can be ascertained. *First,* DEQ's decision must be based on information that was "set forth in the application or information that was otherwise

available to DEQ at the time it issued the Permit." *Id.*, ¶ 52. This matches the statutory and regulatory requirements. *See* § 82-4-432 (10)(c), MCA. ("…the department shall determine **if the information** meets the requirements of subsection (14)(a) and notify the operator in writing. **If the requirements are met, the operator may commence the operation** on receipt of the notification." (Emphasis added.)); *See also* A.R.M. 17.24.212 (1) ("Upon receipt of an application to conduct opencut operations and within the time limits provided in 82-4-432, MCA, the department **shall evaluate the application to determine if the requirements of the Act and this subchapter are satisfied.**"(Emphasis added.))

Second, any exhibits or testimony that does not reference or rely on information that was "not available to or relied on by DEQ" in its April 27, 2023, decision should not be allowed in. *Westmoreland*, ¶ 50.

Third, any expert testimony must be drawn from information in the application or otherwise compiled by DEQ before its April 27, 2023, decision. *Westmoreland*, ¶ 52. As such, and as discussed below, it cannot include newly created or discovered evidence.

Far from giving DEQ and LHC *carte blanche* to create new information after the fact to bolster DEQ's poorly documented initial decision, *Westmoreland* provides very clear side rails and limitations on what the hearing examiner may allow in here.

The case at hand is largely analogous. The requirements for DEQ to issue an Opencut Permit are contained within the § 82-4-432, MCA. ("…the department shall determine if the information meets the requirements of subsection (14)(a) and notify the operator in writing. If the requirements are met, the operator may commence the operation on receipt of the notification). Thus, just as it does with in the MSUMRA, DEQ reviews requisite information submitted by an applicant to determine if statutory and regulatory criteria for issuance of a mining permit are met. Here, just as in *Westmoreland*, aggrieved citizens have a right to appeal that decision to the BER. § 82-

4-427, MCA. In both statutory schemes (MSUMRA and Opencut), permitting decisions appealed to the Board are subject to "[t]he contested case provisions of [MAPA]." § 82-4-206(2), MCA; 82-4-427 (4), MCA .

Thus, the Montana Supreme Court's holding that "DEQ's permit must base a decision on whether material damage will occur on the basis of information 'set forth in the application or information otherwise available that is compiled by the department' " (*Westmoreland,* ¶ 50) is directly applicable and analogous to the case at hand. Said another way, this body is bound by these principles and to avoid making a reversible error, the BER should limit the introduction of post-hoc rationalizations by both TMC, Inc. and DEQ at the forthcoming hearing.

While the Montana Supreme Court did leave the door open for potential rebuttal testimony by an extra-record expert, the propriety of that rebuttal must be directly related to its use at trial. ("The generally accepted test for determining whether certain rebuttal evidence is proper is whether it tends to counteract new matters offered by the adverse party." *McGee v. Burlington N., Inc.*, 174 Mont. 466, 480, 571 P.2d 784, 792 (1977).) As a result, the BER can and should issue a limiting order in line with *Bull Mountain* and *Westmoreland*, while also preserving the ability for TMC and DEQ to put on proper rebuttal evidence if and when that opportunity becomes appropriate under Montana law – *i.e*. if and when GCA offers "new matters" into evidence that were not available to DEQ at the time it made its final agency action approving TMC's permit.

Recently, in *In the Matter of: Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473*, the BER's hearing examiner issued an Order on Motions in Limine, attached hereto as Exhibit A. In it, the Hearing Examiner largely hewed to the ruling in *Westmoreland* and the standards discussed above. However, she did go slightly too far in explaining the propriety of post- decisional evidence in stating "Mr. Krogstad's lack

of involvement in the actual permitting process does not determine his expertise in reviewing, analyzing, or explaining the information on which other professionals at DEQ relied. Analysis or explanation of the information that was before DEQ is relevant and appropriate." Order in limine at 4.

The BER here should not enlarge, as the Hearing Examiner in Clearwater did, the scope of reviewable evidence past "rebuttal", as clearly held by the Montana Supreme Court. Said another way, if Objectors (in any case) do not put on new evidence, there is no proper rebuttal and thus, "review, analysis, or explanation" of evidence that was before DEQ by never-before-involved 3rd parties is not appropriate. In short, the Hearing Examiner in *Clearwater* erred as a matter of law in holding that the threshold at issue is whether the proffered evidence simply "ties back to the facts before DEQ when it made its decision." The Petitioners in the Clearwater case will be seeking clarification of that issue from the BER in that case.

Additionally, however, the Hearing Examiner in *Clearwater* made a ruling that completely undercuts DEQ's argument that the administrative record review principles discussed above do not control in these types of cases. The Hearing Examiner stated:

> BER is building the final agency action record during the contested case proceeding. *See* Mont. Code Ann. § 2-4-614 (1). If DEQ's permit decision does not get appealed to BER, it becomes final after the time to appeal passes. **If DEQ's permit decision is appealed to BER, then BER's decision becomes the final agency action**. This procedural wrinkle is evidenced by the fact that a permit decision which is not appealed to the BER cannot be appealed to the District Court, **therefore DEQ's permit decision is <u>not</u> final for purposes of judicial review.**
> Ex. A, p. 3.

Ultimately, DEQ cannot have it both ways. If the permit decision is the final agency action and thus the permit becomes active upon issuance, then the evidentiary rules regarding administrative record review, discussed above, apply. However, if the issuance of the permit is not the final agency action and thus the permit is not active upon issuance, then of course

DEQ (and all parties) may continue to develop the record. The latter path is mirrored in the MAPA contested case processes held by DNRC under the Water Use Act. See generally § 85-2-310 MCA et seq. But this only makes sense if the underlying granted permit does not allow any activity until the final BER decision. That is, of course, not the position that DEQ and the gravel mining companies are taking.

Instead, DEQ and applicants take the position that the issued permit *is* the final agency action, and they may immediately mine pursuant to the permit, as has been the case in at least two cases cited above; AND that they may nevertheless stuff the record with post-hoc rationalizations and support for the already issued and acted on permit. This has required the extraordinary effort of Objectors seeking preliminary injunctive relief to stop the unlawful mining. Thankfully, DEQ's entire theory has just been contradicted by the Hearing Examiner in the *Clearwater* case, in essence negating the need for any further preliminary injunctive relief in future cases, because – according to her – no mining company is legally able to start mining during a BER appeal. Accordingly, Petitioners here will also be seeking a stay of this Permit pending a final decision by the BER.

In any event, under these well-established standards administrative record review principles, the testimony and new evidence should be limited, as set forth below.

B. **Post-decisional Testimony and Evidence is Not Relevant and Would be Unfairly Prejudicial.**

As demonstrated above, the nexus between evidence admitted in administrative hearing process and the record an agency had before it at the time it made its final permitting decision is foundationally, one of relevance. *Overton* and its progeny have found that the information an agency had at the time of its decision is a "fact of relevance," which is not made more, or less, probative with "after the fact" rationalizations. This bedrock principle is the rule of law in administrative cases, and

also applies to the rules of evidence in this case. Montana Rule of Evidence 402 states that "all relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence." M. R. Evid. 401.

In *Kiely Construction*, *supra*, the Montana Supreme Court expressly found that "after- the-fact opinions" of individuals involved in the subdivision certification process *were not relevant*. *Kieley Construction,* ¶ 97. Clearly, testimony from individuals who were *not* involved in the initial permitting process in this case, such as DEQ's and LHC's experts, would constitute irrelevant "post-decision" statements of the kind disallowed by *Overton* and *Kiely Construction* because they are not relevant to the issue being adjudicated.

All the evidence detailed below, falls *outside* that umbrella of relevance and thus pursuant to Rule 402 Mont. R. Evid. and therefore, must be excluded.

Considering the foregoing, the proffered evidence should also be excluded under Montana Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice and misleading the fact finder. The issue here is whether the permit decision made on March 1, 2024[1],[1] was lawful based on the information DEQ had at that time, not what DEQ or other witnesses think of that decision after the fact or what additional information they can now conjure to bolster the propriety of DEQ past action.

The risk of unfair prejudice here, with DEQ being able to buttress its decision with after-

[1] [1] Petitioners anticipate that DEQ will continue to take the position that it may buttress the record post-permit decision notwithstanding the Hearing Examiner's ruling in *Clearwater*, discussed above.

the-fact rationales, substantially outweighs the evidence's probative value because, as described above, considering post-hoc evidence allows an agency to flout its legal obligations to the public in the moment of its action, only supporting them after an appeal has been filed. *See* M. R. Evid. 403.

Considering extra-record evidence not only "rewards gamesmanship in the administrative process", but it also diminishes constitutionally protected opportunities for public participation in government and undercuts public faith in administrative processes. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 68, 356 Mont. 41, 65, 230 P.3d 808, 824 [2](Justice Jim Rice, concurring), (*See also Flathead Lakers Inc. v. Mont. Dep't of Nat. Res. & Conservation*, 2023 MT 85 ¶ 56, 412 Mont. 225 ("(E)rrors of law and process undermine confidence in the agency's determination"). Petitioners and citizens such as Gateway Conservation Alliance are prejudiced if agencies can wait until after a decision is made to determine the adequacy and appropriateness of an issued permit and allowing them to do so undermines the integrity of the permitting process as a whole. *See id.* As such, the testimony described below should be excluded or circumscribed because it is irrelevant and/or unfairly prejudicial.

C. **Limitations on Testimony in This Proceeding**

With the standards discussed above in mind, Gateway Conservation Alliance requests that the Court establish the following limitations on testimony or evidence in this matter going forward.

1. DEQ Experts:

DEQ's Preliminary Prehearing Statement does not disclose any experts. However, under the BER's Scheduling Order, the deadline for expert disclosure is December 6, 2024. If DEQ does name any expert, the expert's testimony should be limited or prohibited based on the ruling in the *Westmoreland* case: it must be "supportable before the Board without reference to information that

was not available to and relied upon by DEQ at the time of the permitting decision is reasonable." *Westmoreland,* ¶ 46.

2. TMC's Expert:

TMC's Preliminary Prehearing Statement does not disclose any experts. However, under the BER's Scheduling Order, the deadline for expert disclosure is December 6, 2024. If TMC does name any expert, the expert testimony should be limited or prohibited based on the ruling in the *Westmoreland* case: it must be "supportable before the Board without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision is reasonable." Clearly, since the record does not disclose any prior involvement in the permitting process by any TMC "expert", any such expert should be excluded, unless they are identified solely for rebuttal purposes as a rebuttal witness.

3. TMC General Manager Ken Stoeber.

Presumably Mr. Stoeber would testify regarding the application and application process, as well as his knowledge of the site and mining operation planned. Because Gateway is challenging the issuance of the permit by DEQ, and the adequacy of the permit application, that application and other documents related to it in the DEQ files is the best evidence of the application. Mr. Stoeber, who had no role in the permitting *decision* at issues, should not be allowed to testify concerning the application or the DEQ decision.

4. DEQ Employees Anne Spezia and Whitney Bausch

Ms. Spezia was the DEQ employee who was the most involved in reviewing the application. She also prepared the EA. Ms. Bausch was the supervisor who signed the Permit; however, she had limited involvement in the review of the application leading up to her review and decision to approve.

While it is possible that Ms. Spezia and Ms. Bausch could testify, or provide affidavits, on specific

issues as agency personnel involved in the decision, given the limited and narrow circumstances where such post-decision and extra record testimony may be allowed, as set forth in *Heffernan, Kieley,* and the Federal authorities cited above, GCA believes it is incumbent on DEQ to demonstrate that one of those limited exceptions would allow such testimony. Because clearly, at this stage, any post-decision testimony likely would be the type of post-hoc testimony kept out in countless cases, including *MM&I, LLC, Kieley*, and now *Westmoreland* unless it fit into one of the limited exceptions.

5. *David Donohue*

As noted above, GCA's appeal challenges a discrete number of issues in the permit decision. Gateway hired David Donohue, a professional hydrologist, to review the application and EA. He also submitted numerous comments to DEQ prior to the issuance of the Permit. Mr. Donohue's testimony will focus on information that was not provided by TMC in the application, but which should have been provided. *See Lands Council,* 395 F.3d at 1030.

This is precisely the type of limited additional information allowed under *Skyline Sportsmen* and *Aspen Trails.* In *Skyline Sportsmen,* the Court said:

> The standard of review of an informal administrative decision is whether the decision was arbitrary, capricious, or unlawful. It was appropriate for the District Court, in applying that standard, to accept new evidence and not to limit its review to the administrative record. In a proceeding to determine whether an agency decision was arbitrary, capricious, or unlawful, unless the reviewing court looks beyond the record **to determine what matters the agency should have considered**, it is impossible for the court to determine **whether the agency took into consideration all relevant factors in reaching its decision**.

Skyline Sportsmen's Assn., 266 Mont. at 113, 951 P.2d at 32 (emphasis added) (citations omitted); *see also Aspen Trails,* ¶ 53*; Heffernan,* ¶ 66; *Westmoreland,* ¶¶ 36-37.

As such, Mr. Donohue's limited testimony is information that meets the exception allowing testimony and exhibits to show that the agency did not "consider all relevant factors" in reaching the decision.

III. CONCLUSION

Ultimately, DEQ is attempting to use this hearing process to re-evaluate and justify its decision to approve the Permit using information not contained in the record, and created after the permit was issued and mining had begun. This is not permissible under either MAPA, or the case law interpreting MAPA. That new information and analysis must be excluded.

Respectfully submitted this 28th day of June, 2024.

MORRISON SHERWOOD WILSON & DEOLA

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CERTIFICATE OF SERVICE

I hereby certify that on June 28th, 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**	Cause No. BER 2023-03 OC **ORDER ON MOTION IN LIMINE**

This matter comes before the Hearing Examiner at the request of Protect the Clearwater (Clearwater), which seeks to limit testimony provided by the Department of Environmental Quality's (DEQ) and LHC, Inc.'s (LHC) identified witnesses. On December 1, 2023, Clearwater filed its Motion in Limine. On December 22, 2023, DEQ and LHC each filed a response. On January 12, 2024, Clearwater filed a reply. On March 8, 2024 the Hearing Examiner declared the Motion in Limine to be moot following a decision on summary judgment. On May 1, 2024, the Board of Environmental Review (BER) did not adopt the Hearing Examiner's summary judgment decision and remanded the matter for further fact finding. Following the remand, the Motion in Limine is no longer moot.

Clearwater argues testimony by DEQ's and LHC's witnesses should be limited because they were not involved in the review of the permit application and, therefore, the witnesses' testimony would be "post-decisional evidentiary support[.]" Clearwater Motion at p. 8. DEQ argues its witnesses can testify as long as their testimony "can be tied to DEQ's permitting decision[.]" DEQ Response at p. 9. LHC further argues that limiting the testimony "would put an unfair evidentiary thumb on the scale for [Clearwater]."

LHC Response at p. 2. The question in front of this Hearing Examiner is whether the testimony offered by witnesses identified by DEQ and LHC should be limited.

LEGAL STANDARDS

The purpose of a motion in limine is to "prevent the introduction of evidence which is irrelevant, immaterial or unfairly prejudicial." *Feller v. Fox*, 237 Mont. 150, 153, 772 P.2d 842, 844 (1989) *overruled on other grounds*. "The authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Id.* (internal citations omitted).

DISCUSSION

Clearwater requested a hearing under Mont. Code Ann. § 82-4-427(1), which allows any person whose interest is or may be adversely affected by approval or disapproval of a permit application to request a hearing. The statute further provides that any hearing provided is subject to the contested case provisions of the Montana Administrative Procedure Act (MAPA).

Mont. Code Ann. § 82-4-427(4). MAPA contested cases are governed by the Rules of Evidence. Mont. Code Ann. § 2-4-612(2). BER's role in a MAPA contested case proceeding is to receive evidence, enter findings of fact based on the preponderance of evidence presented, and issue conclusions of law based on those findings of fact. *Mont. Envtl. Info. Ctr. V. Mont. Dep't of Envtl. Quality*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964.

BER is building the final agency action record during the contested case proceeding. *See* Mont. Code Ann. § 2-4-614(1). If DEQ's permit decision does not get appealed to BER, it becomes final after the time to appeal passes. If DEQ's permit decision is appealed to

BER, then BER's decision becomes the final agency decision. This procedural wrinkle is evidenced by the fact that a permit decision which is not appealed to BER cannot be appealed to District Court, therefore, DEQ's permit decision is not final for purposes of judicial review.

Mont. Code Ann. § 2-4-623. What evidence BER should consider has been recently clarified in the Montana Supreme Court decision *MEIC v. Westmoreland, et al.*, 2023 MT 224, 2023 WL 8103553.

MAPA affords all parties the opportunity to present evidence and respond to arguments on all issues involved. *Id*. at ¶ 32 (citing Mont. Code Ann. § 2-4-612(1)). BER has previously interpreted this limitation "as requiring DEQ's permitting decisions to be supportable before [BER] without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision[.]" *Id*. at 46 (citing *In re Bull Mountain* BER Case No. 2016-07 SM).

> In other words, [Clearwater] may explain and support their objections to DEQ's written findings, using expert testimony as necessary, in an effort to meet its burden to show by a preponderance that DEQ should not have issued the permit…. DEQ and [LHC] may in turn explain and support the [permit] and written findings, with expert testimony as needed. Neither party, however, may make arguments or present evidence that is entirely new, or which it cannot tie back to the [the documents] before DEQ at the time of the permitting decision.

Western Energy, BER Case No. 2016-03 SM *Order on Motions in Limine* at p. 5.

Clearwater argues that the only relevant evidence is "the information DEQ had at the time, not what DEQ or other witnesses think of that decision after the fact or what additional information they can now conjury to bolster the propriety of DEQ past action." Clearwater Motion at p. 17. Clearwater's arguments are unpersuasive for two reasons.

First, Clearwater relies on authority from decisions made by district courts during judicial review which is not persuasive as this case is not in the stage of judicial review. Second, the court in *Westmoreland* made it clear that rebuttal testimony from respondents is proper where the "opinion is drawn from information contained in the [permitting process] or otherwise compiled by DEQ during the permit approval process." *Westmoreland*, ¶ 50.

Next, Clearwater argues "testimony from individuals who were *not* involved in the initial permitting process in this case, such as DEQ's and LHC's experts, would constitute irrelevant 'post-decision' statements of the kind disallowed… because they are not relevant to the issue being adjudicated." Clearwater Motion at p. 16 (original emphasis). This argument is also unpersuasive. Clearwater, as the petitioner, has the burden to show DEQ erred in its decision. *Westmoreland*, ¶¶ 20–22. As stated above, any testimony from DEQ and LHC to rebut Clearwater is proper if it is drawn from information considered or compiled by DEQ during the permit process. *Id*. at ¶ 50. Appropriate testimony may include analysis by experts who were not part of the permitting process. An expert witness is not someone who was necessarily involved in the facts underlying a case, and so (for example) Mr. Krogstad's lack of involvement in the actual permitting process does not determine his expertise in reviewing, analyzing, or explaining the information on which other professionals at DEQ relied. Analysis or explanation of the information that was before DEQ is relevant and appropriate. However, evidence that does not tie back to the facts before DEQ when it made its decision is not relevant, and the Hearing Examiner exercises her discretion to exclude it.

ORDER

Based on the forgoing IT IS HEREBY ORDERED:

Clearwater's Motion in Limine is GRANTED to the extent that witnesses testimony shall be limited to opinions that are drawn from or can tie back to the information contained in LCH's permit application or otherwise compiled by DEQ in the permitting process and DENIED on all other grounds.

DATED this 14th day of June, 2024

/s/ Terisa Oomens
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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 NOS. BER 2024-03 OC **DEQ'S RESPONSE IN OPPOSITION TO GCA'S MOTION IN LIMINE**

Respondent Montana Department of Environmental Quality ("DEQ"), through undersigned counsel, submits this response in opposition to Petitioner Gateway Conservation Alliance's ("GCA") motion to limit evidence.

INTRODUCTION

GCA filed a notice of appeal of this case with the Board of Environmental Review ("Board") on April 1, 2024, challenging DEQ's issuance of an operating permit to intervenor TMC Inc. ("TMC") in Gallatin County under the Montana Opencut Act, §§ 82-4-401, MCA. Since then, the only operative events that have occurred were TMC's unopposed intervention in the case and the parties' filing of preliminary prehearing statements. No party has disclosed any

witnesses or exhibits, exchanged discovery, identified expert witnesses, or conducted any depositions.

Yet on June 28, 2024, GCA filed a motion to limit evidence—a procedural mechanism typically reserved for seeking to preclude the introduction of evidence shortly before or during a jury trial to avoid the risk of confusing or emotionally affecting a jury that does not make the relevant facts at issue more or less probable—based on its assertion this case is record review. GCA's motion must be denied.

First, this case is not record review, but a Montana Administrative Procedures Act ("MAPA") contested case proceeding in which all parties are entitled to present evidence and argument on all issues involved. Section 2-4-612(1), MCA. And GCA cites no cases that support its position.

Second, even if GCA had legal support for its position that the evidentiary record in this case is limited, it still must identify the specific evidence it seeks to limit and identify unfair prejudice that would occur through its admission. Given this case's infancy, GCA offers only speculation as to the *scope* of potential evidence that it seeks to preclude from consideration; it offers no *specific* evidence that must be limited. And further, any evidence that could be admitted that makes GCA's claims more or less probable—regardless of when the evidence was collected—doesn't, as matter of law, constitute unfair prejudice.

Indeed, GCA's motion doesn't appear to actually be directed at a ruling in this case at all, but is a collateral attack on the Hearing Examiner's orders on GCA's counsel's identical motions in other pending Opencut cases but which have yet to make their way before the full Board. Upon the Hearing Examiner's issuance of the findings of fact and conclusions of law in those cases, counsel will have adequate opportunity to lodge objections to those findings before the

full Board. Efforts to circumvent that process through a premature motion in this case should be rejected.

LEGAL STANDARD

"A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area." *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009). Motions in limine may be "made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n. 2, 105 S. Ct. 460 (1984).

"To preserve an objection for appeal through use of a motion in limine, the objecting party must make the basis for his objection clear to the district court" by being "sufficiently specific as to the basis for the objection." *State v. Crider*, 2014 MT 139, ¶ 20, 375 Mont. 187, 328 P.3d 612. To do so, "[t]he motion in limine must *specify the evidence* to which the defendant is objecting." *Id.* (emphasis added) (citing *State v. Vukasin*, 2003 MT 230, ¶ 35-37, 317 Mont. 204, 75 P.3d 1284 (motion in limine was not sufficient to preserve an issue for appeal where it only sought to exclude any "reference, comment, allusion or statement made to any crime, wrong or act pursuant to Rule 404(b), M. R. Evid.")).

While a fact finder has "broad discretion when ruling on motions in limine" such motions "should not be used to resolve factual disputes or weigh evidence." *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n. 4 (9th Cir. 2013). "To exclude evidence on a motion in limine, the evidence must be inadmissible on all potential grounds." *Id.*; *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Id.* "This is because although rulings on

motions in limine may save time, costs, effort and preparation, a court is almost always better situated during the actual trial to assess the value and utility of evidence." *Id.*

In administrative proceedings "on questions of admissibility, a hearings examiner has a greater risk of reversal by excluding evidence rather than including evidence in the hearing record." William L. Corbett, *Montana Administrative Law Practice: 41 Years After the Enactment of the Montana Administrative Procedure Act*, 73 Mont. L. Rev. at 363 (2013).

ARGUMENT

I. This case is a MAPA contested case proceeding in which all parties may respond and present evidence and argument on all issues involved, just like a civil bench trial or a federal proceeding before an Administrative Law Judge.

Before addressing GCA's legally erroneous arguments, it is important to orient the Board to what, precisely, a MAPA contested case is. This contested case proceeding, governed under Title 2, chapter 4, part 6, MCA, imparts obligation on the Board to make a record, including,

> (a) all pleadings, motions, and intermediate rulings;
> (b) all evidence received or considered, including a stenographic record of oral proceedings when demanded by a party;
> (c) a statement of matters officially noticed;
> (d) questions and offers of proof, objections, and rulings on those objections;
> (e) proposed findings and exceptions;
> (f) any decision, opinion, or report by the hearings examiner or agency member presiding at the hearing, which must be in writing;
> (g) all staff memoranda or data submitted to the hearings examiner or members of the agency as evidence in connection with their consideration of the case.

Section 2-4-614(1), MCA.

As part of the Board's obligation, MAPA requires that "[o]pportunity shall be afforded to all parties to respond and present evidence and argument on *all issues involved*." Section 2-4-612(1), MCA (emphasis added).

Because of the gathering of evidence and the creation of a record through a typical

evidentiary proceeding, "a formal MAPA contested case hearing resembles a judicial bench trial of a civil matter." Corbett, 73 Mont. L. Rev. at 361. This makes sense because just like a plaintiff in a civil bench trial, a petitioner in a MAPA contested case proceeding must prove the essential elements of his or her claims by a "preponderance of the evidence." *McCann v. McCann*, 2018 MT 207, ¶ 12, 392 Mont. 385, 425 P.3d 682 (in civil bench trial, district court "must evaluate and weigh all the evidence, make determinations regarding credibility, and resolve the case on the basis of the preponderance of the evidence."); *Mont. Envtl. Info. Ctr. v. Mont Dep't of Envtl. Quality*, 2005 MT 96, ¶¶ 14, 22, 326 Mont. 502, 112 P.3d 964 (recognizing just like findings of fact in a civil matter, the party asserting claim for relief in a MAPA contested case bears the burden of producing evidence in support of that claim and to prove the essential elements by a preponderance of the evidence).

And perhaps even more analogous than to a civil bench trial, this contested case proceeding essentially mirrors federal administrative hearings before an administrative law judge ("ALJ") under the federal Administrative Procedure Act ("APA"). *See* 5 U.S.C. §§ 551-559; *id.* § 556(c), (d) (identifying admission of evidence and recognizing that "[a]ny oral or documentary evidence may be received."). In such federal administrative proceedings, like here, the APA "recognizes the reality that rigorous exclusionary rules for the admission of evidence makes little sense in hearings before an administrative agency where the ALJ acts as both judge and factfinder." *United States Steel Mining Co. v. Director, Office of Workers' Comp. Programs*, 187 F.3d 384, 388 (4th Cir. 1999). That's because "[w]hen the judge is also factfinder, he is equally

exposed to evidence whether he admits it or excludes it." *Id.*[1]

Consequently, "[r]ules for admission of evidence before ALJs are thus aimed not so much to protect the ALJ from prejudice but rather to facilitate the efficiency in the process." *Id.* Because 5 U.S.C. § 556(d) of the APA permits "[a]ny oral or documentary evidence may be received," federal courts have concluded this provision empowers ALJs to admit and consider "all relevant evidence, erring on the side of inclusion." *Id.* (quoting *Underwood v. Elkay Mining*, 105 F.3d 946, 951 (4th Cir. 1997)). This relaxed standard makes sense because "[i]n a nonjury trial, whether in the district court or before an administrative law judge, little harm can result from the reception of evidence . . . because the judge, trial or administrative, is presumably competent to screen out and disregard what she thinks she should not have heard, or to discount it for practical and sensible reasons." *Multi-Med. Convalescent v. N.L.R.B.*, 550 F.2d 974, 977 (4th Cir. 1977). Thus, "on questions of admissibility, a hearings examiner has a greater risk of reversal by excluding evidence rather than including evidence in the record." Corbett, *Mont. Law. Rev.* at 363.

Upon the Board's issuance of findings of fact and conclusions of law in this proceeding, § 2-4-623, MCA, just like upon an ALJ's issuance of a final determination in a federal APA administrative hearing, 5 U.S.C. § 557, a party aggrieved by the final decision issued by the Board or ALJ may appeal the decision to a district court, along with transmittal of the certified administrative record created in the underlying agency proceeding, for judicial review. *Compare* § 2-4-702, MCA, *with* 5 U.S.C. § 702.

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[1] The Attorney General's Model Rules provide "Unless otherwise provided by statute, *all evidence* introduced in a contested case hearing shall be received and evaluated in conformance with common law and statutory rules of evidence." ARM 1.3.221 (emphasis added). It is well settled that exclusionary rules of evidence are generally more relaxed in an administrative proceeding than in a civil jury trial. *See* Kenneth Culp Davis, *Admin. Law Text*, § 14.03 (3rd ed. West 1973).

During judicial review, because the administrative record has been established,[2] the reviewing court conducts limited review of the final agency action, confined to the underlying record, to determine whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Section 2-4-704, MCA; 5 U.S.C. § 706. And because the record has been established, the reviewing court generally does not permit extra-record evidence except in exceptional circumstances. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S. Ct. 1598 (1985); *Skyline Sportsmen's Assn. v. Bd. of Land Commrs*. 286 Mont. 108, 113, 951 P.2d 29, 32 (1997); § 2-4-703, MCA.

II. GCA ignores the MAPA contested case directives and bases its motion in limine on an inapplicable record review standard reserved for judicial review.

Understanding the procedural posture of this case, as described above, completely defeats GCA's motion.

Throughout its brief, GCA discusses the "limitations on administrative record review," citing to a host of state and federal cases to claim that the only evidence which either DEQ or TMC may present in any instance, including rebuttal, is that which was before the agency at the time the permit was issued. GCA Br. at 4-6. But all of these cases, save for one, are completely inapplicable, concerning the *judicial review* stage of an agency's decision.[3]

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[2] There are, of course, instances where an agency's decision is *not* subject to a MAPA contested case before the Board or a Hearing Examiner or adjudication by an ALJ. A good example in Montana is an appeal of an agency's environmental review conducted under the Montana Environmental Policy Act, which proceeds directly to judicial review of an established record. *See* § 75-1-201, MCA. That is not the case here. Section 82-4-427, MCA.

[3] GCA also argues, based on nothing more than dicta in the Hearing Examiner's order in a separate case, that issuance of a permit is a final agency action such that record review applies. GCA Br. at 11-12. DEQ's issuance of the permit is the final decision of DEQ for purposes of the Opencut Act. Section 82-4-427, MCA. And upon issuance of the permit, an operator may begin mining. But that doesn't mean that the judicial review standards and limits on evidence apply. If it did, the MAPA contested case procedure would state as much. They don't. And the Board may not insert into these statutes such language. Section 1-2-101, MCA.

For example, GCA cites to federal cases *Citizens to Preserve Overton Park v. Volpe*,[4] *Camp v. Pitts*,[5] and *Lands Council v. U.S. Forest Service*,[6] to support its proposition that this case is merely record review and the admission of new evidence is subject to narrow exceptions. GCA Br. at 4-6. *Overton Park*, however, concerned petitioners challenge to the Secretary of Transportation's authorization of use of federal funds to finance the construction of highways. The United States Supreme Court remanded the challenge to the District Court to base its review on the full administrative record before the Secretary at the time he made its decision. 401 U.S. at 420. Importantly, the Supreme Court noted that the case was *not* an appeal to a district court from an "agency action . . . based on a public adjudicatory hearing" pursuant to 5 U.S.C. §§ 556, 557. *Id.* at 414. Accordingly, the limited judicial review standards for record review of an administrative record were to be applied to the lower court proceeding. *Id.* at 420. In short, *Overton Park* is inapposite to the present proceeding.

So too is *Camp v. Pitts*, which concerned applicants' appeal of a Comptroller's denial of the application under the National Bank Act, 12 U.S.C. § 27. The applicants filed an action in federal district court seeking review of the Comptroller's decision. The district court, after reviewing the entire administrative record, granted summary judgment to the Comptroller, holding *de novo* review was not warranted. *Pitts*, 411 U.S. at 139. On appeal, the Court of Appeals reversed and ordered a remanded to the district court for "a trial de novo." *Id.* at 140. The United States Supreme Court reversed the Court of Appeals' instructions for a "trial de novo" because "neither the National Bank Act nor the APA requires the Comptroller to hold a

[4] 401 U.S. 402, 91 S. Ct. 814 (1971).

[5] 411 U.S. 138, 93 S. Ct. 1241 (1973).

[6] 395 F.3d 1019 (9th Cir. 2004).

hearing or to make formal findings on the hearing record when passing on applications for new banking authorities." *Id.* at 140-41. Consequently, the Supreme Court found that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 142. In other words, the procedural posture of *Pitts* was, like *Overton Park*, an appeal that goes straight to district court for review without a contested case trial de novo proceeding, such that the administrative record was *already* established.

Lands Council is no different procedurally than *Overton Park* and *Pitts*, which involved judicial review of the Forest Service's approval of a timber harvest under the National Environmental Policy Act and the National Forest Management Act. Because the case on judicial review did not involve factfinding and an underlying contested case or adjudication, but merely review of an existing administrative record that proceeds directly to judicial review, the 9th Circuit noted the narrow exceptions for extra-record evidence that applied. *Id*., 395 F.3d at 1030.

In sum, these cases specifically distinguish the trial de novo proceeding that occurs before an ALJ (or the Board), which is subject to the preponderance of the evidence standard, from the narrow judicial review standards that apply to administrative records that have already been set. A case like this one, as already established in *Mont. Envtl. Ctr. v. DEQ*, 2005 MT 96, is the former. *Id.*, ¶ 23 (explaining that contested case proceedings under part 6 of MAPA in which an agency is acting as a factfinder do not apply the "clearly erroneous, arbitrary and capricious, or abuse of discretion standard" because those standards are expressly limited to judicial review). And thus, GCA's reliance on these federal cases do not support its argument.

Nor does GCA's reliance on cases from Montana, *Richards v. Cnty. of Missoula*[7] and

[7] 2012 MT 236, 366 Mont. 416, 288 P.3d 175.

Kiely Construction v. City of Red Lodge,[8] provide support for its position regarding the applicability of narrow evidentiary exceptions. GCA Br. at 6. *Richards* turned on whether during the judicial review stage, the plaintiff could supplement the administrative record created before the Board of County Commissioners with new evidence and information. *Richards*, ¶ 20; *id.*, ¶¶ 23-24 (citing *MM&I, LLC v. Bd. of Co. Commrs. of Gallatin Co*., 2010 MT 274, ¶ 27, 358 Mont. 420, 246 P.3d 1020 (determining district court did not abuse its discretion in excluding deposition testimony because plaintiffs "**sought to introduce on judicial review** deposition testimony regarding the individual commissioners' thought processes about actions taken more than five years earlier.") (emphasis added)). Similarly, *Kiely* involved appeal of the City of Red Lodge's denial of Kiely's application for a preliminary subdivision approval to a district court, which required the reviewing court to apply the "arbitrary and capricious" standard. *Kiely*, ¶¶ 69, 70.

Here, the Board, like the Board of County Commissioners in *Richards* or the City of Red Lodge in *Kiely*, is the trier of fact, and thus has the authority to "assess the credibility of information and arbitrate disputes over conflicting information." *Richards*, ¶ 20. The Board is not a district court that employs limited judicial review standards on an already-created administrative record. *Compare*, § 2-4-612, MCA (evaluation of evidence in contested case) *and* § 2-4-614, MCA (record in contested case) *with* § 2-4-704, MCA (standard of judicial review of agency decision in MAPA contested case).

The only authority GCA cites to that is even remotely applicable to the present case is *Mont. Envtl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*,[9] Br. at 6-8, which involved the

[8] 2002 MT 241, 312 Mont. 52, 57 P.3d 836.

[9] 2023 MT 224, 414 Mont. 80, 545 P.3d 623.

appeal of a coal mining permit issued under the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), §§ 82-4-201, MCA, *et seq.*, and which proceeded, like this case, first via a MAPA contested case. But a correct reading of *Westmoreland* and an accurate understanding of the prior contested case of which the Board's limitation of evidence was based in *Westmoreland* does not support GCA's position.

Specifically, the scope of evidence permitted during the contested case proceeding in *Westmoreland* was based on a prior MSUMRA case, *In re Bull Mountain Mine*, No. BER 2013-07 SM (Jan. 14, 2016), in which the Hearing Examiner "required DEQ's permitting decision to be supportable before the Board without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision." *Westmoreland*, ¶ 46. But, importantly, in *Bull Mountain*, unlike in this case or other cases that are before a hearing examiner referenced by GCA, the parties stipulated to a closed record and agreed that the case would be decided on summary judgment without testimony or other evidence. Ex. A, *In re Bull Mountains*, Findings of Fact, Conclusions of Law, at 3.[10]

Also of import, *Bull Mountains* and subsequent MSUMRA contested case proceedings operated under the belief that plaintiffs had an exhaustion requirement, whereby issues and arguments had to be raised during the comment period to be preserved for argument before the Board. In *Westmoreland*, however, the Montana Supreme Court explicitly found that plaintiffs need not preserve issues during the comment period under MSUMRA and thus could raise claims for the first time in its petition for a contested case. *Westmoreland*, ¶¶ 36-37. This clarification matters because if petitioners like GCA can raise new issues, arguments, and evidence for the first time in the contested case proceeding, DEQ and intervenors must have the

[10] As parties are, of course, permitted to do under MAPA. Section 2-4-604, MCA.

ability to fully respond, as plainly required in § 2-4-612(1), MCA.

More pertinently, the Supreme Court's decision in *Westmoreland* did not purport to establish the bright-line rules for evidence that GCA argues for here. GCA Br. at 9. Rather, the question on appeal that the Supreme Court addressed with respect to evidence and argument was whether the Board erred in *limiting* conservation groups from presenting argument on certain evidence while permitting DEQ and Westmoreland to present post-decisional evidence and analyses tied to the information DEQ had before it at the time it made its permit decision regarding DEQ's material damage determination. *Id.*, ¶ 48.

While the Supreme Court did find that the Board's limiting of conservation groups from presenting argument on post-decisional evidence and argument was reversible error, *id.*, ¶ 48, the Supreme Court ultimately did not fault the Board for limiting DEQ's and Westmoreland's presentation of evidence to that which the agency could tie back to information it had before it at the time it made its decision regarding whether material damage would occur because it found that the Board's interpretation of its own regulation, ARM 17.24.405(6)(c),[11] upon which the *Bull Mountain* determination was based, was a reasonable interpretation and thus required to deference. *Id.*, ¶ 46.

But, critically, the Supreme Court did not articulate some dispositive rule regarding evidence that could or could not be admitted in all contested case proceeding or tie the Board's hands in the consideration of evidence, reiterating instead the fundamental rule that under MAPA, "all parties" may "respond and present evidence on all issues involved." *Westmoreland*,

[11] ARM 17.24.405(6) provides DEQ cannot approve a permit application unless DEQ's "written findings *confirm*, on the basis of information set forth *in the application or information otherwise available* that is compiled by the department" that no material damage will result. (emphasis added). There are no "written findings" in an Opencut permit, as there is no Cumulative Hydrologic Impact Assessment that must be prepared.

¶ 49 (citing § 2-4-612(1), MCA). In other words, the only question the Supreme Court answered was a narrow one: Whether the Board's limitation of evidence was reasonable; it did not hold that the Board does not have the authority to consider evidence and argument after a permit was issued in all instances.

Thus, if there is any lesson to be gleaned from *Westmoreland* for purposes of this, and future, contested case proceedings, it is the matter of equity to all parties in the presentation of evidence, and hewing closely to the mandate in § 2-4-612(1), MCA. GCA's request, at its core, is really asking the Board permission to present new evidence and argument during the contested case proceeding, *see* GCA Br. at 16 ("Donohue's testimony will focus on information that was not provided by TMC in the application"), while limiting DEQ and TMC from responding. But that creates precisely the type of "uneven playing field" the Montana Supreme Court found to be reversible error in *Westmoreland*. *Id.*, ¶ 48.

Of course, it remains GCA's burden of proof and persuasion in this contested case proceeding. *Westmoreland*, ¶ 18; *MEIC*, 2005 MT 96, ¶ 16. If GCA chooses to present no new evidence that wasn't before DEQ at the time the permit was issued, DEQ need not present any new evidence in response.[12] But if GCA does provide any new evidence or argument, especially since there is no exhaustion requirement for GCA, that absolutely opens the door for DEQ and TMC to challenge that evidence with new evidence and argument of its own. Section 2-4-612(1), MCA.

In short, GCA's motion in limine is based on its fatal misunderstanding of the law. It should be denied for this reason alone.

[12] GCA makes a sweeping and hyperbolic argument that DEQ is attempting to "stuff" the record with "post-hoc" evidentiary support in other cases. GCA Br. at 12. But GCA provides zero factual evidence for that assertion.

III. GCA's boilerplate motion is premature, lacks specificity, and fails to identify any prejudice it may suffer.

In addition to lacking any legal foundation, GCA's boilerplate motion is premature, made at the inception of this contested case proceeding before *any* evidence has been exchanged, lacks the requisite specificity, and does not identify any prejudice it may suffer if it's not granted.

"Motions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial." *Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980), *superseded by rule on other grounds as stated in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n. 16 (5th Cir. 2002). GCA's motion is hypothetical and abstract, as it brings the instant motion before any evidence has even been exchanged; indeed, the only event that has occurred to date in *this* case beyond GCA's filing of the petition and TMC's intervention is the parties' submission of preliminary prehearing statements. GCA, accordingly, has failed to point to anything more than a hypothetical fear of "post-hoc rationalizations," that in any case, isn't a consideration found anywhere in law for MAPA contested case proceedings, but only during judicial review of an already-existing administrative record.

For the same reason, GCA's motion in limine should be denied because it fails to identify any *specific evidence* it seeks to exclude—a necessary prerequisite to the grant of a motion in limine. *Crider*, ¶ 20 (motion in limine "must specify the evidence to which the defendant is objecting"); *Vukasin*, ¶ 35-37 (motion in limine not sufficient to preserve an issue for appeal where it only sought to exclude any "reference, comment, allusion or statement made to any crime, wrong or act pursuant to Rule 404(b), M. R. Evid." and did not specify the basis for the objection). Rather, GCA's motion is predicated on the *scope* of evidence it believes should be admitted. Even presuming GCA's argument regarding the scope of evidence that should or should not be admitted had any merit, GCA has not, nor can it at this stage of the proceeding,

point to specific evidence that should be excluded based on its objection.

Similarly, GCA's motion fails to identify any specific prejudice it may suffer absent the Board's grant of its premature motion. GCA complains broadly of the risk of "unfair prejudice"[13] pursuant to Rule 403, M. R. Evid., that would occur if DEQ or TMC were to hypothetically offer post-decisional evidence. GCA Br. at 12-14. But GCA ignores what "unfair prejudice means," resting instead on its unfounded argument that this case is record review. Evidence is "unduly prejudicial only when it tends to have some adverse effect upon a defendant *beyond* tending to prove the fact or issue that justified its admission into evidence." *United States v. Kadir*, 718 F.3d 115, 122 (2d Cir. 2013) (emphasis added). And "[u]nfair prejudice is measured by the degree to which a jury responds negatively to some aspect of the evidence *unrelated to its tendency to make a fact in issue more or less probable*." *United States v. Johnson*, 820 F.2d 1065, 1069 (9th Cir. 1987) (emphasis added).

Here, even if DEQ or TMC sought to offer evidence obtained after the permit decision was issued it still must pertain to the claims and defenses at issue in the case, making it directly within the realm of making the fact at issue more or less probable. Rules 401, 402, M. R. Evid. For example, GCA asserts that mining will intercept the groundwater table and that waste will not be buried on site to protect groundwater quality. Notice of Appeal, ¶¶ 48-56. Introducing evidence, regardless of when obtained, regarding the depth to groundwater doesn't make this evidence unfairly prejudicial because it is directly related to making the fact at issue more or less probable. *Johnson*, 820 F.2d at 1069. Said differently, simply because additional evidence may

[13] Of note, GCA is really suggesting it has little confidence in the Board's ability to sift through evidence that goes to the merits of the claims and defenses at issue. But GCA's unfounded fear ignores that the Board is "competent to screen out and disregard what [it] thinks [it] should not have heard, or to discount it for practical and sensible reasons," *Multi-Med.*, 550 F.2d at 977, and may draw on its "experience, technical competence, and specialized knowledge" in the evaluation of evidence, § 2-4-612(7), MCA.

undermine the validity of GCA's legal theories doesn't make it unduly prejudicial. Moreover, in this hypothetical event, DEQ and TMC must still disclose any evidence in discovery, of which GCA will have a full opportunity to test the strength of that evidence such that they cannot claim unfair surprise or prejudice.

Indeed, GCA isn't really concerned about improper evidence being admitted in this case at all (nor can it, as this case is in its infancy). Rather, as evidenced by the bulk of GCA's brief dedicated to argument regarding the Hearing Examiner's orders on motions in limine in other ongoing cases, GCA seeks to collaterally attack the wisdom of those orders in this case *before* the Hearing Examiner issues a final determination in those other cases for presentation to the full Board. GCA's counsel, of course, will have ample opportunity to address those orders, and any effect it may have on the Hearing Examiner's proposed findings of fact and conclusions of law, in its objection period. Section 2-4-621(3), MCA. But its attempts to circumvent the normal process of those other proceedings through a premature boilerplate motion in this case should be rejected.

At bottom, GCA points to no specific evidence DEQ or TMC seek to introduce at this stage, let alone any evidence that does not make a fact at issue more or less probable that could cause undue prejudice. The prudent course for the Board that puts it at the least risk of reversible error is to "err on the side of inclusion" of evidence and ensure the creation of a robust administrative record for judicial review. *Multi-Med.*, 550 F.2d at 977; *Underwood*, 105 F.3d at 951; *N. Plains Res. Council v. Bd of Nat. Res. & Conservation*, 181 Mont. 500, 510, 594 P.2d 297, 303 (1979) (setting forth the three basic principles which a District Court must consider in determining what the scope of review of an administrative decision should be, including "(1) that limited judicial review of administrative decisions strengthens the administrative process by

encouraging the full presentation of evidence at the initial administrative hearing…"). For these reasons, too, GCA's motion should be denied.

CONCLUSION

For the reasons stated herein, the Board should deny GCA's motion in limine.

Dated this 2nd day of August 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Kaitlin Whitfield
KAITLIN WHITFIELD

Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August 2024, I caused a true and accurate copy of the foregoing document to be emailed to:

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DEPARTMENT OF
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EXHIBIT A

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY MONTANA ENVIRONMENTAL INFORMATION CENTER REGARDING DEQ'S APPROVAL OF COAL MINE PERMIT NO. C1993 017 ISSUED TO SIGNAL PEAK ENERGY LLC FOR BULL MOUNTAIN MINE NO. 1 IN ROUNDUP, MT	**CASE NO. BER 2013-07 SM**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PROCEDURAL HISTORY

On October 5, 2012, Signal Peak Energy (SPE) sought approval for amendment to its mining and reclamation plan from Montana Department of Environmental Quality (DEQ) to increase the amount of coal to its permitted area for its Bull Mountains No. 1 Mine under permit ID SMP C1993017. DEQ notified SPE its application was technically acceptable on September 13, 2013, and on October 18, 2013, DEQ issued its approval of that permit. DEQ based that approval on its Cumulative Hydrologic Impact Assessment (CHIA), an analysis of anticipated hydrologic impacts associated with mining in and adjacent to the proposed permit area.

Administrative Rule of Montana (ARM) 17.24.314(1) requires that DEQ determine that a given proposed mining and reclamation operation has been designed to minimize disturbance to the hydrologic balance on and off the mine plan area, and prevent material damage to the hydrologic balance outside the permit area. In order to evaluate whether the proposed mining and reclamation plan has been designed to

prevent material damage, a CHIA is prepared by DEQ. Prior to making a permitting decision, DEQ makes an assessment of cumulative hydrologic impacts of all existing and anticipated mining operations. The CHIA analysis must be sufficient to determine whether mining impacts to the hydrologic balance on and off the permit area have been minimized and material damage outside the permit area has been prevented [ARM 17.24.314(5)]. DEQ found that the operational and reclamation plans for the Bull Mountains Mine No. 1 were designed to minimize impacts to the hydrologic balance within the permit area and to prevent material damage outside of the permit area.

On November 18, 2013, the Montana Environmental Information Center (MEIC), pursuant to Montana Code Annotated § 82-4-206(1)-(2), and Montana Administrative Code 17.24.425(1), filed its notice of appeal and request for hearing.

MEIC stated that the grounds for this appeal were that DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the assessment employed the incorrect legal standard; and DEQ's determination that the proposed mine expansion was designed to prevent material damage to the hydrologic balance outside the permit area was arbitrary and capricious and not in accordance with the law because the permit application did not affirmatively demonstrate and DEQ could not, therefore, rationally conclude that the proposed mine expansion was designed to prevent material damage to the hydrologic balance. Both of these arguments were based purely on questions of law, and the parties have never disputed the record or the relevant facts or evidence therein.

On April 11, 2014, MEIC filed its Motion for Summary Judgment; on May 30, 2014, SPE filed its Cross-Motion for Summary Judgment. The parties agreed the matter was capable of determination via summary judgment motions. *See* Order Adopting Joint Stipulated Procedural Schedule for Administrative Review (Jan. 6, 2014). For summary judgment to be appropriate, there must be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law. *See* Mont. R. Civ. P. 56(c)(3). Each of the parties agreed that there was no genuine issue of material fact. The parties argued the matter before the Board on July 31, 2015, and submitted proposed findings of fact and conclusions of law.

The Board met again on October 16, 2015, to determine whether or not there were sufficient material within these proposed findings of fact and the conclusions of law to allow a decision without any further hearing; and whether it were possible to rule on the facts in the CHIA and the administrative record.

Ultimately, the Board voted to rule on the motions for summary judgment, deeming the proposed findings of fact as undisputed, and disposition available upon adjudicating the issues of law. The Board chose to adopt MEIC's proposed findings of fact and conclusions of law, with amendments.

In accordance with the Board's order, both DEQ and SPE submitted proposed findings of fact. As Mont. Code Ann. § 2-4-623 requires that the decision must include a ruling upon each proposed finding, those findings are set out below in italics, and each is followed by its ruling.

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Docket 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	Cause No. BER 2024-03-OC **TMC, INC.'S OPPOSITION TO APPELLANT'S MOTION *IN LIMINE* TO LIMIT EVIDENCE**

Intervenor TMC, Inc. (TMC) respectfully submits the following response to Appellant Gateway Conservation Alliance's (GCA) motion *in limine*:

INTRODUCTION

Almost 30 years ago, the Montana Legislature created DEQ and the Board of Environmental Review (Board). Since that time, the Board has heard and determined all manner of appeals from DEQ permitting decisions pursuant to the rules governing contested cases under the Montana Administrative Procedure Act (MAPA). Those appeals have routinely included discovery and other fact-finding procedures, including contested hearings, which are essentially a form of trial. Now however, after that long history, the Board is presented with several contested cases in which the appellants contend that there can be no evidence considered that was not considered by DEQ. (Appellants make an exception for the testimony of their own

expert.) These three cases[1] have one thing in common – the same attorneys represent the appellants in each case. After 30 years in which no one (to TMC's knowledge) raised a serios question that the MAPA contested case rules should simply be followed as written, these appellants have untied the Gordian Knot to contend that everyone before them was wrong.

Specifically, it is appellants' theory in these cases that the Board sits in review of the documentation and evidence in the administrative record created in DEQ's evaluation of the permit application. In other words, their argument means that the contested case provisions of MAPA mean basically nothing, and that the Board can only perform the same review that a district court would repeat on any appeal from the Board's decision. Furthermore, the appellants contend that limited form of review and the limited evidence upon which it occurs does not apply to them. In their theory, appellants are free to hire experts to dispute DEQ's findings, not confined to the record frozen in time to the other parties (DEQ and the applicant) when appellants noticed their appeal.

GCA and the other appellants cannot be right, because their approach eviscerates the MAPA contested case rules and eliminates the Board's function as an intermediate step between the challenge to a final agency action and judicial review in district court. Instead, there would be serial reviews of the administrative record, first by the Board and then by the District Court. TMC does not believe that is a reasonable interpretation of the Board's function and the laws that give it effect.

[1] The cases are: *In the Matter of: Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473; In the Matter of: Appeal and Request for Hearing By Valley Garden Land and Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3;* and *In the Matter of: Appeal and Request for Hearing by Friends of the Jocko Regarding Issuance of Opencut Mining Permit #3415.*

ARGUMENT

A. The Record Does Not Freeze On the Day the Permit Issues.

GCA starts by quoting the appeal rights on DEQ's decision to issue an opencut mining permit, emphasizing that the appeal must be from the agency's "final decision." Brief in Limine (Brief), p. 3. GCA's implication is that the words "final decision" mean there can be no more information submitted after DEQ's decision unless it meets the narrow exceptions for supplementing the administrative record. A fairer interpretation of the phrase "final decision" is that it merely refers to the basic administrative law tenet that an appeal from an agency's decision must be from the final decision. "When an agency has not adjudicated the issues raised on appeal, there is no final agency action upon which a district court can assume jurisdiction." *Qwest Corp. v. Montana Dept. of Public Service Regulation*, 2007 MT 350, ¶ 30, 340 Mont. 309, 174 P.3d 496, citing *Marble v. Dept. of Health & Human Serv*., 200 MT 240, ¶ 28, 301 Mont. 373, 9 P.3d 617. In fact, where an appeal from DEQ's decision must be filed with the Board (another branch of the same administrative agency), the party challenging the permit decision will not have exhausted its administrative remedies without completing the MAPA contested case proceeding in the Board. *See e.g., Gilpin v. State*, 249 Mont. 37, 812 P.2d 1265 (1991) (failing to appeal a Board decision is a failure to exhaust administrative remedies).

The Montana Supreme Court has pointed out that the MAPA contested case statutory provisions "outline the process for notice, discovery, informal hearings, hearing examiners, hearings rules, records, final orders, and other procedural rules." *Puget Sound Energy, Inc. v. Mont. Dept. of Revenue,* 2011 MT 141, ¶ 26, 361 Mont. 39, 255 P.3d 171 (citing Mont. Code Ann. § 2-4-601 to 631). The Court also observed in the context of the tax appeal in the *Puget* case:

> MAPA's hearing provision provides for the presentation of evidence in accordance with common law and statutory rules of evidence, the taking of testimony under oath, the opportunity for cross examination, the taking of judicial notice of cognizable facts, and the exercise of STAB's expertise, technical competence, and specialized knowledge in evaluating the evidence.

Id. GCA's motion raises an obvious question: Why would these MAPA procedural and evidentiary provisions be necessary if the Board's role was limited to record review?

The motion in limine simply writes the MAPA procedural laws out of existence, allowing GCA to argue from the erroneous premise that, to be considered by the Board, evidence outside of the administrative record must fall within one of the federal exceptions to judicial review under the federal Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 551–559. The role of the Board is not so consigned. Under MAPA, a contested case is "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." Mont. Code Ann. § 2-4-102(4) (emphasis added). MAPA also requires that judicial review of the administrative record can only occur after the party seeking review has exhausted its administrative remedies. The point is that if the Montana Legislature intended that instead of a contested case hearing governed by the Rules of Evidence, a party challenging agency action would be required to go through administrative record review twice – first at BER and then in district court – somewhere Montana statutory or case law would say that. GCA cannot supply such authority, which is an obvious indictment of its motion.

The Montana Supreme Court recently addressed the question of limiting evidence in a BER contested case in *MEIC v. Westmoreland, et al*. (MEIC), 2023 MT 224, 414 Mont. 80, 545 P.3d 623. The Court first noted that appellant groups challenging DEQ's permitting decision have the burden before the Board to show that DEQ erred. *MEIC*, 2023 MT 224, ¶¶ 20-22. The Board's hearing examiner granted DEQ and Westmoreland motions in limine to preclude

appellant groups from presenting argument or evidence on issues not raised prior to the BER contested case. *Id*. at ¶ 30. The Court reasoned that under MAPA the "[o]pportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved". *Id*. at ¶ 32, citing Mont. Code Ann. § 2-4-612(1). From that the Court concluded: "The relevant statutes do not appear to require an aggrieved party to have raised prior objections with DEQ *at all* in order to bring a challenge before the Board." *Id*. (emphasis original). TMC and DEQ are not the aggrieved parties here, but the *Westmoreland* opinion went on to address a motion in limine filed by the appellant groups like the motion filed in this case, i.e. to bar expert testimony from DEQ's or Westmoreland's witnesses "that would bolster" the agency's decision. The BER allowed that evidence, but the district court held that allowing DEQ and Westmoreland to present post-decisional evidence and analyses but limiting the appellant groups to their pre-decisional comments "created an uneven playing field." *Id*. at ¶ 48.

The Supreme Court ruled that "[t]o the extent the District Court relied on the 'uneven playing field' rationale, the court was correct." *Id*. However, the Court also reversed the district court's ruling that BER should not have allowed rebuttal expert testimony. *Id*. at ¶ 50. The Court said that the report was proper rebuttal where the opinion "is drawn from" information in the administrative permitting process or "otherwise compiled by DEQ" during that process. *Id*. The Court again emphasized the MAPA provision that "[o]pportunity shall be afforded to *all parties* to respond and present evidence and argument on *all issues involved*." *Id*. at ¶ 51 (emphasis original).

GCA cites the Board's decision *In re Bull Mountain Mine*, No. BER-2013-07 SM (Jan. 14, 2016) for the proposition that DEQ's decision must be sustainable without additional evidence that was not before it when the permitting decision was made. Brief, p. 4. There are

two problems with reference to Bull Mountain; First, the cited language is not the same thing as saying the decision must be sustainable in the face of appellant's allegations on appeal with no additional input from the agency or permit holder, which is GCA's position. Moreover, any language in any Board decision on this topic must be read in light of the recent *Westmoreland* decision case discussed above. GCA's discussion of the Board's handling of that case is simply a long-winded attempt to lessen its impact on GCA's motion and should be disregarded.

GCA's argument includes a lengthy discussion of seminal federal cases on the topic of supplementing the administrative record in a case involving judicial review under the APA. A similarly lengthy rebuttal is unnecessary, as the entire discussion is inapplicable to the issue before the Board because those federal cases do not involve the same regulatory structure as the one Montana uses with the MAPA contested case procedures before a unique citizen Board. This case is anything but analogous to the federal administrative procedures.

The ultimate goal of GCA's motion is to allow it to present expert opinions and testimony at the Board level challenging DEQ's reasoning, while handcuffing DEQ and TMC. That is justified with the theory that appellant's testimony fits one of the narrow exceptions to confining the evidence in an APA judicial review case to the administrative record lodged by the permitting agency. The appellants would, for example, use their additional evidence to show the agency did not "consider all relevant factors" in its permitting decision. GCA Br. p. 16. Again, total reliance on the exceptions to review on the administrative record does not work when the state legislature has created an additional layer of review based on contested case rules, a circumstance that is completely absent from the cases cited by GCA.

Even if the federal cases were relevant, GCA's discussion of them omits key language that would emphasize the discretion the Board would be required to extend to DEQ's permit

evaluation. First, the exceptions are narrowly construed, and the "relevant factors" exception is "the most difficult to apply." *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). The exceptions are rooted in the concept that judicial review of an administrative record "ensures that the reviewing court affords sufficient deference to the agency's action." 776 F.3d at 992.

As the *San Luis & Delta-Mendota Water Authority* quote and many other cases note, the other side of the administrative record review coin is the requirement for the reviewing tribunal to give sufficient deference to the agency's decision. *See id*. Yet GCA's brief in limine does not even contain the word "deference," even though it appears GCA seeks to substitute federal APA standards for the MAPA contested case procedures. If strict record review becomes the new standard, then it is only fair that the applicable body of APA law comes with it, which includes the requirement that a court (here, the Board) "must defer to the informed discretion" of the responsible agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-377 (1989) (emphasis added). Consistent with that standard of review, parties who challenge an agency's decision are constrained on the evidence they are permitted to submit. Consideration of extra-record evidence "to determine the correctness or wisdom of the agency's decision is not permitted." *Asarco, Inc. v. U.S. Envt'l Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980).

This discussion illustrates that GCA is attempting to cherry pick the features of administrative record review APA-style, retaining the narrow exceptions that the agency would face to submit information from outside the record, but not including the broad prohibition against second-guessing the agency's decision with extra-record information. The Board should not endorse GCA's radical attempt to jettison MAPA contested case procedures.

CONCLUSION

For these reasons, the Board should deny GCA's motion in limine.

DATED this 2nd day of August, 2024.

By:*/s/Mark L. Stermitz*
Mark L. Stermitz
Attorneys for TMC, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following, by the means designated below, this 2nd day of August, 2024.

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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 ALLIANCE REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3462	Cause No. BER 2024-01 through -03 OC **REPLY BRIEF IN SUPPORT OF MOTION TO LIMIT EVIDENCE**

Comes now, Petitioners Gateway Conservation Alliance, and submit this reply brief in support of their motion to limit evidence.

I. INTRODUCTION

Petitioners Gateway Conservation Alliance (GCA) has filed a motion to limit testimony and evidence at the outset of this matter because the issue is threshold in nature. It has also become patently clear to counsel of record that the government would like to

have its cake and eat it too. More specifically, the Montana Department of Environmental Quality (DEQ) seeks to use its position to issue Opencut Permits with little to no effort, only conducting a thorough investigation *if and after* a permit has been challenged. In doing so, DEQ sandbags the public, by disclosing almost nothing in support of a granted permit, only creating supporting evidence after the public has invested time in an administrative appeal.

As GCA pointed out in their opening brief, the question of the scope of review of appeals of opencut permits to the Board of Environmental Review (BER) is now before this Board in at least three other cases[1]. The proliferation of administrative litigation of opencut permits, following the passage of HB 599 in the 2021 Montana Legislature, is, presumably, the reason that the BER decided to handle this case directly as opposed to delegating it out to a hearing examiner. Thus, this Board has the opportunity here to establish precedent and ground rules for these cases going forward.

DEQ and the applicant TMC see the process created here by the Legislature – that final mining permits must first be appealed to the BER pursuant to the contested case provisions of the Montana Administrative Procedures Act (MAPA) – as an opportunity to buttress, after the permit is issued, their minimal efforts during the application process. Those efforts were minimal because of the constraints imposed by the 2021 Legislature. In essence, DEQ and TMC want to have it both ways. They want a final permit that allows the

[1] *In the Matter of: Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473; In the Matter of: Appeal and Request for Hearing By Valley Garden Land and Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3; and In the Matter of: Appeal and Request for Hearing by Friends of the Jocko Regarding Issuance of Opencut Mining Permit #3415*

operator to operate immediately, while at the same time allowing themselves to add to the administrative record for months or years[2] after that final permit is issued and after the mine has begun to operate.

Although TMC[3] waxes at length about GCA (and its counsel) recently inventing this issue (when an agency action becomes final and the relationship of that conclusion to a proper administrative record), decades of case law directly contradict that notion. Instead, both federal and Montana courts have held firm as to the well-settled precedent TMC attacks. The Supreme Court's summary of the law of finality in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) is now the widely cited test:

> As a general matter, two conditions must be satisfied for an agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow.

Through this lens, the absolute duplicity of DEQ's and TMC's invention is laid bare. They ask both that DEQ's permitting decision be made "final" at the time it is issued - so that mining can commence - but that they also not be held to that "finality" standard when it comes to what evidence can be reviewed to support that same decision. And, beyond the flagrant constitutional violations enacted through HB 599. that is the most egregious harm being done to the public through this process. Quite

---

[2] *In the Matter of: Appeal and Request for Hearing By Valley Garden Land and Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3* is now in its third year before the BER, all the while the mining company has been operating under the issued permit.

[3] It is worth noting that TMC is represented by the exact same counsel as LHC Inc. in the Clearwater BER appeal.

plainly, DEQ is swimming upstream against the current of precedent to meet the ends of it political aim.

As pointed out in GCA's opening brief, the Hearing Examiner in the case of *In the Matter of: Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473* identified, perhaps inadvertently, the procedural knot this creates:

> **BER is building the final agency action record during the contested case proceeding**. *See* Mont. Code Ann. § 2-4-614 (1). If DEQ's permit decision does not get appealed to BER, it becomes final after the time to appeal passes. **If DEQ's permit decision is appealed to BER, then BER's decision becomes the final agency action**. This procedural wrinkle is evidenced by the fact that a permit decision which is not appealed to the BER cannot be appealed to the District Court, **therefore DEQ's permit decision is <u>not</u> final for purposes of judicial review.**

Ex. A to opening brief, p. 3 (emphasis added).

If the Hearing Examiner is correct in this assessment, then, yes, the MAPA contested case could theoretically create a whole new record that then becomes the final record for a final agency action. However, if that is the case, then the permit issued here by DEQ, and the permits issued by DEQ in the three other appeals cited, are not *final*, and therefore the operators should not be able to perform any act pursuant to the preliminary permit decision. Of course, neither DEQ[4] nor the applicant here or in the other cases take that position; rather, they want it both ways – a full trial de novo ***and*** the ability to forge ahead with operation of the mines. It is this latter approach that GCA seeks to address with the motion to limit the hearing here.

[4] See DEQ footnote 3, DEQ Brf. p. 7.

II. ARGUMENT

A. What is at issue here drives what is relevant and therefore what should be allowed or excluded as evidence.

This is an appeal of an Opencut Mining Permit. Such appeals are subject to the following requirements.

> (1) (a) Subject to subsections (1)(b) and (1)(c), a person whose interests are or may be adversely affected by a **final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying materia**l under this part is entitled to a hearing before the board if a written request stating the reasons for the appeal is submitted to the board within 30 days of the department's decision.

§ 82-4-427(1), MCA (emphasis added).

That final decision is, in turn, based on certain evidence before the agency:

> (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.

§ 82-4-422(1), MCA(emphasis added), Section 82-4-432, MCA, in turn, sets forth the specific information that must be in an application.

These provisions of the Opencut Act make crystal clear that the *decision* to issue a permit is based on information that was in the hands of the decision maker when she made the decision. Indeed, an appeal may only be taken from a permit decision and its "accompanying material." § 82-4-427(1), MCA. That material is necessarily pre-decisional. So § 82-4-427, MCA, itself limits the scope of an appeal to only that information that was present at the time of the decision. That is also consistent with the recent decision in *Montana Envtl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, ("*Westmoreland*") 2023 MT 224, ¶

46, 414 Mont. 80, 545 P.3d 623 where the Court said: "Bull Mountain's interpretation of Admin. R. M. 17.24.405(6) (2004) and 17.24.314(5) (2012) as requiring DEQ's permitting decision to be supportable before the Board ***without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision*** is reasonable." (emphasis added).

From *Westmoreland*, it is clear that DEQ's decision must be based on information that was "set forth in the application or information that was otherwise available to DEQ at the time it issued the Permit." *Id.*, ¶ 52; § 82-4-432 (10)(c), MCA. ("…the department shall determine **if the information** meets the requirements of subsection (14)(a) and notify the operator in writing. **If the requirements are met, the operator may commence the operation** on receipt of the notification." (Emphasis added.)); *See also* A.R.M. 17.24.212 (1) ("Upon receipt of an application to conduct opencut operations and within the time limits provided in 82-4-432, MCA, the department **shall evaluate the application to determine if the requirements of the Act and this subchapter are satisfied.**"(Emphasis added.))

Thus, the issue, and the only issue, before this Board, is whether GCA can establish that the information submitted in the application and evaluated by DEQ before it made its decision was sufficient to meet the statutory requirements. Any *post hoc* evidence submitted by DEQ or TMC to support the decision already made should be excluded, and the proper time for the Board to make that determination is now, not in the middle of a costly and lengthy evidentiary hearing. So yes, as a practical matter in contrast to the argument made by TMC, the BER should determine that the record should largely "freeze" as of the date of the decision.

B. MAPA contested case provisions do not prevent this Board from limiting the scope of its inquiry.

This case is subject to the contested case provisions under the Montana Administrative Procedures Act (MAPA), but that does not give TMC and DEQ unlimited power to introduce new information that was not relevant to the permitting decision itself. DEQ and TMC do not appear to contest that *post-hoc* evidence is not "relevant." Rather they simply argue that MAPA contested case evidentiary rules are "loose." But that ignores the appropriate inquiry.

GCA agrees: contested case provisions set forth the rules for contested case hearings, including the taking of evidence. § 2-4-612, MCA. Contested case hearings are subject to the Rules of Evidence. § 2-4-612 (2), MCA. Moreover, as the Prehearing Order makes clear, the proceeding is also subject to the Rules of Civil Procedure and the Uniform District Court Rules.

DEQ takes the position that the provision of MAPA that allows parties to "present evidence and argument on all issues" (DEQ Brf. p. 4) gives them carte blanche to put in any new evidence they want. And they cite to authority for the proposition that "rules of evidence are more relaxed" in contested case provisions. *Id.,* p. 6. However, that does not mean that this Board, under the very specific requirements of the Opencut Act, should "relax" rules about what is relevant and therefore admissible here.

In sum, just because this is a contested case doesn't mean that evidence created *after* the permit was issued is at all relevant, and therefore appropriate, for this Board to consider in a contested case.

C. Cases discussing relevance of evidence in challenges to final agency action do determine the parameters of this Board's review.

GCA discussed, at pp. 3-14, a series of Montana and Federal cases that evaluate the scope of evidence that is relevant when a party is challenging a final agency decision. DEQ agrees that the permit under appeal here is a final agency decision. (See DEQ Brf. p. 7, FN 3) But DEQ nevertheless argues that these legal principles do not apply because they were in cases of judicial review of agency decisions, not at the administrative appeal level. Again, this highlights the blatant inequity of DEQ's position: Judicial review is only available for final agency actions (which DEQ admits occurred upon issuance of TMC's permit thereby granting TMC the ability to mine), but *somehow*, at the same time, for evidentiary purposes, the final agency action has yet to occur, and thus the rules of judicial review do not apply.

TMC takes a different approach (TMC Brief, p. 3), arguing essentially that while the permit decision is a "final decision" for the purposes of an appeal under § 82-4-427, MCA, it is not actually a final decision, and therefore the full trial de novo is allowed.

Neither argument should convincingly persuade this Board to ignore clear logic, the Rules of Evidence and admit a myriad of *post hoc* evidence, here. The federal cases cited by GCA, though on judicial review, all turn, as is the case here, on what is *relevant* to an evaluation of an agency *permitting decision*. The *Kiely* decision cited in GCA's Opening Brief makes this clear: "Nor were the after-the-fact opinions of individual council members as to

the reasons for the denial relevant." *Kiely Construction v. City of Red Lodge,* 2002 MT 241, ¶ 97, 312 Mont. 52, 57 P.3d 836.

GCA discussed the *Westmoreland* case at length in their opening brief (pp. 8-10). DEQ attempts to distance this case from *Westmoreland* citing to differences between the Opencut Act and the Coal Act at issue in *Westmoreland.* But as GCA noted (opening brief p. 11) the requirements of the two acts are similar, and the language in the Opencut Act and the implementing regulations limiting the decision maker's decision to matters submitted in the application and before the agency at the time of the decision hews precisely to the operative ruling in *Westmoreland: "Bull Mountain's* interpretation of Admin. R. M. 17.24.405(6) (2004) and 17.24.314(5) (2012) as requiring DEQ's permitting decision to be supportable before the Board **without reference to information that was not available to and relied upon by DEQ at the time of the permitting decision** is reasonable." *Westmoreland,* ¶ 46 (emphasis added). Here, if the evidence is not contained in the TMC application or "otherwise compiled by DEQ during the permit approval process" (*Westmoreland* ¶ 50), it should not be allowed in.

D. Petitioners' motion is not premature.

DEQ argues that GCA's motion to limit the scope of this Board's review is "premature." DEQ Brf., p. 14. But as noted throughout the briefing by GCA, this Board has enough similar cases before it to know exactly what is coming in this case, and it certainly has power, under §2-4-612, MCA, and this Board's own scheduling order, to limit the scope of the hearing up front. While specific testimony may not be known yet, the *Westmoreland*

decision gives this Board the ability to proscribe, in advance, the parameters of evidence and testimony.

Both DEQ and TMC argue that GCA wants to allow its expert while completely excluding testimony from TMC and GCA. That argument, of course, completely misconstrues what GCA has argued as evidence by the opening brief, pp. 17-20. However, for the purposes of narrowing and simplifying the issues before the Board and eliminating the opportunity for DEQ and TMC to make up new evidence in "rebuttal", if this motion is denied, GCA will withdraw its expert, Dave Donohue, as a witness and will solely rely on his comments submitted to the agency prior to the decision.

III. CONCLUSION

This motion asks the BER to answer a simple and straightforward question: Opencut permits are either a "final agency action" on the date that they are issued or, they are not. Which one is it? If the permit is not final upon issuance, then a full trial, producing a new record is appropriate. But then the Board must also determine that any permit must be stayed pending that final decision from the BER. If the permit *is* the final agency action because it marks the "consummation of the agency's decision-making process" and confers "rights or obligations" "from which legal consequences flow", then the BER must properly limit the introduction of evidence to the universe of documents and information that existed prior to that decision being made.

DATED THIS 9th DAY OF AUGUST, 2024

MORRISON SHERWOOD WILSON & DEOLA

/s/ David K. W. Wilson, Jr.
David K. W. Wilson, Jr.
Robert Farris-Olsen

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By: _____
Graham J. Coppes

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I hereby certify that on August 9th, 2024, I have served true and accurate copies of the foregoing to the following:

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DEQ Montana Department of Environmental Quality

Board of Environmental Review

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FROM: Sandy Moisey Scherer, Board Secretary
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DATE: July 29, 2024

SUBJECT: Board of Environmental Review Case No. BER 2024-04 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA	
IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY GALLATIN COUNTY COMMUNITY COALITION REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3561	Case No. BER 2024-04 OC

On July 26, 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.

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Docket No: BER 2024-04 OC

Attorneys for Petitioner Gallatin County Community Coalition

BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY GALLATIN COUNTY COMMUNITY COALITION REGARDING ISSUANCE OF OPENCUT MINING PERMIT #3561	Cause No. **NOTICE OF APPEAL AND REQUEST FOR HEARING**

Petitioner, Gallatin County Community Coalition ("GCCC") by and 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 Concrete Materials of Montana, Inc., for a new gravel pit located in Gallatin County, Montana (the "Lucht Site") (Opencut Permit #3561.) This appeal is brought pursuant to § 82-4-427, MCA, and § 2-4-601, et seq., MCA. GCCC challenges DEQ's actions as violations of the Montana Opencut Mining Act, §§ 82-4-401, et seq., MCA and regulation thereunder. GCCC also asks that the BER declare that based on its Hearing Examiner's recent rulings in other cases, pursuant to this appeal, the permit is not active, does not authorize mining and following a determination that this permit was issued in error, BER must set aside the permit as being unlawful.

PARTIES, JURSIDICTION AND VENUE

1. Petitioner GCCC is a not-for-profit corporation duly registered and licensed in the State of Montana.

2. GCCC's members live in and around the permit area, own property in the vicinity o the proposed mine, utilize the area for recreational and aesthetic enjoyment, and own water rights senior to the proposed uses identified herein.

3. GCCC's members raise their families on lands and properties directly adjacent to the proposed mine, submitted comments to DEQ in relation to their concerns about the failures of the Opencut Act review process as described herein, and are fearful that DEQ's actions here will cause harm to their health, property and prosperity as Montana citizens.

4. 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.

5. Jurisdiction is based on § 82-4-427, MCA.

FACTS

The Setting:

6. The Lucht 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 Valley until it reaches the confluence with the Jefferson and Madison Rivers to form the Missouri River.

7. The Gallatin River is about one mile from the Lucht Site, and Baker Creek, a perennial stream, runs about ½ mile west of the site and flows northward into the Gallatin River.

8. The proposed Lucht Site is located above an unconfined alluvial aquifer composed of alluvial sand, gravel, silt and clay. Groundwater across the site is expected to range from 10 feet to 37 feet below the ground surface (bgs) depending on location and seasonality. This information was obtained from the Application and data provided to DEQ from The Gallatin Local Water Quality District (GLWQD). The well is located approximately one-half mile northwest of the permit boundary (GWIC 90960) and is shown on the Area Map in Figure #3. According to DEQ, the water table has a variable depth. According to DEQ, the elevations are not based on site specific data.

9. Neither the Applicant nor DEQ relied on information from the on-site well as a part of its analysis.

10. DEQ has identified that the overall geomorphology of the excavation would create a bowl toward the center of the site, so most precipitation would drain inwards.

11. Precipitation at the site would likely infiltrate into groundwater and flow through the site's aquifer, now carrying untold contaminants from the mining process.

12. 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.

The Mine:

13. The Lucht Site is a new proposed opencut mine stretching over 78.4 acres directly adjacent to the Gallatin River Floodplain.

14. Concrete Materials proposes to permit a new Standard opencut operation to mine, screen, crush, wash, stockpile, and transport 5,000,000 cubic yards of gravel and sand from a 78.4-acre site located approximately 1.5 miles NE of Churchill, Montana.

15. The site would be located on private property.

16. The material/product would be mined to a maximum depth of 40 feet.

17. A screen, wash plant, and crushing equipment would continue to be used on site during the operation, each of which the applicant says will require water diversions and beneficial use as a part of the process.

18. Mobile processing equipment and mine material stockpiles would move with mining activity (i.e. migrate with the highwall).

19. Mining would begin in the northeastern portion of the bonded area and would progress as described in section D3-2 of the Application.

20. Final reclamation would be complete by December of 2043, unless extended.

21. The site is located near three irrigation ditches. White Ditch is north of the site, Lewis Ditch is located to the south of the site and an unnamed ditch is located to the west of the site.

22. Applicant proposes to mine directly into local groundwater. This will create a surface water feature identified as a surface water pond or lake.

23. DEQ failed to require applicant to follow its own guidelines for these surface water features, include not adding bonded acreage for potential wetlands, not requiring vegetation for potential wetlands.

24. These omissions and failures will likely contribute to further degradation of the surface and ground water connected to the pond. These failures may also contribute to contamination of groundwater from eutrophication events and toxic algae development.

25. DEQ acknowledges and admits that this process will create a direct conduit for contamination of groundwater.

26. Applicant proposes to divert and beneficially use its newly created surface water for operation of a crusher, wash plant, dust control, and potentially other unknown uses by the Applicant.

27. Water would also be pumped and diverted for additional beneficial use from an onsite well.

28. DEQ has taken no steps to consult with DNRC to determine whether any of this water use is lawful pursuant to the Water Use Act.

29. DEQ has taken no steps to ensure that groundwater quality will be protected as a part of its review and approval of this mine.

Procedural History:

30. TMC, Inc., first applied for the Opencut Permit on November 2, 2023.

31. DEQ issued 6 total deficiency letters between November 2023 and June of 2024.

32. Concrete materials numerous applications were replete with errors.

33. The first deficiency notice identified nine failures by the applicant, with successive deficiency notices identifying additional errors all the way up until the very last submission by Applicant.

34. More specifically, on June 19, 2024 DEQ issued a deficiency letter stating that "although this deficiency was missed in the previous deficiency letter issued by Opencut, it is required by the Opencut Rules to be addressed."

35. Yet, on the same day DEQ issued a letter stating that it received a revised application for review.

36. It is unclear which application DEQ determined acceptable.

37. Nevertheless, the application still remains deficient today.

38. During the entire back and forth process of six (6) deficient applications, DEQ received public comment that it largely ignored.

39. Public comments identified that the past land use included a garbage dump, which was never disclosed or described.

40. Public comments identified that children live in close proximity to the site and that scientific and medical research identify that the proposed levels of noise pollution and silica dust and particulate matter that will be created by the mine will be have detrimental health effects of children nearby.

41. Public comments identified that the application did not identify the presence of noxious weeds at the site, including knapweed.

42. Public comments identified that proof of legal access to the site on the proposed route was not provided.

43. Public comments identified that land use in the vicinity includes concentrated animal feeding and rearing operations.

44. The Gallatin County Commission submitted comment opposing issuance of this permit stating "the location of the proposed Lucht site is within the Town of Manhattan's controlled groundwater area for their municipal source (MT PWS ID No. MT0000285). The downstream location of Manhattan's horizontal well collects water near a spring source. This area of the valley has an aquifer that is unconfined, meaning that groundwater is not protected by a confining layer (a layer that slows or blocks the flow of groundwater) that impedes the migration of contaminants. Water moves relatively freely and quickly in this area which has been documented by DEQ study 2008 by Stimson.

45. Public Comments identified that specific individuals were missing on the surface landowner name list, even though that individual owned land within ½ mile of the site. DEQ did nothing to correct these issues.

46. Public comments were submitted by the Lewis Ditch Company stating that they did not receive notice of the application, even though their conveyance facilities were 50 feet away and stating that DEQ's administrative rules establishing the 50' buffer were inadequate to protect water quality in their ditch. The Ditch company further explained to DEQ that the Applicant could be dewatering their senior water rights and that DEQ should require information about whether and how the applicant could obtain a water right for this project.

47. Despite these problems, DEQ issued Opencut Permit #3462 on June 26, 2024, 2024.

48. An environmental assessment (EA) was completed by DEQ and released to the public on the same day DEQ issued the permit on June 26, 2024.

49. The public did not have an opportunity to comment directly on the EA prior to its release, violating the Montana Environmental Policy Act.

50. 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.

51. 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.

52. The application also violates 82-4-401 et seq., because it is not designed to preserve natural resources or protect wildlife and aquatic resources.

COUNT ONE – VIOLATION OF OPENCUT MINING ACT'S PROHIBITION ON DEGREDATION AND REQUIRED PROTECTION OF THE ENVIRONMENTAL LIFE SUPPORT SYSTEM

53. The preceding paragraphs are realleged as though set forth in full hereunder.

54. 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.

55. 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

56. In this case, there is no analysis or evidence that relates to how surface water or groundwater will be protected from non-degradation by this application.

57. To the contrary, DEQ states in its EA for this project that "the Opencut Act does not regulate water quality."

58. In this case, as a part of its Opencut Act obligations, DEQ did not analyze how local air quality will be protected from non-degradation by this application.

59. To the contrary, DEQ states in its EA for this project that "the Opencut Act does not regulate air quality."

60. These conclusions and the lack of DEQ's affirmative actions to protect these resources is a violation of the Opencut Act and Article II, Section 3 and Article IX, Sections 1 & 2 of the Montana Constitution.

61. 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 WATER RESOURCES WILL BE PROTECTED

62. 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).

63. The application fails to meet these regulatory requirements, as set forth above.

64. 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 insufficient information to prove that contaminants from the mining operation will not find their way into directly adjacent irrigation ditches, local groundwater which supplies drinking water, and the Gallatin River or nearby tributaries.

65. Based on the deficiencies in the application and DEQ's work and analysis, the BER should reverse and set aside Opencut Permit #3561.

COUNT THREE – VIOLATION OF OPENCUT MINING ACT'S REQUIREMENT THAT DEQ CONFIRM LOCAL LAWS WILL BE AND CAN BE FOLLOWED

66. The Opencut Act requires a certification from the Applicant and the local governing body that all local laws will be followed. §82-4-432-434, MCA.

67. 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

68. Here, DEQ was made aware that that Gallatin County Planning laws were in direct contradiction with the Applicant's mining proposal: (1) the Amsterdam-Churchill Community Plan and (2)The Gallatin County Sensitive Lands Protection Plan.

69. Public comments informed DEQ exactly how these local land use planning laws would be violated by the proposed mining, including but not limited to greater requirements for water setbacks, public hearing requirements, natural asset protection plans, and community decay.

70. DEQ ignored this information and failed to carry out its duties to ensure that the certifications made by the Applicant to this effect were correct.

71. More specifically, even though the Applicant certified that it would comply with local laws, DEQ failed – as a matter of law – to analyze whether the Applicant even could under the applied for mining permit.

72. Because there are no sets of facts and circumstances under the current mining permit that could comply with local laws, DEQ violated its obligation under the Opencut Act by accepting certifications that are demonstrably, objectively, and legally unattainable.

COUNT FOUR – VIOLATION OF OPENCUT MINING ACT'S REQUIREMENT THAT DEQ CONFIRM AND VERIFY ALL DATA SUBMITTED BY THE APPLICANT

73. 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

74. Here, DEQ violated the Opencut Act, as described above, by failing to itself verify that the requirements of the Act were met.

75. 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.

76. 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.

COUNT FIVE – VIOLATION OF OPENCUT MINING ACT'S REQUIREMENT THAT DEQ CONFIRM AND VERIFY THAT APPLICANTS PLAN FOR BENEFICIAL WATER USE IS FACTUALLY AND LEGALLY POSSIBLE AND WILL NOT HARM EXISTING WATER RESOURCE DEMANDS

77. Applicant informed DEQ by and through its permit that it plans to both divert water from a groundwater well on site and to develop a new surface water source, by and through its excavation activities, which it will also use by pumping diversions for additional beneficial use in mining activities.

78. The Applicant certified to DEQ that it will follow all federal, state and local laws pursuant to § 82-4-434, MCA.

79. DEQ is required by § 82-4-422, MCA to ensure that this declaration is legally possible.

80. DNRC is a sister state administrative agency within the State of Montana that is entrusted with carrying out the Water Use Act.

81. Where, as here, an applicant proposes and applies to DEQ for a mining permit that facially identifies the need for the beneficial use of water and informs DEQ that it intends to seek new water rights for its applied for mining use, DEQ is required by law to ensure that those uses are in fact authorized or able to be authorized prior to granting the Opencut Permit.

82. DEQ cannot – as a matter of law – issue a mining permit which facially states and requires a water right for the beneficial use of water that the Applicant cannot legally obtain.

83. The Lucht site lies within the Gallatin Basin, which is a closed basin for new appropriations.

84. There is no evidence submitted with the application, or analyzed by DEQ as to how, if and whether DNRC will or can issue the water use permits requested and demonstrated by applicant as necessary for this Opencut Mining permit.

85. Therefore, DEQ and the Applicant have failed to meet its obligation to prove that it will and can – as a matter of law – comply with state law under the Water Use Act.

COUNT SIX – DECLARATORY JUDGMENT THAT PERMIT 3561 IS NOT FINAL AND THERFORE NOT ACTIONABLE FOR MINING.

86. On June 14, 2024, BER Hearing Examiner Terisa Oomens issued an order GRANTING Protect the Clearwater's Motion *in Limine* in the matter of BER 2023-03 OC.

87. In that Order, Hearing Examiner Oomens held "BER is building the final agency action record during the contested case proceeding. *See* Mont. Code Ann. § 2-4-614(1). If DEQ's permit decision does not get appealed to BER, it becomes final after the time to appeal passes. If DEQ's permit decision is appealed to BER, then BER's decision becomes the final agency decision." Order at pages 2-3.

88. Therefore, based on this ruling, GCCC requests a declaration from BER that until there is a decision from BER in this matter, there has been no final agency action

on the permit and the permit is therefore not valid for the purposes of mining authorized therein.

PRAYER FOR RELIEF

Gallatin County Community Coalition 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 approval of Permit 3561 as unlawful, and *void ab initio.*
3. That pursuant to its Hearing Examiner's previous orders, that BER declare that during the term of this appeal, no mining be allowed to commence or be carried out pursuant to Permit 3561.
4. That the BER award Petitioner its attorney's fees pursuant to the Private Attorney General doctrine.
5. That the BER award Petitioner its costs.
6. That the BER grant such other and further relief as it deems equitable and appropriate.

Dated this 26th day of July 2024.

FERGUSON & COPPES, PLLC
A Natural Resource Law Firm

/s/ Graham J. Coppes
By: Graham J. Coppes
By: Emily F. Wilmott
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of July 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
ber@mt.gov
(emailed)

By Graham J. Coppes

Montana Code Annotated 2023

TITLE 75. ENVIRONMENTAL PROTECTION
CHAPTER 1. ENVIRONMENTAL POLICY AND PROTECTION GENERALLY
Part 1. General Provisions

Short Title

75-1-101. Short title. Parts 1 through 3 may be cited as the "Montana Environmental Policy Act".

History: En. Sec. 1, Ch. 238, L. 1971; R.C.M. 1947, 69-6501.

Montana Code Annotated 2023

TITLE 75. ENVIRONMENTAL PROTECTION
CHAPTER 1. ENVIRONMENTAL POLICY AND PROTECTION GENERALLY
Part 1. General Provisions

Intent -- Purpose

75-1-102. Intent -- purpose. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that:

(a) environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations; and

(b) the public is informed of the anticipated impacts in Montana of potential state actions.

(2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

(3) (a) The purpose of requiring an environmental assessment and an environmental impact statement under part 2 of this chapter is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies.

(b) Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to **75-1-201**(4)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.

History: En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502; amd. Sec. 1, Ch. 352, L. 1995; amd. Sec. 5, Ch. 361, L. 2003; amd. Sec. 1, Ch. 396, L. 2011; amd. Sec. 35, Ch. 55, L. 2015.

Montana Code Annotated 2023

TITLE 75. ENVIRONMENTAL PROTECTION
CHAPTER 1. ENVIRONMENTAL POLICY AND PROTECTION GENERALLY
Part 1. General Provisions

Policy

75-1-103. Policy. (1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) protect the right to use and enjoy private property free of undue government regulation;

(e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;

(f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and

(g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment. The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare.

History: En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503; amd. Sec. 2, Ch. 352, L. 1995; amd. Sec. 6, Ch. 361, L. 2003.

Montana Code Annotated 2023

TITLE 75. ENVIRONMENTAL PROTECTION
CHAPTER 1. ENVIRONMENTAL POLICY AND PROTECTION GENERALLY
Part 1. General Provisions

Policies And Goals Supplementary

75-1-105. Policies and goals supplementary. The policies and goals set forth in parts 1 through 3 are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

History: En. Sec. 7, Ch. 238, L. 1971; R.C.M. 1947, 69-6507.

DEQ Montana Department of Environmental Quality

I. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

2. Non-enforcement cases assigned to a Hearing Examiner.

a. In the Matter of Notice of Appeal and Request for Hearing by MEIC and Sierra Club Regarding Approval of Surface Mining Permit No. C2011003F for Western Energy Company, BER 2019-05 OC.

In August, 2019, the BER appointed ALS to preside over the contested case. A four-day hearing took place on June 2-4 and 21, 2021. On December 17, 2021, DEQ filed a Motion for Stay Pending Appeal of the AM4 Decision to the Montana Supreme Court and a Brief in Support. This matter was stayed pending the outcome of the Montana Supreme Court's ruling regarding the AM4 decision. On November 22, 2023, DEQ submitted a Status Report indicating that the Montana Supreme Court has issued an Opinion in the AM4 matter. On March 8, 2024, the Petitioners filed an Unopposed Motion to Lift Stay and Set a Briefing Deadline. The Hearing Examiner issued an Order Granting Motion to Lift Stay and Setting Briefing Scheduling on March 21, 2024. On May 3, 2024, DEQ and Westmoreland filed their Joint Objections to Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners filed their Response to WRM's and DEQ's Proposed Findings of Fact and Conclusions of Law. The Hearing Examiner is drafting a Proposed Findings of Fact and Conclusions of Law.

g. In the Matter of Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473, BER 2023-03 OC.

On May 26, 2023, Protect the Clearwater and Libby Langston, Gayla Nicholson, Jeff Dickerson and Terry Martin Denning, individually filed a formal appeal challenging the Department of Environmental Quality's approval of LHC, Inc.'s ("LHC") Opencut Mining Permit #3473 for the Clearwater State ("Clearwater") Site near Seeley Lake, Montana in Missoula County. The Board assigned this matter to ALSB at the June 9, 2023, meeting.

On March 8, 2024, the Hearing Examiner issued a Proposed Findings of Fact and Conclusions of Law and an Order on Exceptions. DEQ and Petitioners filed their Exceptions to Proposed Findings of Fact and Conclusions of Law on March 22, 2024. On May 1, 2024, the Board remanded this matter back to the Hearing Examiner for further fact finding.

On August 2, 2024, all parties filed their second Motions for Summary Judgment and Statements of Disputed Facts.

Sample Briefing Item Summary

b. In the Matter of Notice of Appeal and Request for Hearing by MEIC and Sierra Club Regarding Approval of Surface Mining Permit No. C2011003F for Western Energy Company, BER 2019-05 OC.

Date Filed: May 31, 2019

Major Actions: The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, former Hearing Officer Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. The case proceeded to a hearing on the one remaining issue. A four-day hearing took place on June 2-4 and 21, 2021. On December 17, 2021, DEQ filed a Motion for Stay Pending Appeal of the AM4 Decision to the Montana Supreme Court and a Brief in Support. This matter was stayed pending the outcome of the Montana Supreme Court's ruling regarding the AM4 decision. On November 22, 2023, DEQ submitted a Status Report indicating that the Montana Supreme Court has issued an Opinion in the AM4 matter. The Hearing Examiner issued an Order Granting Motion to Lift Stay and Setting Briefing Scheduling on March 21, 2024. On May 3, 2024, DEQ and Westmoreland filed their Joint Objections to Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners filed their Response to WRM's and DEQ's Proposed Findings of Fact and Conclusions of Law.

Current Status: Proposed FOFCOL by Hearing Examiner in progress

Projected Board Action: December 2024

g. In the Matter of Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473, BER 2023-03 OC.

Date Filed: May 26, 2023

Major Actions: Petitioners filed an Opposed Motion to Stay Proceedings on September 25, 2023, with a Brief in Support. On October 20, 2023, the Hearing Examiner issued an Order on Motion to Stay denying the Motion to Stay. On December 1, 2023, the Petitioners filed a Motion in Limine and to Limit Scope of Hearing, as well as a Motion for Summary Judgment. DEQ filed their Motion for Summary Judgment with Brief in Support and a Statement of Undisputed Facts on December 1, 2023. On March 8, 2024, the Hearing Examiner issued a Proposed Findings of Fact and Conclusions of Law and an Order on Exceptions. DEQ and Petitioners filed their Exceptions to Proposed Findings of Fact and Conclusions of Law on March 22, 2024. On April 5, 2024, the parties filed their Responses to the respective Exceptions. On May 1, 2024, the Board remanded this matter back to the Hearing Examiner for further fact finding. On June 14, 2024, the Hearing Examiner issued an Order on Motion in Limine. On June 24, 2024, PTC filed Petitioner's Motion to Certify Order on Motion in Limine to Board of Environmental Review. On July 5, 2024, the Hearing Examiner issued an Order denying Certification. On August 2, 2024, all parties filed their second Motions for Summary Judgment and Statements of Disputed Facts.

Current status: Second motions for Summary Judgment are being briefed

Projected Board Action: Possibly Summary Judgment in December 2024