

**BOARD OF ENVIRONMENTAL REVIEW
AUGUST 22, 2025**

AGENDA TABLE OF CONTENTS

AGENDA

ADMINISTRATIVE ITEMS

I.A.1. JUNE 20 MEETING MINUTES pg 001

BRIEFING ITEMS

II.A.1. CONTESTED CASE UPDATES
II.A.2. NON-ENFORCEMENT CASE UPDATES
II.A.3. CONTESTED CASES NOT ASSIGNED TO A HEARING EXAMINER

ACTION ITEMS

III.a. Retain Dana Hupp as Interim General Counsel pg 005

III.b. BER 2019-06 WQ pg 008
The Notice of Appeal and Request for Hearing by Westmoreland Absaloka Mining, LLC
regarding Renewal of MPDES Permit No. MT0021229

GENERAL PUBLIC COMMENT

BOARD CHAIR UPDATE

V.a. FY25 Legal Cost Summary Update pg 040

V.b. Hearing Examiner Status



**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

JUNE 20, 2025

Call to Order

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

Attendance

Board Members Present

Chair Dave Simpson; Board Members Amanda Knuteson, Jennifer Rankosky and Joe Smith.

Vice Chair Stacy Aguirre and Board Member Julia Altemus were not in attendance.

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 Director: Sonja Nowakowski

DEQ Legal: Catherine Armstrong, Kirsten Bowers, Sarah Christopherson, Sam King, Kurt Moser, Abigail Sherwood, Nick Whitaker, and Kaitlin Whitfield

DEQ Air, Energy and Mining: Whitney Bausch, Adam Bradley, Josh Bridgeman, Julian Calabrese, Beverly Faraday, Mike Glenn, Mitch Hoffman, Emily Lodman, Alex Mackey, Brian Schrage, Bailey Tasker, Madeline VerWey, and Dan Walsh

Other Parties Present

Laurie Crutcher — Crutcher Court Reporting

Elena Hagen — Montana DOJ Agency Legal Services Bureau

Mark Stermitz and Vicki Marquis — Crowley Fleck

David (Kim) Wilson — Morrison Sherwood Wilson & Deola, PLLP

Todd Briggs — Westmoreland

David Smith — MT Contractors Association

Frank Tabish and Jeff — LHC MT

Sabrina Temple — Decker Coal Company

Samuel Yemington — Holland & Hart

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the April 11, 2025, Meeting Minutes and the April 25, 2025, Meeting Minutes.

Board member Smith moved to APPROVE the April 11, 2025, meeting minutes and the April 25, 2025, meeting minutes. Board member Rankosky SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

- a. Chair Simpson, Board Counsel Oomens, Sam King of DEQ, and Samuel Yemington of Holland & Hart offered clarification regarding cases.

Chair Simpson spoke about six cases that were assigned to Rob Cameron as Hearing Examiner, by former Chair Steve Ruffato. Three cases have concluded but three remain undecided – BER 2019-05 OC (Western Energy Area F), BER 2022-04 OC (Valley Garden Land & Cattle) and BER 2022-05 SM (Rosebud Mine Area B Amendment 5). Rob Cameron has notified the Board that he will not be able to continue as Hearing Examiner for these three cases. Chair Simpson asked Board Attorney Oomens for her recommendation for how the Board should handle this.

Board Counsel Oomens reviewed the status of the three cases and recommended that the Board assume jurisdiction of these cases.

Kim Wilson, counsel for Valley Garden Land & Cattle, said that the status of this case as described in the agenda is not correct. Motions in Limine are still pending. Sam King of DEQ concurred with Mr. Wilson's rendition of the procedural nature of the case.

Board member Knuteson requested hearing transcripts for BER 2019-05 OC (Western Energy Area F) and BER 2022-05 SM (Rosebud Mine Area B Amendment 5). Board Attorney Oomens said that the Board Secretary would get information to Board members, so they would have sufficient time for review. Sam Yemington of Holland & Hart, representing Westmoreland in both cases, noted that the hearing transcripts from the Westmoreland cases are quite considerable.

Board member Rankosky motioned for the Board to ASSUME jurisdiction of BER 2019-05 OC (Western Energy Area F), BER 2022-04 OC (Valley Garden Land & Cattle) and BER 2022-05 SM (Rosebud Mine Area B Amendment 5). Board member Smith SECONDED. The motion PASSED unanimously.

Chair Simpson had questions regarding BER 2019-06 WQ (Alpine Pacific Utilities). Kirsten Bowers of DEQ gave an update.

Chair Simpson, Kirsten Bowers of DEQ, and Samuel Yemington of Westmoreland offered clarification regarding BER 2022-06 WQ (Westmoreland Rosebud).

The Board did not have any additional questions.

III. ACTION ITEMS

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

Chair Simpson reviewed the history of the case, and noted that the parties have agreed to waive exceptions and oral argument. The Board will proceed with deliberations regarding the new and revised Hearing Examiner's Proposed Findings of Fact and Conclusion of Law. Discussion ensued.

Board member Smith moved to APPROVE the Hearing Examiner's Findings of Fact and Conclusions of Law. Board member Rankosky SECONDED. Discussion ensued. The motion PASSED unanimously.

- b. **In the Matter of: Decker Coal Company's Request for Hearing Regarding Permit C1987001C (West Decker Mine), BER 2025-01 SM.**

Chair Simpson said that the Board was scheduled to hear oral argument on Decker's request for hearing to revise the permit for West Decker. Decker Coal Company recently filed an unopposed Motion to Stay Proceedings until December. Chair Simpson asked counsel for Decker Coal to give an update to the Board. Ms. Marquis spoke about how Decker Coal is working with DEQ towards a resolution, and Decker Coal will provide a status update to the Board in advance of the December 2025 meeting. She also gave an update for East Decker. Sam King of DEQ concurred with Ms. Marquis' remarks.

Board member Rankosky moved to STAY BER 2025-01 SM until the December 2025 Board meeting. Board member Knuteson SECONDED. The motion PASSED unanimously.

- c. **In the Matter of: Decker Coal Company's Request for Hearing Regarding Permit C1983007 (East Decker Mine), BER 2025-02 SM.**

Board member Rankosky moved to STAY BER 2025-02 SM until the December 2025 Board meeting. Board member Knuteson SECONDED. The motion PASSED unanimously.

IV. NEW CONTESTED CASE

- a. **In the Matter of: Yogo Sapphire Group, LLC Exploration License No. 00886, BER 2025-03 HRM.**

Chair Simpson spoke about the new contested case, and Nick Whitaker of DEQ gave an update. The matter has been resolved by the parties.

Board member Smith motioned to GRANT dismissal of this case. Board member Rankosky SECONDED. The motion PASSED unanimously.

V. GENERAL PUBLIC COMMENT

No public comment was given.

VI. BOARD CHAIR UPDATE

Chair Simpson spoke regarding the status of the litigation in progress with the Selenium case (CDV 2023-21), as the briefing has concluded. Oral arguments are scheduled for July 22 in Helena at 9:00 a.m.

He also mentioned that Board Attorney Oomens is leaving Agency Legal Services. Chair Simpson thanked her for her work with the Board. Currently Agency Legal Services is unable to assign cases to anyone else at the agency, as they are short staffed. The Board will need to obtain legal counsel. Chair Simpson has spoken with Board Liaison, Deputy Director Fehr, and they will be discussing this matter in greater detail.

VII. ADJOURNMENT

Board member Rankosky MOVED to adjourn the Board Meeting; Board member Smith SECONDED. The motion PASSED unanimously. The meeting was adjourned at 10:13 A.M.

Board of Environmental Review June 20, 2025, minutes approved:

DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE



WORDEN
THANE P.C.
ATTORNEYS AT LAW

Established in 1924

Donovan Worden, Sr.
(1892 – 1967)
Donovan Worden, Jr.
(1918 – 2001)
Jeremy G. Thane
(1927 – 2016)

Ronald A. Bender
Martin S. King
Reid J. Perkins
William E. McCarthy
Amy M. Scott Smith
Chris A. Johnson (MT,WA)
Dana L. Hupp
Martin Rogers

Brand G. Boyar
Natalie L. Black
Elizabeth W. Erickson
Dillon Kato
Erika D. Colstad
Noah P. Hill
Emily Bruner
Erika L. Johnson
Jamie B. Ross (CA)

August 8, 2025

Via Email Only

Mr. David Simpson
Chairman
Montana Board of Environmental Review
dave.simpson375@gmail.com

Re: Montana Board of Environmental Review
Letter of Interest - Interim Legal Counsel

Dear Chairman Simpson:

This letter confirms my interest in serving as interim legal counsel for the Montana Board of Environmental Review. Attached is a summary of my prior professional experience for your review and records.

It is my understanding that the scope of the interim legal counsel position would include, but not be limited to, attending Board meetings, drafting Board orders, and providing general legal advice as needed.

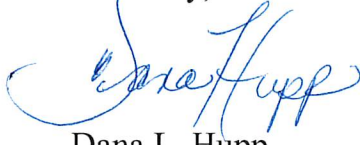
My standard new client hourly rate is \$350.00. Given the volume of work Worden Thane anticipates I would be handling on behalf of the Board and because the client is the State of Montana, the firm is agreeable to reducing my current hourly rate for the Board to \$250.00 per hour. I anticipate utilizing paralegals and associates on Board matters to help reduce costs. Their hourly rates range from \$100 to \$250 per hour. The Board is not charged for my legal assistant's time.

I understand that the term of the parties' agreement would be for one year, renewable upon the agreement of both parties, and that I may not be acting as interim legal counsel for the Board for the entirety of the one-year period.

Mr. David Simpson
Montana Board of Environmental Review
August 8, 2025
Page 2

Thank you for considering me for this position. I would be honored to continue providing legal services to the Board. Please feel free to contact me if you have questions or would like to discuss the position further.

Sincerely,



Dana L. Hupp

I agree with the above terms and conditions:

Chairman Simpson, Montana Board of Environmental Review

DANA L. HUPP
Worden Thane P.C.
Missoula, Montana

PROFESSIONAL EXPERIENCE

Worden Thane P.C., Missoula, MT

Shareholder and Member of Management Committee, December 2015-Present

- Practice areas: commercial litigation and business advice, professional malpractice defense, and natural resource and environmental regulatory and litigation matters.
- Assist business clients in applying strategic, long-term thinking to meet their goals both efficiently and cost-effectively.
- Expertise in electronic discovery, including working with public entities, Fortune 500 companies, small businesses, and individuals.

Gough, Shanahan, Johnson & Waterman, PLLP, Helena, MT

Partner 2006-2015; Associate May 2002-2005

- Practice areas: commercial litigation, insurance defense, professional malpractice defense, natural resource and environmental regulatory and litigation matters, and electronic discovery.

Montana Eighth Judicial District Court, Great Falls, MT

Law Clerk to Judge Kenneth Neil, August 2000-April 2002

- Advised, consulted with, and reported to judges on matters related to civil and criminal matters.
- Researched and analyzed a diverse range of legal issues and drafted memoranda and judicial orders.
- Mediated civil and family law matters and conducted special master hearings.

United States Department of the Interior, Office of the Solicitor, Portland, OR

Law Clerk, Natural Resources Division, Pacific Northwest Region, 1998-1999

EDUCATION

Northwestern School of Law of Lewis and Clark College, Portland, OR

Juris Doctorate and Environmental and Natural Resources Certificate, May 2000

Miami University, Oxford, OH

B.A. Political Science, May 1997

Dolibois European Center, Luxembourg, 1995

CURRENT COMMUNITY ACTIVITIES, MEMBERSHIPS, AND HONORS

- Montana State Bar, Trustee
- Montana State Bar Technology Committee, Member and Past Chair
- Montana State Bar Professionalism Committee, Member
- Watson Children's Shelter, Member and Past President
- Missoula Chamber of Commerce Ambassadors, Member
- Washington Middle School Parent Teacher Association, President
- Litigation Counsel of America, Fellow

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Electronically Filed with the
Montana Board of Environmental Review
7/1/25 at 4:18 PM
By: Sandy Moisey Scherer
Docket No: BER 2015-06 WQ

Attorneys for Westmoreland Absaloka Mining, LLC

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

IN THE MATTER OF:

THE NOTICE OF APPEAL AND
REQUEST FOR HEARING BY
WESTMORELAND ABSALOKA
MINING, LLC REGARDING RENEWAL
OF MPDES PERMIT NO. MT0021229

Case No.: BER 2015-06-WQ

**NOTICE OF APPEAL AND REQUEST
FOR HEARING**

Pursuant to Montana Code Annotated § 75-5-403(2), Administrative Rules of Montana 17.30.1370(4), and Board Order dated November 16, 2020 (Doc. 027),¹ Westmoreland Absaloka Mining, LLC (“Westmoreland”) appeals the Department of Environmental Quality’s (“DEQ” or the “Department”) renewal of Montana Pollutant Discharge Elimination System (“MPDES”) Permit No. MT0021229 (the “2025 Renewal”) and requests a hearing before the Board of Environmental Review (“Board”). The 2025 Renewal, DEQ’s 2025 Responses to Comments, and the final 2025 Environmental Assessment are attached as Exhibits A, B, and C, respectively. Westmoreland’s timely comments to the 2025 Draft Renewal are attached as Exhibit D. DEQ’s

¹ Documents filed with the Board in this matter are referenced by the document number provided on the Pleading Docket.

2025 Draft Renewal, 2025 Fact Sheet, and 2025 Draft Environmental Assessment are attached as Exhibits E, F, and G, respectively.

I. INTRODUCTION

The Board has authority to hear contested case appeals of DEQ's MPDES permitting decisions, such that the Board may affirm, modify, or reverse DEQ's permitting action. § 75-5-403(2)(a), MCA. The "contested case provisions of the Montana Administrative Procedure Act" apply to this appeal. *Id.* Additionally, a 2020 Settlement Agreement between the parties and a November 16, 2020 Board Order provide that additional administrative appeals related to the 2025 Renewal will proceed within this contested case. Doc. 025 (Joint Motion for Remand and For Suspension of Proceedings (September 30, 2020)), Ex. A, p. 2, ¶ 7; Doc. 027 (Order Granting Remand (November 16, 2020)), p. 2.

Westmoreland and DEQ have communicated multiple times regarding the 2025 Renewal and prior versions of Permit No. MT0021229. DEQ publicly noticed a draft renewal on September 3, 2024, including a draft permit (the "2024 Draft Renewal"), fact sheet (the "2024 Fact Sheet") and environmental assessment (the "2024 Draft EA"). Exhibits I, J, and K. On October 2, 2024, Westmoreland timely commented on the 2024 Draft Renewal, 2024 Fact Sheet, and 2024 Draft EA. Exhibit H. As a result of comments received on the 2024 Draft Renewal, DEQ revised the draft and, on February 3, 2025, publicly noticed a new draft renewal (the "2025 Draft Renewal"), fact sheet (the "2025 Fact Sheet"), and draft environmental assessment (the "2025 draft EA"). Exhibits E, F, and G. On March 6, 2025, Westmoreland timely commented on the 2025 Draft Renewal, 2025 Fact Sheet, and 2025 Draft EA. Exhibit D. On June 3, 2025, DEQ mailed its final decision, the 2025 Renewal, to Westmoreland by U.S. Postal Service, which Westmoreland received on June 9, 2025. Westmoreland now timely appeals the 2025 Renewal.

II. BACKGROUND

Westmoreland owns and operates the Absaloka Mine, a surface coal mine located near Hardin, Montana. Hardin is a rural community of approximately 3,300 people located just outside the Crow Indian Reservation in south-central Montana. The Absaloka Mine was opened in 1974 and has been in operation since then. As noted in the most recent Environmental Impact Statement for the mine's South Extension onto the Crow Indian Reservation, "[t]he Absaloka Mine provides substantial benefits to the Crow Tribe in several ways," including royalty payments, production taxes, employment, and electric power generation. The Absaloka Mine also benefits the State of Montana by paying Montana severance and gross proceeds taxes. U.S. Dept. of Interior and Montana DEQ, *Final Environmental Impact Statement*, p. ES5 (October 2008).

Permit No. MT0021229 was first issued in 2000 and was renewed in 2005, 2010, 2015, and most recently, 2025. Most of the area governed by the 2025 Renewal is in reclamation and not subject to active mining. Many of the sediment ponds, containment structures, and other wastewater processing elements at the mine have been removed, filled in, and/or reclaimed. All of the outfalls permitted in both the 2015 Renewal and the 2025 Renewal discharge to unnamed hydrologically ephemeral tributaries. See Exhibit F (2025 Fact Sheet), Table 2 and Appendix II (map); Exhibit E (2025 Draft Renewal), Table 1; Exhibit M (2015 Renewal), Table 1; Exhibit L (MPDES Application Update (July 22, 2020)), pdf pp. 6, 14 (map).

The 2015 Renewal permitted discharges only to unnamed hydrologically ephemeral tributaries of Sarpy Creek, Middle Fork Sarpy Creek and East Fork Sarpy Creek. However, for the first time, DEQ applied numeric water quality standards for iron (found in Circular DEQ-7) to Outfalls 013, 015, 016, 017, and 018, which discharge to hydrologically ephemeral tributaries

of Middle Fork Sarpy Creek, which is also hydrologically ephemeral. Doc. 001, Notice of Appeal (September 29, 2015); Exhibit M (2015 Renewal), pp. 5-6 (Table 4); Exhibit N (2015 Fact Sheet), p. 20 (“Middle Fork Sarpy Creek is predominantly ephemeral; it flows only in response to precipitation or snowmelt events,” flow data “generally indicate a dry channel year-round with ephemeral flows occurring rarely and only after significant precipitation or snow melt,” and “[t]he majority of years reviewed record zero flow year-round”). DEQ applied the numeric water quality standards from Circular DEQ-7 based on its perception of “two short segments of Middle Fork Sarpy Creek that are wet for much of the year due to groundwater expression.” Ex. N, p. 20 and Appendix III (aerial photo with markings added to denote “approximate intermittent segment locations”). DEQ did not note or measure any flow of groundwater into Middle Fork Sarpy Creek or any flow within Middle Fork Sarpy Creek.

Westmoreland disagreed and appealed the 2015 Renewal, which initiated this contested case. Doc. 001. Westmoreland specifically appealed DEQ’s use of the numeric water quality standards found in Circular DEQ-7 to regulate discharges to a hydrologically ephemeral tributary of a hydrologically ephemeral stream. Doc. 018 (Westmoreland Resources, Inc.’s More Definitive and Detailed Statement of Issues on Appeal (March 2, 2020)).

Westmoreland’s appeal was stayed pending resolution of a judicial challenge to DEQ’s interpretation of ARM 17.30.637(4) as applied to hydrologically ephemeral streams. Doc. 007 (Joint Motion to Stay Proceeding (November 21, 2016)). In early 2020, Westmoreland timely applied for renewal of the 2015 Renewal, paying a total of \$12,000 in fees for DEQ’s review and processing of the renewal application. Exhibit L. Later in 2020, Westmoreland entered into a settlement agreement with DEQ following the Montana Supreme Court’s decision, which affirmed DEQ’s interpretation of ARM 17.30.6237(4) as exempting “certain hydrologically

ephemeral waters” from the numeric water quality standards found in Circular DEQ-7. *Montana Environmental Information Center v. Department of Environmental Quality*, 2019 MT 213, ¶ 56. In the Settlement Agreement, DEQ and Westmoreland agreed that the Board should remand this matter “to DEQ to clarify the record on the hydrologic status of the receiving waters.” Doc. 025 (Joint Motion for Remand and For Suspension of Proceedings (September 30, 2020)), Ex. A. On November 16, 2020, the Board granted the parties’ Joint Motion and ordered that “this contested case proceeding is stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following this remand.” Doc. 027.

Westmoreland continued to work and cooperate with DEQ, providing additional information upon DEQ’s requests over the next four years as DEQ prepared the 2025 Renewal. In September 2024, DEQ issued a draft Renewal, accompanied by a Fact Sheet and draft Environmental Assessment. Exhibits I, J, and K. The 2024 Draft Renewal and 2024 Fact Sheet carried over the challenged 2015 Renewal’s language and use of numeric water quality standards from Circular DEQ-7 to regulate discharges to ephemeral tributaries of Middle Fork Sarpy Creek based on two allegedly intermittent segments within the ephemeral Middle Fork Sarpy Creek. *Compare* Exhibit N (2015 Fact Sheet), pp. 20-21 *with* Exhibit J (2024 Fact Sheet), p. 15.

Westmoreland timely submitted comments to the 2024 Draft Renewal, noting that “[a]ll segments of Middle Fork of Sarpy Creek are ephemeral.” Exhibit H, p. 4. DEQ then issued its second draft of the 2025 Renewal in February 2025, also accompanied by a Fact Sheet and draft Environmental Assessment. Exhibits E, F, and G. Again, DEQ carried over language from the challenged 2015 Renewal and applied the numeric water quality standards from Circular DEQ-7 based the same two short segments of Middle Fork Sarpy Creek alleged to be intermittent. *Compare* Exhibit N (2015 Fact Sheet), pp. 20-21 *with* Exhibit F (2025 Fact Sheet), p. 15-16.

Westmoreland again timely submitted comments, providing additional evidence that Middle Fork Sarpy Creek is ephemeral with no intermittent segments. Exhibit D, pp. 5-6. Westmoreland also commented that there was no evidence or indication of toxicity and Whole Effluent Toxicity testing should not be required. Exhibit D, p. 8. DEQ responded to Westmoreland's comments and issued its final decision on the 2025 Renewal in June 2025. Exhibit B. Regarding Middle Fork Sarpy Creek, DEQ agreed that "no reasonable potential analysis was performed" that would support applying numeric water quality standards from Circular DEQ-7, but DEQ applied the numeric iron water quality standard anyway. Exhibit B, p. 3-4 (Resp. to Cmt. 4). DEQ's Responses to Comments did not address the additional information provided by Westmoreland and simply carried over (again) information from the challenged 2015 Renewal and Fact Sheet, which did not become effective due to this pending contested case. *Compare* Exhibit N (2015 Fact Sheet), p.20 *with* Exhibit B (DEQ's 2025 Responses to Comments), p. 3 (Resp. to Cmt. 3). Regarding Whole Effluent Toxicity testing, DEQ alleged that "[a]cute WET testing is necessary for characterization of the effluent." Exhibit B, p. 11 (Resp. to Cmt. 9).

Westmoreland now appeals to the Board for a hearing and to modify portions of DEQ's final decision on the 2025 Renewal, including DEQ's unsupported decisions regarding the hydrologically ephemeral Middle Fork Sarpy Creek and Whole Effluent Toxicity testing.

III. STATEMENT OF ISSUES

Issue 1: Improper Characterization of Middle Fork Sarpy Creek

DEQ improperly characterized Middle Fork Sarpy Creek as an intermittent stream and improperly applied the numeric water quality standards for iron found in Circular DEQ-7. Westmoreland only discharges to hydrologically ephemeral tributaries of Middle Fork Sarpy

Creek, which is also hydrologically ephemeral. An ephemeral stream, defined at ARM 17.30.602(10), is a “stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table.”² In contrast, ARM 17.30.602(13) defines an intermittent stream as a “stream or reach of a stream that is below the local water table for at least some part of the year, and [which] obtains its flow from both surface run-off and ground water discharge.”³ Thus, to conclude a stream is intermittent requires a determination of where the stream exists in relation to the local water table and confirmation that the stream receives flow from ground water.

Westmoreland’s written comments provided information supporting its conclusion that the segments of Middle Fork Sarpy Creek which DEQ alleged are intermittent are actually ephemeral – just like the rest of Middle Fork Sarpy Creek. Studies and surveys of these segments showed no visible flow and no apparent bed, bank, or channel thalweg.⁴ Exhibit D, p. 6. At most, the segments are near a spring that, at times, contributes some water to the area, but even so, the area remains dry, moist, or muddy, with no flow. *Id.* These characteristics do not align with an intermittent characterization and instead, indicate that those segments, like the rest of Middle Fork Sarpy Creek, are ephemeral. DEQ’s carry-over of language from the 2015 Permit disregards or ignores this information and indicates that “the record on the hydrologic status of the receiving waters” has not been clarified as agreed in the parties’ September 2020 Settlement Agreement. Doc. 25, Ex. A, p. 1.

² The EPA’s definition of ephemeral streams is also similar: “Rain-dependent streams (ephemeral) flow only after precipitation. Runoff from rainfall is the primary source of water for these streams.”

³ The EPA’s definition of intermittent streams is similar, identifying them as streams which have “flow during certain times of the year when smaller upstream waters are flowing and when groundwater provides enough water for stream flow.”

⁴ A thalweg is “the line or curve of lowest elevation within a valley or watercourse.” Wikipedia, <https://en.wikipedia.org/wiki/Thalweg> (accessed June 30, 2025).

Additionally, the entire length of Middle Fork Sarpy Creek should be reviewed when characterizing its hydrologic condition. Guidance from the U.S. Army Corps of Engineers (“USACE”) instructs that “the flow regime that best characterizes the *entire tributary* should be used” when characterizing waterbodies for Clean Water Act purposes. USACE, *CWA Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (2008), n. 24 (emphasis added). Because MPDES permits are issued pursuant to the Clean Water Act, the USACE Guidance applies here. Therefore, even if the short segments of Middle Fork Sarpy Creek at issue here could be considered intermittent on their own (which they cannot, but assuming *arguendo*, they could), no one disputes that Middle Fork Sarpy Creek, as a tributary to Sarpy Creek, is ephemeral. Exhibit F, pp. 15, 18 (“the stream assessment unit is predominantly ephemeral and does not flow as a unit for more than 270 days during most years”). As USACE instructs, the “stream assessment unit,” which is the “entire tributary” should be considered when making Clean Water Act determinations, including MPDES permit decisions. Middle Fork Sarpy Creek should be characterized as ephemeral in the 2025 Renewal, which results in imposition of narrative water quality standards instead of the numeric water quality standards from Circular DEQ-7. ARM 17.30.637(4); *MEIC v. DEQ*, 2019 MT 213, ¶ 56.

Additionally, even if the iron standard from Circular DEQ-7 could apply, there must be a Reasonable Potential Analysis showing that the discharge has reasonable potential to cause or contribute to an exceedance of the iron standard. Here, no Reasonable Potential Analysis was completed; therefore, nothing supports imposing the iron standard from Circular DEQ-7 to Westmoreland’s discharges. Exhibit B, pp. 3-4 (Resp. To Cmt. 4).

Furthermore, imposition of an iron standard in terms of total iron instead of dissolved iron is contrary to the EPA’s recommended water quality criteria. As recognized by EPA, “[t]he

dissolved metal concentration is generally a better approximation of the concentration that is bioavailable to aquatic organisms.” EPA, *Factsheet on Water Quality Parameters, Metals* (December 2021); *see also* EPA Memo, *Subject: Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria* (October 1, 1983) (“the use of dissolved metal to set and measure compliance with water quality standards is the recommended approach, because dissolved metal more closely approximates the bioavailable fraction of metal in the water column than does total recoverable metal”). Therefore, to ensure protection of beneficial uses in non-ephemeral streams, the standard for iron and any derived MPDES permit limit should be expressed in terms of dissolved iron rather than total iron.

Issue 2: Improper Inclusion of Monitoring Requirements for Whole Effluent Toxicity

DEQ improperly included monitoring requirements for Whole Effluent Toxicity (WET) in the 2025 Renewal, based on an alleged need to characterize the effluent. Exhibit A, p. 4, Table 2 and p. 7, Table 5; Exhibit B, p. 11 (Resp. to Cmt. 9). This permit has been in effect since 2000; therefore, 25 years’ worth of data exists for use in characterizing the effluent. No significant changes to the operation have occurred that would support a WET testing requirement, and there is no indication that toxicity exists in the discharge. Exhibit D, p. 8; Exhibit L, pdf p. 291, 293 (showing no toxicity present in a planned discharge from Outfall 001). WET testing requires advance notice and planning with the laboratory conducting the analysis to ensure the required species are available for the analysis. This is nearly impossible for precipitation-driven discharges, which cannot be planned sufficiently in advance to allow for proper coordination with the laboratory. Additionally, while the 2025 Renewal, 2025 Fact Sheet, and 2025 Responses to Comments indicate that acute WET testing is required only at “coal preparation plants and coal preparation plant associated areas” such as Outfall 001, the 2025

Permit seems to unnecessarily expand the testing to “all outfalls” if acute toxicity is detected.
Exhibit A, p. 4, Table 2, n. 2; p. 7, Table 5, n. 2.

IV. CONCLUSION

For the reasons noted above for Issue 1, as well as other reasons that will be proven during the course of this contested case, the 2025 Renewal must either be modified by the Board or remanded to DEQ with instructions to regulate discharges to ephemeral tributaries of an ephemeral stream, such as Middle Fork Sarpy Creek, pursuant to narrative water quality standards, not “the specific water quality standards of ARM 17.30.620 through 17.30.629,” including the numeric water quality standard for iron found in Circular DEQ-7. ARM 17.30.637(4); *MEIC v. DEQ*, 2019 MT 213, ¶ 56. Additionally, no iron water quality standard can be imposed because no Reasonable Potential Analysis has been completed to support such imposition. However, should imposition of the numeric iron water quality standard be upheld, the 2025 Renewal should be modified to include a permit limit in terms of dissolved iron, not total iron.

For the reasons noted above for Issue 2, as well as other reasons that will be proven during the course of this contested case, the 2025 Renewal must either be modified by the Board or remanded to DEQ with instructions to remove WET testing requirements.

Dated this 1st day of July, 2025.

/s/ Victoria A. Marquis
Victoria A. Marquis
Luke P. Poteat
CROWLEY FLECK PLLP
P. O. Box 2529
Billings, MT 59103-2529

Attorneys for Westmoreland Absaloka Mining, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 1st day of July, 2025:

<input type="checkbox"/> U.S. Mail	Sandy Moisey Scherer, Board Secretary
<input type="checkbox"/> FedEx	Board of Environmental Review
<input type="checkbox"/> Hand-Delivery	1520 E. Sixth Avenue
<input checked="" type="checkbox"/> Email	P.O. Box 200901
<input checked="" type="checkbox"/> State File Transfer	Helena, MT 59620-0901
	deqbersecretary@mt.gov
<input type="checkbox"/> U.S. Mail	Kirsten Bowers
<input type="checkbox"/> FedEx	Montana Department of Environmental Quality
<input type="checkbox"/> Hand-Delivery	1520 East Sixth Avenue
<input checked="" type="checkbox"/> Email	P.O. Box 200901
<input checked="" type="checkbox"/> State File Transfer	Helena, MT 59620-0901
	kbowers@mt.gov

/s/ Victoria A. Marquis
VICTORIA A. MARQUIS
LUKE P. POTEAT

List of Exhibits

<u>Exhibit</u>	<u>Document</u>
A	2025 Renewal
B	DEQ's 2025 Responses to Comments
C	DEQ's Final 2025 Environmental Assessment
D	Westmoreland's Comments to the 2025 Draft Renewal
E	2025 Draft Renewal
F	2025 Fact Sheet
G	2025 Draft Environmental Assessment
H	Westmoreland's Comments on the 2024 Draft Renewal
I	2024 Draft Renewal
J	2024 Fact Sheet
K	2024 Draft Environmental Assessment
L	MPDES Application Update (July 22, 2020)
M	2015 Renewal
N	2015 Fact Sheet

BER 2015-06 WQ – Westmoreland Absaloka

Exhibits A-N are available upon request.

9/30/20 at 3:02 PM

By: Aleisha Solem

Kirsten H. Bowers
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901

*Attorney for Montana Department of
Environmental Quality*

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Billings, MT 59103-0639

*Attorneys for Westmoreland Absaloka
Mining, LLC*

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

IN THE MATTER OF:)	
WESTMORELAND RESOURCES)	
INC.'S APPEAL OF FINAL)	
MPDES PERMIT NO. MT0021229)	CASE NO. BER 2015-06 WQ
ISSUED BY DEQ FOR THE)	
ABSALOKA MINE IN HARDIN,)	
BIG HORN, COUNTY,)	
MONTANA.)	

**JOINT MOTION FOR REMAND AND FOR SUSPENSION OF
PROCEEDINGS**

The Montana Department of Environmental Quality (“DEQ”), by counsel, and Appellant Westmoreland Absaloka Mining, LLC (“Westmoreland”) f/k/a Westmoreland Resources, Inc., by counsel, (collectively, “the Parties”) after consultation, submit this Joint Motion for Remand and Suspension of Proceedings. The Parties have negotiated and reached an agreement to settle this matter without further litigation. *See* Exhibit A (“Settlement Agreement”). Accordingly, the Parties jointly request that the Board remand this matter to DEQ for further consideration and suspend these proceedings until a final permit decision renewing the Permit as stipulated in the Settlement Agreement and until any administrative or judicial review of the Permit renewal is resolved.

DATED this 30th day of September, 2020.

/s/ John C. Martin

John C. Martin
William W. Mercer
HOLLAND & HART LLP
25 S. Willow Street, Suite 200
Jackson, WY 83001
jcmartin@hollandhart.com
*Attorneys for Westmoreland Absaloka
Mining, LLC*

/s/ Kirsten H. Bowers

Kirsten Bowers
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901
*Attorney for Montana Department of
Environmental Quality*

CERTIFICATE OF SERVICE

I hereby certify on September 30, 2020 that I caused a true and accurate copy
of the foregoing to be emailed to:

Sarah Clerget, Hearing Examiner
Montana Department of Environmental
Quality
Board of Environmental Review
1520 E. 6th Avenue
Helena, MT 59601
sclerget@mt.gov
asolem@mt.gov

Deb Sutliff
Montana Department of Environmental
Quality
Board of Environmental Review
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jcmartin@hollandhart.com;
smmathiascheck@hollandhart.com;
tjdipaola@hollandhart.com;

*Attorneys for Defendant/
Intervenors and Appellants
Western Energy Company*

*Attorney for Defendant/
Intervenors and Appellants
Western Energy Company*



Sandy Scherer, Paralegal
DEPARTMENT OF ENVIRONMENTAL QUALITY

Settlement Agreement

This Settlement Agreement is made by and between the Montana Department of Environmental Quality ("DEQ") and Westmoreland Absaloka Mining LLC ("Westmoreland") and is effective as of the date when it has been signed by both Parties ("the Effective Date").

WHEREAS the Environmental Protection Agency delegated to Montana the authority to implement the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, within the State according to the terms of the Montana Water Quality Act, § 75-5-101, MCA, *et seq.*;

WHEREAS DEQ is primarily responsible for administering the Water Quality Act and has the authority to approve Montana Pollutant Discharge Elimination System ("MPDES") permits. § 75-5-402, MCA;

WHEREAS on August 31, 2015, DEQ issued MPDES Permit No. MT0021229 for discharges at Westmoreland's Absaloka Mine ("Mine") to Westmoreland's predecessor-in-interest, Westmoreland Resources, Inc.;

WHEREAS on September 9, 2015, pursuant to ARM 17.30.1370, § 75-5-403, MCA, and § 75-5-611, MCA, Westmoreland submitted to the Board of Environmental Review a Notice of Appeal and Request for Hearing for review of certain conditions in Permit No. MT0021229, which matter was docketed as Case No. BER 2015-06 WQ ("Appeal");

WHEREAS Westmoreland and DEQ agreed to stay the litigation pending resolution of a related case regarding the interpretation of ARM 17.30.637(4);

WHEREAS the Montana Supreme Court has issued its decision in the related case, *Montana Environmental Information Center v. Department of Environment Quality*, 2019 MT 213, addressing the interpretation of ARM 17.30.637(4);

WHEREAS MPDES Permit No. MT0021229 will expire on September 30, 2020;

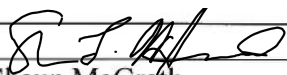
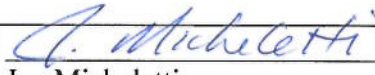
WHEREAS Westmoreland has submitted an application for a permit renewal ("Renewal Application") on April 6, 2020;

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

1. On or before September 30, 2020, Westmoreland and DEQ shall file a joint motion to remand Permit No. MT0021229 to DEQ to clarify the record on the hydrologic status of the receiving waters.
2. DEQ will consolidate its remand evaluation with its pending consideration of the Renewal Application.
3. DEQ commits to consider the instructions of the Supreme Court in *Montana Environmental Information Center v. Department of Environment Quality*, 2019 MT 213,

in the development of all discharge limits for outfalls where the receiving waters are determined to be ephemeral in any future permit issued for the Mine.

4. Westmoreland submitted additional information to DEQ in response to DEQ's May 8, 2020 notice of deficiency. The renewal application was deemed complete on August 19, 2020. The department may request additional information, including a site visit, from Westmoreland to clarify, modify, or supplement information within the pending renewal application.
5. On or before June 1, 2021, or after all additional information requested by DEQ has been submitted, whichever date is later, DEQ shall prepare a draft permit, give public notice, and make the draft permit available for public comment for at least 30-days pursuant to ARM 17.30.1372. If a public hearing is held, no less than 30-days' notice prior to the hearing shall be provided.
6. Within 90 days after the public comment period closes, DEQ shall make a final permit decision and issue a response to public comments pursuant to ARM 17.30.1377 and 17.30.1378.
7. Within 30 days after notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.
8. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.
9. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
10. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully-executed agreement.

 Shaun McGrath Director Montana Department of Environmental Quality September 30, 2020	 Joe Micheletti President, Westmoreland Absaloka Mining LLC September 29, 2020
--	--

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

IN THE MATTER OF:)	
WESTMORELAND RESOURCES)	
INC.'S APPEAL OF FINAL)	
MPDES PERMIT NO. MT0021229)	CASE NO. BER 2015-06 WQ
ISSUED BY DEQ FOR THE)	
ABSALOKA MINE IN HARDIN,)	
BIG HORN, COUNTY,)	
MONTANA,)	

ORDER GRANTING REMAND

On September 30, 2020, the Montana Department of Environmental Quality (DEQ) and Westmoreland Absaloka Mining LLC (“Westmoreland”) (collectively “the Parties”) filed a Joint Motion for Remand and for Suspension of the Proceedings. The motion is based on the fact DEQ and Westmoreland entered a settlement agreement under which the Parties agree to remand MPDES Permit No. MT0021229 to DEQ. Upon remand, DEQ will consider the instructions of the Montana Supreme Court in *Montana Environmental Information Center v. Department of Environment Quality*, 2019 MT 213, in developing discharge limits for outfalls where the receiving waters are determined to be ephemeral in the renewal permit issued for the Absaloka Mine.

There being good cause, IT IS HEREBY ORDERED MPDES Permit No. MT0021229 is remanded to DEQ for renewal in accordance with the terms of the Settlement Agreement between the Parties. IT IS FURTHER ORDERED that this

contested case proceeding is stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following this remand. The Parties will provide a written joint status report two weeks after issuing a public notice of the draft renewal permit or no later than June 30, 2021.

DATED this 16th day of November, 2020

/s/ Christine Deveny
Christine Deveny
BER Board Chair

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be
mailed to:

Ms. Deb Sutliff
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
Dsutliff@mt.gov

John C. Martin
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975 F Street NW Ste. 900
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Kirsten H. Bowers
Department of Environmental Quality
P.O. Box 200901
1520 E. Sixth Avenue
Helena, MT 59620-0901
kbowers@mt.gov

DATED: 11/16/20 /s/ Aleisha Solem

First Amendment to Settlement Agreement

On September 30, 2020, the Montana Department of Environmental Quality (“DEQ”) and Westmoreland Absaloka Mining LLC (“Westmoreland”) entered a Settlement Agreement to address issues related to renewal of Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0021229, which expired September 30, 2020. Westmoreland timely applied for renewal of MPDES Permit No. MT0021229 and the terms and conditions of the prior permit were administratively continued and remain in effect until MPDES Permit No. MT0021229 is renewed. This First Amendment to the Settlement Agreement is entered between DEQ and Westmoreland to update the timeframe agreed upon in the September 30, 2020 Settlement Agreement for completing renewal of MPDES Permit No. MT0021229.

WHEREAS, on November 16, 2020, the Board of Environmental Review (“BER”) issued an order remanding MPDES Permit No. MT0021229 to DEQ for renewal in accordance with the terms of the September 30, 2020 Settlement Agreement between the Parties. The November 16, 2020 Order further directed that Westmoreland’s Notice of Appeal and Request for Hearing for review of certain conditions in MPDES Permit No. MT0021229, docketed as Case No. BER 2015-06 WQ (“Appeal”) was stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following BER’s remand.

WHEREAS, the Parties provided a written joint status report on June 30, 2021, in accordance with the November 16, 2020 Order, informing the BER that on May 6, 2021, pursuant to Paragraph 4 of the September 30, 2020 Settlement Agreement, DEQ requested additional information from Westmoreland to better understand the current location and status of outfalls receiving discharges from the Absaloka Mine and treatment processes for wastewater from the coal preparation plant.

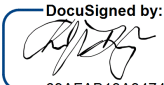

WHEREAS, on June 26, 2023, Westmoreland provided updated information regarding outfalls identified in the Permit application as being subject to Western Alkaline standards for reclaimed areas, including Outfalls 008, 009, 011, 012, 017 and 018, and information related to the purpose of Dry Coulee Pond;

WHEREAS, DEQ is currently reviewing and considering information provided by Westmoreland in its June 26, 2023 letter and may request additional information from Westmoreland to update and complete the pending renewal application.

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

1. By December 29, 2023, Westmoreland will provide DEQ with information necessary to modify the Permit to reflect the current owner/operator of MPDES Permit No. MT0021229 in accordance with ARM 17.30.1360.
2. By December 29, 2023, DEQ will respond in writing to Westmoreland’s June 26, 2023 letter and request any additional information DEQ deems necessary to update, clarify, modify, supplement, or complete Westmoreland’s pending renewal application.

3. By April 1, 2024, Westmoreland will provide DEQ with an updated renewal application that includes all additional information requested by DEQ in its response to Westmoreland's June 26, 2023 letter.
4. By July 1, 2024, or within four months of receipt of an updated renewal application that includes all additional information requested by DEQ in its response to Westmoreland's June 26, 2023 letter, whichever is later, DEQ shall prepare a draft permit.
5. By August 1, 2024, or within thirty days of DEQ's preparation of a draft permit, DEQ shall give public notice of its tentative decision to issue the renewal of MPDES Permit No. MT0021229 and make the draft permit available for public comment for at least 30 days pursuant to ARM 17.30.1372. If a public hearing is held, no less than 30 days' notice prior to the hearing shall be provided.
6. By November 1, 2024, or within ninety days of issuing the tentative renewal of MPDES Permit No. MT0021229, DEQ shall make a final permit decision and issue a response to public comments pursuant to ARM 17.30.1377 and 17.30.1378.
7. Within 30 days after notice of the final permit decision or after any administrative or judicial appeal or challenge is finally resolved, whichever is later, Westmoreland will seek voluntary dismissal of this Appeal.
8. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.
9. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
10. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully executed agreement.

<p>DocuSigned by:</p>  <p>69AFAB13A3474A0...</p> <p>Christopher Dorrington Director Montana Department of Environmental Quality 11/22/2023 November , 2023</p>	 <p>Scott Sturm Chief Operating Officer Westmoreland Absaloka Mining LLC November 22, 2023</p>
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Amendment 2 to Settlement Agreement

On September 30, 2020, the Montana Department of Environmental Quality (“DEQ”) and Westmoreland Absaloka Mining LLC (“Westmoreland”) entered a Settlement Agreement to address issues related to renewal of Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0021229, which expired September 30, 2020. Westmoreland timely applied for renewal of MPDES Permit No. MT0021229 and the terms and conditions of the prior permit were administratively continued and remain in effect until MPDES Permit No. MT0021229 is renewed. The First Amendment to the Settlement Agreement was entered between DEQ and Westmoreland on November 22, 2023, to update the timeframe agreed upon in the September 30, 2020 Settlement Agreement for completing renewal of MPDES Permit No. MT0021229. This Second Amendment to the Settlement Agreement is necessary to adjust the dates by which DEQ must prepare a draft permit, give public notice of its tentative decision, and make a final permit decision.

WHEREAS, on November 16, 2020, the Board of Environmental Review (“BER”) issued an order remanding MPDES Permit No. MT0021229 to DEQ for renewal in accordance with the terms of the September 30, 2020 Settlement Agreement between the Parties. The November 16, 2020 Order further directed that Westmoreland’s Notice of Appeal and Request for Hearing for review of certain conditions in MPDES Permit No. MT0021229, docketed as Case No. BER 2015-06 WQ (“Appeal”) was stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following BER’s remand.

WHEREAS, the Parties provided a written joint status report on June 30, 2021, in accordance with the November 16, 2020 BER Order, informing the BER that DEQ requested additional information from Westmoreland to better understand the current location and status of outfalls receiving discharges from the Absaloka Mine and treatment processes for wastewater from the coal preparation plant.

WHEREAS, on June 26, 2023, Westmoreland provide updated information regarding outfalls identified in the Permit application as being subject to Western Alkaline standards for reclaimed areas, including Outfalls 008, 009, 011, 012, 017, and 018, and information related to the purpose of the Dry Coulee Pond;

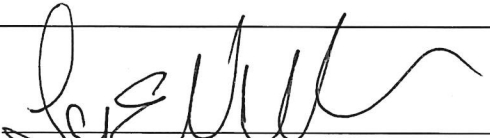

WHEREAS, DEQ continues to review and consider information provided by Westmoreland and is developing a draft renewal of MPDES Permit No. MT0021229, but due to staffing shortages and workload, DEQ hired Eastern Research Group, Inc. (ERG) to provide technical assistance in writing the renewal of MPDES Permit No. MT0021229;

WHEREAS, the Parties agree, it is reasonable and necessary to extend the following deadlines to complete the renewal of MPDES Permit No. MT0021229:

- (a) to extend the deadline for the draft permit, in Paragraph 4, to August 1, 2024;
- (b) to extend the date by which DEQ will give public notice of the tentative permit decision, in Paragraph 5, to September 1, 2024; and
- (c) to extend the date for completion of the final permit decision and responses to comments, in Paragraph 6, to December 1, 2024.

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

1. DEQ and Westmoreland satisfied the terms of the September 30, 2020 Settlement Agreement and the November 22, 2023 First Amendment to that Agreement through Paragraph 3.
2. As of December 29, 2023, Westmoreland and DEQ determined Westmoreland submitted a complete renewal application. DEQ may request additional or updated information to assist in drafting the renewal of MPDES Permit No. MT0021229, and Westmoreland will provide requested information to DEQ in a timely manner.
3. On or before August 1, 2024, DEQ shall prepare a draft permit.
4. By September 3, 2024, or within thirty days of DEQ's preparation of a draft permit, DEQ shall give public notice of its tentative decision to issue the renewal of MPDES Permit No. MT0021229 and make the draft permit available for public comment for at least 30 days pursuant to ARM 17.30.1372. If a public hearing is held, no less than 30 days' notice prior to the hearing shall be provided.
5. By December 3, 2024, or within ninety days of giving public notice of its tentative decision to issue the renewal of MPDES Permit No. MT0021229, DEQ shall make a final permit decision and issue a response to public comments pursuant to ARM 17.30.1377 and 17.30.1378.
6. Within 30 days after notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.
7. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.
8. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
9. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully executed agreement.

 Sonja E. Nowakowski Director Montana Department of Environmental Quality August <u>29</u> , 2024	 Scott Sturm Chief Operating Officer, Westmoreland Absaloka Mining LLC August 28, 2024
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Amendment 3 to Settlement Agreement

On September 30, 2020, the Montana Department of Environmental Quality (“DEQ”) and Westmoreland Absaloka Mining LLC (“Westmoreland”) entered a Settlement Agreement to address issues related to renewal of Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0021229, which expired September 30, 2020. Westmoreland timely applied for renewal of MPDES Permit No. MT0021229 and the terms and conditions of the prior permit were administratively continued and remain in effect until MPDES Permit No. MT0021229 is renewed. The First Amendment to the Settlement Agreement was entered between DEQ and Westmoreland on November 22, 2023, to update the timeframe agreed upon in the September 30, 2020 Settlement Agreement for completing renewal of MPDES Permit No. MT0021229. The Second Amendment to the Settlement Agreement was necessary to adjust the dates by which DEQ must prepare a draft permit, give public notice of its tentative decision, and make a final permit decision. This Third Amendment is necessary to adjust the date by which DEQ must issue the Final Renewal of MPDES Permit No. MT0021229 and respond in writing to substantive comments from the public from December 3, 2024, to March 3, 2025.

WHEREAS, on November 16, 2020, the Board of Environmental Review (“BER”) issued an order remanding MPDES Permit No. MT0021229 to DEQ for renewal in accordance with the terms of the September 30, 2020 Settlement Agreement between the Parties. The November 16, 2020 Order further directed that Westmoreland’s Notice of Appeal and Request for Hearing for review of certain conditions in MPDES Permit No. MT0021229, docketed as Case No. BER 2015-06 WQ (“Appeal”) was stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following BER’s remand.

WHEREAS, the Parties provided a written joint status report on June 30, 2021, in accordance with the November 16, 2020 BER Order, informing the BER that DEQ requested additional information from Westmoreland to better understand the current location and status of outfalls receiving discharges from the Absaloka Mine and treatment processes for wastewater from the coal preparation plant.

WHEREAS, on June 26, 2023, Westmoreland provide updated information regarding outfalls identified in the Permit application as being subject to Western Alkaline standards for reclaimed areas, including Outfalls 008, 009, 011, 012, 017, and 018, and information related to the purpose of the Dry Coulee Pond;



WHEREAS, DEQ continues to review and consider information provided by Westmoreland and is developing a draft renewal of MPDES Permit No. MT0021229, but due to staffing shortages and workload, DEQ hired Eastern Research Group, Inc. (ERG) to provide technical assistance in writing the renewal of MPDES Permit No. MT0021229;

WHEREAS, the Parties agree, it is reasonable and necessary to extend the following deadline to complete the renewal of MPDES Permit No. MT0021229:

- (a) to extend the deadline for completion of the final permit decision and responses to substantive public comments, in Paragraph 5, to March 3, 2025.

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

1. DEQ and Westmoreland satisfied the terms of the September 30, 2020 Settlement Agreement, the November 22, 2023 First Amendment to that Agreement, and the August 29, 2024 Second Amendment to the Settlement Agreement through Paragraph 4.
2. As of December 29, 2023, Westmoreland and DEQ determined Westmoreland submitted a complete renewal application. DEQ may request additional or updated information to assist in drafting the renewal of MPDES Permit No. MT0021229, and Westmoreland will provide requested information to DEQ in a timely manner.
3. On or before August 1, 2024, DEQ shall prepare a draft permit.
4. By September 3, 2024, or within thirty days of DEQ's preparation of a draft permit, DEQ shall give public notice of its tentative decision to issue the renewal of MPDES Permit No. MT0021229 and make the draft permit available for public comment for at least 30 days pursuant to ARM 17.30.1372. If a public hearing is held, no less than 30 days' notice prior to the hearing shall be provided.
5. By March 3, 2025, or within ninety days of giving public notice of its tentative decision to issue the renewal of MPDES Permit No. MT0021229, DEQ shall make a final permit decision and issue a response to public comments pursuant to ARM 17.30.1377 and 17.30.1378.
6. Within 30 days after notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.
7. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.
8. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
9. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully executed agreement.

 Sonja E. Nowakowski Director Montana Department of Environmental Quality December <u>23</u> , 2024	 Scott Sturm Chief Operating Officer, Westmoreland Absaloka Mining LLC December 18, 2024
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Amendment 4 to Settlement Agreement

On September 30, 2020, the Montana Department of Environmental Quality (“DEQ”) and Westmoreland Absaloka Mining LLC (“Westmoreland”) entered a Settlement Agreement to address issues related to renewal of Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0021229, which expired September 30, 2020. Westmoreland timely applied for renewal of MPDES Permit No. MT0021229 and the terms and conditions of the prior permit were administratively continued and remain in effect until MPDES Permit No. MT0021229 is renewed. The First Amendment to the Settlement Agreement was entered between DEQ and Westmoreland on November 22, 2023, to update the timeframe agreed upon in the September 30, 2020 Settlement Agreement for completing renewal of MPDES Permit No. MT0021229. The Second Amendment to the Settlement Agreement was necessary to adjust the dates by which DEQ must prepare a draft permit, give public notice of its tentative decision, and make a final permit decision. The Third Amendment was necessary to adjust the date by which DEQ must issue the Final Renewal of MPDES Permit No. MT0021229 and respond in writing to substantive comments from the public from December 3, 2024, to March 3, 2025. This Fourth Amendment to the Settlement Agreement is necessary to accommodate a second public notice period that will close March 5, 2025. Due to the second public notice period, it is necessary to extend the deadline for completion of the final permit decision and responses to substantive public comments, in Paragraph 5 of the Settlement Agreement, from March 3, 2025, to June 1, 2025.

WHEREAS, on November 16, 2020, the Board of Environmental Review (“BER”) issued an order remanding MPDES Permit No. MT0021229 to DEQ for renewal in accordance with the terms of the September 30, 2020 Settlement Agreement between the Parties. The November 16, 2020 Order further directed that Westmoreland’s Notice of Appeal and Request for Hearing for review of certain conditions in MPDES Permit No. MT0021229, docketed as Case No. BER 2015-06 WQ (“Appeal”) was stayed until resolution by DEQ and Westmoreland of the permit renewal, and any administrative or judicial review thereof following BER’s remand.

WHEREAS, the Parties provided a written joint status report on June 30, 2021, in accordance with the November 16, 2020 BER Order, informing the BER that DEQ requested additional information from Westmoreland to better understand the current location and status of outfalls receiving discharges from the Absaloka Mine and treatment processes for wastewater from the coal preparation plant.

WHEREAS, on June 26, 2023, Westmoreland provided updated information regarding outfalls identified in the Permit application as being subject to Western Alkaline standards for reclaimed areas, including Outfalls 008, 009, 011, 012, 017, and 018, and information related to the purpose of the Dry Coulee Pond;

WHEREAS, DEQ reviewed and considered information provided by Westmoreland and developed a draft renewal of MPDES Permit No. MT0021229 and hired Eastern Research Group, Inc. (ERG) to provide technical assistance in writing the renewal of MPDES Permit No. MT0021229;

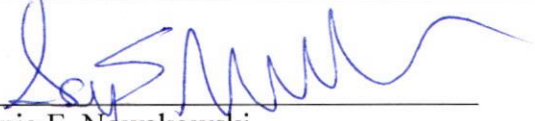

WHEREAS, due to substantive changes to the permit resulting from comments and information received during the public comment period on the draft renewal of MPDES Permit No. MT0021229, DEQ deemed a second public notice period, that will close March 5, 2025, necessary to allow the public to review and comment on changes to the draft permit. To address all comments received during both public comment periods, it is necessary to extend the deadline for completion of the final permit decision and responses to substantive public comments from March 3, 2025, to June 1, 2025

WHEREAS, the Parties agree, it is reasonable and necessary, due to the second public comment period, to extend the deadline for completion of the final permit decision and responses to substantive public comments to June 1, 2025.

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

1. DEQ and Westmoreland satisfied the terms of the September 30, 2020 Settlement Agreement, the November 22, 2023 First Amendment to that Agreement, the August 29, 2024 Second Amendment to the Settlement Agreement through Paragraph 4, and the December 23, 2024 Third Amendment to the Settlement Agreement through Paragraph 4.
2. As of December 29, 2023, Westmoreland submitted a complete renewal application.
3. DEQ prepared a draft MPDES permit number MT0021229 and issued the first public notice (Public Notice No. MT-24-10) to take public comment on the draft permit, fact sheet, and environmental assessment through October 3, 2024.
4. During the initial public comment period, DEQ received comments on the draft Permit, Fact Sheet, and Environmental Assessment from Westmoreland. Westmoreland's comment letter included additional information and requests that necessitated substantive changes to the draft permit such that a second public notice period was necessary. The revisions to the draft permit and the additional 30-day public comment period require additional time for final permit issuance. A second public notice was issued February 3, 2025 (PN MT-25-02) and will close March 6, 2025.
5. By June 1, 2025, pursuant to ARM 17.30.1377 and 17.30.1378, DEQ shall make a final permit decision and issue a response to public comments received during both the first and second public comment periods.
6. Within 30 days after notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.
7. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modification of the timeframes.

8. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Settlement Agreement may only be modified or amended by written agreement executed by the Parties.
9. This Settlement Agreement may be signed in counterpart copies which together shall constitute a fully executed agreement.

 _____ Sonja E. Nowakowski Director Montana Department of Environmental Quality February <u>21</u> , 2025	 _____ Scott Sturm Chief Operating Officer, Westmoreland Absaloka Mining LLC  February <u>20</u> , 2025
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MONTANA BOARD OF ENVIRONMENTAL REVIEW

August 10, 2025

To: BER Members

C. James Fehr, Deputy Director, DEQ

From: Dave Simpson, Chairman

Re: FY 2025 Legal Expenses

Attached for your information is a summary table of legal expenses incurred by the BER during Fiscal Year 2025, which ended June 30. Totals for FY 2024 are included for comparison; total expenditures were approximately \$10,000 less than the previous year. Highlights are as follows:

As was the case in FY2024, the highest individual item, \$110,435, was defending BER in the selenium rule litigation brought by DEQ and MEIC et al. This was \$37,599 higher than last year because nearly all the briefing was done this year. Of the remaining \$49,052, \$19,805 was paid to Rob Cameron's firm, primarily associated with Rosebud Mine AM5 and the remaining \$29,247 was ALS charges. Total billed hours associated with contested cases was 310, compared to 659 the previous year – a substantial decrease. This is primarily a result of fewer active cases overall.

Five cases were concluded during the year, compared to 12 in 2024. Only two new cases, West Decker and East Decker, were filed in FY 2025. Both are currently stayed until December, 2025.

Of the nine remaining active cases, four have been stayed, leaving just five cases in progress at the end of the fiscal year. Three are Rob Cameron cases assumed by the board at the June meeting – Westmoreland Rosebud Area F (BER 2019-05), Valley Garden Land and Cattle (BER 2022-04 OC), and Westmoreland Rosebud Area B Amendment 5 (BER 2022-05 SM). The remaining two cases – Westmoreland Resources (BER 2015-06 WQ) and Alpine Pacific (BER 2019-06 WQ) are long standing with little ongoing activity.

The bottom line: Fewer cases are being petitioned to the BER. In FY 24 there were five new cases, four of which were dismissed, and in FY 2025 just two, both of which are currently stayed as noted above. Although at times it doesn't seem like it, we are clearing cases faster than new cases are being filed – certainly not a bad thing.

BER CASE SUMMARY FY 2025

DRAFT 10/30/24

CASE NO.	PROGRAM	SUBJECT	HEARING EXAMINER	FY 2024 ATT HRS	\$ BILLED	PARA HRS	\$ BILLED	MISC \$	TOTAL \$	STATUS
BER 2015-06 WQ	MPDES	WESTMORELAND RESOURCES	T. OOMENS	0.2	\$ 24.20	0.8	\$ 56.80		\$ 81.00	AWAITING PROPOSED SETTLEMENT
BER 2016-03 SM	SURFACE MINING	ROSEBUD AM3 REMAND		0.7	\$ 84.70				\$ 84.70	AWAITING REMAND FROM DISTRICT COURT
BER 2016-07 SM	SURFACE MINING	SIGNAL PEAK AM3		0.3						AWAITING DISTRICT COURT DECISION
BER 2019-05 OC	SURFACE MINING	MEIC ET AL.; ROSEBUD AREA F	R. CAMERON			0.3	\$ 45.00		\$ 45.00	AWAITING PROP-POSED FOFCOL
			ALS	0.2	\$ 24.20	0.2	\$ 14.20		\$ 38.40	
BER 2019-06 WQ	MPDES	ALPINE PACIFIC	T. OOMENS	1.0	\$ 121.00	2.4	\$ 177.50		\$ 298.50	AWAITING PROPOSED SETTLEMENT
BER 2021-07 WQ	MPDES	SIDNEY SUGARS	A. BROWN	0.6	\$ 72.60	1.8	\$ 157.80		\$ 230.40	SETTLEMENT APPROVED 7/8/24
BER 2022-04 OC	OPEN CUT	VALLEY GARDEN LAND & CATTLE	R. CAMERON	1.8	\$ 450.00	0.2	\$ 30.00		\$ 480.00	WORKING TOWARD A HEARING
			ALS	0.2	\$ 24.20	0.8	\$ 56.80		\$ 81.00	
BER 2022-05 SM	SURFACE MINING	MEIC ET AL.; ROSEBUD AM5	R. CAMERON	71.6	\$ 17,900.00	9.2	\$ 1,380.00		\$ 19,280.00	PROPOSED FOFCOL COMPLETE
			ALS	0.3	\$ 36.30	1.3	\$ 92.30		\$ 128.60	
BER 2022-07 WQ	MPDES	CHS INC.	R. CAMERON							SETTLEMENT APPROVED 7/8/24
			ALS	1.8	\$ 217.80	2.8	\$ 198.80		\$ 416.60	
BER 2022-08 OC	OPEN CUT	FIRSTMARK MATERIALS	L. LEMAN							SETTLEMENT APPROVED 8/11/24
BER 2023-02 OC	OPEN CUT	FRIENDS OF THE JOCKO & J. COEFIELD	T. OOMENS	73.4	\$ 8,881.40	16.1	\$ 1,143.10	\$ 209.50	\$ 10,234.00	DECIDED 12/26/24
BER 2023-03 OC	OPEN CUT	PROTECT THE CLEARWATER	T. OOMENS	30.9	\$ 3,738.90	8.6	\$ 624.80	\$ 166.75	\$ 4,530.45	DECIDED 6/20/25
BER 2023-04 SUB	SUBDIVISIONS	THE DAIRY SUBDIVISION	T. OOMANS	0.7	\$ 84.70	1.2	\$ 85.20		\$ 169.90	DISMISSED 6/24/24
BER 2024-03-03 OC	OPEN CUT	GATEWAY CONSERVATION ALLIANCE	BER	5.8	\$ 701.80	4.6	\$ 326.60	\$ 5.50	\$ 1,033.90	STAYED 8/24
BER 2024-04 OC	OPEN CUT	GALLATIN CO COMMUNITY COALITION	BER	4.3	\$ 485.30	2.7	\$ 198.80		\$ 684.10	STAYED 8/24
BER 2025-01 SM	SURFACE MINING	WEST DECKER	BER	6.2	\$ 750.20	3.9	\$ 276.90		\$ 1,027.10	STAYED 6/25
BER 2025-02 SM	SURFACE MINING	EAST DECKER	BER	18.6	\$ 2,250.60	7.5	\$ 532.50		\$ 2,783.10	STAYED 6/25
DEQ V. BER; MEIC ET AL. V. BER	CDV-2023-21	SELENIUM RULE - WORDEN THANE		381.9	\$ 96,974.10	83.5	\$ 8,010.00	\$ 5,450.79	\$ 110,434.89	ORAL ARGUMENT 07/29/25
GENERAL BER	ALS			41.6	\$ 5,028.50	26.9	\$ 2,123.20	\$ (50.50)	\$ 7,101.20	
	R. CAMERON			1.3	\$ 325.00				\$ 325.00	
TOTALS FY 2025				643.4	\$ 138,175.50	174.8	\$ 15,530.30	\$ 5,782.04	\$ 159,487.84	
TOTALS FY 2024				764.8		216.0			\$ 170,544.00	
NEW CASES (2)										FY 25 CONCLUDED CASES (5)